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DEPARTMENT OF
WATER RESOURCES

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: See Attachment A

**GROUND WATER DISTRICTS' REPLY
IN SUPPORT OF STATE'S 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 (collectively the "Ground Water Districts") submit this reply brief in support of the *State of Idaho's Motion for Partial Summary Judgment* dated January 25, 2012.

INTRODUCTION

The Director of the Idaho Department of Water Resources ("IDWR" or "Department") issued Director's Reports for water right numbers 1-2064 and 1-2068 in December 2006. For purposes of this reply, the Ground Water Districts offer a brief and limited procedural history below. The full procedural history is set forth in detail on the SRBA website.¹

On April 19, 2007, the United States Bureau of Reclamation ("Bureau") objected to the Director's Report for water right no. 1-2064 (American Falls Reservoir storage water right). The

¹ Water right no. 1-2064: <http://164.165.134.61/S0102064XX.HTM>
Water right no. 1-2068: <http://164.165.134.61/S0102068XX.HTM>

Bureau's objection states: "The following remarks should be included under this element: "This Water Right includes the right to refill under the priority date of this water right to satisfy the United States' storage contracts." Minidoka Irrigation District filed a similar objection stating that "Water rights should include the right to refill the reservoir in priority." Twin Falls Canal Company, Milner Irrigation District, and North Side Canal Company filed objections to the recommended quantity and priority date, but did not include any specific reasons supporting their objections. The Bureau, Minidoka Irrigation District, Milner Irrigation District, and North Side Canal Company filed the same objections to the Director's Report for water right no. 1-2068 (Palisades Reservoir storage water right) as they did for water right no. 1-2064.

The Ground Water Districts filed responses to the foregoing objections. All parties except for the City of Pocatello stipulated to resolve certain objections, as evidenced by the *Stipulation to Resolve Certain Objections* filed with the court on January 26, 2012. The *State of Idaho's Motion for Partial Summary Judgment* dated January 25, 2012, addresses three remaining unresolved issues.

DISCUSSION

The Ground Water Districts agree with the State's position that Water District 1 has adopted administrative procedures and practices to account for in-season refill of the American Falls and Palisades Reservoirs. The Ground Water Districts also agree that such refill is not a refill "in priority" as requested in the objections by the Bureau and Minidoka Irrigation District. There is no dispute of fact that the reservoirs in Water District 1 may be refilled, but that the refill is not done with the priority of the underlying water right.

This practice was explained by Tony Olenichak in his deposition.

Q: Does Water District 1 recognize refill of storage water rights in priority?

A: No, it does not.

Q: Can you explain that.

A: Assuming the reservoir rights have filled to 100 percent and then some refill occurs, that refill does not occur in priority to the reservoirs. In other words, a reservoir – let's say the most senior reservoir wouldn't have first right to refill.

(Orr Aff. Ex. 9, Olenichak Depo. Tr. p. 20, L. 21 – p. 21, L. 4.)

Q: Okay. In Water District 1 you say you do not recognize refill of storage water rights in priority. So if a storage water right has filled, does Water District 1 allow any further accumulation under that right before the fill of junior water rights?

A: No.

(Orr Aff. Ex. 9, Olenichak Depo. Tr. p. 57, L. 14 – 21.)

This practice is in keeping with what the Supreme Court found in the decision in *Clear Springs Foods, Inc. v. Idaho Dept. of Water Resources* where the Court recognized that the zero flow at Milner Dam’s primary purpose is to optimize the development of waters above the Snake River for development: “[t]he purpose of allowing a zero river flow at Milner Dam was to maximize the amount of water available for development above the dam, including groundwater development in the aquifer.” 150 Idaho 790, 799, 252 P.3d 71, 80 (2011). (See, Orr Aff. Ex. 9, Olenichak Depo. Tr. Vol. p. 81, L. 11-21.)

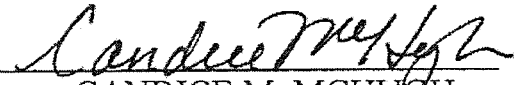
Water District 1 has operated its administration consistently for decades. The practice of allowing the reservoirs to fill once in priority, but permitting in-season refill thereafter, has been discussed repeatedly by prior administrators including former State Reclamation Engineer R. Keith Higginson in a letter dated March 6, 1970, already cited in the State’s Brief at 42. (Also see , Orr Aff. Ex. 49.) Furthermore, the Committee of Nine that serves to assist the Water District 1 Watermaster acknowledged the importance of preventing a second refill at the expense of junior water rights. In other words, the Committee opposed an “in priority” refill as sought by the Bureau and Minidoka Irrigation District in their objections. (See State’s *Memo* at 44; Orr Aff. Ex. 51.)

CONCLUSION

The Ground Water Districts’ interest in this proceeding is that the Water District 1 accounting and administrative procedures that have been in place not be disrupted through these subcases. The remarks proposed by the Bureau and Minidoka Irrigation District in their objections relative to refill are contrary to how Water District 1 has allowed refill. As such, the Ground Water Districts are supportive of the State’s position that Water District 1 continue to operate under the one-time-refill rule but allow for the continued practice of an in-season refill that is not in accordance with the priority of the underlying water right as explained by Tony Olenichak.

DATED this 29th day of June, 2012.

RACINE, OLSON, NYE, BUDGE &
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By: 
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ATTACHMENT A

(American Falls Subcases)

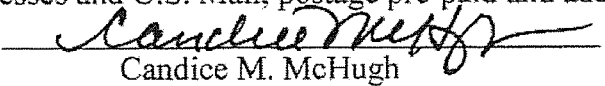
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(Palisades Subcases)

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CERTIFICATE OF MAILING

I hereby certify that on this 29th 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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