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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. **Attachment 1**
)
) **CLAIMANTS' JOINT**
) **RESPONSE TO MLWU'S**
) **MOTION FOR SUMMARY**
) **JUDGMENT**
)
)

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company, Claimants in the above-

referenced subcases (collectively referred to as “SWC”), by and through counsel of record, and pursuant to I.R.C.P. 56(c), hereby submit this *Joint Response to MLWU’s Motion for Summary Judgment*. This response is supplemented by the Claimants’ joint motions for summary judgment and the accompanying materials in support of those motions filed with the Court on August 22, 2008 and June 25, 2009 respectively, and the Claimants’ *Response to Ground Water Districts’ August 22, 2008 Motion for Summary Judgment* and *Response to Ground Water Districts’ Motion for Summary Judgment on Priority Dates* which are incorporated by reference as if set forth in full herein. This response is also supported by the *Third Affidavit of Travis L. Thompson* and the *Affidavit of David B. Shaw and Norman C. Young* filed together herewith.

For the reasons set forth below, MLWU’s motion for summary judgment should be denied in all respects.

I. FACTS IN DISPUTE

MLWU has asked this court to find that several proposed facts are undisputed. *See MLWU Memorandum in Support of Motion for Summary Judgment*, pp. 4-5. SWC responds to those proposed facts as follows:

1. No dispute.
2. No dispute.
3. No dispute. To the extent the Water District has records of the diversion and use of the water rights the Claimants do not dispute those. However, there have been times when water in the river has not been regulated and no records have been kept by the district. Accordingly, those records would not reflect the water rights diverted and used during those times in those particular years.
4. No dispute.
5. **Dispute.** The rights listed in MLWU’s Exhibit B were not decreed with any limitations or conditions as to any “flood water nature”.

6. **Dispute.** While MLWU's exhibits clearly reference "flood water" rights several times, there was no "universal understanding" that the water rights set forth in the *Eagle Decree* with a priority date of April 1, 1939, were any different than any other irrigation water right.
7. No dispute.
8. **Dispute.** The delivery of water rights on the Snake River below Blackfoot varies by year. Water rights 1-209 and 1-210 are not the only rights in priority after "sometime in June or early July" every year. *See Shaw Aff.*
9. No dispute.
10. No dispute.

II. ARGUMENT

The thrust of MLWU's argument is that the water rights listed on its Exhibits A, B and C must be clarified as "flood water" rights. As for the water rights and claims set forth on Exhibits B and C, (which are also encompassed by MLWU's Exhibit A), MLWU's argument is simply that the parties to the *Eagle Decree* intended these rights to be "flood water" rights and they must be subordinated to ground water rights that are junior in priority. This argument fails for several reasons. First, unless the Court determines it to be ambiguous, the intent of the *Eagle Decree* must be gleaned only from the words of the Decree itself. Additionally, MLWU's attempt to create an inferior subclass of water rights (i.e. "flood water rights") has no basis in Idaho law, is contrary to Idaho's system of prior appropriation, and in fact would subject every water right that has been decreed in the SRBA to the re-litigation of the issue of source and/or sub-source and the period of use. Finally, MLWU is seeking to collaterally raise an argument that was already rejected by the Director.

A. MLWU HAS BROUGHT FORTH NO ADMISSIBLE EVIDENCE THAT COULD REBUT THE NATURE AND EXTENT OF THE WATER RIGHTS CONTAINED IN THE DIRECTOR'S REPORT.

Under Idaho law the Director's report constitutes prima facie evidence of the nature and

extent of the water rights acquired under state law. I.C. § 42-1411(4). The “prima facie” status accorded the Director’s report constitutes an evidentiary presumption that imposes on the party against whom it is directed the burden of producing admissible evidence to rebut that presumption. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-746, 947 P.2d 409, 418 (1997); I.R.E. 301. If rebutted, for example by way of affidavit, the facts contained within the affidavit merely create triable issues of fact. *Hagerman Water Right Owners, Inc.*, 130 Idaho at 746. Triable issues of fact preclude the granting of summary judgment. See I.R.C.P. 56(c).

As discussed below, MLWU has presented no admissible evidence that would allow a granting of summary judgment in their favor. Additionally, if their exhibits are to be considered by this Court, they would only create a triable issue of fact.

1. THE *EAGLE DECREE* MUST BE INTERPRETED FROM ITS PLAIN LANGUAGE.

MLWU has asserted that the Director’s recommendation with respect to the Claimant’s call must include a remark (or other mechanism) indicating that the water rights with an April 1, 1939, priority date are “flood water” rights. In support of this assertion, MLWU has offered some 36 exhibits that purport to demonstrate that this was intended by the *Eagle Decree*. However, in arriving at the “meaning” of the *Eagle Decree*, these exhibits are inadmissible and of no value, since the *Eagle Decree* must be interpreted from its four corners.

A decree is the same as a judgment or a court order. See *Ballentine’s Law Dictionary*, 3rd Ed. p. 336 (1969). It is well established that the rules of construction that apply to contracts also apply to court orders and decrees. *Sun Valley Ranches, Inc. v. Prairie Power Cooperative, Inc.*, 124 Idaho 125, 131, 856 P.2d 1292, 1298 (Ct. App. 1993); *Suchan v. Suchan*, 113 Idaho 102, 106, 741 P.2d 1289, 1294 (1986). In interpreting a contract (or decree) the intent of the parties

must be determined from the plain meaning of its words unless the contract is determined to be ambiguous. *Swanson v. Beco Construction Co., Inc.*, 145 Idaho 59, 63, 175 P.3d 748, 753 (2007).

If the language used by the parties is plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and from that language alone, no matter what the actual or secret intentions of the parties may have been. Presumptively, the intent of the parties to a contract is expressed by the natural and ordinary meaning of their language referable to it, and such meaning cannot be perverted or destroyed by the courts through construction, for the parties are presumed to have intended what the terms clearly state. Only when the language of the contract is ambiguous may the court turn to extrinsic evidence of the contracting parties' intent.

Id. citing with approval *17A Am.Jur.2d, Contracts*, § 348 (2004). Therefore, just like a contract, a decree must be interpreted from its plain language unless it is found to be ambiguous.

In this case, the language of the *Eagle Decree* is clear and unambiguous. See Ex. A. to *Affidavit of Travis L. Thompson* (filed August 22, 2008, in support of the SWC's *Joint Motion for Summary Judgment*). The decree clearly describes the elements of each of the water rights contained within. See *id.* This description includes the nature of use, which is "for irrigation and other purposes," *Id.* at p. 1, 7, as well as the points of diversion and lands to which appurtenant. Additionally, the nature of use helps to define the period of use. Although the prior decrees or licenses (with the exception of 1-2061), including the water rights listed in the *Eagle Decree* did not identify a specific beginning and ending date that is now required¹ for the "irrigation season", the rights were decreed for "irrigation and other purposes", hence the period of use was determined since water could be put to beneficial use for "irrigation and other purposes" as determined by the water right holder.

Accordingly, contrary to the suggestion of MLWU's motion, the nature and period of use

¹ See *A&B Irrigation Dist. V. Idaho Conservation League*, 131 Idaho 411 (1998).

were adequately defined in the *Eagle Decree*, therefore these so-called “omissions” cannot be used as a springboard for MLWU’s argument that the flood water nature of these rights must be evidenced. Compare *MLWU Memo* at 16.

Furthermore, MLWU has not even argued that the decree is ambiguous. Instead, they seek to avoid the longstanding principles of contract and decree interpretation in order to put the words “flood water” before this Court as many times as possible. However, in the absence of actual ambiguity, there is simply no room to even consider MLWU’s Exhibits when determining the meaning of the *Eagle Decree*.

2. MLWU’S EXHIBITS CREATE AN ISSUE OF MATERIAL FACT THAT PRECLUDES A GRANTING OF SUMMARY JUDGMENT IN THEIR FAVOR.

Even if this Court finds that the Decree is ambiguous, such a finding would be fatal to MLWU’s motion for summary judgment. Like a contract, when a decree is ambiguous, its interpretation presents a question of fact. See *Arraguin v. Farmers Ins. Co.*, 145 Idaho 459, 180 P. 3d. 498 (2008); *Sun Valley Ranches, Inc.*, 124 Idaho at 131, 856 P.2d at 1298.

Therefore, if this Court gave credence to MLWU’s exhibits, the exhibits at best could only create an issue of material fact. Since issues of material fact preclude the granting of summary judgment, I.R.C.P. 56(c), MLWU’s motion should be denied under this circumstance as well.

For these reasons, the Claimants respectfully ask the Court to conclude that the *Eagle Decree* is not ambiguous and therefore extrinsic evidence may not be used to change, add to, or, determine its meaning. See *Swanson*, 145 Idaho at 63, 175 P.3d at 753. Accordingly, the *Eagle Decree* cannot be used as a basis to add a remark to the Director’s report indicating the so-called “flood water” nature of the water rights and licenses at issue or otherwise indicate that the these water rights are inferior in nature to any other water right.

Interestingly, MLWU seems to argue that the members of the SWC made a “deal” or a contract which subordinated the water rights at issue. See MLWU Memo at 15, 16. This argument is made despite the fact that MLWU admits that the “flood water” nature of the right was not one of the water right elements listed in the decree. *Id.* Additionally, this argument requires the gigantic inferential leap between the words “flood water rights” and MLWU’s conclusion that these rights were always intended to be inferior, based on the source of water molecules, to other water rights.

Besides being unsupportable by Idaho law, this argument is not supported by the facts. The stipulation that led to the Eagle Decree did not limit the water rights therein to either particular periods of use or to particular water molecules that the holders of the water rights were entitled to divert and use. Instead, the stipulation regulated the water rights by priority, meaning that junior rights are curtailed when there is not enough water to satisfy all the water rights on the river. However, the stipulation does not reflect an intent to create an “inferior” water right or to create an irrigation right would be restricted to a shortened season of use.

B. MLWU’S MOTION FOR SUMMARY JUDGMENT ATTEMPTS TO DEFINE WATER RIGHTS IN A MANNER THAT IS CONTRARY TO IDAHO LAW.

Even if MLWU’s several exhibits could be considered when evaluating the director’s recommendation and/or the *Eagle Decree* itself, MLWU’s attempt to label the rights listed encompassed by their exhibit A as “flood water rights” is contrary to Idaho law and would undermine the longstanding rule of “first in time, first in right.”

The cornerstone of water law in Idaho is the principle that the first to appropriate water and put it to beneficial use has a superior right over subsequent appropriators. Idaho Const. art. XV, § 5; I.C. § 42-106; *Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007). This principle is central

to Idaho's system of administering water rights. At its essence, MLWU's motion attempts to create an inferior subclass of water rights; if successful, the practical result would deny certain surface water users their statutory and constitutional right to curtail water use by interfering junior water users, be those surface or ground water rights.

MLWU argues that certain SWC water rights decreed in the *Eagle Decree* case should now have a clarifying remark, condition, notation or a shortened season of use because they were referenced as "so-called flood water rights" in the *Stipulation* entered into between the parties in that proceeding. The desired result of this argument is to prevent the SWC from making a delivery call against junior water rights. In MLWU's brief it is argued that "an unlawful elevation in status to a non-flood water right status would allow the Surface Water Coalition to wield these water rights..." This statement finds no support in Idaho case law or statute, and if this proposition is accepted by this Court, it would undermine Idaho's system of prior appropriation.

Moreover, the available facts do not support MLWU's proposition. During his deposition, Anthony Olenichak testified that any water right besides the most senior rights could be considered a "high water right." See *Transcript of Deposition of Anthony Olenichak* taken October 6, 2008 (hereinafter Olenichak Depo.) pp. 46-49. Ex. D to *Third Thompson Aff.*

Q. Are you aware that on the second page of your affidavit that you identified "high water rights" on the Snake River? Do you recall that?

A. I recall a definition of "high water rights," yes.

Q. Okay. And I believe it's paragraph 8. I'm handing you the second page of your affidavit. Does that look like the definition you identified for the high-flow rights?

A. Yes.

Q. My question, Tony, would be that in accordance with that definition, wouldn't every right that is senior (junior) to the most senior right on a particular source be high flow if the senior right is the only one that's being met?

A. Yes.

Q. Okay. So for example, at least with respect to those rights that are delivered above Blackfoot, would it be true that Aberdeen-Springfield with the 1895 right would be essentially a high-flow right in comparison to those other rights above it on the Snake River?

A. Yes, some people would think that would be a high-water. It depends on perspective. It depends on the canal. It depends upon the comparative rights in the base discipline.

Olenichak Depo. pp. 46-48. Mr. Olenichak went on to articulate that in some circumstances, for example on Willow Creek, any right that is junior to an 1885 priority would be considered a high water right. *Id.* at 48.

Therefore, the fact that the water rights at issue can be termed as high water or "flood water" rights in laymen's terms does not support MLWU's assertion that such rights require a remark, condition or shortened season of use to demonstrate that they are somehow inferior as a matter of law. If that were the case, all water rights except the most senior rights would require the same treatment.

Furthermore, and as discussed in great detail in SWC's other summary judgment memoranda, the source of the water for the rights encompassed in MLWU's exhibit A has already been decreed as the Snake River. It is absurd to argue that the waters of the Snake River must be further divided and a hierarchy created based on the source of the molecules when it is settled law that an adjudication of a main source like the Snake River also encompasses its tributary sources. *See Schaub v. Dist. Court of Fifth Jud. Dist.*, 96 Idaho 924, 926 (1975). However, this is the argument put forth by MLWU. *See MLWU Memorandum in Support of Motion for Summary Judgment*, p. 18.

Moreover, there is no need to evidence, as MLWU requests, the flood water nature of the rights encompassed by their Exhibit A. The system of prior appropriation adequately addresses this concern. Although a junior priority right to the Snake River, like the 1939 water rights decreed in the *Eagle Decree* case may not be available for use throughout the entire irrigation season due to water supply conditions and distribution of water to senior rights, that does not mean the 1939 water rights should be limited or conditioned in a way to prevent that use.

C. WATER RIGHTS 1-2050 AND 1-2061 ARE LICENSED RIGHTS AND MLWU HAS NO BASIS TO NOW ATTACK THOSE IN THE SRBA.

MLWU cannot collaterally attack water rights 1-2050 and 1-2061. These water rights were previously licensed by IDWR. *See* Ex. G to *Thompson Aff.* (filed August 22, 2008). Pursuant to Idaho law and the law of the case in the SRBA, once licensed, the nature and extent of these rights cannot be challenged. *See* I.C. § 42-220; *Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue* (subcases 36-02708 *et al.*) (Dec. 29, 1999); *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law* (subcase no. 29-11609) (Oct. 6, 2006). This is so because the “the binding effect of a license extends beyond the parties to the administrative proceeding and their privies.” *Memorandum Decision* at 13 (subcase no. 29-11609).

For this reason, MLWU is bound to accept the nature and extent of the previously licensed water rights 1-2050 and 1-2061. It cannot collaterally attack that license in the SRBA. Therefore, MLWU’s motion for summary judgment as to water rights 1-2050 and 1-2061 fails as a matter of law.

D. MLWU'S ARGUMENT IN FAVOR OF A SHORTENED SEASON OF USE FAILS AS A MATTER OF LAW.

MLWU and others have argued that the “flood water” nature of these rights (listed on MLWU’s Exhibit A) must be evidenced and that this can be accomplished through a shortened irrigation season of use. Pursuant to Idaho Code § 42-1411, the Director is required to prepare a report with specific elements of a water right, including “the period of the year when water is used for such purposes.” I.C. § 42-1411(2)(g). For “irrigation” water rights, IDWR prepared an administrator’s memorandum, Adjudication Memo #39 (“*Memo #39*”), that describes the standards used for the “season of use” to recommend for water rights in various locations across the basin. *See Ex. C to Second Thompson Aff.* IDWR explains in *Memo #39* as follows:

A new 1:1,000,000 scale map of the “Irrigation Season of Use” (map at the end of the memo) presents a new standard for use in water right adjudication and water right licenses, permits, and transfers. A reduced reproduction of the map is attached to the memo; the reduced reproduction is for illustrative purpose only. The official version of the map is in digital form and can be accessed by contacting the Adjudication Bureau. A full-size copy of the map is available in the SRBA map case.

The purpose of these maps is to provide consistent standards in a simple format. . . .

The standard season from the new map is to be used for recommendations in the SRBA as described in the Claim Investigation Handbook.

Memo #39 at 1, 2. *Ex. C to Second Thompson Aff.*

All SWC irrigation water rights in this proceeding were recommended with the standard “3/15 to 11/15” season of use, pursuant to the area as defined in the *Memo #39* map.² Accordingly, IDWR followed the prescribed standard procedure when issuing the water right recommendations. Pursuant to Idaho law, IDWR’s recommendation is presumed to be correct. *See Idaho Code § 42-1411(4).*

² Except Falls Irrigation District’s water right 1-13, which includes a season of use of 4/1 to 10/31. This is the standard season provided by IDWR’s *Memo #39*. FID is entitled to a 4/1 to 10/31 season of use as a matter of law.

Whereas the SWC water rights were previously licensed or decreed without a defined irrigation “season of use”, IDWR recommended the standard season consistent with *Memo #39* and the Idaho Supreme Court’s decision in *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411 (1998). On rehearing in *A&B*, the Idaho Supreme Court held that the period of use for water rights decreed in the SRBA must be identified by specific dates, rather than simply being identified as “irrigation season”. 131 Idaho at 424.

MLWU and others now argue that the “flood water” nature of these water rights (listed on MLWU’s Exhibit A) must be evidenced and they suggest that this can be accomplished through a shortened irrigation season of use. This argument is analogous to GWD’s objections to the recommended season of use element for the SWC water rights wherein GWD stated that it “should be limited to the high-flow period only, ending in late June or early July”. See generally, *GWD Amended Objections*. Just like GWD’s objections, MLWU’s argument fails as a matter of law under the Idaho Supreme Court’s decision in *A&B*.

First, in *A&B*, the Supreme Court initially agreed with the SRBA District Court and affirmed the “irrigation season” as the proper “season of use” for the water rights at issue in that case. 131 Idaho at 415. However, on rehearing, the Court withdrew that portion of its opinion and held that “each irrigator’s water right shall be decreed with a specific period of use setting for the beginning date and an ending date, as previously adhered to by the IDWR.” *Id.* at 424. On October 12, 1999 IDWR issued *Memo #39* shortly after the Court’s decision in *A&B*.

MLWU has simply suggested that the Court mandate a “shortened season of use”, without further defining what that season might be. This argument fails as a matter of law since it violates the standard set forth by the Idaho Supreme Court in *A&B*. Just as the “irrigation season” is now insufficient to define the water right, so is the suggestion of a “shortened season

of use”. Whereas IDWR has defined a specific beginning date and ending date pursuant to its standard procedures and the requirement stated in *A&B*, MLWU’s argument does not and therefore it fails as a matter of law.

Finally, MLWU’s argument in favor of a shortened season of use is not supported factually. If for example, a senior water right is not diverting water, then that water may be available for a junior right. Therefore, the water rights listed on MLWU’s Exhibit A could have water available to them in the fall months of the irrigation season. See e.g. *Olenichak Depo.* p. 62. *Ex. D to Third Thompson Aff.*; see also, *Claimants’ Joint Response to Ground Water Districts’ August 22, 2008 Motion for Summary Judgment* at 17-21.

E. THERE IS NO BASIS TO DECREE THE SWC WATER RIGHTS AS “FLOOD WATER”RIGHTS.

Finally, MLWU argues that the SWC water rights should be decreed as “flood water” rights since they do not receive water for “an entire irrigation season”. While the delivery of water to the SWC water rights varies by year and water conditions, receiving water for an “entire irrigation season” is not a criteria to classify an irrigation water right. Stated another way, MWLU, like the Ground Water Districts, attempts to create a new standard for irrigation water rights that is not supported by Idaho law. Moreover, the fact as to each SWC water right are unique, and plainly demonstrate that they do receive water throughout varying periods during the irrigation season, not just until “June or early July”. See *Claimants’ Joint Response to Ground Water Districts’ August 22, 2008 Motion for Summary Judgment* at 17-21; *Shaw Affidavit, Young Affidavit*.

In addition, MWLU wrongly claims that the “Water District classifies water rights with priorities after October 11, 1900 as ‘high water’ or ‘flood water’ rights”. *MLWU Memo* at 20. No such condition is used in administration of water rights in Water District 01. Lyle Swank, the

Watermaster, and Tony Olenichak, the Program Manager both provided testimony that a “high water” right designation is not used in administration. Mr. Swank explained as follows:

Q. [BY MR. SIMPSON]: Well, my question goes to you as the watermaster in carrying out your responsibilities to deliver water: From that delivery-of-water perspective, if the water is in the river in its natural flow and a particular right is in priority, to you as watermaster does it matter or is it necessary for you to know whether the water arrived at that point in the river from snowmelt or subsurface flows or return flows to the river or precipitation, or is it simply that that water is there at the point of diversion and that right is in priority and it’s your job to deliver it to the right holder?

A. [BY MR. SWANK]: Yeah, our job is to make sure that water is available at that point of diversion, regardless of how it got there, other than natural flow and storage being split out.

Q. Okay. So it’s not necessary for you in carrying out your duties to necessarily know how that water arrived at that point in the river in terms of whether its origin is from snowmelt or return flows or subsurface flows; correct?

A. That’s correct. We just deliver water based upon the available supplies.

Swank Depo. Tr. p. 13, ln. 19 – p. 14, ln. 17. Ex. E to *Third Thompson Aff.*

Similarly, Mr. Olenichak confirmed Water District 01’s practice for distributing water to the SWC’s Snake River rights:

Q. [BY MR. FLETCHER]: So you don’t have any history or any records showing what is making up this water that’s in the Snake River, whether it’s snowpack or whether it’s rain or whether it’s springs or what it is?

A. [BY MR. OLENICHAK]: No, we don’t make that determination.

* * *

Q. And so as you administer this water right, any of these water rights that are at issue in this case, as someone that’s one the firing line on the administration end, are you trying to make a distinction of what the source of water is that’s in the Snake River at the time those water rights are being diverted?

A. No. We simply each day calculate the reach gains in the river and divide the water up according to priority. Fill the senior rights first and then the junior rights after the senior rights are filled.

Olenichak Depo. Tr. p. 65, ln. 23 – p. 66, ln. 22. Ex. D to *Third Thompson Aff.*

Mr. Olenichak further clarified the testimony in his affidavit and confirmed that trying to segregate the various water supplies that make up the Snake River is not relevant for administration:

Q. [BY MR. ARKOOSH]: But the – the river or the diversion structure doesn't know where the molecules of water comes from and doesn't segregate the molecules of water, does it?

A. [BY MR. OLENICHAK]: No.

Q. And the accounting program doesn't know and doesn't segregate molecules of water?

A. It only segregates natural flow in storage.

Q. Okay. So you've come to the conclusion in paragraph 10 based upon empirical observation?

A. Yes.

Q. Okay. And what happens in paragraph 10 has absolutely nothing to do with administration of water?

A. That's correct.

Olenichak Depo. Tr. p. 97, ln. 22 – p. 98, ln. 13. Ex. D to *Third Thompson Aff.*

Finally, Mr. Olenichak also testified that he did not consider water rights with priorities of 1916 or earlier to be "high water" rights:

Q. [BY MR. FLETCHER]: Do you consider the 1903 right a high-water right under your definition?

A. [BY MR. OLENICHAK]: I would not.

* * *

Q. Okay. SO when you're talking about high-water rights in this affidavit, you're talking about water rights with priority dates of 1916 and after?

A. Well, specifically, the water rights listed in paragraph 12 is what I was referring to. And I believe they are all junior to 1916.

Olenichak Depo. Tr. p. 71, ln. 24 – p. 25, ln. 5.

Therefore, MWLU's argument is not even supported by Water District 01 staff, let alone represent the official position of the district. As testified to at their depositions, Mr. Swank and Mr. Olenichak confirmed they distribute water by priority based upon the available not supply. *See Claimants' Joint Response to Ground Water Districts' August 22, 2008 Motion for Summary Judgment* at 22-25.

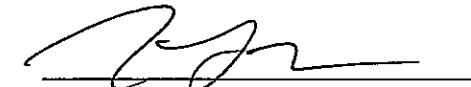
In summary, the SWC water rights are not limited or conditioned in the manner MLWU seeks. The SWC water rights have been administered by priority and are available at varying times of the year depending upon the available supply. No limitation is warranted that would preclude their future administration as against other junior surface or ground water rights in the basin.

III. CONCLUSION

The terms of the *Eagle Decree* are clear and unambiguous. Accordingly, MLWU's effort to condition or re-define the SWC water rights fails as a matter of law. The Court should deny MLWU's motion.

DATED this 29th day of July, 2009.

CAPITOL LAW GROUP PLLC



Roger D. Ling

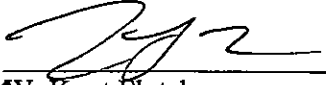
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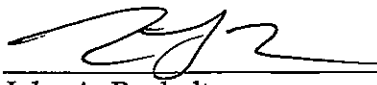
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2009, I served a true and correct copy of the foregoing *Claimants' Response to Ground Water District's First Motion for Summary Judgment* on the following by the method indicated:

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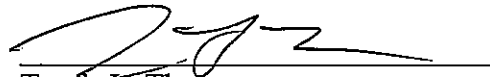
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Travis L. Thompson

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