

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

RECEIVED

JUL 31 2009

DEPARTMENT OF
WATER RESOURCES

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company and Twin Falls
Canal Company*

**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**
)

) **AFFIDAVIT OF DAVID B. SHAW**
) **IN SUPPORT OF CLAIMANTS'**
) **JOINT RESPONSES TO**
) **SUMMARY JUDGMENT**
) **MOTIONS**
)
)

STATE OF IDAHO)

) ss.

County of Ada)

DAVID B. SHAW, being first duly sworn upon oath, deposes and hereby states as follows:

1. My name is David B. Shaw, and my work address is ERO Resources Corporation, 3314 Grace Street, Boise, ID 83703-5836. My telephone number is 208-373-7983.

AFFIDAVIT OF DAVID B. SHAW

1

2. My educational background includes bachelor of science and master of science degrees in Agricultural Engineering from the University of Idaho in 1966 and 1972, respectively. I am a registered professional engineer in the States of Idaho, Arizona, Oregon and Colorado, and a registered professional land surveyor in the State of Idaho. I continue to attend seminars and short courses in the areas of water law, water rights and applicable technology. I have made numerous presentations at seminars covering water law and water right issues, most often regarding some aspect of water right adjudication.

3. My work experience includes five years of teaching at the University of Idaho in the College of Engineering from 1968 to 1973. I was with the Idaho Department of Water Resources (department) and its predecessor agencies from November 1973 until July 1996. With the department, I served in a number of technical and administrative positions including Regional Supervisor for the department's western region from 1978 to 1985 and Adjudication Bureau Chief from 1985 to 1996. As Adjudication Bureau Chief I was responsible for all the department's obligations in the Snake River Basin Adjudication of water rights (SRBA). The SRBA is an adjudication of all water rights in the Snake River basin in Idaho and includes about 150,000 claims to water rights. The department's obligations included serving notice of the SRBA to all potential water users, assisting claimants file their claims to water rights, investigating each state law based claim and making a recommendation as to each state law based claim to the SRBA Court. If a recommendation was protested (contested) the department was obligated to put on the evidence to justify its recommendation. My experience with the department includes successfully managing the SRBA for 11 years and resolving a variety of water right, water supply and water distribution situations.

4. Since July 1996 I have been employed by ERO Resources Corporation (ERO) providing consulting services to clients in the areas of water rights, water right adjudication, and water distribution and management. In January 2003 I became a Principal of ERO, one of 11 employee owners of the firm. ERO is a natural resources consulting firm based in Denver, Colorado with satellite offices in Boise, Idaho, and Durango and Hotchkiss, Colorado. ERO has a long history of, among other services, providing expertise to clients in water resource matters around the West.

5. I was a member of the technical team that prepared the expert report for the Surface Water Coalition (SWC) filed in the SWC Delivery Call: *In the Matter of Distribution of Water*

to Various Rights Held by or for the Benefits of A & B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. As a part of that effort and others, including preparation of this Affidavit, I have become familiar with, examined, and extracted data from the Water District 01 (formerly Water District 36) water distribution records for the Upper Snake River basin.

6. An examination of the water distribution records for water right 01-211 for Burley and Minidoka Irrigation Districts (This water right is recommended as water rights 01-211A and 01-211B to reflect the separate ownerships of portions of the right but the common priority date still applies and is the relevant element for this inquiry.) for the period 1968 through 2007 show this water right priority of March 26, 1903 is on and receiving water deliveries until July 18 and is once again on by September 10 of each year, on average. In some years the priority of this water right is good and the right receives water throughout the entire irrigation season. A further examination of these records shows that for the period of 1968 through 1979 the right was good until July 24 and was on again on September 4 of each year, on average, disregarding years it was on all year but including the drought year of 1977. An examination of the period 1980 through 2007, notwithstanding the high flow years of the early 80s and mid to late 90s, the right was on until July 16 and was not again available until September 12, on average, or 16 days less, on average, than during the earlier period from 1968 through 1979. The fact that this right is always available late in the irrigation season after the spring freshet and that it shows a marked response to reduced reach gains downstream from the confluence of the Snake River and Blackfoot River show the right does not rely entirely upon spring runoff and snow melt.

7. A similar analysis with similar conclusions was completed for water right 01-212 for North Side Canal Company with a priority date of October 7, 1905. For the period 1968 through 2002 the water right was on until July 12 and was again available on September 25, on average. For the earlier period from 1968 through 1979 the right was good until July 16 and was again available on September 19, on average. For the later period from 1980 through 2002 the right was good until July 11 and again available on September 28, on average, or 13 days less, on average, than during the earlier period from 1968 through 1979.

8. The Milner Irrigation District water right 01-17 with a priority of November 14, 1916 was analyzed using the same procedure. For the period 1968 through 2007 this right was

available until June 27 and was again available on October 6, on average. For the period 1968 through 1979 the right was available until July 6 and was again available on September 27, on average. During the later period from 1980 through 2007 the right was available from June 23 and was again available on October 10, on average, a period 25 days shorter, on average, than the right was available from 1968 through 1979. During the later period the date the right becomes available is often later than the date the District stops making deliveries. Even though the District enjoyed the late season benefits of this water right in the past the right has generally not been available for delivery late in the season in recent years probably due to reduced reach gains to the Snake River downstream from the confluence with the Blackfoot River.

9. The American Falls Reservoir District #2 water right 01-6 with a priority date of March 30, 1921 was analyzed using the same procedure. For the period 1968 through 2007 this right was available from June 16 and was again available on October 13, on average. For the period 1968 through 1979 this right was available until July 1 and was again available on September 27, on average. For the later period from 1980 through 2007 the right has been available until June 9 and is again available on October 19, on average, or 44 days less, on average, than during the earlier period. Even though this water right is junior to the Milner Irrigation District water right, AFRD #2 typically makes water deliveries later in the year than Milner and does benefit from the water right late in the season in most years. The reduced availability of this water right during recent years is probably due to reduced reach gains as those reduced reach gains directly effect both the water available for this water right and the refill of American Falls Reservoir.

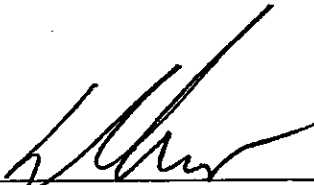
10. A & B Irrigation District's water right 01-14 with a priority date of April 1, 1939 was analyzed using the same procedure. For the period 1968 through 2007 this right was available until June 5 and was again available on October 16, on average. For the period 1968 through 1979 this right was available until June 14 and was again available on October 4, on average. For the later period from 1980 through 2007 this right has been available until June 1 and was again available on October 22, on average, or 32 days less, on average, than during the earlier period. As with Milner Irrigation District, in recent times this water right is usually not available for late season use until after the District has stopped making deliveries. The reduced availability of this right in recent times is probably due to reduced reach gains to the Snake River downstream from its confluence with the Blackfoot River.

11. Prior to 1978 the Water District 01 records did not record all diversions of water but rather began the record when the river went on regulation. Water diverted under what later became the "1939 Eagle Decree" water rights (39 rights) could have been diverted and used, but not recorded, because the Watermaster was not yet recording water diversions. Evidence the various irrigation systems had capacity to divert more water than available under their earlier water rights, except for A & B Irrigation District, indicates they could use water under the 39 rights even if that use was not recorded by the Watermaster. The table below shows when system capacity became available and the first recorded use of water pursuant to water rights numbered 01-7, 01-8, 01-9, 01-10 and 01-14 based upon the records of Water District 01.

WATER RIGHT NUMBER	AVAILABLE CAPACITY	FIRST USE
01-7	1931	1936
01-8	1931	1936
01-9	1928	1928
01-10	Prior to 1919	1927
01-14	1957	1957

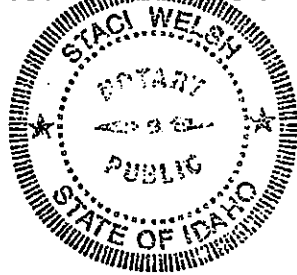
12. In my experience, both as SRBA Bureau Chief when I worked for IDWR, and as a private consultant that has reviewed water rights all over the state, I have never seen any water rights of record with IDWR or with the SRBA Court listing the source of water as "high flows, flood flows, spring runoff or snow melt" when the water right was diverted from a named watercourse, such as in this case the "Snake River." In my opinion, such a designation would be confusing and/or meaningless since the priority date of the water right still controls when water is available for diversion in administration of that water right and such a source designation would not entitle junior priority water rights to interfere with any water supply for a more senior water right.

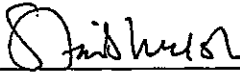
Dated this 29 day of July, 2009



David B. Shaw

SUBSCRIBED AND SWORN to before me this 29th day of July, 2009





NOTARY PUBLIC FOR Idaho
Residing at: Menden
My Commission Expires: 2/3/2011

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2009, I served a true and correct copy of the foregoing *Affidavit of David B. Shaw in Support of Claimants' Joint Responses to Summary Judgment Motions* on the following by the method indicated:

Clerk of the SRBA Court
253 Third Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Natural Resources Division Chief
State of Idaho
Attorney General's Office
P.O. Box 44449
Boise, Idaho 83711-4449

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort St., MSC 033
Boise, Idaho 83724

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

IDWR Repository
P.O. Box 83720
Boise, Idaho 83720-0098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Jerry Rigby
25 N. 2nd E.
P.O. Box 250
Rexburg, Idaho 83440-0250

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Robert Harris
1000 Riverwalk Dr., Suite 200
P.O. Box 50130
Idaho Falls, Idaho 83405

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Randy C. Budge
Candice M. McHugh
Racine Olson
101 S. Capitol Blvd, Suite 208
Boise, Idaho 83702

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Craig Hobdey
125 5th Ave.
P.O. Box 176
Gooding, Idaho 83330

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Sarah A. Klahn
White & Jankowski, LLP
Kittredge Building
511 16th St., Suite 500
Denver, CO 80202

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, Idaho 83201

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

William A. Parsons
137 W. 13th St.
P.O. Box 910
Burley, Idaho 83318

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Adam T. Devoe
James S. Lochhead
Brownstein, Hyatt & Farber, PC
410 17th Street, 22nd Flr.
Denver, CO 80202

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Josephine P. Beeman
409 W. Jefferson St.
Boise, Idaho 83702

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Patrick D. Brown
Hutchinson & Brown, LLP
104 Lincoln St.
P.O. Box 207
Twin Falls, Idaho 83303-0207

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

H. Evan Call
4373 Cold Water Rd.
American Falls, Idaho 83211

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Bret Anderson
Robyn Anderson
322 E. Main
Burley, Idaho 83318

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email



Travis L. Thompson

Attachment 1

1-4
1-5
1-6
1-7
1-8
1-9
1-10
1-13
1-14
1-16
1-209
1-210
1-211A
1-211B
1-212
1-213
1-214A
1-214B
1-219
1-2050
1-2061
1-10225
1-10034
1-10237
1-10238
1-10239
1-10240
1-10241
1-10482