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	)	**Subcase 63-08447 (Kandler)**
	)	
Case No. 39576	)	**MEMORANDUM DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT**
	)	
	)	**ORDER SETTING SCHEDULING CONFERENCE**
	)	

I. APPEARANCES

Thomas B. Dominick, Dominick Law Offices, PLLC, Boise, Idaho, for claimants Robert and Jennifer Kandler.

Chas. F. McDevitt, McDevitt & Miller LLP, Boise, Idaho, for objector New York Irrigation District.

David W. Gehlert, United States Department of Justice, Natural Resources Section, Environment and Natural Resources Division, for respondent United States of America, Department of Interior, Bureau of Reclamation.

II. PROCEDURAL AND FACTUAL BACKGROUND

On July 12, 1989, Robert and Jennifer Kandler (hereinafter "Kandlers") filed with IDWR a *Notice of Claim to a Water Right Acquired Under State Law*. The claim is based upon a previously issued license, with a priority date of February 14, 1977, for 0.02 cfs for irrigation of one (1) acre of land, and a source of Eight Mile Creek. The *Director's Report* for Basin 63, Part II, recommended the water right consistent with the license, with the exception that the *Director's Report* recommended a "shoulder remark" allowing irrigation to begin as early as March 1, subject to subordination.

On April 21, 2006, the Nampa & Meridian Irrigation District filed an objection to the *Director's Report*, asserting that:

> This claimed water right is within the boundaries of the Nampa & Meridian Irrigation District ("NMID") and the source of said claim is a drain which was constructed or enlarged by or for NMID. Said drain is owned, operated, maintained and controlled by NMID and the water within said drain is seepage or waste water that has been developed, captured, and/or controlled by NMID. Therefore, said water is not subject to appropriation, would amount to an impermissible trespass, and this claimed water right should not exist.

At the initial hearing, held on December 7, 2006, the attorney for the Nampa & Meridian Irrigation District withdrew its objection, for the reason that the subject water right is located outside the boundaries of the District.[1]

Also on April 21, 2007, the New York Irrigation District (NYID) filed an objection to the *Director's Report*, which was amended pursuant to an ***Order Granting Motion to Amend Standard Form 1 Objection***, issued August 8, 2007. The amended objection states:

> There has been no lawful appropriation of this right. The waste waters belong to the New York Irrigation District and are not available for private development and appropriation. Further, any attempted development of this right constitutes a trespass against the drains of the New York Irrigation District.

Responses to the objections were timely filed by the United States of America, Department of Interior, Bureau of Reclamation (BOR), also asserting that the water right should not exist.

On May 25, 2007, the Kandlers filed their *Motion for Summary Judgment*, together with a memorandum in support thereof, and the *Affidavit of Thomas B. Dominick*. The New York Irrigation District timely filed its *Opposition to Kandlers' Motion for Summary Judgment*, and the BOR timely filed its *Response to Kandlers' Motion for Summary Judgment and Memorandum in Support*.

[1] The Notice of Claim for water right 63-08447, under the "remark" section, states: "At the time this system was put in place, approval was given from the Nampa-Meridian Irrig. Dist. to put the pump in Eight Mile Creek."

III. ISSUES PRESENTED

At the outset, it should be noted that although the objection filed by NYID and the response filed by the BOR assert that the subject water right should not exist, the issues involved in this subcase have been narrowed and refined, so that the remedy now sought by the NYID and the BOR is the inclusion of a remark under the "source" element of the water right. Specifically, the NYID and the BOR seek a remark which 1) states that the source of the water is waste water; and 2) a statement of the legal affect of the water being waste water.

In its briefing on summary judgment, the Kandlers raise the following issues:

1) Have the NYID and the BOR failed to produce evidence, by way of affidavit or deposition, sufficient to create a genuine issue of material fact so as to withstand summary judgment?

2) Does the objection by the NYID and the response by the BOR constitute an impermissible collateral attack on an administrative agency's (IDWR) action? In other words, are the NYID and the BOR precluded from pursuing a wastewater remark in the SRBA for the reason that neither of them pursued the issue or exhausted their administrative remedies before IDWR in connection with the permitting and issuance of the license?

3) Is there a need for the requested waste water remark?

IV. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on July 27, 2007. The parties have not requested an opportunity to submit additional briefing, nor does this Special Master require any additional briefing. Therefore, this matter is deemed fully submitted for decision the next business day, or July 30, 2007.

V. STANDARD OF REVIEW ON SUMMARY JUDGMENT

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

VI. ANALYSIS

ISSUE 1: Have the NYID and the BOR failed to produce evidence sufficient to create a genuine issue of material fact so as to withstand summary judgment?

The Kandlers argue that summary judgment in their favor should be granted for the reason that the NYID and the BOR have failed to produce any evidence by way of admissions, affidavits, or depositions that would show that the water in Eight Mile creek is in fact waste water[2] originating from the operation of the New York Irrigation District

[2] In their briefing, the Kandlers also assert that the relief sought by the NYID and the BOR should not be granted for the reason that Idaho law does not allow a water user to "waste" water. It must be understood, however, that there is a difference between "waste" and "waste water." The legal concept of "waste" involves the "unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession . . . ." Black's Law Dictionary, 5th Ed. (1983). Committing waste of water is prohibited under Idaho law. *American Falls Reservoir Dist. No. 2 v. The Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007). The term "waste water," on the other hand, is generally used to describe water that has been diverted and used pursuant to a valid water right, but is then disposed of for the reason that it is uneconomical to put the water to further use due to issues of quantity, quality, or timing of occurrence. In other words, the term "waste water" is an imprecise way to refer to a variety of things such as drain water, seepage from conveyance systems, and/or water which contains pollutants, etc. In sum, Idaho law has never required a water user to be 100% efficient in the diversion and application to beneficial use of water, and reasonable amounts are allowed for conveyance losses and other

or an associated Bureau of Reclamation project. In other words, the Kandlers' position is that the NYID and the BOR are simply relying on the assertions in their pleadings that Eight Mile Creek is a drain used by the New York Irrigation District, and the water therein is waste water. The party opposing a motion for summary judgment may not rest merely on the allegations in the pleadings, but rather the non-moving party must produce evidence to contradict the assertions of the moving party. *Amborse v. Buhl Joint School Dist No. 412*, 126 Idaho 581, 584 (Ct. App. 1985).

On the other hand, the Kandlers assert that they have produced an affidavit which uncontrovertedly shows that the source of their water right is the water in Eight Mile Creek. The Kandlers assert that the Application for Permit, the License, and the *Director's Report* (which has *prima facie* weight) all show the that the source of water for water right 63-8447 is Eight Mile Creek, and the NYID and the BOR have produced nothing to controvert this fact.

This Special Master disagrees with the Kandlers on this issue. No party to this subcase is asserting that Eight Mile Creek is not the source of water for Kandlers' right. The issue raised by the NYID and the BOR concerns the origin of the water in Eight Mile Creek. The description of the source element of a water right by means of a geographic name (e.g. Eight Mile Creek) in the *Director's Report* or other document does not necessarily answer the question of whether or not the molecules of water in that named source have been beneficially used pursuant to an up gradient water right. This Special Master has reviewed the documents submitted by the Kandlers (i.e. the Application for Permit, License, etc.), as well as the copy of IDWR's license file submitted by IDWR. Nowhere in any of these documents is there any sort of analysis as to the origins of the waters in Eight Mile Creek.[3]

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inefficiencies, and such amounts are not necessarily considered to be "waste." Finally, it should be noted that the term "waste water" has never been explicitly defined under Idaho statutes or case law. *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist*. 141 Idaho 746, 750, 118 P.3d 78, 82, (2005). To the extent that the Kandlers are asserting that the NYID and or the BOR are diverting water that is being illegally wasted, they should seek enforcement by IDWR pursuant to I.C. § 42-351.

[3] The only elaboration regarding the water in Eight Mile Creek that can be found in IDWR's license file is a card dated February 25, 1982, and signed by Robert B. Kandler, with the handwritten notation under source which states: "8 Mile Creek Above Ground Water." The meaning of this notation is not known to this Special Master.

As an example of a water source consisting in part of previously used water, IDWR has found that the Easter Snake Plain Aquifer (ESPA) incurred substantial incidental recharge as a result of gravity flood/furrow irrigation practices during the first half of the twentieth century, which correspondingly increased spring discharges in the Thousand Springs reach of the Snake River. *See e.g. Second Amended Order*, *In the Matter of Distribution of Water to Water Right Nos. 36-15501, 36-02551, and 36-07694* (Before the Department of Water Resources, State of Idaho)(May 19, 2005) p. 3. The source of the water for the spring flow water rights in the Thousand Springs reach is typically listed simply as "springs." It is apparent that this simple description of the source does not provide any indication as to whether a portion of the water emanating from those springs would not be present but for the use of water by up gradient users.

Indeed, most beneficial uses of water are not 100% consumptive (i.e. lost to evaporation or transpiration)[4], and the non-consumptively used portion of the water diverted ultimately becomes commingled with the surface or ground waters of the State of Idaho, and become subject to appropriation and use by other water right holders. The description of the source of water in a water right typically does not address the question of whether the water in that source consists of water that has previously been diverted, non-consumptively used, and returned to the source from which it was diverted, or perhaps some other body of water. The issue of the origin of the water in a source usually does not need to be addressed in the context of the adjudication proceedings unless it is raised by a party, in which case it may need to be resolved for purposes of efficient administration of water rights.

In accordance with the foregoing, this Special Master finds that there are genuine issues of material fact concerning the nature or origin of the waters in Eight Mile Creek, and therefor summary judgment is not appropriate.

[4] Idaho Code § 42-202B defines "consumptive use" as "that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right."

ISSUE 2: Does the objection by the NYID and the response by the BOR constitute an impermissible collateral attack on an administrative agency's (IDWR) action?

The Kandlers assert that the SRBA District Court lacks subject matter jurisdiction to review IDWR's decisions to issue the permit and grant the license for Kandlers' water right, for the reason that the NYID and the BOR failed to pursue the issue or exhaust their administrative remedies before IDWR in connection with the administrative licensure proceedings. For the reasons set forth below, this Special Master disagrees with the Kandlers, and holds that the NYID and the BOR are not precluded from pursuing inclusion of a "waste water" remark in the Kandlers' partial decree.

When the Kandlers filed their Application for Permit for their water right, item number (2) of the Application asks for the source of the water supply, to which the Kandlers responded "Eight Mile Creek." The source of the water supply is a statutory element of a water right. I.C. § 42-202(1)(b). IDWR's current administrative rules regarding the listing of the source on an application for permit states:

> The name of the water source to be appropriated shall be listed. For surface water sources, the source of water shall be identified by the official geographic name listed on the U.S. Geological Survey Quadrangle map, or if no official name has been given, by the name in local usage. If the source has not been named, it can be described as "unnamed," but the system or river to which it is tributary shall be identified. For groundwater sources, the source shall be listed as "groundwater." Only one source shall be listed on an application unless the application is for a single system which will have more than one source.

IDAPA 37.03.08.035. When IDWR processes and reviews an application for permit, there is no requirement that the source element be examined and further described for the purpose of identifying whether or not the water in the source consists of the non-consumptively used portion of an up gradient water right. Additionally, the Notice of Application for Water Permit, which was published in the Idaho Statesman, a copy of which is in the subcase file, simply states that the water sought to be appropriated is "water from Eight Mile Creek." This notice does not identify whether the water in Eight Mile Creek consists of return flows from other beneficially used water rights.

Because the source of water in an application for permit is required to be identified simply by its geographic name, without any further analysis as to the origins of the water in the source, it was not incumbent upon the NYID and the BOR to administratively protest the Kandlers' license due to the lack of such further identification of the source. Accordingly, the NYID and the BOR were not required to exhaust their administrative remedies before IDWR, because the further elaboration as to the source of water was not an issue required to be raised or decided in the administrative proceeding. Simply put, there was no problem to remedy.

The Kandlers argue that Judge Wood's decision in the *River Grove* case is controlling regarding the requirement that the NYID and the BOR exhaust their administrative remedies. ***Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge***, SRBA Subcase No. 36-08099 (Jan. 11, 2000)("*River Grove"*). The BOR points out in its briefing that the *River Grove* subcase is distinguishable from the present subcase. This Special Master agrees with the BOR. In that subcase, the predecessors-in-interest to River Grove Farms, Inc., had applied for a permit to appropriate water for hydropower purposes. The permit and license ultimately issued by IDWR contained a subordination clause that was not contested before the administrative agency. In seeking to have the subordination clause removed from its partial decree in the SRBA, Judge Wood wrote: "River Grove's objection to the subordination remark contained in the *Director's Report* is a very belated attempt to seek judicial review of an administrative agency's decision (IDWR)." In the *River Grove* subcase, IDWR had previously made an affirmative decision to require the hydropower right to be subordinated. Simply put, *River Grove* involved a collateral attack on a previously licensed term. In the present subcase, during the licensure proceedings IDWR did not make -- nor was it required to make – any decisions or take any action to define or clarify the source of the subject water right beyond simply identifying the geographic name of the source. Again, the NYID and the BOR are not now contesting that the source of Kandlers' water right is Eight Mile Creek.

Finally, denying summary judgment to Kandlers, and allowing the NYID and the BOR to seek inclusion of the subject waste water remark is consistent with Judge

Melanson's ruling in the *Title Issue* subcase. ***Memorandum Decision on Cross-Motions for Summary Judgment***, SRBA Subcase No. 91-63 (Sept. 2, 2004)("*Title Issue*"). In the *Title Issue* subcase, several irrigation entities sought inclusion of a remark that recognized the irrigation entities' ownership interest in the water rights titled in the name of the Bureau of Reclamation. With respect to the inclusion of a remark that simply restates existing law, Judge Melanson wrote:

> In the interest of uniformity and brevity, referring to existing law in individual partial decrees is the exception and not the rule. The Court generally views it as unnecessary because parties have the right to rely on the backdrop of existing law for the definition and administration of their water right. The exception is when the application of the existing law is at issue. Without clarification of applicable law, the issues raised here potentially make the decree ambiguous without a clarifying remark. In such cases the Court allows a clarifying remark so as to avoid future controversy.
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> In the instant matter, the issue of the relationship between the BOR and project water users was never raised or litigated in either the licensing proceedings or in conjunction with the *Bryan Decree*. Project water users were entitled to rely on the backdrop of existing law in defining the relationship between the BOR and project water users, irrespective of whether or not it was incorporated into the decree. . . .
>
> To the extent the Court is now being asked to clarify existing law against which the water right holders were entitled to rely, the Court does not view that as a collateral attack on a prior license or decree. The Court views the matter as a clarification of a prior decree or license. The Court also finds it necessary to include a remark regarding the same so as to avoid having to readdress the issue at some point in the future.

Id. at pp. 29-30. There are remarkable parallels between the *Title Issue* subcase and the instant subcase. First, the issue regarding whether or not there is waste water in Eight Mile Creek was neither raised nor litigated in the licensure proceedings. Secondly, the NYID and the BOR are seeking inclusion of a remark that restates existing law regarding the use of waste water under Kandlers' water right. (Obviously, such a remark would be irrelevant in the event that the water in Eight Mile Creek is not waste water.) Lastly, the NYID and the BOR are seeking inclusion of the remark for the purpose of avoiding future controversy in the event that there would no longer be waste water flowing in Eight Mile Creek.

Consistent with Judge Melanson's ruling in the *Title Issue* subcase, this Special Master does not view the issues raised as a collateral attack on the Kandlers' license. The determination of whether the water used under Kandlers' license consists of waste water is a question of fact. Similarly, there is also question of fact as to whether the partial decree for Kandlers' water right should include a remark which restates Idaho law regarding the use of waste water.[5]

In accordance with the foregoing, this Special Master holds that the objection and response filed by the NYID and the BOR do not constitute an impermissible collateral attack on an administrative agency action, and summary judgment for this reason is therefore denied.

ISSUE 3: Is there a need for the requested remark?

The Kandlers assert in their briefing that there is no need for the clarifying remark, because IDWR has not had any trouble administering the water right without a remark since it was licensed in 1988; and further that such a remark would allow the NYID or the BOR to override the Kandlers' water right at their discretion by recapturing the water. As explained below, this Special Master finds that there are genuine issues of material fact regarding the need for the remark sought by the NYID and the BOR.

Pursuant to I.C. § 42-1411(2)(b), the Director of the Department of Water Resources is required to determine the source of water for inclusion in the director's report. Under I.C. § 42-1411(2)(j), the Director may also include "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." The director's report constitutes *prima facie* evidence of the nature and extent of a water right acquired under state law. I.C. § 42-1411(4)-(5). The objecting party has the burden going forward with evidence to rebut the presumption established by the director's report. This

[5] In this Special Master's view, the determination of whether a restatement of Idaho law should appropriately be included on the face of Kandlers' partial decree would involve issues such as: 1) Is such a restatement necessary for purposes of providing certainty and predictability as to future administration of Kandlers' right?; 2) What is the likelihood that the NYID and/or the BOR will implement operational or infrastructural changes that might affect the amount of waste water accumulating in Eight Mile Creek?; and 3) What are the changes that could potentially be made by the NYID and/or the BOR?

presumption is overcome when the "opponent produces substantial evidence of the nonexistence of the fact [presumed]." *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986). "When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745, 947 P.2d 409, 418 (1997). If the presumption is overcome by the objector, the claimant has the "ultimate burden of persuasion for each element of a water right." I.C. § 42-1411(5). In other words, when the *prima facie* evidence of the director's report is rebutted by competent evidence, the issue is decided, like other issues, on the sum of the proof. *See* D. Craig Lewis, Idaho Trial Handbook, § 12.5 (2005), *citing Reddy v. Johnston*, 77 Idaho 402, 293 P.2d 945 (1956).

In the instant case, the NYID and the BOR seek the inclusion of a remark in Kandlers' water right that states: "**The source of this water right is waste water. The wasting of water may be discontinued at any time**." This first sentence of this remark is intended by the NYID and the BOR to further define or clarify the source element of the water right. Because of the absence of such a remark in the *Director's Report*, under the standards set forth above, the Kandlers have the benefit of the presumption that such a remark is not necessary to define or clarify the source element of the water right. In order to prevail on the issue, the NYID and the BOR have the burden of providing evidence to show that the water in Eight Mile Creek in fact consists of waste water.

As to the second sentence of the above-quoted remark, the NYID and the BOR intend this to be a statement of Idaho Law as to the legal relationship between a water user who returns its non-consumptively used water to a stream, and a junior appropriator of this water.[6] At oral argument on summary judgment, counsel for the NYID stated that such a remark is necessary to put users of waste water "on notice" that their use of water is subject to the right of the up gradient user to change its practices in a manner that would eliminate or diminish the flow of waste water. Again, the Kandlers start out with the benefit of the presumption that such a statement of law is not necessary to be included

in the partial decree for their water right, and the NYID and the BOR have the burden of going forward with evidence that such a statement is necessary for the administration of the right.[7]

The naming of the source in a water right provides information that may be relevant in many ways. Naming the source provides notice to potential future (junior) appropriators that there are senior appropriations of the waters from that source. Additionally, identifying the source in a license or decree prevents the water users from changing to a different source that may still lie within the legal description of the point of diversion (e.g. switching from a surface stream source to groundwater). As regards administration of water rights, the identification of the source in a water right helps the water master begin to determine which rights to curtail in times of scarcity. In other words, as a starting point in delivering water to the senior users, the water master would look to junior rights on the same source. Obviously the naming of the source is not definitive as to the hydrologic connection between water rights, as clearly there are situations where the curtailment of juniors with a different named source would provide water to the senior users, as well as situations where curtailment of a junior on the same named source would not provide water to the senior (e.g. futile call).

In the present case, the NYID and the BOR seek to add language to clarify or define the source of Kandlers' water right, and to state the legal relationship between the water use by the NYID and the water use by the Kandlers, particularly for the purpose of

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[6] ***In Memorandum Decision and Order on Challenge***, Subcase 36-00077D (June 30, 2000)(*Gisler*), Judge Wood adopted the reasoning of the Special Master in a companion subcase, and declined to include a remark in a partial decree, in part because the remark was "merely a restatement of existing law." *Id*. at 22.

[7] This decision does not address the question of law as to whether the proposed remark accurately restates Idaho law as may be necessary to define the relationship between the water rights at issue. This Special Master does note, however, that the general rule in Idaho is that the non-consumptively used portion of a beneficially used water right (i.e. waste water, seepage, etc.) may be recaptured and reused by the original appropriator. *Reynolds Irr. Dist. V. Sproat*, 70 Idaho 217, 214 P.2d 880 (1959); *Sebern v. Moore*, 44 Idaho 410, 258 P.2d 176 (1927). The water so recaptured must be beneficially used, and used within the limitations of the such appropriator's water right (e.g. used within parameters defined for the place of use, purpose of use, period of use, etc.). In ***Order on Challenge***, Subcase Nos. 36-02080 et al. (April 25, 2003)(*A&B Irrig. Dist*.), Judge Burdick included a discussion regarding the use of waste water that has been commingled with natural flow, and stated that there may be factual situations under which "junior appropriators relying on return flow have rights which in effect place limitations on the original appropriator's ability to alter the consumptive use of the original right." *Id* at 16. (citing *Crocket v. Jones*, 42 Idaho 652, 249 P. 483 (1926); *Beecher v. Cassia Creek Irr. Co*., 66 Idaho 1, 154 P.2d 507 (1944)).

preventing future conflict and litigation should water from Eight Mile Creek become unavailable due to changes in delivery or irrigation practices by the NYID (e.g. piping or lining ditches, recapturing water before it becomes commingled, or moving water use to other areas within the NYID service area). *See. e.g. Estate of Steed v. New Escalante Irrig. Co*., 846 P.2d 1223 (Utah 1992)(Landowner sought decree compelling upstream irrigation company to replace runoff and seepage water that landowner lost after irrigation company changed its method of water application). These issues of whether the proposed remark is necessary to clarify that the source of water is waste water, and further that such a remark is necessary to administer the right, involve questions of fact that cannot be decided on summary judgment.

VII. CONCLUSION AND ORDER

In accordance with the foregoing, this Special Master determines that there are genuine issues of material fact that preclude summarily deciding the matter. Kandlers' *Motion for Summary Judgment* is **denied**.

VIII. ORDER SETTING SCHEDULING CONFERENCE

A trial scheduling conference will be held on **October 9, 2007 at 10:00 AM Mountain Time** at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 225-383-1099 and when prompted entering the code 675342.

Dated August 28, 2007

_/s/Theodore R Booth__

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication