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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) Subcases 36-02080, 36-15127 (36-15127A
) and 36-15127B), 36-15192, 36-15193
Case No. 39576,) (36-15193A and 36-15193B), 36-15194
) (36-15194A and 36-15194B), 36-15195
) (36-15195A and 36-15195B), 36-15196
) (36-15196A and 36-15196B) (US/BOR)

MOTION TO RECONSIDER ORDER ON CHALLENGE

COMES NOW the Claimant/Objector, A & B Irrigation
District (hereinafter "District"), by and through its attorneys
of record, and pursuant to Rule 11(a)(2)(B) of Idaho Rules of
Civil Procedure respectfully requests that the Court reconsider
its Order on Challenge entered April 25, 2003. This Motion is
supported by the pleadings, affidavits, reports, exhibits, briefs
and transcripts on file with the court and is made upon the
following grounds and for the following reasons, to-wit:

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3 1. Legal conclusions have been reached by the Court
4 which are not supported by the underlying facts and are inconsis-
5 tent with established Idaho law;

6 2. The situation before the Court was not contem-
7 plated by the Supreme Court in Fremont-Madison v. Ground Water
8 Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996), in that
9 this is exactly the situation wherein the use of water on en-
10 larged or expanded acres results in a benefit to junior appropri-
11 ators rather than an injury and, as such, mitigation or subordi-
12 nation is required; and

13 3. If all of the water at issue in this matter is
14 correctly characterized only as ground water and the court
15 concludes that injury results, the subordination date should be
16 March 1, 1985, the enactment date of I.C. § 42-1416.

18 19 DISCUSSION

20 **A. Legal conclusions have been reached by the Court which are**
21 **not supported by the underlying facts.**

22 1. The evidence before the Court does not support the
23 Court's conclusion that the only source of water
24 supplying the "B" rights is ground water originat-
25 ing from licensed right 36-02080.

26 Under the standards of summary judgment set forth in
27 Rule 56(c), I.R.C.P. and City of Idaho Falls v. Home Indemnity
28 Co., 126 Idaho 604, 606, 888 P.2d 383, 385 (1995), the Special

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3 Master's Recommendation that the source of water supplying the B
4 rights is limited to ground water originating from licensed right
5 36-02080 is incorrect. As indicated by state law and in the
6 Court's Order, the Court must liberally construe facts and
7 inferences contained in existing record in favor of the party
8 opposing the motion for summary judgment. Bonds v. Sudwicks, 119
9 Idaho 539, 554, 808 P.2d 876, 881 (1991). In reviewing all of
10 the reasonable inferences which may be drawn from the existing
11 record, it is clear that there are other sources which may, and
12 in fact, do supply the "B" rights. Specifically, District's
13 Response to Request for Admission No. 3 and Answer to Interroga-
14 tory No. 4 at page 6 of the Responses to the Respondent's First
15 Set of Interrogatories and Requests for Production of Documents
16 which were included as Exhibit "B" to the Affidavit of John
17 Marshall filed January 24, 2001 and relied upon by the Court,
18 makes it clear that drain water may flow upon the District's
19 project from independent sources. This water is captured by the
20 District in its drain system and commingled with the District's
21 drain water. This water then is used in part upon the expanded
22 acres. The clear inference that there are other independent
23 sources which flow into the District's system and which are
24 commingled with the other waters of the District should clearly
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3 prevent the Court from entering summary judgment against the
4 District as a genuine issue of material fact exists.

5 Furthermore, the report of Brockway attached as Exhibit
6 2 to the Affidavit of C. E. Brockway and filed with the court in
7 opposition to the District's *Motion for Summary Judgment* also
8 refers to other sources. Throughout the report, Brockway refers
9 to "surface drainage" and in the conclusion of his report distin-
10 guishes between "irrigation return flow" and "non-irrigation
11 runoff." Brockway concludes that the proper utilization of this
12 combined return flow and runoff on existing irrigated lands can
13 reduce pumping from the aquifer and minimize the net depletion of
14 the aquifer compared to other alternatives. At the very least,
15 the underlying facts established by the record clearly indicate
16 that a genuine issue of material fact exists and that summary
17 judgment on this issue against the District was improper.
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19 2. The facts and the law of the State of Idaho do not
20 support the Court's conclusion that "the source of
[the] 'B' rights is ground water".

21 On this issue, the Court correctly concludes that water
22 maintains its identity as ground water until such time as the
23 District relinquishes control of the water. Furthermore, the
24 District agrees that this conclusion is consistent with the body
25 of law pertaining to the reuse of recaptured waste water and the
26 respective rights as between original and third-party appropria-
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3 tors. The Court correctly states the general rule that waste
4 water resulting from beneficial use of a water right may be
5 recaptured and reused by the original appropriator of a water
6 right so long as the recaptured waste water is put to beneficial
7 use. Reynolds Irrig. Dist. v. Sproat, 70 Idaho 217, 214 P.2d 880
8 (1990); Sebern v. Moore, 44 Idaho 410, 258 P. 176, 178 (1927).
9 In addition, third parties may appropriate the waste water after
10 it leaves the control of the original appropriator. However, the
11 right of third-party appropriators is subject to the paramount
12 right of the original appropriator to recapture and reuse the
13 waste water or to later reduce the quantity of waste water
14 through implementation of water use practices. Colthorp v.
15 Mountain Home Irrigation District, 66 Idaho 173, 157 P.2d 1005
16 (1945).
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18 However, the facts in the record do not support the
19 Court's conclusion that the District never relinquishes control
20 of the ground water diverted under right 36-02080 and that it is
21 never commingled with a surface source. Instead, the record
22 clearly reflects that the District pumps water from the wells
23 licensed under 36-02080 and delivers the water to waterusers
24 within the District. Upon delivery of the water to the
25 wateruser, the District relinquishes control of the water. (See
26 the report of Brockway.) The District can only deliver a spe-

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3 cific amount. It is up to the wateruser to use what ever means
4 they choose to put the water to beneficial use. This may include
5 gravity irrigation or sprinkler irrigation and is out of the
6 District's control.

7 As indicated in the report of Brockway, because of
8 poorly defined surface drainage and closed basins, drainage
9 systems were designed by the Bureau of Reclamation. After the
10 water is delivered to the water user, any drain water is col-
11 lected in this drainage system as it leave the lands of the
12 waterusers. It is important to note that the District has no
13 control over the amount of waste water which makes it into these
14 drainage systems. This is important because it verifies the fact
15 that the District relinquishes control of the ground water
16 diverted under right 36-02080.

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18 As stated by this court, once the District has relin-
19 quished control of the ground water, it loses its identity as
20 ground water. Upon the District's capture of the drain water it
21 is commingled with non-irrigation runoff. At this point, the
22 water has clearly lost its identity as ground water and must be
23 appropriately characterized as captured drain or waste water.
24 Again, the District cannot control the amount of water which it
25 receives in this fashion. Clearly, based on the underlying facts
26 and Idaho law, the water captured in the drains, although origi-
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3 nally ground water, must be identified as waste or drain water.
4 Furthermore, it must be identified as an additional source to be
5 consistent with Idaho law.

- 6 3. The captured drain water at issue in this matter
7 is private water and is therefore not subject to
8 the permit and licensing procedures applicable to
9 waters of the state.

10 As set forth in the District's *Opening Brief in Support*
11 *of Challenge* the drain water at issue in this matter is private
12 water. Sebern v. Moore, 44 Idaho 410, 258 P. 176 (1927) makes
13 it perfectly clear that where there has been no appropriation of
14 water prior to construction of the drains in which it collects,
15 the drain water collected "*is in the possession of the owner*" and
16 not subject to appropriation. Clearly, the water at issue in
17 this case is private water. As set forth in Idaho case law,
18 water is private where it meets the statutory requirement and
19 where the water would naturally flow into a river or stream.
20 Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976). Here, the
21 evidence is undisputed; the drainage system is ill defined and
22 consists of closed basins which have required the use of injec-
23 tion wells to dispose of the water. In addition, the drain water
24 is collected solely on the property of the District. (See
25 Affidavit of Brockway). With this in mind, there is no question
26 that the drain water collected in the District's drains and ponds
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3 is private water and not subject to appropriation. Furthermore,
4 because it is private water it may be put to beneficial use by
5 the District on any lands serviced by the District, whether the
6 lands are covered by a license or permit, or whether the lands
7 are enlargement lands covered originally by I.C. § 42-14-16 and
8 subsequently by I.C. § 42-1426.

9 The District has admitted that to some extent it has
10 used ground water on expanded acres. There is no question that
11 this falls under the amnesty statute. However, the District has
12 also maintained that it captures drain water, which is private
13 water located upon the lands of the District. In addition, the
14 district has used this water on the expansion lands as well as
15 the original lands of the District. Under Idaho law this use of
16 the captured drain or waste water is permissible and is the very
17 use for which the District seeks recognition. It should not be
18 subordinated to any other right because it is a separate, private
19 source to which no other appropriator has access. To lump this
20 water in with the ground water of the District ignores the
21 underlying facts and is not a correct statement of Idaho law.
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24 **B. The case before the Court is the very situation not contem-**
25 **plated by the Supreme Court in Fremont-Madison v. Ground Water**
26 **Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996).**
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3 The court has reasoned that because the District did
4 not provide a "mitigation plan" the Special Master was correct in
5 recommending the inclusion of the subordination remark for the B
6 rights. However, this ruling does not take into account the fact
7 that there is no injury to be mitigated. In fact, this is the
8 very situation which the Supreme Court in Fremont-Madison, stated
9 it would be difficult, if not impossible, to perceive. Id. at
10 461. Nevertheless, the situation does exist in this case. Here
11 the facts are such that there is no reason to provide a substi-
12 tuted water source as suggested by this court because the exist-
13 ing water users actually receive a benefit as a result of the
14 District's use of the waste water on enlarged lands. This fact
15 is made perfectly clear in the undisputed *Affidavit of Brockway*.
16

17 As a hypothetical, if a water shortage did occur, the
18 District would only be required to curtail its pumping under its
19 licence if a senior water right made a call and the call was not
20 futile. Subordination is of no benefit to water rights junior to
21 the District and in existence at the time the amnesty statute
22 was passed because the district would still be allowed to divert
23 all of the water to which it is entitled under the license.
24 Based on the *Affidavit of Brockway*, shutting off the District's
25 use of the drain water would actually be a detriment to those
26 rights because use on the enlarged lands produces the greatest
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3 return to the aquifer. This fact is extremely relevant to the
4 court's conclusions when considering whether injury is caused and
5 whether mitigation is required.

6 Based on the facts of this case it is incorrect to
7 conclude that "injury to junior appropriators occurs any time an
8 enlargement claim is given priority over water rights existing as
9 of the date of the enactment of I.C. § 42-1426, and where no
10 mitigation plan is presented." To make this conclusion gives
11 rise to an unintended and unconscionable result which creates a
12 hardship on all appropriators involved and is inconsistent with
13 the "beneficial use" doctrine of the state. Furthermore, instead
14 of resolving the issue now while the matter is before the court,
15 it invites future litigation relating to administration of the
16 rights.
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19 **C. Even if the Court is correct and all of the water at issue in**
20 **this matter is characterized only as ground water and the court**
21 **concludes that injury results, the subordination date should be**
22 **March 1, 1985, the enactment date of I.C. § 42-1416.**

23 In the District's case, the date applicable to a
24 subordination remark, to the extent such remark is appropriate,
25 should be March 1, 1985, the enactment date of I.C. § 42-1416.
26 The conclusion that the general rule regarding the simultaneous
27 repeal and enactment of a statute does not apply in this case
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3 does not correctly consider the law on this subject. First,
4 while it is true that Judge Hurlbutt had declared I.C. § 42-1416
5 void for vagueness, the matter was on appeal to the Supreme Court
6 at the time the legislature repealed the law and simultaneously
7 enacted its substitute. No where does the law suggest that this
8 constitutes an interruption which circumvents the general rule.

9 Where a statute is repealed by a new statute which
10 relates to the same subject matter, and which re-enacts
11 substantially the provisions of the earlier statute,
12 and the repeal and re-enactment occur simultaneously,
13 the provisions of the original statute which are re-
14 enacted in the new statute are not interrupted in their
15 operation by the so-called repeal . . .

16 73 Am. Jur 2d Statutes § 391. See also Bear Lake and River
17 water Works and Irrigation Co. V. Garland, 164 U.S. 1 (1896)

18 Second, the case law cited by the District both in the
19 Summary Judgment proceedings and the Challenge proceedings
20 clearly indicates that the two acts only need to be substantially
21 the same; not identical. See Bear Lake and River water Works and
22 Irrigation Co. V. Garland, 164 U.S. 1 (1896). In fact, to
23 insist that a repealed law and a substituted law be identical
24 would remove any reason for the repeal and re-enactment alto-
25 gether. Certainly this conclusion is not consistent with the
26 general rule stated by the court.

27 Next, although it is believed that it is irrelevant for
28 the application of the general rule, it is clear that the Dis-

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3 trict did in fact have vested rights under I.C. § 42-1416 and
4 which should not be extinguished by the repeal and simultaneous
5 enactment of the second statute. The facts as established by the
6 record make this point undeniably clear. First, the District
7 withdrew it's permit application based on the enactment of I.C. §
8 42-1416. Second, IDWR made a report based on the District's
9 claim under the presumption statute. No objections were ever
10 raised to the District's claims within the time limits allowed.
11 At that point, it can be reasonably concluded that the District
12 obtained vested rights.

13 These rights were not extinguished by any act. The
14 fact that Judge Hurlbutt found I.C. §42-1416 void for vagueness
15 did not extinguish these rights. In fact, the matter was on
16 appeal to the Supreme Court at the time the legislature repealed
17 § 42-14-16 and simultaneously enacted § 42-1426. The appeal was
18 dismissed as moot after the change. Nevertheless, Judge Hurlbutt
19 could have been overtured by the Supreme Court just as he was in
20 Fremont-Madison. In fact the Supreme Court could have made the
21 same findings in that matter as it did in the Fremont-Madison
22 case and the date for subordination would have remained March 1,
23 1985. Because the District was not afforded full opportunity to
24 pursue its rights it is only equitable and just that the date of
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3 subordination, if appropriate at all, be the original enactment
4 date.

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6 **CONCLUSION**

7 For the reasons stated above, the District respectfully
8 requests that the court reconsider the *Order on Challenge* and
9 enter an amended order consistent with the underlying facts and
10 the applicable case law. Oral argument is requested.

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12 Respectfully submitted this 27th day of January, 2003.

13 LING, ROBINSON & WALKER
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16
17 By: 

18 Jason D. Walker
19 Attorneys for Claim-
20 ant/Objector
21 A & B Irrigation District
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CERTIFICATE OF MAILING

I hereby certify that on the 01 day of May, 2003, I served true and correct copies of the ***Motion to Reconsider Order on Challenge***, upon:

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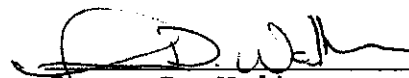
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