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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	)	Subcases: 75-10603 & 75-14531
	)	
	)	
Case 39576	)	CLAIMANT/OBJECTORS
	)	HELTSLEY & FELTON
	)	CLOSING ARGUMENTS
	)	
	)	

Pursuant to the request of Special Master Dolan at the end of the Court Trial held on the 26th day of February, 2010, comes now Claimant/Objectors Ann M. Heltsley Living Trust and Stuart & Mitzi Felton, by and through counsel of record, Jerry R. Rigby, of Rigby, Andrus & Rigby, Chartered, and hereby file the following Closing Arguments:

Following the trial of this matter, the historical facts in this case along with the testimony of witnesses, signed historical affidavits/statements and historical documents, separately and together have provided compelling and sufficient factual evidence for the above entitled Court to rule in favor of these Claimant/Objectors and find the point of diversion of each of the above

water rights to be at the location claimed by Claimant/Objectors as evidenced at the trial of this matter¹.

At the outset it should be noted that long before the trial was held on this matter, the Department's original Directors Report² recommended the point of diversion of each of the disputed water rights to be at the head of the spring which is the beginning of the water course and the source of water for Heltsley/Felton' above described water rights. The original Director's Report was investigated by a qualified SRBA investigator and was based upon the documentation, affidavits, notice of claims to water rights and SRBA claims filed by the various water users to a spring (and smaller springs) which flowed into a channel known as the "Spring Ditch". It was only when preparing for trial of this matter that Ms VanBussum³ amended the Director's recommendation and changed the original point of diversion to a point which is down stream of the spring and is located on Forest Service lands.

The problem with the present recommendation is that it relies almost exclusively upon a

¹It should be noted that even though there was a mistake in the actual point of diversion originally recommended, there is no dispute by any party or the Department as to the intended location of the point being at the beginning of the spring which is the main source of Claimant/Objectors' water rights.

²On May 19, 2006, IDWR western region adjudication section claim verification field exam sheet was complete by Jack Ellis. The IDWR employed Mr. Ellis to achieve this field work. An SRBA aerial photograph was generated by this field survey and signed by Roxanne Brown. The generated map was entered into the Directors Report, by the IDWR, and declared the point of diversion to be at the head of the spring rising.

³Who is the second SRBA investigator to the litigated water rights and who, following a several hour visual investigation and without any interviews being made of the historical parties, disagreed with her SRBA counterpart, the original Director's Recommendation and the historical documentation.

several hour site visit to the premises and ignores the personal testimony of those who have historically owned the lands and worked with the water from the spring and ignores the historical documentation which is all contrary to the change in the Department's recommendation. It is important to review what the historical evidence actually evidenced.

First, Ms. Heltsley and Ms. Felton read from the old records of how their lands were homesteaded. Just as was common in the late 1800s, ditches were dug and banks were levied in order to keep water as high along the upper edges of the irrigated lands as possible in order to enjoy the benefit of gravity fed irrigation to the irrigable acres of their lands. The Heltsley/Felton lands were homesteaded by Elizabeth Eldridge who resided on the property from approximately 1887 to 1918 and who, with her sons, dug the type of ditches necessary to irrigate her lands and irrigate a grove of fruit trees.

It should be noted that Heltsley/Felton Exhibit 1 deeded the property from the United States to Ms. Eldridge in 1913 along with "all water rights and ditches that were established". In order to qualify for the homestead, one is required to evidence that the lands had been "worked" and "watered". Therefore, Heltsley/Felton Exhibit 2 signed and dated, September 4, 1910, is the United States official survey map of the Elizabeth Eldridge homestead. The survey map identified the Spring Ditch as established and already carrying water to the Eldridge property. No where on the survey does it mention a "creek" or "stream" which would only seem logical if the reach from the spring was ever considered anything other than a ditch.

As further significant historical evidence as to how the spring waters channel was treated by those who worked and owned the properties in question prior to Murphy/Hull was Heltsley/Felton Exhibit 3. This was a claim of to a water right, claim #75 4055, signed and dated

October 13, 1976. This claim was filed by John Westman and officially accepted and filed in the records of the Department. Additionally, is Heltsley/Felton Exhibit 5 which is also a pre-adjudication claim to a water right signed by Russ Kozacek in 1979. It is important to note that these claims were made well before the adjudication claims and describe the water source as the Spring and the means of diversion of water, as the ditch capturing the spring water. No where in the pre-adjudication claims does it state a diversion from a stream, creek or other natural channel. It is also important to note that neither the Department nor the landowners ever disputed the claims or the point of diversion.

In fact, Harold Hanson confirmed in a statement attached to the claims (Heltley/Felton Exhibit 9) that the water source and point of diversion was the Spring Ditch on his land. The statement was signed and dated March 5, 1979. As confirmed by Mrs. Adele Crawford, Mr. Hanson was a long time resident of more than forty five (1948 to 2002) years, on the old Jones homestead (Murphy/Hull lands), where the Spring Ditch begins. In fact, for several years, he was responsible for the irrigation of both the old homesteads, Jones (Hanson) and Eldridge (Ravndal), properties. No single person knew more about the ditch systems then Mr. Hanson. His notarized statement was unwavering in the fact that the water arises on his lower piece of property and is carried by the Spring Ditch down to the Eldridge homestead. This is an important concession by a previous owner of the lands now owned by Murphy/Hull. Clearly, he believed that the entire disputed reach was a DITCH and treated it as such.

Without enumerating each of the exhibits relating to the SRBA claims made by the landowners claiming water from the Spring one by one, it is sufficient to state that each and every one of them claimed the Spring as their source and the ditch as the capturing device from

the spring⁴. Again, no where in the claims does it state that there was ever a diversion of these water rights from a stream, creek or other natural channel, only the Spring.

Mrs. Adele Crawford's testimony at trial is most compelling. She owned or worked on the entire property now owned by Murphy/Hull and lived & worked the same from approximately 1968 to 1988. She was emphatic that the entire reach from the spring down through her property was a ditch. She confirmed that the ditch was called "Spring Ditch" by all who were associated with it. Furthermore, she testified that she worked on the springs itself and modified the direction of its flow. She testified that while she was on the lands, the disputed reach looked much more like a ditch than it does today due to Mr. Hanson and her vigorous "work" on the banks of the ditch.

The law is clear that a "diversion", for purpose of a defining beneficial use, can be anything which causes a natural drainage to be changed in a manner or a direction different than it originally runs. The work performed on the opposite side of the original road to Mrs. Crawford's home and then piped under the road by a culvert to a reach which Mrs. Crawford and her predecessor in interest, Mr. Hanson, constantly maintained to insure that there was no breach of the banks, clearly meets the test of a diversion for a beneficiary use as required by law.

Mrs. Crawford even testified that she could specifically recall several occasions (and one

⁴Murphy/Hull attempt to argue that because the Kozacks have settled with Murphy/Hull this in some way is an admission that they were wrong in their claims and point of diversion. However, a settlement is in no way an admission but can only be viewed as their decision not to proceed due to many factors, including costs and the emotional distress associated with trial. Furthermore, because it came out in the trial, it is important to note that even the Kozack settlement involves their ability to continue to "maintain" the disputed reach which would be contrary to the claim that this reach is a natural channel.

most specifically) where the water from the Spring Ditch DID breach the banks on her lands and the flow of the water was toward the North Fork and NOT parallel to the banks of the present ditch. She also testified, which was attested to by other witnesses besides the claimants, including Mr. Warner and Ms. Nancy Liebrecht of Rocky Mountain Environmental, that to have any water breach the banks and head toward the North Fork would be water lost to the Heltsley/Felton lands and only swamp Mrs. Crawford's lands. Finally, the same witnesses testified that a change in the elevation of the water, even to a small degree, would not supply the water to the ditch further down the reach. The water was required to be kept as high as possible in order to maintain its elevation.

Clearly, the Spring ran in a channel before man's intervention. However, equally clear from the testimony of those who were on those lands for many decades, is that the "natural flow" was in a direction below the present location and in an angle toward the North Fork, thus making it unusable to the lands of Heltsley/Felton. Furthermore, as was testified by Heltsley/Felton's experts, Mr. Warner & Ms. Liebrecht, it is common to take over natural water courses and "convert" them into private canals or ditches. Mr. Warner used as an example one of the largest systems known for such an event, the "Great Feeder" located in Southeast Idaho. At one time, it actually WAS the Snake River and now it is a private canal system which supplies water to several canal companies in the Jefferson County area. This too can help explain why today the disputed reach appears to look natural. Testimony by Mr. Warner and Ms. Liebricht each testified that it is consistent to have these type of man made ditches take on the appearance of a natural channel, especially when there has not been any maintenance work done on them for several years. In other words, the path as originally altered from its natural tendency to head in the

general direction toward the North Fork instead of in a direction virtually horizontal to the river as it does today can only be due to man's intervention. Furthermore, it is important to note that this is not the type of production ditch or canal which most of us are used to seeing and working with. This is a ditch dug and maintained by hand by those who were seeking the benefits of a very small spring whose flows deviated only slightly.

The present case before the Special Master is not the case of a creek or stream which has several diversions from it as it meanders down its natural course to a larger creek or the river. The entire sum of its water is carried in ONE channel from the springs at its origin to the lands of water users who divert all of it upon their lands. Even by admission of the Department and Murphy/Hull, without any "diversion" or "rediversion" the so called stream or creek magically "morphs" or "transforms" into a ditch after it reaches the Forest land. The Department and Respondents attempt to justify this due to the fact that the ditch comes to a point on the Forest lands where it widens. However, the evidence was abundantly clear from Ms. Heltsley, Ms. Felton and Mr. Larry Heltsley (Ms. Heltsley's brother) that not only is there NO other diversion or drain from the Forest land, the only reason for the widening effect at the Forest land was due to historical breaches in the bank of the ditch in previous years which required a significant levy to be built on the downhill side of the ditch causing it to widen and pond to a certain degree. The historical testimony and evidence is not in dispute and not one shred of evidence was presented to dispute it. As stated above, the Heltsley/Felton lands were developed and homesteaded by Ms. Eldridge who, together with her young sons, hand dug ditches to water the lands of her homestead. The disputed ditch had, as its origin, a main spring and series of smaller springs captured in a channel which was known by all as the Spring Ditch.

Testimony from Mrs. Crawford, Ms. Heltsley, Ms. Felton, Mr. Warner, Ms. Liebrecht each testified that “but for mans intervention” the spring would have found its way to the North Fork from its origin and NOT remained as high as it presently runs in order to be up gradient from the newly proposed point of diversion and eventually to the Helstley/Felton lands which are watered from its waters.

Although an older case, the reasoning and holding in an Idaho Supreme Court case continues to be clear for the purposes of applying the historical testimony presented at the trial on this matter. The case is entitled *Park v. Boulware*, 7 Idaho 490, 63 P. 1045 (Idaho 1901). The facts of the *Park* case evidenced that what had previously been known as a “slough” or “high water channel” had been adopted by the landowner as part of his ditch system and therefore it was NOW known as a ditch which, if proven sufficiently, would grant ownership rights to the water user equal to an artificial channel. Although historical witnesses to the Spring Ditch have testified that the entire reach of the Spring was in some way manipulated by man (even at its origin by Mrs. Crawford who worked on the spring itself and diverted it into a culvert), the *Park* holding would stand for the ability to “adopt” certain natural reaches into ones ditch and not destroy all rights associated with a ditch.

As stated above, besides the testimony of all of the historical witnesses themselves, the next most compelling evidence is the historical documentation itself. Again, as with the historical witnesses, there was not ONE document which called the disputed reach a “spring” or anything which would suggest that it was a natural channel. In fact, to the contrary, the documentation referred to the reach as Spring Ditch. Although Miss Van Bussum and Murphy/Hull attempted to confine the naming of Spring Ditch to only the Forest lands in the Murphy/Hull exhibits

pertaining to the work being performed on the Forest lands, it is clear that the line indicating the Spring Ditch continues upstream onto the Murphy/Hull lands without any re-designation of the ditch to a creek or stream. Therefore, instead of contradicting Heltley/Felton's position, the documentation and maps produced by Murphy/Hull actually add credibility to Heltsley/Felton's position that the reach on the Murphy/Hull lands was always considered a ditch. Logic would dictate that the reason the ditch line didn't go all the way to the spring itself was that the work for which the map was created was to aid in receiving authority from the Forest Service over its lands only, not the lands upstream as they were not necessary for the approval process. Furthermore, it is also logical to assume that if the ditch was in fact deemed by those creating the documents to be a creek or stream upstream from a point that was still on Forest Lands⁵, wouldn't they have referred to it with a notation or designation as such upstream from that point instead of just drawing a line which eventually quits upstream from the line named "Spring Ditch" over the balance of the Forest lands and well into the Murphy/Hull lands?

Others exhibits which support Heltsley/Felton's position are as follows:

(A) The affidavit by Velma Revndal (Heltsley/Felton Exhibit 10) with was signed before a notary and dated, July 13, 1984. The Ravndal family purchased the Eldridge homestead in 1918 and were long time residents of thirty nine (39) years. Velma makes no mistake in describing the water used for the ranch as coming from "tapping the overflow from a spring on the private property of Harold Hanson and building the "Spring Ditch", coming across Forest Service property to the said Eldridge property". Velma included an attached; signed & dated,

⁵As the present recommended point of diversion is in fact down stream from the Forest Service's upper boundary.

hand drawn map showing the Spring Ditch originating at the head of the spring rising. The Spring Ditch is not connected to the North Fork of the Salmon River and only feeds out to the NF drainage, at the end of its reach. The same is true today.

(B) A special use permit issued to Lew Gohmes by the Forest Service, dated September 17, 1962 was presented by Murphy/Hull as Murphy/Hull Exhibit ____.

i) The permit reflects the public lands managed by the Forest Service and it required a permit for any work being proposed. This Exhibit is obviously determining the Gohmes proposed ditch reconstruction of the Spring Ditch. The permit is for the work to be done on the Forest lands and Gohmes was not addressing any work that may or may not be needed on private land.

ii) On the south end of the Forest lands, the drawing for proposed reconstruction suddenly stops at the boundary of private land. In reality, and by everyone's admission the ditch continues on down through the Heltsley/Felton private property.

iii) On the north end of the Forest lands, the drawing of proposed reconstruction stops. However, the line continuing upstream depicts the Spring Ditch continuing to the 'live spring' on private property. As the Heltsley/Felton witnesses have testified, this area of the ditch is beset with beaver damage and requires a significant amount of repair. The Forest Service permit is an indication of reconstruction that is inherent with the Spring Ditch. There is no indication shown on the said permit, that a point of diversion is located on Forest lands.

As far as the experts are concerned, Heltsley/Felton produced two experts skilled in the area and whose jobs are dedicated to the type of evidence required at this hearing. Following is a summary of their additional testimony and qualifications:

(A) Report of the expert witness, Nancy Liebrecht (Exhibit 11 of Heltsley/Felton). Ms.

Liebrecht is an environmental planner and wetland scientist. The certificates of education, work history and environmental studies in the field of wetlands are extensive. Ms. Liebrecht was charged with the environmental impact study for the whole reach of the North Fork Salmon River, in compliance with the Clean Water Act and Endangered Species Act. This study took more than a year of ground investigation. Her unwavering opinion was that mature vegetation may give the impression that the existing channel is natural, but native black cottonwoods and willows are very fast growing and will easily reach maturity in 40 to 50 years. The Spring Ditch was put into use over one hundred (100) years prior to Ms. Liebrecht's examination. The woody riparian plant community colonized the ditch corridor after the channel was dug by early settlers.

(B) Report of the expert witness, Roger Warner (Exhibit 12 of Heltsley/Felton). Mr. Warner is a hydrologist and partner owner of the Rocky Mountain Environmental Association. He has vast experience with the Department as a former employee. Warner has worked on several water rights issues along the Salmon Valley and Bitterroot Mountain range. A significant on site visit analysis was completed and testimony given based on his knowledge of the area. Yet, unlike Ms. Van Bussum, his bottom line testimony was that without proper maintenance, the disputed reach will fail some day and Heltsley/Felton will not receive their full water rights. Furthermore, Mr. Warner produced gradient map which evidences that the flow, although not as significant as further downstream, was in fact toward the North Fork and NOT toward the high line ditch as it presently runs.

To accept the position of Ms. Van Bussen as supported by Murphy/Hull and their marine fishery expert is to take all of the documentation and the testimony of the historical witnesses and completely disregard them based upon a several hour day trip view of the reach.

Even though there is abundant evidence that the work which was done by Ms. Eldridge in developing her homestead was in fact a “diversion” from the spring itself and therefore created the original point of diversion from the spring, the modifications of Mrs. Crawford at the spring and the work done by the owners of the Murphy/Hull lands before Mrs. Crawford owned the lands were more than sufficient to cause an accomplished transfer of the point of diversion to the box she created at the spring itself and the culvert she caused to be buried under the historical road. In fact, there is absolutely no testimony to dispute Mrs. Crawford. One would have to believe that she lied in order to say that she did not change the spring diversion in some manner or that she did not work on the banks of her lands in order to keep the waters from the spring within the banks of the ditch to the end of her property.

To further support her testimony, Mr. Heltsley and Ms. Heltsley each testified that they helped Mr. Hanson repair a breach on the banks of the ditch **on** the Murphy/Hull lands and that water was flowing away from the ditch which would be lost to the Heltsley/Felton lands. Again, one would have to conclude that people, who had worked their lands for decades, weren’t even familiar enough with the breached location so as to know whether it was above or below the Forest Service line or even the lower location where the department has recently concluded the point of diversion to be located.

The Forest Service permit for which was applied and received by the Kozaceks granted the right to cross the **entire** width of Forest Service lands along the channel. Why would one need to cross the lands of the Forest Service from its upper boundary if the upper reach from the newly recommended point of diversion was a natural creek and not a ditch. Again, this defies logic and is contrary to the position taken by the Department when it changed its

recommendation to the new point of diversion.

It is important to point out that the issue of the location of the true point of diversion is not a fundamental issue for the State of Idaho or the Department of Water Resources. There was no objection filed by Idaho Fish and Game as to the originally recommended point of diversion being the spring itself and therefore we have to assume that F&G has no objection to the Spring being the point of diversion. This is a dispute between landowners only. In fact, it is only a dispute between Heltsley/Felton and those landowners who have recently purchased the lands from predecessors who had **no** dispute with the position taken by Heltsley/Felton but actually supported it to the point that they personally maintained the banks of the ditch as it crossed their lands.

Furthermore, there is no dispute that the entire water from the Spring has been continuously diverted and beneficially applied by the Heltsley/Felton property owners upon their lands as required. Murphy/Hull has NO water rights in the Spring. Arguably, Murphy/Hull have no standing to object under *Idaho Code, Title 42, Chapter 14*, as they cannot prove any injury as required by the statute. Their desire to change the name of the Spring Ditch to a 'natural stream' in and of itself, is not an injury. Furthermore, their insisting that the point of diversion be moved off from their lands does not constitute an injury to their water rights as contemplated by the SRBA adjudication.

Lastly, it should be stated that Heltsley/Felton right of maintenance has always been a right of maintenance with hand tools as that is all that was necessary conforming with Chapter 11 and 12 of Title 42 to the Idaho Code. By the testimony of Ms. Heltsley and Ms. Felton, they each testified that they never intended or would intend to disrupt the reach from the Spring to the

Forest Service line except to insure that their water rights remained in the ditch. This has taken only hand tools in the past and unless Murphy/Hull cause something to change upon their lands in the future, this should only take hand tools to maintain in the future. However, as was testified by Mr. Warner and Mrs. Crawford in addition to the claimants, without **some** maintenance, the water rights of Heltsley/Felton stand in jeopardy of being lost with no legal right to enter the lands of Murphy/Hull and correct the flows to allow their water rights to be restored. Therefore, it is imperative that the original point of diversion to the actual Spring as recommended by the Department and as corrected as to its specific location by the testimony at the trial of this matter, be restored.

CONCLUSION

Pursuant to *Title 42, Chapter 14, 42-1411 (4)*, the Director's Report "constitutes prima facie evidence of the nature and extent of the water rights acquired under state law." However, it is also clear that pursuant to the next paragraph (*42-1411 (5)*), that it is the "claimant" who has the "ultimate burden of persuasion for each element of a water right." Those objecting to the Report "shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." (*42-1411 (5)*). Therefore, the prima facie evidence presented by the Department is clearly rebuttable by the claimants evidence presented at trial on the particular matter. Finally, those who disagree with the objector's position "may submit evidence in opposition to the objector's position and in support of the director's report." (*42-1411 (5)*)

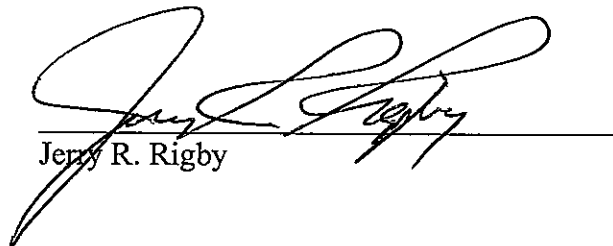
Heltsley/Felton would submit that as demonstrated above and at trial, they have clearly met the required burden of persuasion and that Murphy/Hull have failed to discredit the evidence

by Heltsley/Felton through either historical documentation or witnesses. To the contrary, the historical documentation and historical witnesses (none of which was refuted), fully support the original Director's Report Recommendation. Furthermore, the Heltsley/Felton land owners have continuously diverted the water from the Spring through the Spring Ditch for beneficial use upon their lands and have never forfeited these rights.

Therefore, Heltsley/Felton respectfully request that the Director's original recommended report (using multiple Department Investigators) which found and recommended the Spring to be the true point of diversion should be reinstated.

The bottom line was best said by Ms. Heltsley when she emphatically stated: Your honor, the DITCH is a DITCH, is a DITCH.

Respectfully Submitted this 29th day of April, 2010.



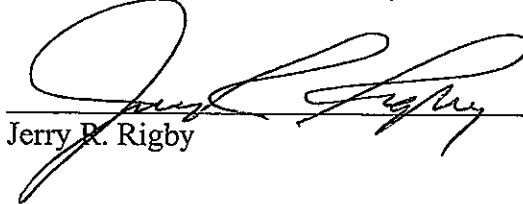
Jerry R. Rigby

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
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I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 29th day of April, 2010.

RIGBY ANDRUS & RIGBY, Chartered


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