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JUN 28 2010

DEPARTMENT OF
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	)	
	)	Case No. See Exhibit A
Case No. 39576	)	
	)	OPPOSITION TO MOTION FOR
	)	REHEARING OF ORDER DENYING
	)	MOTION TO REMAND SUBCASES
	)	
	)	
	)	
	)	

COME NOW, ALBERT & ALVERA FOLS, CHARLES & MARY HARLING, A.C. & LUELLA PILKERTON, LLOYD & SHERYL TUTOR, JAMES EDGREN & JENNIFER BRADY, and TRACY MASCIA, Respondents in the above-referenced subcases (hereinafter collectively referred to as the "Carmen Creek Users"), by and through their attorneys of record, Barker Rosholt & Simpson LLP, and hereby submit this opposition to the , *Motion for Rehearing of Order Denying Motion to Remand* filed by one Objector in these subcases, John and Ruth Burns ("Burns").¹ The motion fails to justify the request to remand these subcases to IDWR and

¹ Noticeably, none of the other Objectors, George Matejko, Rick and Linda Rice, Robert M. & Jacqueline D. Ernest, William W. Clements and James R. & Rowena D. Quinn, have sought rehearing on the Special Master's *Order Denying Motion to Remand Subcases*.

delay the trial schedule.² As discussed below, the Court properly denied the request for remand pursuant to Idaho Code § 42-1425. There is no basis to reconsider that decision.

Burns seeks rehearing on the Special Master's decision to deny the request for remand pursuant to Idaho Code § 42-1425(2)(a). Burns alleges that there is significant information demonstrating why the Department's determination that the Exchange Water Rights were moved to the north side of Carmen Creek through an accomplished transfer is inappropriate and should be reversed. However, Burns misunderstands the purpose of the remand statute and provides no reason for this Court to reconsider its decision denying the prior motion.

Resolution of this motion rest in the plain language of the accomplished transfer statute:

(2) Any change of place of use, point of diversion ... by any person entitled to use of water ... prior to November 19, 1987 ... may be claimed in a general adjudication ... 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 rights. ...

(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.

I.C. § 42-1425(2) (emphasis added); *see also* I.C. § 42-1425(1) (The purpose of the accomplished transfer statute is to provide a “more limited examination” of the changes to ensure that they “do not injure other existing water rights or constitute an enlargement of use of the original right”).

In reviewing the law and facts, the Special Master properly concluded that the remand provision does not apply here because, in 1948 – the year that the Department determined the

² In their *Reply to Response to Objector's Motion to Remand Subcases*, the Objectors admitted that remand would likely delay the trial schedule they agreed to that has been set before the Court for several months.

accomplished transfer took place – the entire property was owned by a single landowner, Mr. Frank Parmenter. The Objectors try to confuse matters by referencing a 1915 conveyance and “some 23 land transactions” that “took place involving the original homestead prior to the subdivision.” *Motion* at 3. Importantly, however, there is no dispute that in 1948 all of the relevant land (i.e. all of the land to which the above water rights and claims are appurtenant) was owned by Mr. Parmenter. Based upon this undisputed fact, the Special Master properly concluded that “none of the current landowners’ water rights existed at that time [in 1948]. Hence, the Burns Group cannot claim injury from any accomplished transfer that may have occurred before they purchased their lands.” *Order* at 2. To put it simply, the remand provision does not apply in this case.

The Objectors would have the Special Master overlook the “other water rights existing on the date of the change” language in the accomplished transfer statute – claiming that subsection (2) of the accomplished transfer statute should be bifurcated and read as separate provisions. *Motion* at 2. The law, however, does not allow the Special Master read provisions of a statute in a vacuum. *Moss v. Bjornson*, 115 Idaho 165, 166 (1988) (a statute “cannot be examined in a vacuum. It is a well-settled principle of statutory construction that statutes should not be construed to render other provisions meaningless”).

That the accomplished transfer statute does not apply here is further emphasized by the fact that this dispute seeks to resolve competing claims to the same water rights – i.e. the Exchange Water Rights (priority dates 1875 and 1882). Both the Carmen Creek Users and the Objectors – including the other five that have not sought rehearing of the Special Master’s *Order* – claimed portions of the Exchange Water Rights. According to the Director, those portions of the Exchange Water Rights were transferred (via an accomplished transfer) off of the lands on

the south side of Carmen Creek to those on the north side in 1948. The Objectors have simply filed a claim to water that was moved off of their land over 60 years ago. Indeed, they claim the same water rights – portions of the Exchange Water Rights. They do not have any “other existing” water rights that could have been affected at the time of the accomplished transfer. Merely filing a claim to the same water and receiving a separate claim number cannot trigger the remand provisions of the accomplished transfer statute, as recognized by IDWR at the June 3, 2010 hearing.

Furthermore, in addition to the fact that the Objectors have not claimed “other existing” water rights, Burns demonstrates a misunderstanding of the purpose of the remand provisions. The remand provisions contemplate an administrative hearing to determine whether or not the accomplished transfer injured other water rights or enlarged the use of the transferred water rights. Notwithstanding this clearly stated purpose, Burns’ *Motion* centers around the “facts” they claim demonstrate that an accomplished transfer did not occur and why they should be entitled to a portion of the Exchange Water Rights. *Motion* at 2-6. In essence, they believe that an administrative hearing before IDWR will determine the parties’ respective “ownership” of the water rights. They are mistaken.

IDWR plainly explained to the Court at the June 3rd hearing that competing water right claims and determining ownership of water rights is an issue to be resolved by the SRBA Court through the objection process, not through a remand hearing before IDWR under Idaho Code § 42-1425(a). They claim that a “full and complete administrative record” is required before the SRBA Court can proceed with a trial on the pending Objections. *Motion* at 2-6. However, that is not the purpose of the remand hearing as set forth in Idaho Code § 42-1425(a), and the “record” Burns seeks to complete will be the trial proceeding on the pending Objections.

Importantly, neither Burns nor the other five Objectors seek a remand to discuss injury to, or enlargement of, other “existing” water rights. Instead, they appear to ask the Court to order IDWR to conduct the trial on their pending Objections. Again, this interpretation is contrary to the law, as recognized by the Court’s decision denying the motion.

Finally, enlargement is not an issue here for at least the following reasons. First, the total acreage recommended in the 2010 *Supplemental Report* is less than the total acreage recommended in the 2007 *Director’s Report*. There was no claim of enlargement by the Objectors to the 2007 recommendation. Second, the Objectors seek an order from the Court disallowing the Carmen Creek Users’ claims to the exchange water rights. Again, this is an “ownership” question to be resolved by the SRBA Court, not through a remand hearing before IDWR. According to the *Objections*, there can be no enlargement because the water rights should not be recommended – let alone used – on the Carmen Creek Users’ properties.

Accordingly, for the reasons stated above, and in the Carmen Creek Users’ *Response to Objector’s Motion to Remand Subcases*, the Special Master properly denied the requested remand and should deny the *Motion for Rehearing*.

DATED this 25th day of June, 2010.



Travis L. Thompson
Paul L. Arrington

Attorneys for the Carmen Creek Users

CERTIFICATE OF MAILING

I certify that on the 25th day of June, 2010, I served a true and correct copy of the foregoing **OPPOSITION TO MOTION FOR REHEARING OF ORDER DENYING MOTION TO REMAND SUBCASES** on the following individuals via first class mail, postage prepaid:

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**OPPOSITION TO MOTION FOR REHEARING OF ORDER DENYING MOTION TO
REMAND SUBCASES**

Attachment A

75-10061AA	75-10061N	75-10061A
75-10061B	75-10061X	75-10061Q
75-10061C	75-10062L	75-10061R
75-10061J	75-10062V	75-10061Y
75-10061T	75-14025	75-10061AE
75-10061Z	75-14027	75-10062A
75-10061AC	75-14044	75-10062P
75-10061AM	75-14046	75-10062W
75-10062C	75-14055	75-10062AC
75-10062H	75-14056	75-14441
75-10062R	75-14057	75-14443
75-10062X	75-14058	75-14540
75-10062Y		
75-10062AA		
75-10062AB		
75-10062AL		
75-10136A		
75-10136B		
75-10137A		
75-10137B		
75-14388		