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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, 1-17, 1-211A, 1-211B, 1-214A, 1-214B,
1-219, 1-2050, 1-2061, 1-10034, 1-10225, 1-10237,
1-10238, 1-10239, 1-10240, 1-10241, 1-10482,
1-10483

**GROUND WATER USERS' REPLY
TO CLAIMANT'S JOINT RESPONSE
AND UNITED STATES' RESPONSE TO
SUMMARY JUDGMENT MOTIONS**

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 pursuant to the *Order Setting Summary Judgment Briefing Schedule* dated June 25, 2009 and file this *Reply to Claimant's Joint Response and United States' Response to Summary Judgment Motions* ("Claimants' Joint Response").

**GROUND WATER USERS' REPLY TO CLAIMANT'S JOINT RESPONSE AND UNITED STATES'
RESPONSE TO SUMMARY JUDGMENT MOTIONS - Page 1**

ARGUMENT

I. The SRBA Court is the forum to determine the elements of the SWC's water rights.

The Surface Water Coalition ("SWC") would like to merge the questions of defining and adjudicating water right elements in the SRBA with the conjunctive administration of the SWC's delivery call before IDWR. *Claimants' Joint Response* at 13. However the questions presented in those two forums are entirely different. The SWC argues that the Ground Water Districts "ask this Court to predetermine the result of a delivery call for the SWC surface water rights by claiming that these rights 'cannot curtail junior priority ground water rights'." *Claimant's Joint Response* at 4. The SWC also argues that because their delivery call proceeding before IDWR was "accepted" by the Director that somehow the questions raised by the Ground Water Districts' Objections in the SRBA relating to remarks to further clarify and define the elements of their water rights as to source, priority date, or season of use cannot go forward.

However, as recently determined by the Honorable John Melanson in his *Order on Petition for Judicial Review* in *A&B Irrigation District v. Spackman*, Case No. 2008-551 (Fifth Jud. Dist., Co. of Gooding), "the SRBA Court is vested with exclusive jurisdiction for determining the elements of a water right." *Id.* at 31. Third Aff. of McHugh, Ex. Q. Furthermore, in his *Order on Petition for Judicial Review* in *Clear Springs Foods, Inc. v. Tuthill*, Case No. 2008-444 (Fifth Jud. Dist., County of Gooding), the Honorable John Melanson noted that in that case, the Spring Users' water rights were partially decreed in the SRBA without "any conditions or limitations on the use." *Id.* at 8-9; Third Aff. of McHugh, Ex. R. These decisions make two things clear: 1) the SRBA Court is the proper forum for challenging elements to water rights and 2) if any limiting conditions or remarks are needed for administrative purposes

between groundwater and surface water users they should be included on the water rights' partial decrees. Thus, the Ground Water Districts' Objections are properly before by the SRBA Court.

Further, former IDWR Director Dreher specifically found that the junior users were not precluded from challenging the SWC's water rights in the adjudication even though he entertained their delivery call. In the Conclusions of Law of the *Amended Order of May 2, 2005* in the SWC delivery call case, the Director concluded:

9. Following review of the briefs of the parties on the issue of whether Idaho law permits the members of the Surface Water Coalition to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party, the Director remains troubled by the conflicting court decisions and recognizes that the issue is not free from doubt. The Director is persuaded, however, that under the circumstances of the present case it is appropriate to recognize the right of the Coalition members to pursue their delivery call against the holders of junior priority ground water rights within established water districts who were not parties to nor bound by the prior decrees that adjudicated the surface water rights of the Coalition members.
10. The Director reaches this conclusion to recognize the Surface Water Coalition delivery call based upon the holding of the majority of the Idaho Supreme Court in *Higginson*, 98 Idaho at 94, 558 P.2d at 1055, that the Department may rely upon a decree for the orderly distribution of water rights among the right holders within adjoining water districts on connected sources until such time as a court action is brought to challenge the rights established in the decree. In this instance, while water rights of the members of the Coalition have not been adjudicated in the SRBA simply because of the timing of the Director's Report for Basin 01, they possess rights that have long been administered by the watermaster of Water District 01.
11. The Director also reaches this conclusion based upon the fact that a junior water right is established subject to all existing water rights. If a junior water right holder has concerns regarding the validity of the senior water right making the delivery call, the junior right holder has the opportunity and right to challenge the senior water right in an adjudication proceeding. Thus, there is an avenue for addressing any due process concerns.

(emphasis added). Attached to the Third Aff. of McHugh as Exhibit S for the Court's reference is a complete copy of the *Amended Order of May 2, 2005*, portions of which were attached to the

Third Aff. of Thompson as Exhibit G. Judge Melanson's decisions and IDWR's order require a rejection of the SWC's repeated claims that the administrative case dealing with the SWC Delivery Call somehow precludes the Ground Water Districts' Objections in the SRBA.

II. Idaho law places the burden on the Claimant to prove their claims based on beneficial use.

Water right claimants seeking water rights based upon beneficial use must prove actual diversion and use of water. Idaho Code § 42-1411(5) states that "[e]ach claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right."

A. 1-10025 and 1-10241 are enlargement water rights and cannot support a delivery call against junior groundwater users.

Starting on page 9 of Claimant's Joint Response, the SWC argues that "Water Rights 1-10025, et al. should be decreed as recommended" as if all of the water rights based on beneficial use have the same characteristics and without any facts in the record other than the bare claims upon which the beneficial use claims are based. Importantly, the SWC uses only water right 1-10025 as an example in their discussion relating to the delivery of the water rights based on beneficial use. However, 1-10025 and 1-10241 are claims for enlargement water rights by A&B Irrigation District ("A&B"). That being the case, these water rights have no independent diversion rate and as such have no right to demand water from junior groundwater users. Based on the fact that they are enlargement water rights only, they should include a condition that they cannot support a delivery call against ground water rights as a matter of law.

B. Claimants offer no evidence that Water Right Nos. 1-10237, 1-10238, 1-10239, and 1-10240 have actually been diverted and used.

Based on the evidence in this record, the undisputed facts establish that there has been no

water diverted and used under Water Right Nos. 1-10237, 1-10238, 1-10239, and 1-10240 claimed by A&B. A&B rests on its claims submitted to the SRBA Court to establish diversion and beneficial use under these water rights. Claimants' Joint Response at 7. Former WD01 watermaster Ronald Carlson testified that he could not find any evidence that these water rights had ever been diverted or delivered. He also stated in his affidavit that water distribution in Water District 01 "requires data for every diversion every day of the year . . . Over 90% of the water diverted in Water District 01 is monitored by this automated system." Carlson Aff. at 3. Mr. Carlson testified in his deposition that it is possible that unrecorded beneficial use claims may receive water if water goes over Milner or if there is excess water in the system. Claimants' Joint Response at 12. However, Claimants did not produce any evidence via affidavit or otherwise to show that A&B has actually used and diverted water under its water rights even under those circumstances. Instead they rely only on the fact that they made a "sworn claim" to the water rights and IDWR recommended them. At the very least there may be a dispute of fact as to the validity of these claims.

C. BOR Water Right Nos. 1-10034 and 1-10482 may exist, but should still be considered "high" flow or "flood" water rights

The Ground Water Districts' Amended Motion for Summary Judgment filed June 25, 2009, withdrew the Ground Water Districts request that claim no. 1-10034 be disallowed as a matter of law but rather, that it be included as a "flood" or "high" water right. The United States' Bureau of Reclamation ("BOR") submitted the *United States' Response to the Summary Judgment Motions of the Ground Water Districts and Mud Lake Water Users Association* ("BOR Response") stating that designating this water right as a "flood" or "high" water right is not proper because it fills nearly every single year. BOR Response at 7. Further, the BOR

argues that adding remarks to clarify the source or period of use for their water rights is “unnecessary” because priority of the water right “already functions to determine when within the season of use water is available to the right.” *Id.* at 6. However, priority alone is not the only relevant inquiry in the administration between groundwater and surface water. *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, 143 Idaho 862, 870 (2007). And, like the SWC, the BOR has argued that its ability to store water year-round is interfered with by the pumping of groundwater. Yet, the BOR’s water rights do not divert and store water year-round. At best, the BOR’s storage water rights may start filling in late fall and through late spring, and thus, their source and season of use should be conditioned accordingly.

Claim no. 1-10482 has a claimed priority date of 1940. Mr. Fredrickson’s Affidavit submitted by the BOR shows that water was likely used under this water right in 1942 or earlier. While this evidence may show there is an issue of fact, it does not insulate the water right from needing a designation as a “flood” water right. The undisputed facts show that water rights, at least post-1916 are considered “high” or “flood” water rights in Water District 01. BOR Response at p. 7. Furthermore, the Eagle Decree itself establishes that water rights with a 1939 priority date are “flood” water rights. McHugh Aff. Ex. D and E; Harris Aff. Ex. 1-36. Thus, as a matter of law, any post-1939 water right should receive the designation as a “flood” water right with a limited season of use as well.

III. Claimants’ Water Rights have no determined season of use¹ and the season of use is a required element of a water right that should be limited to the extent of beneficial use developed under the water right.

The Ground Water Districts are requesting that the season of use element, which has not

¹ With the exception of water right no 1- 2061 which was licensed with the season of use 4/1 to 10/31

been previously defined for these water rights, be limited to when the water was actually diverted and used under these water rights. *Memorandum in Support of Motion for Summary Judgment* at 9-10. The SWC argues that because the season of use recommended by IDWR was based “upon standard IDWR procedure referencing the particular geographic location of the SWC irrigation projects” that the Director’s recommendation is correct as a matter of law. First of all, that argument is completely without basis and taken to its logical conclusion would mean that so long as IDWR used its “procedure” to recommend any water rights in the SRBA, that no claimant would be allowed to question IDWR’s recommendation on a specific element. The fact is, these water rights have not been diverted and used for an entire irrigation season, the Claimants have not relied upon them to provide water for an entire irrigation season and for those decreed in the Eagle Decree (and junior thereto), there is no doubt they are flood water rights available only during times of high water.

It is undisputed that there was no defined season of use element for these water rights.² Further, it is undisputed that the supporting documentation for the water rights that were decreed in the Eagle Decree specifically state that the water rights are limited to that period of use that is only “during periods of high flow.” McHugh Aff. Ex. D at 3 and Ex E. at 3. What this shows is that the basis for the Eagle Decree upon which the SWC relies for its water rights specifically noted that the period of use should be limited to the periods of high flow. This is exactly what the Ground Water Districts are requesting of the SRBA Court to define and clarify for these water rights. And, as pointed out by the *State of Idaho’s Response Brief*, “additional explanatory remarks to the Period of Use element that are necessary for the definition,

² Except for license no 1-2061 as stated in fn. 1 above.

clarification, or administration of the rights” are allowed under I.C. § 42-1411(2)(j). Id. at 7.

A. Irrigation Season of Use Should Reflect the Historical Development of the Water Right.

The SWC argues that limiting their flood flow water rights to a season of use that ends in late June or early July would require the SRBA Court and IDWR to redefine the season for all water rights in the Snake River Basin; such a result is absurd. First, there is no question that these water rights were intended to be flood flow water rights and available only during periods of high flow. However, with their water rights being challenged for the first time, the SWC suddenly does not want to embrace the limited nature of their water rights.

The unique thing about Water District 01 is that water distribution since 1978 occurs on the Snake River year-round, every single day. Therefore, it is obvious, when water rights have only a limited availability and the tables prepared for Mr. Young and included with his affidavit amply demonstrate this point. While his affidavit is specific to only the more senior Burley Irrigation District (“BID”) and Minidoka Irrigation District (“MID”) water rights (bearing priority dates of 1903 and 1908) the fact that these water rights are only available in select years for only a short period of time shows how limited their availability really is and shows that BID and MID depend not on base flows from the Snake River for the irrigation of their lands, but on their large storage contracts under water rights held for their benefit by BOR. Certainly water rights that bear priority dates more junior to BID and MID’s 1903 and 1908 water rights, such as those with 1939 priority dates, would be even less reliable and diverted for an even shorter duration.

B. Additional remarks are necessary for administration between surface and groundwater rights.

While it may be generally true, as the BOR argues, that “high flow” is merely a laymen’s term, the fact is that in this case, the court itself recognized that the water rights decreed in the Eagle Decree were “flood” flows. Further, limiting a water right’s season of use to reflect when it has actually been diverted for administrative purposes may not be as critical in a priority only, surface water system. However, when the partial decrees are going to be used to administer groundwater and surface water together, a system which is not administered on priority alone, then additional administrative conditions are necessary.

The SWC made a delivery call against junior ground water users under senior priority water rights ranging in priority from 1900 through the 1960s. It is interesting, and somewhat disingenuous that the SWC have attached excerpts from documents arising out of the SWC Delivery Call case when these same parties and same counsel objected to these documents as irrelevant in the Minidoka Credit trial before this same Special Master. However, as the Ground Water Users argued in the Minidoka Credit trial and as they argue here, the SWC delivery call case demonstrates why it is so important for the SRBA to get it right.

1) Priority may be enough in a surface water only system, but is not the only consideration in conjunctive administration.

In this case, the current watermaster Lyle Swank, the former watermaster Ronald Carlson and IDWR employee Tony Olenichak all agree that water rights post-1916 are high flow water rights. Aff. of Olenichak at 2-3. They also all agree that the priority date on water rights, serves to limit those high flow water rights in most years in the distribution of water in Water District 01. The testimony they gave obviously relates to the administrative activities in the surface

water only system of Water District 01. However, the Supreme Court confirmed that strict priority, like that in Water District 01, is not how groundwater and surface water are conjunctively managed. *American Falls Reservoir Dist. No. 2* 143 Idaho at 870 and 876 (the district court “rejected American Falls’ position at summary judgment that water rights in Idaho should be administered strictly on a priority in time basis.”). Additional considerations are required by IDWR’s *Rules for the Conjunctive Administration of Surface and Ground Water Resources* which the Supreme Court found to be constitutional. *Id.*

The fact is that the SWC is now trying through administration to secure groundwater for its senior water rights for a full irrigation season, even though those water rights were never historically available for a full irrigation season and despite the fact that many of these water rights were designated as “flood” rights at the time they were decreed. In the SWC delivery call case, the SWC contended that their water rights were entitled to water for the entire irrigation season. Third McHugh Aff., Ex. T. However, as the undisputed facts show, the water rights at issue in this case have never been used or relied on for an entire irrigation season. These flood flow water rights are supplied by spring and snow melt.

The State of Idaho in its Response Brief does not argue that these water rights should not be conditioned as “flood” water rights, but simply that any condition the Court may impose that it not require calculation to distinguish between “flood” and “base” flows of the Snake River. The remarks requested by the Ground Water Districts identify that these water rights are flood flows and are not available for an entire irrigation season and therefore cannot support a delivery call against junior ground water users. These conditions do not require any calculation by the Watermaster to distinguish between the water that is in the Snake River and will not disrupt the

historical administration of Water District 01. Rather, they will properly condition these water rights to the limitations under which they were historically developed, will avoid costly administrative hearings and guard against the demand that junior groundwater users provide mitigation water to supply a full irrigation season under water rights that are truly only flood water rights.³

- 2) Forcing groundwater users to defend against a delivery call for flood water rights is unjust and should be avoided by including appropriate conditions on the use of the water rights.

It is incredible that the SWC is now arguing that because the Director provided them relief and “accepted” their delivery call, they are now immune from any challenge to limit their water rights before the SRBA District Court. The Director administered the SWC water rights based only upon the recommendations made to the SRBA Court with the acknowledgement that any challenges by junior ground water users to those water rights could go forward in the SRBA. *May 2 Order* at 11-15. The SWC is fully aware that many of these water rights were intended to be flood flow water rights as they were all parties to the stipulation that reflected that fact and most certainly would have been involved in the drafting of the language in the stipulation that referred to the water rights as flood flows. *McHugh Aff.*, Ex. D and Ex. E. And, as the exhibits to Mr. Harris’ affidavit shows, counsel representing many if not all of the SWC entities knew

3 When Water District 01 went to a computer accounting system in the late 1970s, some of the water rights may have become available in the late season. However, there is no evidence that these water rights at the time of appropriation were ever used past late June or early July. The priority date of a water right is the “date from such application to beneficial use” and should not be expanded beyond what was historically available. See *Bachman v. Reynolds Irrigation Dist.*, 56 Idaho 507, 510 (1936). Actual diversion and application to beneficial use is the determining factor as to what the elements of a water right should be and in this case, when these water rights were developed they were diverted and used only during periods of high flow.

that the water rights in the Eagle Decree were “flood” water rights. Harris Aff. Ex. 1-36. To ignore these facts would simply be unjust.

The SWC and the BOR claims that the Court here need not limit their water rights because the junior groundwater users can just “defend” against one of their delivery calls claiming that the call is “futile.” *Claimants’ Joint Response* at 28; *BOR Response* at 2 This argument however shows why a “bright line” is necessary and why a condition that states that these water rights have no right to make a delivery call against junior groundwater rights is appropriate.

Notwithstanding the fact that the burden in the SRBA is on the SWC (and the BOR) to prove the proper season of use for its water rights, as the SWC, the BOR and the Ground Water Users are all aware, being forced to defend against a delivery call is a time consuming and costly endeavor. If the SRBA Court refuses to properly condition these water rights, then the junior groundwater users are stuck with just the plain elements as recommended. Then, in an administrative delivery call dispute, when the junior groundwater users attempt to show that these water rights are “flood” water rights not dependent on groundwater as their source, the SWC argues or a reviewing Court reasons, if these water rights were flood flows, why didn’t the SRBA Court say so?

This is not a just a hypothetical situation, but has actually occurred. Judge Melanson found in the Spring Users’ delivery call that the “decrees do not contain any conditions or limitations on use.” *Clear Springs Foods, Inc. v. Tuthill*, Case No. 2008-444 Order on Petition for Judicial Review at 8 and 9 (Fifth Jud. Dist. Gooding Co.). See Third Aff. of McHugh, Ex. R. In that case, the groundwater users’ argued that the Spring Users’ water rights should be

administered as groundwater because they are entirely supplied by the Eastern Snake Plain Aquifer which was an undisputed fact accepted by all experts. However, the Ground Water Districts' argument was rejected because the Hearing Officer found that to do so would constitute a "collateral attack on the partial decree." Third McHugh Aff., Ex. U, *Order Granting in Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment* at 7-8. In this case, the rationale would be, if IDWR treats the SWC's water rights as "flood" water rights in an administrative delivery call, that would be a collateral attack on the partial decree, because the partial decrees contain no such limitation. Essentially, the SWC's argument boils down to the fact that they want the groundwater users caught in this "catch-22" and do not want the groundwater users to have a forum to prove that their water rights should be limited.

Thus, the SRBA should add a remark that the source of these water rights is "flood" flows and as such, these water rights are precluded from demanding curtailment of junior groundwater users.

CONCLUSION

As this case clearly demonstrates, not all water rights are created equally. The Ground Water Districts know the SWC's position is that they can demand that the groundwater users supply them through mitigation water (or curtailment) enough water to satisfy their "senior" water rights for a full irrigation season despite the water rights' historic availability. The facts as established by the SWC's own testimony in Affidavits attached to Claimants' Joint Response show that their water rights are indeed used for only very short, brief periods of time and that they rely on their storage contracts for the remainder of the irrigation season. There is no genuine

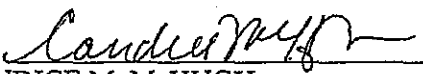
issue of material fact in this case; these water rights do not provide water for a full irrigation season and never have. In fact, they were not developed to provide water for a full irrigation season and depend on high flows in the Snake River that end in late June or early July. Therefore, as a matter of law, the SRBA Court should so limit these water rights.

The water rights decreed in the Eagle Decree were unquestionably intended to be limited to the early spring run-off period and any water rights with priority dates similar in time or more junior to the Eagle Decree water rights must be considered flood flows as well as a matter of law.

Conditions on the source and/or a season of use limitation is necessary to avoid the unjust result of the SWC trying to secure a water supply that is enhanced beyond what was historically available. The fact is the groundwater users should only have to defend against and supply those water rights that actually rely on flows from the Snake River which depend or may be impacted by groundwater pumping, not for water rights that depend on snowmelt and late spring run-off. Therefore, as a matter of law, the SRBA Court should condition these water rights so that they cannot support a delivery call against junior groundwater users.

DATED this 18th day of August, 2009.

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By: 
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CERTIFICATE OF MAILING

I hereby certify that on this 18th day of August, 2009, a true and correct copy of the foregoing was served by email on August 19th, 2009 to those with email addresses and U.S. Mail, postage pre-paid and addressed to the following:


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