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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 Nos. 1-6, 1-4, 1-10, 1-209

**AFRD #2 AND TFCC JOINT  
OPPOSITION TO GROUND WATER  
DISTRICTS' MOTION TO FILE  
SECOND AMENDED OBJECTIONS**

COME NOW Claimants, American Falls Reservoir District #2 and Twin Falls Canal

Company, by and through their respective counsel of record, C. Tom Arkoosh and Isaac Keppler, of Capitol Law Group, PLLC, and Barker Rosholt & Simpson LLP, and hereby jointly object to the Ground Water Districts' (GWD) *Motion to File Second Amended Objections*. For the reasons set forth below, said motion should be denied.

### **ARGUMENT**

It is true that whether or not to grant a motion to amend a pleading is within the court's discretion and that leave to amend should be freely given when justice so requires. I.R.C.P. 15(a); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175 (1991) (underlined emphasis added). In exercising its discretion, a court should appropriately consider whether the new allegations state a valid claim. *See id.* If the proposed amended pleading "does not set out a valid claim, or if the opposing party would be prejudiced by the delay in adding the new claim, or if the opposing party has an available defense...it is not an abuse of discretion for the trial court to deny the motion." *Id.*

Moreover, a trial court properly denies a motion to amend where the proposed changes are nothing more than insignificant wording changes whose purpose are to clarify existing pleadings. *See Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho*, 132 Idaho 318, 324 (1998).

In this case, the proposed amended objections do nothing more than make insignificant wording changes, ask for conditions which contradict existing decrees and Idaho law, and are not within the province of this Court, and in any event, do not set out a valid claim, defense or objection. Therefore, granting leave to amend the objections as requested by GWD would cause unnecessary delay in these proceedings, and therefore the motion should be denied.

**1. THE PROPOSED AMENDMENT DOES NOT ALLEGE ANYTHING NEW; IT IS SIMPLY A MINOR WORDING CHANGE.**

The difference between the current objections and the proposed objections is extremely insignificant. The third sentence of the “Quantity” portion of the current objection reads<sup>1</sup>:

Additionally, for purposes of conjunctive administration, the irrigation requirement for purposes of a delivery call, the quantity should not exceed 5/8 inch per acre head gate delivery.

The third sentence of the “Quantity” portion of the proposed amended objection is as follows:

Additionally, the quantity under this water right should be reduced to reflect present needs, beneficial use and in no event should the quantity exceed 5/8 per acre. The quantity element should be reduced to reflect the actual irrigated acres.

See *Motion to File Second Amended Objections and Memorandum in Support*, pp. 2-3.

Additionally, the “Place of Use” portion of the current objection reads:

For the purposes of conjunctive administration, the irrigation requirement for the purposes of a delivery call is limited to actual irrigated acres.

The “Place of Use” portion of the proposed amended objection reads:

The total acres under this water right should be reduced to actual irrigated acres. The quantity element should be reduced accordingly.

*Id.* at 3.

Clearly, these proposed amendments offer nothing more than insignificant word changes. They do not allege any new information, nor are the changes necessary for the effective adjudication of the water rights at issue. Indeed, the heart of the objections, which is the first three sentences of the “Quantity” element, remains unchanged. For this reason alone, it would be appropriate to deny the GWD *Motion to File Second Amended Objections*.

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<sup>1</sup> The first two sentences of the current objections and the proposed objections are identical.

**2. BOTH THE CURRENT AND PROPOSED OBJECTIONS REQUEST CONDITIONS THAT ARE CONTRARY TO STATUTE.**

Both the current and proposed objections by GWD request a condition that the quantity element under the water rights at issue should not exceed 5/8 of an inch per acre. See *Motion to File Second Amended Objections and Memorandum in Support*, pp. 2-3. Notably, the proposed objections do not propose anything new. Moreover, the condition they request is contrary to Idaho law and wrongly asks this Court to step into the shoes of the water delivery entities and decide how to operate the American Falls Reservoir District #2 and Twin Falls Canal Company irrigation projects. Without evidence that a greater amount is necessary, the statutory duty of water in Idaho is 1 cubic foot per second (cfs) per fifty irrigated acres, or as commonly described, one miner's inch per acre. I.C. § 42-220. As a matter of law, applicants can apply for and beneficially use 1 miner's inch per acre for irrigation purposes. Ironically, thousands of the GWD members' ground water rights have been licensed or decreed in the State of Idaho for this statutory rate of delivery. Therefore, the condition requested by GWD in both its current and proposed objections is contrary to Idaho law.

Moreover, the prior decrees confirming AFRD #2's and TFCC's water rights do not limit their individual irrigators on a per acre basis. See generally, *Eagle Decree*, *Foster Decree*; (Exs. "A", "D" to *Affidavit of Travis L. Thompson in Support of Claimants' Joint Motion for Summary Judgment*, filed August 22, 2008). Instead, the quantity element was decreed to the water delivery entity and has been continuously distributed by the Water District #01 Watermaster based upon a total cubic foot per second delivery, i.e. TFCC – 3,000 cfs; AFRD #2 – 1,700 cfs. How much water AFRD #2 and TFCC deliver to their respective users on a per acre, or per share basis, is the entity's decision. This decision is guided by water conditions, climate, and the

amount of water available in storage.<sup>2</sup> The rate per acre delivery can change from year to year, or even within an irrigation season. Accordingly, if AFRD #2 and TFCC deliver 1/2", 5/8", or even 1 miner's inch per acre, provided the amount is within the quantity element of the water right, they have the right to make that management decision in the interests of the entity's water users.

The Court has no basis to limit what can be beneficially used for irrigation purposes by AFRD #2's and TFCC's water users within the decreed quantity element delivered by the Watermaster. Thus, the motion to amend is merely asking this Court to engage in a pointless judicial exercise and should be denied.

**3. THE PROPOSED AMENDMENTS DO NOT ALLEGE A VALID OBJECTION, CLAIM OR DEFENSE IN THE SUBCASES AT ISSUE.**

The asserted factual basis for GWD's objections, both current and proposed, is that

The quantity of water available to supply this right has historically been limited to the period of high flows resulting from snowmelt.

The argument follows:

Accordingly, consideration should be given to the history and seasonal availability of water so as not to require replacement water at times when the right has not received a full supply.

Although the Court indicated that "None of [these] subcases should be considered settled in this *Order*"<sup>3</sup>, the factual issue asserted by GWD has already been exhaustively argued and rejected by this Court. Both in their prior objections and on summary judgment, the GWD argued that the "claims are 'high water rights'" requiring "a condition limiting the season of use...[and] conditions clarifying the source of supply and barring the rights from making a

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<sup>2</sup> The decision is also impacted by conjunctive administration and the injury caused by hydraulically connected junior priority ground water rights in the Eastern Snake Plain Aquifer ("ESPA"). Limited water supplies have limited AFRD #2's and TFCC's water delivery decisions.

<sup>3</sup> See December 11, 2009, *Order on Motions for Summary Judgment and Order Setting Status Conference* ("Order").

deliver call against junior ground water rights.” *Order* at p. 4.

Thus the factual argument advanced in GWD’s motion for summary judgment on the “Source” element which was squarely rejected, is now the identical argument they seek to advance on the “Quantity” and “Place of Use” elements. Unfortunately for GWD, while these subcases may not be fully resolved, the “High Flow” or “Flood Water” argument they have advanced is “settled” since it was rejected by the Court on summary judgment.

Similarly, the asserted legal basis for both the current and proposed objections is not a valid claim, defense or basis for objection. The SRBA Court has specifically held that “historical practices” is not an independent legal basis for an objection or for modifying a water right. See *Order Deconsolidating Subcase 00-92026 and Order of Recommitment to Special Master*.

Despite this Court’s clear holding, GWD’s apparent basis for their objection is that the right has “historically been limited.” This is the assertion in both the current objections, and the proposed objections. Since there is no legal basis for the current objections and the same basis is asserted in the proposed objections, there is no justifiable reason for granting the motion to amend.

Accordingly, neither the current objections nor the proposed amended objections present any valid claim, defense or objection. Thus, *GWD’s Motion to File Second Amended Objections* must be denied.

**4. SINCE THE PROPOSED AMENDMENTS SERVE NO LEGAL PURPOSE, GRANTING THE MOTION WOULD CAUSE UNNECESSARY DELAY.**

As discussed above, there is no viable legal reason to grant GWD’s motion. Additionally, it will cause delay to the adjudication of these subcases if the motion is granted. Given the fact that the delay would serve no purpose, it would be an appropriate exercise of

discretion to deny GWD's motion, and allow these subcases to proceed accordingly.

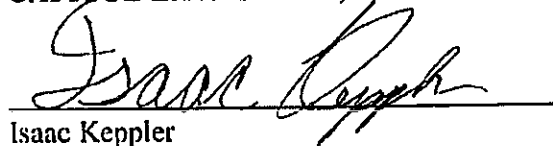
**CONCLUSION**

GWD's proposed amended objections do not present any significant change from their current objections. Just like the current objections, the proposed amendments do not offer a valid claim, defense or objection, since the asserted factual basis has already been rejected. Therefore, granting the motion would cause unnecessary delay to the adjudication of the subcases at issue. For all these reasons, this Court should deny GWD's motion.

Respectfully submitted.

DATED this 3 day of January, 2011.

**CAPITOL LAW GROUP, PLLC**

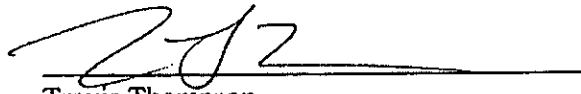


Isaac Keppler

*Attorneys for American Falls Reservoir District  
No. 2*

DATED this 3<sup>rd</sup> day of January, 2011.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 3<sup>rd</sup> day of January, 2011, I served a true and correct copy of the foregoing document by depositing a true and correct copy thereof in the United States mail, postage prepaid, in an envelope addressed to the following individuals at the addresses below listed:

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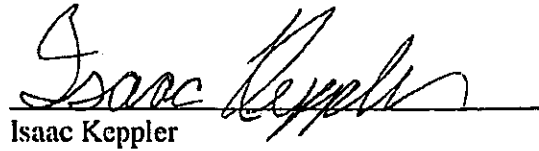
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