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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. 01-23B, 01-297, 35-2543 & 35-4246
	)	(Aberdeen-Springfield Canal Co.)
Case No. 39576	)	
	)	BRIEF IN SUPPORT OF
	)	MOTION FOR RECONSIDERATION

COME NOW, Objectors, American Falls Reservoir District #2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company, by and through counsel of record, and file this brief supporting their *Motion for Reconsideration*, filed on June 25, 2009, requesting that the Court reconsider its *Order Partially Granting Aberdeen-Springfield's Motion for Summary*

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

Judgment and Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike Affidavits, dated June 11, 2009.

PROCEDURAL BACKGROUND

On March 25, 2008, the Director filed an amended report for water right 1-23B in the name of Aberdeen-Springfield Canal Company (ASCC) that included as a purpose of use "recharge for irrigation", included as a place of use "diversion of this right for the purpose of recharge for irrigation" and stated that the right includes an "accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code". The amended report, as part of the other provisions, referenced a *Settlement Agreement Regarding Aberdeen-Springfield Canal Company's Basin 01 Surface Water Rights and Consolidated SRBA Subcase No. 35-2315* (Settlement Agreement). Objectors filed objections to the priority date, purpose of use, place of use and remarks. Subsequently, the State of Idaho was granted leave to file a late response.

In March, 2009, ASCC filed a *Motion for Summary Judgment* supported by the affidavits of Randall C. Budge, Steven T. Howser and Anthony Olenichak. Objectors filed *Objectors' Joint Motion for Summary Judgment* only in subcase 1-23B.

The State of Idaho filed a Brief in response to both Motions. Included with the State's response were Affidavits of former IDWR Director Karl J. Dreher, Michael Holliday and David J. Barber.

ASCC and Objectors each filed responses and ASCC. Objectors and the State filed replies to the others' Briefs. In addition, Objectors filed a Motion seeking to strike portions of the Affidavits filed by Karl Dreher, Steven Howser and Michel Holliday because they lacked foundation, were not admissible in evidence and did not comply with I.R.C.P. 56(e). In the alternative, Objectors requested that if the affidavits were not stricken, that Objectors be allowed

to engage in discovery and depose the named affiants pursuant to the provisions of I.R.C.P.

56(f). Objectors also argued that the provisions of I.C. § 42-1425(2)(a) mandate that the Court remand the water right to the Director for further hearing whenever an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use.

Following oral argument, the Court issued its *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike Affidavits*. For the purposes stated herein, the Court granted ASCC's Motion for Summary Judgment and denied Objectors' Motions for summary judgment and to strike the affidavits. The Court did not expressly rule on Objectors' request for additional discovery pursuant to I.R.C.P. 56(f).

ISSUES FOR RECONSIDERATION

In an attempt to avoid reversible error, Objectors respectfully request that the Court reconsider its Order on the following grounds:

1 – The Court made no ruling on Objectors' request for discovery pursuant to I.R.C.P. 56(f).

2 – The Court misinterpreted the plain and direct language of I.C. § 42-1425(2), which provides that whenever an objection is filed on a recommendation for an accomplished transfer, the Court shall remand a water right to the Director.

3 – If the Court were to allow additional discovery or remand the case, the decisions on the Motions for Summary Judgment must be set aside until further proceedings take place.

APPLICABLE LAW AND RULES

The issues raised in the Objectors' *Motion for Reconsideration* can be decided on the plain language of the Civil Rules and applicable statutes. Accordingly, they are set forth in their entirety, below:

Civil Rule 56(c): Motion for summary judgment and proceedings thereon. ... The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

Civil Rule 56(e): Form of affidavits - Further testimony - Defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Civil Rule 56(f): When affidavits are unavailable in summary judgment proceedings. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Civil Rule 11(a)(2)(B): Motion For Reconsideration. A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

Idaho Code § 42-1425(2): 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, and prior to January 1, 2006, for the northern Idaho adjudications authorized by section 42-1406B, Idaho Code, may be claimed in the applicable 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. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

(a) If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.

(b) This section is not applicable to any claim based upon an enlargement of use.

Idaho Code § 42-108: CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE -- APPLICATION OF ACT. The person entitled to the use of water or owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of the constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same and transfer the same to other lands, if the water rights of others are not injured by such change in point of diversion, place of use, period of use, or nature of use, provided; if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion, place of use, period of use, or nature of use of such water shall be made or allowed without the consent of such corporation or irrigation district. Any permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the legislature, except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval.

Any person desiring to make such change of point of diversion, place of use, period of use, or nature of use of water shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code. After the effective date of this act, no person shall be authorized to change the period of use or nature of use, point of diversion or place of use of water unless he has first applied for and received approval of the department of water resources under the provisions of section 42-222, Idaho Code.

Idaho Code § 42-222: CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION -- APPEALS. (1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence. For applications proposing to change only the point of diversion or place of use of a water right in a manner that will not change the effect on the source for the right and any other hydraulically-connected sources from the effect resulting under the right as previously approved, and that will not affect the rights of other water users, the director of the department of water resources shall give only such notice to other users as he deems appropriate.

**THE COURT FAILED TO RULE ON OBJECTORS' REQUEST FOR DISCOVERY
PURSUANT TO I.R.C.P. 56(f)**

In its Response To Aberdeen-Springfield Canal Company's Motion For Summary Judgment And Request Pursuant To Rule 56(F) To Allow Depositions To Proceed Before Hearing, Objectors requested that the Court allow the Objectors to engage in discovery pursuant to I.R.C.P. 56(f) , if the Court did not strike specific provisions of the affidavits submitted by ASCC and the State. The Court, in its ruling on the motions before the Court, did not address this request.

ASCC and the State argued, and the Court found, that the basis for the “recharge for irrigation” recommendation was the Settlement Agreement. The Settlement Agreement is a written unambiguous agreement that is integrated by its terms; it clearly provides that the “Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties, and there are no covenants, provisions, promises, agreements, conditions, or understandings, ether oral or written, between them other than are herein set forth.” Settlement Agreement, p. 6.

Even though the Settlement Agreement is clear and unambiguous, the Affidavits of Dreher, Howser and Holliday were proffered in an attempt to explain the agreement. This information was first provided with responses filed by ASCC and the State of Idaho – not with the original Motion filed by ASCC. The Affidavits did not comply with the provisions of I.R.C.P. 56(e) since, as explained by the Objectors, and uncontradicted by ASCC and the State, the Affidavits lacked foundation for their conclusions and did not attach sworn or certified copies of all papers or parts thereof referred to.

When this occurs, the Court has some options. The Court can strike the offending portions of the affidavits. Another option is set forth in I.R.C.P. 56(f) above; the Court can allow

time for additional discovery, in effect providing the opportunity to cure these objections. Because the new information supplied in response to the pending Motions for Summary Judgment was not contained in the integrated Settlement Agreement, the Objectors were left in the position of having inadequate time to respond. Accordingly, the Objectors requested additional time for discovery, pursuant to I.R.C.P. 56(f). As required by that rule, these concerns were addressed in the Affidavit of Travis L. Thompson, filed in support of the Objectors' response. The Court failed to rule on Objectors' Rule 56(f) request.

By not acting on Objectors request, the Court has prevented the Objectors from reviewing the records referenced for the first time in this matter in the responses to the motions and eliminated the ability of the Objectors to determine the foundation for the conclusions stated therein. In order to provide Objectors an adequate opportunity to respond to this new information and to avoid reversible error, the Court should grant Objectors' Rule 56(f) request. *See Doe v. Garcia*, 126 Idaho 1039 (Ct. App. 1995) (district court committed reversible error when it denied a Rule 56(f) motion and prevented discovery of relevant information before ruling on a summary judgment motion).

THE COURT MISINTERPRETED THE REQUIREMENTS OF I.C. § 42-1425

As can be seen above, Idaho Code §§ 42-108 and 42-222 set forth onerous procedures that are required to be followed if one wants to obtain IDWR approval for changes to a water right. In order to simplify the procedures and streamline the duties of IDWR, the legislature enacted section 42-1425(2), above, allowing a party to bypass the provisions of sections 42-108 and 42-222 so long as the procedure contained in section 42-1425(2) is followed. However, section 42-1425(2) states that if an objection is filed to a claim for an accomplished transfer, "the district court shall remand the water right to the director for further hearing to determine whether

the change injured a water right existing on the date of the change or constituted an enlargement of the original right.” (Emphasis added). This statute does not provide the district court with any discretion on this matter. Rather, the matter “shall” be remanded to the IDWR.

Here, the Court apparently read into the statute that one filing an objection has to allege injury or enlargement in order to obtain an administrative hearing on an accomplished transfer. That is not what the statute says. Rather, it only requires the filing of an objection to the accomplished transfer – at which time the Court “shall” remand the matter back to the Director.¹

This is not the first time that this issue has been addressed in the SRBA. Special Master Bilyeu confronted the same issue when dealing with water right claims made by the City of Pocatello, water rights 29-271 *et seq.* In an *Order on Summary Judgment* entered in those subcases, attached, Special Master Bilyeu followed the clear direction set forth in I.C. § 42-1425(2) and remanded the matter. She stated “However duplicative a formal remand may be, it is provided for when an objection is filed relating to I.C. § 42-1425”. *See Order on Summary Judgment*, p. 5.

The only requirement set forth in I.C. § 42-1425 for remand to the Director is an objection to an accomplished transfer. There is no requirement that one allege injury or enlargement. In order to avoid reversible error, the Court should reconsider its decision concerning remand and order that the water right be remanded to IDWR for hearing.

THE COURT MUST SET ASIDE ITS RULINGS ON SUMMARY JUDGMENT

In order to allow for discovery pursuant to I.R.C.P. 56(f) and to remand the water right to the Director for hearing as required by I.C. § 42-1425(2), the Court necessarily must set aside its

¹ The Director is then required to hold a hearing. In this case, no hearing has been held. The only evidence before the court is that ASCC and IDWR negotiated the Settlement Agreement. There was no hearing held prior to ASCC and IDWR signing the Settlement Agreement. Section 42-1425(2) contemplates that a hearing will be held as required by the APA, with the Objectors having the opportunity to put on evidence or confront witnesses. The Director then determines whether injury is occurring and submits a report to the Court.

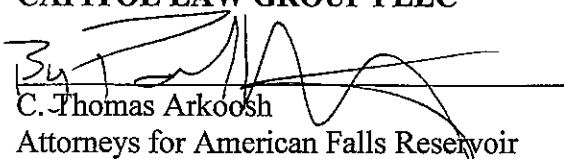
rulings on the pending motions for summary judgment until discovery takes place and the remand hearing is completed, at which time the Court should hold another hearing on the pending motions for summary judgment to address the information resulting from the remand hearing and discovery.

CONCLUSION

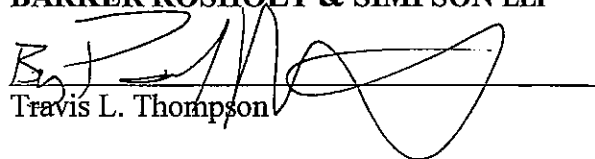
The Court failed to properly rule on the Objectors' request for discovery pursuant to I.R.C.P. 56(f) and misconstrued the requirements of I.C. § 42-1425 that require remand to the Director if an objection is filed to an accomplished transfer. Objectors request that the Court reconsider its rulings on these issues, set aside its rulings on the pending motions for summary judgment, allow discovery to take place and remand the water right to the Director for hearing, following which the pending motions can be reheard by the Court.

DATED this 9th day of July, 2009.

CAPITOL LAW GROUP PLLC

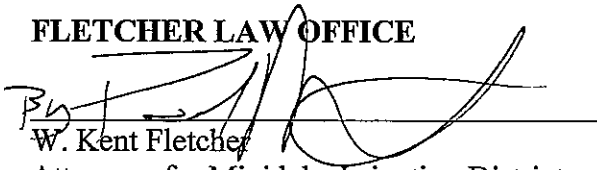

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CERTIFICATE OF SERVICE

I certify that on July 9, 2009, I served the original and copies of the foregoing to the following persons as indicated:

Original hand delivered to:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

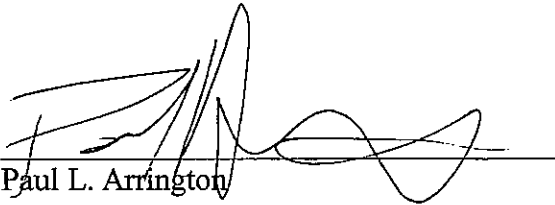
Copies mailed U.S. mail, postage prepaid, to:

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IDWR Document Depository
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Paul L. Arrington

Attachment

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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 29-271 (See Exhibit A)
)
)

) ORDER ON SUMMARY JUDGMENT
)
)

Case No. 39576
_____)

I. PROCEDURAL BACKGROUND

The above subcases were claimed in the SRBA by the City of Pocatello (hereafter "Pocatello") under a state basis. (Pocatello claimed the same water use under its federal theory under subcase number 29-11609.) *Director's Reports* were issued by the Idaho Department of Water Resources (hereafter "IDWR") on the state-based claims. Pocatello filed *Objections* to the *Director's Reports* because it disagreed with conditions placed on the "other provisions necessary" element. The condition states:

To the extent necessary for administration, water was first appropriated or used from: Pocatello Well No. ___, located in [legal description] on [date] in the amount of _____ cfs.

Pocatello filed *City of Pocatello's Motion for Summary Judgment on IDWR's Authority Under I.C. § 42-1425* (hereafter "*Summary Judgment Motion*") on May 4, 2006. The *Summary Judgment Motion* argues that the condition is improper as a matter of law. First, Pocatello asserts that formal transfer No. 5452 was approved pursuant to I.C. § 42-222 without a condition. Thus, any conditions added in a *Director's Report* are impermissible collateral attacks on the administrative decision.

Second, Pocatello asserts the "accomplished transfer" statute, I.C. § 42-1425, allows for changes in water rights and that these "accomplished transfers" claims should be recognized without any conditions.

The State of Idaho opposed the *Summary Judgment Motion*. A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, Americans Falls Reservoir District #2, and the Minidoka Irrigation District filed a *Joint Response to City of Pocatello's Motion for Summary Judgment* generally supporting the *Summary Judgment Motion*. A hearing on the *Summary Judgment Motion* was held on July 12, 2006.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any," to determine whether the moving party is entitled to summary judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 425 P.2d 362 (1969).

III. FACTS

The following facts are not in dispute.

1. IDWR issued Transfer No. 5452 to Pocatello on June 28, 1999. (Attached hereto as Exhibit 1)
2. Transfer No. 5452 refers to water right nos. 29-02274, 29-02338, and 29-07375 as those subject to the transfer.
3. Transfer No. 5452 did not include the condition at issue under the "Conditions of Approval and Remarks" section.
4. The *Director's Reports* for claims 29-02274, 29-02338, and 29-07375 did not add any conditions. (Attached hereto as Exhibit 2)
5. Other state-based claims filed by Pocatello assert transfers under the "accomplished transfer" statute, I.C. § 42-1425.
6. The *Director's Reports* for some of these "accomplished transfer" claims include a condition under the "other provisions necessary" element which states:

To the extent necessary for administration, water was first appropriated or used from: Pocatello Well No ___, located in [legal description] on [date] in the amount of ___ cfs.

7. IDWR filed a *706 Report* relating to Pocatello's claims. In the *706 Report*, a similar condition is recommended:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, water was first appropriated at or used from: ___

8. These subcases were not "remanded" to IDWR.

IV. ANALYSIS

A. Transfer No. 5452

Pocatello argues that IDWR may not add a condition to a transferred water right if the transfer was approved without the condition pursuant to I.C. § 42-222. It is undisputed that in 1999, Pocatello transferred the water rights relating to 29-2274, 29-2338, and 29-7375. IDWR approved the transfer without adding the condition.

Pocatello points out that adding a material change to a water right subject to a formal transfer decision is an impermissible collateral attack on an administrative decision. The SRBA Court generally disfavors such collateral attacks. *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" issue*, subcases 36-02708 *et al.* (December 29, 1999). However, IDWR did not include the condition in the recommendations for the three enumerated water rights 29-2274, 29-2338, or 29-7375.

At oral argument, Pocatello argued that the condition was included in other subcases which relate to Transfer No. 5452. Unfortunately neither Pocatello nor the other parties could identify the subcases to which this argument applies. It is inappropriate for the court to grant summary judgment regarding unidentified subcases.

B. Idaho Code § 42-1425

Pocatello has multiple state-based claims that rely on the accomplished transfer statute. Idaho Code § 42-1425 was enacted to address changes in established water rights that were made in violation of Idaho's mandatory transfer procedures. The statute sets forth:

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.

I.C. § 42-1425(2).

The statute allows SRBA claimants to assert water rights with changes to the elements if three components exist:

1. The change was made before November 19, 1987;
2. No other water rights existing on the date of the change were injured; and
3. The change did not result in an enlargement of the right.

The statute establishes a procedure for evaluating claims based on an accomplished transfer.

If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights.

I.C. § 42-1425(2)(a). (Emphasis added.)

1. Legality of the Condition

Pocatello argues that the condition placed on its accomplished transfer is improper. Pocatello's argument is twofold. First, Pocatello argues that the condition is improper because these subcases were not "remanded" to IDWR as set forth in I.C. § 42-1425(2)(a).

Second, Pocatello argues that the condition is improper as a matter of law because it seeks to prevent **potential** injury rather than actual injury. Pocatello bases this argument on language from the *706 Report* which states that the condition was recommended "to prevent injury that **could** result from allowing this practice." *706 Report* at 15.

Pocatello asserts that its accomplished transfers did not injure water rights existing on the date of the change. IDWR concluded that water rights existing on the date of the changes were injured by the change and added the condition. *706 Report* at 15.

Pocatello reads the *706 Report* language as improperly looking at prospective, not actual injury. However, construing the language in favor of the non moving party shows that it addresses actual injury. The injury IDWR discusses is to the priority of rights on a given source. Injury to a water right would occur when another right takes precedence. For example, if a change in the point of diversion of Pocatello's wells allows a portion of its water rights to be delivered before existing water rights, those existing water rights are injured. Depending on conditions such as precipitation and weather, the damages may not appear immediately. Immediate injury to priority resulting in future damages appears to be just what IDWR was trying to prevent with the condition. The *706 Report* raises genuine issues of material fact on the injury issue. Therefore, this Special Master declines to strike the conditions under the summary judgment standard.

2. Remand Provision

Idaho Code § 42-1425 requires that the district court "shall remand the water right to the director for further hearing" if an objection is filed to a claim asserting an accomplished transfer.

Pocatello objected to the *Director's Report* because it disagreed with the conditions. Thus it would appear that the statutory directive of a remand has been met.

It is interesting to note that parties to the SRBA have not previously requested a formal "remand" to IDWR because IDWR regularly receives additional information from parties during the litigation process and supplements or amends its recommendations when necessary. Parties may provide additional information to IDWR, and IDWR may consider that information without a formal remand.

However duplicative a formal remand may be, it is provided for when an objection is filed relating to I.C. § 42-1425. Here, an objection was filed that relates to the accomplished transfer portion of the claim. To the extent Pocatello seeks a formal remand to IDWR, the motion is **granted**. These subcases are "remanded" to IDWR, with the Special Master retaining concurrent jurisdiction. The remand will consist of additional information or evidence being presented to IDWR. After IDWR considers the additional information, its conclusions may be reported in an *Amended Director's Report* or a *Supplemental 706 Report*. The *Amended*

Director's Report or *Supplemental 706 Report* should contain explanatory material stating the basis for its recommendation and should address injury to existing water rights. To be clear, the remand is not intended to be a separate administrative transfer proceeding, but is to be part of the record for this case.

V. CONCLUSION

The *Motion for Summary Judgment* is denied in part and granted in part. There are no facts of record showing that IDWR added conditions to the subcases identified in Transfer No. 5452. If other subcases relating to Transfer No. 5452 are identified at trial, the court may consider facts and argument relating to transfer No. 5452 at that time. However, there are insufficient facts of record supporting a summary judgment ruling relating to Transfer No. 5452.

The facts of record regarding Pocatello's claimed accomplished transfers indicate that IDWR considered the injury question which is part of the inquiry under I.C. § 42-1425. IDWR apparently recommended conditions to prevent injury to existing water rights. No facts of record or legal arguments presented here support a finding that the condition is improper as a matter of law. Whether IDWR's conclusion on injury is correct is a matter for trial.

Finally, I.C. § 42-1425 provides for a remand to IDWR if an objection is filed "to a claim for accomplished change" Pocatello's objections dispute the conditions recommended by IDWR. Therefore, the objections appear to come within the statutory language "an objection . . . filed to a claim for accomplished change." Therefore, these subcases are "remanded" to IDWR for the purpose of allowing Pocatello to present additional evidence and information regarding the condition. The Special Master retains concurrent jurisdiction. All information must be presented to IDWR on or before August 31, 2006. IDWR should report its additional conclusions in a *Supplemental 706 Report*. The *Supplemental 706 Report* is due September 7, 2007.

DATED: August 18, 2006.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

EXHIBIT A CITY OF POCA TELLO

Subcase Nos:

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07222
29-07322
29-07375
29-07431
29-07450
29-07502
29-07770
29-07782
29-11339
29-11344
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13636
29-13637
29-13638
29-13639

(Subcase list: BEEMANGP)
8/18/06