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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 36-15127A, 36-15127B,
)	36-15192, 36-15193A, 36-15193B,
Case No. 39576)	36-15194A, 36-15194B, 36-15195A,
)	36-15195B, 36-15196A and 36-15196B
)	Response of the United States to
)	A&B Irrigation District's Motion to
)	Reconsider Order on Challenge
)	

COMES NOW the United States of America for the U.S. Bureau of Reclamation, the primary claimant in the above subcases, by and through its attorney of record, David W. Gehlert and hereby submits its response to A&B Irrigation District's ("A&B") Motion to Reconsider Order on Challenge.

Even though the United States did not file a challenge to the Court, it supports correcting the "source" of the Bureau of Reclamation claimed water rights (herein known as the

“B”claimed rights) to reflect the actual origin of the water, that is “ground water, waste; seepage and return flows.”^{1/} *Amended Notice of Claim for the “B” rights, filed on April 9, 1998.*

This change is consistent with I.C. § 42-1426(2) which authorizes enlargement claims provided “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; and ... that the enlargement in use d[oes] not injure water rights existing on the date of the enlargement of use.” *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Standard of Review

Litigation in the SRBA is governed by the Idaho Rules of Civil Procedure and the Idaho Appellate Rules. *SRBA Administrative Order 1(1)*. This Court’s decision may be reconsidered pursuant to I.R.C.P. 59(e). *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Idaho Ct. App. 1986).

Argument

I. **THE ENLARGEMENT STATUTE, I.C. § 42-1426, DOES NOT PRECLUDE THE SOURCE OF A WATER RIGHT FROM BEING ACCURATELY DEPICTED EITHER AS A MATTER OF LAW OR AS A MATTER OF FACT**

This Court’s Order found that the source of the water for these claims is ground

^{1/} The reason the United States seeks an accurate depiction of flow operations is to protect the main project water right, 36-02080, from dilution if water conservation measures, drought, or other conditions would cause patrons of the A&B Irrigation District that currently utilize enlargement water rights to seek water for their enlarged acres under the main right. With the source depicted as “ground water,” the enlargement rights could claim water under the main right but with only a junior priority date. Thus, if the actual waste water, seepage, or return flows were no longer available as the source for the enlargement water user, then it is very likely those users would seek it from the main right of 36-02080 given that their decree will identify the 36-02080 right as the water right’s source.

water diverted pursuant to water right 36-02080, even though the Court acknowledged that “[i]t is apparent from the record that the source of the water is *reused* to supply the B rights is water originally diverted under the 36-02080 ground water right.” ***Order on Challenge*** (Subcase Nos. 36-02080, 36-15127, *et al.*), dated April 25, 2003, at 15 (emphasis added). In addition, the Court stated that as a matter of law that the source of the “B” rights must be ground water, even though the water is subsequently *recaptured and reused*. ***Order on Challenge*** at 15-16 (emphasis added). Both conclusions should be reconsidered.

The underlying record shows that the source of some of the “B” claims is mainly commingled ground and drain water. *Responses and Answers to Respondents’ First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents to District*, included as “Exhibit B” to the *Affidavit of John M. Marshall*, filed on January 24, 2001. Thus, as a matter of fact, the source of the Reclamation water rights includes “ground water, waste, seepage and return flows.”

As a matter of law, correcting the source to be “ground water, waste, seepage and return flows” is consistent with the decision in *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). In *Fremont-Madison* the Supreme Court ruled the enlargement statute, I.C. § 42-1426, allowed enlargement water rights to be decreed if the claimed right: (1) would not increase the rate of diversion; (2) would not injure other water rights existing on the date of enlargement; and (3) when decreed, would fully mitigate for any potential injury to junior water rights existing as of the date of enactment of the amnesty statutes. *Fremont-Madison* 129 Idaho at 460, 926 P.2d at 1307.

In this case, the Reclamation enlargement rights meet all of those conditions. The

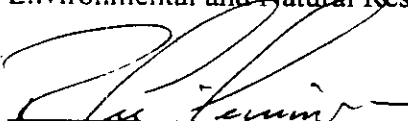

Reclamation water rights completed beneficial use prior to November 19, 1987; the use of the old and new rights combined do not exceed the original diversion rate; and the United States has agreed to have the rights subordinated to other non-enlargement and senior enlargement rights to avoid injury to those rights.

In short, correcting the source of the enlargement water to be “ground water, waste, seepage and return flows” is consistent with both the facts of this case and the Supreme Court’s decision in *Fremont-Madison*. As a result, the enlargement water rights should be decreed with the source as “ground water, waste, seepage and return flows.”

DATED this 13th of June 2003.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 13th day of June, 2003, I served a true and correct copy of the **Response of the United States to A&B Irrigation District's Motion to Reconsider Order on Challenge** by postage prepaid in the U.S. Mail and envelopes addressed to the following parties upon:

By Facsimile Transmission:

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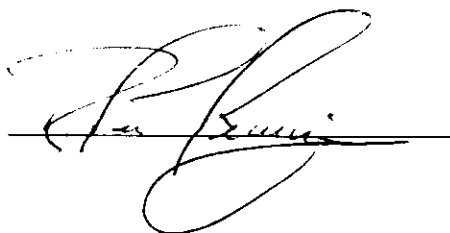
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A handwritten signature in black ink, appearing to read "Roger Ling", is written over a horizontal line.