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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 THE COUNTY OF TWIN FALLS

In Re: SRBA

Subcase Nos. 31-11440

Case No. 39576

OBJECTORS' REPLY BRIEF

Objectors James F. Hagenbarth, David J. Hagenbarth, and Margaret Hagenbarth
("Objectors" or "Hagenbarth") submit this Reply Brief in support of Objectors' Motion for
Summary Judgment.

ARGUMENT

This case concerns whether Right 79 in the *Sauve v. Abbott* decree with a priority of June 21, 1902 included a stockwater purpose of use. *Ernest Sauve vs. W.H. Abbott et al.*, no. 635 (Nov. 1, 1930).¹ There is no dispute that Right 79 was decreed abandoned on December 29, 1959 in favor of a 10.0 cfs right with a priority of May 1, 1924 in the name of the United States (which included Right 79 as well as other rights from *Sauve v. Abbott*). Order in *United States of America vs. Singleton*, No. 2083, United States District Court for the District of Idaho, Eastern Division (the "1959 order").² The only question is whether the 1959 order abandoning Right 79

¹ Relevant portions are attached as Exhibit 6 to the Affidavit of Patti Rowland.

² Attached as Exhibit 7 to the Affidavit of Patti Rowland.

and recognizing that the United States had appropriated the water formerly associated with Right 79 included a stockwater purpose of use.

Claimants maintain that the court order declaring Right 79 abandoned included only irrigation and not stockwater.³ They argue that any stockwater associated with Right 79 actually was only incidental to irrigation and that there was an additional, independent, underlying, non-decreed, and non-disclosed stockwater right with the same priority date and same place of use as Right 79. According to Claimants, the 1959 court order abandoned only Right 79 and any incidental stockwatering included with that right was an independent stockwater right associated with the property. This argument has no merit.

As discussed in Hagenbarth's Opening Brief, the *Sauve v. Abbott* decree specifically includes "watering of livestock" as a purpose of use for the rights decreed therein. Accordingly, there is no question that Right 79 included a stockwater purpose of use. Whether it is recognized as "incidental" or as a separate purpose of use, stockwater is included as part of Right 79. Because Right 79 includes stockwater, when the court in 1959 ruled that there had been "no use" of Right 79 by Singleton since at least May 1, 1924 and that the right had been abandoned, the stockwater purpose of use was abandoned as well regardless of whether it is labeled as "incidental," "de minimis," or otherwise.

Moreover, the United States has claimed, and this Court has decreed, a right to the United States that is consistent with the elements identified in the 1959 order that includes stockwater as a purpose of use. *See* Partial Decree for water right 31-326. In other words, the stockwater purpose of use associated with Right 79 already has been decreed to the United States in accordance with the 1959 order transferring Right 79 from M. Hillman to the United States. Any

³ Claimants' argument is based entirely on the Affidavit of Allen Ruberry, a water resource agent with the Idaho Department of Water Resources. His conclusions about his interpretation of the legal effect of prior court order is not entitled to any weight. It is the Court, not the parties or their witnesses, that determines the legal effect of prior decrees.

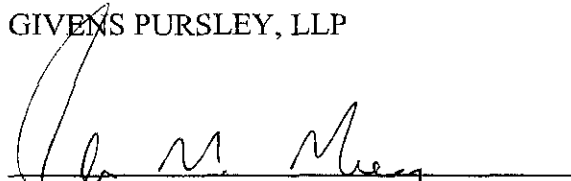
new stockwater right on the claimed place of use for right 31-11440, if one exists at all, must bear a priority date no earlier than December 30, 1959, one day after the 1959 order.

Claimants suggest that Hagenbarth should be estopped from asserting that the claim to right 31-11440 can be decreed on the basis that Hagenbarth has received decrees for stockwater in rights 31-10255, 31-10256, and 31-10257 that allegedly were not included in the *Sauve v. Abbott* decree. In making this argument, Claimant overlooks the critical fact that none of the referenced water rights is subject to a former court order decreeing them—or all uses upon the lands where they are claimed—as abandoned. Further, each of the referenced Hagenbarth water rights is for an instream stockwater right as opposed to Hillman's claim to divert water away from a stream for watering livestock that clearly was included in *Sauve v. Abbott* decree. In sum, there are critical factual differences between partial decrees for Hagenbarth's water rights and the right at issue here that preclude application of estoppel in this case.

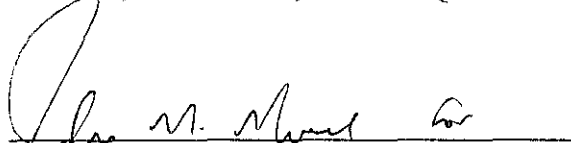
The claim to water right 31-11440 at issue in this case is an improper attempt by Claimant to resurrect the stockwater portion of a right that undisputedly has been decreed abandoned. Hagenbarth requests an order from the Court decreeing right 31-11440 as disallowed or alternatively with a priority date of December 30, 1959.

Respectfully submitted this 24th day of July, 2002.

GIVENS PURSLEY, LLP


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Patti L. Rowland

CERTIFICATE OF MAILING

I certify that on this 24th day of July, 2002, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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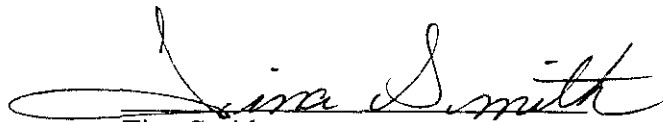
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