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DEPARTMENT OF
WATER RESOURCES

Attorneys for Aberdeen-Springfield Canal Company

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA Case No. 39576

Subcase Nos. 01-23B, 01-297, 35-2543,
35-4246

**RESPONDENT ABERDEEN-SPRINGFIELD
CANAL COMPANY'S BRIEF IN RESPONSE
TO OBJECTORS' JOINT OPENING BRIEF
ON CHALLENGE**

COMES NOW Claimant Aberdeen-Springfield Canal Company ("Claimant" or "ASCC"), by and through its attorneys of record and, pursuant to this Court's *Challenge Scheduling Order* of September 15, 2010, hereby files this *Brief in Response to the Objectors' Joint Opening Brief on Challenge* which was filed with this Court on or about November 23, 2010 by Objectors, 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 ("Objectors" or "SWC").

I. BACKGROUND AND PROCEEDINGS

Claimant's water right 01-23B was initially claimed in the early years of the SRBA claims process and was based on prior court decrees. The Idaho Department of Water Resources (IDWR, Department) recommended water right 01-23B to have a priority date of February 6,

1895. None of the SWC filed any objection to the original recommendation, although objections were originally filed by the Claimant and the Bureau of Reclamation. ASCC objected to the "place of use" and paragraphs 1 and 2 of the "other provisions" portions of the recommendation. The Bureau of Reclamation objected to the place of use with respect to certain of its land included in the digital boundary defining the place of use. These objections were resolved with additional map review and the aid of the Department. Because the corrected place of use involved more acres than originally claimed, it was necessary for ASCC to file an Amended Claim. The Amended Director's Reports followed on March 21, 2008, which gave rise to the new objections by the SWC.

Claimant and the SWC filed motions for summary judgment.¹ On June 11, 2009, the Special Master entered an *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Objectors's Motion for Summary Judgment and Motion to Strike Affidavits* (June 11, 2009 Order). Following the June 11, 2009 Order, the SWC filed a *Motion for Reconsideration*, on January 8, 2010, the Special Master entered an *Order Denying Motion for Reconsideration* (January 8, 2010 Order). On April 23, 2010, the Special Master issued a *Special Master's Report and Recommendation* ("Special Master's Recommendation") pursuant to I.R.C.P. 54(d) for Water Right Nos. 01-23B and 01-297. In response, the SWC filed a *Motion to Alter or Amend*, on May 28, 2010, which was heard before the Special Master on July 1, 2010, and denied in the *Order Denying Motion to Alter or Amend* dated August 31, 2010. The SWC have now brought before this Court a *Challenge* to the April 23, 2010 *Special Master*

¹ The background and initial proceedings following the SWC's objections are accurately discussed in greater depth in the Court's *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Objectors's Motion for Summary Judgment and Motion to Strike* on June 11, 2009 ("Summary Judgment Order") and in the *State of Idaho's Memorandum in Response to Objectors' Motion for Reconsideration* dated September 29, 2009 ("State's Memorandum") as such, it will not be repeated here .

Recommendation and August 21, 2010, *Order Denying Motion to Alter or Amend* with regard to Water Right No. 01-23B.

II. OBJECTORS' CHALLENGE TO THE SPECIAL MASTER'S RECOMMENDATION

The SWC Challenge raises the following issues:

1. That the refusal to remand to the Director for further hearing is contrary to the language of the accomplished transfer statute, Idaho Code § 42-1425.
2. That Water Right 01-23B should not have a "recharge for irrigation" purpose of use with a priority date of 1895 because a) the claimants are bound by prior decrees, and b) since "recharge for irrigation" was not a lawfully recognized beneficial use until at least 1978, it is improper to recommend such a use with an 1895 priority date.
3. That 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 because a) the Director has no authority to recommend a water right with elements that were not claimed in the SRBA and b) there is no evidence in the record to support the purpose of us "recharge for irrigation."

In addition to the issues raised by the SWC, the Court must determine: 1) whether the Special Master's rulings on the issues were "clearly erroneous" such that reversal by a District Court would be appropriate; 2) whether the Objectors' claims at this procedural stage are barred by *res judicata*; and 3) whether the Idaho Rules of Civil Procedure (I.R.C.P.) permit the Objectors to conduct additional discovery at this late stage in the proceedings.

III. STANDARD OF REVIEW ON CHALLENGE

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); *Rodriguez v. Oakley Valley Stone, Inc.*, 125 Idaho 948, 951, 877 P. 2d 919, 922 (1994). Exactly what is meant by the phrase "clearly erroneous," or how to

measure it, is not always easy to discern. The United States Supreme Court has stated that “[a] finding is ‘clearly erroneous’ when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

It is idle to try to define the meaning of the phrase “clearly erroneous”; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

In Idaho, a special master’s findings which a district court adopts in a non-jury action are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court’s standard for reviewing a special master’s findings of fact is to determine whether they are supported by substantial, although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104. In other words, a referring district court reviews a special master’s findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court’s findings of fact in a non-jury action, i.e. using the “clearly erroneous” standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. Wright and Miller, *supra*, § 2614; *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court’s findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an

erroneous view of the law. Wright and Miller, *supra*, § 2585. See Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge, Subcase No. 36-08099 (January, 2000).

In contrast to the standard of review relative to findings of fact, a special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Stated another way, the conclusions of law of a special master are not protected by or cloaked with the "clearly erroneous" standard. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991). Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Higley*, 124 Idaho at 534.

AO1 does not set forth any criteria or standard of review for a challenge to a special master report and recommendation. However, the SRBA Court has consistently held that Rule 60(b), IRCP provides the proper standard governing motions seeking relief from judgments or orders of the court and that such relief is only granted in "limited situations." See *Memorandum Decision and Order on Challenge*, Subcases 36-00061, 36-00062 and 36-00063 dated September 17, 1999; *Order Denying Claimant's Motion to Alter or Amend* entered by Special Master Booth on November 27, 2009 in Subcase No. 63-32533; *Memorandum Decision and Order on Challenge* issued July 28, 2006 by Judge Melanson on Consolidated Subcase No. 67-13701 (Nez Perce Tribe and United States "Springs or Fountains" Claims). Rule 60(b) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct, of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment.

Miller v. Haller, 129 Idaho 345, 349 (1996). In *Miller*, supra, the court describes the standard for Rule 60(b) motions at pg. 3:

...although the court is vested with broad discretion in determining whether to grant or deny a *Rule 60(b)* motion, its discretion is limited and may be granted only on a showing of "unique and compelling circumstances" justifying relief. *Matter of Estate of Bagley*, 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct. App. 1990) (citing *Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983)). (Emphasis added).

In a recent SRBA proceeding, subcase number 63-32533, Special Master Booth issued an *Order Denying Claimant's Motion to Alter or Amend* on November 27, 2009 ("Order Denying"). In that case the Objectors' counsel Barker Rosholt represented Wilder Irrigation District and successfully argued in their *Response in Opposition to Motion to Alter or Amend* that Rule 60(b) set the applicable standard and that relief could only be granted in "limited situations." Special Master Booth agreed and in his Order Denying rejected the claimant's desire to present additional evidence after the Special Master's Report was issued. Special Master Booth has also ruled that the issuance of a Special Master's Report is governed by Idaho Rule of Civil Procedure 52(b). His opinion directs the parties to "[s]ee *Memorandum Decision and Order on Challenge*, issued by SRBA Judge Wood in subcases 36-61, 36-62, and 36-63 on September 17, 1999. As discussed by Judge Wood:

A motion is made under Rule 52(b) for the purpose of amending Findings or Conclusions, or making additional Findings or Conclusions. IRCP 52(b). Under Federal Rule of Civil Procedure 52(b) – which is identical to IRCP 52(b) – such a motion can be made prior to the entry of a judgment. (Citations omitted) Essentially, a motion under Rule 52(b) allows the Court to correct or augment its Findings so that an appellate court may have a clear understanding of how the trial court arrived at its decision. *9 Moore's Federal Practice*, 52.60(3). The rule is not intended to allow parties to advance new theories or re-litigate the merits of a case. *Id.*

Under Fed. R. Civ. P. 52(b), there are four recognized grounds for granting a motion: (1) correction of manifest error; (2) newly discovered evidence; (3) change in law; and (4) supplement or amplify findings. *9 Moore's Federal Practice* 52.60[4][a]-[d].”

Memorandum Decision and Order on Challenge at 27. On this basis Judge Wood denied the challenge to the Special Master's Recommendations. Similarly, and applying the same standard, Special Master Booth in his denial order in Subcase 63-32533 concluded that the standard had not been met for allowing a Motion to Alter or Amend and refused to reopen the proceeding to allow additional evidence. *See ASCC's Response and Objection to Motion to Alter or Amend* at 3.

Lastly, in its review, the Court may affirm the decision on other grounds than those relied upon by the special master. A reviewing court “must uphold the finding and judgment of the [lower] court if it is capable of being upheld on any theory.” *Mortensen v. Stewart Title Guaranty Co.*, 149 Idaho 437 (2010) (quoting *Fischer v. Fischer*, 92 Idaho 379, 382 (1968)). 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 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. *Ernst v.*

Hemenway and Moser Co., Inc., 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151, 153, 922 P.2d 1077, 1079 (Ct. App. 1996). *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985). Since Special Master Dolan's *Recommendation* does indeed "correctly state the law," this Court should affirm his decision. Furthermore, in the interest of efficient use of judicial resources and fairness, and in accordance with applicable law and procedure, this Court should deny the Objectors' plea for remand.

V. ARGUMENT

A. Introduction

Based on the established record and following oral arguments, the Court issued its *Summary Judgment Order* on June 11, 2009, holding 1) that recharge through irrigation was recognized as a beneficial use of water in Idaho before enactment of the ground water recharge statute in 1978 and 2) that the portion of ASCC's diversion from the Snake River decreed "for irrigation and other purposes" was lawfully changed to include "recharge for irrigation" as an accomplished transfer pursuant to Section 42-1425, Idaho Code. In so doing, the Court recognized that the Objectors offered no evidence of injury or enlargement of the diversion and consumptive use, only speculation; and, further, noted that the Objectors' request for remand for further hearing on whether the change injured other water rights "lack[ed] merit because no one has claimed injury or enlargement and besides, the Director has already submitted his report with

his findings and conclusions,” and “another hearing would only serve to delay final resolution of the claim.” *Summary Judgment Order* at 11. Thus, the Court granted ASCC’s Summary Judgment with regard to Water Right 01-23B.

Similarly, the Court denied the Objectors’ *Motion for Reconsideration* on January 8, 2010, on similar, if not identical, bases, holding that:

The Objectors’ *Motion for Reconsideration* failed to present any arguments not already heard in the summary judgment proceedings and they suggested no sound reasons to amend the June 11, 2009 [*Summary Judgment Order*] [. . .] The Coalition may disagree with the Director’s findings, but the results stand. We can run over a skunk twice, but it’s still dead.

Order Denying Rule 56(f) Request for Additional Discovery and Motion for Reconsideration at 4-5.

The Court denied the Objectors’ claims a third time in the *Motion to Alter and Amend* on August 31, 2010, stating that:

The Objectors repeated the two main arguments it made in earlier proceedings Aberdeen-Springfield Canal Company and the State correctly stated the Coalition’s *Motion to Alter or Amend* merely repeats arguments made twice before in these subcases. Both times, the Special Master reached the same conclusions It should be obvious by now that the disputed issues have been fully briefed, argued and determined at the special master level and nothing further is to be gained by more of the same. The Coalition has failed to present any new arguments; hence its *Motion to Alter or Amend* must be denied.

Order Denying Motion to Alter or Amend at 4-5.

Here again, the SWC has presented to the Court on *Challenge* the same set of issues which have been briefed and argued repeatedly. The Court’s Orders, ASCC’s Briefs, and State’s Memoranda have repeatedly and thoroughly refuted the arguments asserted by the Objectors’ *Summary Judgment Motion*, *Motion for Reconsideration*, and *Motion to Alter and Amend*, and are adopted

herein by ASCC by reference. ASCC submits the arguments below to bolster and supplement the Court's prior and appropriate rulings on these issues.

B. THE SPECIAL MASTER HAD NO DUTY TO REMAND UNDER I.C. §42-1425 BECAUSE THE SWC FAILED TO ALLEGE OR DEMONSTRATE ACTUAL INJURY DUE TO AN ACCOMPLISHED TRANSFER

The Special Master is not required to remand for further hearing under the accomplished transfer statute, I.C. §42-1425. The SWC argues that the Court misinterpreted the requirements of the accomplished transfer statute, I.C. § 42-1425, by failing to remand the water right to the Director for further hearing to see if the change injured a water right existing on the date of change or constituted an enlargement. This argument was made by the SWC in its briefs and memoranda in support of its *Summary Judgment Motion*, *Motion to Alter and Amend*, and *Motion for Reconsideration*. See *Objectors' Response to ASCC's Motion for Summary Judgment and Rule 56(f) Request* at 7-8; *Objectors' Reply in Support of Motion to Alter and Amend* at 2-4; *Objectors' Reply to Response Briefs* at 9-10, and *Objectors' Brief in Support of Motion for Reconsideration* at 8-9. Each time the Court has rejected this argument.

First, the Court properly rejected this argument at page 11 of the *Summary Judgment Order*:

Given that record, the Director then found that the change took place before November 19, 1987, there was no injury to other water users and there was no enlargement of ASCC's diversion and consumptive use. Thus, the requirements of Idaho's accomplished transfer statute were met and the Director properly recommended inclusion of the recharge for irrigation use. ASCC correctly noted that the Objectors offered no evidence of injury or enlargement of the diversion and consumptive use, only speculation. The Objectors' suggestion that the matter be remanded to the Director 'for further hearing to determine whether the change injured a water right existing on the date of change or constituted an enlargement of the original right (I.C. §42-1425(2)(a)) lacks merit because no one has claimed injury or enlargement and besides, the Director has already submitted his Report

with his findings and conclusions. Another hearing would only serve to delay final resolution of the claim.”__

Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Objectors's Motion for Summary Judgment and Motion to Strike Affidavits at 11.

The Court again addressed and specifically rejected this argument in its order following Objectors' *Motion for Reconsideration*:

[R]emanding the issue of the accomplished transfer to the Director for further hearings on the issues of when the accomplished transfer occurred and possible injury to existing water rights and enlargement would only delay final resolution of [the] claim because the Director has already heard the matter.

Order Denying Rule 56(f) Request for Additional Discovery and Motion for Reconsideration at 4-5.

Finally, the Court rejected this argument a third time in its *Order Denying Motion to Alter or Amend*, clearly concluding that remand would only serve to further delay a final disposition of this water right claim. Special Master Dolan stated:

The Objectors repeated the two main arguments it made in earlier proceedings: [. . . including that] the refusal to remand to the Director for further injury analysis and a hearing is directly contrary to the plain language of the law. *Objectors' Motion*, at 2 and 4.On the ... issue of remand to the Director under I.C. § 42-1425(2)(a), the Special Master twice held that remand would only serve to delay final resolution of the claim since the Director has already submitted his findings.... It should be obvious by now that the disputed issues have been fully briefed, argued and determined at the special master level and nothing further is to be gained by more of the same. The Coalition has failed to present any new arguments; hence its *Motion to Alter or Amend* must be denied.

Order Denying Motion to Alter or Amend at 2 and 4-5.

The SWC's continued efforts to seek a rehearing are ineffectual given the fact they persist in failing to offer any evidence of injury or enlargement that would rebut the presumption of the Director's Report. The Objectors are not entitled to any additional administrative hearing under I.C. §42-1425(2). Objector's motivations appear to be to be given

a second opportunity to correct their mistake on not conducting timely discovery and to delay final resolution of their objections and partial decrees for ASCC's water rights. The requirements of I.C. §42-1424 have been met and the *Summary Judgment Order*, *Order on Motion for Reconsideration*, and *Order on Motion to Alter or Amend* were properly entered in accordance with the Director's Recommendation.

C. THE SPECIAL MASTER CORRECTLY CONCLUDED THAT WATER RIGHT 01-23B HAS A VALID "RECHARGE FOR IRRIGATION" PURPOSE OF USE WITH AN 1895 PRIORITY DATE.

1. Recognizing Recharge for Irrigation Under ASCC's Water Right 01-23B is Not Precluded by the Prior Decrees.

The Objectors contend that ASCC is bound by prior decrees as to purpose of use for Water Right No. 01-23B, thereby concluding that "recharge for irrigation" cannot be added as a purpose since it was not included in the Eagle or Rexburg Decrees. *Memorandum in Support of Joint Motion for Summary Judgment* at pp. 5, 6. This argument is devoid of merit and entirely ignores the very purpose and clear and unambiguous language of the accomplished transfer statute. The Objectors present no authority whatsoever to support their argument to disregard the plain language and very purpose of the statute to recognize an accomplished transfer. The prior Decrees establishing ASCC's Water Right No. 01-23B which establish "irrigation" and "other purposes" as the purpose of use certainly do not preclude the addition of "recharge for irrigation" as an additional purpose as a matter of law. This argument by the Objectors should be dismissed entirely for lack of a legal basis.

2. "Recharge for Irrigation" is a Valid and Recognized Beneficial Use

The Objectors argue that recharge could not have been a beneficial use of water prior to the 1978 enactment of Idaho Code § 42-234, and argue that the earliest priority date available

for recharge would be that of the statute's enactment. However, as the State pointed out in its *Memorandum in Response to Objectors' Motion to Alter or Amend*, the Special Master correctly concluded in his orders dated June 11, 2009, and January 8, 2010, that this argument fails based on both the law and facts at issue since 1) Idaho Code § 42-1425 authorized IDWR to recognize an accomplished transfer if the change in purpose met the statute's limitations and 2) "[n]othing in Idaho law precluded recharge appropriation prior to 1978, and the considerable benefits of recharge had been widely recognized long before the enactment of section 42-234."

The Court first explained the posture of recharge as an accepted beneficial use in its *Summary Judgment Order*:

The one objective of the Idaho Water Resource Board quoted earlier ("beneficial and efficient water use") strongly suggests that as early as 1974, the State considered recharge as a beneficial use of water: "All new water uses, both consumptive and non-consumptive 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. . . ." Barber *Affidavit*, attachment 1, last page. In other words, beneficial use was not limited to the four preferred uses: domestic, agricultural, manufacturing and mining. Idaho Const. Art XV, § 3.

It takes no stretch of the imagination to conclude that Idaho has historically considered recharge a beneficial and efficient use of water since the use contributes to efficient water use practices, particularly where groundwater sources are shrinking. Idaho has simply chosen to define beneficial use through the lens of efficient water use practices, not solely according to past or current practices. What may be considered beneficial use today may be considered wasteful tomorrow and vice versa. 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, especially in light of the Idaho Water Resource Board's stated objective in 1974.

Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Objectors's Motion for Summary Judgment and Motion to Strike Affidavits at 10.

When the Objectors nonetheless moved for reconsideration and renewed their position that recharge is not a beneficial use, the Court again specifically rejected this argument:

[O]n the issues of 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, the answer to both questions remains the same, "yes."

Order Denying Rule 56(f) Request for Additional Discovery and Motion for Reconsideration:

Months later, the Court rejected this argument once more in its *Order Denying Motion to Alter or Amend*:

The Objectors repeated the [. . .] argument[] it made in earlier proceedings: Water right 01-23B should not have a "recharge for irrigation purpose of use with a priority date of 1895 [emphasis in original]. *Objectors' Motion*, at 2 and 4. [. . .] Aberdeen-Springfield Canal Company and the State correctly stated the Coalition's *Motion to Alter or Amend* merely repeats arguments made twice before in these subcases. Both times, the Special Master reached the same conclusions: "1) recharge for irrigation was recognized as a beneficial use of water before enactment of [Idaho's] groundwater recharge statute in 1978, and 2) a portion of ASCC's [Aberdeen-Springfield Canal Company's] diversion from the Snake River decreed 'for irrigation' with a priority date of February 6, 1985." April 23, 2010 *Special Master Report*, subcases 01-23B and 01-297, at 3.

Order Denying Motion to Alter or Amend at 4.

The Objectors continue to challenge the validity of the proposed use and priority date of Water Right 01-23 despite the Court's repeated insistence of the validity of both the 1895 priority date and the inclusion of "recharge for irrigation" as a valid and recognized beneficial use. It is significant to not that in all proceedings to date, the Objectors have not introduced any evidence nor have they presented a compelling argument to overcome the Special Master's rulings by demonstrating they were "clearly erroneous." The record in this case is undisputed that recharge for irrigation is a beneficial use of water and that ASCC has complied with the accomplished transfer requirements of Idaho Code § 42-1425. Thus, the Court should uphold the Special Master's rulings on this Challenge by affirming the Partial Decree on ASCC's water right 01-23B claim as recommended in the Director's Report as a matter of law.

Recharge for irrigation has been recognized by this Court, the Department and decreed with pre-1978 priority dates on many occasions. In fact, the Court that decreed water rights in the Rexburg Decree, decreed water rights for “sub-irrigation” and allowed excess water to be run early through the canals of certain irrigators so that the recharged or stored water in the ground could be used later for irrigation:

[P]roper Irrigation of the lands included in these sections of country it is necessary and that it has been the practice of the parties using water upon these lands to use large quantities of water during the Spring months, or the high water season in the Snake River, for the purpose of filling up the soil with water, and that their irrigating is done by sub-irrigating the lands and such filling up of the soil; [. . .] that they use excessive amounts of the high water of the Snake River and its tributaries until on or about the first day of July of each year, at which time the soil becomes saturated with water and that after that date they are enabled to keep the supply of water up by the use of an amount of at least one inch per acre for the balance of the irrigating season, delivered upon the land. [. . .]

What the use of such large quantities of water during the high water season tends to hold back and conserve the supply or amount of water flowing in the Snake River and its tributaries, for use by lower claimants along the said stream during the low water period, or the months of July, August and September [. . .]

Rexburg Irrigation Company et al v. Teton Irrigation Canal Company, Finding of Fact and Conclusions of Law, Finding 31. A copy of the relevant portions from the Rexburg Decree findings of fact are attached as Exhibit 3 to R. Budge Affidavit.

Further, IDWR licensed water right no. 33-2133 for “Soil Root Zone Storage Only” with a June 22, 1949 priority date. In the SRBA this license was claimed by and decreed to Sagewillow, Inc. for “ground water recharge” and “irrigation” based on evidence that the use of water is for ground water recharge which is used for irrigation. A copy of the license and partial decree are attached as Exhibits 1 and 2 to R. Budge Affidavit. The Rexburg decree court’s findings and IDWR’s license referenced above serve to illustrate that the SWC argument that recharge as a purpose of use with a priority date prior to 1978 is entirely without merit.

“Recharge for irrigation” was properly recommended as a purpose of use, in conformance with the facts and evidence in the record and IDWR’s files and expressed in the Director’s Report, as an “accomplished transfer” pursuant to Idaho Code § 42-1425.

The Director’s recommendation justified recharge for irrigation as a valid purpose of use under Idaho Code § 42-1425 for water right 01-23B based on facts in the record, which clearly indicate that 1) ASCC converted a portion of its surface water irrigation to diversion from ground water prior to November 19, 1987, 2) ASCC continued to divert the full amount of water authorized under water right 01-23B in most years, and 3) ASCC did not enlarge its water right by diverting or consuming more than its historical use. The Director’s Report constitutes *prima facie* evidence of the “recharge for irrigation” element. The basis for this recommendation was set forth in the Settlement Agreement, together with the Second Affidavit of Steven T. Howser establishing, as a matter of fact, that ASCC’s Water Right No. 01-23B provides recharge for irrigation through the Company’s canals and delivery systems, which is the source of supply for the ground water rights of the Company and its shareholders within the Company’s place of use for irrigation of lands covered by shares of the Company. *Second Affidavit of S. Howser*, ¶ 4, 5, 8, 9, 10.

Notably, the Coalition agreed there were no genuine issues of material fact as to the issue of recharge for irrigation use when they filed their *Objectors’ Joint Motion for Summary Judgment* in subcase 01-23B on March 27, 2009. *See Order Denying Rule 56(f) Request for Additional Discovery and Motion for Reconsideration* at 4. However, the Objectors then argued, and continue to argue, that recharge for irrigation cannot be considered a beneficial use for the purposes of this water right because it was not a recognized beneficial use at the time of the assigned priority date of 1895.

The Director's recognition of ASCC's change in its purpose of use from irrigation to include "recharge for irrigation" also meets the timing requirements set forth in I.C. §42-1425. An "accomplished transfer" is defined as a change in nature or purpose of use which took place prior to November 19, 1987. Here, the facts are clear and undisputed that the change in the purpose of use of Water Right No. 01-23B to include recharge occurred after this water right was originally decreed in the 1910 Rexburg Decree, yet long before the November 19, 1987 commencement of the Snake River Basin Adjudication. *Second Aff. Of S. Howser*, ¶¶ 7, 8, 9. Furthermore, the I.C. §42-1425(2) requirements are met since no other water rights existing on the date of the change could be injured and there is no enlargement of the original right as a matter of law because the recharge water is delivered to the same lands to which Water Right 01-23B is appurtenant and covered by shares of ASCC. *Second Aff. Of S. Howser*, ¶¶ 7, 8, 9, 10. The Director properly complied with his mandatory duty under I.C. §42-1425 by recommending "recharge for irrigation" as a purpose of use as an accomplished transfer.

All of the wells of ASCC shareholders in Consolidated Subcase No. 35-2315 were licensed with priority dates prior to 1987 as evidenced by the records of the Department. All of these wells and ground water claims have as their source of supply for irrigation water recharge ground water under ASCC's Water Right 01-23B, with irrigation on the same lands covered by shares to which this water right is appurtenant. *Second Aff. Of S. Howser*, ¶ 10. Accordingly, the Director not only had a right, but an obligation, to recommend "recharge for irrigation" as a purpose of use in addition to irrigation for water right 01-23B.

**D. THE SPECIAL MASTER'S FINDINGS OF FACT WERE NOT
"CLEARLY ERRONEOUS."**

In the Recommendation dated April 23, 2010, the Special Master issued the following

Findings of Fact:

01-23B - the Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, IDWR Lower Basin 01* on May 15, 2006. The Director recommended the claim to the Aberdeen-Springfield Canal Company, P.O. Box 857, Aberdeen, Idaho, 83210, for 1,172.1 cfs from the Snake River to irrigate 58,942 acres within the area served by the Aberdeen-Springfield Canal Company and for recharge for irrigation of 21,094 acres from April 1 to October 31 with a priority date of February 6, 1895, based on a decree. Under quantity and place of use, the Director included the remark: "Diversion of rights 1- 23B and 1-297 for the purpose of recharge for irrigation is authorized for a maximum of 501.8 cfs /21,094 acres." Under explanatory material, the Director included the remark: "Right includes accomplished change in purpose of use / place of use pursuant to Section 42-1425, Idaho Code."

A Director's Report is "*prima facie* evidence of the nature and extent of the water rights acquired under state law." Idaho Code § 42-1411(5). A "party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the Director's report as to all issues raised by the objection." Idaho Code § 42-1411(5).

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 and that the 1895 priority date is appropriate. Since the Objectors have offered no evidence whatsoever to rebut the presumption afforded the Director's report on Water Right 01-23B regarding recharge as a beneficial use, the applicable priority date, validity of the accomplished transfer, or lack of injury due to enlargement, they fail in their burden to show that the Special Master's findings are clearly erroneous. As such, the Court must affirm the prior rulings.

F. THE OBJECTORS' GUISED ATTEMPT TO PROCURE ADDITIONAL DISCOVERY SEEKS TO CIRCUMVENT THE I.R.C.P.

The *Trial Schedule Order* dated September 2, 2008, established March 6, 2009 as the cutoff date for all discovery and was issued six months before the deadline for filing dispositive motions. There was an adequate opportunity for discovery as agreed upon by the parties. During the discovery period, the Objectors had the opportunity, pursuant to I.R.C.P. §§ 45(b)(2) and 30(b)(6), to obtain information and documents and take depositions relevant to the Director's recommendations. Despite more than six months to conduct discovery, the Objectors failed to pursue discovery or offer any evidence of injury or enlargement required to rebut the presumption established by the Director's Report that there had been an accomplished change in the purpose of use of ASCC's water rights 01-23B and 01-297. Rather, the Objectors waited until ASCC's *Summary Judgment Motion* was granted, and the Objectors' *Summary Judgment Motion* was denied to attempt for the first time an untimely fishing expedition for facts to support their speculation of injury under Rule 56(f). The denial was proper since "[w]here a party's own lack of diligence is to blame for that party's failure to secure discoverable information, it is not an abuse of discretion to deny a Rule 56(b) motion." *Jenkins v. Boise Cascade Corp*, 141 Idaho 233, 108 P. 3d 380 (2005).

At this late stage, the Objectors have still failed to substantiate any allegation of injury, neglected to show by affidavit or other discovery tool that they could not have timely conducted discovery or present facts by affidavits, or demonstrated how the Court abused its discretion in refusing additional discovery. To allow their belated discovery request at this late stage, and without any allegation of what injury additional discovery might demonstrate, would only serve

to unfairly disregard and prejudice ASCC's right to have the objections timely resolved and their water rights partially decreed.

In sum, the Objectors had ample time to conduct discovery to rebut the *prima facie* evidence from the Director's report, but failed to do so. Thus, the presumption remains that irrigation for recharge should be added as an additional use because it did not injure other water rights or result in an enlargement. The Objectors have not argued, presented, or even alleged that evidence exists that would show ASCC has not in fact utilized water for recharge for irrigation, that the Objectors' water rights have been injured, or that an enlargement occurred from the accomplished transfer. Their lack of diligence and failure to present any evidence of injury or enlargement other than pure speculation, and their failure to prevail on their summary judgment motion, simply does not warrant the Court permitting them to now use a Rule 56 approach to conduct further discovery. The Court did not abuse its discretion in denying the Rule 56(f) motion, so its ruling should be reaffirmed.

VI. CONCLUSION

For the reasons stated above, the Objectors' Challenge is without merit and should be rejected. The Court's *Order Denying Motion to Alter or Amend* and the *Special Master's Recommendation* are based upon a substantial record of undisputed material facts based upon which this Court and the Special Master properly interpreted and applied the accomplished transfer statute, I.C. § 42-1425.

The Objectors have not come forward with evidence that contradicts the director's report or would support overturning any of the Special Master's findings with reference to ASCC's Water Right 01-23B using the legal standard applicable to a District Court on challenge to a

Special Master's ruling. Though the arguments from the prior appeals have been repackaged and renewed, the core issues on this *Challenge* are the same, and their disposition should reflect the same well- reasoned analysis of the prior decisions. Therefore, ASCC's Water Right 01-23B should be resolved in finality by this Court consistent with the rulings on the *Motion for Summary Judgment*, *Motion to Alter and Amend*, *Motion for Reconsideration*, and the *Director's Report* to confirm the Special Master's Recommendation.

RESPECTFULLY SUBMITTED this 27th day of December, 2010.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By Randall C. Budge
RANDALL C. BUDGE