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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. **Attachment 1**
)

) **CLAIMANTS' JOINT RESPONSE**
) **TO GROUND WATER**
) **DISTRICT'S AUGUST 22, 2008**
) **MOTION FOR SUMMARY**
) **JUDGMENT**
)

COME NOW, 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, 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 August 22, 2008 regarding the SWC water rights’ “source” and “season of use” elements (hereinafter “*GWD Source 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, which are incorporated by reference as if set forth in full herein. Finally, this response is 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

The Ground Water Districts (“GWD”) offer a “Statement of Undisputed Facts” in the *Memorandum in Support of Motion for Summary Judgment* (hereinafter “*GWD Source Memo*”) at pages 3-5. SWC responds to those statements of fact as follows (by number as listed in the *GWD Source Memo*):

1. No Dispute.
2. No Dispute.
3. **Dispute.** The responses to GWD’s discovery requests speak for themselves. Moreover, the Water District 01 records do not contain information about the SWC “beneficial use” claims at issue in this case. *See Part I, infra*. To the extent the Water District 01 records or the watermaster’s list of water rights do not contain information about “beneficial use” claims, they do not provide “the best information available regarding the diversion and use of water under the water rights” at issue in this case. *See also, Notices of Claim* for these water rights. Ex. A to *Third Thompson 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.

4. **Dispute.** Although the prior decrees or licenses (with the exception of 1-2061²) did not identify a specific beginning and ending date for the “irrigation season”, the rights were decreed for “irrigation and other purposes”, hence the period of use was determined since water could be put to beneficial use for “irrigation and other purposes” as determined by the water right holder. None of the prior decrees or licenses limited or restricted the period or “season of use” as suggested by GWD’s motion. The facts demonstrate that the SWC water rights have been diverted and used at times throughout the standard irrigation season of 3/15 to 11/5, not just limited to only “late June or early July” as an ending date. *See Part II, infra.*
5. **Dispute.** *See response to #4 above.*
6. No Dispute.
7. **Dispute.** *See Notices of Claim, Ex. A to Third Thompson Aff. See Part I, infra.* These “beneficial use” water rights have been diverted and used by SWC. The fact the rights have not been previously adjudicated or listed on the Water District 01 Watermaster list does not mean they “have never been delivered water” and should be summarily disallowed. Moreover, GWD’s own witness admitted this fact at his deposition. *See Part I, infra* at 10.
8. No Dispute.
9. **Dispute.** *See Part II, infra. See also, Shaw Aff., Young Aff.*
10. **Dispute.** *See Part II, infra. See also, Shaw Aff., Young Aff.* The source element of the SWC water rights is properly defined as the “Snake River”.
11. **Dispute.** Although the parties to the *Eagle Decree* entered into a Stipulation in that case, the water rights were decreed pursuant to the Court’s decree, not the Stipulation. The reference in the Stipulation and the Court’s Findings of Fact and Conclusions of Law to the “so-called ‘Flood Water Rights’” did not limit or condition the SWC water rights in any way. Moreover, the copy of the *Eagle Decree* produced as Ex. F in the McHugh Aff. has notations and writing contained in it, therefore it is not an accurate reproduction of the Court’s decree in that case and should not be accepted as such.
12. **Dispute.** SWC does not dispute the recommended “season of use” for its water rights of 3/15 to 11/15, however SWC disputes the rest of the alleged facts offered by GWD. *See Response to #4 above.* Moreover, SWC disputes the characterization of “full irrigation season” as somehow conditioning or further defining IDWR’s recommended season of use.
13. **Dispute.** All water rights in Water District 01 are administered by priority depending upon the available water supply in the Snake River. The timing of curtailment of junior

² Water right 1-2061 was licensed by IDWR with a 4/1 to 10/31 season of use. *See Ex. E to Affidavit of Travis L. Thompson* filed on August 22, 2008.

priority natural flow rights varies from year to year. The characterization offered by GWD to limit or condition the SWC rights is not accurate or legally justified. *See Part II, infra. See also, Shaw Aff., Young Aff.*

14. No Dispute. The Director's Reports are prima facie evidence pursuant to Idaho law and speak for themselves.
15. No Dispute. The Director's Reports are prima facie evidence pursuant to Idaho law and speak for themselves.

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

GWD seeks to redefine the "source" element and condition the SWC water rights in this case in order to limit or eliminate conjunctive administration. By alleging that the source of the SWC water rights is "spring runoff or snowmelt" only, GWD seeks to artificially limit the timeframe within which these rights may be exercised. Further, GWD is asking the Court to pre-determine the result of a delivery call for the SWC surface water rights by claiming that these rights "cannot curtail junior priority ground water rights". There is no legal or factual basis for the requested "subordination". Moreover, the SWC water rights were recently subject to a water delivery call proceeding before IDWR, a call which the Director accepted. Importantly, GWD

raised this identical “source” defense in that proceeding, the Director rejected it, and GWD did not appeal that final agency order.

Contrary to GWD’s theory, there is no ambiguity in the “Snake River” source element that needs clarified through a limiting condition or remark. All water in the Snake River, be it precipitation, snowmelt, runoff, reach gains, springs, tributary creeks or rivers, or return flow from up river irrigation projects, is part of the natural flow that is subject to priority distribution in Water District 01. Water rights are curtailed by priority. That is the fundamental premise of water right administration under the prior appropriation doctrine.

Although more senior rights are entitled to divert and use the available supply first, that does not mean the junior SWC water rights, with priorities after 1900, are limited to only divert a particular source of water in the river (i.e. runoff or snowmelt), or only divert and use water during a particular time in the irrigation season, or that those rights are somehow subordinated to junior ground water rights acquired years or decades later. Yet that is the result pressed by GWD’s motion.

The Director recommended the SWC water rights with a “Snake River” source and a standard “3/15 to 11/15” season of use. The Director followed prior decrees and standard procedure in recommending these elements. They are presumed correct as a matter of law. *See* I.C. § 42-1411(4). No ambiguity exists hence no clarification is needed for future administration. Indeed these water rights have been subject to continuous surface water right administration for over 40 years and conjunctive administration for the last 5 years.

In summary, the GWD’s motion fails to meet the standard to demonstrate that a clarifying remark is needed. *See* I.C. § 42-1411(2)(j). Moreover, there is no basis in Idaho law to further define or distinguish the recommended “source” and “season of use” elements. The

SWC water rights are adequately defined and no element needs clarification for administration. The Court should therefore deny GWD's motion.

I. The Claimants Beneficial Use Water Rights³ Should be Decreed as Recommended By IDWR.

GWD argues that the BOR's and SWC's beneficial use water right claims should be disallowed "because water has never been delivered or diverted under these water rights". *GWD Source Memo* at 7-8. GWD's only support for this argument is a former watermaster's statement that water was never delivered to those rights. *Id.* However, as Mr. Carlson admitted at his deposition, just because an undecreed beneficial use claim is not included on Water District 01's list of prior decreed or licensed rights under the control of the watermaster, that alone does not defeat the claim as a matter of law and does not mean that the right does not exist. Indeed, the purpose of the SRBA is to effect a "comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system". *See* I.C. § 42-1406A (uncodified). Consequently, the SWC "beneficial use" claims were properly filed and recommended for adjudication. The statements of a former watermaster who does not have personal knowledge of the water use under the subject beneficial use rights does not warrant summary dismissal of the claims. As explained below, it's obvious that water for BOR's 1-10034 was believed to have been delivered to an earlier priority right (1-219) and that A&B's "enlargement" claims simply cover additional lands as part of an authorized expansion of an earlier decreed water right (1-14). *See* I.C. § 42-1426; *see also* Ex. A to *Third Thompson Aff.*

³ Water rights 1-10034, 1-10225, 1-10237, 1-10238, 1-10239, 1-10240, 1-10241, and 1-10482. Water right 1-10034 was filed by the United States Bureau of Reclamation ("BOR") for storage water in Lake Walcott for Burley and Minidoka Irrigation Districts. BOR claimed a "decreed" basis for the claim, however, IDWR noted that the basis for the claim in the recommendation was "beneficial use". This response does not address any other objections to these claims filed by Claimants.

The SWC beneficial use water rights are all documented in the verified *Notices of Claim*, filed by BOR (for the benefit of Burley and Minidoka Irrigation Districts) and A&B Irrigation District. *See id.* IDWR recommended these water rights for decree based upon the verified claims. *See* Ex. B to *Third Thompson Aff.* The Director's Report for these water rights constitutes prima facie evidence of the "nature and extent" of the water rights. *See* I.C. § 42-1411(4). GWD's motion cannot overcome the weight of the sworn statements in the *Notices of Claim* and the prima facie evidence of the Director's Report by merely relying upon the statement of a former watermaster who had no personal knowledge of the particular water rights and their use. At a minimum, the Director's Report and *Notices of Claim* create a genuine issue of material fact precluding GWD's requested summary dismissal of these water rights.

A. Water Right 1-10034 (BOR)

For water right 1-10034 it is clear that the former watermaster and current Water District 01 staff believe the water has been accounted for and used pursuant to a more senior storage water right at Lake Walcott (1-219). At his deposition Mr. Carlson acknowledged the following:

Q. [BY MR. FLETCHER]: In paragraph 9, one of the water rights listed there is 1-10034, which is a Bureau of Reclamation claim pertaining to storage at Minidoka Dam, Lake Walcott?

A. [BY MR. CARLSON]: Yes.

Q. Just to clarify a few things, based upon your experience as watermaster, you agree that Lake Walcott holds 95,200 acre-feet of active storage; correct?

A. I think that's the right number.

Q. And that every year it's delivered?

A. That's correct.

Q. And can you tell me what priority date it's been delivered under? I mean, do you know? Do you remember?

A. I don't remember exactly. I think it's a 1906 priority water right, as I recall.

Q. Something like that. Yeah. Okay.

A. Or 1909.

Q. Yeah. So to that extent, you have no objection to the Lake Walcott storage right?

A. Oh, no.

* * *

Q. So tell me what your objection is to this particular right?

A. I just have no evidence that it was ever delivered.

Q. Okay. And is it your position that that right should be delivered under the 1909 right of storage at Lake Walcott?

A. Based on the capacity of that right, yes.

Carlson Depo. Tr. p. 84, ln. 14 – p. 86, ln. 4. Ex. C to *Third Thompson Aff.*

Q. [BY MR. GEHLERT]: Okay. And you've been – your understanding is that you've been delivering water under the senior water right and only the senior right?

A. [BY MR. CARLSON]: Right.

Q. And that's why the junior water right's on your list as never having been delivered to?

A. Right.

Carlson Depo. Tr. p. 139, ln. 18 – p. 140, ln. 1. *Id.*

Tony Olenichak, Water District 01's Program Manager, further testified that it was his experience that all of the storage in Lake Walcott has been stored under the 1909 storage water right (1-219). Therefore, he was not aware of any water being delivered to the 1911 priority, or water right 1-10034:

Q. [BY MR. FLECTHER]: Okay. Now in Ron Carlson's affidavit he claims that the March 1911 right has never been delivered out of Lake Walcott. Are you familiar with that statement?

A. [BY MR. OLENICHAK]: I am not aware of a 1911 water right.

Q. Well, that's the 1—1-10034 that I was talking to you about. That's March of 1911. It's for 53,500. It's a component of the 90,000 you were talking about.

A. I'm not familiar with that right. I was under the assumption the entire right for Lake Walcott was 1909.

Q. Okay. So you believe the whole 90,000 is under the 1909 right?

A. I thought it was.

Olenichak Depo. Tr. p. 74, ln. 23 – p. 75, ln. 12. Ex. D to *Third Thompson Aff.*

Accordingly, where Water District 01 has believed that water has been stored under a prior right, water right 1-219, that does not necessarily defeat water right claim 1-10034 on summary judgment. If it establishes anything, it is that all of the Lake Walcott storage right should have a priority date of 1909, to which Claimants will stipulate if so desired by the Ground Water Districts to clear up the issue.

B. Water Rights 1-10225 et al. (A&B)

Mr. Carlson's affidavit does not conclusively establish that the SWC beneficial use water rights should be disallowed as a matter of law. Mr. Carlson states that during his time as watermaster he "never delivered water" to these beneficial use water rights. *Carlson Aff.* p. 4, ¶ 9. The fact water was not called for within the water district for these rights, or purposely delivered by the watermaster in administration, does not mean the rights were not established and that available water was not diverted and used by A&B pursuant to its beneficial use rights. Indeed, the SWC beneficial use rights are not included on the Water District 01 list of water

rights to distribute water to since they have not yet been adjudicated in the SRBA. At his deposition, Mr. Carlson admitted this fact:

Q. [MR. FLETCHER]: Let me see how your worded it. You say, "The records of Water District 1 confirm the fact that no water has ever been delivered under," and then you list the various claims.

Isn't it true that the water delivery records of Water District 1 do not contain beneficial – the water that would be delivered under a beneficial-use claim?

A. [MR. CARLSON]: That's correct.

Carlson Depo. Tr. p. 75, Ins. 14-23. Ex. C to *Third Thompson Aff.*

Moreover, Mr. Carlson acknowledged that there were times when the Snake River was not under regulation by the district, in which case the records would not be dispositive of diversion and use of water at those times:

Q. [BY MR. FLETCHER]: So that's something you became aware of when you came on the job that you were informed of from the prior watermaster?

A. [BY MR. CARLSON]: I don't believe so. They did it entirely different before I became watermaster. So the processes prior to 1978 did not include – or 24/7/365-day-a-year distribution that we implement in '78.

Typically the watermaster sometime in September would just declare the river was no longer under regulation and it became kind of a free-for-all at that point. And to the extent people weren't complaining, they took what water they wanted.

Q. So under that circumstance, for example, A & B could have diverted water sometime prior to 1978 under the circumstance of the river not being on regulation?

A. I believe that's true.

Q. Okay. Do you have any knowledge as to whether or not these SRBA claims filed by A & B are premised upon deliveries prior to the time you were watermaster?

A. Well, certainly the priority dates claimed are.

Q. Have you reviewed any of the prior black books prior to 1978 to – which would identify whether or not water was delivered in excess of the 1939 natural flow?

A. That's not in those earlier black books. What would be in those would be just the period when the watermaster had the river under regulation.

Carlson Depo. Tr. p. 47, ln. 11 – p. 48, ln. 18. *Id.*

Tony Olenichak, Water District 01 Program Manager, further confirmed that the district does not administer beneficial use water rights as they are not included in the accounting program:

Q. [BY MR. FLETCHER]: Do you administer beneficial-use rights?

A. [BY MR. OLENICHAK]: We do not.

Q. Okay. So beneficial-use rights could have been diverted or may be diverted, but you're not administering those?

A. The water right accounting program only delivers to those decreed, permitted, licensed rights. Any diversion above those rights or outside the priority shows up as a storage diversion.

Olenichak Depo. Tr. p. 67, lns. 1-11. Ex. D to *Third Thompson Aff.*

Despite the fact a beneficial use water right is not contained in the Water District 1 records, or the list of rights for distribution by the watermaster in the accounting program, that does not mean the right could not be established by A&B. Yet, GWD seeks to prohibit the adjudication of these beneficial use rights solely upon that theory. Even GWD's own witness does not support this claim. At his deposition Mr. Carlson admitted that beneficial use water rights, including those held by the A&B, could be established and used within Water District 01 – even though they were not identified in Water District 01 records.

Q. [BY MR. FLETCHER]: So the records of Water District 1 would never show a beneficial-use claimed delivery; correct?

A. [BY MR. CARLSON]: Well, said differently, they would never receive water, because all of the water supply that's available in the system is distributed each day by the watermaster. And so those claims would never be in a position to receive water.

Q. Except for the circumstances that you talked about with John in which if water went over Milner or if there was excess water in the system, it was being diverted or it could be diverted?

A. It could be under those circumstances.

Q. And if a water user under those circumstances had diverted the water and put it to beneficial use, that could give rise to a beneficial-use claim; right?

A. Certainly.

Carlson Depo. Tr. p. 75, ln. 24 – p. 76, ln. 17. Ex. C to *Third Thompson Aff.*

Accordingly, contrary to his affidavit submitted in support of the *GWD Source Motion*, Mr. Carlson's deposition testimony plainly recognizes that beneficial use water rights, including those claimed by the SWC in this case, could exist. The sworn claims filed by A&B present evidence of the diversion and use of those water rights. *See Ex. A to Third Thompson Aff.* IDWR recommended the claims for decree to this Court based upon that evidence. The fact the Water District 01 watermaster did not purposely distribute water to some of these rights is not surprising since they constitute "enlargement" claims of other decreed water rights. *See I.C. § 42-1426.* For example, A&B's water right 1-10225 is an "enlargement" claim of decreed water right 1-14. As such, the fact a beneficial use right, like 1-10225, was not included on the Water District 01 list of rights for distribution is not dispositive and does not preclude the adjudication of those claims here in the SRBA.

As demonstrated in the *Notices of Claim* and Director's Reports for the various rights, the water was diverted and put to beneficial use on specific acres within the A&B irrigation project. *See Ex. A to Third Thompson Aff.* Although these beneficial water rights include "enlargement"

claims filed pursuant to Idaho Code § 42-1426 to cover additional irrigated lands, they should not be disallowed on the single basis offered by GWD. Consequently, the GWD motion fails on this issue and should be denied.

II. There is No Legal Basis to Limit or Redefine the Season of Use for the Claimants' Water Rights.

In its motion, GWD complains about IDWR's recommended season of use for the SWC water rights.⁴ See *GWD Source Memo* at 9. Based upon standard IDWR procedure referencing the particular geographic location of the SWC irrigation projects, the Director recommended the season of use as 3/15 to 11/15. There is no alleged error in this procedure. The real complaint, however, is that the SWC made a water right delivery call against the GWD's members' junior priority ground water rights in 2005 in order to protect their senior surface water rights. See *id.* Since junior priority ground water rights were injuring hydraulically connected senior surface water rights, and Water Districts 120 and 130 had been created to regulate junior ground water rights, the SWC filed a delivery call pursuant to Idaho law. GWD takes issue with the fact that a 1903 or 1939 Snake River water right should be allowed to use water ahead of a 1990 ground water right. GWD's effort to artificially limit or condition the "season of use" for the SWC senior water rights is squarely aimed at preventing future administration of their junior ground water rights by turning Idaho's prior appropriation doctrine on its head.

The motion fails for three reasons. First, the recommended season of use properly followed standard IDWR procedure for definition of irrigation water rights and the recommendations are supported by prior decrees. Second, Idaho law does not support GWD's suggested limitation or condition. Finally, the facts demonstrate that the SWC water rights have been used throughout different periods of the irrigation season, depending upon the available

⁴ Water rights 1-4, 1-5, 1-6, 1-7, 1-8, 1-9, 1-10, 1-13, 1-14, 1-16, 1-17, 1-211A, 1-211B, 1-212, 1-213, 1-214A, 1-214B, 1-219, 1-2050.

water supply in a particular year, and that the suggested vague and undefined “early July” ending period is erroneous.

A. IDWR Properly Recommended the Standard Season of Use for the SWC Irrigation Water Rights.

Pursuant to Idaho Code § 42-1411, the Director is required to prepare a report with specific elements of a water right, including “the period of the year when water is used for such purposes.” I.C. § 42-1411(2)(g). For “irrigation” water rights, IDWR prepared an administrator’s memorandum, Adjudication Memo #39 (“*Memo #39*”), that describes the standards used for the “season of use” to recommend for water rights in with places of use in various geographic locations across the basin. *See Ex. C to Second Thompson Aff.* IDWR explains in *Memo #39* as follows:

A new 1:1,000,000 scale map of the “Irrigation Season of Use” (map at the end of the memo) presents a new standard for use in water right adjudication and water right licenses, permits, and transfers. A reduced reproduction of the map is attached to the memo; the reduced reproduction is for illustrative purpose only. The official version of the map is in digital form and can be accessed by contacting the Adjudication Bureau. A full-size copy of the map is available in the SRBA map case.

The purpose of these maps is to provide consistent standards in a simple format. . . .

The standard season from the new map is to be used for recommendations in the SRBA as described in the Claim Investigation Handbook.

Memo #39 at 1, 2. *Ex. C to Second Thompson Aff.*

All SWC irrigation water rights in this proceeding were recommended with the standard “3/15 to 11/15” season of use, pursuant to the area as defined in the *Memo #39* map.⁵

Accordingly, IDWR followed the prescribed standard procedure when issuing the water right

⁵ Except Falls Irrigation District’s water right 1-13, which includes a season of use of 4/1 to 10/31. This is the standard season provided by IDWR’s *Memo #39*. FID is entitled to a 4/1 to 10/31 season of use as a matter of law.

recommendations. Pursuant to Idaho law, IDWR's recommendation is presumed to be correct. *See Idaho Code § 42-1411(4).*

GWD's requested remark, on the other hand, is vague and unclear. Contrary to the standard used by IDWR, which is to provide "consistent standards in a simple format", GWD's remark would make the right confusing and impossible to administer. After all, a defined season of 3/15 to 11/15 is clear and unambiguous as opposed to a subjective "early July" ending date. Since GWD's remark contradicts the standard used by IDWR and would only create confusion not clarify for purposes of administration, it should be disregarded.

B. Idaho Law Does Not Limit or Condition the Standard Irrigation Season for the SWC Water Rights.

GWD argues that the season of use for the SWC water rights should be changed or limited because water may not be available "for an entire irrigation season and never [has]". *See GWD Source Memo* at 10. Through this argument GWD attempts to create a new standard for water rights in Idaho: unless water is available to satisfy a right for the "entire" irrigation season, then the standard season of use recommended by IDWR does not apply. If this new criteria was accepted, then either IDWR or the SRBA Court would be forced to re-examine every surface water right in the Snake River Basin. After all, only the most senior water rights (which vary by priority and location) likely receive water for an entire irrigation season. And even then, the water supply is variable depending upon numerous factors such as climate and precipitation. As recognized by Tony Olenichak, if this condition was the standard essentially all water rights would be classified as "high water rights":

Q. [BY MR. SIMPSON]: My question, Tony, would be that in accordance with that definition, wouldn't every right that is senior to the most senior right on a particular source be high flow if the senior right is the only one that's being met?

A. [BY MR. OLENICHAK]: Yes.

Q. Okay. So for example, at least with respect to those rights that are diverted above Blackfoot, would it be true that Aberdeen-Springfield with the 1895 right would be essentially a high-flow right in comparison to those other rights above it on the Snake River?

A. Yes, some people would think that would be a high-water right. It depends on the perspective. It depends on the canal. It depends upon the comparative rights in the base discipline.

Olenichak Depo. Tr. p. 47, ln. 11 – p. 48, ln. 1. Ex. D to *Third Thompson Aff.*

This hydrologic reality, that water is scarce and not all rights are filled, which has existed well before statehood, does not create new legal criteria limiting an irrigation right's "season of use". Moreover, it does not create a "new" condition that would insulate junior priority ground water rights from conjunctive administration with those surface water rights.

For purposes of the SRBA, the Director is required to recommend "the period of the year when water is used for such purposes". I.C. § 42-1411(2)(g). As set forth in Part II.A, *supra*, IDWR followed its standard procedure in recommending a 3/15 to 11/15 season of use for the SWC irrigation water rights. In other words, if water is available, the SWC is entitled to divert and use it for irrigation purposes under their water rights anytime between March 15th and November 15th of any given year. The season of use does not mean that water will always be available to satisfy those rights every day throughout the entire irrigation season.⁶ However, that is not the standard to define a season of use for irrigation water rights in Idaho.

Rather, in Idaho, the season of use for irrigation, in addition to being defined by the standard procedures by IDWR, *see* Part II.A *supra*, is further defined by the water user. In *McGinness v. Stanfield*, 6 Idaho 372, 375 (1898), the Idaho Supreme Court stated that "so long as the appropriator of water applies the same to a beneficial or useful purpose, he is the judge,

⁶ In times of scarcity, however, the watermaster is required to distribute water to senior rights first. *See* I.C. §§ 42-602, 607.

within the limits of his appropriation, of the times when and the place where the same shall be used.” Accordingly, the SWC determines the “times when” the water under their respective rights can be used for irrigation within the recommended 3/15 to 11/15 season of use.

Although the water supply can vary from year to year, that does not give junior ground water users the right to divert and use water ahead of a prior surface water right even though that prior surface water right may be curtailed to satisfy an even more senior surface water right. GWD asks the Court to ignore Idaho’s constitution and the prior appropriation doctrine in this regard. Accordingly, GWD’s efforts to further refine the season of use in order to limit or condition the water rights in a way to protect junior priority ground water rights in administration is not justified. The Court should deny GWD’s motion on this issue.

C. Facts Regarding Use of SWC Water Rights.

Given the variable use of the SWC water rights, which is year and water supply specific, GWD’s proposed season of use to end “in early July” is not factually correct and fails to recognize use throughout the season for some SWC rights as well late season use. *See Shaw Affidavit, Young Affidavit*. Consequently, there is not basis to limit the season of use in that manner.

GWD relies upon the affidavits of Ron Carlson and Tony Olenichak to allege that the SWC water rights “are high flow water rights” and “that other than water rights nos. 1-209 and 1-210, water has never been diverted and put to beneficial use for a full irrigation season”. *GWD Source Memo* at 11. Again, these statements are incorrect based upon the review of water diversions under the SWC water rights, notably the 1903 water rights held by BID and MID (1-211A and 1-211B). *See Young Aff*. Although not all SWC water rights are in priority every day of the entire irrigation season, various rights have been available beyond the “spring and early

summer”. *Id.* At his deposition, Mr. Carlson admitted that some of the SWC water rights do receive water at other times in the irrigation season, not just during the spring or “high water” period:

Q. [BY MR. FLETCHER]: Okay. So water delivered after June or July in most years under the 1903 right or the 1908 right in August, September, October that is not natural-flow water?

A. [BY MR. CARLSON]: That is natural-flow water.

Q. Okay. So if in most years we can show you that 1903 water is delivered in August, September, or October –

A. Uh-huh.

Q. -- would you agree that this is a false statement?

A. No.

Q. Why would this not be a false statement?

A. All that says – all that says is that the river is no longer is – breaks at Blackfoot, and you again have a demand that you can make – place on the river above Blackfoot. And so the return flows and all those things that are coming in upstream from Blackfoot now get distributed without reference to Blackfoot.

Q. But those are natural flows; correct?

A. They are.

Q. And those natural flows consist then not of spring runoff, do they?

A. Yeah, what they consist of then is the fact that people upstream and downstream are curtailing their water use, and so the water rights are no longer demanding that water. And to the extent that you can use it downstream, you use it.

Q. And they’re not made up of runoff –

A. Well –

Q. -- of spring runoff at that point; correct?

A. That’s correct.

Q. And they're not made up of snowmelt/ correct?

A. That's correct.

Q. They're made up of whatever is in the river at that time?

A. That's – that is true.

Q. So this statement is not correct, this statement is a false statement; isn't that true? There is water available to deliver to junior water rights in the river below Blackfoot?

A. There are some years when there is water available late in the season that can be delivered to junior water rights.

Carlson Depo. Tr. p. 98, ln. 4 – p. 100, ln. 3. Ex. C to *Third Thompson Aff.*

Mr. Olenichak, Water District 01's program manager, also confirmed the fact that water is available throughout different parts of the irrigation season to fill SWC junior water rights, not just the 1900 water rights held by TFCC and NSCC (water rights 1-209 and 1-210):

Q. [BY MR. FLETCHER]: Okay. So for water rights that come back on in August or September or October of most years, those would not be high-water rights?

A. [BY MR. OLENICHAK]: Well, they would be high-water rights in the springtime. In the fall when they come back on, it's not a matter of the natural flow increasing from any additional snowmelt or rain, it's simply a matter of senior rights turning off.

Q. Okay. But isn't that how all water rights work? I mean, the senior rights take their plug out of the amount of water that's available and then the juniors take the amount they're entitled to take?

A. Yes.

Q. And if – for example, take Twin Falls' 1900 natural-flow right and compare it to MID's 1903 right. MID can never divert Twin Falls' 1900 right lawfully; correct?

A. Unless there's sufficient water to fill the 1900 right and then any additional water that they would have a right to.

Q. Okay. But that additional water is being diverted under the 1903 right; correct?

A. Correct.

Q. It's not being diverted under the 1900 right? It's MID's own 1903 right; correct?

A. Right.

Q. Or 1908 right or whatever right may be filled at that point in time?

A. Right.

Q. So when a senior isn't diverting 100 percent of their natural-flow right, the junior isn't taking part of that 1900 right, is it? Aren't they diverting under their own right?

A. That is correct.

Q. Okay. Under paragraph 10 you use the term "primarily," that "The source of supply for high-water rights consists primarily of snowmelt and spring runoff." What does "primarily" mean to you?

A. When those water rights are filled, it's generally during the snowmelt runoff. We can see that. There are exceptions to that, like you pointed out. In the fall when senior diversions start to curtail, we can fill some of those junior water rights, which may be defined as high-water rights in the springtime, may not be – because of high water in the fall, it's just simply a matter of the senior rights being curtailed – or not curtailed, but just deciding not to divert this water.

Olenichak Depo. Tr. p. 62, ln. 16 – p. 64, ln. 17. Ex. D to *Third Thompson Aff.*

As demonstrated by the testimony above, in addition to the information provided in affidavits of David B. Shaw and Norman C. Young, GWD's claim that the SWC water rights are only diverted and used during the spring runoff period is not true. Moreover, it is obvious that these junior natural flow rights are able to divert and use water at varying times during the irrigation season, and not just during the "flood" or "high water" stage on the Snake River.

Consequently, the facts do not support GWD's theory that the source of the SWC water rights should be limited or further defined to period shorter than 3/15 to 11/15.

D. The Eagle Decree Rights Do Not Have a Limited Season of Use.

GWD also argues that certain SWC water rights decreed in the *Eagle Decree* case should now have a shortened season of use because they were referenced as "so-called flood water rights" in the *Stipulation* entered into between the parties in that proceeding. See *GWD Source Memo* at 12. Although the *Stipulation* references the 1939 water rights decreed to the SWC and numerous other Snake River water rights as "so-called flood water rights", neither the *Stipulation* nor the *Eagle Decree* limited the "season of use" as to when those water rights could be used.⁷

Although a junior priority right to the Snake River, like the 1939 water rights decreed in the *Eagle Decree* case, may not be available for use throughout the entire irrigation season due to water supply conditions and distribution of water to senior surface water rights, that does not mean the 1939 water rights should be limited or conditioned in a way to prevent that use. Therefore, if there is sufficient water in the river, at any point in time in the irrigation season, the 1939 water rights are entitled to divert that water in priority. Although these water rights are curtailed to fill more senior rights as water supply diminishes, that varies depending upon the particular year. Moreover, contrary to the GWD's claim, there is no "flood water" or "high flow" condition contained in the *Eagle Decree* that would limit those rights in the manner GWD seeks. See *GWD Source Memo* at 13.

⁷ Including the SWC water rights, the Twin Falls County District Court and Fremont County District Court decreed 63 water rights with an April 1, 1939 priority date to individuals, canal companies, and irrigation districts throughout Basin 01 above Milner Dam as part of the *Eagle Decree* proceedings. GWD did not object to these other *Eagle Decree* water rights and has not claimed those rights should have a limited season of use. Presumably GWD does not seek to limit the other *Eagle Decree* rights because none of those rights have filed a water delivery call against junior priority ground water rights.

Accordingly, since the *Eagle Decree* did not restrict the season of use there is no basis to limit or condition the SWC *Eagle Decree* rights now. GWD's motion should be denied on this issue.

III. The Source Element for the SWC Water Rights is Not Defined by "Primary" Water Supplies and No Remark is Necessary to Clarify the "Snake River".

In another attempt to redefine the SWC water rights and preclude administration of junior priority ground water rights, GWD argues that the "source" element of the SWC water rights should be limited to "spring runoff and snow melt" only. *GWD Source Memo* at 13-14. GWD argues that such a limiting remark is necessary because the Snake River source element is "ambiguous" and that it would "assist in administration" and "reduce potential controversy between the parties in the future".

Importantly, the Water District 01 Watermaster and staff do not support GWD's theories or believe the requested remark is needed for administration. *See Swank Depo. Tr. p. 49, Ins. 10-13; Olenichak Depo. Tr. p. 75, Ins. 15-19; Exs. E, D to Third Thompson Aff.* GWD attempts to create an issue about the Director's recommended source element, the Snake River, which does not exist. Consequently, the motion on this issue fails and should be denied.

GWD admits that the source element for the SWC decreed and licensed water rights "was determined to be the 'Snake River'". *GWD Source Memo* at 13. As explained in the SWC's *August 22, 2008 Joint Motion for Summary Judgment* and supporting documents, the fact the source element has already been determined by prior decrees and licenses ends the inquiry. However, GWD claims that "it is now understood that not all water rights that divert below Blackfoot in fact only rely on the base flows from the Snake River as their primary supply". Such a claim, even if true, does not lead to a changed result in the SRBA. *Id.* In essence, GWD's motion seeks to artificially distinguish the water destined for the SWC headgates as it

flows downstream. Such an act is not only physically impossible, it is not necessary for the Watermaster's administration of these water rights. At his deposition, Water District 01 Watermaster Lyle Swank explained how he distributes water to the various water rights, irrespective of the different water supplies that comprise the Snake River:

Q. [BY MR. SIMPSON]: Well, so you as watermaster look at the amount of water available at the point of diversion that would be available for diversion under priority by a particular water right; correct?

A. [BY MR. SWANK]: That's correct.

Q. And so the upstream sources of water or upstream tributaries that would then aggregate to the water available at the point of diversion make up the amount of water that's available for that particular water right; correct?

A. That's correct.

Q. And so the particular sources, if you will, or origins of that water is not of a concern to you in delivering the water to that delivery or to that point of diversion, simply that the water is available and it would be delivered in priority; correct?

A. That's correct.

Swank Depo. Tr. p. 12, ln. 14 – p. 13, ln. 7. Ex. E to *Third Thompson Aff.*

Apparently under GWD's theory only "spring runoff or snowmelt" can be diverted under the SWC water rights at issue in this case and only TFCC and NSCC can divert "base flows" under their 1900 water rights, as if water in the river could be divided by the Watermaster in that manner. The argument defies logic and ignores reality. Both Lyle Swank and Tony Olenichak explained that GWD's "source distinction" is not applicable in water right administration. Mr. Swank explained as follows:

Q. [BY MR. SIMPSON]: Well, my question goes to you as the watermaster in carrying out your responsibilities to deliver water: From that delivery-of-water perspective, if the water is in the river in its natural flow and a particular right is in priority, to you as watermaster does it matter or is it necessary for you to know whether the water arrived at that point in the river from

snowmelt or subsurface flows or return flows to the river or precipitation, or is it simply that that water is there at the point of diversion and that right is in priority and it's your job to deliver it to the right holder?

A. [BY MR. SWANK]: Yeah, our job is to make sure that water is available at that point of diversion, regardless of how it got there, other than natural flow and storage being split out.

Q. Okay. So it's not necessary for you in carrying out your duties to necessarily know how that water arrived at that point in the river in terms of whether its origin is from snowmelt or return flows or subsurface flows; correct?

A. That's correct. We just deliver water based upon the available supplies.

Swank Depo. Tr. p. 13, ln. 19 – p. 14, ln. 17. Ex. E to *Third Thompson Aff.*

Similarly, Mr. Olenichak confirmed Water District 01's practice for distributing water to the SWC's Snake River rights:

Q. [BY MR. FLETCHER]: So you don't have any history or any records showing what is making up this water that's in the Snake River, whether it's snowpack or whether it's rain or whether it's springs or what it is?

A. [BY MR. OLENICHAK]: No, we don't make that determination.

* * *

Q. And so as you administer this water right, any of these water rights that are at issue in this case, as someone that's one the firing line on the administration end, are you trying to make a distinction of what the source of water is that's in the Snake River at the time those water rights are being diverted?

A. No. We simply each day calculate the reach gains in the river and divide the water up according to priority. Fill the senior rights first and then the junior rights after the senior rights are filled.

Olenichak Depo. Tr. p. 65, ln. 23 – p. 66, ln. 22. Ex. D to *Third Thompson Aff.*

Mr. Olenichak further clarified the testimony in his affidavit and confirmed that trying to segregate the various water supplies that make up the Snake River is not relevant for administration:

Q. [BY MR. ARKOOSH]: But the – the river or the diversion structure doesn't know where the molecules of water comes from and doesn't segregate the molecules of water, does it?

A. [BY MR. OLENICHAK]: No.

Q. And the accounting program doesn't know and doesn't segregate molecules of water?

A. It only segregates natural flow in storage.

Q. Okay. So you've come to the conclusion in paragraph 10 based upon empirical observation?

A. Yes.

Q. Okay. And what happens in paragraph 10 has absolutely nothing to do with administration of water?

A. That's correct.

Olenichak Depo. Tr. p. 97, ln. 22 – p. 98, ln. 13. Ex. D to *Third Thompson Aff.*

Whereas the water supply in the Snake River is comprised of multiple sources, including tributary creeks, rivers, springs, reach gains, and return flow, GWD would have this Court redefine the "Snake River" only for purposes of the SWC water rights at issue in this case, not the rest of the rights on the Snake River, or in the basin. Such a theory finds no support in Idaho law and would in turn force the Court to re-examine every "river" right it has decreed to date. Indeed, there is no support in Idaho law to dissect a previously decreed source such as the "Snake River" and attempt to limit or condition water rights based upon tributary sources to the river. Just the opposite, when rights to a main stream are adjudicated that includes all tributary water sources as well. *See Schaub v. Dist. Court of Fifth Jud. Dist.*, 96 Idaho 924, 926 (1975).

Similar to the 3/15 to 11/15 "season of use" element, the source of the SWC water rights, the Snake River, is prima facie evidence and presumed to be correct. *See* I.C. § 42-1411(4). Only by alleging that the Snake River is somehow "ambiguous" can GWD attempt to offer a

“remark” that it claims is necessary for the definition of the right, for clarification of the element, or for the administration of the right.⁸ As explained below, none of those criteria are present which would require the remark that GWD seeks to impose on the SWC water rights.

First, the SWC water rights have all been defined by prior decree or license. Dividing the “Snake River” source into multiple water supplies such as “spring runoff and snow melt”, tributary springs, creeks, rivers, or return flows is simply not necessary to define or administer the water rights. The water rights have been clearly defined by the prior decrees and licenses and have been administered by Water District 01 for decades without further definition. In addition, the water rights have been subject to conjunctive administration with junior priority ground water rights for the last 5 years without the need for further definition as requested by GWD. Consequently, the first criteria for the “source” remark is not satisfied.

Next, there is no need to clarify the “Snake River” source element. The Snake River is not “ambiguous” since water rights to the river have already been the subject of prior decrees and licenses issued by IDWR. Moreover, IDWR properly identified the Snake River as the source of the SWC water rights based upon its standard adjudication procedures. Although GWD would rather the source of the SWC rights be defined as “spring runoff and snow melt”, such terms themselves are in turn vague and ambiguous. For example, what exactly is “spring runoff”? Where does it come from? When does “spring” begin or end? Moreover, what particular “snow melt” is identified as filling the rights? Water melting from snow on the Eastern Snake plain? From the Portneuf River valley? From the mountains near Island Park? Near Jackson Hole, Wyoming? These questions demonstrate the error in GWD’s so-called “clarifying” remark.

⁸ Although GWD argues that the source element it is “ambiguous”, it nonetheless moves for summary judgment on this issue, claiming there is no genuine issue of material fact. Normally, when a Court determines a term of a contract (in this case a decree) to be ambiguous, summary judgment is not appropriate. *See e.g., Moss v. Mid-American Fire & Marine Ins.*, 103 Idaho 298, 301 (1982).

Stated another way, GWD's remark raises more questions than it answers and therefore is not necessary for definition or administration of the water right. Since the SWC water rights properly identify the source at which their diversion structures are located, the Snake River, the element is crystal clear and needs no further definition. Consequently, the second criterion for a qualifying remark is unmet.

Finally, the remark is not necessary to "avoid future controversy". There is no dispute that the Claimants divert their water rights from the Snake River at their respective points of diversion. Lyle Swank, the Water District 01 Watermaster, or the person responsible for the day-to-day administration of these water rights readily testified to this fact at his deposition:

Q. [BY MR. SIMPSON]: Is that your understanding of what the source of water is for a particular water right is the water that's available at the point of diversion?

A. [BY MR. SWANK]: Yes.

Q. Would you agree, then, that the point of diversion identifies the source of water for a particular water right? For example, water that's I'll say for Snake River Irrigation District or an irrigation district that diverts out of the Snake River, that that point of diversion identifies the Snake River as the source of water for that particular water right?

A. Yes, as measured at the closest USGS gauging station.

Swank Depo. Tr. p. 11, Ins. 6-20. Ex. E to *Third Thompson Aff.*

Although GWD disputes the fact junior priority ground water rights are subject to administration, and it would like to preclude conjunctive administration altogether, that does not create a "controversy" about the Snake River source. Moreover, the controversy GWD would prefer to avoid already occurred and was squarely decided by the Director in the SWC Delivery Call proceeding.⁹

⁹ Administrative case before IDWR captioned *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District et al.* The contested case began in 2005, culminated with a hearing

In that proceeding, the SWC made a delivery call upon junior priority ground water rights that were injuring their senior surface water rights. The SWC specifically included the water rights at issue in this case as part of that delivery call. *See* Ex. F to *Third Thompson Aff.* The Director accepted the call and recognized the SWC water rights for purposes of administration as against hydraulically connected junior priority ground water rights.¹⁰ *See* Ex. G to *Third Thompson Aff.* The Director did not deny the call as to certain SWC water rights because they were junior priority surface water rights, or that the source was only “spring runoff or snowmelt”. At hearing, GWD specifically raised the “source” issue as a defense to the SWC delivery call. For example, in GWD’s *Summary of Positions on Director’s Orders Related to the Surface Water Coalition Delivery Call*, it identified the “source” or “enhanced water supply”¹¹ issue as an affirmative defense:

2. Historical Water Supply:

Senior water right holders are not entitled to a water supply that is enhanced over what was historically available at the time of their original appropriations. The Surface Water Coalition (SWC) wrongfully seeks to establish a water supply greater in quantity and certainty than existed when their rights were established at the expense of groundwater users.

Ex. H to *Third Thompson Aff.* (emphasis in original).

GWD further raised the “source” issue as part of their alleged “futile call” defense:

3. Futile Call:

The delivery call results based upon the curtailment orders are speculative and uncertain in quantity and time. The curtailment of ground water users will not result in a useable quantity of water to the senior water right holders because their primary source of supply is not affected by ground water depletion. Thus, curtailing ground water users is futile.

in January 2008 and a final agency order in September 2008. The Director’s final order was appealed by SWC to the Gooding County District Court (Case No. 08-551) with the Honorable John M. Melanson presiding. Judge Melanson issued his *Order on Petition for Judicial Review* on July 24, 2009.

¹⁰ However, the Director noted the statutory exception for administration of the various beneficial use water rights. *See* I.C. § 42-607, Ex. G to *Third Thompson Aff.*

¹¹ Compare the GWD’s argument in the SWC Delivery Call case with the same theory that it offers here in its *Source Motion*. *See* *GWD Source Memo* at 12-14.

Id. (emphasis in original).

GWD proposed “findings of fact” and “conclusions of law” in support of their “source” or “enhanced water supply” defense:

The source of the natural flow rights historically available to SWC members consists of two components: (a) natural flow of the Snake River that passes Blackfoot during spring runoff periods (aka “flood flow”) and (b) reach gain that accrues to the river below Blackfoot. Although the reach gain may be subject to depletion by ground water development, ***flood flow is not because it consists of spring runoff which flows directly into the river.*** Other than the October 1900 rights of the Twin Falls Canal Company and the North Side Canal Company and sometimes a small fraction of the March 1903 right of the Minidoka Project, the ***natural flow water rights of the SWC members are and always have been almost entirely dependent upon flood flows. These post-1903 rights don’t have a basis to pursue enhancement of reach gains through curtailment of ground water pumping because they have almost never, since they were first appropriated, been able to utilize those reach gains as a source of supply.***

Ex. I to *Third Thompson Aff.* (emphasis added).

In addition, similar to the claims advanced in its *Source Motion* in these subcases, GWD also mischaracterized certain SWC water rights as a “high water right” that “only receives water during the spring runoff period after American Falls Reservoir has filled” in the SWC Delivery Call case. Ex. I to *Third Thompson Aff.*

The Hearing Officer in the SWC Delivery Call case, former Idaho Supreme Court Justice Gerald F. Schroeder, rejected GWD’s “source” defense and found that the SWC water rights had been injured by junior groundwater pumping:

3. Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights. Once it is established that the Snake River and Eastern Snake Plain Aquifer are connected the conclusion is inevitable that withdrawal of water from the aquifer reduces flow in the Snake River. . . . The evidence in this case establishes that during recent periods of water shortage ground water pumping has affected the quantity and timing of water available to SWC members. Natural flow rights have been exhausted earlier and storage has been used earlier and more extensively, limiting the application of water during

the irrigation season and diminishing the amount of carryover storage to which the surface water users are entitled.

Ex. J to *Third Thompson Aff.* (emphasis in original).

Hearing Officer Schroeder recognized the various SWC water rights, just as the Director did in his 2005 order, and denied GWD's defenses to the call. Notably, the Hearing Officer did not limit or deny administration of the SWC water rights based upon the theories alleged by GWD. Consequently, GWD took exception to the Hearing Officer's decision in its appeal to the Director.¹² In its *Exceptions Memorandum* to the Director, GWD argued:

IGWA takes exception to the following items in the Recommended Order and requests the Director modify the recommendations on these issues accordingly. . . .

(1) Material Injury.

No SWC entity suffered material injury because they had sufficient water to meet crop needs and they actually received a supply of water during the recent drought that was greater in quantity and certainty than what was historically available to them.

* * *

(3) Source of Storage Supply.

Ground water users are only responsible for the depletions they cause that result in material injury to senior water right holders. Ground water pumping cannot affect the timing or amount of snow melt and spring run off which is the source of water for most of the SWC entities and the primary source of storage supplies.

Ex. K to *Third Thompson Aff.*

In support of the above "exceptions", GWD advanced the very same arguments that they are offering here in this case:

The first item of historical import is that, other than the 1900 rights of Twin Falls Canal Company ("TFCC") and NSCC and sometimes a small fraction of the March 1903 right of the Minidoka Project, there historically has not been any natural flow available to supply the later priority surface water rights of all

¹²See Idaho Code § 67-5244; IDAPA 37.01.01.720.

other SWC entities. . . . These post-1903 rights of the SWC entities have no legal basis to curtail groundwater rights to enhance reach gains that have historically never been their source of supply.

* * *

The evidence shows that the source of the natural flow rights historically available to SWC entities consists of two components: (a) natural flow of the Snake River that passes Blackfoot during spring runoff periods (aka “flood flows”) and (b) reach gain that accrues to the river below Blackfoot and above Milner. Although the reach gain may be subject to depletion by groundwater development, flood flow is not, because it consists of spring runoff which flows directly into the river from surrounding mountains unaffected by groundwater depletions. . . . Therefore, only the natural flow rights of TFCC and NSCC can potentially be injured by groundwater depletions affecting reach gains in the Near Blackfoot to Neeley reach during the irrigation season. . . . That being the case, the rights of the other SWC entities have no legal basis to curtail groundwater rights to enhance reach gains that have never been their source of supply or relied upon.

Ex K to *Third Thompson Aff.*

The Director rejected GWD’s arguments as to the “source” issue in his September 5, 2008 *Final Order*. See Ex. L to *Third Thompson Aff.* GWD did not appeal that final agency order. Therefore, the alleged “controversy” over “source” that GWD raises in support of its requested remark is concluded. The Director, similar to the Hearing Officer, recognized the SWC water rights for conjunctive administration, accepted the SWC call on those rights, and found that junior priority groundwater pumping injured those rights. Accordingly, there is no basis for the remark on the SWC Snake River water rights requested by GWD. The Court should therefore deny GWD’s motion.

IV. There is No Legal Basis for GWD’s Requested Subordination of the SWC Senior Surface Water Rights to Junior Ground Water Rights.

GWD seeks a “clarifying remark” so that the SWC water rights “cannot curtail junior priority ground water rights” in conjunctive administration. *GWD Source Memo* at 14. In other

words, GWD claims that the SWC water rights should be “subordinated” to all junior priority ground water rights. The law and facts do not support GWD’s theory.

First, GWD claims the remark is necessary to “assist in the administration of these water rights” and “reduce potential controversy between the parties in the future”. Neither criteria supports GWD’s theory. As explained above, the Director previously accepted a delivery call on the SWC water rights, the parties engaged in a four-year contested case before IDWR, and the case is on appeal to the Gooding County District Court (*A&B Irrigation District et al. v. Spackman*, Fifth Jud. Dist., Case No. 08-551) wherein Judge Melanson recently issued an *Order on Petition for Judicial Review* on July 24, 2009. In other words, the “potential controversy” GWD is trying to avoid has already occurred. Moreover, GWD raised the “source” issue as a defense to the SWC delivery call and lost on that issue. GWD did not appeal the Director’s decision.

In addition, GWD has repeatedly argued that the SRBA is not the forum to “pre-determine” questions of administration before IDWR. In litigation over the constitutionality of the Department’s Conjunctive Management Rules (IDAPA 37.03.11 *et seq.*) in *AFRD #2 v. IDWR*, Case No.05-600, GWD¹³ represented the following to the Gooding County District Court:

The existence of a water right, whether decreed or licensed, is one thing, but its exercise as against other water rights is quite another. This area of water law is called administration. ***Administration has nothing to do with determining the existence or elements of the right***, with "readjudicating" the entitlement, or with "looking behind" the decree, as Plaintiffs continuously argue in their challenge of the Rules. Rather, ***if the Director is to "equally guard all the various interests involved," he must have authority to determine whether and how to curtail a valid, vested water right so that water will go to a more senior user who needs it.*** As a matter of a constitutional and statutory mandate, this requires a determination of whether beneficial use is occurring.

¹³ GWD was represented in that litigation by the Idaho Ground Water Appropriators, Inc. (“IGWA”). IGWA intervened in that proceeding on behalf of all the Ground Water Districts who are objectors in these subcases.

IGWA's Memorandum in Response to Plaintiffs' Motions for Summary Judgment at 29 (emphasis added). Ex. M to *Third Thompson Aff.*

The Idaho Supreme Court agreed with GWD and distinguished between adjudications and decisions made by IDWR in administration:

Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a readjudication. For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. §§ 42-1411(2)(a)-(j). . . . Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.

AFRD #2, 143 Idaho at 876-77.

GWD requests this Court to wade into the delivery call question that the Supreme Court has stated is not answered in the SRBA. By seeking blanket subordination to all junior priority ground water rights, GWD asks this Court to step into the Director's shoes and address questions about administration between the SWC water rights and junior priority ground water rights. Questions, coincidentally that have already been answered by the Director and Judge Melanson in Case No. 08-551. Clearly, there is no legal basis for GWD's request, particularly when the SWC water rights have already been the subject of a call that has been accepted by the Director and which has resulted in a separate administrative contested case. If GWD believed that the SWC water rights were not entitled to curtail junior priority ground water rights, they had the opportunity to raise that defense (which in fact they did and lost) in the administrative forum. The adjudication of the SWC water rights (which have already been decreed in prior proceedings anyway) does not provide a "second" forum for GWD to retry their theories in defending against a call that has already occurred. See *e.g. Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* at 15 (Subcase Nos. 36-02708 et al.,

12/29/1999) (SRBA cannot serve as a “second opportunity” to challenge matters determined in an administrative forum before IDWR)¹⁴.

Therefore, GWD’s requested remark that the SWC water rights “cannot curtail junior priority ground water rights” fails both as a matter of fact and law and should be rejected by this Court.

CONCLUSION

GWD’s *Source Motion* wrongly asks this Court to further distinguish and define the “source” and “season of use” elements for the SWC water rights. Since these water rights plainly define the “Snake River” source and a “3/15 to 11/15” season of use, consistent with IDWR standard procedure and prior decrees, there is no legal or factual basis that would support GWD’s theory. Furthermore, since the SWC water rights have been subject to administration, both as against other surface and ground water rights, no clarifying remark is needed for either element. Finally, GWD’s erroneously to subordinate the SWC senior surface water rights to all hydraulically connected junior ground water rights. Since Idaho law requires water rights to be administered pursuant to the prior appropriation doctrine, GWD’s argument fails.

For the reasons set forth above, the Court should deny GWD’s motion for summary judgment.

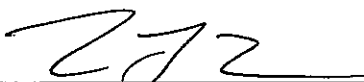
DATED this 29th day of July, 2009.

CAPITOL LAW GROUP PLLC



Roger D. Ling

*Attorney for A & B Irrigation District,
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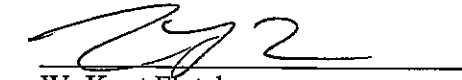


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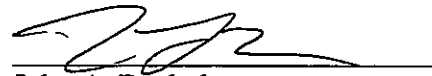
¹⁴ Although the issue in the *Facility Volume* case was a prior license, the same reasoning should apply to final orders issued by IDWR in administrative cases such as a delivery call proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2009, I served a true and correct copy of the foregoing *Claimants' Response to Ground Water Districts' August 22, 2008 Motion for Summary Judgment* on the following by the method indicated:

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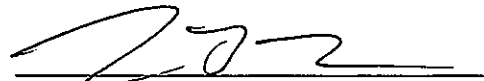
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Attachment 1

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