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OCT 14 2010

**DEPARTMENT OF
WATER RESOURCES**

Attorneys for Movants: Individual Claimants in Subcases described below

**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	)	Subcase Nos. 01-1J, <i>et al.</i> ; 01-4046, <i>et al.</i> ;
	)	22-48, <i>et al.</i> ; 22-163A, <i>et al.</i> ; 35-2315; 35-2543;
	)	35-4246; 35-2670B; 35-2670C & 35-2670D
	)	
Case No. 39576	)	CLAIMANTS' RESPONSE TO
	)	SURFACE WATER COALITION'S JOINT
	)	OPPOSITION TO MOTION TO FILE
	)	AMENDED NOTICE OF CLAIM
_____	)	

COMES NOW, *Claimants listed in Attachments A, B, C & D*, by and through counsel of record, Jerry R. Rigby of **Rigby, Andrus & Rigby, Chartered** (hereinafter collectively referred to as Claimants) and hereby respond to the *Surface Water Coalition's Joint Opposition to Motion to File Amended Notice of Claim*, dated September 29, 2010 and filed in the above-entitled subcases.

INTRODUCTION & STATEMENT OF THE FACTS

Claimants presently seek to amend their claims timely filed and previously recommended in the SRBA. Their position is simply stated in their individual motions and objections presently on file with the Court. Since well before Claimants were required to file objections to their recommendations to their water rights on or about May of 2006, Claimants have been in active

mediation and negotiations with the Surface Water Coalition (hereinafter “SWC”) as to the elements and remarks contained in the proposed amended claims and their objections to the director’s recommendations in the above entitled sub-cases. Furthermore, because of those negotiations and mediation it was always anticipated and represented to both SWC and the Special Masters that should the parties reach a settlement of the mediation and negotiations, the Claimants would amend their claims in a manner in which would adhere to whatever the form of agreement was reached. In furtherance of said position, Claimants filed objections to their individual claims setting forth the position which is now subject of the proposed amended claims. Therefore, for a matter of years, all parties, especially including the SWC, clearly knew that the proposed motions to amend would necessarily be filed by Claimants. Claimants are each shareholders/electors of an irrigation entity which has also filed to amend its claims to allow for the abundant amount of water beyond incidental recharge to be decreed as “Recharge For Irrigation” as an additional beneficial use. The purpose of the beneficial use was to allow the irrigation entities’ individual shareholders/electors the authority to withdraw their water recharged by the irrigation entity through wells drilled by the individual shareholder/elector and use the recovered water on lands within the irrigation entities’ authorized place of use.

STANDARD OF REVIEW

A motion to modify a timely filed claim in the SRBA is always treated with a lower threshold of “good cause” under I.R.C.P 55(c), which is more lenient than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho at 935, 854 P.2d at 279. This take into account the following factors: 1) whether the delay was willful; 2) whether granting the modified claim would be prejudicial to SWC; and 3) whether a meritorious position by the Claimants has been presented.

SWC's motion, although extremely pre-mature, should be treated in the same manner as a motion for summary judgment for the purpose of its burden of proof. Therefore, the burden is upon SWC to prove the absence of a genuine issue of material facts, which have yet to be documented through normal discovery as far as the court proceeding is concerned. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). All doubts are to be resolved against SWC and its motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986).

RESPONSE ARGUMENT

Claimants have fully met the "good cause" requirement of I.R.C.P 55(c). As supported by the affidavit of counsel for Claimants, Jerry R. Rigby (attached hereto), there has been no willful delay. This matter has been through years of negotiations and mediation which have addressed virtually every aspect of the claims and any potential modifications of the claims acceptable to the parties. There can be no claim that the delay was willful in that everyone was informed, including the court on several occasions, that amended claims would be forthcoming in due time, either in a form as agreed upon by the all parties or by the Claimants should negotiations break down.

To determine the timeliness of Claimants' motions to amend, the court considers the stage of the proceeding at which an applicant seeks to amend, the prejudice to the other parties, and the reason for the length of the delay. *Farrell v. Board of Comm'rs, Lemhi County*, 138 Idaho 378, 390, 64 P.3d 304, 316 (2002). See also *Order Granting Motions to File Late Notices of Claims*, in Water right claims: 71-10886 et al. As a result of the numerous meetings and documentation supplied SWC by Claimants and their experts, there can be no prejudice to SWC.

Furthermore, the proposed amendments virtually mirror the original objections to the individual Claimants' rights which were filed in 2006.

As to the meritorious position of the proposed amended claims, Claimants certainly have a rights to proceed along the standard avenues allowed and in fact required by the SRBA, especially in having a director's report filed with the Court. Pursuant to Idaho Code § 42-1141, it is clear that until the director provides a director's report the present motion by SWC is premature. Claiming that a license cannot be "collaterally attacked" is a shot gun approach at a statute which allows for significant modification to licenses, each of which can fall far short of collateral attacks to the license itself.

The report of the director under I.C. 42-1411 requires the director, in part, to do the following:

...
(2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

...
(b) the source of water;

...
(d) the date of priority;
(e) the legal description of the point(s) of diversion; ...

(3) The director may include such general provisions in the director's report, as the director deems appropriate and proper, to define and administer all water rights.

The Court is well aware that notwithstanding the fact that Claimants have claimed an earlier priority then that which was licensed, the director's recommendation of those rights could result in a remark which, for the purpose addressing the source (together with the priority of the source and the points of diversion of each individual licensed well) would address the priority for rights which are claimed by the irrigation entities within which the licensed right exists and which would be a necessary or a more efficient and flexible means "to define and administer" said water rights. See *Memorandum Decision and Order on Motions for Summary Judgment*, in

Water right claims: 63-02529 et al, at page 8. This is not a collateral attack but rather a further defined source of the water to be pumped by the individual licensed Claimants.

As stated above, SWC claims that Claimants are attempting to collaterally attack prior licenses or transfers. SWC cites to the *Order on Challenge of "Facility Volume" Issue and Additional Evidence Issues*, Subcase Nos 37-2708, et al., 1999, at page 15, and states that the SRBA court disfavors collateral attacks on licenses. However, SWC seems to ignore that the *Order* states "a remark *may be inserted to administer or clarify* a right so long as the remark does not alter or restrict the *use of the license*." *Id.* at page 15. (Emphasis added.) The importance of this is two-fold in the present case. First, the Claimants only seek to amend their claims to reflect how they have historically irrigated under their licenses. Second, in light of I.C. § 42-228, which allows for recovering groundwater, the remarks or additions to their water right elements the Claimants may seek by amending their claims would certainly be a more efficient means of administering the water rights in question. Said remarks or additions would not redefine the licenses or transfers in a way as to alter the use of the license from its historical use.

The ability of the SRBA court to insert remarks or further definitions of the elements in order to clarify the administration of a right is further evidenced in the *Memorandum Decision and Order on Motions for Summary Judgement* cited by the SWC. Subcase Nos. 63-02529 et al. The claimants in that case objected to a volumetric limitation being placed in the Director's Report for a water right which did not contain such a limitation in the license. The court states that "while Idaho code § 42-220 prevents a previously licensed water right from being redefined in the SRBA, neither the Facility Volume Order nor Idaho Code § 42-220 prevent the SRBA adjudication process from being used to determine and define any previously undefined elements of a water right." *Id.* at page 12. The Court therefore actually allowed an **addition to the element of the water right** beyond the normal remark which provided a volumetric limitation as

it defined previously undefined elements of the water right. Similarly, Claimants in the present case seek a remark or addition to the element of their rights which would clarify their historic use of their licenses.

SWC claims that there is no basis in law to demonstrate any meritorious position for the amended claims. This is not true. The accomplished transfer portion of the proposed amended claims has recently been addressed in the cases heard before Special Master Dolan by his *Order Partially Granting Aberdeen Springfield's Motion for Summary Judgment . . .*, in sub-cases 01-23B et. al, dated June 11, 2009. Although the Aberdeen Springfield did not necessarily claim the rights of the accomplished transfer within each individual well, the agreement with IDWR and the "accomplished transfer" anticipated by said order clearly requires the individual wells to be the transferred point of diversion and the source of the recovery for the recharged water by Aberdeen Springfield's water rights. Claimants position is that such recognition on each licensed individual water right, by whatever means, is a more efficient means "to define and administer" said water rights granted by the said order. To predetermine that "means" before the director makes his recommendation is premature.

Although Claimants recognize that a true collateral attack of the licensed water rights is on its face is not appropriate, the terms of settlement with the Department of Water Resources and the consequences of the rulings contained in the Aberdeen Springfield Order clearly anticipate that the individual licensed water rights are "modified" in a way which enables them to "recover" the recharged water of Aberdeen Springfield Canal Company. Claimants position is that this is NOT a collateral attack and that it is best for all parties and the Department to have those additional rights defined within the individual water rights in order to fully comply with the intent of I.C. 42-1411 as a more efficient means "to define and administer" said water rights.

Finally, Idaho Code §42-228 clearly sets forth the authorization for “the excavation and opening of wells and the withdrawal of water therefrom by canal companies, irrigation districts, and other owners of irrigation works for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on the or drainage of lands to which the established water rights of the parties constructing the wells are appurtenant;”. As is set forth in their proposed motions to amend their claims, the Claimants are those who own membership in an irrigation entity; are individually entitled to its surface water diversions applied to the Claimants individual lands, who continue to pay their assessments, have had authorization by their individual irrigation entity to drill a well, and who take water therefrom which has resulted from irrigation under their irrigation works. As so called authorized agents of the irrigation entities, they fully comply with the purpose and language of the recovered water statute. By the drilling of their individual wells, the Claimants did not abandon their rights to the water of their irrigation entity and have applied the reclaimed water to the very lands authorized by their irrigation entities water rights. Why would they have continued to pay their assessments if they believed that their well water was all that they were entitled to? Claimants are entitled to have the facts as to their drilling and recovery of the irrigation entity’s water fully fleshed out through normal discovery of their cases. Therefore SWC’s present motion is again untimely and premature.

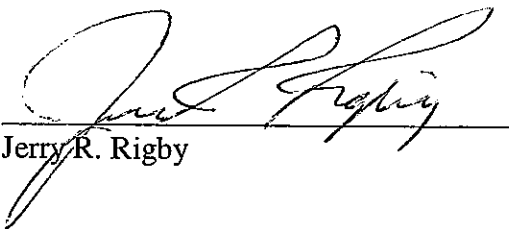
CONCLUSION

The Claimants proposed motions to amend their individual licensed claims meet the standards required by law and the policy of the SRBA Court. Claimants have a vital interest in protecting their ability to have the rights of their irrigation entity (and them individually as shareholders/electors) added to their licensed water rights which incorporates the principles set forth in the “accomplished transfer” and “recovered water” statutes of Idaho law. The Claimants

seek to assure that their interests are fully protected as afforded by law. Granting the individual Claimants' motions to amend their claims in this action will assure that the Claimants' interests are fully taken into account. Accordingly, the Movants respectfully request the right to file their individual motions to amend as filed.

DATED this 12th day of October, 2010.

Rigby, Andrus & Rigby, Chtd.



Jerry R. Rigby

CERTIFICATE OF MAILING

I certify that on October 12, 2010, I mailed the original and copies of this form, including all attachments, to the following persons by electronic mail as follows:

1. Original to

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
Twin Falls, ID 83303-2707

2. Copies to:

IDWR Document Depository
P. O. Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
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State of Idaho
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Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resources
Division
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Bonneville Jefferson Ground Water Dist.
Clark Jefferson Ground Water Dist.
IGWA
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Madison Ground Water Dist.
Magic Valley Ground Water Dist.
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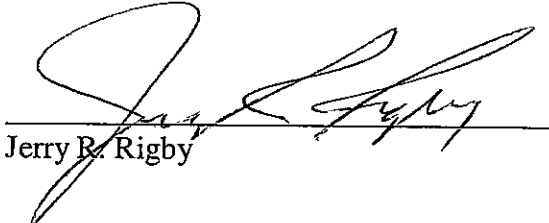
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Jerry R. Rigby

ATTACHMENT A

01-00001J	01-00141	01-00260	01-10050
01-00002A	01-00146A	01-00261	01-10057
01-00047E	01-00146B	01-00263	01-10060
01-00048	01-00147	01-00264	01-10062
01-00052A	01-00148	01-00266	01-10091
01-00052B	01-00157A	01-00298	01-10092
01-00053A	01-00157B	01-00304	01-10471
01-00092A	01-00158B	01-00306	01-10472
01-00092B	01-00193A	01-00324	01-10474
01-00116BB	01-00193B	01-04061	01-10475
01-00131A	01-00232	01-10046	01-10476
01-00132A	01-00247	01-10048	01-10477
01-00133A	01-00259	01-10049	

ATTACHMENT B

01-04046

01-04047

01-04049

01-04051

ATTACHMENT C

21-00048	21-07050	21-12923
21-00049	21-07060	21-12934
21-00060B	21-07089	21-12946
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21-00073D	21-07138	21-12954
21-00073F	21-07152	21-12955
21-00073J	21-07170	21-12957
21-00075	21-07173	21-12961
21-00109C	21-07175	21-13018
21-00141	21-07194	21-13019
21-00148	21-07300A	22-02303B
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21-02103	21-10890	22-07593
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21-07049	21-12921	

ATTACHMENT D

22-00163A	22-00660	22-11004
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22-00514	22-07259	22-13467
22-00537C	22-07269	22-13468
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