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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. 1-23B, 1-297, 35-2543 and
Case No. 39576) 35-4246
(Aberdeen-Springfield Canal Company)
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)

SURFACE WATER COALITION'S JOINT OPENING BRIEF ON CHALLENGE

On *Challenge* from Special Master Dolan's April 23, 2010 *Special Master Report* and August 21, 2010 *Order Denying Motion to Alter or Amend*

Honorable Eric J. Wildman, Presiding Judge

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Facsimile: (208) 436-6804
Attorneys for A&B Irrigation District et al.

C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP PLLC
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873
Attorneys for AFRD #2

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444
Attorneys for A&B Irrigation District, et al.

(See Service Page for Remaining Counsel)

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INTRODUCTION

This *Challenge* raises two distinct legal issues seeking to correct errors in the Special Master's April 23, 2010 *Special Master Report* ("SMR") and August 21, 2010 *Order Denying Motion to Alter or Amend*. These issues involve the Special Master's refusal to comply with the nondiscretionary language of the accomplished transfer statute (I.C. § 42-1425) and the creation of a beneficial use where none existed. These plain legal errors require reversal of the Special Master's decision in this case.

Although Aberdeen Springfield Canal Company ("ASCC") claimed "irrigation" as the purpose of use for water right 01-23B, the Director recommended "irrigation" and "recharge for irrigation" in his Director's Report. The recommendation was based on the theory that ASCC had completed an accomplished transfer that allows the diversion of groundwater under the theory that the groundwater is actually recaptured water previously diverted under ASCC's surface water right.

The "recharge for irrigation" purpose of use is apparently an attempt to "mitigate" for certain groundwater use within the ASCC surface irrigation project. *See Settlement Agreement Regarding ASCC's Basin 01 Surface Water Rights and Consolidated Subcase No. 35-2315* ("*Settlement Agreement*") at 4.¹ Although the surface water right was under the direction and control of Water District 01 for several decades, pursuant to prior decrees, and distributed as an "irrigation" water right only, the Director unilaterally changed the purpose of use as part of the 2002 *Settlement Agreement* with ASCC.² The Surface Water Coalition filed timely objections

¹ A copy of the *Settlement Agreement* is included as Exhibit E to the *Affidavit of Travis L. Thompson in Support of Objectors' Joint Motion for Summary Judgment* (dated March 27, 2009) (hereinafter referred to as "*Thompson Aff.*")

² The *Settlement Agreement* purports to address "mitigation" matters for private ground water rights in Basin 35. It is questionable whether the SRBA District Court can "decree" an agreement that addresses "mitigation" matters for future water right administration cases that have yet to proceed before IDWR or the relevant water districts. Moreover, given the procedural requirements for mitigation plans filed under the Conjunctive Management Rules (37.03.11.43), the terms of the *Settlement Agreement* may violate Idaho law.

to the purpose and place of use elements of water right 01-23B. Notwithstanding the objections, the Special Master proceeded to approve the recommendations on summary judgment. This decision violates Idaho law.

First, Idaho Code § 42-1425 provides that the SRBA District Court “*shall remand* the water right to the director for further hearing” whenever an objection has been filed on a water right recommended pursuant to an accomplished transfer. The statutory language is mandatory and provides no discretion. Remand is required and the Special Master’s refusal to comply with this law should be reversed.

Second, “recharge” was not a lawfully recognized beneficial use of water throughout Idaho until 1994.³ This fact is undisputed. However, relying on a 1974 “policy” of the Idaho Water Resource Board (“IWRB”), the Special Master recommended the above water rights with a “recharge for irrigation” purpose of use with an 1895 priority date – 99 years *before* recharge was lawfully recognized as a beneficial use by the Idaho Legislature. There is no legal support for the Special Master’s conclusion. The IWRB policy merely provides that beneficial uses should be broadly construed – it did not purport to create new beneficial uses for the appropriation of water in the State. Indeed, if that “policy” did establish a legal basis for creating a new beneficial use, there would have been no need for the subsequent legislative actions creating the beneficial use of recharge. Any “recharge for irrigation” element on a water right, therefore, must be limited to a priority date no earlier than the time that “recharge” became a legally recognized beneficial use.

In sum, the Special Master’s recommendation violates Idaho law. Therefore, the Court should reverse and remand the decision.

³ As discussed here, prior legislative recognitions of recharge as a beneficial use were limited to specific geographic regions.

STATEMENT OF ISSUES

Based on the foregoing facts, the Coalition raises the following issues in its Challenge:

1. Whether the Special Master erred in refusing to remand water right 01-23B to the Idaho Department of Water Resources (“IDWR”) where Idaho Code § 42-1425 requires a remand whenever an objection has been filed on the place and purpose of use elements of a water right subject to an accomplished transfer?
2. Whether the Special Master erred in recommending for decree a new beneficial use, “recharge for irrigation,” that was only created through agreement between IDWR and the ASCC and that is contrary to the prior decreed use for the water right?
3. Whether the Special Master erred in recommending a water right with “recharge for irrigation” as a purpose of use and a priority date of 1895, when “recharge” was not a legally recognized beneficial use in Idaho until at least 1978?
4. Whether there are sufficient facts in the record to support the finding that ASCC changed the nature or a portion of its diversion from “irrigation” to “recharge for irrigation” at any time prior to November 19, 1987, as required by Idaho Code § 42-1425, in order to avoid the requirements of Idaho Code § 42-222?

STATEMENT OF FACTS

ASCC's water right 01-23B is subject to a prior decree that did not include "recharge for irrigation" as a purpose of use. The water right was decreed to the American Falls Power & Canal Company (ASCC's predecessor) in the *Rexburg Irrigation Company, et. al v. Teton Irrigation Canal Company, et. al* adjudication on December 19, 1910 ("*Rexburg Decree*"). In the *Rexburg Decree's Findings of Fact and Conclusions of Law*, Referee F.J. Cowen found the following relative to water right 01-23B:⁴

33. That the said lands are arid in character, and require the artificial application of water thereto before they can be successfully cultivated and profitable crops of agricultural products raised thereon.

34. That for the irrigation of their respective tracts of land, and for the irrigation of tracts of land lying under the canals of the various appropriators herein, and for domestic and other purposes, the said claimants and their predecessors in interest appropriated, on the respective dates set opposite their names, of the waters of the Snake River and its tributaries, the respective amounts of water set opposite each name, and at the respective times, to wit;

Ex. A to *Thompson Aff.* (*Rexburg Decree Findings of Fact* at 151).

Water right 01-23B was reaffirmed to ASCC on March 12, 1969 in the *Aberdeen-Springfield Canal Company et. al v. Henry Eagle* adjudication ("*Eagle Decree*"). Ex. B to *Thompson Aff.* ASCC and the Coalition were all parties to the stipulation and decree in that case. Ex. C to *Thompson Aff.* (*Stipulation* at 71-73). There, the parties agreed that "all the parties plaintiff herein do hereby accept as binding upon them the provisions of all prior valid decrees ... including, particularly, but not limited to the *Rexburg Decree*." *Id.* at 2.

ASCC filed its original *Notice of Claim* for water right 01-23B on May 8, 1990, consistent with the prior decrees, claiming an "irrigation" purpose of use only. Ex. D to

⁴ At the time of the *Rexburg Decree* water right 01-23B01-23B was part of larger water right (62,500 inches, or 1,250 cfs) decreed to ASCC's predecessor, the American Falls Power & Canal Company. Ex. A to *Thompson Aff.* (*Rexburg Decree Findings of Fact and Conclusions of Law* at 152). Water right 01-23B01-23B was originally claimed as part of water right 01-23. The right was split sometime after May 8, 1990.

Thompson Aff. ASCC did not allege that its water right included a “recharge for irrigation” purpose of use at that time.

On June 7, 2002, ASCC, IDWR, and the State of Idaho entered into the *Settlement Agreement* to resolve ASCC’s objections to certain ground water rights in Basin 35. Ex. E to *Thompson Aff.* In order to resolve ASCC’s objections, the *Settlement Agreement* stated that IDWR would recommend “irrigation” and “recharge for irrigation” as the purposes of use for ASCC’s surface water rights 01-23B and 01-297.⁵ See *Settlement Agreement* at 3. The parties expressly recognized that such a recommendation “will not automatically result in approval by the SRBA District Court of IDWR’s recommendation for the Canal Company’s Basin 01 water rights,” *id.* at 5.

On May 15, 2007, ASCC filed an *Amended Notice of Claim* for water right 01-23B.⁶ Ex. F to *Thompson Aff.* In the *Amended Notice of Claim*, ASCC again only claimed an “irrigation” purpose of use for its water right and indicated that it was being filed “to more accurately [identify] the place of use resulting in a larger number of acres than originally claimed.” *Id.* The claim for “irrigation” as the only purpose of use is consistent with the *Rexburg* and *Eagle* decrees and the original claim filed by ASCC in 1990. *Supra.*

On March 21, 2008, IDWR issued its amended Director’s Report for water right 01-23B, recommending both an “irrigation” and “recharge for irrigation” purpose of use. There is no explanation in the amended claim as to why the Director recommended a “recharge for irrigation” purpose of use even though no such claim was ever made by ASCC. The Coalition

⁵ IDWR did not recommend a “recharge for irrigation” purpose of use for water right 01-297 in its amended Director’s Report issued on March 21, 2008. As such, the Coalition did not file an objection to the purpose of use for that water right. Likewise, Special Master Dolan did not recommend water right 01-297 with a “recharge for irrigation” purpose of use.

⁶ The claims may have been amended between the original notice of claim in 1990 and the latest amended claim filed in 2007. Those amended claims, if any, are not relevant for this motion but should be filed on record with the SRBA Court if the Court needs to review them.

filed a timely objection to the amended Director's Report, objecting to the purpose and place of use elements of the recommendation.

The Coalition filed a motion for summary judgment on March 26, 2009. The Coalition asserted, as a matter of law, that "recharge for irrigation" was not a valid beneficial use on a water right with a priority date of 1895. The Coalition also argued that the objection to the place and purpose of use elements of the water right mandated a remand to IDWR based on the provisions of Idaho Code § 42-1425. ASCC also filed a motion for summary judgment in late March, 2009. In support, ASCC submitted the affidavit of Steve Howser, its manager. The State of Idaho then filed a "response" to the Coalition's motion for summary judgment, and submitted the affidavits of Karl Dreher (former Director) and Michael Holliday (IDWR employee). Although styled a "response," the State's briefing and affidavits actually supported ASCC's motion for summary judgment. Contrary to Rule 56(c), the State's materials in support of ASCC's motion were only filed two weeks before the summary judgment hearing. Consequently, the Coalition filed a motion to strike the affidavits or alternatively requested the opportunity to depose the affiants as provided by I.R.C.P. 56(f).

On June 11, 2009, the Special Master issued his *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment & Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike*. On January 8, 2010, the Special Master issued his *Order Denying Rule 56(f) Request for Additional Discovery & Motion for Reconsideration*. On April 23, 2010, the Special Master issued a *Special Master Report*. On August 21, 2010, the Special Master issued an order denying the Coalition's *Motion to Alter or Amend*. The Coalition filed a timely challenge to the Special Master's orders.

STANDARD OF REVIEW

This Court recently stated the standard of review on a challenge as follows:

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriquez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p.18.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodward*, 124 Idaho 531, 534 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

Memorandum Decision & Order on Challenge, Subcase No. 63-32533 (Apr. 21, 2010), pp. 3-4

The Special Master's *Recommendation* does not "correctly state the law." As such, the Presiding Judge should reverse the decision and, at a minimum, instruct the Special Master to remand the proceeding back to IDWR as required by I.C. § 42-1425.

ARGUMENT

I. The Refusal to Remand to the Director For Further Hearing is Directly Contrary to the Plain Language of the Accomplished Transfer Statute.

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. *See Simpson v. Louisiana Pacific Corp.*, 134 Idaho 209, 212

(2000); *see also, Madison v. J.I. Morgan, Inc.*, 115 Idaho 141, 144 (1988) (“This Court has held on many occasions that the word ‘shall’ denotes a mandatory, not a discretionary, act”).

Notwithstanding this plain language, the Special Master refused to remand the case to IDWR. Instead, the Special Master reasoned that a remand “would only serve to delay final resolution.” *Summary Judgment Order* at 11. Yet, alleged “delay” in litigation is not an exception to the statutorily required remand. Contrary to the Special Master’s conclusions, the language is clear – there is no room for discretion in the accomplished transfer statute. As such, the Special Master erred as a matter of law and the summary judgment order, and subsequent Special Master’s Report must be vacated.

Through 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. The findings clarify that many accomplished transfers “occurred with the knowledge of other water users and that the water has been distributed to the right as changed.” I.C. § 42-1425(b).

Relief from the statutory transfer process, however, is not unlimited – particularly when other water users are not aware of the alleged change and the right is not distributed “as

changed.” As the accomplished transfer statute makes clear, the waiver of the transfer requirements only exists to the extent that no one objects to the accomplished transfer. If an objection is filed, remand is required:

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 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).

The remand requirement ensures due process to water users that have no knowledge of the purported change. It ensures that the requirements of “no injury” and “no enlargement” are met. In this case, the Coalition filed an objection to the place and purpose of use elements of the water right – thus triggering the statute’s automatic remand requirement. The issues of whether the alleged transfer resulted in “injury” to other rights or an “enlargement” of ASCC’s irrigation water right have not been determined.

The Special Master refused to follow the plain language of the statute on the theory that “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 Director has already heard the matter.” *Reconsideration Order* at 4 (Jan. 8, 2010).⁷ No hearing was held before the Director as the statute’s required remand was ignored by the Special Master. As such, the Special Master’s decision is plainly erroneous and must be reversed.

⁷ 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. If one was held, the Objectors were not given the opportunity to participate.

The statute makes clear that a Director's report does not circumvent the remand obligation. The statute anticipates that the Director will issue a recommendation – as he did in this case. The remand requirements are not triggered until an objection is filed. A recommendation on its own, therefore, cannot meet the hearing requirements of Idaho Code § 42-1425. The Special Master's contrary conclusion effectively renders the objection and remand 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).⁸

In light of the plain language of the statute, the Special Master's conclusion that the Coalition "offered no evidence of injury or enlargement" or that "no one has claimed injury or enlargement," *Summary Judgment Order* at 11, misses the point. Indeed, 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 required.

In addition, the Coalition never had the opportunity to discover or present evidence of injury or enlargement before IDWR because no hearing was allowed. In lieu of a fair and open hearing before IDWR, the Special Master proceeded to consider affidavits submitted by ASCC

⁸ Special Master Dolan's refusal to remand is also inconsistent with a previous decision by Special Master Bilyeu. In her *Order on Summary Judgment* (water rights 29-271 *et seq.*), Special Master Bilyeu followed the clear, nondiscretionary, mandates of I.C. § 42-1425(2)(a). 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."

and the State of Idaho that did not comply with Idaho's civil rules of procedure. First, the affidavits submitted by ASCC and the State included numerous "conclusory" statements without any foundation. See *Objectors' Objection to and Motion to Strike Affidavits* at 3-7 (April 23, 2009). For example, former Director Karl Dreher made the following statements regarding the alleged accomplished transfer:

7. I concluded that the accomplished transfer was justified because ASCC shareholders continued to pay assessments and ASCC diverted the full amount of water authorized under water right number 01-23B in most years. Thus, a portion of the diversion provided incidental recharge to the Eastern Snake Plain Aquifer ("ESPA").

There is nothing in the record to support the stated conclusion that ASCC shareholders continued to pay assessments, and there is no foundation indicating the shareholders to which Mr. Dreher is referring. Further, there is nothing in the record to support the statement that ASCC diverted "the full amount of water authorized under water right number 01-23B in most years" and there is no indication of the years to which Mr. Dreher refers. There is nothing in the record supporting the conclusory statement that "a portion of the diversion provided incidental recharge to the Eastern Snake Plain Aquifer ("ESPA")", and even if true, there is nothing in the law or in the affidavit that would explain how or when "incidental recharge" is converted into "recharge for irrigation."⁹

In addition, Mr. Dreher made the following conclusory statement about the alleged accomplished transfer:

8. The change from irrigation to recharge for irrigation took place prior to November 19, 1987.

Although this assertion is repeated in various places, there are no facts set forth supporting this

⁹ The *Settlement Agreement* is an integrated agreement (see paragraph 6 of the *Settlement Agreement*) and is not ambiguous. As such, the Director and any other person are now barred from attempting to add interpretations or terms to the written integrated agreement. The *Settlement Agreement* makes no mention of "incidental recharge."

conclusion and no explanation of when or how incidental recharge under ASCC's irrigation water right became "recharge for irrigation." Without a specific date to identify when the change occurred, there is no way for the Objectors, IDWR or the Court to analyze whether the change caused "injury" to other water rights or constituted an "enlargement" of the right.

Notwithstanding the lack of facts in the record, Mr. Dreher concluded:

9. The accomplished change in purpose of use from irrigation to recharge for irrigation for a portion of ASCC's water rights did not injure other water rights or result in an enlargement because the amount of water ASCC diverted and consumptively used was no more than its historic diversion and consumptive use.

10. Since the change from irrigation to recharge for irrigation took place prior to the commencement of the SRBA on November 19, 1987, and there was no injury and no enlargement, the criteria of the accomplished transfer statute, Idaho Code § 42-1425, were met.

The statements that there is no injury or enlargement are wholly conclusory, and there are no facts indicating how or when IDWR came to such a conclusion or the factors that were reached in making this conclusion.

The conclusions lack foundation and plainly violate Idaho's civil rules. *See* I.R.C.P. 56(e). In essence, Mr. Dreher's affidavit substituted for the process provided by the required remand under I.C. § 42-1425. The Coalition was denied due process and was not provided any opportunity to discover the basis of Mr. Dreher's statements. Notably, Mr. Dreher's affidavit was submitted as part of the State of Idaho's "response" brief on summary judgment on April 16, 2009, only two weeks prior to the summary judgment hearing (leaving the Coalition just one week to respond).

Given the conclusory statements offered in the Dreher affidavit as well as others, the Coalition requested the opportunity to depose the affiants in order to properly respond to

ASCC's motion. The Coalition submitted the *Affidavit of Travis L. Thompson* in support of the Rule 56(f) request, wherein the need for depositions was explained:

5. The undersigned affiant believes that depositions of Mr. Dreher, Mr. Holliday, and Mr. Howser are necessary to allow the Objectors to discover the basis for the statements contained in the affidavits and respond to ASCC's motion for summary judgment. The undersigned affiant believes these depositions are necessary so that the Objectors may present facts essential to justify their opposition to ASCC's motion.

Affidavit of Travis L. Thompson at 2 (dated April 23, 2009).

Although ASCC and the State of Idaho submitted the objectionable affidavits only a week before the Coalition was required to respond, the Special Master wholly ignored the Rule 56(f) request prior to the summary judgment hearing – further prejudicing the Coalition.¹⁰ Instead, the Special Master wrongly considered the affidavits and refused to allow the Coalition to depose the affiants. *See Summary Judgment Order* at 11-12. This action plainly violated Idaho's civil rules and prejudiced the Coalition's right to discover the basis of the statements made in order to respond to ASCC's motion.

In essence, the Special Master unlawfully denied the Coalition the right to discover the basis of the statements made by Mr. Dreher and others, and instead considered the affidavits as a substitute for the required remand before IDWR. Given the timing of when the affidavits were provided, and the Special Master's refusal to allow the Coalition to take the depositions of the affiants, the Coalition was denied the right to due process. At a minimum, the Special Master had no authority to deny the required remand and grant summary judgment on that basis.

Since IDWR recommended an accomplished transfer and the Coalition filed objections to the purpose of use and place of use was filed, the law required the Special Master to remand the

¹⁰ Special Master Dolan did not even rule on the Rule 56(f) request until January 8, 2010 – 8 months after the summary judgment hearing held on April 30, 2009. *See Order Denying Rule 56(f) Request for Additional Discovery and Motion for Reconsideration.*

case for further hearing before the Director. I.C. § 42-1425. Since the Special Master refused to follow the mandatory statute, the Court should reverse the decision.

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

A. ASCC is Bound by the Prior Decrees.

Parties and their privies are bound to prior water right decrees in the SRBA. *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742 (1997). Water right 01-23B, which was decreed in the *Rexburg Decree*, authorized the use of water for irrigation. *Ex. A Thompson Aff. (Rexburg Decree Findings of Fact & Conclusions of Law at 151)*. In *Crow v. Carlson*, 107 Idaho 461 (1984), the Court stated:

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. ... Our holding of the presumption of accuracy of the decree is in keeping with the judicial policy of deterring the reopening of judgments long after cases are decided and the files are closed. ...

Hence, we confirm the validity of the 1910 decree and hold that the water right at issue herein was appropriated for the lands in Sections 26 and 27, as described in the *Rexburg* decree, and that the water so decreed was beneficially applied to those respective parcels by the then appropriator Byrne. 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.

107 Idaho at 465-66 (emphasis added). Given its binding nature, “It would be unwise and unjust to overturn a decree imposed 74 years ago [now, 100 years ago] which awarded water rights with a priority of nearly 100 years ago.” *Id.* at 466; *see also Ex. C. to Thompson Aff. (Eagle Decree Stipulation at 2)* (ASCC signed the *Eagle Decree Stipulation* acknowledging that it is bound by the *Rexburg Decree*).¹¹

¹¹ In addition, 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

Water right 01-23B was decreed to ASCC's predecessor in the *Rexburg Decree* "for the irrigation of their respective tracts of land . . . and for domestic and other purposes." Ex. A to *Thompson Aff. (Rexburg Decree Findings of Fact and Conclusions of Law* at 151).¹² The water right was not decreed for "recharge for irrigation" purposes. The decree was a judicial determination of ASCC's water rights and water usage at that time. I.C. §§ 42-1412(6) & 42-1420. By failing to include a "recharge for irrigation" purpose of use, the Court effectively concluded that "recharge for irrigation" was not a beneficial use of the water right at that time.

ASCC did not challenge the *Rexburg Decree*. To the contrary, ASCC subsequently participated in the *Eagle Decree* proceedings, which validated and confirmed the *Rexburg Decree*. By signing the *Stipulation* in the *Eagle Decree* proceedings, ASCC agreed with the Objectors to "accept as binding upon them the provisions of all prior valid decrees, which have been entered with respect to the waters of Snake River and its tributaries, including, particularly, but not limited to the *Rexburg Decree*." Ex. C to *Thompson Aff. (Stipulation* at 2). At no time did ASCC assert that the *Rexburg Decree* was in error for failing to include "recharge for irrigation" as a purpose of use. Moreover, the water right has been administered by Water District 01 for "irrigation" purposes of the ASCC surface water irrigation project.

ASCC is bound by the prior decrees. It cannot create new beneficial uses that were not included on the prior decrees.

may not collaterally attack it in a later adjudication, such as the SRBA." *Order of Recommitment to Special Master for Specific Findings* at 2-3 (Subcase No. 74-50A et al., January 12, 2009).

¹² The use of the term "other purposes" in both the *Rexburg Decree* and the *Eagle Decree* cannot be construed to authorize "recharge for irrigation." The original priority dates for ASCC's water right (02/06/1895 for water right 01-23B01-23B) forecloses such an interpretation since Idaho did not recognize "recharge" in the ASCC area of the State until 1994. *Infra*.

B. Since Recharge Was Not a Lawfully Recognized Beneficial Use Until At Least 1978, it is Improper to Recommend Such a Use with an 1895 Priority Date.

It is not surprising that the *Rexburg Decree* did not provide for “recharge for irrigation.” Indeed, “recharge” was not a statutorily recognized purpose of use, or beneficial use, in the State of Idaho until 1994. Although the Legislature recognized “recharge” as a beneficial use in St. Anthony and Rexburg in 1978, it was not until the 1994 statutory amendments that the use was recognized statewide. Accordingly, any recommendation that authorizes a “recharge” use prior to that time is not supported by the law.

There is no evidence to dispute that “recharge” was not a lawfully recognized beneficial use until 1994 – or 1978 in the St. Anthony and Rexburg area of the state. As originally drafted, Idaho Code section 42-234 addressed recharge “in the vicinity of St. Anthony and Rexburg, Idaho.”¹³ 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.* (emphasis added). In 1994, the Legislature expanded the recognition of “recharge” as a lawful beneficial use for the State of Idaho and amended section 42-234.¹⁴

The Special Master’s only support for the contrary conclusion is a reference to a 1974 “policy” statement of the IWRB. That policy provides that “All new water users, both consumptive and nonconsumptive, such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged to have equal desirability as beneficial uses. Att. 1 to *Barber Aff.* (quoted by *Summary Judgment Order* at 10). According

¹³ For the Court’s convenience, a copy of the 1978 statute is attached to this Motion.

¹⁴ For the Court’s convenience, a copy of this amendment is attached to this Motion.

to the Special Master, this language “strongly suggests” that recharge would have been considered a beneficial use prior to the Legislative actions. *Summary Judgment Order* at 10.

A policy that beneficial uses should be broadly construed does not mean that the IWRB was creating new beneficial uses, or even had the authority to create the same for purposes of new appropriations of water. Indeed, it has no such authority. *See* I.C. § 42-1734 (power and duties of the IWRB do not include the designation of beneficial uses of water).

The Special Master concluded that the “fact that Idaho enacted a groundwater recharge statute in 1978 in no way signifies it declined to recognize recharge as a beneficial use before then.” *Summary Judgment Order* at 10. If it were true, and the 1974 IWRB policy did recognize “recharge” as a beneficial use, then it would have been wholly unnecessary for the Legislature to “declare” that “recharge” “shall constitute a beneficial use” in 1978, for a limited area of the State and again, in 1994 for the entire State. The Special Master refused to explain why the Legislature would have enacted statutes if the beneficial use was already recognized by IDWR prior to that time.

Based on the 1978 and 1994 Legislative actions, the only logical conclusion is that “recharge” was not a recognized beneficial use in 1974 – or any time prior to 1978 and 1994. Since “recharge” was not a lawfully recognized beneficial use prior to that time, the Special Master had no authority to recommend a water right with a “recharge for irrigation” purpose of use with an 1895 priority date. The Court should reverse the Special Master’s decision accordingly.

III. There is Insufficient Evidence to Support a Claim of an Accomplished Transfer and the Procedure Resulting in the Special Master's Recommendation Constitutes an End Run Around the Law.

There is absolutely no evidence to support the Director's recommendation of an accomplished transfer of water right 01-23B. Indeed, ASCC did not even claim the water right as an accomplished transfer, or verify that an "recharge for irrigation" purpose of use occurred prior to 1987 in a sworn notice of claim. *Supra*. Notwithstanding the lack of a verified claim or evidence, the Director, and then the Special Master, recommended water right 01-23B with "recharge for irrigation" as a purpose of use. Since there is no support in the law or facts for this recommendation, it should be reversed.

A. The Director has No Authority to Recommend a Water Right with Elements that Were Not Claimed in the SRBA.

The SRBA process begins with a notice of claim that describes "each purpose of use and the period of the year when water is used for each purpose." I.C. § 42-1409(1)(g)(i); *see also* I.C. § 42-1409A (amended claims allowed). Upon receipt of the claim, the Director examines the system and issues a Director's report. I.C. §§ 42-1410 & 42-1411.

In conformance with the statutory requirement to identify "each purpose of use," I.C. § 42-1409(1)(g)(i), ASCC's *Amended Notice of Claim* for water right 01-23B identifies only "irrigation" – it does not include a claim for "Recharge for irrigation." *Ex. F to Thompson Aff.* Such a claim is consistent with the prior *Rexburg* and *Eagle* decrees. *Supra*.

Based on the statutes, the Director had no authority to include a new purpose of use not identified in ASCC's notice of claim. Indeed, while the statute specifically authorizes the Director to include necessary remarks and "general provisions," I.C. §§ 42-1411(2)(j) & 42-1411(3), there is no authority to add purposes of use not identified in the claim. Yet,

notwithstanding the absence of any such claim, the Director's report includes "recharge for irrigation" as a purpose of use.

Since the Director does not have the authority to recommend a purpose of use that is not included in the claim, the recommendation was improper and the "recharge for irrigation" purpose of use should be removed from water right 01-23B.

B. There is No Evidence in the Record to Support the Purpose of Use "Recharge for Irrigation."

Other than conclusory affidavits submitted by the former Director, the record in this case is completely devoid of any evidence to support the recommendation of "recharge for irrigation" as a purpose of use for water right 01-23B. This lack of evidence is made clear by ASCC's *Amended Notice of Claim* that did not include "recharge for irrigation" as a purpose of use. *Supra.*

Instead, IDWR relies on the *Settlement Agreement* it entered into with ASCC and the State of Idaho in 2002. *Ex. E to Thompson Aff.* Yet, that agreement, in which IDWR agreed to recommend the "recharge for irrigation" purpose of use, was entered to resolve objections in Basin 35 and does not provide any evidentiary support for an accomplished transfer of ASCC's own surface water right 01-23B. *Id.* In fact, the agreement recognizes that it "will not automatically result in approval by the SRBA District Court of IDWR's recommendation" – including the recommendation. *Id.* at 5.

Noticeably, there is no evidence that a field exam was conducted in conjunction with the amended claims or that IDWR investigated the "recharge for irrigation" use of the water right prior to 1987. Moreover, ASCC's other Basin 01 water right (01-297) does not include "recharge for irrigation" as a purpose of use even though it is diverted from the same point of

diversion and used on the same place of use. This is consistent with the *Rexburg* and *Eagle* decrees, which identify “irrigation” as the purpose of use – not “recharge for irrigation.”

During these proceedings, ASCC and the State submitted several affidavits, in an attempt to justify the recommendations. *See supra*. Yet, these affidavits provide nothing but conclusory and unsupported statements. *Id.* As discussed above, there is no evidence in the record to support the conclusions made in the affidavits – including the allegation that assessments were paid by the shareholders notwithstanding the fact that no surface water was ever delivered. *Id.* Such conclusory statements, without any evidentiary support, cannot justify summary judgment.

Since there is no evidence to support the Special Master’s recommendation for an unclaimed purpose of use, it should be reversed.

CONCLUSION

The Special Master’s summary judgment order and resulting report for water right 01-23B violates Idaho law. Since the Coalition filed timely objections to the recommended accomplished transfer of the purpose of use to “recharge for irrigation”, the Special Master was required to remand the case to IDWR for further hearing to determine whether any other rights were “injured” or if an unlawful “enlargement” resulted. Contrary to the statute, no remand was ordered and no hearing was ever held.

In addition, the Special Master’s decision recommends a beneficial use not recognized in Idaho until 1978. Consequently, the Special Master had no authority to recognize an accomplished transfer to a recharge use with an 1895 priority date. The Court should reverse the Special Master’s decision accordingly.

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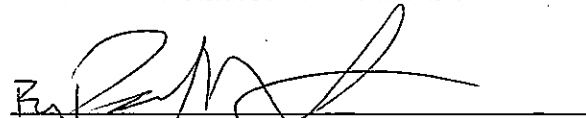
DATED this 23rd day of November, 2010.

CAPITOL LAW GROUP PLLC


C. Thomas Arkoosh

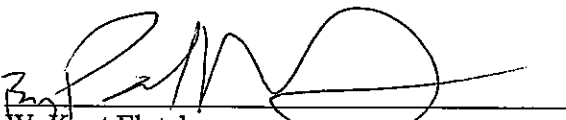
Attorneys for American Falls Reservoir
District #2

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson

Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company and Twin Falls
Canal Company

FLETCHER LAW OFFICE


W. Kent Fletcher

Attorneys for Minidoka Irrigation District

CERTIFICATE OF SERVICE

I certify that on November 23, 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

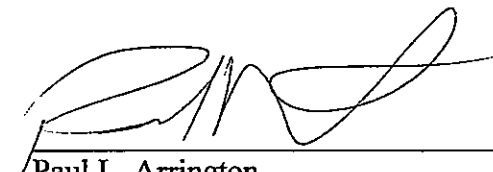
Copies mailed U.S. mail, postage prepaid, to:

Randy Budge
Racine Olson
P.O. Box 1391
Pocatello, Idaho 83204-1391

IDWR Document Depository
P.O. Box 83720
Boise, Idaho 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724


Paul L. Arrington

CHAPTER 366

(H.B. No. 598)

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 APPROPRIATION 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 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 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 actual ground water resource with the provisions of Idaho Code, public requirements if the application water basin of sand (10,000 combination of that the withdrawal adversely affects pumping from adversely affects drawal from rights, the department take such action will offset the pumping level.

In the area which has area, if the from the inventory herein provided determining the action that has to believe subject to a well described department of cation; provided location is as for the director issue a permit such water is

Any application director of the the district 42-237e, Idaho

SECTION 3 and the same NEW SECTION, Idaho Code, as

42-232. .

resides shall have the same fees for licenses granted under the provisions of this section shall be the same as those prescribed for courses as set forth in section 23-904, Idaho Code. Licenses granted under the provisions of this section are not transferable.

in the obtaining of a license, as amended 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 and 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 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-

AMENDING CHAPTER 433
A NEW SECTION 42-234
FACILITY UPON A SINKHOLE

Idaho:

Code, be, and the same
NEW SECTION, 42-234
to Code, and to read as follows:

NG. Nothing contained in
a license to the owner
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apply to any license

affected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code. 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.

(3) The legislature further recognizes that incidental groundwater recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right. Incidental recharge of aquifers which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Approved April 7, 1994.

CHAPTER 434
(S.B. No. 1601)

AN ACT
RELATING TO SALARIES OF THE STATE TAX COMMISSION; AMENDING SECTION 63-508, IDAHO CODE, TO INCREASE THE SALARIES OF MEMBERS OF THE STATE TAX COMMISSION.

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

SECTION 1. That Section 63-508, Idaho Code, be, and the same hereby amended to read as follows:

63-508. COMPENSATION. Each member of the commission shall devote full time to the performance of duties and shall receive an annual salary of forty-eight ~~thousand four-hundred-and-eighty-five~~ thousand five-hundred dollars ~~(\$48,485)~~ (\$55,000) notwithstanding the provisions of section 59-510, Idaho Code.

Approved April 7, 1994.

CHAPTER 435
(S.B. No. 1602)

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

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AN EFFECTIVE 1

Be It Enacted by 1

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Approved April