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DEPARTMENT OF
WATER RESOURCES

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

In Re: SRBA

Case No. 39576

Subcase Numbers: ATTACHMENT A

**RESPONSE TO THE SURFACE WATER
COALITION'S JOINT MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District and North Snake Ground Water District (herein referred to as the "Ground Water Districts") by and through their undersigned attorneys of record, and submit this response to the *Surface Water Coalition's Joint Motion to Partial Summary Judgment* ("SWC Joint Motion").

I. INTRODUCTION

The Ground Water Districts were not parties to the *Eagle Decree*. As such, the Ground Water Districts are not bound by the terms of the *Eagle Decree*. See *Mays v. District Court*, 34 Idaho 200, 206-207, 200 P.115, 116 (1921). The attempt by the Surface Water Coalition to bind

junior users to private contractual provisions should be denied because the provisions are not necessary for the definition or administration of the water rights.

II. DISCUSSION

The request by the Surface Water Coalition in the SWC Joint Motion fails to appreciate the nature of the *Eagle Decree* and the proceeding from which it derived. The Surface Water Coalition's characterization that the *Eagle Decree* "adjudicated various water rights" at page 3 of their *Memorandum in Support of Joint Motion for Summary Judgment* ("SWC Memo") conflicts with the District Court's holding that the action that lead to the *Eagle Decree* was a "summary supplemental adjudication proceeding [and it] not only failed to result in a *de facto* general adjudication for purposes of binding non-parties but it also failed to adjudicate any water rights *de facto* or otherwise." (*Memorandum Decision and Order on Motion to Alter or Amend Judgment, I.R.C.P. 59(e), Subcase Nos. 1-217, 1-218, 1-4024, 1-4025 (Minidoka Power Rights), 1-2068 and 1-4054 (Palisades Power Rights)*, at 7 (May 17, 2011)). Not only did the Presiding Judge find that no water rights had been adjudicated, he also held in a bold heading that "[t]he *Eagle Decree* did not adjudicate any water rights or other administrative provisions...." *Id.* at 5 (emphasis added). Therefore, while the *Eagle Decree* may have acknowledged certain contractual rights of the parties, it did not decree these contractual rights as administrative provisions as part of water rights which would then be binding on non-parties. The Special Master should decline to include contractual provisions as part of the water right elements decreed by the Court. The contracts remain in full force and effect between the parties; Water District 01 administration can continue to acknowledge certain contractual obligations and provisions when administering the water rights. However, muddling the decreed elements of these water rights with the requested contractual provisions is not necessary for the administration or definition of the water right under I.C. 42-1411(2).

The Surface Water Coalition's argument that all junior users take the system as they find it, also does not support the fact that all juniors are therefore bound by provisions in private contracts. Although junior users may take their water rights subject to all prior decreed water rights; that is not what is being asked for by the Surface Water Coalition. Here, the Surface Water Coalition is asking that the Court bind junior users and the State to private contractual provision to which neither are party. This should not be done and is contrary to how this court has handled such arrangements in other cases.

In the interest of standardizing and simplifying the form of the partial decree, it was determined from the outset of the SRBA that every administrative term pertaining to a water right would not need to be included in the body of the partial decree. Accordingly, pertinent contracts, stipulations or other documents specifying how a particular right is to be administered are frequently referenced or incorporated into the partial decree without including all of the terms of the contract or document in the face of the decree. The Court acknowledges that in disputes concerning the administration of the water right the Idaho Department of Water Resources may refer to a document that has been incorporated by reference into a partial decree. This process is not new to the SRBA.

Order on Motion for Reconsideration and Order Modifying Court's January 14, 2005 Final

Order, Consolidated Subcase: 91-63 at 3, (March 3, 2005). Referencing the fact that the contracts may affect administration of these water rights would be enough, although, that may not even be necessary since the contracts are binding on the parties without a reference to them in the water rights.

In addition, to the fact that the provisions are purely contractual in nature the specific provisions requested by the Surface Water Coalition should not be included in the partial decrees for the water rights because the requested provisions are not necessary because they are either the subject of a stipulation between the parties or have already been recommended by IDWR and as such, the provisions would be redundant and are unnecessary to be decreed. Furthermore, three of the provisions requested by the Surface Water Coalition have not been administered by

Water District 01 and thus not necessary to be decreed as part of the water right elements.

A. Winter Water Savings

On January 26, 2012, the parties filed a *Stipulation to Resolve Certain Objections and Statement of Remaining Issues* (“Stipulation”). As part of that Stipulation, the parties addressed the winter water savings that results from the discontinued practice of diverting water through the canal systems in the winter months to allow for Palisades storage. The Stipulation specifically provides:

The Parties agree the recommended Winter Water Savings Remark shall be deleted, and instead, the storage rights at American Falls and Palisades shall be split as follows:

<u>Right No.</u>	<u>Quantity (afa)</u>	<u>Priority</u>
01-02064	1,540,600	03/30/1921
01-10042	159,400	03/29/1921
01-02068	940,400	07/28/1939
01-10043	259,600	03/29/1921

Stipulation at 2. The Ground Water Districts are party to the Stipulation as is the Surface Water Coalition. The Ground Water Districts believe the Stipulation fully satisfies the request by the Surface Water Coalition in the *SWC Joint Motion* and therefore the Ground Water Districts stand by the Stipulation and would request that any additional remark sought by the current motion would be in conflict with the Stipulation, would be redundant and unnecessary for the definition and administration of the water rights.

B. Temporary Storage in Upstream Reservoirs

The Surface Water Coalition in the *SWC Joint Motion* also asks for “[a]uthorization to temporarily hold storage water in any reservoir upstream of Milner Dam when necessary to conserve water” and asks to attach to the water rights provision 19. (a) of Exhibit C to the *Eagle Decree*. (SWC Memo at 4; SWC Joint Motion Exhibit 1.) The Director’s Report for water

right no. 2064 (American Falls) already includes the following provision that directly addresses the practice of temporarily holding storage water in reservoirs upstream of Milner Dam:

Place of use for irrigation storage and power storage is American Falls Reservoir, provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range, 21E, sections 28 and 29, when determined by the Department of Water Resources, the Water District advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.

Likewise, for water right 1-2068 (Palisades):

Place of use for irrigation storage and power storage is Palisades Reservoir, provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range, 21E, sections 28 and 29, when determined by the Department of Water Resources, the Water District advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.

The above conditions already recommended by the Department adequately address the historic practice to maximize the amount of storage in the Upper Snake Reservoirs. The Surface Water Coalition's request adds nothing to clarify this language and in fact, attempts to add imprecise language such as "the endeavor will be to hold stored water in reservoir system space that is farthest upstream." The conditions as contained in the Director's Report are more precise and add the necessary clarification to the place of use element of these water rights. The request by the SWC Joint Motion should be denied.

C. Exchange Provisions

The Surface Water Coalition asks for two exchange provisions. First it requests a condition that provides for an exchange of storage water held by North Side Canal Company and Burley Irrigation District in Jackson Lake Reservoir with storage water held by Upper Valley Users in the American Falls Reservoir. (SWC Memorandum at 4.) Second, it requests a condition that provides for an exchange of storage water held by the Minidoka Irrigation District

in Jackson Lake for storage water in American Falls Reservoir and other provisions regarding Minidoka Irrigation District's designation of storage use. *Id.* The Surface Water Coalition argues that the exchange provisions are important to protect against "any conveyance loss charges that may occur in administration." *Id.* at 15. Yet, the Surface Water Coalition admits that the Water District does not currently charge conveyance loss and can only point to speculation from Anthony Olenichak that he has "heard rumors" that there "may be" a charging of conveyance loss "some day." *Id.* (See too, Ex. 41 Thompson Aff., Tr. Vol. II p. 306, L. 25 – p. 307, L. 5).

As testified to by Mr. Olenichak who is the Program Manager and Deputy Watermaster for Water District 01, he is not sure that the exchange between the Minidoka Project and North Side Canal Company was ever completed. (Ex. 41, Thompson Aff., Tr. Vol. II p. 217, L. 6-8.) Furthermore, no calculation of the "exchange credit" has been done by Water District 01.

Q. And to your knowledge has this exchange credit ever been calculated before by the committee referenced here?

A. No, not to my knowledge.

(Ex. 41, Thompson Aff., Tr. Vol. II p. 281, L. 16-19.) While Mr. Olenichak acknowledged that such a calculation could be done, he was clear that such a calculation has not been done. (See, Ex. 41, Thompson Aff., Tr. Vol. II pp. 281-222.) Therefore, it follows, that the exchange provisions are not necessary for the definition or administration of these water rights because Water District 01 has been administering these water rights for decades without calculating anything relating to the exchanges. The exchange of storage water for these entities is a purely contractual driven provision. If the entities have a right to the exchange via contract, the right can be enforced through contract and the Water District could calculate the credit under the parties' private contractual right, without having the provision decreed. Therefore, while the

right to an exchange can exist by contract, it is not necessary under I.C. § 42-1411(2) to be included as part of the elements of the water right decree.

D. Michaud Project Measurements

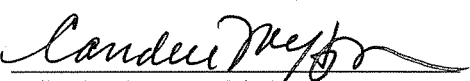
Lastly, the Surface Water Coalition requests that there be a requirement of “measurement of surface and ground water diversions of water that would otherwise flow into the American Falls Reservoir and administration of the storage rights consistent with the contract between Reclamation and the Bureau of Indian Affairs (Michaud Project). (SWC Memo at 4; SWC Joint Motion, Ex. 1.) This remark should also be rejected by the Special Master for the same reasons the exchange provisions set forth above should be rejected: Water District 01 has not administered this provision and the provision, deriving from contract, can be exercised by the parties through the contract at which time the Water District can calculate any effects at that time. (Ex. 41, Thompson Aff., Tr. Vol. II pp. 223-226.) Furthermore, this provision references yet a third contract between the United States Bureau of Reclamation and the Bureau of Indian Affairs, who is not a party to this action and which extends the provision beyond the parties’ contractual rights.

III. CONCLUSION

For the foregoing reasons, the Special Master should deny the SWC Joint Motion because the provisions are either contrary the parties’ Stipulation or are not necessary for the definition or administration of the water rights.

DATED this 8th day of June, 2012.

RACINE, OLSON, NYE, BUDGE &
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By: 
CANDICE M. McHUGH
Attorney for the Ground Water Districts

ATTACHMENT A

(American Falls Subcases)

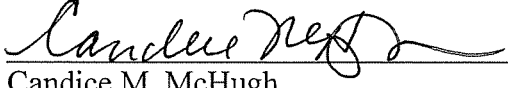
01-02064
01-02064A
01-02064E
01-02064F
01-02064L
01-10042
01-10042A
01-10042B
01-10053A
01-10190

(Palisades Subcases)

01-02068
01-02068D
01-02068E
01-02068F
01-02068M
01-02068Y
01-10043
01-10043A
01-10043E
01-10191
01-10389

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of June, 2012, a true and correct copy of the foregoing was served by email to those with email addresses and U.S. Mail, postage pre-paid and addressed to the following:


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