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December 10, 2003

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DEC 12 2003

Department of Water Resources

Diana Delaney
Clerk of the Court
Snake River Basin Adjudication
253 3rd Avenue N.
P. O. Box 2707
Twin Falls, ID 83303-2707

Re: Subcase Numbers 43-103B, 43-103C, and 43-11263

Dear Ms. Delaney:

Enclosed for filing and presentation to the Court are a series of documents related to a settlement agreement between J.R. Simplot Company and Ted and Betty Higley concerning these rights. As you will see from the documents, the Idaho Department of Water Resources has concurred in this settlement agreement. The first document is a joint motion to set aside two of the partially decreed rights, 43-103B and 43-11263, and to refer to those rights to the Special Master who has been handling the Basin 43 subcases. Attached to the stipulation is an affidavit of Kelly Christensen, the Department's water resource agent in charge of these water rights concurring in the motion to set aside.

Also enclosed are three Standard Form 5s stipulating to the elements of water rights for these three rights, 43-103B, 43-103C, and 43-11263. Each of these SF 5s has been signed by the claimants and objectors, and has been concurred in by the Department and counsel for the Department.

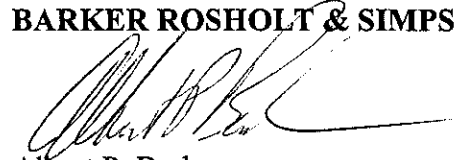
These filings were discussed with the Special Master at the status conference held in these subcases on December 5, 2003. Thus, the Special Master is expecting these filings.

Diana Delaney
December 10, 2003
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If you have any questions, or if I can be of further assistance, please feel free to contact me.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Albert P. Barker', written over the firm name.

Albert P. Barker

APB/cp

Enclosures

Cc: Nick Spencer (w/enclosures)
Gray Young (w/enclosures)
Vic Conrad (w/o enclosures)

Name of Parties Filing Document:

Ted and Betty Ann Higley, Pro Se
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Malta, ID 83342

and

J. R. Simplot Company

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

In Re SRBA	) Subcase Numbers: 43-103B and 43-11263
	)
	)
Case No. 39576	) JOINT MOTION TO SET ASIDE
	) PARTIALLY DECREED SUBCASES
	) AND REFER TO
	) THE SPECIAL MASTER

MOTION

The J. R. Simplot Company ("Simplot"), by and through the undersigned attorney and Ted Higley and Betty Ann Higley ("Higley" or "Higleys") acting pro se, respectfully moves this Court for the following:

1. Pursuant to Idaho R. Civ. P. 60(a), for an Order setting aside the partial decrees filed in the above-captioned subcases because, through oversight or omission, the water rights were decreed while a valid objection was pending on another subcase, namely subcase 43-103C, involving the same water which was decreed under subcase nos. 43-103B and 43-11263.
2. Alternatively, pursuant to Idaho R. Civ. P. 60(b)(5), should Simplot's claim no. 43-103C be recommended during the contested subcase proceedings, the prospective application of claim nos. 43-103B and 43-11263 would no longer be equitable since they contain, through administrative error, omission, or oversight and without notice to Simplot, the water Simplot is entitled to receive under 43-103C.
3. For an Order referring the above-captioned subcases to the Special Master to allow corrections that may become necessary from the resolution of the pending objection to 43-103C.

MEMORANDUM AND POINTS AND AUTHORITIES

Subcase 43-103A was an irrigation claim originally filed by Grant N. Beyler and Clara W. Beyler ("Beyler"). Subcase 43-103B was an irrigation claim originally filed by Blaine Wight and Viola Wight ("Wight"). Subcase 43-103C was an irrigation claim originally filed by Simplot.

The Higleys are the successors to Beyler's interest in claim no. 43-103A pursuant to a warranty deed recorded in the official real property records of Cassia County, Idaho on January 30, 1995 as instrument no. 243341. The Higleys are also the successor to Wight's interest in claim no. 43-103B pursuant to an unrecorded contract for the purchase of Wight's real property dated February 7, 1992.

Beyler, Wight and Simplot claimed portions of a water right originally owned by their predecessor in the real property and water right interest, H. F. Deardorff and Rosa V. Deardorff ("Deardorff"). This water right was decreed in the 1928 Jobe Adams Decree

under water right no. 43-103 in the amount of 5.1 cfs. As previously mentioned, during the claims filing period in 1989, the Idaho Department of Water Resources ("IDWR") assigned the Beyler, Wight and Simplot claims with the following claim numbers respectively, 43-103A, 43-103B and 43-103C.

For reasons that are not clear to Simplot but apparently pursuant to an IDWR claim numbering policy, during the period between 1989 and the administrative preliminary recommendation procedure, claim no. 43-103A was renumbered to 43-10794. Without notice to Simplot, on October 16, 2000, IDWR split claim no. 43-10794 again renumbering the claim into claim nos. 43-11263 and 43-11264. Claim no. 43-11263 was further revised and amended by the IDWR and Higley on September 17, 2001.

The IDWR's Director's Report was filed with the court on September 29, 2001. Inexplicably, the IDWR changed its earlier recommendation for Simplot's claim no. 43-103C from allowing 1.1 cfs to disallowing the entire claim. Simplot filed a timely objection to the Director's Recommendation for the disallowal of 43-103C. Higley also filed a timely objection to the Director's Recommendation for the disallowal of 43-103C.

Uncontested claim no. 43-103B, relating to the original Deardorff water right no. 43-103 was partially decreed with Simplot's knowledge on June 8, 2002. Simplot did not object or otherwise contest this decree because on its face, it only decreed 3.060 cfs out of the total 5.1 cfs, leaving sufficient water to supply Simplot's right of 1.1 cfs, and it did not appear to involve water Simplot is entitled to receive under Simplot's claim 43-103C. On September 9, 2003, Simplot was informed by IDWR that uncontested claim 43-11263 was partially decreed on June 28, 2002, in the amount of 2.040 cfs. At the time of the partial decree, Simplot had no notice of claim 43-11263, its relationship to the original water right decreed to Deardorff, its relationship to claim 43-103C or the fact that 43-11263 was partially decreed.

In August 2002, an initial hearing was held for several subcases contested by Higley and Simplot involving the Deardorff water right. It was decided during the hearing that Higley's counsel would file a motion to set aside the partial decrees entered for the

JOINT MOTION TO PARTIAL SET ASIDE DECREED SUBCASES AND REFER TO THE SPECIAL
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uncontested claims relating to the Deardorff water right to facilitate adjustment to claims that might be required by a resolution of the subcases involved in the hearing. On August 28, 2002, counsel for Higley, Jason Walker, filed a Motion to Set Aside the Partial Decrees for 43-103B and 43-104A. Subcase 43-104A does not affect the water right at issue here, 43-103C.

The re-numbering of subcase 43-103A into 43-11263 without identifying its relationship to the original Deardorff water right no. 43-103 obscured the origin for claim 43-11263 and Simplot consequently was unaware of its relationship with 43-103C. This situation was and is so confusing that Simplot respectfully suggests to the Court that it is probable that Higley's lawyer inadvertently did not seek to set aside the partial decree entered for 43-11263 when it would be reasonable to assume that 43-11263 should also be set aside to fully and fairly adjudicate the water rights at issue.

Subsequently, pursuant to a Court Order issued on August 11, 2003, Higley's counsel withdrew, and Higley has represented themselves, pro se in this action.

Procedurally, Simplot timely filed an objection to the IDWR's Director's recommendation for the 43-103C claim to protect its rights. Simplot now is in the untenable position of having taken every appropriate and necessary procedural action to protect its interest in water right no. 43-103C, yet having the water represented by its claim partially decreed by the Court to another claimant under an entirely different subcase numbering sequence selected by the IDWR without notice to Simplot.

Unless the partial decrees are set aside, Simplot's property rights may be impaired without due process of law even though Simplot has diligently pursued its rights in its contested subcase no. 43-103C. As indicated in the attached Affidavit by Kelly Christensen, the Department has determined that Simplot is entitled to receive the quantity allowed under 43-103C.

The facts set forth in this Memorandum and the supporting Christensen Affidavit clearly show that the partial decrees entered for 43-103B and 43-11263 were based upon an oversight or omission in the administrative process that led the Court to the conclusion that no parallel contested subcases were pending involving all or portions of the same water claimed under 43-103C. But for this oversight or omission, the Court or the Department would have taken notice on its own initiative that the subject partial decrees should be set aside pending the outcome of subcase 43-103C.

Simplot and Higley agree that the provisions of Idaho R. of Civ. P. 60(b)(5) apply as a basis to set aside the partial decrees entered for 43-103B and 43-11263. Specifically, Simplot's claim no. 43-103C is entitled to be recommended during the contested subcase proceedings, the prospective application of claim nos. 43-103B and 43-11263 would no longer be equitable since 43-103B and 43-11263 incorrectly and inappropriately contain water Simplot is entitled to receive under 43-103C. It would be inequitable for the claimant under 43-103B and 43-11263 to be awarded water belonging to Simplot based on these administrative irregularities that it has not beneficially used and in which it has no title or interest. The IDWR agrees that an award of these water rights to the claimant, unless modified as set forth in the attached, would result in an expansion of the original decreed water right no. 43-103 (see Christensen Affidavit attached).

In view of all of the facts and circumstances set forth herein above, Higley, Simplot and the Department agree that it is appropriate to set aside these two decrees in order to properly allocate water among water right nos. 43-11263, 43-103B and 43-103C.

Therefore, for good cause shown, this Court should set aside the partial decrees filed in the above captioned subcases. In accordance with Administrative Order 1, 10.b., the above-captioned subcases should be referred to the Special Master to resolve the pending objections to 43-103C.

In addition, Simplot, Higley, and the Department agree that water rights 43-11263, 43-103B and 43-103C would be decreed in the amounts set forth in the attached SF-5s.

Those amounts equal the 5.1 cfs decreed in the original water right from which these three rights are split.

Dated this 10th day of December, 2003.

Respectfully submitted,

J. R. Simplot Company

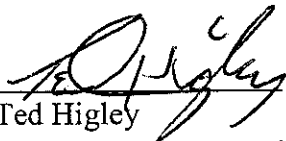


Albert P. Barker

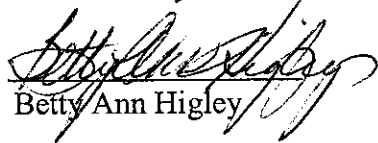
Attorney for J. R. Simplot Company

Dated this 3 day of November, 2003.

Higleys, Pro Se



Ted Higley



Betty Ann Higley

CERTIFICATE OF SERVICE

I certify that on Dec 16, 2003, I served a true and correct copy of the foregoing JOINT MOTION TO PARTIAL SET ASIDE DECREED SUBCASES AND REFER TO THE SPECIAL MASTER by placing the documents in the United States Mail in Washington D.C. postage paid, and addressed as follows:

Original to

Snake River Basin Adjudication
PO Box 2707
Twin Falls, ID 83303-2707

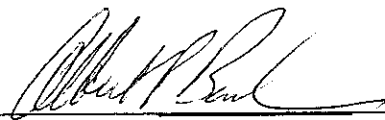
Copies to:

US Department of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83720-0098

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Ted Higley
2200 Rodocker Lane Box 57
Malta, ID 83342



Signature of Person Serving Documents

AFFIDAVIT OF KELLY K. CHRISTENSEN

STATE OF IDAHO)
) S.S.
Twin Falls County)

The undersigned being duly sworn upon his oath, hereby states and avers as follows:

1. My name is Kelly K. Christensen. I am a Senior Water Resource Agent for the State of Idaho Department of Water Resources ("IDWR") Southern Regional Office, which is located at 1341 Fillmore Street, Suite 200, Twin Falls, ID 83301.
2. I was first hired at this location on June 1, 1991. Since that time it has been my responsibility to evaluate claims to water rights filed in the Snake River Basin Adjudication ("SRBA"). This involves working directly with claimants, field-verifying claims, utilizing IDWR records, county real property and assessor records, aerial photography, and any other available documentation to verify claims and to assist in preparing the Director's Recommendations to be filed with the SRBA Court for water rights including, but not limited to those located in IDWR administrative basin no. 43.
3. I am familiar with the facts circumstances and records used in preparing the Director's Recommendations for SRBA Claim Nos. 43-103B, 43-103C and 43-11263. These claims were based upon portions of the original water right decreed in the 1928 Jobe Adams Decree (Federal District Court Decree No. 992) as water right no. 43-103 with a decreed quantity of 5.10 cfs.
4. My original preliminary recommendation allocating 1.10 cfs under 43-103C was based partly on a proportional split of the decreed rights located on properties owned by J.R. Simplot Co. ("Simplot"), Ted Higley and Grant and Clara Beyler and on the quantity contained in Simplot's original claim filed in the SRBA.
5. However, I changed by preliminary recommendation and recommended in the Director's Report to the SRBA the following quantities of water under the relevant water rights: 43-103C – disallowed; 43-103B for 3.06 cfs and 43-11263 for 2.04 cfs.
6. In preparing the recommendations for the Director's Report for claim nos. 43-103B, 43-103C and 43-11263, I concluded that all of the water originally decreed under 43-103 should be recommended under SRBA Claim nos. 43-103B and 43-11263. I also concluded that Claim no. 43-103C filed by Simplot was not entitled to receive any portion of the water right 43-103. This conclusion was recently discovered to be in error based upon a closer reading of the deeds conveying the property.
7. Although the Director's Report contained an allocation of all of the water under right no. 43-103 to right nos. 43-103B and 43-11263, it is now my conclusion after reviewing and

analyzing the recorded deed conveyances, that Simplot is entitled to receive 1.10 cfs under claim no. 43-103C.

8. In order to accurately allocate water under claim no. 43-103, the partial decrees entered under 43-103B and 43-11263 would have to be set aside and reduced accordingly to allow 1.10 cfs of the water to be allocated to Simplot under claim no. 43-103C. Setting aside these partial decrees is necessary if 43-103C is to be recognized as a valid water right with a quantity of 1.10 cfs in order to prevent an expansion of the original decreed water right no. 43-103.

Further the affiant sayeth not.

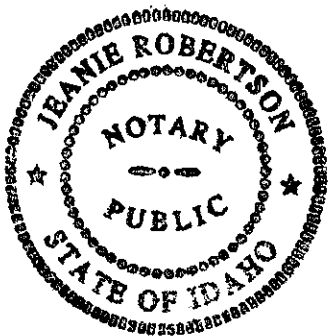
AFFIANT:

Kelly K. Christensen
Kelly K. Christensen

STATE OF IDAHO)
) S.S.
COUNTY OF Twin Falls)

On this 23rd day of September, 2003, before me, a Notary Public in and for said State, personally appeared **Kelly K. Christensen**, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Jeanie Robertson
Notary Public for Idaho
Residing at: Twin Falls, Id.
My Commission Expires: 9-23-06