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RECEIVED
OCT 31 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	)	
	)	Subcase Nos. Exhibit A
Case No. 39576	)	
	)	JOINT REPOSE TO GROUND
	)	USER'S MOTION FOR LEAVE
	)	TO FILE AMENDED
	)	OBJECTIONS AND
	)	POCATELLO'S
	)	MEMORANDUM
	)	

COMES NOW, Claimants, A & B Irrigation District, American Falls Reservoir District
#2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side
Canal Company, and Twin Falls Canal Company, by and through their undersigned counsel of
**JOINT RESPONSE TO GROUND USER'S MOTION FOR LEAVE TO FILE AMENDED
OBJECTIONS AND POCATELLO'S MEMORANDUM**

record, and submit this response to (1) the joint *Motion for Leave to File Amended Objections*, filed by various ground water districts, irrigation districts, and canal companies represented by Racine, Olson, Nye, Budge & Bailey, Chartered, Rigby, Andrus & Moeller, Chartered, and Holden, Kidwell, Hahn & Crapo, P.L.L.C. (collectively referred to as “ground water users”), and (2) the *Memorandum Regarding Pocatello’s Participation and Issues Raised after March 26, 2008*, filed by the City of Pocatello.

PROCEDURAL BACKGROUND

It has been more than two-years since objections were due on IDWR’s recommendations for the above water rights (October, 2006). At that time, the ground water users filed *Objections* – objecting only to the “source” of the water rights. Timely responses to the objections were filed. Subsequently, the Court established a number of deadlines – including deadlines for discovery and for dispositive motions. All of the original deadlines have expired.

As discovery began and motions were filed by the ground water users, it became apparent that the ground water users were seeking to greatly expand their “source” objections – challenging the priority date, season of use, and even the existence of certain water rights. Claimants objected to the ground water users’ inappropriate attempts to expand their *Objections* through discovery, by seeking to strike any information not addressed in the *Objections*.

At a hearing held on Claimants’ *Motion to Strike* and the ground water users’ *Motion to Compel*, the ground water users argued that by checking one (1) box on the *Objection* form, they were giving notice of objection to *all elements* of a water right. The ground water users were unable to provide any legal support for this contention and were unable to explain how an express objection to the “source” of a water right should be read to include an objection to all other elements of the water right – should the objector decide, at some time in the future, that it

is unhappy with other elements of the water right not marked on the *Objection* form. The ground water users challenged the requirement to give actual notice of their objections, and threatened to simply check all boxes on the form – apparently, regardless of whether facts or law exist to support such sweeping objections. Importantly, the ground water users deem the requirement to provide actual notice as a “procedural technicality.” *Motion* at 4.

The SRBA Court rejected this overbroad interpretation of the *Objection* form and informed the ground water users that they would be required to file a motion, seeking leave to amend their Objections, if they wanted to address elements other than “source.” In response, the ground water users filed their *Motion for Leave to File Amended Objections* and Pocatello filed its *Memorandum seeking to clarify Pocatello’s participation in issues raised after March 26, 2008*.¹ The ground water users’ motion is set for hearing on November 25, 2008.

THE GROUND WATER USERS FAIL TO MEET THEIR BURDEN

AO1 sets forth the procedural requirements for filing an *Objection* and provides that Civil Rule 15 sets forth the procedural standard for amendment. Under Civil Rule 15, a motion seeking to amend must be filed in a timely manner and must establish a valid cause of action. The ground water users fail to meet these requirements.

To the extent that the new objections are contrary to the Decrees and Basin Wide 5, they do not state a valid cause of action

The source of all of the water rights at issue was recommended as the “Snake River.” There is no dispute that all of the entities divert water from the Snake River. However, the ground water users desire to alter the source recommendation to add conditions to the water right.

¹ March 26, 2008 is the date of the Order allowing Pocatello to participate in this matter.
**JOINT RESPONSE TO GROUND USER’S MOTION FOR LEAVE TO FILE AMENDED
OBJECTIONS AND POCATELLO’S MEMORANDUM**

The water rights at issue are based upon prior decrees and licenses identifying the source as the “Snake River”. The Court’s “connected sources” general provision, decreed in the Basin Wide 5 Order, legally defines the relationship between all water rights (surface or ground) in the Basin and precludes an objection that seeks to affect a “separate source” determination for the Claimants’ water rights. *See Memorandum in Support of Claimants Joint Motion for Summary Judgment*, dated August 22, 2008. To the extent the amended objections seek to alter the “source” of the water rights, they are without a legal basis and fail to establish a valid cause of action.

Further, many of the requested amendments seek to object to the quantity, priority date, period of year, and place of use for these water rights. Almost all of these rights have been decreed or licensed by the State, and the ground water users have not asserted any legal basis that would allow them to now attack the decrees and licenses. In fact, as can be seen below, many of the ground water users and Pocatello were parties to the stipulation that resulted in the entry of the Eagle Decree (*Burley Irrigation Dist. v. Eagle*, Supplemental Decree and Stipulation (Idaho 5th Jud. Dist., 1968) and are estopped from attempting to alter the provisions of that Decree.

The proposed amendments must contain allegations which, if proven, would entitle the ground water users to the relief that they seek. As such, the refusal to allow an amendment seeking to raise an unsustainable allegation – one that will not entitle the ground water users to the relief requested – is not an abuse of discretion. *See Stonewall Surplus Lines Ins. Co., v. Farmers Ins. Co.*, 132 Idaho 318 (1998) *Black Canyon Racquetball Club, Inc. v. Idaho First Nat’l Bank*, 119 Idaho 171 (1991); *Wells v. United States Life Ins. Co.*, 119 Idaho 160 (Ct. App. 1991).

Before allowing any amendment, the Court should go through each proposed amended objection and determine whether each element of each proposed amended objection contains a valid allegation upon which relief could be granted, if proven. Most of the proposed amended objections filed by the ground water users do not establish a valid cause of action as a matter of law and do not provide a basis upon which relief can be granted.

The Ground Water Users' Motion is Untimely

The deadline for filing objections on the above water rights expired more than two (2) years ago! The ground water users did file *Objections* before the objection deadline. Since that time, discovery deadlines have passed, summary judgment motions have been filed, and a trial was set. Notwithstanding all that has transpired and all the expense that has been incurred by the Claimants in defending their water rights, the ground water users now seek to amend their objections – in an effort to significantly expand the issues before the Court.

In *Maroun v. Wireless Systems Inc.*, 141 Idaho 604 (2005), the Idaho Supreme Court affirmed the denial of a motion to amend a complaint – seeking to add allegations against existing and new parties. There, the Supreme Court recognized that the stipulated scheduling order set a deadline for filing motions to amend pleadings. The plaintiff filed its motion to amend after the deadline for filing amended pleadings and after two (2) discovery deadlines had passed. Citing the district court, the Supreme Court recognized that “we are now two years into the case, the time to amend pleadings has passed, and two discovery deadlines have expired. *It is now simply too late to further amend the substance of the pleadings.*” (Emphasis added). Since the two years have passed, the discovery deadline has expired, and the summary judgment motions are pending, “it is now simply too late” for the ground water users “to further amend the substance of the pleadings.”

The Proposed Amended Objections would Prejudice the Claimants

Finally, the Court should consider whether the proposed amendments would cause delay or would prejudice the defendants. *See Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866 (1999). It is without questions that any amendment seeking to drastically expand the issues before the Court – beyond the “source” objections originally filed by the ground water users – will cause significant delay and will force the Claimants to incur even greater expense in defending against the ground water users unsupportable objections. *See, supra*. Such delay and expense would prejudice the Claimants. This Court has, on several occasions, voiced a concern over potential delays in its trial calendar – if a case is postponed. Obviously, if the expansive amendments sought by the ground water users are granted, the trial in these cases will be delayed.

These proceedings have progressed, and great expense has been incurred, based on the ground water users’ 2006 *Objections*. The ground water users assert that “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.” *Motion* at 6. Yet, their motion fails to point to any new facts that have been discovered since the 2006 *Objections* were filed. They have not shown that anything has changed since they filed their original *Objections*. The ground water users’ only assertion is that they want to “more specifically define the issues” that “have become clearer.” *Id.* at 3 & 6. Nonetheless, they provide no factual support for this assertion.

Apparently recognizing that the failure to properly object to these water rights has impaired their case, the ground water users seek to deride the requirement to provide actual notice of a party’s objections by claiming that any such requirements are “procedural technicalities.” *Motion* at 4. They further denigrate this requirement by asserting that it “would

be incredible” to require actual notice, rather than allowing the ground water users to assert whatever claims they want at any time regardless of the notice provided. *Id.* at 6. The ground water users claim that the undefined “merits” of their case should be elevated above the notice requirement. *Id.* The fact that the ground water users can cite to no law to support this incredible argument demonstrates its futility. Apparently, the ground water users would have the Court believe that a Claimant is required to read the mind of the Objectors in order to know what elements are actually at issue – rather than reviewing the elements actually placed in issue by the *Objection*. See *Id.* at 4 (glancing over the “source” objection and asserting that “there is no surprise here as to what is at stake or what elements are at issue”). This litigation-by-surprise scheme should be rejected.

The ground water users’ attempt to back-door their additional and new arguments by citing to *State v. United States*, 128 Idaho 246 (1995), must also be rejected. While the SRBA Court may have authority to review the Director’s Report (including those portions not objected to), it does not follow that an Objector who fails to provide notice may raise every conceivable issue – regardless of the connection to the actual objections.

The ground water users’ final argument is that “there is no prejudice to the parties” merely because the Claimants now have an opportunity to respond to the proposed amended objections. *Motion* at 8. This argument ignores the time and expense incurred by the Claimants in complying with the scheduling order. The Claimants will be prejudiced by the fact that at this late date substantial new issues will be raised necessitating significant additional discovery and motions. Pending before the Court is the Claimants’ *Motion for Summary Judgment*, based on the *Objections* filed in 2006. To now allow these amendments would be to open up all of these claims to new responses and would result in restarting the procedural process.

Since the proposed amended objections (i) seek to raise issues that cannot be sustained, (ii) are untimely, (iii) would result in delay and (iv) would prejudice the Claimants, the Court should deny the ground water users' motion.

**POCATELLO & MANY OF THE GROUND WATER USERS ARE BARRED FROM
ATTACKING ANY OF THE PROVISIONS DECREED IN THE EAGLE DECREE**

Contrary to its assertions in its *Motion for Summary Judgment*, Pocatello was a signatory to the stipulation that lead to the issuance of the *Eagle Decree*. See Exhibit R, p. 28 (*Affidavit of Travis L. Thompson in Support of Claimants' Joint Motion for Summary Judgment* (August 21, 2008)). Other signatories to that stipulation include Fremont Madison Irrigation District and Blackfoot Irrigation Company. In addition, all of the other ground water users, including those composing the ground water districts, either received notice of the pending action pertaining to the Eagle Decree (either by actual notice or by publication) or established their water rights subsequent to the entry of the Eagle Decree.

All parties to the stipulation are precluded from now asserting a position inconsistent with that previously taken at the time the stipulation was signed. The doctrine of quasi estoppel applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted the benefit. The act of the party against whom the estoppel is sought must have gained some advantage to himself or produced some disadvantage to another, or the person invoking the estoppel must have been induced to change his position. *Gardner v. Bartchi*, 139 Idaho 430 (2003).

Judicial estoppel precludes a party from gaining advantage by taking one position, and then seeking a second advantage by taking a contrary position. The policies underlying judicial estoppel are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. Judicial estoppel is intended to prevent a litigant from playing

fast and loose with the courts. *Heinze v. Bauer*, 145 Idaho 232 (2008). Judicial estoppel is intended to prevent abuse of the judicial process through the deliberate shifting of positions in order to suit the exigencies of a particular action. The concept of judicial estoppel takes into account not only what a party states under oath in open court, but also what the party knew, or should have known, at the time the original position was adopted. Thus the knowledge that the party possesses, or should have possessed, at the time the statement is made is determinative as to whether that person is “playing fast and loose” with the court. *Heinze v. Bauer, supra*, citing, *Mckay v. Owens*, 130 Idaho 148 (1997).

Finally, the parties who participated in the Eagle Decree litigation made judicial admissions by signing the stipulation. A judicial admission is a formal act or statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact. Judicial admissions remove the admitted facts from the field of controversy. The party making a judicial admission is bound by the statement and may not controvert the statement on trial or appeal. *See Strouse v. K-Tek, Inc.*, 129 Idaho 616 (Ct. App. 1997).

Parties who signed, knew, or should have known about the existence of the Eagle Decree litigation should not now be allowed to raise objections to the stipulated elements that resulted in the Decree. To allow such objections, or participation in those objections, is to allow those parties to play fast and loose with the court.

**THE REAL INTENTION OF THE GROUND WATER USERS IS TO SUBORDINATE
SENIOR SURFACE RIGHTS TO JUNIOR PRIORITY RIGHTS**

The real intention of the ground water users is described in their requested amendment to the “other conditions” portion of the proposed amended objection in which the ground water users request that a condition be placed on each of the water rights stating “a condition should be

added that this water right is not entitled to make a delivery call against junior priority ground water rights.” There is nothing in the materials submitted by the ground water users that would support this type of condition, this condition would be contrary to the constitutional and statutory priority doctrine of the State of Idaho and is therefore unlawful. The ground water users should not be allowed to circumvent the Idaho Constitution and Idaho water law. Any request by the ground water users to prohibit the making of a delivery call against their junior priority ground water rights should be denied by the Court.

CITY OF POCATELLO’S PARTICIPATION

The Court should require Pocatello to abide by its own statements and restrict its participation to those issues raised prior to March 26, 2008. Pocatello has already abused the order allowing it to participate in this action. Notwithstanding its representation that it would only participate in “issues raised by other parties to this matter,” Pocatello filed a *Motion for Summary Judgment* on the issue of priority dates – an issue that had not been raised by any party prior to that time. Further, Pocatello misrepresented to the Court that it was not a party to the Eagle Decree. As a result of Pocatello and the ground water users raising new issues, the Court rescinded its prior scheduling order.

It would be unjust to allow Pocatello to benefit from its misrepresentations to the Court. The Claimants request that Pocatello’s participation be limited to those issues existing on March 26, 2008.

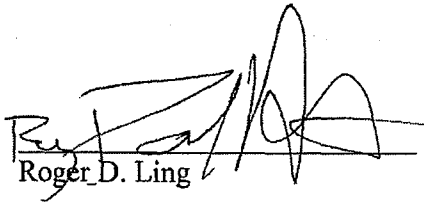
CONCLUSION

The ground water users’ requested amendments fail to establish a cause of action upon which relief can be granted, are untimely, would lead to great delay and would prejudice the Claimants. Those parties to the Eagle Decree stipulation, as well as those who received notice of

the proceedings or who have developed water rights subsequent to the Eagle Decree are estopped from taking a position contrary to the Eagle Decree. As such, the ground water users' *Motion for Leave to File Amended Objections* should be denied.

Finally, Pocatello should be bound by its own terms for participation and should not be allow to participate as to any issues raising after March 26, 2008.

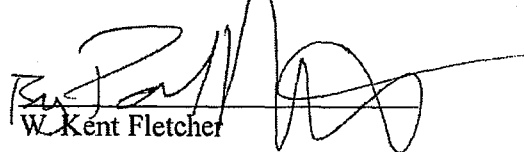
DATED this 30th day of October, 2008.



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and Burley Irrigation District

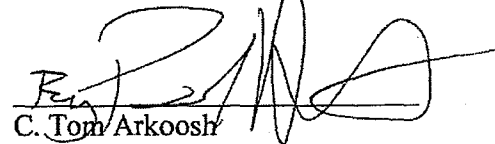
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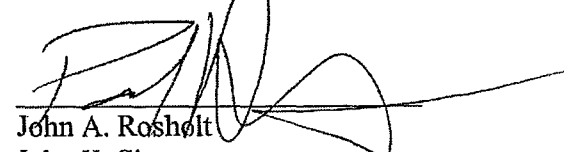
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2008, I served a true and correct copy of the foregoing document on the following by the method indicated:

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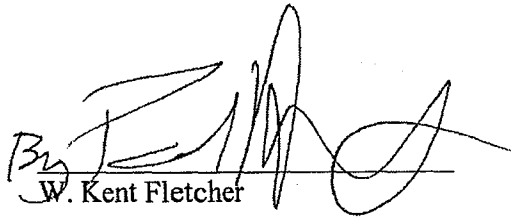

W. Kent Fletcher

EXHIBIT A
SUBCASE LIST

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