

Roger D. Ling, ISB #1018
P.O. Box 623
Rupert, Idaho 83350
Telephone: (208) 434-2717
Facsimile: (208) 436-6804

*Attorney for A&B Irrigation District,
Burley Irrigation District and Falls
Irrigation District*

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company and Twin Falls
Canal Company*

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AUG 20 2009
DEPARTMENT OF
WATER RESOURCES

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP PLLC
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

*Attorneys for American Falls Reservoir
District #2*

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 SECOND JOINT**
) **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-

**CLAIMANTS' REPLY IN SUPPORT OF SECOND 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’ *Second Joint Motion for Summary Judgment* (filed June 25, 2009). As discussed herein, the Ground Water Districts (“GWD”), the Fremont-Madison Irrigation District et al. (“Fremont-Madison Objectors”), the Mud Lake Water Users (“MLWU”) and the City of Pocatello (“Pocatello”) (collectively referred to as “Objectors”) have failed to meet the burden necessary to sustain their objections to the above-referenced water rights and, therefore, summary judgment is appropriate.

INTRODUCTION

The Objectors, who generally have ground water rights that are junior in priority to the Claimants’ senior surface water rights, seek an order from this Court prejudging the results of a conjunctive administration before the Idaho Department of Water Resources (“IDWR”). In essence, the Objectors seek a de-facto “futile call” determination for the SWC water rights in order to shield their junior priority ground water rights from administration altogether. In light of the fact that the Director has already found that diversions under their junior priority ground water rights from the Eastern Snake Plain Aquifer (“ESPA”) injure the SWC senior surface water rights and has already denied their alleged defenses to that call, the Objectors ask this Court to decree a result they could not obtain before IDWR.

Without any consideration for the long history of administration of these *decreed* rights – which includes administration by Water District 01 pursuant to the *Eagle Decree* since 1968 and by the Director in conjunctive administration for the last 5 years – the Objectors seek to impose “clarifying” remarks and subordination provisions on the Claimants’ water rights. Essentially, the Objectors would have this Court isolate the Claimants’ surface water rights from all other

Snake River water rights in the Basin (as well as rights on tributary surface streams) and include conditions or remarks that would foreclose future administration, including vis-à-vis junior priority ground water rights. Such a demand has no support in the law. The result would be that these rights would be administered separately and distinctly from other rights acquired at the same time under the same methodology. Why? Because junior-priority water users fear that administration in Basin 01 might actually occur in a manner consistent with how water has been regulated in Water District 01 for over 100 years.

GWD even fabricate ulterior motives by claiming that the SWC is seeking to “position themselves to call out and demand mitigation from ground water users to provide a supply during times of the irrigation season it had never historically [sic] has been available” and that the SWC is “attempting to improve the historic quantity and certainty of water available under” the above water rights. *GWD Resp. to 2nd Motion* at 18 & 23. Contrary to GWD’s accusations, the Claimants seek to *confirm* their previously licensed and decreed water rights, not “expand” those rights. GWD’s request results in a blanket subordination that has never existed and should not exist. Requesting that water rights be decreed in priority is not an “expansion” of the surface water rights. Rather, it is the required administration under Idaho’s prior appropriation doctrine.

Next, the Objectors attempt to pigeon hole their challenge to the *Eagle Decree* water rights by asserting that the 1968 statutes allowed for a challenge to a supplemental decree¹ “in a court of competent jurisdiction at any time by any person deeming himself aggrieved thereby.” *MLWU Resp.* at 6-7; *GWD Resp. to 2nd Motion* at 10 (each citing former Idaho Code § 42-1405). However, the Objectors do not dispute the findings of the *Eagle Decree* and do not claim that they are “aggrieved” by the *Eagle Decree*. Rather, their only complaint is that they have junior priority water rights that may be administered if their diversions injure senior water rights. The

¹ The GWD wrongly claim that the *Eagle Decree* is a private decree. See, e.g., *GWD Resp. to 2nd Motion* at 7-10.

potential administration of a junior water right that may be injuring a senior water right is not what the legislature considered when it used the term “aggrieved” in the statute. Moreover, that provision was repealed by the Legislature through the amendment and redesignation of I.C. §42-1405 in 1994.

Furthermore, as the State identified in its responsive briefing, the traditional defenses of “adverse possession, estoppel, laches, waiver, waste, forfeiture, abandonment, etc.” are available to those who were not parties to the *Eagle Decree*. *State Resp.* at 7. Yet, the Objectors have not raised any of these issues. Rather, they attempt to elevate their junior status and give themselves power over the extensive history of development in the Upper Snake.

While fashioned as a challenge to a lack of “clarity” regarding the “high flow” or “flood water” nature of these rights, the Objector’s actions merely amount to an attempt to a request that the Court prejudge potential injury and mitigation issues in an attempt to avoid future administrative proceedings before the Department. The Objectors do not dispute that these water rights have been administered by Water District 01 since the early 1900’s and that the Water District has never parsed out “flood” vs. “non-flood” water in administering water rights to the Snake River. Importantly, these water rights have been subject to conjunctive administration in the Surface Water Coalition Call proceedings since 2005. There, the Director determined that pumping under junior-priority groundwater rights had materially injured the SWC’s senior-priority surface water rights. Contrary to the GWD’s claims here, no “clarifying” comment was required by the Water District 01 Watermaster or by the Director to administer the rights and the GWD did not challenge the Director’s material injury finding.²

² As discussed in the Claimants’ *Joint Response to GWD Source Motion*, the GWD made nearly identical arguments before the Department and Hearing Officer in the SWC Call proceedings. *See Joint Response to GWD Source Motion* at 27-31. These arguments were rejected and the GWD chose not to challenge the Director’s final order on these issues. *See id.*

The GWD further complain that the standard IDWR “season of use” is too long and that the SRBA Court should cut that season in half and set an end date sometime between the end of June or early July. The GWD claim there are no material facts in dispute, yet fail to provide the Court with any guidance as to their consideration of an appropriate date. In addition, they fail to provide any legal or factual support for their claimed criteria that water must be available every day of the entire irrigation season in order for a water right to have a standard 3/15 to 11/15 season of use. Rather, they assert that the Court should just reject the standard irrigation season and arbitrarily pick a date sometime between the end of June and early July. *GWD Resp. to 2nd Motion* at 20. They ignore the fact that many of the rights are available for diversion and use at other times beyond their suggested ending date, including toward the end of the irrigation season. Such blind guidance cannot overcome the *prima facie* nature of the Director’s Recommendation for the above water rights. *See* Idaho Code § 42-1411(4).

Finally, the Objectors’ opposition to the priority date of certain rights (1-7, 1-8, 1-9 and 1-14) cannot stand up to the undisputed facts in the case. Notably, GWD fail to recognize the priority date decreed by the *Eagle Decree* Court by attempting to add new criteria to the priority date element. While the record demonstrates that water right 1-14 was not used until 1957, the remaining rights were available for use prior to the April 1, 1939 priority date decreed, claimed and recommended. Accordingly, the Claimants’ summary judgment motions should be granted.

BURDEN OF PROOF

Apparently misunderstanding the applicable law, the GWD continually assert that the Claimants must prove that the recommendations are correct. *See, e.g., GWD Priority Memo* at 9 (“Claimants have not proffered evidence that can meet their burden under I.C. § 41-1411(5) [sic] to prove that their claimed and the recommended priority date is correct”); *GWD Resp. to 2nd*

Motion at 5 (“The burden is on the SWC to prove that there is no genuine issue of fact regarding their water right claims in order for them to succeed on summary judgment”). Under Idaho Law, the Director’s report “shall constitute prima facie evidence of the nature and extent of the water rights.” I.C. § 42-1411(4). Furthermore, “any party filing an objection to any portion of the director’s report *shall have the burden of going forward with the evidence to rebut the director’s report* as to all issues raised by the objection.” I.C. § 42-1411(5) (emphasis added).³ Since the Objectors have not provided any evidence to rebut the *prima facie* nature of the Director’s report, summary judgment in favor of the Claimants is appropriate. Although the Claimants have the burden to demonstrate no genuine issue of material fact with regards to their summary judgment motions, this does not shift the burden the Objectors carry with respect to their objections to the Director’s recommendations for the Claimants’ water rights.

ARGUMENT

I. The Objectors are Barred from Attacking the SWC Water Rights Defined by the *Eagle Decree*.

The *Eagle Decree*, and the prior decrees it confirmed, defined the “source” and “priority date” elements of the water rights subject to these subcases. The Director recommended these elements consistent with these prior decrees. The Objectors attack these previously decreed elements by claiming that “remarks” are necessary to identify the “flood water” nature of the rights and the fact the water rights are not available for the entire irrigation season. By their arguments, the Objectors seek to create new criteria, and a new classification for the SWC

³ The GWD claim that the Claimants’ have the burden even though they have not filed an objection. Such a claim is not consistent with section 42-1411(5), which provides:

Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right. Since the director’s report is prima facie evidence of the nature and extent of the water rights acquired under state law, *a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director’s report.*

(Emphasis added).

surface water rights different than what was previously decreed in an attempt to limit and restrict the SWC's use of those rights. The SWC water rights are regulated in priority just like any other surface water right on the Snake River, and the Objectors' water rights whether they are surface or ground water rights, are held to the same standard under Idaho's prior appropriation doctrine.

Accordingly, any attempt to redefine the source or limit the season of use of the water rights is simply an effort to preclude the Watermaster from distributing water to the Claimants' senior water rights. As described below, these arguments fail.

A. As Parties, the City of Pocatello and the Fremont-Madison Objectors are Bound by the Terms and Elements Defined by the *Eagle Decree*.

As parties to the *Eagle Decree*, the City of Pocatello and the Fremont-Madison Objectors are barred from collaterally attacking the SWC's water rights in the SRBA. *See SWC Memo in Support of Second Joint Motion* at 5-6. The Fremont-Madison Objectors provided no response to the SWC motion on this point, hence it is clear they accept the binding provisions of that prior decree. On the other hand, Pocatello alleges that it is free to object to the SWC water rights, despite its party status to the *Eagle Decree* case, to ensure the "SRBA decree does not improperly expand the scope of the underlying rights to the detriment of Pocatello." *Poc. Resp.* at 4. Similar to GWD's theory, Pocatello alleges that it is not bound by the *Eagle Decree* because the Claimants are seeking to "expand" their previously decreed water rights. This is untrue. Pocatello further claims that it is eligible to "litigate the proper terms and conditions of claims arising under the Eagle Decree" based upon the Idaho Supreme Court's decision in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736 (1997), and because Idaho law authorizes the SRBA Court to re-examine the SWC *Eagle Decree* water rights because they were either missing an element or a term was vague. *Id.* at 7-9. Both arguments fail as a matter of law.

There is no issue of fact that Pocatello was a party to the *Eagle Decree*. As such, Pocatello is bound by that decree, as well as the *Stipulation* it signed agreeing to the defined elements of the SWC's Snake River water rights. See *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 741-42 (1997); *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law* at 12 (subcase no. 29-11609) (Oct. 6, 2006). Contrary to its claim, the Legislature and Idaho Supreme Court have not authorized this Court to allow signatory parties to evade the effect of prior judgments.

Pocatello's argument that its joinder in the objections to the SWC water rights does not constitute a "collateral attack" is similarly unpersuasive. With respect to a judicial proceeding, a "collateral attack" is defined as "an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." See *Black's Law Dictionary*, 6th ed. 1991. Pocatello is asking this Court to re-define the elements of water rights to which it previously agreed and which were decreed in a prior adjudication. Admittedly, Pocatello seeks to limit the SWC water rights to protect its later acquired "junior ground water rights". *Poc. Resp.* at 4. There is no question that Pocatello is seeking to evade the prior court judgment contrary to Idaho law. Both the Idaho Supreme Court and the SRBA Court have held that parties to prior decrees are bound in the SRBA. Therefore, Pocatello is precluded by law from attacking the *Eagle Decree* now.

Next, Pocatello relies upon Idaho Code § 42-1427 to allege that it is free to attack the SWC water rights because the *Eagle Decree* did not define all of the elements or that the prior decree is vague. The *Eagle Decree* adjudicated water rights to the Snake River. Hence, there is no basis to conclude that I.C. § 42-1427 applies since the "source" element was clearly defined.⁴

⁴ Although Pocatello withdrew from GWD's *Motion for Summary Judgment on Priority Dates*, it apparently does not believe it is bound as to the "source" element defined by the *Eagle Decree*.

In addition, Pocatello failed to identify any “vague terms” in the *Eagle Decree* that would need clarification or would make I.C. § 42-1427 applicable in this case.⁵ Just the opposite, the terms of the *Eagle Decree* are clear and unambiguous and therefore no extrinsic evidence is needed to clarify or interpret its provisions. See *Claimants’ Joint Response to MLWU’s Motion for Summary Judgment* at 4-6. The provisions of I.C. § 42-1427 therefore do not apply.

As parties to the *Eagle Decree* Pocatello and the Fremont-Madison Objectors previously agreed to the SWC Snake River water rights without the limitations and conditions they seek in their objections. Accordingly, they are bound by that prior judgment and Idaho law precludes their “collateral attack” on the Claimants’ water rights now.

B. *Res Judicata* Bars All Challenges by Water Users who Failed to Take Advantage of the Opportunity to Litigate the *Eagle Decree* Water Rights.

GWD miss the point regarding the Claimants’ previously decreed elements of their water rights. Actual litigation is not necessary to bar a claim under *res judicata*. In their *Memorandum in Support of Second Joint Summary Judgment Motion* at 9-14, the Claimants discuss this legal principle – that refusing to take the opportunity to litigate can bar future challenges. Any water user whose right is senior to 1968 would, therefore, be barred from raising any future challenges based on their refusal to participate or to appear and “defend against” the water rights decreed in the *Eagle Decree* proceedings. None of the Objectors directly respond to this argument. Instead, GWD states that it was not a named party to, and therefore, is not bound by the *Eagle Decree*. *GWD Response* at 7.

GWD asserts that the *Eagle Decree* proceeding was not an *in rem* general adjudication and therefore should only be considered a “private adjudication” for this purpose. GWD relies upon *Mays v. District Court of the Sixth Jud. Dist.*, 34 Idaho 200, 207 (1921), to claim that their

⁵ Despite the cited SRBA order concerning a summary judgment motion on certain Basin 36 water right claims, the statute does not address “vague terms” from prior decrees.

objections to the elements of the SWC water rights are not barred by the *Eagle Decree*. GWD's reliance upon *Mays* is misplaced. First, the *Eagle Decree* proceeding specifically incorporated prior Snake River decrees, namely *Woodville Canal Co. v. Clark & Edwards Canal & Irrigation Company, et al.* ("*Woodville Decree*"), *Twin Falls Canal Company v. Charles N. Foster, et al.* ("*Foster Decree*"), and *Rexburg Irrigation Company et al. v. Teton Irrigation Canal Company, et al.* ("*Rexburg Decree*").⁶ See Ex. A to *Thompson Aff.* The proceeding was therefore binding upon all parties to those prior decrees and proceeded to adjudicate all remaining water rights to the Snake River, not previously adjudicated or licensed. The proceeding was also binding upon the Water District 01 Watermaster (at that time Henry Eagle) since he was a named defendant. The water rights have been administered pursuant to this decree for decades.

The Court in *Mays* held that a summary supplemental adjudication was not the exclusive method to have a water right decreed, and that the statute (C.S. 7036) "did not intend to take away from a water user an adequate remedy." 34 Idaho at 206. The issue in *Mays* was whether the summary supplemental adjudication statute "excludes the right of the company to bring an action to quiet title under sec. 6961, or is merely cumulative." 35 Idaho at 205. In other words the issue was whether a water user had a separate means to have his water right adjudicated. The Court held that the Company did have an alternative in that case.

Here, the question concerns GWD's objections to the SWC's previously decreed water rights, as recommended by IDWR, not GWD's claims to water in the Snake River Basin. GWD's water right claims, or its methods to acquire a water right are not at issue in these subcases. Unlike the question in *Mays* which concerned a company's water right to the Little Lost River that was not addressed in prior decrees, and its ability to file a quiet title action

⁶ All water rights decreed in the *Woodville*, *Foster*, and *Rexburg* decrees were reconfirmed in the *Eagle Decree*. The Court held that "said Decrees and Findings of Fact and Conclusions of Law upon which they are based are binding upon all plaintiffs herein". *Eagle Decree* at 1; Ex. A to *Thompson Aff.*

instead of a summary supplemental adjudication, here the question is the effect of a prior decree and its defined elements and whether subsequent water users, like GWD and its members, appropriate their rights “subject to” previously decreed and licensed surface water rights.⁷

Accordingly, although GWD was not a signatory party to the *Eagle Decree*, they are similarly bound by its defined elements given the statutory procedure followed and the fact they acquired their junior priority ground water rights subject to existing prior water rights, or their rights were acquired before the *Eagle Decree* and they failed to appear and defend against the water rights they disagree with now. Water rights on the Snake River junior to the 1939 *Eagle Decree* water rights have been regularly curtailed to satisfy those senior rights in Water District 01. See *Swank and Olenichak Depositions*. Accordingly, the fact a water user acquired a Snake River right junior to 1939 doesn’t mean that he is free from administration. The same reasoning applies to junior priority ground water rights.

The MLWU disparage the Claimants’ use of the phrase “technical privity” but, in the end, can only cite a treatise to support its attempt to avoid *res judicata*. None of the objectors dispute, however, that, for the purposes of *res judicata*, both “party” and “privity” are liberally defined. See *Ticor Title Co. v. Stanion, II*, 144 Idaho 119 (2007); *Safeco Ins. Co. v. Yon*, 118 Idaho 367 (1990).⁸ For example, even though Ticor was technically not a party to the first proceeding, the court held that it was a party for the purposes of *res judicata*. *Ticor Title Co.*, 144 Idaho at 121-123. Similarly, though Yon and Bussell’s heirs were not technically in privity

⁷ GWD’s reliance upon *Union Central Life Ins. Co. v. Albrethsen*, 50 Idaho 196 (1930) is also incorrect. The decree in *Albrethsen* was declared “void” because the statutory requirements for a supplemental adjudication were not followed and the appellant Albrethsen had attempted to acquire a water right to water that was previously appropriated pursuant to the *Frost Decree* and *Woodworth Decree*. 50 Idaho at 206-08. No such similar procedural defects are alleged here against the *Eagle Decree*.

⁸ Defining these concepts liberally is consistent with the goal of *Res Judicata*, which is to “prevent wasteful relitigation of issues which have already been presented, or at least should have been presented, in prior adjudications.” *Sun Valley Land and Minerals, Inc. v. Burt*, 123 Idaho 862, 869 (1993).

with one another, they did have a mutual interest and were held to be in privity under a *res judicata* analysis. *Safeco Ins. Co.*, 118 Idaho at 368-373. Here, all waters in the Snake River Basin are considered interrelated. *State v. Hagerman Water Rights Owners, Inc.*, 130 Idaho 736, 742 (1997). It follows, therefore, that all water rights in the basin share a commonality of interest, or, for *Res Judicata* purposes, privity.

According to the Findings of Fact for the *Eagle Decree*, the “Plaintiffs herein comprise *all persons diverting water from, and claiming or asserting rights to divert water from the Snake River and its tributaries above Milner Dam.*” *McHugh 2nd Aff.* Ex. D1 at 2-3 (emphasis added). The proceeding included all water right claimants to the Snake River and its tributaries to adjudicate additional water rights, it was not simply a private adjudication that concerned two water users on an isolated stream. Notice of the proceedings was published in “the counties of Power, Cassia, Minidoka, Twin Falls, Jerome, Blaine, Gooding, Lincoln and Elmore, Idaho” and any “party interested” had the opportunity to appear and defend against such rights pursuant to Idaho Code § 42-1405. *Id.* Stated differently, the Objectors (whether a party to the *Eagle Decree* or not) had notice and an opportunity to participate in Court if they disagreed with the SWC water rights. Neither GWD, MLWU, nor the GWD’s members holding groundwater rights prior to the creation of the GWD, so appeared or defended. Similar to the parties in *Ticor* and *Safeco Ins. Co.*, *res judicata* should bar the Objectors’ challenges to the *Eagle Decree*.⁹

The published notice provided for in the *Eagle Decree* proceeding was similar to that provided by IDWR for new water right applications as well as that provided for claims filed and reported in the SRBA. Accordingly, GWD cannot distinguish the fact that the Idaho Supreme

⁹ MLWU’s assertion that the Director is not obligated to accept a prior decree issued in a private adjudication is not relevant to these proceedings, which are addressing the binding nature of a supplemental decree.

Court has upheld such notice provisions as satisfying due process requirements for other water right holders. See *LU Ranching Co. v. United States*, 138 Idaho 606 (2003).

In addition, no party appealed the *Eagle Decree*. Their refusal to participate and appeal that judgment cannot now be used against the parties to the *Eagle Decree* as a way to avoid *res judicata* in a post hoc challenge to the decree. Since the statutory procedures were followed, and every water user had the opportunity to appear and object to the water rights, they are estopped from challenging those decreed elements, including the “source”, here in the SRBA.

Seeking to avoid the binding affect of the *Eagle Decree*, the Objectors rely on one phrase from the prior supplemental decree statute. They claim that the following provision from former Idaho Code § 42-1405 authorizes their challenge:

Provided, that the right thus established shall not be deemed adjudicated, but prima facie merely, and may be attacked by suit brought in a court of competent jurisdiction at any time by any person deeming himself aggrieved thereby.

Second Thompson Aff. Ex. B.

The statute was amended and redesignated by the Idaho Legislature in 1994. The above cited provision was repealed. Therefore, the *Eagle Decree* is no longer subject to this provision. Further, none of the Objectors claim to be “aggrieved” by the water rights adjudicated in the *Eagle Decree*. To the contrary, they each claim that their objections are intended to carry their restrictive interpretations of the *Eagle Decree* into the SRBA decree. The only manner in which they claim to potentially be “aggrieved” is that the Director can determine that their junior rights are injuring senior rights and they can be subject to administration. The fact a water user acquires a junior water right that is subject to administration in order to protect senior water rights – as required by the Constitution, statutes, and case law – does not mean the person is “aggrieved” by a senior water right as that phrase was used in section 42-1405. Indeed, the

recognition that there will *not* be sufficient water to satisfy all water rights all the time is the very essence of Idaho's prior appropriation doctrine.

Junior water rights are acquired with full knowledge and notice of prior water rights, including the Claimants' water rights that have been decreed and annually administered by Water District 01. Attached as Exhibit B to the *Arrington Aff.*, is an example license and permit issued by the Department that specifically identifies that the water right being acquired is "subject to all prior water rights." The fact that junior rights are obtained "subject to all prior water rights" does not mean those junior users qualify as "aggrieved persons" who can "attack" the water rights decreed in the *Eagle Decree* proceeding. Clearly, the Objectors would not have standing to file such a suit contemplated by the former statute. Since the Objectors are not "aggrieved," the statute did not authorize their challenge they claim to make.

At any rate, the statute was amended and redesignated in 1994. Now, the adjudication statutes define a supplemental adjudication as follows:

(10) "Supplemental adjudication" means an action commenced in accordance with section 42-1424, Idaho Code, for the judicial determination of both the extent and priority of the rights of a person to the use of water from any water system within the state of Idaho which has been adjudicated in a general adjudication or in a private adjudication.

I.C. § 42-1401A(10). Accordingly, under Idaho law, a supplemental adjudication determines "both the extent and priority" of the water right acquired. Contrary to GWD's claim that the Legislature did not "intend for prior decrees to have conclusive weight in the SRBA", the definition of a "supplemental adjudication" states otherwise. Therefore, the *Eagle Decree* Court determined the "extent and priority" of the water rights adjudicated in that proceeding.

Finally, the Water District 01 (formerly Water District 36) Watermaster was a named party to the *Eagle Decree* as well. As such, the Watermaster and the Water District are bound by its provisions. The Watermaster cannot administer the water rights inconsistent with the provisions of the *Eagle Decree*. In addition, the Director cannot authorize new water rights that impair or interfere with prior rights, including water rights previously decreed. *See* I.C. § 42-110 (The proprietors of any ditch, canal or conduit, or other works for the diversion and carriage of water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any valid claim, permit, license or decree of court, shall be entitled to such quantity measured at the point of diversion, subject, however, to all prior rights) (emphasis added); I.C. § 42-607 (watermaster authorized to distribute waters “according to the prior rights”); *see also Arrington Aff.* Ex. B (example of license and permit issued by IDWR indicating that the water appropriated is “subject to prior water rights”).

Since the Watermaster is required to administer the rights to the Snake River consistent with the *Eagle Decree*, and junior ground water rights were acquired “subject to” those prior decreed rights, it follows that the decree and its defined elements should be binding upon those water right holders now in the SRBA. GWD attempts to evade the reality that its rights were acquired “junior” to the SWC decreed water rights by claiming the SWC rights “could be administered to achieve a water right greater in quantity and certainty than ever existed when they were originally decreed”. *GWD Response* at 11-12. Nowhere have the Claimants sought to “expand” their water rights in the manner suggested by GWD. To the contrary, Water District 01 has confirmed that the SWC water rights have been administered consistent with their priority as against all other surface water rights in the district. *See Claimants’ Joint Response to GWD Source Motion* at 17-23.

With respect to conjunctive administration, the SWC water rights have similarly proceeded through a delivery call proceeding and have been administered against junior priority ground water rights in the ESPA. The SWC water rights are not “expanded” because they are senior to a majority of the ground water rights developed on the ESPA. If a hydraulically-connected junior ground water right interferes with and injures a senior surface water right with a priority of 1880 or 1939 that junior ground water right is still subject to administration. Moreover, the Director of IDWR has already determined that junior priority ground water rights injure both natural flow and storage water rights held by SWC, and he did not find an illegal “expansion” of the junior priority surface water rights as suggested by GWD. *See Claimants’ Joint Response to GWD Source Motion* at 27-31. Accordingly, the claim by GWD is unpersuasive and does not justify the subordination they seek.

II. The Source of the SWC Water Rights is the “Snake River” and the Water Rights are Not Limited by a New “Flood” or “High Flow” Classification.

Contrary to the testimony of GWD’s own experts, the Objectors continue to wrongly assert that the Claimants’ water rights are comprised solely of “high flow” or “flood water” and that a clarifying comment is necessary to ensure that the Objectors’ junior priority water rights are free from administration, even if they injure the Claimants’ senior water rights. This claim that the water rights “only” divert “flood water” and are only available during certain times of the irrigation season is factually incorrect. *See Claimants’ Joint Response to GWD Source Motion* at 17-21.

Although GWD claim that it “does not seek to change the elements as set forth in the SWC’s water right claims”, the requested condition would in effect cut-off the water rights from diverting any Snake River water at certain times of the year unless the river could be described as running at a “high flow” or “flood water” stage. Moreover, contrary to its argument, GWD

seeks to artificially limit the “source” element of the Claimants’ water rights in a manner never administered by Water District 01 or the Director. *See Claimants’ Joint Response to GWD Source Motion* at 23-31. Although GWD admits that the water rights are not limited or conditioned by language in the *Eagle Decree* itself, they still argue that a “flood water right” reference in the *Stipulation and Findings of Fact* is controlling and creates a new classification of water rights that is somehow subordinated to later acquired ground water rights. *GWD Response* at 12. Even if the GWD’s premise that these water rights are “flood water rights” is accepted, that doesn’t mean junior ground water rights acquired after the Claimants’ surface water rights are free to injure those rights through out-of-priority diversions. The argument flies in the face of the prior appropriation doctrine and is not supported by Idaho law.

GWD points to no statute or case that states a “flood water right” is subordinate to junior priority ground water rights. Although water rights on a surface water stream are regularly curtailed by priority to satisfy senior rights, and some junior rights may not be available as often as more senior rights, does not mean those junior surface water rights are inferior to even more junior hydraulically connected ground water rights. Yet that is the extreme result pressed by GWD in these subcases.

In addition, GWD go so far as to claim that the Claimants’ previously licensed water rights (1-2050 and 1-2061) should “likewise be considered flood water rights” simply because their priorities are later than the 1939 *Eagle Decree* rights. No “flood water” condition exists on the licenses issued by IDWR. Accordingly, Idaho law precludes GWD’s “collateral attack” on the SWC previously licensed water rights in the SRBA. *See Claimants’ Memo in Support of Second Joint Motion for Summary Judgment* at 17-18. If GWD disagreed with the water rights licensed by IDWR they should have protested the applications at the time they were noticed for

protests by IDWR or appealed the licenses after they were issued. The fact GWD did not oppose those rights at that time precludes the objections they seek to raise now.

Finally, GWD wrongly argues that the SWC water rights must be “conditioned” because “they were never available during the entire irrigation season and were intended to be administered as flood water rights”. *GWD Response* at 6. Again, by attempting to create a new criteria for only the SWC water rights, i.e. “water availability” and what GWD claims was “intended” by the parties to the *Eagle Decree*, GWD seeks to place limitations and conditions not found on any other Snake River rights in Basin 01. Neither of these criteria are defined elements for the Director to recommend to the SRBA Court. *See* I.C. § 42-1411.¹⁰

In creating new criteria for the SWC rights only, GWD ignore the facts in the record, including the long history of administration of these water rights, Water District 01’s admission that “natural flow” and “high flow” water is never considered when distributing water by priority, and GWD’s failure to challenge the Director’s final order in the SWC Call proceeding that specifically found material injury to the SWC water rights – including those subject to these proceedings. The Objectors do not rely upon the decreed elements in the *Eagle Decree* to support their claim. Rather, they rely upon extrinsic evidence only, pre-decree documents and what they claim parties “intended” in that case in hopes that the Court will ignore the unambiguous decreed elements of the water rights and the subsequent history of administration. This information is not relevant since the decree is unambiguous. In short, the facts do not support their claim.

As the affidavits of Dave Shaw and Norm Young make clear, water under the alleged “high flow” or “flood” water rights has historically been available through early July and then

¹⁰ It is telling that the Objectors (including the Objectors that hold surface water rights decreed in the *Eagle Decree* proceeding) are not seeking these conditions or clarification of the source for their own surface water rights.

again in September or October. In fact, as to the Burley Irrigation District and Minidoka Irrigation District water rights, it is uncontroverted that the Water District 01 records show that the “availability and use of natural flow has not been limited to brief periods during spring freshets.” *Young Aff.* ¶ 10. To deem these rights as only being available during periods of “high flow” or “flood” ignores the history of availability and the fact water availability can vary during the irrigation season and from year to year. Accordingly, even using GWD’s “water availability” criteria, which is not supported by Idaho law, it is obvious the facts do not support their theory.

Furthermore, the Claimants’ water rights have been administered by Water District 01 for decades based on their *priority and the available water supply* – not the origin of the water supply. As stated by one of GWD’s and the State’s Affiants, Deputy 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).¹¹

Clearly, the Watermaster does not “divide” the water based upon the source of the molecules and distribute it to various rights on that basis. Yet, this is the so-called “clarification” the Objectors request through their objections. Even the Objectors can’t agree on this issue. While the MLWU concede that the source of these rights is the Snake River, *MLWU Resp.* at 2, the GWD continue to assert that the source should be listed as “high flow” water because, according to the GWD, run-off water *in the Snake River* is not tributary to the Snake River and

¹¹ 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.”).

cannot be considered “natural flow,” *GWD Resp. to 1st Motion* at 4. The GWD fail to cite any law or fact to support this illogical argument. To the contrary, the Director and Watermaster are required to distribute the “water from all natural water sources.” I.C. § 42-602. 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.*¹² Finally, 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 or limit the source element of the Claimants’ water rights in an unprecedented way to avoid future administration is not supported by the facts or law and should be rejected.

Notably, the GWD raised a nearly identical argument as a defense in the Spring Users Delivery Call case, where they argued that certain groundwater was not subject to administration because it was “incidental recharge, 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. In his *Order Granting in part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*, Justice Gerald Schroeder (the Hearing Officer in the case) confirmed that Idaho law does not authorize administration by segregation of the water molecules:

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:

¹² This does not mean, as the GWD imply, that spring runoff cannot be considered part of the natural flow.

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).¹³ Although the summary judgment order was incorporated into the Director's final order, the GWD did not appeal this decision. The same legal reasoning applies in this proceeding where the Objectors seek to artificially divide the source of the water in the Snake River.

Once water enters the Snake River, "from whatever source, it is subject to administration by priority." Whether from a tributary stream, a spring, irrigation return flow, or spring runoff, the water is subject to priority administration. Any attempt to parse out the water based on its ultimate beginning point is unnecessary, would derail the administrative process and require the re-adjudication of all water rights that could, arguably, be diverting spring run-off only.¹⁴ Since IDWR has properly recommended the source element as the Snake River, consistent with prior decrees, the objections seeking to re-define or limit the source of the Claimants' water rights fail.

Objectors would have the SRBA Court rewrite Article XV, sections 1 and 3 of the Idaho Constitution. In *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909), the Idaho Supreme Court clearly pointed out that these Constitutional provisions relate to the appropriation of public waters of the State of Idaho. Under section 3, it is clearly stated that: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be

¹³ Excerpts from Hearing Officer Schroeder's summary judgment opinion are attached as Exhibit A to the *Arrington Affidavit*. The entire opinion is available at IDWR's website at www.idwr.idaho.gov.

¹⁴ The Objectors' motives in filing objection to the Claimants' water rights is suspect. The *Eagle Decree* decreed over 60 so-called "flood water rights." However, the Objectors have only filed objections on the Claimants' rights, not all of the rights decreed in that case.

denied.” The Constitution then points out that “Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same” certain preferences for certain purposes were established. The Constitution does not reference the source of the water of the “natural stream.” It is also clear that rain and melting snow becomes public waters administered by the State only when they become a part of a “natural stream”, lakes, springs and subterranean waters. *See Wash. County Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935). In *Speer v. Stephenson*, 102 P. at 368, the Court confirmed the decision in *Boise Irr. & Land Co. v. Stewart*, 10 Idaho 38, 77 P. 25 (1904), whereby the Court held that the term “public waters” as used in the irrigation act approved March 11, 1903, refers to all water running in the natural channel of the streams. Again, the ultimate source of these waters is generally immaterial. *See I.C. §§ 42-101 & 42-103*. However, in *Board of Directors v. Jorgensen*, 64 Idaho 538 (1943), the Idaho Supreme Court noted that although it had been stated in some cases that a water user is not concerned with and has no right to any specific source of supply or to any particular water, that an “appropriator does have, after diversion and application to a beneficial use, a constitutional right to the continuation of the source of his supply of water as it physically existed at the time his appropriation was made.”

III. No Limiting Remarks or Subordination Conditions are Appropriate or Necessary for Administration.

The Objectors claim that the SRBA Court should include a remark to “clarify” the nature of these water rights as being “flood flow” or “high flow.” GWD’s wrongly alleges that I.C. § 42-1427 applies so that the Court can “establish[] the parameters of a previously undetermined element of a water right”. *GWD Response* at 18. Contrary to GWD’s claim, the source element,

the Snake River, was previously defined in the *Eagle Decree*. Accordingly, this is not a case where an element was missing from an earlier decree as is provided for in I.C. § 42-1427.

In addition, GWD wrongly claims that a condition is necessary to “define the meaning of the flood water designation for administrative purposes.” *GWD Response* at 22. GWD continues to falsely assert that the SWC water rights are “supplied entirely by spring runoff (not Snake River base flows).” *Id.* The artificial distinction they request is not made in administration, and it ignores the facts of how water in the Snake River (from whatever origin) is distributed to these rights by priority.

The GWD also assert that a subordination provision should be included in the remark – making it impossible to seek continued conjunctive administration of these rights before IDWR. As discussed above, however, since the source of these water rights is the Snake River, and all water in the Snake River is subject to administration regardless of ultimate origins, no such remarks are necessary. This is consistent with the Water District’s practice of administering “water deliveries based upon priorities and water availability.” *Olenichak Aff., supra.* In fact, “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.” *Id.* ¶¶ 4 & 5 (emphasis added). In addition, the Director has not required any clarification in conjunctive administration that has proceeded over the last 5 years and the GWD and Pocatello accepted that administration and subsequent material injury finding by the Director when they decided not to appeal the Director’s Final Order. Contrary to GWD’s repeating theme, the SWC is not seeking to “improve the historic quantity and certainty of water available under these” water rights to “demand an even greater supply of mitigation” from junior ground water users. *GWD Response* at 23. Indeed, these surface water rights pre-date most ground

water development hence curtailing junior priority ground water rights will not “improve” their historic water supply greater than it was before pumping began, it would simply prevent injury by those junior ground water rights from occurring.

No “clarifying” remark or subordination provision has ever been included on these water rights. Yet, the Watermaster has been administering these rights as against both senior and junior surface water rights for decades. Importantly, the Objectors *do not* claim that this historical administration has been in error. They *do not* contend that the Water District is wrong to administer based on priority and water availability and not the ultimate source of the water. They *do not* contend that IDWR was wrong to administer these rights in association with the SWC Delivery Call against junior priority ground water rights. In fact, these rights were subject to administration in the SWC Call and the GWD specifically chose not to appeal the Director’s final order even though identical arguments were raised and rejected by the Director and even though the Director found the GWD’s out-of-priority diversions were materially injuring the SWC’s senior water rights. *See Claimants’ Joint Response to GWD Source Motion* at 27-31. The GWD cannot have it both ways. They cannot participate and accept administration of the rights before IDWR (a five year process – and counting) and then, after the fact, complain to the SRBA Court that the decrees need clarification in order to be administered a different way in the future. Although they are dissatisfied with the Director’s rejection of their defenses in the call proceeding, the fact remains that the Claimants’ water rights have already been subject to conjunctive administration with GWD’s ground water rights with no “clarification” or further “guidance” needed. Although GWD seek a blanket subordination in order to protect its junior priority ground water rights, it has no legal basis to support that theory. Whereas the Director previously rejected GWD’s defenses to the SWC call, it is obvious that junior priority ground

water rights are subject to administration to satisfy the Claimants' senior priority surface water rights.

In addition, Mr. Olenichak, deputy Watermaster for Water District 01, confirmed that no remark is necessary to "clarify" these water rights:

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, Ins. 3-23 (emphasis added).

Notwithstanding this information, the Objectors rest their entire case on pre-*Eagle Decree* documents and the *Stipulation* in that proceeding. They assert that these documents emphasize the need for a clarifying remark or a subordination provision. Yet, the Objectors cannot rectify these so-called dispositive pre-*Eagle Decree* documents with the long history of administration based on priority and water availability. They cannot rectify their demand with testimony that the Water District has never parsed out "natural flow" versus "high flow" water in

administration or that it is the position of IDWR's Affiant that a remark is not necessary. They cannot rectify their acceptance of the Director's administration of these rights in the SWC Call. In short, the Objectors' attempt to change history and prevent any future administration of these water rights must be rejected.

IV. The Standard Season of Use Was Recommended Properly

The GWD claim that the season of use should end sometime in "late June or early July," but this claim is contrary to the uncontroverted facts in the record. GWD disregards IDWR's standard season of use for the geographic locations of where these entities' irrigation projects are located.¹⁵ Moreover, GWD wrongly relies upon IDWR's Memo #39 to argue in favor of a shorter, or more restricted season of use different than IDWR's "uniform" irrigation season authorized by I.C. § 42-1401B. The question posed in the memo was "how and when IDWR will consider specific evidence of a longer irrigation season." See Ex. N to *Second McHugh Aff.* Therefore, if a claimant seeks a decreed season of use "longer" than what IDWR recommends, the memo explains how IDWR will review that evidence and proceed. The memo does not address the situation the Objectors pose here, where they seek to cut the recommended season of use in half for the SWC water rights. Contrary to GWD's claim, the season of use for "irrigation" in the *Eagle Decree* was left to the individual water user. IDWR then recommended the "standard" season of 3/15 to 11/15, with a specific beginning and ending date, consistent with all other irrigation rights in the area.¹⁶ The Claimants are not seeking a "longer" irrigation season than what IDWR recommended. Hence, the memo does not support GWD's theory.

¹⁵ The irrigation season is set by the location of the entities' irrigation projects, located in Basins 36, 45, and 47, not Basin 01, which includes all water rights to the Snake River above Milner Dam east to basins above Idaho Falls.

¹⁶ GWD's example water right, #37-04137, does not support their theory. In that subcase the claimant claimed a shorter season of use of "4/1 to 6/30". IDWR apparently recommended a longer season by including the standard start date of 3/15. That was a case where a claimed season of use was "extended", not shortened as GWD seeks in the present subcases.

Next, GWD wrongly claims that a season of use “must be determined based on when the water has actually been available, diverted and used”. *GWD Response* at 20. In other words, GWD claims that water must be available every day throughout the irrigation season from 3/15 to 11/15 in order to have a full season of use decreed. GWD goes even further by alleging the water must be “diverted and used” every single day in order to qualify for a standard season of use. This is not the criteria for the irrigation season of use set by the adjudication statutes. *See* I.C. §§ 42-1401B(1); 42-1411. Nowhere does Idaho law mandate that water right’s season of use be limited to only when water is “available, diverted, and used”. In that case every water right in the SRBA, including GWD’s members’ junior priority ground water rights, would need to be re-evaluated, unless they can prove they divert and use water every day from March 15 through November 15.

GWD provides no sustainable basis for the requested shortened “season of use” and they ignore facts demonstrating that the water is available for use at the end of the irrigation season. As discussed in the *Shaw Affidavit*, much of the water under these so-called post 1900 “flood rights” is available for diversion and use near the end of the irrigation season – starting as early as mid-September. Yet, the GWD demand a restriction on these water rights that would prevent the Claimants from using this late season water at all. Such a demand cannot stand – particularly where, as here, the Objectors fail to rebut the Director’s recommendation and the facts in the record.

In addition, if more senior rights are transferred, retired, or ever forfeited, more junior surface water rights, such as the *Eagle Decree* rights, would be in priority to divert available water supplies. However, under the Objectors’ theory these rights would be precluded from

diverting and using available water in the river at that time. This example further demonstrates the error in the requested remarks.

V. The Priority Dates were Recommended Properly.

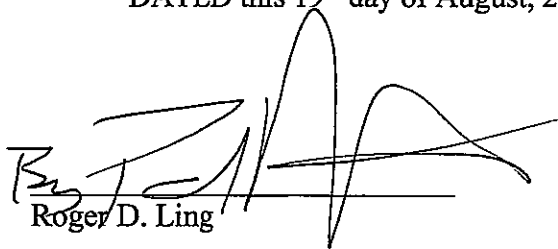
The Claimants responded to the GWD's priority date objections in their *Joint Response to Ground Water Districts' Motion for Summary Judgment on Priority Dates*, dated July 29, 009. The GWD provide no new information or argument in their responsive briefing. As described in the Claimants' response, the GWD's objection cannot stand. It is an unauthorized challenge to a prior decree that already defined this element. Furthermore, with the exception of water right 1-14 (which was first used in 1957), the uncontroverted facts establish that each of these rights could have been diverted and used prior to the 1939 priority date anyway, even if that use was not recorded by the Water District. *See Shaw Aff.* at 5, ¶ 11. As such, summary judgment dismissing the GWD's objection is appropriate.

CONCLUSION

The Objectors have failed to provide sufficient evidence to rebut the Director's recommendations for the Claimants' water rights and the undisputed facts in the record. Despite their efforts to re-define the "source", "priority date", and "season of use" elements, these elements were properly recommended consistent with the *Eagle Decree*. It is clear the true motive behind the objections is an effort to preclude and frustrate future water right administration, including the regulation of hydraulically connected junior priority ground water rights. Since the Claimants' rights have already been administered both in Water District 01 since 1968 and by the Director as against ground water rights since 2005, it is obvious the requested "remarks" are unnecessary and are offered only in an attempt to have this Court decree a de-facto "futile call". In doing so, they attempt to rewrite history.

Since the Objectors have failed to meet their burden with respect to their challenges to the Director's recommendations in these subcases, summary judgment is appropriate.

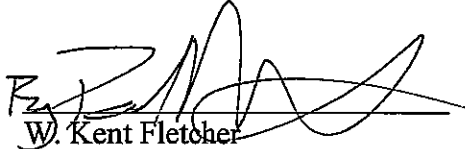
DATED this 19th day of August, 2009.



Roger D. Ling

*Attorney for A & B Irrigation District,
Burley Irrigation District and Falls
Irrigation District*

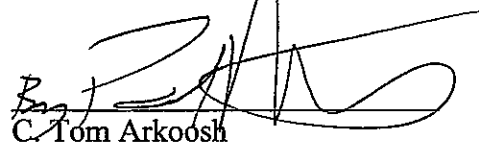
FLETCHER LAW OFFICES



W. Kent Fletcher

Attorneys for Minidoka Irrigation District

CAPITOL LAW GROUP PLLC



C. Tom Arkoosh

*Attorneys for American Falls
Reservoir District #2*

BARKER ROSHOLT & SIMPSON LLP



John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington

*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner Irrigation
District, North Side Canal Company, and
Twin Falls Canal Company*

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 SECOND JOINT MOTION FOR SUMMARY JUDGMENT** on the following by the method indicated:

Clerk of the SRBA Court
253 Third Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Natural Resources Division Chief
State of Idaho
Attorney General's Office
P.O. Box 44449
Boise, Idaho 83711-4449

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort St., MSC 033
Boise, Idaho 83724

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

IDWR Repository
P.O. Box 83720
Boise, Idaho 83720-0098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Jerry Rigby
25 N. 2nd E.
P.O. Box 250
Rexburg, Idaho 83440-0250

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Robert Harris
1000 Riverwalk Dr., Suite 200
P.O. Box 50130
Idaho Falls, Idaho 83405

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Randy C. Budge
Candice M. McHugh
Racine Olson
101 S. Capitol Blvd, Suite 208
Boise, Idaho 83702

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Craig Hobdey
125 5th Ave.
P.O. Box 176
Gooding, Idaho 83330

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Sarah A. Klahn
White & Jankowski, LLP
Kittredge Building
511 16th St., Suite 500
Denver, CO 80202

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, Idaho 83201

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

William A. Parsons
137 W. 13th St.
P.O. Box 910
Burley, Idaho 83318

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Adam T. Devoe
James S. Lochhead
Brownstein, Hyatt & Farber, PC
410 17th Street, 22nd Flr.
Denver, CO 80202

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Josephine P. Beeman
409 W. Jefferson St.
Boise, Idaho 83702

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

Patrick D. Brown
Hutchinson & Brown, LLP
104 Lincoln St.
P.O. Box 207
Twin Falls, Idaho 83303-0207

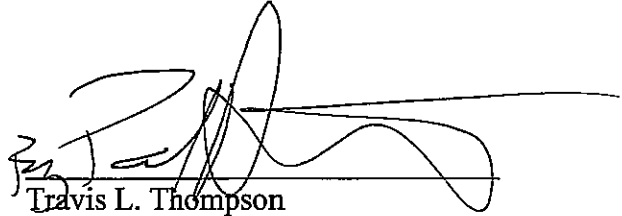
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☒ Email

H. Evan Call
4373 Cold Water Rd.
American Falls, Idaho 83211

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Bret Anderson
Robyn Anderson
322 E. Main
Burley, Idaho 83318

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email



Travis L. Thompson

Attachment 1

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