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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 Numbers: 1-4, 1-6, 1-7, 1-8, 1-9,
1-10, 1-13, 1-14, 1-209, 1-211A, 1-211B,
1-214A, 1-214B, 1-2050, and 1-2061¹

**GROUND WATER DISTRICTS'
RESPONSE TO CLAIMANTS' JOINT
MOTION FOR SUMMARY JUDGMENT**

Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District And North Snake Ground Water District (collectively, the "Ground Water Districts") respectfully submit this response to the *Claimants' Joint Motion for Summary Judgment ("SWC First Motion")*.

¹ The Ground Water Districts do not have objections pending to the water rights nos. 1-5, 1-16, 1-210, 1-212, and 1-213 of NSCC pursuant to a stipulation with NSCC but the SWC's motion is pending in those subcases as well.

I. BACKGROUND

On August 22, 2008, the Claimants, A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, the “SWC”), filed the *SWC First Motion*.

The Claimants submit there is no genuine issue of material fact concerning the “source” element of their water right claims, and that the objections filed by the Ground Water Districts and others should be dismissed as a matter of law. In support of the *SWC First Motion*, the Claimants submitted the *Affidavit of Travis L. Thompson* dated August 21, 2008, and a *Memorandum in Support of Claimants’ Joint Motion for Summary Judgment* (“*SWC First Memo*”) dated August 22, 2008. The *SWC First Motion* was filed before the Ground Water Districts’ Objections were amended on January 13, 2009. The Ground Water Districts modified their prior objections and requested that a condition be added to define the subject water rights as “high flow or “flood water” rights supplied by snow melt and spring runoff and available only ephemerally during high flow periods. Ex. D at 3, Ex. E at 3, *Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment* (“McHugh Aff.”); see Amended Objections on file herein. Because the objections filed by the Ground Water Districts were modified subsequent to the *SWC First Motion*, many of the arguments made by Claimants no longer apply to the objections.

The following motions for summary judgment are currently pending before the Court:

- a. *Claimants’ Second Joint Motion for Summary Judgment* (“*SWC Second Motion*”) filed June 25, 2009, which seeks to dismiss objections to their water rights under a theory of *res judicata*.

b. Ground water Districts' *Amended Motion for Summary Judgment* dated June 25, 2009, which seeks to have certain water rights disallowed because they have never been diverted and to have certain conditions inserted that clarify the water rights as flood water rights and to limit the season of use. The *Amended Motion for Summary Judgment* is supported by the *Memorandum in Support of Motion for Summary Judgment* (August 22, 2008) and *Affidavit of Candice McHugh in Support of Motion for Summary Judgment* (August 22, 2008).

c. *Motion for Summary Judgment on Priority Dates* (June 25, 2009), supported by the Ground Water Districts' *Memorandum in Support of Motion for Summary Judgment on Priority Date* (June 25, 2009), and *Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment on Priority Dates* (June 25, 2009).

d. *Mud Lake Water Users, Inc., Motion for Summary Judgment* filed June 25, 2009 that seeks to have the flood nature of the SWC water rights decreed.

These pending motions for summary judgment overlap on many factual and legal issues. As such, the Ground Water Districts do not repeat, but do incorporate by reference, the arguments made in the *Ground Water Districts' Response to Claimants' Second Joint Motion for Summary Judgment*. Because the SWC only raises an issue relating to BWI-5 in the *SWC First Motion*, this response focuses on that argument.

II. ARGUMENT

A. The "source" element of the SWC water rights should be clarified consistent with the intent of the Eagle Decree and their historic availability to show that the rights are supplied by flood water available only during times of high spring runoff.

The *SWC First Motion* asks the Court to dismiss the Ground Water Users' Objections as a matter of law because there is no dispute of fact as to the "source" element of their water rights. There is no dispute that the subject water rights are supplied by flood water available only during periods of high spring runoff. The only question is whether the unique characterization of these rights as "flood flow" or "high water" rights should remain in the SRBA decree.

As the Amended Objections show, the Ground Water Users request that a condition be placed on the subject water rights to define them as flood water rights. This remark would serve

to clarify the “source” and/or “period of use” elements as necessary for the administration of the water rights. While the Special Master can recommend the source of these rights as the Snake River, thereby agreeing in part with the SWC, the Court can certainly also include appropriate conditions that are consistent with the actual nature of the water rights as being flood water rights.

On pages 13-16 in the *SWC First Memo*, the SWC strains to argue that the source element includes “tributaries.” However, the authorities cited by the SWC do not support the assertion that high flow runoff that, available only temporarily during peak spring snowmelt periods or other flood events, are part of “natural flow.” For example, the Watermaster Handbook cited by SWC, identifies the sources of natural flow as: “tributary streams, springs, return flow from irrigated fields or ditches, and underground flow or groundwater which seeps into the stream channel”. This list does not include flood flows or spring run-off which is available only for a short time. Water users at the time of the Eagle Decree understood this. That is why the claimants stipulated to flood water rights rather than natural flow rights, and why the Eagle Decree describes the source as waters in the Snake River only “available during periods of high flow.” McHugh Aff. Ex. D at 3, Ex. E at 3.

Idaho Code § 42-1411(j) specifically recognizes that some water rights may require certain “remarks and other matters as are necessary for definition of the right, for clarification of any element ... or for administration” This statute requires the Court to decree water rights in a manner that enables the Watermaster to properly distribute water. Further, when SRBA claims are based upon prior decrees, the SRBA Court should decree the water rights consistent with the prior the diversion and beneficial use made under the water rights. See *Graham v. Leek*, 65 Idaho 279, 298-99 (1943). There are statutory criteria that must be met for enlargement of a

water right beyond the parameters of the prior decree (*see* Idaho Code § 14-1426), but the SWC has not alleged enlargement here.

Instead, the SWC asks this court to abandon the flood water designation by asserting that the Watermaster cannot be expected to “divide” the source. Yet, that is precisely the reason that the SRBA Court needs to decree these water rights with a flood water condition. Indeed, it is not the Watermaster’s prerogative to administer the water rights as such without such a condition. With a condition that defines the rights as flood flow water rights, the Watermaster can easily administer the rights to protect against a delivery call made against non-flood water supplies, such as a delivery call made against junior-priority ground water rights. Including such a condition eliminates guess work by the Watermaster and is necessary for the administration of these water rights. For further support of these arguments, see *Mud Lake Water User’s Motion for Summary Judgment* dated June 23, 2009 and supporting documents; *Ground Water Districts’ Amended Motion for Summary Judgment* dated June 25, 2009 and supporting documents; *Ground Water Districts’ Motion for Summary Judgment on Priority Dates* dated June 25, 2009 and supporting documents; *Ground Water Districts Response to Claimants’ Second Joint Summary Judgment Motion* dated July 29, 2009 and supporting documents.

B. The “Connected Sources” general provision does not preclude the SRBA Court from inserting necessary conditions in individual water right decrees.

The SWC further argues that the objections to their water rights must be dismissed because they are an “end run around” the SRBA Court’s “connected sources” general provision that has already been decreed.² *SWC First Memo* at 17. This argument is a red herring. Including a remark that the subject water rights are limited to “flood flows,” consistent with the Eagle Decree and historic treatment, is simply unrelated to the goals of the connected sources

² As a point of fact, the SRBA Court’s connected sources general provision in Basin 01 has not yet been decreed.

general provision of Basin-Wide Issue 5 (“BWI-5”).

BWI-5 does not preclude the Court from inserting clarifying remarks that affect a limited number of water rights on a given source when necessary for the administration of the water right.

The point of the *SRBA Court’s Order on Cross Motions for Summary Judgment* (“Connected Sources Order”) cited on p. 19 of the *SWC First Memo* was to determine the legal relationship between connected ground and surface waters for purposes of conjunctive administration, not to override the legislature’s requirement under I.C. section 42-1411(j) that the Court make appropriate factual determinations to clarify or define elements of a water right, or include other administrative conditions regarding the historical parameters on individual water rights. See also I.C. § 42-1427.

Further, the Supreme Court remanded the question for factual determinations to the SRBA District court recognizing the technical and hydrologic complexities stating that factual determinations should be decided in each sub-basin.

We conclude that the order of the district court denying the inclusion of general provisions dealing with interconnection and conjunctive management of surface and ground water rights in Basins 34, 36 and 57 must be vacated and the matter remanded to the district court for the purpose of holding an evidentiary hearing to determine factually whether the proposed general provisions for each of those areas is necessary either to define or to efficiently administer the water rights decreed by the court in the adjudication process. Because each of the proposed general provisions regarding interconnection and conjunctive management in Basins 34, 36 and 57 is separate and distinct, each Basin's conjunctive management provision must be discretely considered in reaching the factual determination whether the respective general provision is necessary either to define or to more efficiently administer water rights in that particular Basin.

In re SRBA, A&B Irrigation Dist. v. Idaho Conservation League, 131 Idaho 411, 423, *citing*, I.C. § 42-1412(6) and *In re SRBA, Higginson v. United States*, 128 Idaho 246, 262 (1995). As

contemplated by the Supreme Court and by the SRBA District Court's Connected Sources Order, remarks that are necessary for administration or to clarify elements on individual water rights must be made on a case-by-case basis in each individual basin. The Ground Water Districts' Objections seek only this, and no more, and are not attempting to "undo" the connected sources general provision as argued by the SWC.

III. CONCLUSION

The Ground Water Districts' Amended Objections properly request a clarifying remarks or conditions on the SWC's water rights' source identifying them as flood water rights that should not be allowed to demand water from junior ground water users. For the foregoing reasons, the *SWC First Motion* should be denied.

DATED this 29th day of July, 2008.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

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

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of July, 2009, a true and correct copy of the foregoing was served by email to those with email addresses and U.S. Mail, postage pre-paid and addressed to the following:


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DOCUMENTS AND EXHIBITS FILED IN SUPPORT OF GROUND WATER DISTRICTS' AMENDED MOTION FOR SUMMARY JUDGMENT MOTION AND DOCUMENTS FILED IN SUPPORT OF GROUND WATER DISTRICTS' RESPONSE TO CLAIMANTS' JOINT MOTION FOR SUMMARY JUDGMENT AND CLAIMANTS' SECOND JOINT MOTION FOR SUMMARY JUDGMENT IN

Document Name	Exhibits attached to Document ID - No.	
<i>AFFIDAVIT OF CANDICE M. MCHUGH IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DATED AUGUST 22, 2008</i>	Exhibit	Document Name
	A	License No. 01-2061
	B	License No. 01-2050
	C	Responses to Request for Admission
	D	Eagle Decree Stipulation
	E	Eagle Decree Findings of Fact and Conclusions of Law
	F	Eagle Decree Supplemental Decree
	G	Woodville Decree
	H	Milner Low Lift Decree
	I	Foster Decree
	J	Development of the Snake River by Henry Eagle
	K	Water District 36 Minutes dated 3-6-67
	L	Water District 36 Minutes dated
<i>SECOND AFFIDAVIT OF CANDICE M. MCHUGH DATED JULY 29, 2009</i>	M	Certified copy of IDWR Claim Investigation Handbook
	N	Certified copy of December 18, 1998 Memo to Tuthill from Anderson re: Customized Season of Use
	O	Examples of Water Rights with Shortened Season and Subordination Conditions
	P	Transcript of Dreher Testimony
<i>AFFIDAVIT OF RONALD D. CARLSON IN SUPOPT OF MOTION FOR SUMMARY JUDGMENT DATED AUGUST 22, 2008</i>	A	Table of Water Rights
<i>AFFIDAVIT OF TONY OLENICHAK DATED AUGUST 21, 2008</i>	None	