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DEPARTMENT OF
WATER RESOURCES

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

In Re: SRBA

SUBCASE NOS.
See Attachment A¹

Case No. 39576

GROUND WATER DISTRICT'S REPLY 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

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¹ Attachment A contains the 37 subcases the Court has on its Attachment A. Attachment B contains the list of subcases that was attached to the Ground Water Districts' Amended Motion for Summary Judgment dated June 23, 2009.

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The issues in this case are straight forward: Should the Snake River Basin Adjudication Court identify these water rights as “flood water rights?” Should the Snake River Basin Adjudication Court decree a full season of use for these water rights when the facts show that they have never been available, diverted or used for a full irrigation? Should the Snake River Basin Adjudication Court decree a priority date that is not based on when the water was actually first diverted and put to beneficial use?

This reply responds to the *Surface Water Coalition’s Joint Response to Ground Water Districts’ Opening Brief on Permissive Review* (“*Joint Response*”) and *The United States’ Response to the Ground Water Districts’ Opening Brief on Permissive Review* (“*BOR Response*”). This reply responds to two main themes that are present in both briefs: 1) the arguments that there is no legal or factual basis to add a flood water condition or to limit the season of use of these water rights and 2) that to condition these water rights as flood water rights or to limit the season of use impermissibly interferes with the Director’s ability to administer these water rights.

This reply also briefly provides additional argument in support of conditioning the priority date for certain water rights.

ARGUMENT

As elegantly stated by Special Master Booth in his *Memorandum Decision and Order on Motion for Summary Judgment Order Setting Scheduling Conference*, Subcase 63-8447 (August 28, 2007), “[t]he issue of the origin of the water in a source usually does not need to be addressed in the context of the adjudication proceedings unless it is raised by a party, in which case it may need to be resolved for purposes of efficient administration of water rights.” (emphasis added). Here, the issue of the origin of the subject water rights has been raised.

Further, the origin of the source of the subject water rights has been previously conditioned and acknowledged by the Court and parties in the Eagle Decree as “flood water”. Without reiterating the arguments contained in the *Ground Water District’s Opening Brief on Permissive Review* and the memoranda filed in support of the motions for summary judgment before Special Master Dolan, the arguments of which are incorporated herein by reference, the Ground Water Districts ask the Court to condition the SWC’s water rights as “flood water” rights. The basis for this request is that the undisputed facts show that these water rights, when they were first developed and appropriated, were only available during periods of high flow and that the supply of water runs out in late June or early July. Because of this undisputed fact, these water rights were never used for a full irrigation season and should be so conditioned. The water rights decreed in the Eagle Decree were specifically identified as “flood water” rights and this condition should be included in the SRBA decrees for these water rights. It follows, then that any surface water rights junior to those in the Eagle Decree are also flood water rights.²

I. The Eagle Decree Provides the Legal and Factual Basis for Including a “Flood Water” Condition.

Water Right Nos. 1-7, 1-8, 1-9, 1-10, 1-13 and 1-14 are high flow or flood water rights as agreed to in the Eagle Decree. These water rights were decreed with an April 1, 1939, priority date in the Eagle Decree pursuant to a stipulation. Exhibits D-F, First McHugh Aff. The Stipulation at page 3 and page 4 characterize these water rights as “flood rights.” The Findings of Fact and Conclusions of Law reiterate the identical language. See Exhibit E to McHugh Aff.

² The SWC argues that the Ground Water Districts’ request must fail because the Ground Water Districts did not object to every possible water right diverting from the Snake River that may also be considered a flood water right. *Joint Response* at 9 and also Attachment III. The SWC’s water rights are before the Court and the facts surrounding their water rights are at issue. When the Court decides that the SWC’s are flood water rights and if the Court decides that this would require all users with similar priority dates to have a similar flood water designation, a process can be fashioned to properly decree the other water rights, in much the same way as is currently being done in subcase number 910013. However, the fact that the Ground Water Districts only objected to the SWC’s water rights does not make the facts any less compelling that the SWC’s water rights at issue here are flood water rights.

pp. 3-4. The Supplemental Decree entered thereafter specifically relies on the previous Findings of Facts and Conclusions of Law. See Ex. F, First McHugh Aff. at 1. In addition, 36 contemporary documents identify the water rights to be decreed in the Eagle Decree as “flood water rights.” See Ex. 1-36, Harris Aff. summarized on Attachment III to the *Ground Water Districts’ Opening Brief on Permissive Review*.

The SWC claims they have used these water rights “later in the season” sometime in September or October of some years. *Joint Response* at 5-6. If that is true, then this practice must have occurred sometime after the entry of the Eagle Decree since it was acknowledged by the parties and the Court in the Eagle Decree that water was only available under these water rights “during periods of high flow.” Ex. D to First McHugh Aff., Stipulation at 3 (emphasis added). The SWC’s diversion and use of these water rights later in the season is not a legal basis for the SRBA Court to ignore the “flood water” condition that was contained in the Eagle Decree.

- II. Actual Beneficial Use and Water District 01 Records Provides the Legal and Factual Basis for Conditioning the Water Rights, Limiting the Season of Use and Lend Further Support to Adding a “Flood Water” Condition**
- A. Determining the Facts Regarding When Water Has Historically Been Diverted and Used is a Necessary Determination in Order to Not Unlawfully Enlarge Water Rights and to Avoid Injury to Junior Users.**

Beneficial use is the ultimate determinate of the irrigation season of use. *Memorandum Decision and Order Re: Basin-Wide Issue 5*, Subcase 91-00005, at 12 (April 26, 1996). When there is evidence of beneficial use to establish the parameters of the omitted element as of the date of the prior decree, reliance on the provisions of I.C. § 42-1427 becomes unnecessary.³ See

³ The GWDs acknowledge that I.C. § 42-1427 provides an additional basis for decreeing the period of use element for the subject water rights in a manner that conforms with beneficial use. However, in no case can the SRBA

Memorandum Decision and Order on Challenge Subcases 36-00003A et al., at pp. 37-38 (November 23, 1999). In this case, IDWR simply recommended its standard season. However, IDWR's standard season only sets forth the period of time when water can be beneficially used, not when water has actually been beneficially used. The SWC and the BOR make arguments that would eliminate this Court's review of whether or not the water rights before it have actually been used during the time claimed. Instead, they argue that so long as the season is in keeping with IDWR's process of recommending a "standard season" questioning when during the year the water has actually been available, diverted and used is irrelevant. This contradicts the requirement that the Court not exceed the extent of beneficial use and not decree elements that will injure other water rights. See I.C. §§ 42-220 and 42-1427 (beneficial use is the measure and limit of a water right).

The Director's Report should only be confirmed if it is based on actual facts. If it were enough just to follow the "proper process" then the Director's Report elements could be based on no facts at all. Actual use is critical and the Supreme Court has instructed the SRBA not to decree water rights that would be "in excess of the amount actually used for the beneficial purpose for which such right is claimed." *State v. Hagerman Water Right Owners (in Re SRBA Case No. 39576)*, 130 Idaho 727, 947 P.2d 400 (1997) (emphasis added).

When a water right can be used and for how long the quantity element can be diverted is just as important as how much water can be diverted. The period of use on the water right has meaning. Junior users understand that each element of the water right as decreed (or omitted), can be used against them in an administrative delivery call. The elements as decreed here matter to the Director's evaluation of the senior users' claims of injury in an administrative action. If

Court decree the omitted element in a fashion that exceeds how the water has been used or that would cause injury to other water rights.

the water rights are decreed in a manner that changes or mischaracterizes the water rights' historical use then the junior user has forgone his chance to argue that the elements are incorrect or that additional conditions should be considered in an administrative hearing. *See Ground Water Districts' Opening Brief on Permissive Review* at 5.

B. Water District 01 Delivery Records Support a Season of Use Condition and/or a Shortened Season of Use.

The SWC admits on page 4 of its *Joint Response* that “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.” (emphasis added). They further establish in their *Joint Response* and with the *Affidavit of David Shaw* that certain water rights are not reliable after late June or early July and summarize his conclusions that water rights with priorities ranging from 1903 to 1939 have not received water for a full irrigation season. *Id.* at 5. The BOR argues that there is no factual basis to restrict the period of use. *BOR Response* at 3. Yet, as pointed out by the SWC and the Water District 01 delivery records, water rights junior to at least 1903 have never been available for the full irrigation season. Their own evidence and argument support what the Ground Water Districts have been arguing this entire time – these water rights have not been diverted and used for a full irrigation season (even prior to the onset of ground water pumping) and the SRBA decree should reflect that fact.

In order to wave away this fact, the SWC argues that because their water rights are again used in mid-to late September or October “on average” that a full irrigation season is warranted under these water rights. *Joint Response* at 5-6. At best, what that may establish, is that these water rights should have a bifurcated season, but it does not show that the full irrigation season is in fact valid. It may also be explained, as set forth on the next page of their *Joint Response*, that

this late-season use is simply a matter of surface water administration: “[i]ndeed, the ‘high flows’ could also be comprised of return flows from upstream irrigation” *Joint Response* at 6. While this might point out why strict priority administration works in a surface water only system, it does not foreclose the relief that the Ground Water Districts seek: to have a source and/or season of use condition added to these water rights so that the senior user is not able to secure more water administratively through mitigation than they have had historically.

III. Conditioning the Water Rights Properly in the SRBA Provides Necessary Guidance Without Hampering Flexibility for the Director to Administer these Water Rights in Response to a Conjunctive Management Delivery Call

A. Conditions Equally Guard All Parties’ Rights and Interests When it Comes to Administration of These Water Rights.

The SWC in its *Joint Response* argues that the Ground Water Districts’ request to add a remark designating the SWC’s water rights as “flood water” or to limit the season of use would be “vague and unclear” and “impossible to administer.” *Joint Response* at 11. Yet, the SRBA has decreed hundreds of water rights with varying seasons of use, including but not limited to water rights with quantities that change over time during an irrigation season or throughout a year.⁴ Decreeing a shorter season or adding a “flood water” condition on these water rights does not create ambiguity, it does the opposite: it more clearly defines the actual character of these water rights and actually aids in the administration of these water rights.

The BOR argues that the Ground Water Districts’ request would deprive seniors from making a call. *BOR Response* at 3. While the Ground Water Districts believe this is a logical outcome to finding that these water rights are “flood water rights” the Court does not have to go that far; it has at its disposal any number of tools that will address how these water rights should be decreed. The Ground Water Districts have asked for a variety of relief: condition the source

⁴ Examples of such conditions and seasons are attached hereto for the Court’s reference.

to be high-spring run-off or snow melt, to add a condition that states these water rights are “flood water rights,” to limit the season of use by ending the season in late June or early July or to provide a condition on the season of use. The facts show that these water rights need additional conditions in order to allow proper conjunctive administration.

The BOR argues in support of Special Master Dolan’s point that the Director, under the current Conjunctive Management Rules, “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.’” *BOR Response* at 4. Yet, the CM Rules can change between the time these water rights are decreed and the next dry year. Further, even if the CM Rules remain unchanged, without a condition, the senior is presumed entitled to all the elements as decreed and the juniors are precluded from arguing that these water rights are really not valid for a full season or are really flood water rights dependent on snow melt and not impacted by interconnected ground water rights.

The BOR also argues that adding a condition will “handcuff” the Director. *BOR Response* at 5. However, conditioning these water rights as flood rights provides the opposite. With appropriate conditions added, the Director is not trapped by overstated elements or by the presumption that this Court has actually judicially determined the full extent of beneficial use for these water rights or pre-determined the reliability of the supply. Rather, the Director is free to examine the rights, in light of the conditions, and review the period of use and evaluate evidence before him when he decides whether the junior ground water users are injuring the senior’s water supply during a period of time when the senior would have historically had water, but for the junior’s use.

The undisputed facts show that the SWC's water rights are not available, especially in dry years, after early July and certainly not during the "peak irrigation season." *Joint Response* at 4-6. Yet, they argue that the SRBA should judicially determine otherwise as if overstating the source and season of use elements will have no consequences in an administrative delivery call action. However, if this Court decrees elements of these water rights, contrary to the established facts that they have a limited season of availability and were actually considered "flood water rights" by the parties themselves and the Court in the Eagle Decree action, then, the consequence is that the SWC can demand water from the junior groundwater users for the whole irrigation season – in August, when they have never diverted or used water under these water rights. For all practical purposes, the SRBA would have determined, as a matter of fact and law, that the SWC's water supply was reliable for a full irrigation season, when the facts clearly demonstrate otherwise. If a remark or a shortened irrigation season is not added, it then follows, that when a finding of injury by the Director occurs in an administrative delivery call case, that junior groundwater users can be required to replace the senior's water supply, during a period of time when the senior user would have never had water anyway.

The Ground Water Districts are not asking the court to decide whether or not the pumping of groundwater causes injury to the SWC and BOR's water rights. Rather, the Ground Water Districts are asking this Court to determine that a remark should be added, as matter of law that will allow the Director to consider the source and limited season as part of an administrative action.

The SWC argues: "[r]egardless 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." *Joint Response* at 6. Likewise, the senior user has no right to secure in the SRBA a water

right for a full season, without limitation, when the right is a flood water right with a shortened (or bifurcated) season.

Adding to the decree a condition that these are flood water rights or that limits the season of use, actually provides the Director with the necessary discretion to consider the reliability of the water right as it was historically developed and used under these water rights. While the Ground Water Districts believe that it is a logical outcome that a flood right not be allowed to make a delivery call against junior ground water users, the Court does not have to go that far. The Court can simply acknowledge the fact that these water rights are “flood rights” which will still allow the Director in an administrative proceeding to find injury -- if there is evidence to show that junior groundwater pumping impacts the supply. Importantly, however, such a condition also allows the junior users to argue that the historic reliability of the supply needs to be considered in ordering curtailment or mitigation, that there should not be a presumption that the supply of water is interconnected to groundwater at all times throughout the whole irrigation season and to argue when the Director can order mitigation and for what point in the irrigation season.

B. Priority Alone Does Not Address the Issues Presented in a Conjunctive Management Administrative Action

The Ground Water Districts do not dispute the arguments made by the SWC, the BOR or the findings by the Special Master that in a surface water only system, priority administration “takes care” of intermittent water rights. Contrary to the SWC’s claim, the Ground Water Districts are not trying to alter Water District 01 surface water administration by asking the court to limit the season of use for these water rights or to condition them as “flood water rights.” Rather, the Ground Water Districts are asking that this Court decree the water rights based on the facts as established by the Eagle Decree and Water District 01 delivery records. Conjunctive

administration is not simply based on priority. *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, 870 (2007). The SWC has argued repeatedly that the beginning point for the Director in conjunctive administration is the water right and its elements which includes source and season of use. Gooding County Dist. Ct. 5th Jud. Dist. Case No. CV-2008-551, *SWC Joint Opening Brief* at 12-13, 25, 26-28, 30-31; *SWC Joint Reply Brief* at 13. The SWC has argued that there is a legal presumption that the Ground Water Districts' members' water rights are interconnected and as such, the Ground Water Districts are foreclosed from arguing otherwise in an administrative delivery call. Gooding County Dist. Ct. 5th Jud. Dist. Case No. CV-2008-551, *SWC Joint Opening Brief* at 4-5; *SWC Joint Reply Brief* at 40. If the source and season of use are not conditioned, then the Director must presume that the senior is entitled to the elements as set forth in the decree. This presumption will enlarge these water rights to the detriment of junior users.

IV. The Priority Date Should Reflect the Date When Water was First Diverted and Used

In *Reno v. Richards*, the Supreme Court identified that "where there is a total lack of evidence upon this point [application to beneficial use] a decree awarding water to the claimant cannot be sustained." *Reno v. Richards*, 32 Idaho 1, 8 (1918). In that case the Supreme Court remanded the proposed decrees back to the district court because "it appears that the awards to each of these claimants gives them a date of priority in advance of the actual application of the water to a beneficial use." *Id.* at 15. That is what occurred with Water Right Nos. 1-7, 1-8, 1-9, 1-10, 1-13 and 1-14. These water rights were decreed with an April 1, 1939, priority date in the Eagle Decree pursuant to a stipulation, not because that was the date when the water was first diverted and used. Exhibits D-F, First McHugh Aff. Exhibit 10 of the Harris Aff. states that as of 1956 there has been "no use yet" for the North Side Pumping Division of the Michaud flats

Project or for American Falls Reservoir District No. 2 and thus, a priority date would have to be by stipulation of the parties.

The SWC argues that because the priority date has been used for years in the administration of surface water rights in Water District 01, it must be valid. *Joint Response* at 28-29. Further, the SWC argues because there was an important reason (i.e. the building of Palisades Dam) that justifies an artificial priority date being decreed in the SRBA to bind non-parties to the Eagle Decree. *Id.* at 29-30. While the priority date can continue to be administered, as between the parties to the Eagle Decree pursuant to the stipulation of the parties, it should not be confirmed in the SRBA without a condition that advances the priority date to the date of actual diversion for water users who were not bound by the Eagle Decree.

The SWC also argues that there is no “legal basis” to decree “two priorities” in the SRBA. *Id.* at 29, fn. 10. Yet, the SRBA decrees “two priorities” for enlargement water rights – one being the date when the use of water occurred and one being 1994 so as to avoid injury to water users, the Court should condition these water rights’ priority dates accordingly. In addition, the SRBA has decreed water rights with subordination conditions that essentially advance the priority date of certain water rights in order to avoid injury to other water users; similarly here, the Ground Water Districts request that the court find, as a matter of law, that the priority date must reflect the date when water was first diverted and put to beneficial use.

CONCLUSION

What the Court decrees here will have a real and important impact on what the Director may consider in a conjunctive management delivery call, what evidence he may consider and what arguments the junior users can make to protect their property rights. Conditioning these water rights with a “flood water” condition, conditioning, shortening (or even bifurcating) the

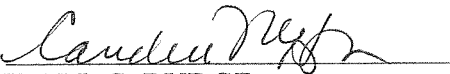
season of use, will not alter surface administration in Water District 01 which is a strict priority system. The reason these water rights need to be designated as flood water rights and/or have a shortened season of use is because that is how the parties and the Court in the Eagle Decree defined them, that is how they were developed and used, that is what they are.

Finally, the priority of a water right is the “essence” of the water right. That being the case, it should be based on when the water was first diverted and put to beneficial use. While parties can agree to a stipulated priority date, non-parties should not be bound to an artificial date that can be used against them in the future. The Court should find that the stipulated priority date of April 1, 1939 in the Eagle Decree is not effective against non-parties and that the priority date for administrative purposes against non-parties to the Eagle Decree must be the date when water was first diverted and put to beneficial use.

[illegible]

DATED this 12th day of May, 2011.

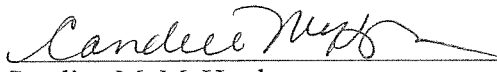
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 

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

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2011, the above and foregoing document(s), was served by mail postage prepaid on May 12th, 2011 and by email May 13th, 2011, to those with email addresses as follows:


Candice M. McHugh

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ATTACHMENT A
SRBA LIST

01-00004
01-00005
01-00006
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01-10225
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01-10483

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

1-4
1-6
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1-8
1-9
1-10
1-13
1-14
1-17
1-211A
1-211B
1-214A
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1-10483

ATTACHMENTS REFERENCED in fn 4 – PAGE 9

RIGHT NUMBER: 22-594

SOURCE: MOODY CREEK

QUANTITY: 6.400 CFS

PRIORITY DATE: 03/15/1881

PURPOSE AND
PERIOD OF USE:

PLACE OF USE:

22-594

SRBA

PARTIAL DECREE 21-12928

Issued on 03-03-2011.

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Contact IDWR or the Court for a Certified Copy.

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NAME AND ADDRESS: EGIN BENCH CANALS INC
PO BOX 15
ST ANTHONY, ID 83445

SOURCE: HENRYS FORK TRIBUTARY: SNAKE RIVER

QUANTITY: 400.00 CFS
The quantity of water diverted under this water right during the periods July 2 through July 16 and August 1 through October 31 shall not exceed 360 cfs.

PRIORITY DATE: 06/14/1895

POINT OF DIVERSION: T07N R40E S02 LOT 6 (NESE) Within Fremont County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation	04-01 TO 07-01	400.00 CFS
Irrigation	07-02 TO 07-16	360.00 CFS
Irrigation	07-17 TO 07-31	400.00 CFS
Irrigation	08-01 TO 10-31	360.00 CFS
Stockwater	01-01 TO 12-31	50.00 CFS
Subirrigation	11-01 TO 03-31	132.00 CFS

Sub-irrigation is authorized between 11/1 and 3/31 consistent with the practices described in the Rexburg Irr. Co. v. Teton Irr. Co. Decree (including paragraph 31).

PLACE OF USE:

Stockwater	Within Fremont County
Same as Irrigation	
Subirrigation	Within Fremont County
Same as Irrigation	

30102 ACRES TOTAL

The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.

Right Nos. 21-12928 and 21-12910 are limited to the irrigation of a combined total of 7272 acres in a single irrigation season.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

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