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DEPARTMENT OF
WATER RESOURCES

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 Nos. 1-7, 1-8, 1-9, 1-14
)

) **CLAIMANTS' JOINT RESPONSE**
) **TO GROUND WATER**
) **DISTRICTS' MOTION FOR**
) **SUMMARY JUDGMENT ON**
) **PRIORITY DATES**
)

COME NOW, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, and Minidoka Irrigation District, Claimants in the above-referenced subcases (hereinafter collectively referred to as "Claimants" or "SWC"), by and through counsel of record, and hereby respond to the motion for summary judgment filed by the Ground Water

Districts¹ on June 25, 2009 regarding the “priority date” element for the above referenced subcases (hereinafter “*GWD Priority Motion*”). This response is supplemented by the Claimants’ joint motions for summary judgment and the accompanying materials in support of those motions filed with the Court on August 22, 2008 and June 25, 2009 respectively, and the Claimants’ *Response to Ground Water Districts’ August 22, 2008 Motion for Summary Judgment* which are incorporated by reference as if set forth in full herein. This response is further supported by the *Third Affidavit of Travis L. Thompson*, the *Affidavit of David B. Shaw*, and the *Affidavit of Norman C. Young* filed together herewith.

STATEMENT OF FACTS

GWD offers a “Statement of Undisputed Facts” in its *Memorandum in Support of Motion for Summary Judgment* (hereinafter “*GWD Priority Memo*”) at pages 4-5. SWC responds to those statements of fact as follows (by number as listed in the *GWD First Memo*):

1. No Dispute.
2. No Dispute. The April 1, 1939 priority date was also the subject of the *Eagle Decree*, a final judgment entered by the Twin Falls County District Court, Judge Theron Ward presiding, on July 10, 1968.
3. No Dispute. The cited provisions of the decree speak for themselves.
4. No Dispute. The April 1, 1939 priority date was defined by the *Eagle Decree*.
5. **Dispute.** The evidence referenced is not the only information concerning the delivery records for these rights, since the graphs only extend back to 1955. *See Shaw Aff., Young Aff.*
6. **Dispute.** *See Shaw Aff., Young Aff.*
7. **Dispute.** *See Shaw Aff., Young Aff.*
8. **Dispute.** *See Shaw Aff., Young Aff.*

¹ Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey-Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

9. No Dispute.

STANDARD OF REVIEW

Summary judgment is appropriate if the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497 (2005). Where the action is to be tried before the court, the judge need not draw inferences in favor of the nonmoving party, but is then free to arrive at the most probable inferences based on the uncontroverted evidence. *Id.* If there are no material facts in dispute, the court may enter judgment in favor of the party who is entitled to prevail as a matter of law. *Barlow’s Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310 (Ct. App. 1982).

ARGUMENT

In its *Priority Motion*, GWD attacks the priority date for four of the SWC water rights (1-7, 1-8, 1-9, and 1-14) previously decreed in the *Eagle Decree* proceeding. However, rather than asking this Court to change the priority date element, which was previously adjudicated in a final court judgment, GWD requests a clarifying remark. GWD claims that because the entities did not use their rights on April 1, 1939, a clarifying remark is needed “to facilitate administration of these rights”. *GWD Priority Memo* at 2. GWD further asserts that the Director’s recommendations for these rights, based on the *Eagle Decree*, are inconsistent with Idaho law. GWD’s motion fails for three reasons.

First, the priority date element was established by a prior decree, a court judgment that cannot be collaterally attacked here in the SRBA. Any junior ground water users with water rights prior to July 10, 1968 were provided with notice and an opportunity to object to the SWC water rights’ priority dates. None did. Any junior water rights holders (surface or ground) who

obtained their rights after July 10, 1968 took their rights “subject to all prior rights”. Hence, GWD cannot challenge the priority element of these previously decreed water rights.

Next, Idaho law provides that elements defined by prior decrees should be accepted by the Director for purposes of the SRBA, particularly when the Watermaster is bound by the prior decree. Since the Water District 01 Watermaster was a party to the *Eagle Decree*, he is bound by the priority dates adjudicated and is required to distribute water in accordance with those terms.

In addition, for water rights 1-7, 1-8, and 1-9, water was diverted and used prior to April 1, 1939, contrary to GWD’s claims. *See Shaw Aff., Young Aff.* Accordingly, the facts do not support GWD’s theory about when water was first diverted and used.

Finally, the SWC water rights have been administered in Water District 01 with an April 1, 1939 priority date for over 40 years. Further, the water rights have been administered conjunctively vis-à-vis junior priority ground water rights for the last 5 years. In the SWC Delivery Call case, GWD disputed the SWC water rights (which by implication included the priority date) for purposes of conjunctive administration in the SWC Delivery Call case. The Director accepted the call on the SWC 1939 water rights, GWD’s defense was rejected, and GWD failed to appeal the Director’s decision. Consequently, GWD’s present effort to re-define the priority element for these four water rights through the SRBA should fail.

I. GWD Cannot Collaterally Attack the Priority Dates of the SWC’s Previously Decreed Water Rights.

In support of its dispute with the April 1, 1939 priority date, GWD analogizes the four SWC water rights to “beneficial use” claims. *GWD Priority Memo* at 10. GWD alleges the water rights “were not diverted for beneficial uses on or before the claimed priority date”. *Id.* Contrary to GWD’s argument, the four SWC water rights are not similar to “beneficial use” claims since they were previously decreed. Although GWD argues that a water right can only be

established through either the statutory or constitutional method, GWD ignores the fact that these rights have been confirmed by a final district court judgment.

The Twin Falls County District Court, Judge Theron Ward presiding, decreed the priority dates for the SWC water rights in the *Eagle Decree* on July 10, 1968. *See Ex. A Thompson Aff.* The April 1, 1939 priority date was decreed to ensure that the storage of water in Palisades Reservoir (under a July 28, 1939 priority date, water right 1-2068) would not interfere with the diversion and use of water under these and other SWC natural flow water rights.² In addition, since the execution of the Palisades contracts between the parties and the U.S. Bureau of Reclamation, the “operation of the dams, diversion and distribution works of the parties [and BOR] has conformed to the general scheme or plan set out herein and has recognized the priorities set out herein.” *Findings of Fact* at 5, ¶ k; *McHugh Aff. Ex. D.* The Court confirmed the priority dates as a complement to the “plan for the administration of the Snake River” set out in the contracts. *Id.* at 11.

The *Eagle Decree*, a final judgment from the Twin Falls County District Court, cannot be collaterally attacked in the SRBA. *See Harkness v. Utah Power & Light Co.*, 49 Idaho 756, 291 P. 1051, 1053 (1930) (“Judgments and decrees of a court of record can be collaterally attacked only for fraud or lack of jurisdiction . . .”). The Director’s Report properly recommended an April 1, 1939 priority date for these water rights based upon the *Eagle Decree*.

Moreover, the *Eagle Decree* proceeding was not a “private adjudication” like the proceeding at issue *State v. Hagerman Water Right Owners*, 130 Idaho 736, 741 (1997), since it

² The Twin Falls County District Court, along with the Fremont County District Court (*Aberdeen-Springfield Canal Co. et al. v. Eagle*, Case No. 6117) decreed 63 water rights to individuals, canal companies, and irrigation districts with an April 1, 1939 priority date. Consequently, the four rights at issue in GWD’s motion are not the only rights decreed with the priority date that GWD disputes.

was a general supplemental adjudication noticed up for objection in 9 different counties.³ *See* Ex. A *Second Thompson Aff.* Further, the Water District 01 Watermaster, Henry Eagle, was joined as a defendant, binding the district to distribute water pursuant to the decreed priorities. Given the published notice procedures that were followed for the *Eagle Decree*, the SWC water rights were acquired in a manner similar to a new water right permit. Just as IDWR publishes notice of new application for permit pursuant to Idaho Code § 42-203A, the SWC water rights were similarly noticed for objection by any affected parties in 1967. *See* Ex. A *Second Thompson Aff.* The notice specifically advised the following:

This cause will be brought on for hearing in open court at 2:00 o'clock p.m. on the 20th day of March, 1967, at which time any party interested may appear and defend against said rights as above set out.

Id.

No ground water right holders objected to the April 1, 1939 priority date at that time. Consequently, IDWR and any affected persons were provided with due process and the opportunity to make their case heard if they disputed the April 1, 1939 priority date. Therefore, GWD's reliance upon *Hagerman Water Right Owners* is misplaced in arguing that the Director erred in recommending the previously decreed priority date for the SWC water rights. *GWD Priority Memo* at 7.

In addition, GWD's own witness agrees with the April 1, 1939 priority date. At his deposition, Ron Carlson (former watermaster) testified as follows:

Q. [BY MR. FLETCHER]: Did you have any problem with the recommended priority date for that water right, April 1 of 1939?

A. [BY MR. CARLSON]: My recollection is that that comes from a previous decree. So I don't have any objection to the priority date.

³ The companion case in Fremont County District Court (Case No. 6117) was also published in 6 different counties (Fremont, Madison, Teton, Bonneville, Jefferson, and Bingham). *See* Ex. N to *Third Thompson Aff.*

* * *

Q. Once that's decreed, what's your position concerning the priority date?

A. I have no position. I believe the priority date's valid.

Carlson Depo. Tr., p. 80, Ins. 20-25, p. 81, Ins. 12-15. Ex. C to *Third Thompson Aff.*

Finally, GWD argues that the April 1, 1939 priority date is in error because SWC cannot rely on the "Eagle Decree stipulation alone to support a priority date". *GWD Priority Memo* at 11-12. SWC, in their *Notices of Claim*, relied upon the *Eagle Decree*, just as the Director did in filing his Director's Report with the SRBA Court. *See* Ex. O to *Third Thompson Aff.* Hence, it is not just the "stipulation" that provides a basis for the priority date, but also a final judgment from the Twin Falls County District Court. Accordingly, GWD's allegation that the recommended priority date arises solely from a private "stipulation" is wrong.

Since the April 1, 1939 priority date for the four SWC water rights (1-7, 1-8, 1-9, and 1-14) were defined by prior decree, GWD cannot collaterally attack that element. *See also*, SWC's *Memorandum in Support of Second Joint Motion for Summary Judgment* at 6-15.

III. No Remark is Necessary for Administration of the SWC Rights.

GWD alleges a clarifying remark is necessary to "facilitate lawful administration" of the SWC water rights as if it was somehow "illegal" to recognize a previously decreed priority date. *GWD Priority Memo* at 12. GWD fails to mention that the four SWC water rights, along with the other 59 water rights decreed in the two *Eagle Decree* cases (Twin Falls and Fremont Counties) have been administered with the April 1, 1939 priority date for over 40 years in Water District 01. In support of its claim that a "remark" is necessary for administration of the SWC water rights only, GWD theorizes that the *Eagle Decree* did not definitively establish a "fundamental element of a right, the date of first beneficial use". *GWD Priority Memo* at 12.

Contrary to the statutory elements set forth in Idaho Code § 42-1411(2), GWD creates a new “element” for purposes of its argument, “the date of first beneficial use”. Since the “date of first beneficial use” is not one of the elements the Director is required to determine in Idaho Code § 42-1411(2), GWD’s argument fails. *See also, Order on Challenge (Consolidated Issues) of “Facility Volume” and “Additional Evidence” Issue* at 30 (Subcase Nos. 36-02708 et al., 12/29/1999) (“The court cannot limit ‘the extent of beneficial use of the water right’ in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right.”).

In addition, no clarifying remark is needed for purposes of administration. The April 1, 1939 priority date is unambiguous and has been recommended by IDWR based upon a prior decree. The priority date has been used for purposes of surface water right administration in Water District 01 for over 40 years. Current Water District 01 staff and GWD’s own witness (a former watermaster) have testified that water has been delivered by that priority and that the 1939 priority date is valid. At his deposition, Mr. Tony Olenichak testified as follows:

Q. [BY MR. FLETCHER]: . . . Do you agree with the ground water district’s assertion in this case that some kind of notation needs to be made on these water rights?

A. [BY MR. OLENICHAK]: No.

Q. Why doesn’t that need to happen?

A. When Water District 1 calculates the amount of natural flow each day, we deliver that based on priority date. There’s no distinction between what is high water, whether it’s computed from spring water, from snowmelt. We simply deliver according to the priorities and the amount of water in the river system each day.

Olenichak Depo. Tr. p. 75, ln. 15 – p. 76, ln. 2. Ex. D to *Third Thompson Aff.*

Ron Carlson, former watermaster and GWD's own witness, testified as follows:

Q. [BY MR. FLETCHER]: Did you have any problem with the recommended priority date for that water right, April 1 of 1939?

A. [BY MR. CARLSON]: My recollection is that that comes from a previous decree. So I don't have any objection to the priority date.

* * *

Q. Once that's decreed, what's your position concerning the priority date?

A. I have no position. I believe the priority date's valid.

Carlson Depo. Tr., p. 80, lns. 20-25, p. 81, lns. 12-15. Ex. C to *Third Thompson Aff.*

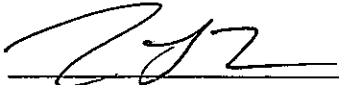
Furthermore, the Director accepted the April 1, 1939 priority date and the call made upon the four SWC water rights in the SWC Delivery Call Case for purposes of conjunctive administration. *See* Exs. G, L to *Third Thompson Aff.* Although GWD disputed SWC's water rights and raised several defenses to the call, the Director rejected those defenses. GWD did not appeal the final agency order. Consequently, both Water District 01 and IDWR have determined that no remark is needed for purposes of administration of the four SWC water rights. GWD's motion should be denied.

CONCLUSION

The priority dates for the four SWC water rights have been clearly defined by the *Eagle Decree*, a final court judgment. IDWR properly recommended the April 1, 1939 priority date based upon the prior decree. The priority date is clearly defined and needs no further clarification. Finally, there is no legal basis to include the requested remark as the water rights have been administered with an April 1, 1939 priority date for over 40 years. Therefore, the Court should deny GWD's *Priority Motion*.

DATED this 29th day of July, 2009.

FLETCHER LAW OFFICES



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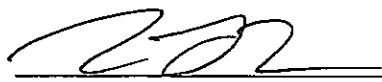
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2009, I served a true and correct copy of the foregoing *Claimants' Joint Response to Ground Water Districts' Motion for Summary Judgment on Priority Dates* on the following by the method indicated:

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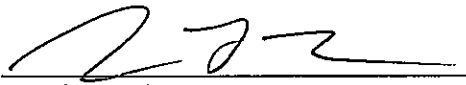
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