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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, 1-219, 1-10034,
1-10237, 1-10238, 1-10239, 1-10240,
1-10241, 1-104821

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

COME NOW 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 referred to herein as "Ground Water Districts"), by and through their attorneys of record and hereby submit this Response to the Claimants' Second Joint

1 The Ground Water Districts do not have objections to NSCC water right nos. 1-5, 1-16, 1-210, 1-212 and 1-213 due to a stipulation with NSCC; however, the SWC's Second Motion is pending in those subcases as well.

Motion for Summary Judgment (“SWC Second Motion”).

The Surface Water Coalition² (“SWC”) is seeking summary judgment and has filed two motions for summary judgment: *Claimants’ Joint Motion for Summary Judgment* dated August 22, 2008 (“SWC First Motion”) and *Claimants’ Second Joint Motion for Summary Judgment* dated June 25, 2009 (“SWC Second Motion”). In a nut shell, the SWC seeks to have the objections to their water rights dismissed as a matter of law. The SWC wants to insulate their water rights from any review or scrutiny by the SRBA Court because they are based on prior decrees and the prior decrees should be enough evidence to fully support the water rights as claimed and recommended by the SWC. Yet, without a doubt, the SRBA Court has the inherent power to decree the water rights in conformance with actual facts and evidence and cannot be “strip[ped] . . . of the ability to review the contents of the Director’s report and apply the law to the facts.” *In re SRBA, Higginson v. United States*, 128 Idaho 246, 259 (1995). Furthermore, justice requires that the Ground Water Districts and the members whom they represent be “heard at a meaningful time and in a meaningful manner when their property rights are being adjudicated.” *Id.* at 261. In this case, the SRBA presents the first forum for the Ground Water Districts to challenge the SWC’s water rights and to make sure that those water rights are decreed in keeping with the requirements of Idaho law; namely, that the historic beneficial use under which these water rights were developed be sufficiently decreed by the SRBA District Court in order to not impermissibly alter or expand the inherent nature of the flood flow water rights that are at issue in these subcases.

2 The SWC includes 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.

Although the issues in the *SWC First Motion* and *SWC Second Motion* are closely related, the Ground Water Districts' are providing two responses for the record. However the substantive arguments in response to the issues raised by the both SWC motions are primarily made in this response: *Ground Water Districts' Response to Claimants' Second Joint Motion for Summary Judgment*. This response is further supported by the Second Affidavit of Candice M. McHugh ("McHugh Second Aff.") and attached exhibits filed contemporaneously herewith.

SUMMARY OF ISSUES

The issues in these subcases can be broken down as follows: 1) objections relating to source; 2) objections relating to priority date;³ 3) objections relating to season of use; and 4) objections relating to administrative conditions, which overlaps and is in addition to the objections to source and season of use.

Source. The SWC seeks dismissal of the objections to their water rights that were decreed in *Burley Irr. Dist. v. Eagle*, Civil Case No. 21406 (Fifth Jud. Dist., Twin Falls County 1968) referred to as the "Eagle Decree."⁴ They argue that the Objectors are barred by the doctrine of *res judicata* and cannot request clarifying conditions on the source element or any

3 There is pending the *Ground Water Districts Motion for Summary Judgment on Priority Date* in subcase numbers 1-7 1-8, 1-9 and 1-14 that argues that the stipulated priority date of April 1, 1939 must be modified for administrative purposes since that is not the date that water was first diverted and applied to beneficial use under those water rights. Thus this response will not directly address the question relating to the priority date issue, but refers the Special Master to the motion relating to priority dates and the supporting documents thereto.

4 Of the water rights listed in Attachment 1 to the SWC Second Motion, water right nos. 1-5, 1-6, 1-7, 1-8, 1-9, 1-10, 1-13, and 1-14 are the only water rights that were decreed in the Eagle Decree. Water right nos. 1-209, 1-210, 1-211A, 1-211B, 1-212, 1-213, 1-214A, 1-219 are decreed in Foster Decree. Water right no. 1-4 of TFCC was decreed in the supplemental decree *Woodville Canal Co. v. Clark and Edwards Canal and Irrigation Co.*, Decree 661 (Eastern Div. Fed. Dist. Ct. 1929) with a priority date of 1915 but like the Foster Decree, the SWC only makes argument relating to the Eagle Decree. Water right nos. 1-2050, 1-2061 are based on prior licenses. Water right nos. 1-10034, 1-10237, 1-10238, 1-10239, 1-10240, 1-10241, 1-10482 are based on beneficial use.

element previously decreed in the Eagle Decree. While the same argument is not directly made in the *SWC Second Motion*, to the water rights decreed in the *Twin Falls Canal Co. v. Foster*, June 20, 1913 (Fifth Jud. Dist., Twin Falls Co.) (“Foster Decree”) it is presumed that the SWC seeks dismissal of the objections to those water rights for the same reasons as those made that relate to the Eagle Decree. (See fn. 4 *supra*). The SWC also seeks to dismiss the objections to recommendations based on prior licenses and beneficial use. See fn. 4 *supra*.

Season of Use. The SWC seeks summary judgment on the season of use and asks the SRBA District Court to decree the season of use of 3-15 to 11-15 as recommended by the Director of the Department of Water Resources. They base their argument on the fact that recommended season is based on IDWR’s “standard season” and would request that the Court ignore any evidence to the contrary even though the water rights were not previously decreed with any season of use.

Priority Date. The SWC asks that the Court decree the priority date as recommended on various claims listed on pg. 17 of the *SWC Memo* as a matter of law. While there is no pending objection to the priority date element of claimed right nos. 1-4, 1-5, 1-6, 1-16, 1-17,⁵ 1-209, 1-210, 1-211A, 1-211B, 1-212, 1-213, 1-214A, 1-214B, 1-219, 1-2050 and 1-2061, that is not to say that a determination of the priority date on these claims may not be effected by a condition or remark necessary for administrative purposes contained under other elements. Further, there are objections pending on priority date on claimed right nos. 01-10225, 1-10238, 1-10239, 1-10240, 1-10241 and 1-10482 stating that these water rights should not exist. See *Ground Water*

5 Water right no. 1-17 does not appear on Attachment 1 to the SWC Second Motion and therefore the Ground Water Districts understand that the only issue relating to that water right in the SWC Second Motion is the request relating to priority date.

Districts' Amended Motion for Summary Judgment and supporting documents thereto.

Other Conditions. Finally, the SWC seeks to dismiss the Ground Water Districts' request for a condition that the water right holder cannot make a delivery call on junior ground water users.

This Response will respond to each of the issues in order. First, the Ground Water Districts were not parties to the Eagle Decree or Foster Decree nor were ground water rights decreed or joined in those actions. Therefore, the SWC's arguments that raise *res judicata* as a bar against the Ground Water Districts are without merit. There is simply no doubt that the claims at issue in this case are flood water rights and should be decreed as such. There is also no doubt that the season of use has been recommended by the Department in error and that a shorter season is all that is justified for these water right claims. Finally, a condition that clearly states that these flood water rights cannot make a delivery call on junior ground water rights correctly captures how these water right claims were intended to be administered.

ARGUMENT

The burden is on the SWC to prove that there is no genuine issue of fact regarding their water right claims in order for them to succeed on summary judgment. The SWC depends on the fact that the elements were decreed in prior decrees to show that there is no dispute of fact, but that is not enough. In fact, there is no dispute of fact regarding the flood nature of the SWC water rights.

For reasons unknown to the Ground Water Districts, the Director's recommendations for the SWC water rights do not contain all the necessary conditions to accurately define them as flood water rights and to provide sufficient administrative guidance to the Department in the

event there is a dispute between the SWC and junior water users. In addition, the Director's recommendations regarding the season of use element is plainly in error and not based on fact.

I. The Ground Water Districts are not precluded from requesting that clarifying remarks be added to the source element on the water rights that were decreed in the Eagle Decree.

The SWC on pages 6 through 14 of the *SWC Memo* argues that the doctrine of *res judicata* bars re-litigation of the elements previously decreed in the Eagle Decree. However, the SWC is missing the main point raised by the Objections filed by the Ground Water Districts. The Ground Water Districts' Objections do not seek to change the elements as set forth in the SWC's water right claims, rather, the Ground Water Districts in their objections seek conditions that accurately decree the true and intended nature of these water rights as being flood water rights. This condition is required because 1) the Eagle Decree itself was based on the undisputed fact that these water rights were indeed flood water rights; 2) the historical beneficial use under these water rights show that they were never available during the entire irrigation season and were intended to be administered as flood water rights; and 3) because these conditions are "necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director" in accordance with Idaho Code § 42-1411(2)(j).⁶

The doctrine of *res judicata* is simply not applicable in this case because the Objectors were not parties to the prior litigation giving rise to the prior decrees and simply request that the SRBA recognize the actual nature of the water rights as intended by the Eagle Decree and set

⁶ The Ground Water Districts' objections specifically request a condition on the source, quantity, period of year, or other condition that identifies the source as a "flood right" available only during high flow periods. Such a condition is necessary as a matter of law as demonstrated in the Ground Water Districts' *Amended Motion for Summary Judgment* filed June 25, 2009 and supporting documents and Mud Lake Water Users, Inc. ("MLWU") *Motion for Summary Judgment* filed June 24, 2009 and supporting documents.

forth clearly in the Stipulation of those parties. The SWC's argument that the Objectors and the SRBA Court are precluded from clarifying elements or adding additional remarks to previously decreed water rights is simply unsupported by the facts and the law. Therefore the SWC's motion for summary judgment must be denied. However, to the extent the Court believes that *res judicata* does apply, the Ground Water Districts offer the following argument in addition to the arguments made by MLWU in its *Response to Claimants Second Joint Motion for Summary Judgment* and *Pocatello's Response to Claimants Second Joint Motion for Summary Judgment*.

A. The Ground Water Districts are not barred by the Doctrine of *Res Judicata*

The SWC argues that the objections must be dismissed under the theory of *res judicata* because (1) the Objectors were a party to the Stipulation in the Eagle Decree; (2) the Objectors had notice of the pendency of the Eagle Decree Adjudication but failed to object or intervene; or (3) because the Objections have taken their water rights subsequent to the issuance of the Eagle Decree and therefore any water rights are subject to the rights as set forth in the Eagle Decree. *Surface Water Coalition Memorandum in Support of Second Joint Summary Judgment Motion* ("SWC Memo") at 2.

1) Ground Water Districts were not parties to the Stipulation or prior decrees

The first argument raised by the SWC does not apply to the Ground Water Districts or ground water users as they were not parties to the Stipulation or prior decrees. Therefore, this Response will not directly address that argument.

2) The Eagle and Foster Decrees were private decrees and could not bind non-parties or future water right holders.

The Eagle and Foster Decrees do not preclude the Court from examining the issues raised by the objections because 1) these decrees are private decrees and 2) the statutes in existence at

the time did not provide that such decrees would bind future water users.

In the context of water rights, only a decree arising from an *in rem* general adjudication can bind all water users, including future water users. “Except for that limited class of actions which are strictly *in rem*, a decree is not, and cannot be made, conclusive, as to parties who are strangers to it The contention that one’s rights can be affected by a decree to which he is a stranger is repugnant to the fundamental principle of our jurisprudence that no one will be judged until he has had a hearing.” *Mays v. District Court*, 34 Idaho 200, 207 (1921). In *Higginson v. U.S.*, 128 Idaho 246 (1995), the Idaho Supreme Court indicated that prior to the SRBA, there was no practical way under Idaho law to initiate an *in rem* general adjudication:

When the SRBA was authorized by statute in 1986, no reasonable method of initiating the proceeding, providing notice to potential claimants, examining the Snake River Basin or preparing a report of that system, or means of objecting to that report or claimed water rights within that system was provided by the existing Rules of Civil Procedure. In order for the Legislature to provide for adjudication, including the claims within the scope of the McCarran Amendment, and in light of the absence of applicable Rules of Civil Procedure, it was necessary for the Legislature to provide special procedural rules for the initiation of the SRBA.

Id. at 255.

Thus, neither the Eagle Decree nor the Foster Decree meet the standards for an *in rem* general adjudication and thus, they are private adjudications. Hence, these decrees do not foreclose the Ground Water District from objecting to the water right claims in the SRBA that are based on prior decrees.⁷ Furthermore, in the context of the SRBA and the effect of prior decrees on the adjudication of the Snake River, the Supreme Court in *State v. Hagerman Water*

⁷ See also *In Re SRBA*, Special Master Report, Subcase 43-10356 (William D. Jones and Son) dated March 2, 2004 parties that are not parties to a prior decree are not precluded from “attacking and potentially setting aside [items] in [prior decrees]” at fn. 13, p. 11.

Right Owners, 130 Idaho 736 (1997) held that prior decrees in private adjudications are only binding on the parties and are not conclusive proof of the nature and extent of current water use. *Id.* at 413. In addition, the Idaho Supreme Court has repeatedly recognized that water right adjudications (occurring before the SRBA) are not binding on persons that are not parties to that adjudication. The rule that a decree binds all parties “does not apply to judgments in proceedings *quasi in rem* like suits to quiet title or to adjudicate water rights.” *Albion-Idaho Land Co., v. Naf Irr. Co.*, 97 F.2d 439, 444 (Idaho 1938).

Although the SWC argues that because notice was published by the Court at the time of the Eagle Decree (and presumably the Foster Decree) that means that all water users, including ground water users are bound to the decreed terms, this argument is entirely without merit.⁸ The SWC confuses notice under former Idaho Code § 42-1405 with today’s current general adjudication statute, Idaho Code § 42-1406. While it is true that the Supreme Court in *LU Ranching Co. v. United States*, 138 Idaho 606 (2003) upheld the notice given in the SRBA, that case is entirely inapplicable to the process used by the Court at the time of the Eagle and Foster Decrees. First, the LU Ranching case is a case arising from the SRBA. Second, the statutes upon which the SRBA is based did not exist in the same form prior to the commencement of the SRBA and therefore the fact that the notice was sufficient in LU Ranching is entirely irrelevant with regard to the notice that may have been required at the time the SWC water rights were decreed. Third, as discussed above, there was no process to initiate an *in rem* general adjudication prior to the SRBA; notice alone is not sufficient. *Higginson* at 255. Fourth, for

⁸ The SWC cite the case *Safeco Ins. Co. v. Yon*, 118 Idaho 367 (1990) in support of the statement that a party need not actually litigate to be bound by a prior court decision. However, as noted by the Supreme Court in *Yon*, the decision in that case was limited to the facts of that case which involved whether a guilty verdict in a criminal case could bind a civil action: “in this limited context, we conclude that this relationship is sufficient to constitute ‘privity’ for the purposes of collateral estoppel.” *Yon* at 371.

reasons discussed below, the Eagle and Foster Decrees were subject to review in subsequent judicial proceedings.

3) Idaho statutes at the time of the Eagle and Foster Decrees limited the decrees' application to non-parties and further water users

The statutes under which the Eagle Decree and the Foster Decree were specifically limited and allowed review in further judicial proceedings. The Eagle Decree (and Foster Decree) were entered pursuant to Idaho Code § 42-1405 which was subsequently amended and redesignated as Idaho Code § 42-1424. At the time of the Eagle and Foster Decrees, the statute Idaho Code § 42-1405 stated that any water right entered in a decree pursuant to the statute “shall not be deemed adjudicated, but prima facie evidence merely, and may be attacked by suit... at any time by any person deeming himself aggrieved thereby.” (emphasis added), Exhibit B. to *Second Affidavit of Travis L. Thompson in Support of Joint Motions for Summary Judgment* (“Thompson Second Aff.”). Indeed, the Idaho Supreme Court held that this language, which was in place at the time of the Eagle and Foster Decrees in Idaho Code § 42-1405 (at the time codified at C.S. 7036) “makes a decree thereunder merely *prima facie* evidence, and subject to collateral attack.” *Union Central Life Ins. Co. v. Albrethsen*, 294 P. 842, 846 (Idaho 1930) (emphasis added). Therefore even when entered the Eagle and Foster Decrees did not constitute the final word.

4) The Idaho legislature has demonstrated that it does not intend prior decrees to bind all water rights holders who acquired subsequent water rights.

The Legislature and Idaho Supreme Court have made it clear that prior decrees do not create a presumption of validity, nor do they foreclose the Director or the SRBA Court from making necessary changes or clarifications to prior decreed water rights. Importantly, the Idaho

legislature has repealed provisions that afforded prior decrees such a presumption.

Former, Idaho Code § 42-1416(3) provided that “a prior decree adjudicating a tributary stream or sub-basin within the basin shall be presumed correct...” That provision was repealed in 1994 after the SRBA court found it unconstitutionally vague.⁹ Although the Legislature re-enacted certain provisions of Idaho Code § 1416, it did not re-enact the presumption of validity for prior decrees found in the prior version. Hence, the Legislature did not intend for prior decrees to have conclusive weight in the SRBA. And, as stated previously, the Idaho Supreme Court has held that a prior decree is not conclusive proof of a claimant's water right, and does not insulate the claim from re-examination by the SRBA Court. *State v. Hagerman Water Users* at 413-414.

5) Taking water rights subsequent to a prior decree does not preclude the Ground Water Districts from challenging the water rights in the SRBA

The final argument the SWC makes to contend that the Ground Water Users cannot challenge their water right claims in the SRBA is because the Ground Water Users took their water rights “subsequent” to the SWC’s water rights therefore, they are bound by the prior decrees. This is just another way to elevate the status of the prior decrees to be binding on all future water users contrary to clear Supreme Court precedent and legislative intent, and ignores the complexities and realities of the conjunctive management of ground water and surface water that has since developed requiring clear guidance in current decrees for administrative purposes. Absent appropriate remarks or conditions in the decrees as requested by the Ground Water Users for clarification and administrative purposes, the SWC’s water rights could be administered to

⁹ In Re SRBA, *Memorandum Decision and Order on Basin Wide Issue No. 1* dated February 4, 1994.

achieve a water right greater in quantity and certainty than ever existed when they were originally decreed. For the same reasons stated above, the Ground Water Districts' Objections, requesting that the previously licensed or decreed water rights contain conditions reflecting the fact that they are high flow claims is allowed in the SRBA.

In sum, the doctrine of *res judicata* does not bar the Ground Water Districts' objections because 1) the Eagle and Foster Decrees are a private adjudications and do not bind future water users; 2) the Ground Water Districts did not even exist at the time of the Eagle and Foster Decrees and could not have been parties to the decrees; and 3) ground water rights were not mentioned nor decreed by the Eagle or Foster Decrees and thus the issue of how the water rights should be decreed as they relate to ground water rights was not even contemplated, let alone actually litigated in any of the prior decrees or licensed water rights.

B. The Facts Support the Ground Water Districts' Objections that the Source, Season of Use and/or Other Remarks are Necessary on the SWC's Water Rights

- 1) Water right nos. 1-4, 1-6, 1-7, 1-8, 1-9, 1-10, 1-13, and 1-14 were actually recognized in the Eagle Decree as "flood water rights."

Importantly, for the water rights decreed in the Eagle Decree, the Objections seek to simply reflect the intended decreed nature of the water rights. The Eagle Decree itself was a "flood water right decree." The *Stipulation and Findings of Fact* entered in Eagle Decree which are Exhibits D and E to the *Affidavit of Candice M. McHugh in Support of Summary Judgment* dated August 22, 2008 ("McHugh Aff.") specifically identifies the water rights to be decreed in the Eagle Decree as "'Flood Water Rights,' being those waters of the river which are only available during periods of high flow." McHugh Aff., Ex. D at 3, Ex. E at 3; see also Ground Water Districts' *Memorandum in Support of Motion for Summary Judgment* dated August 22,

2008 at 12-13. Identifying the decreed nature of these water rights as “flood water rights” is further supported by the *Motion for Summary Judgment* submitted by MLWU and the *MLWU Memorandum in Support of Motion for Summary Judgment* (“*MLWU Memo*”) and *Affidavit of Robert L. Harris in Support of Motion for Summary Judgment* (“*Harris Aff.*”) and Exhibits 1-36 thereto. The Eagle Decree cannot be divorced from the Stipulation upon which it was entered nor can the nature of the decree itself be undone simply because the word “flood” does not appear in the description of the water rights in the decree itself.

Further, given the established, undisputed facts surrounding the nature of the Eagle Decree, any water right with priority dates junior to the priority dates of those contained in the Eagle Decree would also likewise be considered flood water rights. Likewise, water right nos. 1-2050 and 1-2061 that were licensed with priority dates ranging from 1956 to 1968 are post-1939 and would similarly be considered high flow or flood water rights in that water is seldom available to supply them at all and only then for short duration

2) Water rights with priority dates of 1916 and junior have always been considered flood water rights.

Historically, water rights on the Snake River with 1916 priority dates and junior were also considered flood water rights. Former Water District 36 (now Water District 1) Watermaster, Henry C. Eagle recognized that water rights with 1916 priority dates and junior were “floodwater” rights and said as much in his work, *Development of Snake River Irrigation*:

The year of 1905 was the first year the Snake River canals experienced any water shortage of consequence. During the late summer of that year Snake River was dry for a distance of about 10 miles in the vicinity of Blackfoot. At that time the lower users in the vicinity of Blackfoot endeavored, without much success, to get the canals further upstream to turn down some water. A serious shortage was also experienced on Teton River in the same year. As a consequence a suit was started soon after to adjudicate the water rights on Snake River and tributaries above

Blackfoot. This culminated in the so-called Rexburg decree in 1910 covering water rights in the upper valley. The Foster Decree adjudicating lower valley rights handed down in 1913. In later years many of the canals increased their diverting capacity and in the so-called Woodville Decree of 1929 additional floodwater rights of 1916 priority were awarded by stipulation to these canals. (emphasis added)

McHugh Second Aff. Ex. J

The understanding that water rights with 1916 priority dates were flood water rights is further confirmed in the watermaster minutes from the annual meeting of Water District No. 36 where reference is made to the “1916 ‘floodwater’ rights”. McHugh Second Aff. Ex. K and Ex. L. This understanding has continued into modern times as well. The deposition transcript cited by the SWC for Mr. Olenichak further bolsters the fact that at least water rights with a 1916 priority date and junior are high water or flood water rights. Mr. Olenichak stated that “I think from most water users I talk to, generally 1916 is a high-water right.” *Olenichak Depo.* p. 70, L. 12-12; *SWC Memo* at 22. “I would not consider – generally, 1916 is where I draw the line for a high-water right.” *Olenichak Depo.* p. 71, L. 18-19; *SWC Memo* at 23. While the SWC argues on pages 19-24 of the *SWC Memo* that somehow Mr. Carlson and Mr. Olenichak contradict the fact that water rights with priority dates of 1916 and junior are not considered “high flow” or “flood” water rights, quite the opposite is true. Mr. Olenichak’s testimony confirms this fact and Mr. Carlson’s testimony appears to only discuss pre-1916 water rights when he says there may be some water available to divert under a 1903 water right late in the year when the river was “off regulation.” *SWC Memo.* at 19-20.

- 3) **Water District 01 delivery records show that water rights junior to 1900, but senior to 1915 have not been diverted for an entire irrigation season or at the very least, there is a genuine issue of material fact regarding those water rights**

In addition, there is no dispute that the water delivered below Blackfoot in Water District 1 cuts back to an October 11, 1900 priority date sometime in June or early July of most years. *Affidavit of Anthony Olenichak in Support of Motion for Summary Judgment* at 2; *Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment* at 5. This is true because TFCC and NSCC's water rights (1-209 and 1-210) that total 3,400 cfs command the entire flow of the Snake River below Blackfoot. Exhibit P to McHugh Second Aff. Testimony of Karl Dreher, SWC Delivery Call (Tr. p. 372; L. 8-18).

C. Current statutes require that the SRBA partial decree contain conditions that are necessary to clarify an element of the water right or are needed for the administration of the water right.

The SRBA Court is governed by statutes relating to general adjudications which are found in Idaho Code Title 42, Chapter 14. As the Supreme Court noted in the *Hagerman* case nowhere in Title 42 is the Director (or the SRBA Court) obligated to accept a prior decree issued in a private adjudication. (Id. at 414) Quite the opposite is true. The SRBA Court is obligated to base its decrees on facts as they existed at the time the SRBA was commenced. See, I.C. § 42-1427. In other words, just because a claimant makes a claim for a water right, based on a prior decree, the Director must still make a recommendation to the SRBA Court and that recommendation must comport with his findings.

- 1) **The decrees in the SRBA must be based on the historic extent of beneficial use and not enlarge the use of previously decreed water rights.**

The Legislature recognized that there may be a need in the SRBA to bring previously licensed or decreed water rights “current.” This is evidenced by many of the statutes contained in Idaho Code Title 42, Chapter 14;

For example, Idaho Code § 41-1411 sets forth all the elements that the Director must recommend (regardless of whether all of the elements were contained in prior decrees), including

(i) conditions on the exercise of the water right included in any decree, license, or approved transfer application; and

(j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, for administration of the right by the director. (emphasis added)

Furthermore, Idaho Code § 42-1425, which deals with “accomplished transfers” specifically recognizes and permits certain elements that may have changed from prior decrees. Similarly, Idaho Code § 42-1426, deals with “enlargements”, and allows enlarged or expanded acres developed since a prior decree. Yet another example is Idaho Code § 42-1427, commonly referred to as the “ambiguous” decree statute, which gives the Director (and the SRBA Court) authority to decree water rights in the SRBA in a uniform fashion in order to aid in administration and to include undefined elements of previously licensed or decreed water rights. The driving force behind this statute is that the Director shall make his recommendation “based upon the extent of beneficial use of the water right.” Id. Idaho Code § 42-1427 clearly sets forth that a claimant cannot attempt to exceed any previously determined and recorded element of the decreed or licensed water right merely because one or more elements of the water right are ambiguous, nor does this section provide for an enlargement of an existing water right. *Fremont-*

Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996).

The SRBA Court is expected to decree water rights in the SRBA that “determine the nature and extent of the water right[s].” Idaho Code § 42-1412. Certainly the SRBA Court is not simply a “rubberstamp” to the Director’s recommendations.

To establish a water right, the appropriator must divert the water and apply it to a beneficial use. *See* Idaho Const. art XV, § 3; *see also* Idaho Code §42-104; *Morgan v. Udy*, 58 Idaho 670, 680 (1938) (application to beneficial use is an essential prerequisite to a decree awarding water right.) An appropriator is only entitled “to such water from year to year as he puts to a beneficial use.” *Conant v. Jones*, 3 Idaho 606, 613 (1893). The SWC cites *Board of Directors v. Jorgensen*, 64 Idaho 538 (1943) and quotes “an appropriator does have, after diversion and application to a beneficial use, a constitutional right to the continuation of the source of his supply as it physically existed at the time his appropriation was made.” (emphasis added). However, the SWC ignores this requirement and wants the SRBA Court to decree an amount that exceeds the amount that existed at the time of the appropriation by ignoring the flood nature of the water rights. In this case, the SWC is essentially arguing that the SRBA confirm the fact that they can demand that their water rights be supplied for the entire irrigation season although this is contrary to the uncontroverted evidence which shows that they have never diverted the water under their water rights for an entire irrigation season,¹⁰ and although the water rights in the Eagle Decree state they were at the time of the decree only available “during

¹⁰ See *Olenichak Aff.* and *Carlson Aff.*

periods of high flow,”¹¹ and even though the historic administration and treatment of their water rights were as flood water rights.¹² By so doing, the SWC in effect is trying to wrongfully enhance the quantity of water available under their water rights and then position themselves to call out and demand mitigation from ground water users to provide a supply during times of the irrigation season it had never historically has been available. The Court should see clearly through these thinly veiled strategies.

When a claimant (or an Objector as in this case) is able to produce evidence of beneficial use that establishes the parameters of a previously undetermined element of a water right, then that evidence should drive the Court’s decision as to that element. In fact, a water right, confirmed by a prior decree, can be altered or lost, if the Claimant cannot show that the amount “awarded to him has been actually diverted [and] that it was applied to a beneficial use” and if the “evidence utterly fails to disclose the amount of water ever at any time diverted and the amount required for the beneficial use to which it was put.” *Graham v. Leek*, 65 Idaho 279, 298-299 (1943). In this case, there is no doubt that the water rights are flood water rights and not available for the entire irrigation season.

2) The recommended “Standard Season of Use” of 3/15 to 11/15 is incorrect and should end in late June or early July

The SWC argues on pg. 16 of the *SWC Memo* that because IDWR recommended the season of use for the SWC’s water rights using its “standard ‘3/15 to 11/15’ season” under Adjudication Memo #39, that the Objectors and the SRBA Court are precluded from determining

¹¹ McHugh Aff., Ex. D and E.

¹² Id. and Second McHugh Aff Ex. J-K.

any other season of use for their water rights. This argument is entirely without merit. Interestingly, Memo #39 does not clearly show a “standard season” for Basin 01.

The IDWR’s “process” upon which the SWC so heavily rely, recognizes that a different season of use, other than the standard season of use, may be warranted in some circumstances. Exhibit C to Thompson Second Aff. suggests the standard season may be changed, if it can be shown that “a different season is necessary.” Further, even if there is a decreed season in a prior adjudication, IDWR still looks at the decreed season to see if it is “reasonably supportable.” Second McHugh Aff. Ex. M at Chapter 7. (*Claim Investigation Handbook* “IDWR will recommend the decreed season of use from private adjudications, so long as the decreed season is reasonably supportable.”); see also *Graham v. Leek* at 298-99. Finally, IDWR’s recommendation on season of use is not solely driven by the “standard” season; as pointed out in a companion memo dated December 18, 1998, to IDWR Memo #39, customized seasons of use are allowed and recognizes that “the actual water rights, however, may not be accurately described by the uniform parameters. In Idaho, water rights are determined by the extent of historical beneficial use” Second McHugh Aff., Ex. N. In this case, there is no decreed season at all so it stands to reason that the period of year recommended and decreed in the SRBA should at least be “reasonably supportable” and be based on the extent of historical beneficial use and not just default to the full standard irrigation season when the facts show that the water rights were never used and developed for the entire season.

Idaho Code § 42-1411 requires the Director to prepare a Director’s Report with specific elements of a water right including “the period of the year when water is used for such purposes.” Idaho Code § 42-1411 (2)(g). While the Department’s standard procedure is to

recommend a full season of use pursuant to its irrigation season of use map, when the facts show that the water rights have never been historically used during that period of time, then, the season of use should be changed. By way of example, Ex. O to Second McHugh Aff. shows a partial decree with a shortened season ending June 30.

The SWC makes the argument that because the Ground Water Districts' Objections request a season of use that ends in "late June or early July", that the Objections must be dismissed and the Court enter a partial decree with the standard season recommended by IDWR. The parameters that govern the beginning and end date must be determined based on when the water has actually been available, diverted and used. The Court is free to determine, as a matter of law, that the Director's Report, recommended season, which is the full irrigation season from 3/15 to 11/15 is incorrect and can provide that the end date for these water rights should be a date certain at the end of June or in early July or can request that IDWR provide an amended season based on administrative facts and the historic use under the water rights.

The Ground Water Districts' objection is not requesting the SRBA Court to simply leave an open-ended irrigation season, but is asking the Court to determine, based upon the undisputed facts in the record, that the recommended the season of use is wrong and that the end date for the season of use under these water rights must be at the end of June or in early July. Furthermore, much of this disagreement can be rendered moot if the Court adds appropriate remarks and conditions that clearly establish that the rights are flood water rights only available during such times for limited periods. See *Amended Motion for Summary Judgment* and supporting documents thereto.

D. Priority Dates

There is no pending objection to the priority date element of water rights 1-4, 1-5, 1-6, 1-16, 1-17, 1-209, 1-210, 1-211A, 1-211B, 1-212, 1-213, 1-214A, 1-214B, 1-219, 1-2050 and 1-2061. Yet, that is not to say that a determination of the priority date on these water rights may not be affected by a condition or remark necessary for administrative purposes contained under other elements.

There are objections pending that state the water right should not exist for water right nos. 01-10225, 1-10238, 1-10239, 1-10240, 1-10241 and 1-10482 which would include an objection to priority date. See *Ground Water Districts' Amended Motion for Summary Judgment* and supporting documents thereto. In sum, these rights should not exist because the undisputed facts clearly demonstrate they have never received any water

The Ground Water Districts' response to the SWC argument regarding the 1939 priority dates incorporates the argument and documents filed the *Ground Water Districts' Motion for Summary Judgment on Priority Date* dated June 25, 2009 the for water right nos. 1-7, 1-8, 1-9 and 1-14 along with supporting documents.¹³

E. Subordination Language

The SWC argues there is no legal basis to include in their partial decrees a remark that defines the administrative effect of the flood water designation given the SWC's post-1900 water rights. SWC Second Motion at 24-25. Their argument is predicated on the false proposition that the floodwater designation has no meaning at all. Further, it ignores the Court's statutory

¹³ The Ground Water Districts' are no longer objectors to NSCC's water rights but there are other Objectors to NSCC's water rights and the objections may relate to the priority date or other elements of NSCC water rights.

authority to decree “such remarks and other matters as are necessary for definition of the right ... or for administration of the right by the director.” Idaho Code 42-1411(2)(j).

The parties in fact agreed in their Stipulation leading to the Eagle Decree and the Court found in its Findings of Fact that the SWC water rights were flood water for good reason. These parties specifically recognized the limited timing and availability of those rights and deemed it necessary to expressly identify them as flood water rights in their Stipulation.

The purpose of the condition requested by the Ground Water Districts that “this water right is not entitled to make a delivery call against junior priority ground water rights” is to define the meaning of the flood water designation for administrative purposes. The truth is that the SWC’s flood water rights have never been available at all times during all irrigation seasons and in fact have never been used to seek curtailment of junior water rights since their sole source supply has always been flood flows.

The condition requested by the Ground Water Districts is necessary to clarify that the SWC’s floodwater rights are supplied entirely by high spring runoff (not Snake River base flows). As such, these rights should not be administered in a fashion that would entitle them to make a delivery call for base flow or to make a delivery call at times when water has never been available to fill these rights. For additional argument on this point, see the Ground Water Districts’ Response to Claimants’ Motion for Summary Judgment dated July 29, 2009.

By reason of depletions to base river flows impacted by groundwater pumping, the Ground Water Districts in response to SWC delivery calls have implemented Department approved mitigation plans that rely upon the purchase and delivery of storage water to certain SWC to make up for seasonal shortages in dry years which has mitigated for injury caused by

groundwater pumping. In this proceeding the SWC is now attempting to improve the historic quantity and certainty of water available under these flood water rights to demand an even greater supply of mitigation water from the Ground Water Districts' members.

There is no need to omit the flood water designation from the definition of the SWC's water rights. The SWC argues that the issue should be left up to the Director to address in response to a delivery call, so they can then argue that the Director is precluded from looking beyond the decree to historic delivery practices, arguments they continue to make in their pending court appeals of the Director's orders responding to their delivery calls. SWC Second Motion at 25. If the partial decrees are silent on the issue, the SWC will certainly then argue, as they already have in other delivery call proceedings, that the Director has no authority to consider the administrative effect of the flood water designation because that would result in a "re-adjudication" of their water rights. Further, it is a waste of time and resources to leave the issue for a later day when it can be concluded in this proceeding.

Hopefully, the Court recognizes the SWC's request for what it is—an attempt to improve their post-1900 water rights by shedding the flood water designation. Instead, the Court should include a condition that these are flood water rights and should provide that the water rights are "not entitled to make a delivery call against junior priority ground water rights" which will provide necessary instruction and guidance to the Director and all parties to the adjudication on how these water rights should be administered going forward.

F. MLWU's Motion for Summary Judgment is Consistent with the Ground Water Districts' Motions for Summary Judgment and Should Be Granted.

MLWU's file a Motion for Summary Judgment seeking that the court decree the water rights listed on Attachment A to their motion be decreed to recognize their "flood nature." The

Ground Water Districts support MLWU's motion and believe it should be granted.

CONCLUSION

For the foregoing reasons, the SWC Second Motion should be denied.

DATED this 29th day of July, 2009.

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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