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DEPARTMENT OF
WATER RESOURCES

Attorneys for Wilder Irrigation District, Objector

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

)
) **Subcase No.: 63-32533**
)
) **WILDER IRRIGATION**
) **DISTRICT'S RESPONSE IN**
) **OPPOSITION TO THE**
) **CLAIMANTS' CHALLENGE**
)

COMES NOW, the Objector, Wilder Irrigation District ("Wilder"), by and through its attorneys of record, Barker Rosholt & Simpson LLP, and hereby files this response in opposition to the *Challenge*, filed by the Claimants, Bill Aten, Joe Aten, Matthew Aten and Maria Morales (collectively, the "Atens"). This response is filed pursuant to the Court's January 7, 2010 *Order Setting Challenge Scheduling Order A01 § 13.c.*

INTRODUCTION

This matter comes before the Court on the Atens' *Challenge* to Special Master Booth's September 14, 2009 *Order Granting Motion for Summary Judgment; Special Master's Report; Findings of Fact & Conclusions of Law* ("Summary Judgment Order"), which was upheld in the November 27, 2009 *Order Denying Claimant's Motion to Alter or Amend* ("November Order"). In the *Summary Judgment Order*, Special Master Booth held that water right 63-32533 is a

**WILDER IRRIGATION DISTRICT'S RESPONSE IN OPPOSITION TO THE
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wastewater right and that the following remark was necessary for future administration of the water right:

The source of this right is wastewater. The wasting of water may be discontinued at any time.

Special Master Booth based his decision on the undisputed evidence in the record, which includes an admission by Bill Aten, one of the claimants to water right 63-32533, that the source of water right 63-32533 is “drainage water.” *Affidavit of Paul L. Arrington* (“*Arrington Aff.*”) Ex. A.¹ In addition, Vern Case, a life-time local resident and a member of Wilder’s Board of Directors, testified that the Arena Drain, East Arena Drain and Case Drain were constructed and are operated to gather drainage or wastewater from the Wilder Irrigation District. *See Affidavit of Vern E. Case* (“*Case Aff.*”).²

Through their *Challenge*, the Atens ask this Court to overturn Special Master Booth’s decision. In order to succeed, they must show that Special Master Booth’s factual findings are “clearly erroneous” and that the conclusions of law misapplied the correct legal principles. *Clear Springs Foods, Inc. v. Clear Lake Trout Co.*, 136 Idaho 761 (2002). Yet, the Atens have not provided any evidence or testimony to rebut the evidence in the record and they do not even question Special Master Booth’s application of the law. As such, the Atens’ *Objection* should be denied and Special Master Booth’s decision should be affirmed.

STATEMENT OF FACTS

Water right 63-32533³ is claimed by Joe Aten, Matthew Aten, Bill Aten and Maria Morales and, as recommended, has the following elements:

¹ The *Affidavit of Paul L. Arrington* was filed in support of Wilder’s *Motion for Partial Summary Judgment*, on August 6, 2009. The affidavit is in the file for water right 63-32533.

² The *Affidavit of Vern E. Case* was filed in support of Wilder’s *Motion for Partial Summary Judgment*, on August 6, 2009. The affidavit is in the file for water right 63-32533.

³ Water right 63-32533 was originally numbered 63-4035, authorizing a diversion rate of 2 cfs. The right was subsequently split into water right 63-32533 and 63-32534.

Source:	Case Drain Ditch
Priority Date:	11/04/1933
Point of Diversion:	SW¼ NE¼ §13, T4N, R6W, Canyon County
Place of Use:	SW¼ NE¼ §13, T4N, R06W
Purpose, Quantity & Period of Use:	Irrigation, 0.13 cfs 04/01-11/01 Stockwater, 0.03 cfs 01/01-12/31

This water right was developed in 1933 by Walter Ray Aten.

That water right 63-32533 is a wastewater right is confirmed by the undisputed evidence in the record. First, Bill Aten, son of Walter Aten and a claimant to water right 63-32533, admitted that, from the earliest development of this water right, it was a wastewater right. In a written statement dated September 14, 2006, Bill Aten informed the Department that “my father ‘Walter Ray Aten put a tile under the Riverside Ditch to get *drainage water* out of what is known as “case drain.”” *Arrington Aff.* Ex. A (emphasis added).

Second, Vern Case, a life-long resident of the area and Wilder Board member, testified that water diverted under water right 63-32533 is wastewater. *Case Aff.* ¶ 6. This drain water reaches the Claimants’ point of diversion through the Arena, Case and East Arena Drains. *Id.* These drains gather waste and seepage water throughout the Wilder Irrigation District. *Id.* Wastewater diverted under water right 63-32533 flows west, from the Arena Drain to the Case Drain. *Id.* ¶¶ 4-5 & Ex. A. Near where the Arena Drain turns into the Case Drain, there is a headgate that, when opened, allows the wastewater to flow into the East Arena Drain. *Id.* Unless the East Arena Drain is checked up, the wastewater will flow directly to the Riverside Canal pursuant to a contract between Wilder, the Boise Project Board of Control, and the Riverside Irrigation District. *Id.* If checked up, however, the water backs up in the East Arena Drain and overflows into a pipe that conveys the wastewater under the Riverside Canal and to the place of use on the Claimants’ property.

In addition, the Director's recommendation for water right 63-32533, dated December, 2006 concluded that water being diverted under water right 63-32533 is wastewater. The recommendation included the following comment:

This right remains subject to the right of the original appropriator, is good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place or manner of wasting it, or to recapture it.

The Department represented during the initial hearing on this matter, that this comment is used by the Department to identify water rights that divert waste or seep water – i.e. wastewater rights. Including this comment on water right 63-32533 means that the Department considers water right 63-32533 to be a wastewater right.

On June 18, 2007, Wilder filed a timely objection to water right 63-32533, asserting that the source of the water is wastewater belonging to the Wilder Irrigation District, that the right had been developed in trespass and that the Department's wastewater comment does not adequately protect Wilder's interests and legal rights as the paramount appropriator.⁴ Wilder sought inclusion of an alternate comment that better protects Wilder's rights. That comment provides:

The source of this right is wastewater. The wasting of water may be discontinued at any time.

The Claimants did not file an objection to the Department's recommendation and recognition of water right 63-32533 as a wastewater right.

On August 6, 2009, Wilder filed a *Motion for Summary Judgment*, seeking an order confirming that water right 63-32533 is a wastewater right and adoption of an appropriate remark. The Atens did not respond to Wilder's motion and did not appear at the hearing on the

⁴ Wilder's *Objection* also included a claim that water right 63-32533 was developed in trespass and should, therefore, not exist.

motion. On September 14, 2009, Special Master Booth issued the *Summary Judgment Order*, finding that “there are no genuine issues as to any material fact, and that the moving party [Wilder] is entitled to judgment as a matter of law.” Special Master Booth further found that “the record demonstrates that the water which accumulates in the Case Drain is in fact wastewater first diverted by the Wilder Irrigation District. Therefore the Claimant’s water right is subject to Idaho law regarding the relationship between a user of wastewater (the Claimants), and the original or ‘paramount’ appropriator (the Wilder Irrigation District).” *Id.* Finally, Special Master Booth found that the remark requested by Wilder was “necessary for ... administration of the right by the Director.” *Id.* (quoting Idaho Code § 42-1411(2)(j)). This same remark, or a similar remark, has been included on numerous water rights throughout the SRBA. *See, e.g.*, Partial Decree for Water Right Nos. 63-3001C, 63-30462, 63-32166, 47-2244, 47-2111; *see also Memorandum Decision and Order on Motion for Summary Judgment; Special Master’s Report and Recommendation*, Subcase 63-27475 (May 2, 2008) (the “Janicek decision”) (discussing need for a remark on wastewater rights).

On October 27, 2009, the Atens wrote a letter to the Court, which was treated as a *Motion to Alter or Amend the Summary Judgment Order*. The Atens did not provide any evidence to support their motion. Oral argument was held on the motion and, on November 27, 2009, Special Master Booth issued the *November Order* affirming his previous decision:

The Claimants, in their motion to alter or amend, have not met the standard for allowing this proceeding to be reopened for the purpose of considering additional evidence. As stated by Wilder Irrigation District in its *Response*, the Claimants have simply made conclusory assertions that the subject water right is somehow not subject to Idaho law concerning the relationship between a user of wastewater and the paramount appropriator of that water. ***The uncontradicted evidence presented by the Wilder Irrigation District in connection with its motion for summary judgment clearly demonstrates that the source of the Claimant’s water right is wastewater.*** The Claimants have not shown any manifest error in this finding, nor have they otherwise

demonstrated any grounds for altering or amended the previously issues
Special Master's Report.

November Order at 2 (emphasis added).

On December 14, 2009, the Atens again wrote a letter to the Court, which was treated as a *Challenge* to Special Master Booth's decision. A scheduling order was issued and the Atens submitted their statements of issues on January 13, 2010 and January 14, 2010.

The Atens cannot meet the burden for overturning the Special Master's reasoned decisions. As such, the challenge should be denied and Special Master Booth's orders should be affirmed.

STANDARD OF REVIEW

"In an action to be tried without a jury the court *shall* accept the master's findings of fact unless clearly erroneous." Idaho R. Civ. P. 53(e)(2) (emphasis added); see *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377 (1991). A "finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

This Court analyzed the standard of review on a *Challenge* in its *Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006) (the "*Springs & Fountains Order*"). There, at pages 17-18, the Court stated:

[A] district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,⁵ although perhaps conflicting, evidence.

⁵ The Court recognized that "substantial" does not mean "uncontradicted." *Springs & Fountains Order* at 17, n.11. Rather, "a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached." *Id.* citing *Mann v. Safeway Stores, Inc.*, 95 Idaho 732 (1974) & *Evans v. Hara's, Inc.*, 123 Idaho 473, 478 (1993).

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence de novo. The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law.*

...

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party.

...

A special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review.

(Citations omitted) (emphasis added); *see also Clear Springs Foods, Inc. v. Clear Lake Trout Co.*, 136 Idaho 761 (2002) (same).

"In sum, findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review." *Springs & Fountains Order* at 18. Here, the Atens cannot show that Special Master Booth's findings were "clearly erroneous" or that incorrect legal principles were applied. As such, the orders should be affirmed.

ARGUMENT

I. The Atens' Challenge Should be Dismissed as Untimely.

According to AO1 13.c, any challenge "shall be filed with 14 days following the date of the filing of the decision on the Motion to Alter or Amend." Special Master Booth's *November Order* was filed on November 27, 2009, meaning that a challenge was due on December 11,

2009. However, the Atens did not file their challenge until December 14, 2009. Since it was untimely, the challenge should be dismissed.

II. Special Master Booth's Findings of Fact Are not "Clearly Erroneous," and the Law Was Applied Correctly, thus the Atens Cannot Meet Their Burden.

A. The Evidence in the Record Supports the Special Master's Findings of Fact.

Special Master Booth summarized the Atens' defense to Wilder's objection as follows:

[T]he Claimants have not filed any briefing or affidavits to show that either the water in the Case Drain is not wastewater, or that a remark is not necessary for future administration of the right.

Summary Judgment Order at 3. Further,

[T]he Claimants have simply made conclusory assertions that the subject water right is somehow not subject to Idaho law concerning the relationship between a user of wastewater and the paramount appropriator of that water.

November Order at 2.

A party opposing a summary judgment motion "may not rest merely on the allegations in the pleadings, but rather the non-moving party must produce evidence to contradict the assertion of the moving party." *Summary Judgment Order* at 3 (citing *Amborse v. Buhl Joint School Dist. No. 412*, 126 Idaho 581, 584 (Ct. App. 1985); see also *Blickenstaff v. Clegg*, 140 Idaho 572, 577 (2004) ("The non-moving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact").

In order to overturn the Special Master's determination, the Court must find that the findings of fact were "clearly erroneous." *Clear Springs Foods, Inc.*, 136 Idaho at 780.

Furthermore, the "mere fact that on the same evidence an appellate court might have reached a

different result does not justify it in setting a district court's findings aside.” *Springs & Fountains Order* at 17.

The evidence in the record clearly supports Special Master Booth’s decision.

1. *Affidavit of Vern E. Case*: In this affidavit, Mr. Case, a life-long local resident and member of Wilder’s Board of Directors, testifies that water diverted under water right 63-32533 from the Case Drain “is waste water that is gathered throughout the Wilder Irrigation District.”
2. *Statement of Bill Aten (Arrington Aff. Ex. A)*: In this statement, Bill Aten, one of the Claimants, informs the Department that “a tile” was placed “under the riverside ditch to get drainage water out of what is known as ‘Case drain.’” (Emphasis added).

The Atens have not provided anything to refute this evidence. For this reason alone, the Special Master’s decision should be affirmed.

In their January 14, 2010 filing, at page 10,⁶ the Atens assert that the *Affidavit of Vern E. Case* is “misleading” because there is allegedly “running water from underground springs that feed this drain ditch.” Even if these unsupported and conclusory statements were true, it is not sufficient to overturn the Special Master’s order because the Atens did not provide the Special Master or this Court with any evidence to support the statement. Furthermore, Bill Aten has already confirmed that the water being diverted is “drainage water.” Accordingly, even if there are “underground springs that feed this drain ditch,” the water being diverted under this water right is “drainage water” and is therefore subject to the right of Wilder, as the “paramount appropriator.” Furthermore, irrigation in the Boise Valley for the past one hundred years, has caused the water table to rise, giving way to increased wastewater run off and spring discharges; thus increasing the utility of the wastewater. See *Janicek* decision at 3 & 7, n.2 (“after several

⁶ The January 14, 2010 filing appears to continue numbering from the January 13, 2010 filing. Therefore, the first page of the January 14, 2010 filing is identified as “Page #10.” In this opposition brief, Wilder will cite to the page numbers as identified by the Atens.

years of widespread irrigation both outside and within the boundaries of NMID ... the water table in the vicinity of Purdam Gulch Creek has risen ... it is unlikely that pre-development surface runoff into Purdam Gulch Creek would have yielded sufficient water in either volume or continuity of flow to be beneficially useable for the irrigation of farm land”). Aten’s *Challenge* simply claims that water levels have risen, but does not provide a shred of evidence that these water levels are independent from the original source of irrigation water.

Atens continue to misunderstand the nature of Wilders objection and the import of the Special Master’s decision. Wilder’s objection does not deny them a water right, as they fear. January 13, 2010 filing at 12. The remark included by the Special Master merely recognizes on the decree that the source of this right in these developed drains is wastewater. The Atens’ misunderstanding of the objection and the Special Master’s decision is not grounds to set the decision aside.

Special Master Booth’s decision is support by the evidence and is not “clearly erroneous.” It should be affirmed.

B. The Special Master Applied the Correct Legal Standards

“[I]t has long been settled law in Idaho that a senior appropriator of water retains his right to surface waste and seepage water, and may reclaim it, even though such water has been used by a junior appropriator.” *Hidden Spring Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680 (1980) (citing *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173 (1945)). Special Master Booth relied on this decision in the “*Janicek* decision.”

In the *Janicek* decision, Special Master Booth relied on this “settled law” to affirm the right of the “preeminent appropriator” to cease wasting water, to recapture and reuse wastewater or to change the manner of wasting the water.

The *Director's Report* for water right 63-27475 contains no remark regarding the fact that a substantial portion of the water in Purdam Gulch Creek drain is waste water and seepage coming from lands irrigated by water diverted from the Boise River under NMID's water rights. Under Idaho Law, the NMID ***has the right to recapture and re-use any of this water*** that can reasonably be identified as originating from water diverted under its water rights. ***This right to recapture and re-use is unaffected by junior appropriations of the waste or seepage water.*** The water so re-used by NMID is pursuant to the right(s) under which the water was first diverted, and not as an independent water right to the use of the seepage or drain water. ... The NMID is the paramount appropriator of the water that can be so identified, and as such the right of the NMID to capture and re-use this water is superior to Janicek's right. ... ***Janicek does not have a vested right to such seepage and waste water as against the NMID's paramount ownership.***

(citation omitted) (emphasis added); see also *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753 (2005).

Furthermore, the "paramount appropriator's" rights are "superior to" subsequent appropriations of waste water in "two respects:"

First, the NMID's right is superior based on relative priority dates. ... Secondly, and irrespective of the relative priority dates, NMID is the paramount appropriator and has the right to cease wasting the water, in good faith change the place or manner of wasting it, or to recapture it, so long as the NMID applies it to beneficial use within the parameters of the water right(s) under which it was diverted.

Id. (citations omitted).

Finally, Idaho Code § 42-1411(2)(j) provides that a water right should include "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for ***administration of the right by the director.***" (Emphasis added).

This law was applied by Special Master Booth in his review of the facts and determination that water right 63-32533 is a wastewater right and that a wastewater remark is necessary to ensure that future administration of water right 63-32533 is consistent with Wilder's rights as the "paramount appropriator."

Here, the Atens do not address the law applied by Special Master Booth. They do not assert that Special Master Both applied the wrong law or misapplied the existing law. They have failed to meet their burden. *See supra*.

Since Special Master Booth applied the correct law, his decision should be affirmed.

III. Other Issues Addressed in the Atens' Challenge.

Other issues were discussed in the Atens' challenge but they are not necessary for this Court's decision. However, so as to avoid confusion, Wilder will briefly address these issues.

A. The Atens' Shares of Riverside Irrigation District.

On page 2 of their January 13, 2010 filing, the Atens appear to complain that Wilder's passing reference to their Riverside Irrigation District water shares is deceptive. Similar accusations were made in their motion to alter or amend.

Wilder's reference to the Riverside water, however, is solely for informative purposes. The Atens own 0.6 shares of Riverside Irrigation District water that is delivered to the same property as water right 63-32533. *Case Aff.* ¶ 7. This water is delivered through the Riverside Canal, not the Case Drain. *Id.* Wilder again emphasizes that it does not object to the Claimants' receipt and use of this water.

B. Atens Failure to Respond on Summary Judgment and the Alleged Issues with Mail Delivery.

The Atens spend much of their January 13, 2010 filing (pages 4-6) discussing the alleged deficiencies of their mail delivery services. The Atens appear to blame their failure to respond to Wilder's summary judgment motion and their failure to appear at the summary judgment hearing on these allegedly deficient mail services. This is a non-issue. First, there is a presumption in the law that mail "properly addressed and deposited in the post office, postage prepaid," is

“delivered to the addressee in due course of mail transportation.” *Hobson v. Security State Bank*, 56 Idaho 601 (1936).

Furthermore, while it is true that the Atens did not respond on summary judgment and did not participate in the summary judgment hearing, they have had regular contact with the Court and Wilder’s counsel from the early stages of these proceedings. In fact, according to the January 13, 2010 filing, the Atens have even discussed this matter with Wilder. The Atens participated in status conferences, sent letters to the Court and parties, discussed the matter with Wilder’s counsel over the phone on several occasions and made several phone calls to the Court. In addition, they filed and argued their motion to alter or amend and have now filed and briefed a *Challenge* to Special Master Booth’s decision. Importantly, to date, the Atens have not rebutted any of the evidence in the record. They rest their entire case on conclusory and unsupported statements and do not even address the admission of Bill Aten that the water being diverted is “drainage water.”

C. The Right of Way Remark

Wilder filed numerous objections on water rights diverting out of Wilder’s drains and waste ways. In some instances, Wilder sought a remark addressing right of way and crossing issues. The Special Master’s Report and Recommendation in this case does not include any right of way remark. The Atens express concern over a “rightaway issue (sic)” and include a page from what appears to be an early draft of a proposal for an SF5 for this water right. *See* January 14, 2010 filing at 10-11. No SF5 was ever signed for this water right. Since a remark dealing with rights of way was not sought by Wilder in the summary judgment motion or included on the Special Master’s recommendation for water right 63-32533, it is not an issue before the Court.

Should the Court affirm the Special Master's order, the right of way remark will not be included on water right 63-32533.

D. Claim for Damage or Injury

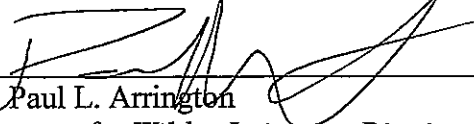
The Atens filed a *Claim for Damage or Injury* against Wilder and included a copy of the *Claim* with their January 14, 2010 filing. They do not show how this claim has any bearing on the validity of the remark or the decision of the Special Master. Moreover, this Court, as a court of limited jurisdiction, does not have jurisdiction over any such claim for damages.

CONCLUSION

The Special Master's decision is not "clearly erroneous." The evidence is undisputed that water right 63-32533 diverts wastewater collected through Wilder Irrigation District. In challenging the Special Master's decision, however, the Atens have *failed to provide any testimony or evidence* which would lead this, or any court, to any other conclusion. This failure is fatal. The Court should affirm the Special Master's decision.

Dated this 17th day of March, 2010.

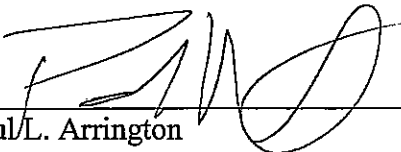
BARKER ROSHOLT & SIMPSON/LLP


By: Paul L. Arrington
Attorneys for Wilder Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2010, I served true and correct copies of the foregoing **WILDER IRRIGATION DISTRICT'S RESPONSE IN OPPOSITION TO THE CLAIMANTS' CHALLENGE**, via U.S. mail, postage prepaid, and addressed to the following:

Bill Aten 21737 Case Ln. Wilder, ID 83676	Joe Aten 30588 Peckham Rd. Wilder, ID 83676
Matthew Aten 30588 Peckham Rd. Wilder, ID 83676	Maria L. Morales 30588 Peckham Rd. Wilder, ID 83676
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Paul/L. Arrington