

10-12

RECEIVED

OCT 13 2010

DEPARTMENT OF
WATER RESOURCES

Dana L. Hofstetter, ISB No. 3867
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, Idaho 83702
Telephone: (208) 424-7800
Facsimile: (208) 424-8774

Debra K. Ellers, ISB No. 3497
ATTORNEY AT LAW
P.O. Box 1030
McCall, Idaho 83638
Telephone: (208) 315-2827
Facsimile: (208) 634-9946

Attorneys for Raymond C. Barker, Jr.
Charles J. Kritz, Jr. and Diane B. Kritz

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

In Re SRBA

Case No. 39576

Subcase No. 2-2318A

**BRIEF IN SUPPORT OF
OBJECTORS' MOTION TO ALTER
OR AMEND**

I. INTRODUCTION

Objectors Raymond C. Barker, Jr., Charles J. Kritz, Jr. and Diane B. Kritz respectfully submit this Brief in Support of Objectors' Motion to Alter or Amend filed on September 28, 2010, seeking to alter or amend the Special Master's Order Denying Motion to Strike, Granting Summary Judgment and Vacating Trial and Special Master Report filed on August 25, 2010 (hereafter, the "Report"). There already exists extensive briefing and a factual record from Objectors in response to Claimants' Motion for Summary Judgment and in support

of Objectors' Motion for Reconsideration, all of which have been and are hereby incorporated by reference as if set forth in full in support of this Motion. Accordingly, this Brief will address only the standards applicable to motions to alter or amend in the SRBA, and provide additional support for the ground that, at a minimum, a remark should be included in the Report's recommended Partial Decree in accordance with Idaho Code §§ 42-1411(2)(j) and 42-1412(6), clarifying in the point of diversion element that no right of way or easement is conferred across the property of another.

II. LAW AND ARGUMENT

A. Standards On Motion to Alter or Amend

A motion to alter or amend under SRBA Administrative Order 1 ("A.O. 1") 13 is not strictly governed by the same standards as an I.R.C.P. 59(e) motion to alter or amend.¹ *See In re SRBA*, Case No. 39576, Subcases 36-00061, 36-00062 and 36-00063, *Memorandum Decision and Order on Challenge* filed on September 27, 1999, at 26 (hereafter "*Order on Challenge*"). That is because the Special Master's Recommendation is not a "final judgment" within the meaning of I.R.C.P. 59(e). *See Order on Challenge, supra*, at 26. Rather, a motion to alter or amend under A.O. 1 §13 is more properly analogous to a motion pursuant to I.R.C.P. 52(b) to amend findings or fact or conclusions of law, or to make additional findings or conclusions. *Id.*, at 27.

There are four recognized grounds for properly granting a motion under Rule 52(b): (1) to correct manifest error; (2) newly discovered evidence; (3) change in law; and (4) to

¹ The SRBA Deputy Clerk's Notice of Special Master's Recommendation which accompanied the August 25, 2010, Report explicitly noted the following due date for Motions to Alter or Amend: "Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month." Objectors' Motion to Alter or Amend was timely filed on September 28, 2010.

supplement or amplify findings. *Id.* In this case, both grounds (1) and (4) apply to dictate adding a clarifying remark under the authority discussed in the next section.

B. A Remark Should Be Included in the Partial Decree's Point of Diversion Element Clarifying that the Partial Decree Does Not Confer the Right of Access Across the Property of Another.

As Objectors stated on page 22 of their Brief in Opposition to Claimants' Motion for Summary Judgment, "[a]ny Partial Decree issued should either require an application for transfer of the point of diversion, specify that the result in the Easement Case will control, or otherwise condition the decree to recognize that Claimants' have not established a right of access to the alleged point of diversion." (Emphasis added). Nevertheless, the Special Master's Report, which included a Recommendation for the Partial Decree, failed to include language confirming that it is not purporting to confer any alleged right of way or easement access by Claimants across Objectors' Riverfront Parcel to the recommended point of diversion on the Snake River.

Idaho Code § 42-1411(2)(j), regarding Director's Reports, requires the inclusion of "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...." In turn, SRBA Partial Decrees must "contain or incorporate a statement of each element of a water right," including any such remarks. I.C. § 42-1412(6).

As the SRBA Court ruled in construing these statutory provisions in *In Re SRBA*, Case No. 39576, *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, filed on December 29, 1999, at 6:

With respect to the "remark" section, or I.C. § 42-1411(2)(j), there are three (3) possible statutory components which need to be examined. They are:

- 1) whether the remark is necessary for definition of the right, or
- 2) whether the remark is necessary for clarification of any element of a right, or
- 3) whether the remark is necessary for the administration of the right by the Director.

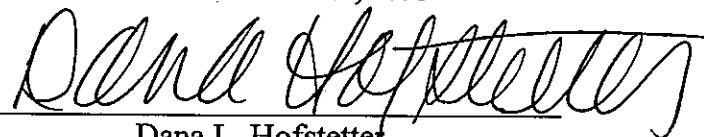
In this Subcase, grounds (2) and (3) referenced here, apply. A remark is necessary to clarify that the identified point of diversion for Water Right 02-2318A is on the property of another and that the Partial Decree does not grant an easement or right of way across another's property. Alternatively, such a remark is necessary to administer Water Right 02-2318A because a legal easement or other legal right of way is necessary for the proper distribution and use of water under the right. Because the Easement Case in Owyhee County is still pending, and the recommended point of diversion is located on Objectors' real property, it is proper under this statutory authority to include a remark to clarify no right of access is being determined or otherwise accorded to Claimants in the SRBA. Thus, the point of diversion element of the Partial Decree issued in this matter should include language stating that the water right does not grant any right of way or easement across the land of another.

III. CONCLUSION

For the foregoing reasons, the Objectors respectfully request that this Court grant Objectors' Motion to Alter or Amend on the grounds stated, including a recommendation for a Partial Decree with a remark that the Partial Decree does not grant a right of way or easement across the property of another.

DATED this 12th day of October, 2010.

HOFSTETTER LAW OFFICE, LLC

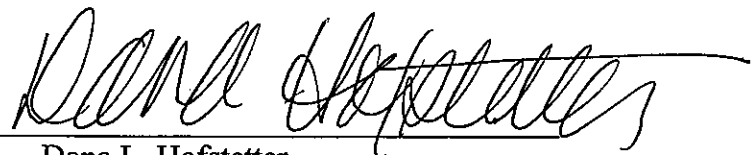
By: 
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2010, I caused to be served copies of the foregoing Brief in Support of Objectors' Motion to Alter or Amend by the pre-paid method(s) indicated below:

IDWR Director
P. O. Box 83720
Boise, Idaho 83720-0098
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Jon Gould
Ringert Law
P.O. Box 2773
Boise, ID 83701-2773
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

A handwritten signature in black ink, appearing to read 'Dana L. Hofstetter', is written over a horizontal line.

Dana L. Hofstetter