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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,	Subcases 36-02080, 36-15127 (36-15127A and 36-15127B), 36-15192, 36-15193 (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) **OPENING BRIEF IN SUPPORT OF CHALLENGE**

COMES NOW the Claimant/Objector, A & B Irrigation District ("District"), by and through its attorneys of record, and submits this Opening Brief in Support of the Challenge to the Special Master's Report and Recommendation.

I. INTRODUCTION

A. STATEMENT OF THE CASE

This is a challenge to the Special Master's Report and Recommendation entered on October 8, 2002. The challenge focuses on "source of water" and "subordination" language recommended by the Idaho Department of Water Resources ("IDWR") and adopted by the Special Master in his Summary Judgment Order of March 26, 2001 and included in his Report and Recommendation.

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B. PROCEDURAL BACKGROUND

On or about November 23, 1984, the United States of America acting through the Bureau of Reclamation ("BOR"), filed an application for a permit with IDWR to appropriate water for lands to be developed and expanded acres in "Unit B" of the North Side Pumping Division of the Minidoka Project. (Affidavit of Walton.) The operation and maintenance of the North Side Pumping Division is performed by the District. The application was for eighteen (18) to twenty-four (24) new wells and the expansion of the lands irrigated with one hundred seventy-seven (177) existing wells.

On March 1, 1995, the Idaho Legislature passed House Bill 71, later codified as Idaho Code §42-1416. This statute provided in part that the expansion of a valid, unadjudicated water right in violation of the permit requirements of the State would be presumed valid and to have created a water right with a priority date corresponding with the completion of the expansion, provided, however, no other appropriators were injured. (*Idaho Session Laws*, 1985 Chapter 19, p.31) Following the enactment of I.C. §42-1416, BOR withdrew their permit applications and filed a claim to a water right pursuant to I.C. §42-1416. A notice of the claim was advertised by IDWR pursuant to I.C. §42-244 and identified as Claim No. 36-04265. (Affidavit of Walton.)

BOR and the District then filed claims in the Snake River Basin Adjudication ("SRBA") for Water Right Nos. 36-15127, 36-15193, 36-15194, 36-15195, and 36-15196. These SRBA enlargement claims were

based upon claim 36-04265 pursuant to I.C. §42-1416. Each of these claims were eventually recommended by the Director of IDWR. These Recommendations did not contain the subordination language and no objections were filed to the Director's Report.

On January 4, 1994, SRBA presiding Judge Daniel C. Hurlbutt held that I.C. §42-1416(2) was void for vagueness and therefore unconstitutional. This decision was appealed to the Idaho Supreme Court. Thereafter, the Idaho Legislature repealed I.C. §§42-1416 and 42-1416A and simultaneously enacted I.C. §42-1426. Based on this action by the Legislature, the Idaho Supreme Court dismissed the pending appeal. This new statute section was found to be constitutionally sound by the Idaho Supreme Court in *Fremont-Madison v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996). In August of 1998, SRBA Water Right Claim Nos. 36-15127, 36-15193, 36-15194, 36-15195, and 36-15196 were split into "A" and "B" claims, with the "A" claims representing the constitutional appropriations made prior to the amendment of I.C. §42-229 and the "B" claims representing the enlargement claims at issue in this matter.

On August 21, 1998, IDWR filed an amended Director's Report on the "B" claims which included the following "subordination" language:

> This water right is subordinate to all water rights with a priority date earlier than April 12, 1994 which are not decreed as enlargements pursuant to §42-1426, Idaho Code.

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On October 13, 1998, the District filed Objections to the Director's Recommendations to the source, quantity and priority including the subordination language. BOR also filed Objections as to the source of the water, arguing that the source should include ground water, waste, seepage and return flows. BOR further objected that the subordination language was too narrow in that it failed to include a mitigation plan option.

On October 30, 1998, Responses were filed to the Objections by numerous "Ground Water Users". The Ground Water Users then filed a Motion for Summary Judgment with Special Master Terrence A. Dolan. Briefs were lodged along with the uncontested Affidavits of C. E. Brockway, Dan Temple, and Dala Walton. Oral argument was heard on February 23, 2001.

On March 26, 2001, the Special Master entered an Order Granting Partial Summary Judgment in favor of the Ground Water Users. In that Order, the Special Master held that (1) the source of the water for the "B" claims was ground water only, (2) the provisions of I.C. §42-1426 applied, and (3) the priority dates were the dates when the water was first put to beneficial use subject to the subordination language recommended by IDWR. Following the Special Master's decision on summary judgment, the parties entered into stipulations wherein the parties agreed on the issues of quantity and place of use. However, the District specifically reserved its right to challenge the Special Master's findings in respect to the

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source of the water and the priority dates included in the subordination language.

On October 8, 2002, the Special Master entered his Report and Recommendation. The District filed a Motion to Alter or Amend on October 16, 2002, and a hearing was held on November 14, 2002. The Special Master subsequently entered his Order denying the Motion to Alter or Amend on November 20, 2002. On December 3, 2002, the District filed a Notice of Challenge to the Special Master's Report and Recommendation.

C. UNDISPUTED FACTS

There are a number of undisputed facts which are important in the Court's review of the Special Master's decision. First, the District is an irrigation district organized pursuant to Title 43 of the Idaho Code to provide irrigation water services to approximately 81,300 irrigated acres developed by the United States Bureau of Reclamation as the North Side Pumping Division of the Minidoka Project (hereinafter "Project"). (Affidavit of Brockway.) Unit B of the Project was designed as a gravity irrigation system utilizing ground water. *Id*. Water is pumped from the Eastern Snake River Plain Aquifer into a distribution system of canals and laterals and delivered to landowners of the District. Landowners then take water from the District's canals and laterals for application on agriculture lands within the District. *Id*. Surface water, drain water, irrigation waste and return flows (drain water) are collected by a drainage system consisting of a series of ditches, drains and ponds

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operated and maintained by the District. Historically, the District utilized injection wells to dispose of excess drain water. However, the District has also utilized some of the excess drain water to irrigate additional acres within the District. *Id*.

In recent years, the expense of operating the injection wells has increased dramatically along with the risk to water quality. Dr. Charles G. Brockway was commissioned by the District to determine the best alternative to the injection well system to dispose of drain water. The report of Dr. Brockway is made a part of Dr. Brockway's Affidavit and details his findings relevant to these proceedings.

II. ISSUES

A. Whether the Special Master erred in failing to recognize all of the sources of the water associated with the "B" claims.

B. Whether the Special Master erred in failing to recognize drain water as a source to these claims and that such water is private water of the District and is not subject to subordination.

C. Whether the Special Master erred in failing to recognize that, to the extent surface water is the source of the water used on the enlargement acres, there is no potential injury to junior water rights pursuant to Idaho Code §42-1426(2).

D. Whether the Special Master erred in finding that Claim Nos. 36-15193B and 36-15194B should contain subordination language where these claims are constitutional appropriations by beneficial use and are not subject to Idaho Code §42-1426.

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E. Whether the Special Master erred in not allowing the District to rely upon the original enactment date of Idaho Code §42-1416 as notice of the State's approval of the "B" claims.

F. Whether the Special Master erred in finding that the doctrines of waiver and estoppel did not bar the Ground Water Users from having the enlarged water rights of the District subordinated to their own water rights.

III. 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 AO1(13)(f). See also *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377-378, 816 P.2d 326, 333-334 (1991). The court must carefully consider objections to the Special Master's report and where the findings of fact are clearly erroneous, the court after hearing may reject the report, modify it, or may reject it in whole or in part. *Id*. The court may receive other evidence or may recommit it with instructions to the Special Master. *Id*.

The Court is not required to adopt the Special Master's conclusions of law. *Rodriguez* at 378 and 334. The Special Master's conclusions of law are not binding on the District Court. *Id*. They may, however, be considered and even adopted by the District Court, but only if they correctly state the law.

IV. ARGUMENT

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A. The Special Master erred in failing to recognize the correct source of the water associated with the "B" claims.

The first issue before the Court is whether the Special Master erred in finding that the source of the water used on the enlargement acres at issue in this matter is limited to ground water. The undisputed facts clearly show that, in addition to ground water, the enlargement acres also utilize drain water. Furthermore, neither the law in Idaho nor the facts support the Special Master's conclusion that ground water is the sole source of water for these claims. The Special Master clearly erred in limiting the source to ground water only.

There is no question that the District utilizes ground water which is pumped out of the Eastern Snake River Plain Aquifer at various points of diversion across the lands of the District in Unit B. This water is put into a delivery system of laterals and ditches and delivered to the District's water users for application to lands within the District. A portion of the ground water delivered to the water users is applied to enlargement acres within the District.

The District is also the owner of the drain water it collects in its system of ditches, drains and ponds located across the District. This drain water has been used by the District and its landowners to irrigate lands within the District, including the enlargement acres at issue in this matter. Under Idaho law, the District's drain water is a separate source and must be recognized

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as such in the adjudication proceedings. The Special Master's failure to include drain or waste water as a source is clearly erroneous.

Idaho law is clear that any water flowing in its natural channels, including all natural springs and lakes, are the property of the State and are appropriated under the supervision of the State. I.C. §42-101. These waters are often referred to as "public waters" and generally include subterranean or ground water. I.C. §42-226. See also *Hinton v. Little*, 296 P.2d 582, 587, 50 Idaho 371, 376 (1931); *Branson v. Miracle*, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984) reh'g denied.

The Idaho Supreme Court has also recognized waste water as a source of water. *Sebern v. Moore*, 44 Idaho 410, 416-418, 258 P. 176, 178 (1927); *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680, 619 P.2d 1130, 1133 (1980) reh'g denied; and *Jensen v. Boise-Kuna Irrigation District*, 75 Idaho 133, 269 P.2d 755 (1954). In *Jensen*, waste and seepage water had been accumulating as the result of irrigation of lands in the Boise-Kuna Irrigation District. *Id*. To dispose of this accumulation of water, the irrigation district contracted to supply waste water to Jensen. The court held that, while the irrigation district could not obligate itself to deliver dedicated water to users outside the district, surplus, waste or seepage water was a source of water that could be delivered outside the district under contract. In reaching this decision, the court clearly recognized that the waste water was a

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separate and distinct source from the dedicated water used to irrigate the lands of the district.

In addition, the Idaho Supreme Court has made it clear that an appropriator may recapture his waste water as long it is applied to a beneficial use. *Colthorp v. Mountain Home Irrigation District*, 66 Idaho 173, 179, 157 P.2d 1005, 1007 (1945). The Supreme Court in *Colthorp* stated that it is only when water is abandoned and flowing down the bed of a natural channel that it is subject to appropriation by other users. *Id.* at 66 Idaho at 179-180, 157 P.2d at 1007-1008. In the matter before the Court, there is no dispute that the District has never abandoned its drain water and same of it is used for the irrigation of enlargement lands. It is also clear that the Supreme Court of the State of Idaho has recognized waste water as a separate and distinct source. The failure of the Special Master to recognize waste water as a distinct source of water in these enlargement claims is clearly erroneous.

B. The Special Master erroneously failed to recognize that, to the extent the source of water on these claims is "drain water", such water is private water and not subject to subordination.

As set forth above, the District collects surface and waste water in its system of ditches, drains and ponds. There is nothing unlawful in collecting and impounding surface or waste water. *King v. Chamberlain*, 20 Idaho 504, 505, 118 P. 1099, 1100 (1911). In this case, waste water is a source which must be recognized to adequately inventory and adjudicate the waters used in the Snake River basin.

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In addition, it must be clear that the surface and waste water is "private" water captured and owned by the District.

Idaho Code §42-212 prohibits the Idaho Department of Water Resources from issuing or granting permits to appropriate private water to anyone other than the person or corporation owning the land upon which the water is located, collected or impounded. This is consistent with the holding of *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927). There, the court held:

> Where there has been no appropriation of water or seepage water prior to the construction of the drain in which such water collects, said water is in the possession of the owner of the drain, and is therefore not subject to appropriation. . . . *Id*.

In this matter, no appropriation of the waste water was made prior to the construction of the drain in which the water collects. Furthermore, it is clear that the waste water collected by the District is private water and not subject to appropriation. Therefore, it was erroneous for the Special Master to hold that this waste water could be subordinated as part of the ground water appropriated and delivered by the District.

C. The Special Master erred in failing to recognize that, to the extent surface water is the source of the water used on the enlargement acres, there is no potential injury to junior water rights in compliance with Idaho Code §42-1426(2).

Another area of concern deals with the mitigation of potential injury. The Supreme Court, in *Fremont-Madison v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996), made it clear that under I.C. §42-1426, the enlargement must (1) not

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increase the rate of diversion; (2) not injure other water rights existing on the date of enlargement; and (3) fully mitigate any potential injury to junior water rights existing as of the date of the enactment of the amnesty statute. Clearly there cannot be injury to a junior appropriator where the water at issue is never available for appropriation. Thus, there is no need to mitigate a potential injury that cannot exist. Therefore, it is not appropriate to require the District's water rights to be subordinated and in fact is contrary to the law set forth in I.C. §42-1426(2).

D. The Special Master erred in finding that Claim Nos. 36-15193B and 36-15194B should contain subordination language since these are constitutional appropriations not covered by Idaho Code §42-1426.

Should the court somehow find that the recaptured waste waters of the District are subject to appropriation, it is clear that the District has a Constitutional appropriation of those waters to the extent used, at least as to Claim Nos. 36-15193B and 36-15194B. It is undisputed that the recaptured drain water of the District is surface water. It is further undisputed that the District began putting the water claimed under Claim No. 36-15193B to beneficial use on April 4, 1965 and began putting the water claimed under Claim No. 36-15194B to beneficial use on April 4, 1968. This established a constitutional appropriation of the drain water used which is not subject to the subordination clause inserted in the Special Master's Report and Recommendation. In 1971, I.C. §42-201 was amended to provide that all rights to divert and use the waters of this state

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for beneficial purposes shall be acquired and confirmed under the provisions of that chapter, and not otherwise. Prior to the amendment of I.C. §42-201, one could appropriate surface waters of the state through diversion and application to beneficial use constituting a "constitutional appropriation." See *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977).

It is beyond dispute that the drain water recaptured by District and applied to beneficial use is surface water. It clearly is not, "water under the surface of the ground whatever may be the geological structure in which it is standing or moving . . ." as "ground water" is defined in I.C. §42-230. As indicated above, waste water drains from lands being irrigated with water delivered by District and is collected, on the surface, in ponds and drainage works of the District. From here it is applied to lands of the District. It is further undisputed that the District in these two claims began putting these waters to beneficial use on April 1, 1965 and April 1, 1968, respectively.

Based on these undisputed facts it is clear that even if the District's waste waters are subject to appropriation, the District has a Constitutional appropriation based on beneficial use. Therefore, it is clear that the Special Master erred in requiring these constitutional appropriations of drain water to be subject to the subordination language in the Special Master's Report and Recommendation.

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E. The Special Master erred in failing to recognize that, to the extent ground water is the source of the water used on the enlargement acres, the District is entitled to a priority date consistent with the original enactment of Idaho Code §42-1416.

As shown above, expanded irrigation using recovered waste water is not an enlargement claim under I.C. §42-1426, but an appropriate and lawful use of water to avoid waste. However, to the extent such lands have been irrigated with direct ground water diversions authorized under Right No. 36-02080, such expanded irrigation would constitute an enlargement claim. The rights to which these enlargement claims are subordinated should only be those rights established prior to November 19, 1987.

As was argued in the oral argument on *Respondents' Motion for Summary Judgment*, the enactment of I.C. §42-1426 simultaneously with the repeal of I.C. §42-1416 acted as a re-enactment of I.C. §42-1416 and therefore vested rights acquired by District due to its reliance upon I.C. §42-1416 were preserved. The general rule as to this issue is made clear in 73 Am. Jur. 2d *Statutes* §391.

> Where a statute is repealed by a new statute which relates to the same subject matter, and which re-enacts substantially the provisions of the earlier statute, and the repeal and re-enactment occur simultaneously, the provisions of the original statute which are re-enacted in the new statute are not interrupted in their operation by the so-called repeal; they are regarded as having been continuously in force from the date they were originally enacted. Thus, it is said that the simultaneous repeal and re-enactment of substantially the same statutory provision is to be construed, not as a true repeal, but as an affirmation and continuation of the original provision. All rights and interests arising under the original

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> statute are therefore preserved; by the same token, liabilities which have arisen under a statute are not affected by its repeal and re-enactment. Where a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, it follows that while the re-enacted provisions are deemed to have been in operation continuously from the original enactment, the additions or changes are treated as amendments effective from the time the new statute goes into effect.

This general rule was recognized by the U.S. Supreme Court in *Bear Lake and River Water Works and Irrigation Co. v. Garland*, 164 U.S. 1 (1896). In that case, at issue was whether the plaintiff retained a right to commence an action on a lien when the lien was originally filed under the Act of 1888. (Comp.Sp. §3814). The Act of 1888 only allowed 90 days to commence an action whereas the Act of 1890 provided for an entire year. In ruling on this matter, the court found that both Acts legislated upon the same subject and in many cases the provisions of the two statutes were similar and almost identical. Although there had been a formal repeal of the old statute by the new, there had never been a moment of time when these similar provisions had not been in force. The court found that the new Act should be construed as a continuation of the old with the modification contained in the new Act. In making this finding, the court relied on an earlier case of *Steamship Co. v. Joliffe*, 2 Wall. 459. There, the court had found that as the provisions of a new act took effect simultaneously with the repeal of the old one it might more properly

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be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act.

The U.S. Supreme Court's reasoning in *Bear River* has been followed by a number of state courts.[1] The Oregon Court of Appeals in *Allied Veterans Council v. Klamath County*, 544 P.2d 190 (Or. App. 1979), restated the rule that:

> Where a statute is repealed by a "new" statute which relates to the same subject matter and which reenacts provisions of the earlier statute, the repeal and reenactment occur simultaneously, the generally accepted rule is that the provisions of the "old" statute actually reenacted are not interrupted in their operation by the repeal, but should be regarded as having been continually in force from the date of their original enactment.

This rule was also followed by the Arizona Supreme Court in *King v. Uhlmann*, 437 P.2d 928 (Ariz. 1968) and by the Idaho Supreme Court with regard to criminal statutes. In *State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955), the court stated:

> Where a statute is repealed and all of its provisions are at the same time reenacted, such re-enactment is an affirmance of the old law so that the provisions of the repealed act which are thus re-enacted, continue in force without interruption and all rights and liabilities incurred thereunder are preserved and may be enforced. *Id.* at 636.

In *Webb*, the prosecuting attorney of Twin Falls County filed a felony information against appellant Webb charging him with a second offense of driving a motor vehicle while under the influence of liquor. Webb

[1] These cases were discussed in more detail in the District's Brief in Opposition to Respondents' Motion for Summary Judgment.

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filed a demurrer based on the grounds that I.C. §§49-502 and 49-561 under which he was convicted were repealed by the 1953 legislature and replaced by §49-520.2 effective January 1, 1954, and that the latter section completely governed all offenses for driving motor vehicles while under the influence of intoxicating liquor.

In deciding the case, the court noted that all of the statutory provisions repealed and those simultaneously re-enacted were not the same. They found however that the re-enacted statute made it unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle upon any highway within the state and the penalty for the second offense had remained the same. The court then found that "a subsequent act of the legislature repealing and re-enacting at the same time, a preexisting statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter." *Id*.

There is also a long-standing rule of law that "the repeal of a statute does not operate to impair or otherwise affect rights which have been vested or accrued while a statute was in force." *King*, 437 P.2d at 931 citing 82 C.J.S. statutes §435 at p.1010. This rule has been restated a number of times by the Washington Supreme Court in its finding that "repeal of a statute does not destroy vested rights or rights of a common law nature embodied in the repealed statute." See *Cazzanigi v. General Electric Credit Corp.*, 938 P.2d 819, 822 (Wash. 1997), *Seattle Rendering Works, Inc. v. Darling-Delaware Co., Inc.*, 701 P.2d 502, 505 (Wash. 1985).

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It is clear that District established "vested rights" for expanded acres that had been irrigated prior to the commencement of the SRBA pursuant to I.C. §42-1416(2). There should be no dispute that the legislature, in adopting I.C. §42-1416 intended to recognize that a constitutional water right was established by diverting unappropriated waters and putting those waters to beneficial use, notwithstanding the mandatory permit system that had previously been adopted by the State of Idaho. *Nettleton*, *supra*. As stated in *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944), an adjudication is merely a proceeding by which a claimant seeks to "confirm his right to the use of water by a prior appropriation." The fact that the confirmation of a right requires that there be no injury to water rights existing at the time of the expansion or that all potential injury to junior appropriators be fully mitigated, does not detract from the undisputed fact that there is a "vested right" as of the date of the expansion. If junior rights need protection, it would be to those rights acquired prior to the adoption of §42-1416, I.C.

It is clear that the District has a vested right in the water rights in question based on the District's application of the water to a beneficial use and the District's reliance upon I.C. §42-1416(2) to establish those rights. It is also clear that the enactment of I.C. §42-1426 acts as a re-enactment of I.C. §42-1416, and that any rights vested under that section by reliance upon it should be recognized. To set the enactment date back from November 19, 1987 to April 12, 1994 is in direct contradiction of the

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legislature's stated policy. See I.C. §42-1426(1)(b). Therefore, it is respectfully submitted that the District was entitled to rely upon the enactment date of I.C. §42-1416. For the Special Master to subordinate the District's rights to the later enactment date of April 12, 1994 was clearly erroneous.

F. The Special Master erred in finding that the doctrines of waiver and estoppel did not barr the Ground Water Users from having the enlarged water rights of the District subordinated to their own water rights.

Ground Water Users, by their actions, should have been found to have waived any right to have the enlarged water rights of District be subordinated to their water right. The Ground Water Users should be estopped from denying that the District's enlarged water rights to divert from the original source are entitled to the priority date as of the date of the enlargement, and if a subordination to rights is required it should be only to the rights in existence with a priority date prior to the date of the adoption of I.C. §42-1416. It is undisputed that the District filed claims with the Department of Water Resources based upon the passage of and in reliance on I.C. §42-1416. These claims were recommended by the Director and following that recommendation no Objections were filed by respondents to the Recommendations of the Director. By respondents' failure to object to the claims made by the District, the respondents have waived their right to assert a claim of injury and should be estopped from contesting the claims made by the District after the Idaho Supreme

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Court decision in *Fremont-Madison v. Idaho Ground Water Appropriators*, *supra*.

In *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981), the Idaho Supreme Court, in discussing "waiver" stated:

> Waiver is a voluntary, intentional relinquishment of a known right or advantage.
>
> Waiver does not necessarily depend on any new or additional consideration.
>
> Waiver arising out of conduct partakes of the nature of estoppel, and no consideration is necessary.

Finally, the court stated: "Even though consideration is not necessary to establish a waiver, it must appear that the adversary party has acted in reliance upon such a waiver and altered his position."

In *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982), in addressing the doctrine of "waiver," the Idaho Supreme Court stated: "The existence of waiver ordinarily is a question of fact, and if there is any substantial evidence in the record to support a waiver it is for the trier of fact to determine whether the evidence establishes such a waiver." The Idaho Supreme Court, after further noting that the matter had been decided on summary judgment, stated:

> . . . The parties, by their mutual motions for summary judgment on the same issues and theories, and by statements made in their oral arguments on the matter, effectively stipulated that there was no genuine issue of material fact which would preclude the court from entering judgment without a trial.

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In applying these legal principles to the facts in this case, it is clear that District filed an enlargement claim in the SRBA in reliance upon I.C. §42-1416. It is further clear that the claim was recommended by the Director. In the absence of the adoption and repeal of I.C. §42-1416 and simultaneous adoption of I.C. §42-1426 by the Idaho Legislature, the District would have had the opportunity to proceed with its application for a permit and to obtain a license for the enlarged use with a priority date established by the Application for Permit. No party to the SRBA, including the respondents or members of respondents, claimed injury as the result of the acknowledgment of the enlarged water right, nor were any objections filed to the recommendations of the Director in regard to said claims. After the adoption of I.C. §42-1426, section 34 of Chapter 454 of the 1994 Idaho Session Laws, subsection (3)(b) clearly provided that none of the District's claims were subject to further objection in view of the fact that the Notice of Claim was not modified following remand to the Director. By the State of Idaho accepting claims from the District for enlarged water rights pursuant to I.C. §42-1416, and the failure of the respondents in the SRBA to file objections to those claims, a waiver of any subordination of those claims to their rights is clearly established.

It is also respectfully submitted that respondents are estopped from asserting that District's enlarged water rights should be conditioned upon a subordination clause as recommended by the Director on remand to him after the adoption of I.C. §42-1426. In

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Tommerup v. Albertson's, Inc., 101 Idaho 1, 607 P.2d 1055 (1980), the Idaho Supreme Court, in discussing quasi estoppel, stated: "The first element of quasi estoppel is the initial taking of a position by the party against whom the doctrine is to be applied. " The court then, in quoting from *Clontz v. Fortner*, 88 Idaho 355, 364-365, 399 P.2d 949, 954 (1965), stated:

> The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting to another's disadvantage, a right inconsistent with the position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit.

By the failure of respondents to file an objection to the Director's Report in 1992, and by respondents actually filing claims under I.C. §42-1416, they are estopped to deny the validity of the claims of District as originally reported. For the respondents to now assert a right to a subordination clause is an inconsistent position which, if affirmed, is substantially detrimental to District. Each claimant of an enlarged claim did forego the right to file for an application permit after March 1, 1985, in reliance upon I.C. §42-1416 and the lack of objections to their claims and the recommendations of the Director under that section.

The court in *Keesee v. Fetzek*, 111 Idaho 360, 723 P.2d 904 (Idaho App. 1986), in discussing the purpose of the "quasi estoppel" doctrine, stated:

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> Quasi estoppel is a broadly remedial doctrine, often applied *ad hoc* to specific fact patterns. It "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." (Case cited.) The doctrine is designed to prevent a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. (Cases cited.) Quasi estoppel, unlike equitable estoppel, does not require misrepresentation by one party or actual reliance by the other. (Case cited.)

As was shown above, the District acquired vested rights in the claims filed by the District in reliance on I.C. §42-1416. Ground Water Users did not object to these claims following the recommendation by the Director. The clear weight of legal authority makes it clear that Ground Water Users have waived any objection they may have had to the claims and should be estopped from disputing the priority of the District's enlargement claims and the rights to which they are subordinated. The fact that the Special Master ignored the clear weight of the legal authority in this issue is clearly erroneous and the Report and Recommendation should be altered or amended consistent with the law stated herein.

V. CONCLUSION

Based on the foregoing argument, it is clear that the Special Master erred in his Report and Recommendation and that the water rights at issue herein should be decreed as prayed for by the District.

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Respectfully submitted this 27th day of January, 2003.

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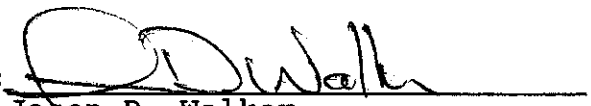
By: 

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CERTIFICATE OF MAILING

I hereby certify that on the 27th day of January, 2003, I served a true and correct copy of the ***Opening Brief in Support of Challenge***, upon:

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