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District, North Side Canal Company, and
Twin Falls Canal Company*

**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 Nos. 01-23B, 01-297, 35-2543 & 35-
) 4246
) *(Aberdeen-Springfield Canal Company)*

) **NOTICE OF CHALLENGE**
)
)
)

COMES NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal
Company, and Twin Falls Canal Company (the "Coalition"), by and through counsel of record
and pursuant to Administrative Order #1 ("AO1") 13(c), and hereby submit this *Notice of*

Challenge in the above subcases. The Coalition challenges Special Master Dolan’s April 26, 2010 *Special Master Report* and the August 31, 2010 *Order Denying Motion to Alter or Amend* (collectively referred to as the “*Recommendation*”).

INTRODUCTION

The *Recommendation* is contrary to Idaho law. In particular, the *Recommendation* purports to decree a new beneficial use that was created only through agreement between IDWR and the claimant, contrary to the water right’s prior decrees and the claimant’s own claims in the SRBA. In addition, the *Recommendation* refuses to comply with the plain language of the accomplished transfer statute by failing to remand the matter back to IDWR upon the objections filed by the Coalition.

This case involves Aberdeen Springfield Canal Company’s (“ASCC”) water right claim (01-23B) with 1895 priority date and a purpose of use identified as “recharge for irrigation.” The water right was originally decreed for “irrigation” purposes in the *Rexburg Decree* and later confirmed again in the *Eagle Decree*. Importantly, until the late 1970’s, the State of Idaho did even not recognize “recharge” as a beneficial use – and, even then, it was only authorized in connection with new recharge projects and recharge districts. Moreover, to date, “recharge for irrigation” has never been recognized as an accepted beneficial use of water – statutorily or otherwise. Notwithstanding a lack of legal authority, Special Master Dolan’s *Recommendation* includes “recharge for irrigation” as a purpose of use on ASCC’s water rights with an 1895 priority date since the use was stated in the agreement between IDWR and ASCC. Special Master Dolan justified this decision by relying on a 1974 “policy” from the Idaho Water Resource Board (“IWRB”) that “suggests” recharge was a legally recognized beneficial use prior to 1978. Yet, that policy does not discuss recharge, let alone “recharge for irrigation”.

Furthermore, this argument renders the Legislature's specific legislation in 1978 authorizing recharge as a beneficial use meaningless. Finally, there is nothing in the record to support the arguments made by the State of Idaho and ASCC that "recharge" or "recharge for irrigation" was recognized as a beneficial use of water prior to 1978 or that ASCC ever changed the nature of use of its diversion from irrigation (as previously decreed as recently as 1969) to a "recharge for irrigation" use.

Under Idaho's accomplished transfer statute, it is mandated that a Special Master remand a recommendation for an accomplished transfer whenever there is an objection filed to, among other elements, the place of use or purpose of use. Idaho Code § 42-1425(2)(a) ("***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") (emphasis added). There is no discretion to consider the water right once an objection is filed. The Coalition filed objections to the place of use and purpose of use for ASCC's claim 1-23B. Notwithstanding these objections, the Special Master refused to remand the water rights for hearing required by Idaho law, and instead reasoned that remand was unnecessary because the Coalition had failed to present the SRBA Court with evidence of enlargement or injury resulting from the alleged accomplished transfer. This decision of the Special Master clearly violates the statute. Yet, the statute does not require that an objecting party submit evidence to the SRBA Court as a prerequisite to remand. It only requires that a party object. At that point, the Special Master must remand so that the Director can hold a hearing to determine whether the change injured a water right.

Both of these determinations are contrary to the plain language of the law and the Presiding Judge should correct these legal errors.

STATEMENT OF ISSUES

Based on the foregoing facts, the Coalition raises the following issues in its *Notice of Challenge*:

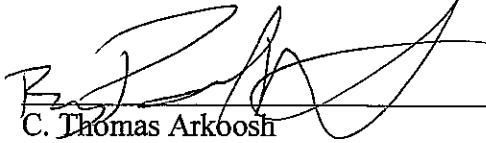
1. Whether the Special Master erred in recommending for decree a new beneficial use “recharge for irrigation” that was only created through agreement between IDWR and the claimant contrary to the prior decreed use for the water right?
2. Whether the Special Master erred in recommending a water right for partial decree with “recharge for irrigation” as a purpose of use and a priority date of 1895 when “recharge” was not a legally recognized beneficial use in Idaho until at least 1978?
3. Whether there are sufficient facts in the record to support the finding that ASCC changed the nature of a portion of its diversion from “irrigation” to “recharge for irrigation” at any time prior to November 19, 1987, as required by Idaho Code § 42-1425, in order to avoid the requirements of Idaho Code § 42-222?
4. Whether the Special Master erred by refusing to remand water right 01-23B to the Idaho Department of Water Resources where Idaho Code § 42-1425 requires remand when an objection has been filed on the place of use and/or purpose of use?

TRANSCRIPT

The Coalition requests a copy of the transcript of the summary judgment hearing in this matter held on April 30, 2009 and a copy of the transcript of the hearing on the *Motion to Alter or Amend*, held on July 1, 2010. Pursuant to A01(13)(d), the Coalition has included payment of \$520 for the transcripts with this motion.

DATED this 14th day of September, 2010.

CAPITOL LAW GROUP PLLC


C. Thomas Arkoosh

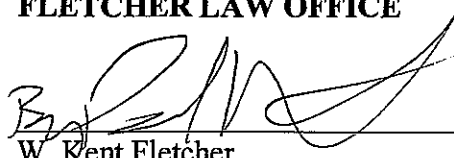
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CERTIFICATE OF SERVICE

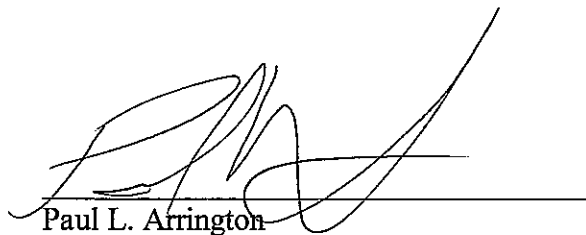
I HEREBY CERTIFY that on this 14th day of September, 2010, I caused to be served a true and correct copy of the foregoing **NOTICE OF CHALLENGE** addressed to each of the following, via first class mail, postage prepaid:

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