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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
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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
Case No. 39576

Subcase No: 36-08139 & 36-08140

**Memorandum in Support
of Motion to Correct Clerical
Errors**

COMES NOW, Claimants in the above captioned Subcases by and through their attorney of record, Jason R. Miciak to lodge this *Memorandum in Support of Motion to Correct Clerical Errors* in order to assist the Court in its consideration of the *Motion*. This Memorandum should alleviate the Court's concerns regarding the effect of BWI-12 on the issues inherent to the *Motion*.

ARGUMENT

On May 31st, 2002, the Court issued an *Order Setting Hearing On Court's Motion to Alter or Amend Judgment; I.R.C.P. 59 (e)* in which the Court noted that the limitation sought to be removed from the decree may have been included pursuant to Judge Hurlbutt's

Memorandum Decision and Order RE: Basin Wide Issue-12 (April 25th, 1997). The Court's concern is understandable given the complexity of issues surrounding claims such as these. However, close inspection of the precise issue addressed in BWI-12 and these particular claims vitiates all concern deriving from BWI-12 allowing the Court to feel comfortable that a clerical error resulted in the inclusion of the limitation.¹

This Court properly pointed to Judge Hurlbutt's decision, in particular the portion which found that "the quantity used in cubic feet per second for a *de minimis* claim under I.C. § 42-1401A(12) involving a diversion may be based on any hourly rate so long as the amount is capped to a quantity not to exceed 13,000 gallons per day." *Id.* Focusing on this portion alone might well lead one to conclude that BWI-12 establishes the basis for the inclusion of the relevant limitation. However, reading on through the opinion Judge Hurlbutt noted a critical defining characteristic of *de minimis* claims:

I.C. § 42-1401A(12) defines a class of *de minimis* water rights for treatment in the SRBA. The class includes small rights (13,000 gallons per day or less) diverted solely for stock water or solely for wildlife. *Id.* (Emphasis added.)

Therefore, a *de minimis* claim is one for stockwater use solely or for wildlife solely. Additionally the claim itself must be for less than 13,000 gallons per day.

1. 36-8140

The above defining characteristics of a *de minimis* water right exclude the possibility that water right no. 36-8140 could have been filed as a *de minimis* claim because the claim is for both stockwater and commercial uses as separate uses. The claim specifically sets forth that the commercial use is for "Dairy Barn Use," a separate use with clear intent to divert that is distinct from the "solely" stockwater claims that Judge Hurlbutt addressed.

Additionally, there is another indication within the claim that excludes 36-8140 from the distinct *de minimis* class established by Judge Hurlbutt's order. The claim is for a dairy

¹ The limitation which claimants seek to have removed is the following: The quality of water under this right shall not exceed 13,000 gallons per day.

with 700 cows. The Department of Water Resources utilizes a "rule of thumb" which allows a minimum of 35 gallons per day per cow. (See attachment "A"). Therefore, a 700 cow dairy requires a minimum of 24,500 gallons to operate. This quantity is clearly above the 13,000 gallon limit established for *de minimis* claims and is completely consistent with the .04 cfs claimed for the cows without consideration of the barn. Claimants respectfully assert that there is ample evidence that water right 36-8140 was claimed outside of the class of *de minimis* water rights established in Judge Hurlbutt's *Order*.

2. 36-8139

Initially it would seem that 36-8139 would be more likely to qualify as a *de minimis* right as the purposes of use were domestic and stockwater. However, here again the claim was for .06 cfs, three times more than the 13,000 gallon limitation as demonstrated above and for 500 cows. More importantly, the partial decree was signed on December 13, 1996 along with a Rule 54(b) certificate. The *Memorandum Decision and Order RE: Basin-Wide Issue 12* was signed on April 25, 1997. Therefore, under due process principles of notice and meaningful opportunity to be heard, this Court would never impose a serious limitation any claimant which did not have had notice or opportunity to be heard upon such a limitation. For these reasons, the limitation of 13,000 gallons per day should be lifted from the partial decree to be made consistent with the Director's Report.

DATED: June 7, 2002



Jason R. Miciak
Counsel for Claimants

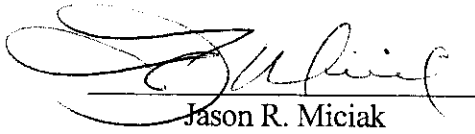
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I HEREBY CERTIFY that on this 7th day of June, 2002, I caused a true and correct copy of the above indicated document to be served by placing the same in the U.S. Mail, postage prepaid, to the following parties.

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Environment & Nat'l Resources Div.
550 W. Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449



Jason R. Miciak

Table 3

NON-IRRIGATION WATER REQUIREMENTS

Types of Establishments	<u>Gallons/day</u>
Airports (per passenger)	3-5
Apartments, multiple family (per resident)	60
Bathhouses (per bather)	10
Camps:	
Construction, semi-permanent (per worker)	50
Day with no meals served (per camper)	15
Luxury (per camper)	100-150
Resorts, day & night, limited plumbing (per camper)	50
Tourist, central bath & toilet facilities (per person)	35
Cottages with seasonal occupancy (per resident)	50
Courts, tourist with individual bath units (per person)	50
Clubs:	
Country (per resident member)	100
Country (per non-resident member)	25
Dwellings:	
Boardinghouses (per boarder)	50
Kitchen requirements (per boarder)	10
Multiple family apartments (per resident)	40
Roominghouses (per resident)	60
Single family (per resident)	50-75
Estates (per resident)	100-150
Hotels:	
With private baths (2 persons/room)	60
Without private baths (per person)	50
Hospitals (per bed)	250-400
Institutions other than hospitals (per person)	75-125
Laundries (per washing/customer)	50

EXHIBIT

A

Livestock (per animal):

Cattle (range)	12
Cattle (dairy)	35
Goat	2
Hog	4
Horse	12
Mule	12
Sheep	2
Chickens (per 100)	5-10
Turkeys (per 100)	10-18

Motels:

With bath, toilet & kitchen facilities (per bed)	50
With bed & toilet (per bed)	40

Parks:

Overnight with flush toilets (per camper)	25
Trailers with individual bath units (per camper)	50

Picnic:

With bathhouses, showers & flush toilets (per picnicker)	20
With toilet facilities only (per picnicker)	10

Restaurants:

With toilet facilities (per patron)	7-10
Without toilet facilities (per patron)	3
With bars & cocktail lounge (additional per patron)	2

Schools:

Boarding (per pupil)	75-100
Day with cafeteria, gyms & showers (per pupil)	25
Day with cafeteria, no gyms or showers (per pupil)	20
Day without cafeteria, gym or showers (per pupil)	15

Service stations (per vehicle)

10

Stores (per toilet room)

400

Swimming pools (per swimmer)

10

Theaters:

Drive-in (per car space)	5
Movie (per auditorium seat)	5

Workers:

Construction (per person/shift)	50
Day (per person/shift)	15