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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)

REPLY BRIEF OF A & B IRRIGATION DISTRICT

COMES NOW the Claimant/Objector, A & B Irrigation District ("District"), by and through its attorneys of record, and respectfully submits this Reply Brief to the Ground Water Users Response to A & B Irrigation District's Opening Brief.

I. FACTS

As indicated in District's Opening Brief, Unit B of the District's project was designed as a gravity irrigation system utilizing ground water pumped from the Eastern Snake River Plain Aquifer into a distribution system of canals and laterals and delivered to landowners of the District. The District then collects surface water, drain water, irrigation waste and return flows (drain water) in a drainage system consisting of a series of

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ditches, drains and ponds operated and maintained by the District. (Affidavit of Brockway) Historically, the District utilized injection wells to dispose of excess drain water. In addition, the District used some of the excess drain water to irrigate some 2,363 additional acres within the District. (Affidavit of Brockway)

On or about November 23, 1984, the Bureau of Reclamation ("BOR") filed for a permit with the Idaho Department of Water Resources ("IDWR") to appropriate water for these expanded acres in "Unit B" and other acres of the North Side Pumping Division of the Minidoka Project. (Affidavit of Walton.) However, before the permits could be approved, the Idaho Legislature passed House Bill 71, later codified as Idaho Code §42-1416. This law was enacted on March 1, 1985. As has been indicated, 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)

Relying upon that statute, the District acting through BOR withdrew its permit applications and, on or about November 19, 1987 the District filed claims in the Snake River Basin Adjudication ("SRBA") for water rights consistent with its expanded use. IDWR recommended each of the enlarged uses of water rights on or

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about November 2, 1992. it is significant that no objections to the recommendations made by IDWR were filed.

Two years later, on January 4, 1994, SRBA District Judge Daniel C. Hurlbutt found I.C. §42-1416(2) void for vagueness. Judge Hurlbutt's decision was appealed to the Idaho Supreme Court. However, before the Supreme Court could hear the appeal, the Idaho Legislature repealed I.C. §§42-1416 and 42-1416A and simultaneously re-enacted I.C. §42-1426, which also were found by Judge Hurlbutt to be invalid. This decision was also appealed.

In October of 1996, the Idaho Supreme Court determined that §42-1426 is constitutional in *Fremont-Madison v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996). As a result of that decision, in August of 1998, IDWR filed an Amended Director's Report on all enlargement claims in Basin 36 with the subordination remark included, which is one of the issues in this matter. Further, the Report stated, contrary to the District's claims, that the source of all water used on the enlarged acres is ground water. Objections were filed by the District as to the source, quantity, priority date, and the subordination remark. In due course, the Special Master ruled against the District, and the District filed a Motion to Alter or Amend which was also denied. The present challenge was filed by the District to have included in any decree on these claims the source of the water utilized by the District on its expanded acres, and to further establish that the subordination remark is not applicable where drain water, waste

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water and surface return flows are the source of the water utilized on the expanded acres. Furthermore, the District has maintained that, to the extent the subordination remark is applicable to its claims, the District's water rights should only be subordinate to those water rights obtained by permit prior to the adoption of I.C. §42-1416(2).

II. ARGUMENT

The District has challenged the Special Master's Report and Recommendation claiming that certain findings of the Special Master were clearly erroneous. The Ground Water Users have responded to the District's Opening Brief and attempted to cloud or minimize the issues. They claim that the Special Master was correct both in law and in fact in his findings. The District maintains that the Special Master's Report should have made the following findings:

1. The source of the water in the "B" claims includes drain water, waste water, diffused surface water, and return flows (hereinafter referred to collectively as "drain water") in addition to ground water.

2. To the extent that drain water is the source used by the District on its "B" claims, the drain water is private water captured by the District within the project and is not subject to appropriation by others and therefore inappropriately subordinated to other ground water rights.

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3. Use of drain water for irrigation is the most effective way to return water to the aquifer and actually provides a benefit to the Ground Water Users, eliminating their claim of injury and the need to subordinate.

4. Even if it is determined that the drain water used by the District is subordinated to the subsequent appropriation of ground water by others, Claim Nos. 36-15193B and 36-15194B are constitutional appropriations of surface water not covered by I.C. §42-1426 or I.C. §42-1416, and therefore may not be subordinated to junior water rights.

5. To the extent ground water is utilized by the District on enlarged acres, and to the extent subordination is appropriate, if at all, the District's water rights should only be subordinated to water rights established prior to March 1, 1985.

6. Respondents are barred from having the District's rights subordinated to junior rights acquired by permit after March 1, 1985 by the doctrine of waiver and estoppel.

Each of these proposed findings is discussed below.

A. <u>The source of drain water in the "B" claims should include drain water, waste water, diffused surface water, and return flows in addition to ground water</u>.

The first issue before the Court is the correct identification of the source of water for these rights. The Special Master incorrectly concluded that ground water is the sole source for the rights claimed by the District, and that drain water is ground water. In support of the Special Master's decision, respondents'

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Memorandum ignores the undisputed facts which clearly establish additional sources of water utilized by the District. These additional sources are the drain water discussed herein.

The Idaho Supreme Court has recognized waste water or drain water as a source that can be put to a beneficial use. *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). The undisputed report of Dr. Charles Brockway and the undisputed facts have clearly establish that, in addition to ground water, the District is utilizing drain water as a source for the expanded acres. It should be noted that the only evidence before the Special Master were the Affidavits submitted on behalf of the District. No challenge was ever made to those Affidavits.

The District agrees with the respondents's statement that the reality of the source must be reflected in the decrees. While the respondents' reality defines the source exclusively as ground water, it ignores the fact that the nature of the ground water is changed by its use by landowners and subsequent recovery by the District. Furthermore, the respondents' reality ignores the fact that diffused surface water from storms and other sources is collected in the District's drains, ponds and ditches. The District, however, seeks to have these sources acknowledged in the decrees as part of the source utilized on the District's expanded

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acres. To do otherwise would perpetuate a fallacy which would serve neither the District, the Ground Water Users, nor the State. The undisputed facts in this case, as well as the uncontested report of Dr. Brockway, cannot be ignored. Drain water must be acknowledged as a separate and distinct source from ground water in the decrees sought by the District.

B. To the extent that drain water is the source used by the District on its "B" claims, the drain water is private water captured by the District within the project and is not subject to appropriation by others and therefore inappropriately subordinated to other ground water rights.

Idaho Code §42-1426 provides in pertinent part as follows:

> [T]he legislature finds that prior to the commencement of the Snake River Basin Adjudication . . . persons entitled to the use of water or owning any land to which water has been made appurtenant by decree license or constitutional appropriation have through water conservation and *other means*, enlarged the use of said water without increasing the rate of diversion and without complying with the mandatory permit system adopted by the legislature. . . . Thus, the legislature further finds and declares that it is in the public interest to waive the mandatory permit requirements for these enlargements in use prior to the commencement of the general adjudication so long as the enlargements in use did not increase the rate of diversion of the original water right or exceed the rate of diversion for irrigation provided in section 42-202 Idaho Code after the enlargement of use, and the enlargement of use did not reduce the quantity of water available to other water rights existing on the date of the enlargement in use.

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Similarly I.C. §42-1416, which has been repealed, stated in a pertinent part that:

> Extension of use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirement shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.

Certainly neither of these statutes limits the source of the water to be used in the enlarged place of use. Idaho Code § 42-1426 only refers to waters made available through conservation and other means. The recapture of drain water as accomplished by the district qualifies as "other means." Therefore, the respondents' argument that the District's right to recapture drain water or return flow does not allow them to put it to beneficial use on other lands is contrary to the enlargement statute cited above.

This inconsistency is made clear by the respondents' own argument. In one sentence the Ground Water Users contend that while a right to recapture and reuse drain water exists, the reuse cannot be on additional lands. However in the next sentence they cite *Colthrop v. Mountain Home Irrigation District*, 66 Idaho 181 157 P.2d 1008 (1945), stating that "any change in 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)." If this proposition is correct, the reverse must be true: adding additional acres is possible as long as the addition

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does not injure other water rights. In fact this is consistent with the language of both I.C. §42-1426 and repealed I.C. §42-1416. Furthermore, it is precisely on point with the case at hand.

The drain water collected by the District is private water and not subject to appropriation by others. *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927). I.C. §42-212. Under I.C. §42-212, the IDWR is prohibited 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, without the consent of the owner. Because no appropriation can be made by anyone other than the District, no injury can result to any other individuals. The drain water is water available by "other means" and can be and was put to beneficial use on enlarged acres. Thus, contrary to the assertion of the respondents, the District's right to recapture drain or return flow water does in fact allow for enlargement under the plain language of the statute.

C. The District's use of drain water on enlargement acres is the most effective way to return water to the aquifer and will actually provide a benefit to the Ground Water Users, thus eliminating their claim of injury and the need to subordinate.

The respondents argue that the District's enlargements reduce return flows to the aquifer, increase consumptive use in the basin, and will injure existing rights. (Ground Water Users' Response to A&B's Opening Brief, p.12) There is no evidence in the record to support this factual claim and it appears to be an

attempt to justify subordination by creating an injury where none exists. The statement made by respondents blatantly ignores the facts in this case and further disregards the undisputed report of Dr. Brockway.[1]

The District diverts approximately 1,110 cubic feet per second of ground water from the aquifer. This water is delivered through its system of ditches to lands within the District. A portion of the water is lost through transpiration and evaporation. Another part of the water is utilized for irrigation by the water users. A certain amount, which we will call "carriage water," is unused and is collected in the District's drains and ponds. This carriage water is limited to the amount of water necessary for delivery of water within the system. There is also a certain amount of runoff from irrigation, seepage and diffused surface water that is collected in the drainage system of the District.

Historically, once all this water was collected, the District then injected a portion of it back into the aquifer through its injection wells. It should be noted that, while the District has historically utilized injection wells, there is no

[1] It should be noted that the respondents have attempted to make their own jaded interpretation of the District's position appear as if it was a quote from the District's Opening Brief. (Ground Water Users' Response to A&B's Opening Brief, p.12) The indented language referred to is not a quote, nor does it accurately represent the District's position. The use of drain water for irrigation actually enhances the return of water to the aquifer and cuts down on evaporation loss. While the District has maintained that the project is a closed system with respect to surface water, it has never disputed that water can and does eventually percolate back to the aquifer. The real issue is whether utilizing irrigation as a method to dispose of the waste water creates an injury to the respondents or other junior right holders.

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requirement that they continue that practice. Furthermore, the District is in the process of closing its injections wells out of concern over water quality issues.

Therefore, the question remains, what should the District do with the collected drain water? One option is to leave the water in the ditches and ponds where it is collected. According to Dr. Brockway, this is the least favorable approach from the standpoint of aquifer recharge. The rate of evaporation far exceeds the very slow rate of percolation. In addition, sedimentation and settling also reduce the rate of percolation further as time goes on. Simply allowing the water to sit in ponds and drains to eventually evaporate and/or percolate would be a waste of a resource. The District is entitled to utilize this method, and the Ground Water Users could not complain of injury because of the drain water's non-use.

The most efficient option for use of the drain water is irrigation. (Affidavit of Brockway) According to Dr. Brockway, irrigation maximizes the return of water to the aquifer and limits the amount lost to evaporation. In other words, the use of the drain water for irrigation does not increase consumptive, does not reduce return flows to the aquifer, and does not injure junior right holders. Furthermore, utilization of drain water for irrigation complies with the State's policy of putting water to a beneficial use and avoiding unnecessary waste.

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It is ironic that the very approach which will most benefit the Ground Water Users is the very use to which they appear to be opposed. Perhaps the Ground Water Users recognize that without an injury, there can be no subordination? Certainly there can be no injury to the Ground Water Users where the District's utilization actually provides a greater amount of return to the aquifer and cuts down on the amount of evaporation loss. Under these circumstances, there is no justification for the subordination language contained in the Special Master's Report and Recommendation.

D. **Even if it is determined that the drain water used by the District is subordinated to the subsequent appropriation of ground water by others, Claim Nos. 36-15193B and 36-15194B are constitutional appropriations of surface water not covered by I.C. §42-1426 or I.C. §42-1416, and therefore may not be subordinated to junior water rights.**

This issue is addressed in part above in the discussion characterizing the source of the water utilized. Despite the efforts of the Ground Water Users, it is clear that drain water is a source which must be recognized in the District's claims. If the proper sources are recognized, Claim Nos. 36-15193B and 36-15194B are constitutional appropriations of surface water prior to 1971 and are not subject to subordination. They instead would maintain the priority date established by putting those waters to beneficial use. It appears that the respondents' Response Brief is silent on this issue and only argues the characterization of the source of

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the water. It is presumed that the silence is acquiescence to the conclusion stated hereinabove.

E. To the extent ground water is utilized by the District on enlargement acres, and to the extent subordination is appropriate, if at all, the District's water rights should only be subordinated to water rights established prior to March 1, 1985.

The issue here is whether or not the District should be given the benefit of the earlier enactment date based on its reliance on the statute and the Legislature's repeal of I.C. §42-1416 and simultaneous re-enactment of I.C. §42-1426. The respondents argue that the District did not acquire vested rights under I.C. §42-1416 despite their obvious reliance on the statute. Specifically, respondents state that "[b]y enacting section 42-1416 the Legislature never purported to create a new water right or any other kind of right." This is a ridiculous assertion and an inaccurate interpretation of the law.

A plain reading of I.C. §42-1416 suggests that in fact the Legislature did intend to allow the creation of a new water right by presumption. The statute reads, in pertinent part:

> "Expansion of use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have *created a water right* with a priority date as of the completion date of the expansion, in the absence of injury to other appropriators. (Emphasis added.)

A water right under this definition is clearly a property right.

In addition, the District did rely upon the statute. Its acts were clear and unambiguous. The claims of the District were

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filed with IDWR, and Notice of the Director's recommendations of the District's claims was given as provided by statute. No objections were ever filed opposing the recommendations in the District's expanded water rights under I.C. §42-1416. Despite the Ground Water Users' involvement in other litigation, the specific requirement of filing an objection to the Director's recommendations on these water rights was not addressed by the Ground Water Users. As such, the District did in fact acquire a vested right under I.C. §42-1416.

Even if the District does not have vested rights as set forth above, the enactment of the new statute by operation of law relates back to the enactment date of the old statute. The U. S. Supreme Court has held that where a statute is replaced 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, all rights and interests arising under the original statute are preserved. *Bear Lake and River Water Works and Irrigation Co. v. Garland*, 164 U.S. 1 (1896); *Allied Veterans Council v. Klamath County*, 544 P.2d 190 (Or. App. 1979); *King v. Uhlmann*, 437 P.2d 928 (Ariz. 1968); *State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955). Similarly, 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.G.S. Stat. Section 435 at page 1010. There should be no dispute that the District established

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"vested rights" for expanded acres pursuant to I.C. §42-1416. In adopting I.C. §42-1416, it is clear that the Legislature 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. To advance the enactment date from November 19, 1987 to April 12, 1994 is in direct contradiction of the Legislature's stated policy. I.C. §42-1426 (1)(b). To subordinate the District's right to the later enactment date of April 12, 1994 is not only clearly erroneous but fundamentally unfair in that it ignores the District's reliance upon the enactment of the statute and deprives it of a priority date it would have otherwise had.

F. Respondents are barred from having the District's rights subordinated to junior rights acquired by permit after March 1, 1985 by the doctrine of waiver and estoppel.

The Ground Water Users have voluntarily and intentionally relinquished their right to object to the water right claimed by the District under I.C. §42-1416. In the Ground Water Users' Response to A&B's Opening Brief, the Ground Water Users argue that this case does not involve waiver or estoppel. By making this argument, the Ground Water Users attempt to gloss over the fact that they had a clear and specific opportunity to object to the water rights claimed by the District under I.C. §42-1416. Nevertheless, the respondents were silent and relinquished their right to raise an objection. The Ground Water Users further seek

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to excuse themselves from taking such actions by indicating that they steadfastly opposed the application of both the presumption statute and the amnesty statute at every opportunity. However, when faced with this opportunity and required by notice to object to this specific water right, the Ground Water Users failed to capitalize on that opportunity and have thus waived their right to object.

Indeed, the facts upon which the Ground Water Users rely in asserting that no waiver or estoppel should apply is as non-existent as the objection which they failed to file when notice was provided regarding the recommendations of District's claims under I.C. §42-1416. No party to the SRBA, including the respondents, claimed injury as a result of the acknowledgment and presumption of the enlarged water right. Furthermore, 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 their 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 to file objections to those claims in the SRBA, a waiver of any subordination of those claims to their rights is clearly established.

The doctrine of estoppel is also applicable. By the failure of the respondents to file an objection to the Director's Report in 1992 and by the respondents actually filing claims under

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I.C. §42-1416, the respondents are estopped to deny the validity of the claims of the District as originally reported. For the respondents to now assert a right to a subordination clause is inconsistent with their previous position. Furthermore, if that position is affirmed, it is detrimental to the District.

The clear weight of legal authority makes it clear that the Ground Water Users have waived any objection they might 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 on this issue is clearly erroneous. Therefore, the Report and Recommendation of the Special Master should be altered or amended to be consistent with the law.

III. CONCLUSION

For the reasons stated herein, the Special Master's Report and Recommendation should be altered and the Court should find as follows:

1. The source of the water in the "B" claims includes drain water, waste water, diffused surface water, and return flows (hereinafter referred to collectively as "drain water") in addition to ground water.

2. To the extent that drain water is the source used by the District on its "B" claims, the drain water is private water captured by the District within the project and is not subject to

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appropriation by others and therefore inappropriately subordinated to other ground water rights.

3. Use of drain water for irrigation is the most effective way to return water to the aquifer and actually provides a benefit to the Ground Water Users, eliminating their claim of injury and the need to subordinate.

4. In the alternative, even if it is determined that the drain water used by the District is subordinated to the subsequent appropriation of ground water by others, Claim Nos. 36-15193B and 36-15194B are constitutional appropriations of surface water not covered by I.C. §42-1426 or I.C. §42-1416, and therefore may not be subordinated to junior water rights.

5. To the extent ground water is utilized by the District on enlarged acres, and to the extent subordination is appropriate, if at all, the District's water rights should only be subordinated to water rights established prior to March 1, 1985.

6. Respondents are barred from having the District's rights subordinated to junior rights acquired by permit after March 1, 1985 by the doctrine of waiver and estoppel.

Respectfully submitted this 5th day of March, 2003.

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CERTIFICATE OF MAILING

I hereby certify that on the 5th day of March, 2003, I served a true and correct copy of the ***Reply Brief of A & B Irrigation District***, upon:

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