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Randall C. Budge, ISB No. 1949
Scott J. Smith, ISB No. 6014
Candice M. McHugh, ISB No. 5908
Thomas J. Budge, ISB No. 7465
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED
101 South Capitol Boulevard, Suite 208
Boise, ID 83702
Telephone: 208-395-0011
Fax: 208-433-0167
rcb@racinelaw.net
sjs@racinelaw.net
cmm@racinelaw.net
tjb@racinelaw.net

Attorneys for Ground Water Districts

Jerry R. Rigby, ISB No.
RIGBY, ANDRUS & MOELLER, CHARTERED
25 N 2nd E
PO Box 250
Rexburg, ID 83440-0250
Telephone: 208-356-3633
Fax: 208-356-0768
jrigby@rex-law.com

Attorney for Fremont-Madison Irr. Dist., Blackfoot Irr.
Co., United Canal Co.

Robert L. Harris, ISB No.
HOLDEN KIDWELL HAHN & CRAPO, PLLC
1000 Riverwalk Dr., Ste 200
PO Box 50130
Idaho Falls, ID 83404-0130
Telephone: 208-523-0620
Fax: 208-523-9518
rharris@holdenlegal.com

Attorney for Independent Water Users, Mud Lake Water
Users, Inc., Jefferson Irr. Dist., and Montevue Canal
Co.

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OCT 17 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 attached
Exhibit A¹

**MOTION FOR LEAVE TO FILE
AMENDED OBJECTIONS AND
MEMORANDUM IN SUPPORT**

¹ Exhibit A does not include all of the water rights that are listed on Attachment A to the September 2, 2008 *Amended Trial Schedule*. The Court's Attachment A does not include 1-209 and 1-210. The Ground Water District's Summary Judgment Motion is not filed in those two subcases. But, amended objections for those two subcases are attached hereto and incorporated herein. There are signed SF5s being circulated for 1-15, 1-23A and 1-2073 and thus, no amended objections are being filed to those water rights. The Ground Water Districts do not have objections filed on 1-2040, 1-2060, 1-2060A, 1-10189. On September 17, 2008, the Court granted the Ground Water Districts' motion to withdraw objection to 1-10390.

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 DISTRICT² ("Ground Water Districts"), FREMONT-MADISON IRR. DIST., BLACKFOOT IRR. CO., UNITED CANAL CO. AND INDEPENDENT WATER USERS, MUD LAKE WATER USERS, INC., JEFFERSON IRR. DIST., AND MONTEVIEW CANAL CO.³ ("Upper Snake Users") by and through their respective attorneys of record, and hereby file pursuant to Rule 1a of SRBA Administrative Order 1 and Rule 15(a) of the Idaho Rules of Civil Procedure this Motion for Leave to File Amended Objections and Memorandum in Support. Copies of the Amended Objections are attached hereto and made a part hereof. This motion is made on the grounds that the Amended Objections more clearly define the issues raised in the original objections.

Timely objections were filed by the Ground Water Districts⁴, various upper Snake River canal companies and water users ("Upper Snake Users"), and in some cases the Bureau of Reclamation and the claimant. On March 26, 2008, the City of Pocatello was granted

2 Magic Valley Ground Water District and North Snake Ground Water District are not objectors to North Side Canal Company's water rights.

3 The Upper Snake Users join in this Motion for Leave to Amend Objections in order to support the Ground Water Districts' Motion and arguments. The Upper Snake Users want to ensure that they are allowed to fully participate in all elements of the subcases as set forth in the amended objections to the extent they determine necessary.

4 By order dated May 29, 2008, the Court granted the Idaho Ground Water Appropriators, Inc.'s Motion to Substitute Parties making the Ground Water Districts the parties to these subcases.

participation in certain subcases involved in this matter. The Amended Objections, which are incorporated herein, more specifically define the issues raised in the Ground Water Districts' original objections and will assist the Court and the parties in evaluating the issues involved in these water rights claims.

Idaho Rule of Civ. Procedure 15(a) provides that leave to amend or supplement a pleading shall be "freely given when justice so requires." In this case, these subcases have timely objections filed and are "at issue", the schedule in these subcases has been vacated in order to allow the amended objections to be filed and to provide an opportunity for the claimants to respond. By allowing the amended objections the court and the parties will be able to concentrate on the claims with a full and fair opportunity to address all elements that are implicated by the issues raised in the objections. Because there are no pending deadlines at this time there is no prejudice to any party in this matter.

Oral argument is requested, and pursuant to the Court's Order Vacating Trial Schedules, Order Denying Motions and Order Setting Deadlines and Hearing dated October 2, 2008, the hearing for this Motion is set for November 25, 2008 at 10:00 a.m. or as soon thereafter as counsel may be heard.

MEMORANDUM IN SUPPORT

In April, 2008, the Court held its initial hearings in these subcases. After the initial hearings, the Ground Water Districts continued in good faith in complying with the schedule that was set and propounded discovery. Ultimately, the Ground Water Districts filed a Motion for Summary Judgment in several of the subcases requesting that certain water rights be disallowed, and that others be conditioned to reflect that they are high flow water rights or that the priority

date be conditioned so as to not impermissibly grant a priority date that can be used for administrative purposes to the detriment of junior water users. In response to the Motion for Summary Judgment, the Claimants, collectively referred to as the Surface Water Coalition, filed a Motion to Strike certain issues from the Summary Judgment motions because the only box checked on the objection forms for the various water rights pertained to "source" and therefore, the issues raised by the summary judgment order were not covered in the objections. A hearing was held on the Motion to Strike and Motion to Compel and the Court determined that the only "viable remedy at this point is to deny" the motions and that "the Ground Water Districts should be provided a fair opportunity to move to amend their Objections and the claims should have an equal opportunity to respond." Accordingly, the Ground Water Districts are filing this Motion for Leave to File Amended Objections and Supporting Memorandum.

In these subcases, it is important to note that there were timely objections filed by the Ground Water Districts, the Upper Valley Users and the Bureau of Reclamation and the claimants themselves in many instances. These subcases have been "at issue" since the original objection deadlines. In addition, many of these water right claims that are the subject of these subcases have been at the heart of the Surface Water Coalition Delivery call that was filed in 2005 and have been the topic of numerous discussions among counsel for the claimants and Ground Water Districts for the past three years. There is no surprise here as to what is at stake or what elements are at issue. However, in order to more clearly define the issues for the court and the parties, the Ground Water Districts have filed this motion and the attached amended objections which should be granted and the amended objections filed, so that the court may get to substance of these objections, and no longer have to wrangle with procedural technicalities.

A. Amendment of Pleadings to Be Freely Given

Idaho Rule of Civil Procedure 15(a) provides that leave of the court to amend a pleading “shall be *freely given when justice so requires*.” (Emphasis added). The SRBA Court acknowledges that “Rule 15(a) establishes a rather lenient standard for amending pleadings.” *Order Granting Motion to Amend Objection*, SRBA Subcase 37-154C et. al., p. 4 (October 10, 2008). The burden is on the party opposing the amendment to show why a court should not grant leave to amend a complaint. *Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986). Although an objection in the SRBA is not a “complaint” in the same way as in other civil cases, the objection does provide the avenue for a third party or claimant to question the Director’s recommendation of a water right claim. Once an objection is filed to the Director’s Report, that water right becomes a “subcase” and is then “at issue.” The purpose of I.R.C.P. 15(a) is “[f]irst to allow the best chance for each claim to be determined on its merits, rather than on some procedural technicality; and, second, to relegate pleadings to the limited role of providing parties with notice of the nature of the pleader’s claim and to the facts that have been called into question. Issue formulation is to be left to the discovery process and pleadings are not to be viewed as carrying the burden of fact revelation or of controlling the trial phase of the action.” *Id.* It is within the District Court’s discretion to allow a party to amend its complaint, and the rules favor liberal grants of leave to amend a party’s complaint. See, *Christensen v. Christensen*, 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999). In the SRBA, Special Master Bilyeu recently allowed objections to be amended when the amendment related to the elements of the water right because conditions relating to that element may have a valid basis and in fact, allowed an amendment seeking to add a remark relating to water quality, even though quality is

not an element of a water right administered by IDWR. *Order Granting Motion to Amend Objections*, SRBA Subcase 37-154C et. al. pp. 8-9 (October 10, 2008). In this case, the Ground Water Districts seek to amend their objections that relate specifically to elements of the water rights. See amended objections attached hereto.

In the SRBA, in an effort to assist the parties in defining the issues and to standardize the practice, the SRBA District Court provides standard forms for objection to the Director's recommendation of a particular water right claim. It would be incredible to believe that because there are "boxes" on the objection form that were not checked, that it would be proper to elevate the standard form over the actual merits of a party's objection. As has often been said and practiced in the SRBA, an objection to one element of a water right puts the entire water right "at issue" because at the very early stages it is difficult to fully determine all the elements that may ultimately need to be revised in order to address a party's objection to the recommendation. In this case, the Ground Water Districts, in good faith, timely objected to these water rights and checked the "source" box, and provided an explanation behind the box that stated the source, should be: "High surface water runoff from snowmelt or rain." The Ground Water Districts also provided "Reasons Supporting Objection(s)" as follows:

The Director's recommendation fails to identify and distinguish the water supply associated with this water right. The claimed right is entitled to be filled only by high surface water runoff from snowmelt or rain. Its source of supply is not from base flow (ground water) to the Snake River. Conditions are required to prevent enlargement of the source of supply.

As these subcases have progressed, the issues have become clearer and, thus, the Ground Water Districts filed their motions for summary judgment which precipitated the amended objections attached hereto and incorporated herein, which more clearly define.

the objections and issues to be resolved in these subcases.

B. SRBA Court Has the Ultimate Authority to Review the Director's Report and Issue the Decree on All Elements of the Water Right, Whether or Not the Water Right, or Specific Element is "Objected" to.

The amended objections that are attached hereto, further define and clarify the issues and should be allowed, especially considering the fact that even without an objection, the SRBA Court has the authority to review the Director's recommendation of a water right claim and can change the elements of the water right if the Court determines it is necessary. As has been "long accepted" by the Courts of Idaho, "water rights adjudications present unique circumstances, often requiring departure from established rules of procedure." *In Re: SRBA Case No. 39576, State v. United States* 128 Idaho 246, 254, 912 P.2d 614, 622 (1995). Hence, special procedural rules were adopted by the Legislature and the SRBA District Court to govern the proceedings. In that case, one of the questions answered by the Supreme Court was whether or not the "unobjected" to portion of a Director's Report could be decreed without any review of the SRBA District Court. The Supreme Court held that the district court retains the "inherent power to apply law to facts and render a decision" and found that "[s]tripping the district court of the ability to review the contents of the Director's report and apply law to the facts as established in that report is an unconstitutional intrusion into the province of the judicial department." *Id.* at 259, 912 P.2d at 627.

That being the case, it is certainly within the SRBA Court's authority to review other, non-objected to elements in a contested subcase. It also follows, that parties to the subcase can present argument and evidence on other non-objected to elements in a contested subcase in order to fully develop the record before the Court who then can freely review the entire

recommendation. Yet, in order to assist the court and parties in these cases and to more clearly refine the objections, the Ground Water Districts have filed their motion for leave to amend the objections, along with amended objections and request that the court allow the amended objections to be filed.

C. There is No Prejudice to the Parties Because There is Ample Time to Respond and There Are No Pending Deadlines

In its October 8, 2008, *Order Vacating Trial Schedules, Order Denying Motion and Order Setting Deadlines and Hearing*, the SRBA has provided an opportunity for the claimants and all parties to fully respond to the Ground Water Districts' Amended Objections. Thus, there is no prejudice to the parties and any concerns about due process to other parties in the SRBA has been remedied. Given the fact that one of the major goals of the SRBA Court is to properly consider and decree water rights within the Snake River Basin, allowing these amended objections will allow the parties to fully understand and litigate the issues. Allowing the Amended Objections is in keeping with the SRBA Court's purpose as well with the interests of justice, will allows the parties to litigate the merits of these water right claims and does not improperly limit the SRBA's authority to consider all elements of the water right claims.

CONCLUSION

When one considers I.R.C.P. 15(a)'s standard that amendments to pleadings should be freely given, with the SRBA's confirmed authority to review all portions of a Director's Report, including "unobjected" to recommendations and elements, the Ground Water Districts' Motion for Leave to File Amended Objections should be granted and the Amended Objections attached hereto should be filed with the Court.

DATED this 15th day of October, 2008.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

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

RIGBY, ANDRUS & MOELLER, CHARTERED

By: *Candice McHugh for*
JERRY R. RIGBY
Attorney for Fremont-Madison Irr. Dist., Blackfoot
Irr. Co., United Canal Co.

HOLDEN KIDWELL HAHN & CRAPO, PLLC

By: *Candice McHugh for*
ROBERT L. HARRIS
Attorney for Independent Water Users, Mud Lake
Water Users, Inc., Jefferson Irr. Dist., and
Montevue Canal Co.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2008, the above and foregoing document(s), was served 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 253 Third Avenue North PO Box 2707 Twin Falls, ID 83302-2707	Original VIA Fed Ex on 10/15/08	
Natural Resources Division Chief State of Idaho Attorney General's Office PO Box 44449 Boise, ID 83711-4449		IDWR Repository PO Box 83720 Boise, ID 83720-0098
United States Department of Justice Environment & Natural Resources Div 550 West Fort Street MSC 033 Boise, ID 83724 david.gehlert@usdoj.gov		Barker, Rosholt & Simpson LLP 113 Main Ave W, Suite 303 PO Box 485 Twin Falls, ID 83303-0485 jks@idahowaters.com tlr@idahowaters.com
Josephine Beeman 409 W Jefferson St Boise, ID 83702 jo.beeman@beemanlaw.com		Sarah A. Klahn White & Jankowski LLP Kittredge Building 511 16 th St, Suite 500 Denver, CO 80202 sarahk@white-jankowski.com
Roger D. Ling 615 H St PO Box 396 Rupert, ID 83350-0396 rdl@idlawfirm.com		A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello, ID 83201 dtranmer@pocatello.us
Jerry R. Rigby 25 N 2nd E PO Box 250 Rexburg, ID 83440-0250 jrigby@rex-law.com		Robert L. Harris 1000 Riverwalk Dr, Ste 200 PO Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com
C. Thomas Arkoosh 301 Main St PO Box 32 Gooding, ID 83330 alo@cableone.net		Craig D. Hobdey 125 5th Ave Po Box 176 Gooding, ID 83330

W. Kent Fletcher 1200 Overland Ave PO Box 248 Burley, ID 83318 wkf@pmt.org	
Bret Andersen Robyn Andersen 322 E Main Burley, ID 83318	Tim Eilers 1109 W 300 S Heyburn, ID 83336
Steve Muecke 925 W Wanda Ln Heyburn, ID 83336	Patrick D. Brown Hutchinson & Brown LLP 104 Lincoln St PO Box 207 Twin Falls, ID 83303-0207 patbrown@cableone.net
William A. Parsons 137 W 13th St PO Box 910 Burley, ID 83318 wparsons@pmt.org	

EXHIBIT A
SUBCASE LIST

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1-17
1-209
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