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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: 1-7, 1-8, 1-9, 1-14

**GROUND WATER USERS' REPLY
TO CLAIMANT'S JOINT
RESPONSE TO MOTION FOR
SUMMARY JUDGMENT ON
PRIORITY DATES**

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 to Motion for Summary Judgment on Priority Dates*.

**GROUND WATER USERS' REPLY TO CLAIMANT'S JOINT RESPONSE TO MOTION FOR
SUMMARY JUDGMENT ON PRIORITY DATES - Page 1**

ARGUMENT

Idaho law requires that the priority date reflect the date of application of water to beneficial use.

The SWC argues that because a prior court in a private decree accepted the parties' stipulation that the priority date should be April 1, 1939, that the Ground Water Districts are precluded from challenging that priority date or requesting a remark that for administrative purposes that the priority date for the water rights be the date when water was first applied to beneficial use. They claim that a prior decree cannot be "collaterally attacked" in the SRBA. *Claimants' Joint Response* at 5. However as argued in the *Ground Water Districts' Response to Claimants Second Joint Motion for Summary Judgment*, as non-parties to the Eagle Decree, the Ground Water Districts and their members are not bound by the decree. See also State of Idaho's Response Brief at 6-7.

At the time of the Eagle Decree, conjunctive administration between groundwater and surface water had not occurred. So, it is no surprise that when the Court decreed the water rights in the Eagle Decree pursuant to a stipulation of the parties that it did not question the parties' agreement. After all, the parties can choose to be bound by a stipulation. However, as we all know, decrees that adjudicate water rights have the unusual characteristic of affecting unknown, future users. The question is, can a private stipulation, adopted by a Court now be wielded against non-parties, especially when the stipulation manufactured a priority date that has no basis in fact? In *Reno v. Richards*, the Supreme Court identified that "where there is a total lack of evidence upon this point [application to beneficial use] a decree awarding water to the claimant cannot be sustained." *Reno v. Richards*, 32 Idaho 1, 8 (1918). Further, in that case the Supreme Court remanded the proposed decrees back to the district court because "it appears that

the awards to each of these claimants gives them a date of priority in advance of the actual application of the water to a beneficial use” Id. at 15.

Exhibit 10 of the Harris Aff. states that as of 1956 there has been “no use yet” for the North Side Pumping Division of the Michaud Flats Project or for American Falls Reservoir District No. 2 and thus, a priority date would have to be by stipulation of the parties. Exhibit 33 of the Harris Aff. in the Statement of R. Keith Higginson, Idaho State Reclamation Engineer (who opposed the entering of the Eagle decree) on p. 3, states “ [The Eagle Decree] will firm up the present practices, even though it will determine priorities of 1939 for diversion which in some instances did not take place until the late 50’s.” (emphasis added) He further states that “a decree entered in this matter will not be binding upon this office or any organization not a party to the suit who might at some future date wish to establish a right to use Snake River water One wonders if perhaps the reason for the decree is to place the water users, through their representatives, in the position of being able to control the location and extent of any future development.” Id. Yet, Higginson reluctantly removed himself from the lawsuit, but noted that “My decision is bated [sic] upon my inability to show an injury to any water right holder not a party to the stipulation and proposed decree. I am certain that this will not always be the case, however, and this question will eventually have to be conclusively settled.” Id.

The wisdom and foresight of Higginson is uncanny. What the SWC is now attempting to do through its delivery call is to interfere with the development of the Eastern Snake Plain Aquifer by curtailing the groundwater users who were not parties to the Eagle decree (or any of the prior decrees), who after the entry of the prior decrees, with the blessing of the State and under the provisions of the Ground Water Act made the desert bloom by developing the

agricultural economy in southern Idaho. Idaho Code § 42-226 specifically promotes full economic development and limited the priority doctrine so that it would not be used to “block full economic development of the states’ underground water resources.” The Ground Water Districts are asking the SRBA to make it clear that the water rights of the SWC will not be used in violation of the Ground Water Act.

The Ground Water Districts adopt the arguments set forth in the *Ground Water Districts’ Response to Claimants’ Second Joint Motion for Summary Judgment* filed July 29, 2009 regarding why the Eagle Decree elements do not bind non-parties. In this case, having the judgment apply prospectively against junior users who were not parties to the decree would be the same thing as deciding that the prior judgment is entirely binding on non-parties contrary to clear Supreme Court’s decisions in *State v. Hagerman Water Right Owners, Inc.* 130 Idaho 736, 741 (1997), *Mays v. Dist. Court*, 34 Idaho 200, 207-208 (1921), *Olson v. Bedke*, 97 Idaho 825, 829 n. 2 (1976). Clearly, the Court’s duty is to provide for the fair administration of water between water right users. In this case, the priority date should be modified through an administrative condition that states for the administration between surface and groundwater users the priority date should be the date when water was first put to beneficial use.

The Ground Water Districts incorporate their arguments in the *Ground Water Users Reply to Claimants’ Joint Response and BOR Response to Motions for Summary Judgment* dated August 18, 2009, relating to the administrative case on the Surface Water Coalition delivery call, the fact that the Director’s “acceptance” of the 1939 priority date does not preclude the Ground Water Districts from challenging the SWC’s water rights in the SRBA and the arguments regarding why additional administrative conditions for the conjunctive administration of

groundwater and surface water are necessary.

CONCLUSION

There is no material dispute of fact that water was not diverted and used in 1939 under the water rights decreed in the Eagle Decree and that the priority date was manufactured from a stipulation of the parties and not based on when the water was first diverted and used. Harris Aff. Ex. 10 and 33. Therefore, the *Ground Water Users' Motion for Summary Judgment on Priority Date* should be granted as a matter of law and a condition added that states for conjunctive administration purposes the water right will be administered with a priority date¹ that reflects when the water was first diverted and beneficially used.

DATED this 19th day of August, 2009.

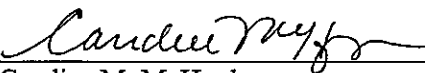
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By: 
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¹ The SWC in fn. 2 of their Joint Response to GWD Priority Motion, indicates that there were 63 water rights decreed with the April 1, 1939 priority date. The SRBA Court has the authority to condition all the water rights if the Court finds that appropriate as it is the Court's obligation to decree all water rights in accordance with Idaho law.

CERTIFICATE OF MAILING

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


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