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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 RESPONSE TO CLAIMANTS'
SECOND JOINT 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 Response to the Surface
Water Coalition's Joint Motions for Summary Judgment regarding the adjudication of certain flood
water rights on the Snake River.

I. INTRODUCTION

On May 15, 2006, the Director filed his recommendations for the above-listed water rights with this Court. On October 4, 2006, multiple objections to these water rights were filed. Joint Motions for Summary Judgment were filed by the Ground Water Districts and the Surface Water Coalition (hereinafter “SWC”). After hearing a Petition to Amend the objections, a stay was issued on the previously filed Motions for Summary Judgment. In compliance with the *Stipulation Regarding Summary Judgment Briefing Schedule* entered into by the parties and filed with the Court on June 3, 2009, multiple additional Summary Judgment Motions were filed on June 24 and 25, 2009 by the Surface Water Coalition, Ground Water Districts, Mud Lake Water Users, and Fremont-Madison Irrigation District. Mud Lake Water Users submit this Response to the Surface Water Coalition’s Joint Motions for Summary Judgment filed on August 22, 2008 and June 25, 2009.

As set forth below, their Joint Motions for Summary Judgment should be denied.

II. ARGUMENT

A. The Water Rights at Issue Have Been Previously Decreed and Recognized as Flood Water Rights.

In their first Memorandum in Support of their Joint Motion for Summary Judgment, SWC erroneously asserts that MLWU “seek to legally halt [the hydrologic cycle] and cut-off several sources of water supply to the Claimants’ Snake River water rights [by] alleging that the source element of the SWC water rights should be qualified or changed from the ‘Snake River’ to ‘high surface water runoff from snow melt or rain’.”¹ This is a mischaracterization of MLWU’s argument.

MLWU does not dispute the fact that the river channel from which the SWC water rights are diverted is the Snake River. As defined in the Idaho Department of Water Resources’ Beneficial Use

¹Claimants’ Memorandum in Support of Joint Motion for Summary Judgment, p. 3 (August 22, 2008).

Examination Rules, “source” is the “name of the water body at the point of diversion. Examples are Snake River, Smith Creek, ground water, spring, etc.”² Clearly, the name of the water body at SWC points of diversion is the Snake River. However, in order to accurately record these water rights as they were previously decreed and historically used, the unmistakable flood water nature of these rights must somehow be reflected on the right further describing the source of water as flood water in the Snake River.

While not directly listed as one of the general seven elements of a water right in the water rights listing in the Eagle Decree,³ the flood water nature of these water rights was central to the stipulation and eventual decree.⁴ 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. As an example, the nature of use for these water rights of “irrigation” was not listed in the individual water rights description, but the irrigation nature of use is made evident by reviewing the language from the Stipulation:

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 . . .⁵

Similar to the irrigation nature of use, the flood water component of these water rights was not specifically listed in individual water right listings in the Eagle Decree. However, this does not

²IDAPA 37.03.02.010.27.

³ Source, Point of Diversion, Priority Date, Nature of Use, Quantity, Period of Use, and Place of Use.

⁴ The individual water right descriptions begin on page 7 of the Eagle Decree.

⁵ Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment (hereinafter “McHugh Affidavit”), Exhibit D, at 5-6 (¶¶ VII and X).

preclude the Department or 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.”⁶ 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.”⁷ Because the flood water connotation is a 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, which is 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.”⁸ Now is the time to list the flood water nature of these water rights in the partial decree.

The preferable mechanism available to document the flood water nature of these rights in MLWU’s view, is with remarks or conditions. In recommending water rights for adjudication to the SRBA Court, Idaho Code § 42-1411 states that 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

⁶ IDAHO CODE § 42-1427(2).

⁷ IDAHO CODE § 42-1427(1)(b).

⁸ *Id.*

(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.⁹

For reasons not entirely clear, the director's report for the water rights at issue in this matter 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."¹⁰ Such a limitation must be included via condition or remark in the partial decrees for these water rights.

MLWU is less concerned with the mechanism that this court uses to document the flood water nature of these water rights, and more concerned that the substance of what these water rights really are is decreed correctly. When an element of a water right is not clearly reflected, and when a clarifying remark can avoid future controversy, it is appropriate to include it in the decree issued by the SRBA.¹¹ SWC's argument that "there is no legal basis to identify and distinguish the various water supplies that make up the source"¹² ignores the Eagle Stipulation and would unlawfully elevate the water rights. SWC's motions for summary judgment should therefore be denied.

B. Water Rights Established By A Supplemental Adjudication Are Not Deemed To Be Adjudicated And May Be Attacked At Any Time By Any Person Aggrieved Thereby.

SWC argues that because the *Eagle Decree* was issued pursuant to a summary supplemental adjudication under I.C. § 42-1424, to three previous private adjudications, the water rights at issue

⁹ IDAHO CODE § 42-1411(i)-(j).

¹⁰ McHugh Affidavit, Exhibit D, at p. 3.

¹¹ See In Re SRBA, *Memorandum Decision and Order on Cross Motions for Summary Judgment* in Consolidated Subcase 91-63 dated Sept. 1, 2004 at pp. 24-25.

¹² Claimants' Memorandum in Support of Joint Motion for Summary Judgment, p. 8 (August 22, 2008).

are some how off-limits in the SRBA, which is a general adjudication. Furthermore, SWC makes the flawed analogy that because notice and publication given for a supplemental adjudication is similar to that given for a water right license, “similar to being bound to a water rights license... all of the objectors should be bound by the water rights decreed in the *Eagle Decree* proceeding.”¹³

When the *Eagle Decree* was issued in 1968, the summary supplemental adjudication statute was codified at I.C. § 42-1405.¹⁴ SWC argues that “the issues raised by the objectors are the very issues that the *Eagle Decree* previously resolved. They are bound by those elements and subject to *res judicata* accordingly.”¹⁵ SWC conveniently ignores the fact that in the very section of law that they include in their Affidavit, it states:

The court by its decree in said action shall determine the rights of said plaintiff in accordance with the proof submitted but subject to the terms of the original decree hereinbefore referred to; *Provided*, that the right thus established shall not be deemed adjudicated, but prima facie merely, and may be attacked by suit brought in a court of competent jurisdiction at any time by any person deeming himself aggrieved thereby.¹⁶

In other words, the very statute that SWC argues precludes MLWU from raising any objections in the SRBA, clearly granted that right. The Idaho Supreme Court has similarly held that “[t]he decree does not adjudicate any right. It simply gives a prima facie right to the delivery of so much water. It may be attacked by a suit brought in a court of competent jurisdiction at any time by any aggrieved party.”¹⁷

¹³ *Id.* at 8.

¹⁴ See Exhibit B to Second Affidavit of Travis L. Thompson in Support of Joint Motions for Summary Judgment.

¹⁵ Claimants’ Memorandum in Support of Second Joint Motion for Summary Judgment, p. 8 (June 25, 2009).

¹⁶ See Exhibit B to Second Affidavit of Travis L. Thompson in Support of Joint Motions for Summary Judgment.

¹⁷ *Mays v. District Court of Sixth Judicial Dist. in and for Butte County*, 34 Idaho 200, 200 P.115, 116 (1921).

SWC's argument that MLWU cannot now challenge the decreed elements of the Eagle Decree is erroneous and without merit.

C. *Res Judicata* Does Not Bar The Objections Raised By MLWU.

MLWU was not a party in the Eagle Decree. Yet, SWC argues that MLWU is attempting to challenge water rights that they “expressly stipulated to and were settled over 40 years ago” and that the doctrine of *res judicata* bars any such attempt.¹⁸ Neither, *res judicata* nor collateral estoppel bars MLWU's objections.

Res judicata includes both claim preclusion and issue preclusion. Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action which might have been made.¹⁹ Issue preclusion protects litigants from litigating an identical issue with the same party or its privy. Both claim and issue preclusion fail if the parties are not the same or in privity with a party to the original action.

SWC argues that MLWU, along with all other objectors, “were either parties, privies, or should be bound by the Eagle Decree *despite a lack of technical privity*.”²⁰

We have not been able to find any cases to support this argument in *res judicata* jurisprudence regarding “technical privity,” and indeed, SWC has not provided any either. Instead, SWC relies upon a statement from the Idaho Supreme Court in 1997 that “the water rights in the Snake River basin are interrelated, and therefore what is done by one water right holder necessarily impacts the rights of other water right holders.”²¹ Therefore, SWC argues, “all water right holders

¹⁸ Claimants' Memorandum in Support of Second Joint Motion for Summary Judgment, p. 6 (June 25, 2009).

¹⁹ *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007).

²⁰ Claimants' Memorandum in Support of Second Joint Motion for Summary Judgment, p. 13 (June 25, 2009). Emphasis added.

²¹ *Id.*, quoting *State v. Hagerman Water Rights Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

in the basin are in privity with one another for the purposes of *res judicata*.”²² SWC’s logic fails on several accounts.

First, it appears that the SWC argues that because MLWU, like the SWC, holds water rights, and both are therefore part of a common group of Idaho water rights holders, that this is enough of a connection for *res judicata* to apply. That is not the case. The Idaho Court of Appeals, citing to 50 C.J.S., *Judgments*, has held that “[p]rivity is defined as a mutual or successive relationship to the same property rights, or such an identification in interest or one person with another as to represent the same legal rights.”²³ MLWU’s water rights are not and have never been the same water rights as the SWC’s or any other party to the Eagle Decree. MLWU does not even possess water rights diverted out of the Snake River. Because the rights of both parties are not the same, neither *res judicata* nor collateral estoppel applies.

Further, in the same treatise cited to by the Idaho Court of Appeals—50 C.J.S., *Judgments*—it states that “[c]ommonality of interests alone is insufficient to establish privity.”²⁴ Common interests in water rights does not equate to party status in all water rights matters sufficient to establish privity for purposes of *res judicata* or collateral estoppel. It is self-evident that neither *res judicata* nor collateral estoppel applies in this matter from the simple definitions and cases which describe these doctrines.

A further, and therefore second, area where SWC’s logic fails is their representation of the Supreme Court’s statement in the *Hagerman* case which they have misquoted. The Supreme Court did not state that “what is done by one water right holder necessarily impacts... other water right

²² *Id.*

²³ *Sun Valley Land and Minerals, Inc. v. Burt*, 123 Idaho 862, 869, 853 P.2d 607, 614 (1993) (emphasis added).

²⁴ 50 C.J.S., *Judgements*, § 1099.

holders.” Rather, the Supreme Court stated that “...*the Director’s factual findings as to one water right holder* impact the rights of other water right holders.”²⁵ This adds significance, especially when placed in context with the next sentence in the decision, which is ignored by SWC:

To hold that the Director is “obligated to accept prior decrees as being conclusive proof of the nature of a water right” is contrary to the Director’s statutory role in the SRBA and such a holding would have the effect of binding water right owners not parties in a prior adjudication to a prior decree issued in a private adjudication. This is an untenable outcome.²⁶

Once again, the very law SWC relies on to support their position, when placed in context, is directly contrary to it. There is no doubt that the *Eagle Decree* was a supplemental adjudication authorized then under I.C. 42-1405. However, it was a supplemental adjudication to three private adjudications – the *Woodville Decree*, the *Foster Decree* and the *Rexburg Decree*. Given that water rights in the Snake River Basin are interrelated, and that the Director’s findings as to one water right holder impact other water right holders, it truly would be an “untenable outcome” for this court to hold that MLWU is bound by a prior decree issued in a supplemental adjudication to a private adjudication when MLWU was not a party to those adjudications.

SWC also appears to argue that because the Supreme Court held in 1997 that water rights in the Snake River basin are interrelated specifically within the context of the SRBA, that means that water rights were also considered interrelated in 1968 when the *Eagle Decree* was entered. Therefore, using SWC’s logic, “the present objections filed by [MLWU]... should have been all been [sic] brought 40 years ago.”²⁷ It is common knowledge that conjunctive management of water in

²⁵ State v. Hagerman Water Rights Owners, Inc., 130 Idaho 736,742, 947 P.2d 409, 415 (1997). (emphasis added).

²⁶ *Id.*

²⁷ Claimants’ Memorandum in Support of Second Joint Motion for Summary Judgment, p. 14 (June 25, 2009).

Idaho was not instituted until the mid 1990's. SWC's argument that today's understanding of conjunctive management principles should be applied retroactively over 40 years to a general adjudication proceeding is illogical and contrary to law.

Finally, and in the alternative, even if MLWU was in privity to the *Eagle Decree* for the purposes of *res judicata*, MLWU is not trying to "re-litigate issues that were decided in the *Eagle Decree*."²⁸ Rather, MLWU's position is that the terms of the *Eagle Decree* – terms that the SWC was a party to and agreed to—must be enforced and decreed correctly in the SRBA. A party to a stipulation, which is a contract, has a vested interest to ensure that its terms are enforced.²⁹ Furthermore, the Idaho Supreme Court has held that as a general rule, parties to a stipulation are bound by it and that stipulations will be enforced unless good cause to the contrary is shown.³⁰ In short, MLWU only seeks to have the Stipulation enforced, not changed, as to the unmistakable flood water provision.

III. CONCLUSION

MLWU is not seeking to change the source element of SWC water rights. Rather, MLWU's position is that the flood water nature of these water rights must be reflected on the right in order to accurately record these water rights as they were previously decreed and historically used. 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 efforts to curtail ground water users in administrative calls before the Idaho Department of Water Resources, in a manner contrary to their

²⁸ See *Id.* at 7.

²⁹ See *Olson v. Idaho Department of Water Resources*, 105 Idaho 98, 100, 666 P.2d 188, 190 (1983), *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 611, 114 P.3d 974, 981 (2005).

³⁰ See *Call v. Marler*, 89 Idaho 120, 127, 403 P.2d 588, 592 (1965), *Farrell v. Board of Commissioners of Lemhi County*, 138 Idaho 378, 388, 64 P.3d 304, 314 (2002).

undisputable nature. MLWU is less concerned with the mechanism that this court uses to document the flood water nature of these water rights, and more concerned that the substance of what these water rights really are is decreed correctly.

Further, the *Eagle Decree* was a supplemental decree to private adjudications, which MLWU was not a party. The very law that SWC relies on to bar MLWU's objections grants MLWU that very right to challenge the decrees as a person deeming himself aggrieved.

Finally, the doctrine of *res judicata* does not apply here. MLWU was not a party to the *Eagle Decree* nor were they in privity with any of the parties. The Idaho Supreme Court made this issue clear when they held that "[t]he contention that one's rights can be affected by a decree to which he was a stranger is repugnant to a fundamental principle of our jurisprudence that no one will be judged until he has had a hearing."³¹ Alternatively, even if MLWU was in privity with a party to the *Eagle Decree*, they are not now trying to challenge the terms of that decree, but instead only seek that the Eagle Decree provisions are enforced and reflected in the SRBA partial decree for these rights. Accordingly, SWC's Joint Motions for Summary Judgment should be dismissed.

DATED this 29 day of July, 2009.



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³¹ Mays v. District Court of Sixth Judicial Dist. in and for Butte County, 34 Idaho 200, 200 P.115, 116 (1921).

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 29 day of July, 2009.

DOCUMENT SERVED: MLWU Response to Claimants' Second Joint Motion for Summary Judgment

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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