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DEPARTMENT OF
WATER RESOURCES

Attorney for
Indian Creek Ranch Owners Association, Inc.

**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 39576

) Subcase Nos. 37-296A, 37-717, 37-1216,
) and 37-7854
)
) **INDIAN CREEK RANCH OWNERS'**
) **ASSOCIATION, INC.'S**
) **MEMORANDUM IN SUPPORT OF**
) **MOTION TO AMEND OBJECTIONS**
)
)
)

The Indian Creek Ranch Owners Association, Inc. ("ICROA") by and through its above-captioned counsel of record respectfully submits this *Memorandum in Support of Motion to Amend Objections* to add the following respective claims:

37-296A:

Validity and priority date issues related to a historic change in source from Indian Creek to Indian Springs; and

Right, as originally decreed, was for irrigation season only.

37-1216 and 37-717:

Available chain of title does not support City of Hailey ownership;

Validity and priority date issues related to a historic change in source from Indian Creek to Indian Springs;

Rights, as originally decreed were for non-irrigation season only;

Quantities overlap quantity of 37-7854 and quantities of the two rights with 37-7854 are not additive; and

As originally decreed, diversion of 37-717 was conditionally limited to when Water Right No. 37-28 was not able to be obtained.

37-7854:

Quantities are excessive based on available diversion records.

I. Standard of Review

Rule 15(a) of the Idaho Rules of Civil Procedure governs motions to amend.

Amendments should be granted liberally, under the rationale our Supreme Court stated in *Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993 (1986):

...[T]echnical rules of pleading have long been abandoned in this state. *Rauh v. Oliver*, 10 Idaho 3, 9, 77 P. 20, 21-22 (1904). The general policy behind the current rules of civil procedure is to provide every litigant with his or her day in court. *Sines v. Blaser*, 98 Idaho 435, 437, 566 P.2d 758, 760 (1977). The rules are to be construed to secure a just, speedy and inexpensive determination of every action or proceeding. I.R.C.P. 1(a). The purpose of a complaint is to inform the defendant of the material facts upon which the plaintiff bases his action. *Fox v. Cosgriff*, 64 Idaho 448, 454, 133 P.2d 930, 932-33 (1943). A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief. I.R.C.P. 8(a)(1); *Stone v. Bradshaw*, 64 Idaho 152, 157, 128 P.2d 844, 846 (1942).

Citing Professors Wright and Miller in discussing Federal Rule 15-an identical counterpart to I.R.C.P. 15, the Court-in *Clark* noted that the purpose of Rule 15(a) is two-fold: First, to allow the best chance for each claim to be determined on its merits rather than a procedural technicality, and second, to relegate pleadings to the limited role of providing parties with notice of the nature of the pleader's claim and the facts that have been called into question. *Clark, supra*, 110 Idaho at 326, citing C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1471 (1971). Consequently, the Court ruled, it was an abuse of discretion for the trial court to deny the plaintiff's motion to amend his complaint. *Id.* at 327.

II. Because the Accomplished Transfer Statute, I.C. 42-1425, does not apply to changes in source, Water Right Nos. 37-296A, 37-1216 and 37-717 should have their priority dates adjusted to reflected the date the source of these rights, originally decreed with a source of Indian Creek, was changed to Indian Springs

Water Right Nos. 37-296A, 37-1216 and 37-717 all were decreed with a source of Indian Creek in the 1900 *Caldwell v. Tucker* Decree and the 1909 *Frost* Decree. *Affidavit of Dana L. Hofstetter Supporting Motion to Amend Objections, Exhibits A and B.* However, sometime thereafter, the source was changed from Indian Creek to Indian Springs. *Id., Exhibit I.* While I.C. 42-1425 recognizes certain changes in water right elements as "accomplished transfers," it does not so recognize changes in source as "accomplished transfers." Accordingly, the change in source legally resulted in the establishment of new beneficial use water rights with new priority dates.

III. Water Right No. 37-296A, as established, was an irrigation season only right, and Water Right Nos. 37-1216 and 37-717, as established, were non-irrigation season rights.

Water Right No. 37-296A, was originally decreed to be an irrigation right in the 1900 *Caldwell v. Tucker* Decree and in the 1909 *Frost* Decree. *Affidavit of Dana L. Hofstetter*

Supporting Motion to Amend Objections, Exhibits A and B. Water Right Nos. 37-1216 and 37-717 were originally decreed to be "winter" rights in the 1900 *Caldwell v. Tucker* Decree and the 1909 *Frost* Decree as the irrigation season flows of Indian Creek were fully appropriated under Water Right No. 37-296. *Id.* Accordingly, in order to prevent water right enlargements these rights should be limited to their respective historic seasons of use.

IV. **Available chain of title information reflects conveyance of title to Water Right No. 37-296A to the City of Hailey but does not support the City's asserted title to 37-717 and 37-1216.**

Available chain of title information reflects conveyance of Water Right No. 37-296A to the City of Hailey but does not support the City's asserted title to 37-717 and 37-1216. *Id.*, *Exhibits E to H and K and L.* These two rights were originally decreed to the Alturas Water Company and based on the available chain of title information, title to 37-717 and 37-1216 does not appear to belong to the City. *See, id., Exhibits A and B.*

V. **The diverted quantities of Water Right Nos. 37-296A, 37-717 and 37-1216 overlap the quantity diverted under 37-7854, and remarks are necessary to clarify that these quantities are not additive.**

Field examinations confirm that Water Right Nos. 37-296A, 37-1216, 37-717 and 37-7854 are all diverted into a single pipe which first runs to the City's hydroelectric turbine before being discharged to the City's municipal water supply tank. *Id., Exhibit J.* Accordingly the City's municipal rights, 37-296A, 37-717 and 37-1216, overlap, and are not additive to, the City's power right, 37-7854. Remarks need to be included in the respective Recommendations clarifying that the municipal right quantities are not additive to the power right quantities.

VI. As originally decreed, diversion of 37-717 was conditionally limited to when 37-28 was not able to be obtained.

As originally decreed in the Frost Decree the use of Water Right No. 37-717 was limited to when Water Right No. 37-28 was not able to be obtained. *Id.*, *Exhibit B*. Accordingly, this condition continues to legally apply to Water Right No. 37-717.

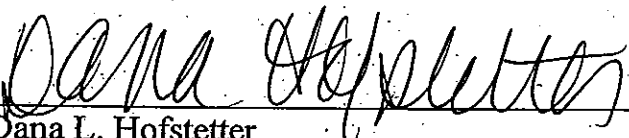
VII. Based on available diversion records, the quantities recommended to 37-7854 are excessive.

The City's available diversion records for the years 1995-2005 indicate that the maximum licensed flow rate of 3.38 cubic feet per second ('cfs') for Water Right No. 37-7854 is rarely, if ever, realized. *See, id.*, *Exhibit M*. At the same time, it appears that the Director's Report acre feet per annum Recommendation for this right is based on a continuous year round diversion at 3.38 cfs. Accordingly, the recommended quantities for Water Right No. 37-7854 are excessive.

VIII. Conclusion

For the foregoing reasons, ICROA's Motion to Amended Objections should be granted.

DATED this 27th day of August, 2010.


Dana L. Hofstetter
Attorney for ICROA

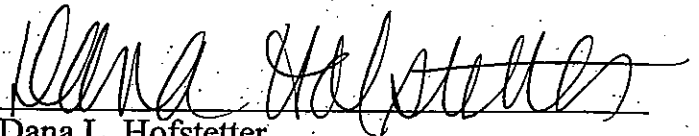
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document (including any attachments) this 27th day of August, 2010, by the pre-paid method(s) indicated below to:

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