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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. 31-11700 and 31-11701

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 Objector's Motion for Summary Judgment.

- 1. The water right claimed and recommended as right 31-11700 in the SRBA was claimed but affirmatively not decreed in the *Cartier v. Buck* decree. Thus, res judicata bars claimants from re-litigating the right's existence in this adjudication.**

In its opening brief, Hagenbarth pointed out that Claimants' predecessor, Frank Serfas, claimed a water right in the *Cartier v. Buck* decree with a priority of October 19, 1897, a diversion rate of 4.0 cfs, a source of Bear Gulch, and a place of use in the northwest quarter of Section 25, Township 13N, Range 35E. Hagenbarth also pointed out that ultimately, the court in *Cartier v. Buck* decreed Mr. Serfas a right for only 1.60 cfs with a priority of May 1, 1898. Thus, the court in *Cartier v. Buck* determined that Mr. Serfas had appropriated less water under a later priority date than Mr. Serfas had claimed. See Exhibits 5 through 9 to the Affidavit of Patti L. Rowland.

The claim to right 31-11700 in this adjudication is for 4.0 cfs from Bear Gulch Creek with a priority date of October 19, 1897 and a place of use that includes the northwest quarter of Section 25—the exact same elements claimed by Mr. Serfas in *Cartier v. Buck*. Claimants utterly fail to address the dispositive fact that their SRBA claim for right 31-11700 is identical to the claim made by Mr. Serfas in *Cartier v. Buck* but rejected by the court. The claim is clearly duplicative of the claim made by Mr. Serfas, and Claimants are barred by res judicata from attempting to relitigate the claim in this case. Moreover, the right 31-11700 was neither claimed nor decreed in the subsequent *Sauve v. Abbott* decree. Accordingly, this right, if it exists at all cannot predate the *Suave v. Abbott* decree.

Rather than addressing Mr. Serfas' claim in *Cartier v. Buck*, Claimants rely entirely on the Affidavit of Mr. Ruberry and his conclusion that “although Hillman’s predecessor, Frank Serfas, was decreed a water right in *Cartier v. Buck*, this does not necessarily mean that the one water right decreed to Mr. Serfas was the only right he owned.” This statement, which is Mr. Ruberry’s uninformed and inadmissible legal conclusion about the effect of prior decrees, also fails to address the fact that Mr. Serfas’ claimed 4.0 cfs under a priority of 1897 in *Cartier v. Buck*. Indeed, by this statement, it is quite clear that Mr. Ruberry did not have the benefit of all the pleadings to the *Cartier v. Buck* decree when making his recommendation or his affidavit.

Because neither Claimants nor IDWR have provided any evidence or explanation to refute the fact that the claim to right 31-11700 in this adjudication is duplicative of the claim filed by Mr. Serfas in *Cartier v. Buck* and rejected by that court, there is no genuine dispute of fact as to this issue. Res judicata applies to preclude this attempt to relitigate the claim and should be decreed as disallowed.

2. The claim to right 31-11701 is duplicative of the partial decree for right 31-82.

As noted above, Frank Serfas was decreed a water right in *Cartier v. Buck* for 1.60 cfs with a priority of May 1, 1898. Decree, p. 4 (Rowland Affidavit, Ex. 8). M. Hillman expressly claimed this right in the *Sauve v. Abbott* decree with the source changed to West Camas Creek, to which Bear Gulch Creek is tributary. The right was claimed for the same place of use in the northwest quarter of Section 25 as the Serfas claim in *Cartier v. Buck*. Counter Claim of M. Hillman, p.1 (Rowland Affidavit, Ex. 9). This right ultimately was decreed as water right numbered 31-82 by IDWR with a priority of May 1, 1898 and a quantity of 1.60 cfs. However, in the SRBA, Claimants seek to duplicate right 31-82 by making the same claim but with a source of Bear Gulch Creek. Decreeing this right would impermissible insert a new right in front of junior rights decreed in *Sauve v. Abbott*.

Claimants do not have an answer to the fact that the claim by M. Hillman in *Sauve v. Abbott*, which was decreed as right 31-82, itself states that it is the 1898 water right from *Cartier v. Buck*. Mr. Ruberry goes through an analysis where he shows that the claimed sources are different, but this is beside the point and does provide an answer to M. Hillman's claims. Nor does it address the fact that claimed places of use for rights 31-82 and 31-11701 are the same.

There can be no genuine dispute that the claim to right 31-11701 is duplicative of right 31-82 and an attempt to add a new senior right in front of existing rights. This attempt is barred by res judicata, and the Court should enter judgment dismissing duplicative claim 31-11700 in this case.

3. The *Sauve v. Abbott* decree adjudicated West Camas Creek and all of its tributaries, which undisputedly includes Bear Gulch Creek.

Claimants also rely on the statement by Mr. Ruberry that *Sauve v. Abbott* did not decree Bear Gulch, making it appropriate for him to decree beneficial use rights to this stream. Mr.

Ruberry is mistaken. First, there is no dispute that Bear Gulch Creek is a tributary of West Camas Creek. Second, the *Sauve v. Abbott* decree specifically states as follows:

It is hereby FURTHER OREDRED, ADJUDGED and DECREED
HEREIN, that none of the parties to this cause have any rights or
right in or to the waters of Mud Lake and its tributaries, other than
those set forth in said schedule of right

Sauve v. Abbott, page 98 (see Attachment A)

The decree makes clear that Camas Creek and its tributaries are
included:

Mud Lake, sometimes called Crystal Lake, is a natural body of
water situated in Jefferson County, Idaho, and, in part, receives its
supply of water, from the flow of Camas Creek and its tributaries.

Sauve v. Abbott, page 7 (see Attachment A).

Accordingly, it is clear that *Sauve v. Abbott* adjudicated Bear Gulch Creek.

4. Quasi-estoppel does not apply to prohibit Hagenbarth from litigating this case.

Claimants argue that Hagenbarth should be estopped from arguing that Claimants rights
should not be decreed because Hagenbarth is taking a contrary position in another subcase.

There are at least two reasons why estoppel does not apply.

First, the particular facts at issue in Hagenbarth's other subcases distinguish them from
this case and are not before the Court in this matter. Principally, Hagenbarth's other subcases do
not involve facts like those at issue here where rights are duplicative and repetitive claims
addressed in a prior court decree. Moreover, there are other facts that distinguish the other
subcases that are not before this Court.

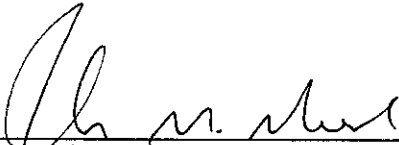
Second, to the extent Hagenbarth is taking a contrary position, he is required to do so by
IDWR's recommendations which have recommended others' claims with priorities that pre-date
the *Sauve v. Abbott* decree while declining to do so for Hagenbarth's rights. It is IDWR, not

Hagenbarth who is taking inconsistent positions.

For all the reasons discussed above, the recommendations for water rights 31-11700 and 31-11701 either must be rejected outright or amended such that the priority dates are no earlier than November 2, 1930.

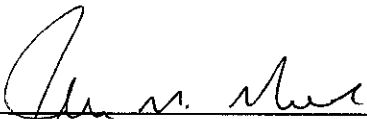
Respectfully submitted this 24th day of July 2002.

GIVENS PURSLEY, LLP



John M. Marshall

DONEY, CROWLEY, BLOOMQUIST & UDA, P.C.

 for

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:

Clerk of the District Court
Snake River Basin Adjudication
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P.O. Box 2707
Twin Falls, ID 83303-2707

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IDWR Document Depository
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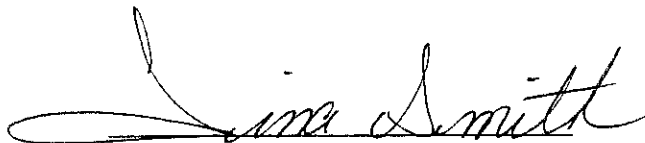
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Chief, Natural Resources Division
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Boise, ID 83724

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Tina Smith

None
Office
copy

Plaintiff's
Exhibit
No. 1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

ERNEST SAUVE,

Plaintiff,

-vs-

No. 635. -- In Equity

D E C R E E

To W. H. Abbott, Fay Abbott, Mary C. Adels, Allen Almonda, G. B. Allen,
Allen & Harn, a co-partnership, consisting of G. B. Allen and H. R. Harn;
Wm. A. Andrews, Joseph Andrasen, Anderson Bros. Bank, a corporation; Gerret
Auldhouse (sometimes known as Gerret Oldhouse); Clausen Auldhouse (sometimes
known as Clausen Oldhouse); William Axline, Ernest Beuerle,
Edward C. Barnes, May L. Barnes, Lovisa Barney, Arthur J. Barber, Charles Bart-
lett, Ambrose J. Beckner, Laura E. Beckner, William Beck, David Bethune, Lloyd
Bennett, Gus E. Brauer, Administrator of the Estate of Annie J. Bennett, deceased;
A. W. Belnap, C. W. Belnap, The Bennett Investment Company, Limited, a corporation;
Gussie Binnard, Burka Binnard, Horace L. Birch, Binnard Ranch Company, a corpora-
tion; B. Binnard, Sarah Binnard and E. F. Mobley, Trustees for Binnard Ranch
Company, a defunct corporation; Charles O. Rickman, as Trustee in Bankruptcy of
Binnard Ranch Company, a corporation; Oscar A. Johannason, as Receiver of Binnard
Ranch Company, a corporation; Heber J. Blackburn, W. B. Boucher, Ray Dohney,
R. T. Boatman, Mary Nicholas Boyd, Frank Boe, Charles E. Brosic, E. L. Browning,
Adna E. Branswell, Afton Bradshaw, Theresa Brinkmann, Lottie Burcham, G. F.
Burcham, Katherine Buregraf, Anna M. Buregraf, John Burke (sometimes known as
John Birke); John H. Burnside, Don R. Burnside, Arthur G. Burnside, Robert Burn-
side, Alexander Burrus, Burnside Bros., a co-partnership, consisting of John H.
Burnside and Don R. Burnside; Vienna Carter, Luther V. Capps, Fred C. Carrell,
Alice M. Cain, Charles G. Carlson, Albert Calkins, Elizabeth C. Capps, John Camp-
bell, A. E. Carlson, Charles Campbell, Camas Mutual Irrigation District, a public
corporation of Clark County, Idaho; Irene M. Cerney, Central Idaho Irrigation Dis-
trict, a public corporation of Jefferson County, Idaho; Chris Christensen, E. L.

BE IT REMEMBERED, That this cause came on for final hearing at Pocatello, Idaho, this 13th day of October, in the year 1930, and having been duly presented, and the Court having made and filed its findings of fact and conclusions of law herein, and in accordance therewith, on motion of counsel for plaintiff, it is ORDERED, and ADJUDGED and DECREED as follows, to-wit:

PART I

1.

That this action be, and is dismissed as against Thomas Wagoner. That the waters used by Thomas Wagoner are not tributary to, nor a part of Mud Lake.

2.

The default of J. W. Dill be, and is, vacated insofar as the rights of his successors in interest, Thomas J. Williams and R. F. Cope, are concerned, and not otherwise. That the defaults entered in this cause be, and are confirmed, without prejudice to any community property rights in waters herein decreed to a spouse.

3.

That there is hereby drawn within the jurisdiction of this Court, for distribution for beneficial uses under and pursuant to the terms of this decree, all the waters of Mud Lake (sometimes known as Crystal Lake) and its tributaries which are hereby decreed to constitute a single interdependent source of water supply to be administered under the terms of this decree, and Spring Lake and North Lake which are independent of Mud Lake.

4.

That Mud Lake, sometimes called Crystal Lake, is a natural body of water situated in Jefferson County, Idaho, and, in part, receives its supply of water, from the flow of Camas Creek and its tributaries, Beaver Creek, (sometimes called Dry Creek) and its tributaries, Rays Lake, Deadline Lake and Sandhole Lake, and each of their tributaries, all of which are herein decreed to be tributaries of Mud Lake. That North Lake and Spring Lake are not tributaries of Mud Lake, and the rights herein awarded in Spring Lake and the rights herein awarded to North Lake, if any, may be

respectively separately administered and diverted without reference to the priority of right awarded to any other party to this suit. And while the provisions of this decree shall govern and determine as between themselves the rights and priorities of those persons diverting water from said respective lakes they are not affected by and do not affect the rights and priorities of any other parties to this suit. Except as otherwise specifically provided, all the waters of the various lakes, ponds, streams and sloughs herein allotted constitute part of the supply of Mud Lake and shall be administered and distributed with reference to the priorities herein decreed.

5.

It being necessary in order to give effect (as among themselves), to the priority of rights herein allotted, having points of diversion from Mud Lake or its tributaries at points affected by the back waters of Mud Lake, that the diversion of all such water should be regulated during each irrigation season so as to leave available at all times, so far as practicable, sufficient water to fill such rights in the order of their priority during the balance of the irrigation season,

IT IS HEREBY DECREED, as follows: That on May 1st of each year, the Commissioner, water master, or other official charged with the distribution of water under this decree, shall compute from the gauge height of the lake the amount of water then available in the lake for diversion and use, and shall add thereto the sum of 18,000 acre feet being the average inflow during the past seven years between the period of May 1st to September 1st, and the aggregate amount of water then in the lake, plus said estimated inflow, shall be provisionally deemed the amount of waters of Mud Lake available that season for use; Likewise, on May 1st said official shall compute in acre feet the allotment of water necessary to fill each right from May 1st to September 1st, in the order of their respective priorities as such rights in Mud Lake and its tributaries having points of diversion as aforesaid, as the same are herein decreed; and such of those rights of earliest priority, the cumulative total of whose allotments does not exceed the said calculated amount available that season, shall be permitted to begin the use of water that season

PART III

1.

IT IS FURTHER ADJUDGED AND DECREED HEREIN, that none of the parties to this cause have any rights or right in or to the waters of Mud Lake and its tributaries, other than those set forth in said schedule of right, and that of the parties who are not named in said schedule of rights, none of them have any right or rights whatever in or to the said waters, PROVIDED, that nothing in this decree contained shall be construed to affect the mortgage, or other lien of any party hereto, the interest of a spouse in community property, nor the interest of a corporation stockholder in such waters, as are herein decreed, nor to affect rights which may hereafter be initiated.

2.

It is further ORDERED, ADJUDGED and DECREED that each of the parties hereto, both plaintiff and defendants, cross-complainants and intervenors, together with their heirs, successors, assigns, agents, servants, and employees are hereby severally and particularly RESTRAINED and ENJOINED from using, attempting to use, diverting, or attempting to divert, any of the waters herein decreed as hereinbefore defined and set out, in any manner except as hereinbefore provided and set out, and in strict accordance with the terms of this decree.

3.

It is further ORDERED, ADJUDGED and DECREED that each of the parties hereto, both plaintiff and defendants, cross-complainants and intervenors, shall pay his own costs expended in this cause, such costs being filing fees, marshall's fees, publication fees, witness fees, and reporters' fees; that the costs of securing supplies, necessary expenses of the Commissioners, and compensation allowed said Commissioners for preparing Findings and this Decree, including stenographic expenses incurred