

RECEIVED

AUG 21 2009

DEPARTMENT OF
WATER RESOURCES

Robert L. Harris, Esq. (ISB # 7018)
Luke H. Marchant (ISB # 7944)
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

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

I. ARGUMENT.

A. **The *Eagle Decree* Consists of Three Documents, Not One Document, as Claimed By The SWC. The SWC Cannot Ignore the Stipulation and Findings of Fact, Which Are Two of the Three Intertwined Documents of the *Eagle Decree*.**

Remarkably, the SWC asserts that this Court can ignore documentation that is part and parcel to the *Eagle Decree* because it now does not like some of its terms. The SWC argues that the intent “must be gleaned only from the words of the Decree itself,”¹ and therefore, asks this court to ignore two out of the three crucial intertwined documents that reference and incorporate one another. In essence, SWC asks this court to cherry-pick provisions it likes and disregard provisions it does not like. As set forth below, the documents entitled “Stipulation,” “Findings of Fact and Conclusions of Law,” and “Supplemental Decree” are the *Eagle Decree*. Contrary to the SWC’s position, the *Eagle Decree* is not simply the document entitled “Supplemental Decree.”

The intertwined nature of the of the three *Eagle Decree* documents is made clear by examining the language from each of the three intertwined documents. These documents link to each other by specific reference to them. Beginning in the document the SWC asserts that court can only look at, the very first paragraph in the “Supplemental Decree” document states the following:

This matter having come on regularly before the Court and the Court having made and entered its **Findings of Fact and Conclusions of Law** herein directing that Decree be entered accordingly and good appearing therefor, . . .²

With the “Supplemental Decree” document incorporating the Findings of Fact and Conclusions of Law, said Findings of Fact and Conclusions of Law states the following regarding water rights with an April 1, 1939 priority date:

¹ *Id.* at 3.

² Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment (hereinafter “McHugh Affidavit”), Exhibit F, at p. 1. (emphasis added).

In connection with the establishment of the water rights for said Palisades Reservoir, it was particularly necessary for the parties Plaintiff to agree among themselves, and void extensive, expensive and delaying litigation by so agreeing upon a common priority date for those persons who were using, or were making plans to construct projects and perfect rights to use, the so- called "**Flood Water Rights,**" being those waters of the river which were only available during periods of high flow,, and which the parties Plaintiff had been using to the best of their ability and to the extent of their irrigation works, or were planning to use as projects were constructed; and that the parties Plaintiff did at such time agree on a common priority date of **April 1, 1939,** for such rights, which said agreement has been acted upon by all of the parties Plaintiff hereto continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.³

How did the Court enter such Findings of Fact? It did so because the parties agreed to the findings of fact by a contract—a Stipulation—entered into between the parties. This is evident in first paragraph of the Findings of Fact and Conclusions of Law:

This matter having come on regularly before the Court and it appearing that the defendant has filed herein a disclaimer of an interest adverse to the plaintiffs **and proof having been submitted in the form of a Stipulation by all of the plaintiffs** and the Court, being fully advised in the premises, makes and enters the following:
...⁴

What does the Stipulation say about the Findings of Fact and Conclusions of Law and the eventual judgment (the Supplemental Decree document)? It is found at the first paragraph of the Stipulation, which states the following:

The parties signatory hereto do hereby stipulate and agree **that the following facts, and conclusions derived therefrom, are true and correct, and shall be the basis for the entry of judgment herein,** to-wit: ...⁵

As the basis for any subsequent documentation, the Stipulation is an inseparable component of the *Eagle Decree*. With regards to flood water, not surprisingly, the language contained in the Findings

³ McHugh Affidavit, Exhibit 4, p.4 (emphasis added).

⁴ *Id.* at p. 1.

⁵ *Id.* at Exhibit D, p. 1.

of Fact and Conclusions of Law mirrors that of the language of the Stipulation, which includes specific reference to “flood water rights:”

- (c) That in connection with the establishment of the water rights for said Palisades Reservoir, it was particularly necessary for the parties Plaintiff to agree among themselves, and avoid extensive, expensive and delaying litigation by so agreeing upon a common priority date for those persons who were using or were making plans to construct projects and perfect rights to use, the so-called “**Flood Water Rights,**” **being those waters of the river which were only available during periods of high flow;** and which the parties Plaintiff had been using to the best of their ability and to the extent of their irrigation works, or were planning to use as projects were constructed; and that the parties Plaintiff did at such time agree on a common priority date of **April 1, 1939**, for such rights, which said agreement has been acted upon by all of the parties Plaintiff hereto continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.
- ...
- (f) That it was necessary to agree that additional projects authorized by the Congress of the United States as an integral part of the Palisades Reservoir legislation would have their proportionate rights in said so-called **flood water rights** with said priority date of **April 1, 1939**, and that said legislation was achieved, and said projects were authorized and constructed, and have been developed, on the basis of such understanding as to their water rights; and that such projects have used water from the Snake River under such claimed priority date as promptly as they were able to do so, dependent upon the construction of their facilities.⁶

The incorporation of these documents in the Supplemental Decree document makes is evident that the *Eagle Decree* is more than the single documented entitled “Supplemental Decree.” The incorporation between them means they are part and parcel to the *Eagle Decree*. As one decree, this Court is free to consider all three documents to determine as a matter of law whether the parties agreed to the flood-water nature of these water rights. It is undeniable that they did, and therefore, summary judgment in favor of MLWU is appropriate. MLWU’s position is simply to incorporate

⁶ *Id.* at Exhibit D, p. 3-4.

into the SRBA partial decree all of the provisions of these documents that address elements of the water rights that the parties have previously agreed to. Because the flood water nature of the water rights with an April 1, 1939 priority date was agreed to, but omitted in the respective water right recommendations, it must now be included.

B. Even If The *Eagle Decree* is Determined By This Court to Consist Only of the “Supplemental Decree” Document, Despite Its Incorporation of the Findings of Fact and Conclusions of Law and Stipulation, the SRBA Court Can Still Consider the Findings of Fact and Conclusions of Law, the Stipulation, and 36 MLWU Additional Exhibits Under Idaho Law.

The SWC asserts that the document entitled “Supplemental Decree” is the only document that the SRBA Court can examine, and in examining this document, must apply contract interpretation principles. The SWC’s citation to various Idaho cases on this matter are a correct recitation of Idaho law on the surface, but when viewed with the specifics of this case, the SWC has misapplied this law.

In determining the intent of the parties subject to a court decree, the Idaho courts have distinguished between:

- (1) a decree where no stipulation agreeing to the entry of the decree was entered—in other words, it is a decree based on the ruling of a judge, and
- (2) a decree when there was a stipulation—a contract—entered into between the parties leading to the entry of the decree—in other words, the decree is based on the agreement of the parties.

This distinction is made clear in the recent case of *McKoon v. Hathaway*.⁷

In *McKoon*, the former wife of a divorced couple filed a quiet title action concerning property addressed in a divorce decree with her former husband. The Court of Appeals described the crux of the case as follows: “This case hinges on the interpretation of the provision in the divorce decree

⁷ 146 Idaho 106, 190 P.3d 925 (Ct. App. 2008).

awarding McKoon ‘the real property located at Route 2, Box 32A, Worley, Idaho and all obligations associated therewith.’⁸

In analyzing the case to determine how to address the interpretation issue, the court in *McKoon* offered the following discussion:

Although some Idaho appellate decisions addressing the interpretation of divorce decrees have approached that task as one of **determining the intent of the parties**, in these cases, the divorce decree was entered on a stipulation of the parties or it adopted the terms of a marital settlement agreement. **Therefore the decree was not a ruling of a judge but a reflection of an agreement that had been reached by the parties**. This is not such a case. Where the ambiguous language in a decree was not simply adopted from an agreement of the parties, the inquiry is to determine the intent of the court that entered the decree.⁹

Because the decree in *McKoon* was not entered as a result of a stipulation or agreement, the decree was subject to the general decree/contract interpretation law cited to in the case, which is similar to that cited to by the SWC in this matter, because it was necessary in *McKoon* **to determine the intent of the court**.

The obvious difference in the matter now before the SRBA court is that the document “Supplemental Decree” was entered as a result of a Stipulation signed by all of the parties. Therefore, the proper inquiry before this court is now to **determine the intent of the parties**. In determining that intent, the court is free to consider the Stipulation, Findings of Fact and Conclusions of Law, and the 36 exhibits previously submitted by MLWU without first finding an ambiguity, as explained in *McKoon*. The intent of the parties controls, not the intent of the court.

Thus, in determining the intent of the parties to the *Eagle Decree*, the court therefore does not need to determine an ambiguity before examining documents that are part and parcel to the

⁸ *Id.* at __, 190 P.3d at 928.

⁹ *Id.* at __, 190 P.3d 929 (emphasis added).

Supplemental Decree or documents that evidence the parties' intent. Therefore, it is entirely appropriate for the SRBA court to review and examine the Stipulation and the Findings of Fact and Conclusions of Law even if we make the assumption that the documents entitled "Stipulation" and "Findings of Fact and Conclusions of Law" are not part and parcel to the *Eagle Decree*. The SWC's assertions that the court must first find an ambiguity in the Supplemental Decree document before examining the other incorporated documents is misplaced because the case law cited in support of its position is only applicable when a decree is entered because of a ruling of a judge. A different analysis applies here because the ruling was entered by stipulation and Findings of Fact and Conclusions of Law of the parties. Thus, in addition to violating notions of fundamental fairness by arguing that cherry-picked provisions of the Stipulation should be ignored, the SWC's arguments regarding ambiguity are misplaced.

C. In Response to the SWC's Assertion That Flood Water Rights in the *Eagle Decree* "were not decreed with any limitations or conditions as to any 'flood water nature,'" MLWU's Exhibits Are Relevant and Admissible To Ascertain the Intent of the Parties to the *Eagle Decree*.

SWC asserts that instead of arguing that the decree is ambiguous, MLWU "seek[s] 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."¹⁰ As set forth above, the SWC's application of this case law is misplaced. Additionally, this argument from the SWC mischaracterizes MLWU's argument.

MLWU has consistently argued that the language from the *Eagle Decree*, which includes all three documents as set forth in detail above, defines water rights with an April 1, 1939 priority date to be "flood water rights" which are "only available during period of high flow," is clear.

¹⁰ Claimants' Joint Response to MLWU's Motion for Summary Judgment, p. 6 (July 29, 2009). (hereinafter, "SWC Response Brief").

The SWC wishes to completely ignore this language, and argues that the their water rights “were not decreed with any limitations or conditions as to any ‘flood water nature.’”¹¹ Thus, the intent of MLWU was to provide the court additional evidence of the parties’ intent, which this court can review under the clear principles of *McKoon* set forth above. In other words, if the language of the *Eagle Decree* documents are not clear enough, MLWU has provided ample additional evidence of that the parties’ intent. In such an instance, MLWU’s evidence is clearly admissible in this matter.

The SWC argues that even if this court gave credence to the thirty-six exhibits submitted by MLWU, at best, it would only create an issue of material fact, and therefore, summary judgment should be denied.¹² In support of this argument, the SWC cites to cases which hold that when a decree is ambiguous, its interpretation presents a question of fact.

However, this argument and the cases cited to by the SWC demonstrate that the question of fact only arises if the other party provides evidence that creates a material fact. The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. The SWC has not asserted any such differing interpretation of the flood water language and its intent in order to create a question of fact. They simply argue that the their water rights set forth in the *Eagle Decree* with an April 1, 1939 priority date “were not decreed with any limitations or conditions as to any ‘flood water nature.’”¹³

As we understand their argument, they have not challenged the inclusion of that term in the *Eagle Decree* documents, nor provided evidence of a different interpretation of that term which is

¹¹ See Affidavit of Robert L. Harris in Support of MLWU Motion for Summary Judgment, Exhibits 1-36.

¹² SWC Response Brief at 6.

¹³ See Affidavit of Robert L. Harris in Support of MLWU Motion for Summary Judgment, Exhibits 1-36.

set forth in the Stipulation and Findings of Fact and Conclusions of Law which were incorporated in the Supplemental Decree document. They want to ignore those provisions entirely.

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*:¹⁴

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.” 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.¹⁵

The SWC has not met its burden in this instance by providing affidavits or otherwise regarding the flood water provision that alleges that its inclusion was erroneous, or that it means something different than its definition found in the *Eagle Decree* documents. For example, there are no affidavits from Roger Ling or John Rosholt offering evidence that their use of “flood water” terminology in Mr. Ling’s letter to Mr. Rosholt meant anything different than what was contained in the *Eagle Decree* documents.¹⁶ Had this been submitted, then perhaps there would be a question of fact that would preclude summary judgment, but because no such evidence has been presented, summary judgment can still be granted in MLWU’s favor.

¹⁴ 136 Idaho 835, 41 P.3d 263 (2002).

¹⁵ Id. at 838-39, 41 P.3d at 266-67 (internal citations omitted).

¹⁶ Affidavit of Robert L. Harris in Support of MLWU Motion for Summary Judgment (hereinafter, “Harris Affidavit”) at Exhibit 36 (emphasis added).

D. MLWU's Position Regarding the Inclusion of a Condition Would Not Violate The Prior Appropriation Doctrine.

The SWC also asserts the broad brushed argument that MLWU's position regarding an agreed-to definition from a Stipulation in which members of the SWC were parties would violate the ultimate bedrock of Idaho water law: prior appropriation. MLWU is not attempting to insert riparian water law or some other form of prior appropriation into Idaho law. MLWU simply wants to ensure that members of the SWC are bound by a previous decree that they agreed to. The SWC cites to no authority that by incorporating language from a previous private decree into a new water right decree in a general adjudication would violate the prior appropriation doctrine. This argument is wholly without merit.

Idaho statutes give IDWR the clear authority to include conditions from a previous decree. In recommending water rights for adjudication to the SRBA Court, the director's report shall include:

(i) conditions on the exercise of any water right included in any decree, license, or approved transfer application;¹⁷

The SWC has not challenged the constitutionality of this provision under its interpretation of the prior appropriation doctrine.

As authorized by state law, the SRBA court has often incorporated provisions from previous decrees into SRBA partial decrees. For example, Water Right No. 22-277A, which is from the Teton Basin and was decreed to Grand Teton Canal Co., contains the following two conditions:

The quantity of water diverted under this water right shall be from the portion awarded to Idaho and deducted there from as set forth in Roxana Canal Co. v. Daniels, Equity No. 2447 (D. Wy. Feb 4, 1941). This water right is subject to the delivery provisions contained in Roxana Canal Co. v. Daniels, Equity No. 2447 (D. Wy. Feb 4, 1941) ("Roxana decree"). Nothing in this Partial Decree is intended to

¹⁷ IDAHO CODE § 42-1409(i).

relieve or alter the state of Idaho nor the state of Wyoming from their obligations contained in the Roxanna decree.¹⁸

There is nothing unusual or unlawful with incorporating provisions from a previous private decree into a SRBA partial decree. The language proposed by MLWU in this matter is substantially similar to the Roxanna Decree language set forth above.

Indeed, the SRBA encourages compromise between parties, and often conditions are agreed to even subordinate water rights that have a senior priority water right to a junior priority water rights as between those rights only. For example, in Subcase No. 74-54, the parties agreed to subordinate this water right to a number of other water rights with the following condition:

“Pursuant to a call in times of scarcity, the diversion of water under the following water rights listed below shall not be subject to curtailment by water right 74-54: Water Rights: 74-56, 74-59A, 74-63, 74-398, 74-399, 74-1103, 74-181, 74-1834, 74-7165, and 74-15003.”¹⁹

Surely the agreement of such conditions does not violate the prior appropriation doctrine. Water rights can have conditions under the prior appropriation doctrine, even conditions that the parties previously agree to.

In sum, there is no constitutional or statutory provision that prohibits the inclusion of conditions from a previous decree, nor is there any case law of which we are aware that holds that these types of agreements strike at the core of prior appropriation. The prior appropriation doctrine does not prohibit this in any way, and therefore, SWC’s arguments are without merit.

E. The Legal Effect of a Flood Water Condition in a Water Call Situation is Not Before the SRBA Court.

¹⁸ An electronic copy of the Partial Decree is available at IDWR’s website.

¹⁹ An electronic copy of the Partial Decree is available at IDWR’s website.

Throughout its Response Brief, the SWC states that MLWU's desired condition that "this water right is a flood water right which is available only during periods of high flow as decreed in the case of *Burley Irr. Dist. v. Eagle*" is not supported by Idaho law. As set forth in the above section, the inclusion of conditions is clearly allowed, and reference to prior decrees has been included in previous SRBA decrees. In MLWU's view, the inclusion of a flood water remark would evidence the intent of the parties to the *Eagle Decree* to define the water right as a flood water right.

Further, in MLWU's view, this creates a water right with a limitation, and if that flood water limitation is not clearly referenced in the partial decrees for these water rights, it has the potential to be used in a manner contrary to its nature in a call proceeding.

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*. What legal effect that remark is given in a water call proceeding will certainly be argued in future water call proceeding, but it appears that the parties to this matter see this as a limitation on the water right given the definition language in the *Eagle Decree* documents 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.

However, the issue of the condition's legal effect is not now before the court. The SRBA Court is not addressing a call proceeding. What is before the SRBA Court is whether the condition referencing the flood water nature of these rights should be included in the SRBA partial decree. Such a condition must be included to preclude the potential for the water right's status to be elevated above something it was not previously.

In sum, the SRBA Court's role is to adjudicate the water right in accordance with Idaho law and the provisions of *Eagle Decree*, and provisions from previous decrees and stipulations must be

included to preclude the potential for the water right's status to be elevated above something it was not previously.

F. Previously Licensed Rights May Be Reexamined In An Adjudication Setting.

The SWC argues that MLWU cannot collaterally attack water rights 1-2050 and 1-2061 because these rights were previously licensed by IDWR. However, the issuance of license does not bar the director from reexamining that license in the SRBA.

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 extend of beneficial use of the water right as of the date of the commencement of the adjudication.”²⁰ 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.”²¹

Furthermore, the Idaho Supreme Court has stated that “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. . .”²² If the director is not required to accept prior decrees as conclusive proof of the nature of a water right, it follows that the director is not required to accept

²⁰ IDAHO CODE § 42-1427(2).

²¹ IDAHO CODE § 42-1427(1)(b).

²² State v. Hagerman Water Rights Owners, Inc., 130 Idaho 736, 742, 947 P.2d 409, 415 (1997).

prior licenses as conclusive proof of the nature of the water right evidenced by the license. The SWC's argument on this basis is without merit and is not supported by Idaho statutes or cases.

G. The SRBA Court Has Authority to Enter a Shortened Season of Use to Evidence the Flood Water Nature of a Water Right.

MLWU has been clear that it is less concerned with the exact mechanism that this court could use to document the flood water right nature of these water rights (which could be done with a condition, a remark, a shortened season of use, a notation regarding the source of water as snow melt, a condition protecting ground water users from administration claims above and beyond the historic delivery of the water rights, etc.), and more concerned that the substance of what these water rights really are is decreed in order to correctly adjudicate the agreed-to beneficial use of these water rights. MLWU's preferred mechanism is inclusion of a condition that states that "this water right is a flood water right which is available only during periods of high flow as decreed in the case of *Burley Irr. Dist. v. Eagle*"

An alternative to the condition proposed by MLWU is to change other elements of the water right to document the flood water nature of these water rights. The SWC argues that various memos, statutes, and other rules do not allow the SRBA Court to shorten the season of use. However, it remains that in making recommendations to the SRBA Court, the Director of IDWR is to include "conditions on the exercise of any water right included in any decree, license, or approved transfer application" and "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."²³ The "other matters" portion of this statutory provision certainly gives IDWR to ability to change elements of a water right to reflect provisions contained in a previous decree.

²³ IDAHO CODE § 42-1409(i)-(j).

H. Water Rights with Priorities Junior to Water Right Nos. 1-209 and 1-210 With Points of Diversion Below Blackfoot Are Flood Water Rights Based on Historic Delivery.

The SWC asserts that testimony from Lyle Swank and Tony Olenichak of Water District 01 does not support MLWU's contention that water rights junior to Water Right Nos. 1-209 and 1-210 below Blackfoot are flood water rights. MLWU's rationale regarding these water rights is based upon delivery records from Water District 01, not Water District 01's daily delivery practices. It is clear that the actual water molecules are not different colors so that Water District 01 can distinguish between water that finds its way into the Snake River via precipitation, snowmelt, spring flows, etc. The Water District looks at available water supplies, no matter their source, and delivers water based on priority. We agree with the State of Idaho that there should not be a requirement for Water District 01 to distinguish between sources in the day-to-day water deliveries. Mr. Olenichak and Mr. Swank stated that they do not distinguish on this basis when delivering water.

However, 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.²⁴ 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, the water rights are properly classified as flood water rights, and summary judgment is appropriate in this matter.

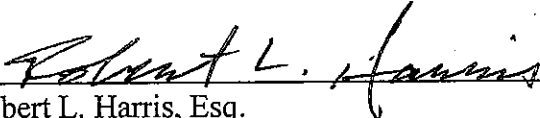
²⁴ Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment, ¶11(b).

Additionally, the SWC has not addressed the arguments raised previously by MLWU that Hearing Officer Schroeder found that the natural flow rights at issue in this matter during the runoff period.²⁵ The Hearing Officer's findings are further persuasive authority documenting the flood water nature of the water rights at issue.

III. CONCLUSION

The entire *Eagle Decree* contains clear language regarding the flood water nature of those water rights. Summary judgment must be entered to accurately document and decree the true character of the water rights, which are subject to the motion for summary judgment, as flood water rights. MLWU is less concerned with the exact mechanism that this court could use to document the flood water right nature of these water rights, and more concerned that the substance of what these water rights really are is decreed in order to correctly adjudicate these water rights.

DATED this 12th day of August, 2009.


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

²⁵ See MLWU Memorandum in Support of Motion for Summary Judgment at 20.

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 17th day of August, 2009.

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

ATTORNEYS SERVED:

Clerk of the District Court
Snake River Basin Adjudication Court
PO Box 2707
Twin Falls, ID 83302-2707

Randall C. Budge
Racine, Olson, Nye, Budge & Bailey, Chtd.
101 South Capitol Blvd., Ste. 208
Boise, ID 83702

United States Dept. of Justice
Environment & Natural Resource Div.
550 West Fort Street
MS 033
Boise, ID 83724

Natural Resources Division Chief
State of Idaho
Attorney General's Office
PO Box 44449
Boise, ID 83711-4449

Barker, Rosholt & Simpson, LLP
PO Box 485
Twin Falls, ID 83303-0485

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Josephine Beeman
409 W. Jefferson St.
Boise, ID 83702

Roger D. Ling
PO Box 396
Rupert, ID 83350-0396

Craig D. Hobdey
PO Box 176
Gooding, ID 83330

Jerry Rigby
Rigby, Andrus & Moeller, Chtd.
PO Box 250
Rexburg, ID 83440-0250

C. Thomas Arkoosh
Capitol Law Group
PO Box 32
Gooding, ID 83330

W. Kent Fletcher
PO Box 248
Burley, ID 83318

M. Evan Call
4373 Cold Water Rd.
American Falls, ID 83211

Call Farms Partnership
c/o Evan Call
4371 Coldwater Rd.
American Falls, ID 83211

Robert A. Maynard
Perkins, Coie, LLP
251 E. Front St., Ste. 400
Boise, ID 83702-7310

Tim Eilers
1109 W. 300 S.
Heyburn, ID 83336

Martin & Lorraine Muecke
1250 W. 300 S.
Heyburn, ID 83336

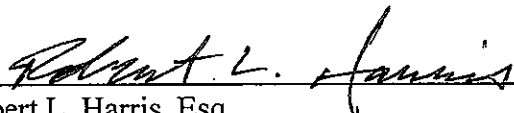
Steve Muecke
925 W. Wanda Ln.
Heyburn, ID 83336

William A. Parsons
Parsons, Smith & Stone, LLP
PO Box 910
Burley, ID 83318

Bret Andersen
Robyn Andersen
322 E. Main
Burley, ID 83318

E. Gail McGarry
United States, Department of Interior
Bureau of Reclamation
1150 N. Curtis Rd., Ste. 100
Boise, ID 83706-1234

J. Vaughn Hobson
19 S. 700 W.
Burley, ID 83318


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

G:\WPDATA\RLH\1047 MLWU\01, Objections, Oct 2006\Reply to SWC's response.wpd

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