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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	)	Subcase No.: See Attachment A
	)	
Case No. 39576	)	THE UNITED STATES' RESPONSE TO
	)	THE SUMMARY JUDGMENT MOTIONS
	)	OF THE GROUND WATER DISTRICTS
	)	AND THE MUD LAKE WATER USERS
	)	ASSOCIATION

Introduction

This proceeding addresses water rights the Ground Water Districts and Mud Lake Water Users Association (collectively "Ground Water Users") have dubbed "high water rights."¹ The

¹ "High water right" is a layman's term with no established definition. See Deposition of Lyle Swank at 29:25 - 30:6 ("Swank Depo.," pertinent pages attached as Exhibit A to the Deposition of David A. Jarvis) . Such rights are also variously referred to as "flood rights" and "flood water rights." E.g., Stipulation filed in *Burley Irr. Dist. v. Eagle*, Civil Case No. 21406

Ground Water Users' Motions for Summary Judgment ask this Court to impose a hard and fast rule that the so-called "high water rights" cannot call against any junior groundwater right, under any circumstance because the "high water rights" are "primarily" composed of run-off and do not receive water late in the irrigation season in "most" years. While the Ground Water Users' desire to avoid ever having to prove a particular call would be futile is understandable, the necessary equivocation of their factual statements illustrates that this is a case where the exceptions must swallow the proposed rule. Even were that not the case, the Ground Water Districts' own affiants' deposition testimony demonstrates that the proposed remark is unnecessary and therefore the Ground Water Users' Motions must fail as a matter of law.

In addition to its generalized short comings, the Ground Water Districts' Motion is particularly ill-founded with respect to its challenges to two water rights held by the United States. The first of those, Water Right 01-10034, is the junior storage water right for Lake Walcott. That right, with a priority of 1911, becomes one of the senior water rights on the river in the winter and is filled every year. Thus it is no surprise that all of the Ground Water Districts' affiants testified that there is no reason to consider the right a "high water" right.

The second federal water right challenged by the Ground Water Districts is 01-10482, a beneficial use right created by pumping water to irrigate Lake Walcott State Park. The Ground Water Districts' contention that the water right must be disallowed because it has never been delivered by the water master runs afoul of their own affiant's testimony – and Idaho statutes – recognizing that water masters do not deliver beneficial use rights. Even if that were not the

(1968). (referring to such rights as "so-called 'Flood Water Rights'") (quoted in MLWU Mem. at 6). The United States will use the term "high water right" in this Memorandum.

case, the claim must be affirmed because the water right has been used throughout the irrigation season for decades.

Argument

I. The Ground Water Users Motions for Summary Judgment Are Without Foundation and Must be Denied.

A. The Ground Water Users' Arguments and the Deposition Testimony of Their Affiants Demonstrate That There Is No Basis For the Condition They Seek.

The Ground Water Users' Motions ask this Court to burden the water rights at issue here with a remark explaining that the "water right's source of supply consists *primarily* of spring run off and snow melt" and that as a result, the water rights are precluded from "curtail[ing] junior priority ground water rights." GWD Mem. at 14; *see also* MLWU Mem. at 4. In other words, the Ground Water Users seek to convert a factual generality into a bright-line legal rule. Their arguments fall short as a matter of both logic and of law.

As a matter of logic, the equivocation permeating the Ground Water Users' arguments demonstrates that there is no basis to impose the bright-line rule they desire. To argue, as the Ground Water Users do, that a water right is *primarily* dependent on run off and only receives water until early July in *most* years is to concede both that the water right receives water from sources other than run-off and that the right receives water throughout the irrigation season in some years. Thus, the Ground Water Users own arguments illustrate that there is no hard and fast rule for when water will be available to the so-called "high water rights."

The deposition testimony of the Ground Water Districts' affiants demonstrates that is in fact the case. Current Water Master Lyle Swank agreed that post-1900 rights can be in priority early in the year in some years; during the middle of the season in some years; and are "very

often” in priority late in the season. Swank Depo. at 99:23 – 100:3. Similarly, former Water Master Ron Carlson testified that in some years water can be available to the challenged rights in August, September and October. Deposition of Ronald D. Carlson at 101:2-16 (“Carlson Depo.,” pertinent pages attached as Exhibit B to the Affidavit of David A. Jarvis) ; *see also* Deposition of Anthony Olenichak at 64:24 – 65:10 (acknowledging that the “high water rights” receive water from springs and return flows, among other sources) (“Olenichak Depo.,” pertinent pages attached as Exhibit C to the Affidavit of David A. Jarvis). In short, the Ground Water Districts’ argument acknowledges – and the testimony of their affiants confirms – that the variability in hydrologic conditions from year to year prevents the use of the bright-line rule they advocate.

The Ground Water Users are asking this Court to impose a condition that would have the effect of ruling that a call by *any* of the so-called “high water rights” at issue here against *any* junior groundwater right would be futile under *any* circumstance. *See* Carlson Depo. at 115:15-18 & 124:3-15 (characterizing the Ground Water Users’ argument as intended to “preempt” the need to assert a futile call defense). Apart from the problems inherent in the Ground Water Users’ effort to turn factual generalities into an absolute legal rule, the Ground Water Users’ Motions must be denied because the system of water rights administration is not static.

The Ground Water Users’ motions are premised on the assertion that rights senior to the so-called “high water rights” take all the water available during the irrigation season. *E.g.*, GWD Mem. at 2; MLWU Mem. at 19. Yet, Mr. Carlson testified that there are times when senior water rights either take no water or take less than they are entitled to and therefore water is available to junior users that ordinarily would not be. Carlson Depo. at 68:20-24. The Ground Water Districts’ argument utterly fails to accommodate that common sense proposition.

Moreover, their arguments also fail to accommodate the potential operation of the doctrines of abandonment and forfeiture. The Ground Water Districts would have this Court write those doctrines out of Idaho law by declaring the so-called “high water rights” forever unable to make a call because of senior water rights that someday may no longer exist.²

B. The Remarks the Ground Water Users Seek are Unnecessary.

A remark may be included on a water right when it is “necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.” I.C. § 42-1411(2)(j); *State v. Nelson*, 131 Idaho 12, 15, 951 P.2d 943, 946 (1998). The Ground Water Users’ arguments fail to demonstrate a remark is necessary; indeed, as is discussed below, Water District 01 personnel testified repeatedly the proposed remark is unnecessary.

As noted above, the Ground Water Users seek a remark identifying certain water rights as “high water rights.” Although the Ground Water Users attempt to imbue the term “high water right” with some sort of talismanic significance, the term is no more than a “kind of a laymen’s term” used to describe a relatively junior right.³ Swank Depo. at 29:25 – 30:6; *see also* Olenichak Depo. at 121:24 – 122:4 (“high water right” is a term used in conversation with water users). The term is not used in the administration of water rights; nor are any water rights designated as “high flow” rights. *Id.* None of the Ground Water Users have cited an Idaho

² The Mud Lake Water Users make the additional argument that the parties to the Eagle Decree agreed the water rights are “high water rights” and “a deal is a deal.” MLWU Mem. at 15. The United States was not a party to the Eagle Decree and is not bound by it, much less by any “deal” underlying the decree.

³ Mr. Carlson’s testimony illustrates the ambiguity inherent in the term. He testified that on some streams within Water District 01, a 1895 priority right would be a “high water” right; on some streams a right junior to 1900 would be; and on other streams, the right would have to be junior to 1916 for him to consider it a high water right. Carlson Depo. at 87:1-16.

statute or decision that suggests – much less holds – that a so-called “high water” right should be limited on any basis beyond that inherent in the right’s relatively junior priority. Given all that, it is not surprising that Water Master Swank and Anthony Olenichak, the Program Manager for Water District 01, both testified that a remark designating a water right as a “high water” right is unnecessary. Swank Depo. at 31:3-19; Olenichak Depo. at 75:15-19. Even former Water Master Carlson, Ground Water Districts’ hired expert, initially testified he did not contend there is a need to “try to determine what makes up the supply of water in the river.”⁴ Carlson Depo. at 101:17-22.

The Ground Water Districts suggest their proposed remark is necessary to clarify the “period of use” and “source” elements of these water rights. Far from being necessary, the proposed remark would add only ambiguity. The Ground Water Districts apparently believe their remark would “clarify” the “period of use” element by explaining that the rights “are not available for an entire irrigation season.” GWD Mem. at 14. Of course, a water right’s priority already functions to determine when within the season of use water is available to the right. *Cf.* GWD Mem. at 2 (water is not available to the challenged water rights “[b]ecause of their late priority.”). Moreover, the testimony of the Ground Water Districts’ own affiants demonstrate that the proposed “clarification” is not even factually accurate as these rights do receive water

⁴ Later Mr. Carlson suggested anyone seeking to call against ground water should be required to do so – even though he acknowledged that would be impossible. Carlson Depo. at 106:14 – 107:13. Mr. Carlson’s testimony appears colored by his ardent belief that “the attempt to regulate ground water to supply water to surface water is not appropriate.” Carlson Depo. at 84:3-5. Needless to say, both the Idaho Legislature and the Idaho Department of Water Resources have decided otherwise. *See e.g., A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 421-22, 958 P.2d 568, 578-79 (1997) (noting that “most, if not all, water in the Snake River System is interconnected” and that conjunctive management of ground and surface water rights was one of the main reasons for the SRBA).

throughout the season in some years. Thus, to the extent the remark would add anything to the “period of use” element it would only add ambiguity and the possibility of conflict over whether the priority or the remark governed availability.

The same problems befall Ground Water Districts’ purported desire to clarify the “source” element. First, the “source” element needs no clarification. Indeed, the Ground Water Districts’ affiants have testified that the physical composition of water (what the Ground Water Users term its “source”) has nothing to do with the “source” of the water as that term is used in the administration of water rights. Olenichak Depo. at 102:7-14. Moreover, the proposed remark would, again, add only ambiguity because, as the Ground Water Users concede throughout their argument, the water rights are not in fact composed solely of run-off.

C. Even if a “High Water” Remark Could be Justified, Water Right 01-10034 for Storage in Lake Walcott is Not a “High Water” Right.

Even assuming there is a rationale for having certain water rights declared “high water” rights, Water Right 01-10034 is not a “high water” right.⁵ Water Right 01-10034 is the junior of the two storage rights for Lake Walcott and has a priority date of 1911. Apart from the fact that Mr. Olenichak defined “high water rights” as junior to 1916, the water right is obviously not a “high water right” because it is a storage right which fills every single year. Indeed, as is discussed below, the Ground Water Districts’ own affiants testified there is no reason to consider it a “high water right.”

⁵ The Ground Water Districts originally sought to have Water Right 01-10034 disallowed entirely. However, when their experts all testified that Lake Walcott fills almost every year, *see e.g.*, Carlson Depo. at 138:19 – 139:2; Olenichak Depo. at 108:6-9, the Ground Water Districts amended their Motion and now seek only to have the right declared a “high water” right. GWD Amended Motion for Summary Judgment at 1, fn. 1.

The Ground Water Districts define “high water rights” as those that do not rely on reach gains and instead are dependent on early season “high flows or flood flows.” GWD Mem. at 6. As irrigation use declines in the fall, this water right becomes one of the senior rights on the river and remains in priority until it fills, as it does almost every year. *See* Carlson Depo. at 138:19 – 140:1; Olenichak Depo. at 108:6-9. Thus, the Ground Water Districts are wrong in claiming the right does not rely on reach gains.⁶

Deposition testimony by the Ground Water Districts’ affiants reiterates that there is no basis to characterize this storage right as a “high water” right. Mr. Olenichak testified that the Lake Walcott storage rights are delivered every year; that he would not consider the rights to be “high water” rights and that his affidavit was not intended to address the Lake Walcott storage right. *See* Olenichak Depo. at 73:12-14, 72:21 – 73:11, 78:4 - 13. Similarly, current Water Master Swank testified he would not consider a reservoir storage right a “high water” right. Swank Depo. at 95:20 – 96:3. Even former Water Master Carlson testified he could see no reason for the Ground Water Users’ “source objection” to be applied to the Lake Walcott storage rights. Carlson Depo. at 144:7 – 145:10.⁷

⁶ Indeed, Professional Engineer and Reclamation Program Manager Patrick McGrane submitted expert testimony during the Surface Water call proceeding which demonstrated that curtailing groundwater use would make additional water available for storage. Expert Report of Patrick McGrane (attached as Exhibit D to the Affidavit of David A. Jarvis).

⁷ Mr. Carlson’s testimony was directed to Water Right 01-219, the senior storage water right for Lake Walcott, which he mistakenly thought was the only operative storage right for the reservoir. *See* Carlson Depo. at 145:2-10 and 138:19 -140:1.

D. The Ground Water Districts' Motion Must be Denied With Respect to Water Right 01-10482 Because the Right Has Been Beneficially Used for Decades.

Water Right 01-10482 is a beneficial use water right Reclamation established by using a pump to irrigate what is now Lake Walcott State Park.⁸ The Ground Water Districts assert that the right must be disallowed because water has never been delivered to the right by Water District 01. GWD Mem. at 8. That argument fails both as a matter of law and as a matter of fact.

As a matter of law, the Director's Report recommending the right is *prima facie* evidence that the right has been used. I.C. § 42-1411(4); *State v. Hagerman Water Right Owners, Inc.*, 947 P.2d 409, 130 Idaho 736 (1997). The Ground Water Districts' argument cannot overcome that presumption because a water master is only authorized to deliver "adjudicated, decreed, permit or licensed right(s)." I.C. §42-607. Thus, as both Mr. Olenichak and Mr. Swank explained, the water master's actions have no bearing on whether a beneficial use right has actually been used. *See* Olenichak Depo. at 67:1-11, 107:18 – 108:5; Swank Depo. at 28:17-22. Accordingly, the Ground Water Districts have failed to provide sufficient evidence to rebut the Director's Report. *Id.* at § 1411(5).

Even if that were not the case, the argument would fail as a matter of fact because the water right has been used for decades. The Ground Water Users' expert, former Water Master

⁸ Walcott Park was originally administered by Reclamation. The United States still owns the Park, however, in 1999 management of the Park was transferred to the Idaho Department of Parks and Recreation. *See* 1999 Idaho Laws Ch. 294 (amending I.C. § 67-4212 to include Lake Walcott State Park in the Idaho State Park system); Affidavit of Don Bowden ("Bowden Aff.") at ¶ 6.

Carlson, acknowledged that during his tenure a small pump was used to irrigate Walcott Park.⁹ Carlson Depo. at 140. In fact, Reclamation has pumped natural flow water and used it to irrigate Walcott Park at least since the 1940s. Affidavit of Jerry D. Frederickson at ¶ 2. Irrigation of the Park continues to this day. Bowden Aff. at ¶ 5. In short, water right 01-10482 has been used for decades and must be affirmed.

Conclusion

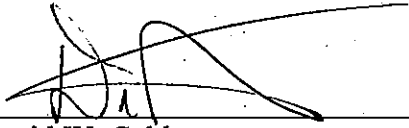
The Ground Water Users' Motions for Summary Judgment ask this Court to adopt a remark which would have the effect of forever foreclosing the so-called "high water rights" from issuing a call against any junior groundwater user under any circumstance. Their Motions must be denied as they have presented no sound reason for the Court to adopt such a draconian rule. First, the Ground Water Users necessary equivocation in their factual assertions demonstrates that there is no basis for the bright-line rule the Ground Water Users' advocate. Even if that were not the case, the Ground Water Users have failed to establish that the remark they seek is necessary. Instead, their affiants have testified it is not.

The deposition testimony of their affiants also forecloses the relief the Ground Water Users seek against two of the United States' water rights. Their affiants testified that there is no basis to consider Water Right 01-10034, a storage water right for Lake Walcott, a "high water right" and the record bears that out. During the non-irrigation season the right is one of the senior rights on the river and fills almost every year. Similarly, the Ground Water User's expert

⁹ He mistakenly believed the pump was being served by stored water, but no such storage account exists. All of the water accruing to storage in Lake Walcott is allocated between the Burley Irrigation District and the Minidoka Irrigation District. OPERATIONS DESCRIPTION FOR BUREAU OF RECLAMATION PROJECTS...., Appendix E, fn. 2 (excerpts attached as Exhibit E to the Affidavit of David A. Jarvis).

testified that water has been pumped to irrigate Walcott Park for years. Affidavit testimony by Reclamation employees confirms that is the case and demonstrates that Water Right 01-10482 was established by decades of beneficial use of water to irrigate the Park.

DATED this 28TH day of July, 2009.



David W. Gehlert

Attachment A

Subcase Nos.

01-00004
01-00005
01-00006
01-00007
01-00008
01-00009
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