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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA) Subcase Nos. *See Attachment A*
)
)
Case No. 39576)
)
_____)

SURFACE WATER COALITION'S JOINT RESPONSE TO GROUND WATER
DISTRICTS' OPENING BRIEF ON PERMISSIVE REVIEW

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

Honorable Eric J. Wildman, Presiding Judge

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Facsimile: (208) 436-6804

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*

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

Attorneys for A&B Irrigation District, et al.

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,
et al.*

(See Service Page for Remaining Counsel)

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INTRODUCTION

Anyone with irrigation experience in southern Idaho knows about the variability of the Snake River's flows, whether seasonal or caused by rain or snow or the lack of such moisture. One year may be a banner year of runoff while the next year may be called a drought. In any event, the flows of the river all along its reach are uncertain at best. For those reasons, western states like Idaho are left with administration of water rights according to priority of appropriation and such measures as conjunctive management where hydraulically connected groundwater rights are considered. The necessary result is that administration of the river requires that the river be considered as a whole whatever the source of the water. For instance, higher than normal flows resulting from a thunderstorm at Palisades Reservoir cannot be weighed separately from base flows – whatever that means in any given year. It's all part of the hydrologic cycle where senior appropriators may see their full measure of water and junior appropriators may see less. It would be convenient if higher than normal flows of water were colored blue while base flows were colored red but that is not the case. It's all Snake River water subject to administration in priority including such rules as material injury and futile call.

Order on Motions for Summary Judgment at 17 (Dec. 11, 2009) (“*Summary Judgment Order*”).

Special Master Dolan confirmed Idaho's prior appropriation doctrine for the Surface Water Coalition's Basin 01 water rights, recognizing that all water flowing in a natural watercourse, in this case the Snake River, is natural flow and is distributed by priority regardless of its original source.¹ Notwithstanding this basic tenet of Idaho water law, the Ground Water Districts seek to segregate certain of the Coalition's² water rights and “impose an undue and novel” administrative scheme not recognized or practiced anywhere else in Idaho. *See Summary Judgment Order* at 17. The Districts seek to create a new condition whereby any surface water right that is not available every day of “a full irrigation season” must be subordinated to junior ground water rights. The Districts' argument is wrong as a matter of law.

¹ An exception is water released from storage from one of the Upper Snake reservoirs.

² For this proceeding the “Coalition” is comprised of A&B Irrigation District (“A&B”), American Falls Reservoir District #2 (“AFRD #2”), Burley Irrigation District (“BID”), Falls Irrigation District (“FID”), Milner Irrigation District (“Milner”), Minidoka Irrigation District (“MID”), North Side Canal Company (“NSCC”) and Twin Falls Canal Company (“TFCC”). The Coalition is also referred to as the “Surface Water Coalition” or “SWC.”

Nothing in Idaho law requires a water right holder to divert and use water every day in order to have a standard season of use decreed.³ The only support the Ground Water Districts conjure up for this theory is that if the standard season is recognized, then the Director's conjunctive administration of the Coalition's water rights would "prejudice" their junior ground water rights. Their circular reasoning concludes with the proposition that the Coalition's surface water rights should not be allowed to call out any junior ground water rights. Contrary to the Districts' argument, Idaho is a prior appropriation state and "first in time" is "first in right." *See* IDAHO CONST. Art. XV, § 3.

Surprisingly, the Ground Water Districts seek to impose this new legal regime only on the Coalition's Snake River water rights – they have never claimed that this scheme should apply to any other similarly situated surface water rights throughout Basin 01 (or anywhere else in the Upper Snake River Basin, i.e. Teton, Henry's Fork, Blackfoot, Portneuf Rivers). The Districts fail to explain why their "new" season of use limitation should only apply to the Coalition's water rights and not to any other surface water user in Basin 01.⁴ This inconsistency further reveals the flaws in their argument.

In addition to the lack of legal support for their argument, the Districts can point to no factual basis for the "new" conditions they seek. For example, Water District 01 has never administered the Coalition's Snake River water rights in the manner requested by the Ground Water Districts. To require such administration would flip decades of administration upside

⁴ That the Ground Water Districts would have the Court apply a different standard to the Coalition's water rights is clear when one considers that there were at least 53 water rights recommended in Basin 01 with an April 1, 1939 priority date. *See* Attachment III. This does not even account for the hundreds of additional water rights recommended in Basin 01 with a priority date junior to October 11, 1900. Of those 53 water rights, 41 have been partially decreed. Importantly, the Ground Water Districts did not challenge the priority dates for any of the April 1, 1939 water rights other than the Coalition's water rights. Likewise, they have never argued that any other Basin 01 water right above Blackfoot with a priority date post-1900 should be subject to the conditions that the water being diverted was snow melt or spring runoff or that they would be prohibited from conjunctive administration.

down and create what Special Master Dolan deemed a “legal nightmare.” *Summary Judgment Order* at 17.

The Ground Water Districts’ motion is based on an erroneous factual assertion: that “all later priority natural flow water rights of the SWC members are and always have been dependent upon high flows or flood flows available only in the spring and early summer months of the irrigation season.” *GWD Br.* at 17; *id* at 6 (“there has never been water available to supply these water rights after the runoff period in August or September”). The facts in the record plainly demonstrate otherwise.

Notably, the testimony of Water District 01 employees, the district in charge of administration of the rights, along with the testimony from the Coalition’s witnesses, *Affidavit of David B. Shaw* (“*Shaw Aff.*”) and *Affidavit of Norman C. Young* (“*Young Aff.*”), show that the Coalition’s post-1900 water rights have been diverted and used later in the irrigation season. In other words, the Ground Water Districts’ claim that the water rights are never satisfied beyond “late June or early June” is simply false. In short, the Coalition’s water rights are like every other surface water right in Idaho – subject to a fluctuating water supply and relative priorities of water use. They are available at different times during the irrigation season – and at different times from one season to the next. Changing hydrologic conditions from year to year does not mean that the Coalition’s surface water rights should be subordinated to hydraulically-connected junior ground water rights. To do so would violate Idaho’s constitution. IDAHO CONST. Art XV., § 3.

The Ground Water Districts’ priority date arguments point only to selected portions of the record and overlook those facts and prior decrees that are dispositive of their request. In particular, while they claim that the water rights were not actually diverted until least 1955,

GWD Br. at 25-26, the *Shaw Affidavit* and *Young Affidavit* plainly show that many of the water rights decreed in the *Eagle Decree* proceedings were actually diverted and used prior to April 1, 1939. In light of the stipulation of all surface water users in Water District 01 and the consideration given for the administration of the Upper Snake Reservoirs, including the construction of Palisades Reservoir, there is no reason to alter the decreed priority date for the Coalition's 1939 surface water rights.

In summary, Special Master Dolan properly applied the law to the facts in these subcases and ruled in favor of the Coalition. The Ground Water Districts have failed to show any error in that decision and cannot meet the statutory criteria for including new limiting remarks on the Coalition's water rights. Accordingly, the Court should affirm the Special Master's *Summary Judgment Order*.

STATEMENT OF FACTS

The Coalition responded to the Ground Water Districts' alleged "Statement of Undisputed Facts" before the Special Master, specifically in reference to their *Flood Water Motion* and *Priority Date Motion*, copies of which are attached hereto as Attachments I and II, respectively.⁵ In addition, the following facts further rebut the Districts' arguments.

Water District 01's water delivery records show that the Coalition's surface water rights junior to October 11, 1900 have historically been available throughout the irrigation season – with periods of unavailability during the peak irrigation season. *See Shaw Aff.*; *Young Aff.* In particular:

⁵ For the Court's convenience, the Coalition will refer to the Districts' two motions for summary judgment in the same manner referred to in the Ground Water Districts' briefing. As such, the motion addressing the high flow rights will be referred to as the "*Flood Water Motion*," while the motion addressing the priority date issues will be referred to as the "*Priority Date Motion*." Reference to the high flow motion as the "*Flood Water Motion*" is for convenience purposes only and should not be construed as an admission that the Coalition considers the water available to these rights to be comprised solely of "flood water." As discussed herein, such a designation ignores the facts in the record and actual administration of the water rights.

- Water Rights 01-211A and 01-211B, with a priority date of March 26, 1903, have historically received “water deliveries until July 18 and is once again on by September 10 of each year, on average.” *Shaw Aff.* at ¶ 6. The rights have also been available as early as September 4 in some years. *Id.*
- Water Right 1-212, with a priority date of October 7, 1905, has historically received water “until July 12 and was again available on September 25, on average.” *Id.* at ¶ 7. It has also been available as early as September 19 in some years. *Id.*
- Water Right 1-17, with a priority date of November 14, 1916, has historically received water “until June 27 and was again available on October 6, on average.” *Id.* at ¶ 8. It has also been available as early as September 27 in some years. *Id.*
- Water Right 1-6, with a priority date of March 30, 1921, has historically received water until “June 16 and was again available on October 13, on average.” *Id.* at ¶ 9. It has also been available as early as September 27 in some years. *Id.*
- Water Right 1-14, with a priority date of April 1, 1939, has historically received water “until June 5 and was again available on October 16, on average.” *Id.* at ¶ 10. It has also been available as early as October 4 in some years. *Id.*

See also Third Thompson Aff. at Ex. D (*Olenichak Depo.* at 69-70) (confirming that the water rights are “certainly” delivered in October every year and on a “per day” basis in September).⁶

Dave Shaw, who has extensive experience as the Department’s former SRBA Bureau Chief, testified that he has never seen a water right designated as “‘high flows, flood flows, spring runoff or snow melt’ when the water right was diverted from a named watercourse, such as in this case the ‘Snake River.’” *Shaw Aff.* at ¶ 12. Mr. Shaw testified that such a remark would be confusing and unnecessary “since the priority date of the water right still controls when water is available for diversion.” *Id.* The Ground Water Districts simply ignore the actual water delivery records in this case.

In addition, Water District 01’s assistant watermaster and program manager, Tony Olenichak, testified that he “administers water deliveries based upon priorities and water

⁶ *Third Thompson Aff.* filed on July 29, 2009.

availability.” *Affidavit of Anthony Olenichak in Support of the State of Idaho’s Response Brief* at ¶ 4 (July 28, 2009).⁷ As such, “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.” *Id.* at ¶ 5 (emphasis added).

According to Mr. Olenichak, characterizing the so-called “high flow” water rights as being comprised entirely of snow melt or spring runoff is incorrect. Indeed, the “high flows” could also be comprised of return flows from upstream irrigation. *Third Thompson Aff.* at Ex. D (*Olenichak Depo.* at 65, lns. 2-6). The *Eagle Decree* characterizes the “so-called flood water rights” as being comprised of “waters of the river which were only available during periods of high flow.” *First Thompson Aff.* at Ex. R, p.3.⁸ However, the decree does not define the “so-called flood water rights” as comprising only of snow melt or spring runoff and does not state that these “so-called flood water rights” are only available until “early July.” Contrary to the Districts’ argument, the water rights are administered in priority and may be available at different times of the year depending upon the particular water conditions. Although a 1939 water right may be available well into July one year, it may only be available through April the next. Regardless of the different water supply conditions junior ground water users have no legal right to take water out-of-priority and injure a senior surface water user.

In the *Eagle Decree* Stipulation, all surface water users that divert from the Snake River above Milner Dam stipulated to a priority date of April 1, 1939, for certain “so-called flood water rights.” *First Thompson Aff.* Ex. R. As it relates to the Coalition’s water rights, the *Shaw*

⁷ The July 28, 2009 *Olenichak Affidavit* was filed by the State of Idaho. Previously, the Ground Water Districts filed an *Affidavit of Anthony Olenichak*, dated August 21, 2008. The Ground Water Districts rely on the 2008 *Olenichak Affidavit* to support their “bifurcating-the-waters” theory of adjudication – i.e. “natural flow” vs. “high flow.” However, as clarified in the 2009 *Olenichak Affidavit*, at ¶ 5, Water District 01 does not, and has never, distinguished between “natural flow” and “high flow” water in administering the water rights.

⁸ *First Thompson Aff.* filed August 22, 2008.

Affidavit, at ¶ 11, confirms that many were diverted prior to 1939 – as early as 1927. Likewise, the *Young Affidavit*, at ¶¶ 8-14, summarizes delivery records for BID and MID water rights from 1919 through 2008 and confirms that the April 1, 1939 water rights were used as early as 1932.

Although the Director at the time, Keith Higginson, opposed the stipulation, asserting that “in some instances” the water users had not diverted water “until the late 50’s”, he did not identify the Coalition’s water rights as being the subject of his concerns. *See Harris Aff.*, Ex. 33. Moreover, the common priority date was critical in the construction and operations of Palisades Dam. The water users all recognized the new “common plan” of administration and how the feasibility of new storage at Palisades was contingent upon execution of the Palisades contracts. In the end, the Director withdrew from the *Eagle Decree* proceedings and the water rights were decreed with an April 1, 1939 priority date and have been administered with that priority ever since.

Despite the Districts’ arguments, Special Master Dolan properly upheld the season of use, source, and priority date elements in the Coalition’s water rights. This Court should affirm.

STANDARD OF REVIEW

This Court’s permissive review of the *Summary Judgment Order* is governed by Administrative Order 1, Section 9(e). That provision, which is substantially similar to Idaho Appellate Rule 12(a), gives the Presiding Judge authority to review “controlling questions of law as to which there are substantial grounds for difference of opinion and on which immediate consideration of the determination may advance the orderly resolution of the litigation.” The intent of the rule is “to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved.” *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 789 (2009).

This Court has free review of a Special Master’s conclusions of law:

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodward*, 124 Idaho 531, 534 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

Memorandum Decision & Order on Challenge, Subcase No. 63-32533 (Apr. 21, 2010), pp. 3-4

ARGUMENT

The Ground Water Districts oppose conjunctive administration of their junior priority ground water rights. With this backdrop they attempt to persuade the Court that the “source” and “season of use” elements of the Coalition's water rights should be conditioned or limited in a way to prevent future conjunctive administration. The Districts even go so far to argue that the Coalition's senior surface water rights should be subordinated to junior ground water rights! As explained below, the Ground Water Districts' motion is not supported by the facts or Idaho law. Moreover, the “new” conditions the Districts seek to impose run counter to the rest of the Snake River water rights in Basin 01, and the standard practice employed by IDWR in recommending irrigation water rights throughout the SRBA.

Citing to the *Memorandum Decision & Order on Petition for Judicial Review*, dated May 4, 2010, and the *Memorandum Decision & Order on Petitions for Rehearing*, dated November 3, 2010, each filed in *A&B Irr. Dist. v. IDWR*, Case No. 2009-647 (Minidoka County) (collectively referred to as the “*A&B Orders*”), the Districts demand that this Court limit and condition the Coalition's senior surface water rights to truncate the standard irrigation season of use and prohibit any future delivery calls.

The Districts seek to: (1) to identify the rights' source as “snow melt or spring runoff” only; (2) limit the season of use to the spring and early summer months (ending in “early July”); and (3) prohibit future conjunctive administration. In other words, the Ground Water Districts

demand that this Court limit the use of these water right regardless of the water supply and foreclose any future administration of these rights regardless of the Director's past and future determinations as to the injury caused by junior ground water diversions. These demands run counter to Idaho's Constitution and adjudication statutes and cannot be accepted.

First, the Ground Water Districts cannot demonstrate that IDWR erred in recommending the "Snake River" as the source and "3/15 to 11/15" as the season of use. These elements are unambiguous and require no remarks for clarification, further definition, or administration of the Coalition's water rights. *See* I.C. § 42-1411(2)(j). It is undisputed that the Districts cannot meet the statutory criteria to change or limit these elements.

In addition, the Ground Water Districts cannot point to any law supporting the contention that a water right must be used during the entire irrigation season or face a limited season of use and subordination to junior ground water rights. Just the opposite, the facts, many of which were overlooked by the Ground Water Districts, show that the Coalition's post- 1900 water rights have been routinely diverted and used later in the irrigation season – not just in the spring and "early summer" months.

The Ground Water Districts' own actions belie their alleged concern over the future use and administration of senior Snake River water rights. Indeed, the Ground Water Districts have selectively objected to the Coalition's water rights only – ignoring the rest of the Basin 01 water rights with identical priority dates. There are at least 53 other water rights with the same April 1, 1939 priority date. *See* Attachment III. Forty-one of the 53 have already been partially decreed by this Court. If the Districts were truly concerned about the so-called "flood" water rights and priority dates, they would have objected to other similarly situated water rights in the Upper Snake River Basin – not just the Coalition's rights only.

Finally, there is no basis for the Court to include unprecedented conditions and limitations on surface water rights that are not available “for a full irrigation season.” All water flowing in the natural watercourse of the Snake River – be it precipitation, snowmelt, runoff, reach gains, springs, tributary creeks or rivers, or return flow from upstream irrigation projects – is all part of the natural flow that is subject to appropriation and priority distribution in Water District 01. That is the fundamental premise of water right administration under the prior appropriation doctrine and that is the right conclusion made by Special Master Dolan in the *Summary Judgment Order*.

Consequently, the Court should deny the Ground Water Districts’ motion.

I. Neither the Law Nor the Facts Support a Condition or Remark Indicating that the Rights are “So-Called Flood Water Rights” that are Prohibited from Seeking Conjunctive Administration.

A. There is No Legal Basis to Limit or Redefine the Source or Season of Use Elements of the Coalition’s Water Rights.

The Ground Water Districts object to the Department’s recommended season of use for the Coalition’s water rights (3/15 to 11/15).⁹ *GWD Br.* at 14-20. They seek to artificially limit or condition the “season of use” to prohibit future conjunctive administration of these rights. This requested relief fails for at least three reasons: (1) the Director followed IDWR procedures in recommending the source and season of use elements; (2) Idaho law forecloses the Districts’ suggested limitations; and (3) the undisputed facts show that the Coalition’s water rights have historically been used at various times throughout the irrigation season. Accordingly, any suggestion that the season of use should absolutely end in “early July” is erroneous.

Pursuant to Idaho Code § 42-1411, the Director is required to prepare a report with specific elements of a water right, including “the period of the year when water is used for such

⁹ Water rights 1-4, 1-5, 1-6, 1-7, 1-8, 1-9, 1-10, 1-13, 1-14, 1-16, 1-17, 1-211A, 1-211B, 1-212, 1-213, 1-214A, 1-214B, 1-219, 1-2050.

purposes.” I.C. § 42-1411(2)(g). For “irrigation” water rights, IDWR prepared an administrator’s memorandum, Adjudication Memo #39 (“*Memo #39*”), that describes the standards used for the “season of use” to recommend for water rights in with places of use in various geographic locations across the basin. *See* Ex. C to *Second Thompson Aff.* IDWR explains in *Memo #39* as follows:

A new 1:1,000,000 scale map of the “Irrigation Season of Use” (map at the end of the memo) presents a new standard for use in water right adjudication and water right licenses, permits, and transfers. A reduced reproduction of the map is attached to the memo; the reduced reproduction is for illustrative purpose only. The official version of the map is in digital form and can be accessed by contacting the Adjudication Bureau. A full-size copy of the map is available in the SRBA map case.

The purpose of these maps is to provide consistent standards in a simple format. . . .

The standard season from the new map is to be used for recommendations in the SRBA as described in the Claim Investigation Handbook.

Memo #39 at 1, 2. Ex. C to *Second Thompson Aff.*¹⁰

All Coalition irrigation water rights in this proceeding were recommended with the standard “3/15 to 11/15” season of use, pursuant to the area as defined in the *Memo #39* map.¹¹ Accordingly, IDWR followed the prescribed standard procedure when issuing the water right recommendations. Pursuant to Idaho law, IDWR’s recommendation is presumed to be correct. *See* I.C. § 42-1411(4).

The Districts’ requested remark, on the other hand, is vague and unclear. Contrary to the standard used by IDWR, which is to provide “consistent standards in a simple format”, the Ground Water Districts’ remark would make the rights confusing and impossible to administer. After all, a defined season of 3/15 to 11/15 is clear and unambiguous as opposed to a subjective

¹⁰ *Second Thompson Aff.* filed on June 25, 2009.

¹¹ Except Falls Irrigation District’s water right 1-13, which includes a season of use of 4/1 to 10/31. This is the standard season provided by IDWR’s *Memo #39*. FID is entitled to a 4/1 to 10/31 season of use as a matter of law.

“early July” ending date. Since the Districts’ remark contradicts the standard used by IDWR and would only create confusion for purposes of administration, Special Master Dolan rightly rejected it. *See Summary Judgment Order* at 19.

IDWR also followed proper procedure in recommending the “Snake River” as the source for the Coalition’s water rights. Idaho’s adjudication statutes clearly define the process for filing and recommending water right claims in the SRBA. First, the Director is required to “prepare and furnish on request a standard notice of claim form”. I.C. § 42-1409(1). The notice of claim for must include “the source of water”. I.C. § 42-1409(1)(b). With respect to the source of water supply, the Department’s *Instructions for Filing Notice of Claim to a Water Right Acquired Under State Law in the General Adjudication of Rights to the Use of Water From the Snake River Basin Water System* instruct claimants as follows:

Enter the name of the stream, lake, drain ditch, or spring for a surface water source on line (a). Use the name shown on the U.S. Geological Survey quadrangle map. . . Only one source is allowed per claim, except when more than one source is being used for a single delivery system.

First Thompson Aff. Ex. I (IDWR Instructions at 3). Thereafter, the Director is required to prepare and file a “director’s report on the water system” which must include “the source of water” element. I.C. § 42-1411(1), (2)(b). All of the claims subject to the Districts’ motion identified the “Snake River” as the source. The Coalition’s claims complied with the adjudication statutes and the Director appropriately recommended the “Snake River” as the source.

In addition, the recommendations followed the Department’s adjudication rules. The rules clarify how the “source” element of a water right is defined:

- i. For surface water sources, the source of water shall be identified by the official name listed on the U.S. Geological Survey Quadrangle map. If no official name has been given, the name in local common usage should be

listed. If there is no official or common name, the source should be described as “unnamed stream” or “spring.” The first named downstream water source to which the source is tributary shall also be listed. For ground water sources, the source shall be listed as “groundwater.”

IDAPA 37.03.01.05.c.i (emphasis added).

For AFRD #2, NSCC, TFCC, and Milner, the “Milner, Idaho” USGS quadrangle survey map lists the “Snake River” as the source at the point of diversion. Ex. J to *First Thompson Aff.* For A&B, the “Burley SW, Idaho” USGS quadrangle survey map lists the “Snake River” as the source at the point of diversion. Ex. K to *First Thompson Aff.* For BID and MID, the “Lake Walcott, West” quadrangle survey map list the “Snake River” as the source at the point of diversion. Ex. L to *First Thompson Aff.* For FID, the “American Falls, Idaho” USGS quadrangle survey map lists the “Snake River” as the source of water where FID diverts its water rights. Ex. M to *First Thompson Aff.*¹²

It is undisputed that the source of the Coalition’s water rights is the “Snake River”. It is further undisputed that the season of use is March 15th to November 15th (and April 1st to October 31st for FID). Therefore, the Special Master properly confirmed these elements as a matter of law and concluded that no remarks were necessary to further define or clarify those elements. *See Summary Judgment Order* at 19. The Court should affirm this decision and deny the Ground Water Districts’ motion.

B. All Water in the Snake River is Subject to Administration Regardless of its Original Source.

The Ground Water Districts’ effort to limit the season of use is based on the premise that the watermaster should parse out particular waters of the Snake River depending upon the

¹² The Department’s “Watermaster Handbook” (at p.4) supports the statute and rules and confirms the “Snake River” is the appropriate source for the Coalition’s water rights: “**Source** is the water body at the point of diversion. Examples are Salmon River, Squaw Creek, spring, ground water, etc.” *See* Ex. N to *First Thompson Aff.* (emphasis in original).

original source of that water. They claim that the Court should impose a condition on the water rights indicating that they are “flood water rights.” *GWD Br.* at 14. They assert that such a remark would assist in administration and reduce potential controversy between the parties in the future.¹³ *Id.* In essence, the Ground Water Districts seek to artificially distinguish the “type” of Snake River water destined for the Coalition headgates as it flows downstream.

Such an act is not only physically impossible, it is unnecessary for the administration of surface water rights in Water District 01. Lyle Swank, the Watermaster, confirmed as much:

Q. [BY MR. SIMPSON]: Well, so you as watermaster look at the amount of water available at the point of diversion that would be available for diversion under priority by a particular water right; correct?

A. [BY MR. SWANK]: That’s correct.

Q. And so the upstream sources of water or upstream tributaries that would then aggregate to the water available at the point of diversion make up the amount of water that’s available for that particular water right; correct?

A. That’s correct.

Q. And so the particular sources, if you will, or origins of that water is not of a concern to you in delivering the water to that delivery or to that point of diversion, simply that the water is available and it would be delivered in priority; correct?

A. That’s correct.

Third Thompson Aff. at Ex. E (*Swank Depo.* Tr. pp. 12-13).

The theory that the Coalition can only divert “spring runoff” or “snowmelt” under their water rights is not only illogical, it ignores reality and is contrary to the historical diversions of these water rights. *See Infra*, Part I.D. Mr. Swank further described the actual administration of the Coalition’s water rights as follows:

¹³ Contrary to the Ground Water Districts’ claim, the “future controversy” has already occurred. The Surface Water Coalition made a delivery call on junior priority ground water rights in 2005, which proceeded through an administrative hearing and judicial review. The District Court’s decision in the case has been appealed to the Idaho Supreme Court. *See A&B Irr. Dist. et al. v. IDWR* (Gooding County Dist. Ct., 5th Jud. Dist., Case No. 2008-551).

Q. [BY MR. SIMPSON]: Well, my question goes to you as the watermaster in carrying out your responsibilities to deliver water: From that delivery-of-water perspective, if the water is in the river in its natural flow and a particular right is in priority, to you as watermaster does it matter or is it necessary for you to know whether the water arrived at that point in the river from snowmelt or subsurface flows or return flows to the river or precipitation, or is it simply that that water is there at the point of diversion and that right is in priority and it's your job to deliver it to the right holder?

A. [BY MR. SWANK]: Yeah, *our job is to make sure that water is available at that point of diversion, regardless of how it got there, other than natural flow and storage being split out.*

Q. Okay. So it's not necessary for you in carrying out your duties to necessarily know how that water arrived at that point in the river in terms of whether its origin is from snowmelt or return flows or subsurface flows; correct?

A. That's correct. We just deliver water based upon the available supplies.

Third Thompson Aff. at Ex. E (*Swank Depo.* Tr. pp. 13-14) (emphasis added).

Similarly, Mr. Olenichak confirmed Water District 01's practice for distributing water to the Coalition's, as well as all other Snake River rights:

Q. [BY MR. FLETCHER]: So you don't have any history or any records showing what is making up this water that's in the Snake River, whether it's snowpack or whether it's rain or whether it's springs or what it is?

A. [BY MR. OLENICHAK]: *No, we don't make that determination.*

* * *

Q. And so as you administer this water right, any of these water rights that are at issue in this case, as someone that's on the firing line on the administration end, are you trying to make a distinction of what the source of water is that's in the Snake River at the time those water rights are being diverted?

A. No. *We simply each day calculate the reach gains in the river and divide the water up according to priority.* Fill the senior rights first and then the junior rights after the senior rights are filled.

Third Thompson Aff. at Ex. D (*Olenichak Depo.* Tr. pp. 65-66) (emphasis added); *Id.* at pp.97-98

The water supply in the Snake River is comprised of multiple sources, including tributary creeks, rivers, springs, reach gains, and return flow.¹⁴ As described by Water District 01 personnel, trying to segregate the various water supplies that make up the Snake River is not relevant for administration. Yet, the Ground Water Districts would have this Court redefine the “Snake River” for the Coalition water rights only. Such a theory finds no support in Idaho law.

When rights to a main stream source are adjudicated it includes all tributary water sources as well. *Schaub v. Dist. Court of Fifth Jud. Dist.*, 96 Idaho 924, 926 (1975). The holding in *Schaub* is further supported by prior cases involving tributary water sources to a main stream. *Martiny v. Wells*, 91 Idaho 215 (1966); *Jones v. McIntire*, 60 Idaho 338 (1939); *Josslyn v. Daly*, 15 Idaho 137 (1908). Since the Coalition’s water rights have all been previously decreed as rights to the “Snake River”, the Special Master properly found as a matter of law, “it’s all Snake River water subject to administration in priority.” *Summary Judgment Order* at 17. The Ground Water Districts have failed to show any legal error in his decision.

C. Idaho Law Rejects the Ground Water Districts’ Demand for a Limit or Condition on the Standard Irrigation Season.

The Ground Water Districts assert that the season of use should be changed or limited because water may not be available “for an entire irrigation season and never [has]”. *GWD Br.* at 15-20. In essence, they seek to create a new standard for water rights in Idaho: unless water is available to satisfy a right for every day of the “entire” irrigation season, the standard season of use cannot be decreed. *Id.*

¹⁴ For a comprehensive review of the various water sources tributary to the Snake River above Milner Dam see *Claimants’ Memorandum in Support of Summary Judgment* (August 22, 2008) at 11-12.

As set forth above, the Director followed the proper procedure in recommending a standard season of use for the Coalition's irrigation rights.¹⁵ As such, if water is available, the Coalition members are entitled to divert and use it for irrigation purposes anytime between March 15th and November 15th of any given year.¹⁶ This does not mean, however, that water will always be available to satisfy those rights every day throughout the entire irrigation season. If there is only enough water to satisfy the most senior rights, junior rights are curtailed. Just because a junior surface water right (i.e. 1939) is curtailed to satisfy a senior right (i.e. 1905), that does not mean junior ground water rights are entitled to take water out-of-priority. See *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388 (1982).

The Special Master correctly recognized that the realities of the hydrologic cycle – i.e. fluctuations from year to year and throughout each irrigation season – result in the “western states like Idaho” administering “water rights according to priority of appropriation.” *Summary Judgment Order* at 17. “Higher than normal flows” – from whatever source – are “all party of the hydrologic cycle where senior appropriates may see their full measure of water and junior appropriates may see less.” *Id.* Variability of water supply from year to year does not give junior ground water users the right to take water ahead of a prior surface water right, regardless if it is a 1900 or a 1939 priority. Such subordination would ignore Idaho's Constitution, statutes and case law that recognize the prior appropriation doctrine. See IDAHO CONST. Art XV, § 3; I.C. §§ 42-602, 607; *Bower v. Moorman*, 27 Idaho 162, 181 (1915) (“The first appropriator of

¹⁵ In fact, in addition to being defined by the standard procedures by IDWR, *see supra*, the season of use for irrigation is further defined by the water user. The Supreme Court recognized this when it held that “so long as the appropriator of water applies the same to a beneficial or useful purpose, he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used.” *McGinness v. Stanfield*, 6 Idaho 372, 375 (1898).

¹⁶ Between April 1st and October 31st for FID.

water for useful or beneficial purposes has the prior right thereto, and the right, once vested, will be protected and upheld, unless abandoned.”).

Special Master Dolan rightly found that the Ground Water Districts’ request would “create a legal nightmare.” *Summary Judgment Order* at 17. If the Districts’ new criteria were accepted, IDWR or the SRBA Court would be forced to re-examine every surface water right in the Snake River Basin. After all, only the most senior water rights (which vary by priority and location) likely receive some water for an entire irrigation season. Even then, the water supply is variable depending upon numerous factors such as climate and precipitation. Mr. Olenichak testified as much:

Q. [BY MR. SIMPSON]: My Question, Tony, would be that in accordance with the definition, wouldn’t every right that is senior to the most senior right on a particular source be high flow if the senior right is the only one that’s being met?

A. [BY MR. OLENICHAK]: Yes.

Q. Okay. So for example, at least with respect to those rights that are diverted above Blackfoot, would it be true that Aberdeen-Springfield with the 1895 right would be essentially a high-flow right in comparison to those other rights above it on the Snake River?

A. Yes, some people would think that would be a high-water right. It depends on the perspective. It depends on the canal. It depends upon the comparative rights in the base discipline.

Third Thompson Aff. at Ex. D (*Olenichak Depo.* Tr. P. 47-48).

The fact that water is scarce in an arid state like Idaho and not all rights will be satisfied every day during the irrigation season is not a “new” concept, it is hydrologic reality. That reality does not mean that IDWR or the SRBA Court must condition a water right’s “season of use” to only those days when water is actually available. As recognized by Special Master Dolan such a task would be impossible. The Director followed the law and procedure and

properly recommended a standard season of use for the Coalition's water rights in these subcases. Since water can be beneficially used for irrigation purposes from March 15th to November 15th in this area, the Ground Water Districts have no legal basis to limit or condition the water rights to anything less.¹⁷ Therefore, the Court should affirm Special Master Dolan's order.

D. The History of Water Use Confirms the Availability of the Coalition's Water Rights At Times Throughout the Irrigation Season.

In seeking to artificially limit the Coalition's water rights, the Ground Water Districts overlook the undisputed facts in the record that show the water rights have been available for diversion and use throughout the irrigation season – not just during the spring or “high water” period. *See, e.g. Shaw Aff. & Young Aff.* The Districts' own witness, Ron Carlson, former Water District 01 watermaster confirmed these facts:

Q. [BY MR. FLETCHER]: Okay. So water delivered after June or July in most years under the 1903 right or the 1908 right in August, September, October that is not natural-flow water?

A. [BY MR. CARLSON]: *That is natural-flow water.*

Q. Okay. So if in most years we can show you that 1903 water is delivered in August, September, or October –

A. Uh-huh.

Q. -- would you agree that this is a false statement?

A. No.

Q. Why would this not be a false statement?

A. All that says – all that says is that the river is no longer is – breaks at Blackfoot, and you again have a demand that you can make – place on the river above Blackfoot. And so the return flows and all those things that are coming in upstream from Blackfoot now get distributed without reference to Blackfoot.

¹⁷ For the area containing the Falls Irrigation District project the season of use is 4/1 to 10/31.

Q. But those are natural flows; correct?

A. They are.

Q. And those natural flows consist then not of spring runoff, do they?

A. Yeah, what they consist of then is the fact that people upstream and downstream are curtailing their water use, and so the water rights are no longer demanding that water. And to the extent that you can use it downstream, you use it.

Q. *And they're not made up of runoff –*

A. Well –

Q. *-- of spring runoff at that point; correct?*

A. *That's correct.*

Q. *And they're not made up of snowmelt/ correct?*

A. *That's correct.*

Q. They're made up of whatever is in the river at that time?

A. That's – that is true.

Q. So this statement is not correct, this statement is a false statement; isn't that true? *There is water available to deliver to junior water rights in the river below Blackfoot?*

A. *There are some years when there is water available late in the season that can be delivered to junior water rights.*

Third Thompson Aff. Ex. C (Carlson Depo. Tr. p. 98-100) (emphasis added).

Mr. Olenichak also confirmed that water is available at different times in the irrigation season – that it is not just limited for delivery to the October 11, 1900 priority water rights held by TFCC and NSCC, as alleged by the Ground Water Districts:

Q. [BY MR. FLETCHER]: Okay. So for water rights that come back on in August or September or October of most years, those would not be high-water rights?

A. [BY MR. OLENICHAK]: Well, they would be high-water rights in the springtime. In the fall when they come back on, it's not a matter of the natural flow increasing from any additional snowmelt or rain, it's simply a matter of senior rights turning off.

Q. Okay. But isn't that how all water rights work? I mean, the senior rights take their plug out of the amount of water that's available and then the juniors take the amount they're entitled to take?

A. Yes.

Q. And if – for example, take Twin Falls' 1900 natural-flow right and compare it to MID's 1903 right. MID can never divert Twin Falls' 1900 right lawfully; correct?

A. Unless there's sufficient water to fill the 1900 right and then any additional water that they would have a right to.

Q. Okay. But that additional water is being diverted under the 1903 right; correct?

A. Correct.

Q. It's not being diverted under the 1900 right? It's MID's own 1903 right; correct?

A. Right.

Q. Or 1908 right or whatever right may be filled at that point in time?

A. Right.

Q. ***So when a senior isn't diverting 100 percent of their natural-flow right, the junior isn't taking part of that 1900 right, is it? Aren't they diverting under their own right?***

A. ***That is correct.***

Third Thompson Aff. at Ex. D (*Olenichak Depo.* Tr. p. 62-64) (emphasis added).

The testimony in the *Shaw* and *Young Affidavits* further confirms that the Coalition's post-1900 water rights are not solely diverted in the spring and early summer. Rather, they have historically been used later in the irrigation season. *Infra*. Consequently, the facts do not

support the Ground Water Districts' claim that the source of all post-1900 water rights held by the Coalition should be limited to a shorter season of use. The facts plainly show that when water is available in the Snake River later in the irrigation season it can and has been diverted by a 1903, a 1908, and 1939 water right. Given this history of use and administration by priority, there is no basis for the Ground Water Districts' argument on this point. The Court should affirm the Special Master's order accordingly.

E. The *Eagle Decree* Did Not Limit the Coalition's Season of Use.

Finally, the Ground Water Districts contend that the *Eagle Decree* provides further support for their requested limitations. *GWD Br.* at 20-23. The argument is essentially that, since the rights were referenced as "so-called flood water rights" in the *Stipulation* entered into between the parties in that proceeding, the rights were known to be comprised solely of snow melt and spring runoff. *Id.* Contrary to this argument, neither the *Stipulation* nor the *Eagle Decree* limited the "season of use" as to when those water rights could be beneficially used by the Coalition or any other surface water right holder in Basin 01.

Furthermore, nothing in the *Eagle Decree* states that these rights are limited to diverting only "spring snow melt" in the Snake River. The Special Master properly found that the "flood water" reference was a convenient "short hand" description, not a legal condition limiting the use of the rights:

It did not mean the parties agreed to limit certain diversions to high flows or restrict the periods during which they could use the water (season of use). The term "flood water rights" was 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.

Summary Judgment Order at 18.

After entry of the *Eagle Decree*, Mr. Carlson and Mr. Olenichak each confirmed that the Coalition's rights have been available and have actually been diverted later in the irrigation season, not just during "flood" periods. *See supra* Part I.D. Historically, if there was sufficient water in the river – at any point during the irrigation season – the 1939 water rights were entitled to divert that water in priority. *Shaw Aff. & Young Aff.* As such, nothing in the *Eagle Decree* justifies the limitations sought by the Ground Water Districts.

Finding no support in the *Eagle Decree*, the Ground Water Districts instead rely upon extraneous letters from former Director Higginson to justify their assertions. *GWD Br.* at 21-22. According to those letters, Mr. Higginson was concerned that some water users "divert upwards of 15 acre feet per acre for the land irrigated." *Id.* With this reference, the Ground Water Districts assert that, unless there is a remark, the Coalition's rights will be presumed to be diverted every day of the irrigation season. Importantly, Mr. Higginson's letters did not identify any of the Coalition water rights as being the source of his concerns. In fact, there is no evidence in the record – or even any claim – that the Coalition is diverting such excessive quantities of water under their water rights. Mr. Olenichak explained why the Districts' "enlargement" arguments as to this issue are unwarranted:

Q. [BY 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. [BY 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 is 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.

Q. Okay. And so that comes back to Mr. Fletcher's point that you administer water in priority, and if you're entitled to water in priority, your water will be there, and if you're not entitled, it won't be there; is that correct?

A. That's correct.

Q. Okay. So everybody's adequately protected by administration in priority?

A. Yes.

Q. And that comes back again as well to Mr. Simpson's point, is that if water rights have a common source, administration of priority adequately protects everybody's interests?

A. Yes.

Third Thompson Aff. at Ex. D (*Olenichak Depo.* Tr. pp. 98-100).

In summary, the *Eagle Decree* did not limit or condition the Coalition's water rights in the manner suggested by the Ground Water Districts. Actual administration of the water rights, confirmed by Water District 01 personnel, demonstrates that the water rights are not limited to availability only in the spring or early summer. Special Master Dolan properly recognized the history behind the *Eagle Decree* and denied the Districts' motion accordingly. This Court should affirm.

II. There is No Legal Basis to Subordinate the Coalition’s Senior Surface Water Rights to Junior Ground Water Rights.

The Ground Water Districts seek a “clarifying remark” so that the Coalition’s water rights cannot curtail junior priority ground water rights in conjunctive administration. *GWD Br.* at 23-24. In essence, they assert the Court should “subordinate” the Coalition’s senior surface water rights to all ground water rights – regardless of priority. Again, the law and facts do not support this novel theory for water right administration in Idaho.

Pursuant to Idaho’s adjudication statutes, a remark may be included only when “necessary for the definition of the rights, for clarification of any element of a right, or for administration of the right by the director.” I.C. § 42-1411(2)(j). The Ground Water Districts have failed to meet the statutory criteria to demonstrate why any limiting remarks are necessary for the Coalition’s water rights. First, the water rights were defined by prior decrees that did not divide the “Snake River” into multiple sub-sources. Second, the source element “Snake River” is unambiguous and does not need any clarification. *See infra* Part I.B. Accordingly, there is no basis under the law for further definition or clarification of the water rights.

Furthermore, the remark is unnecessary for the administration of the water rights. Indeed, the Coalition’s water rights have already been subject to administration by Water District 01 for decades, *infra* Part I.D, and more recently subject to conjunctive administration by IDWR. Importantly, the Director considered and rejected the Ground Water Districts’ identical “source” arguments in the context of the Coalition’s delivery call proceeding. Accordingly, no condition or remark is necessary.

In the SWC Delivery Call, the Director found that out of priority diversions under junior ground water rights were causing material injury to the Coalition’s senior surface water rights. That call specifically included the water rights at issue in this case. *Third Thompson Aff.* at Ex.

F. The Director accepted the call and recognized the Coalition water rights for purposes of administration. The Director did not deny the call relative to these water rights because they were junior priority surface water rights, or that the source was only “spring runoff or snowmelt.” The Districts challenged the Director’s decision, which proceeded to a contested case and administrative hearing before IDWR.

During the proceedings, the Ground Water Districts specifically raised identical “source” issues as a defense to the Coalition’s delivery call. For example, in their *Summary of Positions on Director’s Orders Related to the Surface Water Coalition Delivery Call*, the Ground Water Districts asserted:

2. Historical Water Supply:

Senior water right holders are not entitled to a water supply that is enhanced over what was historically available at the time of their original appropriations. The Surface Water Coalition (SWC) wrongfully seeks to establish a water supply greater in quantity and certainty than existed when their rights were established at the expense of groundwater users.

Third Thompson Aff. at Ex. H (emphasis in original). They further argued:

3. Futile Call:

The delivery call results based upon the curtailment orders are speculative and uncertain in quantity and time. The curtailment of ground water users will not result in a useable quantity of water to the senior water right holders because their primary source of supply is not affected by ground water depletion. Thus, curtailing ground water users is futile.

Id. (emphasis in original). Finally, in their proposed “findings of fact” and “conclusions of law,” they asserted:

The source of the natural flow rights historically available to SWC members consists of two components: (a) natural flow of the Snake River that passes Blackfoot during spring runoff periods (aka “flood flow”) and (b) reach gain that accrues to the river below Blackfoot. Although the reach gain may be subject to depletion by ground water development, ***flood flow is not because it consists of spring runoff which flows directly into the river.*** Other than the October 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, *the natural flow water rights of the SWC members are and always have been almost entirely dependent upon flood flows. These post-1903 rights don't have a basis to pursue enhancement of reach gains through curtailment of ground water pumping because they have almost never, since they were first appropriated, been able to utilize those reach gains as a source of supply.*

Id. at Ex. I (emphasis added).

These arguments were considered and rejected by Hearing Officer Schroeder:

3. Ground water pumping has hindered SWC members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights. Once it is established that the Snake River and Eastern Snake Plain Aquifer are connected the conclusion is inevitable that withdrawal of water from the aquifer reduces flow in the Snake River. ... The evidence in this case establishes that during recent periods of water shortage ground water pumping has affected the quantity and timing of water available to SWC members. Natural flow rights have been exhausted earlier and storage has been used earlier and more extensively, limiting the application of water during the irrigation season and diminishing the amount of carryover storage to which the surface water users are entitled.

Id. at Ex. J (emphasis in original).

The Ground Water Districts took exception to the Hearing Officer's decision and challenged the decision before the Director. In their *Exceptions Memorandum*, the Ground Water Districts advanced the very same arguments that they are offering here in this case – that the Coalition's surface water rights are supplied by snow melt only and cannot be conjunctively administered with junior ground water rights. *Id.* at Ex. K.

The Director rejected these arguments, *id.* at Ex. L, and the Districts did not appeal that decision to District Court. Accordingly, the argument that the Coalition's post-1900 surface water rights cannot be conjunctively administered with junior ground water rights is without merit and should be rejected. Furthermore, the Special Master rightly concluded that "there is no legal reason to suggest water rights decreed by Judge Ward must be subordinated to hydraulically connected junior water rights, regardless of source." *Summary Judgment Order* at

19. There is no reason to alter the Special Master's conclusions on this matter. The Court should affirm.

III. Special Master Dolan Properly Upheld the April 1, 1939 Priority Date for Certain of the Coalition's Water Rights.

The Ground Water Districts assert that the priority date of water rights 1-7, 1-8, 1-9 and 1-14 were wrongly recommended as April 1, 1939. *GWD Br.* at 24-25. They assert that the water was not put to beneficial use until the 1950's and rely on a letter from Mr. Higginson, expressing concern that the *Eagle Decree* Stipulation authorized a 1939 priority date for diversions that "in some instances did not take place until the late 1950's." *Id.* (quoting *Harris Aff.* Ex. 33).

The priority date of April 1, 1939 was agreed to by all Snake River water users and was decreed by the Twin Falls County District Court. The water rights have been administered according to this priority date for over 40 years. Recently, in the SWC delivery call proceedings, the rights were conjunctively administered by the Director. *Supra.* There has been no confusion over the priority date – it is clear.

Former Water District 01 Watermaster Ron Carlson, witness for the Ground Water Districts, agreed that the priority date is appropriate:

Q. [BY MR. FLETCHER]: Did you have any problem with the recommended priority date for that water rights, April 1, 1939?

A. [BY MR. CARLSON]: My recollection is that that comes from a previous decree. So I don't have an objection to the priority date.

...

Q. Once that's decreed, what's your position concerning the priority date?

A. I have no position. I believe the priority date's valid.

Third Thompson Aff. at Ex. C (*Carlson Depo.* Tr. p. 80-81).

In addition to ignoring the *Eagle Decree*, the Ground Water Districts refuse to acknowledge all of the facts in making their priority date argument. They claim that the rights were not put the beneficial use until the 1950's. *GWD Br.* at 24-25. They then cite to a letter from Mr. Higginson expressing concern over the fact that "in some instances [diversions of *Eagle Decree* rights with an April 1, 1939 priority date] did not take place until the late 50's." *Id.*

In making these arguments, the Ground Water Districts overlook several facts in the record. Importantly, Mr. Higginson did not claim that it was any of the Coalition's water rights that were the source of his concern. Indeed, he could not have made such a claim. As explained in the *Shaw Affidavit* and *Young Affidavit*, both of which are based on a review of Water District 01 delivery records, most of the Coalition's rights were diverting water prior to April 1, 1939 – even as early as 1927.

History shows that the April 1, 1939 priority date was stipulated to as a settlement to "avoid extensive, expensive and delaying litigation." *McHugh Aff.* at Ex. D (*Stipulation*, at 3). Accordingly, even though some water rights were diverted prior to April 1, 1939, and some may have been diverted after that date, the parties stipulated to a priority date in order to avoid future litigation.¹⁸ As such, even though water right 1-10 was originally diverted in 1927, *Shaw Aff.* ¶ 11, the water right has a stipulated priority date of April 1, 1939 – 12 years later. In making these concessions, the parties avoided significant litigation. *McHugh Aff.* at Ex. D. Accordingly, Special Master Dolan correctly found:

Viewed in its entirety, the *Eagle Decree* properly decreed a 1939 priority date for certain of the rights because Judge Ward viewed the water to have been

¹⁸ Even if certain projects were not constructed at the time, the common priority date was necessary for the plan of operation affirmed by the *Eagle Decree*, including making new storage at Palisades Reservoir feasible. There is no legal basis for previously decreed water rights to have two priorities adjudicated in the SRBA (i.e. one for surface water administration and one for conjunctive administration). See I.C. § 42-1411(2)(d) (the date of priority).

validly appropriated by the parties' prior use even as their diversion works were being expanded and modified. There is no sound basis to assert the claims were for some future use with a later priority date. ***In fact, in some cases, the parties may have been entitled to an even earlier priority date based on their earlier project work.***"

Summary Judgment Order at 18 (emphasis added).

In addition to avoiding litigation over individual priority dates, the *Eagle Decree* confirmed the "common plan" of reservoir operations in the Upper Snake which made the construction of Palisades Dam and storage of additional water in Upper Snake Basin feasible. The April 1, 1939 priority date for the natural flow water rights, held by the Coalition and many other surface water entities, is senior to the general storage water right at Palisades Reservoir (01-2068, priority date July 28, 1939).¹⁹ The consideration of the common priority date was central to the stipulation and the new storage operations agreed to in the Palisades Contracts and ratified in the *Eagle Decree*. Special Master Dolan specifically recognized this history in his decision:

Their goal was to create a "common fair, equitable and just plan designed to result in the most efficient, fair and complete beneficial use of all the waters of the Snake River and its tributaries." *Stipulation*, at 3.

To that end, the plaintiffs in the *Eagle Decree* planned to seek Congressional authorization and appropriation to construct Palisades Reservoir and related irrigation projects.

...

The 1939 priority date was integral to the construction of additional projects authorized by Congress and developed "on the basis of such understanding as to their water rights; and that such projects have used water from the Snake River under such claimed priority date as promptly as they were able to do so upon the construction of their facilities."

Summary Judgment Order at 15-16.

¹⁹ A portion of the reservoir space in Palisades, or the "winter water savings" space, has a March 29, 1921 priority date.

The Twin Falls County District Court confirmed the priority dates in the *Eagle Decree* as a complement to the “plan for the administration of the Snake River” set out in the contracts. There is no basis to now collaterally attack that final judgment now in the SRBA. *See Harkness v. Utah Power & Light Co.*, 49 Idaho 756, 291 P. 1051, 1053 (1930) (“Judgments and decrees of a court can be collaterally attacked only for fraud or lack of jurisdiction”). The record in this case supports the Special Master’s conclusions and the *Summary Judgment Order* should be affirmed.

CONCLUSION

The Ground Water Districts’ continued quest to limit or preclude conjunctive administration finds no support in Idaho law and should be rejected by this Court. Whether cloaked as a remark on the “source” or “season of use” elements, or presented openly as an outright subordination request, the Districts have failed to justify their novel approach to the adjudication of the Coalition’s senior surface water rights. Special Master Dolan reviewed the facts in the record and properly denied the Districts’ requests. This Court should do the same.

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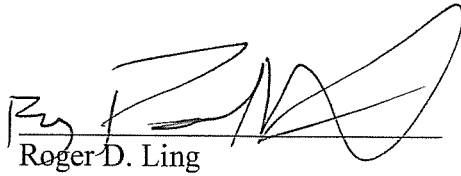
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DATED this 3rd day of May, 2011.


Roger D. Ling

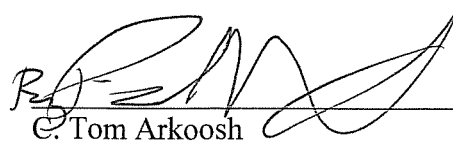
*Attorney for A & B Irrigation District,
Burley Irrigation District and Falls
Irrigation District*

FLETCHER LAW OFFICES


W. Kent Fletcher

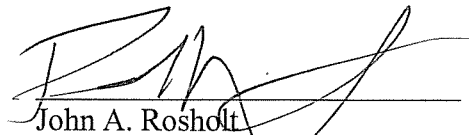
Attorneys for Minidoka Irrigation District

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 3rd day of May, 2011, I served a true and correct copy of the foregoing **SWC'S JOINT RESPONSE TO OPENING BRIEF ON PERMISSIVE REVIEW** 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
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☐ Facsimile
☐ Email

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
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☐ 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 300
Boise, Idaho 83702

☒ 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

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

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
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Travis L. Thompson

ATTACHMENT A

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1-211B
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ATTACHMENT I

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*

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*

FILED
2009 JUL 29 PM 4 36
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

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' JOINT RESPONSE**
) **TO GROUND WATER**
) **DISTRICT'S AUGUST 22, 2008**
) **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-

referenced subcases (hereinafter collectively referred to as “Claimants” or “SWC”), by and through counsel of record, and hereby respond to the motion for summary judgment filed by the Ground Water Districts¹ on August 22, 2008 regarding the SWC water rights’ “source” and “season of use” elements (hereinafter “*GWD Source Motion*”). This response is supplemented by the Claimants’ joint motions for summary judgment and the accompanying materials in support of those motions filed with the Court on August 22, 2008 and June 25, 2009 respectively, which are incorporated by reference as if set forth in full herein. Finally, this response is supported by the *Third Affidavit of Travis L. Thompson*, the *Affidavit of David B. Shaw*, and the *Affidavit of Norman C. Young* filed together herewith.

STATEMENT OF FACTS

The Ground Water Districts (“GWD”) offer a “Statement of Undisputed Facts” in the *Memorandum in Support of Motion for Summary Judgment* (hereinafter “*GWD Source Memo*”) at pages 3-5. SWC responds to those statements of fact as follows (by number as listed in the *GWD Source Memo*):

1. No Dispute.
2. No Dispute.
3. **Dispute.** The responses to GWD’s discovery requests speak for themselves. Moreover, the Water District 01 records do not contain information about the SWC “beneficial use” claims at issue in this case. *See Part I, infra.* To the extent the Water District 01 records or the watermaster’s list of water rights do not contain information about “beneficial use” claims, they do not provide “the best information available regarding the diversion and use of water under the water rights” at issue in this case. *See also, Notices of Claim* for these water rights. Ex. A to *Third Thompson Aff.*

¹ Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey-Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

4. **Dispute.** Although the prior decrees or licenses (with the exception of 1-2061²) did not identify a specific beginning and ending date for the “irrigation season”, the rights were decreed for “irrigation and other purposes”, hence the period of use was determined since water could be put to beneficial use for “irrigation and other purposes” as determined by the water right holder. None of the prior decrees or licenses limited or restricted the period or “season of use” as suggested by GWD’s motion. The facts demonstrate that the SWC water rights have been diverted and used at times throughout the standard irrigation season of 3/15 to 11/5, not just limited to only “late June or early July” as an ending date. *See Part II, infra.*
5. **Dispute.** *See response to #4 above.*
6. No Dispute.
7. **Dispute.** *See Notices of Claim, Ex. A to Third Thompson Aff. See Part I, infra.* These “beneficial use” water rights have been diverted and used by SWC. The fact the rights have not been previously adjudicated or listed on the Water District 01 Watermaster list does not mean they “have never been delivered water” and should be summarily disallowed. Moreover, GWD’s own witness admitted this fact at his deposition. *See Part I, infra* at 10.
8. No Dispute.
9. **Dispute.** *See Part II, infra. See also, Shaw Aff., Young Aff.*
10. **Dispute.** *See Part II, infra. See also, Shaw Aff., Young Aff.* The source element of the SWC water rights is properly defined as the “Snake River”.
11. **Dispute.** Although the parties to the *Eagle Decree* entered into a Stipulation in that case, the water rights were decreed pursuant to the Court’s decree, not the Stipulation. The reference in the Stipulation and the Court’s Findings of Fact and Conclusions of Law to the “so-called ‘Flood Water Rights’” did not limit or condition the SWC water rights in any way. Moreover, the copy of the *Eagle Decree* produced as Ex. F in the *McHugh Aff.* has notations and writing contained in it, therefore it is not an accurate reproduction of the Court’s decree in that case and should not be accepted as such.
12. **Dispute.** SWC does not dispute the recommended “season of use” for its water rights of 3/15 to 11/15, however SWC disputes the rest of the alleged facts offered by GWD. *See Response to #4 above.* Moreover, SWC disputes the characterization of “full irrigation season” as somehow conditioning or further defining IDWR’s recommended season of use.
13. **Dispute.** All water rights in Water District 01 are administered by priority depending upon the available water supply in the Snake River. The timing of curtailment of junior

² Water right 1-2061 was licensed by IDWR with a 4/1 to 10/31 season of use. *See Ex. E to Affidavit of Travis L. Thompson* filed on August 22, 2008.

priority natural flow rights varies from year to year. The characterization offered by GWD to limit or condition the SWC rights is not accurate or legally justified. *See* Part II, *infra*. *See also, Shaw Aff., Young Aff.*

14. No Dispute. The Director's Reports are prima facie evidence pursuant to Idaho law and speak for themselves.
15. No Dispute. The Director's Reports are prima facie evidence pursuant to Idaho law and speak for themselves.

STANDARD OF REVIEW

Summary judgment is appropriate if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497 (2005). Where the action is to be tried before the court, the judge need not draw inferences in favor of the nonmoving party, but is then free to arrive at the most probable inferences based on the uncontroverted evidence. *Id.* If there are no material facts in dispute, the court may enter judgment in favor of the party who is entitled to prevail as a matter of law. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310 (Ct. App. 1982).

ARGUMENT

GWD seeks to redefine the "source" element and condition the SWC water rights in this case in order to limit or eliminate conjunctive administration. By alleging that the source of the SWC water rights is "spring runoff or snowmelt" only, GWD seeks to artificially limit the timeframe within which these rights may be exercised. Further, GWD is asking the Court to pre-determine the result of a delivery call for the SWC surface water rights by claiming that these rights "cannot curtail junior priority ground water rights". There is no legal or factual basis for the requested "subordination". Moreover, the SWC water rights were recently subject to a water delivery call proceeding before IDWR, a call which the Director accepted. Importantly, GWD

ATTACHMENT II

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*

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, and Milner Irrigation District,*

DISTRICT COURT - SRBA
W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83308
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

**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. 1-7, 1-8, 1-9, 1-14
)
) **CLAIMANTS' JOINT RESPONSE**
) **TO GROUND WATER**
) **DISTRICTS' MOTION FOR**
) **SUMMARY JUDGMENT ON**
) **PRIORITY DATES**
)

COME NOW, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, and Minidoka Irrigation District, Claimants in the above-referenced subcases (hereinafter collectively referred to as "Claimants" or "SWC"), by and through counsel of record, and hereby respond to the motion for summary judgment filed by the Ground Water

Districts¹ on June 25, 2009 regarding the “priority date” element for the above referenced subcases (hereinafter “*GWD Priority Motion*”). This response is supplemented by the Claimants’ joint motions for summary judgment and the accompanying materials in support of those motions filed with the Court on August 22, 2008 and June 25, 2009 respectively, and the Claimants’ *Response to Ground Water Districts’ August 22, 2008 Motion for Summary Judgment* which are incorporated by reference as if set forth in full herein. This response is further supported by the *Third Affidavit of Travis L. Thompson*, the *Affidavit of David B. Shaw*, and the *Affidavit of Norman C. Young* filed together herewith.

STATEMENT OF FACTS

GWD offers a “Statement of Undisputed Facts” in its *Memorandum in Support of Motion for Summary Judgment* (hereinafter “*GWD Priority Memo*”) at pages 4-5. SWC responds to those statements of fact as follows (by number as listed in the *GWD First Memo*):

1. No Dispute.
2. No Dispute. The April 1, 1939 priority date was also the subject of the *Eagle Decree*, a final judgment entered by the Twin Falls County District Court, Judge Theron Ward presiding, on July 10, 1968.
3. No Dispute. The cited provisions of the decree speak for themselves.
4. No Dispute. The April 1, 1939 priority date was defined by the *Eagle Decree*.
5. **Dispute.** The evidence referenced is not the only information concerning the delivery records for these rights, since the graphs only extend back to 1955. *See Shaw Aff., Young Aff.*
6. **Dispute.** *See Shaw Aff., Young Aff.*
7. **Dispute.** *See Shaw Aff., Young Aff.*
8. **Dispute.** *See Shaw Aff., Young Aff.*

¹ Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey-Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

9. No Dispute.

STANDARD OF REVIEW

Summary judgment is appropriate if the “pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497 (2005). Where the action is to be tried before the court, the judge need not draw inferences in favor of the nonmoving party, but is then free to arrive at the most probable inferences based on the uncontroverted evidence. *Id.* If there are no material facts in dispute, the court may enter judgment in favor of the party who is entitled to prevail as a matter of law. *Barlow’s Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310 (Ct. App. 1982).

ARGUMENT

In its *Priority Motion*, GWD attacks the priority date for four of the SWC water rights (1-7, 1-8, 1-9, and 1-14) previously decreed in the *Eagle Decree* proceeding. However, rather than asking this Court to change the priority date element, which was previously adjudicated in a final court judgment, GWD requests a clarifying remark. GWD claims that because the entities did not use their rights on April 1, 1939, a clarifying remark is needed “to facilitate administration of these rights”. *GWD Priority Memo* at 2. GWD further asserts that the Director’s recommendations for these rights, based on the *Eagle Decree*, are inconsistent with Idaho law. GWD’s motion fails for three reasons.

First, the priority date element was established by a prior decree, a court judgment that cannot be collaterally attacked here in the SRBA. Any junior ground water users with water rights prior to July 10, 1968 were provided with notice and an opportunity to object to the SWC water rights’ priority dates. None did. Any junior water rights holders (surface or ground) who

ATTACHMENT III

ATTACHMENT III

SWC Joint Response to Opening Brief on Permissive Review

Water Right	Owner	Decreed
1-7	Burley Irrigation District	N
1-8	Minidoka Irrigation District	N
1-9	Milner Irrigation District	N
1-10	Twin Falls Canal Co.	N
1-13	Falls Irrigation District	N
1-14	A&B Irrigation District	N
1-15	Bret & Robyn Anderson	Y
1-297	Aberdeen Springfield Canal Co.	N
1-298	Blackfoot Irrigation District	N
1-299	Kite-Nord Canal Co.	Y
1-301	Butler Island Canal Co.	Y
1-302	Butte & Market Lake Canal Co.	Y
1-303	Clark & Edwards Canal Co.	Y
1-304	Corbett Slough Ditch Co.	N
1-305	Edward Croft	Y
1-306	Danskin Ditch Co.	N
1-307	Dilts Irrigation Co., LTD	Y
1-309	Harrison Canal & Irrigation Co.	Y
1-310A	Susan Horner	Y
1-310D	Bear Island Water Assn., Inc.	Y
1-310F	Farrell Black	Y
1-310K	Richard & Kathie Rice	Y
1-312	Idaho Irrigation District	Y
1-313	Dennis & Kristine Hill	Y
1-315	Labelle Irrigating Co.	Y
1-316	Liberty Park Irrigation Co., Inc.	Y
1-317	Long Island Irrigation Co.	Y
1-319A	Bear World LTD, LLC	Y
1-319B	Lois & Gaylen Pond	Y
1-322	Progressive Irrigation Co.	Y
1-323A	Reid Canal Co.	Y
1-323B	Lenroot Canal Co.	Y
1-324	Riverside Canal Co.	N
1-326	R. Gene Scott	N
1-327B	Call Farms Partnership	Y
1-327C	Bradley & Ruby Snarr	Y
1-327D	Bradley & Ruby Snarr	Y
1-328	Snake River Valley Irrigation Dist.	Y
1-329	Texas Slough Irrigating Canal Co.	Y
1-330	Osgood Canal Co., Inc.	Y

ATTACHMENT III

SWC Joint Response to Opening Brief on Permissive Review

1-331	West Labelle Irrigating Co., LTD	Y
1-1009B	Bradley & Ruby Snarr	Y
1-10090	Takeno Sakaguehi & Son	Y
1-10133	David & Anita Reed	Y
1-10150	Brett & Kristy Jensen	Y
1-10177	Gerald & Ted & Yamasaki	Y
1-10435	Ray Stoddard	Y
1-10436	Jeff & Stephanie Avery	Y
1-10516	Idaho Fresh-Pak	Y
1-10517	Jerry Becker	Y
1-10518	Toni & Daniel Ziegler	Y
1-10519	Lloyd & Shannon Brown	Y
1-10520	Clara Newby	Y