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DEPARTMENT OF
WATER RESOURCES

Randall C. Budge, ISB No. 1949
Thomas J. Budge, ISB No. 7465
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED
P.O. Box 1391; 201 E. Center Street
Pocatello, Idaho 83204-1391
Telephone: 208-232-6101
Fax: 208-232-6109

Attorneys for Aberdeen-Springfield Canal Company

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

In Re SRBA	)	
	)	
Case No. 39576	)	A. Subcase Nos. 01-23B, 01-297, 35-2543, 35-4246
	)	
	)	CLAIMANT'S BRIEF IN RESPONSE
	)	TO OBJECTORS' MOTION FOR
	)	RECONSIDERATION
	)	
	)	
	)	

COMES NOW Claimant Aberdeen-Springfield Canal Company ("Claimant" or "ASCC"),
by and through its attorney of record and hereby files this Brief in Response to the Surface Water
Coalition Objectors' ("Objectors") *Motion for Reconsideration* filed with the Court on or about June
25, 2009.

I. BACKGROUND AND PROCEEDINGS:

The background and proceedings are accurately discussed at length in the Court's *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike* on June 11, 2009 ("Summary Judgment Order") and in the *State of Idaho's Memorandum in Response to Objectors' Motion for Reconsideration* dated September 29, 2009 ("State's Memorandum") and adopted by ASCC

rendering further discussion unnecessary. Additionally, ASCC has filed herewith the *Affidavit of Randall C. Budge* for the purpose of placing into the record the Objectors' "Initial Basis for Objections" dated August 18, 2008 for purposes of Objectors' *Motion for Reconsideration*. This was referenced and quoted in relevant part in the State's Memorandum at page 3 and further demonstrates that Objectors well knew that the accomplished transfer statute, I.C. 42-1425, was a central issue in the case long before the summary judgment motions were filed.

II. OBJECTORS' MOTION FOR RECONSIDERATION:

The Objectors' requests reconsideration of the Summary Judgment 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, 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 the 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.

III. ARGUMENT:

A. INTRODUCTION.

The State's Memorandum thoroughly refutes each of the arguments asserted by the Objectors' *Motion for Reconsideration* and is adopted by ASCC by reference. ASCC submits brief arguments below.

Based on the established record and following oral arguments, the Court issued its Summary Judgment Order on June 11, 2009 holding that recharge through irrigation was recognized as a beneficial use of water in Idaho before enactment of its ground water recharge statute in 1978; and, that the portion of ASCC's diversion from the Snake River decreed "for irrigation and other purposes" was lawfully changed to "recharge for irrigation" as an accomplished transfer pursuant to Section 42-1425, Idaho Code. In so doing, the Court recognized that the Surface Water Coalition ("Objectors") offered no evidence of injury or enlargement of the diversion and consumptive use, only speculation; and, further, that the Objectors' Request for Remand for further hearing on whether the change injured other water rights "lacks merit because no one has claimed or injury or enlargement and besides, the Director has already submitted his report with his findings and conclusions," and "another hearing would only serve to delay final resolution of the claim." (Summary Judgment Order at 11)

B. THE SWC'S REQUEST FOR DISCOVERY PURSUANT TO I.R.C.P. WAS UNTIMELY AND PROPERLY DENIED.

The Court's *Trial Schedule Order* dated September 2, 2008, established a March 6, 2009 date to complete all discovery. Despite more than six months provided to conduct discovery, the Objectors pursued none. Nor did the Objectors offer any evidence of injury or enlargement required to rebut the presumption established by the Director's Report that there had been an accomplished change in the purpose of use of ASCC's water rights 01-23B and 01-297. Instead, only after ASCC's Summary Judgment Motion was granted and the Objectors' Summary Judgment Motion was denied do the Objectors now seek to pursue belated discovery under Rule 56(f) in an untimely attempt to fish for facts to support their speculation of injury. Rule 56(f) is available in summary

judgment proceedings only when “it appears 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.” Even then such a request for additional discovery or a continuance is left to the sound discretion of the Court. In this case the Objectors have made no showing by affidavit or otherwise that they could not have timely conducted discovery or present facts by affidavits and have made no showing for purposes of their Motion for Reconsideration that the Court abused its discretion in refusing additional discovery. The failure to diligently and timely conduct discovery is proper grounds for denying a Rule 56(f) motion requesting additional time to respond to a summary judgment motion. *See* State’s Memorandum at p. 10, Jenkins v. Boise Cascade corp. 141 Idaho 233, 108 P.3d 380 (2005)

The position now being asserted by the Objectors that they should be allowed to conduct untimely, after-the-fact discovery is entirely inconsistent and contrary to the position they previously asserted when discovery was sought by ASCC. ASCC submitted discovery requests on March 5, 2009, one day before the discovery cutoff of March 6, 2009, based on its understanding and belief that the March 6 date was the cutoff to submit, not complete, discovery. All seven members of the Surface Water Coalition Objectors filed objections to ASCC’s discovery requests and opposed its Motion to Compel arguing they were untimely. The Court agreed, holding that it was not feasible for the propounded discovery to be completed by the deadline, ruling that “the *Motions* must be denied and the subcases will proceed in accordance with the September 2, 2008 *Trial Schedule Order*. It is indeed disingenuous for the Objectors to now seek their own discovery after objecting to ASCC’s and to allow their belated discovery request under the facts and circumstances of this was

would only serve to unfairly disregard and prejudice ASCC's right to have the objections timely resolved and their water rights partially decreed.

In sum, the Objectors had ample time to conduct discovery to rebut the Director's Report *prima facie* evidence that irrigation for recharge should be added as an additional use did not injure other water rights or result in an enlargement, but failed to do so. The Objectors simply failed to meet their burden of proof to present facts to rebut the Director's Report and support their objections as required by I.C. 42-1411(5) and Rule 56(e). Their lack of diligence and failure to present any evidence of injury or enlargement other than speculation and their failure to prevail on their summary judgment motion simply does not warrant the Court permitting them to now use a Rule 56 approach to conduct further discovery. The Court did not abuse its discretion in denying the Rule 56(f) motion which should be reaffirmed.

C. THE COURT CORRECTLY APPLIED THE ACCOMPLISHED TRANSFER STATUTE, I.C. §42-1425.

The Objectors also argue that the Court misinterpreted the requirements of the accomplished transfer statute, I.C. §42-1425, by failing to remand the water right to the Director for further hearing to see if the change injured a water right existing on the date of change or constituted an enlargement. This argument is not new on reconsideration and the same argument made by the Objectors. *Objectors' Response to ASCC's Motion for Summary Judgment and Rule 56(f) Request* at 7-8. The Court has already properly rejected this same argument at page 11 of the Summary Judgment Order:

"The Surface Water Coalition's suggestion that the matter be remanded to the Director 'for further hearing to determine whether the change injured a water right existing on the date of change or constituted an enlargement of the original right (I.C. §42-1425(2)(a)) lacks merit because no one has claimed injury or enlargement and besides, the Director has already submitted his Report with his findings and

conclusions. Another hearing would only serve to delay final resolution of the claim."

The Objectors cry for an administrative hearing rings hollow given the fact they've offered not even a scintilla of evidence of injury or enlargement, wholly failing to rebut the presumption of the Director's Report. Nor have they even speculated or suggested any evidence that might be uncovered if further discovery were allowed. Quite obviously the conclusion is inescapable that the Objectors' only motivation is to further delay final resolution of their objections and partial decrees for ASCC's water rights. Accordingly, the requirements of I.C. §42-1424 have all been met and summary judgment was properly entered in accordance with the Director's Recommendation.

The Objectors also contend that they are entitled to an administrative hearing under I.C. §42-1425(2). This argument is without merit and should be rejected for the reasons described above; and, further, for the reasons set forth in the State's Memorandum, Part II. C., which ASCC concurs with and adopts.

CONCLUSION

For the reasons stated above, the Objectors' Motion for Reconsideration is without merit and should be rejected. The Court's Summary Judgment Order is based upon a substantial record of undisputed material facts based upon which the Court properly interpreted and applied the accomplished transfer statute, I.C. §42-1425.

RESPECTFULLY SUBMITTED this 6th day of October, 2009.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: Randall C. Budge
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2009, I caused to be served a true and correct copy of the foregoing document on each of the following persons by the indicated method:

1. Original to:
- | | | |
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| PO Box 2707 | ☐ | Facsimile (208-736-2121) |
| Twin Falls, Idaho 83303-2707 | | |

2. Copies via U.S. Mail, postage prepaid, to:

A&B Irrigation District
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c/o Travis L. Thompson
PO Box 485
Twin Falls, Idaho 83303-0485

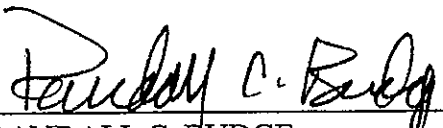
American Falls Reservoir District
c/o C. Thomas Arkoosh
PO Box 32
Gooding, Idaho 83330

Minidoka Irrigation District
c/o W. Kent Fletcher
P.O. Box 248
Burley, Idaho 83318

State of Idaho
Lawrence G. Wasden, Attorney General
Clive J. Strong, Deputy AG
Harriet A. Hensley, Deputy AG
P.O. Box 44449
Boise, Idaho 83711-4449

United States of America
USDI BOR/USDI BLM
U.S. Department of Justice
550 West Fort Street, MSC 033
Boise, Idaho 83724

Director of IDWR
P.O. Box 83720
Boise, Idaho 83720-0098



RANDALL C. BUDGE