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DEPARTMENT OF  
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re: SRBA

SUBCASE NOS.  
See Attachment A

Case No. 39576

GROUND WATER DISTRICT'S OPENING BRIEF ON PERMISSIVE REVIEW

*On Permissive Review from Special Master Dolan's December 11, 2009,  
Order on Motions for Summary Judgment*

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Honorable Eric J. Wildman, Presiding Judge

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## INTRODUCTION

The Ground Water Districts seek to impose certain remarks to define and clarify the period of use and source of supply of the water rights listed on Attachment B<sup>1</sup> based upon the undisputed facts that these water rights are high water or flood water rights<sup>2</sup> and not available for a full irrigation season. In addition, four of the water rights, 1-7, 1-8 , 1-9 and 1-14, have a stipulated priority date of April 1, 1939 which is prior to the date the water was first diverted and put to beneficial use. As such, the Ground Water Districts seek a condition to identify these water rights as “flood water” rights and to clarify or change the negotiated priority date, especially as it relates to non-parties to the decree issued in *Burley Irr. Dist. v. Eagle*, Civil Case No. 21406 (1968). Ex. C1<sup>3</sup> ¶¶ VI (b)-(k) to *Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment on Priority Dates* (“McHugh Priority Aff.”). The Stipulation, Findings of Fact and Conclusions of Law and Supplemental Decree entered in that case are referred to collectively as the “Eagle Decree” and are attached as Ex. C1, D1, and J1 to the McHugh Priority Aff.<sup>4</sup>

The Ground Water Districts are concerned with the way these water rights get decreed in the SRBA for many reasons, but the main reasons are as follows:

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<sup>1</sup> Attachment B contains the list of subcases that was attached to the Ground Water Districts’ Amended Motion for Summary Judgment dated June 23, 2009. The subcases listed there are a subset of the 37 subcases that the Court has on its Attachment A.

<sup>2</sup> To be consistent with the historical documents, this motion will refer to flood water rights. The Ground Water Districts acknowledge that some of their prior pleadings and documents refer to the water rights as “high” water rights; however the Ground Water Districts use the term “flood” or “high” water rights interchangeably.

<sup>3</sup> An Index of the Affidavits and Exhibits referred to in this Opening Brief is provided at the end of this brief for the Court’s reference.

<sup>4</sup> Ex. E1-H1, McHugh Priority Aff. include the Director’s Report and Recommendations for the water rights at issue in this matter.

- 1) The SRBA is the first and only time the Ground Water Districts have the right to challenge water rights claimed by the Surface Water Coalition<sup>5</sup> who claims injury and seeks curtailment of tens of thousands of ground water irrigated lands before the Idaho Department of Water Resources, ("IDWR") under the water rights at issue here.

2) When a delivery call is made by a senior water right it becomes very difficult, complicated and costly for junior ground water users to challenge the actual beneficial use under that right and to prove the actual quantity needed to raise crops. The difficulty and expense is compounded when the senior user asserts injury to water rights that have never been relied upon or diverted for a full irrigation season and have never been available in dry years.
- 2) This Court has held that for the Director to find that a senior user needs less than his decreed right, that he must be convinced of that fact by clear and convincing evidence. *A&B Irrigation Dist. v. Idaho Dep't of Water Resources*, Case No. 2009-647, MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING at 38 (Minidoka County, Nov. 2, 2010). This places a substantial and difficult burden of proof upon junior ground water users.
- 3) Once a partial decree is issued the Ground Water Districts have been precluded from "looking behind the decree" in an administrative delivery call. This presumes the decreed elements accurately capture the timing and amount of water needed in a delivery call. The Ground Water Districts have been precluded from arguing in the administrative proceeding that the Spring Users' water rights should be administered as groundwater based on the hydraulic fact that they are in fact groundwater, yet, the Hearing Officer found that because the Spring Users' water rights were not conditioned as such, the argument was a "collateral attack on the partial decree." *Third McHugh Aff., Ex., U, Order Granting in Part and Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment* at 7-8. Hence, it is critical that the SWC's water rights are properly conditioned.
- 4) The SWC's water rights have not yet been partially decreed. However, once they are they will be presumed entitled to all the decreed elements because "the quantity specified in a decree of an adjudicated right is a judicial determination of beneficial use consistent with the purpose of use for the water rights." *A&B Irrigation Dist. v. Idaho Dep't of Water Resources*, Case No. 2009-647, MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING at 38 (Minidoka County, Nov. 2, 2010). This statement presumably also applies to the source and season of use elements, as well as to the conditions or restrictions on any of the elements.
- 5) The Ground Water Districts must mitigate for their use when the Director finds that their members are causing material injury to a senior right. The amount of mitigation

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<sup>5</sup> The Surface Water Coalition is made up of A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company.

is dependent upon both how much and when the injury occurs. Without a condition limiting the period of time the senior's water right is available, the Ground Water Districts would in effect be required to provide a mitigation supply at a time when the senior never had water available resulting in providing mitigation greater in quantity and certainty than the senior ever had historically.

For these reasons, it is important to the Ground Water Districts that a condition or remark be added to the decree to limit the period of use in accordance with historic availability and that recognizes that the source of supply for these particular water rights is in fact high water or flood water that is not available for a full irrigation season. The failure to condition these water rights as flood water rights will create a presumption that these flood water rights are entitled to the full decreed quantity every year for the full irrigation season which is contrary to the nature of the supply and historic use of these water rights. Without conditioning these water rights, this presumption will carry into administrative cases, where junior users, will be precluded from arguing that these water rights have a limited utility, that they are not valid for an entire irrigation season. It could effectively preclude Ground Water Users from presenting evidence in an administrative delivery call proceeding that there has never been water available to supply these water rights after the runoff period in August or September. Not conditioning these water rights in the SRBA and relying instead on the "priority" system<sup>6</sup> prejudices junior users because it allows these water rights, that have only ever relied on flood flows available during periods of high run off, to make delivery calls against ground water users who likely do not impact the supply of water under the water rights.

The Snake River Basin Adjudication ("SRBA") Court is the forum to address these questions and the claimants bear the burden of proving every element of their water right claims

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<sup>6</sup> The Special Master stated that it is enough to rely on the priority system as suggested by the State. Order on Motions for Summary Judgment. However, on page 7 of his Order, the Special Master summarized the State's arguments where it acknowledged that conditioning the season of use or the rights as "flood flows" could be appropriate so long as the condition doesn't require the Watermaster to distinguish between "flood" and "base" flows. This concern is taken care of with a "flood right" condition and by limiting the season of use.

and non-parties to the Eagle Decree have the right to scrutinize the evidence and insure these rights are properly decreed. I.C. § 42-1411(5) and I.C. § 42-1420.

### STATEMENT OF ISSUES

- 1) Should the claimants' water rights at issue contain a condition or remark to reflect that they are "flood water rights" consistent with prior decrees and historic beneficial use?
- 2) Should conditions or remarks be included to reflect that the claimants' water rights at issue cannot make a delivery call against junior ground water rights?
- 3) Is a stipulated priority date binding upon non-parties to the negotiated decree? Does the claimant bear the burden of proof on each element of a water right, including the priority date?

### COURSE OF PROCEEDINGS

On May 15, 2006, the Director filed his recommendations for the water rights listed on Attachment A with this Court in the SRBA Basin 01, Part 1 Irrigation & Others Director's Report. The Director recommended the water rights at issue here be decreed with the source listed as the Snake River and with an irrigation season from March 15 to November 15.<sup>7</sup>

On October 4, 2006, the Idaho Ground Water Appropriators, Inc.<sup>8</sup> filed timely objections to these water rights alleging that:

The Director's recommendation fails to identify and distinguish the water supply associated with this water right. The claimed right is entitled to be filled only by high surface water runoff from snow melt or rain. Its source of supply is not from base flow (ground water) to the Snake River. Conditions are required to prevent enlargement of the source of supply.

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<sup>7</sup> Except for water right 01-2061 which has a recommended season of use as 4/1 to 10/31 based on the license.

<sup>8</sup> On May 29, 2008, the Court issued its order *Granting IGWA's Motion for Substitution of Parties* which substituted the Ground Water Districts for IGWA. The Ground Water Districts are referred to collectively herein as the Ground Water Users. North Snake and Magic Valley Ground Water Districts, however, are not objectors to the water rights claimed by North Side Canal Company.

The objections further alleged that certain of the water rights have never been delivered and that these water rights should be disallowed.<sup>9</sup> See Objections on file herein and Ex. A, Affidavit of Ronald D. Carlson in Support of Motion for Summary Judgment (“Carlson Aff.”)<sup>10</sup>

On August 22, 2008, the Ground Water Districts filed a *Motion for Summary Judgment* asking among other things, that certain water rights be designated as “high water rights,” that a condition be added to limit the season of use and to clarify the rights and that a condition be placed on these water rights barring them from making a delivery call against ground water users. *Ground Water Districts’ Motion for Summary Judgment* at 2. (This motion is referred to herein as the “*Flood Water Motion*”.)

Also on August 22, 2008, the Ground Water Districts filed a *Motion for Summary Judgment* asking that a clarifying remark be added to the priority date of four subcases. *Ground Water Districts’ Motion for Summary Judgment* on Priority Dates at 2. (This motion is referred to herein as the “*Priority Date Motion*”). On June 25, 2009, the Ground Water Districts amended their *Flood Water Motion* which noted that their objections to the claims by North Side Canal Company had been dismissed and that they no longer sought dismissal of water right 1-10034. Also on June 25, 2009, the Ground Water Districts re-filed their *Priority Date Motion*, but the City of Pocatello was no longer a party to that motion.

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<sup>9</sup> The Special Master’s Order on Summary Judgment did not specifically address the Ground Water Districts’ request that water right nos. 1-10034, 1-10482, 1-10225, 1-10237, 1-10238, 1-10239, 1-10240, 1-10241 and 1-10483 be disallowed entirely. It is presumed that the Ground Water Districts’ motion was denied, however, the issue regarding whether these water rights should have been recommended or exist is not on permissive review here since the Order on Summary Judgment did not address this issue.

<sup>10</sup> Exhibit A to Carlson Aff. contains certain water rights that are not the subject of the underlying Motion for Summary Judgment, namely, 1-23A, 1-15 and 1-2073 claimed by Southwest Irrigation District, Brett & Robyn Andersen and J. Vaughn Hobson respectively; and, 1-10390 claimed by Call Farms Partnership. The Ground Water Districts filed the same objections to these water rights but those objections have reached a resolution in principle and SF5s are being prepared accordingly. Further, the Ground Water Users filed a Motion to Withdraw Objection on 1-10390 on August 20, 2009 with the consent of claimant’s counsel. Water Right nos. 1-209 and 1-210 owned by Twin Falls Canal Company and North Side Canal Company are also not subject to the current motion proceeding.

On December 11, 2009, the Special Master issued his Order on Motions for Summary Judgment that denied the Ground Water Districts' *Flood Water Motion* and *Priority Date Motion*.

#### STATEMENT OF FACTS

The "Statement of Undisputed Facts" contained in the *Flood Water Motion* and the *Priority Date Motion* are attached hereto as Attachments I and II and incorporated herein by reference. They can also be found at pages 3-5 in the *Memorandum in Support of Motion for Summary Judgment* on the *Flood Water Motion* on file herein and on pages 4-5 of the *Ground Water Districts' Memorandum in Support of Motion for Summary Judgment on Priority Dates* also on file herein. The following are some of the key facts that are especially important in this proceeding.

In 1968, a group of water users in Water District 01 met and stipulated to the elements of new water rights for themselves resulting from additional Bureau of Reclamation projects which gave rise to the Eagle Decree. Ex. C1 ¶¶ VI (b)-(k) to McHugh Priority Aff. The Stipulation, Findings of Fact and 36 contemporaneous documents relating to the Eagle Decree all refer to the water rights that were decreed in the Eagle Decree as "Flood Water Rights." Exhibits D, E to *Affidavit of Candice M. McHugh In Support of Motion for Summary Judgment* dated August 22, 2008 ("First McHugh Aff.") A summary of Exhibits 1-36 to the *Affidavit of Robert L. Harris in Support of Motion for Summary Judgment* dated June 23, 2009 ("Harris Aff.") are attached hereto as Attachment III and incorporated herein by this reference.

The issue surrounding the water rights decreed in the Eagle Decree has been longstanding. In fact, when these water rights were being considered by the District Court in the late 1960s, the Idaho State Reclamation Engineer, Keith Higginson, expressed concern about

decreeing the flood water rights. He stated, however, that he would not interfere with the parties' stipulation to resolve the pending litigation in a statement to the attorneys involved in the Eagle Decree lawsuit. To that end, Director Higginson stated:

I, therefore, am opposed to the entering of a decree which will confirm rights to perpetuate such wasteful and excessive diversion practices. However, I am faced with a situation in which all of the presently-affected water users have signed a stipulation agreeing to the decree.

It 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. It will also confirm certain contracts entered into with the U. S. Bureau of Reclamation in connection with construction of Palisades Reservoir. These contracts contain some provisions which appear to conflict with Idaho law, including reserving a 1939 priority for 300,000 acre feet of water for some unnamed future project. However, they are only applicable to the parties.

The Attorney General has advised that a decree entered in this matter will not be binding upon this office or any organization not a party to the suit that might at some future date wish to establish a right to use Snake River water. It will be forced to carry the burden of proof that there is unappropriated water available for storage or use. 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.

In any event, I am withdrawing from intervention in the lawsuits. This will allow the decrees to be entered as proposed, but will leave unsettled for a time the questions of reasonable beneficial use and irrigation efficiency. My decision is based [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.

Ex. 33 to Harris Aff., STATEMENT OF R. KEITH HIGGINSON, IDAHO STATE RECLAMATION ENGINEER, at 3 (emphasis added). As expected by Mr. Higginson, the time has come to address how these water rights that were acknowledged and decreed as flood water rights in the Eagle Decree should be limited to prevent enlargement beyond historic beneficial use and to prevent injury to other water rights.

Rather than litigate the priority date of these new junior flood rights, the parties to the Eagle Decree (including certain of the party claimants of the sub-cases referenced herein) negotiated a priority date of April 1, 1939. Ex. C1 ¶¶ VI (c), (f), McHugh Priority Aff. The stipulated priority did not reflect the date upon which the water under the stipulated water rights was diverted and put to beneficial use. Based upon evidence presented by the claimants in the Surface Water Coalition Delivery call before the Idaho Department of Water Resources, Burley Irrigation District, Minidoka Irrigation District and Milner Irrigation District did not divert water under water right numbers 1-7, 1-8 and 1-9 until May, 1955. Ex. B1 at 4-5, 2-3 and 10-11 respectively, to McHugh Priority Aff. A&B Irrigation District did not even exist until 1950 and their evidence shows that the first time they diverted water under water right number 1-14 was May of 1957. Ex. A1 at 1, and B1 at 11-12 McHugh Priority Aff.

The Eagle Decree established that water rights with an April 1, 1939 priority date and junior, were “flood water rights.” See Exhibits D, E and F to First McHugh Aff. and Harris Aff. Exhibits 1-36 summarized on Attachment III hereto.

However, the water rights decreed in the Eagle Decree are not the only high water or “flood water rights” with a shortened season of use found on the Snake River. In addition, water rights junior to the April 1, 1939 flood water rights decreed in the Eagle Decree should likewise be conditioned as “flood water rights” because the undisputed facts show that their source of supply and season of use is even more limited than that of the water rights decreed in the Eagle Decree. Anthony Olenichak, current Program Manager for Water District 01, testified in his affidavit that for water delivery below Blackfoot, “Water District 01 cuts back to an October 11, 1900 priority date sometime in June and early July of most years.” *Affidavit of Anthony Olenichak* dated August 21, 2008 (“Olenichak Aff.”) at ¶ 9. This means that water rights junior

to October 11, 1900 “have no natural flow available.” *Id.* at ¶11. The undisputed facts show, that natural flow water rights that are junior to Twin Falls Canal Company and North Side Canal Company’s October 11, 1900 water rights were never decreed a season of use, have never enjoyed a full irrigation season, and should now be decreed with a condition identifying them as high water or “flood water” rights and/or limiting their season of use based on their historic diversion and use.

The Ground Water Districts simply seek a remark or condition in recognition of these facts. As this Court recently wrote: “[T]he partial decree issued in the SRBA ... represents a quantitative determination of beneficial use.” *A&B Irrigation Dist. v. Idaho Dep’t of Water Resources*, Case No. 2009-647, MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING at 18 (Minidoka County, Nov. 2, 2010). While the Director may consider seasonal variability in determining material injury in a delivery call proceeding, a point recognized by Special Master Dolan, that is not enough in light of the fact that the partial decree and is a “judicial determination of beneficial use consistent with the purpose of use [and presumably the source and season of use] for the water right. See *Id.* MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW at 30.

A condition or remark identifying the source and season of use as flood water is necessary to recognize inherent seasonal, quantity and beneficial use limitations. Otherwise, the claimants’ rights would be unlawfully enlarged to full irrigation season rights and in a position to call out junior ground water rights and demand a full supply for an entire irrigation season, contrary to established facts and their historic use.

## STANDARD OF REVIEW

### A. Permissive Review.

The SRBA's permissive review procedure is for an "interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion." *SRBA Administrative Order 1* § 9.e. In a permissive review procedure, the Court must only review the question of law which the Court has been requested by either the Special Master or parties to review. On permissive review, this Court must only narrowly review the "controlling question of law" at issue.

The Court's inquiry is limited to review of the Special Master's legal conclusions and the application of those legal conclusions to any facts that exist at the time of the permissive review. A Special Master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378 (1991). Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley v. Woodard*, 124 Idaho 531, 534 (Ct.App. 1993).

### B. Whether a Condition is Necessary for the Administration/Definition of a Water Right

When an element of a water right can make the decree ambiguous without a clarifying remark, and when a clarifying remark can avoid future controversy, it is appropriate to include it in the decree issued by the SRBA. See *In Re SRBA, Memorandum Decision and Order on Cross Motions for Summary Judgment* in Consolidated Subcase 91-63 dated Sept. 1, 2004 at 29. In *State v. Nelson*, a general provision was at issue, rather than a clarifying remark. *State v.*

*Nelson*, 131 Idaho 12, 15-16 (1998) (discussion of “remarks” in the context of general provisions under I.C. 42-1411(2) and 42-1411(3). The Court’s reasoning in *Nelson* setting forth the test for whether a general provision should be added to a partial decree is equally applicable when considering the propriety of adding a clarifying remark.

### ARGUMENT

The Ground Water Districts assert the Special Master erred as a matter of law: (1) by refusing to insert a condition or remark on the water rights listed on Attachment A that identifies the water rights as “flood water rights” with a source or season of use remark showing that these water rights only available during the spring run-off period, not the full irrigation season, consistent with historic beneficial use, water availability and the Eagle Decree; and (2) by accepting the stipulated April 1, 1939 priority date in the Eagle Decree for water rights 1-7, 1-8, 1-9 and 1-14 thus binding water users who were not parties to the Eagle Decree, while disregarding undisputed evidence of much later priority dates thereby relieving Claimants of their burden of proof as to each element of their water right including the priority date.

The Director is required to recommend in his report to the SRBA Court the source of water, quantity, date of priority and purpose of use, among other elements. I.C. 42-1411(2)(a)-(j). He is also to include “(i) conditions on the exercise of any water right included in any decree...; and (j) such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director.” *Id.*

**I. THE WATER RIGHTS AT ISSUE SHOULD CONTAIN A CONDITION OR REMARK TO REFLECT THAT THEY ARE “FLOOD WATER RIGHTS” CONSISTENT WITH PRIOR DECREES AND HISTORIC BENEFICIAL USE.**

#### A. Flood Water Motion

The Director's recommendation in the SRBA is the first attempt to define the period of use but erroneously recommended the period of use for these water rights as March 15 to November 15, contrary to the established diversion and delivery of water under those claimed rights. The Ground Water Districts in their *Flood Water Motion* asked the Special Master to determine: 1) that water rights junior to October 11, 1900 are flood water rights; 2) that the water rights in the Eagle decree were conditioned as flood water rights; and 3) that water rights junior to April 1, 1939 are flood water rights. The Special Master denied the Ground Water Districts' *Flood Water Motion*. However, in doing so, he focused only on the water rights with the April 1, 1939 priority date and junior and did not address the water rights junior to October 11, 1900; it's presumed he denied that motion as well, but he offered no analysis. However, because there are no undisputed facts, the Presiding Judge is free to review the law and determine that the water rights junior to October 11, 1900, are flood water rights and/or that they should have a shortened season of use.

Idaho Code § 42-1427(1)(a) states that the SRBA is bound to include a condition regarding flood rights because it is obliged to "not exceed[] any previously determined and recorded element of the decreed or license water rights." As this Court has stated, "the appropriate time for contesting the Department's recommendation as to quantity was in the adjudication." *A&B Irr. Dist. v. Idaho Dep't of Water Resources*, Case No. 2009-000647, MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING (Minidoka County, Nov. 2, 2010). It follows, then, that the appropriate time for contesting the recommendation as to the source, season of use or remarks that would clarify the water right is also in the adjudication.

Idaho Code § 42-1411(i) states that the Director shall include “conditions on the exercise of any water right included in any decree ....” and Idaho Code § 42-1411(j) states he should include “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....”

The Supreme Court has stated that “[i]ntegral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 730 (1997). The SRBA should not decree water rights “in excess of the amount actually used for beneficial purposes for which such right is claimed.” I.C. §42-1402. The Court must not decree a season or source that would amount to something greater than was developed or ever beneficially used. *See*, I.C. § 42-220. While Idaho Code § 42-220 refers to quantity, to decree these water rights in the SRBA with a full irrigation season ignores the limited beneficial use made under these water rights which are not available after high spring run-off and creates a presumption that the water rights are entitled to the maximum quantity of water decreed for a full irrigation season. The source of supply and season of use are no less elements on a water right. In *A&B v. Idaho Conservation League*, 131 Idaho 411, 424 (1998) the Supreme Court held “that each irrigator's water right shall be decreed with a specific period of use setting forth a beginning date and an ending date, as previously adhered to by the IDWR.” Idaho Code §42-1427(2) requires the Director to determine a previously undetermined element of the water right, “based upon the extent of beneficial use of the water right as of the date of the commencement of the adjudication.” The recommendation allows for the clarification of otherwise “ambiguous” elements, but it does not allow for the enlargement of any existing water right. *Freemont-Madison Irrigation Dist. & Mitigation Group, v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 463 (1996). In this case, Water District 1 watermaster

records establish when beneficial use has been made under these water rights, the Eagle Decree decreed the April 1, 1939 water rights as “flood rights” and by implication, water rights junior to 1939 could only be “flood rights” as well. It is the claimants’ burden to prove every element of their claim, including source and season of use. I.C. § 42-1411(5). The undisputed record before the Court clearly demonstrates the supply of water available to fill these rights only exists during high spring runoff, is quickly diminished as runoff subsides and then is simply non-existent by late June or early July depending on yearly snowpack variability. Olenichak Aff. at ¶¶ 9 and 1.

By decreeing a water right that has never actually been diverted and placed to beneficial use or to decree a period of use to include a time when water was never diverted or beneficially used violates the principle set forth in *Hagerman* and would be in excess of the beneficial use established. The decree must be based on facts that support the determination of each element of the claimed right otherwise, the decree would be without a factual basis.

**i. Water Rights Junior to October 11, 1900**

The water rights listed on Attachment B are high water rights, primarily dependent on spring run-off and snow melt. Other than the October 11, 1900 rights of the Twin Falls Canal Company and the North Side Canal Company and sometimes a small fraction of the March 1903 right of the Minidoka Project, all later priority natural flow water rights of the SWC members are and always have been dependent upon high flows or flood flows resulting available only in the spring and early summer months of the irrigation season. Carlson Aff. ¶¶ 10, 11. Because of their late priority dates, these water rights receive little or no water in dry years, only receive water until June or early July in most years, and never for the full irrigation season. See Olenichak Aff. ¶ 9; Carlson Aff. ¶ 11 and Exhibit A to Carlson Aff.

Despite the fact the period of use has never been licensed or decreed for these rights,<sup>11</sup> the Director's Reports recommend the full irrigation season as the period of use without any conditions or remarks to clarify the actual season of use or clarify the source as high water or "flood water". It is an undisputed fact that the water rights that are junior to October 11, 1900, do not provide water for an entire irrigation season and never have. See Olenichak Aff. at ¶ 9, Carlson Aff. at ¶¶ 10, 11. Further, the fact that these water rights only divert water during high flow periods was determined by Hearing Officer Schroeder in *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefits of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company* in his *Opinion Constitution findings of Fact, Conclusions of Law and Recommendation and Amended Order* dated April 29, 2008 at ¶ 9.a. at p. 10. That finding states in full:

- a. **MID, BID, A&B, AFRD#2 and Milner rely primarily on water from their storage contracts with the BOR.** Their natural flow rights are relatively junior and commonly only provide water during the runoff period between April and June in years of moderate to good snowpack and runoff. When there is a low snowpack, such as the period from 2001 through 2004, the natural flow rights produce very little water. During the runoff period when there is water passing Blackfoot, these entities are able to divert natural flow water. When senior users upstream from Blackfoot divert the water that would otherwise pass Blackfoot, the senior natural flow rights of TFCC and NSCC command the inflow to the river downstream of Blackfoot, leaving little to no water for the natural flow rights of other canals in the Blackfoot to Milner reach.

Idaho Code § 42-1427(a) states that because of "the increasing demand for water, it is important the elements of a water right be standardized to allow for fair and efficient administration of the limited water supply" and many times, because of the "passage of time it is

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<sup>11</sup> Water right no. 1-2061 was licensed with a season of use of 4/1 to 10/31 but this season is not supported by any facts and is actually contrary to the facts as established by the delivery records for Water District 01; the licensed season is simply the standard season at the time the license was issued by IDWR and should be clarified.

not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established.” However, this is not the case here. In this case, the water rights in question are delivered and administered by one of the most sophisticated water districts in the State of Idaho, Water District 01. Carlson Aff. ¶¶ 3-7. Water District 01’s records, which the Claimants agree are the best evidence to show what water has been delivered and diverted by them under their rights,<sup>12</sup> show that other than water right nos. 1-209 and 1-210, water has never been diverted and put to beneficial use for a full irrigation season. Exhibit C to First McHugh Aff.; *see also* Olenichak Aff. ¶¶ 9 and 12 and Carlson ¶¶ 10, 11.

The actual diversion and use of these water rights is limited in most years, and at the time of the initial appropriation, to spring and early summer at the latest. Olenichak Aff. ¶ 9; Carlson Aff. ¶¶ 10, 11. Therefore, the Director’s recommendations that provide for a period of use from March 15 to November 15 is wrong and the period of use should end in early July. Furthermore, these water rights should have a condition included indicating that the source and supply is flood water which is subject to yearly and seasonal availability. Carlson Aff. ¶¶ 10, 11.

These post-1900 high water rights rely upon snow melt and spring rains, and even if for argument sake they relied on reach gains to the Snake River as a source of their supply, they have never been available for a full irrigation season and their source of supply is seasonal at best. Consequently, these water rights should only be decreed with appropriate conditions reflecting that they are flood rights only delivered during the early irrigation season and that the source of supply is spring snow melt and rains, otherwise, the “judicial determination of

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<sup>12</sup> All of the Claimants admitted that the records of Water District 01 represent the best available information pertaining to the historical distribution of the water rights with the exception of the following: a) AFRD#2 denied the admission without explanation; b) Falls Irrigation District reserved the right to object or deny; and, c) the United States –Bureau of Reclamation was unable to admit or deny the request.

beneficial use” of these water rights will create a presumption in a delivery call that is contrary to facts and will unfairly enlargement all elements of these water rights to be considered full season right.

**ii. Water Rights Decreed in the Eagle Decree**

Idaho Code 42-1411(2)(i) provides an additional basis to condition Water Right Nos. 1-7, 1-8, 1-9, 1-10, 1-13 and 1-14 as high flow or flood water rights. These water rights were decreed with an April 1, 1939, priority date in the Eagle Decree pursuant to a stipulation. Exhibits D-F, First McHugh Aff. The Stipulation at page 3 and page 4 characterize these water rights as “flood rights.”

- (c) That in connection with the establishment of the water rights for said Palisades Reservoir, it was particularly necessary for the parties...to agree among themselves, and avoid extensive, expensive and delaying litigation by so agreeing upon a common priority date for those persons who were using, or were making plans to construct projects and perfects rights to use, the so-called “Flood Water Rights,” being those waters of the river which were only available during periods of high flow; and; which the parties Plaintiff had been using to the best of their ability and to the extent of their irrigation works, or were planning to use as projects were constructed; and that the parties Plaintiff did at such time agree on a common priority date of April 1, 1939, for such rights, which said agreement has been acted upon by all of the parties Plaintiff hereto continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.

Ex. D to First McHugh Aff., Stipulation at 3 (emphasis added).

- (f) That it was necessary to agree that additional projects authorized by the Congress of the United States as an integral part of the Palisades Reservoir legislation would have their proportionate rights in said so-called flood water rights with said priority date of April 1, 1939, and that said legislation was achieved, and such projects were authorized and constructed and have been developed, on the basis of such understanding as to their water rights . . . .

Ex. D, First McHugh Aff. Stipulation at 4 (emphasis added). The Findings of Fact and Conclusions of Law reiterate the identical language. See Exhibit E to McHugh Aff. pp. 3-4. The Supplemental Decreed entered thereafter specifically relies on the previous Findings of Facts and Conclusions of Law. See Ex. F, First McHugh Aff. at 1. In addition, 36 contemporary documents identify the water rights to be decreed in the Eagle Decree as "flood water rights." See Ex. 1-36, Harris Aff. summarized on Attachment III.

Because these rights were recognized in the Eagle Decree as "flood water rights" and have a limited source and season of availability the full irrigation season should not be recommended and a condition must be added under I.C. § 42-1411(2)(i). A failure to do so is a failure to define the water right that will allow proper administration of the right by the Director as a matter of law. Exhibit 31 to Harris Affidavit illuminates the reason why a limitation on these water rights as flood water rights must be included so as to not enlarge the water rights beyond their intended purpose. In a September 27, 1967, letter from R. Keith Higginson to Watermaster Henry Eagle Mr. Higginson writes:

I suspect you can appreciate my concern over the proposed supplemental flood water adjudication which is currently pending the [sic] district courts in Twin Falls and St. Anthony. A check of your Watermaster's reports indicate that almost every year there are canals within District 36 which divert upwards of 15 acre feet per acre for the land irrigated. This is probably two or three times the amount of water actually required to meet the requirements of the crops grown in the area if considering a normal efficiency of application.

Mr. Higginson's concern is again reiterated in a June 24, 1968, letter to some of the water user's attorneys:

As you know, I filed a motion with the court to intervene in this action to allow the department the opportunity to study its possible effects upon other water rights. Even though I am now withdrawing that intervention I wish to make it perfectly clear that my position has not changed concerning

the seemingly excessive quantities of water which are being diverted from the Snake River for irrigation purposes.

Ex. 33, Harris Aff. Without a condition on source and/or a shortened season, the senior will be presumed entitled to a full irrigation season while junior ground water users would be subject to an enlarged mitigation obligation extending for the entire irrigation season even though those water rights may never be available in dry years and only through June or early July in wet years.

The Special Master erred when he denied the *Flood Water Motion* as it relates to the water rights decreed in the Eagle Decree; he found that the water rights at issue were “no more than a short hand way to describe excess water that would remain in the Snake River if not diverted or stored for future use.” *Order on Motions for Summary Judgment*, p.18. These water rights are rights to flood flows, apart from the water rights that are diverted to storage by the United State’s Bureau of Reclamation. These flood water rights were acknowledged as flood rights, available only during periods of high flow which is a period limited to the late spring ending sometime in late June or early July. This condition and limitation was acknowledged by the Court in the Eagle Decree and should not be lost in the SRBA decrees for these water rights.

The Special Master was wrong when he concluded that:

[T]here is no legal reason to clarify the source or season of use elements of any of the water rights, whether decreed with a priority date before, on or after April 1, 1939. As the State suggested, the rights will be administered in priority and in accord with Idaho's conjunctive management rules which authorize the IDWR Director to consider seasonal variability of source flows in determining material injury in delivery call proceedings.

*Order on Motions for Summary Judgment*, p. 19. This rationale ignores this Court’s ruling in the A&B Irrigation District delivery call where this Court stated that what is decreed in the SRBA is a “judicial determination of beneficial use”. *A&B Irrigation Dist. v. Idaho Dep’t of Water Resources*, Case No. 2009-647, MEMORANDUM DECISION AND ORDER ON PETITIONS FOR

REHEARING at 30 (Minidoka County, Nov. 2, 2010). If this court determines these Snake River water rights are entitled to a certain quantity for an entire irrigation season, without limitation, then these water rights are likely presumed to be entitled to that full quantity for the entire irrigation season when the Director examines these water rights in light of a delivery call. To decree these water rights without noting that they are flood water rights ignores the nature of these water rights, elevates their status to water rights that have been diverted, used, and relied upon for a full irrigation season, which is entirely contrary to the Eagle Decree and the historical beneficial use of these rights and has direct and prejudicial impact on junior users in an administrative action.

**B. Flood Water Rights Should Not Be Allowed to Make Delivery Calls Against Junior Ground Water Rights**

Although the source element for these previously licensed and decreed water rights was determined to be the “Snake River” it is now understood that not all water rights that divert below Blackfoot in fact rely on the base flows from the Snake River as their primary supply. Thus, as provided by I.C. § 42-1411(2)(j), one of the elements of a water right is “such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for the administration of the right by the director.” When an element of a water right can make the decree ambiguous without a clarifying remark, and when a clarifying remark can avoid future controversy, it is appropriate to include it in the decree issued by the SRBA. See *In Re SRBA, Memorandum Decision and Order on Cross Motions for Summary Judgment* in Consolidated Subcase 91-63 dated Sept. 1, 2004 at 29.

These water rights are all junior to October 11, 1900. See the claims and Director’s reports for each water right on file herein and Exhibits A, B, and D through I to First McHugh Aff. In this case, there is no question that these water rights primarily depend on spring runoff

and snow melt and would be “high water rights” that are not available for an entire irrigation season. Carlson Aff. at ¶ 10, 11 and Olenichak Aff. at ¶¶ 8, 9 and 10. Adding a clarifying remark that these water rights’ source of supply consists primarily of spring runoff and snow melt and cannot curtail junior priority ground water rights will not only clarify the elements and assist in the administration of these water rights, but will certainly reduce potential controversy between the parties in the future.

**II. THE PRIORITY DATE SHOULD REFLECT THE DATE WHEN WATER WAS FIRST PUT TO BENEFICIAL USE; A STIPULATED PRIORITY DATE SHOULD NOT BIND NON-PARTIES.**

Water Right Nos. 1-7, 1-8, 1-9, 1-14 are water rights claimed and recommended in the SRBA with priority dates set by stipulation in the Eagle Decree. The recommendations for these water rights recommend a priority date that is unrelated to the date water was diverted for beneficial use is inconsistent with Idaho law and inconsistent with the Director’s duty to determine the extent of beneficial use under these water rights and contrary to requiring the claimants to prove every element of their claim. I.C. § 42-1411(5). As this Court has stated, “[t]he priority date is the essence of a water right in a prior appropriation system.” *Memorandum Decision and Order on Petition for Judicial Review* at 37. That being the case, the priority date should be meaningful and based on when the water right was first put to beneficial use, especially when wielded against junior water users who were non-parties to the Stipulation. The priority dates claimed in these subcases are evidenced only by the Eagle Decree Stipulation, and are inconsistent with the date the water was actually put to beneficial use. Former Director of the Department of Reclamation, (predecessor agency to IDWR) Keith Higginson recognized that fact: “It 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." Ex. 33, Harris Aff. (emphasis added).

A negotiated priority date in a prior decree is not dispositive of beneficial use on the claimed date absent specific findings of fact supporting the date. The Ground Water Districts were not parties to the Eagle Decree and therefore they are not bound by the decree through privity with any parties to the decree.

The Special Master's conclusion that the April 1, 1939 priority date was a proper priority date based on that fact that by 1968 the parties had "constructed, operated, and now control and maintain all necessary diversion dams, canals, laterals and distribution systems adequate to divert and distribute to the proper lands all of the water herein stipulated to be decreed to them, in addition to all other water rights owned by said parties" does not address the issue in this case: can the parties agree to an artificial priority date and then wield it against non-parties? The Ground Water Districts are not saying that by the time the parties got together in 1968 that they did not have diversion works in place, rather, the point is that the parties agreed to manufacture an April 1, 1939 priority date for flood water rights even though there is no dispute that the parties did not have the diversion works in place in order to put the quantity of water claimed and stipulated to beneficial use at that time. See Statement of Facts 6-15 on Attachment II and *supra* (Burley Irrigation District, Minidoka Irrigation District and Milner Irrigation District did not divert water under water right numbers 1-7, 1-8 and 1-9 until May, 1955. Ex. B1 at 4-5, 2-3 and 10-11 respectively, to McHugh Priority Aff. A&B Irrigation District did not even exist until 1950 and their evidence shows that the first time they diverted water under water right number 1-14 was May of 1957. Ex. A1 at 1, McHugh Priority Aff.)

While the April 1, 1939, priority date may be effective as between those parties who agreed to that date through contract, that priority date should be conditioned so as to not work to the parties' advantage against other, non-party water users. Although the Special Master speculates on p. 18 that "the parties may have been entitled to an even earlier priority date based on their earlier project work" but that is entirely contrary to the facts. A clarifying remark is necessary on the priority date to justly administer these rights. I.C. § 42-1411(2)(j); *State v. Nelson*, 131 Idaho 12, 15-16 (1998).

### CONCLUSION

The Ground Water Users' only forum to place necessary conditions on these water right claims is in the SRBA. By the time they are defending their water rights against delivery calls in an administrative hearing, the senior user is presumed entitled to the elements as set forth in the decree, absent clear and convincing evidence to the contrary. The statutory structure in the SRBA provides that the claimant bears the burden to prove every element of their claim. In this case, the source of supply, the season of use and the priority dates require conditions and/or a season that accurately reflects when certain of these rights were first put to beneficial use, the fact that they rely on flood flows and the fact that these water rights have never been used or relied upon for an entire irrigation season. The consequence of not conditioning these rights properly results in an abdication of this Court's responsibility to decree water rights that accurately reflect the beneficial use that has been made under the water rights and runs the risk of enlarging these rights and upsetting the "historic water use patterns and custom ... on the date of the establishment of the water right [which] could result in significant impacts upon the claimant, the local economy and tax base...." *See*, I.C. 41-1427(1)(a). In this case, the history, delivery, use and source is known: these water rights are flood water rights, available only

during periods of high flow. The SRBA decrees should be meaningful for all water users and should reflect these facts.

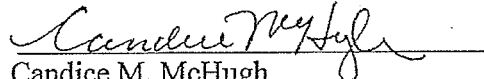
DATED this 5<sup>th</sup> day of April, 2010.

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

By:   
RANDALL C. BUDGE  
CANDICE M. McHUGH  
Attorney for the Ground Water Districts

## CERTIFICATE OF SERVICE

I hereby certify that on this 5<sup>TH</sup> day of April, 2011, the above and foregoing document(s), was served by email to those with email addresses and by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:

  
Candice M. McHugh

|                                                                                                                                                                                                          |                                             |                                                                                                                                                                                                                                                                                                       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
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|                                                                                                                                                                                                                                       |                                                                                                                                                                                  |
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ATTACHMENT A  
SRBA LIST

01-00004  
01-00005  
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01-10225  
01-10237  
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01-10241  
01-10482  
01-10483

ATTACHMENT B  
SUBCASE LIST FOR GROUND WATER DISTRICTS'  
FLOOD WATER MOTION

1-4  
1-6  
1-7  
1-8  
1-9  
1-10  
1-13  
1-14  
1-17  
1-211A  
1-211B  
1-214A  
1-214B  
1-219  
1-2050  
1-2061  
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