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DEPARTMENT OF
WATER RESOURCES

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**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

**RESPONSE BRIEF IN OPPOSITION
TO CLAIMANTS' MOTION TO
ALTER OR AMEND**

Objectors Raymond C. Barker, Jr., Charles J. Kritz, Jr. and Diane B. Kritz, by and through their above-indicated counsel of record, respectfully submit this Response Brief in Opposition to Claimants' Motion to Alter or Amend.

I. INTRODUCTION

Claimants ask the Court to amend its August 29, 2011, *Memorandum Decision and Order on Challenge* ("Order on Challenge") to:

1. revise footnote 1 on page 3 to state that based on a field exam of September 16, 1983, the 13 Acre Parcel was determined to have been irrigated as of that date; and
2. remove or revise the Court's remark in the Partial Decree regarding the pendency of the related easement proceeding in Owyhee County, *Wilkerson v. Snake River R.V. Resort, et al*, Case No. CV-06-05541.

As discussed more fully below, Objectors assert that Claimants' Motion to Alter or Amend should be denied for the following reasons:

1. A careful reading of the Affidavit of Jon Gould, Exhibit D, actually reveals that only 33 acres of the full 50 licensed acres were determined to have been irrigated as of the September 16, 1983, field examination and, apparently, the 13 Acre Parcel may not have been irrigated as of that date; and
2. The Court's proposed remark describes the status of the easement proceeding well with the exception, perhaps, of the fourth sentence of the remark which Objectors would not oppose changing the verb tense as follows to reflect the fact that the Easement Case has not been concluded as of yet: "The judicial determination of the right of access to the point of diversion and conveyance system was or will be decided separately in *Wilkerson v. Snake River R.V. Resort, et al*, Third Judicial District, Owyhee County (Case No. CV-06-05541).

II. LAW AND ARGUMENT

A. Standard for a Motion to Alter or Amend.

A Motion to Alter or Amend under I.R.C.P., Rule 59(e), provides an opportunity for a court to correct legal or factual errors:

... Rule 59(e) provides a trial court a mechanism to correct legal and factual errors occurring in proceedings before it. *First Security Bank v. Neibaur*, 98 Idaho 598, 603, 570 P.2d 276, 281 (1977). ... This Court will review an order denying a motion to alter or amend judgment for an abuse of discretion. *See Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982). So long as the trial court recognized the matter as discretionary, acted within the outer boundaries of the court's discretion, and reached its conclusion through an exercise of reason, this Court will not disturb the decision on appeal. *See Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Slaathaug v. Allstate Insurance Co., 132 Idaho 705, 707, 979 P.2d 107, 109 (1999).

With regard to footnote 1 on page 3 of the Court's *Order on Challenge*, Objectors agree that it contains factual errors, but not the same factual errors claimed by Claimants. Exhibit D to the Affidavit of Jon Gould actually does not confirm irrigation of the 13 Acre Parcel in either 1977 or 1983 and should be deleted entirely. With regard to the remark in the Partial Decree, the only

arguable error is the verb tense used in the fourth sentence, but, otherwise, the Court's remark accurately and clearly states the relationship between the SRBA proceedings and the Owyhee County Easement Case and should be retained in its current form.

B. Footnote 1 on Page 3 of the Order on Challenge Actually Should Be Deleted Entirely, Since Exhibit D to the Affidavit of Jon Gould Indicates that the 13 Acre Parcel Was Not Irrigated at the Time of the Field Examination in 1983 and Also May Not Have Been Irrigated at the Time of the 1977 Aerial Photograph.

Page 1 of Exhibit D to the Affidavit of Jon Gould in this Subcase is a Report of Examiners for Claim No. 02-2318 in the prior Snake River Adjudication and page 2 is an Adjudication Claim Analysis Sheet.¹ Both documents appear to have been prepared on September 16, 1983. Page 1 is signed by John K. Noyes and page 2 has the initials JKN, indicating that both pages apparently were prepared by the same Mr. Noyes. Page 1, the Report of Examiners, describes only a 33 acre irrigated place of use, although License No. 2-2318 provided for a total of 50 acres of irrigation, covering what is now both the Objectors' Riverfront Parcel and the Claimants' 13 Acre Parcel. Affidavit of Jon Gould, Exhibit B. Page 2 of Exhibit D further indicates in remarks "acreage on license is in error." Thus, a careful review of Exhibit D to the Affidavit of Jon Gould indicates that the examination of September 16, 1983, did not necessarily confirm the irrigation of the 13 Acre Parcel at the time, as apparently 17 acres of the total 50 acres were specifically determined not to have been irrigated at that time.

Further, Exhibit D to the Affidavit of Jon Gould does not describe any analysis based on the 1977 photograph. Page 2, the Adjudication Claim Analysis Sheet, references the 1977 photograph but it also references a field exam conducted September 16, 1983, covering the "acreage and P.D. [point of diversion] only." While page 2 of Exhibit D does reference review of an aerial photograph

¹ A copy of Exhibit D to the Affidavit of Jon Gould in this Subcase is attached hereto for the convenience of the Court in evaluating this matter.

of 1977, there is no specific statement on Exhibit D as to the extent of irrigation depicted on the 1977 photograph.

For these reasons, footnote 1, on page 3 of the Order on Challenge should actually be deleted and Claimants' Motion to Alter or Amend denied in this regard. If anything, Exhibit D supports Objectors' claims of abandonment and forfeiture.

C. **The Court Correctly Included a Remark in the Partial Decree Clarifying that the Partial Decree Does Not Confer the Right of Access Across the Property of Another and that the Easement Matter was Being Determined in Another Pending Case in Owyhee County.**

Objectors requested that, at a minimum, the Partial Decree include a remark clarifying that no right of access to the point of diversion on the Riverfront Parcel had been established. Without such a clarifying remark in the SRBA, the decreed point of diversion could be misconstrued as legally exercisable in the future, when, in fact, the matter of a legal easement across the Riverfront Parcel, is being determined in a separate proceeding, *Wilkerson v. Snake River R.V. Resort, et al*, Third Judicial District, Owyhee County (Case No. CV-06-05541) (the "Easement Case").

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. Idaho Code § 42-1412(6).

The Court found that a remark was necessary: 1. to provide "certainty concerning the rights and obligations surrounding the water right so as to avoid any future controversy between the parties or any successors-in-interest," and 2. because "the issues pertaining to the validity of the water right and the issues pertaining to the right of access ... are being decided in two different forums" and the "exclusion of a clarifying remark could be misconstrued as a determination of the validity of a right of access to the water right in the parallel proceeding." *Order on Challenge* at 23.

The remark determined by the Court to be legally necessary appropriately and accurately clarified that the point of diversion was located on other property, that the SRBA Partial Decree did not determine any right of access to the point of diversion and that the right of access was being determined in the Owyhee County Easement Case:

This water right is a split from former license 02-2318. As a result, access to the decreed point of diversion and delivery system for this water right is located on property other than that to which this water right is appurtenant. The decreed elements for this water right do not constitute a judicial determination of the validity of any right to access the point of diversion and/or conveyance system located on property other than to which this water right is decreed appurtenant. The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541). Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to any final judgment entered in that proceeding.

Id.

Claimants assert that the fourth sentence of the remark needs to be removed or clarified because a right of access has not been decided yet by the Owyhee County Court. *Wilkersons' Brief on Motion or Alter or Amend* August 29, 2011, *Memorandum Decision and Order on Challenge* at 2. It is true that the Easement Case has not yet been fully decided but because the November 2011, trial scheduled in the Easement Case is imminent and it remains uncertain whether these SRBA proceedings or the Easement Case will be concluded first, any language modification should take into account the alternative timing possibilities. Objectors would not oppose the following modification of the fourth sentence of the remark as follows: "The judicial determination of the right of access to the point of diversion and conveyance system was or will be decided separately in *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541)." However, to totally delete this sentence from the remark, as Claimants suggest, would leave out important information about the existence and ultimate effect of the separate easement proceeding.

Claimants also request deletion of the final sentence of the remark because “if the parties settle the matter, the right of access would not be decided by a judgment of the Owyhee County Court.” *Id.* at 3. However, the final sentence refers to the final Judgment entered in the Easement Case, and is not limited only to a decision or determination on the merits. If there is a final settlement of the Easement Case, the Owyhee County Court’s Judgment would reflect the outcome of the stipulated settlement. Thus, whether there is a final determination on the merits or a settlement in the Easement Case, either way the final Judgment in that case will determine the right of access issue, as the last sentence of the Court’s remark states.

The following remark, suggested by Claimants to be used instead of the Court’s remark, omits much relevant information, promising to cause confusion, rather than prevent it:

Water right 02-2318A is a split from former license 02-2318. An action in Owyhee County has been pending since May 23, 2006, regarding the right of access to the point of diversion and conveyance system for water right 2-2318A, *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541).

Id. This language does not address this Court’s stated concerns for 1. “certainty concerning the rights and obligations surrounding the water right so as to avoid any future controversy between the parties or any successors in interest,” and 2. misinterpretation of the SRBA Partial Decree “as a determination of the validity of a right of access to the water right in the parallel proceeding.” The language proposed by the Claimants does not clearly state that the SRBA Partial Decree is not a determination of any right of access and that the right of access matter is being decided in the Easement Case. Accordingly, the Claimants’ proposed language does not satisfy the Court’s stated reasons for why a remark was necessary and is not an adequate substitute for the Court’s original remark.

Claimants’ Brief actually illustrates exactly why the Court’s carefully worded remark is so necessary in its original and complete form. Much of Claimants’ Brief recounts many of this Court’s

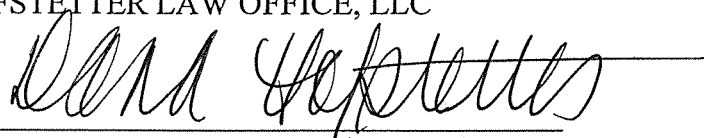
Findings of Fact which Claimants assert support a determination that, at least at one time, an easement existed to the Snake River. *Wilkersons' Brief on Motion or Alter or Amend* August 29, 2011, *Memorandum Decision and Order on Challenge* at 3-7. In this manner, Claimants suggest that the SRBA Court's various findings about Water Right No. 2-2318A equate to a *de facto* determination of a right of access. Claimants further indicate that the Court's remark contradicts these findings: "However, the SRBA is a "snapshot in time" as of November 19, 1987, and the remark could be read as stating no easement ever existed between the 13 Acre Parcel and the Snake River point of diversion, and indeed could be misconstrued as determining that there was never a valid right of access to the Snake River diversion." *Id.* at 4. Actually this Court's remark unequivocally clarifies that the SRBA Court is not determining the right of access issue and that the right of access issue is being determined by the Owyhee County proceeding. Under the circumstances, the importance of the Court's full and complete original remark clarifying these matters is more necessary than ever.

IV. CONCLUSION

For the foregoing reasons, the Objectors respectfully request that this Court: 1. deny Claimants' Motion to Alter or Amend, 2. delete footnote 1 on page 3 of the Court's Memorandum Decision, and 3. re-affirm the previously issued Partial Decree or re-issue a Partial Decree with the verb tense of the remark modified to indicate that the Owyhee County Easement Case has not yet concluded.

DATED this 6th day of October, 2011.

HOFSTETTER LAW OFFICE, LLC

By: 

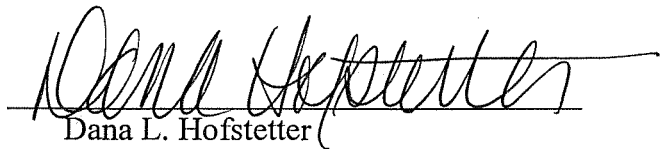
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2011, I caused to be served copies of the foregoing document (with any attachments) by the pre-paid method(s) indicated below:

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Dana L. Hofstetter

Form 1409b
5/81State of Idaho
Department of Water ResourcesADJUDICATION CLAIM
REPORT OF EXAMINERSClaim No. 02-2318

1. Name of Applicant Largus & Sons
2. Priority 6/5/64
3. Source of Water Gracie R.
4. (Quantity) (Domestic, Irri., Stock Water, etc.) (Period of Use)
 .66 cfs Use Irrigation From 3/15 to 11/15
 _____ cfs Use _____ From _____ to _____
5. Location of Point of Diversion: _____ of Section _____
 Twp. _____, Rge. _____, County of _____
6. Describe Diversion Works: _____
7. Describe Location of Use: _____

TWP	RGE	SEC	NE 1/4				NW 1/4				SE 1/4				SW 1/4				TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
									16	25									
34	5R	14							4	29									33

TWP.	RGE.		COUNTY				SCALE: 1" = 1 MILE											

8. Purpose other than irrigation: none
9. Remarks: a diversion of water from a main
 section of off for irrigation purposes.
- This examination was made on the 16 day of August, 19 83.

(Signed) John R. Meyer
Examiner

Form 1409a
6/81State of Idaho
Department of Water Resources

ADJUDICATION CLAIM ANALYSIS SHEET

Review by 9KADate 9/16/83Right No. 02-2318Claimant Jorge A. HernandezRecommendation differs from claim:
(Document any differences)☒ Yes ☐ No ☐ Disallow

Claim Details Verified Against:

Check (X or ✓) those searched. Circle records used for recommendation.
Include copies or memos where applicable to explain findings.☒ License☐ Previous Statutory Claim.☐ Permits, valid or lapsed. Number(s) if different than above _____☐ Decree. Name & date _____☐ Conveyance Loss Calculations. See printout included.☐ Title abstract. ☐ In file. Or, Name & location _____☐ County records. ☐ In file. Or, Name & location _____☐ Affidavits. ☐ In file.☐ Posted Notices, Water Locations Notices. ☐ In file.☐ Deed Records. ☐ In file. Or, Name & location _____☐ Patent Records. ☐ In file. Or, Name & location _____☐ Metzker Maps. Identify _____☒ A.S.C.S. Records. Year & Photograph No. 1977 photo attached☐ Irrigation Company/District Records. ☐ In file. Or Name & location _____☐ Historical Books. Name(s) & location _____☐ Interview(s). Attach conversation memorandum.☐ Other _____☐ _____Field Exam Made: ☒ Yes ☐ No Date 9/16/83 average + P.D. only☐ Adj. Report in file ☐ Beneficial Use Report in License (S.O.) File

Measurement _____ cfs. Amount recommended _____ cfs.

Type of measuring device: _____ Meter No. _____

Condition _____ Date _____ Time _____

Adjudication Photo(s) Used: Name or No. _____

Field Photographs Taken ☐ Yes ☒ NoMemorandum in file ☐ Yes ☒ NoRemarks G.D. was changed from original P.D. list
also with some other changes
Signature: A. Perez on 9/16/83 in room