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DEPARTMENT OF
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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 Nos. 22-13212 and 22-13503

**OBJECTORS' RESPONSE TO CLAIMANTS'
MOTION FOR SUMMARY JUDGMENT**

Cedron Irrigation, LLC, Teton Rainbow Ranches, Inc., Trees, Inc., Mahogany Ranch Holdings, and Wally Rothgeb, Jr. (collectively, the "Objectors") hereby respond pursuant to Rule 56 of the Idaho Rules of Civil Procedure to the *Motion for Summary Judgment* filed by Michael L. Reid (the "Claimant") on May 21, 2009.

TABLE OF CONTENTS

INTRODUCTION	3
SUMMARY JUDGMENT STANDARD	3
STATEMENT OF UNDISPUTED FACTS	4
ARGUMENT	5
I. IDAHO CODE § 42-1427 DOES NOT APPLY TO CLAIM NUMBERS 22-13212 AND 22-13503.....	6
II. UNDISPUTED EVIDENCE ENTITLES THE CLAIMANT TO A WATER RIGHT PRIORITY DATE NO EARLIER THAN JULY 21, 1969.	8
III. THERE IS NO COMPETENT EVIDENCE THAT THE CLAIMANT'S PROPERTY WAS BROUGHT UNDER IRRIGATION BY AN ACCOMPLISHED TRANSFER OF WATER RIGHT NUMBER 22-405.....	9
IV. THE COMBINED RATE OF DIVERSION OF CLAIM NUMBERS 22-13212 AND 22-13503 SHOULD NOT EXCEED 0.59 CFS.....	10
V. THE CLAIMANT'S REQUEST FOR A PRIORITY DATE OF MAY 23, 1901, IS BARRED BY THE DOCTRINE OF <i>RES JUDICATA</i>	11
CONCLUSION.....	12

INTRODUCTION

The Claimant's *Motion for Summary Judgment* asks this Court to award a 1901 priority date for an appropriation that was not made until 1969. In fact, when the Claimant purchased his property in 1999, the water right records of the Idaho Department of Water Resources ("IDWR") showed only one water right appurtenant to the property—a statutory claim, filed by the Claimant's predecessor in the chain of title, for a water right with a priority date of July 21, 1969. Now, the Claimant seeks to vastly improve his water right by claiming a 1901 priority date and an increased rate of diversion in the Snake River Basin Adjudication ("SRBA").

This response to the Claimant's *Motion for Summary Judgment* shows that SRBA claim numbers 22-13212 and 22-13503¹ derive from an appropriation that was made in 1969, not 1901, and that the claimed rate of diversion exceeds the quantity that was appropriated in 1969. The undisputed facts before this Court not only require denial of the Claimant's *Motion for Summary Judgment*, but warrant summary judgment in favor of the Objectors. The SRBA is and must be a forum to define water rights as they are, not as claimants wish them to be.

SUMMARY JUDGMENT STANDARD

In the SRBA, the claimant has the ultimate burden of persuasion for each element of the claimed water right. Idaho Code § 42-1411(5).

Summary judgment is proper when 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 judgment as a matter of law." Idaho R. Civ. P. 56(c). "All disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Robert Comstock, LLC v. Keybank Nat'l Assn.*, 142 Idaho 568, 571 (2006).

"Summary judgment may be rendered for any party, not just the moving party, and on any or all of the causes of action involved." *Brummett v. Ediger*, 106 Idaho 724, 726 (1984). Where both parties seek summary judgment "on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the court from entering summary judgment." *Brown v. Perkins*, 129 Idaho 189, 191 (1996). In such circumstances, "the district court is free to arrive at the most probable inferences based upon the

¹ Water right claim numbers 22-13212 and 22-13503 claim the same place of use and priority date, and arguably should have been incorporated into a single claim. Regardless, the facts and arguments set forth herein apply equally to both claims.

evidence before it and grant summary judgment, despite the possibility of conflicting inferences." *Id.*

STATEMENT OF UNDISPUTED FACTS

1. The Claimant's SRBA claim number 22-13212 claims a right to divert 0.5 cfs from Paradise Springs for the irrigation of 35.6 acres, with a priority date of June 1, 1904. The IDWR Director's Report recommended the elements of SRBA claim number 22-13212 as claimed.

2. The Claimant's SRBA claim number 22-13503 claims a right to divert 0.2 cfs from Paradise Springs for the irrigation of 35.6 acres, with a priority date of June 1, 1904. The IDWR Director's Report recommended the elements of SRBA claim number 22-13503 as claimed.

3. Although the Director's Report recommended claim number 22-13212 as claimed, the Claimant filed an objection, asserting an earlier priority date of May 23, 1901. The Claimant has not objected to the Director's Report for water right number 22-13503.

4. The Objectors filed objections to claim numbers 22-13212 and 22-13503, asserting that these water rights should not exist because they duplicate the Claimant's SRBA claim number 22-11639, which was properly claimed, recommended, and decreed for the same place of use with a priority date of July 21, 1969, and a diversion rate of 0.59 cfs.

5. There are no prior decreed or licensed water rights appurtenant to the place of use claimed under SRBA claim numbers 22-13212 and 22-13503, with the exception of SRBA claim number 22-11639 (for which a Partial Decree has been entered).

6. The Claimant asserts that claim numbers 22-13212 and 22-13503 are offspring rights of water right number 22-405, which was decreed in the 1910 Rexburg Decree, with a priority date of June 1, 1904. (Mot. for Summ. J. at 1-2.)

7. The decreed place of use of water right number 22-405 does not include the place of use of SRBA claim numbers 22-13212 and 22-13503. (*See*, Budge Aff., Ex. K.)

8. At the time of the Rexburg Decree, only nine acres were irrigated under water right number 22-405. (Mot. for Summ. J., Ex. D at 5.)

9. At the time of the Rexburg Decree, the Claimant's property was not irrigated. (Kunz Aff., ¶ 4.)

10. The Claimant's property is physically incapable of being irrigated by means of gravity-flow irrigation from Paradise Springs. (Kunz Aff., at ¶ 5.)

11. A Notice of Claim to a Water Right (IDWR water right number 22-4104) was filed with the IDWR on May 20, 1983, by the Claimant's predecessor in the chain of title (LeRoy Miller), claiming a right to irrigate 54 acres from Paradise Springs with a priority date of July 21, 1969. (Budge Aff., Ex. C.) The place of use of said Notice of Claim includes the 35.6 acres claimed under SRBA claim numbers 22-13212, 22-13503, and 22-11639.

12. Neighboring water users had always understood that the Claimant's property was irrigated under a water right with a 1969 priority date. (Kunz. Aff., at ¶ 6.)

ARGUMENT

Of all the land irrigated from Paradise Springs, the Claimant's property was the very last to come under irrigation, in the year 1969. (Kunz. Aff., at ¶ 6.) Accordingly, the Claimant's neighbors have always understood and treated the Claimant's water right as last in priority on Paradise Springs. *Id.* Now, however, the Claimant has engaged in a vigorous campaign to leapfrog the priorities of his neighbors in an apocalyptic quest to make the last first, and the first last.

The Claimant aims to improve his priority date by asserting that claim numbers 22-13212 and 22-13503 are offspring rights of water right 22-405, which was decreed in the 1910 Rexburg Decree. The Claimant's position is not supported by either the history of water right 22-405 or the history of irrigation of the Claimant's property.

This response first demonstrates that the IDWR erred by recommending claim numbers 22-13212 and 22-13503, pursuant to Idaho Code § 42-1427, and that the IDWR Director's Report therefore does not constitute *prima facie* evidence of the claims. Second, undisputed evidence shows the Claimant's property was not irrigated until 1969. Third there is no evidence that the Claimant's property was brought under irrigation by an accomplished transfer of water right number 22-405. Fourth, the rate of diversion claimed under claim numbers 22-13212 and 22-13503 exceeds the quantity actually appropriated in 1969. And, finally, the Claimant's request for a priority date of May 23, 1901, is *res judicata*.

In sum, if the SRBA is to decree water rights based on actual water use, then SRBA claim numbers 22-13212 and 22-13503 should be disallowed as duplicative of the Claimant's

SRBA claim number 22-11639, or alternatively, decreed with a priority date of July 21, 1969, with a combined quantity of 0.59 cfs.

I. IDAHO CODE § 42-1427 DOES NOT APPLY TO CLAIM NUMBERS 22-13212 AND 22-13503.

The Claimant asserts that claim numbers 22-13212 and 22-13503 are offspring rights of water right number 22-405, which was decreed in the 1910 Rexburg Decree. (Mot. for Summ. J. at 1-2.) However, the place of use of claim numbers 22-13212 and 22-13503 is not located within the decreed place of use of water right number 22-405. (*See*, Budge Aff., Ex. K.) Consequently, claim numbers 22-13212 and 22-13503 cannot be deemed offspring of water right number 22-405 without proof of an "accomplished transfer" of that right.

The IDWR recommended claim numbers 22-13212 and 22-13503 as offspring of water right number 22-405, but not by means of an accomplished transfer. Instead, the IDWR used the so-called "ambiguous decree" statute (I.C. § 42-1427) to recommend the claims as offspring of water right number 22-405. (IDWR Paradise Springs notes, Budge Aff., Ex. N at 1-2.) Yet, as explained below, Idaho Code § 42-1427 does not properly apply to claim numbers 22-13212 and 22-13503, and the IDWR exceeded its statutory authority by applying that statute to recommend the claims. Consequently, the IDWR Director's Report should not be treated as *prima facie* evidence of the elements of claim numbers 22-13212 and 22-13503.

Idaho Code § 42-1427 provides a mechanism for the IDWR to recommend undefined elements of previously decreed or licensed water rights. The statute reads, in relevant part:

If a licensed or decreed water right does not describe all of the elements of a water right required under section 42-1409, Idaho Code, the director shall 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 an adjudication.

Rather than require the IDWR to investigate the actual history of water use under the previously decreed or licensed right, the statute allows the IDWR to use water use conditions that existed in 1987 (the year the SRBA commenced) to recommend undefined elements.

Critically, Idaho Code § 42-1427 can only be used to recommend "those elements not defined by the prior license or decree." (Emphasis added.) It cannot be used to re-define previously decreed elements. Nor can the statute "be used to claim an expansion beyond the beneficial use existing at the time the right was originally memorialized in a decree or license."

Revised Memorandum Decision and Order on Basin-Wide Issue No. 4; The Constitutionality of I.C. §§ 42-1425, 42-1426 and 42-1427, As Written, 1 SRBA 43 (1995) ("*Basin-Wide Issue 4*"), at 43.8. "The core meaning of I.C. § 42-1427 ... prohibits it from being used to assert a claim to any expanded, enlarged or changed use of a water right." *Id.* "For any expanded, enlarged or charged use, the claimant's assertion shall be governed by the more specific statute." *Id.*

Water right number 22-405 was decreed in the Rexburg Decree, which does not precisely define the number of acres irrigated by each water right, but does define the place of use for each water right to the nearest quarter-section. Therefore, the IDWR can rely upon Idaho Code § 42-1427 to recommend irrigated acres based on 1987 conditions, but only to the extent that such acres are located within the place of use defined by the Rexburg Decree. Otherwise, if the IDWR were to use 1987 conditions to recommend acres located outside the decreed place of use, it's recommendation would be a re-determination of previously decreed elements (which is not permitted by Idaho Code § 42-1427) rather than an initial determination of undefined elements (which is allowed by the statute).

In this case, the place of use of SRBA claim numbers 22-13212 and 22-13503 is not located within the decreed place of use of water right number 22-405. (*See*, Budge Aff., Ex. K.) Consequently, Idaho Code § 42-1427 is inapplicable to claim numbers 22-13212 and 22-13503.

The IDWR applied Idaho Code § 42-1427 anyways, by making a unilateral determination that the Rexburg Decree was in error, and by unilaterally assigning a new place of use to water right number 22-405. (IDWR Paradise Springs notes, Budge Aff., Ex. N at 1-2). The IDWR did not file a motion with the appropriate court to amend the Rexburg Decree, nor was an Application for Transfer of Water Right filed to change the place of use of water right number 22-405. Rather, the IDWR made an independent, in-house decision to recognize a different place of use of water right number 22-405 than was decreed.

Unlike the decreed place of use of water right number 22-405, the place of use assigned by IDWR does include the place of use of SRBA claim numbers 22-13212 and 22-13503. In reliance on its reassigned place of use, the IDWR then recommend claim numbers 22-13212 and 22-13503 based on 1987 conditions, pursuant to Idaho Code § 42-1427.

The IDWR did not use Idaho Code § 42-1427 to simply define a previously un-decreed element, but instead used the statute to change an element that was in fact defined by the

Rexburg Decree. In so doing, the IDWR exceeded its statutory authority under Idaho Code § 42-1427.

Since the IDWR exceeded its authority in recommending SRBA claim numbers 22-13212 and 22-13503, the IDWR Director's Reports should not constitute *prima facie* evidence of the elements of those claims. Rather, the Claimant must be required to come forward with evidence to prove each element of claim numbers 22-13212 and 22-13503 based on the actual history of irrigation of the Claimant's property.

Even if the IDWR had properly applied Idaho Code § 42-1427 in recommending claim numbers 22-13212 and 22-13503, its recommendations are not absolutely definitive of the elements of the claims. Rather, "the 'prima facie' status accorded to the Director's Report in I.C. Section 42-1411(4) constitutes a rebuttable evidentiary presumption." *State v. Hagerman Water Right Owner (In re SRBA Case No. 35976)*, 130 Idaho 736, 745 (1997). The presumption "imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast." Idaho Rule of Evidence 301.

Therefore, even if Idaho Code § 42-1427 was properly applied to claim numbers 22-13212 and 22-13503, the Objectors have presented ample evidence to rebut the recommended priority date and quantity elements, as explained below.

II. UNDISPUTED EVIDENCE ENTITLES THE CLAIMANT TO A WATER RIGHT PRIORITY DATE NO EARLIER THAN JULY 21, 1969.

It is undisputed that the Claimant's property was not irrigated at the time of the Rexburg Decree. The Claimant's property is located up-gradient from Paradise Springs and is physically incapable of being irrigated by means of gravity flow, which was the sole means of irrigating in 1910. (Kunz. Aff., at ¶ 5.) Therefore, it was not until hydraulic pumping became technologically and economically feasible in the latter half of the twentieth century that the Claimant's property was ever irrigated.

In 1983, the Claimant's predecessor in interest, LeRoy Miller, filed a Claim to a Water Right with the IDWR, claiming a priority date of July 21, 1969. (Budge Aff., Ex. C.) LeRoy Miller corroborated his claim by providing electric records from the Fall River Electric

Company. (Budge Aff., Ex. O.) LeRoy Miller's claim of a 1969 priority date is further confirmed by Larry Kunz, who farmed LeRoy Miller's property in 1969 and helped install the pump that year. (Kunz. Aff., at ¶ 4.) Larry Kunz further attests that there was no irrigation of the Claimant's property prior to 1969. *Id.* These documents provide sound evidence that the Claimant's property was not irrigated until 1969.

Nevertheless, in an effort to push his priority date earlier, the Claimant argues that LeRoy Miller did not make a new appropriation in 1969, but that he at that time acquired a portion of water right number 22-405, decreed in the 1910 Rexburg Decree. However, as explained above, the Claimant's property is not located within the decreed place of use of water right number 22-405, and there has never been a formal transfer of the right to the Claimant's property. For the Claimant to have any part of water right number 22-405, he must prove an accomplished transfer of the right, of which there is no competent evidence, as explained below. Further, even if water right number 22-405 were somehow deemed appurtenant to the Claimant's property as of 1910, the right was forfeited long before the Claimant's property came under irrigation in 1969.²

III. THERE IS NO COMPETENT EVIDENCE THAT THE CLAIMANT'S PROPERTY WAS BROUGHT UNDER IRRIGATION BY AN ACCOMPLISHED TRANSFER OF WATER RIGHT 22-405.

Idaho Code § 42-108 allows the elements of a water right to be changed so long as "the water rights of others are not injured by such change" and the water user complies with the requirements of Idaho Code § 42-222. Where an element of a water right was changed prior to the SRBA, but without complying with the requirements of Idaho Code §§ 42-108 and 42-222, the claimant is allowed to claim the changed element under Idaho Code § 42-1425 (the "accomplished transfer" statute) "provided no other water rights are injured thereby, [and] the change does not constitute an enlargement in use of the original right."³ "[C]laimants asserting their claims of 'changed' use bear the ultimate burden of persuasion to prove no injury and no enlargement." *Basin-Wide Issue 4*, at 43.6.

² A water right is forfeited by "a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated." Idaho Code § 42-222(2). A water can be forfeited in whole or in part due to non-use. *In re SRBA, Case Nos 39576, 91-00010 Ex Rel, Partial Forfeiture Re; Basin-Wide Issue 10*, 130 Idaho 727, 733-735 (1997) (partial forfeiture recognized).

³ The requirement that a transfer not injure other water users existed when the Claimant's property first came under irrigation in 1969. *See*, 1945 Idaho Sess. Laws, ch. 63, § 1, p.81 ("provided no one shall be injured by the transfer").

The requirement that a transfer not constitute an enlargement means that the transfer cannot "increase the burden on the stream or reduce the volume of water available to other water users." *Basin-Wide Issue 4*, n.4, at 43.6. This means that an accomplished transfer of the place of use cannot occur without evidence that previously-irrigated acres were taken out of production. In other words, for each acre that is newly irrigated as a result of a transfer, an acre that was previously irrigated must be dried up.

The Claimant argues that the irrigation of his property in 1969 was facilitated by a reduction in irrigated acres under water right number 22-405 when a dam was constructed in the early 1900s. (Mot. for Summ. J. at 4). The Claimant asserts that 25 acres were transferred to his property⁴ from water right number 22-405, yet there were only nine acres irrigated under that right at the time of the Rexburg Decree. (See, Rexburg Decree Transcript, Mot. for Summ. J., Ex. D, at 5.)⁵ Further, the land originally irrigated by John J. Miller was claimed in 1983 by LeRoy Miller, (Budge Aff., Ex. A, at 2), and has already been partially decreed in the SRBA as water right number 22-13211, (Budge Aff., Ex. Q).

The Claimant's argument that water right 22-405 was moved from land north of Paradise Springs to the Claimant's property is further compromised by SRBA claim numbers 22-13586, 22-13853 and 22-13509, which encompass essentially all of the property of John J. Miller located north of Paradise Springs. If in fact 25 acres north of Paradise Springs was transferred to the Claimant's property, the places of use of these other water rights would reflect that, which they do not. Notably, the Claimant has not specifically identified the 25 acres he claims were dried up in 1969. (Mot. for Summ. J. at 4.) Further, LeRoy Miller says nothing of a transfer in the water right claim he filed in 1983. (Budge Aff., Ex. C.) The Claimant's allegation that a transfer occurred in 1969 incredibly requires the Court to assume that LeRoy Miller did not know that a transfer had occurred, or that he did not believe it was important to claim the priority date of the water right being transferred.

Finally, the Claimant's transfer allegation is compromised by the timing of the claimed transfer. The Claimant argues that water right 22-405 was transferred to his property in consequence of a dam being constructed on Paradise Springs. (Mot. for Summ. J. at 4.)

⁴ It should be noted that LeRoy Miller brought 54 acres under irrigation in 1969—more than twice the number of acres the Claimant alleges were transferred. (Cf., Budge Aff., Ex. C.)

⁵ Q: How much of it has he (John J. Miller) actually watered up to this time (1904)?

A: About nine acres....

However, as the Claimant points out, that dam was completed near the turn of the twentieth century, *Id.* at 3, while the Claimant's property was not irrigated until 1969. If there were acres dried up when the dam was constructed in the early 1900s, the water right appurtenant to such land was forfeited long before the Claimant's property became irrigated in 1969.

There is simply no evidence of land being dried up to allow irrigation of the Claimant's property in 1969. In fact, just the opposite occurred. Rather than fewer acres irrigated from Paradise Springs, more acres were coming under irrigation in the 1960s as farmers in the neighborhood began installing sprinkler lines. (*See*, Notice of Claim to Water Right, Budge Aff., Ex. B.) Moreover, even if there was a legitimate basis to claim accomplished transfer, the Claimant's priority date would have to be advanced to July 21, 1969, to prevent injury to the Objectors, since an accomplished transfer is allowed only if "no other water rights existing on the date of the change were injured." Idaho Code § 42-1425.

The history of irrigation of the Claimant's property, and the history of irrigation from Paradise Springs generally, confirms that LeRoy Miller did not transfer water from elsewhere onto the Claimant's property, but that he made a new appropriation in 1969. The reality is that the irrigation of the Claimant's property in 1969 created a new demand on Paradise Springs that did not previously exist. It reduced the volume of water available to other water users, and therefore constitutes a new appropriation that should be awarded a priority date of July 21, 1969.

IV. THE COMBINED RATE OF DIVERSION OF CLAIM NUMBERS 22-13212 AND 22-13503 SHOULD NOT EXCEED 0.59 CUBIC FEET PER SECOND.

SRBA claim numbers 22-13212 and 22-13503 seek a combined rate of diversion of 0.7 cfs, (Budge Aff., Exs. E & G), which is 0.11 cfs more than was appropriated by the Claimant's predecessor in interest, LeRoy Miller. The statutory claim filed by LeRoy Miller in 1983 claimed a right to divert 0.80 cfs for the irrigation of 54 acres, which includes the Claimant's property as well as adjacent property currently owned by LeRoy Miller's son, Don Miller. (Budge Aff., Ex. C.) The IDWR recommended a split of the water right in the SRBA between the Claimant and Don Miller, with the Claimant receiving 0.59 cfs for the irrigation of 35.6 acres under SRBA claim number 22-11639. (Budge Aff., Ex. I.)

Regardless of whether claim numbers 22-13212 and 22-13503 are determined to be offspring of water right number 22-405, they cannot be decreed with a quantity greater than was

actually put to beneficial use by LeRoy Miller. And given that LeRoy's statutory claim was filed in 1983, it must be presumed that no more than 0.59 cfs was diverted from 1969 until that date.

If the Claimant has evidence that more than 0.59 cfs has been diverted since 1983, then the Claimant may be able to prove an enlargement of the right. However, without such evidence, the Claimant is bound by the appropriation that was made by LeRoy Miller. Therefore, the combined rate of diversion between claim numbers 22-13212 and 22-13503 should not exceed 0.59 cfs.

V. THE CLAIMANT'S REQUEST FOR PRIORITY DATE OF MAY 23, 1901, IS BARRED BY THE DOCTRINE OF *RES JUDICATA*.

Finally, the Claimant argues that water right number 22-405 should have received a priority date of May 23, 1901, rather than the June 1, 1904, priority date that was in fact awarded in the Rexburg Decree. Notably, the Claimant submitted the testimony of Samuel Kunz, given in the Rexburg Decree case, stating that John J. Miller first took water from Paradise Springs in 1904. (Mot. for Summ. J., Ex. D, at 5.)⁶ Further, prior decrees are given a presumption of accuracy, "in keeping with the judicial policy of deterring the re-opening of judgments long after cases are decided and the files are closed." *Crow v. Carlson*, 107 Idaho 461, 465 (1984).

In sum, the issue of the priority date awarded to water right number 22-405 in the Rexburg Decree is *res judicata*. Therefore, whatever argument the Claimant wants to make in support of an earlier priority date is simply irrelevant to the adjudication of SRBA claims alleged to be offspring of water right number 22-405.

CONCLUSION

The SRBA is and must be a forum to define water rights as they are, not as claimants wish them to be. Therefore, the Objectors ask this court to deny the Claimant's *Motion for Summary Judgment* and to instead award summary judgment in favor of the Objectors. Specifically, the Objectors ask the Court to issue an order that (1) the IDWR improperly applied Idaho Code § 42-1427 in its recommendation of SRBA claim numbers 22-13212 and 22-13503, and (2) based on undisputed evidence, claim numbers 22-13212 and 22-13503 are duplicative of

⁶ Q: When did [John Miller] first take the water from Paradise Springs upon this land of his?

A: This last season.

Q: 1904?

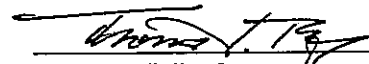
A: Yes sir.

claim number 22-11639 and should be denied, or alternatively, that claim numbers 22-13212, 22-13503, and 22-11639 should be decreed with a priority date of July 21, 1969, and a combined rate of diversion of 0.59 cfs. To award an earlier priority date or greater rate of diversion would be an affront to the fundamental principle that water rights are acquired by actual water use, not theoretical water use.

RESPECTFULLY SUBMITTED.

DATED this 26th day of June, 2009.

RACINE OLSON NYE BUDGE
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Thomas J. Budge

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Rainbow Ranches, Inc., Trees, Inc., Mahogany
Ranch Holdings, and Wally Rothgeb, Jr.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June, 2009, the above and foregoing document was served in the following manner:

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Snake River Basin Adjudication
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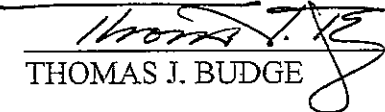
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