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DEPARTMENT OF
WATER RESOURCES

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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 No.: See Exhibit A

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

MUD LAKE WATER USERS, INC., MONTEVIEW CANAL CO., INDEPENDENT
WATER USERS OF MUD LAKE, PRODUCERS IRRIGATION CO., AND JEFFERSON
IRRIGATION DISTRICT (hereinafter, "MLWU"), by and through counsel of record, Robert L.
Harris of Holden, Kidwell, Hahn & Crapo, PLLC, hereby submits this Memorandum in Support of
Motion for Summary Judgement.

I. INTRODUCTION.

February 24, 1969

John A. Rosholt
Parry, Robertson, Daly & Larsen
P.O. Box 525
Twin Falls, Idaho 83301

Re: Supplemental Adjudication - Upper River

Dear John:

In view of the fact that you made the original appearance on behalf of the A & B Irrigation District in the **flood water adjudication suits** and your name appears of record as the attorney for said District, I can no reason to change the record in any respect. A & B Irrigation District does consent to the terms of the Amended Complaint and I can see no need for a change of attorney to be filed in the action. In view of the extensive work done by your firm, John, on behalf of A & B Irrigation District, I believe you should be representing A & B for the purposes of this Stipulation.

If you have any questions please feel free to call on me.

Very truly yours,

/s/

Roger D. Ling ¹

The above letter is one of thirty-six documents ranging from December 17, 1953 to February 24, 1969 which documents the universal and unmistakable intent to decree certain water rights set forth in the Eagle Decree with a priority date of April 1, 1939 as "flood water rights."² A list of these water rights is attached as Exhibit B. The clear intent of these documents culminated in a stipulation leading to the entry of the Eagle Decree which states that "flood water rights" are those "which were

¹ Affidavit of Robert L. Harris in Support of MLWU Motion for Summary Judgment (hereinafter, "Harris Affidavit") at Exhibit 36 (emphasis added).

² See Harris Affidavit, Exhibits 1-36.

only available during periods of high flow.”³ While not directly listed as one of the general seven elements of a water right in the water rights listing in the Eagle Decree,⁴ the flood water nature of these water rights was central to the stipulation and eventual decree, and must be documented as an element of these rights either as one of the general seven elements, or with a condition or remark in the decree.

This is language that the water right holders—and now SRBA claimants listed in Exhibit B—agreed to. Because it is generally well accepted that a deal is a deal, MLWU submits that the language from the Eagle Decree must be included in the decree of the subcases set forth in Exhibit B as an element of the water right, just as the stipulation specified. Indeed, the SRBA is bound to include such language because of its obligation to “not exceed[] any previously determined and recorded element of the decreed or licensed water right.”⁵ Because the flood water connotation is a previously decreed limitation on these rights, a partial decree in the SRBA for these rights without specific language pertaining to the flood water nature of these rights would unlawfully elevate an inferior flood water right to that of a non-flood water right. Such an elevation in status of these water rights could continue to permit members of the Surface Water Coalition to wield such elevated rights against ground water right holders in their continuing efforts to curtail ground water users in administrative calls before the Idaho Department of Water Resources and therefore be used in a manner contrary to their undisputable nature.

Secondarily, the Eagle Decree’s unequivocal statement that the “flood water rights” should be decreed with an April 1, 1939 priority date is undisputable evidence of the generally-accepted

³ Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment (hereinafter “McHugh Affidavit”), Exhibit D, at p. 3.

⁴ Source, Point of Diversion, Priority Date, Nature of Use, Quantity, Period of Use, and Place of Use.

⁵ IDAHO CODE § 42-1428(1)(a).

understanding that any water right with a priority date after April 1, 1939 is, as a practical and legal matter, a “flood water right.” Therefore, the water rights listed in Exhibit C should likewise be decreed as “flood water rights” because their priority date is junior to April 1, 1939.

Thirdly, based on actual water delivery records, all of the water rights listed in Exhibit A, including water rights with priority dates ranging from March 26, 1903 to May 18, 1926, should likewise be decreed as “flood water rights” as the delivery records clearly show that these water rights are only delivered in the early spring during periods of high runoff.

For these reasons, support for which is set forth below, MLWU requests an entry of summary judgment to accurately document and decree the true character of the water rights listed on Exhibit A as flood water rights. MLWU is less concerned with the mechanism that this court could use to document the flood water right nature of these water rights (which could be done with a condition, a remark, a shortened season of use, a notation regarding the source of water as snow melt, a condition protecting ground water users from administration claims above and beyond the historic delivery of the water rights, etc.), and more concerned that the substance of what these water rights really are is decreed correctly.

II. STATEMENT OF FACTS.

Based on the record before the Court, MLWU submits that the following are material facts that should be undisputed and entitle them to summary judgment as a matter of law.

1. The water rights on Attachments B and C have priority dates of April 1, 1939 or later.⁶
2. The water rights on Attachment A all divert from locations on the Snake River from points of diversion below the confluence of the Blackfoot River.⁷

⁶ See the Director’s Report for each water right on file.

⁷ *Id.*

3. Water District 01 records provide the best information available regarding the diversion and use of water rights.
4. The water rights listed on Exhibit B all have a priority date of April 1, 1939 and were decreed in the *Burley Irr. Dist. v. Eagle*, Civil Case No. 21406 (1968) pursuant to a Stipulation.⁸
5. The Stipulation resulting in the Eagle Decree, and the Findings of Fact and Conclusions of Law in the actual Eagle Decree specifically decreed the flood water nature of the water rights listed on Exhibit B.
6. Correspondence spanning a time frame of between December 17, 1953 and February 24, 1969 clearly documents the universal understanding of the parties involved that the water rights set forth in the Eagle Decree with a priority date of April 1, 1939 were “flood water rights.”⁹
7. The water rights set forth in Exhibit C all have a priority date **after** April 1, 1939.¹⁰
8. For water delivery from the Snake River below the confluence of the Blackfoot River and the Snake River, Water District 01 cuts back to an October 11, 1900 priority date sometime in June or early July in years of moderate or low snowpack after which time the only entities diverting Snake River natural flow water (as opposed to storage water) are Twin Falls and North Side Canal Companies under water right nos. 1-209 and 1-210.¹¹
9. The water rights on Attachment A as recommended by the Director do not contain any remark or other limitation to reflect that they are high water or flood water rights that do not receive water throughout the full irrigation season.¹²
10. Additionally, the water rights on Attachment A do not contain a remark reflecting that spring runoff and snow melt is the primary supply of water for these water rights and therefore these rights are not entitled to place a delivery call against or curtail junior priority ground water users.¹³

⁸ McHugh Affidavit, Exhibit D.

⁹ Harris Affidavit, Exhibits 1-36.

¹⁰ See Director’s Report for each subcase on file herein.

¹¹ See Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment and Affidavit of Anthony Olenichak in Support of Motion for Summary Judgment.

¹² See Director’s Report on file herein.

¹³ *Id.*

IV. ARGUMENT.

A. Legal Standards

Summary judgment is proper when “the pleadings, depositions, 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.”¹⁴ “All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the non-moving party.”¹⁵ Yet to withstand a motion for summary judgment, the opposing party’s case must be anchored in something more solid than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact.

B. The Water Rights Set Forth In Exhibit B Were Previously Decreed As Flood Water Rights And A Remark Must Be Included To Define Them As The Parties To the Eagle Stipulation Agreed.

The Water Rights set forth in Exhibit B were decreed with an April 1, 1939, priority date in the case of *Burley Irr. Dist. v. Eagle*, Civil Case No. 21406 (1968) pursuant to a Stipulation. The Stipulation at page 3 and page 4 clearly characterizes these water rights as “flood rights.”

- (c) That in connection with the establishment of the water rights for said Palisades Reservoir, it was particularly necessary for the parties Plaintiff to agree among themselves, and avoid extensive, expensive and delaying litigation by so agreeing upon a common priority date for those persons who were using or were making plans to construct projects and perfect rights to use, the so-called “Flood Water Rights,” being those waters of the river which were only available during periods of high flow; and which the parties Plaintiff had been using to the best of their ability and to the extent of their irrigation works, or were planning to use as projects were

¹⁴ I.R.C.P. 56(c).

¹⁵ *Robert Comstock LLC v. Keybank Nat’l Assn.*, 142 Idaho 568, 130 P.3d 1106 (2006).

constructed; and that the parties Plaintiff did at such time agree on a common priority date of April 1, 1939, for such rights, which said agreement has been acted upon by all of the parties Plaintiff hereto continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.

...

- (f) That it was necessary to agree that additional projects authorized by the Congress of the United States as an integral part of the Palisades Reservoir legislation would have their proportionate rights in said so-called **flood water rights** with said priority date of April 1, 1939, and that said legislation was achieved, and said projects were authorized and constructed, and have been developed, on the basis of such understanding as to their water rights; and that such projects have used water from the Snake River under such claimed priority date as promptly as they were able to do so, dependent upon the construction of their facilities.¹⁶

Further, the Findings of Fact and Conclusions of Law entered as a result of the Stipulation specifically referenced the “flood water” nature of those rights with a priority date of April 1, 1939.¹⁷

The Supplemental Decree entered thereafter specifically referenced and relied on the previous Findings of Fact and Conclusions of Law.¹⁸

The Eagle Decree, Stipulation, Findings of Fact and Conclusions of Law, and eventual Eagle Decree were products of nearly two decades of work by water users and their counsel to reach a common goal:

That it will greatly aid and assist all responsible State officials, Watermaster and other officials in handling, managing and distributing the waters of the Snake River and its tributaries above Milner Dam to have those rights enumerated and listed in one decree as is intended to be accomplished by this action.¹⁹

¹⁶ McHugh Affidavit, Exhibit D, at p. 3-4.

¹⁷ McHugh Affidavit, Exhibit E, at p. 7.

¹⁸ McHugh Affidavit at Exhibit F, p. 1.

¹⁹ McHugh Affidavit, Exhibit D, p. 6.

The extent of the work accomplished by the parties, and their intent to have the water rights shown on Exhibit A decreed as flood water rights, is made clearly evident in the documents attached to the Harris Affidavit. For ease of reference, the descriptions after the listed correspondence document for most of said documents are a brief description of the document, followed by direct quotations from said document where such quotations use the term or reference of “flood water rights” (emphases below added):

Exhibit No:

1. December 17, 1953; From: W. J. O’Bryant, Idaho Manager, Utah-Idaho Sugar Co.; To: David W. Dick, Secretary-Treasurer, Upper Snake River Water Users Protective Union.
 - a. Letter requesting that Upper Snake River Water Users Protective Union handle the filing of the flood water rights for Utah-Idaho Sugar Co.
 - b. “According to your letter of November 27, 1953 we may file an action to establish a **flood water decree** preceding Palisades Reservoir decree in date of priority...”
 - c. “We have consulted with Lynn Crandall relative to our use of **flood water** and are advised by him that we would be entitled to 20 sec. ft.”
 - d. “We would appreciate it greatly if you will handle the filing for us for this amount of **flood water**.”
2. April 25, 1955; From: William S. Holden, General Counsel, Upper Snake River Water Users’ Protective Union; To: Clarence H. Rands, Secretary, Butler Island Canal Co.
 - a. Letter requesting information from Butler Island Canal Co. regarding their use of flood waters.
 - b. “Will you kindly furnish our office with the following information so that we may proceed with the court actions: (1) Place of diversion of water from Snake River; (2) Legal description of lands irrigated by the **flood waters** so diverted; (3) Number of acres irrigated by the **flood water**.”
3. April 25, 1955; From: William S. Holden, General Counsel, Upper Snake River Water Users’ Protective Union; To: James H. Anderson, Secretary, Clark & Edwards Canal Co.; Response from Lee Ormond is handwritten on Mr. Holden’s letter.
 - a. Letter requesting information from Clark & Edwards Canal Co. regarding their use of flood waters.
 - b. “Will you kindly furnish our office with the following information so that we may proceed with the court actions: (1) Place of diversion of water from Snake River; (2) Legal description of lands irrigated by the **flood waters** so diverted; (3) Number of acres irrigated by the **flood water**.”
4. April 25, 1955; From: William S. Holden, General Counsel, Upper Snake River Water Users’ Protective Union; To: L. Ivan Jensen, Secretary, Snake River Valley Irrigation District; Response from Mr. Jensen is typed above Mr. Holden’s letter.

- a. Letter requesting information from Snake River Valley Irrigation District regarding their use of flood waters.
 - b. "Will you kindly furnish our office with the following information so that we may proceed with the court actions: (1) Place of diversion of water from Snake River; (2) Legal description of lands irrigated by the flood waters so diverted; (3) Number of acres irrigated by the flood water."
5. April 25, 1955; From: William S. Holden, General Counsel, Upper Snake River Water Users' Protective Union; To: Grant F. Stucki, Secretary, Harrison Canal Co.; Response from Mr. Stucki is handwritten on Mr. Holden's letter and also attached on separate sheets of paper.
 - a. Letter requesting information from Harrison Canal Co. regarding their use of flood waters.
 - b. "Will you kindly furnish our office with the following information so that we may proceed with the court actions: (1) Place of diversion of water from Snake River; (2) Legal description of lands irrigated by the flood waters so diverted; (3) Number of acres irrigated by the flood water."
6. April 25, 1955; From: William S. Holden, General Counsel, Upper Snake River Water Users' Protective Union; To: V. C. Hargrove, Secretary, Dilts Irrigation Company; Response from Roy L. Reed is handwritten on Mr. Holden's letter.
 - a. Letter requesting information from Dilts Irrigation Company regarding their use of flood waters.
 - b. "Will you kindly furnish our office with the following information so that we may proceed with the court actions: (1) Place of diversion of water from Snake River; (2) Legal description of lands irrigated by the flood waters so diverted; (3) Number of acres irrigated by the flood water."
7. May 6, 1955; From: W. J. O'Bryant, Idaho Manager, Utah-Idaho Sugar Co.; To: William S. Holden, General Counsel, Upper Snake River Water Users' Protective Union
 - a. Letter providing information requested from Mr. Holden regarding Utah-Idaho Sugar Co.'s use of flood waters. Provides place of diversion, place of use and number of acres irrigated by flood water.
8. May 14, 1955; From: Rudolph C. Larsen, Vice President, Liberty Park Irrigation Co.; To: William S. Holden, General Counsel, Upper Snake River Water Users' Protective Union
 - a. Letter providing information requested from Mr. Holden regarding Liberty Park Irrigation Co.'s use of flood waters.
 - b. "Legal description of lands irrigated by flood waters so diverted is enclosed on separate sheets..."
 - c. "The number of acres irrigated by flood water under our canal according to the records obtained in the court house is 5387 acres.
9. March 24, 1956; From: Howard R. Stinson, (Holden & Holden); To: Mr. Jones (Jones, Pomeroy & Jones)
 - a. Letter discussing possible procedures to obtain supplemental flood water decrees.
 - b. "The watermaster, Mr. Lynn Crandall, advised the Bureau of Reclamation's project superintendent on July 19, 1954, with respect to some forty flood

- water rights for which filings had not been made, but which had been used mostly since 1939. There was a discussion at that time as to how these flood water rights would be handled in relation, particularly, to the storage filing for Palisades Reservoir.”
- c. “It has been and is the program of the Protective Union to obtain decrees for these flood water rights...”
10. March 29, 1956; From: Howard R. Stinson (Holden & Holden); To: Lynn Crandall, Watermaster, Water District No. 36
- a. Letter discussing the future preparation of a Complaint for the “securing of a summary supplemental decree for flood water rights with priority dates ahead of the Palisades reservoir filing.” Letter also asks Mr. Crandall to review the names of those who should receive a supplemental water right, and what the amount of that right should be.
- b. “...it has been your expressed opinion, I believe, that it would be useful to have a common priority date for all of these additional flood water rights.”
11. May 22, 1956; From: Howard R. Stinson (Holden & Holden); To: Ralph Jones (Jones, Pomeroy & Jones)
- a. Letter discussing the “best course of action to pursue with respect to obtaining a decree for flood water rights in accordance with the agreement reached in 1950-1952 during the negotiation of the Minidoka-Palisades contracts...”
- b. “This office, in considering this matter, is speaking primarily for those companies and districts represented in the Protective union, but there are some individuals who are represented by this firm who are interested in flood water rights.”
- c. “There is attached to this letter a letter dated April 2, 1956, from the Watermaster, in which he summarizes the additional flood water rights which, in his opinion, should have a common priority date of April 1, 1939, ahead of the Palisades priority date of July 28, 1939.”
- d. “If the only issues involved were those connected with the establishment of flood water rights the procedure of obtaining a summary supplemental adjudication of water rights would seem to be proper.”
- e. “...there could be a joinder, for example, of all the companies and districts who are parties to the Minidoka-Palisades contracts, together with all those who are not party to such contract, but who will be claiming flood water rights.”
12. March 1, 1958; Document entitled “Proposed Supplemental Water Decrees on the Snake River.”
- a. “Suggested flood water rights to be decreed with priority of April 1, 1939, which is just ahead of the Palisades priority of July 28, 1939, based on maximum diversion to date in excess of presently decreed rights.”
13. June 25, 1958; From: William S. Holden (Holden & Holden); To: Adonis H. Nielson (Nielson & Nielson)

- a. Letter states that he agrees with Adonis's comments in a letter dated June 11, 1958 concerning "the action to adjudicate **flood water rights** on the Snake River."
14. March 24, 1964; From: Lon F. Davis (Holden, Holden & Kidwell); To: Ralph O. Lounsbury, Secretary, The Butler Island Canal Company
 - a. Letter detailing need for supplemental flood decree with a date of priority before Palisades rights. Letter states that Holden, Holden & Kidwell is in the process of filing a legal action to obtain this decree for the Upper Snake River Water Users Protective Union and requests information and consent to the adjudication of the other supplemental decrees in the amounts listed for other companies, districts and individuals.
 - b. "During the negotiations on the Palisades Project, the question arose as to how the existing **flood water rights** of companies, districts and individuals could be protected as being prior to the Palisades storage rights. It was then agreed that a supplemental **flood** decree should be obtained..."
15. March 24, 1964; From: Lon F. Davis (Holden, Holden & Kidwell); To: Raymond P. Parry (Parry, Robertson & Daly)
 - a. Letter discussing the best method to file an action in Upper and Lower Valley to "obtain a supplemental decree of **flood water rights**." Letter encloses a form entitled "Notice to Watermaster" which was sent to all of the Upper Valley water users from Henry Eagle (Watermaster, District 36) to obtain information for the supplemental flood water decree.
 - b. "We are now proceeding to draft the necessary pleadings to obtain a supplemental decree of the **flood water rights** in the Upper Snake River Valley with a priority date of April 1, 1939."

From the enclosed "Notice to Watermaster" form:

 - c. "During the time of negotiations to obtain the Palisades Project, it became apparent that there was a need for supplemental decrees on the Snake River and its tributaries to several companies, districts and individuals in order to protect their **flood water rights** as being prior in time to the Palisades Project Storage Rights."
 - d. "I have enclosed a list of the proposed **flood water right** decrees with a proposed priority date of April 1, 1939, which was compiled by Lynn Crandall, the former Watermaster of District 36, and William S. Holdn (sic), Attorney for The Upper Snake River Water Users Protective Union and The Committee of Nine. The Committee of Nine has approved this list at one of their annual meetings."
 - e. "It would seem advisable to adjudicate all of the **flood rights** of all affected parties in one action if possible."
 - f. "As these **flood rights** will be prior in time and right to the Palisades storage rights and will protect your priority against subsequent down stream diversions, I think it would be wise to take advantage of this opportunity of obtaining this supplemental decree of an additional right for your lands."
16. April 3, 1964; From Clifford E. Fix (Parry, Robertson & Daly); To: Lon F. Davis (Holden, Holden & Kidwell)
 - a. "Re: **Supplemental Flood Decrees** on the Snake River"

- b. Letter in response to letter above from Lon F. Davis dated March 24, 1964. States that separate action would have to be filed for Lower Valley rights, but that they (Parry, Robertson & Daly) propose to defer filing any action until they have made a further study of the water rights involved.
- 17. April 9, 1964; From Clifford E. Fix (Parry, Robertson & Daly); To: Lon F. Davis (Holden, Holden & Kidwell)
 - a. Short FYI letter to send Lon a copy of Clifford's response to Mr. Eagle.
 - b. "Re: **Supplemental Flood Decrees** on the Snake River"
- 18. May 6, 1964; From: H.C. Eagle, Watermaster, District 36; To: Leonard Graham
 - a. Letter questioning when the proposed supplemental decrees were approved by the water users.
- 19. May 6, 1964; From: H.C. Eagle, Watermaster, District 36; To: Coral Allred, President, Island Irrigation Co.
 - a. Letter explaining why Island Irrigation Co. was not entitled to file for a flood water right.
- 20. May 19, 1964; From: Lon F. Davis (Holden, Holden & Kidwell); To: Shattuck Irrigation Company
 - a. Letter detailing need for supplemental flood decree with a date of priority before Palisades rights. Letter states that Holden, Holden & Kidwell is in the process of filing a legal action to obtain this decree for the Upper Snake River Water Users Protective Union and requests information concerning the land serviced by the company.
 - b. "During the negotiations on the Palisades Project, the question arose as to how the existing **flood water rights** of companies, districts and individuals could be protected as being prior to the Palisades storage rights. It was then agreed that a **supplemental flood decree** should be obtained..."
- 21. May 19, 1964; From: Lon F. Davis (Holden, Holden & Kidwell); To: Utah-Idaho Sugar Company
 - a. Letter detailing need for supplemental flood decree with a date of priority before Palisades rights and requesting additional information about land on which the supplemental water is to be used and the point of diversion.
 - b. "During the negotiations on the Palisades Project, the question arose as to how the existing **flood water rights** of companies, districts and individuals could be protected as being prior to the Palisades storage rights. It was then agreed that a **supplemental flood decree** should be obtained..."
- 22. August 18, 1964; From: Lon F. Davis (Holden, Holden & Kidwell); To: R.P. Parry (Parry, Robertson & Daly)
 - a. Letter discussing draft of the pleadings for the "**supplemental flood decrees** for the Upper Snake River Valley." Also discusses whether certain Palisades contractors should be added as parties and also the nature of North Side Canal Company's water right.
 - b. "We are working on the drafts of the pleadings for the **supplemental flood decrees** for the Upper Snake River Valley and will have a draft for your consideration and comments in the very near future."
 - c. "An additional question arose as to the **flood right** of the North Side Canal Company mentioned in Cliff's letter to Henry Eagle dated April 9, 1964, a

- copy of which was forwarded to us on that date, together with copies of the correspondence between Henry Eagle and Carl Tappan.”
23. September 16, 1964; From: Lon F. Davis (Holden, Holden & Kidwell); To: R.P. Parry (Parry, Robertson & Daly)
 - a. Letter discussing draft Complaint (which was enclosed) for the “supplemental rights on the Snake River with the accompanying prayer for an adjudication of key paragraphs of the Palisades Contract.”
 - b. Also discusses whether to add all Palisades contractors and the best way to accomplish that if they decide to do it.
 24. March 30, 1966; From: John A. Rosholt (Parry, Robertson & Daly); To: Bob Holden (Holden, Holden & Kidwell)
 - a. Letter discussing progress on assembling party plaintiffs in Lower Valley and how to proceed with “action for **supplemental flood water decrees** on Snake River”.
 25. August 2, 1966; From: John A. Rosholt (Parry, Robertson & Daly); To: Bob Holden (Holden, Holden & Kidwell)
 - a. Letter discussing proposed party plaintiffs to “Action for **Supplemental Flood water Decree** on Snake River and Affirmation of Certain Palisades Contract Provisions.”
 - b. “I have indicated on this list those entitled to **flood water** as per Henry Eagle’s original list.”
 26. August 25, 1966; From: John A. Rosholt (Parry, Robertson & Daly); To: Bob Holden (Holden, Holden & Kidwell)
 - a. Letter asking if Bob reviewed list of potential party plaintiffs sent on August 2, 1966 for “Action for **Supplemental Flood water Decree** on Snake River and Affirmation of Certain Palisades Contract Provisions”.
 27. September 1, 1966; From: Robert B. Holden (Holden, Holden & Kidwell); To: John A. Rosholt (Parry, Robertson & Daly)
 - a. Letter discussing proposed party plaintiffs and other elements of “Action for **Supplemental Flood water Decree** on Snake River and Affirmation of Certain Palisades Contract Provisions”.
 28. October 12, 1966; From: John A. Rosholt (Parry, Robertson & Daly); To: Bob Holden (Holden, Holden & Kidwell)
 - a. Letter discussing draft of Complaint and procedure for proceeding with “**Supplemental Flood Water Decree**”.
 29. November 29, 1966; From: John A. Rosholt (Parry, Robertson & Daly); To: Robert B. Holden (Holden, Holden & Kidwell)
 - a. Letter discussing proposed complaint and proposed stipulation as well as process and schedule to proceed with “**Supplemental Flood Water Decree**”.
 - b. “Presently, I am busy checking the changes in names which you inserted so that my list of party plaintiffs and persons entitled to **flood water** on Henry’s Fork and in the Upper Valley are properly conformed.”
 30. December 14, 1966; From: William Burpee, Field Solicitor, United States Department of the Interior, Office of the Solicitor, Portland Region, Boise Field Office; To: Robert B. Holden (Holden, Holden & Kidwell).

- a. Letter thanking Robert Holden for previous communication which included a copy of a proposed complaint to provide for supplemental decree and certain provisions of Palisades contracts. Letter suggests adding Fremont-Madison Irrigation District as a party to the proceeding.
 - b. "I appreciate very much receiving your letter of November 18 forwarding me a copy of a proposed complaint to provide for a supplemental decree confirming **flood waters** and certain provisions of the Palisades contracts."
- 31. September 27, 1967; From: R. Keith Higginson, State Reclamation Engineer; To: Henry Eagle
 - a. Letter discussing press release made by Henry Eagle regarding high ground water in the Rigby area. Higginson questions the excessive amount of water being diverted in District 36 and the need for the proposed supplemental flood water adjudication.
 - b. "I suspect you can appreciate my concern over the proposed supplemental **flood water** adjudication which is currently pending the district courts in Twin Falls and St. Anthony."
- 32. December 21, 1967; From: William Burpee, Field Solicitor, United States Department of the Interior, Office of the Solicitor, Portland Region, Boise Field Office; To: William Holden (Holden, Holden & Kidwell) & R.P. Parry (Parry, Robertson & Daly)
 - a. Letter enclosing article from The Idaho Daily Statesmen concerning water adjudication suit. Letter expresses concern over some of the content of the article which indicates that Palisades Reservoir water is not being put to beneficial use. Letter suggests that steps be taken to stop this rumor before it attains any widespread credence.
- 33. June 24, 1968; From: R. Keith Higginson, State Reclamation Engineer; To: Holden, Holden, Kidwell & Williams
 - a. Letter to Firm expressing concern over excessive quantities of water being diverted from the Snake for irrigation, also certain provisions of the Palisades contracts. Letter also states he is withdrawing his intervention in the proposed supplemental flood water adjudication suit. Encloses a copy of his statement concerning the proposed adjudication suit.
 - b. "I am enclosing a copy of my statement concerning the proposed supplemental **flood water** adjudication suit on the Snake River for your information."
 - c. From Higginson's statement:
 - i. "My major concern is with the so-called '**flood water rights**' which the plaintiffs are attempting to establish."
- 34. June 26, 1968; From: R. Keith Higginson, State Reclamation Engineer; To: Bureau of Reclamation, Region 1
 - a. Same letter (with enclosure) as that above dated June 24, 1968, to Holden, Holden, Kidwell & Williams.
- 35. July 9, 1968; From: William S. Holden; To: William Burpee
 - a. Letter to William Burpee discussing public statement made by Keith Higginson concerning the "wasteful use of water in Southeastern Idaho and stating that the Palisades contracts do not conform to Idaho State law." Letter

- also discusses correspondence with Leonard Braham suggesting that he call a meeting of the Committee of Nine.
- b. "...we are attorneys of record in the pending suit in which we are seeking to have the Court confirm and approve the Palisades contracts and to grant the supplemental **flood water rights**."
36. February 24, 1969; From: Roger Ling; To: John Rosholt (Parry, Robertson, Daly & Larsen)
- a. Letter from Roger suggesting that John remain as the attorney of record for A&B Irrigation District in representing them in the Stipulation.
 - b. "In view of the fact that you made the original appearance on behalf of the A&B Irrigation District in the **flood water** adjudication suits... I can see no reason to change the record in any respect."

The above documents evidence an unmistakable intent to have the water rights attached at Exhibit A decreed as "flood water rights." This clear intent was then documented in the Stipulation that led to the Eagle Decree.

Regarding stipulations to resolve litigation, the Idaho Supreme Court has held that "[a] stipulation is a contract,"²⁰ and further, "[s]tipulations for the settlement of litigation are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown."²¹ In addition, "[a]n agreement entered into in good faith in order to settle adverse claims is binding upon the parties, and absent a showing of fraud, duress or undue influence is enforceable either at law or in equity."²² In short, a deal is a deal, even if some of the parties to a stipulation later do not want to bound by its terms.

While not directly listed as one of the general seven elements of a water right in the water rights listing in the Eagle Decree,²³ the flood water nature of these water rights was central to the

²⁰ Kohring v. Robertson, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002) (*quoting* Olson v. Idaho Department of Water Resources, 105 Idaho 98, 100, 666 P.2d 188, 190 (1983)).

²¹ *Id.*

²² Lawrence v. Hutchinson, 146 Idaho 892, 898, 204 P.3d 532, 538 (2009).

²³ Source, Point of Diversion, Priority Date, Nature of Use, Quantity, Period of Use, and Place of Use.

stipulation and eventual decree.²⁴ In fact, the water rights list in the Eagle Decree also omitted some of the general seven elements to describe a water right, such as period of use or even nature of use. However, as an example, the nature of use for these water rights of “irrigation” is made evident by reviewing the language from the Stipulation, not from the water rights descriptions in the decree:

That all of the lands hereinafter described, to which water shall be decreed herein, are arid in character and will not produce ordinary agricultural crops without the application of irrigation water; . . .

. . .
That all of the supplemental waters herein agreed to be decreed are required for and will be beneficially used for the production of agricultural crops and associated domestic uses upon the lands to which they are stipulated to be decreed . . .²⁵

Similar to the irrigation nature of use, the flood water component of the water rights in Exhibit B was not specifically listed in individual water right listings in the Eagle Decree. However, this does not preclude the SRBA Court from now filling in those blanks with remarks, conditions, etc. Indeed, the Idaho Legislature specifically noted that water rights were not uniformly defined prior to the commencement of the SRBA, as contained in Idaho Code § 42-1427, and therefore, the Legislature specifically authorized the director to “include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of the adjudication.”²⁶ In doing so, the director is required to recommend the previously undefined water rights “based upon the conditions existing on the date of the commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.” Because the flood water connotation is a limitation on these rights, a partial decree in the SRBA for these rights

²⁴ The individual water right descriptions begin on page 7 of the Eagle Decree.

²⁵ McHugh Affidavit, Exhibit 3, at 5-6 (¶¶ VII and X).

²⁶ IDAHO CODE § 42-1427(2).

without specific language pertaining to the flood water nature of these rights would unlawfully elevate an inferior flood water right to that of a non-flood water right, which is would be squarely contrary to the Idaho Legislature's intent for water right partial decrees "not [to] exceed[] any previously determined and recorded element of the decreed or licensed water right."²⁷ Now is the time to list the flood water nature of these water rights in the partial decree.

A mechanism available to document the flood water nature of these rights is with remarks or conditions. In recommending water rights for adjudication to the SRBA Court, the director's report shall include:

- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.²⁸

For reasons not entirely clear, the director's report for the water rights contained on Exhibit B do not contain any reference to the flood water nature of these rights, even though the flood water element of the water right was clear in the Stipulation and eventual Eagle Decree. The flood water element is clearly a limitation on the water right, which, by stipulated definition, is "only available during periods of high flow."²⁹ Such a limitation must be included via condition or remark in the partial decrees for these water rights.

The flood water nature of these rights is not simply academic. It has real and potentially devastating impacts on ground water users. An unlawful elevation in status to a non-flood water right status would allow the Surface Water Coalition to wield these water rights, in their continuing

²⁷ IDAHO CODE § 42-1427(1)(a).

²⁸ IDAHO CODE § 42-1409(i)-(k).

²⁹ Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment (hereinafter "McHugh Affidavit"), Exhibit D, at p. 3.

efforts to curtail ground water users in administrative calls before the Idaho Department of Water Resources, in a manner contrary to their undisputable nature.

In sum, summary judgment must be entered to accurately document and decree the true character of the water rights listed on Exhibit B as flood water rights. MLWU's preference for doing so would be to add a remark stating that "This water right is a flood water right which is available only during periods of high flow as decreed in the case of *Burley Irr. Dist. v. Eagle*." However, MLWU is less concerned with the exact mechanism that this court could use to document the flood water right nature of these water rights (which could be done with a condition, a remark, a shortened season of use, a notation regarding the source of water as snow melt, a condition protecting ground water users from administration claims above and beyond the historic delivery of the water rights, etc.), and more concerned that the substance of what these water rights really are is decreed in order to correctly adjudicate the agreed-to beneficial use of these water rights.

D. Water Right Nos. 1-2050 and 1-2061 And Claim Nos. 1-10225, 1-10237, 1-10238, 1-10239, 1-10240, 1-10241 and 1-10482 All Have a Priority Date After April 1, 1939 And Should Have a Remark Indicating That They Are Flood Water Rights.

As discussed at length above, a priority date of April 1, 1939 was designated by numerous parties to the Eagle Decree as a priority date for "flood water rights." As set forth in the documents above, this date was chosen because it was ahead of the storage water right for Palisades Reservoir, which had a priority date of July 28, 1939. The general fear was that Palisades would store water during high flow periods, which would take from historic or planned uses for flood water. Thus, it was universally determined by all parties to the Eagle Decree that April 1, 1939 was a priority date for water rights on the Snake River where the water molecules so diverted were flood water molecules.

Given the universal agreement amongst those in the Eagle Decree, it logically follows that any water right on the Snake River after April 1, 1939 should appropriately be conditioned as a flood water right that is only available during periods of high flow. Therefore, the water rights listed on Exhibit C—which are diverted from the Snake River and have priority dates after April 1, 1939—should likewise be decreed as flood water rights based simply on the language from the Eagle Decree. The Eagle Decree is persuasive authority for the establishment of a priority date which establishes the cut-off priority date between flood water and non-flood water rights. Based on the Eagle Decree alone, the Exhibit C water rights should be classified as flood water rights.

However, in addition to the above argument relative to the Eagle Decree, as set forth in the following section, these rights—as well as the natural flow water rights junior to October 11, 1900—are flood water rights based on Water District 01 water delivery records.

E. The Water Rights Attached as Exhibit A Should Be Decreed as Flood Water Rights Based on Water District 01 Water Delivery Records and Recent Findings of Fact and Conclusions of Law in Administrative Call Actions Initiated by the Surface Water Coalition.

It is an undisputed fact that water rights that are junior to October 11, 1900 do not provide water for an entire irrigation season. As contained in the Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment, based on the delivery records for Water District 01 over the past 29 years, Water Right Nos. 1-209 and 1-210 held by Twin Falls Canal Company and North Side Canal Company—which total 3,400 cfs—require all natural flow water available below Blackfoot after June or early July in most years.³⁰ Water Right Nos. 1-209 and 1-210 have priority dates of October

³⁰ Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment, ¶11(b).

11, 1900, and therefore, the Water District classifies water rights with priorities after October 11, 1900 as “high water” or “flood water” rights.³¹

In addition to the Water District records, the flood water nature of the Exhibit A Water Rights was noted by Hearing Officer Schroeder in *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefits of 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* in his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation and Amended Order* dated April 29, 2008 at ¶ 9.a. at p. 10. That finding states in full:

- a. **MID, BID, A&B, AFRD#2 and Milner rely primarily on water from their storage contracts with the BOR.** Their natural flow rights are relatively junior and commonly only provide water during the runoff period between April and June in years of moderate to good snowpack and runoff. When there is a low snowpack, such as the period from 2001 through 2004, the natural flow rights produce very little water. During the runoff period when there is water passing Blackfoot, these entities are able to divert natural flow water. When senior users upstream from Blackfoot divert the water that would otherwise pass Blackfoot, the senior natural flow rights of TFCC and NSCC command the inflow to the river downstream of Blackfoot, leaving little to no water for the natural flow rights of other canals in the Blackfoot to Milner reach.

The Hearing Officer’s findings are further persuasive authority documenting the flood water nature of the water rights at issue.

In short, the Water District classification of all the water rights subject to the motion for summary judgment, and the Hearing Officer finding set forth above, establish the flood water nature of these water rights, which should be documented in the Exhibit A water rights. For these reasons, in addition to the Eagle Decree arguments set forth above relative to water rights with a priority date

³¹ *Id.* ¶11(c); *See also* Affidavit of Anthony Olenichak, ¶¶8-12.

of April 1, 1939 and after, summary judgment is appropriate to accurately document and decree the true character of the water rights listed on Exhibit A as flood water rights.

V. CONCLUSION.

When the parties to the Eagle Stipulation entered into that agreement, they recognized that the water rights that they were agreeing to were flood water rights. The Stipulation itself, along with the additional documentation set forth above which led to the Stipulation that was entered into by the Claimants through their respective counsel (some of whom represent parties in this very action) and various other parties, show a clear understanding that water rights with a priority date of April 1, 1939 were flood water rights.

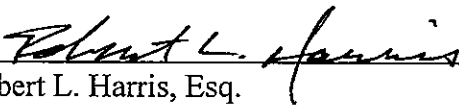
Further, given the universal agreement amongst those in the Eagle Decree, it logically follows that any water right on the Snake River with a priority date after April 1, 1939 should be appropriately conditioned as a flood water right that is only available during periods of high flow. Therefore, the water rights listed on Exhibit C—which are diverted from the Snake River and have priority dates after April 1, 1939—should likewise be decreed as flood water rights based simply on the language from the Eagle Decree. The Eagle Decree alone is persuasive authority for the establishment of a priority date which establishes the cut-off priority date between flood water and non-flood water rights. Based on the Eagle Decree alone, the Exhibit C water rights could and should be classified as flood water rights.

Lastly, the Water District classification of all of the water rights subject to the associated motion for summary judgment, and the Hearing Officer's finding set forth above in the context of an administrative call, establish the flood water nature of these water rights. For these reasons, in addition to the Eagle Decree arguments set forth above, summary judgment is appropriate to

accurately document and decree the true character of all of the water rights listed on Exhibit A as flood water rights.

Summary judgment must be entered to accurately document and decree the true character of the water rights, which are subject to the motion for summary judgment, as flood water rights. MLWU is less concerned with the exact mechanism that this court could use to document the flood water right nature of these water rights (which could be done with a condition, a remark, a shortened season of use, a notation regarding the source of water as snow melt, a condition protecting ground water users from administration claims above and beyond the historic delivery of the water rights, etc.), and more concerned that the substance of what these water rights really are is decreed in order to correctly adjudicate these water rights.

DATED this 23rd day of June, 2009.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 23rd day of June, 2009.

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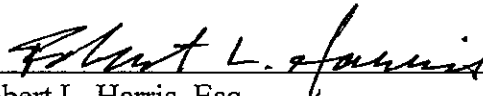
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EXHIBIT A

WR#	Claimant	Priority Date
1-4	TFCC	12/22/1915
1-5	NSCC	12/23/1915
1-6	AFRD	3/30/1921
1-7	BID	4/1/1939
1-8	MID	4/1/1939
1-9	Milner	4/1/1939
1-10	TFCC	4/1/1939
1-13	FID	4/1/1939
1-14	A&B	4/1/1939
1-16	NSCC	12/23/1915
1-17	Milner	11/14/1916
1-211A	BOR	3/26/1903
1-211B	BID	3/26/1903
1-212	North Side	10/7/1905
1-213	North Side	6/16/1908
1-214A	BOR	8/6/1908
1-214B	BID	8/16/1908
1-219	BOR	12/14/1909
1-2050	Milner	10/25/1939
1-2061	BOR	6/11/1956
1-10034	BOR	3/15/1911
1-10225	A&B	4/1/1984
1-10237	A&B	7/11/1968
1-10238	A&B	7/11/1968
1-10239	A&B	7/11/1968
1-10240	A&B	7/12/1968
1-10241	A&B	4/1/1978
1-10482	BOR	4/1/1940
1-10483	Amalgamated	5/18/1926

EXHIBIT B

WR#	Claimant	Priority Date
1-7	BID	4/1/1939
1-8	MID	4/1/1939
1-9	Milner	4/1/1939
1-10	TFCC	4/1/1939
1-13	FID	4/1/1939
1-14	A&B	4/1/1939

EXHIBIT C

WR#	Claimant	Priority Date
1-2050	Milner	10/25/1939
1-2061	BOR	6/11/1956
1-10225	A&B	4/1/1984
1-10237	A&B	7/11/1968
1-10238	A&B	7/11/1968
1-10239	A&B	7/11/1968
1-10240	A&B	7/12/1968
1-10241	A&B	4/1/1978
1-10482	BOR	4/1/1940
1-10483	Amalgamated	5/18/1926