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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' RESPONSE TO
A&B'S MOTION TO RECONSIDER**

In its April 25, 2003 Order on Challenge ("Order"), this Court denied the challenge filed by A&B Irrigation District ("A&B") to the Special Master's summary judgment ruling in favor of the Respondents (the "Ground Water Users"). On May 7, 2003, the Court issued partial decrees for each of A&B's enlargement claims. In accord with both the Court's and the Special Master's rulings (and the Supreme Court's decision in *Fremont-Madison*), the partial decrees specify that each of A&B's enlargement rights has ground water as a source and carries a priority subordinated to the April 12, 1994 effective date of Idaho Code § 42-1426 (the "amnesty statute").

A&B now has filed its Motion to Reconsider Order on Challenge ("Motion") in which it repeats arguments that both the Special Master and this Court have thoroughly considered and rejected.

As it has done in all prior briefing and argument in this case—before the Special Master and in this Court and on its motion for challenge—A&B’s motion for reconsideration requests backdated, pre-1994 priorities for its enlargements without ever attempting even to grapple with how this can be accommodated legally without injuring the priorities of post-enlargement water rights. Instead, just as before, A&B attempts to skirt the issue—even though this Court, the Special Master and the Idaho Supreme Court all have ruled that such a result would unconstitutionally injure existing rights—by arguing, in the face of its own evidence, that the water it uses to irrigate its enlargements is unconnected to the Snake Plain Aquifer or any other source in which other water rights exist. Motion at 6-9. As recognized previously by the Court, A&B’s assertion not only is completely baseless, it is of no legal consequence even if it were true. Order at 17 and 26.

The Court already has ruled on the arguments A&B makes in its motion and therefore should deny the Motion and affirm its prior Order.

I. The Court correctly observed that water involved in A&B’s enlargements is not within a “closed basin” separate from the Eastern Snake Plain Aquifer and that A&B’s enlargement claims are not entitled to be treated as if they have no relation to any other water rights in the basin.

In its motion for reconsideration A&B doggedly repeats its theory that, once pumped from the aquifer, its particular ground water resides in “closed basins” that are hydraulically separate from the ESPA and the thousands of other ground water rights (such as those of the Ground Water Users) that rely on the ESPA and connected surface sources. A&B Motion at 6-9. Based on this “closed basin” theory, A&B reasserts its arguments that: 1) the water source for its enlargements is a “private” source not subject to appropriation by others, and 2) its enlargements do not cause injury to other water users diverting from the ESPA. *Id.*

Astonishingly, A&B continues to advance these arguments even though the Court has pointed out that A&B's own admissions, and facts from its own expert's report, directly contradict this "closed basin" theory. Order at 26. The Court properly noted that this is not open for debate: "A & B is not a 'closed system.'" *Id.* (emphasis added). A&B should understand this by now: "A & B by its own argument regarding the respective rates of recharge acknowledges that the system is not closed. *See Affidavit of C.E. Brockway.*" *Id.* (emphasis added).¹ Yet now, in its Motion, A&B again points to Dr. Brockway's affidavit as support for its "closed basin" argument. Motion at 7-9. A&B cites nothing in the record and does not even attempt a new spin on this theory. Rather, it adopts an attitude of denial with regard to its own factual proof.

There simply are no facts to support the "closed basin" theory. Indeed, all the facts are to the contrary. Dr. Brockway uses the phrase "closed basin" in his report, but only in the context of drain water being unable to reach "live streams"—that is, surface water streams in the A&B area. Brockway Affidavit Exhibit 2 at 1.² His report never suggests, as A&B would have the Court believe, that A&B is set apart hydraulically from the ESPA. Mischaracterization of Dr. Brockway's report, hardly tolerable at any phase of these proceedings, is particularly disturbing as the basis for "reconsideration" after the Court has expressly pointed out A&B's error.

¹ Moreover, as noted by the Special Master, the Brockway Affidavit concerns the irrigation of new lands in the future if A&B ceases using its injection wells. Order Granting Respondents' Motion for Partial Summary Judgment (March 26, 2001) at 10. Dr. Brockway's analysis compares the relative rates of aquifer recharge from ponds compared to that resulting from irrigating new lands if injection wells are phased out. Either way, there is return flow to the aquifer. The basin is not closed, and thousands of other water rights are implicated.

² It is not surprising that Dr. Brockway found that A&B's ground water, once running in (and seeping from) drains, could not find its way to live streams. The reason A&B began pumping ground water in the first place is that the arid Snake River Plain in that location contains precious few live streams from which to appropriate reliable surface water supplies. It is widely recognized that such streams as there are (e.g. the Big and Little Lost Rivers) typically sink into the aquifer and themselves become ground water. Just like the water in A&B's drains.

The Court should affirm its prior rulings recognizing that A&B's enlargements are part of the ESPA hydrologic system.

II. The amnesty statute is the only mechanism by which the Court can decree water rights for A&B's enlargements, and it requires precisely the result the Court has fashioned here.

Even if A&B's "closed basin" assertion were true, this still would not alter the outcome of this litigation. This is because A&B must comply with the provisions of the amnesty statute, which requires the Court to decree A&B's enlargements as subordinated ground water rights.

A. Pursuant to section 42-1426, A&B's enlargements must be decreed with their source listed as ground water.

As recognized by the Court in its Order (and not disputed by A&B or the United States), A&B has irrigated unauthorized acres in violation of Idaho's mandatory water right permit system. Order at 17. Thus, as a legal matter, A&B's enlargements cannot be decreed in this adjudication absent compliance with the provisions of the amnesty statute, which is the exclusive remedy for recognizing otherwise illegal diversions. *Id.*

The amnesty statute is not a blanket approval of enlargements, of course. It contains express limitations. It specifically allows otherwise illegal enlargements only if they were accomplished as part of a previously authorized diversion. In other words, pursuant to the statute, an enlargement must be tied to the diversion of an existing base right: "a new water right may be decreed for the enlarged use of the original water right" I.C. 42-1426(2) (emphasis added). Furthermore, the statute then immediately qualifies this limitation: "provided however, that 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." Idaho Code § 42-1426(2) (emphasis added).

The Court understands this statute and correctly ruled that A&B has no choice legally but to accept ground water under this right as the source of its enlargements:

As discussed below, I.C. § 42-1426 provides amnesty for enlargements of **existing rights** as opposed to any previously unauthorized independent use. Implicit in the express purpose of I.C. § 42-1426 is the acknowledgment that the enlargement and the original right share the same source. . . . To the extent the “enlargement” is really from a different source then it’s not an enlargement of an existing right and in which case I.C. § 42-1426 will not operate to excuse non-compliance with the mandatory permit requirements.

Order at 17-18 (emphasis in the original).

The Court’s Order is clear and correct; it adheres to the express statutory language. If A&B really wants a different source for its water rights, then it must forego the amnesty statute’s protections and suffer the consequences of irrigating with illegal, unauthorized diversions.³

B. The amnesty statute requires subordination of A&B’s enlargements.

1. Injury to existing priorities is injury *per se*.

A&B also requests reconsideration of its argument that its enlargements should not be subordinated because they injure no one. A&B Motion at 9. This argument is an extension of the “closed basin” theory; A&B asserts that more recharge occurs through irrigation than if the water were allowed to pool up and evaporate. Motion at 9.

Here again, the Court has directly considered this argument and rejected it as a legal matter even after assuming, for purposes of argument, that A&B’s “closed basin” argument has

³Presumably in hopes of having its two small, pre-1971 enlargements decreed as beneficial use rights, A&B renews its argument that its drain water is surface water distinct from the ground water source from which it is derived. A&B Motion at 4-7. A&B asserts that by the time water is collected in its drains, it has lost control of it and it has been commingled with surface runoff, causing the water to lose its identify as ground water. *Id* at 6. This argument does not address the Court’s ruling that ground water remains as such until it mixes with another public water source. Order at 15. Moreover, A&B never has reconciled the fact that this argument is self-defeating. If its enlargements are irrigated with surface water separate from right 36-2080, then all of A&B’s post-1971 enlargements are illegal diversions for which there is no amnesty. As discussed above, the amnesty statute applies only where the enlargement’s diversion is a part of an existing, authorized diversion under an existing water right.

factual merit. Order at 26. Analyzing and quoting from the Idaho Supreme Court's decision in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996), the Court correctly ruled that backdating priorities under the amnesty statute without subordination automatically would cause injury:

Hence, the essence and value of a water right in a prior appropriation system is the priority date. To the extent a claimant is entitled to retroactively receive a valid water right with a priority date senior to other appropriators on the same source the juniors are *per se* injured irrespective of the extent of the water supply.

Order at 25. Indeed, the amnesty statute was held to be constitutional only because it requires the new water right to be covered by mitigation or, if no mitigation is provided, to be advanced in priority (that is, given a junior priority date) to assure that it would not injure water rights existing on the date of enactment of the amnesty statute. Order at 23-24 (*citing Fremont-Madison* at 461 and I.C. § 42-1426(2)).

Then, as had the Special Master, the Court ruled that the Director's recommended subordination remark "satisfies the constitutional concerns raised in *Fremont-Madison* by protecting the order of priorities of existing rights." *Id* at 26.

After recognizing the general rule, the Court takes up A&B's proposed "closed basin/no injury" exception. The Court ruled that even if it were true that A&B exists in a closed system, it would be of no consequence: "[t]he fact that the recharge to the ESPA may arguably be enhanced by application to adjacent lands as opposed to allowing the water to pool is irrelevant for defining priorities as in times of shortage the junior right would be curtailed prior to the subject enlargement claim." *Id*. Thus, backdating senior priorities would occur and, in the words of the Court, constitute injury *per se*.

As with its other arguments on reconsideration, A&B has not addressed this Court's ruling and instead simply repeats its prior arguments. The Court's reasoning is sound and should not be altered.

2. To circumvent injury and the inevitable legal conclusion that its enlargements must be subordinated, A&B proposes to illegally waste water.

In a last-ditch effort to avoid the certain legal conclusion that its enlargements must be subordinated, A&B again proposes that curtailment of its enlargements in a call actually would reduce the quantity of water available to other rights. Motion at 9. According to A&B, this is because the water that otherwise would be used to irrigate these enlargements—that is, water diverted under right 36-2080 but not needed—would pool up and evaporate. *Id.* While A&B has made this same general argument before, until now it never has admitted that it may deliberately waste water in a call situation.⁴ Yet that is precisely what A&B proposes.

Like most enlargers in the Snake River Basin, A&B has found itself with excess water under its original right because its members have become more efficient water users through conversion from flood to sprinkler irrigation systems.⁵ Brockway Affidavit, Exhibit 2 at 1 (“The project was designed as a gravity surface irrigation system; however, approximately 78 percent of the project acres are now sprinkler irrigated.”). By pumping the full authorized quantity of 1,100 cfs under right 36-2080 despite these efficiency increases, A&B has additional water

⁴ In addressing this argument in A&B's last round of briefing, the Court noted that even if A&B's factual scenario were true, this is a matter of water administration that is “irrelevant for defining priorities in times of shortage.” Order at 26. If curtailing A&B's enlargements actually will not make additional water available, then it can attempt to prove at the time of the call that it is futile. *Id.* However, as a legal matter, the enlargements must be subordinated.

⁵ A practice so common it is specifically called out in the amnesty statute: “[irrigators] have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion.” I.C. § 42-1426(1)(a).

available, and simply elected on its own to irrigate new acres and thus illegally enlarge its place of use (not to mention its consumptive use).

A&B baldly asserts that despite these increased efficiencies, if its enlargements were curtailed, it will continue pumping the full authorized diversion under right 36-2080, even though it does not need this quantity to beneficially irrigate the acres authorized under the right, and then let at least a portion of the excess evaporate from ponds, presumably for nothing more than spite. In other words, A&B appears to be saying it would deliberately waste water not needed to accomplish the beneficial use authorized under its water right. This obviously cannot be made the basis of any legitimate assertion that other appropriators are better off by A&B's enlargements.⁶ It is of no legal consequence to assert the water that otherwise would go to irrigate enlargements would be wasted upon curtailment of the enlargement. As this Court noted in its Order, "[c]omitting waste is legally prohibited." Order at 16, fn. 9 (*citing State v. Hagerman Water Owners.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997)).

Finally, the obvious rejoinder to A&B's point about pumping and wasting in times of shortage is that, at least in times of delivery call, A&B simply should pump less water. A&B evidently attempts to obtain a ruling in this case that would sanction even a blatant waste of water in the event of a delivery call. The Court should neither provide aid to such a position nor in any way disable other water right holders, such as the Ground Water Users, from asserting in the future that, in times of shortage, A&B's pumping should be curtailed to the extent of its enlargement acres.

It is time to put A&B's theory to bed once and for all. Other ground water users are not "better off" by A&B's enlargements. They must be subordinated.

⁶ As we have pointed out before, any irrigator can make the same argument—and they would if A&B were successful in this case—by asserting that pumping the full authorized quantity under its base right upon curtailment of its enlargements would create additional waste water that is best disposed of by irrigating the enlargements. .

IV. Idaho Code § 42-1416 did not grant anyone any “vested rights.”

The Special Master and this Court both have given full consideration to A&B’s argument that it obtained protectable, vested rights with the passage of Idaho Code § 42-1416, and that any subordination of its rights therefore should be based on the 1985-passage date of this statute. Even so, A&B makes the same argument for the third time, apparently hoping it will find traction by repetition.

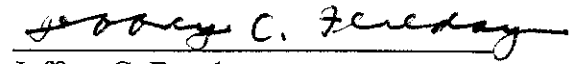
It is indeed frustrating to once again have to respond to this argument. This Court’s holding, and that of the Special Master should have long since laid it to rest. Section 42-1416 did nothing more than create rebuttable presumptions and ultimately was held unconstitutional and repealed. Consequently, the “statute did not confer an absolute or vested right to previous unauthorized enlargements or otherwise excuse non-compliance with the mandatory permit and license requirements.” Order at 28. Instead, it merely created a “**rebuttable presumption.**” *Id.* (emphasis in original). Therefore any reliance A&B placed on section 42-1416 “was misguided.” *Id.* A&B has not presented any argument that justifies reversal of these sound rulings. Raising this issue once again does nothing more than raise costs and waste judicial resources.

CONCLUSION

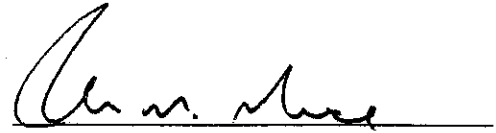
A&B’s Motion simply repeats prior arguments this Court has thoroughly considered and rejected both at the Special Master and Presiding Judge level. A&B has failed to provide any basis by which this Court should overturn its prior Order. The Court should deny the A&B Motion and affirm its Order.

Respectfully submitted this 13th day of June, 2003.

GIVENS PURSLEY LLP

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Jeffrey C. Fereday

A handwritten signature in cursive script, appearing to read "John M. Marshall", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 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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