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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.: 31-12181

**MEMORANDUM IN SUPPORT OF
FINDING OF NO PREJUDICE TO
OTHER PARTIES**

Mud Lake Water Users, Inc., by and through counsel of record, hereby submit this Memorandum in Support of Finding of No Prejudice to Other Parties. This memorandum is supported by the Affidavit of Robert L. Harris filed herewith.

INTRODUCTION

Mud Lake Water Users filed a Motion to File Late Notice of Claim on October 30, 2009. The SRBA Court heard the Motion to File Late Notice of Claim on January 19, 2010, at 1:30 p.m. The hearing was held in front of Eric J. Wildeman, the new presiding judge of the Snake River Basin Adjudication. After hearing the claimant's reasons for making an untimely filing of their late claim, the Court determined that the applicant had an excuse for the untimely filing and had a meritorious position, both of which are elements of good cause as required under Idaho Rule of Civil Procedure 55(c) and as required by the SRBA Administrative Order 14.d.(2)(d). However, the presiding judge determined that a question remained as to prejudice to other parties that may arise by the late claim,

and was not specifically resolved at the hearing on Mud Lake Water Users' Motion to File Late Notice of Claim. The Court therefore assigned the matter to Special Master Brigitte Bilyeu to make a finding of prejudice or non-prejudice to the other party. The Court noted in its order of reference that "Basin 31 is a completed basin and the practice of the Court is to refer the matter to the Special Master for a determination of prejudice to other parties." Therefore, the Court is to determine prejudice to the other parties, and that issue is scheduled to be heard before Special Master Bilyeu on March 5, 2010, at 11:30 a.m. As set forth below, there will be no prejudice to other parties in allowing Claim No. 31-12181 to continue it through the adjudication process, because of the prior appropriation doctrine, and the junior priority date claimed for Water Right no. 31-12181.

ARGUMENT

Idaho Code § 42-106 succinctly summarizes the prior appropriation doctrine in Idaho regarding distribution of water diverted pursuant to lawful water rights: "as between appropriators, the first in time is first in right." Water is distributed in Idaho pursuant to the prior appropriation doctrine, which generally holds that individuals with a senior priority water right are entitled to their full allotment of water before any junior water right holder is entitled to any water pursuant to their water rights. As such, a late claim being introduced into a system that has already been adjudicated will not result in prejudice to other parties if the priority date of the late claim were junior to all prior rights.

Water Right Claim No. 31-12181 claims a priority date of May 5, 1969. As set forth in the late claim, Mud Lake Water Users has excellent evidence of when water was first applied to beneficial use in 1969. Attached to the late claim are US Geological Survey records showing that 617 cfs was discharged on May 5, 1969. Thus, Claim No. 31-12181 is being claimed as a beneficial use water right, as it was developed prior to the mandatory permitting cutoff date of March 19, 1971.

Attached at Exhibits A and B of the Affidavit of Robert L. Harris is an IDWR Water Right Adjudication Search performed by Mr. Harris on March 4, 2010. Within the Department's website, individuals can search for water rights through a variety of methods. Based on the information known to the person performing the search, the query parameters can be framed through various means. Mr. Harris performed a water right adjudication search for water rights in Basin 31 which list Camas Creek and Mud Lake as the source and the location of its point of diversion. Attached at Exhibit A of the Harris Affidavit is the 10 page return search, and if the Court examines each of

the priority dates on Camas Creek, it will discover that the May 5, 1969 priority date claimed by Mud Lake Water Users would be the most junior priority date water right on the Camas Creek system. Similarly, attached at Exhibit B is the same search but with Mud Lake (which has Camas Creek as a tributary) listed as the source, and the 1969 right is also the most junior.

Therefore, water would only be permitted to be diverted under Water Right No. 31-12181 provided that the needs of all senior priority date water users in Camas Creek and Mud Lake are met. Furthermore, Water District 31 is managed by a water master, who would ensure that delivery of water under 31-12181 would only occur at appropriate times to the non-injury of other water right holders. Therefore, the existing parties in Camas Creek and Mud Lake would not suffer prejudice if Claim No. 31-12181 were authorized to move forward through the adjudication process.

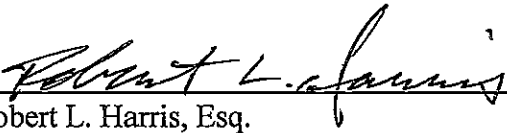
Additionally, we would note that while water diverted under this water right is certainly applied to the beneficial use of groundwater recharge, it is typically only done during periods of high flow. As noted in the documents attached to the Applicant's Motion to File Late Notice of Claim, the diversion heading into what is called the "Lone Tree Canal" was constructed primarily as a flood control measure, but with the beneficial use of groundwater recharge for waters so diverted for flood control purposes. Therefore, we would anticipate diversions of water through the Lone Tree Canal to only occur at times when there are flood flows or near flood flows as determined by decision-making individuals within Clark and Jefferson counties in Basin 31. For this additional reason, no other water user will suffer prejudice in the event Water Right No. 31-12181 receives a partial decree in the Snake River Basin Adjudication.

Lastly, as a matter of clarification, we wish to point out to the Court that Mud Lake Water Users did file an Application for Permit for this same use of water in 1997, which was assigned Water Right No. 31-7650. It was only recently discovered in reviewing records associated with this Application for Permit that the parties discovered that water had actually first been applied to beneficial use in 1969. Therefore, Mud Lake Water Users has requested a stay from the Department on the processing of Water Right No. 31-7650 to allow the Department to investigate Claim No. 31-12181 in the adjudication process. While not relevant to the finding of prejudice to other parties, we hope this provides a measure of clarification to the Court.

In conclusion, because Claim No. 31-12181, at best, would have a priority date of May 5, 1969, this water right would still be junior to any and all water rights diverted from Camas Creek and Mud Lake. Therefore, under the prior appropriation system, other parties would not suffer

prejudice. Additionally, as set forth above, water is generally only diverted through the Lone Tree diversion during periods of near flood or actual flood events. During these events, there would be more water available than other water right users could hold, and diversions under this claim would not reduce their water supply. For these reasons, we request that the Special Master make a finding of no prejudice to other parties, and allow the claim to be processed through the SRBA claims process.

DATED this 4th day of March, 2010.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

CERTIFICATE OF SERVICE

I hereby certify 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, on this 14th day of March, 2010.

DOCUMENT SERVED: MEMORANDUM IN SUPPORT OF FINDING OF NO PREJUDICE TO OTHER PARTIES

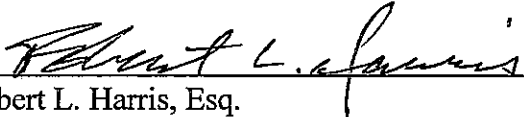
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