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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, and
	)	35-04246
	)	
	)	STATE OF IDAHO'S MEMORANDUM IN
Case No. 39576	)	RESPONSE TO OBJECTORS' MOTION TO ALTER
	)	OR AMEND
	)	
	)	

The State of Idaho, ("State"), by and through the undersigned deputy attorney general, hereby files this memorandum in response to *Objectors' Motion to Alter or Amend* 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 ("Surface Water Coalition" or "SWC") on May 28, 2010, seeking an Order altering or amending the April 23, 2010 *Special Master's Report* in the above subcases.

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* ("June 11, 2009 Order"). After the Surface Water Coalition filed a *Motion for Reconsideration*, the Special Master entered an *Order Denying Rule 56(f) Request for Additional Discovery and Motion for Reconsideration* ("January 8, 2010 Order"). In accordance with these orders, on April 23, 2010 the Special Master issued a

Special Master's Report and Partial Decree pursuant to I.R.C.P. 54(d) for Water Right Nos. 01-23B and 01-297. In response, the Surface Water Coalition filed on May 28, 2010, its *Objectors' Motion to Alter or Amend* scheduled for hearing before the Special Master on July 1, 2010.

The *Objectors' Motion to Alter or Amend* fails to present any arguments not previously heard and considered in these proceedings. These arguments have been addressed in the State's briefs and oral arguments which are incorporated by reference here. For the convenience of the court, a brief summary of the State's position on the issues raised by the SWC over the course of these proceedings is provided.

The Surface Water Coalition advances the argument that recharge could not have been a beneficial use of water prior to the 1978 enactment of Idaho Code § 42-234. As the Special Master concluded correctly in the June 11, 2009 Order and January 8, 2010 Order, this argument is flawed both legally and factually. Nothing in Idaho law precluded recharge appropriation prior to 1978, and the considerable benefits of recharge had been widely recognized long before the enactment of section 42-234.

Moreover, during the summary judgment proceedings, the SWC failed to offer any evidence whatsoever to rebut the presumption afforded the Director's Report¹ concluding that recharge for irrigation be included as a purpose of use for a portion of Aberdeen-Springfield Canal Company's ("ASCC") water rights. That conclusion was fully supported by the affidavits and documents submitted by the State and ASCC, and therefore, summary judgment consistent with the Director's Report was proper.

During the summary judgment proceedings, the Surface Water Coalition sought to use Rule 56(f)² to initiate discovery and take additional testimony, long after the discovery period had closed. The SWC appears to have abandoned this argument in the *Motion to Alter or Amend*, and wisely so. The SWC had notice of the central issues in these subcases long before the summary judgment proceedings. They had ample opportunity during the court-ordered discovery period to obtain information and documents on the factual underpinnings of the

¹ *Amended Director's Reports, Subcase Nos. 01-23B, 01-287, 35-2543 and 35-4246 (March 25, 2008).*

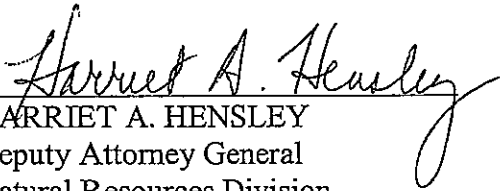
² Rule 56(f). When affidavits are unavailable in summary judgment proceedings.

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.

Director's Report, and yet failed to take advantage of discovery whatsoever. Thus, the Special Master properly exercised his discretion in denying the Rule 56(f) motion.

The Surface Water Coalition also argues that, pursuant to the accomplished transfer statute, they are entitled to a hearing under the Idaho Administrative Procedure Act and an opportunity to "put on evidence and confront witnesses." *Brief in Support of Motion for Reconsideration* at 1. This argument is completely without merit. The Director does not have jurisdiction to conduct a contested case proceeding in the Snake River Basin Adjudication ("SRBA"). Nor can a party to the SRBA use the remand procedures in the accomplished transfer statute to obtain testimony it failed to secure during a court-ordered discovery period, conduct belated trial-type proceedings to challenge a party's case, or shift the burden of proof on injury or enlargement. Thus, even if the Court were to decide to remand for a hearing pursuant to Idaho Code § 42-1425(2), the scope of the hearing should be limited in compliance with and consistent with Idaho Code § 42-1410.

DATED this 28th day of June 2010.


HARRIET A. HENSLEY
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June 2010, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S MEMORANDUM IN RESPONSE TO OBJECTORS' MOTION TO ALTER OR AMEND on each of the following persons by the indicated method

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
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- ☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
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☐ Statehouse Mail

2. Copies via facsimile and also by U.S. Mail, postage prepaid and addressed to:

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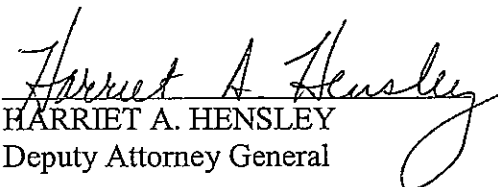
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