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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 Nos. **Attachment 1**
)

) **CLAIMANTS' REPLY IN**
) **SUPPORT OF JOINT MOTION**
) **FOR SUMMARY JUDGMENT**
)
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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-

**CLAIMANTS' REPLY IN SUPPORT OF JOINT MOTION FOR SUMMARY
JUDGMENT**

referenced subcases (hereinafter collectively referred to as “Claimants” or “SWC”), by and through their attorneys of record, and hereby submit this reply in support of the Claimants’ *Joint Motion for Summary Judgment* (filed August 22, 2008).

INTRODUCTION

Since the Claimants filed their first motion for summary judgment in August, 2008, the Ground Water Districts (“GWD”) have amended their objection – conceding that the source of the Claimants’ water rights is the Snake River. They persist, however, in their demand that a “clarifying” condition or remark be placed on the water rights to identify the actual water diverted under the Claimants’ water rights as “high flow” or “flood” water. The City of Pocatello joins in the GWD’s arguments. Neither cites any law to support their untenable demand.

The law in Idaho is well settled. Water in a natural water course, such as the Snake River, is available for diversion and beneficial use regardless of its original and ultimate source – whether that be a spring, irrigation return flow, spring runoff or a tributary stream. Such water is also subject to administration. For example, Water District 01 has administered the various Claimants’ water rights for nearly a century, including rights decreed in the *Eagle Decree* proceeding for over 40 years. In addition, the Claimants’ water rights have been subject to conjunctive administration, before the Idaho Department of Water Resources, for the last five years as part of the Surface Water Coalition Delivery Call proceeding. There, the Director determined that junior priority ground water diversions were materially injuring the Claimants’ senior water rights. Both the GWD and Pocatello were parties to that call and accepted the Director’s material injury finding – neither appealing the Director’s final order.

The GWD's demanded relief stands to completely overhaul a century of administration in Water District 01. They claim that a comment is necessary to "clarify" the nature of these water rights. Yet, they do not dispute that such a comment has never been included on the water rights and that the Watermaster has never parsed out the so-called "flood" v. "natural" flow in administering these water rights. They claim that a comment is necessary to eliminate "guess work by the Watermaster" in administering these water rights. Yet, they do not question the Watermaster's historical administration of these rights or the fact that the Watermaster does not feel that any comment is necessary. In other words, there is no "guess work" to be concerned about now, it is GWD that is trying to fabricate questions, or "guess work," through their objections.

The GWD assert that their demands do not run afoul of the Connected Sources provisions of Basin Wide 5. In doing so, they miss the point. What GWD seek here is a determination by the SRBA Court that their ground water rights – which are hydraulically connected to the Snake River – are not hydraulically connected to the above water rights based on the allegation that the water rights are comprised solely of "high flow" or "flood" water. The GWD admit as much in asserting that a comment is necessary to "protect against a delivery call made against non-flood water supplies." Such a demand is not supported by the law, and it ignores the burden they could not meet by obtaining a "separate source" provision for their individual ground water rights.

The GWD ignore the fact that water rights 1-211A and B (BID and MID), 1-6 (AFRD#2), 1-2061 (FID) and 1-2050 (Milner) are licensed rights. Water rights 1-211A and B and 1-6 were subsequently decreed in the *Foster Decree* and *Eagle Decree*, respectively. Under Idaho Law, such licenses are binding on the GWD and cannot be challenged in the SRBA.

Finally, Pocatello, as a signatory to the *Stipulation* and party to the *Eagle Decree*, is bound by that decree.¹

ARGUMENT

I. The Source of the Claimants' Water Rights is the Snake River.

It is undisputed that the Claimants divert the above water rights from the Snake River. Although they originally challenged the "Snake River" as the source, the GWD now concede that the source is the Snake River. As such, summary judgment on this point is appropriate.

Notwithstanding this admission, the GWD and Pocatello continue to demand that the SRBA Court place a limiting remark on the water rights that identifies the actual water being diverted as "flood flow" or "high" water. In doing so, they seek to draw a legal distinction between the "natural flow" of the Snake River and the so-called "high flows" or "flood" water. The GWD's and Pocatello's end goal here is to make the prior appropriation doctrine apply only to so-called "natural flow" water rights. They fail to recognize that all surface water rights are to "natural flows" in the river, whatever the source. The GWD would have the SRBA Court bifurcate the Snake River into "natural flow," to which the prior appropriation doctrine applies, and the so-called "high flow" or "flood" water, to which the prior appropriation doctrine does not apply. Unsurprisingly, the GWD cannot cite any law to support their demand. Furthermore, such a demand runs afoul of well-established administration of these rights in Water District 01 pursuant to the prior decrees.

First, Idaho water law does not support the demand to bifurcate the Snake River. In the Spring Users' call case, the GWD raised a nearly identical argument. There, they asserted that certain groundwater was not subject to administration because it was "incidental recharge,

¹ The binding affect of the *Eagle Decree* is discussed in the Claimants' *Reply in Support of Second Joint Motion for Summary Judgment* and will not be discussed at length in this reply.

seepage, or ‘waste water.’” They claimed that such water, primarily the result of flood irrigation practices in the early-to-mid-1900’s, had artificially augmented the water table above historical levels and that, therefore, they should not be responsible for any material injury to the Spring Users’ senior water rights. They claimed that they should not be administered to restore any of the so-called “waste water” levels in the aquifer. In his *Order Granting in part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*, Hearing Officer Gerald Schroeder confirmed that Idaho law does not support the attempt to bifurcate the water source:

Water in the aquifer is subject to conjunctive management ***regardless of its source, so long as hydraulically connected.*** ...

It is not directly on point, but the logic of *Shaub v. Dist. Ct. of the 5th Jud. Dist.*, 96 Idaho 924, 926 (1975), is applicable:

It is well settled in Idaho that an adjudication of water rights to the main stream also adjudicates right to all tributary streams and other sources of supply to the main stream.

Facts about the source may be informative as to whether shortages are the result of weather or pumping, but ***once water enters the aquifer and river channels of the Eastern Snake River Plain from whatever source it is subject to administration by priority.***

Spring User SJM Order at 9-10 (emphasis added).² Although the summary judgment order was incorporated into the Director’s final order, the GWD did not challenge this decision.

The claim that a comment is necessary to “clarify” the historical nature and use of the Claimants’ water rights and to eliminate the “guess work by the Watermaster” in administering these rights, *GWD Resp.* at 3-5, is not supported by the facts of this case.

For decades, the Claimants’ water rights have been administered by the Water District based on their *priority and the available water supply* – not their origins. As Deputy

² For the Court’s conveniences, excerpts from Hearing Officer Schroeder’s summary judgment opinion are attached as Exhibit A to the *Arrington Affidavit*.

Watermaster, Anthony Olenichak has confirmed “The Water District administers water deliveries based upon priorities and water availability. In determining water availability within the main stem Snake River, the Water District *has at no time distinguished between ‘base flows’ and the ‘high flow runoff and spring snowmelt’* extant in the Snake River channel for purposes of administering water rights.” *Affidavit of Anthony Olenichak in Support of the State of Idaho’s Response Brief* ¶¶ 4 & 5 (emphasis added); *see also Olenichak Depo.* at 99, Ins. 14-23 (“Historically, when the Department has issued water rights, they issue them for the full irrigation season. *And the administration, if there was sufficient water in the system to fill those water rights, we would. If there wasn’t, then we wouldn’t*”) (emphasis added).

No “clarifying” remark or subordination provision has ever been included on these water rights. Importantly, there is no claim, from either the GWD or Pocatello, that the Water Master’s historical administration of these rights has been in error. They do not contend that the Water District is in error when it administers based on priority and water availability. They do not contend that IDWR was wrong to administer these rights in association with the SWC call. In fact, these rights were subject to administration under the SWC Call and the GWD and Pocatello specifically chose not to appeal the Director’s Final Order even though identical arguments were raised and rejected and even though the Director found the GWD’s and Pocatello’s out of priority diversions were materially injuring the SWC’s senior water rights. The GWD cannot have it both ways. They cannot accept administration of the rights before IDWR (a five year process – and counting) and Water Master and then complain to the SRBA Court that the decrees need clarification in order to be administered.

The deposition testimony also belies the GWD's argument that a comment is necessary to avoid "guess work" in administration. *GWD Resp.* at 5. Mr. Olenichak, deputy Watermasters and 18-year employee of the Water District, confirmed as much:

Q. (MR. ARKOOSH) There has been an argument made here that "Absent a remark that limits whatever rights we're talking about as high-water rights to a particular season of use, there will be a possibility of expansion of those rights."

Are you familiar with that argument?

A. (MR. OLENICHAK) Yes.

Q. Do you agree with that argument?

A. No.

Q. Okay. And why is it you don't agree with that argument?

A. Historically, when the Department has issued water rights, they issue them for the full irrigation season. And the administration, if there was sufficient water in the system to fill those water rights, we would. If there wasn't, then we wouldn't.

They were not based on historically looking at each day that that water right was historically filled and restricting the period of use to those days. We have not done that.

Olenichak Depo. at 99, lns. 3-23. In other words, by administering these rights based on priority and water availability, the Watermaster has avoided any of the "guess work" asserted by the GWD.

Finally, the GWD assert that the so-called "high flow runoff" is not "tributary" to the Snake River and cannot be considered part of the "natural flow." *GWD Resp.* at 4. The GWD failed to cite any law or fact to support this argument. To the contrary, the Director is given charge to distribute the "water from all natural water sources." I.C. § 42-602. There is no provision in the law that authorizes the Director or Watermaster to distribute water based on its

ultimate source. While the Watermaster handbook defines “natural flow” as including (i.e. it “may include”) “tributary streams, springs, return flows from irrigated fields or ditches, and underground flow or groundwater which seeps into the stream channel,” *Thompson Aff.* Ex. N, this list is, by its own terms, non-exclusive and cannot be read, as the GWD apparently read it, to be an exclusive list of sources to the “natural flow.” In fact, as stated above, the Water District has never “distinguished between ‘base flows’ and the ‘high flow runoff and spring snowmelt.’” *Olenichak Aff, supra*. In short, the GWD demand that the SRBA Court change decades of water management to suit their desires to avoid administration.

Since the source of the Claimants’ water rights is the Snake River and all water in the Snake River is subject to priority administration, summary judgment in favor of the Claimants is appropriate.

II. The Objectors Cannot Circumvent the Connected Sources General Provision

The GWD response to the Claimants’ arguments regarding the Connected Sources provision misses the point. They assert that they are not attempting to evade the Connected Sources provision but are seeking to obtain a “clarifying” remark on the water rights pursuant to Idaho Code § 42-1411(j). *GWD Resp.* at 5-7. Yet, the GWD’s own brief belies this argument and reveals that the true intent of the GWD is to treat the GWD’s junior-priority ground water rights as separate from the Claimants’ water rights for purposes of administration:

With a condition that defines the rights as flood flow water rights, the Watermaster can easily administer the rights *to protect against a delivery call made against non-flood water supplies, such as a delivery call made against junior-priority ground water rights.*

Id. at 5 (emphasis added). This end goal flies in the face of connected sources general provision.

“It is not in contest in the SRBA proceedings that most, if not all, water in the Snake River system is interconnected.” *A&B Irr. Dist. v. Idaho Cons. League*, 131 Idaho 411, 421

(1998). Based on this understanding, a general provision for all water rights decreed in the SRBA was drafted, providing that all water rights within a basin “will be administered as connected sources of water” unless otherwise determined to be a “separate source.” *Thompson Aff.* Ex. Q. Neither the GWD nor Pocatello sought a “separate source” provision on their respective ground water rights when they were partially decreed. They cannot now seek to effectuate a separate source provision on their rights by demanding a condition on the Claimants’ water rights that “protect[s] against a delivery call made against ... junior-priority ground water rights.”

III. Parties to the *Eagle Decree* are Bound by that Decree

The City of Pocatello was a party to the *Eagle Decree* and as such, is bound by the terms of the *Eagle Decree* – including the determination in the *Eagle Decree* that the water rights decreed therein divert “the waters of the Snake River.” *Thompson Aff.* Ex. A. This issue is more thoroughly addressed by the Claimants in their *Reply in Support of Second Joint Motion for Summary Judgment*, filed concurrently herewith.

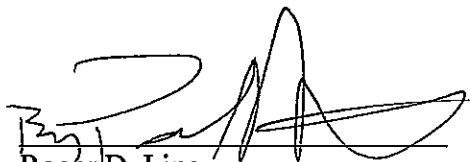
IV. Prior Licenses are Binding on the Department and Parties

The SRBA Court disfavors collateral attacks on licenses. *Order on Challenge of “Facility Volume” Issue & Additional Evidence Issues*, 3 SBA 18, 18.15 (Dec. 29, 1999). Water rights 1-2061 (FID) and 1-2050 (Milner) are licensed rights (formerly license no. 18919). In addition, prior to being decreed in the *Foster Decree* and *Eagle Decree*, water rights 1-211A and B (license no. 66) and 1-6 (license 15134) were licensed rights. Yet, the GWD and Pocatello each ignore the licenses and fail to respond to the Claimants’ argument. Since a license is binding upon the Department and cannot be collaterally attacked in the SRBA. I.C. § 42-220.

CONCLUSION

The Claimants divert water from the Snake River to fill their rights. All water in the Snake River is subject to priority administration and has never been parsed out depending on its ultimate source. The GWD and Pocatello demand that a century of water right administration be changed to suit their desire to avoid priority administration. They seek to separate their junior-priority ground water rights from the hydraulically connected Snake River for purposes of administering these rights and they demand that the SRBA Court limit the rights with a condition or remark. In making such arguments, they wholly ignore the prior licenses that established many of these rights. Since the GWD and Pocatello cannot sustain their objections on these theories, summary judgment is appropriate.

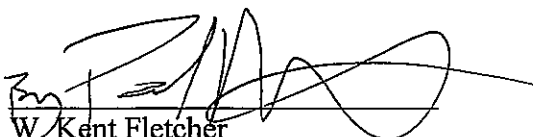
DATED this 19th day of August, 2009.



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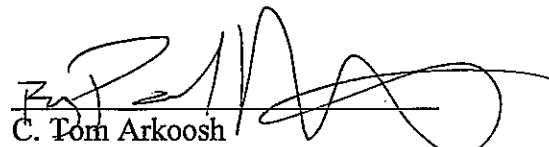
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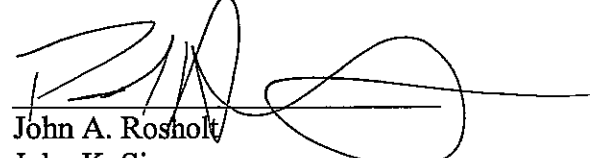
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2009, I served a true and correct copy of the foregoing **CLAIMANTS' REPLY IN SUPPORT OF JOINT MOTION FOR SUMMARY JUDGMENT** on the following by the method indicated:

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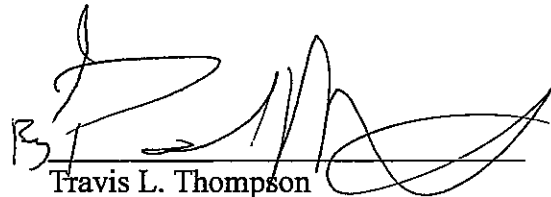
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Attachment 1

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