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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	)	<b>Subcases 36-15127A, 36-15127B,</b>
	)	<b>36-15192, 36-15193A, 36-15193B,</b>
Case No. 39576	)	<b>36-15194A, 36-15194B, 36-15195A,</b>
	)	<b>36-15195B, 36-15196A and 36-15196B</b>
	)	
	)	Response of the United States to A&B
	)	Irrigation District's Challenge
	)	to Special Master's Report and
	)	Recommendation

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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 Challenge to the Special Master's Recommendation of the above subcases for partial decree.

The United States files this brief to inform the court that although the United States did not file a challenge to the Special Master's Report, the United States agrees with A & B

**United States Response to A&B Irrigation District's Challenge to Special Master's Report and Recommendation -1-**

Irrigation District's that the Special Master incorrectly identified the source of the water for these claims as solely groundwater.

### *Background*

The United States by and through the Bureau of Reclamation is the licensed water right holder for the B Unit of the A&B Irrigation District and these ownership interests are represented by the main claim of 36-02080. The United States entered into a settlement agreement with the A&B Irrigation District in that case wherein the United States agreed to hold legal title to the water right for the benefit of the irrigation district's patrons pursuant to the terms and conditions of a 1962 contract between A&B Irrigation District and the United States of America as may be further amended or supplemented by the parties. Because the United States is the licensed holder of the B Unit's main water right, IDWR recommended amended claims<sup>y</sup> 36-15127, 36-15193, 36-15194, 36-15195, and 36-15196 in the name of the United States. In that recommendation, IDWR split the claims into two parts, "A" and "B," depending upon the legal basis of the water right. The "A" claims are constitutional appropriations and not in issue in this case. The "B" claims are filed as expansion claims under Idaho Code § 42-1426, with a claimed source of "groundwater, waste, seepage, and return flow."

When the United States filed objections to the recommendation of the Director on the "B" claims, the United States sought to have the source of the water rights documented as "groundwater, waste, seepage and return flow." Subsequently, on March 26, 2001, the Special

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<sup>y</sup> The SRBA Court granted the United States leave to file amended claims on April 9, 1998.

Master held that: the source of the water on the “B” claims was ground water only; the provisions of the amnesty statute, I.C. § 42-1426 applied; and that the priority dates of the “B” Claims was either when the water was first put to beneficial use against other amnesty claims or subordinated to 1994 as against non-amnesty claimed water rights. *See* Order Granting Respondent’s Motion for Partial Summary Judgment (Mar. 26, 2001). Thereafter, the United States and A&B Irrigation District entered into a stipulation with the Respondents reflecting the parties agreement on the quantity of water and place of use for the “B” claims.

On November 14, 2002, the Special Master held a hearing on the District’s Motion to alter or amend his recommendation of October 8, 2002. At this hearing, the United States reiterated its position that a more factually correct characterization of the source of water on the “B” claims is “groundwater, wastewater, seepage and return flows” rather than solely groundwater as the Special Master has characterized it.

#### ***Standard of Review***

Litigation in the SRBA is governed by the Idaho Rules of Civil Procedure and the Idaho Appellate Rules. *Administrative Order 1(1)*. In an action without a jury, the court shall accept the Special Master’s findings of fact unless clearly erroneous. I.R.C.P. 53(E)(2) and A01(13)(f). The Special Master’s conclusions of law are reviewed *de novo*. *See Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991).

#### ***Argument***

#### **I. The Source of the Water for the “B” Claims Should Be Characterized As Ground Water, Waste, Seepage and Return Flows.**

As was described in the A&B Irrigation District's Opening Brief, the District operates a drain system which collects waste and return flows. *A&B Irrigation District's Brief* at 5 (citing Affidavit of Dr. Brockway). Water collected by the drain system is applied to the enlargement acres along with groundwater. *Id.* at 6, 8. Thus ground water is not the sole source of water for these claims and the Special Master's decision mis-characterizes the source. Moreover, there is no legal barrier to a water right describing the source of water as waste, seepage and return flows in addition to groundwater.

It has long been "settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing and able to put it to a beneficial use."<sup>2</sup> *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 214, 222, 214 P.2d 880, 883 (1950).

Similarly, it is well established that

a landowner cannot acquire a prescriptive right to the continued flow of waste or seepage water from the land of another, that is, seepage water or waste water running from one's land to that of another need not be continued and it may be intercepted and taken by such owner at any time and used on the land to which it is appurtenant.

*Thompson v. Bingham*, 78 Idaho 305, 308, 302 P.2d 948, 949 (1956)(internal citations omitted).

Moreover, even where a downstream water user has appropriated waste water, the original appropriator may discontinue the waste or recapture the water for its own use. *Sebern v.*

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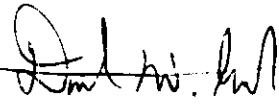
<sup>2</sup> It does not matter that the original appropriator was not the actual user of the reclaimed water, only that the original appropriator continues to ensure that the water was put to beneficial use and not being wasted. *Reynolds*, 70 Idaho at 223. Thus the District may act to reclaim the United States' water for use within the federal project.

*Moore*, 44 Idaho 410, 258 P. 176 (1927)( “surface waste and seepage water may be appropriate under the provisions of C.S. § 5562 [C.S. § 5562 was superceded by I.C. § 42-107] subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use”); *Colthorp v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 182, 157 P.2d 1005, 1009 (1945)( “[The] respondent could not be required to continue to waste 75% of the water decreed to it, for the benefit of appellant; [the] respondents could not be enjoined from ceasing to waste such decreed water and making beneficial use of it ....”). This rule was recently reaffirmed by the Idaho Supreme Court in *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980), where the court explained “[t]he senior appropriator retains his right to all of the water, including that which is lost through reasonable seepage, and thus may reclaim it...” *Id.* at 1134.

#### ***Conclusion***

The facts demonstrate that A & B applies waste, seepage and return flows as well as groundwater. Nothing in Idaho law precludes waste, seepage and return flows from being identified as the source of a water right. Accordingly, the Special Master’s decision should be corrected and the water rights of the United States under the “B” claims should be decreed with the source as “groundwater, waste, seepage, and return flows.”

Respectfully Submitted this 19<sup>th</sup> day of February 2003.

By:   
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David W. Gehlert  
Attorney for the United States

CERTIFICATE OF MAILING

I hereby certify that on the 19<sup>th</sup> day of February, 2003, I served a true and correct copy of the **United States Response to A&B Irrigation District's Challenge to Special Master's Report and Recommendation** by fax filing with the SRBA Court and by postage prepaid in the U.S. Mail and envelopes addressed to the following parties:

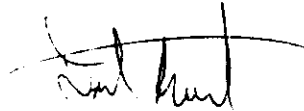
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