

MAY 28 2010

DEPARTMENT OF
WATER RESOURCES

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Albert & Alvera Fols, Charles & Mary Harling, A.C. & Luella Pilkerton, Lloyd & Sheryl Tutor, James Edgren & Jennifer Brady, and Tracy Mascia

**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. See Exhibit A
	)	
Case No. 39576	)	RESPONSE TO OBJECTORS' MOTION
	)	TO REMAND SUBCASES TO THE
	)	DIRECTOR OF IDWR FOR INJURY
	)	ANALYSIS PURSUANT TO IDAHO CODE
	)	SECTION 42-1425(2)(A)
	)	

COME NOW, ALBERT & ALVERA FOLS, CHARLES & MARY HARLING, A.C. & LUELLA PILKERTON, LLOYD & SHERYL TUTOR, JAMES EDGREN & JENNIFER BRADY, and TRACY MASCIA, Respondents in the above-referenced subcases (hereinafter collectively referred to as the "Carmen Creek Users"), by and through their attorneys of record, Barker Rosholt & Simpson LLP, and hereby submit this response to the Objectors' *Motion to Remand Subcases to the Director of IDWR for Injury Analysis Pursuant to Idaho Code § 42-1452(2)(a)*. As discussed below, the Court should deny the Objectors' Motion because the statute does not require remand of these subcases.

The Objectors, John E. & Ruth C. Burns, George Matejko, Rick and Linda Rice, Robert M. & Jacqueline D. Ernest, William W. Clements and James R. & Rowena D. Quinn (the “Burns Group”), have filed a motion requesting a remand of the above subcases pursuant to Idaho Code § 42-1425(2)(a). In the *Supplemental Report Regarding SRBA Subcase Nos. 75-69A, et al.*, dated January 11, 2010, the Director analyzed the historical diversions and use of the above water rights (the “exchange water rights”), and concluded:

As stated above, the Department recommended the exchange water rights to the claimants within the Burns group because the exchange rights were decreed to the originally patented place of use. However, based upon additional investigation and affidavits submitted, the Department believes its original recommendations should be changed. ***Affidavits have been submitted to the Department establishing an accomplished change in place of use for the exchange water rights prior to 1987.***

Supplemental Report at 9 (emphasis added).

In particular, the Director concluded that “there was an accomplished transfer of the exchange water rights from their decreed place of use to the lands north of Carmen Creek” based on affidavits establishing that the water rights were used “exclusively” on the north side of Carmen Creek from “about 1948.” *Id.* at 9-10. The Burns group objected to the *Supplemental Report*.

Section 42-1425(2)(a) states the following with regards to a recommendation for an accomplished transfer:

If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.

Citing to this provision, the Burns group asserts that the SRBA Court must remand the above subcases for a hearing before the Director “to determine whether the Department’s

accomplished transfer findings contained in their Supplemental 706 Report ... injured existing water rights or constituted an enlargement of the original rights.” *Motion* at 1. They assert that the “claimants have not had an opportunity to present evidence from prior landowners testifying to the continued use and utilization of water late in the irrigation season on their respective properties.” *Id.* at 2.

The Burns group’s motion should be denied for at least the following reasons. First, as the *Supplemental Report*, at page 10, n.6, makes clear, the Department has already considered “a number of affidavits with statements regarding historic use of water on [the Burns group’s] property.” The Department concluded that,

While the Department has considered the additional affidavits submitted by Mrs. Burns, the Department gives more weight to the affidavit of Robert Parmenter, the son of the former property owner and a person with personal knowledge of the irrigation practices on the property, and to the former water master David McFarland, who oversaw water distribution along Carmen Creek.

Id. In short, the Director has already considered “evidence from prior landowners testifying to the continued use and utilization of water late in the irrigation season,” and has already determined that the testimony of Mr. Parmenter and Mr. McFarland was more credible. The Burns group’s disagreement with this conclusion is more appropriately addressed through the objection process in the SRBA, which includes a trial scheduled for October 2010, approximately 5 months from now. Remanding to the Director to consider the same type of evidence already considered would only unnecessarily delay these proceedings.

Second, in 1948, when the accomplished transfer took place, all of above water rights, and the land to which they are appurtenant, were owned by one person – Frank Parmenter. *Supplemental Report* at 9. During his ownership, Mr. Parmenter moved the water around within

his own property and effectively transferred the exchange water rights off of his lands on the south side of Carmen Creek. This is the accomplished transfer recognized by the Department. *Id.* at 9-10. As the property has since been sold and subdivided, the exchange water rights (originally 2) have been split numerous times to numerous owners. All subsequent owners, including the Carmen Creek Users and the Burns group, acquired the property and appurtenant water rights subject to this accomplished transfer effected by Mr. Parmenter.

The Burns group's insistence that these subcases be remanded is essentially a request that the Department hold a hearing to determine whether Mr. Parmenter injured himself and his own water rights when he accomplished a transfer of the water rights off of the south side of Carmen Creek exclusively to the north side. The purpose of the accomplished transfer statute is to provide a "more limited examination" of the changes to ensure that they "do not injure other existing water rights or constitute an enlargement of use of the original right." Idaho Code § 42-1425(1)(c). Importantly, all of the above exchange water rights – including those claimed by the Burns group – were transferred by Mr. Parmenter to the north side of Carmen Creek in approximately 1948. These are not "other existing water rights." To the contrary, they represent a part of the exact same rights that were transferred.

Importantly, there are no objections to the amended recommendations by any water users either upstream or downstream of the property Parmenter property claiming an injury caused by the accomplished transfer. There is no claim by the holders of any "other existing water rights" that the accomplished transfer caused injury. The accomplished transfer statute does not contemplate holding a hearing to determine if the accomplished transfer caused injury to the very water right being transferred. As such, remand should be denied.

Finally, the evidence submitted to the Director confirmed that the exchange water rights were used “exclusively” on the north side of Carmen Creek from as early as 1948 through the 1980’s. *Supplemental Report* at 9-10. There is no enlargement. The Burns group’s affidavits allege that they irrigated into the late season “until freezing.” *Id.* at 10, n.6. This assertion does not mean that they were using exchange water rights. While it is unclear what water they used to irrigate their property “until freezing,” the evidence shows that the exchange water was used “exclusively” on the north side of Carmen Creek. *Id.* at 9-10.

The Burns group’s request for remand is essentially an attempt to argue their objections in front of the Director before they argue them in front of the Special Master. They have already submitted evidence of historical water use to the Department and that evidence was considered in issuing the *Supplemental Report*. Furthermore, there is no provision in the statute to allow an injury hearing on the actual right that was transferred pursuant to section 42-1425. Finally, since the water has been used “exclusively” on the north side of Carmen Creek for nearly 60 years, there is no enlargement. Accordingly, the Court should deny the Burns group’s request for a remand.

DATED this 27th day of May, 2010.

A handwritten signature in black ink, appearing to read 'Travis L. Thompson', written over a horizontal line.

Travis L. Thompson
Paul L. Arrington

Attorneys for the Carmen Creek Users

CERTIFICATE OF MAILING

I certify that on the 27th day of May, 2010, I served a true and correct copy of the foregoing **RESPONSE TO OBJECTOR'S MOTION TO REMAND SUBCASES TO THE DIRECTOR OF IDWR FOR INJURY ANALYSIS PURSUANT TO IDAHO AFFIDAVIT OF CODE S 42-1425(2)(A)** on the following individuals via first class mail, postage prepaid:

Natural Resources Division Chief
State of Idaho Attorney General's Office
P.O. Box 44449
Boise, Idaho 83711-4449

United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street MSC 033
Boise, Idaho 83724

IDWR Depository
P.O. Box 83720
Boise, Idaho 83720-0098

Danny & Roberta Fadness
P.O. Box 286
Carmen, ID 83462

James & Cathleen Tippet
P.O. Box 15
Carmen, ID 83462

Robert & Fransicka Mosher
P.O. Box 1473
Carmen, ID 83462

Shirley Mattis
P.O. Box 265
Carmen, ID 83462

Phillip Eisenhauer
Shelley Erwin
3608 Foothill Blvd.
Redding, CA 96001

Terry & Veralyn Hershey
P.O. Box 121
Carmen, ID 83462

Thomas & Donna Jackson
P.O. Box 47
Carmen, ID 83462

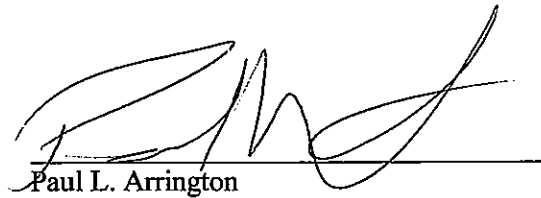
Rodney & Susan Edmiston
P.O. Box 155
Carmen, ID 83462

Johnny J. Cabigas
Lana Greenway
1267 Mobil Ave.
Camarilla, CA 93010

Steven Yowell
3509 Balance Court
Chesapeake, VA 23321

James Hudson
P.O. Box 173
Carmen, ID 83462

Robert L. Harris
Holden, Kidwell, Hahn & Crapo,
PLLC
P.O. Box 50130
Idaho Falls, Idaho 83405



Paul L. Arrington

Attachment A

75-10061AA	75-10061N	75-10061A
75-10061B	75-10061X	75-10061Q
75-10061C	75-10062L	75-10061R
75-10061J	75-10062V	75-10061Y
75-10061T	75-14025	75-10061AE
75-10061Z	75-14027	75-10062A
75-10061AC	75-14044	75-10062P
75-10061AM	75-14046	75-10062W
75-10062C	75-14055	75-10062AC
75-10062H	75-14056	75-14441
75-10062R	75-14057	75-14443
75-10062X	75-14058	75-14540
75-10062Y		
75-10062AA		
75-10062AB		
75-10062AL		
75-10136A		
75-10136B		
75-10137A		
75-10137B		
75-14388		