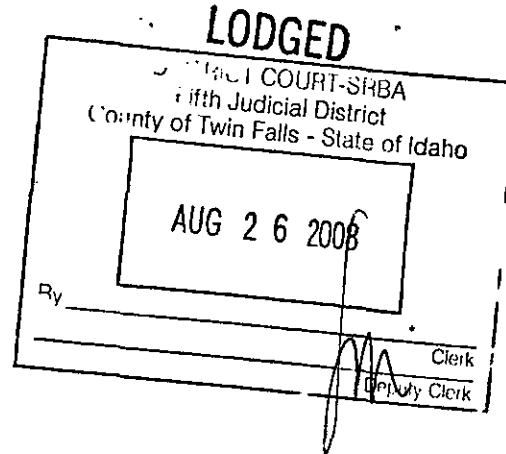


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Attorneys for Ground Water Districts



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 Numbers: See Attachment
A**

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

COME NOW, ABERDEEN AMERICAN FALLS GROUNDWATER DISTRICT,
BINGHAM GROUNDWATER DISTRICT, BONNEVILLE JEFFERSON GROUNDWATER
DISTRICT, CAREY VALLEY GROUNDWATER DISTRICT, JEFFERSON CLARK
GROUNDWATER DISTRICT, MADISON GROUNDWATER DISTRICT, MAGIC VALLEY
GROUNDWATER DISTRICT, AND NORTH SNAKE GROUNDWATER DISTRICT,
(collectively referred to herein as "Groundwater Users") by and through counsel of record

provide this Memorandum in Support of the Ground Water Districts' Motion for Summary Judgment.

I. INTRODUCTION

Attachment A reflects certain water right claims pending in the SRBA commonly referred to as "high water rights" or "flood rights". Various objections have been filed by the Ground Water Users and others. Pursuant to their summary judgment motion, the Ground Water Users seek to impose certain remarks for administrative purposes to clarify the actual period of use and source of supply based upon the undisputed facts and water delivery records of Water District 1.

II. BACKGROUND

The water rights listed on Attachment A are high water rights, primarily dependent on spring run-off and snow melt. Because of their late priority dates, these water rights only receive water early in the irrigation season, until June or early July in most years, and never for the full irrigation season. See Olenichak Aff. ¶ 9; Carlson Aff. ¶ 11 and Exhibit A to Carlson Aff. Despite the fact the period of use has never been licensed or decreed for these rights,¹ the Director's Reports recommended the full irrigation season as the period of use without any remarks to clarify the actual season of use or identify the source. The Ground Water Users objected to these recommendations and request clarifying remarks to reflect the actual period of use and to identify the source of supply. Otherwise, these water rights could make a delivery call

¹ Water right no. 1-2061 was licensed with a season of use of 4/1 to 10/31 but this season is not supported by any facts and is actually contrary to the facts as established by the delivery records for Water District 01; the licensed season is simply the standard season at the time the license was issued by IDWR and should be clarified.

upon junior priority ground water rights to expand their water rights and receive a greater period of use and quantity than has historically been delivered. Further, the Ground Water Districts request that the claims based on beneficial use be disallowed because no water has ever been delivered to them and no beneficial use has ever been established under those claims.

III. STATEMENT OF UNDISPUTED FACTS

Based on the record before the Court, the Ground Water Users submit that the following material facts are undisputed and entitle them to summary judgment as a matter of law.

1. The water rights on Attachment A have priority dates junior to October, 11, 1900. See the Director's Report for each water right on file herein and Exhibit A to Carlson Aff.
2. The water rights on Attachment A all divert from locations on the Snake River from points of diversion below the confluence of the Blackfoot River. See the Director's Report for each water right on file herein.
3. Water District 01 records provide the best information available regarding the diversion and use of water under the water rights listed on Attachment A. See Exhibit C to McHugh Aff., Claimants' Answers to Request for Admission.
4. None of the water rights on Attachment A have a period of use established by a previous decree or license except water right no. 01-2061 which was previously licensed with a standard irrigation season. See Exhibit A to McHugh Aff.
5. Water right no. 1-2050 was previously licensed but did not have an established period of use on the license. See Exhibit B McHugh Aff.
6. Claim nos. 1-10225, 1-10237, 1-10238, 1-10239, 1-10240, 1-10241, are claimed by A&B Irrigation District. Claim nos. 1-10034 and 1-10482 are claimed by the United States Bureau of Reclamation ("BOR"). Claim no. 1-10483 is claimed by The Amalgamated Sugar Co. All of these claims are based on beneficial use and have not been previously decreed or licensed and thus, have not had any of their elements previously established. See the Director's Report for the respective water right on file herein.
7. Claim nos. 1-10034, 1-10225, 1-10237, 1-10238, 1-10239, 1-10240, 1-10241, 1-10482, 1-10483 have never been delivered water and should be disallowed. See Carlson Aff. at ¶ 9 and 11.

8. All of the water rights listed on Attachment A, except those claimed as beneficial use water rights discussed in the preceding paragraphs, have been administered as part of Water District 01. Once the beneficial use water rights have been decreed by the SRBA District Court they will be administered as part of Water District 01. See Olenichak Aff. at ¶ 12.
9. Water District 01 records show that water under the water rights listed on Attachment A, except those for beneficial use water rights that should be disallowed as discussed above, is only available during high runoff, during late spring and early summer months and not is not delivered thereafter during the remainder of the irrigation season during most years. Carlson Aff. at ¶¶ 9, 11 and Exhibit A; See also Olenichak Aff. at ¶¶ 8, 9 and 11 and 12.
10. The primary supply for all of the water rights listed on Attachment A is high water consisting of spring run off and snow melt and not base flows of the Snake River that may be interconnected to the ESPA. Carlson Aff. at ¶¶ 10, 11.
11. Water right nos. 1-7, 1-8, 1-9, 1-10, 1-13 and 1-14 all have a priority date of April 1, 1939 and were decreed in the *Burley Irr. Dist. v. Eagle*, Civil Case No. 21406 (1968) pursuant to a Stipulation. The Stipulation and the Findings of Fact and Conclusions of Law both acknowledge that these water rights are considered "flood rights". See Exhibits D and E to McHugh Aff. The Supplemental Decree entered notes that the Court made and entered the Findings of Fact and Conclusion of Law. See Exhibit F to McHugh Aff.
12. Water right nos. 1-4, 1-5, 1-6, 1-7, 1-8, 1-9, 1-10, 1-13, 1-14, 1-16, 1-17, 1-211A, 1-211B, 1-212, 1-213, 1-214A, 1-214B, 1-219, 1-2050, 1-2061, although previously decreed or licensed, do not have a previously decreed or licensed period of use. See Exhibit F to McHugh Aff. for water right nos. 1-7, 1-8, 1-9, 1-10, 1-13 and 1-14; See Exhibit G to McHugh Aff. for water right no. 1-16; See Exhibit H to McHugh Aff. for water right no. 1-17; See Exhibit I to McHugh Aff. for water right nos. 1-211A, 1-211B, 1-212, 1-213, 1-214A, 1-214B, 1-219 See Exhibit B to McHugh Aff. for water right 1-2050. The recommendations for these claims recommend a full irrigation season of March 15 to November 15. See the Director's Report for each water right on file herein
13. For water delivery from the Snake River below the confluence of the Blackfoot River and the Snake River, Water District 01 cuts back to an October 11, 1900 priority date sometime in June or early July in years of moderate or low snowpack after which time the only entities diverting Snake River natural flow water (as opposed to storage water) are Twin Falls and North Side Canal Companies under water right nos. 1-209 and 1-210. Olenichak Aff. at ¶¶ 9 and 11; Carlson Aff. at ¶ 11.

14. The water rights on Attachment A as recommended by the Director do not contain any remark to reflect that they are high water or flood water rights that do not receive water the full irrigation season. See the Director's Report for each water right on file herein.
15. Additionally, they do not contain a remark reflecting that spring run off and snow melt is the primary supply and therefore these water rights are not entitled to place a delivery call against or curtail junior priority ground water users. See the Director's Report for each water right on file herein.

IV. THE COURSE OF THE PROCEEDINGS

On May 15, 2006, the Director filed his recommendations for the above listed water rights with this Court in the SRBA Basin 01, Part 1 Irrigation & Others Director's Report. The Director recommended these water rights be decreed with the source listed as the Snake River and with an irrigation season from March 15 to November 15.²

On October 4, 2006, the Idaho Ground Water Appropriators, Inc.³ filed timely objections to these water rights alleging that:

The Director's recommendation fails to identify and distinguish the water supply associated with this water right. The claimed right is entitled to be filled only by high surface water runoff from snow melt or rain. Its source of supply is not from base flow (ground water) to the Snake River. Conditions are required to prevent enlargement of the source of supply.

The objections further alleged that certain of the water rights have never been delivered and that these water rights should be disallowed. See Objections on file herein and Exhibit A to Carlson Aff.⁴

² Except for water right 01-2061 which has a recommended season of use as 4/1 to 10/31 based on the license.

³ On May 29, 2008, the Court issued its order *Granting IGWA's Motion for Substitution of Parties* which substituted the Ground Water Districts for IGWA. The Ground Water Districts are referred to collectively herein as the Ground Water Users. North Snake and Magic Valley Ground Water Districts, however, are not objectors to the water rights claimed by North Side Canal Company.

On April 29, 2008, an initial hearing was held in these subcases and a schedule was set for possible early resolution of the issue of diversion of water under the high water subcases. The schedule provides for a deadline for filing Summary Judgment on August 22, 2008.⁵ The Ground Water Districts' Motion and Memorandum in Support is filed in accordance with that schedule.

V. ARGUMENT

A. Summary of Argument

Other than the October 11, 1900 rights of the Twin Falls Canal Company and the North Side Canal Company and sometimes a small fraction of the March 1903 right of the Minidoka Project, all later priority natural flow water rights of the SWC members are and always have been dependent upon high flows or flood flows resulting available only in the spring and early summer months of the irrigation season. Carlson Aff. ¶¶ 10, 11. These post-1900 high water rights do not rely upon reach gains as a source of their supply, rather spring rains and snow melt. Consequently, these water rights have only been diverted and applied to beneficial use for a short period of time, during early season high flow events and should only be decreed with a full

⁴ Exhibit A to Carlson Aff. contains certain water rights that are not the subject of the current Motion for Summary Judgment, namely, 1-23A, 1-15 and 1-2073 claimed by Southwest Irrigation District, Brett & Robyn Andersen and J. Vaughn Hobson respectively; and, 1-10390 claimed by Call Farms Partnership. The Ground Water Districts filed the same objections to these water rights but those objections have reached a resolution in principle and SF5s are being prepared accordingly. Further, the Ground Water Users filed a Motion to Withdraw Objection on 1-10390 on August 20, 2009 with the consent of claimant's counsel. Water Right nos. 1-209 and 1-210 owned by Twin Falls Canal Company and North Side Canal Company are also not subject to the current motion for Summary Judgment.

⁵ On August 20, 2008, the Ground Water Users have filed a *Motion to Compel Discovery Responses and Motion to Extend Deadlines*. In that motion the Ground Water Users request that the summary judgment schedule be adjusted because the Claimants have refused to respond to discovery requests and supply information that may be relevant to the issues presented on this summary judgment motion. A hearing was set for August 28, 2008 but on August 21, 2008, an Objection was filed regarding the hearing on the Motion to Compel. Counsel has been advised that the Special Master in these subcases intends to conference with the parties on August 28, 2008 to discuss the schedule for the Motion to compel.

irrigation season with appropriate remarks and/or conditions reflecting that they are high water rights or flood rights only delivered during the early irrigation season, that the source of supply is spring snow melt and rains. As such these rights are not entitled to curtail junior ground water users which would result in an expanded water right with a period of use and quantity greater than historically has been available based upon the historic delivery records of Water District 1 which provide the best and most reliable delivery records for these claimed water rights.

B. Legal Standards

Summary judgment is proper when “the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). “All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the non-moving party.” *Robert Comstock LLC v. Keybank Nat’l Assn.*, 142 Idaho 568, 130 P.3d 1106 (2006). Yet, to withstand a motion for summary judgment, the opposing party’s case must be anchored in something more solid than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853 (Ct. App. 1986).

C. Claim Nos. 1-10034, 1-10225, 1-10237, 1-10238, 1-10239, 1-10240, 1-10241, 1-10482, and 1-10483 Should Be Disallowed Because Water Has Never Been Delivered or Diverted Under These Water Rights

When a water right is claimed as a beneficial use right, there must be some proof that water was diverted and used in accordance with the claimed elements. A water right is described and defined by the stated elements of the water right. The Director’s mandate in the Snake River Basin Adjudication (“SRBA”) according to I.C. § 42-1411 is to determine the elements of the

water right which include the name of the owner, the source, quantity, date of priority, period and place of use and the purpose of use and shall include "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." The Supreme Court has stated that "Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed.'" *State v. Hagerman Water Right Owners*, 130 Idaho 727, 730, 947, P.2d 400, 403 (1997), *quoting* I.C. § 42-1402. By decreeing a water right that has never actually been diverted and placed to beneficial use or to decree a period of use to include a time when water was never diverted or beneficially used violates this principle and would be in excess of the beneficial use established. The decree must be based on facts that support the determination of each element of the claimed right otherwise, the decree would be without basis and would undo the settled administration of water rights.

Claim Nos. 1-10034 and 1-10482 are claimed by the United States Bureau of Reclamation ("BOR"). Claim Nos. 1-10225, 1-10237, 1-10238, 1-10239, 1-10240, and 1-10241, are claimed by A & B Irrigation District. Claim No. 1-10483 is claimed by The Amalgamated Sugar Co. All of these claims are based on beneficial use and have not been previously decreed or licensed. In this case, there is no evidence that beneficial use has ever been established under these water rights because water under these water rights has never been delivered to them. Carlson Aff. ¶¶ 9, 11. Water District 01 allocates all of the water available for diversion and use from the Snake River year round. Carlson Aff. ¶¶ 4-7. These water rights have never been delivered any of the water from the Snake River. Carlson Aff. ¶¶ 9, 11. Hence, the Director's Recommendation that recommends these water rights is in error and contrary to established facts.

Therefore, these claims should be disallowed and summary judgment finding these claims disallowed should be granted to the Ground Water Districts.

D. The Director's Recommendation for Period of Use Must be Based on the Diversion Beneficial Use of the Water Right Which Cannot Extend Beyond That Period When the Water Has Been Diverted and Used.

The same principle from *Hagerman* discussed above, applies equally to the period of use element. The previously decreed or licensed water rights listed on Attachment A (i.e. all those except the beneficial use claims discussed above) were recommended with a standard irrigation season of March 15 to November 15.⁶ In this case, these water rights have been used to make delivery calls against junior water rights claiming that the junior use is interfering with these "senior" water rights' ability to divert water during the irrigation season. Yet, the facts directly show, that water under these water rights were never available nor diverted for an entire irrigation season and this fact should be reflected in the decree.

Although water right nos. 1-4, 1-5, 1-6, 1-7, 1-8, 1-9, 1-10, 1-13, 1-14, 1-16, 1-17, 1-211A, 1-211B, 1-212, 1-213, 1-214A, 1-214B, 1-219, 1-2050, were previously decreed or licensed, no period of use was established for these water rights and the fact that they are high flow water rights was not previously decided. Exhibits B, D through I of McHugh Aff. A prior decree or license is evidence of the existence of a water right but does not preclude the SRBA Court from clarifying an element of a previously licensed or decreed water right when it was not

⁶ As for water right no. 01-2061, the licensed season of use is based solely on the Department's standard season of use for the area at the time the licensed was issued. There are no independent facts that have been produced or discovered to show that the season as licensed is based on any facts or actual application to beneficial use. To that extent, that element of the license is without a basis in either fact or law and should be clarified for the same reasons that the previously decreed water rights should be clarified.

previously determined. In this case, the season of use and the fact that these water rights are high flow water rights was not previously determined. Id.

It is an undisputed fact that the water rights that are junior to October 11, 1900, do not provide water for an entire irrigation season and never have. See Aff. of Olenichak at ¶ 9, Carlson Aff. at ¶ ¶10, 11. Further, the fact that these water rights only divert water during high flow periods was determined by Hearing Officer Schroeder in *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefits of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company* in his *Opinion Constitution findings of Fact, Conclusions of Law and Recommendation and Amended Order* dated April 29, 2008 at ¶ 9.a. at p. 10. That finding states in full:

- a. **MID, BID, A&B, AFRD#2 and Milner rely primarily on water from their storage contracts with the BOR.** Their natural flow rights are relatively junior and commonly only provide water during the runoff period between April and June in years of moderate to good snowpack and runoff. When there is a low snowpack, such as the period from 2001 through 2004, the natural flow rights produce very little water. During the runoff period when there is water passing Blackfoot, these entities are able to divert natural flow water. When senior users upstream from Blackfoot diver the water that would otherwise pass Blackfoot, the senior natural flow rights of TFCC and NSCC command the inflow to the river downstream of Blackfoot, leaving little to no water for the natural flow rights of other canals in the Blackfoot to Milner reach.

The Director's recommendation in the SRBA is the first attempt to define the period of use and erroneously recommended the period of use for these water rights as March 15 to November 15, contrary to the established diversion and delivery of water under those claimed rights.

Idaho Code § 42-1427(a) states that because of “the increasing demand for water, it is important the elements of a water right be standardized to allow for fair and efficient administration of the limited water supply” and many times, because of the “passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established.” However, this is not the case here. In this case, the water rights in question are delivered and administered by one of the most sophisticated water districts in the State of Idaho, Water District 01. Carlson Aff. ¶¶ 3-7. Water District 01’s records, which the Claimants agree are the best evidence to show what water has been delivered and diverted by them under their rights,⁷ show that other than water right nos. 1-209 and 1-210, water has never been diverted and put to beneficial use for a full irrigation season. Exhibit C to McHugh Aff.; see also Olenichak Aff. ¶¶ 9 and 12 and Carlson ¶¶ 10, 11. Rather, the actual diversion and use of these water rights is limited in most years, and at the time of the initial appropriation, to spring and early summer at the latest. Olenichak Aff. ¶ 9; Carlson Aff. ¶¶ 10, 11. Therefore, the Director’s Recommendation that provides for a period of use from March 15 to November 15 is wrong and the period of use should end in early July. Furthermore, these water rights should have a condition included indicating that they are high flow water rights. Carlson Aff. ¶¶ 10, 11.

⁷ All of the Claimants admitted that the records of Water District 01 represent the best available information pertaining to the historical distribution of the water rights with the exception of the following: a) AFRD#2 denied the admission without explanation; b) Falls Irrigation District reserved the right to object or deny; and, c) the United States –Bureau of Reclamation was unable to admit or deny the request.

E. Water Right Nos. 1-7, 1-8, 1-9, 1-10, 1-13 and 1-14 Were Previously Found to Be High Water Rights or "Flood Rights" and a Remark Should Be Included Stating They Are High Water Rights And Limiting Their Period of Use

Water Right Nos. 1-7, 1-8, 1-9, 1-10, 1-13 and 1-14 have an additional basis for the inclusion of a remark indicating that they are high flow or flood water rights. These water rights were decreed with an April 1, 1939, priority date in the case of *Burley Irr. Dist. v. Eagle*, Civil Case No. 21406 (1968) pursuant to a Stipulation. A copy of the Stipulation is attached as Exhibit D to McHugh Aff. The Stipulation at page 3 and page 4 characterize these water rights as "flood rights."

- (c) That in connection with the establishment of the water rights for said Palisades Reservoir, it was particularly necessary for the parties...to agree among themselves, and avoid extensive, expensive and delaying litigation by so agreeing upon a common priority date for those persons who were using, or were making plans to construct projects and perfects rights to use, the so-called "Flood Water Rights," being those waters of the river which were only available during periods of high flow; and; which the parties Plaintiff had been using to the best of their ability and to the extent of their irrigation works, or were planning to use as projects were constructed; and that the parties Plaintiff did at such time agree on a common priority date of April 1, 1939, for such rights, which said agreement has been acted upon by all of the parties Plaintiff hereto continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.

Stipulation at 3 (emphasis added).

- (f) That is was necessary to agree that additional projects authorized by the Congress of the United States as an integral part of the Palisades Reservoir legislation would have their proportionate rights in said so-called flood water rights with said priority date of April 1, 1939, and that said legislation was achieved, and such projects were authorized and constructed

and have been developed, on the basis of such understanding as to their water rights

Stipulation at 4 (emphasis added). The Findings of Fact and Conclusions of Law reiterate the identical language. See Exhibit E to McHugh Aff. pp. 3-4. The Supplemental Decree entered thereafter specifically relies on the previous Findings of Facts and Conclusions of Law. See Exhibit F to McHugh Aff. at 1. The “flood water” or high flow condition is part of the prior decree for these water rights. Thus, it is without a doubt that these water rights should be designated as high water rights with a shortened period of use and with a condition that specifically states that they are high water rights. To find otherwise would enlarge the use under these water rights and expand their use beyond the high flow season in violation of the prior finding.

F. The Primary Source of Supply for the Water Rights Listed on Attachment A That Were Previously Decreed or Licensed is Snow Melt and Spring Runoff, Therefore They Should Not be Entitled to Make a Delivery Call Against Junior Priority Ground Water Users

Although the source element for these previously licensed and decreed water rights was determined to be the “Snake River” it is now understood that not all water rights that divert below Blackfoot in fact rely on the base flows from the Snake River as their primary supply. Thus, as provided by I.C. 42-1411(2)(j), one of the elements of a water right is “such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for the administration of the right by the director.” When an element of a water right can make the decree ambiguous without a clarifying remark, and when a clarifying remark can avoid future controversy, it is appropriate to include it in the decree issued by the SRBA. See *In Re SRBA, Memorandum Decision and Order on Cross Motions for Summary Judgment* in Consolidated Subcase 91-63 dated Sept. 1, 2004 at pp. 24-25.

These water rights are all junior to October 11, 1900. See the claims and Director's reports for each water right on file herein and Exhibits A, B, and D through I to McHugh Aff. In this case, there is no doubt that these water rights primarily depend on spring runoff and snow melt and would be "high water rights" that are not available for an entire irrigation season. Carlson Aff. at ¶ 10, 11 and Olenichak Aff. at ¶¶ 8, 9 and 10. Adding a clarifying remark that these water rights' source of supply consists primarily of spring run off and snow melt and cannot curtail junior priority ground water rights will not only clarify the elements and assist in the administration of these water rights, but will certainly reduce potential controversy between the parties in the future.

CONCLUSION

The water delivery records of Water District 1 are the best records available that establish the history of water delivered to these water right claims which are the subject matter of this case. Accordingly, there are no material issues of fact regarding the historic period of use and source of supply of these high water rights rendering summary judgment proper as a matter of law. The clarifying remarks sought by the Ground Water Users are necessary to avoid future misunderstandings and controversy and also to provide clarity to the "period of use" and "source" elements of these water right claims. Therefore, clarifying remarks should be inserted to establish that these water rights are "high water rights" or "flood rights" available only during high run-off early in the irrigation season in June or early July of most years and not available during the full irrigation season. Further, a condition should be added that the source of these rights is primarily snowmelt and spring runoff and these high flow water rights are not supplied

by reach gains below Blackfoot by reason of which they cannot be utilized to make a call upon ground water users.

RESPECTFULLY SUBMITTED,

DATED this 22nd day of August, 2008.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 
CANDICE M. McHUGH
Attorney for the Ground Water Districts

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2008, the above and foregoing document(s), was served by email to those with email addresses and by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:


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**ATTACHMENT A
SUBCASE LIST**

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