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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

)

) Subcase Nos. 01-00004 et al.

)

) (see attached list of 30 subcases)

)

Case No. 39576

)

) **STATE OF IDAHO'S RESPONSE BRIEF**

)

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The State of Idaho, by and through the undersigned deputy attorney general, hereby submits its brief in response to the various motions for summary judgment filed in the above-entitled subcases and in accordance with the *Order Setting Summary Judgment Briefing Schedule and Supplemental Scheduling Conference* entered on June 25, 2009.

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I. BACKGROUND

On August 22, 2008 the Groundwater Districts¹ filed their first motion for summary judgment in which they raised the following arguments:

1. Water Right Nos. 01-10034, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, 01-10482, and 01-10483 should be disallowed because no water has been delivered under these water rights.
2. Water Right Nos. 01-00004, 01-00005, 01-00006, 01-00007, 01-00008, 01-00009, 01-00010, 01-00013, 01-00014, 01-00016, 01-00017, 01-00211A, 01-000211B, 01-00212, 01-00213, 01-00214A, 01-00214B, 01-00219, 01-02050, and 01-02061 should include a condition in the season of use element of the rights that recognizes that the rights have only been delivered during the spring and early summer periods during times of high flow runoff and spring snowmelt.
3. Water Right Nos. 01-00004, 01-00005, 01-00006, 01-00007, 01-00008, 01-00009, 01-00010, 01-00013, 01-00014, 01-00016, 01-00017, 01-00211A, 01-000211B, 01-00212, 01-00213, 01-00214A, 01-00214B, 01-00219, 01-02050, 01-002061, 01-10034, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, 01-10482, and 01-10483 should include a condition in the source element of the rights that limits the ability of the rights to make a delivery call against junior groundwater rights so as to recognize that the source of the rights is primarily high flow runoff and spring snowmelt.

On August 22, 2008 the Surface Water Coalition² filed their first motion for summary judgment, seeking to dismiss the objections to the source element of their water rights pursuant to the following arguments:

1. The source element was properly recommended as the "Snake River" pursuant to adjudication statutes and administrative rules.
2. Idaho law does not parse out tributary water supplies for purposes of defining the source element of these water rights.

¹ 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.

² 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.

3. Idaho law does not parse out tributary water supplies for purposes of administration.
4. The objections conflict with the resolution of Basin-Wide Issue No. 5.
5. As a party to the *Eagle Decree*, Burley Irrigation Dist. v. Eagle, No. CV-21406 (Idaho 5th Dist. Ct., July 10, 1968), Fremont-Madison Irrigation District is precluded from raising its source objections in the SRBA.
6. Objectors are estopped from challenging the source element of water right nos. 01-00006, 01-00211A, 01-00211B, 01-02061, and 01-02050, which constitute a collateral attack upon the underlying licenses.

On August 22, 2008 the Groundwater Districts filed their second motion for summary judgment jointly with the City of Pocatello, which was focused on the priority date of certain water rights:

1. Water Right Nos. 01-00007, 01-00008, 01-00009, and 01-00014 should include a condition in the priority date element of the rights that recognizes the date of actual beneficial use rather than the date of set forth in the *Eagle Decree*.

On August 25, 2008 the Upper Valley Irrigators³ joined in the Groundwater Districts' first motion for summary judgment.

On November 17, 2008 the City of Pocatello withdrew its support for the August 22, 2008 joint motion for summary judgment, indicating that the Groundwater Districts would re-file the motion independently.

On June 24, 2009 the Mud Lake Water Users⁴ filed their motion for summary judgment on the following arguments:

1. Water Right Nos. 01-00007, 01-00008, 01-00009, 1-00010, 01-00013, and 01-00014 should include a condition characterizing the rights as "flood rights" consistent with language set forth in the *Eagle Decree*.

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

⁴ Mud Lake Water Users, Inc., Montevue Canal Company, Independent Water Users of Mud Lake, Producers Irrigation Company, and Jefferson Irrigation District.

2. Water Right Nos. 01-02050, 01-02061, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, and 01-10482 should similarly include a condition characterizing the rights as “flood rights” as implied by the proceedings in the *Eagle Decree* litigation.
3. Water Right Nos. 01-00004, 01-00005, 01-00006, 01-00007, 01-00008, 01-00009, 01-00010, 01-00013, 01-00014, 01-00016, 01-00017, 01-00211A, 01-000211B, 01-00212, 01-00213, 01-00214A, 01-00214B, 01-00219, 01-02050, 01-002061, 01-10034, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, 01-10482, and 01-10483 should include a condition characterizing the rights as “flood rights” consistent with historical administration and as addressed in the Surface Water Coalition delivery call proceedings.

On June 9, 2009 the Groundwater Districts withdrew their objections in several Basin 01 subcases, including the following subcases at issue here: 01-00005, 01-00016, 01-00212, and 01-00213.

On June 24, 2009 the Mud Lake Water Users filed their second motion for summary judgment, arguing as follows:

1. The “flood water rights” remark set forth in the *Eagle Decree* should be carried over into the SRBA decrees.
2. A “flood water rights” remark should be included in the SRBA decrees to recognize historical administration.

On June 25, 2009 the Groundwater Districts re-filed their motion for summary judgment on the priority date issue, which was previously joined in by the City of Pocatello:

1. Water Right Nos. 01-00007, 01-00008, 01-00009, and 01-00014 should include a condition in the priority date element of the rights that recognizes the date of actual beneficial use rather than the date set forth in the *Eagle Decree*.

On June 25, 2009 the Groundwater Districts also filed an amended motion for summary judgment, modifying their August 22, 2008 motion in the following respects: first, it recognized that the Groundwater Districts had withdrawn their objections to the North Side Canal Company’s water rights, and thus, the summary judgment motion no longer applied to those

subcases; and second, it withdrew its argument that water right no. 01-10034 should be dismissed entirely. As a result, the Groundwater Districts amended first motion for summary judgment stands as follows:

1. Water Right Nos. 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, 01-10482, and 01-10483 should be disallowed because no water has been delivered under these water rights.
2. Water Right Nos. 01-00004, 01-00006, 01-00007, 01-00008, 01-00009, 01-00010, 01-00013, 01-00014, 01-00017, 01-00211A, 01-000211B, 01-00214A, 01-00214B, 01-00219, 01-02050, and 01-02061 should include a condition in the season of use element of the rights that recognizes that the rights have only been delivered during the spring and early summer periods during times of high flow runoff and spring snowmelt.
3. Water Right Nos. 01-00004, 01-00006, 01-00007, 01-00008, 01-00009, 01-00010, 01-00013, 01-00014, 01-00017, 01-00211A, 01-000211B, 01-00214A, 01-00214B, 01-00219, 01-02050, 01-02061, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, 01-10482, and 01-10483 should include a condition in the source element of the rights that limits the ability of the rights to make a delivery call against junior groundwater rights so as to recognize that the source of the rights is primarily high flow runoff and spring snowmelt.

On June 25, 2009 the Surface Water Coalition filed its second joint motion for summary judgment, raising the following issues:

1. City of Pocatello and Fremont-Madison Irrigation District, as parties to the *Eagle Decree*, are estopped from challenging the elements in the present Director's Recommendations.
2. The *Eagle Decree* is *res judicata*, as against both parties and non-parties to the *Decree*, preventing challenges to the elements in the present Director's Recommendations.
3. Water right holders who acquired their rights subsequent to the *Eagle Decree* are prevented from challenging the elements of the water rights set forth in the *Eagle Decree* as a matter of law.
4. Objections to the recommended irrigation season—3/15 to 11/15—should be dismissed as a matter of law.

5. Objections to the recommended priority dates should be dismissed as a matter of law.
6. Objectors' argument for an explanatory remark subordinating these rights to junior groundwater rights is not supported in fact or law.

The following discussion sets forth the State's position on the issues identified. The State takes no position at this time on the remaining issues raised by the parties on summary judgment.

II. DISCUSSION

A. **WATER RIGHT HOLDERS WHO ACQUIRED THEIR RIGHTS SUBSEQUENT TO THE ISSUANCE OF THE *EAGLE DECREE* ARE NOT PREVENTED FROM CHALLENGING THE WATER RIGHT ELEMENTS DECREED THEREIN AS A MATTER OF LAW.**

The Surface Water Coalition argues that "the holder of a right acquired subsequent to the rights established in the *Eagle Decree* cannot challenge the elements of the Decree because, as a matter of law, they could not be injured by the elements of the *Eagle Decree* and they take their rights 'subject to' those previously established water rights." *Claimants' Memorandum in Support of Second Joint Motion for Summary Judgment* at 14. This argument wrongly assumes that the elements of the *Eagle Decree* are conclusive on all persons. The Idaho Supreme Court rejected that argument in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997), finding instead that "decreed water rights, although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water right has been forfeited, abandoned, or lost through adverse possession." *Id.* at 741, 947 P.2d at 414. Re-examination is particularly appropriate where the rights of a water right holder, who was not a party to a previous decree, are at issue: "A decree issued in a private water adjudication binds only those parties to the decree. . . . 'The contention that one's rights can be affected by a decree to which he was a stranger is repugnant to a fundamental principle of our jurisprudence that no one will be judged until he has had a hearing.'" *Id.* at 742,

947 P.2d at 415 (quoting *Mays v. Dist. Ct. of Sixth Judicial Dist.*, 34 Idaho 200, 207-08, 200 P. 115, 116 (1921)). The same principle applies to the effect that a prior private adjudication may have on the IDWR Director's recommendation as well:

To hold that the Director is "obligated to accept prior decrees as being conclusive proof of the nature of a water right" is contrary to the Director's statutory role in the SRBA and such a holding would have the effect of binding water right owners not parties in a prior adjudication to a prior decree issued in a private adjudication. This is an untenable outcome.

Id. at 742, 947 P.2d at 415 (citation omitted). As a result, the *Eagle Decree* is binding only upon parties and privies to that decree, and thus, water right holders who were not parties or privies thereto are free to raise valid challenges that they may have to the water rights set forth therein—e.g., adverse possession, estoppel, laches, waiver, waste, forfeiture, abandonment, etc.

B. THE DIRECTOR'S INCLUSION OF A DATE-INCLUSIVE IRRIGATION SEASON DOES NOT PRECLUDE THE APPLICATION OF ADDITIONAL EXPLANATORY REMARKS TO THE PERIOD OF USE ELEMENT.

The State agrees with the Surface Water Coalition that the "irrigation season" for these water rights was properly described in the Director's Recommendation as beginning on March 15 and ending on November 15. That description, nonetheless, does not preclude as a matter of law the application of additional explanatory remarks to the Period of Use element that are necessary for the definition, clarification, or administration of the rights. *See* Idaho Code § 42-1411(2)(j).

C. ANY POTENTIAL "FLOOD WATER RIGHT" REMARK SHOULD NOT REQUIRE THE WATERMASTER TO DISTINGUISH BETWEEN "BASE FLOWS" AND "FLOOD FLOWS" IN THE SNAKE RIVER CHANNEL.

The water rights at issue in these subcases should not include any remark that would require the watermaster to distinguish between the "base flows" and the "high flow runoff and spring snowmelt" extant in the Snake River channel for purposes of administering these water rights. Such a remark would be contrary to Idaho law and contrary to the historic administration

within Water District No. 1. First, it is well settled in Idaho that generally the right to a main stem source includes the right to all hydrologically connected water sources. *See Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908). This principle applies in the SRBA, where the right to waters from the “Snake River” includes the right to all tributary sources, unless otherwise specified. *See Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits*, In re SRBA, Subcase No. 00-91005 (Idaho 5th Dist. Ct., July 2, 2001) (“At present, all water sources within the Snake River basin, unless otherwise recommended by IDWR are presumed to be from a common source.”); *Memorandum Decision and Order of Partial Decree*, In re SRBA, Subcase No. 00-91005 (Idaho 5th Dist. Ct., Feb. 27, 2002) (approving the stipulation entered in the Basin-Wide Issue 5 proceedings). Second, at no time in the past has Water District No. 1 distinguished between what water in the Snake River channel is “base flow” and what water is “high flow/spring snow melt.” *See Affidavit of Anthony Olenichak in Support of State of Idaho’s Response Brief* at 2. Any remark that would require such calculations and measurements in the future would be in sharp contrast to historic and present administration, and therefore, should not be included in the water right descriptions in these subcases.

D. CONJUNCTIVE MANAGEMENT RULES AUTHORIZE THE IDWR DIRECTOR TO CONSIDER SEASONAL VARIABILITY OF SOURCE FLOWS IN DETERMINING MATERIAL INJURY IN DELIVERY CALL PROCEEDINGS.

The State takes no position at this time on the issues of whether, and to what extent, seasonal variability should be address in these water right decrees. Nonetheless, it is important to recognize that the Conjunctive Management Rules, IDAPA 37.03.11, expressly authorize the Director to take into account seasonal variability—of the type asserted in these subcases—in determining material injury to a senior water right holder in a delivery call proceeding. For

instance, one of the factors that the Director may consider in determining whether a senior right holder is suffering material injury includes:

Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.

CMR 042.01.c (emphasis added). Seasonal variability is also recognized in the fashioning of mitigation plans:

Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.

CMR 043.03.b (emphasis added). Furthermore, the principles of futile call may also be implicated by seasonal variations. As a result, the effect of seasonal variability is not lost on IDWR, it simply arises in the administrative venue.

III. CONCLUSION

To the extent that the Court finds that the descriptions of these rights should include some reference to them being “flood flow rights”, the State requests that the Court do so in a manner that does not require the watermaster to distinguish between the “base flows” and the “high flow runoff and spring snowmelt” extant in the Snake River channel for purposes of administering these water rights. To do otherwise would be to impose an undue and novel burden upon the Water District.

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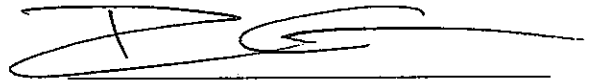
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DATED this 28th day of July 2009.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'D. Stanish', written over a horizontal line.

DAVID I. STANISH
Deputy Attorney General

Subcase Nos:

01-00004
01-00005
01-00006
01-00007
01-00008
01-00009
01-00010
01-00013
01-00014
01-00016
01-00017
01-00023A
01-00212
01-00213
01-02040
01-02050
01-02060
01-02060A
01-02061
01-04060
01-10034
01-10189
01-10225
01-10237
01-10238
01-10239
01-10240
01-10241
01-10482
01-10483

(Subcase list: 01-04ETAL)
6/25/09

CERTIFICATE OF SERVICE

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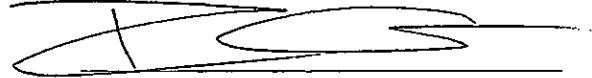
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