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Department of Water Resources

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 31-11440
	)	
	)	CLAIMANT LARRY
	)	SINGLETON'S BRIEF IN
Case 39576	)	OPPOSITION TO OBJECTORS'
_____	)	MOTION FOR SUMMARY
	)	JUDGMENT

COMES NOW, Claimant, Larry Singleton, by and through counsel of record,
Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Chartered, and hereby files this brief in
opposition to Objectors James F. Hagenbarth, David J. Hagenbarth, and Margaret Hagenbarth's
("Objectors") Motion for Summary Judgment and accompanying brief with attachments:

1. Standard of Review:
 - a. Facts are to be liberally construed in favor of party opposing motion for
summary judgment, and that party is also to be given the benefit of all
favorable inferences which might be reasonably drawn from the evidence.

Burgess Farms v. New Hampshire Insurance Group, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985), I.R.C.P. 56(c).

- b. Motion for summary judgment should be granted only when the pleadings, depositions and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact. *Burgess Farms v. New Hampshire Insurance Group*, 108 Idaho 831, 702 P.2d 869 (Ct. App. 1985), I.R.C.P. 56(c).
- c. In summary judgment proceedings, facts are to be liberally construed in favor of party opposing motion, who is also to be given benefit of all favorable inferences which might be reasonably drawn from the evidence. *Smith v. Idaho State University Federal Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982), I.R.C.P. 56(c).
- d. Based upon the records on file and affidavits filed by the Idaho Department of Water Resources in this matter, summary judgment should be denied when said record and affidavits: (1) create a genuine issue of material facts, and (2) which, when construed liberally in favor of Claimant Singleton and against Objectors, and (3) when the benefit of all favorable inferences which might be reasonably drawn from the evidence is afforded Claimant Singleton.

2. Argument.

- a. Objectors' basis to object to Claimant Singleton's claim 31-11440 is

entirely founded upon “prior court decrees to which Claimants’ predecessor was a party” (Objectors’ opening Brief in Support of Motion For Summary Judgment, page 2).

- b. Objectors fail to address or answer the basis for IDWR’s recommendation of claim 31-11440 as more fully set forth in the Affidavit of Allen Ruberry, dated June 14, 2002 (a copy of which is attached hereto and incorporated herein by reference as “Ruberry Affidavit”).
 - i. Rather than address the basis of the Ruberry’s Affidavit, Objectors ignore it completely and go so far as to claim that the department “apparently was unaware of this prior court decree when he recommended right 31-11440 with the claimed priority date of June 21, 1902.” (Objectors’ opening Brief in Support of Motion For Summary Judgment, page 1). However, the Ruberry Affidavit does address the prior court orders (*Ruberry Affidavit*, Paragraphs 8-10) and specifically concludes that said orders do not preclude Claimant Singleton the right to claim a beneficial use right for diverted stockwater.
 - ii. The basis upon which Claimant Singleton may continue to claim a beneficial use right for diverted stockwater is twofold: (1) The *Sauve v. Abbot* Decree (United States District Court, District of Idaho, 1930) did not address, nor did it intend to address all water

rights of every nature. The *Sauve* Decree only addressed incidental stockwater or water which is not diverted independently (See *Ruberry Affidavit*, paragraph 11). Claimant Singleton's water right claim is for diverted stockwater use and thus not intended to be decreed by the *Sauve* Decree. (2) Claimant Singleton's claim number 31-11440 is for a *de minimis* stockwater right. This too was not intended to be covered by the *Sauve* Decree (See *Ruberry Affidavit*, paragraph 12).

iii. Objectors fail to address nor refute the record which substantiates the beneficial use of the water claimed by Claimant Singleton back to the priority date of June 21, 1902 but rather rest their entire summary judgment motion on their argument of collateral estoppel. However, as set forth above, it is clear that because the "right" being claimed by Claimant Singleton differs from the rights addressed within the decrees and judgments of previous courts, the doctrine of collateral estoppel does not apply.

(1) Objectors must admit they too agree that the previous decrees and orders do not apply to all rights because Objectors themselves are presently litigating what they claim are stockwater rights which were not intended to be covered by the previous decrees and judgments. This court

should take judicial notice of Objectors' claims made in water right nos. 31-10255, 31-10256 and 31-10257.

- (2) In fact, because Objectors are advancing their claims in other sub-cases (to the point of partial decrees) while simultaneously objecting to similar claims herein, requires this Court to order that Objectors be estopped from asserting their objection against Claimant Singleton's claim.
- (3) A form of estoppel applicable herein is quasi-estoppel. Quasi-estoppel does not require the typical misrepresentation or concealment claims, only that "the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit" See *KTVB v. Boise City*, 94 Idaho 279, 486 P.2d 992 (Idaho 1971) citing a line of several cases from the state of Hawaii.

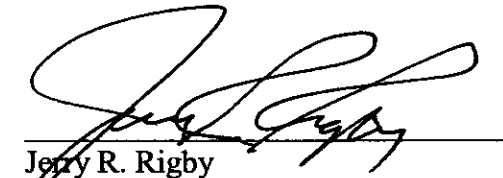
- c. To grant this summary judgment would not be appropriate when this Court and the SRBA court in general has granted partial decrees to water rights

with priority dates pre-dating decrees which, on their face, seem to address
all water rights of every kind and nature.

3. Conclusion:

Based upon the foregoing, Claimant Singleton respectfully requests that this Court deny
Objectors' Motion for Summary Judgment.

Dated this 16th day of July, 2002.



Jerry R. Rigby
of Rigby, Thatcher, Andrus, Rigby,
Kam & Moeller, Chartered
Attorney for Claimant Singleton

CERTIFICATE OF MAILING

I certify that on July 16 2002, I mailed the original and copies of the foregoing brief to
the following:

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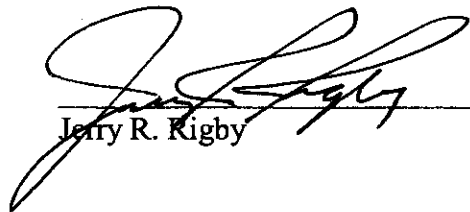
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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase No. 31-11440
	)	
Case No. 39576	)	AFFIDAVIT OF ALLEN RUBERRY
	)	
	)	
	)	

State of Idaho)
) ss.
County of Ada)

Allen Ruberry, being first duly sworn, deposes and states as follows:

1. My name is Allen Ruberry. I am a Senior Water Resources Agent with the Adjudication Bureau of the Idaho Department of Water Resources ("IDWR" or the "Department"). This affidavit is based upon my own personal knowledge.
2. My work address is Idaho Department of Water Resources, 900 North Skyline Drive, Suite A, Idaho Falls, Idaho 83402. I reside in Idaho Falls, Idaho.
3. My educational background is as follows: BS Geology, Boise State Univ. 1980; Assoc. Degree, Civil Engineering, Idaho State Univ., 1979; Cert. Drafting and Design, 1968.

4. My Department of Water Resources work experience includes the following: 1975 to 1977, IDWR, Hydrologic Aid, Adjudication Bureau; 1979 to 1980, IDWR, Water Resource Agent, Dam Safety; 1993 to Present IDWR, Sr. Water Resource Agent, Adjudication Bureau.

5. As part of my duties as Sr. Water Resources Agent, I conduct field investigations for water right claims filed in the Snake River Basin Adjudication. This Affidavit sets forth the basis of my recommendation of claim no. 31-11440.

6. On October 18, 2000, claimant, Larry Singleton (Claimant) called my office to discuss the filing of a stock water claim. On October 19, 2002, at Claimant's request, I filled out the claim according to his direction and mailed it to the Claimant for signature.

7. Claimant has two water right claims that are relevant for discussion in this report: claim nos. 31-4095 and 31-11440.

8. Claimant claimed a statutory claim, 31-4095. When making the recommendation for Claimant's water rights, I reviewed the documentation I had concerning his water rights. After I reviewed claim no. 31-4095 it was apparent that it was the same water right as decreed water right no. 79. Decreed water right no. 79¹ was decreed in *Sauve v. Abbott*, Case No. 635, Decree (Dist. Idaho Nov. 1, 1930) to Burt H. Miller, with a priority date of June 21, 1902, for 2.50 cfs from Dry Creek, a tributary of Camas Creek. Leo Singleton was Claimant's father and the successor in interest to Mr. Miller's land and decreed water right no. 79. Leo Singleton was the defendant in a lawsuit titled *United States v. Singleton*, Case No. 2083 (Dist. Idaho Dec. 29, 1959). The Judgment entered in *United States v. Singleton*, concluded, among other things that water right no. 79 had not been used "on the said land since May 1, 1924; and that said water right (water right no. 79) [had] been abandoned by the said defendant, Leo Singleton, and his

¹ *Sauve v. Abbott* decreed water right no. 79 was re-numbered by the Department as 31-150. I will refer to this right as decreed right no. 79 in this report since that was the number assigned to it in the *Sauve v. Abbott* decree.

predecessors in interest.” *United States v. Singleton*, Case No. 2083, Judgment ¶ III. The Judgment also determined that the United States was entitled to 10.0 cfs of waters from Dry Creek. Leo Singleton did not appear and thus, the Judgment in the case was based on evidence provided by the Plaintiff only.

9. When I reviewed the *Sauve v. Abbott* Decree and the Judgment in *United States v. Singleton*, I determined that water right no. 79 for 2.5 cfs had been found abandoned by the court. Therefore, I recommended claim no. 31-4095 for irrigation for 2.5 cfs from Dry Creek with a priority date of December 30, 1959, one day after the Judgment even though there was evidence in the water master records that shows payment of irrigation delivery in years prior to 1959.

10. I then reviewed Claimant’s stockwater right claim no. 31-11440 with a priority date of June 21, 1902. I concluded that the Judgment in *United States v. Singleton* did not preclude a beneficial use right for diverted stockwater for two reasons.

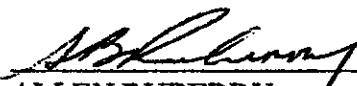
11. First, decreed right no. 79 only included an incidental stockwater right. “Use” is defined in the *Sauve v. Abbott* decree as “the usual ordinary and customary use thereof for irrigation, for watering livestock, and for other domestic purposes.” *Sauve v. Abbott*, Decree, Part II, Schedule of Rights, Definitions. The water rights set out in the *Sauve v. Abbott* decree provide a quantity of water, with a priority date to be used on particular land but do not set forth separate water rights for stockwater. Thus, I concluded that the stockwater referred to in the *Suave v. Abbott* decree only meant incidental stockwater. Incidental stockwater is when stock drink water that is actually intended for irrigation purposes but as an incidental use is also used as stockwater. Thus, I recommended a separate beneficial use water right for diverted stockwater for Claimant under claim no. 31-11440.

12. Second, claim no. 31-11440 is for a *de minimis* stockwater right and thus, I recommended it because I believed that since livestock grazing, and, therefore watering, never ceased that a stockwater right was appropriate. There is evidence of water delivery in the water master records to the property in question. It was therefore reasonable to conclude that water was being used to water stock and that livestock grazing and watering from Dry Creek have occurred continuously since June 21, 1902 on the lands recommended.

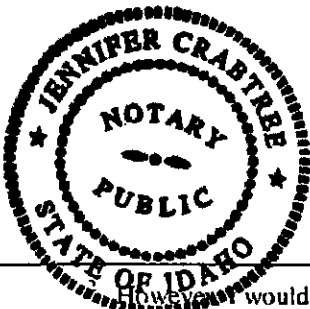
13. I also recommended beneficial use stock water rights to other water users, including Hagenbarths, with priority dates that pre-date the *Sauve v. Abbott* decree. For instance, Hagenbarths' stockwater water rights, 31-10255, 31-10256, and 31-10257 have already been partially decreed with priority dates of May 1, 1902, May 28, 1891 and April 1, 1889 respectively.

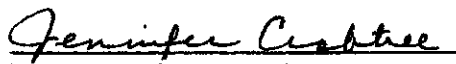
14. Based on the above, I recommended Claimant's claim no. 31-11440 for stockwater purposes with a priority date of June 21, 1902 and a season of use of May 1st thru October 31st.

Further your affiant sayeth naught this 14 day of June, 20002.


ALLEN RUBERRY
Senior Water Resources Agent, IDWR

SUBSCRIBED AND SWORN to before me this 14 day of June, 2002.




Notary Public for Idaho
Residing at Idaho Falls Id
My Commission Expires: 9-23-02

However, I would have recommended a season of use longer than the irrigation season if that was what was claimed. I recommended a longer season of use on Hagenbarths' water rights 31-10255, 31-10256, and 31-10257 because the longer season was claimed.

CERTIFICATE OF MAILING

I certify that on June 14, 2002, I mailed and/or delivered the original and copies of this form, including all attachments, to the following interested parties, by placing them in sealed envelopes, addressed as follows:

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Jennifer Crabtree
Signature of person delivering form