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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	)	Subcase Nos. 01-00023B, 01-00297, 35-02543, &
	)	35-04246
	)	
	)	STATE OF IDAHO'S BRIEF IN RESPONSE TO
Case No. 39576	)	CLAIMANT'S MOTION FOR SUMMARY
	)	JUDGMENT AND OBJECTORS' MOTION FOR
_____	)	SUMMARY JUDGMENT

COMES NOW the State of Idaho, (hereinafter the "State"), by and through the undersigned deputy attorney general, and submits the STATE OF IDAHO'S BRIEF IN RESPONSE TO CLAIMANTS' MOTION FOR SUMMARY JUDGMENT AND OBJECTORS' MOTION FOR SUMMARY JUDGMENT in accordance with the ORDER SETTING SUMMARY JUDGMENT HEARING entered on March 27, 2009.

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COPY

I. STATEMENT OF THE CASE

i. Nature of the Proceedings

This case concerns the description of the priority date, purpose of use, place of use, and remarks for a surface water right from the Snake River.

ii. The Course of the Proceedings

a. Basin 01 Proceedings

The Director's Report was filed for water right nos. 01-00023B and 01-00297 on May 12, 2006. Objections were due on October 6, 2006 and responses were due on December 8, 2006.

The claimant filed its objection on October 5, 2006. The claimant later filed its *Motion to File Amended Notice of Claim* for both water right nos. 01-00023B and 01-00297 on May 16, 2007, and the district court entered its *Order Granting Motions to File Amended Notices of Claims and Setting Deadlines* on June 21, 2007.

The Idaho Department of Water Resources (hereinafter "IDWR") filed its Amended Director's Report on March 25, 2008, and objections were due on April 28, 2008. The Amended Director's Report for water right no. 01-00023B described the water right, in part as follows:

Claimant:	Aberdeen Springfield Canal Company, (hereinafter "ASCC")
Priority Date:	02/06/1895
Purpose of Use:	Irrigation in the amount of 1,172.100 CFS (cubic feet per second) Recharge for Irrigation in the amount of 389.50 CFS
Place of Use:	61,772.6 Acres Total Diversion of this right for the purpose of recharge for irrigation is authorized for a maximum of 17,161.6 acres. The rights listed below are limited to the irrigation of a combined total of 61,772.6 acres in a single irrigation season. Combined Right Nos.: 1-23B, 1-297, 35-2543, and 35-4246. Place of use is within the area served by Aberdeen-Springfield Canal Company.

Other Provisions Necessary for Definition or Administration of this Water Right:

The administration of this right is further defined and set forth in the Settlement Agreement Regarding Aberdeen-Springfield Canal Company's Basin 01 Surface Water Rights and Consolidated SRBA Subcase No. 35-2315, recorded as instrument number 563578 in the Bingham County Recorder's Office, Blackfoot, Idaho.

The Amended Director's Report for water right no. 01-00297 described the water right, in part as follows:

Claimant: ASCC

Priority Date: 04/01/1939

Purpose of Use: Irrigation in the amount of 230 CFS

Place of Use: 61,772.6 Acres Total

Place of use is within the area served by Aberdeen-Springfield Canal Company.

The rights listed below are limited to the irrigation of a combined total of 61,772.6 acres in a single irrigation season. Combined Right Nos.: 1-23B, 1-297, 35-2543, and 35-4246.

The A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company filed on April 28, 2008, an objection to the Amended Director's Report for water right no. 01-00023B, which checked the boxes for priority date, purpose of use, place of use, and remarks, although no supporting information was provided.

The A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company filed on April 28, 2008, an objection to the Amended Director's Report for water right no. 01-00297, which checked the boxes for place of use and remarks, although no supporting information was provided.

American Falls Reservoir District No. 2 and Minidoka Irrigation District each filed on April 28, 2008, an objection to the Amended Director's Report for water right no. 01-00023B. Each objection checked the boxes for priority date, purpose of use, place of use, and remarks, although no supporting information was provided.

American Falls Reservoir District No. 2 and Minidoka Irrigation District each filed on April 28, 2008, an objection to the Amended Director's Report for water right no. 01-00297. The objection checked the boxes for place of use and remarks, although no supporting information was provided.

The State of Idaho filed on July 8, 2008, its *Motions to File Late Response*. The district court entered on July 16, 2008, its *Order Denying Motion to Strike Objection and Order Granting Motion to File Late Response*.

The A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company filed on March 27, 2009, the *Objectors' Joint Motion for Summary Judgment and Affidavit of Travis Thompson* for water right no. 01-00023B. The Objectors also lodged on March 27, 2009, their *Memorandum in Support of Objector's Joint Motion for Summary Judgment* for water right no. 01-00023B.

The claimant filed on March 26, 2009, the *Motion to Clarify and/or Modify Trial Scheduling Order, Claimant's Motion for Summary Judgment, Affidavit of Steven T. Howser, Affidavit of Anthony Olenichak, and Affidavit of Randall C. Budge*. The claimant also lodged its *Memorandum in Support of Claimant's Motion for Summary Judgment and Other Motions* on the same date. These papers were filed in subcases 01-00023B, 01-00297, 35-02543, and 35-04246.

b. Basin 35 Proceedings

The initial Director's Report for Basin 35, part III, was filed on January 29, 1999, which did not include recommendations for seventeen water rights. The Director's Report for the remaining 17 irrigation and other rights was filed on June 18, 1999. Water right nos. 35-02543 and 35-04246 were among the seventeen water rights included in this later filing. Objections were due on August 20, 1999 and responses were due on December 20, 1999.

The claimant filed its objections to water right nos. 35-02543 and 35-04246 on August 6, 1999. The claimant later filed on May 16, 2007 its *Motion to File Amended Notice of Claim*, and the district court entered its *Order Granting Motions to File Amended Notices of Claims and Setting Deadlines* on June 21, 2007.

The Amended Director's Report for water right no. 35-02543 described the water right, in part as follows:

Claimant: ASCC
Priority Date: 08/07/1958
Purpose of Use: Irrigation in the amount of 6 CFS
Place of Use: 61,772.6 Acres Total
Place of use is within the area served by Aberdeen-Springfield Canal Company.
...
The rights listed below are limited to the irrigation of a combined total of 61,772.6 acres in a single irrigation season. Combined Right Nos.: 1-23B, 1-297, 35-2543, and 35-4246.

The Amended Director's Report for water right no. 35-04246 described the water right, in part as follows:

Claimant: ASCC
Priority Date: 10/15/1934
Purpose of Use: Irrigation in the amount of 2.44 CFS
Place of Use: 61,772.6 Acres Total
Place of use is within the area served by Aberdeen-Springfield Canal Company.
...
The rights listed below are limited to the irrigation of a combined total of 61,772.6 acres in a single irrigation season. Combined Right Nos.: 1-23B, 1-297, 35-2543, and 35-4246.

The A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company filed on April 28, 2008, an objection to the

Amended Director's Report for water right nos. 35-02543 and 35-04246, which checked the boxes for place of use and remarks, although no supporting information was provided.

American Falls Reservoir District No. 2 filed on April 28, 2008, an objection to the Amended Director's Report for water right nos. 35-02543 and 35-04246. The objection checked the boxes for place of use and remarks, although no supporting information was provided.

The State of Idaho filed on July 8, 2008, its *Motions to File Late Response*. The district court entered on July 16, 2008, its *Order Denying Motion to Strike Objection and Order Granting Motion to File Late Response*.

The following table summarizes the present status of the objections, responses, and motions for summary judgment filed for subcase nos. 01-00023B, 01-00297, 35-02543, and 35-04246:

Water right #	Objectors to Amended D.R.	Respondent	Movant for Summary Judgment
01-00023B	A&B I.D. Burley I.D. Milner I.D. Northside Canal Co. Twin Falls Canal Co. American Falls Reservoir Dist. #2 Minidoka I.D.	State of Idaho	A&B I.D. Burley I.D. Milner I.D. Northside Canal Co. Milner I.D. American Falls Reservoir Dist. #2 Minidoka I.D. ASCC
01-00297	A&B I.D. Burley I.D. Milner I.D. Northside Canal Co. Twin Falls Canal Co. American Falls Reservoir Dist. #2 Minidoka I.D.	State of Idaho	ASCC
35-2543	A&B I.D. Burley I.D. Milner I.D. Northside Canal Co. Twin Falls Canal Co. American Falls Reservoir Dist. #2	State of Idaho	ASCC

35-4246	A&B I.D. Burley I.D. Milner I.D. Northside Canal Co. Twin Falls American Falls Reservoir Dist. #2	State of Idaho	ASCC
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iii. Statement of Facts

The District Court for the Sixth Judicial Court, in and for the County of Fremont, entered on December 16, 1910, its decree in *Rexburg Irrigation Company et al. v. Teton Irrigation Canal Company, et al.*, (hereinafter the “Rexburg Decree”). The Aberdeen Springfield Canal Company, successor to American Falls Power & Canal Company, was decreed a water right in the amount of 1,250 cubic feet per second, a priority date of February 6, 1895, and a purpose of use for irrigation and for domestic and other purposes. *Affidavit of Travis L. Thompson in Support of Objectors’ Joint Motion for Summary Judgment, Exhibit A*, at unnumbered pages 3-4; *Idaho Exhibit 2: Affidavit of Michael Holliday Dated April 15, 2009*, at 2.

The ASCC transferred in 1997 77.9 CFS of water right no. 01-00023B to Southwest Irrigation District. This transfer left ASCC with 1,172.1 CFS. *Id.*

The ASCC filed objections to one-hundred and twelve water rights from ground water that had been claimed by various persons who were shareholders of ASCC. ASCC claimed that these claimants had excavated and opened the wells that were the points of diversions for these water rights as agents for ASCC and that they were recovering water initially diverted by ASCC under its surface water rights. *See* Objection to water right no. 35-02315 by ASCC. During IDWR’s review of these objections, IDWR concluded that many ASCC shareholders had converted from surface water to ground water, that these ASCC shareholders had continued to pay assessments to ASCC, and that ASCC diverted the full amount of water authorized under water right no. 01-00023B in

most years. Thus, a portion of the diversion provided incidental recharge to the Eastern Snake Plain Aquifer (hereinafter "ESPA."). The IDWR further concluded that "[t]he accomplished change in purpose of use from irrigation to recharge for irrigation for a portion of ASCC's water rights did not injure other water rights or result in an enlargement because the amount of water ASCC diverted and consumptively used was no more than its historic diversion and consumptive use." *Idaho Exhibit 1: Affidavit of Karl J. Dreher Dated April 15, 2009*, at 2-3.

The ASCC and the IDWR resolved these objections by the execution of a *Settlement Agreement Regarding Aberdeen-Springfield Canal Company's Basin 01 Surface water Rights and Consolidated Subcase No. 35-2315* (hereinafter "*Settlement Agreement*"), which provided that IDWR would recommend a purpose of use of "recharge for irrigation" for ASCC's Basin 01 surface water rights. *Idaho Exhibit 1: Affidavit of Karl J. Dreher Dated April 15, 2009, Exhibit A*. The *Settlement Agreement* stated, in part, as follows:

2. Recommendations of the Director

D. IDWR will recommend the diversion rate in three components: (1) the minimum diversion rate for direct surface water irrigation will be the diversion rate associated with acreage directly irrigated with surface water as of 1987 (including acreage with supplemental ground water rights) and will be determined as the total recommended diversion rate multiplied by the acreage directly irrigated with surface water as of 1987 divided by the total acreage originally irrigated with surface water, (2) the maximum diversion rate for direct surface water irrigation will be equal to the total recommended diversion rate; and (3) the maximum diversion rate for 'recharge for irrigation' will be equal to the diversion rate from (1) subtracted from the total recommended diversion rate. The intent of this calculation together with (C) is to maximize the acreage authorized for direct surface water irrigation while fixing the maximum quantity of surface water that can be used for 'recharge for irrigation' as an accomplished transfer.

E. Existing ground water rights used for irrigation within the service area of the Canal Company on lands paying assessments to the Canal Company and to which the Canal Company's surface water rights have remained appurtenant will be given mitigation credit for the amount of water recharged against ground water depletions arising from the authorized diversion and use of ground water. The volume of water credited for mitigation in each year must be determined from measurements and accounting.

Idaho Exhibit 1: Affidavit of Karl J. Dreher Dated April 15, 2009, Exhibit A, at 3-4.

Mr. Michael Holliday prepared the Director's recommendation for water right no. 01-00023B. Mr. Holliday recommended water right 01-00023B in conformance with the *Settlement Agreement*. *Idaho Exhibit 2: Affidavit of Michael Holliday Dated April 15, 2009, at 2.*

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ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

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 there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). In making that determination of whether an issue of material fact exists, all disputed facts are liberally construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Garner v. Bartschi*, 139 Idaho 430, 432, 80 P.3d 1031, 1033 (2003). Substantive law defines as material those factual disputes that affect the outcome. Disputes about irrelevant matters do not defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II. WATER RIGHT NO. 01-00023B CORRECTLY INCLUDES “RECHARGE FOR IRRIGATION” AS A PURPOSE OF USE.

A. Introduction

The objectors challenge the inclusion of the purpose of use of “recharge for irrigation” for a water right initially decreed in the Rexburg Decree. They make two points. First, the claimant is bound by the prior decrees that determined the purpose of use for water right no. 01-00023B to be “for the irrigation of their respective tracts of land . . . and for domestic and other purposes.” *Memorandum in Support of Objectors’ Joint Motion for Summary Judgment* (hereinafter “*Objectors’ Memo*”), at 5. Second, recharge was not recognized as a beneficial use in Idaho until enactment of Idaho Code § 42-234 in 1978. Accordingly, the objectors argue that the earliest priority date that a water right for this purpose could have is the date of enactment of this statute. *Id.* at 8. The objectors’ arguments are fundamentally flawed for two reasons. First,

Idaho Code § 42-1425 authorized the IDWR to recognize an accomplished transfer, if the change in purpose of use occurred in accordance with the limitations of that section. Second, “recharge for irrigation” was a beneficial use of water prior to enactment of Idaho Code § 42-234 in 1978.

B. Idaho Code § 42-1425 authorized the recognition of “recharge for irrigation” for water right no. 01-00023B.

The accomplished transfer statute authorizes the IDWR to recommend a change in the nature of use of previously decreed water right, if the change satisfies the following three requirements: (1) the change took place prior to November 19, 1987; (2) the change does not injure other water rights existing on the date of the change; and (3) the change did not result in an enlargement.¹

Here, the Amended Director’s Report for water right no. 01-00023B recommended this water right based on an accomplished transfer in accordance with this section. Statement of Facts (hereinafter “SOF”), at 8. This recommendation was based on three critical conclusions. First, ASCC converted a portion of its surface water irrigation to diversion from ground water prior to November 19, 1987. This change in management resulted in a decrease in the number of acres being irrigated with surface water. Second, notwithstanding this conversion, the ASCC continued to divert the full amount of water authorized under water right no. 01-00023B in most years. Thus, additional water was left in the canals of ASCC that provided incidental recharge to the ESPA. Third, the ASCC did not enlarge its water right because the amount of water ASCC

¹ Idaho Code § 42-1425(2) states, in part, as follows:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication, even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.

(emphasis added).

diverted and consumptively used was no more than its historical diversion and consumptive use. SOF at 7-8.

None of the objectors in their objections or in their submissions to the district court in this proceeding offer any evidence on the subject of injury or enlargement. Since the director's report constitutes *prima facie* evidence of water right no. 01-00023B, the district court should enter a partial decree consistent with the recommendation of the director for water right no. 01-00023B.

C. Recharge was a beneficial use of water prior to 1978.

The Objectors also argue that "Idaho did not recognize 'recharge' to be a beneficial use [of water] until the Legislature enacted Idaho Code § 42-234 *in 1978*." *Objectors' Memo*, at 8 (emphasis in original); *see also id.* at 2 ("ASCC's decrees predate the recognition of 'recharge' as a beneficial use in Idaho, which did not occur until 1978"). While it is true that the Legislature formally recognized the benefits of recharge in 1978 through the enactment of Idaho Code § 42-234, this does not mean that recharge was precluded as a beneficial use prior to 1978. Under the Idaho Constitution, the Idaho water code and Idaho Supreme Court decisions, any reasonable use of water that benefits the appropriator can be a "beneficial use," regardless of whether the Legislature has formally declared it a "beneficial use."

Section 3 of Article XV of the Idaho Constitution establishes the right to appropriate the unappropriated waters of the state for "beneficial uses":

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the uses thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural

purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

Idaho Const. Art. XV § 3 (emphasis added). Nothing in this provision makes the right to appropriate contingent upon a formal legislative recognition that a particular use is a “beneficial use.” Rather, the fact that the right to appropriate “shall never be denied” suggests exactly the opposite: that any use that is beneficial in fact may form the basis for an appropriation, regardless of whether the Legislature has formally recognized the beneficial nature of the particular use.

This view finds support in the legislative implementation of Idaho Const. Article XV § 3. In Idaho Code § 42-101, the Legislature declared the waters of the state to be public waters and provided that they may be appropriated for “**any** beneficial use.” Idaho Code § 42-101 (emphasis added). In his work on Idaho water law, Wells A. Hutchins wrote that this statute authorizes appropriations “for any useful or beneficial purpose,” without limitation:

The water-rights statute provides that the appropriation must be for some useful or beneficial purpose, without placing any limitation upon purposes that would be considered useful or beneficial; and the so-called ‘constitutional’ or non-statutory appropriations likewise may be made, apparently, for any useful or beneficial purpose.

Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 IDAHO L. REV. 1, 42 (1968). This interpretation is also consistent with the Idaho Constitution’s provision for “optimum development of water resources in the public interest,” Idaho Const. Art. XV § 7, and the Idaho Water Resource Board’s implementation of its duties under that constitutional provision.² As the

² The Idaho Water Resource Board is the constitutional entity responsible for carrying out the Idaho Constitution’s directive to prepare and implement “a state water plan for optimum development of water resources

Idaho Supreme Court has held: “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). It would be contrary to this policy, and would impede optimum development of the state’s water resources, to preclude the use of water for a beneficial purpose simply because the Legislature has not formally recognized the particular use in question to be a “beneficial use” through a statutory enactment.

While the Idaho Supreme Court has not squarely addressed the question of whether a particular use must be specifically recognized by the Legislature before it can be considered a “beneficial use” for purposes of the Idaho Constitution, the Court’s interpretations of Article XV § 3 read it broadly and as authorizing any appropriation that is beneficial in fact. *Idaho Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974) dealt with the question of whether the use of water for maintaining a minimum in-stream flow constituted a “beneficial use.” In that case, the Court rejected the argument that the five uses specified in Article XV § 3 (domestic, agriculture, mining, manufacturing and power) are the only “beneficial uses” that are cognizable under the Idaho Constitution, and characterized the expression “beneficial use” in Article XV § 3 as simply a “generic term” that had never been judicially or statutorily defined. *Id.* at 443, 530 P.2d at 927.

in the public interest.” Idaho Const. art. XV § 7. In the first State Water Plan (1974), the Board also took a broad view of the term “beneficial use” as used in Article XV § 3:

The policy of the Idaho Water Resource Board is to follow a broader definition of the term “beneficial use of water” to include all water uses, both consumptive and nonconsumptive (for example stream resource maintenance flows) and to seek implementation of those water resource projects and programs which provide for this definition through efficient water use practices.

Idaho Exhibit 3: Affidavit of David J. Barber Dated April 16, 2009 (“Barber Aff.”), Attachment 1 at 10 (Idaho Water Resource Board, STATE OF IDAHO - THE OBJECTIVES - STATE WATER PLAN -- PART ONE at 15 (1974)).

In his concurrence, Justice Bakes emphasized that Article XV § 3 “does not concern itself with abstract notions such as the relationship between the citizenry and their government, but instead concerns itself with the very practical question of water rights. I think we should be very practical in trying to construe it.” *Id.* at 446, 530 P.2d at 930 (Bakes, J., concurring). He further stated that because the Idaho Supreme Court is the final arbiter of the Idaho Constitution,

we must determine whether or not the scenic and recreational uses in this case are a ‘beneficial use’ within the meaning of Article 15 § 3 With the exception of those uses elevated to beneficial status by Article 15 § 3 of the Constitution, the concept of what is or is not a beneficial use must necessarily change with changing conditions. . . . The notion of beneficiality of use must include a requirement of reasonableness. With the exception of the uses implicitly declared to be beneficial by Article 15 s 3, there is always a possibility that other uses beneficial in one era will not be another and vice versa. As stated in *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal. 2d 489, 45 P.2d 972, 1007 (1935):

What is beneficial, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Id. at 447-48, 530 P.2d at 931-32 (Bakes, J., concurring). This practical, case-by-case approach to the question of whether a particular use constitutes a “beneficial use” finds further support in the fact that Article XV § 3 of the Idaho Constitution as originally proposed was adopted virtually verbatim from Colorado Constitution. *See* II Proceedings And Debates Of The Idaho Constitutional Convention 1889 1351-52 (I.W. Hart, ed. 1912) (“So far as section 3 is concerned, the amendment reported by the committee is taken word for word from the constitution of the state of Colorado.”). Colorado’s constitution and statutes simply required that water be put to “some valuable use.” *Larimer County Reservoir Co. v. People*, 9 P. 794, 796 (1886).

Thus, the language of the Idaho Constitution and Idaho Code § 42-101, as well as the plurality and concurrence opinions in *Idaho Dept. of Parks v. Idaho Dept. of Water*

Administration, demonstrate two important points: (1) the question of what constitutes a “beneficial use” of water under Idaho law is primarily a factual inquiry; and (2) any use of water that is valuable or beneficial in fact can be sufficient to support a lawful appropriation in Idaho.

These principles are also consistent with the prior appropriation doctrine as it has been generally understood throughout the western United States for many years. “So long as the use of water made under an appropriative right is a beneficial one, no distinction is made between appropriations for different useful purposes . . .” Wells A. Hutchins, Harold H. Ellis & J. Peter DeBraal, 1 *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 522-23 (USDA 1971). “And, in general, we will say that any purpose that is useful or beneficial may be the object of such appropriations.” Clesson S. Kinney, 2 *IRRIGATION AND WATER RIGHTS* 1193 (Bender Moss, 2d ed. 1912); *see also id.* at 1194 (“And in general it may be said that under the Arid Region Doctrine of appropriation water may be legally appropriated for any beneficial use or purpose.”)

Thus, while a legislative enactment specifically recognizing a new “beneficial use” may be helpful in clarifying whether a particular use is in fact beneficial—particularly when, as in *Idaho Dept. of Parks v. Idaho Dept. of Water Administration*, the use or its benefits are somewhat novel—such an enactment is not required, nor does it mean that such use prior to enactment was not a “beneficial use.”

In any event, recharge was practiced long before 1978, and the potential benefits of recharge were widely recognized in Idaho and elsewhere at least as early as 1953. In that year, D. Lynn Crandall³ prepared a depletion analysis report in connection with Idaho Power

³ Mr. Crandall had been the Watermaster of the upper Snake River and the District Engineer for the United States Geological Survey since 1930. *See Barber Aff.*, Attachment 3 at 7-8 (Transcript of Examination of D. Lynn Crandall, Formal Hearings Before The Federal Power Commission, Project No. 1971, P-2132, P-2133 at 10135-36 (Jan. 12, 1954) (“Crandall Depo”)).

Company's proposal for its Hells Canyon project. The report expressly recognized the potential to use surface flows to recharge the Eastern Snake Plain Aquifer, "thereby replacing in part the water consumed by ground-water pumping." *Barber Aff.*, Attachment 2 at 8 ("Future Upstream Depletion Above Hells Canyon" at 6). The next year, Mr. Crandall discussed artificial recharge at length during his deposition in the Federal Power Commission proceedings on the Hells Canyon project, *id.*, Attachment 3 at 33 (Crandall Depo. at 10316-22), and testified that artificial recharge activities were already underway in California at the time. *Id.* at 36 (Crandall Depo. at 10319). In 1960, an information bulletin jointly released by the Bureau of Reclamation and the Corps of Engineers discussed "the possibility of artificially recharging [the Eastern Snake Plain Aquifer] by diverting surplus flows." *Id.*, Attachment 4 at 11 (information bulletin at 9). In 1961, Mr. Crandall again discussed recharge in a statement he prepared for an inter-agency meeting on development of the water resources of the Columbia Basin. *Barber Aff.*, Attachment 5 at 9 (statement at 6). In a 1966 letter to the United States Secretary of the Interior, Governor Robert E. Smylie pointed out the potential for ground water recharge projects in the Upper Snake River Basin. *Barber Aff.*, Attachment 6 at 2 (letter at 1). In a 1967 letter responding to questions posed by the Director of the Idaho Water Resource Board, the Assistant Regional Director of the Bureau of Reclamation discussed the benefits of recharge. *Barber Aff.*, Attachment 7 at 3-4 (letter at 2-3). In the 1974, in the first Idaho State Water Plan, the Idaho Water Resource Board pointed out the potential benefits of using recharge to store excess surface water in the aquifer. *Barber Aff.*, Attachment 1 at 9.

Accordingly, the Objectors' argument that recharge could not have been a "beneficial use" of water prior to the 1978 enactment of Idaho Code § 42-234 is flawed both legally and factually. Nothing in Idaho law precluded recharge appropriations prior to 1978, and the

considerable benefits of recharge uses had been widely recognized for many years before the enactment of Section 42-234.

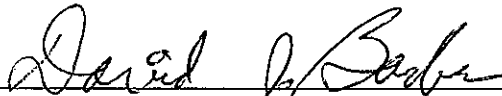
CONCLUSION

For the reasons stated, the State of Idaho respectfully requests that the district court enter summary judgment regarding water right no. 01-00023B consistent with the recommendation by the Director.

RESPECTFULLY SUBMITTED this 16th day of April 2009

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO



DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 16th day of April 2009 I caused to be served the original and/or copy of the STATE OF IDAHO'S BRIEF IN RESPONSE TO CLAIMANT'S MOTION FOR SUMMARY JUDGMENT AND OBJECTORS' MOTION FOR SUMMARY JUDGMENT on each of the following persons by the indicated method:

1. Original and three copies to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to the following persons:

Special Master Terry Dolan
Snake River Basin Adjudication
253 Third Avenue North
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