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DEPARTMENT OF
WATER RESOURCES

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*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. Attachment A
	)	
Case No. 39576	)	MOTION TO AMEND OBJECTIONS
	)	
_____	)	

COME NOW, ALBERT & ALVERA FOLS, CHARLES & MARY HARLING, A.C. & LUELLA PILKERTON, LLOYD & SHERYL TUTOR, MARCI DIXON, AND TRACY MARCIA (hereinafter collectively referred to as the "Carmen Creek Users"), by and through their attorneys of record, Barker Rosholt & Simpson LLP, and move this Court for an Order Granting Motion to Amend Objections in the above-entitled subcases. This motion is made pursuant to SRBA Administrative Order #1 ("AO1") and the Idaho Rules of Civil Procedure. The reasons for the motion are set forth below.

BACKGROUND

The Carmen Creek Users were granted leave to file late objections in the above-referenced subcases on February 20, 2008. *See Order Granting Motion to File Lat Objections and Setting Status Conference* (Subcase Nos. 75-69A, et al.). In granting the motion the Court noted that “it is apparent that the Carmen Creek Users have shown good cause to file late objections in the above 58 subcases. Proceedings in Basin 75 are at an early stage and with all these claims to the same water source, all potential claimants must be allowed to participate fully to assist IDWR and the Court.” *Order* at 2.

This present motion seeks to amend the objections for 21 of the 58 subcases. Although the Carmen Creek Users previously objected to the “quantity” element for these claims, after further review and research, and after participation in the initial hearings before the Court held on September 10, 2008, it is evident that the “point of diversion” is at issue for 10 claims, and the issue of whether or not the water rights should be decreed disallowed based upon forfeiture is at issue for all 21 claims. In order to have these issues presented for adjudication on the merits, the Carmen Creek Users seek to amend their previously filed objections.¹

STANDARD OF REVIEW

The Court’s Rules of Procedure (A01) do not contain a specific standard of review for parties seeking to amend their objections. Accordingly, pursuant to A01(1), the “litigation of the SRBA will be governed by the Idaho Rules of Civil Procedure”. As provided by I.R.C.P. 15(a), a “party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served,” or “a party may amend a pleading only by leave of court or by

¹ The issues are also important to address in any court ordered mediation. To that end the Carmen Creek Users respectfully request a decision on this motion prior to any mediation dates.

written consent of the adverse party; and leave shall be freely given when justice so requires.” Rule 15(a).

Since the Burns Group² claimants failed to file and serve any responses to the objections, the Carmen Creek Users should be allowed to amend their objections “once as a matter of course”. Alternatively, the Court should grant this motion since it will identify all issues that need to be adjudicated in order to fully and fairly resolve all claims in the Carmen Creek drainage. As described below, the Court should not decree water rights to claimants who cannot and have not physically diverted and received Carmen Creek water, nor should the Court decree water rights to claimants who forfeited their rights prior to 1987. As described below, the Carmen Creek Users’ motion meets the above standard, hence it should be granted.

REASONS SUPPORTING MOTION

I. 10 Subcases With Issue Regarding “Point of Diversion” and Forfeiture.

The Carmen Creek Users have continued to review and gather facts concerning the subcases at issue in the Carmen Creek drainage. In conducting this review, it has been discovered that the following water right holders do not receive and have not received water from Carmen Creek for at least five (5) years before the commencement of the adjudication, hence their “point of diversion” is at issue and it is clear the claims should have been recommended disallowed. Given the issue of whether or not IDWR accurately recommended all of the claims in the drainage is already before the Court, it is critical that the Court not decree water rights to claimants that have not diverted and actually used Carmen Creek water on their

² The “Burns Group” is shorthand for all claimants that have claims objected to by the Carmen Creek Users. For ease of reference and purposes of clarification the “Burns Group” description will be used hereafter to include a reference to any and all claimants that have claims objected to by the Carmen Creek Users rather than the “16 Claimants”.

properties. Although these claimants receive water from other sources (e.g. springs, wastewater), the Carmen Creek Users are not challenging that water use or any rights thereto.

Accordingly, the Carmen Creek Users seek to amend their objections to the following claims as provided in the form attached to this motion as Attachment B:

<u>Claimant:</u>	<u>Subcases:</u>
Mattis	75-10061Z, 75-10062X, 75-69P, 75-70P
Hudson	75-10061B, 75-10062C, 75-69B, 75-70B
Jackson	75-10062AB, 75-70S

II. 11 Subcases With Forfeiture Issue

The Carmen Creek Users have continued to review and gather facts concerning the subcases at issue in the Carmen Creek drainage. In conducting this review, it has been discovered that the following water right holders did not divert or receive water from Carmen Creek under the subject water rights for at least five (5) years before the commencement of the adjudication. The water rights in question, also referred to as the “Exchange Rights” with priority dates of 1875 and 1882, were delivered exclusively to the north side of Carmen Creek prior to the adjudication. Although these claimants were involved in certain actions whereby water was unlawfully moved to their places of use, without a formal transfer process, after 1987, it is apparent that the water rights appurtenant to these claimants’ properties and at issue in these subcases were not diverted and used for at least five (5) years prior to the commencement of the SRBA. Given the issue of whether or not IDWR accurately recommended all of the claims in the drainage is already before the Court, it is critical that the Court not decree water rights to claimants that have forfeited their water rights prior to the commencement of the adjudication.

Accordingly, the Carmen Creek Users seek to amend their objections to the following claims as provided in the form attached to this motion as Attachment C:

<u>Claimant:</u>	<u>Subcases:</u>
Burns	75-100061A, 75-10062A
Clementz	75-10061AE, 75-10062AC
Ernest	75-10061Y, 75-10062W
Matejko	75-10061R, 75-10062P
Rice	75-14443, 75-14441
Quinn	75-10061Q

CONCLUSION

As set forth above, this amendment is filed prior to any responses being filed by the Burns Group claimants, hence the Carmen Creek Users meet the standard set forth in Rule 15(a) which allows a party to amend their pleading “once as a matter of course”. Alternatively, the Carmen Creek Users would request the Court’s leave to amend their objections for the identified subcases in order to fully and fairly litigate all issues surrounding these claims and the recommendations made by IDWR.

Since the issue of point of diversion and forfeiture were not previously identified, and after further review and research it is apparent these issues should be decided, the Carmen Creek Users respectfully request the Court to grant their motion.

No argument is requested on this motion unless the Court desires to hear the motion at its convenience.

DATED this 18th day of September, 2008.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Attorneys for Carmen Creek Users

CERTIFICATE OF MAILING

I certify that on 6th day of September, 2008, I mailed the original and copies of the foregoing motion, including all exhibits, to the following persons:

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

Ray Rigby
Hyrum Erickson
Rigby, Andrus & Moeller Chtd.
P.O. Box 250
Rexburg, Idaho 83440

James R. Quinn
Rowena D. Quinn
P.O. Box 1473
Carmen, Idaho 83462

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


Travis L. Thompson

ATTACHMENT A

75-69B
75-69P
75-70B
75-70P
75-70S
75-10061A
75-10061AE
75-10061B
75-10061Q
75-10061R
75-10061Y
75-10061Z
75-10062A
75-10062AB
75-10062AC
75-10062C
75-10062P
75-10062W
75-10062X
75-14441
75-14443

Attachment B

**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	)	A. Subcase Nos. 75-69B, 75-69P, 75-70B, 75-
	)	70P, 75-70S, 75-10061B, 75-10061Z, 75-
	)	10062AB, 75-10062C, and 75-10062X
	)	
	)	
Case No. 39576	)	
	)	

**STANDARD FORM 1
OBJECTION**

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON(s) OBJECTING

ALBERT C FOLS
ALVERA C FOLS
PO BOX 56
CARMEN, ID 83462

CHARLES E HARLING
MARY N HARLING
PO BOX 283
CARMEN, ID 83462

TRACY MARCIA
PO BOX 80
CARMEN, ID 83462

LLOYD A TUTOR
SHERYL L TUTOR
HC 60 BOX 52E12
ROUND MOUNTAIN, NV 89045

A C PILKERTON
LUELLA PILKERTON
PO BOX 23
CARMEN, ID 83462

MARCI M DIXON
PO BOX 221
CARMEN, ID 83462-0221

Name & Address of Attorney, if any:

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
Barker Rosholt & Simpson LLP
P.O. Box 485
Twin Falls, Idaho 83303-0485

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

See Exhibit A (complete list of claimants and their water right claims)

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)).

1. ☐ **Name and Address**

Should be: _____

2. ☐ **Source**

Should be: _____

3. ☐ **Quantity**

Should be: _____

4. ☐ **Priority Date**

Should be: _____

5. ☒ **Point of Diversion**

Should be: _____

6. ☐ **Instream Flow Beginning and Ending Point**

Should be: _____

7. ☐ **Purpose(s) of Use**

Should be: _____

8. ☐ **Period of Year**

Should be: _____

9. ☐ **Place of Use**

Should be: _____

10 ☒ **I object because:**

☒ This water right should not exist.

☐ This water right was not recommended, but should be recommended as claimed

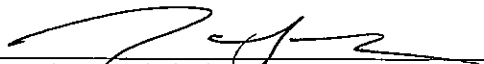
E. REASONS SUPPORTING OBJECTION(S): The point of diversion does not exist to provide water to the lands under this claim. The water right has been forfeited due to non-use for five (5) years prior to the commencement of the adjudication.

F. VERIFICATION

State of Idaho)
) ss.
County of Twin Falls)

TRAVIS L. THOMPSON, duly sworn, upon oath, deposes and says:
That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and(6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

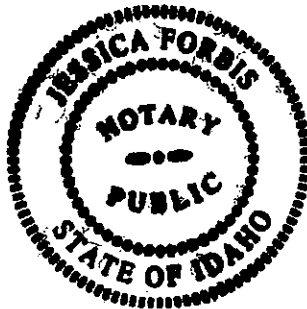
(Signature of person filing objection)

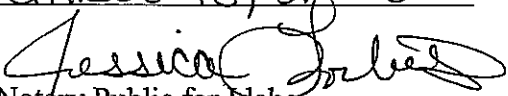


(Attorney signing in representative capacity)

Subscribed and sworn to before me on:

September 18, 2008




Notary Public for Idaho

Residing at: Twin Falls

My Commission Expires: 4/3/12

G. CERTIFICATE OF MAILING

I certify that on September 18, 2008, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimants' counsel of the water rights at the following address:

Ray Rigby
Hyrum Erickson
Rigby, Andrus & Mueller, Chtd.
P.O. Box 250
Rexburg, Idaho 83440-0250

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
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

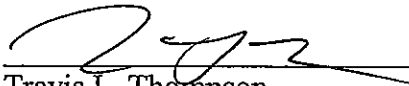

Travis L. Thompson

Exhibit A

List of Claimants (and respective water right claims):

75-10061Z; 75-10062X; 75-69P; 75-70P
SHIRLEY J MATTIS
PO BOX 265
CARMEN, ID 83462
(208)756-3944

75-10061B; 75-10062C; 75-69B; 75-70B
JAMES PAUL HUDSON
PO BOX 173, CARMEN, ID 83462
(208)756-3193

75-10062AB; 75-70S
DONNA K JACKSON
THOMAS M JACKSON
PO BOX 47
CARMEN, ID 83462
(208)756-8047

Attachment C

**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	)	A. Subcase Nos. 75-10061A, 75-10061AE, 75-10061Q, 75-10061R, 75-10061Y, 75-10062A, 75-10062AC, 75-10062P, 75-10062W, 75-14441, and 75-14443
	)	
	)	
	)	
	)	
	)	
Case No. 39576	)	STANDARD FORM 1 OBJECTION
	)	

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON(s) OBJECTING

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ALVERA C FOLS
PO BOX 56
CARMEN, ID 83462

CHARLES E HARLING
MARY N HARLING
PO BOX 283
CARMEN, ID 83462

TRACY MARCIA
PO BOX 80
CARMEN, ID 83462

LLOYD A TUTOR
SHERYL L TUTOR
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A C PILKERTON
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Barker Rosholt & Simpson LLP
P.O. Box 485
Twin Falls, Idaho 83303-0485

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Should be: _____

8. ☐ **Period of Year**

Should be: _____

9. ☐ **Place of Use**

Should be: _____

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☐ This water right was not recommended, but should be recommended as claimed

E. REASONS SUPPORTING OBJECTION(S): The water right has been forfeited due to non-use for five (5) years prior to the commencement of the adjudication.

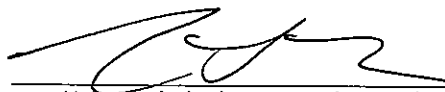
F. VERIFICATION

State of Idaho)
) ss.
County of Twin Falls)

TRAVIS L. THOMPSON, duly sworn, upon oath, deposes and says:

That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and(6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

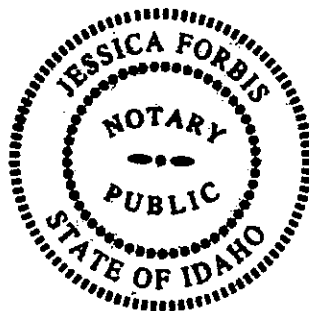
(Signature of person filing objection)

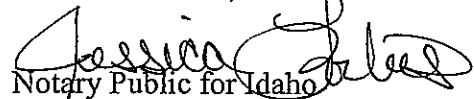


(Attorney signing in representative capacity)

Subscribed and sworn to before me on:

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Hyrum Erickson,
Rigby, Andrus & Mueller, Chtd.
P.O. Box 250
Rexburg, Idaho 83440-0250

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United States Department of Justice
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

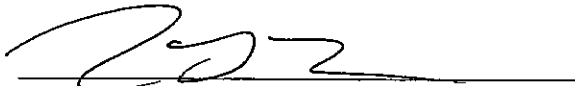

Travis L. Thompson

Exhibit A

List of Claimants (and respective water right claims):

75-10061A; 75-10062A; 75-69A; 75-70A
JOHN E BURNS
RUTH C BURNS
PO BOX 264
CARMEN, ID 83462
(208)756-3645

**75-10061AE; 75-10062AC; 75-69S;
75-70T**
WILLIAM W CLEMENTZ
PO BOX 255
CARMEN, ID 83462
(208)756-2347

75-10061Y; 75-10062W; 75-69N; 75-70N
JACQUELINE D ERNEST
ROBERT M ERNEST
PO BOX 132
CARMEN, ID 83462
(208)756-3334

75-10061R; 75-10062P; 75-69H; 75-70H
GEORGE MATEJKO
PO BOX 129
CARMEN, ID 83462
(208)756-1946

75-14443; 75-14441; 75-69L; 75-70L
LINDA RICE
RICK RICE
PO BOX 285
CARMEN, ID 83462
(208)756-6204

75-10061Q
JAMES R. QUINN
ROWENA D. QUINN
P.O. BOX 1473
CARMEN, ID 83462