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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, &
	)	35-04246
	)	
	)	STATE OF IDAHO'S RESPONSE TO THE
Case No. 39576	)	SURFACE WATER COALITION'S JOINT OPENING
	)	BRIEF ON CHALLENGE
	)	

The State of Idaho ("State"), by and through the undersigned deputy attorney general, hereby files this memorandum in response to the *Surface Water Coalition's Joint Opening Brief on Challenge* filed with the Court on or about November 23, 2010.

BACKGROUND AND PROCEEDINGS¹

The Idaho Department of Water Resources ("IDWR") filed Director's Reports for Water Right No. 01-00023B in 2005, 2006, and 2007, each reflecting "recharge for irrigation" as a purpose of use, along with a maximum number of acres for this purpose, in addition to irrigation as a purpose of use. The filing of these Director's Reports followed the resolution of objections filed

¹ To assist the Court in its review of the proceedings and arguments advanced in this subcase, the State has included selected portions of previous memorandums in this document.

by the Aberdeen Springfield Canal Company ("ASCC") pertaining to recommendations for ground water rights in Basin 35. Pursuant to a Settlement Agreement ("Agreement"), the Director agreed, among other things, to recommend a change in purpose of use to recharge for irrigation for a portion of ASCC's surface water rights. The Agreement was executed by ASCC, IDWR, and the State of Idaho in 2002.

The Idaho Department of Lands and the United States Bureau of Land Management filed objections to the place of use described in Water Right No. 01-00023B, asserting that some of their lands were incorrectly included in the place of use identified by the shape file maps. To resolve these objections, ASCC filed an amended claim and IDWR issued an Amended Director's Report ("Director's Report") on March 25, 2008, which described Water Right No. 01-00023B, in part as follows:

Claimant: Aberdeen Springfield Canal Company

Priority Date: 02/06/1895

Purpose of Use: Irrigation in the amount of 1,172.100 CFS (cubic feet per second)
Recharge for Irrigation in the amount of 389.50 CFS

Place of Use: 61,772.6 Acres Total

Diversion of this right for the purpose of recharge for irrigation is authorized for a maximum of 17,161.6 acres.

The rights listed below are limited to the irrigation of a combined total of 61,772.6 acres in a single irrigation season. Combined Right Nos.: 1-23B, 1-297, 35-2543, and 35-4246.

Place of use is within the area served by Aberdeen-Springfield Canal Company.

Other Provisions Necessary for Definition or Administration of this Water Right:

The rights listed below are limited to the irrigation of a combined total of 61,772.6 acres in a single irrigation season. Combined Right Nos. 1-23B, 1-297, 35-2534, and 35-4246.

Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

The administration of this right is further defined and set forth in the Settlement Agreement Regarding Aberdeen-Springfield Canal Company's

Basin 01 Surface Water Rights and Consolidated SRBA Subcase No. 35-2315, recorded as instrument number 563578 in the Bingham County Recorder's Office, Blackfoot, Idaho.

Diversion of this right for the purpose of recharge for irrigation is authorized for a maximum of 17,161.6 acres.

Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code.

With respect to Water Right No. 01-00023B, 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 ("the Objectors") filed objections on April 28, 2008, checking the boxes for priority date, purpose of use, place of use, and remarks, although no supporting information was provided.

On July 16, 2008, the Court granted the State's *Motion to File a Late Response*, which was filed on the same date.

On August 18, 2008, the Objectors, at the direction of the Court, submitted to ASCC a document entitled "Initial Basis for Objections." With respect to the priority date and purpose of use of the claimed rights, the document stated, in relevant part:

[I]f ASCC is claiming an "accomplished transfer" in its purpose of use, it was not identified in the amended claim filed on May 15, 2007. If the "purpose of use" is recognized then the quantity identified 501.8 cfs is another issue of fact to determine.

Issues of fact and law arise as to this recommended purpose of use and IDWR's basis for its recommendations.

....
... Several issues of fact and law arise as to this agreement and the recommended water right, including: ... 2) the basis for the "recharge for irrigation" purposes of use; 3) the place of use for "recharge for irrigation" as the entire service area of ASCC; 4) the formula and process used to calculate the diversion rate for the "recharge for irrigation" purpose of use; 5) IDWR's agreement to give "mitigation credit" to certain ground water rights located within ASCC's service area and the formula and process used in Paragraph 2(E) of the agreement.

On August 28, 2008, the parties reached agreement on a discovery and trial schedule, and on September 2, 2008, the Court entered a *Trial Schedule Order*, consistent with the agreement, which provided:

Therefore, IT IS ORDERED that the following schedule shall govern the conduct of proceedings through trial:

March 6, 2009	Discovery cut-off; discovery shall be complete
March 27, 2009	Deadline to file dispositive motions
May 21, 2009, 10:00 a.m.	Pretrial conference by telephone phone
Monday June 8-12, 2009, 10:00 a.m.	Trial

During the six month discovery period the Objectors conducted no discovery. On March 6, 2009, the Claimants filed *Notice of Service of Claimant's First Discovery Requests to Objectors and Notice of Taking Deposition Duces Tecum*. In response, the Objectors filed a *Joint Notice of Objection to Discovery* on March 30, 2009, asserting that the propounded discovery violated the *Trial Scheduling Order* and Idaho Rules of Civil Procedure. A *Motion for Order Compelling Discovery* and *Motion to Clarify and/or Modify Trial Scheduling Order* were filed by ASCC on March 30, 2009. The Objectors filed a *Response to Motion for Order Compelling Discovery, Motion to Clarify and/or Modify Trial Scheduling Order* on April 6, 2009, advancing the same arguments set forth in the objection. On April 14, 2009, the Court issued an order denying ASCC's motions.

ASCC filed a motion for summary judgment on March 26, 2009, which was accompanied by the affidavits of Steven T. Howser and Anthony Olenichak, and lodged its *Memorandum in Support of Claimant's Motion for Summary Judgment and Other Motions*. Mr. Howser, the manager who oversees the day-to-day operations of ASCC, described the diversion and beneficial use of ASCC's water rights, and the way in which diversion for recharge is derivative of the surface

water irrigation diversions under Water Right No. 01-00023B. Mr. Olenichak, the Deputy Water Master for Water District 01, stated that water had been diverted and put to beneficial use in the same manner as reported. ASCC argued that the Objectors had failed to provide any evidence to rebut the Director's Report, there were no genuine issues of material fact, and it was entitled to the water right as recommended based on the *prima facie* weight accorded to the Director's Report. *See* Idaho Code § 42-1411(4).

On March 27, 2009, the Objectors filed a *Joint Motion for Summary Judgment* accompanied by the *Affidavit of Travis Thompson* and lodged their *Memorandum in Support of Objectors' Joint Motion for Summary Judgment* for Water Right No. 01-00023B. Attached to Mr. Thompson's affidavit were the following documents: excerpts of previous decrees, excerpts of a stipulation between ASCC and Objectors, excerpts of ASCC's May 8, 1990 Notice of Claim, a copy of the Agreement between IDWR, the State, and ASCC executed by the former Director on June 5, 2002, and ASCC's May 15, 2007 Notice of Amended Claim for Water Right No. 01-00023B. The Objectors' motion for summary judgment stated: "The Objectors submit that there are no genuine issues of material fact as to the 'recharge for irrigation' purpose of use element which was not included in ASCC's previously decreed water right and that purpose of use should be dismissed as a matter of law." *Objectors' Joint Motion for Summary Judgment*, March 27, 2009, at 2.

The State lodged its *Brief in Response to Claimant's Motion for Summary Judgment and Objectors' Motion for Summary Judgment* on April 16, 2009 and submitted the affidavits of the former Director of IDWR, Karl J. Dreher ("Dreher Aff.") and Senior Water Resource Agent Michael Holliday ("Holliday Aff.").

Attached to Mr. Dreher's affidavit was a copy of the Agreement. Pursuant to the Agreement, the Director agreed to recommend a change in purpose of use for a portion of ASCC's

water rights. In the affidavit, Mr. Dreher stated that the Agreement was the result of investigation and negotiations regarding ASCC's water right claims. On the basis of his investigation, Mr. Dreher concluded that an accomplished change in purpose of use from irrigation to recharge for irrigation took place for a portion of ASCC's rights prior to November 17, 1987 and that the change in use met the criteria set forth in Idaho Code § 42-1425, which is generally referred to as the accomplished transfer statute.²

The legislature enacted the accomplished transfer statute because "the continuation of historic water use patterns resulting from these changes in use [without compliance with the transfer provisions set forth in Idaho Code §§ 42-108 and 42-222] is in the local public interest." Idaho Code § 42-1425(1)(b). The statute requires the Director to determine whether the change in use injured a water right existing on the date of the change or constituted an enlargement of the original right. Changes in water rights meeting these criteria may be decreed in the SRBA.

The former Director's findings on injury and enlargement were set forth in the affidavit. Mr. Dreher explained that the amount of water ASCC diverted and consumptively used for both purposes, irrigation and recharge for irrigation, was no more than its historical diversion and consumptive use. Since the change in use took place prior to the commencement of the SRBA and there was no injury and no enlargement, Mr. Dreher determined that the criteria set forth in the accomplished transfer statute were met. The affidavit further explained that under the Agreement,

² Idaho Code § 42-1425(2) states, in part, as follows:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication ... may be claimed in the applicable general adjudication, even though the person has not complied with sections 42-108 and 42-222, Idaho Code, 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 right.

the amount of water diverted for recharge would be calculated on an annual basis. Director Dreher in his affidavit stated:

11. ASCC's recharge mitigates the impacts of pre-commencement ground water rights used for irrigation within the service area of the ASCC on lands paying assessments to ASCC and to which ASCC's surface water rights remained appurtenant. Thus, I concluded that it was appropriate to recognize this benefit through mitigation credits for the amount of water recharged against ground water depletions arising from the authorized diversion and use of ground water that occurred as a result of pre-commencement ground water rights.

12. ASCC's recharge diversions also maintain the status quo and provide a tangible benefit to both the ESPA and the Snake River. . . .

13. Under the agreement, the amount of water diverted for recharge will be calculated on an annual basis. Flexibility is provided such that if ASCC converts acres back to surface water, the available credit for recharge will be less.

Dreher Aff. April 15, 2009 at 3.

The Agreement made clear that the mitigation authorized must be based upon annual measurements and accounting.

The volume of water credited for mitigation in each year must be determined from measurements and accounting. Depletions resulting from ground water diversions eligible for mitigation credits, as described above, will be considered to have been mitigated in any year to the extent to which the recharge documented through measurements and accounting equals or exceeds ground water depletions in the same year. Mitigation credits will accrue only to the extent that surface water is diverted for recharge in a given year and will not carry over to future years.

Agreement at 4.

Mr. Holliday's affidavit stated that the recommendations made in the Director's Report, subsequently issued by Director David Tuthill, were consistent with the terms of the Agreement. He explained the calculations used by IDWR to determine the maximum amount of water authorized for recharge.

Based upon the Director's Report, affidavits, and other documents, the State argued that the accomplished transfer requirements were met and that the Court should issue partial decrees

consistent with the recommendations for Water Right No. 01-00023B in the Director's Report. The State also submitted documents and legal argument showing that recharge for irrigation was recognized as a beneficial use before the enactment of Idaho's ground water statute in 1978. *See* Idaho Code § 42-234.

In the Objectors' April 16, 2009 *Response to Claimant's Motion for Summary Judgment*, the Objectors continued to advance the argument that, as a matter of law, recharge for irrigation was not a beneficial use prior to 1978. Although no evidence was submitted on the subject of injury or enlargement, they asserted that there were issues of fact in dispute that required a remand for further hearing before IDWR pursuant to Idaho Code § 42-1425(2)(a).³

ASCC's answering brief, supported by a second affidavit of Mr. Howser, was lodged on April 17, 2009. Mr. Howser's affidavit further described the measurement and use of ASCC's water and how its delivery through ASCC's canals and delivery systems results in recharge for irrigation from wells for irrigation of lands within ASCC's place of use. Based on the Objectors' failure to rebut the *prima facie* evidence included in the Director's Report on the purpose of use element, the affidavits and other papers submitted, ASCC asserted that its motion for summary judgment should be granted.

³ Idaho Code § 42-1425(2) reads as follows: Except for the consent requirements of section 42-108, Idaho Code, 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 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. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.

On April 23, 2009, the Objectors filed their *Reply In Support of Objectors' Motion for Summary Judgment and Response to [ASCC's] Motion for Summary Judgment and Request Pursuant to Rule 56(f) To Allow Depositions To Proceed Before Hearing* ("Rule 56(f) Request"). They also filed an *Objection to and Motion to Strike Affidavits*.

The Objectors continued to assert that in the event their motion for summary judgment was denied, the case should be remanded to the Director for further fact-finding and added a new argument. They contended that they were entitled to conduct additional discovery under Rule 56(f) of the Idaho Rules of Civil Procedure "due to the alleged facts provided in the affidavits accompanying the State of Idaho's Brief in Response to Claimants' Motion for Summary Judgment and ASCC's Answering Brief filed in this proceeding on April 16, 2009." *Rule 56(f) Request* at 2. Asserting that there had been no opportunity to discover the basis for, rebut, or respond to the affidavits of Mr. Dreher, Mr. Holliday, and Mr. Howser, they urged the Court to continue the summary judgment hearing scheduled for April 30, 2009, to permit the depositions to go forward. The depositions were required, they argued, in order to present "facts essential to justify the opposition to ASCC's motion." *Rule 56(f) Request* at 7. Characterizing the statements made in the affidavits as "conclusory," the Objectors complained that "without supporting information or additional facts to verify [the statements made in the affidavits] the objectors are not presently unable to present facts to oppose ASCC's motion. *Rule 56(f) Request* at 5.

On April 29, 2009, the State filed its *Brief in Response to Objectors' Motion to Strike Affidavits of Karl J. Dreher and Michael Holliday*, setting forth the bases for the affidavits. The State also noted that the Court's order denying ASCC's request to conduct additional discovery was, in part, based on opposition by the Objectors, who, just one month earlier, opposed allowing ASCC additional time for discovery. The Objectors argued:

The *Trial Schedule Order* is clear and unambiguous. It is hard to determine how the words “discovery cut-off; discovery shall be complete” (emphasis added) can be misinterpreted. . . .

ASCC offers no explanation of why it waited over five (5) months following issuance of the *Trial Schedule Order* to serve discovery. The only reason to serve discovery at such a late date would be to require the Objectors to attempt to be responding to discovery while at the same time attempting to prepare for the trial scheduled to commence June 8, 2009. The *Trial Schedule Order* sets forth reasonable times for the parties to conduct discovery in an orderly fashion. If ASCC wanted to engage in discovery it should have served its Interrogatories and Requests for Production more than thirty (30) days prior to the discovery “cut-off” date, and it should have set any depositions prior to the “cut-off” date.

....

This matter has been set for trial for over seven (7) months. There is no valid reason at this point in time to continue the trial. It is the belief of the Objectors that many of the issues involved in this matter are legal issues, not factual issues, and may be resolved through the summary judgment process.

Objectors' Response to Motion for Order Compelling Discovery, Motion to Clarify and/or Modify Trial Scheduling Order at pp. 4-5 (emphasis in original).

A hearing was held on the motions for summary judgment and other motions on April 30, 2009. On May 12, 2009, the Special Master entered an *Order Vacating Trial Schedule* based on the conclusion that there were no genuine issues of fact and that matters would be decided solely on the filings before the Court.

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* (“*Order*”). The Order identified two core issues in the summary judgment proceedings: “1) whether recharge for irrigation was recognized as a beneficial use of water in Idaho before enactment of its groundwater recharge statute in 1978, and 2) whether a portion of ASCC’s diversion from the Snake River decreed “for irrigation and other

purposes” was lawfully changed to “recharge for irrigation” with a priority date of February 6, 1895.” Order at 10. The Special Master concluded that the answer was yes to both inquiries.

On June 25, 2009, the Objectors filed a *Motion for Reconsideration* asserting that the Court failed to rule on its request to conduct additional discovery pursuant to I.R.C.P. 56(f) and that the Court must set aside the summary judgment proceeding until a further hearing is conducted pursuant to Idaho Code § 42-1425(2)(a). In his *Order Denying Rule 56(f) Request For Additional Discovery And Motion For Reconsideration* (January 8, 2010) (“*Reconsideration Order*”), the Special Master determined that the Objectors’ *Motion for Reconsideration* “failed to present any arguments not already heard in the summary judgment proceedings” and that “they suggested no sound reasons to amend the June 11, 2009 Order. *Reconsideration Order* at 4. Further, the Special Master reaffirmed that (1) recharge for irrigation was recognized as a beneficial use of water in Idaho before the enactment of the ground water recharge statute in 1978; (2) a portion of ASCC’s diversion from the Snake River decreed for irrigation and other purposes was lawfully changed to recharge for irrigation; and (3) remanding the issue of the accomplished transfer to the Director for further hearings would only delay the final resolution of the claim. “We have [the Director’s] findings and recommendations in support of the change. The Coalition may disagree with the Director’s findings, but the results stand.” *Reconsideration Order* at 4-5.

In rejecting the Objectors’ assertion of entitlement to conduct discovery, which was based solely on the fact that affidavits were introduced by the State and ASCC, the Special Master observed that “[t]here was reasonable time (over six months) for the Coalition to complete their discovery, especially in light of their early knowledge of the issues and their agreement setting discovery cut-off date.” *Reconsideration Order* at 5. On April 23, 2010, the Special Master issued a *Special Master Report and Recommendations* concluding that partial decrees for Water Rights

Nos. 01-23B and 01-297 should be issued as described in the Director's Report. On August 21, 2010, the Special Master issued an order denying the Objectors' *Motion to Alter or Amend*, having concluded that the Objectors had failed to present any new arguments or facts that would support amending the partial decrees. On September 14, 2010, the Objectors filed a *Notice of Challenge* to the April 26, 2010 *Special Master Report* and the August 31, 2010 *Order Denying Motion to Alter or Amend*.

ARGUMENT

I. STANDARD OF REVIEW

The district court is required to adopt a special master's finding of fact unless they are clearly erroneous. AO1, section 13f; I.R.C.P. 53(e)(2). In so doing, the Court must determine whether the Special Master's findings of fact are supported by substantial evidence. Although a Special Master's conclusions of law are not binding on the district court, conclusions of law correctly applying applicable legal principles to the facts found will be sustained on challenge or review. See SRBA Subcases 29-00271, *et al.*, *Memorandum Decision And Order On Challenge*, dated November 9, 2009.

II. THE SPECIAL MASTER CORRECTLY CONCLUDED THAT WATER RIGHT NO. 01-00023B INCLUDES "RECHARGE FOR IRRIGATION" AS A PURPOSE OF USE.

A. Introduction.

The Objectors challenge the inclusion of the purpose of use of "recharge for irrigation" for a water right initially decreed in the Rexburg Decree. They make two arguments. First, they assert ASCC is bound by prior decrees that determined the purpose of use for Water Right No. 01-00023B. Second, they argue ground water recharge was not a legally recognized beneficial use in Idaho until enactment of Idaho Code § 42-234 in 1978. The Objectors' arguments are

fundamentally flawed for two reasons. First, Idaho Code § 42-1425 authorizes IDWR to recognize an accomplished transfer, if the change in purpose of use occurred in accordance with the limitations of that section. Second, “recharge for irrigation” was a beneficial use of water prior to enactment of Idaho Code § 42-234 in 1978.

B. Idaho Code § 42-1425 Authorized The Recognition Of “Recharge For Irrigation” For Water Right No. 01-00023B.

The accomplished transfer statute authorizes IDWR to recommend a change in the nature of use of a previously decreed water right, if the change satisfies the following three requirements: (1) the change took place prior to November 19, 1987; (2) the change does not injure other water rights existing on the date of the change; and (3) the change did not result in an enlargement.⁴ Idaho Code § 42-1425(2) explicitly authorizes accomplished transfers “by any person entitled to use of water or owning any land to which water has been made appurtenant **either by decree of the court or under the provisions of the constitution and statutes of this state....**” (emphasis added). The plain language of the Idaho Code refutes Objectors’ argument that ASCC is bound by prior decrees as to the purpose of use for Water Right No. 01-23B. Moreover, IDWR has approved transfers where the decreed priority date is retained even though the purpose of use has changed. Partial decrees for such water rights have been issued in the SRBA. *See e.g., Order of Partial Decree for Irrigation Delivery Entity Using Digital Boundary Description: I.C. §§ 42-202B(2), 42-219(2), 42-1411(2)(h) For Water Right: 63-00146 (New*

⁴ Idaho Code § 42-1425(2) states, in part, as follows:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, ... may be claimed in the applicable general adjudication, even though the person has not complied with sections 42-108 and 42-222, Idaho Code, 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 right.

(emphasis added).

Union Ditch Co. Ltd.) (September 21, 2007); Order of Partial Decree for Irrigation Delivery Entity Using Digital Boundary Description: I.C. §§ 42-202B(2), 42-219(2), 42-1411(2)(h) For Water Right: 63-00146 (New Union Ditch Co. Ltd.) (September 21, 2007).

Additionally, the adjudication statutes do not prohibit the Director from recommending a water right with elements different from or in addition to the elements claimed. Just the opposite is true. The Director is required to assure that claims to water rights acquired under state law are accurately reported and to make recommendations as to the extent of beneficial use and administration of each water right. Idaho Code § 42-1401B. Here, the Director's Report described the actual use of the water right and included conditions for the proper administration of the right. The recommendation in the Director's Report was based on three critical conclusions. First, ASCC converted a portion of its surface water irrigation to diversion from ground water prior to November 19, 1987. This change in management resulted in a decrease in the number of acres being irrigated with surface water. Second, notwithstanding this conversion, the ASCC continued to divert the full amount of water authorized under Water Right No. 01-00023B in most years. Thus, additional water was left in the canals of ASCC that provided recharge to the ESPA. Third, the ASCC did not enlarge its water right because the amount of water ASCC diverted and consumptively used was no more than its historical diversion and consumptive use.

The affidavits and documents submitted by the State and ASCC fully support the Director's recommendation that recharge for irrigation be included as a purpose of use for a portion of ASCC's water rights. The Agreement and partial decree reflect the actual nature of use for water right 01-23B and place conditions upon its administration to preclude injury to other water rights and enlargement. None of the Objectors in their objections or in their

submissions to the Court offered any evidence on the subject of injury or enlargement. Since the Director's Report constitutes *prima facie* evidence of Water Right No. 01-00023B, the Special Master properly concluded that a partial decree for Water Right No. 01-00023B should be issued as described in the Director's Report.

C. **The Special Master Properly Concluded That, As A Matter Of Law, Recharge Was Recognized As A Beneficial Use Of Water Prior To 1978.**

The Objectors also argue that Idaho did not recognize recharge as a beneficial use of water until the Legislature enacted Idaho Code § 42-234 in 1978. While it is true that the Legislature enacted recharge legislation in 1978 through the enactment of Idaho Code § 42-234, this does not mean that recharge was precluded as a beneficial use prior to 1978. Under the Idaho Constitution, the Idaho water code, and Idaho Supreme Court decisions, any reasonable use of water that benefits the appropriator is a beneficial use, regardless of whether the Legislature has formally declared it a beneficial use.

Article XV, § 3 of the Idaho Constitution establishes the right to appropriate the unappropriated waters of the state for beneficial uses:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the uses thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

Idaho Const. art. XV, § 3 (emphasis added). Nothing in this provision makes the right to appropriate contingent upon a formal legislative recognition that a particular use is a beneficial use.

This view finds support in the legislative implementation of Idaho Const. Article XV, § 3. In Idaho Code § 42-101, the Legislature declared the waters of the state to be public waters and provided that they may be appropriated for “any beneficial use.” Idaho Code § 42-101 (emphasis added). In his work on Idaho water law, Wells A. Hutchins wrote that this statute authorizes appropriations “for any useful or beneficial purpose,” without limitation:

The water-rights statute provides that the appropriation must be for some useful or beneficial purpose, without placing any limitation upon purposes that would be considered useful or beneficial; and the so-called ‘constitutional’ or non-statutory appropriations likewise may be made, apparently, for any useful or beneficial purpose.

Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 IDAHO L. REV. 1, 42 (1968). This interpretation is also consistent with the Idaho Constitution’s provision for “optimum development of water resources in the public interest,” Idaho Const. art. XV, § 7, and the Idaho Water Resource Board’s implementation of its duties under that constitutional provision.⁵ As the Idaho Supreme Court has held: “The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.” Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960). It would be contrary to this policy, and would impede optimum

⁵ The Idaho Water Resource Board (“Board”) is the constitutional entity responsible for carrying out the Idaho Constitution’s directive to prepare and implement “a state water plan for optimum development of water resources in the public interest.” Idaho Const. art. XV § 7. In the first State Water Plan (1974), the Board also took a broad view of the term “beneficial use” as used in Article XV, § 3:

The policy of the Idaho Water Resource Board is to follow a broader definition of the term “beneficial use of water” to include all water uses, both consumptive and nonconsumptive (for example stream resource maintenance flows) and to seek implementation of those water resource projects and programs which provide for this definition through efficient water use practices.

Idaho Exhibit 3: Affidavit of David J. Barber Dated April 16, 2009 (“Barber Aff.”), Attachment 1 at 10 (Idaho Water Resource Board, STATE OF IDAHO - THE OBJECTIVES - STATE WATER PLAN – PART ONE at 15 (1974)).

development of the state's water resources, to preclude the use of water for a beneficial purpose simply because the Legislature has not formally recognized the particular use in question to be a "beneficial use" through a statutory enactment.

While the Idaho Supreme Court has not squarely addressed the question of whether a particular use must be specifically recognized by the Legislature before it can be considered a "beneficial use" for purposes of the Idaho Constitution, the Court's interpretations of Article XV, § 3, read it broadly and as authorizing any appropriation that is beneficial in fact. Idaho Dep't. of Parks v. Idaho Dep't. of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974) dealt with the question of whether the use of water for maintaining a minimum in-stream flow constituted a "beneficial use." In that case, the Court rejected the argument that the five uses specified in Article XV, § 3 (domestic, agriculture, mining, manufacturing and power) are the only "beneficial uses" that are cognizable under the Idaho Constitution, and characterized the expression "beneficial use" in Article XV, § 3 as simply a "generic term" that had never been judicially or statutorily defined. Id. at 443, 530 P.2d at 927.

In his concurrence, Justice Bakes emphasized that Article XV, § 3 "does not concern itself with abstract notions such as the relationship between the citizenry and their government, but instead concerns itself with the very practical question of water rights. I think we should look to very practical considerations in attempting to construe it." Id. at 446, 530 P.2d at 930 (Bakes, J., concurring). He further stated that because the Idaho Supreme Court is the final arbiter of the Idaho Constitution,

we must determine whether or not the scenic and recreational uses in this case are a "beneficial use" within the meaning of Article 15, § 3 . . . With the exception of those uses elevated to beneficial status by Article 15, § 3 of the Constitution, the concept of what is or is not a beneficial use must necessarily change with changing conditions. . . . The notion of beneficiality of use must include a requirement of reasonableness. With the exception of the uses implicitly declared

to be beneficial by Article 15, § 3, there is always a possibility that other uses beneficial in one era will not be in another and *vice versa*. As stated in Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 3 Cal. 2d 489, 45 P.2d 972, 1007 (1935):

What is beneficial, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

Id. at 447-48, 530 P.2d at 931-32 (Bakes, J., concurring). This practical, case-by-case approach to the question of whether a particular use constitutes a “beneficial use” finds further support in the fact that article XV, § 3 of the Idaho Constitution as originally proposed was adopted virtually verbatim from the Colorado Constitution. *See* II Proceedings And Debates Of The Idaho Constitutional Convention 1889 1351-52 (I.W. Hart, ed. 1912) (“So far as section 3 is concerned, the amendment reported by the committee is taken word for word from the constitution of the state of Colorado.”). Colorado’s constitution and statutes simply required that water be put to “some valuable use.” Larimer County Reservoir Co. v. People, 9 P. 794, 796 (1886).

In summary, the language of the Idaho Constitution and Idaho Code § 42-101, as well as the plurality and concurrence opinions in Idaho Dep’t. of Parks v. Idaho Dep’t. of Water Admin. demonstrate two important points: (1) the question of what constitutes a “beneficial use” of water under Idaho law is primarily a factual inquiry; and (2) any use of water that is valuable or beneficial in fact can be sufficient to support a lawful appropriation in Idaho. These principles are also consistent with the prior appropriation doctrine as it has been generally understood throughout the western United States for many years. “So long as the use of water made under an appropriative right is a beneficial one, no distinction is made between appropriations for different useful purposes . . .” Wells A. Hutchins, Harold H. Ellis & J. Peter DeBraal, 1 WATER

RIGHTS LAWS IN THE NINETEEN WESTERN STATES 522-23 (USDA 1971). “And, in general, we will say that any purpose that is useful or beneficial may be the object of such appropriations.” Clesson S. Kinney, 2 IRRIGATION AND WATER RIGHTS 1193-94 (Bender Moss, 2d ed. 1912); (“And in general it may be said that under the Arid Region Doctrine of appropriation water may be legally appropriated for any beneficial use or purpose.”)

D. Ground Water Recharge Was A Common Practice Long Before 1978.

For decades, water users throughout Idaho have diverted water for the purpose of ground water recharge out of the necessity to use water in an arid region when it was available. By saturating the land within or outside the irrigation season, water users are able to extend the water supply. This historical practice is authorized in decrees and licenses predating Idaho Code § 42-234.

As early as 1902, the use of water for recharge was recognized in the Rexburg Decree. See decree entered in Rexburg Irrigation Co. v. Teton Canal Co., Case No. 319 (9th Dist. Idaho, December 10, 1910. Similarly, the Lemhi Decree recognized and authorized the historical practice of diverting high water or flood waters in an effort to hold or store water underground in the basin which had the effect of augmenting or supplementing the flow of the river during the later portion of the irrigation season. See Supplemental Director’s Report Regarding Subcase Nos. 74-15001 et al. (“Supplemental Report”) filed with the SRBA Court on September 18, 2008, Attachment 1. The Payette and Reynolds Creek decrees also recognized and authorized this historical practice. Supplemental Report, Attachments 2 and 3.

Additionally, partial decrees based on licenses with priority dates preceding the ground water recharge statute have been issued in the SRBA. For example, in 1954, IDWR issued a licensed water right for the purpose of “Soil Root Zone Storage only” with a priority date of June

22, 1949. This water right was subsequently decreed in the SRBA with “groundwater recharge” as the purpose of use. *See Order of Partial Decree For Water Right No. 33-02133*, dated August 31, 2004.

More generally, the potential benefits of recharge were widely recognized prior to 1978. In 1953, D. Lynn Crandall⁶ prepared a depletion analysis report in connection with Idaho Power Company’s proposal for its Hells Canyon project. The report expressly recognized the potential to use surface flows to recharge the Eastern Snake Plain Aquifer, “thereby replacing in part the water consumed by ground-water pumping.” *Barber Aff.*, Attachment 2 at 8 (“Future Upstream Depletion Above Hells Canyon” at 6). The next year, Mr. Crandall discussed artificial recharge at length during his deposition in the Federal Power Commission proceedings on the Hells Canyon project, *Id.*, Attachment 3 at 33 (Crandall Depo. at 10316-22), and testified that artificial recharge activities were already underway in California at the time. *Id.* at 36 (Crandall Depo. at 10319). In 1960, an information bulletin jointly released by the Bureau of Reclamation and the Corps of Engineers discussed “the possibility of artificially recharging [the Eastern Snake Plain Aquifer] by diverting surplus flows.” *Id.*, Attachment 4 at 11 (information bulletin at 9). In 1961, Mr. Crandall again discussed recharge in a statement he prepared for an inter-agency meeting on development of the water resources of the Columbia Basin. *Barber Aff.*, Attachment 5 at 9 (statement at 6). In a 1966 letter to the United States Secretary of the Interior, Governor Robert E. Smylie pointed out the potential for ground water recharge projects in the Upper Snake River Basin. *Barber Aff.*, Attachment 6 at 2 (letter at 1). In a 1967 letter responding to questions posed by the Director of the Idaho Water Resource Board, the Assistant Regional Director of the

⁶ Mr. Crandall had been the Watermaster of the upper Snake River and the District Engineer for the United States Geological Survey since 1930. *See Barber Aff.*, Attachment 3 at 7-8 (Transcript of Examination of D. Lynn Crandall, Formal Hearings Before The Federal Power Commission, Project No. 1971, P-2132, P-2133 at 10135-36 (Jan. 12, 1954) (“Crandall Depo”)).

Bureau of Reclamation discussed the benefits of recharge. *Barber Aff.*, Attachment 7 at 3-4 (letter at 2-3). In the 1974, in the first Idaho State Water Plan, the Idaho Water Resource Board pointed out the potential benefits of using recharge to store excess surface water in the aquifer. *Barber Aff.*, Attachment 1 at 9.

In sum, the Objectors' argument that recharge could not have been a "beneficial use" of water prior to the 1978 enactment of Idaho Code § 42-234 is flawed both legally and factually. Nothing in Idaho law precluded appropriation of water for recharge prior to 1978, and, indeed, prior decrees and licenses authorized such appropriation. The considerable benefits of recharge were widely recognized for many years before the enactment of Section 42-234.

III. A REMAND TO THE DIRECTOR FOR A CONTESTED CASE PROCEEDING GOVERNED BY THE IDAHO ADMINISTRATIVE PROCEDURE ACT WOULD VIOLATE THE SEPARATION OF POWERS PRINCIPLE OF ART. 2, SEC. 1 OF THE IDAHO CONSTITUTION.

The assertion that the contested case requirements of the Idaho Administrative Procedure Act ("APA"), Idaho Code § 67-5240, are relevant to or in any way govern proceedings in the SRBA is without merit. Pursuant to chapter 14, title 42 of the Idaho Code, entitled "Adjudication of Water Rights," the SRBA Court has exclusive jurisdiction over all proceedings related to the adjudication of water right claims. "[O]nce the SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only. Jurisdiction remains with the SRBA district court until it issues a final order concerning the particular water right at issue." Walker v. Big Lost River Irrigation Dist., 124 Idaho 78, 81, 856 P.2d 868, 871 (1993). A remand allowing for an APA contested case hearing would be a relinquishment of the SRBA Court's jurisdiction in violation of the separation of powers principle of Art. II, § 1 of the Idaho Constitution.

The separation of powers doctrine recognizes that each branch of government is intended to operate in its own sphere of authority subject only to those checks and balances expressly granted within the Idaho Constitution. Article II, § 1, of the Idaho Constitution defines the departments of government and states the policy of separation of powers:

Departments of government. The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Article IV, § 1 of the Idaho Constitution generally outlines the executive power. The constitution grants the Governor the ability to carry out this authority through the allocation of executive departments as outlined within Article IV, § 20. The Department has expressly been created as an Article IV, § 20 Department by Idaho Code § 42-1701, which states:

There is hereby created the department of water resources, which shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of the state government.

Article V, § 2 of the Idaho Constitution defines the powers of the judicial branch of government:

Judicial power--Where vested. The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no changes shall be made in the jurisdiction or in the manner of the selection of judges of existing inferior courts.

Article V, § 13 of the Idaho Constitution provides for the role of the Legislature as it concerns the courts:

Power of legislature respecting courts. The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains

to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution....

A. Chapter 14, Title 42 Governs All Proceedings In The SRBA And Clearly Defines The Director's Role Under The Accomplished Transfer Statute.

The legislature in 1986 amended the Idaho adjudication statutes to create a procedural and evidentiary framework designed to provide an orderly and efficient mechanism for adjudicating water right claims in the SRBA. Idaho Code §§ 42-1401-1423. Pursuant to statute, the Director filed a petition for the SRBA and the Idaho Supreme Court issued an order assigning a presiding judge and designating the district court of the fifth judicial district, Twin Falls County, as the county and court of venue for the SRBA. As noted by the Idaho Supreme Court, "these actions created a division of the district courts (SRBA district court) with exclusive jurisdiction to determine all of the claims arising in SRBA. The SRBA district court is, in effect, a separate division of the district courts and exercises the unique jurisdiction given to it by the legislature." Walker v. Big Lost River Irrigation Dist., 124 Idaho at 81, 856 P.2d at 871.

The adjudication statutes were again amended in 1994, in part, because the role of the Director had become a major issue in the SRBA. The 1994 amendments specifically defined IDWR's role in the adjudication:

Section 42-1401B. Role of the director in an adjudication

(1) The director's role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

(2) The director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication.

(3) The director shall not be a party to an adjudication.

Idaho Code § 42-1401B.

There should be no confusion about the Director's role in the SRBA. The Director has a "a continuing role in the adjudication by reason of the obligation to submit reports to the district court, and remains subject to the authority of the court in fulfilling the obligations assigned by statute." In re SRBA Case No. 39576, 128 Idaho 246, 257, 912 P.2d 614, 625 (1995). Moreover, the accomplished transfer statute is very specific about the role of the Director upon remand and the scope and purpose of any fact-finding hearing. Upon an objection asserting injury, the Director is authorized to conduct a hearing at which the parties may submit information relevant to the issue of injury. "After a hearing, the Director **shall submit a supplemental report to the district court setting forth his findings and conclusions**. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court." Idaho Code § 42-1425(2)(a) (emphasis added). The scope of reports submitted to the SRBA Court is defined in Idaho Code §§ 42-1411 and 42-1412(2) and (4).

Consequently, the role of the Director under the accomplished transfer statute is no different than his role with respect to all water right claims. The Director is required to consider and evaluate all information pertinent to the claim and make recommendations to the SRBA Court. Once a Director's Report is filed, only the SRBA Court is authorized to conduct a hearing in accordance with the Idaho Rules of Civil Procedure. Idaho Code § 42-1412(5).

Importantly, a remand pursuant to the statute does not shift the burden of proof required to rebut the presumption of the Director's Report. The legislature has made clear that a party "aggrieved by the director's recommendation, whether that be the party claiming an

accomplished transfer or the party claiming injury, has the burden of proof under section 42-1425.” Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, 129 Idaho 454, 462, 926 P.2d 1301, 1309 (1996).

It has not been the practice of the SRBA Court to use the fact-finding procedures provided in the accomplished transfer statute. Instead, parties and the Court have asked the Director to submit a supplemental or “706” report because, as observed by Special Master Bilyeu in a case where a formal remand was requested, “IDWR regularly receives additional information from parties during the litigation process and supplements or amends its recommendations when necessary. Parties may provide additional information to IDWR, and IDWR may consider that information without a formal remand.” SRBA Subcase No. 29-00271, *Order on Summary Judgment* at 5, August 18, 2006.

Consistent with the statutory scheme governing the SRBA, Special Master Bilyeu limited the scope of the remand as follows:

The remand will consist of additional information or evidence being presented to IDWR. After IDWR considers the additional information, its conclusions may be reported in an *Amended Director’s Report* or a *Supplemental 706 Report*. The *Amended Director’s Report* or *Supplemental 706 Report* should contain explanatory material stating the basis for its recommendation and should address injury to existing water rights. To be clear, the remand is not intended to be a separate administrative transfer proceeding, but is to be part of the record for this case.⁷

Id. at 5-6. Likewise, in a recent subcase, Special Master Booth made clear that “the end result of the hearing under Idaho Code § 42-1425 is the filing of supplemental director’s report setting forth the Department’s findings and conclusions.”⁸ Special Master Booth stated:

⁷ Although IDWR scheduled a fact-finding hearing, the hearing was not held because the parties stipulated to proceeding before the Special Master.

⁸ SRBA Subcases 63-00166A, 63-00166B, 63-00167A, 63-00167B, 63-00179A, 63-00179C, and 63-32580, *Memorandum Decision and Order on Motions for Summary Judgment – Order Requiring Pioneer to File a Statement Regarding Injury and/or Enlargement – Order Setting Status Conference*, dated October 22, 2010.

Even if it were made clear at the time of the initial hearing that an objection was directed toward injury or enlargement resulting from an accomplished transfer, this Special Master would not automatically remand the claim back to IDWR without first discussing the matter with the parties. In most circumstances, it is likely that the parties would waive the opportunity for a hearing before IDWR for the following reasons: First, in the process of recommending water rights IDWR reviews issues of injury or enlargement. Secondly, many objectors would likely opt for a more informal process of discussing issues of injury or enlargement with IDWR as opposed to the formal and likely more costly route of holding a hearing pursuant to I.C. § 42-1425. Third, the end result of the hearing under I.C. § 42-1425 is the filing of supplemental director's report setting forth the Department's findings and conclusions. It is the experience of this Special Master that IDWR is typically willing to create such a report upon request by the parties or the Court.

Id. at 10 n.3.

Special Master Bilyeu's and Special Master Booth's remand orders were not only consistent with the accomplished transfer statute, but also consistent with Idaho Code § 42-1410, which provides for only one type of hearing before the Director in SRBA proceedings. Idaho Code § 42-1410 states, in relevant part:

Examination of water system and of claims:

(1) Upon entry of the court's order commencing a general adjudication, or as provided in section 42-1404 or 42-1424, Idaho Code, the director shall commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system for water rights acquired under state law. The examination shall continue in a manner and for such a period of time as the director determines is necessary to evaluate the extent and nature of each water right for which a notice of claim under state law has been filed. The director may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.

(2) The director and other employees of the department shall have authority to go upon all lands, both public and private, for the purpose of investigating the uses of water from any water source and may require the cooperation of the claimant in investigating the claimant's water use. The employee investigating the claimant's use shall make a reasonable effort to contact the claimant to schedule a date and approximate time for the examination. If the well or diversion works are located in a building other than an unlocked structure used solely for housing the well or other diversion works in which there is no reasonable expectation of privacy, the employee shall only enter the building in the absence of a court order after requesting and receiving the permission of the claimant or other occupant. The

director may request the district court to issue an order compelling inspection and subpoenas requiring the attendance of any witness or the production of documents in accordance with the Idaho rules of civil procedure.

Idaho Code § 42-1410 (emphasis added).

There is nothing in the adjudication statutes authorizing or requiring the Director to conduct a contested case type hearing where parties have the opportunity to “confront” or cross examine witnesses. The procedures provided for by the legislature cannot be used to conduct belated discovery nor can the hearing be used as a trial-type proceeding to challenge an opposing party’s case. If an objector “is aggrieved by the director's determination, they may seek review before the district court.” Idaho Code § 42-1425(2)(a).

Finally, the procedural rules established by the SRBA Court require that “any party to the adjudication desiring to litigate any claim or issue in the SRBA, including all or a portion of a recommendation, abstract or negotiated agreement in a Director’s Report, shall comply with these Rules of Procedure.” AO1 at 1 (emphasis added). All proceedings in the SRBA are entrusted to the SRBA Court and must comply with AO1 and the Idaho Rules of Civil Procedure.

B. Chapter 17 Governs Administrative Proceedings Before The Agency.

The Objectors rely upon Idaho Code § 42-1701A(1) to advance the argument that an accomplished transfer hearing must be conducted in accordance with the APA. Idaho Code § 42-1701A(1) states: “All hearings required by law to be held before the director of the department of water resources shall be conducted in accordance with the provisions of Chapter 52, title 67... and rules promulgated by the director.” Construing the hearing requirements set forth in chapter 17 to govern the Director’s fact-finding responsibilities in the SRBA is an unreasonable interpretation of the statute. See Idaho Cardiology Associates, P.A. v. Idaho

Physicians Network, Inc., 141 Idaho 223, 226, 108 P.3d 370, 373 (2005) (“[t]he Supreme Court may examine the language used, reasonableness of the proposed interpretations, and the policy behind the statutes.”).

Chapter 17 creates an executive department of state government, sets forth the duties of the Director in the administration of water rights, and provides for administrative hearings and enforcement. Idaho Code §§ 42-1701-1701B;1706. Under the APA, the legal effect of administrative decisions determines whether the agency must conduct a contested case. An agency is defined as “each state board, commission, department, or officer authorized by law to make rules or to determine contested cases.” Idaho Code § 67-5201(2). Notably, the definition of agency explicitly exempts the judicial branch which is bound by procedures unique to that branch of government. Any proceeding that may result in the issuance of an “order” is a contested case. Idaho Code § 67-5240. “Order” is defined by the APA as an “agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interest of one (1) or more specific persons.” Idaho Code § 67-5201(11). Judicial review of agency actions is governed by the APA. Idaho Code § 67-5270.

In recent legislation specific to the Department, the Legislature re-affirmed the distinction between the SRBA and contested case proceedings. In response to an Idaho Supreme Court decision holding that the SRBA Court had conclusive jurisdiction to review the Department’s administrative decisions,⁹ the Legislature enacted Idaho Code § 42-1401D, which provides:

JURISDICTIONAL LIMITATION Review of an agency action of the department of water resources, which is subject to judicial review or declaratory judgment under the provisions of chapter 52, title 67, Idaho Code, shall not be heard in any water rights adjudication proceeding commenced under this chapter. Venue and jurisdiction over any such action pending on the effective date of this section, or initiated subsequent thereto, shall be in the district court as authorized

⁹ See Sagewillow Inc. v. IDWR, 135 Idaho 24, 13 P.3d 855 (2000).

under the provisions of section 67-5272, Idaho Code, without regard to any other provision of law.

The legislature amended the adjudication statutes to “clarify that district court proceedings for judicial review of final administrative actions by the Idaho Department of Water Resources (IDWR) are not within the jurisdiction of the Snake River Basin Adjudication (SRBA) district court.” Statement of Purpose, H.B. 114, Leg. 56, Ext. Sess. (Idaho 2001). Section 1 of S.L. 2001, ch. 31 set forth the legislative intent and reads, in relevant part:

It is and has been the intention of the Legislature that the district court presiding over a water rights adjudication proceeding under the provisions of Chapter 14, Title 42, Idaho Code, exercises unique jurisdiction over the “judicial determination” of the elements of the water rights subject to the court’s jurisdiction. Further, it is and has been the intention of the Legislature that judicial review of an agency action by the Department of Water Resources under the provisions of Chapter 52, Title 67, Idaho Code, does not provide a judicial determination of the elements of a water right. Rather, a judicial review proceeding potentially results only in confirmation of an administrative determination of one (1) or more elements of a water right, which then shall constitute prima facie evidence of those elements consistent with the provisions of Section 42-220, Idaho Code.

Idaho Code § 42-1401D, Legislative Intent (2003). Thus, the outcome of a hearing before the Director pursuant to the contested case provision set forth in the APA would be a final agency order that could not be appealed to the SRBA Court. This would be in direct conflict with the adjudication statutes, including Idaho Code § 42-1425.

C. Due Process Does Not Require A Contested Case Proceeding.

The procedural requirements set forth in the adjudication statutes, AO1, and the Idaho Rules of Civil Procedure provide more than adequate due process for the Objectors to have their day in court. “Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights...[t]he opportunity to be heard must occur ‘at a meaningful time and in a meaningful manner to satisfy the due process requirement.’”

Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999). There is nothing whatsoever in the record to support the assertion that “the Coalition never had the opportunity to discover or present evidence of injury or enlargement before IDWR....” Objectors’ Opening Brief at 12-13.

There is no question that the Objectors had and will have opportunities to be heard at a meaningful time and in a meaningful manner. The Objectors had notice and more than adequate opportunity to review the Director’s Report. The Director’s Report made clear that the water rights at issue in this case were being recommended pursuant to the accomplished transfer statute and that the recommendations were based, in part, on the Agreement. The Objectors participated in setting a trial schedule and agreed to a six-month period to conduct discovery. At any time during these proceedings, the Objectors could have submitted information to the Court and the Director on the issue of injury or enlargement. The Objectors have had numerous opportunities to advance their position and arguments before the SRBA Court. The Objectors simply failed to proffer sufficient evidence on the issue of injury or enlargement to defeat ASCC’s motion for summary judgment.

In summary, there are a myriad of opportunities in the SRBA to advance a party’s position. But, nowhere contained within or implied by the statutory language of the accomplished transfer statute is the requirement for a contested case hearing before the Director. Indeed, remanding for an APA contested case proceeding would run directly counter to chapter 14, title 42, Idaho Code. Thus, a party to the SRBA cannot use the remand provisions in the accomplished transfer statute to take additional discovery or obtain testimony it failed to secure during a court-ordered discovery period. Nor can a party use the proceeding to shift the burden of proof on injury or enlargement. The Objectors should not be allowed to avoid summary

judgment by using the fact-finding hearing authorized by Idaho Code § 42-1425(2) to litigate the issues raised in this subcase.

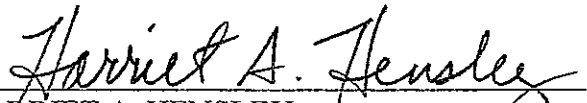
CONCLUSION

For the reasons stated, the State of Idaho respectfully requests that the Court adopt the Special Master's conclusion of law that recharge was a recognized beneficial use prior to 1978. Although the State believes that the recommended partial decree for Water Right No. 01-00023B is fully supported by the record, should the Court decide to issue a formal remand for a hearing pursuant to Idaho Code § 42-1425(2), the State requests that the Court limit the scope of the hearing consistent with chapter 14, title 42, Idaho Code.

RESPECTFULLY SUBMITTED this 28th day of December 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO


HARRIET A. HENSLEY
Deputy Attorney General



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of December 2010, I caused to be served a true and correct copy of the foregoing STATE OF IDAHO'S RESPONSE TO THE SURFACE WATER COALITION'S JOINT OPENING BRIEF ON CHALLENGE on each of the following persons by the indicated method

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Twin Falls, ID 83303-2707

☐ U.S. Mail, postage prepaid
☒ Hand Delivery
☐ Federal Express
☐ Facsimile: (208) 736-2121
☐ Statehouse Mail

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

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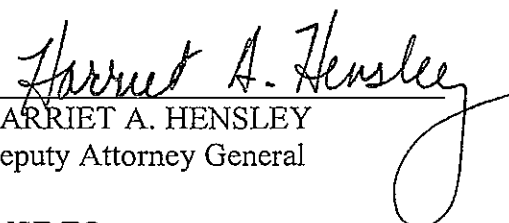
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