

COPY

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Attorneys for Ground Water Districts

RECEIVED

AUG 22 2008

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

Case No. 39576

Subcase Numbers: See Attachment  
A

**GROUND WATER DISTRICTS'  
MEMORANDUM IN SUPPORT OF  
THE MOTION TO COMPEL  
DISCOVERY RESPONSES AND  
MOTION TO EXTEND  
DEADLINES**

COME NOW ABERDEEN AMERICAN FALLS GROUND WATER DISTRICT,  
BINGHAM GROUND WATER DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER  
DISTRICT, CAREY VALLEY GROUND WATER DISTRICT, JEFFERSON-CLARK  
GROUND WATER DISTRICT, MADISON GROUND WATER DISTRICT, MAGIC

VALLEY GROUND WATER DISTRICT, and NORTH SNAKE GROUND WATER DISTRICT ("Ground Water Districts"), by and through their attorneys of record, pursuant to Idaho Rule of Civil Procedure ("IRCP") 37(a)(2), hereby submits this Memorandum in Support of its Motion to Compel Discovery. The Ground Water District respectfully request that the court issue an Order compelling the Claimant<sup>1</sup> to respond fully and fairly to the Ground Water Districts First Interrogatories and Requests for Production ("Discovery Requests"). Further, the lack of compliance with discovery requests necessitates continuing the deadlines presently set by this court.

Counsel for the Ground Water Districts certifies in compliance with I.R.C.P. 27(a)(2) that she has conferred with counsel for Claimant, but a resolution of the matter has not occurred.<sup>2</sup>

## **I. INTRODUCTION AND BACKGROUND**

The Ground Water Districts served Claimant with its Discovery Requests on June 12, 2008.<sup>3</sup> Accordingly, Claimant's responses to these Discovery Requests were due on July 14, 2008.<sup>4</sup> Claimant requested an extension of time to answer the Discovery Requests which the Ground Water Districts Granted. On July 25, 2008, Claimant served its responses to the Ground

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<sup>1</sup> For judicial economy, this Motion is filed against A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, Minidoka Irrigation District, American Falls Reservoir District #2, Falls Irrigation District and the United States Bureau of Reclamation. Each of these entities is a claimant of one or more of the water rights listed on Attachment A. For ease of reference, the Motion and Memorandum in Support refer to Claimant rather than filing multiple identical motions and memoranda against each individual entity.

<sup>2</sup> See Affidavit of Candice M. McHugh ("McHugh Aff."), Exhibit C filed concurrently with this motion.

<sup>3</sup> See McHugh Affidavit, Exhibit A.

<sup>4</sup> Falls Irrigation District and the United States Bureau of Reclamation responses to the Discovery Requests were received on July 18 and 22, 2008 respectively.

Water District's Discovery Requests.<sup>5</sup> However, Claimant failed to provide the Ground Water Districts with a single document. Instead Claimant referenced public records that may number in the thousands of pages and Claimant records that are available for inspection. Additionally, in response to an interrogatory seeking the specific information regarding Claimant's water rights that are at issue in these subcases, Claimant directed the Ground Water District to public records and Claimant records.

Specifically, the Ground Water Districts received the following responses to its discovery requests:<sup>6</sup>

**REQUEST FOR PRODUCTION NO. 2:** Please provide all documents that support your claim to priority date, diversion, and use of water since the date of priority for the water rights subject to this proceeding, including but not limited to delivery records from Water District 1, in your possession, internal delivery records and diversion information, operating or use policies, and any historical documents whether or not they were originally created by A & B Irrigation District.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:** Objection, the request is vague and overly broad and beyond the scope of permissible discovery. Notwithstanding this objection, the records of IDWR, USBR, and WD1 are public records. Specific records of A & B relative to this request are available for inspection and copying at A & B's office.

**REQUEST FOR PRODUCTION NO. 3:** All documents and data referred to or relied upon in filing your claims to the water rights in the SRBA that are the subject of this action.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:** Objection, the request is vague and overly broad and beyond the scope of permissible discovery. Notwithstanding this objection, the records of IDWR, USBR, and WDI are public records. With respect to water right no. 1-14, the Eagle Decree is an available

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<sup>5</sup> See McHugh Affidavit, Exhibit B.

<sup>6</sup> Although the responses to the Discovery Requests varied somewhat between Claimants, this provides an example of the responses received. See the actual responses which are attached as Exhibit B to Counsel's Affidavit.

public document at WD1. Specific records of A & B relative to this request are available for inspection and copying at A & B's office.

**INTERROGATORY NO. 6:** For each referenced water rights please describe precisely and in detail:

- a. All records that exist that evidence the diversion and beneficial use of water, including the periods and quantities of use;
- b. When such records were prepared, who prepared the records, the source of information and where the originals of the records and underlying data are located;
- c. If you dispute any of the records of diversion and use as reflected by the watermaster's reports or records maintained by the Idaho Department of Water Resources, please identify each records you disagree with and describe the reason for the disagreement;
- d. The history, the development, and use of the water rights that are the subject of this action.

**RESPONSE TO INTERROGATORY NO. 6:** Objection, the request is vague and overly broad. Notwithstanding this objection, A & B asserts that any "records" speak for themselves and are available for inspection at the offices of the Idaho Department of Water Resources, Water District 01, U.S. Bureau of Reclamation, and A & B.

Having received little to no information in response to the Discovery Requests, counsel for the Ground Water Districts sent an e-mail to Claimant's counsel seeking to obtain direction as to which public records would be responsive to the discovery requests and to provide copies of the documents Claimant possesses that show diversion and use of water rights it has claimed in this matter. (See e-mail's attached to affidavit of counsel as Exhibit C).<sup>7</sup> Claimant's response to the email was simply to reiterate its prior position.

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<sup>7</sup> Counsel for the United States' Bureau of Reclamation was inadvertently left off of the original emails. However, the email requests were forwarded to the BOR's counsel on August 19, 2008. No response was received.

**II. CLAIMANT SHOULD BE ORDERED TO IDENTIFY THE REQUESTED DOCUMENTS AND ANSWER INTERROGATORY NO: 6.**

The Idaho Rules governing discovery permit the identification and production of documents which are relevant to the subject matter of the pending action, unless protected by privilege. IRCP 26(b)(1) states as follows:

**“Scope of discovery in general.**

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

These rules are intended to encourage the full and fair disclosure of applicable information which will facilitate the pre-trial fact gathering process. The Ground Water District’s interrogatories and production requests seek information pertaining to the water rights Claimant claims, including documents and information that support actual diversion and use of water under the claimed water rights. A general reference to public records at the IDWR and Water District and Claimant’s offices without identifying those records does not give the Ground Water District any guidance to which records Claimant is relying upon to support its water rights claim(s). The Ground Water Districts should not have to wade through voluminous public files

and guess as to what records Claimant may be relying upon in this matter. Additionally, while Claimant has stated it will allow inspection of the specific records it possesses which are responsive to the Discovery Requests, even an inspection of the records will not fully "explain the history, development, and use of the water rights that are the subject of this action" as requested in interrogatory No. 6 which has not been responded to at all.

Wherefore, the Ground Water District requests this Court to enter an Order compelling Claimant to identify the public records it believes are responsive to the discovery requests and to fully answer interrogatory No. 6. Moreover, to the extent Claimant does not separate or otherwise identify which of its own records are responsive to the discovery requests, the Ground Water District request an Order compelling Claimant to specifically identify the responsive documents Claimant possesses.

### **III. EXTENSION OF DISCOVERY CUT-OFF AND MOTION FOR SUMMARY JUDGMENT DEADLINE**

The *Trial Scheduling Order* ("Order"), issued by Special Master Dolan on or about May 6, 2008, sets the discovery deadline at July 25, 2008, and the Motion for Summary Judgment Deadline for August 22, 2008. However, due to Claimant's non-responsive discovery answers, the Ground Water Districts request an extension of the discovery deadline so that they may obtain information regarding Claimant's claimed water rights. Given that the trial date in these matters is set in April of 2009, the parties would not be prejudiced by having the discovery deadline extended. On the other hand, if an extension is not granted, the Ground Water District could be greatly prejudiced.

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#### IV. CONCLUSION

The Ground Water Districts' requests are relevant and reasonably calculated to lead to the discovery of admissible evidence. Based upon the lack of production of any information or documents in response to the discovery requests, the Ground Water Districts respectfully ask that the court compel Claimant to comply with the rules of discovery and identify which public records are responsive to the Ground Water Districts' requests and to provide complete answers to the interrogatories. Further, to the extent Claimant does not intend to separate its responsive documents from non-responsive documents when the Ground Water District inspects Claimant's records, the Ground Water District requests an order compelling Claimant to identify the documents in its possession that are responsive to the discovery requests.

Additionally, it is not feasible for the Ground Water Districts to properly and adequately prepare their motion for summary judgment<sup>8</sup>, other pre-trial motions or for the hearing on this matter unless the discovery deadline is extended and until Claimant provides adequate responses to the Ground Water Districts' Discovery Requests.

Therefore, it is further respectfully requested that

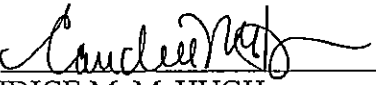
- 1) Claimant be compelled to identify documents and answers responsive to the Discovery Requests.
- 2) That the discovery deadline be extended to a date closer to the pre-trial conference date, currently set for April 2, 2009; and
- 3) That the deadlines set for Summary Judgment be adjusted.

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<sup>8</sup> Because of the approaching deadline for Summary Judgment and the timing of this motion, the Ground Water Districts will file their Summary Judgment motion on August 22, 2008 but request that they be afforded additional time to provide information as necessary.

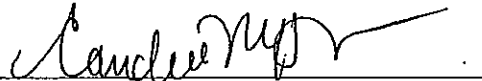
DATED this 20<sup>th</sup> day of Aug, 2008.

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

By:   
CANDICE M. McHUGH  
Attorney for the Ground Water Districts

## CERTIFICATE OF SERVICE

I hereby certify that on this 10<sup>th</sup> day of Aug, 2008, the above and foregoing document(s), was served by email to those with email addresses and by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:

  
Candice M. McHugh

|                                                                                                                                                                                                          |                 |                                                                                                                                                                                                                                                                                                       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Clerk of the SRBA Court<br>253 Third Avenue North<br>PO Box 2707<br>Twin Falls, ID 83302-2707                                                                                                            | <b>Original</b> | IDWR Repository<br>PO Box 83720<br>Boise, ID 83720-0098                                                                                                                                                                                                                                               |
| Natural Resources Division Chief<br>State of Idaho<br>Attorney General's Office<br>PO Box 44449<br>Boise, ID 83711-4449                                                                                  |                 | John K. Simpson, Esq.<br>Travis L. Thompson, Esq.<br>Barker, Rosholt & Simpson<br>113 Main Avenue West, Suite 303<br>Twin Falls, ID 83301-6167<br>Fax: (208) 735-2444<br><a href="mailto:jar@idahowaters.com">jar@idahowaters.com</a><br><a href="mailto:tlr@idahowaters.com">tlr@idahowaters.com</a> |
| United States Department of Justice<br>Environment & Natural Resources Div<br>550 West Fort Street<br>MSC 033<br>Boise, ID 83724<br><a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a> |                 | W. Kent Fletcher, Esq.<br>Fletcher Law Office<br>P.O. Box 248<br>Burley, ID 83318-0248<br>Fax: (208) 878-2548<br><a href="mailto:wkf@pmt.org">wkf@pmt.org</a>                                                                                                                                         |
| Josephine P. Beeman, Esq.<br>Beeman & Associates PC<br>409 W. Jefferson<br>Boise, ID 83702-6049<br>Fax: (208) 331-0954<br><a href="mailto:Jo.beeman@beemanlaw.com">Jo.beeman@beemanlaw.com</a>           |                 | Sarah A. Klahn, Esq.<br>White & Jankowski, LLP<br>511 16 <sup>th</sup> Street, Suite 500<br>Denver, CO 80202<br>Fax:<br><a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>                                                                                                    |
| Roger D. Ling, Esq.<br>Ling, Robinson & Walker<br>615 H Street<br>P.O. Box 396<br>Rupert, ID 83350-0396<br>Fax: (208) 436-6804                                                                           |                 | A. Dean Tranmer<br>City of Pocatello<br>PO Box 4169<br>Pocatello, ID 83201                                                                                                                                                                                                                            |

|                                                                                                                                                                                                               |                                                                                                                                                                                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <a href="mailto:rdl@idlawfirm.com">rdl@idlawfirm.com</a>                                                                                                                                                      |                                                                                                                                                                                |
| <p>Jerry R. Rigby<br/> 25 N 2nd E<br/> PO Box 250<br/> Rexburg, ID 83440-0250<br/> <a href="mailto:jrigby@rex-law.com">jrigby@rex-law.com</a></p>                                                             | <p>Robert L. Harris<br/> 1000 Riverwalk Dr, Ste 200<br/> PO Box 50130<br/> Idaho Falls, ID 83405<br/> <a href="mailto:rharris@holdenlegal.com">rharris@holdenlegal.com</a></p> |
| <p>C. Tom Arkoosh, Esq.<br/> Arkoosh Law Offices, Chtd.<br/> 301 Main Street<br/> P.O. Box 32<br/> Gooding, ID 83330<br/> Fax: (208) 934-8873<br/> <a href="mailto:alo@cableone.net">alo@cableone.net</a></p> | <p>Craig D. Hobdey<br/> 125 5th Ave<br/> Po Box 176<br/> Gooding, ID 83330</p>                                                                                                 |
| <p>Robert A. Maynard<br/> Perkins Coie LLP<br/> 251 E Front St, Ste 400<br/> Boise, ID 83702-7310</p>                                                                                                         | <p>Tim Eilers<br/> 1109 W 300 S<br/> Heyburn, ID 83336</p>                                                                                                                     |
| <p>Martin &amp; Lorraine Muecke<br/> 1250 W 300 S<br/> Heyburn, ID 83336</p>                                                                                                                                  | <p>Steve Muecke<br/> 925 W Wanda Ln<br/> Heyburn, ID 83336</p>                                                                                                                 |

EXHIBIT A  
SUBCASE LIST

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