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Department of Water Resources

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13 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**
14 **STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

15 In Re SRBA) Subcases 36-02080, 36-15127 (36-15127A
16) and 36-15127B), 36-15192, 36-15193
17 Case No. 39576,) (36-15193A and 36-15193B), 36-15194
18) (36-15194A and 36-15194B), 36-15195
19) (36-15195A and 36-15195B), 36-15196
20) (36-15196A and 36-15196B) (US/BOR)

21 **OPENING BRIEF IN SUPPORT OF CHALLENGE**

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

26 **I. INTRODUCTION**

27 **A. STATEMENT OF THE CASE**

28 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.

OPENING BRIEF IN SUPPORT OF CHALLENGE - 1

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3 **B. PROCEDURAL BACKGROUND**

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

13 On March 1, 1995, the Idaho Legislature passed House Bill
14 71, later codified as Idaho Code §42-1416. This statute provided
15 in part that the expansion of a valid, unadjudicated water right in
16 violation of the permit requirements of the State would be presumed
17 valid and to have created a water right with a priority date
18 corresponding with the completion of the expansion, provided, however,
19 no other appropriators were injured. (*Idaho Session Laws*, 1985
20 Chapter 19, p.31) Following the enactment of I.C. §42-1416, BOR
21 withdrew their permit applications and filed a claim to a water right
22 pursuant to I.C. §42-1416. A notice of the claim was advertised by
23 IDWR pursuant to I.C. §42-244 and identified as Claim No. 36-04265.
24 (Affidavit of Walton.)

25 BOR and the District then filed claims in the Snake River
26 Basin Adjudication ("SRBA") for Water Right Nos. 36-15127, 36-15193,
27 36-15194, 36-15195, and 36-15196. These SRBA enlargement claims were

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

7 On January 4, 1994, SRBA presiding Judge Daniel C. Hurlbutt
8 held that I.C. §42-1416(2) was void for vagueness and therefore
9 unconstitutional. This decision was appealed to the Idaho Supreme
10 Court. Thereafter, the Idaho Legislature repealed I.C. §§42-1416
11 and 42-1416A and simultaneously enacted I.C. §42-1426. Based on this
12 action by the Legislature, the Idaho Supreme Court dismissed the
13 pending appeal. This new statute section was found to be constitu-
14 tionally sound by the Idaho Supreme Court in Fremont-Madison v. Idaho
15 Ground Water Appropriators, 129 Idaho 454, 926 P.2d 1301 (1996).
16 In August of 1998, SRBA Water Right Claim Nos. 36-15127, 36-15193,
17 36-15194, 36-15195, and 36-15196 were split into "A" and "B" claims,
18 with the "A" claims representing the constitutional appropriations
19 made prior to the amendment of I.C. §42-229 and the "B" claims
20 representing the enlargement claims at issue in this matter.

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

24 This water right is subordinate to all water
25 rights with a priority date earlier than April
26 12, 1994 which are not decreed as enlargements
27 pursuant to §42-1426, Idaho Code.

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

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

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

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

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

12 **C. UNDISPUTED FACTS**

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

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

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

13 II. ISSUES

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

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

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

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

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3 E. Whether the Special Master erred in not allowing the
4 District to rely upon the original enactment date of Idaho Code
5 §42-1416 as notice of the State's approval of the "B" claims.

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

10 III. STANDARD OF REVIEW

11 Litigation in the SRBA is governed by the Idaho Rules of
12 Civil Procedure and the Idaho Appellate Rules. *Administrative Order*
13 *1(1)*. In an action without a jury, the court shall accept the Special
14 Master's findings of fact unless clearly erroneous. I.R.C.P. 53(E)(2)
15 and AO1(13)(f). See also Rodriguez v. Oakley Valley Stone, Inc.,
16 120 Idaho 370, 377-378, 816 P.2d 326, 333-334 (1991). The court must
17 carefully consider objections to the Special Master's report and where
18 the findings of fact are clearly erroneous, the court after hearing
19 may reject the report, modify it, or may reject it in whole or in
20 part. *Id.* The court may receive other evidence or may recommit it
21 with instructions to the Special Master. *Id.*

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

27 IV. ARGUMENT

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

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

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

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

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

5 Idaho law is clear that any water flowing in its natural
6 channels, including all natural springs and lakes, are the property
7 of the State and are appropriated under the supervision of the State.
8 I.C. §42-101. These waters are often referred to as "public waters"
9 and generally include subterranean or ground water. I.C. §42-226.
10 See also Hinton v. Little, 296 P.2d 582, 587, 50 Idaho 371, 376
11 (1931); Branson v. Miracle, 107 Idaho 221, 225, 687 P.2d 1348, 1352
12 (1984) reh'g denied.

13 The Idaho Supreme Court has also recognized waste water
14 as a source of water. Sebern v. Moore, 44 Idaho 410, 416-418, 258
15 P. 176, 178 (1927); Hidden Springs Trout Ranch, Inc. v. Hagerman Water
16 Users, Inc., 101 Idaho 677, 680, 619 P.2d 1130, 1133 (1980) reh'g
17 denied; and Jensen v. Boise-Kuna Irrigation District, 75 Idaho 133,
18 269 P.2d 755 (1954). In Jensen, waste and seepage water had been
19 accumulating as the result of irrigation of lands in the Boise-Kuna
20 Irrigation District. Id. To dispose of this accumulation of water,
21 the irrigation district contracted to supply waste water to Jensen.
22 The court held that, while the irrigation district could not obligate
23 itself to deliver dedicated water to users outside the district,
24 surplus, waste or seepage water was a source of water that could be
25 delivered outside the district under contract. In reaching this
26 decision, the court clearly recognized that the waste water was a

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

5 In addition, the Idaho Supreme Court has made it clear that
6 an appropriator may recapture his waste water as long it is applied
7 to a beneficial use. Colthorp v. Mountain Home Irrigation District,
8 66 Idaho 173, 179, 157 P.2d 1005, 1007 (1945). The Supreme Court
9 in Colthorp stated that it is only when water is abandoned and flowing
10 down the bed of a natural channel that it is subject to appropriation
11 by other users. Id. at 66 Idaho at 179-180, 157 P.2d at 1007-1008.
12 In the matter before the Court, there is no dispute that the District
13 has never abandoned its drain water and same of it is used for the
14 irrigation of enlargement lands. It is also clear that the Supreme
15 Court of the State of Idaho has recognized waste water as a separate
16 and distinct source. The failure of the Special Master to recognize
17 waste water as a distinct source of water in these enlargement claims
18 is clearly erroneous.

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

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

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

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

11 Where there has been no appropriation of water
12 or seepage water prior to the construction of
13 the drain in which such water collects, said
14 water is in the possession of the owner of the
15 drain, and is therefore not subject to appro-
16 priation. . . . Id.

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

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

28 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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3 increase the rate of diversion; (2) not injure other water rights
4 existing on the date of enlargement; and (3) fully mitigate any
5 potential injury to junior water rights existing as of the date of
6 the enactment of the amnesty statute. Clearly there cannot be injury
7 to a junior appropriator where the water at issue is never available
8 for appropriation. Thus, there is no need to mitigate a potential
9 injury that cannot exist. Therefore, it is not appropriate to require
10 the District's water rights to be subordinated and in fact is contrary
11 to the law set forth in I.C. §42-1426(2).

12 D. The Special Master erred in finding that Claim Nos.
13 36-15193B and 36-15194B should contain subordination language since
14 these are constitutional appropriations not covered by Idaho Code
15 §42-1426.

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

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3 for beneficial purposes shall be acquired and confirmed under the
4 provisions of that chapter, and not otherwise. Prior to the amendment
5 of I.C. §42-201, one could appropriate surface waters of the state
6 through diversion and application to beneficial use constituting a
7 "constitutional appropriation." See Nettleton v. Higginson, 98 Idaho
8 87, 558 P.2d 1048 (1977).

9 It is beyond dispute that the drain water recaptured by
10 District and applied to beneficial use is surface water. It clearly
11 is not, "water under the surface of the ground whatever may be the
12 geological structure in which it is standing or moving . . ." as
13 "ground water" is defined in I.C. §42-230. As indicated above, waste
14 water drains from lands being irrigated with water delivered by
15 District and is collected, on the surface, in ponds and drainage works
16 of the District. From here it is applied to lands of the District.
17 It is further undisputed that the District in these two claims began
18 putting these waters to beneficial use on April 1, 1965 and April
19 1, 1968, respectively.

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

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

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

15 As was argued in the oral argument on *Respondents' Motion*
16 *for Summary Judgment*, the enactment of I.C. §42-1426 simultaneously
17 with the repeal of I.C. §42-1416 acted as a re-enactment of I.C.
18 §42-1416 and therefore vested rights acquired by District due to its
19 reliance upon I.C. §42-1416 were preserved. The general rule as
20 to this issue is made clear in 73 Am. Jur. 2d Statutes §391.

21 Where a statute is repealed by a new statute
22 which relates to the same subject matter, and
23 which re-enacts substantially the provisions of
24 the earlier statute, and the repeal and re-
25 enactment occur simultaneously, the provisions
26 of the original statute which are re-enacted in
27 the new statute are not interrupted in their
28 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

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

5 The U.S. Supreme Court's reasoning in Bear River has been
6 followed by a number of state courts.¹ The Oregon Court of Appeals
7 in Allied Veterans Council v. Klamath County, 544 P.2d 190 (Or. App.
8 1979), restated the rule that:

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

19 This rule was also followed by the Arizona Supreme Court in King v.
20 Uhlmann, 437 P.2d 928 (Ariz. 1968) and by the Idaho Supreme Court
21 with regard to criminal statutes. In State v. Webb, 76 Idaho 162,
22 279 P.2d 634 (1955), the court stated:

23 Where a statute is repealed and all of its
24 provisions are at the same time reenacted, such
25 re-enactment is an affirmance of the old law so
26 that the provisions of the repealed act which
27 are thus re-enacted, continue in force without
28 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

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

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

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

18 There is also a long-standing rule of law that "the repeal
19 of a statute does not operate to impair or otherwise affect rights
20 which have been vested or accrued while a statute was in force."
21 *King*, 437 P.2d at 931 citing 82 C.J.S. statutes §435 at p.1010. This
22 rule has been restated a number of times by the Washington Supreme
23 Court in its finding that "repeal of a statute does not destroy vested
24 rights or rights of a common law nature embodied in the repealed
25 statute." See *Cazzanigi v. General Electric Credit Corp.*, 938 P.2d
26 819, 822 (Wash. 1997), *Seattle Rendering Works, Inc. v. Darling-*
27 *Delaware Co., Inc.*, 701 P.2d 502, 505 (Wash. 1985).

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

20 It is clear that the District has a vested right in the
21 water rights in question based on the District's application of the
22 water to a beneficial use and the District's reliance upon I.C.
23 §42-1416(2) to establish those rights. It is also clear that the
24 enactment of I.C. §42-1426 acts as a re-enactment of I.C. §42-1416,
25 and that any rights vested under that section by reliance upon it
26 should be recognized. To set the enactment date back from November
27 19, 1987 to April 12, 1994 is in direct contradiction of the

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

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

12 Ground Water Users, by their actions, should have been found
13 to have waived any right to have the enlarged water rights of District
14 be subordinated to their water right. The Ground Water Users should
15 be estopped from denying that the District's enlarged water rights
16 to divert from the original source are entitled to the priority date
17 as of the date of the enlargement, and if a subordination to rights
18 is required it should be only to the rights in existence with a
19 priority date prior to the date of the adoption of I.C. §42-1416.
20 It is undisputed that the District filed claims with the Department
21 of Water Resources based upon the passage of and in reliance on I.C.
22 §42-1416. These claims were recommended by the Director and following
23 that recommendation no Objections were filed by respondents to the
24 Recommendations of the Director. By respondents' failure to object
25 to the claims made by the District, the respondents have waived their
26 right to assert a claim of injury and should be estopped from
27 contesting the claims made by the District after the Idaho Supreme
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3 Court decision in Fremont-Madison v. Idaho Ground Water Appropriators,
4 *supra*.

5 In Brand S Corp. v. King, 102 Idaho 731, 639 P.2d 429
6 (1981), the Idaho Supreme Court, in discussing "waiver" stated:

7 Waiver is a voluntary, intentional relinquish-
8 ment of a known right or advantage.

9 Waiver does not necessarily depend on any new
10 or additional consideration.

11 Waiver arising out of conduct partakes of the
12 nature of estoppel, and no consideration is
13 necessary.

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

18 In Riverside Development Co. v. Ritchie, 103 Idaho 515,
19 650 P.2d 657 (1982), in addressing the doctrine of "waiver," the Idaho
20 Supreme Court stated: "The existence of waiver ordinarily is a
21 question of fact, and if there is any substantial evidence in the
22 record to support a waiver it is for the trier of fact to determine
23 whether the evidence establishes such a waiver." The Idaho Supreme
24 Court, after further noting that the matter had been decided on
25 summary judgment, stated:

26 . . . The parties, by their mutual motions for
27 summary judgment on the same issues and theo-
ries, 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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3 In applying these legal principles to the facts in this
4 case, it is clear that District filed an enlargement claim in the
5 SRBA in reliance upon I.C. §42-1416. It is further clear that the
6 claim was recommended by the Director. In the absence of the adoption
7 and repeal of I.C. §42-1416 and simultaneous adoption of I.C. §42-1426
8 by the Idaho Legislature, the District would have had the opportunity
9 to proceed with its application for a permit and to obtain a license
10 for the enlarged use with a priority date established by the
11 Application for Permit. No party to the SRBA, including the
12 respondents or members of respondents, claimed injury as the result
13 of the acknowledgment of the enlarged water right, nor were any
14 objections filed to the recommendations of the Director in regard
15 to said claims. After the adoption of I.C. §42-1426, section 34 of
16 Chapter 454 of the 1994 Idaho Session Laws, subsection (3)(b) clearly
17 provided that none of the District's claims were subject to further
18 objection in view of the fact that the Notice of Claim was not
19 modified following remand to the Director. By the State of Idaho
20 accepting claims from the District for enlarged water rights pursuant
21 to I.C. §42-1416, and the failure of the respondents in the SRBA to
22 file objections to those claims, a waiver of any subordination of
23 those claims to their rights is clearly established.

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

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

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

19 By the failure of respondents to file an objection to the Director's
20 Report in 1992, and by respondents actually filing claims under I.C.
21 §42-1416, they are estopped to deny the validity of the claims of
22 District as originally reported. For the respondents to now assert
23 a right to a subordination clause is an inconsistent position which,
24 if affirmed, is substantially detrimental to District. Each claimant
25 of an enlarged claim did forego the right to file for an application
26 permit after March 1, 1985, in reliance upon I.C. §42-1416 and the
27 lack of objections to their claims and the recommendations of the
28 Director under that section.

 The court in Keese 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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3 Quasi estoppel is a broadly remedial doctrine,
4 often applied *ad hoc* to specific fact patterns.
5 It "precludes a party from asserting, to
6 another's disadvantage, a right inconsistent
7 with a position previously taken by him." (Case
8 cited.) The doctrine is designed to prevent a
9 party from reaping an unconscionable advantage,
10 or from imposing an unconscionable disadvantage
11 upon another, by changing positions. (Cases
12 cited.) Quasi estoppel, unlike equitable
13 estoppel, does not require misrepresentation by
14 one party or actual reliance by the other.
15 (Case cited.)

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

27 V. CONCLUSION

28 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.

LING & ROBINSON

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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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