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DEPARTMENT OF
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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 MEMORANDUM IN
Case No. 39576	)	RESPONSE TO OBJECTORS' MOTION FOR
	)	RECONSIDERATION
_____	)	

The State of Idaho, ("State"), by and through the undersigned deputy attorney general, hereby files this memorandum in response to Objectors' *Motion for Reconsideration* filed with the Court on or about June 25, 2009.

I. BACKGROUND AND PROCEEDINGS

A. The Amended Director's Report, Objections, and Discovery Period

The Idaho Department of Water Resources ("IDWR") filed Director's Reports for water right no. 01-00023B in 2005, 2006, and 2007, each reflecting "recharge for irrigation" as a purpose of use, along with a maximum number of acres for this purpose, in addition to irrigation as a

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purpose of use. The filing of these Director's Reports followed the resolution of objections filed by the Aberdeen Springfield Canal Company ("ASCC") pertaining to recommendations for ground water rights in Basin 35. Pursuant to a Settlement Agreement ("Agreement"), the Director agreed, among other things, to recommend a change in purpose of use to recharge for irrigation for a portion of ASCC's surface water rights. The Agreement was executed by ASCC, IDWR, and the State of Idaho in 2002. The Idaho Department of Lands and the United States Bureau of Land Management filed objections asserting that some of their lands were incorrectly included in the place of use identified by the shape file maps.

To resolve these objections, ASCC filed an amended claim and IDWR issued an Amended Director's Report ("Director's Report") on March 25, 2008 which described water right no. 01-00023B, in part as follows:

Claimant:	Aberdeen Springfield Canal Company
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 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, 35-2534, and 35-4246.

Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

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.

Diversion of this right for the purpose of recharge for irrigation is authorized for a maximum of 17,161.6 acres.

Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code.

With respect to water right no. 01-00023B, objections were filed by American Falls Reservoir District No. 2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company ("Objectors") on April 28, 2008, which checked the boxes for priority date, purpose of use, place of use, and remarks, although no supporting information was provided.

On July 16, 2008, the Court granted the State's *Motion to File a Late Response*, which was filed on the same date.

On August 18, 2008, the Objectors, at the direction of the Court, submitted to ASCC a document entitled "Initial Basis for Objections." With respect to the priority date and purpose of use of the claimed rights, the document stated, in relevant part:

[I]f ASCC is claiming an 'accomplished transfer' in its purpose of use, it was not identified in the amended claim filed on May 15, 2007. If the "purpose of use" is recognized then the quantity identified 501.8 cfs is another issue of fact to determine.

Issues of fact and law arise as to this recommended purpose of use and IDWR's basis for its recommendations.

.... Several issues of fact and law arise as to this agreement and the recommended water right, including: ... 2) the basis for the "recharge for irrigation" purposes of use; 3) the place of use for "recharge for irrigation" as the entire service area of ASCC; 4) the formula and process used to calculate the diversion rate for the "recharge for irrigation" purpose of use; 5) IDWR's agreement to give "mitigation credit" to certain ground water rights located within ASCC's service area and the formula and process used in Paragraph 2(E) of the agreement.

On August 28, 2008, the parties reached agreement on a discovery and trial schedule and on September 2, 2008, the Court entered a *Trial Schedule Order*, consistent with the agreement, which provided:

Therefore, IT IS ORDERED that the following schedule shall govern the conduct of proceedings through trial:

March 6, 2009	Discovery cut-off; discovery shall be complete
March 27, 2009	Deadline to file dispositive motions
May 21, 2009, 10:00 a.m.	Pretrial conference by telephone phone
Monday June 8-12, 2009, 10:00 a.m.	Trial

The record indicates that during the six month discovery period the Objectors did not conduct discovery through depositions, interrogatories, or requests for production. The Claimants, however, filed *Notice of Service of Claimant's First Discovery Requests to Objectors and Notice of Taking Deposition Duces Tecum* with the Court on March 6, 2009. In response, Objectors filed a *Joint Notice of Objection to Discovery* on March 30, 2009, asserting that the propounded discovery violated the *Trial Scheduling Order* and Idaho Rules of Civil Procedure, and that all discovery should have been completed by March 6, 2009. A *Motion for Order Compelling Discovery* and *Motion to Clarify and/or Modify Trial Scheduling Order* were filed by ASCC on March 30, 2009. The Objectors filed a *Response to Motion for Order Compelling Discovery, Motion to Clarify and/or Modify Trial Scheduling Order* on April 6, 2009, advancing the same arguments set forth in the objection. On April 14, 2009, the Court issued an order denying ASCC's motions.

B. Summary Judgment Proceedings

ASCC filed a motion for summary judgment on March 26, 2009, which was accompanied by the affidavits of Steven T. Howser, and Anthony Olenichak and lodged its *Memorandum in Support of Claimant's Motion for Summary Judgment and Other Motions*. Mr. Howser, the manager who oversees the day-to-day operations of ASCC, described the diversion and beneficial

use of ASCC's water rights and the way in which diversion for recharge is derivative of the surface water irrigation diversions under water right no. 01-00023B. Mr. Olenichak, the Deputy Water Master for Water District 01, stated that water had been diverted and put to beneficial use in the same manner as reported. ASCC argued that the Objectors had failed to provide any evidence to rebut the Director's Report, there were no genuine issues of material fact, and it was entitled to the water right as recommended based on the *prima facie* weight accorded to the Director's Report. *See* Idaho Code § 42-1411(4).

On March 27, 2009, the Objectors filed a *Joint Motion for Summary Judgment* accompanied by the *Affidavit of Travis Thompson* and lodged their *Memorandum in Support of Objectors' Joint Motion for Summary Judgment* for water right no. 01-00023B. Attached to Mr. Thompson's affidavit were the following documents: excerpts of previous decrees, excerpts of a stipulation between ASCC and Objectors, excerpts of ASCC's May 8, 1990 Notice of Claim, a copy of the Agreement between IDWR, the State, and ASCC executed by the former Director on June 5, 2002, and ASCC's May 15, 2007 Notice of Amended Claim for water right no. 01-00023B. The motion for summary judgment stated: "The Objectors submit that there are no genuine issues of material fact as to the 'recharge for irrigation' purpose of use element which was not included in ASCC's previously decreed water right and that purpose of use should be dismissed as a matter of law." *Objectors' Joint Motion for Summary Judgment*, March 27, 2009, at 2.

The State lodged its *Brief in Response to Claimant's Motion for Summary Judgment and Objectors' Motion for Summary Judgment* on April 16, 2009 and submitted the affidavits of the former Director of IDWR, Karl J. Dreher and Senior Water Resource Agent Michael Holliday.

Attached to Mr. Dreher's affidavit was a copy of the Agreement. Pursuant to the Agreement, the Director agreed to recommend a change in purpose of use for a portion of ASCC's

water rights. In the affidavit, Mr. Dreher stated that the Agreement was the result of an investigation and negotiations regarding ASCC's water right claims. On the basis of his investigation, Mr. Dreher concluded that an accomplished change in purpose of use from irrigation to recharge for irrigation took place for a portion of ASCC's rights prior to November 17, 1987 and that the change in use met the criteria set forth in Idaho Code § 42-1425, which is generally referred to as the accomplished transfer statute.¹

The legislature enacted the accomplished transfer statute because "the continuation of historic water use patterns resulting from [changes in use without compliance with the transfer provisions set forth in Idaho Code §§ 42-108 and 42-222] is in the local public interest." Idaho Code § 42-1425(1)(a). The statute requires the Director to determine whether the change in use injured a water right existing on the date of the change or constituted an enlargement of the original right. Changes in water rights meeting these criteria may be decreed in the SRBA.

The former Director's findings on injury and enlargement were set forth in the affidavit. Mr. Dreher explained that the amount of water ASCC diverted and consumptively used for both purposes, irrigation and recharge for irrigation, was no more than its historic diversion and consumptive use. Since the change in use took place prior to the commencement of the SRBA and there was no injury and no enlargement, the Director determined that the criteria set forth in the accomplished transfer statute were met. The affidavit further explained that under the Agreement, the amount of water diverted for recharge would be calculated on an annual basis and provide some

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.

mitigation credits for the amount recharged against ground water depletions in the event of an administrative curtailment.

Mr. Holliday's affidavit stated that the recommendations made in the Director's Report, subsequently issued by Director David Tuthill, were consistent with the terms of the Agreement and explained the calculations used by IDWR to determine the maximum amount of water authorized for recharge.

Based upon the Director's Report, affidavits, and other documents, the State argued that the accomplished transfer requirements were met and that the Court should enter summary judgment consistent with the recommendations for water right no. 01-00023B in the Director's Report. The State also submitted documents and legal argument showing that recharge for irrigation was recognized as a beneficial use before the enactment of Idaho's ground water statute in 1978. *See* Idaho Code § 42-234.

In the Objectors' April 16, 2009 *Response to Claimant's Motion for Summary Judgment*, the Objectors continued to advance the argument that, as a matter of law, recharge for irrigation was not a beneficial use prior to 1978. Although no evidence was submitted on the subject of injury or enlargement, they asserted that there were issues of fact in dispute that required a remand for further hearing before IDWR pursuant to Idaho Code § 42-1425(2)(a).²

² Idaho Code § 42-1425(2)(a) reads as follows: 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.

ASCC's answering brief, supported by a second affidavit of Mr. Howser, was lodged on April 17, 2009. Mr. Howser's affidavit further described the measurement and use of ASCC's water and how its delivery through ASCC's canals and delivery systems results in recharge for irrigation from wells for irrigation of lands within ASCC's place of use. Based on the Objectors' failure to rebut the *prima facie* evidence included in the Director's Report on the purpose of use element, the affidavits and other papers submitted, ASCC asserted that its motion for summary judgment should be granted.

On April 23, 2009, the Objectors filed their *Reply In Support of Objectors' Motion for Summary Judgment and Response to [ASCC's] Motion for Summary Judgment and Request Pursuant to Rule 56(f) To Allow Depositions To Proceed Before Hearing* ("Rule 56(f) Request"). They also filed an *Objection to and Motion to Strike Affidavits*.

The Objectors continued to assert that, in the event their motion for summary judgment was denied, the case should be remanded to the Director for further fact-finding and added a new argument. They contended that they were entitled to conduct additional discovery under Rule 56(f) "due to the alleged facts provided in the affidavits accompanying the State of Idaho's Brief in Response to Claimants' Motion for Summary Judgment and ASCC's Answering Brief filed in this proceeding on April 16, 2009." *Rule 56(f) Request* at 2. Asserting that there had been no opportunity to discover the basis for, rebut, or respond to the affidavits of Mr. Dreher, Mr. Holliday, and Mr. Howser, they urged the Court to continue the summary judgment hearing scheduled for April 30, 2009, to permit the depositions to go forward. The depositions were required, they argued, in order to present "facts essential to justify the opposition to ASCC's motion." *Rule 56(f) Request* at 7. Characterizing the statements made in the affidavits as "conclusory," the Objectors complained that "without supporting information or additional facts to verify [the statements made

in the affidavits] they were “presently unable to present facts to oppose ASCC’s motion.” *Rule 56(f) Request* at 5.

On April 29, 2009, the State filed its *Brief in Response to Objectors’ Motion to Strike Affidavits of Karl J. Dreher and Michael Holliday*, setting forth the bases for the affidavits. The State also noted that the Court’s order denying ASCC’s request to conduct additional discovery was, in part, based on opposition by the Objectors who were now asking the Court for further fact finding before IDWR and additional time to conduct discovery.

A hearing was held on the motions for summary judgment and other motions on April 30, 2009. On May 12, 2009, the Special Master entered an *Order Vacating Trial Schedule* based on the conclusion that there were no genuine issues of fact and that matters would be decided solely on the filings before the Court.

On June 11, 2009, the Special Master entered an *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 (“Order”)*. The *Order* identified two core issues in the summary judgment proceedings: “1) whether recharge for irrigation was recognized as a beneficial use of water in Idaho before enactment of its groundwater recharge statute in 1978, and 2) whether a portion of ASCC’s diversion from the Snake River decreed “for irrigation and other purposes” was lawfully changed to “recharge for irrigation” with a priority date of February 6, 1895.” *Order* at 10. The Special Master concluded that the answer was yes to both inquiries.

On June 25, 2009, the Objectors filed a *Motion for Reconsideration* asserting that the Court failed to rule on its request to conduct additional discovery pursuant to I.R.C.P. 56(f) and that the Court must set aside the summary judgment proceeding until a further hearing is conducted pursuant to Idaho Code § 42-1425(2)(a).

II. ARGUMENT

A. There Is No Good Cause For Objectors' Belated Discovery Request

The purpose of Rule 56(f) is to provide a party "who for valid reasons cannot by affidavit -- or presumably by any other means authorized under Rule 56(e) -- 'present facts essential to justify the adverse party's opposition to the [summary judgment] motion.'" 10B Fed. Prac. & Proc. Civ. 3d § 2740. The rule will not be liberally applied to aid parties who have been dilatory. The most obvious indication of lack of diligence is a failure on the part of the nonmovant to present affidavits under either 56(e) or (f). Where a party has failed to take advantage of discovery, courts will not delay a case when the discovery sought could have been instituted earlier. In this situation the court may accept the facts alleged in the movant's affidavits as true and, if they constitute a sufficient basis for summary judgment, the motion will be granted. Id.

Idaho Rule 56(f) is identical to the federal rule and provides:

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.

A Rule 56(f) motion requesting additional time to respond to a motion for summary judgment is reviewed for abuse of discretion and under both state and federal law, the failure to diligently conduct discovery is grounds for denial. *See Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380 (2005) (Where plaintiff failed to prepare case that had been pending for more than a year, district court was soundly within its discretion in denying a motion to vacate a summary judgment hearing to allow a party to continue discovery.)

The request for additional discovery is based primarily upon the assertion that the Dreher, Holliday, and Howser affidavits raised new issues pertinent to the Director's finding and

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recommendation on the issues of injury and enlargement. The record indicates otherwise. It was plain from the outset that the requirements of Idaho Code § 42-1425 were central to the litigation. Thus, the submission of affidavits pertaining to the factual underpinnings of the Director's recommendation was hardly a surprise.

The March 25, 2008 Director's Report, and three previous reports, explicitly stated that the recommendation was based, in part, on the accomplished transfer statute. Most important, the objections themselves and correspondence describing the bases for the objections specifically addressed the purpose of use element. And, in the early stages of the subcase, the adjudication statutes and procedures provided many opportunities to obtain the information that is now being requested. The Objectors could have requested that IDWR prepare a Supplemental Report or "706" Report.³ This is a common practice in the SRBA and provides the parties an opportunity to request that the Director clarify the factual bases for a recommendation, articulate the expert opinion underlying the report, and address issues that will likely be litigated.

Likewise, the trial scheduling order providing an opportunity for discovery was issued six months before the deadline for filing dispositive motions and was based upon the parties' agreement that the discovery period was adequate. During the discovery period, Objectors also had the opportunity, under Idaho Rules of Civil Procedure 45(b)(2) and 30(b)(6), to obtain information and documents and take depositions relevant to the Director's recommendation. It is not as though the Objectors were "lulled" into not undertaking discovery on the factual underpinnings of the Director's Report. To the contrary, they had been on notice that issues related to injury and enlargement would be litigated long before the summary judgment proceedings.

³ Reports prepared and submitted to the court by IDWR as a "court appointed expert," pursuant to Idaho Code § 42-1401B and Idaho Rules of Evidence 706.

Having failed to prevail on their summary judgment motion, the Objectors should not be permitted to use Rule 56(f) to approach summary judgment in stages. The Rule does not sanction such an approach in the summary judgment context, "any more than a litigant could present evidence at trial and then-after having lost on the basis of that presentation-seek further discovery to adduce further evidence." Instituto Nacional de Comercializacion Agricola v. Continental Illinois National Bank and Trust Co. of Chicago, 576 F.Supp. 991, 1003 (1984) citing Canada Dry Corp. v. Nehi Beverage Co., 723 F.2d 512 (7th Cir.1983).

In summary, the Objectors were not unfairly surprised by the evidence submitted to the Court by ASCC and the State. The issues were sufficiently clear from the outset that the Objectors could have made an assessment of what type of information was important to their case. The Objectors had ample opportunity to determine whether there was any evidence to rebut the Director's conclusion that the change in use at issue here did not injure other water rights or result in an enlargement. Yet, they failed to take advantage of discovery whatsoever, let alone on the key issue of injury. Where a party's own lack of diligence is to blame for that party's failure to secure discoverable information, it is not an abuse of discretion to deny a Rule 56(f) motion. Jenkins, 141 Idaho 233, 108 P.3d 380.

B. It Was Proper For The Special Master To Enter Summary Judgment Consistent With The Director's Report.

The Director's Report is "*prima facie* evidence of the nature and extent of the water rights acquired under state law." Idaho Code § 42-1411(4). On summary judgment, a "party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." Idaho Code § 42-1411(5).

The Objectors have not offered any evidence whatsoever to rebut the presumption afforded the Director's Report on the subject of injury or enlargement. Simple assertions are inadequate to defeat a summary judgment motion. The non-moving party must submit more than just conclusory assertions to establish a genuine issue of material fact. Northwest Bec-Corp. v. Home Living Serv., 136 Idaho 835, 839, 41 P.3d 263, 267 (2002). A mere scintilla of evidence is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. Id.

Moreover, the affidavits and documents submitted by the State and ASCC fully support the Director's recommendation that recharge for irrigation be included as a purpose of use for a portion of ASCC's water rights. The record shows that the Director made three critical determinations. 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, 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 recharge to the Eastern Snake Plain Aquifer. Third, ASCC did not enlarge its water right because the amount of water ASCC diverted and consumptively used was no more than its historical diversion and consumptive use. Accordingly, the requirements of Idaho Code § 42-1425 are met. The change in use took place prior to November 19, 1987, no other water rights existing on the date of the change were injured, and the change did not result in an enlargement. Thus, the entry of summary judgment consistent with the Director's recommendation was proper.

C. Should The Court Decide To Order a Formal Remand for Further Fact-Finding, the Adjudication Statutes Do Not Authorize or Require Contested Case Proceedings Pursuant to the Idaho Administrative Procedure Act.

The Objectors contend that “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 and confront witnesses.” *Brief in Support of Motion for Reconsideration* at 1. The assertion that the contested case requirements of the Idaho Administrative Procedure Act (“APA”), Idaho Code § 67-5240, are relevant or in any way govern an SRBA remand proceeding is without merit. First, IDWR does not have jurisdiction to conduct a contested case proceeding on remand. “[O]nce the SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only. Jurisdiction remains with the SRBA district court until it issues a final order concerning the particular water right at issue.” Walker v. Big Lost River Irrigation Dist., 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).

The accomplished transfer statute clearly defines the Director’s role and scope of the fact-finding hearing. Where a recommendation for a water right is based upon the accomplished transfer statute, the Director is authorized to conduct a hearing at which the parties to the subcase may submit information relevant to the issue of injury. The Director is then required to consider the information submitted and provide a supplemental report to the Court setting forth findings and conclusions. The type of hearing provided for in the accomplished transfer statute is specifically defined by Idaho Code § 42-1410, which states, in relevant part:

Examination of water system and of claims:

- (1) Upon entry of the court's order commencing a general adjudication, or as provided in section 42-1404 or 42-1424, Idaho Code, the director shall commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system for water rights acquired under state law. The examination shall continue in a manner and for such a period of time as the director determines is necessary to evaluate the extent and nature of each water right for which a notice of claim under state law has been

filed. The director may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.

(2) The director and other employees of the department shall have authority to go upon all lands, both public and private, for the purpose of investigating the uses of water from any water source and may require the cooperation of the claimant in investigating the claimant's water use. The employee investigating the claimant's use shall make a reasonable effort to contact the claimant to schedule a date and approximate time for the examination. If the well or diversion works are located in a building other than an unlocked structure used solely for housing the well or other diversion works in which there is no reasonable expectation of privacy, the employee shall only enter the building in the absence of a court order after requesting and receiving the permission of the claimant or other occupant. The director may request the district court to issue an order compelling inspection and subpoenas requiring the attendance of any witness or the production of documents in accordance with the Idaho rules of civil procedure.

Idaho Code § 42-1410. (Emphasis added.)

There is nothing in the adjudication statutes authorizing or requiring the Director to conduct a contested case type hearing where parties have the opportunity to “confront” or cross examine witnesses. The procedures provided for by the legislature cannot be used to conduct belated discovery nor can the hearing be used as a trial-type proceeding to challenge an opposing party’s case. If an objector “is aggrieved by the director's determination, they may seek review before the district court.” Idaho Code § 42-1425(2).

Notably, it has not been the practice of the SRBA Court to use the fact-finding procedures provided in the accomplished transfer statute. Instead, parties and the Court have asked the Director to submit a supplemental or “706” report because, as observed by Special Master Bilyeu in a case where a formal remand was requested, “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.” SRBA Subcase No. 29-00271,

Order on Summary Judgment at 5, August 18, 2006.

Consistent with the statutory scheme governing the SRBA, Special Master Bilyeu limited the scope of the remand as follows:

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.⁴

Id. at 5-6.

Importantly, a remand pursuant to the statute does not shift the burden of proof required to rebut the presumption of the Director's Report. The legislature has made clear that a party "aggrieved by the director's recommendation, whether that be the party claiming an accomplished transfer or the party claiming injury, has the burden of proof under section 42-1425." Freemont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, 129 Idaho 454, 462, 926 P.2d 1301, 1309 (1996).

In summary, a party to the SRBA cannot use the remand provisions in the accomplished transfer statute to take additional discovery or obtain testimony it failed to secure during a court-ordered discovery period. Nor can a party use the proceeding to shift the burden of proof on injury or enlargement. The Objectors have simply failed to proffer sufficient evidence on the issue of injury or enlargement to defeat ASCC's motion for summary judgment. They should not be allowed to avoid summary judgment by using the fact-finding hearing authorized by Idaho Code § 42-1425(2) to litigate the issues raised in this subcase.

⁴ Although IDWR scheduled a fact-finding hearing, the hearing was not held because the parties stipulated to proceeding before the Special Master.

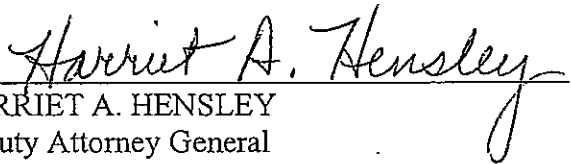
CONCLUSION

For the reasons stated, the State of Idaho respectfully requests that the Court deny the Objectors' request for additional discovery. Although the State believes that the *Order* is proper and fully supported by the record, should the Court decide to issue a formal remand for a hearing pursuant to Idaho Code § 42-1425(2), the State requests that the Special Master limit the scope of the hearing consistent with Idaho Code § 42-1410.

RESPECTFULLY SUBMITTED this 29th day of September 2009.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO


HARRIET A. HENSLEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September 2009, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN RESPONSE TO OBJECTORS' MOTION FOR RECONSIDERATION on each of the following persons by the indicated method

1. Original 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 via U.S. Mail, postage prepaid and addressed to:

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
MILNER IRRIGATION DISTRICT
TWIN FALLS CANAL COMPANY
NORTH SIDE CANAL CO LTD
Represented by:
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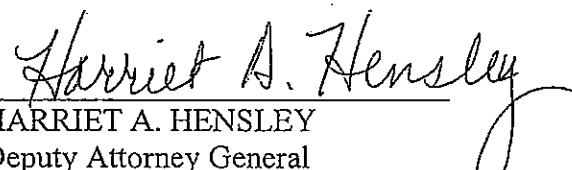
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