

JUN 01 2010

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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	)	
	)	OBJECTORS' MOTION TO ALTER OR
	)	AMEND

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 move this Court, pursuant to Administrative Order No. 1 ("AO1") 13, for an order altering or amending the April 23, 2010 *Special Master Report* ("SMR") in the above subcases.

OBJECTOR'S MOTION TO ALTER OR AMEND

INTRODUCTION

The Special Master's decision in the above subcases is not in accordance with the law. In particular, the Special Master created a right where none existed at the time of appropriation and refused to comply with the plan language of the accomplished transfer statutes.

"Recharge" was not a lawfully recognized beneficial use of water until 1978. This fact is undisputed. Rather, the Special Master cites to a 1974 "policy" of the Idaho Water Resource Board as evidence that "recharge" was a legally recognized use of water before 1978 and should have an 1895 priority date. The law does not support this conclusion.

Likewise, the Special Master's refusal to remand the subcases for further harm analysis is directly contrary to the express language of Idaho Code § 42-1425. The law plainly requires that the SRBA "shall remand the water right to the director for further hearing." This language is clear. Remand is required.

ARGUMENT

I. Water Right 01-23B Should Not have a "Recharge for Irrigation" Purpose of Use with a Priority Date of 1895.

As a matter of law, this Court and ASCC are bound by prior decrees. *See* I.C. § 42-1420. Water right 01-23B, which was decreed in the *Rexburg Decree*, authorized the use of water for irrigation. *Rexburg Decree Findings of Fact & Conclusions of Law* at 151 (**Ex. A to Thompson Aff.**). "The 1910 Rexburg decree is conclusive proof of diversion of the water, and of application of the water to beneficial use, *i.e.*, the decree is res judicata as to the water rights at issue herein." *Crow v. Carlson*, 107 Idaho 461, 465 (1984). Given its binding nature, "It would be unwise and unjust to overturn a decree imposed 74 years ago which awarded water rights with a priority of nearly 100 years ago." *Id.* at 466; *see also Eagle Decree Stipulation* at 2 (**Ex. C to Thompson Aff.**) (ASCC signed the *Eagle Decree Stipulation* acknowledging that it is bound by the *Rexburg*

Decree). Importantly, the *Rexburg Decree* did not provide that the water rights were used for “recharge for irrigation.”¹ Rather, it provided for only “irrigation” and “for domestic and other purposes.” *Rexburg Decree Findings of Fact* at 151 (**Ex. A to Thompson Aff.**).

It is not surprising that the *Rexburg Decree* did not provide for “recharge for irrigation.” Indeed, “recharge” was not a statutorily recognized beneficial use until 1978. ASCC could not have changed the purpose of use of its “irrigation” water right to “recharge for irrigation” prior to that time. *See Order Denying Motion for Summary Judgment* at 4-5 (Subcase Nos. 36-00134B and 36-00135A, June 13, 1996, Special Master Dolan).

There is no evidence to dispute that “recharge” was not a lawfully recognized beneficial use until 1978. The Special Master’s only support for the contrary conclusion is a 1974 “policy” statement of the Idaho Water Resource Board (“IWRB”). The Special Master fails to explain, however, what purpose the 1978 statute (Idaho Code § 42-234) would have if “recharge” was already a lawfully recognized beneficial use. If it were true that the State recognized “recharge” as a beneficial use in 1974 – a conclusion based solely on the IWRB “policy” statement – then there would have been no need for the Legislature to expressly deem “recharge” a beneficial use in 1978.

In fact, as originally drafted, section 42-234 only addressed recharge “in the vicinity of St. Anthony and Rexburg, Idaho.”² The section specifically provided that “the legislature hereby declares that the appropriation and underground storage of water, for purposes of ground water recharge in the vicinity of St. Anthony and Rexburg, Idaho shall constitute a beneficial use.” *Id.*

¹ In addition, the Idaho Supreme Court has held that a prior decree entered in a private adjudication is binding upon the parties (and their privies) to that decree. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742 (1997). Presiding Judge Melanson recently explained that “in the SRBA, water rights decreed in a prior adjudication are binding upon the parties (and their successors-in-interest) to that decree. Such parties bound by that earlier decree may not collaterally attack it in a later adjudication, such as the SRBA.” *See Order of Recommitment to Special Master for Specific Findings* at 2-3 (Subcase No. 74-50A et al., January 12, 2009).

² For the Special Master’s convenience, a copy of the 1978 statute is attached to this Motion.

It was not until 1994 that the statute was amended to address recharge generally.³ Again, if it were true that “recharge” was a recognized beneficial use in 1974 – as the Special Master interprets the 1974 “policy” statement to mean – then it would make no sense to enact a statute that authorized “recharge” activities in “St. Anthony and Rexburg, Idaho” and later amend that statute to authorize “recharge” statewide. In short, “recharge” was not a recognized beneficial use until 1978 and any attempt to create a beneficial use where none existed is not supported by the law.

Since “recharge” was not a lawfully recognized beneficial use prior to 1978, the Court is without authority to recognize a water right that has as a Purpose of Use “irrigation for recharge” with a 1895 priority date.

II. The Refusal to Remand to the Director For Further Injury Analysis and a Hearing is Directly Contrary to the Plain Language of the Law.

The law is clear. 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.” I.C. § 42-1425(2)(a) (emphasis added). There is no discretion – the matter “shall” be remanded to the IDWR. Notwithstanding this plain language, the Special Master apparently believes that it is within his discretion to deny a remand request.

Here, the Special Master refused to follow the plain language of the statute because “the Director has already submitted his report with his findings and conclusions.” *Summary Judgment Order* at 11 (June 11, 2009). According to the Special Master, any “hearing would only serve to delay final resolution of the claim.” *Id.* The Special Master even found that “the

³ For the Special Master’s convenience, a copy of this amendment is attached to this Motion.

Director has already heard the matter.” *Reconsideration Order* at 4 (Jan. 8, 2010). These conclusions are wrong and entirely overlook the purpose of the statute.

First, contrary to the *Reconsideration Order*, the Director has never “heard the matter” of the claimed accomplished transfer and whether or not the “change injured a water right existing on the date of the change or constituted an enlargement.” I.C. § 42-1425(2)(a). No party has claimed that such a hearing took place. Furthermore, if one was held, the Objectors were not given the opportunity to participate. This is not a matter of running “over a skunk twice,” as the Special Master concludes. Indeed, the skunk has never been run over because the hearing was never held.

Second, the accomplished transfer statute is mandatory. There is no room for discretion. Indeed, the statute states that the Special Master “shall” remand the issue to the Department. Rather than doing that, however, the Special Master decided that the Director’s recommendation was sufficient to meet the requirements of the statute. *Summary Judgment Order* at 11. This conclusion flies in the face of the clearly worded statute.

Indeed, the statute anticipates that the Director will issue a recommendation – as he did in this case – and that that recommendation is not sufficient to avoid remand. This is made clear by the fact that the hearing requirement is triggered by the filing of an objection to the Director’s recommendation. I.C. § 42-1425(2)(a). That recommendation, therefore, does not meet the hearing requirements of the statute. If the Director’s recommendation was sufficient, there would be no need for the objection requirement to trigger a hearing. The Special Master’s contrary conclusion effectively renders the objection requirement null and void. *Walker v. Nationwide Financial Corp. of Idaho*, 102 Idaho 266, 268 (1981) (“it is incumbent upon this Court to give a statute an interpretation that will not in effect nullify it and it is not to be

presumed that the legislature performed an idle act of enacting a superfluous statute”) (internal citations omitted).

Special Master Bilyeu recently affirmed the mandatory nature of the accomplished transfer statute hearing requirements. In an *Order on Summary Judgment* (water rights 29-271 *et seq.*), Special Master Bilyeu followed the clear direction set forth in I.C. § 42-1425(2) and remanded the matter. She stated, at page 5 of the opinion, that “However duplicative a formal remand may be, it is provided for when an objection is filed relating to I.C. § 42-1425.”

Attempting to justify the refusal to remand by stating that the Coalition “offered no evidence of injury or enlargement” or that “no one has claimed injury or enlargement” misses the point. *Summary Judgment Order* at 11. The statute’s sole triggering requirement is that an objection be “filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use.” I.C. § 42-1425(2)(a). There is no requirement that the Objectors present any evidence of injury or enlargement to the SRBA Court before a remand can be ordered. Since the objectors filed objections to the purpose of use and place of use for water right 01-23B, the sole triggering requirement has been met and remand is necessary.

In enacting the accomplished transfer statute, the Legislature recognized that “prior to the commencement of the [SRBA], many persons entitled to the use of water or owning land to which water has been made appurtenant ... changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance” with section 42-222. I.C. § 42-1425(1)(a). The Legislature recognized that the denial of these claims for failure to comply with 42-222 “would cause significant undue financial impact to a claimant and the local economy.” *Id.* § 42-1425(1)(b). As such, in order to “avoid the harsh economic impacts that would result from a denial of the claim,” *id.*, the Legislature enacted the accomplished transfer

statute. Under this statute, a water user could claim a water right as an accomplished transfer and would thereby avoid the strict procedural requirements of section 42-108 and 42-222, *id.* at § 42-1425.

The waiver of these requirements, however, is not unlimited. As the statute makes clear, the waiver only exists to the extent that *no one objects to the accomplished transfer*. Indeed, “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 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.***” *Id.* § 42-1425(2) (emphasis added). Here, an accomplished transfer has been claimed. An objection to the purpose of use and place of use has been filed. As such, the law demands a remand.

CONCLUSION

The Special Master’s recognition of “recharge for irrigation” as a beneficial use with an 1895 priority date is not support by the law. That use was not lawfully recognized until at least 1978. Furthermore, the refusal to remand the water rights to the Department for further harm analysis – as plainly required by the accomplished statute – cannot stand. Accordingly, the Special Master should alter and amend the Special Masters Report for the above water rights.

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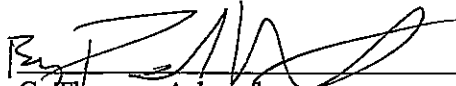
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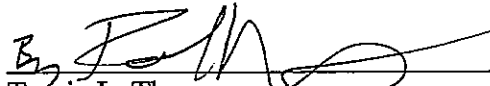
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DATED this 28th day of May, 2010.

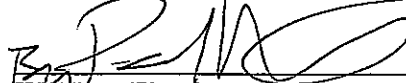
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CERTIFICATE OF SERVICE

I certify that on May 28, 2010, 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

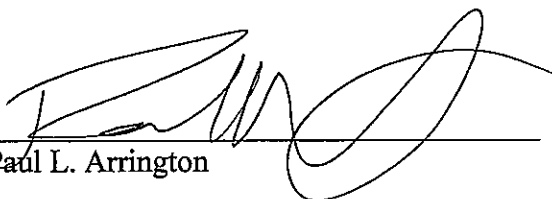
Copies mailed U.S. mail, postage prepaid, to:

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Paul L. Arrington

CHAPTER 366

(H.B. No. 598)

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AMENDING
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AN ACT
RELATING TO RECHARGE OF GROUND WATER BASINS; AMENDING
CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A
NEW SECTION TO BE KNOWN AND DESIGNATED AS SECTION
42-234, IDAHO CODE, TO DECLARE THE APPROPRIATION AND
UNDERGROUND STORAGE OF WATER FOR PURPOSES OF RECHARGE OF
GROUND WATER BASINS IN THE VICINITY OF ST. ANTHONY AND
REXBURG, IDAHO, A BENEFICIAL USE AND TO AUTHORIZE THE
DEPARTMENT OF WATER RESOURCES TO GRANT A PERMIT FOR THE
APPROPRIATION AND UNDERGROUND STORAGE OF WATER TO THE
AUTHORITIES RESPONSIBLE FOR THE IMPLEMENTATION OF THE
RECHARGE PROJECT; AMENDING SECTION 42-233a IDAHO CODE,
TO PROVIDE THAT IN ISSUING A PERMIT FOR THE APPROPRIA-
TION OF GROUND WATER IN EXCESS OF TEN THOUSAND ACRE FEET
PER YEAR FROM A SINGLE OR A COMBINATION OF DIVERSION
POINTS, THE DIRECTOR OF THE DEPARTMENT OF WATER
RESOURCES MAY REQUIRE THAT THE APPLICANT RECHARGE THE
GROUND WATER BASIN IF HE DETERMINES THAT WITHDRAWAL OF
THE AMOUNT REQUESTED WILL ADVERSELY AFFECT EXISTING
PUMPING LEVELS OR WATER RIGHTS; AMENDING CHAPTER 2,
TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION
TO BE KNOWN AND DESIGNATED AS SECTION 42-232, IDAHO
CODE, TO DIRECT THE DIRECTOR OF THE DEPARTMENT OF WATER
RESOURCES TO INSTITUTE NEGOTIATIONS WITH THE BUREAU OF
RECLAMATION AND THE IDAHO CONGRESSIONAL DELEGATION FOR
THE INCORPORATION OF AN ARTIFICIAL GROUND WATER RECHARGE
PROGRAM INTO CERTAIN PROJECTS FOR WITHDRAWAL OF GROUND
WATER BEING UNDERTAKEN IN CONJUNCTION WITH THE SALMON
FALLS CREEK IRRIGATION PROJECT IN TWIN FALLS COUNTY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be,
and the same is hereby amended by the addition thereto of a
NEW SECTION, to be known and designated as Section 42-234,
Idaho Code, and to read as follows:

42-234. GROUND WATER RECHARGE PROJECT IN THE VICINITY
OF ST. ANTHONY AND REXBURG, IDAHO -- AUTHORITY OF DEPARTMENT
TO GRANT PERMIT. It is the policy of the state of Idaho to
promote and encourage the optimum development and augmen-
tation of the water resources of this state. The legislature
deems it essential, therefore, that water projects designed

to advance this policy be given maximum support. The legislature finds that the pilot project to recharge ground water basins in the vicinity of St. Anthony and Rexburg, Idaho, has enhanced the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use. In view of the demonstrated feasibility of the project and in recognition of the benefits to be derived from its continuation and expansion, the legislature deems it in the public interest that this project be continued and expansions of this project be encouraged.

The legislature hereby declares that the appropriation and underground storage of water, for purposes of ground water recharge in the vicinity of St. Anthony and Rexburg, Idaho shall constitute a beneficial use and hereby authorizes the department of water resources to issue to the authorities responsible for the implementation and expansion of this recharge project a permit for the appropriation and underground storage of unappropriated waters in the area of recharge. Any right so granted shall be subject to depletion for surface storage or direct uses after a period of years sufficient to amortize the investment of the appropriator.

SECTION 2. That Section 42-233a, Idaho Code, be, and the same is hereby amended to read as follows:

42-233a. "CRITICAL GROUND WATER AREA" DEFINED -- PUBLIC HEARINGS -- PUBLICATION OF NOTICE -- GRANTING OR DENIAL OF APPLICATION -- APPEAL. "Critical ground water area" is defined as any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

Upon the designation of a "critical ground water area" it shall be the duty of the director of the department of water resources to conduct a public hearing in the area concerned to apprise the public of such designation and the reasons therefor. Notice of the hearing shall be published in two (2) consecutive weekly issues of a newspaper of general circulation in the area immediately prior to the date set for hearing.

In the event an area has been designated as a "critical ground water area" and the director of the department of water resources desires to remove such designation or modify the boundaries thereof, he shall likewise conduct a public

hearing following taking such action.

In the event respect to any local ground water resource with the provisions of Idaho Code, pertaining to requirements

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NEW SECTION, Idaho Code, as

42-232.

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in the obtaining of

April 7, 1994.

CHAPTER 433
(S.B. No. 1575)

AN ACT

RELATING TO GROUND WATER RECHARGE PROJECTS; AMENDING SECTION 42-234, IDAHO CODE, TO RECOGNIZE THAT GROUND WATER RECHARGE PROJECTS ENHANCE THE FULL REALIZATION OF IDAHO WATER RESOURCES, TO PROVIDE THE EFFECT OF RIGHTS ACQUIRED PURSUANT TO PERMIT OR LICENSE, TO RECOGNIZE THAT INCIDENTAL GROUND WATER RECHARGE BENEFITS ARE OBTAINED FROM THE DIVERSION AND USE OF WATER FOR VARIOUS BENEFICIAL PURPOSES, BUT THAT SUCH INCIDENTAL RECHARGE MAY NOT BE USED AS THE BASIS FOR CLAIM OF A SEPARATE OR EXPANDED WATER RIGHT AND TO PROVIDE WHAT IS IN THE PUBLIC INTEREST; AND DECLARING AN EMERGENCY.

Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-234, Idaho Code, be, and the same is hereby amended to read as follows:

42-234. GROUND WATER RECHARGE PROJECTS IN--ST--ANTHONY--AND--REXBURG,--IDAHO -- AUTHORITY OF DEPARTMENT TO GRANT PERMIT. (1) It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support. The legislature finds that the pilot projects to recharge ground water basins in the vicinity of--St--Anthony--and--Rexburg, Idaho, has enhanced may enhance the full realization of our water resource potential by furthering water conservation and increasing the water available for beneficial use. In--view--of--the--demonstrated--feasibility--of--the--project in--recognition--of--the--benefits--to--be--derived--from--its--continuation and expansion, the legislature deems it in the public interest that the project be continued and expansions of this project be encouraged.

(2) The legislature hereby declares that the appropriation and underground storage of water for purposes of ground water recharge in the vicinity of St. Anthony and Rexburg, Idaho shall constitute a beneficial use and hereby authorizes the department of water resources to issue to the authorities responsible for the implementation and expansion of this recharge project a permit for the appropriation and underground storage of unappropriated waters in the an area of recharge. The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior per-

Nothing contained in a license to the owner, because of a split in from a ski resort in section 23-903, Idaho Code, applicable to apply to any license

AN ACT
RELATING TO THE SALARIES OF STATE ELECTIVE OFFICERS; AMENDING SECTION
59-501, IDAHO CODE, TO ADJUST THE SALARIES OF THE STATE ELECTIVE

Approved April