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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

Subcase Nos.: **See Exhibit A**

Case No. 39576

**MUD LAKE WATER USERS RESPONSE TO GROUND WATER DISTRICTS'
OPENING BRIEF ON PERMISSIVE REVIEW**

**On Permissive Review from Special Master Dolan's December 11, 2009 Order on Motions
for Summary Judgment**

Honorable Eric J. Wildman, Presiding Judge

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COPY

MUD LAKE WATER USERS, INC., MONTEVIEW CANAL CO., INDEPENDENT WATER USERS OF MUD LAKE, PRODUCERS IRRIGATION CO., AND JEFFERSON IRRIGATION DISTRICT (hereinafter, "MLWU"), through counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, hereby submits this *Response to Ground Water Districts' Opening Brief on Permissive Review*. The decision at issue is Special Master Dolan's *Order on Motions for Summary Judgment*, entered on December 11, 2009 (hereinafter, the "*Order*"). This Response is made in support of the Ground Water Districts' position relative to the significant need to decree the water rights at issue with the flood water limitation as defined in the *Eagle Decree*.

I. INTRODUCTION.

February 24, 1969

John A. Rosholt
Parry, Robertson, Daly & Larsen
P.O. Box 525
Twin Falls, Idaho 83301

Re: Supplemental Adjudication - Upper River

Dear John:

In view of the fact that you made the original appearance on behalf of the A & B Irrigation District in the **flood water adjudication suits** and your name appears of record as the attorney for said District, I can no reason to change the record in any respect. A & B Irrigation District does consent to the terms of the Amended Complaint and I can see no need for a change of attorney to be filed in the action. In view of the extensive work done by your firm, John, on behalf of A & B Irrigation District, I believe you should be representing A & B for the purposes of this Stipulation.

If you have any questions please feel free to call on me.

Very truly yours,
/s/
Roger D. Ling ¹

¹ Affidavit of Robert L. Harris in Support of MLWU Motion for Summary Judgment (hereinafter, "Harris Affidavit") at Exhibit 36 (emphasis added).

The above letter is one of thirty-six documents ranging from December 17, 1953 to February 24, 1969 which documents the universal and unmistakable intent to decree certain water rights set forth in the *Eagle Decree* with a priority date of April 1, 1939 as “flood water rights.”² A list of these water rights is attached as Exhibit B.

The clear intent of these documents culminated in a stipulation leading to the entry of the *Eagle Decree* which states that “flood water rights” are those “which were only available during periods of high flow.”³ While not directly listed as one of the general seven elements of a water right in the water rights listing in the *Eagle Decree*,⁴ the flood water nature of these water rights was central to the stipulation and eventual decree, and must be documented with a condition or remark in the SRBA partial decree.

Nevertheless, despite the language from the *Eagle Decree*, Special Master Dolan determined that the flood water nature of the water rights should not be included in the partial decrees of the water rights. Special Master Dolan determined that use of the term flood water was “no more than a short hand way to describe excess water that would remain in the Snake River if not diverted or stored for future use.”⁵ MLWU respectfully disagrees, and is in full support of the position advocated in the *Ground Water District's Opening Brief on Permissive Review* (“GWD Brief”) pertaining to the flood water nature of the subcases at issue in this proceeding.

² See Harris Affidavit, Exhibits 1-36.

³ Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment (hereinafter “McHugh Affidavit”), Exhibit D, at p. 3.

⁴ Source, Point of Diversion, Priority Date, Nature of Use, Quantity, Period of Use, and Place of Use.

⁵ *Order* at 18.

The SRBA is bound to include the flood water language because of its obligation to “not exceed[] any previously determined and recorded element of the decreed or licensed water right.”⁶ Because the flood water connotation is a previously decreed limitation on these rights, a partial decree in the SRBA for these rights without specific language pertaining to the flood water nature of these rights would unlawfully elevate an inferior flood water right to that of a non-flood water right. An unlawful elevation in status to a non-flood water right status would allow the Surface Water Coalition to wield these water rights against ground water users, despite a source of these rights consisting of early spring runoff or snow melt. While the Special Master’s decision to include remarks that these rights are “supplemental”⁷—which was taken from the *Stipulation* and *Eagle Decree* documents—may be helpful in responding to ground water delivery calls in the future, it does not fully integrate the substance of the documents leading up to and incorporated in to the *Eagle Decree* regarding flood water.

Secondarily, the *Eagle Decree*’s unequivocal statement that the “flood water rights” should be decreed with an April 1, 1939 priority date is evidence of the generally-accepted understanding that any water right with a priority date on or after April 1, 1939 is, as a practical and legal matter, a “flood water right.”

Thirdly, based on actual water delivery records, all of the water rights listed in Exhibit A, including water rights with priority dates ranging from March 26, 1903 to May 18, 1926, should likewise be decreed as “flood water rights” as the delivery records clearly show that these water rights are only delivered in the early spring during periods of high runoff.

⁶ IDAHO CODE § 42-1428(1)(a).

⁷ *Order* at 19.

These reasons are advanced by the Ground Water Districts in support of their request for permissive review. As parties to these subcases, MLWU agrees with the Ground Water Districts and requests that this court reverse the Special Master's *Order* with regard to the flood water rights matter as advocated by the Ground Water Districts. The SRBA should instead accurately document and decree the true character of the water rights listed on Exhibit A as flood water rights.

II. STATEMENT OF ISSUES, COURSE OF PROCEEDINGS, AND STATEMENT OF FACTS.

MLWU is in agreement with Issues 1 and 2 set forth in the *GWD Brief*, as well as the summary of the course of proceedings and statement of facts contained therein.

III. ARGUMENT.

A. Permissive Review of Special Master Dolan's *Order*.

The SRBA's permissive review procedure is for an "interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion."⁸ In a permissive review procedure, the Court must only review the question of law which the Court has been requested by either the Special Master or parties to review. On permissive review, this Court must only narrowly review the "controlling question of law" at issue.

The Court's inquiry is limited to review of the Special Master's legal conclusions and the application of those legal conclusions to any facts that exist at the time of the permissive review. A Special Master's conclusions of law are not binding upon a district court, although they are

⁸ *SRBA Administrative Order I* § 9.e.

expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law.⁹ Accordingly, a district comes standard of review of a trial court's (special master's) conclusions of law is one of free review.¹⁰

B. The Water Rights At Issue in this Matter Must Be Documented in Some Fashion as “Flood Water Rights” As Contained in the Eagle Decree.

As set forth in the Special Master's *Order*, he determined that no legal effect should be given to the definitive “flood water” nature of the water rights at issue in this matter as set forth in the Eagle Decree. The Special Master held that use of the term flood water was a short hand way of referring to certain water rights, even though the term “flood water” was specifically defined in the Stipulation itself. MLWU agrees with the Ground Water Districts that the Special Master erred as a matter of law, and should be reversed.

The Water Rights set forth in Exhibit B were decreed with an April 1, 1939 priority date in the case of *Burley Irr. Dist. v. Eagle*, Civil Case No. 21406 (1968) pursuant to a *Stipulation*. The *Stipulation* at page 3 and page 4 clearly characterizes these water rights as “flood rights.”

- (c) That in connection with the establishment of the water rights for said Palisades Reservoir, it was particularly necessary for the parties Plaintiff to agree among themselves, and avoid extensive, expensive and delaying litigation by so agreeing upon a common priority date for those persons who were using or were making plans to construct projects and perfect rights to use, the so-called **“Flood Water Rights,” being those waters of the river which were only available during periods of high flow; and which the parties Plaintiff had been using to the best of their ability and to the extent of their irrigation works, or were planning to use as projects were constructed;** and that the parties Plaintiff did at such time agree on a common priority date of April 1, 1939, for such rights, which said agreement has been acted upon by all of the parties Plaintiff hereto

⁹ *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378 (1991).

¹⁰ *Higley v. Woodard*, 124 Idaho 531, 534 (Ct. App. 1993).

continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.

...

- (f) That it was necessary to agree that additional projects authorized by the Congress of the United States as an integral part of the Palisades Reservoir legislation would have their proportionate rights in said so-called **flood water rights** with said priority date of April 1, 1939, and that said legislation was achieved, and said projects were authorized and constructed, and have been developed, on the basis of such understanding as to their water rights; and that such projects have used water from the Snake River under such claimed priority date as promptly as they were able to do so, dependent upon the construction of their facilities.¹¹

Further, the *Findings of Fact and Conclusions of Law* entered as a result of the *Stipulation* specifically referenced the “flood water” nature of those rights with a priority date of April 1, 1939.¹²

The *Supplemental Decree* entered thereafter specifically referenced and relied on the previous *Findings of Fact and Conclusions of Law*.¹³

The *Eagle Decree*, *Stipulation*, and *Findings of Fact and Conclusions of Law* were all products of nearly two decades of work by water users and their counsel to reach a common goal:

That it will greatly aid and assist all responsible State officials, Watermaster and other officials in handling, managing and distributing the waters of the Snake River and its tributaries above Milner Dam to have those rights enumerated and listed in one decree as is intended to be accomplished by this action.¹⁴

The extent of the work accomplished by the parties, and their intent to have the water rights shown on Exhibit A decreed as flood water rights, is made clearly evident in the documents attached to the *Harris Affidavit*, which was submitted in support of MLWU’s prior *Motion for Summary*

¹¹ McHugh Affidavit, Exhibit D, at p. 3-4.

¹² McHugh Affidavit, Exhibit E, at p. 7.

¹³ McHugh Affidavit at Exhibit F, p. 1.

¹⁴ McHugh Affidavit, Exhibit D, p. 6.

Judgment. These documents will not be recounted here, but suffice it to say, these documents evidence an unmistakable intent to have the water rights attached at Exhibit A decreed as “flood water rights” given the continued reference to these rights as flood water rights, which was their source.

Regarding stipulations to resolve litigation, the Idaho Supreme Court has held that “[a] stipulation is a contract,”¹⁵ and further, “[s]tipulations for the settlement of litigation are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown.”¹⁶ In addition, “[a]n agreement entered into in good faith in order to settle adverse claims is binding upon the parties, and absent a showing of fraud, duress or undue influence is enforceable either at law or in equity.”¹⁷

The flood water limitation was part of the *Stipulation* that led to the *Eagle Decree*, and was part of the entire agreement between the parties. It was entered into to resolve any potential dispute between the parties to that *Stipulation*, and with any stipulation, likely came with trade-offs and compromises. This is why all language in a stipulation must be given its proper legal effect.

While not directly listed as one of the general seven elements of a water right in the water rights listing in the *Eagle Decree*,¹⁸ the flood water nature of these water rights was central to the *Stipulation* and eventual decree.¹⁹ In fact, the water rights list in the *Eagle Decree* also omitted some of the general seven elements to describe a water right, such as period of use or even nature of use.

¹⁵ Kohring v. Robertson, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002) (*quoting* Olson v. Idaho Department of Water Resources, 105 Idaho 98, 100, 666 P.2d 188, 190 (1983)).

¹⁶ *Id.*

¹⁷ Lawrence v. Hutchinson, 146 Idaho 892, 898, 204 P.3d 532, 538 (2009).

¹⁸ Source, Point of Diversion, Priority Date, Nature of Use, Quantity, Period of Use, and Place of Use.

¹⁹ The individual water right descriptions begin on page 7 of the *Eagle Decree*.

However, as an example, the nature of use for these water rights of “irrigation” is made evident by reviewing the language from the *Stipulation*, not from the water rights descriptions in the decree:

That all of the lands hereinafter described, to which water shall be decreed herein, are arid in character and will not produce ordinary agricultural crops without the application of irrigation water; . . .

. . .

That all of the supplemental waters herein agreed to be decreed are required for and will be beneficially used for the production of agricultural crops and associated domestic uses upon the lands to which they are stipulated to be decreed . . .²⁰

Similar to the irrigation nature of use, the flood water component of the water rights in Exhibit B was not specifically listed in individual water right listings in the *Eagle Decree*. However, this does not preclude the SRBA Court from now filling in those blanks with remarks, conditions, etc. In the same portions of the *Stipulation* that the “irrigation” nature of use was gleaned, “flood water” was not only stated, but was actually **defined**. Such a defined term should clearly continue in the SRBA decrees for these rights.

Because the flood water connotation is a limitation on these rights, a partial decree in the SRBA for these rights without specific language pertaining to the flood water nature of these rights would unlawfully elevate an inferior flood water right to that of a non-flood water right, which would be squarely contrary to the Idaho Legislature’s intent for water right partial decrees “not [to] exceed[] any previously determined and recorded element of the decreed or licensed water right.”²¹ Now is the time to list the flood water nature of these water rights in the partial decree.

A mechanism available to document the flood water nature of these rights is with remarks or conditions. In recommending water rights for adjudication to the SRBA Court, the director’s report shall include:

²⁰ McHugh Affidavit, Exhibit 3, at 5-6 (¶¶ VII and X).

²¹ IDAHO CODE § 42-1427(1)(a).

- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.²²

The flood water nature of these rights is not simply academic. It has real and potentially detrimental impacts on ground water users. An unlawful elevation in status to a non-flood water right status would allow the Surface Water Coalition to wield these water rights against ground water users, despite a source of these rights consisting on early spring runoff or snow melt. Consistent with the Ground Water District's position, MLWU believes that a remark must be added to the water rights at issue in this matter stating something substantially similar to: "This water right is a flood water right which is available only during periods of high flow as decreed in the case of *Burley Irr. Dist. v. Eagle*."

As the historical documents demonstrate, a priority date of April 1, 1939 was designated by numerous parties to the *Eagle Decree* as a priority date for "flood water rights." This date was chosen because it was ahead of the storage water right for Palisades Reservoir, which had a priority date of July 28, 1939. The general fear was that Palisades would store water during high flow periods, which would take from historic or planned uses for flood water. Thus, it was universally determined by all parties to the *Eagle Decree* that April 1, 1939 was a priority date for water rights on the Snake River where the water molecules so diverted were flood water molecules.

Given the universal agreement amongst those in the *Eagle Decree*, it logically follows that any water right on the Snake River on or after April 1, 1939 should appropriately be conditioned as a flood water right that is only available during periods of high flow.

²² IDAHO CODE § 42-1409(i)-(k).

Furthermore, it is an undisputed fact that water rights that are junior to October 11, 1900 do not provide water for an entire irrigation season. As contained in the *Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment*, based on the delivery records for Water District 01 over the past 29 years, Water Right Nos. 1-209 and 1-210 held by Twin Falls Canal Company and North Side Canal Company—which total 3,400 cfs—require all natural flow water available below Blackfoot after June or early July in most years.²³ Water Right Nos. 1-209 and 1-210 have priority dates of October 11, 1900, and therefore, the Water District classifies water rights with priorities after October 11, 1900 as “high water” or “flood water” rights.²⁴

Lastly, as set forth in the *GWD Brief* at page 18, the flood water nature of these rights was previously determined by Hearing Officer Schroeder in a separate proceeding. This is yet further authority recognizing the flood water nature of these water rights.

V. CONCLUSION.

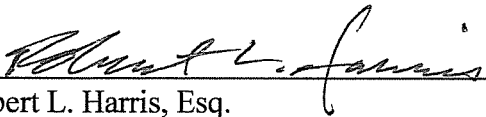
When the parties to the *Eagle Stipulation* entered into that agreement, they recognized that the water rights that they were agreeing to were flood water rights. The *Stipulation* itself, along with the additional documentation set forth above which led to the *Stipulation* that was entered into by the Claimants through their respective counsel (some of whom represent parties in this very action) and various other parties, show a clear understanding that water rights with a priority date of April 1, 1939 were flood water rights. Furthermore, based upon delivery records of the water rights at issue in this matter, their source is early season spring runoff and snow melt and should be appropriately documented as such.

²³ Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment, ¶11(b).

²⁴ *Id.* ¶11(c); See also Affidavit of Anthony Olenichak, ¶¶8-12.

The Ground Water Districts' position on these issues have substantial merit, and therefore, this court should reverse the Special Master's decision dismissing the flood water nature of these water rights as mere nomenclature. The flood water source of these rights is a real and substantial limitation of these rights, and this Court should incorporate the definitional language from the *Stipulation* into the partial decrees for these water rights.

DATED this 4th day of May, 2011.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 4th day of May, 2011.

DOCUMENT SERVED: MUD LAKE WATER USERS RESPONSE TO GROUND WATER DISTRICTS' OPENING BRIEF ON PERMISSIVE REVIEW

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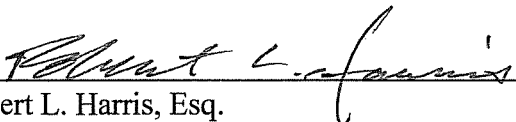
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EXHIBIT A

WR#	Claimant	Priority Date
1-4	TFCC	12/22/1915
1-5	NSCC	12/23/1915
1-6	AFRD	3/30/1921
1-7	BID	4/1/1939
1-8	MID	4/1/1939
1-9	Milner	4/1/1939
1-10	TFCC	4/1/1939
1-13	FID	4/1/1939
1-14	A&B	4/1/1939
1-16	NSCC	12/23/1915
1-17	Milner	11/14/1916
1-211A	BOR	3/26/1903
1-211B	BID	3/26/1903
1-212	North Side	10/7/1905
1-213	North Side	6/16/1908
1-214A	BOR	8/6/1908
1-214B	BID	8/16/1908
1-219	BOR	12/14/1909
1-2050	Milner	10/25/1939
1-2061	BOR	6/11/1956
1-10034	BOR	3/15/1911
1-10225	A&B	4/1/1984
1-10237	A&B	7/11/1968
1-10238	A&B	7/11/1968
1-10239	A&B	7/11/1968
1-10240	A&B	7/12/1968
1-10241	A&B	4/1/1978
1-10482	BOR	4/1/1940
1-10483	Amalgamated	5/18/1926