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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. 36-02080, 36-15127A, 36-15127B, 36-15192, 36-15193A, 36-15193B, 36-15194A, 36-15194B, 36-15195A, 36-15195B, 36-15196A, and 36-15196B

**GROUND WATER USERS' REPLY TO  
UNITED STATES' RESPONSE BRIEF**

Respondents Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Tim Deeg, and Ralph Breeding (the "Ground Water Users") submit this Reply to the United States' Response Brief filed February 19, 2003.<sup>1</sup>

**ARGUMENT**

**I. Although it concedes I.C. § 42-1426 applies to its enlargements, the United States' position would completely undercut the statute's protection of existing rights.**

The United States takes a curious position in this case. To begin with, it does not quarrel with the Special Master's conclusions that "the only viable basis for A&B's claims is I.C. § 42-1426" and, pursuant to the statute, that the Court must "subordinate A&B's enlargement claims

<sup>1</sup> The United States Response Brief concerns claims to water rights 36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B ("the Enlargement Claims"). Both the United States and the A&B Irrigation District filed independent Enlargement Claims covering the same enlargement acres (the "A&B enlargement").

to all other water rights with priority dates earlier than April 12, 1994.” Order on Summary Judgment (“2001 Order”) at 9, 11. Indeed, the United States expressly confirm the enlargement acres at issue are “subject to the terms of Idaho Code § 42-1426.” United States’ October 14, 1998 Objection, quoted in the Special Master’s Summary Judgment Order (“2001 Order”) at 3. Thus, the United States do not share the position advanced by A&B that the use of wastewater to irrigate enlargements effectively preempts the provisions of I.C. § 42-1426 and somehow allows for unsubordinated enlargement water rights with 1948 priorities.

So what is the United States’ position? Despite its express recognition that I.C. § 42-1426 applies, the United States argues that the Special Master should not have limited the source description of the enlargements solely to the ground water source of the underlying enlarged right 36-2080. The United States asserts that the Special Master should have provided a more expansive source description by including not only ground water, but also “wastewater, seepage and return flows.”<sup>2</sup> United States’ Response Brief at 4.

In taking this position, the United States is effectively, and perhaps unknowingly, making an argument that could completely undercut I.C. § 42-1426 and injure the Ground Water Users’ rights by allowing the United States (or A&B) to argue that the enlargements are decreed with an independent, supposedly non-ground water source and therefore should not be administered (that is, be forced to curtail or provide mitigation) along with other water rights pumped from the Eastern Snake Plain Aquifer (“ESPA”). This position not only ignores the fact that the water involved here is all ground water pumped from the ESPA, it also is contrary to I.C. § 42-1426 and the Idaho Supreme Court’s interpretation of this statute.

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<sup>2</sup> This is distinguished from the position of A&B, which while conceding that the original source for its enlargements is ground water pumped under right 36-2080, argues that the source on the enlargement decrees should be only “drain water,” instead of, as the United States puts it, “groundwater, waste, seepage, and return flow.” 2001 Order at 3 (emphasis added).

**II. Adding additional sources to the enlargement claims beyond the ground water source of the underlying enlarged right would be unconstitutional.**

As the ground water users explained in detail in their Response Brief, Idaho Code § 42-1426 is constitutional only because it expressly protects water rights existing as of the April 14, 1994 date this amnesty statute was enacted. Ground Water Users' Response Brief at 10-11, citing *Fremont-Madison Irrigation District*, 129 Idaho 454, 460, 926 P.2d 1301, 1308 (“only those enlargements . . . which fully mitigate any potential injury to junior rights existing on the date of the amnesty statutes are permitted”). The Idaho Supreme Court ruled the only effective way to accomplish this protection is to subordinate new enlargement water rights obtained under I.C. § 42-1426 to all rights existing on April 14, 1994. *Id.*, 129 Idaho at 461, 926 P.2d at 1308 (“if there are no mitigation provisions that will assure that there will be no injury to the junior, the new right for the enlarged use must be advanced [in date of priority]”) (emphasis added).

This mandatory subordination is required because enlargements create an increased burden on the hydrologic system from which the enlarged right is diverted by increasing the quantity of water consumed and decreasing return flows to the system. *Id.* (“the junior appropriator will not receive the water that he/she would have received but for the enlargement if there is not enough water to serve all users”).

By subordinating all enlargement claims, the Court ensures that in the event of a call, these newly recognized enlargement rights, and their increased burden on the system, are automatically in the correct position in the priority order and will be curtailed or forced to mitigate before rights that existed before the legislature passed I.C. § 42-1426 and retroactively allowed the creation—in the SRBA—of these otherwise illegal enlargements.

The United States evidently is attempting to subvert the constitutionally-mandated subordination by requesting a source other than just the ground water source affected by the

enlargements. The only plausible reason for this insistence on these additional source designations is to allow the United States to argue, in a future delivery call involving the ESPA, that the enlargement acres are not subject to curtailment or mitigation because they are irrigated with a non-ESPA source.<sup>3</sup> But if the effect of such language about “source” were to shut off or require mitigation from any post-enlargement water right before such remedies are exacted from the enlargement acres, the constitutional mandate would be violated. *Fremont-Madison Irrigation District*, 129 Idaho at 460, 926 P.2d at 1308. This cannot be allowed.

**III. Idaho Code § 42-1426 itself does not permit additional source designations beyond that of the original enlarged right.**

Not surprisingly, the statutory scheme under I.C. § 42-1426 recognizes enlargements create additional burdens on the source of the enlarged right. Thus, the statute requires that new enlargement rights recognize they are accomplished using the same diversion, and thus the same source, as the underlying enlarged right: “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.” I.C. § 42-1426(2). In this case, that original, existing right is 36-2080, an 1,100 cfs ground water right.

Even if the enlargement is accomplished by collecting wastewater arising from the original diversion, the diversion for the enlargement must be recognized as part of the diversion of the original right. I.C. § 42-1426(2). The statute simply does not draw distinctions between the manner in which irrigators manipulated the originally-diverted water to accomplish the

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<sup>3</sup> Likewise, a call made by A&B or the United States to supply water under 36-2080 would include the right to continue capturing the separate “waste, seepage and return flow” to irrigate the enlargements while other pumpers in the ESPA with rights senior to the subordinated enlargements would be shut off. *See Ground Water Users’ Response Brief* at 15.

If the United States for other reasons, such as administration of water delivery within the district, needs decrees that make clear that the enlargement acres are served with wastewater, this can be noted in the remarks section of the decree.

enlargement: “persons entitled to the use of water . . . have, through water conservation and other means, enlarged the use.” Idaho Code § 42-1426(1).

The limited right to recapture waste or seepage water, which the United States asserts is justification for adding the waste, seepage and return flow sources, does not alter this requirement.<sup>4</sup> Indeed, increasing efficiencies, such as through the use of what formerly was waste or seepage, is really the only way one can enlarge irrigated acres while maintaining the same original diversion. *See* Ground Water Users’ Response Brief at 20-21. Regardless of how the enlargement was accomplished, I.C. § 42-1426 expressly requires that newly recognized and otherwise illegal enlargements must share, and not increase, the same diversion as an existing right.

The Special Master correctly applied the statute by adopting the Department’s recommendation and holding that “[g]roundwater is the only source for 36-2080 and its enlargements.”

### CONCLUSION

The decrees for the enlargements at issue here, like all other decrees for enlargements in the Snake River Basin, must be consistent with Idaho Code § 42-1426 by including a source designation that matches the source of the underlying, enlarged right—in this case ground water—and with priorities subordinated to rights in existence as of April 14, 1994. The United States agrees that the enlargements should be subordinated but argues that the source designation for the enlargements should include “waste, seepage, and return flow” in addition to ground water. Adding these other sources would upset the statutory scheme in I.C. § 42-1426 and place A&B and/or the United States in position to argue that its enlargements are to be administered

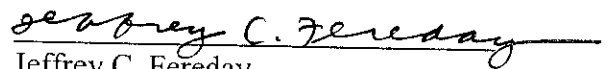
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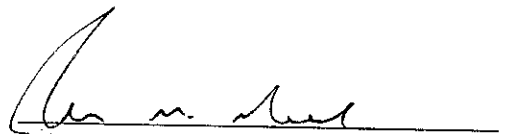
<sup>4</sup> In support of this argument, the United States cites the same cases the A&B cited in its Opening Brief. The Ground Water Users discuss these cases in detail in their Response Brief beginning on page 17. The arguments are not repeated here.

separate from ground water rights in the ESPA. This would be unconstitutional. The Court should adopt the recommendations of the Department and Special Master and issue decrees for A&B's enlargements that include subordinated priorities and ground water as the sole source.

Respectfully submitted this 5<sup>th</sup> day of March 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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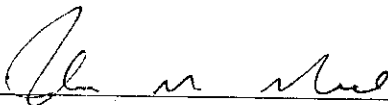
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