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Department of Water Resources  
Adjudication Bureau

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Fred and Susan Walmsley  
Robert Brailsford  
Hagerman Water Users Association  
Walten E. Mildren  
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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. 36-00048A, 36-00049,  
) 36-02169, 36-00039D, 36-04260B,  
) 36-15168, 36-00051A, 36-00021 &  
) 36-10283A

Case No. 39576

)  
) **REPLY TO SPECIAL MASTER'S**  
) **FINDINGS AND**  
) **RECOMMENDATION OF DENIAL**  
) **OF CLAIMANT'S CONSOLIDATED**  
) **MOTION FOR PERMISSIVE REVIEW**  
) **OF MASTER'S ORDERS**

\* \* \* \* \*

## 1

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1 The same ruling was applied to the motion to strike the affidavit of  
2 Michael Creamer, counsel for Cranney Bros. and attachments which were selected  
3 portions of a deposition of Michael Cranney. The affidavit was objected to not only for  
4 evidentiary defects (the attachments were all hearsay) but also because the affidavit was  
5 untimely under I.R.C.P. 6 (d) and prejudicial as it was provided to counsel the afternoon  
6 before hearing. Cranney Bros. Had submitted no affidavit or other form of evidence in  
7 August 1995 with the motion for leave to file a late response. Creamer's affidavit was  
8 filed and received by opposing counsel on the afternoon of November 21, less than 24  
9 hours before the November 22, 1995 hearing on the motions to file late pleadings.

10 In sum, the master erroneously granted leave to file late pleadings without  
11 any competent evidence therefor based on the affidavits by finding good cause for  
12 untimeliness apparently because "it was reasonable for them to rely upon the Director to  
13 investigate all SRBA water claims..." Though not stated by the Master, the basis for the  
14 findings had to have been based on the conclusory assertions in the affidavits or other  
15 assertions that were not evidence, since each affiant admitted in his deposition that he  
16 had no knowledge of the claimants rights or use of water and had not even read the  
17 Director's Report pertaining to the claimants' rights, if at all, until August of 1995. Each  
18 also admitted to having no knowledge about whether the claimant's use of water  
19 affected the affiant's use, or vice versa, but became concerned that it *might* as a result  
20 of Musser v. Higginson, 125 Idaho 392 (1994). In short, each affiant (who was the  
21 30(b)(6) deponent for the respective entities) admitted that the entity's concerns arose  
22 only after the objection and response period ended in 1993. Also, when asked what  
23

1 factual basis there was for seeking to participate other than a wholesale but unverified  
2 acceptance of the Director's recommendation, each affiant claimed there was none he  
3 knew of except that which went undisclosed under claims of attorney client or work  
4 product privilege. Over the claimants' objections, including to standing, Master Dolan  
5 ruled that, "it [made] no difference that none of the Movants knew details in the  
6 Director's Report or specific facts about the Claimants' water uses."

7 Based on those events, the claimants seek permissive review for two  
8 reasons. First, this is a trial court, which, by law, must make findings based on  
9 competent evidence. Second, in what manner and how expeditiously litigation will  
10 proceed in these subcases and in the SRBA generally depends largely on knowing  
11 whether the Idaho Court Rules as well as A.O.1 and other orders of this court will be  
12 applied by Masters. Then, if those rules apply to motion practice before the Masters, it  
13 is equally essential to know how this Court's order setting forth the criteria under which  
14 late pleadings will be allowed has been properly construed and applied, as well as  
15 whether standing is required from a constitutional or prudential perspective at the  
16 subcase level, given this Court's order that subcases proceed as if each is a discreet and  
17 separate lawsuit.

#### 18 **THE STANDARD FOR PERMISSIVE REVIEW**

19 Under A.O.1.11.d., permissive review of a masters interlocutory  
20 determination may occur where the determination "... involves a controlling question of  
21 law as to which there are substantial grounds for difference of opinion and in which  
22  
23

1 immediate consideration of the determination may advance the orderly resolution of the  
2 litigation."

3 This standard is derived from I.A.R.12, which has been construed to turn  
4 upon the weighing of several factors:

5 In accepting or rejecting an appeal by certification under  
6 I.A.R. 12, this court considers a number of factors in  
7 addition to the threshold questions of whether there is a  
8 controlling question of law, and whether an immediate  
9 appeal would advance the orderly resolution of the litigation.  
10 It was the intent of I.A.R. 12 to provide an intermediate  
11 appeal from an interlocutory order if substantial legal issues  
12 of great public interest or legal questions of first impressions  
13 are involved. The court also considers such factors as: 1) the  
14 impact of an immediate appeal upon the parties; 2) the effect  
15 of the delay of the proceedings in the district court pending  
16 the appeal; 3) the likelihood or possibility of a second appeal  
17 after judgment is finally entered by the district court; and 4)  
18 the case work load of the appellate courts. No single factor  
19 is controlling the court's decision of acceptance or rejection  
20 of an appeal by certification, but the court intends by Rule  
21 12 to create an appeal in the exceptional case and does not  
22 intend by the rule to broaden the appeals which may be  
23 taken as a matter of right under I.A.R. 11. For these reasons,  
the court has, over the six year experience of the use of Rule  
12, accepted only a limited number of applications for  
appeal by certification.

17 Budell v. Todd, 105 Idaho 2, 3-4, 665 P.2d 701 (1983) (emphasis added).

18 Considering the factors imposed by the rule, and as enumerated by the  
19 court in Budell, it is exceedingly clear that claimants frame an appropriate situation for  
20 permissive review.

21 The first criteria imposed by the rule is whether the action presents "a  
22 controlling question of law." The Budell court noted that a "controlling question" is one  
23

1 which "terminates" the case and also noted that the rule creates the same basic  
2 procedure, and that its use is subject to the same policy considerations as practiced  
3 under a federal statute, 28 U.S.C. Section 1292(b). Under the federal statute, a  
4 question may be controlling although it does not "terminate" a case:

5 . . . a question need not be dispositive of the case to  
6 qualify as a controlling one.

7 \* \* \*

8 The critical requirement is that it have the potential for  
substantially accelerating the disposition of litigation.

9 It is necessary, however, that the order involve a clear-cut  
10 question of law against a background of determined and  
immutable facts.

11 9 Moores Federal Practice, Section 110.22[2], pp. 273-277 (2nd ed. 1992).

12 Whether the rules of procedure and evidence apply are controlling  
13 questions both in the sense that they may be dispositive and that they are questions of  
14 law overlaying immutable facts which, when resolved, have the potential for  
15 substantially accelerating the disposition of litigation. If the rules apply to motion  
16 practice before masters, then their application indisputably disposes of litigation between  
17 the claimants and Cranney, Sand Springs, Faulkner and May. This is so because the  
18 objectionable affidavits are the sole evidentiary basis upon which leave to file pleadings  
19 rest, and without the entities the claimants are left to present their cases to the Master  
20 for recommendation, without the need to try the cases against the four entities which  
21 seek to intervene. If the rules do not apply, then the subcases may proceed  
22 unencumbered by argument over deadlines and sufficiency and admissibility of  
23

1 evidence and the like, as litigators are want to follow, and must follow in other judicial  
2 proceedings in this state. A decision now avoids sorting through and unwinding the  
3 morass of later determining whether the rules should have been applied and whether  
4 misapplication or nonapplication resulted in harmless error. A decision now also avoids  
5 potentially inconsistent and positively confusing procedures which arise because  
6 different masters hold inconsistent views about applicability. A decision now avoids  
7 potential due process and equal protection concerns that arise because a party does not  
8 know what the procedural rules are and cannot meaningfully participate and because  
9 Masters are proceeding under different rules in different subcases. In short, permissive  
10 review provides the court with the opportunity to head off confusion, inconsistency and  
11 potential challenges of constitutional magnitude concerning subcase proceedings.  
12 Review allows the court to take early control of the litigation and to obviate expense,  
13 delay and prejudice that will result from ill-defined procedure. And since the four  
14 entities which lack any knowledge are the sole SRBA parties seeking participation  
15 (except as to general provisions), review may entirely dispose of adversarial litigation in  
16 the above subcases, eliminate the need for discovery admittedly necessary to educate  
17 the entities as to whether each has a concrete dispute with the claimants, and potentially  
18 accelerate the disposition of each claim.

19 Moreover, the questions are of great public interest and first impression  
20 given the number of subcases and other matters to proceed before masters. The delay  
21 which may result from review may be inconsequential, given the Claimants and other  
22 members of HWRO have moved to stay subcase proceedings pending designation and  
23

1 resolution of Basin-Wide Issues 10 and 11. The possibility of further review after a final  
2 recommendation exists, but would be far more focused if the rules under which the  
3 subcases proceed are now clarified. The possibility of further review of these or other  
4 subcases on due process or equal protection grounds or for inconsistency among matters  
5 is greatly diminished or eliminated by early review. Finally, the district court's appellate  
6 workload is likely to be less complicated and less voluminous if a decision is rendered  
7 now. By reviewing this decision now, the District Court can preempt the possibility of  
8 hundreds of appeals from the Masters due to their failure to follow the appropriate rules.

9 **THE OBJECTORS FAILED TO SHOW "GOOD CAUSE"**  
10 **AND A MERITORIOUS POSITION AS REQUIRED BY**  
11 **ADMINISTRATIVE ORDER NUMBER 1 DATED JULY 28,**  
12 **1995.**

13 On July 28, 1995 this Court entered its ORDER GRANTING IN PART,  
14 AND DENYING IN PART, JOINT MOTIONS FOR AMENDMENT OF ADMINISTRATIVE  
15 ORDER 1. The purpose of that order was to provide a mechanism for allowing parties,  
16 who had initially relied on the Director's Report and IDWR's defenses, to now  
17 participate in subcases. That order states:

18 The removal of IDWR and the Director as a party to the  
19 SRBA and all subcases necessitates special consideration for  
20 **some** parties to the adjudication. Because the Director was  
21 previously a party to the SRBA and to all subcases, some  
22 parties assumed that IDWR would participate and litigate in  
23 defense of the Director's Report. Based on the pleadings  
and party status of IDWR prior to the 1994 amendments to  
the SRBA statutes, some parties decided not to participate in  
certain subcases, choosing instead to rely on the Director's  
Report and IDWR's defense of its pleading.

The Director's Report is no longer a pleading, and IDWR and the Director are no longer a party. Those parties who opted to rely on IDWR to litigate and advocate in favor of the Director's Report are now unable to do so. Therefore, it is necessary to provide a mechanism for parties to participate in subcases where participation is required due to the removal of the Director and IDWR as a party and the change in the status of the Director's Report as a pleading. . .

\* \* \*

Decisions on MOTIONS TO FILE LATE OBJECTIONS and MOTIONS TO FILE LATE RESPONSES shall be decided by the Special Master to whom the subcase has been referred. The Special Master shall require good cause and meritorious position when reviewing these MOTIONS. Parties must allege facts which, if true, would constitute a meritorious position.

This Court further ordered:

2. The court will review the MOTION TO FILE A LATE OBJECTION or a MOTION TO FILE A LATE RESPONSE under a criteria similar to that contained in I.R.C.P. 55(c). The proponent of such MOTIONS **must show good cause for untimeliness and the existence of a meritorious position.**

ORDER GRANTING IN PART, AND DENYING IN PART, JOIN MOTIONS FOR AMENDMENT OF ADMINISTRATIVE ORDER 1, Pgs. 1-2.

This Court has expressly directed the court entertaining the motion to review the motion under a criteria similar to that contained in I.R.C.P. 55(c). IRCP 55(c) requires that an entry of default be set aside for "good cause." Rule 55(c) also allows a judgment to be set aside in accordance with Rule 60(b). In light of this Court's order requiring the showing of good cause and a meritorious, it seems productive to review the reasoning of the Idaho Supreme Court on setting aside an entry of default pursuant

1 to rule 55(c) as well as relief from a judgment pursuant to rule 60(b). In Clear Springs  
2 Trout Co. v. Anthony, 123 Idaho 141, 845 P.2d 559 (1992) the Idaho Supreme Court set  
3 forth the requirements for setting aside a default judgment. The Court stated:

4 Two requirements must be met to set aside a default  
5 judgment. Under rule 60(b)(1), a party may ask for relief  
6 from a default judgment on the grounds of mistake,  
7 inadvertence, surprise, or excusable neglect. In addition, the  
8 moving party must plead facts which, if established, would  
9 constitute a meritorious defense to the entry of default.  
10 (Citations omitted.) (Emphasis added.)

11 Clear Springs Trout Co., 123 Idaho at 143.

12 The Idaho Supreme Court was very clear in stating that there are **two**  
13 requirements for setting aside a default judgment, namely, a showing of good cause as  
14 well as showing a meritorious defense. Likewise, there are **two** requirements for  
15 allowing a party to file a late objection or intervene in a subcase. As is stated in this  
16 Court's order of July 28, 1995 the first requirement is that a party show good cause for  
17 untimeliness.

18 Various courts have held that to "show" requires proof. See; People v.  
19 Resolute Insurance Company, 46 Cal.App.3d 249, 120 Cal.Rptr. 17 (1975), (The word  
20 'show' is synonymous with 'establish' or 'prove.');

21 Walker v. Department of Taxation, (In  
22 2 Bouvier's Law Dict. Rawle's Third Revision, page 3067, the word, 'show,' is defined,  
23 'to make apparent or clear by evidence; to prove. (Citation omitted.) Substantially the  
same definition is give in the Webster, Oxford and Century dictionaries. If one has the  
duty of proving a fact is obvious that the burden of such proof is upon him and, except  
in certain classes of cases, that burden is to prove by a preponderance of the evidence.)

1           This Court's order requires that the party seeking to object in the action  
2 must prove that they had good cause for filing a late objection. In summary, the Court's  
3 order makes it clear that these parties must "show" or prove that they fall within the  
4 narrow class of individuals for whose benefit the July 28, 1995 order was entered;  
5 namely, those individuals who made a conscious decision not to participate in certain  
6 subcases because of their reliance upon the Director's Report and IDWR's defense of its  
7 pleading.

8           In the case before this Court, those parties seeking to file late objections in  
9 this subcase do not fit within this narrowly defined category of individuals. In fact, the  
10 Special Master in this matter allowed the claimants to conduct limited discovery, in the  
11 form of depositions, to determine whether the objecting parties could satisfy the  
12 requirements for late objections as set forth in this Court's order. In those depositions,  
13 each affiant admitted that he had no knowledge of the claimants' rights or use of water  
14 and had not even read the Director's Report pertaining to the claimants' rights, if at all,  
15 until August of 1995. Based upon these admissions, there is no way that the objecting  
16 parties could satisfy the first requirement of the July 28, 1995 order; namely, showing  
17 good cause for untimeliness since the affiants' deposition testimony shows that there  
18 was no conscious decision by the objectors to not file an objection in these specific  
19 subcases due to their reliance upon the Director's Report and the IDWR.

20           In addition to a required showing of good cause, this Court's order  
21 mandates the existence of a meritorious position for the party seeking to object. In the  
22 case before this Court the Special Master allowed the objectors to show a meritorious  
23

1 position by affidavit. However, these affiants admit in their depositions that they do not  
2 have personal knowledge of those facts contained in their affidavits. Therefore, the  
3 Special Master's admission of such affidavits was clearly in error.

4 Rule 101 of the Idaho Rules of Evidence clearly states that the "rules  
5 govern all actions, cases and proceedings in the courts of the State of Idaho..." including  
6 Masters proceedings. Therefore, any matter before the Special Masters is subject to the  
7 Idaho Rules of Evidence.

8 Rule 602 of the Idaho Rules of Evidence specifically requires that a witness  
9 may not testify to a matter unless sufficient proof is set forth to support a finding that the  
10 witness has personal knowledge of the matter.

11 In addition, case authority from various jurisdictions holds that an affidavit  
12 setting forth sufficient facts to show a meritorious defense must be submitted by one  
13 who has personal knowledge of those facts. In U-Totem Store v. Walker, 691 P.2d 315  
14 (App. 1984) the Arizona Court of Appeals stated:

15 A meritorious defense must be established by facts and not  
16 through conclusions, assumptions or affidavits based on  
other than personal knowledge. (Citations omitted.)

17 Although the showing of a meritorious defense need not be  
strong, it must amount to more than mere speculation.

18 U-Totem Store, 691 P.2d at 319.

19 In Echols v. State Farm Mutual Automobile Insurance Company, 732 P.2d  
20 1122 (1986), a case involving an automobile accident, the insurance company  
21 attempted to have a default judgment set aside. In an attempt to establish a meritorious  
22 defense, as is required for setting aside a default judgment, the insurance company  
23

1 submitted the affidavit of the claims representative referring to a recorded statement of  
2 one of the drivers stating that the other driver was speeding. In response to this  
3 affidavit, the Arizona Court of Appeals stated:

4 On appeal, appellee contends that there was no affidavit of a  
5 meritorious defense. The purpose of requiring the  
6 meritorious defense is not to try the issue of liability in  
7 advance, but to show that there are some facts upon which  
8 the defendant might prevail which would provide a defense  
9 to liability, and in some cases to damages. The affidavit of  
10 the claims representative, referring to the recorded statement  
11 of Hedlund, in which Hedlund states that Echols was  
12 speeding at the time of the accident, does not suffice for the  
13 purpose of showing the court that there may exist a  
14 meritorious defense since it was not based on personal  
15 knowledge. The claims representative had no personal  
16 knowledge that Echols was speeding. (Citations omitted.)  
17 (Emphasis added.)

18 Echols, 732 Pl.2d at 1123.

19 See also; Grossberg Tudanger Advertising, Inc. f. Weinreb, 177 A.D.2d 377, 576  
20 N.Y.S.2d 235 (N.Y. App. 1991) (A prerequisite of an application to vacate a default is an  
21 affidavit of merit containing evidentiary facts which are attested to by one with personal  
22 knowledge of those facts.); Cramer v. Metropolitan Savings Association, 337 N.W. 2d  
23 264 (Mich. App. 1983) (A motion to set aside an entry of default shall be granted only if  
good cause is shown and an affidavit of facts showing a meritorious defense is filed. . .  
Since [the affidavit] was signed by Counard and appears to be based on personal  
knowledge, the affidavit is sufficient.); Huwe v. Singer, 63 N.W.2d 399 (S.D. 1954) (The  
burden [for setting aside a default judgment] is on the applicant to show diligence in  
seeking relief and to show good cause for opening the judgment. . .In this affidavit facts

1 must be stated positively. Allegations merely on information and belief are not  
2 sufficient. The affidavit should be made by the defendant or one having personal  
3 knowledge of the facts.)

4 During the depositions of the various affiants, all of the affiants admitted  
5 that they had no personal knowledge regarding the facts contained in their affidavits.  
6 This lack of personal knowledge clearly violates the Idaho Rules of Evidence as well as  
7 the personal knowledge requirement for affidavits proposed to show a meritorious  
8 position in setting aside a default judgment. Various examples of the affiants lack of  
9 knowledge are included in CLAIMANT'S MEMORANDUM IN SUPPORT OF  
10 OBJECTION AND MOTION TO STRIKE AFFIDAVITS AND PRECLUDE  
11 INTERVENTION, a copy of which is attached to this brief as Exhibit A.

12 The Special Master clearly failed to follow the Idaho Rules of Procedure  
13 and Idaho Rules of Evidence when he allowed the objectors to intervene in this subcase.  
14 While the Special Master may be allowed discretion in carrying out his duties, he does  
15 not have discretion to blatantly disregard the Idaho Rules of Civil Procedure, the Idaho  
16 Rules of Evidence and applicable case law. However, the Special Master has chosen to  
17 do exactly that.

### 18 CONCLUSION

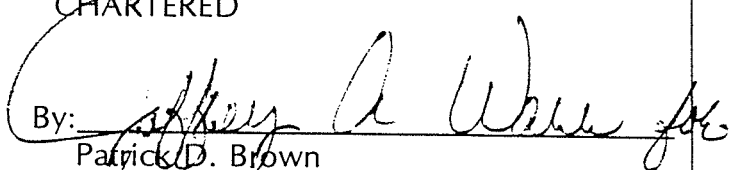
19 The Special Master has failed to follow the Idaho Rules of Civil Procedure  
20 and the Idaho rules of Evidence by allowing the objecting parties to intervene in this  
21 subcase. Whether the Masters are required to follow the IRCP and IRE is a controlling  
22 question of law in the entire adjudication process and a decision on this issue would  
23

1 clearly advance the orderly resolution of this litigation. Clearly, an issue which could  
2 have the effect of requiring appeals in hundreds of subcases due to the Master's view  
3 that they have discretion in applying the IRCP and IRE is the type of scenario  
4 contemplated under the ruling granting a permissive appeal. By not allowing this  
5 appeal, the adjudication and court system in general become clogged with a never  
6 ending stream of appeals on an issue which can be resolved by reviewing the basis for  
7 the judicial system in general; namely, the resolution of conflicts based upon facts, not  
8 mere speculation.

9 For the above discussed reasons, this Court should grant permission to  
10 hear this interlocutory appeal by the procedure set forth in A.O.1.

11 Dated this 14<sup>th</sup> day of March, 1996.

12 HEPWORTH, LEZAMIZ & HOHNHORST,  
13 CHARTERED

14 By:    
15 Patrick D. Brown

16 Attorneys for Claimants  
17  
18  
19  
20  
21  
22  
23

CERTIFICATE OF SERVICE

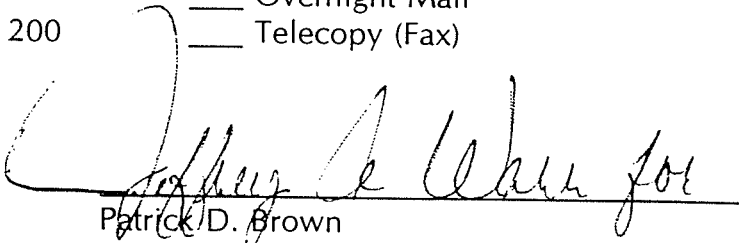
The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 14<sup>th</sup> day of March, 1996, he served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Chief, Natural Resources Div. ☒ U.S. Mail  
Office of the Attorney General ☐ Hand Delivered  
State of Idaho ☐ Overnight Mail  
P. O. Box 44449 ☐ Telecopy (Fax)  
Boise, ID 83711-4449

United States Dept. of Justice ☒ U.S. Mail  
Environment & Natural Resources ☐ Hand Delivered  
550 West Fort Street, MSC 033 ☐ Overnight Mail  
Boise, ID 83724 ☐ Telecopy (Fax)

Jeffrey C. Fereday ☒ U.S. Mail  
Givens, Pursley & Huntley ☐ Hand Delivered  
P. O. Box 2720 ☐ Overnight Mail  
Boise, ID 83701-2720 ☐ Telecopy (Fax)

Josephine P. Beeman ☒ U.S. Mail  
Dillion, Bosch, Daw & Bock, Chtd. ☐ Hand Delivered  
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Boise, ID 83702

  
Patrick D. Brown

(WATER\9SUBBRF.313)

Claimants:

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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 No. 36-00048A, 36-10283A,  
) 36-00051A, 36-0021B, 36-15168,  
) 36-00049

Case No. 39576

) CLAIMANT'S MEMORANDUM IN  
) SUPPORT OF OBJECTION AND  
) MOTION TO STRIKE AFFIDAVITS  
) AND PRECLUDE INTERVENTION  
)

\*\*\*\*\*

Claimants in each of the subcases submit the following in support of their objections, motions to strike and opposition to granting leave to file late objections or responses in the subcases. Because Faulkner, May, and Ambrose have each submitted affidavits which should be stricken for the same reasons, what the claimants say below about

CLAIMANT'S MEMORANDUM IN SUPPORT OF OBJECTION AND MOTION  
TO STRIKE AFFIDAVITS AND PRECLUDE INTERVENTION - 1

EXHIBIT A

000029

one affidavit is equally applicable to all. Additionally, the deposition testimony of each affiant and the deposition testimony of Mike Cranney, provides further evidence for denying intervention or participation by any of the four entities who seek to participate in these subcases.

1. EACH AFFIDAVIT CONTAINS NEITHER EVIDENCE NOR ALLEGATION OF PERSONAL KNOWLEDGE OF THE AFFIANT AND THEREFORE MUST BE STRICKEN AS INSUFFICIENT.

Pursuant to Idaho Rules of Evidence 602, "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that a witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness." Personal knowledge is defined in **Black's Law Dictionary** as "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay. ... In the laws of evidence [personal knowledge] means something which the witness actually saw or heard, as distinguished from something he learned from some other person or sources." **BLACK'S LAW DICTIONARY** 873 (6th ed.1990).

Idaho Rule of Civil Procedure 56(e) provides substance to the term "personal knowledge" by enumerating the necessary requirements for affidavits to support or oppose summary judgment motions. The rule states: "supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein." The general requirements of Rule 56(e) regarding the affiant's competency and personal knowledge of admissible facts when combined with the Idaho Rules of Evidence are reasonable requirements for every affidavit.

Personal knowledge is the backbone of any valid affidavit, and is lacking in each subject affidavit. No affidavit includes a statement of the affiant's competency and personal knowledge, nor any additional allegations from which to infer personal knowledge regarding the claims to which the affiant is objecting. Additionally, as pointed out below, each affiant admits during his deposition that he has no personal knowledge of the contents of the Director's Report, the IDWR files, or the "reputable studies" upon which the department purportedly relied, which form the basis of each objection.

Because each affidavit is silent as to the affiant's personal knowledge of the facts in his affidavit as required by I.R.E. 602, and because each affiant concedes that he has no personal knowledge of the water rights claimed by the claimants, each affidavit must be stricken.

## **2. EACH AFFIDAVIT CONTAINS STATEMENTS OF HEARSAY AND ARE THEREFORE INADMISSIBLE**

Hearsay is defined by I.R.E. 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pursuant to I.R.E. 802, hearsay is not admissible unless it falls within an accepted exception to the hearsay rule.

Each affidavit is full of statements that qualify as hearsay. For example, each affiant claims in an affidavit that "reputable studies, including the Department's, indicate that the statutory standard of one inch per acre is sufficient, on average, to irrigate property such as [claimant's]." This blatant offer of truth is hearsay, just as much as the assertions that the Department determined what the beneficial use is.

I.R.E. 803(8) lays out a hearsay exception for public records and reports, which are presumed by the rule to be trustworthy. The IDWR Director's Report, may be considered a public record or report of a public agency. Each affiant states that "based on the pleadings and party status of IDWR prior to the 1994 amendments to the SRBA statutes, [we] decided not to participate in this subcase, choosing instead to rely on the Director's Report and IDWR's defense of its pleading." Even if each affiant relied on information from the Director's Report, an IDWR official statement, each affiant in his deposition admitted he had not read the Director's Report and therefore there is no applicable hearsay exception. Additionally, the Director's Report may not be within this exception, since Rule 803(8)(D) excludes "factual findings resulting from special investigation of a particular complaint, case, or incident". The Director's Report consists of factual findings in particular water right claims, and as such is excluded from the Rule 803(8). Each affidavit should be stricken.

3. EACH AFFIDAVIT CONSISTS OF CONCLUSORY STATEMENTS OF LAW AND FACT AND THEREFORE MUST BE STRICKEN.

"The averment of facts in an affidavit to be used in a judicial proceeding must be sufficiently definite to warrant the judicial action sought, and such facts must be stated as warrant the court in drawing the legal conclusions sought to be established. Averments which merely state opinions or legal conclusions or characterizations, speculations, and inferences, instead of facts are insufficient." State v. Snyder, 88 Idaho 479,483, 401 P.2d 548 (1965).

Each affiant improperly reaches legal conclusions within his affidavit, claiming for example that a movant's "claim is so unreasonable as to be facially invalid." These legal conclusions must be stricken. Further, each affiant attempts ~~to~~ predict what the IDWR would have done if it had remained a party to the suit, when he alleges that "the facts of this situation show that the IDWR, had it remained a party to this subcase, would have been, without substantial outside assistance, able to defend its report and significantly reduce the claimed diversion rate by [the movant]." This is speculation, which renders the affidavits insufficient. And the assertion that there was reliance on the Director's party status and pleadings is nothing more than a vague characterization, floating in some unknown time zone, which lacks any factual basis. There are no facts from which to conclude that reliance was in anyway manifested by particular conduct.

4. NO AFFIDAVIT CONTAINS AN ALLEGATION THAT THE AFFIANT HAS AUTHORITY TO ACT FOR THE ENTITY OF WHICH HE IS AN OFFICER OR PARTNER, OR ALLEGATIONS THAT THE AFFIANT DID ACT FOR THE ENTITY OF WHICH HE IS AN OFFICER OR PARTNER IN SIGNING THE

AFFIDAVIT, AND THIS LACK OF AUTHORITY RENDERS THE AFFIDAVIT IRRELEVANT AND INCOMPETENT EVIDENCE.

For a court to consider evidence, that evidence must "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. In the terms of I.R.E. 402, "evidence which is not relevant is not admissible."

Each affidavit indicates that the affiant is either a partner or an officer which is the Movant in this matter, but does not indicate the affiant's authority to act for that entity. Because there is no information from which the Court may deduce each affiant's authority to speak for the Movant, each affidavit is irrelevant and should be stricken. Moreover, the lack of testimony concerning the affiant's authority to speak for the entity renders each affidavit incompetent, and each should therefore be stricken.

5. EACH AFFIDAVIT VIOLATES THE IDAHO RULES OF EVIDENCE RELATING TO OPINION TESTIMONY.

Opinion testimony by lay and expert witnesses is allowed by the Idaho Rules of Evidence. I.R.E. 701 relating to lay testimony allows opinion testimony that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." Experts who are qualified by knowledge, skill, experience, training, or education may be utilized "to assist the trier of fact understand the evidence or to determine a fact in issue" pursuant to I.R.E. 702.

There is no reference in any affidavit to any "perception" of the affiant: no affiant alleged to have seen a claimant's claims or to know what amount would be reasonably necessary to irrigate each claimant's land. The opinions stated in the affidavits, such as that a claim is "facially invalid", for example, therefore are not supported by the affiants' perception, and would not be helpful to the trier of fact, and should not be heard.

Further, the affiants did not lay the necessary foundation within the affidavits to qualify themselves as experts in the subject matter. For this reason, the opinions as contained in each affidavit will not assist the trier of fact to either understand the evidence or determine a fact in issue. Accordingly, each affidavit should be stricken.

6. IN THE DEPOSITION TESTIMONY OF MAY, FAULKNER, AMBROSE AND CRANNEY, EACH ADMITS THAT THEY HAVE NO PERSONAL KNOWLEDGE CONCERNING THE HAGERMAN VALLEY RIGHTS AND REFUSED TO DISCLOSE THE HEARSAY INFORMATION THEY POSSESS PURSUANT TO THE ATTORNEY-CLIENT PRIVILEGE.

The deposition of Ralph May reveals that he personally has no information concerning the cases in which he seeks to intervene and has never personally reviewed any of the files or the actual water use to which he seeks to intervene; in short, that he has no personal knowledge and is therefore not competent to have filed an affidavit meeting the requirements of the Rules of Evidence. For example, he admitted he had not ever looked at any of the IDWR studies or anything relating to such a study by IDWR (May Depo, p. 41, L. 6); stated he had never personally looked at the Director's Report (May Depo, p. 49,

L. 13), and had only had hearsay conversations with farmers who had read the Director's Report, although he had never personally read it (May Depo, p. 49, L. 6). May admitted, "I have no personal hands-on knowledge" of the water use of either the Ya-Ta-Hay or Gisler Farm (May Depo, p. 51, L. 22).

In May, 1993, when objections were due, May had not reviewed any pleadings (May Depo, p. 54, L. 22), didn't know then whether the IDWR's pleadings were or were not accurate (May Depo, p. 55, L. 23), and even as of yesterday when deposed, still didn't know since he had no personal knowledge nor review of the file (May Depo, p. 56, L. 5). He admitted that May Farms had not done anything before August 17, 1995, to obtain information about any of the subcases (May Depo, p. 26, L. 2), and instead waited until August 17, 1995, to ask the group's attorney to put together objections that would be filed on the deadline of August 18, 1995 (May Depo, p. 24, LL. 4-17). But, when asked specifically about the information that was the basis for intervention, May refused to answer, claiming that the attorney work product privilege precluded answering the following questions: What information did you look at in the process you undertook to determine what subcases to object to? (May Depo, p. 20, L. 23 - p. 21, L. 4); Tell me how May Farms determined which cases it would intervene in? (May Depo, p. 24, LL. 18-22). The inconsistency and unfairness of these claims to privilege from answering are best illustrated by May's testimony wherein he admitted that the information utilized in determining what subcases to attempt to intervene came solely from counsel (May Depo, p. 26, L. 22), but then stated:

Q. Do you assert that you have a privilege from disclosing what that information is because you obtained it from an attorney?

A. Yes.

(May Depo, p. 26, L. 23 - p. 27, L. 1). In other words, the affiant had no personal knowledge, had not personally reviewed anything and wouldn't disclose the basis of his position for trying to intervene based on the attorney-client privilege, i.e. I don't know and I won't tell you what is there to be known. Interestingly, what there is to be known, though, was not known in 1993. He had not been represented by counsel during the objection and response period in 1993. Further, when asked about his legal standing to filing such a motion based upon a claimed hydrological connection between his water and the water in Hagerman in which he sought to intervene, May admitted that any such alleged interconnection was speculation (May Depo, p. 37, L. 18) and that he didn't have any hard and fast information that the objections to water filings ever affected his water rights or vice versa (May Depo, p. 38, L. 8).

Similarly, the deposition of Tom Ambrose on behalf of Sand Springs Ranches revealed that he too lacked any personal knowledge, had not read any of the studies or pleadings to which reference was made in his deposition, and that, at best, the affidavit was based on inadmissible hearsay. When asked about the Mildren claim, Mr. Ambrose stated he had no personal knowledge (Ambrose Depo, p. 28, L. 14). He had no personal knowledge of what the Director's Report said as he had never read it (Ambrose Depo, p. 28, L. 21) and the only information he had about what may be contained in the Director's Report was hearsay information wherein "I've been told what it says." (Ambrose Depo, p.

30, L. 11). Mr. Ambrose explained, "I told you, I didn't read it. I don't know whether it's accurate. My attorney told me it was." (Ambrose Depo, p. 31, LL. 1-3). However, when asked the following specific questions about the water rights for which intervention was sought, Mr. Ambrose was instructed not to answer, claiming the following questions were protected by the attorney/client privilege: "For each of those cases, please tell me when you first became aware of any facts that suggest that the amounts they have is more than they can reasonable use." (Ambrose Depo, p. 23, L. 12); "And you claim the information you have is privileged . . . (Ambrose Depo, p. 24, L. 8) how do you know that the Department's position has any basis in fact at all" (Ambrose Depo, p. 28, L. 24). Even after explaining that the sole factual basis concerning the Director's Report was based upon what his attorneys had told him, the deponent was repeatedly told not to answer questions about the basis for objecting based on the attorney/client privilege. No answer was allowed when asked, "Why is it that you selected these two water rights to object to" (Ambrose Depo, p. 36, L. 21), or why Sand Springs had not objected in other subcases where the claimant sought more water than an inch per acre (Ambrose Depo, p. 36, L. 5). Like the others who were deposed, Mr. Ambrose had no personal knowledge about whether or not water used by Sand Springs Ranch did or did not affect the Hagerman Water Users Association or Mildren. (Ambrose Depo, p. 11, L. 15).

Mike Faulkner testified on behalf of Faulkner Land & Livestock, and admitted that despite the statement in his affidavit claiming he was testifying from personal knowledge, Faulkner admitted that he didn't even know IDWR's position regarding the Dan

McFaddan claim until he read it in the affidavit he was asked to sign (Faulkner Depo, p. 33, LL. 10-22). Despite the affidavit's statement that IDWR's position was based on reputable studies, Faulkner had not even looked at the studies and had no idea what study they had or had not done (Faulkner Depo, p. 34, LL. 1-7) and, in fact, did not even know if such a study had been done (Faulkner Depo, p. 34, L. 12). Faulkner's legal incompetence to filing an affidavit because of his lack of knowledge was also illustrated by the following questions and answers in his deposition:

Q. When was the first time that you read any part of IDWR files regarding Dan McFaddan's water rights?

A. Never have.

(Faulkner Depo, p. 28, L. 21-23). When asked how he could claim in an affidavit that the IDWR information was accurate, since he had never even read it, counsel again instructed the witness not to answer claiming attorney/client privilege. Similar unfounded attorney/client privilege claims were asserted to proper questions such as: "What did you do leading up to your decision that you would want to attempt to intervene or participate in the McFaddan cases?" (Faulkner Depo, p. 15, LL. 13-19); and "How is it that you selected Dan McFaddan's claims to object to in the Hagerman Valley?" (Faulkner Depo, p. 31, LL. 1-6). This witness, like the others before him, had no idea whether Mr. McFaddan's water rights had any impact on his claimed water rights, saying: "You know I really don't know . . ." "I have no idea." (Faulkner Depo, p. 20, LL. 3-9). Interestingly, recently in a prior water transfer hearing, Faulkner Land & Livestock had hired an expert who asserted that a person had to live southwest of Wendell, Idaho, to impact spring rights in the Hagerman

Valley (Faulkner Depo, p. 20, L. 10 - p. 21, L. 12), and all of Faulkner's land is north of Wendell.

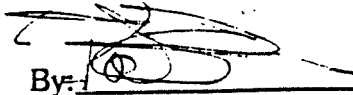
Concerning the three objections filed by Mr. Cranney against three separate water right claimants, it was established that intervention was being sought even though Mr. Cranney had never been to the McFaddan property (Cranney Depo, p. 102, L. 10), hadn't seen the Walmsley farm (Cranney Depo, p. 102, L. 19), and he explained that as of the time of his deposition (November 20, 1995), no investigation had been conducted of any of the elements of these three gentlemen's claims (Cranney Depo, p. 73, L. 9). Like the others, Mr. Cranney also sought to shield inquiry into the unfounded basis for his claimed intervention by invoking the attorney/client privilege to questions such as: "What rights have you looked at?" (Cranney Depo, p. 46, L. 8). Similarly, when asked the basis for his claim for legal standing to assert a right of intervention, Mr. Cranney stated he didn't know whether his water right was or was not hydrologically connected to that of Mr. McFaddan (Cranney Depo, p. 34, L. 10). He stated he had no proof that he was connected to Mr. McFaddan's water (Cranney Depo, p. 36, L. 22) and opinioned this was something a hydrologist would have to address and to date one had not been consulted. (Cranney Depo, p. 37, LL. 6-11).

### CONCLUSION

Based upon the facts and authorities cited above, the claimants' objections and motions to strike should be granted.

Dated this 21st day of November, 1995.

HEPWORTH, LEZAMIZ & HOHNHORST,  
CHARTERED

By:  \_\_\_\_\_

Patrick D. Brown  
Attorneys for Claimants

## CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 24 day of November, 1995, he served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Chief, Natural Resources Div.  
Office of the Attorney General  
State of Idaho  
P. O. Box 44449  
Boise, ID 83711-4449

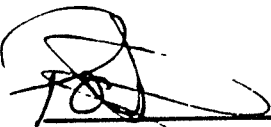
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