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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

)
) Subcase Nos. **Attachment 1**

)
) **CLAIMANTS' MEMORANDUM**
) **IN SUPPORT OF JOINT**
) **MOTION FOR SUMMARY**
) **JUDGMENT**
)
)

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley

Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation

District, North Side Canal Company and Twin Falls Canal Company, Claimants in the above-referenced subcases (hereinafter collectively referred to as “Claimants” or “SWC”), by and through counsel of record, and pursuant to I.R.C.P. 56(c), hereby submit this *Memorandum in Support of Claimants’ Joint Motion for Summary Judgment*.

As set forth below, the Objectors’ “source” objections to the Claimants’ Snake River water rights have no legal basis and should be dismissed as a matter of law.

INTRODUCTION

... water goes through a succession of different phases, called the hydrologic cycle. Fueled by the energy of the sun and the force of gravity, the hydrologic cycle continually moves water from the oceans to the land and back again. Oceans cover more than 70 percent of the earth’s surface and absorb most of the sun’s radiant energy. The sun’s energy evaporates seawater, leaves behind the salts, and circulates the water into the atmosphere. Wind currents eventually carry the moisture-laden air over land, which sharply increases the relative humidity. As the relative humidity increases, the water vapor eventually condenses and becomes precipitation, in the form of rain, snow, or hail. As precipitation reaches land, the process of evaporation begins again and 50 percent of the precipitation returns directly to the atmosphere.

Three things happen to the other 50 percent. First, plants and trees absorb water from the soil through their roots but release water back into the atmosphere through their leaves, in a process known as transpiration. Second, the snowmelt or rain moves over the surface of the earth as gravity inevitably causes water to seek the lowest level. This surface runoff flows into creeks, streams, and rivers; eventually some water reaches the ocean, and the hydrologic cycle begins again. Third, and most importantly for our purposes, water percolates or infiltrates into the ground, in a process called recharge, where the water may remain for years, centuries, or even millennia. A portion of the groundwater near rivers and streams eventually emerges from the ground, in a process called discharge, to augment the surface flows of rivers or streams.

ROBERT GLENNON, *WATER FOLLIES, GROUNDWATER PUMPING AND THE FATE OF AMERICA’S FRESH WATERS* 39-40 (2002).

The above description of the “hydrologic cycle” is important for this proceeding. The objections filed by the Ground Water Districts¹, the Mud Lake Users² and Fremont-Madison Objectors³ seek to legally halt that cycle and cut-off several sources of water supply to the Claimants’ Snake River water rights. By alleging that the “source” element of the SWC water rights should be qualified or changed from the “Snake River” to “high surface water runoff from snowmelt or rain”, the Objectors apparently seek to insulate their hydraulically connected water rights from future administration.⁴

As described below, the objections must be dismissed as a matter of law for several reasons. First, the SRBA statutes and the Idaho Department of Water Resources’ (“Department”) adjudication rules plainly provide that the “source” element of the SWC water rights is properly recommended as the “Snake River”. Second, the SWC water rights are based upon prior decrees and licenses identifying the source as the “Snake River”. Pursuant to Idaho law, an adjudication of a main stream like the Snake River also adjudicates its tributary sources. These prior decrees further bind parties to those decrees including the Fremont-Madison Objectors. As such, the Fremont-Madison Objectors are barred from now objecting to the Snake River “source” element of the SWC water rights.

Finally, the Court’s “connected sources” general provision decreed in the Basin-Wide 5 Order legally defines the relationship between all water rights (surface or ground) in the basin

¹ Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey-Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

² Montevue Canal Company, Producers Irrigation Company, Independent Water Users of Mud Lake, Jefferson Irrigation District, and Mud Lake Water Users, Inc.

³ Fremont-Madison Irrigation District, Blackfoot Irrigation Company, and United Canal Company.

⁴ It is interesting that the Fremont-Madison Objectors are pursuing this source “objection” since they too hold some water rights to the Snake River and its tributaries that are senior to the Claimants’ rights. The SWC is unaware of any similar objections filed by the Fremont-Madison Objectors to their own Snake River claims. Presumably these entities are trying to protect their junior priority natural flow rights or junior priority ground water rights held by their landowners or shareholders.

and precludes an objection that seeks to effect a “separate source” determination for the Objectors’ water rights. In summary, the objections are without a legal basis and should be dismissed as a matter of law.

STATEMENT OF FACTS

The SWC water rights subject to this motion have all been previously decreed in prior adjudications before courts of competent jurisdiction or administrative licensing proceedings before the Department. Each Claimant filed a notice of claim in the SRBA identifying the “Snake River” as the source. Pursuant to the prior decrees and licenses described below, the Department recommended the source as the “Snake River”.

The following history briefly summarizes the origin of each water right to the Snake River by Claimant and water right number.

A&B Irrigation District (1-14)

A&B’s water right 1-14 was decreed by the district court in the *Eagle Decree* on July 10, 1968. See **Ex. A** to *Affidavit of Travis L. Thompson* (hereinafter “*Thompson Aff.*”). The court decreed A&B the right to divert and use 267 cfs of the Snake River with an April 1, 1939 priority date. See *Eagle Decree* at 17.

American Falls Reservoir District #2 (1-6)

AFRD #2’s water right 1-6 was decreed by the district court in the *Eagle Decree* on July 10, 1968. See **Ex. A** to *Thompson Aff.* The court decreed AFRD #2 the right to divert and use 1,700 cfs of the Snake River with a March 30, 1921 priority date. See *Eagle Decree* at 5. Prior to the *Eagle Decree*, AFRD #2 diverted and used its water pursuant to license no. 15134 issued to the U.S. Bureau of Reclamation on July 9, 1942. See **Ex. B** to *Thompson Aff.*

Burley Irrigation District (1-211B, 1-214B, 1-7)

BID holds three natural flow water rights to the Snake River. BID's first right, 1-211B originated from license no. 66 issued to the U.S. Bureau of Reclamation. *See Ex. C to Thompson Aff.* Thereafter, BID's water right 1-211B was decreed by the district court in the *Foster Decree* on June 20, 1913. *See Ex. D to Thompson Aff.* Water right 1-211B to the Snake River entitles BID to divert and use 1,200 cfs with a March 26, 1903 priority date.

BID's second right, 1-214B, was decreed in the *Foster Decree* on June 20, 1913. *See Ex. D to Thompson Aff.* The court decreed BID the right to divert and use 544 cfs of the Snake River with an August 6, 1908 priority date. *See Foster Decree* at 5. Finally, BID's third right, 1-7, was decreed by the district court in the *Eagle Decree* on July 10, 1968. *See Ex. A to Thompson Aff.* The court decreed BID the right to divert and use 163.4 cfs of the Snake River with an April 1, 1939 priority date. *See id.* at 7.

Falls Irrigation District (1-13, 1-2061)

FID's water right 1-13 was decreed by the district court in the *Eagle Decree* on July 10, 1968. *See Ex. A to Thompson Aff.* The court decreed FID the right to divert and use 125 cfs of the Snake River with an April 1, 1939 priority date. *See Eagle Decree* at 17. In addition, the Department issued license no. 1-2061 to the United States Bureau of Reclamation for the FID project on March 31, 1981. *See Ex. E to Thompson Aff.* License 1-2061 entitles FID to use 153 cfs with a June 11, 1956 priority date.

Milner Irrigation District (1-9, 1-16, 1-2050)

Milner's first water right, 1-16, was decreed in the *Milner Low Lift v. Crandall Decree* on April 29, 1931. *See Ex. F to Thompson Aff.* The court decreed Milner the right to divert and use 135 cfs of the Snake River with a November 14, 1916 priority date. *See Milner Decree* at 1.

Milner then acquired its second water right, 1-2050, to divert and use 37 cfs of the Snake River with an October 25, 1939 priority date. The Department issued a license (no. 18919) for water right 1-2050 on July 15, 1950. *See Ex. G to Thompson Aff.*

Finally, Milner's water right 1-9 was decreed by the district court in the *Eagle Decree* on July 10, 1968. *See Ex. A to Thompson Aff.* The court decreed Milner the right to divert and use 121 cfs of the Snake River with an April 1, 1939 priority date. *See Eagle Decree* at 17.

Minidoka Irrigation District (1-211A, 1-214A, 1-8)

MID holds three natural flow water rights to the Snake River.⁵ MID's first right, 1-211A originated from license no. 66 issued to the U.S. Bureau of Reclamation. Thereafter, MID's water right 1-211A was decreed by the district court in the *Foster Decree* on June 20, 1913. *See Ex. D to Thompson Aff.* Water right 1-211A to the Snake River entitles MID to divert and use 1,726 cfs with a March 26, 1903 priority date.

MID's second right, 1-214A, was decreed in the *Foster Decree* on June 20, 1913. *See Ex. D to Thompson Aff.* The court decreed MID the right to divert and use 1,000 cfs of the Snake River with an August 6, 1908 priority date. *See Foster Decree* at 5. Finally, MID's third right, 1-8, was decreed by the district court in the *Eagle Decree* on July 10, 1968. *See Ex. A to Thompson Aff.* The court decreed MID the right to divert and use 266.6 cfs of the Snake River with an April 1, 1939 priority date. *See Eagle Decree* at 8.

North Side Canal Company (1-210, 1-212, 1-213, 1-5, 1-16)⁶

NSCC holds five natural flow rights to the Snake River: (1) water right 1-210 for 400 cfs with a priority date of October 11, 1900; (2) water right 1-212 for 2,250 cfs with a priority date

⁵ Water rights 1-211A and 1-214A are in the name of the U.S. Bureau of Reclamation for the MID project.

⁶ This is not the complete list of NSCC's Snake River water rights. However, NSCC's water rights 1-215 and 1-220 were recommended for disallowal by the Department. NSCC filed timely objections to those recommendations and those claims are proceeding under separate subcase proceedings and are not a part of this present motion.

of October 7, 1905; (3) water right 1-213 for 350 cfs with a priority date of June 16, 1908; (4) water right 1-5 for 300 cfs with a priority date of December 23, 1915; and (5) water right 1-16 for 832 cfs with a priority date of August 6, 1920. The district court decreed NSCC's water rights 1-210, 1-212, and 1-213 on June 20, 1913 in the *Foster Decree*. See **Ex. D** to *Thompson Aff.* NSCC's water rights 1-5 and 1-16 were decreed by the United States District Court, District of Idaho Eastern Division in the *Woodville Decree* issued on June 25, 1929. See **Ex. H** to *Thompson Aff.*

Twin Falls Canal Company (1-209, 1-4, 1-10)

TFCC holds three natural flow rights to the Snake River: (1) water right 1-209 for 3,000 cfs with a priority date of October 11, 1900; (2) water right 1-4 for 600 cfs with a priority date of December 22, 1915; and (3) water right 1-10 for 180 cfs with a priority date of April 1, 1939. The district court decreed TFCC's water right 1-209 on June 20, 1913 in the *Foster Decree*. See **Ex. D** to *Thompson Aff.* Next, TFCC's water right 1-4 was decreed by the United States District Court, District of Idaho Eastern Division in the *Woodville Decree* issued on June 25, 1929. See **Ex. H** to *Thompson Aff.* Finally, TFCC's water right 1-10 was decreed by the district court in the *Eagle Decree* on July 10, 1968. See *Eagle Decree* at 12.

STANDARD OF REVIEW

Summary judgment is appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785, 787 (2005); *Doe v. City of Elk River*, 144 Idaho 337, 160 P.3d 1272, 1273 (2007). When an action is tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the

trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Read*, 112 P.3d at 787. If there are no material facts in dispute a court may enter a judgment in favor of the party entitled to prevail as a matter of law. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 312 (Ct. App. 1982).

ARGUMENT

I. The Source Element for the SWC Water Rights is Properly Defined as the “Snake River” Pursuant to Idaho Law.

The adjudication statutes and Department’s adjudication rules plainly provide the process for defining a water right claim’s “source” element. Contrary to the Objectors’ efforts, there is no legal basis to “identify and distinguish” the various water supplies that make up the source for purposes of decreeing the subject water rights. As such, the objections fail as a matter of law.

A. Adjudication Statutes

Idaho’s adjudication statutes clearly define the process for filing and recommending water right claims in the SRBA. First, the Director is required to “prepare and furnish on request a standard notice of claim form”. I.C. § 42-1409(1). The notice of claim form must include “the source of water”. I.C. § 42-1409(1)(b). With respect to a water right’s source, the Department’s *Instructions for Filing Notice of Claim to a Water Right Acquired Under State Law in the General Adjudication of Rights to the Use of Water From the Snake River Basin Water System* instruct claimants as follows:

Enter the name of the stream, lake, drain ditch, or spring for a surface water source on line (a). Use the name shown on the U.S. Geological Survey quadrangle map. . . Only one source is allowed per claim, except when more than one source is being used for a single delivery system.

Notice of Claim Instructions at 3 (emphasis added). *See Ex. I to Thompson Aff.*

Thereafter, the Director is required to prepare and file a “director’s report on the water system” which must include “the source of water” element. I.C. § 42-1411(1), (2)(b). All of the claims subject to this proceeding identified the “Snake River” as the source element. The claims complied with the adjudication statutes and properly identified the “Snake River” as the water source to which their water rights are diverted from. The Director similarly recommended the “Snake River” as the source in compliance with the statutory directive above.

B. Department’s Adjudication Rules

In order to implement the statute governing the filing of notices of claims to water rights acquired under state law, the Department promulgated a set of adjudication rules. *See* IDAPA 37.03.01 *et seq.* The rules clarify how the “source” element of a water right is defined:

i. For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle map. If no official name has been given, the name in local common usage should be listed. If there is no official or common name, the source should be described as “unnamed stream” or “spring.” The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as “groundwater.”

IDAPA 37.03.01.05.c.i (emphasis added).

Pursuant to the Department’s rules, the SWC water rights all identify the “Snake River” as the source of water. For AFRD #2, NSCC, TFCC, and Milner, the “Milner, Idaho” USGS quadrangle survey map lists the “Snake River” as the source of water where they divert their water rights. *See Ex. J to Thompson Aff.* For A&B, the “Burley SW, Idaho” USGS quadrangle survey map lists the “Snake River” as the source of water where A&B diverts its water rights. *See Ex. K to Thompson Aff.* For BID and MID, the “Lake Walcott, West” USGS quadrangle survey map lists the “Snake River” as the source of water where they divert their water rights. *See Ex. L to Thompson Aff.* For FID, the “American Falls, Idaho” USGS quadrangle survey map

lists the “Snake River” as the source of water where FID diverts its water rights. *See Ex. M to Thompson Aff.* There is no genuine issue of material fact that the above-referenced maps identify the “Snake River” as the source of the SWC water rights in compliance with the adjudication statutes and rules.

Finally, the Department’s “Watermaster Handbook” (at p. 4) supports the statute and rules and confirms the Claimants’ Snake River water rights in its definition of “source”: “**Source** is the water body at the point of diversion. Examples are Salmon River, Squaw Creek, spring, ground water, etc.” *See Ex. N to Thompson Aff.* (emphasis in original). As plainly depicted on the referenced USGS quadrangle maps, all of the Claimants’ points of diversion are located on the Snake River. Accordingly, the Objectors have no basis to challenge the source element hence their objections should be dismissed as a matter of law.

II. Idaho Law Does Not Parse out Tributary Water Supplies for Purposes of Describing the “Source” Element of the SWC Snake River Water Rights.

The Claimants all hold decreed and licensed water rights to the Snake River. *See Facts section, infra* at 4-7. FID diverts water from the Snake River under its Snake River water rights through its pumping plant located just below American Falls Dam. BID and MID divert water from the Snake River under their Snake River water rights through their main canals just above Minidoka Dam. A&B and Milner divert water from the Snake River under their Snake River water rights at their respective pumping plants located just east of Milner Dam. AFRD #2 and TFCC divert water from the Snake River under their Snake River water rights through their main canals just above Milner Dam. Finally, NSCC diverts water from the Snake River under its Snake River water rights through its main canal, the Milner-Gooding Canal, and a small pumping plant all located just above Milner Dam.

A. Description of Upper Snake River Basin

Water enters the Snake River from countless sources in the Upper Snake River Basin. The Upper Snake River Basin, defined by the U.S. Geological Survey as Hydrologic Unit Code 17040212, extends from King Hill to the Jackson Lake headwaters.⁷ The Upper Snake River Basin begins at the headwaters of Jackson Lake in western Wyoming at an elevation of nearly 10,000 feet. The Snake River flows south through mountainous terrain approximately 69 miles from Jackson Lake across the Wyoming/Idaho state line to Palisades Reservoir. From Palisades Reservoir the Snake River (South Fork) flows through Swan Valley to Heise. The Henry's Fork (the largest tributary to the Snake River) flows into the Snake River below Lorenzo, Idaho. From that point the Snake River flows south past Idaho Falls, Shelley, and Blackfoot, and then in a westerly direction past American Falls and Burley to Milner Dam. The distance of the entire reach from the headwater reservoir at Jackson Lake to Milner Dam is about 370 miles.

In Idaho, the South Fork of the Snake River begins at the Idaho/Wyoming border at Palisades Reservoir. There are at least 20 named tributaries to the South Fork Snake River, not to mention numerous unnamed creeks and streams in various canyons and drainages.⁸ The South Fork Snake River joins the Henry's Fork River above Idaho Falls to form the main stem Snake River.⁹ Flowing south, the Snake River receives water from additional tributaries including Spring Creek and Emigrant Creek (above Idaho Falls) and the Blackfoot River. More tributaries join the Snake River at American Falls Reservoir, including Spring Creek, Ross Fork, the

⁷ The USGS definition of a Hydrologic Unit is a geographic area representing part or all of a surface drainage basin or distinct hydrologic feature as delineated by the Office of Water Data Coordination on the State Hydrologic Unit Maps; each hydrologic unit is identified by an 8-digit number. The King Hill HUC represents all of the Snake River basin surface drainage upstream from King Hill.

⁸ A general review of the Idaho Atlas & Gazetteer (DeLorme 2002) topographic map depicts at least the following named tributary creeks to the South Fork Snake River in Idaho: Burns, Trout, McCoy, Indian (above Palisades Dam), Bear, Big Elk, Little Elk, Sheep, Deer, Palisades, Indian (below Palisades Dam), Squaw, Rainey, Fall, Pritchard, Granite, Willow, Little Pine, Pine, Mud, Birch.

⁹ Like the South Fork, the Henry's Fork has numerous tributary sources including major tributaries like the Teton River, Falls River, Warm River, and Buffalo River.

Portneuf River, and Bannock Creek. Below American Falls Dam, Rock Creek, Fall Creek, Raft River, and Marsh Creek are tributary to the Snake River.

In addition to the above-named tributary streams and rivers, the Snake River receives water from tributary reach gains and spring sources hydraulically connected to the Eastern Snake Plain Aquifer (“ESPA”), particularly in the Blackfoot to Minidoka Dam reach. *See Ex. O to Thompson Aff.* Finally, numerous irrigation return flow sites from irrigated projects along the South Fork of the Snake River, the Henry’s Fork, and the main stem Snake River contribute water to supply Snake River flows throughout the irrigation season. *See id.*

In all, the Snake River receives water from numerous sources along its journey, including mountain streams and creeks, major rivers, reach gains and springs, irrigation return flow, and precipitation events (rain and snowstorms). All of these sources of supply, not just a particular one, provide water to the Snake River that then becomes available for diversion and use under the SWC Snake River water rights at their points of diversion located below American Falls and above Minidoka and Milner Dams.

II. The Objectors Seek to Artificially Split Waters that Comprise the Snake River Contrary to Idaho Law.

Each of the objections filed by the Ground Water Districts, Mud Lake Users, and Fremont-Madison Objectors press a result that is contrary to Idaho law. Each of the objections argue that the Director’s recommendations fail “to identify and distinguish the water supply associated with” these water rights. *See generally, Objections.* Instead of the Snake River, the Ground Water Districts go so far to claim the source element should be defined as “High surface water runoff from snowmelt or rain”. *See Ground Water Districts’ Objections.* As explained below, the objections to the Snake River source element are without merit and should be dismissed as a matter of law.

a. Water Subject to Appropriation

Idaho law plainly provides that:

All waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose.

Idaho Code § 42-101.

Under the statute it is clear that “all waters” of the state, when “flowing in their natural channels” are subject to appropriation. Stated another way, the right to divert water from a source like the Snake River, includes the right to “all waters” of the Snake River “flowing in its natural channel”, not just “some waters”, or only “high surface runoff from snow melt or rain” in the river as suggested by the Objectors.

Moreover, the appropriation of water in a main stream source like the Snake River further includes all of its tributary sources that would supply water for that right as recognized repeatedly by the Idaho Supreme Court.

For example, in *Schaub v. Dist. Court of Fifth Jud. Dist.*, 96 Idaho 924 (1975), the Court held:

It is well settled law in Idaho that an adjudication of water rights to a main stream also adjudicates rights to all tributary streams and other sources of supply to the main stream.

96 Idaho at 926.

The holding in *Schaub* is further supported by prior cases involving tributary water sources to a main stream. See *Martiny v. Wells*, 91 Idaho 215 (1966); *Jones v. McIntire*, 60 Idaho 338 (1939); *Josslyn v. Daly*, 15 Idaho 137 (1908). In *Martiny*, a junior appropriator (Wells) constructed a ditch to capture water from various springs to prevent the water from

flowing to Spring Creek, an adjudicated main stream. 91 Idaho at 216. The district court determined the water from the springs was not tributary to Spring Creek and that Martiny, the senior appropriator, had no right to the water. The Supreme Court reversed and prohibited Wells from interfering with tributary water that was destined for diversion and use under Martiny's senior water right. In reviewing Wells' contention that water from the springs was not "tributary" to Spring Creek, the Supreme Court, citing a Colorado decision, rejected the argument and found:

"No case has been cited, and an exhaustive examination of the authorities has failed to disclose one, which holds that the limited construction of 'tributary' contended by appellee is applicable to our irrigation laws, or that it must be alleged and proven that waters diverted by the junior appropriator constituted a running surface stream, within well-defined banks or channels. In *McClellan v. Hurdle* [citations omitted], this court has said: 'It is probably safe to say that it is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean channel, or by an obvious surface channel. If by any of these natural methods it reaches the point, and is there appropriated in accordance with law, the appropriator has a property in it which cannot be divested by the wrongful diversion by another, nor can there be any substantial diminution. To hold otherwise would be to concede to superior owners of land the right to all sources of supply that go to create a stream, regardless of the rights of those who previously acquired the right to the use of the water from the stream below.'"

66 Idaho at 218 (emphasis added).

Accordingly, although water enters the Snake River from many tributary sources, including precipitation runoff, natural creeks and streams, irrigation return flows, and springs, all of those sources provide a supply to water right holders that have appropriated the Snake River. Moreover, water rights to the Snake River are regulated by priority, not by the source of water that originally provided the supply to the river as suggested by the Objectors.

With respect to distribution of water under established rights, the law is similarly clear:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom.

Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-602.

The statute does not allow a watermaster or the Department to try and divide or “distinguish” water and then distribute it to water right holders based upon the origin of the source of that water. Instead, “all waters” of the Snake River are distributed by priority. Practically speaking no watermaster could physically distinguish the source of supply in the Snake River and only distribute particular types of water to particular rights (i.e. tributary Portneuf River water to A&B only, tributary Fort Hall springs to BID only, and tributary irrigation return flow to AFRD #2 only). Once a tributary source is hydraulically connected to the Snake River, be it from a spring in the Fort Hall Bottoms or a major river like the Henry’s Fork or Portneuf, the water is considered part of the Snake River supply for purposes of distribution by priority of right. Idaho law has long recognized a watermaster’s duty to administer water rights according to the plain terms of a decree:

We think the position is correct, and we are also satisfied that in a case like this where the decree upon its fact is explicit as to the stream from which the waters are to be distributed, that the water-master cannot be required to look beyond the decree itself.

Stethem v. Skinner, 11 Idaho 374, 379 (1905).

Whereas watermasters distribute the available supply in a stream like the Snake River to rights according to priority, they have no basis or ability to attempt to divide the various sources that supply the main stream and distribute that particular water out to particular rights. The

Department's "Watermaster Handbook" describes the supplies that make up a stream source and further explains the practice of priority distribution:

Natural flow is that portion of the total flow in a stream channel which does not include storage water released from a reservoir or water from other sources, such as groundwater pumped from a well and injected into a stream, or surface water transferred to the stream from another basin. Sources of natural flow may include tributary streams, springs, return flows from irrigated fields or ditches, and underground flow or groundwater which seeps into the stream channel.

Watermaster Handbook at 3 (emphasis added). *Ex. N to Thompson Aff.*

As between appropriators, the older right is the better right and is to be supplied before later in time appropriators.

* * *

To determine natural flow, the watermaster must measure the streamflow, and any diversions and reservoir storage changes. Data collection is essential to the proper delivery of water and may consume much of the time of the watermaster and assistants during the irrigation season.

After the natural flow has been determined, the watermaster must complete the allocation of flow to the respective users. In general, this is done by deducting the various amounts of the water rights calling for water (ranked from senior to junior) from the amount of natural flow until the entire natural flow has been allotted.

Id. at 20-21.

In summary, Idaho law is clear that an adjudication of a main stream like the Snake River includes its tributary water sources. The law does not allow a watermaster to try and divide and distinguish water supplies to the Snake River for purposes of administration. Since the Snake River receives water from a multitude of sources it is clear that rights to the Snake River enjoy all of those supplies according to their priorities. Accordingly, whereas the Objectors seek to qualify or change the "Snake River" source element of the SWC water rights contrary to Idaho law, the objections should be dismissed as a matter of law.

III. The Objections Constitute an Unlawful “End Around” the SRBA Court’s Decreed “Connected Sources” General Provision.

The effort by the Objectors to qualify or change the SWC Snake River water rights to “high surface water runoff from snow or rain” only constitutes an overt attack on this Court’s general provision that was previously agreed to and decreed in the Basin-Wide 5 proceeding (Subcase No. 91-00005). Rather than pursue a “separate source” designation for their own water rights (ground or surface water), the Objectors have taken an impermissible “flip-side” approach in an attempt to redefine the SWC Snake River water rights. As explained below, this scheme is nothing more than a collateral attack on the Court’s “connected sources” general provision, a provision specifically agreed to by most of the Objectors through the *Settlement Agreement and Stipulation for Entry of Agreed Findings of Fact, Conclusions of Law, and Partial Judgment on Basin-Wide Issue 5* (“Settlement Agreement”). **Ex. P to Thompson Aff.**

Since the “connected sources” general provision was decreed through the SRBA Court’s *Memorandum Decision and Order of Partial Decree* issued on February 27, 2002, the Objectors are estopped from challenging that decision now. Accordingly, their objections, which in effect seek to disconnect numerous sources of supply to the SWC Snake River water rights (most notably hydraulically connected groundwater in the ESPA) should be dismissed as a matter of law.

The history of the SRBA Court’s Basin-Wide 5 proceeding traces back to the Idaho Supreme Court’s decision in *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411 (1998). In *A&B*, the Court addressed the question of a general provision for conjunctive management in the SRBA. In doing so, the Court plainly held that “it is not in contest in the SRBA proceedings that most, if not all, water in the Snake River system is interconnected.” 131 Idaho at 421.

The Supreme Court vacated and remanded the district court's decision denying the inclusion of general provisions back to the SRBA district court to resolve the interconnected sources and conjunctive management general provisions question. 131 Idaho at 423. The SRBA Court explained the purpose of the remand and commented on the process it was undertaking with respect to defining the water rights' sources and priorities, and how that would interface with conjunctive management:

The SRBA is presently in the process of decreeing the relative priority dates of all claimed surface and groundwater rights. The Court is also in the process of decreeing the source of each water right with regard to whether a particular water right has a surface or groundwater source. Thus, these two issues raised in *A & B* are already being addressed. Also, in furtherance of resolving the issue of integrating the administration of ground and surface water into a single priority schedule within these proceedings, the Court can also determine factually which ground and surface rights share a common source within a particular sub-basin and relative to the entire Snake River basin, irrespective of the degree of connectivity. At present, all water sources within the Snake River basin, unless otherwise recommended by IDWR are presumed to be from a common source. Parties seeking to demonstrate that their particular water right does not share a common source should have the opportunity at a future point in these proceedings to demonstrate by a preponderance of the evidence that their particular water right does not share a common source (e.g. perched aquifer etc.). See *A & B*, 131 Idaho at 421-22.

Order on Cross Motions for Summary Judgment at 18 (emphasis added).

The SRBA Court also commented on conjunctive administration and the necessity for a general provision:

[T]he Court concludes that some general provision on conjunctive management may be necessary to both define and efficiently administer water rights in the Snake River Basin.

The starting point for this Court's reasoning is the recognition in Idaho that the prior appropriation doctrine applies as between hydraulically connected ground and surface water right sources. To the extent ground and surface sources are hydraulically connected, the water rights are treated legally as if from the same source irrespective of the fact that one water right is a surface diversion and the other diversion is from a well. A junior groundwater user is not *per se* insulated from a senior surface call simply because the junior right is diverting

from a well. As a result of this recognized legal relationship, ground and surface rights must be regulated and administered by IDWR in conjunction with one another so as to give proper effect to vested priorities.

Order on Cross Motions for Summary Judgment at 24-25 (emphasis added).

After the SRBA Court issued its decision denying the cross summary judgment motions, the parties, including a majority of the Claimants and Objectors here, reached a formal settlement on language for a “connected sources” general provision. The *Settlement Agreement*, signed by Aberdeen-American Falls Ground Water District, Bingham Ground Water District, North Snake Ground Water District, and Fremont-Madison Irrigation District (all Objectors here), defined the “connected sources” general provision to be included for use by the Department in submitting director’s reports within each basin.

The Court, after reviewing the *Settlement Agreement* and holding two hearings on the same, entered a *Memorandum Decision and Order of Partial Decree* approving the language for the general provision on February 27, 2002:

1. The Court finds that all parties to the SRBA, as defined by *SRBA Administrative Order 1*, 2q., were provided notice of the proceedings on Basin-Wide Issue 5 and were given the opportunity to be heard in the proceedings concerning Basin-Wide Issue 5.

2. The Court finds that a general provision on connected ground and surface sources is necessary to define the water rights decree by the SRBA District Court by identifying hydraulically connected ground and surface sources for the purposes of administration and defining the legal relationship between the connected sources.

3. The Court finds that general provision on connected ground and surface sources is necessary to efficiently administer the water rights decreed by the SRBA District Court by notifying water right holders as to how their rights will be administered in order to avoid future controversy in the administration of such rights.

* * *

Based on the foregoing, the form of the conjunctive management general provision is hereby decreed as set forth in the attached “Exhibit A”.

Memorandum Decision and Order of Partial Decree at 4-5. Ex. Q to Thompson Aff.

The general provision language was provided in Exhibit A to the Court's Order, and is set forth as follows:

The following water rights from the following sources in Basin __ shall be administered separately from all other water rights in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law:

Water Right No.

Source

Except as otherwise specified above, all other water rights within Basin __ will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

Exhibit A Partial Decree for Connected Sources in Basin __ (Conjunctive Management General Provision). Ex. Q to Thompson Aff.

Accordingly, unless a water right includes a "separate source" general provision, it is decreed with the "connected sources" general provision and is then administered together with all other water rights (surface or ground) "in accordance with the prior appropriation doctrine as established by Idaho law". The State of Idaho and Department began the effort of conjunctively administering ground and surface water rights in the Eastern Snake River Plain area through the creation of water districts (100, 110, 120, 130, and 140) as authorized by the SRBA Court's orders granting interim administration. The first water districts on the ESPA to include ground water rights were created in 2002 (Water Districts 120 and 130).

To the best of the Claimants' knowledge, no ground water rights within the ESPA (as presently defined by Rule 50 of the conjunctive management rules, IDAPA 37.03.11) have been decreed with a "separate source" general provision. Moreover, to the best of the Claimant's knowledge none of the Objectors' water rights (surface or ground) have been recommended or decreed with a "separate source" provision. Consequently, what the Objectors were unable to

secure in the adjudication of their own rights they now attempt to secure through objections to the SWC Snake River water rights.

In practical effect, the Objectors seek to undo the “connected sources” general provision with respect to their own water rights as they relate to the SWC Snake River water rights. By requesting the Court to decree the source element as “high surface water runoff from snow melt or rain” only, the Objectors are attempting to legally cut-off all other tributary sources of supply to those water rights, including hydraulically-connected groundwater from the ESPA, springs, irrigation return flow, and other tributary rivers, streams and creeks. Such a result would undo the Court’s “connected sources” general provision with respect to the SWC Snake River water rights and would unlawfully protect the Objectors’ junior priority water rights from any future water right administration, even though those water rights are deemed legally connected to all water sources in the basin, including the Snake River. For those Objectors that signed the Basin-Wide 5 *Settlement Agreement* their objections not only constitute grounds for breach of that agreement they represent a concerted effort to undo the past seven years of process the State has worked through to begin administering surface and ground water rights together on the ESPA.

The Court should hold the signatory parties to their prior promises made in the *Stipulation*, as well as all parties in the SRBA to the finality of the Court’s Basin-Wide 5 decision and decreed “connected sources” general provision. To allow the Objectors to go back on their agreement or to ignore the Court’s final order on this issue and seek to circumvent the “connected sources” general provision through their present objections would set an unfortunate precedent in the SRBA, particularly where thousands of water rights have already been decreed with the certainty and knowledge that those rights would be administered together as if from a

common source. The Court should reject the Objectors attempts to undo the Basin-Wide 5 decision and dismiss the objections as a matter of law.

IV. The Eagle Decree and Stipulation Binds Those Parties as to the Source of the SWC Snake River Water Rights.

In the *Burley Irrigation Dist., et al. v. Henry Eagle* case (Fifth Jud. Dist., Twin Falls County District Court), the district court confirmed previously decreed SWC Snake River water rights, and entered a decree for additional Snake River water rights. The *Eagle Decree* was a general supplemental adjudication of the Snake River and its tributaries. Notice of the case in the Twin Falls County District Court was published in nine counties and a companion case covering the Upper Valley water right holders was filed in the Fremont County District Court, *Aberdeen-Springfield Canal Company, et al. v. Henry Eagle* (Seventh Jud. Dist., Fremont County District Court).

All eight Claimants in the present subcases were parties to the *Eagle Decree*. Blackfoot Irrigation Company, United Canal Company¹⁰, and Fremont-Madison Irrigation District (Objectors in these subcases), were also parties to the decree and stipulation entered in the *Eagle Decree* proceedings. Consequently, the Fremont-Madison Objectors are bound by the *Eagle Decree* and its findings and have no legal basis to try and change the source element of the SWC Snake River water rights in the SRBA.

In the *Stipulation*, the Fremont-Madison Objectors specifically agreed to the SWC water rights to the “Snake River and its tributaries”. Stated another way, they agreed that the Claimants held water rights to the Snake River. Specifically, the *Stipulation* provides:

The parties signatory hereto do hereby stipulate and agree that the following facts, and conclusions derived therefrom, are true and correct, and shall be the basis for the entry of judgment herein, to-wit:

¹⁰ Formerly known as Danskin Ditch Company and Trego Ditch Company.

I.

(a) That the priority of the right to use waters of the Snake River and its tributaries with points of diversion at or upstream from Milner Dam (and its tributaries) have been determined by the decrees of Courts of competent jurisdiction (including but not limited to the decree in the case entitled Twin Falls Canal Company v. Charles N. Foster, et al., entered in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Twin Falls on June 20, 1913, hereafter called “Foster Decree”) and that thereafter, and after said decrees, numerous parties have acquired rights to the use of the waters of said Snake River and its tributaries with points of diversion at Milner Dam or above.

(b) That the parties Plaintiff herein are persons who have so acquired such water rights and that they have brought this action under and pursuant to provisions of Idaho Code Section 42-1405.

II.

That all the parties Plaintiff herein do hereby accept as binding upon them the provisions of all prior decrees which have been entered with respect to the waters of the Snake River and its tributaries above Milner Dam, including particularly, but not limited to (1) The Foster decree mentioned in the preceding paragraph; (2) The decree entered in the District Court of the Sixth Judicial District of the State of Idaho in and for the County of Fremont in the case entitled Rexburg Irrigation Company, et al. vs. Teton Irrigation Canal Company et al., filed December 16, 1910, (hereinafter “Rexburg Decree”); and (3) the decree entered in that certain case entitled Woodville Canal Company vs. Clark and Edwards Canal and Irrigation Company, et al., in the District Court of the United States for the District of Idaho, Eastern Division, on June 25, 1929 (hereinafter “Woodville Decree”) and all other prior valid decrees of such water.

See Stipulation at 1, 2 (emphasis in original). **Ex. R** to *Thompson Aff.*

The district court entered a *Supplemental Decree* confirming the rights agreed to in the *Stipulation*, which includes most of the water rights subject to these subcases.¹¹ In decreeing the water rights, the Court plainly held:

2. That the parties hereinafter named have the right to divert and use, for irrigation and other purposes, **the waters of the Snake River** in the amounts and with the priority dates listed, which water shall be diverted at the point and be appurtenant to the lands described herein:

Eagle Decree at 1 (emphasis added). **Ex. A** to *Thompson Aff.*

¹¹ Only Milner’s water rights 1-17 (*Milner Decree*) and 1-2050 (license no. 18919) and FID’s water right 1-2061 (license) were not included in the *Eagle Decree*.

The Fremont-Madison Objectors, signatories to the *Stipulation* and parties to the *Eagle Decree*, are bound by the decree's terms, which define the source of the SWC water rights as the "Snake River". Despite their current efforts to re-write what they already agreed to, Idaho law bars the Fremont-Madison objections. Specifically, the SRBA Court has previously ruled on the effect of prior decrees as between parties to those proceedings. In the *Memorandum Decision and Order on Challenge* (Subcase No. 36-0003A *et al.*), the Presiding Judge held:

The water right elements decreed in the New Int'l Decree are *res judicata* as between the parties and privies to that Decree, and the Claimants are bound thereby as to any water right elements **definitively** adjudged by the New Int'l Court.

Order at 31 (emphasis in original).

Accordingly, it is clear that the decree binds the Fremont-Madison Objectors, parties to the *Eagle Decree*. Stated another way, the Fremont-Madison Objectors have no basis, as a matter of law, to challenge the SWC Snake River Water Rights, including the "source" element which is the Snake River, in the SRBA. Whereas the water rights in these subcases were previously decreed with the "Snake River" as their source, the Fremont-Madison Objectors have no legal basis to challenge that element now. For this reason the objections filed by the Fremont-Madison Objectors should be dismissed as a matter of law.

IV. The Prior Licenses Bind the Department and the Parties to the "Snake River" Source Element.

In addition to the prior decrees (*Foster*, *Woodville*, *Milner*, and *Eagle*) judicially determining the source of Claimants' water rights to be the "Snake River", the various water right licenses (nos. 66, 15134, 18919, 1-2061) issued by the Department further determined the source of those rights to be the "Snake River" as well. *See Exs. B, C, E, G to Thompson Aff.*

Pursuant to prior decisions in the SRBA, the previously issued licenses are binding upon the Department and cannot be collaterally attacked in the SRBA. *See* I.C. § 42-220; *Order on Challenge (Facility Volume Issue)* at 16 (Subcase Nos. 36-02708 *et al.*) (“Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder); *Order Recommending Partial Decree be Set Aside* at 4 (Subcase Nos. 31-7311 *et al.*) (“If the license is not appealed when issued, attempts to appeal the license in a subsequent legal proceeding such as the SRBA would constitute a collateral attack on the license.”). With respect to MID and BID water rights 1-211A and B (formerly license no. 66), AFRD #2 water right 1-6 (formerly license no. 15134), FID water right 1-2061, and Milner water right 1-2050 (formerly license no. 18919), the Objectors are estopped from challenging the licensed “Snake River” element in the SRBA. Accordingly, the objections to these water rights should be dismissed as a matter of law for this reason as well.

CONCLUSION

The Claimants hold water rights to the “Snake River”, which includes all water supplies and tributaries that make up the river’s flow in priority. Contrary to the objections, the previously decreed and licensed rights are not for “high surface water runoff from snow melt or rain” only. The Objectors effort to artificially divide and distinguish the flow of the Snake River into particular tributary sources for certain water rights has no legal basis and is physically and administratively impossible. To find otherwise would force this Court to eventually decree all water rights in the Snake River basin with a “Pacific Ocean” source.

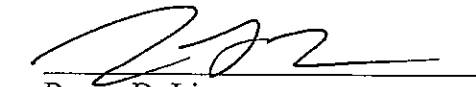
Fortunately, Idaho law guards against this absurd result. As set forth above, the adjudication statutes and rules confirm the Director’s “Snake River” source recommendation for the SWC water rights. Prior decrees and licenses further confirm the “Snake River” source

element. Finally, this Court's "connected sources" general provision as decreed in the Basin-Wide 5 proceeding ensures that all water rights in the basin will be administered together thus precluding the Objectors' effort to insulate their water rights from administration.

In sum, there is no genuine issue of material fact with respect to the Claimants' Snake River "source" element identified in their claims and therefore the objections to that element should be dismissed as a matter of law.

DATED this 22nd day of August, 2008.

CAPITOL LAW GROUP PLLC

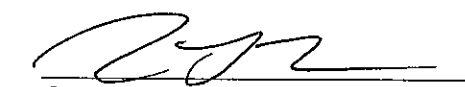

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2008, I served a true and correct copy of the foregoing *Memorandum in Support of Claimants' Joint Motion for Summary Judgment* on the following by the method indicated:

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Attachment 1

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