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DEPARTMENT OF
WATER RESOURCES

Attorneys for Norman A. Batt, Ellen G. Batt, Frederick C. Batt & Ellen B. Batt

**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 No. 63-33143
	)
Case No. 39576	) MEMORANDUM IN SUPPORT
	) OF OBJECTION TO DIRECTOR'S
	) REPORT RECOMMENDATION
	)
	)

COMES NOW Norman A. Batt, Ellen G. Batt, Frederick C. Batt and Ellen B. Batt (collectively the "Claimants"), by and through Batt Fisher Pusch & Alderman LLP, and in response to the Director's Report filed on November 26, 2010 in this case, files this Memorandum in Support of Objection to Director's Report Recommendation.

FACTS

Claimants are the owners of certain real property, hereinafter referred to as the "Batt Place," in Canyon County, State of Idaho. Appurtenant to the Batt Place is Water Right No. 63-4428, which has a priority date of June 1, 1959. A partial decree ("Partial Decree") was entered for Water Right No. 63-4428 on February 6, 2009.

On April 22, 1979, the Claimants obtained real property known as the "Cook Place." *See Exhibit A* attached to the *Affidavit of Norman A. Batt*. Since their purchase of the Cook Place in 1979, the Claimants have continuously diverted water obtained through Water Right No. 63-4428 and applied it to beneficial use on the Cook Place. *See Affidavits of Norman A. Batt, Betty Lanum and Howard Binford*. Since 1979, the Claimants accomplish this by diverting water from Water Right No. 63-4428 and injecting it into the Golden Gate Canal, which is operated by the Wilder Irrigation District. *See Affid. Norman A. Batt*. After injection into the Golden Gate Canal, a like amount of water is taken from the same to irrigate the Cook Place for agricultural purposes. *Id.*; *see also Affids. of Lanum and Binford*.

Exhibit B attached to the *Affidavit of Norman A. Batt* demonstrates that certain irrigation equipment was assigned to the Claimants as part of their purchase of the Cook Place on May 6, 1979, which was used, in part, to irrigate the eighty (80) acres of the Cook Place for agricultural purposes as set forth above. *See Affids. of Batt; see also Affids. Of Lanum and Binford*. The application of water to the Cook Place and Batt Place has always been within the limits for the use of Water Right No. 63-4428 as set forth in its Partial Decree. *See Affid. of Norman A. Batt*. Claimants unfortunately, through honest omission, did not request that the Court consider the use of a portion of the water diverted under Water Right No. 63-4428 on the Cook Place, and as such, the Partial Decree for Water Right No. 63-4428 does not address this issue.

On December 22, 2008, the Claimants, through counsel, filed a Motion and Affidavit in support of filing a Late Notice of Claim to Water Right. In response, the Snake River Basin Adjudication Court (the "SRBA") designated the proceeding for the foregoing Motion and Affidavit as Subcase 63-33143. On March 18, 2009, the SRBA Court granted the Claimants' Motion to file a Late Notice of Claim.

On May 10, 2010, IDWR sent correspondence to the Claimants requesting additional evidence in order to establish evidence of the validity and priority date of 1979 for Water Right No. 63-33143.

On December 2, 2010, IDWR's Director's Report was issued, in part recommending disallowance of Water Right No. 63-33143, because allegedly, there was not sufficient evidence to establish the validity and priority for this water right based upon the current state of the record.

This Memorandum and supporting Affidavits with Exhibits are submitted in response to the Director's Report in order to provide additional evidence establishing the validity and priority of Water Right No. 63-33143.

LEGAL STANDARD

The term "enlargement" has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. *See Idaho Code* § 42-1426(1)(a). *See also Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 360, 926 P.2d 1301, 1307 (1996).

Idaho Code § 42-1426(2) provides in part:

The mandatory permit requirements of sections 42-201 and/or 42-229, Idaho Code, are waived, and a new water right may be decreed for *the enlarged use of the original water right* based upon the diversion and application to beneficial use, with a priority date as of the date of completion of the enlargement of use for any enlargement occurring on or before November 19, 1987. . . .

Idaho Code § 42-1426(2)(emphasis added). An enlargement may include such events as an increase in the number of acres irrigated under an original water right. *Fremont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996).

Idaho Code § 42-1426(2) imposes only two limitations on obtaining such a waiver for an enlargement with a priority date as of the date of enlargement: (1) "that the rate of diversion of the original water right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water right;" and (2) "that the enlargement in use did not injure water rights existing on the date of the enlargement of use." *Fremont-Madison*, 129 Idaho 454, 360, 926 P.2d 1301, 1307 (1996) quoting *Idaho Code* § 42-1426(2).

ARGUMENT

As set forth above, the Claimants purchased the Cook Place in April of 1979. *See Exhibit A, Affid. of Norman A. Batt.* *Exhibit B* attached to the *Affidavit of Norman A. Batt* demonstrates that certain irrigation equipment was assigned to the Claimants as part of their purchase of the Cook Place on May 6, 1979. Starting in May of 1979, and using the foregoing equipment, in part, the Claimants began irrigating eighty (80) acres of the Cook Place, using Water Right No. 63-4428. *See Affid. of Batt, Lanum and Binford.* Since 1979, the Claimants have also irrigated the Cook Place through a water exchange agreement with the Wilder Irrigation District. *See Affid. of Batt.*

As acknowledged by IDWR, the Claimants' request is in the form of a request for enlargement pursuant to *Idaho Code* § 42-1426. As set forth in the *Affidavit of Norman A. Batt*, no additional amount of water is sought to be diverted beyond the limits of that established in Water Right No. 63-4428. *See also* Adjudication Claim Report ("a) [t]his claim is to an enlargement of Water Right No. 63-4428 pursuant to Section 42-1426 *Idaho Code*. No additional rate of diversion is claimed from that listed in Right No. 63-4428.") Furthermore, the application of water to the Cook Place and Batt Place has always been within the limits for the use of Water Right No. 63-4428. *See Affid. of Norman A. Batt.*

The Claimants also assert that no party will suffer any injury in the event the SRBA Court grants their request. The Claimants have received no objection to the manner in which they have employed Water Right 63-4428 to the Cook Place, other than that currently on record as a result of the Director's Report. This is further demonstrated by the Affidavits of two individuals who own real property adjacent to the Cook Place, who state that they have suffered no injury as a result of the Claimants' irrigation practices using Water Right No. 63-4428. *See Affid. of Binford and Lanum.*

REQUEST FOR RELIEF

Based upon the foregoing, and the Affidavits of Norman A. Batt, Howard Binford and Betty Lanum, with attached Exhibits, contemporaneously filed herewith, the Claimants respectfully request that the Court grant their request for an enlargement by finding that Water Right No. 63-33143 is valid, with a priority date of May 6, 1979.

DATED This 20 day of January, 2011.

BATT FISHER PUSCH & ALDERMAN, LLP

By: _____

John R. Hammond, Jr.

CERTIFICATE OF MAILING

I CERTIFY That on January 20, 2011, I mailed the original and copies of the foregoing to the following persons, as indicated below:

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. **One copy to the claimant of the water right at the following address:**

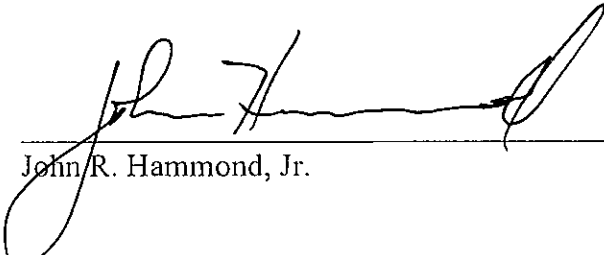
Norman A. Batt, Ellen G. Batt, Frederick C. Batt, and Ellen B. Batt
1621 Idaho Avenue
Caldwell, ID 83605

3. **Copies to:**

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

United States Department of Justice
Environment & Natural Resources Division
550 W. Fort St., MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
P.O. Box 44449
Boise, ID 83711-4449



John R. Hammond, Jr.