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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

Subcases: 01-209 et al (See Attachment)
"Minidoka Credit Remark"

**GROUND WATER DISTRICTS'
RESPONSE TO CLAIMANTS'
POST TRIAL BRIEF**

Pursuant to the Special Master's request, the Ground Water Districts hereby submit their Response to Claimants' Post Trial Brief filed July 31, 2009 by the Minidoka Irrigation District (MID), Burley Irrigation District (BID), Twin Falls Canal Company (TFCC), and North Side Canal Company (NSCC) (hereinafter collectively "Claimants").

ARGUMENT IN RESPONSE

This matter focuses primarily upon whether the water rights at issue should or should not include a remark referencing either the Foster Decree or the Settlement Agreement signed February 14, 2006 (hereinafter "2006 Agreement"). Based upon its own interpretation of language in the Foster Decree, IDWR has historically required that TFCC provide a "credit" of storage water to BID and MID. This so-called credit fluctuated each year depending upon hydrologic conditions present at

the time. The 2006 Agreement was an attempt to establish a credit of an annual fixed amount. Oddly, the 2006 Agreement required that part of the credit be given to parties who had never received any part of the credit in the past.

As explained at trial, the Ground Water Districts have no concern with whether TFCC voluntarily provides a credit of water to another party. What concerns the Ground Water Districts is the claim made by TFCC and apparently supported by IDWR that the Ground Water Districts would be required to provide mitigation water sufficient to replace the voluntary credit in times of shortage.

I. There is no basis for the inclusion of a Minidoka Credit Remark in the water rights.

The Claimants argue in their Post Trial Brief that there is allegedly a legal basis to include the Minidoka Credit Remark in the form currently proposed by IDWR in the water rights at issue in this matter. The Claimants argue that the remark should be included merely because “a credit was assigned for over eighty (80) years” pursuant to IDWR’s administration based upon its interpretation of language in the Foster Decree. *Claimants’ Post Trial Brief* at 4. However, the Foster Decree is not binding upon junior ground water users and is subject to collateral attack in this proceeding. It is also clear that a historical administrative practice regardless of how long it has occurred cannot be used to bind junior ground water users to that administrative practice. The Claimants’ arguments are therefore without merit.

As discussed in the Ground Water Districts’ Post Trial Brief, the Foster Decree is not binding upon junior ground water users. In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court reached two relevant holdings. First, the Supreme Court held that the Director was not obligated under Title 42 to accept a prior decree issued in a “private adjudication.” *Id.* at 741, 947 P.2d at 414. Second, the Supreme Court held that a decree issued in a “private water adjudication” binds only those parties to the decree and that the decree “cannot be

made, conclusive, as to the parties who are strangers to it.” *Id.* at 742, 947 P.2d at 414. The Foster Decree arose from a pre-SRBA “private water adjudication” involving only a select number of water users. Junior ground water users were not parties to that adjudication. Consequently, according to the holding in *Hagerman Water Right Owners*, the Foster Decree is not binding on junior ground water users and can be collaterally challenged in this proceeding.

The Claimants’ additional argument that historical administrative practice somehow binds junior ground water users is also untenable. Judge Melanson has held that historical administrative practices do *not* provide a basis for binding junior water users. *See, In Re SRBA, Order Deconsolidating Subcase 00-92026 and Order of Recommitment to Special Masters, Subcase 00-92026*, dated July 1, 2008. He explained that “if historical practices of administration, without a supporting legal doctrine, were to be controlling a significant purpose of the adjudication would be undermined.” *Id.* Thus, historical administrative practice regardless of how long it may have continued cannot be the sole basis for continuing that practice to the injury of junior ground water users.

As discussed, junior ground water users are neither bound by the Foster Decree since it arose from a pre-SRBA adjudication or by IDWR’s historical administrative practice with regard to the Minidoka Credit. The Special Master should reject the Claimants’ arguments to the contrary. Rather, the Special Master should conclude that there is no basis for IDWR’s continuance of the administration of the Minidoka Credit and no basis to include a Minidoka Credit remark in the water rights currently at issue.

II. There is no basis under Idaho Code § 42-1411 for the inclusion of the Minidoka Credit Remark in the water rights.

The Claimants argue in their Post Trial Brief that Idaho Code § 42-1411 allegedly requires that the Minidoka Credit Remark be included in the water rights. The Claimants contend that the

remark would “set forth conditions on the exercise of water rights and provide[] guidance to the Director for the administration of the rights, all as authorized by the provisions of Idaho Code § 42-1411.” *Claimants’ Post Trial Brief* at 7. The Claimants’ argument must be rejected, however, because it is unsupported by the evidence and testimony from trial.

Idaho Code § 42-1411 authorizes the Director to prepare and file a Director’s Report and include therein “such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.” However, IDWR’s own witness Mr. Olenichak testified that he wasn’t sure which elements of the water rights would be allegedly clarified or further defined by the Minidoka Credit Remark. (Tr. 61:11 – 64:15). He also testified that administration could readily proceed without the proposed Minidoka Credit Remark being included in the water rights. (Tr. 59:18 – 60:14). In fact, Mr. Olenichak even testified that he had no idea what the basis was for IDWR’s recommendation that the remark be included in the water rights. (Tr. 64:25 – 65:3). There is no evidence or testimony to the contrary.

Undisputed testimony from trial reveals that the proposed Minidoka Credit Remark is not necessary to define a water right, is not necessary to clarify any elements of a water right, and is not necessary for administration of a water right. Therefore, Idaho Code § 42-1411 provides no basis for including the Minidoka Credit Remark in the water rights at issue in this case.

III. If the Minidoka Credit Remark is included in the water rights, a special remark should likewise be included indicating that the Minidoka Credit will not increase the mitigation liability of junior ground water users.

In the event that the Court determines to include the Minidoka Credit Remark in the water rights currently at issue, it will become necessary to also include an additional special remark indicating that the Minidoka Credit will not increase the mitigation liability of junior ground water

users.¹ As is clear from their post-trial brief, the Claimants object to this additional special remark. In an attempt to avoid implementation of this additional special remark, the Claimants argue in their post-trial brief that the Special Master does not have jurisdiction to determine this issue and, alternatively, that the special remark is improper because junior ground water users are allegedly liable for the mitigation increase resulting from the Minidoka Credit. The Claimants' arguments however are without merit and must be rejected.

There is no question that the SRBA Court has jurisdiction to include a clarifying remark necessary for administration of the Minidoka Credit if indeed the Minidoka Credit Remark is included in the water rights. See Idaho Code § 42-1411(2)(j) (authorizing "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director").

Further *In Re SRBA Consolidated Subcase No. 92-23 Order Granting In Part, Denying In Part Motion to Dismiss; Consolidating Common Issues Into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 01; and Notice of Scheduling Conference* dated July 24, 2007, Judge Melanson states:

"A significant number of claims in the SRBA based on prior consent decrees or stipulated agreements contain provisions which have resulted in disputes over their interpretation, meaning, and validity. Frequently, **the intended meaning or interpretation of a provision in a former consent decree gets clouded over time or conditions change which may call into question the operation of a particular provision.** See *Memorandum Decision and Order on Challenge*, Subcase Nos. 36-00003A, *et al.* (Nov. 23, 1999) (dispute over intended meaning of "other purposes" language contained in former decree issued in *New International Mortgage Bank v. Idaho Power Co.*, In Equity No. 1602 (D. Idaho March 22, 1932) (unpublished opinion). **The Court has been unable to issue**

¹ There is no legal basis for the inclusion of the Minidoka Credit Remark in the water rights at issue in this matter. However, if the Court determines to include such a remark, it is the position of the Ground Water Districts that an administrative calculation of the "credit" should be as set forth in the 2006 Agreement.

partial decrees for such claims without first resolving the underlying dispute. The procedure has not been to transfer the former decree back to another court for resolution or to include the provision in the partial decree and require the parties to litigate its meaning administratively before IDWR.” (Emphasis added).

It is disingenuous for the Claimants to claim that the Court has jurisdiction to include a Minidoka Credit Remark in the water rights while at the same time claiming that the Court does not have jurisdiction to also include clarifying language concerning the remark for purposes of administration.

This requested clarifying language is necessary for administration purposes if the Minidoka Credit Remark is included in the water rights because without such clarifying language IDWR will continue to administer the water rights in such a way that unlawfully increases the mitigation liability of junior ground water users. Not surprisingly, this is the very reason that the Claimants do not want the requested clarifying language included in the water rights. Obviously, TFCC would prefer to see the junior ground water users replace through mitigation any water that TFCC might “credit” to the other Claimants in dry years.

However, as argued in the Ground Water Districts’ Post Trial Brief, there is no basis for administering the Minidoka Credit in a fashion that injures junior ground water users. Indeed, Idaho law clearly invalids this so-called Minidoka Credit.

The Minidoka Credit is invalid under Idaho law if it causes any injury to the junior ground water users. This “credit” is effectively a water exchange with TFCC receiving “return flow” from BID and MID and in exchange providing a storage water “credit” to TFCC. Such exchanges are “invalid ... if they clearly infringe upon the rights of other water users.” *Almo Water Co. v. Darrington*, 95 Idaho 16, 20, 501 P.2d 700, 704 (1972). Despite this clear law, the Claimants and IDWR nevertheless are proposing to administer this “credit” exchange in such a way that it injures junior ground water users in dry years in violation of the law. Although the credit is not

objectionable in and of itself, it is clearly objectionable and invalid in so far as it is administered in a manner that injures junior ground water users.

The Minidoka Credit is also invalid under Idaho law because it is based upon the fallacious proposition that BID and MID are somehow legally entitled to their "return flow" and that TFCC is somehow obligated to "credit" them for TFCC's alleged use of the "return flow." This proposition upon which the Minidoka Credit is based is at odds with Idaho law which provides that a landowner maintains no right in water once it has left his property and the "return flow" water then becomes available for appropriation by downstream users. *See, e.g., Hidden Springs Trout Ranch v. Hagerman Water Users*, 101 Idaho 677, 619 P.2d 1130 (1980). Since BID and MID have no legal right to their "return flow" then any water from TFCC is given voluntarily. Indeed, this is supported by the fact that the Foster Decree was a *stipulated* settlement agreement between the parties to that case. Since water is credited voluntarily by TFCC, and BID and MID have no legal right to their return flow, there is no legal basis for administering the Minidoka Credit in such a way that it injures junior ground water users.

Based upon these arguments and all other arguments set forth in the Ground Water Districts' Post Trial Brief, it is requested in the event the Minidoka Credit Remark is included in the water rights that a special remark should likewise be included indicating that the Minidoka Credit will not increase the mitigation liability of junior ground water users.

IV. The Ground Water Districts' Exhibit 25 is admissible into evidence pursuant to Idaho Rule of Evidence 408.

The Claimants argue in their Post Trial Brief that the Ground Water Districts' Exhibit 25 is not admissible under Idaho Rule of Evidence 408. This argument, however, is without merit and must be rejected. For the convenience of the Special Master, the Ground Water Districts incorporate herein the arguments set forth on pages 20-28 of their Post Trial Brief concerning the admissibility of

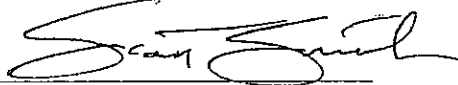
Exhibit 25 under Rule 408. Based upon those arguments, the Ground Water District request that the Special Master conclude that Exhibit 25 is indeed admissible into evidence in this matter.

CONCLUSION

Based upon the foregoing, this Court should conclude that there is no legal basis for the inclusion of a Minidoka Credit Remark in the water rights at issue in this matter. Alternatively, in the event that the Court determines to include such a remark, it should include additional clarifying language indicating that the Minidoka Credit will not increase the mitigation liability of junior ground water users. Lastly, this Court should conclude that the Ground Water Districts' Exhibit 25 is admissible.

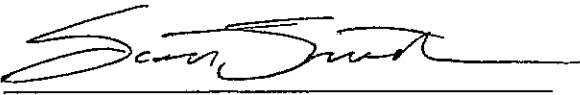
DATED this 4th day of September, 2009.

RACINE, OLSON, NYE, BUDGE
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By: 
FOR CANDICE M. McHUGH
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CERTIFICATE OF MAILING

I hereby certify that on this 4th day of September, 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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Attachment Identifying the Minidoka Credit Subcases

1-209

1-210

1-211A

1-211B

1-212

1-213

1-214A

1-214B

1-217

1-218

1-219

1-10187

1-10188

1-10192

1-10194

The highlighted subcases indicate those in which the Ground Water Districts are not a party.