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Department of Water Resources

Jeffrey C. Fereday (ISB #2719)
Michael C. Creamer (ISB #4030)
John M. Marshall (ISB# 5628)
Givens Pursley LLP
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701
Telephone: (208) 388-1200
Facsimile: (208) 388-1300
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Attorneys for Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Tim Deeg and Ralph Breeding

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 IRRIGATION DISTRICT'S OPENING
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 Response to the Opening Brief filed by A&B Irrigation District ("A&B" or the "District").

INTRODUCTION & FACTUAL BACKGROUND

1. A&B's enlarged use of ground water under its license. After the 1963 date on which Idaho's water right permit system became mandatory for new uses of ground water, A&B enlarged the use under its 1948-priority ground water right no. 36-2080 by irrigating some 2,363

acres beyond the 62,604 acres authorized by the license.¹ Order Granting Ground Water Users' Motion for Partial Summary Judgment ("2001 Order") at 2. These enlarged uses occurred in the period from 1965 to 1984. *Id.* A&B never obtained permits for these enlargement, and instead claims the additional acreage in the SRBA through beneficial use claims with 1948 priorities. *Id.*

2. The Legislature's response to enlargements in use—the amnesty statute.

A&B's enlargement is not unique. In structuring its general adjudication statutes, the Legislature recognized that thousands of acres have been enlarged in violation of the mandatory permit requirements due to water "conservation or other means" whereby the same diversion under the original right is used to serve an enlarged use, such as new, unlicensed acres. I.C. § 42-1426(1)(a). One option, of course, was to cut off these uses altogether. But, by enacting I.C. § 42-1426, the Legislature opted to allow these uses to continue, and to receive recognition in the adjudication as valid water rights.

Usually referred to as the "enlargement" or "amnesty" statute, section 42-1426 retroactively waives the mandatory permit requirements of the water code and provides that "a new water right may be decreed for the enlarged use," provided measures, including mitigation or advancement of the new right's priority, can be imposed to prevent injury to other water rights, including those existing on the statute's 1994 effective date but having priorities junior to the date enlargement took place ("post-enlargement rights"). I.C. § 42-1426(2). Many of the Ground Water Users' water rights are post-enlargement rights.

3. The Idaho Supreme Court underscores the need to protect post-enlargement rights. The Idaho Supreme Court focused squarely on this priority question in its 1996 opinion on the amnesty statute, ruling that the Legislature's clear intent, in I.C. § 42-1426(2), to protect

¹ On March 25, 1963, the Idaho Legislature amended I.C. § 42-229, which made the application permit and license procedure the exclusive method of acquiring new ground water rights.

post-enlargement water rights is crucial to the statute's constitutionality. *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 459, 926 P.2d 1301, 1307 (Idaho 1996).²

And this surely is correct. After all, the only reason for a water right's priority is to vest its holder with the right to curtail, or call out, a more junior right in times of shortage. If a new water right is created through the 1994 statute's retroactive waiver and the SRBA Court assigns it an unsubordinated priority as of its initiation in, say, 1977, then all post-1977 water rights would have this additional water right priority placed in line ahead of them. The Idaho Supreme Court explained that such a retroactive dilution of the priorities of post-enlargement rights would violate the constitutional guarantee of first-in-time, first-in-right. *Fremont-Madison*, 129 Idaho at 460, 926 P.2d at 1307 ("Section 42-1426 of the Idaho Code would violate Article XV, § 3 of the Idaho Constitution if it allowed a party with a claim for an enlargement to unconditionally receive a priority date as of the date of enlargement regardless of injury to junior appropriators").

The supreme court also recognized other real-world implications in our arid state: enlargements impermissibly increase the amount of water consumed from the hydrologic system, reduce the available water supply, and impair the ability of legitimate water right holders to fill their rights. *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. If enlargements take senior priorities slotted in ahead of existing rights, junior users would be shut off in times of water shortage while enlargement rights would be filled. The court in *Fremont-Madison* confirmed that such a result would be unconstitutional. *Id.*

4. In response to *Fremont-Madison*, IDWR and the Special Master recommend subordination of all enlargements. Following the court's ruling in *Fremont-Madison*, the Idaho

² The three Respondent ground water districts involved in this matter participated in *Fremont-Madison* as members of Idaho Ground Water Appropriators, Inc. A&B also was a party.

Department of Water Resources ("IDWR") so far has recommended, as new amnesty-based water rights, over 500 enlargements, 350 of which already have been decreed.³ IDWR's recommendations include the District's enlargements at issue here.⁴ To avoid injury to the priorities of other water rights, IDWR has attached the following subordination condition to its recommendation for each of the 500 new enlargement water rights that have been recommended:

This water right is subordinate to all water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to Section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority is the superior right.

Supplemental Director's Report for Basin 36.⁵

5. The question at issue here. This case comes down to a single question: Did the Special Master violate the law by concluding that A&B's Enlargement Claims can only be

³ Personal communication with Don Shaff, IDWR Adjudication Bureau. These recommendations and partial decrees also are of record with this Court, and are part of material of which the Court can take judicial notice.

⁴ These are water right claim nos. 36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B (the "Enlargement Claims"). Throughout the proceedings A&B's Enlargement Claims have been grouped with the water right nos. 36-2080, 36-15192, 36-15127A, 36-15193A, 36-15194A, 36-15195A and 36-15196A, which are all interrelated with the Enlargement Claims through combined use limitations. Although the caption lists all of A&B's claims, only the Enlargement Claims are at issue in this proceeding.

The District's water rights actually are held in the name of the United States Bureau of Reclamation as part of the Bureau's Minidoka Project, although claims were filed by both the Bureau and the District. In its objection to the description of water right 36-2080 in the Director's Report, the Bureau confirmed that "[u]se of this right is subject to the terms of Idaho Code § 42-1426." Quoted in Special Master's Order at 3. The Bureau's objection sought only clarification as to the entitlement to assert date-of-enlargement priorities for the enlargements if the Bureau provides mitigation to post-enlargement water rights (something the Ground Water Users do not dispute). The Bureau did not press the point further, and has not challenged the Special Master's Order. It also has not suggested or offered any mitigation.

⁵ The Department adds this subordination condition to mitigate the injury to all rights in existence as of the April 12, 1994 enactment date of the amnesty statute. This is in direct response to Supreme Court's holding that "if there are no mitigation provisions that will assure that there will be no injury to the junior appropriator, the new right for the enlarged use must be advanced [in date of priority]. . . ." *Id.* 129 Idaho at 461, 926 P.2d at 1308 (emphasis added). The Ground Water Users recognize that, under the statute, one claiming a new water right for an enlargement always has the option of providing mitigation to protect post-enlargement rights. However, as the Idaho Supreme Court observed, such mitigation would be difficult to provide absent drying up an equivalent amount of irrigated land. To date, no claimant has offered a mitigation plan. Instead, all (except for A&B and a few individual associated with A&B) have accepted the subordination condition.

decreed in accordance with the terms of I.C. § 42-1426—that is, as subordinated enlargements of licensed ground water right 36-2080?

6. The parties' positions. The Ground Water Users have no objection to the District's acquisition of new water rights for its Enlargement Claims, provided they are decreed as ground water enlargements with the subordination condition imposed to protect the Ground Water Users' post-enlargement rights.

The District, however, is not satisfied with the seemingly remarkable benefit, in the circumstances, of obtaining after-the-fact valid water rights for past illegal enlargements. Instead, A&B wants to duck the amnesty statute altogether and have this Court view these uses simply as 1948-priority water rights. A&B makes three arguments.

- First, it says its enlargements were made using “recaptured return flow” or “drain water” resulting from its ground water use under the 1948 license. A&B believes this means the enlargements should be subject to neither the amnesty statute nor the subordination condition and instead should have the “priority date of the water right that creates the drain water.” A&B Objection, quoted in 2001 Order at 3.⁶
- Second, A&B asserts that if an amnesty is required, it actually arises under I.C. § 42-1416—the so-called “presumption statute”—that this Court declared unconstitutional and the Legislature repealed when it enacted the 1994 amnesty statute. A&B's theory is that, upon enactment, section 42-1416's recitation of a rebuttable presumption that a pre-1987 enlargement is valid somehow transformed all of A&B's enlargements into vested water rights.

⁶ Each of A&B's Objections to the Enlargement Claims, on file with the Court and part of the record in these subcases, includes this language. The District has not submitted a mitigation plan to offset the injury to existing water rights—including injury to priority—caused by its enlargements. Answer to Interrogatory No. 10, Exhibit B to the Marshall Affidavit, p. 16.

- Third, A&B asserts that the Ground Water Users are barred by waiver or estoppel from contesting the Enlargement Claims.

The District made these same three arguments to the Special Master.

7. The Special Master's ruling at issue in this challenge. The Special Master ruled that the amnesty statute applies to A&B's enlarged uses of its ground water right, and upheld IDWR's recommendation of the Enlargement Rights with the subordination condition. 2001 Order at 9.

The Special Master recognized that the District irrigates the enlarged acres with waters conserved as drain or recaptured return flow, but concluded "ground water is the only source for 36-2080 and its enlargements." *Id.* That is, the source element for the enlargements is the same ground water source from which the water is pumped in the first place. To use the District's own words quoted above, it is the District's 1948 ground water right "that creates the drain water." The enlarged acres do not use water A&B has imported from some other basin or created from thin air. As the District's own expert notes, the water used to irrigate the District's additional, unlicensed place of use is pumped from the Eastern Snake Plain Aquifer ("ESPA") and will, if not consumed in irrigating some 2,400 unlicensed acres, return (in large measure) to the ESPA and provide recharge that supplies other water rights, including A&B's own non-enlarged rights, the rights of other senior users, or the rights of the Ground Water Users—all of whom rely on this same aquifer. The Special Master's decision recognizes these realities and rejects A&B's attempt to claim a new source for the water it pumps from the aquifer and then uses on its enlarged acres. 2001 Order at 11.

The Special Master also rejected A&B's assertion that the former, now-repealed version of the amnesty statute, I.C. § 42-1416, created vested senior water rights for A&B's enlargements. 2001 Order at 12.

Finally, the Special Master ruled that the Ground Water Users are not barred by waiver or estoppel from contesting the Enlargement Claims. *Id.*

In this challenge, A&B has provided nothing that could even remotely justify reversing the 2001 Order. This Court should affirm the Special Master, adopt IDWR's recommendations and decree A&B's Enlargement Claim as ground water enlargements with the subordination provision.

ARGUMENT

I. Idaho Code § 42-1426 is the exclusive means by which the Court can decree A&B's Enlargement Claims.

A. Unless it can come within the amnesty provided by I.C. § 42-1426, the District cannot obtain a decree for a water right to irrigate its enlarged acres.

A&B's Enlargement Claims seek SRBA Court decrees authorizing it to irrigate 2,363 acres of post-1963 enlargements that are not within the licensed place of use under water right 36-2080 and not recognized under any water right. Accordingly, the Special Master properly characterized A&B's enlargements as "unlawful" and held that "A&B's sole remedy now is to claim the additional acreage as enlargements under Idaho's 'amnesty statute,' I.C. § 42-1426."⁷ 2001 Order at 9.

The Special Master is clearly correct. Indeed, the Idaho Supreme Court's ruling on the constitutionality of I.C. § 42-1426, states "an enlargement may include such events as an

⁷ As the District itself points out in its Opening Brief, it knew it needed a permit and license for its enlargements acres and filed for one. It then chose to withdraw its application and chose to rely the SRBA presumption and amnesty statutes instead. Opening Brief at 2.

increase in the number of acres irrigated” and that “if a water user seeks an enlargement in the adjudication, the request must be pursuant to Section 42-1426 of the Idaho Code which allows for the ‘enlargement’ of existing water rights under certain conditions.” *Fremont-Madison*, 129 Idaho at 459, 926 P.2d at 1305 (emphasis added). These holdings in *Fremont-Madison* recognize that the Legislature repeatedly has confirmed the fundamental principles that an irrigation water right is defined by a particular number of acres that may be irrigated and that an enlargement in the number of irrigated acres requires a new water right.

For example, when issuing a license, Idaho Code requires IDWR to “give a description, by legal subdivision, of the land which is irrigated by such water.” I.C. § 42-219(2). An irrigation water right then becomes appurtenant to the described land: “all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to . . . the land for which the right of use is granted.” I.C. § 42-220.

A central purpose of the license is to specify this place of use, not provide an open door to enlarge the use later at the licensee’s whim through the use of recaptured water or otherwise. The statute requires IDWR to publish public notice of the filing of a water permit application and make available the opportunity for protest. I.C. 42-203A(2). The point is that other water users are entitled to know what is being applied for and what the size and use characteristics the water right will carry upon licensure. Allowing free, post-license enlargements obviously would completely undermine Idaho’s permit and license water right system. While a licensee can seek an enlargement, he or she must do so according to the permit system.

Similarly, in the water right transfer statute, I.C. § 42-222 (1), the Legislature specified that those appropriators seeking to change the “place of use” under a water right first must apply to IDWR, which can approve the transfer only if, among other things, “no other water rights are

injured thereby [and] the change does not constitute an enlargement in use of the original right.”

It would make little sense to include this requirement, and this protection of other water rights, if water right holders were entitled to “recapture and enlarge” at any time and without applying for a transfer or (more likely) a new license. Likewise, under I.C. § 42-351, IDWR may bring an enforcement action against any water user who “has applied water not in conformance with a valid water right.” Again, the licensed place of use means something, and its purpose is, in part, to protect the water supplies of other valid water rights.

These statutes, and the principles of water law behind them, are fundamental. They preclude irrigation of acres beyond those indicated by an existing water right.⁸ If enlargements could be undertaken whenever one recaptures drain water, then, obviously, consumptive use would increase, return flows would decrease, and other rights (both junior and senior) would be injured.

Accordingly, without I.C. § 42-1426’s amnesty from the mandatory permit system, all water right enlargers, including A&B, would have to cease irrigating their enlargement acres. Thus the Special Master is correct in holding that “the only viable basis for A&B’s [enlargement] claims is I.C. § 42-1426.” 2001 Order at 8.

⁸ The District understands the irrigation of additional acres with recaptured drain flows requires a new water right. Indeed, for the enlargement acres the District began irrigating before the 1963 mandatory permit date, the District claimed new “beneficial use” water rights with priorities of the pre-1963 date the District first irrigated these acres. Furthermore, the District accurately listed the source for these acres as ground water, not a newly discovered drain source. Yet, with regard to its enlargements after 1963, the District now takes a different position and asserts that it is entitled to the same 1948 priority date of right 36-2080, that the source is no longer ground water and that a new water right need not be created to allow the use.

B. The District's unmitigated enlargements would violate Idaho's Constitution unless they are decreed as ground water rights subordinated to existing water rights.

1. Idaho Code § 42-1426 is constitutional only because of its mitigation provision.

Idaho Code § 42-1426 provides that new water rights may be decreed for enlargements, provided that conditions are imposed “that mitigate any injury to a water right existing on the date of the enactment of this act.” I.C. § 42-1426(2). And “[i]f injury to a right later in time cannot be mitigated, then the new right for the enlarged use shall be advanced to date one (1) day later than the priority date for the junior water right injured by the enlargement.” *Id.* (emphasis added). This mitigation provision is crucial to the statute's constitutionality and requires that the Court decree A&B enlargements, like all enlargements in the SRBA, with IDWR's recommended subordination condition.

Indeed, in its decision in *Fremont-Madison*, the Idaho Supreme Court observed the “first in time, first in right” guarantee of Article 15, section 3 of the Idaho Constitution would be violated if the amnesty statute “allowed a party with a claim for an enlargement to unconditionally receive a priority date as of the date of the enlargement regardless of injury to junior appropriators.” *Fremont Madison*, 129 Idaho at 460, 926 P.2d at 1307. The Court went on to hold that “only those enlargements . . . which fully mitigate any potential injury to junior rights existing as of the date the amnesty statutes are permitted.” *Id.* 129 Idaho at 460, 926 P.2d at 1307 (emphasis added).

The court then specifically ruled that injury to existing water rights' priorities is precisely the type of impermissible injury that must be mitigated:

Some injury from an enlargement can be identified if the enlargement takes priority over a validly established water right held by a so-called junior appropriator. The junior appropriator

will not receive the water he/she would have received but for the enlargement if there is not enough water to serve all water users.

Id., 129 Idaho at 461, 926 P.2d at 1308. This is consistent with the court's long-standing holding that "to diminish one's priority works an undeniable injury to that water right holder." *Jenkins v. Idaho Department of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982) (citations omitted).

Consistent with Idaho Code § 42-1426(2), the Court held that "it is clear that if there are no mitigation provisions that will assure that there will be no injury to the junior appropriator, the new right for the enlarged use must be advanced [in date of priority]. . . ." *Id.*, 129 Idaho at 461, 926 P.2d at 1308 (emphasis added).

It is difficult to conceive a clearer directive from the Idaho Supreme Court. Retroactively assigning senior priorities is injury *per se* to post-enlargement water rights. The statute requires either actual mitigation of this injury or advancement of the enlargement's priority to a date junior to all post-enlargement rights.

The District has proposed no mitigation for the 2,363 enlargement acres that the District concedes were first irrigated after March 25, 1963 in violation of the mandatory permit statutes. Even so, the District claims its enlargements should unconditionally receive a back-dated priority date regardless of injury to junior appropriators' water rights.

The Special Master correctly rejected the District's claims and ruled that the "only certain way to accomplish [mitigation of injury] is to subordinate A&B's enlargement claims to all other water rights with priority dates earlier than April 12, 1994." 2001 Order at 11. This ruling is mandated by the Supreme Court's holding in *Fremont-Madison* and should be upheld.

2. The District's enlargements reduce return flows to the aquifer, increase consumptive use in the basin, and will injure existing rights.

The District asserts that its enlargements will not injure, and are not injuring, any existing water rights because, says the District, the water source for the added acres is foreign to the ESPA and the Snake River Basin and therefore permanently unavailable to all other appropriators. Opening Brief at 10-12. In other words, the District is saying:

Back-dating our priority to a date before the amnesty statute's enactment will not injure any existing water rights because the water diverted to our enlargements is private drain water, which comes from a source on which no other appropriator ever has relied or ever will rely, and none of the return flows we're now putting to new uses ever returned to a source from which other appropriators divert.

This assertion is ridiculous on its face. It also is contradicted by even the District's own expert. A&B's assertion also has utterly no support in the law.

a) Many appropriators rely on the aquifer that is recharged by the District's drain water; they would be injured if new senior water rights were inserted in the priority line ahead of their rights.

The water used to irrigate A&B's enlargements in fact is water diverted from the ESPA, not water on which no other appropriators rely.

The District diverts 1,110 cfs of ground water from the ESPA pursuant to its licensed water right no. 36-2080. As with all irrigation water rights, a portion of the water diverted under 36-2080, the right's consumptive use, is removed from the hydrologic system through evaporation and evapotranspiration during the irrigation process. *See* Preliminary Report, dated August 2, 2000 by Dr. C.E. Brockway ("Brockway Report") at 7. Of course not all water diverted by an irrigator is consumed, and that quantity diverted but not consumed returns to the hydrologic system through return flows, typically through deep percolation or runoff. Brockway Report at 3. The supreme court in *Fremont-Madison* was keenly aware of this hydrologic

reality. 129 Idaho at 461, 926 P.2d at 1308 (“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 water users”).

A&B historically has used injection wells to send return flows directly back to the ESPA. Additional, and significant, quantities of water return to the ESPA from District lands through deep percolation incident to irrigation. Brockway Report at 7. Other appropriators from the ESPA, of which there are thousands (including the Ground Water Users) rely on all return flows to the aquifer, including the non-consumptive portion of water diverted under right 36-2080.

Over the years, the District has implemented measures by which it increased irrigation efficiencies and thus gave itself the opportunity to recapture field runoff (that is, “tailwater,” “drain water,” “return flows,” or “waste water”) before it escapes to streams or to the Snake Plain Aquifer. Brockway Report at 1. But rather than simply use these recaptured return flows to firm up supplies on the existing, licensed acres, the District broke out the 2,363 additional enlargement acres and irrigated them with the recaptured flows.⁹ These now account for increased consumptive use of ground water, a higher overall water demand on the project, and reduced return flows to the aquifer.

The report from Dr. Brockway, the District’s expert, makes it quite clear that substantial amounts of the District’s drain water return to the ESPA: “The estimated annual return to the aquifer, including deep percolation and pond seepage, may be in excess of 55,000 acre feet”). Brockway Report at 7. At a diversion volume of 4 acre-feet per acre per year, this amount of return flow could supply water for the irrigation of 13,750 acres under existing rights. There

⁹ Apparently, the District intends to irrigate additional enlargement acres beyond those claimed here using water that it has been injecting back to the ESPA. Dr. Brockway’s expert report is a study to determine the best way to dispose of A&B’s wastewater beyond the already accomplished enlargements. The problem is that other water users will be injured if the result is to increase consumptive use under the District’s rights.

simply is no factual basis for the District's contention that the drain waters somehow are separate from all other sources in the basin and are fair game for the District to use outside of its license. The District's own expert confirms this.

Incidentally, the bulk of Dr. Brockway's report discusses drain alternatives if the District were to cease using its injection wells in the future—something the District says it must do for water quality reasons. The report concludes that reuse of the drain water on existing and new lands would be an effective way to dispose of it. Another way to reduce the problem would be to withdraw less water in the first place. In any case, the Ground Water Users do not object to the District using excess water on new lands, so long as each right for such new use contains the subordination provision and recognizes that its source is ground water.

Unless such conditions are imposed, pumpers from the ESPA would be deprived of water that otherwise would be available to the aquifer, and they would be forced to suffer a new water right for some 2,400 acres "slotted in" ahead of them in priority. They would, in effect, have to "pay for" the District's enlargements by being on the hook for curtailment ahead of the District's enlargement acres. Such a result is, quite simply, unconstitutional.

The District cannot solve its drain problem by increasing its irrigated acres unless it acquires a new, junior-priority water right to do so. If the District can no longer send its return flows to the ESPA and instead reuses the drain water for irrigation, the amnesty allows this for those acres irrigated prior to 1987. But the statute, binding court precedent, and the constitutional rule of priority require subordination, as the Department has recommended.

A&B's argument about drain water being a separate or new source is directly contradicted by its own position in this very case. If A&B actually were irrigating the enlarged acres with water pumped from a source on which no other water user relies, then whatever

priority date were selected for the enlargement water right would be of no consequence to the District. If an appropriator is the only user of a water source, then he or she is guaranteed to hold the senior priority—by definition, there is no one else competing for the water and the appropriator always would be senior to whoever might arrive later. But this is clearly not the case here (or anywhere else in the Snake River Basin of which we are aware). Indeed, A&B wants an unsubordinated priority for its new enlargement water rights precisely because it wants to be able to curtail diversions by other users in the ESPA to supply its enlargements. But any order to curtail a post-enlargement water right to supply the enlargements would be unconstitutional.

b) A&B already has asserted its enlargement acres against the Ground Water Users.

The threatened injury to the priority of existing rights discussed here is hardly hypothetical. In 1994, the District made a call for the delivery of water against other ground water users in the ESPA, which includes water rights held by the Ground Water Users and members of the Respondent organizations. District's Petition for Delivery Call, dated July 26, 1994, attached as Exhibit C to the Affidavit of John M. Marshall (part of the summary judgment record). The District alleged that junior rights had reduced the amount of water available to its 1948-priority water right 36-2080. In practical effect, in that 1994 call the District was seeking junior priority curtailments in favor of both its licensed acres and the enlargement acres. The supreme court has already ruled that this cannot be allowed under our Constitution.

c) The source of A&B's enlargements is ground water.

As discussed above, the source of A&B's enlargements is not a foreign, imported source of water from which no others have rights. It is the ESPA. This reality must be reflected in the decrees. Otherwise, when conjunctive management requires curtailment or other mitigation

from ground water users in the ESPA (which it already has), A&B will assert that its enlargements are not ESPA ground water, but surface diversion from drain water. This would create precisely the type of injury to the Ground Water Users' priority the supreme court has forbidden.¹⁰

Moreover, the structure of Idaho Code § 42-1426 requires that the source of all enlargements match the source of the original, now enlarged, right—in this case, is ground water. Idaho Code § 42-1426 provides that new enlargement water rights “may be decreed for the enlarged use of the original water right . . . provided however, that the rate of diversion of the original right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water right.” To implement this provision, IDWR necessarily recommends, and this Court decrees, all enlargement rights with the same source as the original, base right and with a combined diversion rate limitation for both the enlargement and base rights. This formulation makes sense and recognizes that enlargement rights are inextricably tied to an original right. Indeed, it is the same water diverted under the original right that “by conservation or other means” is used to irrigate the enlarged acres. Idaho Code § 42-1426(1). In this case, A&B's enlargements must be decreed with a ground water source that matches the source of the original, enlarged right no. 36-2080.

¹⁰ A&B also argues that two of its Enlargement Claims, 26-15193B and 36-15194B, should be decreed outright because they were developed prior to the mandatory permit date for surface water beginning in 1971. A&B Opening Brief at 12-13. A&B asserts that the Court should recognize its drain water as actually being surface water, and that this allows A&B to develop beneficial use water rights prior to 1971. This argument is self-defeating. If its enlargements were in fact established by beneficial use of a separate, surface drain water source, then 42-1426 would not apply to A&B's post-1971 enlargements because there would not be an “original” right to enlarge. These post-1971 enlargements then would be illegal diversions that must be curtailed because there is no water right for them. Of the District enlargements, 165 acres are pre-1971. However, 2,210 acres are post-1971 acres that would have to be curtailed.

C. The limited right to recapture drain or return flow water does not allow enlargement of the original enlarged right.

The District contends that the limited right to recapture drain water somehow authorizes its enlargements. Although the District never actually comes out and says it, the necessary implication is that the right to collect one's drain water includes the right to use it to irrigate new acres. As noted by the Special Master, the District has failed to cite any authority for such a proposition. 2001 Order at 7. The District does not offer any additional authority in its opening brief, and none exists.

While Idaho cases recognize that an irrigator may recapture and reuse drain, waste, tail, or conserved water, not one of these cases has authorized the enlargement of an existing water right's place of use through this accommodation. For instance, in *Colthrop v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 105 (1945), the Idaho Supreme Court ruled that an appropriator cannot be compelled to continue wasting water for the benefit of another—that is, he can make his beneficial use more efficient—but certainly did not allow an appropriator to recapture waste and enlarge a licensed place of use. On the contrary, the court noted that any change in the place of use of the right creating the waste water (such as attempting to add additional irrigated acres) “could not be made” if the change injured other water rights (which it would if an enlargement were allowed). *Colthrop v. Mountain Home Irr. Dist.*, 66 Idaho at 181, 157 P.2d at 1008 (emphasis added).

In *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, the Idaho Supreme Court again recognized the right of an appropriator to increase the efficiency of its delivery system serving its licensed use, even if this adversely affects another who relies on the seepage formerly coming from the system. But this does not authorize the appropriator to enlarge the beneficial use authorized under his or her existing water right. *Hidden Springs Trout Ranch, Inc.*

v. Hagerman Water Users, Inc., 101 Idaho 677, 619 P.2d 1130 (1980). *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), is to the same effect: the right to recapture waste is recognized, but the opinion does not authorize enlarging the place of use.

In *Jensen v. Boise-Kuna Irrigation Dist.*, 75 Idaho 133, 136, 269 P.2d 755, 756 (1954), appropriators using surplus and drain water acquired a new water right to irrigate the additional acres involved.¹¹ Again, the opinion recognizes that the irrigation of additional acreage beyond that authorized under an irrigation district's right requires a separate water right permit.

All of these cases are fully consistent with Legislature's recognition, in I.C. § 42-1426, that "by conservation and other means," appropriators sometimes find themselves with access to more water than they need for the licensed use. The Legislature found it necessary to enact the amnesty precisely because the common law and the constitution do not confer valid priorities upon do-it-yourself enlargements. If A&B's "conserve and enlarge" theory were the law, the amnesty statute would be unnecessary. And vested water rights would enjoy little meaningful protection in their priorities.

In accord with settled law, the Special Master correctly held that "A&B's water right 36-2080 is appurtenant to certain land and any effort to apply its waste water to new land requires appropriation in compliance with Idaho Code." 2001 Order at 8. In reaching this conclusion, the Special Master correctly noted that Idaho law requiring new water rights for enlarged acres is hardly a new development in Idaho, and is consistent with long-established water law among all the Western states. *Id* at 7.

¹¹ It is well established that appropriators may obtain valid, licensed water rights in drain, waste, and seepage water, subject to the caveat that the source may become unavailable to them if the owner of the system from which the drain water originates undertakes an efficiency measure that reduces the drain flow. The *Hidden Springs Trout* decision is on point. But it is quite another thing for one to recapture drain water and use it for additional or enlarged uses. This is not allowed absent a new water right.

For example, when confronted with this precise issue, the Arizona Supreme Court held that recaptured water cannot be applied to “lands other than those to which the water was originally appurtenant.” *Salt River Valley Water Users’ Assn. V. Kovacovich*, 411 P.2d 201, 203 (Ariz. Ct. App. 1966). As noted by the Special Master, Professor Getches’ summary of Western water law concludes, “[w]aters originating within the watershed can be recaptured and reused by an appropriator if no enlargement of rights . . . results and if the recapture and reuse occur within the land for which the appropriation was made.” David H. Getches, *Water Law*, 2nd Ed. at 135.

The Idaho Attorney General also reached the same conclusion: “The Foundation’s water rights are appurtenant to the lands described in Idaho Code § 42-4403 and should not be applied to other lands. . . . The Foundation does not have the ability to enter into contracts authorizing the use of its waste water on lands not authorized under the water right.” Idaho Attorney General Opinion No. 97-1.

Indeed, allowing a water user to apply waste water would completely circumvent Idaho laws defining irrigation rights as appurtenant to particular ground for a defined number of acres, not to mention the rule against enlargements in transfers. Idaho Code §§ 42-219, 220 and 222 (all discussed above in Section I.A.).

In I.C. § 42-228, the Legislature recognized the right of an “owner of irrigation works” (such as A&B) to construct wells to “recover[] ground water resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights of the parties constructing the wells are appurtenant.” (Emphasis added.) In other words, an appropriator may even drill a well to recapture and reuse seepage from his irrigation facilities, so long as the use is on the lands to which the established water right is appurtenant. That is to say: no enlargements allowed.

Moreover, Idaho Code § 42-107 explicitly requires the acquisition of new water rights for new uses of drain water:

All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the state, shall be governed by the same laws relating to priority of right as those ditches, canals and conduits constructed for the purpose of utilizing the waters of running streams.

I.C. § 42-107 (emphasis added).

Idaho Code § 42-1426 is consistent with all of this authority. Indeed, the very existence of the amnesty statute is premised on the fact that Idaho law disallows the irrigation of additional acres beyond recognized water rights, even where the rate of diversion under the original water right is not increased. The amnesty statute requires a new water right for enlarged acres. It is of no consequence how the water for the enlarged acres became available: “The legislature finds that . . . persons entitled to the use of water . . . have, through water conservation and other means, enlarged the use of said water.” I.C. § 42-1426(1)(a) (emphasis added).

The statute provides no room for the District’s “drain water” exception. Whether one calls it “drain water,” “conserved water,” “tailwater,” “return flow,” or “wastewater,” is quite beside the point.¹² The Legislature has spoken: enlarged acres, regardless of how the water is obtained with which to irrigate them, require a new water right. This would be the case even if the common law summarized above suggested a different conclusion—which it does not.

Despite all this authority, the District would have this Court transform the limited right to increase delivery and irrigation efficiencies, or to recapture drain water and use it on the same place of use, into an entitlement to irrigate new lands without a water right—and increase

¹² Moreover, any irrigator converting to a more efficient irrigation method (a circumstance so common it was mentioned in the statute) creates waste or drain water by continuing to divert the same amount of water as before the efficiency measure. This excess “drain” or “waste water” provides the source to irrigate new acres. By recapturing and applying this water to new lands, the irrigator has, “through water conservation, or other means, enlarged the use of said water.” I.C. § 42-1426(1)(a).

consumptive use under water rights to the detriment of other water users. No Idaho precedent or statute supports such a proposition. In fact, the law is directly contrary.

To be sure, many irrigators in Idaho have enlarged their uses without complying with the mandatory permit law. That is why the Legislature saw the amnesty as important in the first place. And these enlargers have taken advantage of the retroactive waiver provided by the amnesty statute and accepted new water rights with the constitutionally required subordination. If the District wants to continue to irrigate the acres claimed in its Enlargement Claims, it must do the same.

II. The District has no “vested rights” under the unconstitutional and now-repealed “presumption” statute.

The District also continues to assert that the simultaneous passage of section 42-1426 with the repeal of Idaho Code § 42-1416 caused a “re-enactment” of section 42-1416, thereby preserving the “vested rights acquired by the District due to its reliance upon I.C. § 42-1416.” Opening Brief at 14. The core of the District’s argument is that section 42-1416 somehow guaranteed something—actually gave it vested rights—and any subordination of its rights should be based on the 1985 enactment date of section 42-1416 rather than the 1994 date of section 42-1426.

As this Special Master correctly noted in his decision, “A&B acquired no vested rights under I.C. § 42-1416.” 2001 Order at 12. The rationale for this conclusion is simple and unavoidable. By enacting section 42-1416, the Legislature never purported to create a water right or any other kind of property right. *Id.*

Rather, it set up a procedure (an unconstitutional one, as it turned out) whereby irrigators could file claims which would be subject to certain presumptions. Depending on what facts were presented during the course of subsequent litigation, that presumption might or might not

survive. Only at the conclusion of such a proceeding might a “vested” water right emerge. Had such a process run its course with respect to the District’s enlargement claims, the District might conceivably fashion a legal argument that subsequent legislation defeated a vested water right. But such a process never happened. In short, and putting the best face on it, the District has confused the right to make a claim—an inchoate right, a mere hope or expectation, an assertion—with a vested water right. The District’s hopes and expectations may have been frustrated by the invalidation, repeal and replacement of the presumption statute. But that disappointment gives rise to no valid legal theory here, much less a constitutional case. The District is mistaken to assert otherwise.

Even if the presumption statute purported instantaneously to “vest” water rights in every water user who claimed to fall within the announced presumption—which it did not—it would have failed to accomplish this for the simple reason that the statute was declared and finally adjudged unconstitutional. Memorandum Decision on Basin-Wide Issue No. 1, SRBA District Court (1993). The appeal of this decision was dismissed by the Idaho Supreme Court, and it now is a final order and the law of the case in the SRBA.

The District might have an argument if a valid and lawful statute had actually granted it vested water rights and then later was repealed by the legislature. Instead, the District has pinned their case on the repeal of an unconstitutional statute. The law is clear. No one is entitled to rely on an unconstitutional statute. *Smith v. Costello*, 290 P.2d 742, 744 (Idaho 1955) (“An unconstitutional act is not a law and . . . confers no rights and affords no protection.”)¹³; *Smylie*

¹³ In any case, I.C. § 42-1416(2) did nothing more than set up a “bursting bubble”-type presumption to the effect that the use being made under a water right at the time the SRBA began would not injure any other water rights. The Idaho Supreme Court in *Fremont-Madison* stated that there would be injury. Accordingly, if the District was proceeding under the presumption statute, it would receive no new water right at all because the presumption bubble would have burst and the claimant would be required to prove that the enlarged use would cause no injury. If they failed to do so, they would be entitled to no new water right whatsoever for the illegal use.

v. *Williams*, 341 P.2d 451, 454 (Idaho 1959) (state's transfer of functions of one agency to another was declared void when the statute authorizing the transfer was later declared unconstitutional).

In short, the old statute is gone, it is unconstitutional. It never provided the District any entitlement whatsoever, much less an argument in this challenge to the Special Master's Summary Judgment Order. It is frivolous to assert, as the District does, that this Court should ignore section 42-1426 and the Idaho Supreme Court's clear directives concerning it and instead apply a statute which created no water rights, which the SRBA Court has declared unconstitutional and which the Idaho Legislature has repealed.

III. This case involves no waiver or estoppel.

The Special Master also correctly rejected the District's waiver and estoppel argument. Even if such a theory could overcome a supreme court directive based on the constitutional priority principle, there simply are no facts upon which a waiver or estoppel could be based in this case. None of the Ground Water Users is yet subject to a single new water right for an enlargement except those which carry the subordination condition. The Ground Water Users have steadfastly opposed the application of both the presumption statute and the amnesty statute at every opportunity. Their resilience on this score, hardly can be support for a ruling that they have "waived" their right to insist upon the imposition of the subordination condition on the District's new water rights.

Indeed, members of some of the Ground Water Users vigorously (and successfully) attacked the presumption statute from the beginning.¹⁴ They not only participated, but advanced

¹⁴ These members are Busch Agricultural Resources, Inc. and United Water Idaho Inc. (then, Boise Water Corporation), both of which are allied with Ground Water Users in the Idaho Ground Water Appropriators, Inc. Busch and United Water litigated Basin-Wide Issue No. 1, which concerned the enlargement issue and resulted in

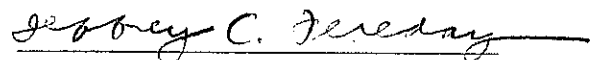
the prevailing position, in the litigation on Basin-Wide Issue No. 4 concerning the effect and proper interpretation of I.C. § 42-1426. The Ground Water Users filed timely responses to the District's objections in these subcases. The Ground Water Users have consistently and steadfastly advanced their position on the enlargement question over several years. And here, as before, the Ground Water Users continue to resist any unconstitutional application of the amnesty statute—such as the application urged here by the District. There simply is no waiver or estoppel.

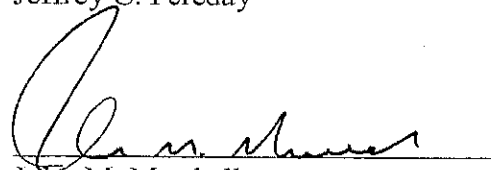
CONCLUSION

A&B has failed to provide any basis by which this Court can overturn the Special Master's 2001 Order. Summary Judgment dismissing A&B's objections in this case is appropriate. The Court should affirm the Special Master and adopt his recommendation that the Court decree A&B's Enlargement Claims as ground water rights with IDWR's recommended subordination condition.

Respectfully submitted this 19th day of February, 2003.

GIVENS PURSLEY LLP


Jeffrey C. Fereday


John M. Marshall
Attorneys for the Ground Water
Users

the ruling declaring I.C. § 42-1416 unconstitutional. The SRBA Court's records contain these parties' papers filed in these various actions.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2003, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

A & B Irrigation District

Roger D. Ling

P.O. Box 396

Rupert, ID 83350-0396

☒ U.S. Mail ☒ Fax ☐ Hand Delivery ☐ Federal Express

USDI Bureau of Reclamation

US Department of Justice

Environmental & Natural Resources

550 W Fort St. MSC 033

Boise, ID 83724

☒ U.S. Mail ☐ Fax ☐ Hand Delivery ☐ Federal Express

Chief, Natural Resources Division

Office of the Attorney General

State of Idaho

P.O. Box 44449

Boise, ID 83711-4449

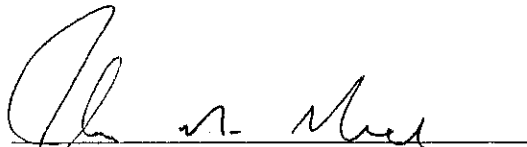
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John M. Marshall