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THE UNITED STATES' RESPONSE TO THE GROUND WATER DISTRICTS' OPENING BRIEF ON PERMISSIVE REVIEW - Page 1

Districts, this restriction is required because historically, in *most* years the rights have only been used in the spring and early summer. The Districts seek to transform that general proposition into a hard and fast rule so that they can avoid the “difficulty and expense” of contesting a potential priority call by any of the rights. *See* GWD Brf. at 5; *see also* Deposition of Ronald D. Carlson, Subcase 01-00004, at 115:15-18 & 124:3-15 (“Carlson Depo.”) (pertinent pages attached as Exhibit B to the Affidavit of David. A. Jarvis (July 27, 2009) (“Jarvis Aff.”)) (characterizing the Ground Water Districts’ argument as intended to preempt the need to assert a futile call defense).

Special Master Dolan found that the Districts’ proposed rule was unwarranted because the challenged water rights will be administered in priority and Idaho’s conjunctive management rules grant the Director of the Idaho Department of Water Resources discretion to consider the seasonal variability flows in administering delivery calls. ORDER ON MOTIONS FOR SUMMARY JUDGMENT at 19 (Dec. 11, 2009) (“Order”). As is explained below, the Special Master’s decision provides ample support for that conclusion. Even were that not the case, a desire to avoid “difficulty and expense,” while understandable, cannot justify a rule that is inconsistent with the facts, would strip the Director of discretion provided by the Conjunctive management rules, and would preclude senior water rights from exercising a call, even during times the rights are in priority. Finally, the Districts’ proposed rule is particularly inappropriate for the challenged water rights held by the United States because undisputed testimony demonstrates those rights have been consistently used for decades.

Argument

The Ground Water Districts correctly note that this Court exercises “free review” over Special Master Dolan’s legal conclusions. GWD Brf. at 13 (citing *Higley v. Woodard*, 124

Idaho 531, 534, 861 P.2d 101, 104 (Id. App. 1993)). Even under a “free review” standard, however, the Ground Water Districts’ request must be rejected because it is unwarranted by the facts and unsupported by the law.

I. A REMARK DESIGNATING WATER RIGHTS AS “FLOOD WATER RIGHTS” IS UNWARRANTED AND UNNECESSARY.

Special Master Dolan’s conclusion that the Districts’ proposed rule is unwarranted because the priority system and the director’s discretion are more than able to protect the Ground Water Districts’ interests is well supported by the applicable facts and law. The Special Master began his analysis by noting that the proposed rule is inconsistent with the inherent variability of flows in the Snake River. *See* Order at 17. The testimony of the Ground Water Districts’ own witnesses reiterates the Special Master’s point and illustrates that there is no factual basis to restrict the period of use of the so-called “flood” water rights. Water District 01 Water Master Lyle Swank testified that the post-1900 water rights the Ground Water Districts seek to relegate to “flood water” status can be in priority early in the season in some years; in the middle of the season in some years and are “very often” in priority late in the year. Deposition of Lyle Swank, Subcase 01-00004, at 99:23 - 100:3 (“Swank Depo.”) (pertinent pages attached as Exhibit A to the Affidavit of David A. Jarvis, Subcase 01-00004 (July 27, 2009) (“Jarvis Aff.”)). Similarly, former Water Master Ron Carlson testified that in some years water has been available to the challenged rights in August, September and October. Carlson Depo. at 101:2-16.

This testimony also demonstrates that an unavoidable consequence of the Ground Water District’s proposed rule would be that in some years senior water users would be deprived of the right to call for water they are entitled to. A junior’s desire to avoid “difficulty and expense” is no reason to hamstring a senior water right, particularly when the Idaho Supreme

Court has instructed that junior water users bear the burden of challenging a senior's priority call. *American Falls Res. Dist., No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 878; 154 P.3d 433, 449 (2007). Indeed, the Ground Water District's request seeks to turn the doctrine of prior appropriation on its head because under Idaho law, junior water users take their water subject to the rights of senior water users.^{2/} *Clear Springs Foods, Inc. v. Spackman*, 2011 Ida. LEXIS 44 at *65.

Special Master Dolan's second important point was that the Ground Water District's proposed remark is unnecessary because the Director has the ability to protect junior ground water users from unwarranted priority calls by "consider[ing] seasonal variability . . . in determining material injury in a delivery call proceeding." Order at 19; *see also A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997) (the conjunctive management rules give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]"). Again the testimony produced by the Ground Water District's witnesses only reiterates the Special Master's conclusion. Water Master Swank and Anthony Olenichak, the Program Manager for Water District 01, both testified that a remark designating water rights as "high water" rights is unnecessary. Swank Depo. at 31:3-19; Deposition of Anthony Olenichak at 75:15-19 (pertinent pages attached as Exhibit C to the Jarvis Aff.). The Ground Water Districts' desire to avoid

^{2/} The Ground Water Districts' final argument illustrates the extent to which the Districts want the prior appropriation system to accommodate the interests of junior ground water users at the expense of senior water users. Not only do the Districts claim that the period of use of these water rights must be limited, they contend the remarks must categorically prohibit the rights from ever issuing a call against junior ground water users at any time, under any circumstances. *See* GWD Brf. at 23-24.

difficulty and expense does not make it necessary for this Court to handcuff the exercise of the Director's discretion. *See American Falls Reservoir District No. 2.*, 143 Idaho at 877, 154 P.3d at 448 (the need for knowledge on how the use of water from one source impacts water flows in another source "is precisely the reason for the CM Rules and the need for analysis and administration by the Director").

II. THE GROUND WATER DISTRICT'S PROPOSED RULE IS PARTICULARLY UNWARRANTED FOR THE WATER RIGHTS HELD BY THE UNITED STATES.

The Ground Water Districts seek to have three water rights held by the United States designated as "flood" water rights: 01-219 (the 1909 priority storage right for Lake Walcott); 01-10034 (the 1911 storage right for Lake Walcott) and 01-10482 (a 1940 priority right to pump water for watering Walcott Park).

The Ground Water Districts' experts all testified that Lake Walcott fills almost every year. *See e.g.*, Carlson Depo. at 138:19 - 139:2; Olenichak Depo. at 108:6-9. Thus it is not surprising that *all* of the Districts' experts testified that the Lake Walcott storage rights should not be relegated to "flood water" status. Mr. Olenichak testified that the Lake Walcott storage rights are delivered every year; that he would not consider the rights to be "high water" rights and that his affidavit was not intended to address the Lake Walcott storage rights. *See Olenichak Depo.* at 73:12-14, 72:21 - 73:11, 78:4 - 13. Similarly, current Water Master Swank testified he would not consider a reservoir storage rights a "high water" right. Swank Depo. at 95:20 - 96:3. Even former Water Master Carlson testified he could see no reason for the Ground Water Users' "source objection" to be applied to the Lake Walcott storage rights. *See Carlson Depo.* at 144:7 - 145:10.

Water Right 01-10482 is a beneficial use water right to pump .540 cfs with a 1940

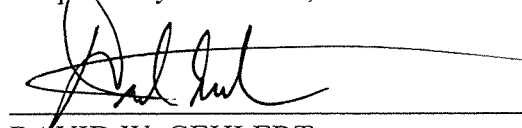
priority for irrigating what is now Lake Walcott State Park.³ The United States presented affidavit testimony documenting that the right has been consistently used during the irrigation season. *See* Bowden Aff. at ¶¶ 3 & 5. The generalities offered by the Ground Water Districts are not sufficient to overcome that evidence. *See Bennett v. Idaho Dept. of Transp.*, 147 Idaho 141, 145, 206 P.3d 505, 509 (Id. App. 2009) (generalized statements are inadequate to overcome specific credible evidence). In short, the evidence produced in this proceeding provides no reason to confine the United States' water rights.

Conclusion

Special Master Dolan had good reason to reject the Ground Water District's proposed remark. A hard and fast rule is inconsistent with the variability of flows on the Snake River and would serve only to benefit junior water users at the expense of seniors. Moreover, it is entirely unnecessary as the Director already has the ability to prevent the harm the Districts fear. Finally, the remark is particularly ill-suited to the water rights held by the United States, all of which have been regularly used.

DATED this 2nd day of May, 2011.

Respectfully submitted,



DAVID W. GEHLERT
Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice

³ Walcott Park was originally administered by Reclamation. The United States still owns the Park. However, in 1999 management of the Park was transferred to the Idaho Department of Parks and Recreation. *See* Affidavit of Don Bowden, Subcase 01-10482 at ¶ 6 ("Bowden Aff.") (July 22, 2009).

CERTIFICATE OF SERVICE

I certify that on this 2nd day of May 2011, I served a true and correct copy of the foregoing THE UNITED STATES' RESPONSE TO THE GROUND WATER DISTRICT'S OPENING BRIEF ON PERMISSIVE REVIEW as indicated below:

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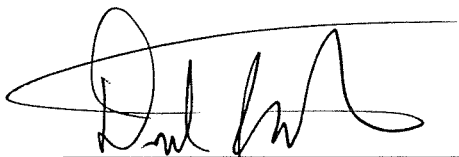
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A handwritten signature in black ink, appearing to read 'David W. Gehlert', is written over a horizontal line.

David W. Gehlert

Attachment A

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