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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

**REPLY TO UNITED STATES'
RESPONSE TO MLWU 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 Reply to United States'
Response to MLWU's Motion for Summary Judgment.

I. ARGUMENT.

A. With a Better Understanding of Storage Water Right No. 1-10034 and Its Historic Delivery, MLWU Will Withdraw Its Objections to This Water Right.

In light of the facts presented by the United States in its Response Brief and Supporting documentation, MLWU will contemporaneously file a Notice of Withdrawal of Objection to Water Right No. 1-10034.

B. Water Right No. 1-10482, An Irrigation Water Right, Must Still Have a Flood Water Remark Inserted As It is After the April 1, 1939 Date Set Forth in the Eagle Decree Defining Such Rights As Flood Water Rights.

As the United States correctly notes, MLWU is challenging Water Right No. 1-10482 as it necessarily must include a provision documenting the flood water nature of this water right. This water right has a priority of April 1, 1940, which is junior to the April 1, 1939 priority date found in the Eagle Decree definition of a flood water right. Thus, it was universally determined by all parties to the Eagle Decree that April 1, 1939 was a priority date for water rights on the Snake River where the water diverted under these rights were from flood water.

Given the universal agreement amongst those in the Eagle Decree, it logically follows that any water right on the Snake River after April 1, 1939 should appropriately be conditioned as a flood water right that is only available during periods of high flow. The Eagle Decree is persuasive authority for the establishment of a priority date which establishes the priority date for flood water rights. Based on the Eagle Decree alone, Water Right No. 1-10482 should be classified as a flood water right.

In response to this argument, the United States argues that a condition is unnecessary and unsupported both legally and factually because it would create an ambiguity in the water right. However, the United States has not provided any documents or factual information that would

challenge the Eagle Decree documents and the universal agreement between the parties defining flood water rights as those with an April 1, 1939 priority date.

In the context of responding to a motion for summary judgment, the burden is on the nonmoving party to provide evidence demonstrating a material issue of fact, as explained in the case of *Northwest Bec-Corp v. Home Living Service*:¹

The nonmoving party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). If the moving party challenges an element of the nonmoving party’s case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact. When presenting affidavits, they “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. “[A] mere scintilla of evidence or only slight doubt as to the facts” is not sufficient to create a genuine issue of material fact for purposes of summary judgment.²

The United States has not met its burden in this instance by providing affidavits or otherwise regarding providing evidence of when water rights are generally considered to be flood water rights.

Instead, the United States makes a similar argument to that of the Surface Water Coalition (“SWC”). The United States asserts that “Water District 01 personnel testified repeatedly the proposed remark is unnecessary.” This is not an accurate statement. Nowhere in the testimony of Water District personnel did they state that the remark was unnecessary. This assertion confuses the testimony regarding the day-to-day operations of the water district with what is evidenced in the Water District 01 records.

¹ 136 Idaho 835, 41 P.3d 263 (2002).

² *Id.* at 838-39, 41 P.3d at 266-67 (internal citations omitted).

In the adjudication of the water rights at issue in this matter, MLWU asserts that the delivery records—not the day-to-day operations of Water District 01—demonstrate that after high spring runoff, Water Right Nos. 1-209 and 1-210 held by Twin Falls Canal Company and North Side Canal Company—which total 3,400 cfs—require all natural flow water available below Blackfoot after June or early July in most years.³ Thus, in the specific area below Blackfoot, it is evident that when the snowmelt contribution to the Snake River drops, the priority dates that are “on” below Blackfoot go straight to the priority date of October 11, 1900, which is the priority date of Water Right Nos. 1-209 and 1-210. Based on these records, Water Right No. 1-10482 is therefore properly classified as a flood water right.

The United States further argues that the inclusion of a remark is not necessary for administration of the water right in the water district’s day-to-day operations. We agree that the watermaster is not obligated to distinguish between the sources tributary to the Snake River, and do not argue that inclusion of this remark would require the watermaster to make those distinctions. But the inclusion of the remark is not intended to address this. The inclusion of the remark is to document the universal understanding regarding a priority date for flood water rights as evidenced by the Eagle Decree which MLWU believes will be relevant in a water call proceeding. What legal effect that remark is actually given by IDWR in a water call proceeding will certainly be argued in future water call proceeding, but it appears that the parties to this matter would presume that it is seen as a limitation on the water right given the definition language in the Eagle Decree and the extreme opposition to the condition’s inclusion. If such a condition was truly meaningless, then we presume the opposition would not exist for its inclusion.

³ Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment, ¶11(b).

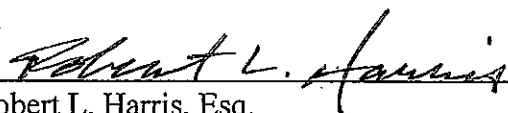
In addition, in an effort to create an issue of fact, the United States has supplied the Affidavits of Don Bowden and Jerry Fredrickson, who both testify that they observed the place of use authorized under Water Right No. 1-10482 being irrigated for many years. The United States mistakenly states that these men witnessed “natural flow” water being used.⁴ Their affidavits contain no reference to natural flow, and furthermore, the fact that Walcott Park was irrigated does not create an issue of material fact in this instance regarding the flood water nature of the water right.⁵

MLWU is not challenging the existence of the water right, but has taken the position that a flood water remark must be included. Given our understanding of the water district records, the Eagle Decree documents, and the affidavits of those associated with the water district, a water right with a priority date post-April 1, 1939 would clearly be a flood water right. The United States has not provided evidence to refute that assertion, and therefore, summary judgment as to this right remains appropriate.

II. CONCLUSION.

For the reasons set forth above, MLWU’s motion for summary judgment as to Water Right No. 1-10482 must be granted.

DATED this 10th day of August, 2009.


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

⁴ See United States’ Response at 10.

⁵ We note that it is possible to irrigate through the irrigation season pursuant to other water right arrangements, and it is possible that Walcott Park is irrigated with BOR uncontracted space, water leases, or other mechanisms. It is even possible that Lake Walcott was an administrative oversight by Water District 01 given its relative small size.

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 14th day of August, 2009.

DOCUMENT SERVED: MLWU Reply to United States' Response to MLWU Motion for Summary Judgment

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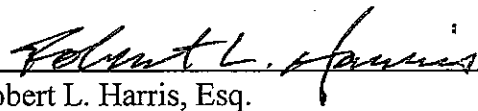
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EXHIBIT A

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