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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	)	Subcases No. 01-209; 01-210;
	)	01-211A; 01-211B; 01-212; 01-213;
Case No. 39576	)	01-214A; 01-214B; 01-217; 01-218;
	)	01-219; 01-10187; 01-10188;
	)	01-10192; 01-10194
	)	(Minidoka Credit Remark)
	)	
	)	CLAIMANTS' RESPONSE TO
	)	GROUND WATER DISTRICTS'
	)	POST TRIAL BRIEF
	)	

This *Response to Ground Water Districts' Post Trial Brief* is submitted on behalf of the Minidoka Irrigation District (MID), Burley Irrigation District (BID), Twin Falls Canal Company (TFCC), and North Side Canal Company (NSCC) (hereinafter collectively referred to as "Claimants").

INTRODUCTION

The above designated subcases came before the Court for trial on May 20, 2009, on the limited issue of whether a remark concerning the “Minidoka Credit” should be included on the described water rights. Subsequent to the trial, the Claimants and the Ground Water Districts submitted Proposed Findings of Fact and Conclusions of Law, and the Claimants, Ground Water Districts, and State of Idaho submitted Post Trial Briefs. The Claimants and the State of Idaho both support the IDWR’s recommendation that a provision pertaining to the “Minidoka Credit” be inserted in the water rights, and that the provision is necessary for the definition, clarification and/or administration of the water rights. Contrary to the GWD’s arguments, the case concerns the methodology for calculating the Minidoka Credit provision, and how that methodology was settled and recommended by IDWR for the Claimants’ water rights.

The only parties in opposition to this remark are the Ground Water Districts, and therefore this Brief is written in response to the Ground Water Districts’ Post Trial Brief.

The Ground Water Districts (GWD) make four (4) arguments supporting their position that the Minidoka Credit remark should not be included on the water rights. The GWD argue that:

1. The SRBA has jurisdiction to decide the issues in this case;
2. The provisions of the Foster Decree do not bind the GWD;
3. The Minidoka Credit amounts to a private agreement or water right exchange and is not necessary for the administration of water rights; and
4. There is no factual or legal basis for the Minidoka return flow credit and it injures ground water users.

In addition, the GWD argue that their Exhibit 25 is admissible.

In order to make these arguments, the GWD ignore the evidence presented at the time of trial, the provisions of the *Foster Decree*, the testimony of their own witness, and the administration of these water rights that has occurred within Water District 01 since 1919.

ARGUMENT

I. GWD's Jurisdictional Argument is a Red Herring.

The GWD misstates the position of the Claimants when it asserts that the Claimants' position is that the SRBA Court lacks jurisdiction to provide administrative instruction to the Director. Rather, it has always been the position of the Claimants that the SRBA Court has jurisdiction to decide this controversy. Moreover, the Claimants' position is that the SRBA Court does not have the jurisdiction or the ability nor was evidence presented at trial that would support the Court prejudging how the Director should determine injury in the future and preemptively telling the Director how to administer some future controversy concerning water rights. It is the GWD's attempt, as they admit, to misdirect the Court and have not only the question, but the result of administration "overlap" in this proceeding. Effectively, the GWD are asking the Court to subordinate the Claimants' senior surface water rights to the junior ground water rights by claiming the Court cannot decree a provision that is allegedly "unjust to the ground water users". This argument mischaracterizes the issues before the Court.

Moreover, GWD wrongly asserts that the "SWC is asking the Court ... to blindly impose upon all water users in the Snake River Basin a private agreement that has historically has had no effect upon no [*sic*]-parties to the arrangement". GWD Post Trial Brief at 9. Quite the contrary, the Minidoka Credit has been administered by Water District 01 since 1919, and the Claimants' water rights have been exercised pursuant to that condition. Although the method of calculation has changed over the years, the fact remains the Water District 01 watermaster has accounted for

the provision based upon the *Foster Decree*, and all junior water rights, both surface and ground, have been appropriated subject to that existing and ongoing administration. GWD's own witness, Ron Carlson, testified to this fact at trial:

Q. [BY MR. SIMPSON]: And you also identified that as part of your duties as regional manager you had the opportunity or the duties to not only distribute water, but to hand out water right licenses and review applications for water rights?

A: [BY MR. CARLSON]: That's correct.

Q. And do you recall at the time you were then the regional manager and partaking in the issuing of licenses that it was recognized that in either the distribution or the application for water that juniors took the water subject to prior licenses and decrees?

A. That language was on each water right.

Q. Right. So it was recognized that when a junior came on and filed for a water right and acquired a water right, they took those rights and the ability to divert water subject to prior existing licenses or decrees; isn't that correct?

A. That's correct.

Tr. pp. 169-170.

As confirmed by GWD's own witness, junior ground water rights were appropriated "subject to" exiting senior water rights and prior decrees, including the *Foster Decree*. See I.C. § 42-110. The statutory permit process confirms Mr. Carlson's testimony. Any ground water user that acquired a water right had the burden to demonstrate, among other things, that his or her new appropriation would not "reduce the quantity of water under existing water rights". See I.C. § 42-203A(5). At the time appropriation the burden is on a junior water right holder to prove "non-injury" to seniors, not the other way around as GWD alleges in this case. In addition, for purposes of administration, junior water rights, not senior rights, are curtailed in times of scarcity. See I.C. § 42-607

Whereas the Water District 01 Watermaster administered the water rights in these subcases subject to the *Foster Decree* and accounted for the Minidoka Credit pursuant to that decree for over 80 years, the agreement between the Claimants settled the method of calculation. IDWR agrees with and has recommended that method for purposes of future administration. In short, the agreement and recommendation for the Claimants' water rights resolves an administrative calculation that varied over the years, nothing more.

Again, GWD's dispute with the fact the Minidoka Credit has been implemented in administration for decades does not change the fact that when junior ground water users appropriated their rights, they were acquired "subject to" those prior existing water rights, both licensed and decreed. The fact that junior water rights are "subject to", or stand to be curtailed in order to satisfy more senior rights, whether those senior rights are surface or ground water rights, is the foundation of Idaho's prior appropriation doctrine mandated by the constitution and statute. *See* IDAHO CONST., Art XV, § 3; Idaho Code §§ 42-602, 607.

There is nothing in the case law to support the GWD argument that, because they are a junior water right holder, they are entitled to some sort of special protection from the SRBA Court, or that the Court cannot decree a provision that will "harm" their water rights. Recognizing the prior administration pursuant to the provisions of the *Foster Decree* is appropriate. The GWD having failed to provide supporting authority, their requests for special consideration must be denied.

Further, the GWD argue that it is not necessary for the administration of these water rights to include the Minidoka Credit remark in the water right decrees. In support of this argument, the GWD asserts "the history of the Minidoka Credit is far from settled". GWD Post Trial Brief at 13. This statement is contrary to the record before the Court and the evidence

presented at trial.

The testimony of Tony Olenichak at the time of trial sets forth the administrative record and history behind the Minidoka Credit provision from the *Foster Decree* as implemented by Water District 01. See Claimants' Proposed Findings of Fact, paragraphs 13, 14, 17, 18, and 19 and citations thereto. Further, contrary to the assertions contained in the GWD Post Trial Brief, Mr. Olenichak testified that the proposed remark is necessary for administration of the water rights. Tr. pp. 132-33. Even the GWD's witness, former watermaster, Ron Carlson, testified that during the entire time he was watermaster, he administered the Minidoka Credit and he did so lawfully. See Claimants' Proposed Findings of Fact, paragraph 25 and citations thereto. Although Mr. Carlson attempted to discontinue accounting for the Credit near the end of his tenure as Water District 01 Watermaster, the Director, at that time Karl Dreher, overruled his decision. Tr. p. 156.

Clearly, the SRBA Court has jurisdiction to entertain the issues that are before it. However, the SRBA Court does not have the authority to determine whether a future Director, when administering a water right, may find injury, and then preemptively tell that future Director how to administer to that injury. Yet that is the result GWD seeks to have the Court pre-determine. Contrary to its claims, GWD offers no evidence to support the theory that the implementation of the Minidoka Credit provision has either historically, or in the future, would somehow "results in a windfall to MID and BID at the expense of junior ground water users". GWD Post Trial Brief at 19-20.

Although junior priority ground water rights have been found to injure the Claimants' senior surface water rights in a separate conjunctive administration proceeding before IDWR, the result of that case is not before this Court. The Court should reject this theory accordingly.

II. The GWD's Only Witness Contradicts its Position Concerning the Effect of the *Foster Decree*.

The GWD argues that the *Foster Decree* was a “private summary supplemental adjudication” and is not binding on the ground water users. Unfortunately for the GWD, this argument contradicts the testimony of the GWD witness, former watermaster Ron Carlson, who testified that when a junior water right holder obtains a water right, its water right is subject to prior existing licenses and decrees. Tr. p. 170. This is the only evidence in the record concerning this issue. It is uncontroverted. The GWD did not impeach their own witness at the time of trial concerning this statement.

Further, the GWD argument begs the real question. The GWD position is unclear on how the Court should analyze water rights that have been exercised and administered for almost one hundred years and are far senior to the GWD's water rights. Since the GWD argues that it is not bound by any decrees to which it is not a party, what should the court look at when determining the water rights? In this case, the uncontroverted record shows that the water rights and Minidoka Credit provision have been administered and accounted for since at least 1919, and that the assigned credit has far exceeded the amount set forth in the Settlement Agreement on most occasions. *See* IDWR Exhibit 2. At trial Randy Bingham testified that the amount in the Settlement Agreement, or the agreed upon methodology for calculating the Minidoka Credit, had a basis in prior calculations and was supported by the administration of the water rights by Water District 01:

Q. [BY MR. THOMPSON]: I guess the number eventually reached in the settlement agreement, is it within the range of calculations made by the water district over time?

A. [BY MR. BINGHAM]: Right. The average return credit – and

there's two averages, one before '77 and then one after '77 – the average was about 34,000 acre-foot a year for that group of years.

Tr. p. 184.

IDWR confirmed at trial that it has no better method the calculation. Tr. pp. 7, 52-53. Accordingly, the evidence presented at trial, both in IDWR Exhibit 2, and by the testimony of Randy Bingham, supports the calculation methodology in the agreement and IDWR's recommendation. Further, the GWD even agreed that the Settlement Agreement is the best method of calculating the credit if the Court deems the Credit to be lawful. Tr. p. 8.

Since GWD's own witness does not support its arguments, GWD instead argues that the Court should ignore the *Foster Decree* and the administration by Water District 01 regarding the exercise of the Claimants' water rights. It is difficult to determine how the Court could lawfully ignore the multiple decade administration of the Minidoka Credit based upon a court decree, an administration of rights that began long before ground water rights were even appropriated, and to which the GWD never administratively objected. Tr. pp. 164-65. This position of the GWD is made more difficult by the fact that there is no legal authority supporting their position that simply because they were not a party to the *Foster Decree*, the Minidoka Credit should therefore not exist and should not be binding on junior water rights acquired subsequent to that decree.

To ignore the administration of the Credit, and claim that it should not exist now, creates a legal and factual fiction since it is uncontroverted that the Credit has been administered for almost a century, including over 25 years by Ron Carlson, GWD's sole witness in this case. Moreover, GWD misses the point in arguing that the *Foster Decree* provisions and its implementation are somehow "unjust to the ground water users" and "not necessary for the administration of the water rights at issue here". GWD Post Trial Brief at 14. GWD cannot dispute that the Credit was accounted for and part of administration when their junior priority

ground water rights were appropriated. All ground water rights were acquired “subject to” all prior existing rights, which includes the Claimants’ water rights and the fact they have been administered by Water District 01 pursuant to the provisions of the *Foster Decree* since 1919. The appropriation of ground water rights later in time, and the fact pumping under those rights has been found to injure the Claimants’ hydraulically connected senior surface water rights to the Snake River does not mean that administration is “unjust”. Rather it is required by Idaho’s prior appropriation doctrine. Indeed, the GWD erroneously claim, without any supporting evidence, that administration of the *Foster Decree* “causes them and their members’ injury.” GWD Post Trial Brief at 17. Just because a junior priority water right is subject to administration to satisfy senior rights does not mean the junior is “injured”. Quite the opposite, administration is carried out to protect senior water rights from injury caused by diversions under junior water rights. *See* I.C. §§ 42-602, 607. Moreover, junior ground water rights could only be appropriated on the condition they did not injure existing rights. *See* I.C. § 42-203A(5).

Accordingly, GWD’s argument related to the *Foster Decree* is misplaced and fails to recognize the necessity of the remark recommended by IDWR. Junior ground water rights acquired after the *Foster Decree* appropriated water under that administration existing at the time. Whereas the methodology for calculating the Minidoka Credit was resolved by the Settlement Agreement, and it is supported by the past administration by Water District 01, IDWR’s recommendation is appropriate.

III. The Administration of the Minidoka Credit Remark is Not an “Exchange” and the Minidoka Credit Remark is Necessary for Administration of the Water Rights.

In a new argument the GWD argues that the Minidoka Credit is now “an exchange of water”. GWD Post Trial Brief at 18. GWD uses this term loosely despite the defined meaning in Idaho law. *See* Idaho Code § 42-240 (application for right to exchange water). Contrary to

this argument, administration of the Minidoka Credit does not constitute a formal “exchange” as that term is used in Idaho Code § 42-240. GWD fails to point to any facts in the record where the Claimants have filed an application for an exchange with IDWR to accomplish the administration that has occurred regarding the Minidoka Credit. No such facts exist.

In making this assertion, the GWD ignore the fact that all of the witnesses at the trial testified that the legal basis for the Minidoka Credit is the *Foster Decree* and that Water District 01 has administered the Minidoka Credit for over eighty (80) years based upon that decree. It is further uncontroverted in the record that the Settlement Agreement between Claimants was the resolution of a dispute concerning the method of calculating the Minidoka Credit, not an exchange agreement. TFCC and NSCC did not give up anything that had not been taken from them by the Water District 01 for over eighty (80) years. The parties merely settled the dispute concerning the method of calculating the Minidoka Credit when entering into the Settlement Agreement, and that evidence is uncontradicted based upon the evidence presented at trial. IDWR supports the methodology since it is acceptable based upon the facts and IDWR does not have a better alternative. Tr. p. 52-53.

Further, GWD’s counsel is bound by statements made at trial and relied upon by the parties when this matter was litigated. Although the GWD goes to great lengths to argue that the Settlement Agreement is a “private agreement” and therefore should not be included in the water right, GWD counsel seems to forget that at the time of trial, GWD counsel advised the Court and counsel, in open court, that if the Court determined that there is a legal basis for a remark pertaining to the Minidoka Credit, the Settlement Agreement (IDWR Exhibit 3) should be the basis for calculating the Minidoka Credit. Tr. pp. 7 – 8. The GWD are bound by the statements of counsel. The arguments of GWD pertaining to the Settlement Agreement as being a private

agreement and therefore not includable in the water rights are completely contrary to the GWD's position asserted at trial and the Court should disregard these arguments accordingly.

IV. The GWD Argument that There is no Factual or Legal Basis for the Minidoka Return Flow Credit is not Supported by the GWD Witness.

In their Brief, the GWD argue that there is no factual or legal basis for the Minidoka return flow credit. This argument is not supported by the record and is contrary to the testimony of the only witness called by the GWD.

The facts in this case are uncontroverted. The Minidoka Credit has been administered and accounted for in Water District 01 since at least 1919. The Credit has been implemented as part of the exercise of the Claimants' water rights decreed in the *Foster Decree*. There is nothing in the record contradicting this fact. Consequently, there is obviously a factual basis for the Minidoka Credit.

It is also uncontradicted that the legal basis for the Minidoka Credit is wording contained in the *Foster Decree*. The GWD's sole witness in this case, former watermaster Ron Carlson, testified that the *Foster Decree* was the basis for his administering the Minidoka Credit. Tr. p. 158. Further, Mr. Carlson testified that when the *Foster Decree* was administered it was done so lawfully. Tr. p. 158. Again, the GWD did not impeach their own witness concerning this issue. It is uncontroverted that there is a lawful basis for the Minidoka Credit.

The GWD argue in the title in one of its arguments that to allow the Minidoka return flow credit remark would "injure" ground water users. GWD Post Trial Brief, p. 19. There is nothing contained in the paragraphs under that argument, nor was any evidence produced at the time of trial, that demonstrates how allowing the Minidoka return flow credit remark would injure a ground water user. This statement shows the true intent of the GWD. It is their belief that if the SRBA Court or the Director of IDWR administers water rights by priority, that will result in

injury to the GWD water users. The real position of the GWD was clearly demonstrated when counsel for GWD stated "... in the SRBA the Court has several duties and one of those duties is that you don't recommend in a partial decree conditions or you don't recommend water rights that would injure other water users." Tr. p. 94 l. 22 – 25. That question is answered at the time of appropriation, and for junior ground water rights, the question is do junior rights "injure" existing senior rights, not the other way around.

Contrary to the GWD assertions, it is not the province of the SRBA Court to do everything possible to protect junior ground water users from administration required by Idaho law. The Court must decide the issues based upon the law and the facts before the Court. The record and the law in this case do not support the GWD arguments.

V. GWD Exhibit 25 is not Admissible Pursuant to the Provisions of IRE 408

The only evidence before the Court is that GWD Exhibit 25 was submitted to the Director of IDWR in the course of settlement negotiations pertaining to the method of calculating the Minidoka Credit. Contrary to the assertions of the GWD in its Post Trial Brief, the GWD witness, Ron Carlson, acknowledged that GWD Exhibit 25 was submitted during the time frame of the negotiations pertaining to the Minidoka Credit and admitted that GWD Exhibit "may have been" related to the negotiations:

Q. [BY MR. FLETCHER]: And you heard the testimony earlier today where a different methodology was used for 2001 and 2002 and that subsequent to that the parties entered into a interim agreement and ultimately the Settlement Agreement was reached. Did you hear that testimony?

A. [BY MR. CARLSON]: I was there. I remember that.

Q. You would agree with that. In fact you sat in on some of the meetings, the settlement negotiations, that were mediated by the Director; isn't that true?

A. I believe that's true.

Q. And wasn't that the context in which Amy Chestnut submitted this Brief to the Director?

A. It was certainly in that time frame.

Q. Wasn't it part of these negotiations pertaining to the Minidoka Credit?

A. I don't recall it being related to the negotiations. It may have been.

Tr. p. 160, l. 20 – 25, p. 161, l. 1 – 11.

Later, in response to an inquiry by the Court:

Q. [BY SPECIAL MASTER DOLAN]: Mr. Carlson do you happen to know the context of why this was submitted?

A. [BY MR. CARLSON]: There were two possible contexts. One of them of course was that Twin Falls had long wanted to get rid of the credit, and I saw Amy being in the office doing that research as being part of the support for the decision that I'd made. I think the negotiations took place later on in time, after an acceptable process wasn't found by the director.

Tr. p. 161.

Therefore, depending on which version of Mr. Carlson's testimony one wants to accept, GWD Exhibit 25 was submitted during the time frame of the negotiations and "may have been" related to the negotiations or that "the negotiations took place later on in time".

Later, Randy Bingham, manger of BID, testified that he received GWD Exhibit 25 as part of the settlement negotiations. Tr. p. 189, l. 23 – 25. In fact, BID wrote a letter of protest to the submittal. Tr. p. 190, l. 1 – 12. Mr. Bingham clearly testified that the submittal of GWD Exhibit 25 was during the time the settlement negotiations were occurring. Tr. p. 190, l. 13 – 15. Moreover, the negotiations began when the Director requested the Claimants to pursue an alternative methodology for the Minidoka Credit calculation. Tr. p. 182.

IRE Rule 408 clearly prohibits the admission of “evidence of conduct or statements made in compromise negotiations.” Mr. Carlson testified that GWD Exhibit 25 was submitted during the “time frame” of negotiations and that “it may have been” related to the negotiations. BID’s manager, Randy Bingham, clearly stated that the Exhibit was submitted during the time the settlement negotiations were occurring. Pursuant to the provisions of IRE 408, GWD Exhibit 25 is not admissible.

If, for some reason, the Court determines that GWD Exhibit 25 is admissible, the weight to be given the document is questionable. It is uncontroverted that the Exhibit was prepared by an attorney representing parties that were engaged in negotiations pertaining the calculation of the Minidoka Credit. The Exhibit represents one side’s version of the historical facts. Randy Bingham testified that BID and MID were not given an opportunity to respond to the submittal, rather the Director, at that time Karl Dreher, “directed the managers to come up with a solution rather than prepare for legal battle”. Tr. p. 191.

This must further be weighed in light of the direct testimony given at the time of trial by Tony Olenichak and Ron Carlson. All parties had an opportunity to examine or cross-examine these witnesses before the Court. There was no dispute presented at the time of trial concerning the history of the Minidoka Credit and how it has been administered. The best evidence before the Court concerning the history of the Minidoka Credit is the testimony of the witness.

GWD Exhibit 25 should not be admitted. If it is admitted in evidence, it should not be given significant weight by the Court.

CONCLUSION

Although the GWD Post Trial Brief seems to attempt to change the issues before the Court, at the time of trial, everyone was in agreement that the issues to be addressed by the Court are:

1. Is there a legal basis for a remark on the water rights pertaining to the Minidoka Credit?

Based upon the uncontroverted factual history of administration of the Minidoka Credit and the wording of the *Foster Decree*, it is uncontroverted that there is legal and factual basis for the Minidoka Credit remark.

2. How should the Minidoka Credit be calculated?

The GWD resolved this issue early in the proceeding by agreeing that the Settlement Agreement should be the basis for calculating the Minidoka Credit, if the Court finds a legal and factual basis for the existence of the Minidoka Credit.

3. Is there any legal or factual basis for a special remark requested by the GWD that would effectively subordinate the accounting for the Minidoka Credit to junior ground water rights?

There is nothing in the record or in the briefing to support this request of the GWD. The Court is not in the position to attempt to prejudge future injuries based upon unknown future factual situations.

4. Is the admission of GWD Exhibit 25 barred?

IRE 408 bars the admission of GWD Exhibit 25. Even if admitted, it should be given minimal weight in light of the direct testimony before the Court.

The Claimants do not argue that the Court lacks jurisdiction to address the issues before it; rather, the Claimants argue that the Court has no legal authority to attempt to prejudge injury in an administrative context and as a result insert wording into water rights to protect the GWD

junior ground water rights from administration. The Court should not address whether an injury determination may be made in the future, nor can the Court predict the facts that may be present at the time of some future administration of water rights. Moreover, the Court should not insert a remark on the water rights that subordinates the Claimants' senior rights to junior ground water rights as requested by the GWD.

Next, the GWD position concerning the effect of the *Foster Decree* is contrary to the testimony of the only GWD witness, Ron Carlson. Junior water right holders take their water rights as they find them – subject to all prior decrees and licenses. Whereas Water District 01's administration of the Claimants' rights and the Minidoka Credit provision had been ongoing since 1919, junior ground water rights were appropriated subject to those existing conditions. Accordingly, including a remark to continue that administration with a set methodology that will not change does not "harm" junior priority ground water rights. Although GWD disputes conjunctive administration altogether, this is not a legal basis to overturn IDWR's recommended remark, which adopts a final and certain methodology for implementing the Minidoka Credit. After all, everyone involved in this litigation other than the GWD agree that, based upon the history of administration and the *Foster Decree*, a remark pertaining to the Minidoka Credit should be inserted in the water rights. GWD has presented no evidence or valid legal bases to preclude IDWR's recommended remark.

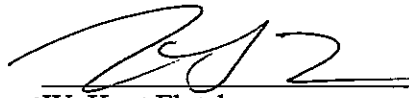
Finally, GWD Exhibit 25 is not admissible pursuant to the provisions of IRE 408 since it evidences statements made in compromise negotiations. Even if it is admissible, it should be given minimal weight in light of the fact that it is simply the position paper of a party to a negotiation and the Court had direct testimony concerning the same issues before it at the time of trial.

The Court should authorize the inclusion of the Minidoka Credit remark in the water rights, as agreed upon by all of the parties except for the GWD, deny the other relief requested by the GWD and deny admission of GWD Exhibit 25 into the record. Further, the Court should adopt the Claimants' Proposed Findings of Fact and Conclusions of Law.

DATED this 4th day of September, 2009.

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CERTIFICATE OF SERVICE

I certify that on this 4th day of September, 2009, I served a true and correct copy of the foregoing **CLAIMANTS' RESPONSE TO GROUND WATER DISTRICTS' POST TRIAL BRIEF** as indicated below:

By Personal Delivery:

CLERK OF THE SRBA COURT
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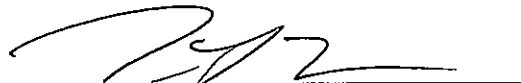
By U.S. Mail, First Class, Postage Prepaid:

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