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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

Case No. 39576

Subcase Nos: 01-23B, 01-297, 35-2543

& 35-4246

(Aberdeen Springfield Canal Company)

OBJECTORS' REPLY TO
RESPONSE BRIEFS

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 (Objectors) reply to the *State of Idaho's Memorandum in Response to Objectors' Motion for Reconsideration* and *Claimant's Brief in Response to Objectors' Motion for Reconsideration* as follows.

RESPONDENTS' ARGUMENTS

In response to the Objectors' Motion for Reconsideration, the State of Idaho (State) and the Claimant Aberdeen Springfield Canal Company (ASCC) each filed response briefs. For the most part, ASCC, in its brief, adopts the arguments of the State. Therefore, references in this brief to the "State" are references to the arguments of both the State and ASCC, unless otherwise noted.

In summary, ASCC and the State argue:

1. The Affidavit and other pleadings filed in support of Objectors' request to be allowed to take depositions do not provide good cause for discovery pursuant to IRCP 56(f).
2. Despite the express provisions of Idaho Code § 42-1425(2), the Court properly entered summary judgment.
3. Impliedly, the express provisions of Idaho Code § 42-1425(2) do not require the Court to remand the case for a hearing.
4. If the Court determines that the express provisions of Idaho Code § 42-1425(2) require remand, the Court should restrict the statutory powers given to the Director in conducting such a hearing.

For the reasons stated below, it is the position of the Objectors that the Respondents are in error, and the Court is statutorily required to grant the Objectors' Motion for Reconsideration.

**THE PROCEDURAL HISTORY OF THIS CASE SUPPORTS ALLOWING OBJECTORS TO
TAKE DEPOSITIONS PURSUANT TO IRCP 56(f)**

The Affidavits at the center of the dispute in this case were not filed by ASCC when it initially filed its Motion for Summary Judgment. Rather, ASCC filed the Second Affidavit of Steven T. Howser dated April 15, 2009 in response to Objectors' Motion for Summary Judgment. In addition, although the State filed the Affidavit of Karl J. Dreher and the Affidavit of Michael Holliday to support ASCC's motion for summary judgment, they were not filed until April 15, 2009; more than three weeks after ASCC filed its motion seeking summary judgment. The affidavits accompanied the State's "response" brief yet they clearly were filed in support of ASCC's motion. In other words, the timeliness of discovery that the State and ASCC complain of was not at issue until the Affidavits were filed just a few weeks before the summary judgment hearing. Because of the lack of foundation contained in these Affidavits, and the conclusory nature of much of the testimony contained in the Affidavits, Objectors timely filed an Objection to and Motion to Strike the Affidavits. See *Objection to and Motion to Strike Affidavits dated April 23, 2009*.

In the Objection and Motion, the Objectors sought to strike those portions of the Affidavits that did not comply with IRCP 56(e). The Objection and Motion filed by the Objectors was very specific – it went through each of the objectionable Affidavits and identified specific paragraphs that either were conclusory in nature, were not supported by facts contained in the Affidavit or in the record, or that were made without foundation. Simultaneously, Objectors filed their *Response to Aberdeen-Springfield Canal Company's Motion for Summary Judgment and Request to Pursuant Rule 56(f) to Allow Depositions to Proceed Before Hearing* dated April 23, 2009. This Response and Request was supported by the Affidavit of Travis L. Thompson dated April 23, 2009.

IRCP 56(f) provides:

Should it appear from the affidavits of a party opposing the motion 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.

As explained in the Affidavit of Travis L. Thompson, and as explicitly stated in the Objection to and Motion to Strike Affidavits and the *Objectors' Response*, there were many statements made in the Affidavits that were not supported by facts contained in the Affidavits, lack foundation and were conclusory. As stated in IRCP 56(f), when a party opposing a summary judgment cannot present facts essential to justify the party's opposition, the court may: 1) refuse the application for judgment or 2) may order a continuance to permit further affidavits or discovery.

Contrary to the assertions of the State, the request of the Objectors was supported by the Affidavit of Travis L. Thompson which incorporated Objectors' Response. Also contrary to the State's assertion, the case of *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380 (2005) supports Objectors' position in this case.

In *Jenkins*, the Court ruled that Jenkins did not provide authority or argument concerning his request for a continuance of a hearing on a motion for summary judgment and that a party must articulate what additional discovery is necessary and how it is relevant to responding to the motion. *See Jenkins*, 141 Idaho at 239, 108 P.3d at 386.

That is exactly what occurred in this case. Once the objectionable Affidavits were filed, Objectors immediately filed the Objection and Motion to Strike, filed the Affidavit of Travis L. Thompson, and, in the Affidavit, Mr. Thompson makes reference to the *Objectors' 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. Significant detailed grounds for discovery are set out in the Objection and Affidavit as well as the *Objectors' Response*.

The State argues that the Objectors were not “unfairly surprised” by the evidence submitted to the Court. However, “unfair surprise” is not the IRCP 56(f) standard for the Court to consider in this action. Moreover, such an argument is irrelevant for purposes of the summary judgment motions that were filed. Again, it should be noted that the Objectors did not request additional discovery based upon the initial filings in support of ASCC’s Motion for Summary Judgment. Rather, the issue was created when a few weeks before the scheduled hearing, ASCC and the State elected to file conclusory Affidavits lacking facts to support the conclusions contained in those Affidavits in an effort to support ASCC’s motion. Critical for this case, the Affidavit of Karl Dreher stated there was no “injury” to other water rights when the accomplished transfer occurred, yet he identified no specific facts as to the analysis actually performed to reach this conclusion, including when exactly the alleged transfer occurred and how no other water rights in the Snake River Basin were injured as a result of the change. It is the position of Objectors that it is only just, pursuant to the standard under IRCP 56(f), to allow Objectors to discover whether the facts and foundation exist to support the conclusions contained in the Affidavits.

A case more on point is *Doe v. Garcia*, 126 Idaho 10336, 895 P.2d 1229 (1995), a case cited in Objectors’ Brief but not mentioned in the response briefs. In *Doe*, the court explicitly held that it was error to deny Doe’s IRCP 56(f) motion seeking an opportunity to conduct discovery on issues critical to the disposition of the summary judgment motions before the court. The court went on to vacate the trial court’s order granting summary judgment on the grounds that Doe was entitled to further discovery. *Doe*, 126 Idaho at 1044, 895 P.2d at 1237.

Summary judgment can only be granted if the pleadings, depositions, admissions, and affidavits show 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. IRCP 56(c). Affidavits must be based upon personal knowledge, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated therein. IRCP 56(e). In order to avoid reversible error, the Court has options pursuant to IRCP 56(f). The Court can either deny the motion for summary judgment or allow further discovery to eliminate Objectors' objections to conclusions and lack of foundation contained in the Affidavits. For example, Objectors should be provided the opportunity to discover what facts Mr. Dreher relied upon when he testified:

1. ASCC shareholders continued to pay assessments and ASCC diverted the full amount of water authorized under Water Right No. 1-23B in most years. *See Dreher Affidavit paragraph 7.*
2. Thus, a portion of the diversions provided incidental recharge to the Eastern Snake Plain Aquifer (ESPA). *See Dreher Affidavit paragraph 7.*
3. The change from irrigation to recharge for irrigation took place prior to November 19, 1987. *See Dreher Affidavit paragraph 8.*
4. The accomplished change and purpose of use from irrigation to recharge for irrigation for a portion of ASCC's water right did not injure other water rights or result in an enlargement because the amount of water ASCC diverted and consumptively used no more than its historic diversion and consumptive use. *See Dreher Affidavit paragraph 9.*

Objectors should further be entitled to discover the basis and foundation for the following statements in the Second Affidavit of Steven D. Howser:

1. Diversion of Water Right No. 01-23B provides water for surface water irrigation and also for the purpose for the recharge for irrigation of maximum of 17,161.6 acres determined by my calculations based upon review of the company's records and maps, confirmed by the departments and set forth in the "recommended water right". *See* Second Affidavit of Howser ¶ 4 (note no calculations, company's records, company's maps, or department's records were attached to the Affidavit as required by IRCP 56(e)).
2. On average the company recharges to ground water up to sixty-seven percent (67%) of the amount diverted into the canal system. Over the last twenty (20) years the recharge amount ranges between 160,000 acre feet and 228,000 acre feet and averages 180,000 acre feet. *See* Second Affidavit of Howser ¶ 5.
3. The change in the actual use of water available under Water Right 1-23B to include recharge for irrigation occurred long prior to November 19, 1987, the date of the commencement of the Snake River Basin Adjudication by the company and shareholders entitled to use water on land covered by company's shares to which the water has been appurtenant. *See* Second Affidavit of Howser ¶ 7 (the Affidavit of Mr. Howser states that he became manager of ASCC in 1998, yet there is nothing in the record of how he has personal knowledge of what was occurring before November 19, 1987, there is nothing in the record to indicate when the "actual use of water" included "recharge for irrigation" or to indicate when IDWR or ASCC decided that incidental recharge became "recharge for irrigation". ASCC has not, at any time during the adjudication, claimed a water right based upon "recharge for irrigation".)

4. At all times prior to and after November 1, 1987, the company has diverted and delivered to the company's shareholders as needed water available up to the authorized maximum quantity available under Water Right No. 1-23B consisting of up to 1,172.1 cfs for irrigation purposes and 389.5 cfs for recharge for irrigation. *See* Second Affidavit of Howser paragraph 5 (there is no foundation in the record for this conclusion and nothing in the record to indicate when ASCC believed it was diverting any water for "recharge for irrigation".)
5. All of the above described wells of the company and of the objected to claimants in consolidated Subcase No. 35-2315 have as their source of supply for irrigation water recharge to the ground water under the company's Water Right No. 1-23B. *See* Second Affidavit of Howser ¶ 10 (there are absolutely no facts in the record to support this conclusory paragraph. This statement contradicts the settlement agreement and other statements made in Karl Dreher's Affidavit. The settlement agreement in Karl Dreher's Affidavit does not state that recharged water is the "source of supply", but rather that water is "recharged for irrigation" is used to mitigate for and replace depletions caused by ground water pumping.)

Finally, Objectors should be entitled to discover why Mr. Holliday, in his Affidavit stated "I prepared the recommendation consistent with IDWR's understanding of the agreement". There is no foundation in Mr. Holliday's Affidavit on how he came to the conclusion of what "IDWR's understanding of the agreement" is, who he talked to or what records he reviewed in order to come to this conclusion, who directed Mr. Holliday to prepare the recommendation, who approved the recommendation or how the "understanding" was determined.

Objectors should be entitled to take the depositions of these affiants in order to determine if there are facts, foundation, documents, and other evidence to support these conclusory statements. The options for the Court are straightforward under the law, it can either allow the discovery required for the Objectors to properly respond, or strike the statements that do not meet Rule 56's criteria. The response briefs completely fail to address the deficiencies in the Affidavits, including those specifically addressed above. Contrary to the State's argument, the Court should not blindly accept evidence to support a summary judgment motion when that evidence does not comply with Idaho's Civil Rules.

I.C. 42-1425(2) CLEARLY REQUIRES REMAND

The only logical conclusion that can be made from the State's argument is that it is arguing that I.C. § 42-1425(2) does not require remand 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. This argument is clearly contrary to the express unambiguous provisions of Idaho Code § 42-1425(2), which, in the event an objection is filed to an accomplished transfer, states that "the district court shall remand the water right to the director for further hearing....". The statute only speaks to when an objection is filed, not proven at trial, as the State and ASCC would have this Court interpret the language. Given the objections in this case, the Court was required to remand the case back to the Director for hearing on the questions concerning the claimed accomplished transfer. That was the trade-off the Legislature required for allowing claimants to proceed in making such a claim when they did not follow the requirements of the transfer procedures under Idaho Code § 42-222. Certainly, Special Master Bilyeu had no problem reading the statute as written and ordering a remand when objections were filed to the City of Pocatello's claimed accomplished transfers. *See Order on Summary Judgment*, Subcase 29-271 *et seq.* (attached to *Brief in Support of Motion for*

Reconsideration). The same reasoning should apply in this case as well. The clear wording of the statute requires this Court to remand this case to the Director for hearing.

**THE COURT SHOULD LET THE DIRECTOR DETERMINE THE TYPE OF HEARING THE
DIRECTOR WILL CONDUCT**

Contrary to the argument of the State, the provisions of Idaho Code § 42-1425(2)(a) are clear:

1. 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.
2. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions.
3. 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.
4. 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.

See I.C. § 42-1425(2)(a)

Again, the statute is clear and unambiguous. If an objection is filed, the district court shall remand the water right to the director, the director shall have a hearing, and following the hearing, the director shall submit a supplemental report to the court. If the claimant or any person who filed an

objection is aggrieved by the director's determination, they may seek review before the district court.

The Director's authority for conducting any "hearings", including the hearing referenced in the accomplished transfer statute, arises under the following statute:

- (1) All hearings required by law to be held before the director of the department of water resources shall be conducted in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

I.C. § 42-1701A.

Contrary to the State's argument, there is nothing in Idaho Code § 42-1425(2) which limits the type of hearing required by that section to the provisions of Idaho Code § 42-1410 (the director's report statute). The Objectors submit that I.C. § 42-1410 has no bearing on the procedure required under the accomplished transfer statute. Even if Idaho Code § 42-1410 somehow limits the inquiry of the director, that code section states that the director "may conduct any fact finding hearing necessary for a full and adequate disclosure of the facts, may examine the facilities in question, may request subpoenas compelling the attendance of witnesses or the production of documents" and otherwise does not limit the type of hearing that the director can conduct. *See* Idaho Code § 42-1410(1) and (2). Accordingly, even if the statute applied in this case, it would not restrict or limit the Director's authority to conduct the hearing required.

The State argues that "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...". However, the State provides no authority that would allow the court to ignore the express provisions of Idaho Code § 42-1425. Indeed, the so-called "usual practice" argument makes no sense when viewed against the statutory provision that specifically

requires a “hearing” before the Director. If the Director only had to issue a supplemental report to comply with the statute, that requirement would be set forth as an option in the statute.

It is the belief of the Objectors that if the State is asked at the time of hearing whether Idaho Code § 42-1425 requires a remand to the Director based upon the facts of this case, the State would have no option but to advise the Court that the statute clearly requires a remand. The clear and unambiguous wording of Idaho Code § 42-1425 requires the remand. In addition, the clear and unambiguous language of Idaho Code § 42-1425 sets forth the duties of the Director once a remand takes place.

**FOR ALL OF THE FOREGOING REASONS, THE COURT SHOULD SET ASIDE THE
ORDER GRANTING SUMMARY JUDGMENT**

As a procedural matter, if the Court grants the Objectors the right to discovery pursuant to IRCP 56(f), or if the Court remands the case as required by Idaho Code § 42-1425, the Court must set aside the Order Granting Summary Judgment in this case in order to allow discovery to proceed and to allow the remand mandated by statute. Following discovery and the Director’s compliance with the provisions of Idaho Code § 42-1425, the matter can then be addressed by the Court.

CONCLUSION

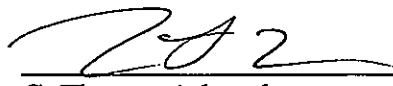
The argument of the State and ASCC is illogical. Unless the State and ASCC sincerely believe that Idaho Code § 42-1425 does not require an objection to a claimed accomplished transfer to be remanded to the Director for further hearing, they cannot logically argue that the Order Granting Summary Judgment was properly granted. Obviously if a remand is required, the Order was not properly granted. The State has provided no authority supporting its implied argument that Idaho Code § 42-1425 does not require a remand and that “usual practice” in the SRBA trumps the statutory

language.

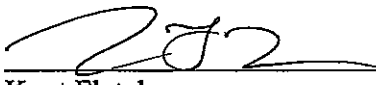
Objectors request that the Court allow additional discovery pursuant to IRCP 56(f) as required by Objectors. Further, the Objectors request that the Court follow the mandate set forth in Idaho Code § 42-1425 and remand this matter to the Director for hearing. Finally, either or both of these actions will require the Court to set aside its Order Granting Summary Judgment.

DATED this 13th day of October, 2009.

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CERTIFICATE OF MAILING

I certify that on October 13th, 2009, I mailed the original and copies of the foregoing to the following persons by U.S. Mail, postage prepaid, and by electronic mail:

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