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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. 75-10603, 75-14531 |
|                | ) |                                 |
|                | ) |                                 |
|                | ) | RESPONSE TO CHALLENGES TO THE   |
|                | ) | MOTION TO ALTER OR AMEND THE    |
|                | ) | SPECIAL MASTER REPORT           |
|                | ) |                                 |

COMES NOW, Claimants/Objectors Heltsley and Felton, by and through their attorneys of record, RINGERT LAW, CHARTERED, and hereby respond to the *Challenges to the Motion to Alter or Amend the Special Master Report* filed by Respondents Murphy and Hull (hereinafter "Murphy" or "Hull" or, collectively, "Respondents"). This *Response* is supported by the record herein.

**SUMMARY**

The *Challenges* submitted by Respondents contain no citations to the record, and little analysis of the same. Rather, the *Challenges* attempt to confuse the Special Master by reciting only

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misleading and erroneous self-serving statements regarding the evidence and testimony at trial without any discussion whatsoever of the overwhelming evidence and uncontroverted testimony supporting the location of the point of diversion and source upon the Hull property.

## ARGUMENT

### 1. Basis for Heltsley and Felton's Concerns

Both respondents attempt to minimize Heltsley's and Felton's concerns regarding the change of the point of diversion recommended by IDWR from the Hull property to Forest Service land. Hull states that "there is no damage to the water users as a result of" moving the point of diversion downstream from its actual location, and Murphy states that Heltsley and Felton "always receive their water." These statements fail to recognize the real reason behind Heltsley's and Felton's worries: the concern that if maintenance of the ditch as it crosses the Hull and Murphy properties is not conducted, a blow-out of the ditch will occur, resulting in the cessation of water flows to the Heltsley and Felton properties.

As described by Ann Heltsley at trial, this exact scenario has occurred in the past. Subcase Nos. 75-10603, 75-14531, 75-14532 Transcript of Digitally Recorded Proceedings (hereinafter "Tr."), p. 296, ln. 15 - p. 297, ln. 9; *see also Memorandum in Support of Motion to Alter or Amend*, pp. 3-4. If the point of diversion is not described upstream of the location recommended by the Special Master, Heltsley and Felton will not have the right to continue their historic maintenance activities on the ditch to prevent similar blowouts. Blowouts resulting in cessation of water flows to the Heltsley and Felton properties will diminish the usability of those properties, and will certainly diminish their value. Thus, the statements by Respondents alleging that the movement of the point

of diversion downstream onto Forest Service land will have no effect upon Heltsley and Felton are disingenuous and untrue.

2. Van Bussum's Investigation

Both Hull and Murphy cite to Monica Van Bussum's conclusion that the point of diversion should be changed from its original location on the Hull property to Forest Service land as "unbiased", and attempt to persuade the Special Master that the change should be accepted without question. In fact, as both Hull and Murphy are well aware, Ms. Van Bussum was only accompanied upon her site visit by Respondents - who opposed the recommendation of the point of diversion on the Hull property. Moreover, Ms. Van Bussum did not even contact the claimants of the water rights - Felton and Heltsley - who supported the recommendation of the point of diversion on the Hull property - either before or after her site visit. Tr., p. 110, lns. 11 - 24. Accordingly, Ms. Van Bussum only received a one-sided view of the dispute.

To suggest that Ms. Van Bussum received "unbiased" information from Hull and Murphy, and was shown all relevant locations at a time when Respondents were opposing the then-existing recommendation of the point of diversion on Hull's property strains credibility. In fact, as discussed in Felton and Heltsley's earlier briefing, Ms. Van Bussum was not even shown the spring box above the road traversing the Hull and Murphy properties, and testified that she did not see the spring box, although she later admitted that she had seen it. Tr. p. 80, ln. 14 - p. 82, ln. 4; *See also Memorandum in Support of Motion to Alter or Amend*, pp. 5-10. Moreover, again as pointed out in Heltsley's and Felton's prior briefing, Van Bussum, under questioning from her attorney, systematically undermined every piece of evidence raised by Heltsley and Felton to support their

claim that the point of diversion is located on Hull's property. There is obviously nothing "unbiased" about this witness, or about the information she was provided by Respondents during her site visit.

3. Kozacek's Settlement

Much is made by Murphy about the Susan Kozacek letter stating that her point of diversion is located on Forest Service land, despite her original claim of the point of diversion on the Hull property. Curiously, despite the importance placed upon this hearsay evidence by Murphy, neither he nor Mr. Hull called Mrs. Kozacek to testify to determine the motivation behind her letter. The same problem exists with respect to the settlement of the Kozacek claims; without testimony to determine why the originally claimed points of diversion were released, the mere fact of settlement is meaningless and should be disregarded.

4. "Historical" Evidence

Both Murphy and Hull argue that certain documents admitted into evidence support a point of diversion located on Forest Service land instead of the Hull property. Specifically, both Hull and Murphy argue that the map attached as part of Hull/Murphy Exhibit 2 - the 1962 Lew Gohmes Special Use-Application - supports a point of diversion on Forest Service property. What Hull and Murphy do not seem to understand is that this hearsay evidence is an application for the reconstruction of only that portion of the ditch located on Forest Service property. The map shows the ditch obviously continuing up from the Forest Service property to the Harold Hanson property, and only shows that portion of the ditch on Forest Service land as subject to proposed reconstruction. Moreover, there is no point of diversion either shown or addressed in any portion of the permit.

Murphy and Hull's arguments to the contrary must be ignored as lacking any substantive basis.

Murphy argues that the "Hughes Creek Ranger Station Survey on November 24, 1908, by George Thompson" (Hull/Murphy Ex. 3) supports the proposition that the Heltsley/Felton point of diversion is located on the North Fork Salmon River, not the spring. The testimony regarding this exhibit is, at best, very confusing. Tr., p. 307, ln. 1 - p. 311, ln. 18; p. 371, ln. 14 - p. 372, ln. 14. The fact is that this hearsay document shows a completely different ditch system from the Spring Ditch. It does not show the alleged "natural stream" that is purportedly the source for the Heltsley/Felton water rights, and the ditch shown on the attached map could never service the Heltsley/Felton properties uphill from the depicted location of that ditch. No water rights or points of diversion are referenced in the document.

Murphy asserts that the September 4, 1986 Rogers Thomas letter to the Law Offices of Speciale & Felton supports the argument that the Spring Ditch diverts from the North Fork Salmon River and not from the springs.<sup>1</sup> He also appears to assert that this hearsay evidence may support a 1908 priority date for the Heltsley and Felton water rights. However, the letter references the "Hughes Creek Ditch" in the upper right hand corner of its letterhead. The Spring Ditch at issue in this litigation has never been referred to as the "Hughes Creek Ditch." Again, we do not have the testimony of the person who either wrote the letter or received it to help us interpret it. As with much of the evidence relied upon by Hull and Murphy, it is dangerous to attempt to rely upon and interpret documents about which little is known.

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<sup>1</sup>Both Hull and Murphy vary between asserting that the source of the Heltsley/Felton water rights is the "natural stream" as currently recommended, and asserting that the source is the alleged ditch from the North Fork Salmon River. These competing assertions are very interesting given that the source cannot be both.

5. Testimony Regarding the Point of Diversion and Ditch on Hull and Murphy Properties.

In contrast to the historical hearsay "evidence" offered by Hull and Murphy about the point of diversion, Adele Crawford, Ann Heltsley, Lawrence Heltsley and Mitzi Felton all testified to their personal actions in maintaining the ditch as it crossed the Hull and Murphy properties. Hull and Murphy both attempt to undercut Adele Crawford's testimony as unreliable because her memory is allegedly flawed. Unfortunately for both of them, Mrs. Crawford lived on the property far longer than either of them. During that time, she testified that she built the spring box which collected and diverted water into the Spring Ditch which she and Mr. Hanson maintained. Tr., p. 127, ln. 11 - p. 128, ln. 24; p. 129, ln. 3 - p. 130, ln. 16; p. 137, ln. 11 - p. 138, ln. 6. Tr. This testimony was confirmed by the testimony of Ann Heltsley, Lawrence Heltsley and Mitzi Felton regarding their own work on the ditch. Later, her testimony regarding the spring box was confirmed by Monica Van Bussum during a hearing on another matter. *Affidavit of Charles L. Honsinger in Support of Motion to Alter or Amend*, Exhibit B - Transcript from Initial Hearing, p. 15, lns. 15 - 19, SRBA Subcase No. 75-10547(January 6, 2011). For Murphy and Hull to suggest that Ms. Crawford is "forgetful" is simply self-serving and without support in the record.

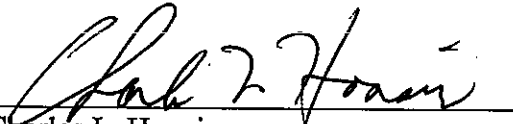
**CONCLUSION**

The Hull and Murphy *Challenges to the Motion to Alter or Amend the Special Master Report* attempt to undercut the strong testimony and evidence establishing that the Spring Ditch crosses the Hull and Murphy properties from the point of diversion for the Heltsley and Felton water rights. However, the evidence relied upon by Hull and Murphy is unclear, inconsistent and confusing, and cannot stand up against the uncontroverted testimony of Heltsley and Felton's four witnesses.

regarding the maintenance of the ditch as it crosses the Hull and Murphy properties. Each of these witnesses confirms the other's testimony - unlike the evidence and testimony relied upon by Hull and Murphy. Accordingly, the Special Master must simply ignore the arguments raised by Hull and Murphy, and confirm that the point of diversion is located in the quarter-quarter section where it was originally claimed by Heltsley and Felton and recommended by IDWR. At a bare minimum, as detailed in Heltsley's and Felton's prior briefing, the Special Master should order a new trial for the taking of evidence regarding this issue because of problems with the original trial, and should view the property for himself during that proceeding.

Dated this 27<sup>th</sup> day of January, 2011.

RINGERT LAW, CHARTERED

By   
Charles L. Honsinger

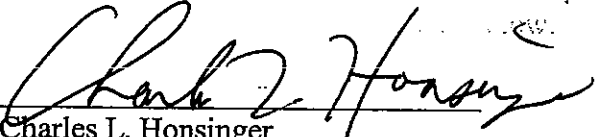
CERTIFICATE OF MAILING

I hereby certify that service of the within and foregoing document was made this 27<sup>th</sup> day of January, 2011, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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