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DEPARTMENT OF  
WATER RESOURCES

Attorneys for Boesiger Family Cabin Trust

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 No. 63-31976

Case No. 39576

**MEMORANDUM IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

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**INTRODUCTION**

The Boesiger Family Cabin Trust ("Trust") move for summary judgment dismissing the objection filed by Paradise Homeowners Association, Inc.'s (the "Association"). The Association's objection concerns only the ability of the Trust to obtain water from an independent source under the Covenants, Conditions and Restrictions ("CCRs") pertaining to Paradise Subdivision. The Association has no basis for a claim of ownership if the Trust's water right, nor any objection to the granting of the Trust's water right. Thus, the objection should be dismissed because there is no genuine dispute that the Trust has a water right.

**UNDISPUTED FACTS**

In the mid-1950s, the Boesiger Family (the "Family") acquired a cabin in Elmore County, Idaho, in what is now called the Paradise Subdivision. The property is located in Section 33, Township 3 North, Range 10 East, Boise Meridian, in Elmore County. At that time,

the Family was leasing the land where the cabin was located. The cabin did not have indoor plumbing or a bathroom. Thus, the Family installed a four inch pipe into a hot water spring flowing into Grouse Creek on the property and started to divert the water for domestic purposes. The Family also carried water from the spring in five gallon buckets for domestic purposes, such as doing dishes and cleaning.

In the late 1970s, the owner sold the entire parcel of property to Willis Carrie. His son, Jim Carrie, began to develop the entire property into the Willis Carrie's Paradise Subdivision. In 1980, the Family purchased two lots in the subdivision, including the lot where the cabin was located. They purchased Lots 29 and 30, Block 1, in the Willis Carrie's Paradise Subdivision. Shortly thereafter, the cabin was destroyed by a fire during a slash burning operation in the subdivision.

In 1981, the Family built a new cabin on the property. At that time or shortly thereafter, the Family installed a catch basin at the hot water spring. A pedestrian bridge was constructed over Grouse Creek to access the hot water spring. They also installed a pump and piping from the spring to the cabin for heat, hot water, and to fill a four hundred gallon outdoor hot tub. The catch basin was approximately two feet tall, two feet wide, and two feet deep, constructed of concrete. The pump was a one horsepower electric pump which could pump about eight gallons per minute. A flow meter located in the cabin indicates that the unit pumps approximately 50 p.s.i. The lift from the pump to the cabin is approximately fifteen feet.

Subsequently, the Paradise Subdivision installed a hot water delivery system to all of the lots, including Lots 29 and 30. Once that occurred, the Family used the water from the hot water spring only to fill the hot tub and as a back-up water system for the cabin. The Family has used the hot water since the 1950s, and have regularly used it for domestic purposes ever since. To

this day, the Family still regularly uses the hot water to fill the hot tub and as a back up for the subdivision water system.

Since the 1950s, the Family and their guests are the only people to have used or attempted to use the hot water spring on their property. On December 14, 2006, the Idaho Department of Water Resources issued its recommendation that the Trust has 0.020 cfs of water for domestic purposes per year, for one home, not to exceed 13,000 gallons per day. This adjudication seeks to confirm that recommendation. The Association protested the granting of the Water Right to the Trust on the grounds and for the reasons that the CCRs prevent the Trust from obtaining water from any source other than the subdivision water system. The foregoing subcase is a result of the protest.

### **STANDARD OF REVIEW**

The basic standard for summary judgment is well established: "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." I.R.C.P. 56(b). The court must grant the motion "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). This is such a case.

### **ARGUMENT**

#### **I. The Boesiger Family Cabin Trust has an established water right to divert water from the hot water spring out of Grouse Creek to their cabin.**

It is undisputed that the Family has used the water from the hot water spring, continuously since the 1950s for domestic purposes. They have used at least 50 p.s.i. for almost

forty years without interruption. These undisputed facts end this matter. The Association simply has no legal claim to ownership of the Family's Water Right.

The law is clear that a conveyance of real property carries with it the water right appurtenant to the land at the time of the conveyance, unless it is specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed. *Silverstein v. Carlson*, 118 Idaho 456, 460, 797 P.2d 856, 860 (1990); *Russell v. Irish*, 20 Idaho 194, 198-99, 118 P. 501, 502 (1911).

Here, the Family purchased Lots 29 and 30, which included the hot water spring, from the Carries in 1980. All water rights that accompanied the property at that time passed to the Family. The Family has consistently used the water since the 1950s and did not abandoned their rights therein. Any issues the Association has with the CCRs and water delivery system of the subdivision are not properly before this Court, but rather, are issues that should be heard in another jurisdiction and venue. Thus, the Court therefore should grant summary judgment.

### CONCLUSION

There is no genuine issue of fact or law regarding title to the Water Right, and this Court should decree the Trust, as owner, consistent with IDWR's recommendations, water right number 63-31976, for 0.020 cfs.

DATED this 23 day of October, 2008.

PICKENS LAW, P.A.

By: Terri R. Pickens  
Terri R. Pickens, of the firm

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document was mailed on October 23, 2008, with sufficient first-class postage to the following:

Paradise Homeowners Association, Inc.  
Attn: Randy Fowers  
320 SW 5<sup>th</sup> Avenue  
Meridian, Idaho 83642

Director of IDWR  
PO Box 83720  
Boise, Idaho 83720-0098

  
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