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RECEIVED
JAN 08 2008
DEPARTMENT OF
WATER RESOURCES

Attorneys for Albert & Alvera Fols, Charles & Mary Harling, A.C. & Luella Pilkerton,
Lloyd & Sheryl Tutor, Marci Dixon, and Tracy Marcia

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. See Exhibit A
	)	
Case No. 39576	)	AFFIDAVIT OF ALBERT FOLS IN SUPPORT
	)	OF CARMEN CREEK USERS' MOTION TO
	)	FILE LATE OBJECTIONS
_____	)	
State of Idaho	)	
	) ss	
County of Lemhi	)	

ALBERT FOLS, being first duly sworn upon oath, deposes and states as follows:

1. I am a claimant in the SRBA (#75-14056, et al.) and make the following affidavit upon my personal knowledge of the facts and circumstances set forth herein below.

2. Charles & Mary Harling, A.C. & Luella Pilkerton, Lloyd & Sheryl Tutor, Marci Dixon, and Tracy Marcia own properties next to me and they too are claimants in the SRBA. We have collectively filed a *Motion to File Late Objections* in the above-referenced subcases. For purposes of this motion I will refer to the group and myself as the "Carmen Creek Users".

3. I own approximately 10 acres at 81 Parmenter Road, Carmen, Idaho. I purchased this property in 2004. My neighbors, the other Carmen Creek Users have purchased their

properties at various times, going back 15 years in some cases. To the best of my knowledge we have all used Carmen Creek water for irrigation since we purchased our respective properties. The Watermaster has delivered our water rights for irrigation ever since I have lived at my property. It was my understanding that my property included appurtenant water rights that were a part of the original Thomas Palmer Ranch. It is my understanding that the other Carmen Creek Users have similar water rights as well.

4. Sometime in 2004 or 2005, the Idaho Department of Water Resources ("IDWR") began its investigations into the water right claims to Carmen Creek. IDWR sent "preliminary recommendations" to me and the other Carmen Creek Users recommending our water right claims in November 2006. I filed *Notice of Error* replies with IDWR, agreeing with the proposed recommendations. It's my understanding the other Carmen Creek Users did the same.

5. On December 6, 2006, IDWR held a public meeting in Salmon, Idaho to present and explain their preliminary water right recommendations for the Carmen Creek drainage. At that time, my claims along with the other Carmen Creek Users' claims were found to be valid and had received preliminary recommendations. Water right claimants attending that meeting were informed by IDWR that recommended water right claims would likely withstand any legal challenge in the SRBA Court.

6. On or about December 24, 2006, I was researching my water right claims on IDWR's website and on-line database. I noticed my preliminary recommendations had changed and that IDWR was proposing to disallow my claims. I emailed Greg Taylor, a water rights agent with IDWR, about the change. He responded and provided me with a "draft" letter that was supposed to go out to the water right claimants explaining the changes from the preliminary recommendations. See Exhibits B, C (email correspondence and "draft" letter from Mr. Taylor).

The letter was never finalized and sent. *See* Exhibit C. IDWR did not provide me or the other Carmen Creek Users' any formal notice that our water rights would not be recommended until the final recommendations were issued sometime after January 8, 2007. The IDWR did not indicate why the final recommendations were different than the preliminary recommendations had been in November 2006, and as explained at the December 6, 2006 meeting in Salmon.

7. I received my final recommendations from IDWR, proposing to disallow all of my claims described in this motion sometime in mid-January 2007.

8. I contacted Travis Thompson about filing objections to the Carmen Creek Users' disallowed claims in September 2007. With Mr. Thompson's assistance we proceeded to file timely objections to our disallowed claims in October 2007. At that time I was unaware that the other claims filed by other water users in the drainage, including the "16 Claimants" that have claimed the water rights subject to these subcases, had changed from their preliminary recommendations from November 2006. At the December 2006 meeting in Salmon IDWR explained that they had recommended the water rights proportionately to all water right claimants based upon acreage. It was my understanding that the 16 Claimants' water rights had been recommended like the Carmen Creek Users' water rights.

9. Neither myself nor the other Carmen Creek Users filed timely objections to the 16 Claimants' water right claims because we were unaware that IDWR's disallowance of our claims had changed the 16 Claimants' final recommendations. I only recently became aware that 13 of the 16 Claimants' final recommendations had increased diversion rates based upon my review of the claims and after speaking with Mr. Thompson last week.

10. I believed the 16 Claimants' water right claims were going to be recommended to the Court as indicated in the preliminary recommendations, and as represented at the December

6, 2006 meeting in Salmon. I was unaware that IDWR had increased the quantity or diversion rate of most of the 16 Claimants' water right claims until recently, after the objection period had expired. I did not purposely withhold filing objections to these claims.

11. Based upon my research and understanding of the water rights regarding the original Thomas Palmer Ranch, the *McNutt v. Palmer* decree of 1902 decreed four water rights to the Palmer Ranch. The decreed amounts and priority dates were as follows:

1875 29 inches

1882 16 inches

1888 20 inches

1892 30 inches

Total 95 inches

The final recommendations made by IDWR for the 16 Claimants' water right claims that were filed with the Court on January 8, 2007, are different:

1875 38.3 inches (9.3 inches more water than was decreed in 1902)

1882 16.9 inches (0.9 inches more water than was decreed in 1902)

1888 19.2 inches (0.8 inches less water than was decreed in 1902)

1892 30.8 inches (0.8 inches more water than was decreed in 1902)

Total 105.2 inches

12. IDWR's change in recommendations for my claims and the other Carmen Creek Users' claims has not been fully explained to me. After the meeting in Salmon on December 6, 2006, I had no reason to suspect that my claims would not be recommended to the Court, and was blindsided by the final recommendations. I further had no reason to suspect that any other recommendations in the drainage would change. The review of the final recommendations has

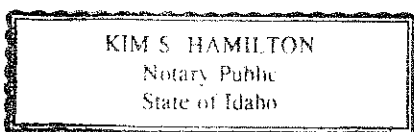
DATED this 2nd day of January 2008.


Albert Fols

STATE OF IDAHO)
) ss.
County of Lemhi)

On this 2 day of JANUARY, 2008, before me, a Notary Public for said County and State, personally appeared ALBERT FOLS, known or identified to me, to be the person whose name is subscribed to the within instrument, and acknowledged to me that he/she 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.



Kerr S. Harrington
NOTARY PUBLIC FOR IDAHO
Residing at: *SALMON IDAHO*
My commission expires: *03/09*

CERTIFICATE OF MAILING

I certify that on the 7th day of January, 2008, I mailed true and correct copies of the foregoing affidavit to the following persons:

Original to:

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

Copies to:

IDWR Document Depository
P.O. Box 83720
Boise, Idaho 83720-0098

U.S. Department of Justice
Environment & Natural Resources
550 West Fort Street, MSC 033
Boise, Idaho 83724

Chief, Natural Resources
Office of Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449

John E Burns
Ruth C Burns
PO Box 264
Carmen, ID 83462

Rodney Hugh Edmiston
Susan Francine Edmiston
PO Box 155
Carmen, ID 83462

William W Clementz
PO Box 255
Carmen, ID 83462

James Paul Hudson
PO Box 173
Carmen, ID 83462

Roberta Fadness
Danny E Fadness
PO Box 286
Carmen, ID 83462

Cathleen Tippet
James R Tippet
PO Box 15
Carmen, ID 83462

George Matejko
PO Box 129
Carmen, ID 83462

Robert D Mosher
Fransicka Mosher
PO Box 213
Carmen, ID 83462-0213

Jacqueline D Ernest
Robert M Ernest
PO Box 132
Carmen, ID 83462

Shirley J Mattis
PO Box 265
Carmen, ID 83462

Phillip G Eisenhower
Shelley L Erwin
1306 W Vista View
Washington, UT 84780

Terry J Hershey
Veralyn E Hershey
PO Box 121
Carmen, ID 83462

Donna K Jackson
Thomas M Jackson
PO Box 47
Carmen, ID 83462

Thomas Family Trust
10400 Presilla Rd.
Camarillo, CA 93012

Linda Rice
Rick Rice
PO Box 285
Carmen, ID 83462

Steven K Yowell
3509 Ballance Ct.
Chesapeake, VA 23321

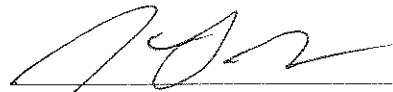

Travis L. Thompson

Exhibit A

75-69A	75-10061B
75-69B	75-10061C
75-69F	75-10061J
75-69H	75-10061R
75-69K	75-10061T
75-69L	75-10061Y
75-69N	75-10061Z
75-69P	75-10062A
75-69Q	75-10062AB
75-69S	75-10062AC
75-69W	75-10062AL
75-69X	75-10062C
75-70A	75-10062H
75-70B	75-10062P
75-70F	75-10062R
75-70H	75-10062W
75-70K	75-10062X
75-70L	75-10062Y
75-70N	75-10136A
75-70P	75-10136B
75-70Q	75-10137A
75-70S	75-10137B
75-70T	75-10678
75-70X	75-10678
75-70Y	75-14387
75-10061A	75-14388
75-10061AA	75-14393
75-10061AE	75-14441
75-10061AM	75-14443

EXHIBIT B

From: Al Fols [mailto:afols@salmoninternet.com]
Sent: Saturday, January 06, 2007 9:11 AM
To: 'Taylor, Greg'
Subject: FW: Carmen Creek Drainage Water Rights With Apology

Mr. Gregory Taylor,

Please accept my apology. After reviewing my water rights with Mr. Dave Mc Farland, a past water master for the Carmen Creek drainage, I misspoke when I asked you to return your recommendations to the preliminary findings. What I should have asked for was the inclusion of six (6) parcels of the Ajax Peak subdivision that you disallowed. These should have been added to the 45" (.90 cfs) of water that you recommended to 13 individual tracts to make a total of nineteen tracts (see the statement from your draft letter below). Historically, as I have tried to point out, the water has been used on this acreage divided amongst the 19 tracts. If you would like to confirm this with Mr. Mc Farland, you can contact him at (208) 756-3752.

I was wrong to infer that the McNutt et al vs. Palmer case cannot be altered, but I believe I am right that the recommendations moved water form one tract of land to another after the decree using historical changes. My "new" recommendations change would carry equal weight. Please confirm my "new" recommendation and "transfer" the rights to include the six (6) tracts.

"This does not seem to be the proper way to recommend the "exchange" or "transferred" rights that were decreed in McNutt et al vs. Palmer et al. McNutt vs. Palmer decreed a total of 620" (12.4 cfs) of exchange rights to 14 individual tracts of land that are specified in the stipulated agreement. This means 45" (.90 cfs) of water is decreed to 13 individual tracts and 35" to one tract. Of the 45", 16" (.32 cfs) has a priority date of 5/1/1882 and 29" (.58 cfs) has a priority date of 5/1/1875."

I apologize, again, for my misunderstanding of the water allocation and hope that you will adjust the recommendations.

Sincerely,

**Albert C. Fols
PO Box 56
Carmen, ID 83462
(208) 756-1535**

From: Al Fols [mailto:afols@salmoninternet.com]
Sent: Friday, January 05, 2007 9:04 PM
To: 'Al Fols'
Subject: RE: Carmen Creek Drainage Water Rights

Mr. Gregory Taylor,

There are two other concerns with your draft letter attached to your email of Tuesday, January 02, 2007 8:48 AM.

- (1) You have not addressed the water rights with priority dates of 1888 and 1892 that were obviously not a part of the McNutt et al vs. Palmer case.
- (2) I have not seen the information supplied to you to disallow my claims in question. I still do not believe McNutt et al vs. Palmer case disallows any of my claims because the Homestead Act of 1862 required that the land be improved and crops grown on the land for at *least* five years prior to the patent.

The IDWR surveyed, asked for public/water user input, and studied the Carmen Creek drainage for more than two years, so I believe it would be only fair to allow those "blindsided" after the review process had ended a chance to confirm the validity of the information supplied.

Please respond.

Sincerely,

Albert C. Fols
PO Box 56
Carmen, ID 83462
(208) 756-1535

From: Al Fols [mailto:afols@salmoninternet.com]
Sent: Thursday, January 04, 2007 11:01 AM
To: 'Taylor, Greg'
Subject: RE: Carmen Creek Drainage Water Rights

Mr. Gregory Taylor,

Thank you for the reply and copy of the draft letter that will accompany the water rights that you will recommend to the court. The letter explains some of my concerns, but not all. With all due respect, it is difficult for me to understand how you are able to justify the specific amount of water decreed by McNutt et al vs. Palmer when you do NOT recognize the specific amount of irrigated acreage decreed in that decision.

You have reduced the total irrigated acreage and reduced the irrigated acreage for some right holders, but not all. All decreed water rights with the same legal standing rendered in the McNutt et al vs. Palmer case must be treated equally. An example of unfair treatment is: you gave WATER RIGHT NO. 75-10137B, 4.5 irrigated acres recommended verses 5.0 irrigated acres decreed; and WATER RIGHT NO. 75-10061AM, 5.0 irrigated

acres recommended verses 5.0 decreed. Both of the rights have a priority date of 1875 and both have identical standing under the decree. I realize that the irrigated acres recommended for WATER RIGHT NO. 75-10137B was reduced because portions of the decreed acreage are no longer irrigated, but you cannot arbitrarily select some portions of a court decision and reject others. You have given WATER RIGHT NO. 75-10061AM better standing under the decree than WATER RIGHT NO. 75-10137B. With your "new" recommendations, the water right owners that have developed the least amount of irrigated acres for uses other than irrigation will benefit from your decision and those that developed more irrigated acres will be adversely effected. My research indicates that there are more than fifty (50) water rights adversely affected.

Once you have made the decision to ignore portions of the McNutt et al vs. Palmer case because of water use changes after the fact, you must consider other factors with the similar standing.

There are two classes of water users on this issue. For those that benefit from McNutt et al vs. Palmer, it is the last word on how the water rights should be adjudicated (which means it cannot be redefined); and those with a more reasonable approach. History since that decree has been significant enough to alter the decree in a responsible manner (which means irrigated acreages and water per acre can be redefined by using all historical evidence). Historical evidence indicates that most of the disallowed claims should be reversed. The IDWR survey of the Carmen Creek drainage has already determined this fact.

There are only two logical remedies to resolve this discrepancy;

- (1) Examine each recommended water right amended for the total acreage decreed and adjust the water right within the limits of McNutt et al vs. Palmer or
- (2) Return the recommendations to the preliminary recommendations and allow the contesting water users a chance to challenge those recommendations with the District Court. Only the District Court has the authority to overturn or redefine McNutt et al vs. Palmer.

Either one of these two remedies would give those that attended the IDWR meetings in Salmon confidence that the recommendation procedure was not sabotaged by water users "giving input" that, in reality, should have been protests to the recommendations. As with any protest to a claim for water rights, it should have been in writing and identified the claims to be contested.

Sincerely,

Albert C. Fols

From: Taylor, Greg [mailto:Greg.Taylor@idwr.idaho.gov]

Sent: Tuesday, January 02, 2007 8:48 AM

To: Al Fols

Subject: RE: Carmen Creek Drainage Water Rights

Dear Mr. Fols,

Here is draft of a letter that I hope explains why the recommendations for some rights were changed after the preliminary recommendations were sent. After speaking with many of the water users in the Carmen Creek drainage, it seems that the way the department analyzed the rights initially needed to be reviewed again. I understand that this may not satisfy you but I hope it helps to explain the logic behind the recommendations. As always, you may file an objection with the court if you still disagree with any portion of your rights.

Sincerely,

Greg Taylor

-----Original Message-----

From: Al Fols [mailto:afols@salmoninternet.com]

Sent: Monday, January 01, 2007 6:41 PM

To: Taylor, Greg

Subject: FW: Carmen Creek Drainage Water Rights

Mr. Gregory Taylor,

I emailed you the previous email before I realized what had happened. After some research, I realize why you changed my recommendations. I guess my complaint is that I was not notified of the changes and I saw no reason for the changes, for example, new information supplied by another claimant or uncovered by the IDWR. I thought the recommendations came after significant research from the IDWR, and that I would be notified of significant changes.

I would still like for you to reply with a phone call or email.

Thank you, again, for your assistance,

Albert C. Fols

From: Al Fols [mailto:afols@salmoninternet.com]

Sent: Tuesday, December 26, 2006 10:09 AM

To: Gregory Taylor (greg.taylor@idwr.idaho.gov)

Subject: Carmen Creek Drainage Water Rights

Mr. Gregory Taylor,

I went onto the IDWR website over the weekend and discovered an error that really upset my Christmas. For some reason the recommended rights on the website do NOT match the recommendations previously posted and do NOT match the recommendations mailed to me by the IDWR (Please find copies attached). I sent in the "NOTICE OF ERROR REPLY" indicating that I agreed with the written recommendations for all six of my claims. The "NOE's" are posted on the IDWR website for each claim, but do not reflect appropriate recommendations.

Please change the recommendations back to their original form, both with your files and on the website ASAP. Also, please reply to this email and/or telephone me as I am very concerned with this error.

Thank you, in advance, for your assistance,

Albert C. Fols
PO Box 56
Carmen, ID 83462
(208) 756-1535

EXHIBIT C

January 2, 2007

DRAFT

Re: Director's Report for Sub-basin #75 sent to District Court.

Dear Carmen Creek Water User:

In the near future you will be receiving a copy of the Director's Report that was sent to the SRBA District Court in Twin Falls. Some of the department's recommendations are not the same as were originally sent to you as Preliminary Reports in November.

After receiving many Notices of Error Replies and then reviewing again the Notices of Claim originally filed, the department found that a different review process for the previously decreed water rights was warranted, specifically for the "exchange" or "transferred" water rights. Originally we took the total diversion rate decreed for the 1875 and 1882 water rights and then divided it by the total number of claimed and irrigated acres within the Carmen Creek **drainage as a whole**. This gave us a rate per acre that we then multiplied by the individual's number of irrigated acres to obtain the total diversion rate for your tract of land.

This does not seem to be the proper way to recommend the "exchange" or "transferred" rights that were decreed in McNutt et al vs. Palmer et al. McNutt vs. Palmer decreed a total of 620" (12.4 cfs) of exchange rights to 14 individual tracts of land that are specified in the stipulated agreement. This means 45" (.90 cfs) of water is decreed to 13 individual tracts and 35" to one tract. Of the 45", 16" (.32 cfs) has a priority date of 5/1/1882 and 29" (.58 cfs) has a priority date of 5/1/1875. Therefore, each decreed tract of land is limited to .58 cfs and .32 cfs respectively. By dividing the .58 cfs and .32 cfs by the total number of claimed and irrigated acres within the **decreed tracts** we came up with a rate per acre that we then multiplied by your individual number of acres.

There were also places of use that were claimed in the SRBA but were not part of the original decreed place of use, or in some instances the licensed place of use. Many of these Notices of Claim were recommended to be disallowed.

Once again, if you disagree with any part of your water right as recommended, you will still have the opportunity to file an objection with the SRBA Court.

Sincerely,

Gregory J. Taylor
Sr. Water Agent