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DEPARTMENT OF
WATER RESOURCES

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

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

SURFACE WATER COALITION'S JOINT REPLY BRIEF ON CHALLENGE

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

Honorable Eric J. Wildman, Presiding Judge

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INTRODUCTION

Aberdeen Springfield Canal Company (“ASCC”) and the State of Idaho (“State”) fail to justify the Special Master’s erroneous recommendation. Through their response briefs, both parties provide several theories as to why the Special Master’s decision should be affirmed. Yet, ASCC never claimed a water right with a “recharge for irrigation” purpose of use. As such, the Director had no authority to recommend such a right. Yet, neither the State nor ASCC even address this issue.

Importantly, neither ASCC nor the State acknowledges the “shall remand” language of the accomplished transfer statute. I.C. § 42-1425. Instead, the State argues that there is a statutory conflict between the clear legal mandates of the accomplished transfer statute and the authority of the SRBA Court to review and consider water right matters. This argument is meritless, however, when the Court considers the limited nature of the remand hearing and the plain language of the statute.

Both the State and ASCC accuse the Coalition of seeking to delay the proceedings or attempt to circumvent the trial scheduling order by conducting unauthorized discovery. Yet, it was the Special Master, not the Coalition, who failed to follow the law and remand the subcases. Given the Special Master’s failure to comply with the remand required by the accomplished transfer statute, the Court cannot fault the Coalition for failing to conduct costly and time-consuming discovery that may have all been for naught. After all, had the remand actually occurred, the parties could have followed the proper procedure and developed a full record regarding injury and enlargement before the Director. Instead, no hearing was held, and the State and ASCC submitted conclusory affidavits on summary judgment that were wrongly accepted by the Special Master contrary to Idaho’s rules of evidence.

Furthermore, there is no basis in the law to force the Coalition to conduct discovery in one forum only to have to then submit to an administrative hearing to prove that remand is appropriate under the accomplished transfer statute. Indeed, the code says that the “district court shall remand” – the only prerequisite is that an objection be filed as was done in this case.

In addition, both the State and ASCC argue that the Legislature’s 1978 enactment of section 42-234 – identifying “recharge” as a beneficial use in certain regions of the State – was a meaningless action. They claim that Idaho had long recognized “recharge” as a beneficial use of water in the state yet they point to no decreed or licensed water rights for “recharge” or “recharge for irrigation”. While “recharge” in a general sense may have been recognized prior to 1978, the Legislature did not authorize the permitting of any water rights for that purpose. In addition, the State’s and ASCC’s attempts to point to water rights for “sub-irrigation” and “root zone soil storage” are not the same as “recharge”. Indeed, both of the examples address a historic surface water irrigation practice in particular areas, not a use of water to mitigate separate junior priority ground water rights, which ASCC has wrongly attempted to do in this case. Their attempt to nullify the Legislature’s action should be rejected.

Finally, the Court must examine the entire purpose behind ASCC’s claimed change in the nature of use of its water right. Essentially, ASCC and the State are asking this Court to “decree” a mitigation plan within a surface irrigation water right. ASCC’s claimed use of “recharge for irrigation” is an attempt to mitigate for junior priority ground water rights within the ASCC tract – directly above the springs and reach gains to the Snake River that supply senior water rights below American Falls. Notwithstanding the requirements of the accomplished transfer statute, which would address injury to other water rights resulting from the alleged change in use, and notwithstanding the requirements of the Conjunctive Management Rules

(Rule 43), ASCC and the State ask this Court to rubber stamp a mitigation plan with no process whatsoever. The result would be that ASCC continues to divert water out of the Snake River at the same rate while its patrons divert groundwater at an additional rate from the Eastern Snake Plain Aquifer – to the detriment of other water right holders in the basin. ASCC cannot have it both ways. This Court should recognize the flawed legal premise and the lack of proper analysis undertaken by IDWR in this case.

Since the Special Master's recommendation is contrary to law, it should be reversed.

ARGUMENT

I. The Director Has No Authority to Recommend A Water Right With Elements that Were Not Claimed in the SRBA.

Noticeably absent from the State's and ASCC's briefing is any response to the Coalition's assertion that the Director is without authority to recommend a water right with an element that was not claimed in the SRBA. *Joint Opening Br.* at Part III.A. As discussed in the Coalition's opening brief, the failure of ASCC to ever claim "recharge for irrigation" as a purpose of use leaves the Director without authority to recommend a water right with that element. Accordingly, the recommendation was improper and should be removed from water right 1-23B.

II. Idaho Code § 42-1425 Requires a Remand When an Objection has been Filed – the Law is Clear and Provides no Discretion.

A. Even Though the Accomplished Transfer Statute Allows for a Recommendation without a Normal Transfer Proceeding, the Exemption from the Hearing Requirement is Limited to Ensure that Due Process Requirements are Satisfied. Failure to Remand in this Case Violated the Coalition's Right to Due Process.

It is important to note that neither response addresses the actual language of section 42-1425. Although the Coalition thoroughly discussed the "shall remand" provision of section 42-

1425(2)(a), neither the State nor ASCC even acknowledge the plain and unambiguous language. Both parties ignore the Legislature's clear instructions. Therefore, their assertions that the statute does not require remand are unpersuasive and should be rejected.

As the Coalition explained in its *Joint Opening Brief*, at 9-16, the accomplished transfer statute was enacted for a very specific purpose: to "avoid the harsh economic impacts that would result from a denial of the claim" for a change in "the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance" with section 42-222. I.C. § 42-1425(1). Importantly, the Legislature specifically found that "**many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed.**"¹ *Id.* at § 42-1425(1)(b) (emphasis added).

Accordingly, the Legislature "waived" "all requirements of section 42-108 and 42-222 ... **in accordance with the following procedures.**" *Id.* at § 42-1425(2) (emphasis added). The statute provides:

If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.

Id. at § 42-1425(2)(a) (emphasis added). According to the Legislature, this "more limited examination of these changes provided for in this section, constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right." *Id.* at § 42-1425(1)(c).

By allowing a hearing, the Legislature ensured that an objecting party received the appropriate due process associated with a normal transfer proceeding under section 42-222.

¹ Such a finding is clearly missing in this case. Although ASCC's decreed "irrigation" water rights were distributed by the Watermaster for nearly a century, there was never any mention or knowledge of other water users of delivering that "irrigation" water to mitigate for junior priority ground water rights.

Without such a hearing, any “changes that occurred [without] the knowledge of other water users,” I.C. § 42-1425(1)(b), would be wrongly accepted without the due process afforded in a normal transfer proceeding. A reading of section 42-1425 makes clear that avoiding due process was not the Legislature’s intent in enacting the accomplished transfer statute. *State v. Scott*, 135 Idaho 457, 458-59 (Ct. App. 2001) (Court “must attempt to give effect to the intent of the legislature. The plain language of the statute determines legislative intent.”).

Here, the Special Master ignored the “shall remand” provision – and instead wrongly accused the Coalition of failing to demonstrate injury or enlargement as a prerequisite for the remand. Importantly, however, the Coalition had no knowledge of ASCC’s alleged change from “irrigation”, as decreed in the *Rexburg Decree*, to “recharge for irrigation”, which wasn’t even a claimed purpose of use by ASCC in its original notice of claim.² Indeed, as the attached excerpts from the Water District 01 Watermaster Reports for 1987, 1978 and 1968, demonstrate, even the Watermaster didn’t know of the alleged change that was claimed to have occurred at some unknown date prior to 1987.³ According to the reports, the watermaster continued to deliver ASCC’s water for “irrigation” – there is no mention of any “recharge for irrigation” deliveries (even in 1987). *Id.* In fact, the reports have no record of any recharge involving ASCC’s previously decreed “irrigation” water rights. *Id.*

Furthermore, ASCC has never claimed these water rights with a “recharge for irrigation” purpose of use. Even after ASCC and the State entered into the settlement agreement, ASCC filed an amended claim that did not include “recharge for irrigation” as a claimed use. In essence, it was not until the Director issued his Director’s Report and unilaterally included

² If ASCC had truly changed a portion of its water right to another use prior to 1987, wouldn’t that purpose of use have been identified in its notice of claim filed in 1990, or at least soon after the accomplished transfer statute was enacted in 1994?

³ Excerpts from the Watermaster Reports for Water District 01 are provide for informational purposes only and are a matter of public record. They are attached as Exhibits A, B & C to the *Thompson Aff.*

“recharge for irrigation” that the Coalition was made aware of ASCC’s new accomplished transfer claims.

Upon learning of ASCC’s new theory and the Director’s recommendation, the Coalition filed an objection. That objection, alone, triggered the accomplished transfer statute’s “shall remand” provision. Contrary to the Special Master’s erroneous interpretation, the Coalition did not have to demonstrate or put on evidence of “injury” or “enlargement” as a condition to the remand. The Special Master’s refusal to remand in accordance with the clear language of the accomplished transfer statute has deprived the Coalition of its right to due process on the alleged change in purpose of use.

The accomplished transfer statute’s plain language cannot be overstated. The statute provides that the “district court shall remand” when an objection has been filed. It does not require any particular language or form in the objection. It does not require a formal remand request by the objecting party. It does not require discovery prior to remand. Finally, it does not require any showing to the district court of injury or enlargement as a prerequisite to remand. It simply states that the “district court shall remand.”

The State’s and ASCC’s refusal to acknowledge this “shall remand” provision is telling. Rather than comport their arguments with the plain language of the statute, the State and ASCC ignore the “shall remand” provisions and instead proffer arguments that seek to write that provision out of the code. The State asserts that the Coalition’s arguments create a violation of the separation of powers doctrine and are inconsistent with the procedures of the APA. Both ASCC and the State assert that remand is not warranted unless and until the objecting party conducts discovery and convinces the SRBA court that there is injury or enlargement. As discussed below, none of these arguments justify a decision by this Court that ignores the plain

language of the statute (i.e. the “shall remand” provision). *See e.g. Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 311 (2009) (“The statute should be considered as a whole, and *words should be given their plain, usual, and ordinary meanings*. It should be noted that the Court *must give effect to all the words* and provisions of the statute so that *none will be void, superfluous, or redundant.*”) (emphasis added); *Scott, supra* at 459 (“When a statute is clear and unambiguous, it must be interpreted in accordance with its language, courts must follow it as enacted, and a reviewing court may not apply rules of construction”). The Special Master’s refusal to remand is contrary to the plain language of the accomplished transfer statute.

B. The Accomplished Transfer Statute Does Not Require that an Objector Conduct Discovery and Participate in a Hearing before the SRBA Court in Order to Prove the Need for Remand.

The State and ASCC continue to cling to the Special Master’s incorrect reasoning and conclusion that the Coalition must first conduct discovery and prove that there is injury or enlargement as a precondition to a remand back to IDWR. The State asserts that the Coalition “could have submitted information to the Court and the Director on the issue of injury or enlargement.” *State Br.* at 30. The State concludes that the Coalition “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.” *Id.* ASCC quotes large portions of the Special Master’s decisions and concludes that the Coalition’s “efforts to seek a rehearing⁴ are ineffectual given the fact they persist in failing to offer any evidence or injury or enlargement.” *ASCC Br.* at 11-12. Importantly, however, neither cite to any provision of the statute to support their “hearing-before-a-hearing” interpretation of the law.

⁴ ASCC’s claim that the Coalition is seeking “a rehearing” is misleading. Indeed, there has never been a hearing as contemplated by the accomplished transfer statute. As such, the Coalition is actually seeking a hearing – not a rehearing.

Indeed, there is no such requirement.⁵ Certainly, had the proper procedures been followed by the Special Master, the parties could have conducted the appropriate discovery in the administrative forum and sought appropriate relief from any supplemental director's report before the SRBA Court. The State's and ASCC's arguments of "what could have been" regarding discovery before the Court are irrelevant considering the context of the failed remand and the fact the parties were improperly precluded from addressing the questions of "injury" and "enlargement" before the agency.

The assertion that the Coalition must prove the need for a remand to the SRBA Court prior to the remand contemplated under section 42-1425 cannot stand. The law is clear. When an objection is filed, the "district court shall remand" to the Director for a hearing. The Special Master's failure to remand is contrary to the plain language of the statute.

C. Accusations that the Coalition is Seeking to Delay the SRBA Proceedings or Conduct Unauthorized Discovery are Without Merit.

ASCC accuses the Coalition of seeking a remand to receive "a second opportunity to correct their mistake on not conducting timely discovery." *ASCC Br.* at 11-12. It accuses the Coalition of seeking "to delay final resolution of their objections and partial decrees for ASCC's water rights." *Id.* at 12. The State echoes the same arguments. *State Br.* at 30 ("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"). The Special Master shared this mistaken interpretation of the statute. *See Order Denying Motion to Alter or Amend* at 4-5. These arguments derive from a misunderstanding of the accomplished transfer statute – which does not require any discovery or other showing prior to remand.

⁵ The State's assertion that "there is nothing whatsoever in the record to support the assertion that 'the Coalition never had the opportunity to discover or present evidence or injury or enlargement before IDWR'" is confusing and misleading. *State Br.* at 30. Indeed, there was never any hearing before IDWR on this matter – the State does not allege that there was.

These arguments mistakenly read the accomplished transfer statute as granting the district court discretion in whether or not to order a remand in the first place. Yet, nothing in the statute provides such discretion – is simply states that the “district court shall remand.” Nothing in the code allows the district court to use alleged “delay” as an excuse to ignore the “shall remand” mandates of section 42-1425.

Contrary to ASCC’s and the State’s claims, the Coalition filed a timely objection to the Director’s Report for water right 01-23B on April 28, 2008. That objection challenged the purpose and place of use elements of the Director’s recommendation. According to section 42-1425, the filing of that objection triggered the requirement that the Court “shall remand” the matter to the Director for a hearing. *See supra*.

Yet, notwithstanding the clear language of the law, the Special Master did not remand the matter. Rather, the parties set a schedule for discovery and a trial. The Coalition did not conduct discovery during the allotted time before the SRBA, and given the clear error made by the Special Master, any discovery conducted may have been for nothing given the context and failure to first address the issues before the agency. Indeed, discovery was not necessary because the matter should have been remanded to the Director for a hearing on injury and enlargement. *Supra*.

Notwithstanding the Special Master’s refusal to remand the matter pursuant to the clear mandates of the accomplished transfer statute for nearly a year, the State, ASCC and even the Special Master accuse the Coalition of trying to delay a resolution of these subcases. In truth, the Coalition filed a timely objection – there is no dispute of that fact – but the matter was never remanded as required by the statute. Simply because the Coalition did not make a formal request for a remand – even though no such request is required by the statute – until after the discovery

period had closed does not make the Coalition's action dilatory. Moreover, although all parties seek timely resolution of their subcases in the SRBA, it is important for the Court and the parties to ensure the cases are properly resolved in conformance with the law. Any arguments to the contrary wrongly ignore the law and facts and should be rejected.

**D. The Procedures Adopted by the Special Master in this Case
Underscore the Need for a Remand.**

The Coalition was prejudiced as a result of the Special Master's refusal to comply with the mandates of the law. In response to the Coalition's summary judgment motion, the State and ASCC each filed several affidavits alleging facts relative to potential injury and enlargement as a result of the alleged accomplished transfer. As discussed in the Coalition's *Joint Opening Brief*, at 12-15, these affidavits contained conclusory statements without any foundation. The Coalition could not properly respond on summary judgment and as provided by Idaho's civil rules sought an opportunity to discover the basis for the various assertions. The Special Master denied that request without any justifiable reason. To date, neither the State nor ASCC have ever provided any basis for these conclusory statements. *Id.*

The testimony provided in the affidavits is exactly the type of evidence that would be heard and properly addressed in a hearing before the Director pursuant to section 42-1425. Yet, the Coalition was denied the opportunity to even discover the basis for that testimony prior to the summary judgment hearing. Indeed, shortly after the hearing on summary judgment, the Special Master vacated the trial setting and subsequently issued his decision granting ASCC's motion for summary judgment. If the trial date was going to be vacated, certainly the Special Master could have provided for some time for the Coalition to depose the affiants and provide a response as allowed by Rule 56(f). Instead, the Coalition was denied that opportunity and the Special Master ignored the rules and proceeded to issue a decision on summary judgment.

In the end, the Coalition was prejudiced for relying on the plain language of the accomplished transfer statute. Indeed, the Coalition was denied the ability to have a hearing before the Director and was further denied the opportunity to discover the basis for the conclusory testimony regarding injury and enlargement – the very information that would have been discovered and addressed in the remand hearing before IDWR. The accomplished transfer statute cannot be read to eviscerate the Coalition’s rights to due process. As such, the Special Master erred as a matter of law in refusing to remand pursuant to the accomplished transfer statute.

E. The Accomplished Transfer Statute Does Not Violate the Separation of Powers Principle or Expand the Director’s Authority before the SRBA Court.

The State attempts to create a conflict between the accomplished transfer statute and the separation of powers principles by claiming the statute expands the Director’s authority before the SRBA Court. The State argues that since “it has not been the practice of the SRBA Court to use the fact-finding procedures provided in the accomplished transfer statute,” *State Br.* at 25, the Coalition’s request should be denied – regardless of the plain language of the statute itself. These arguments are based on a misconception of purpose of the accomplished transfer statute. Moreover, the State’s alleged “historical practice” of other Special Masters is no justification, particularly if the statute was not properly followed in those subcases, or if it was waived by all parties in those proceedings. Those examples do not justify or validate the error in this case.

First, as discussed above, the accomplished transfer statute was intended to help “avoid the harsh economic impacts that would result from a denial” of all water rights claimed with a transfer but that did not follow the normal statutory procedures. I.C. § 42-1425(1)(b). As such, it provided a “limited examination” of the alleged changes when an objection is filed. *Id.* § 42-

1425(1)(c). The statute was not intended to eliminate the due process requirements afforded under normal transfer proceedings. As such, if an objection is filed, due process demands a hearing and an opportunity to address injury and enlargement before the Director. *Id.* § 42-1425(2)(a). This is the same authority provided to the Director pursuant to section 42-222. In essence, through the accomplished transfer statute, the Legislature “waived” the hearing requirements unless an objection is filed to the recommendation of the accomplished transfer. Since an objection was filed in this case, a hearing is required – the “district court shall remand.” *Id.*

The State alleges that a section 42-1425 remand hearing would constitute a “relinquishment of the SRBA Court’s jurisdiction in violation of the separation of powers principle.” *State Br.* at 21. The State is wrong. Indeed, section 42-1425(2)(a) specifically states that the Director is only authorized to hear issues of injury and enlargement and that any decision by the Director is in the form of a “supplemental report.” Contrary to the State’s interpretation, any party aggrieved by the Director’s decision “may seek review before the district court.” I.C. § 42-1425(2)(a).

Reviewing this statute, the Special Masters have recognized that this is not a separate proceeding but, rather, is part of the adjudicatory process. Special Master Bilyeu concluded that “the remand is not intended to be a separate administrative transfer proceedings, but is to be part of the record for this case.” *Order on Summary Judgment*, at 7 (Subcase Nos. 29-271, *et al.*). Special Master Booth confirmed that “the end result of the hearing under Idaho Code § 42-1425 is the filing of a supplemental director’s report setting for the Department’s findings and conclusions.” *Memorandum Decision & Order on Motions for Summary Judgment*, Subcase Nos. 63-166A, *et al.* (Oct. 22, 2010). The Director issues similar “supplemental reports” – such

as “706” reports – on a regular basis in the SRBA Court. In the end, it is the SRBA Court that makes the final decision. There is no “relinquishment of ... jurisdiction” contemplated under the accomplished transfer statute. The State’s contrary arguments conflict with the plain language of the statute.

For the same reason, the State’s assertion that the section 42-1425 remand hearing conflicts with the limited role of the Director in the SRBA, *State Br.* at 23-27, is not persuasive. The limited nature of the remand hearing – i.e. a hearing on specific issues resulting in a “supplemental report” to the SRBA Court – is wholly consistent with the Director’s role as an “independent expert and technical assistant.” I.C. § 42-1401B(1). Nothing in the accomplished transfer statutes contemplates that the Director will have to step out of his normal SRBA role to preside over such a remand hearing. The accomplished transfer statute requires that the Director preside over such a hearing and then issue a “supplemental report” to the Court. Such a duty is not discretionary. *See In re SRBA Case No. 39576*, 128 Idaho 246, 257 (1995) (the Director has a duty “in fulfilling the obligations assigned by statute”) (quoted in *State Br.* at 24).⁶

F. The Remand Hearing Must Comply with the APA.

The State’s final effort to defend the Special Master’s decision is to attempt to create a conflict between section 42-1425 and Idaho’s APA, I.C. § 67-5201 *et seq.* *State Br.* at 27-29. The State asserts that conducting a remand hearing pursuant to the APA “is an unreasonable interpretation of the statute.” *Id.* at 27. The State goes to great lengths to discuss the limited jurisdiction of the SRBA District Court – including the Legislature’s recent affirmation that the SRBA Court does not have jurisdiction to hear challenges to an agency’s final decision in an administrative proceeding. *Id.* at 27-29.

⁶ The claim that the Director can only hold hearing on a claimants’ water system is likewise flawed. *State Br.* at 26. This argument ignores section 42-1425, which specifically provides that the Court “shall remand” for a hearing. There is no basis to write that provision out of the code.

The State's arguments are incorrect for at least the following reasons. First, there is no conflict with the SRBA Court's limited jurisdiction, as the State alleges. Indeed, the APA specifically provides that "Judicial review of agency action shall be governed by the provisions of this chapter *unless another provision of law is applicable to the particular matter.*" I.C. § 67-5270 (emphasis added). Although the State relies on section 67-5270, it conveniently ignores the emphasized provision in its arguments. In this case, section 42-1425(2)(a), which is "applicable to the particular matter" at issue here, provides that the Director will issue a "supplemental report" to the SRBA Court and that if "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.*" (Emphasis added). Similar to Idaho's APA, the accomplished statute allows an aggrieved party to seek review before the SRBA Court. As such, the alleged conflict of jurisdiction with the SRBA Court simply does not exist.

Second, while the State alleges that "due process does not require a contested case proceeding" on remand, it provides no legal authority for that contention. *State Br.* at 29-30. Indeed, most of the State's supporting argument is based on the mistaken theory that the Coalition must conduct discovery and prove injury or enlargement before a remand occurs. *Id.* (asserting that the Coalition "could have submitted information to the Court and the Director on the issue of injury or enlargement" and "the Objectors simply failed to proffer sufficient evidence on the issue of injury or enlargement" before the SRBA Court). As discussed above, however, this contention directly conflicts with the plain language of section 42-1425.

The only statute speaking to the nature of the hearing to be held before the Director is section 42-1701A. That provision is very clear: "*All hearings required by law to be held before the director* ... shall be conducted in accordance with the provisions of chapter 52, title 67." I.C.

§ 42-1701A(1) (emphasis added). Since the accomplished statute requires a hearing before the Director, if an objection is filed, the provisions of Idaho's APA plainly govern the nature and scope of that hearing.

Furthermore, a party must be permitted to discover the basis of a claim that there will be no injury or enlargement associated with the claimed accomplished transfer. Much of this information, particularly as it relates to enlargement, is generally in the possession of the claimant, and would be discovered and addressed in the administrative hearing. This is particularly true in this case where the "other water users" in Water District 01 had no knowledge of the alleged change in nature of use since the Watermaster distributed water to ASCC's "irrigation" water rights pursuant to prior decrees. Denying the objector – here the Coalition – the opportunity to discover that information essentially eviscerates the objector's right to due process and would turn the remand hearing into a practice of form over function.

G. The Claimant Bears the Burden of Proof at the Remand Hearing.

The State opines that "a remand pursuant to the statute does not shift the burden of proof required to rebut the presumption of the Director's Report." *State Br.* at 24; *see also id.* at 30 ("Nor can a party use the proceedings to shift the burden of proof on injury or enlargement"). This argument, however, is based on the State's mistaken conclusion that a remand is not required by section 42-1425 and that any such remand would "run counter to chapter 14, title 42, Idaho Code." *Id.* at 30. As discussed above, however, these arguments are wrong and conflict with the plain language of section 42-1425.

Furthermore, while the objector bears the burden with regards to elements challenged in the SRBA Court, I.C. § 42-1411(5), that does not mean that the objector in the SRBA Court bears the burden before the Director in an APA. To the contrary, as with other transfer

proceedings, the applicant/claimant must bear the burden of demonstrating that the proposed change (i.e. the accomplished transfer) will not injure other water rights and is not an enlargement of the existing right. *See* I.C. § 42-222. The objectors assume the place as “protestants” and would then be in a position to offer evidence on the issues of “injury” or “enlargement” after the claimant (i.e. applicant) puts on its case. Finally, any aggrieved party, which could include ASCC if the accomplished transfer is denied, may seek review of the Director’s decision before the SRBA Court following the hearing. There is no basis to hold that the burdens would be any different in a remand hearing.

III. Contrary to the State’s and ASCC’s arguments, The Legislature’s Enactment of Section 42-234 in 1978 was Not a Meaningless Act. Since Recharge was Not a Lawfully Recognized Beneficial Use until At Least 1978, the Special Master Erred in Recommending a Recharge Right with an 1895 Priority Date.

It is undisputed that the Legislature did not characterize “recharge” as a beneficial use in Idaho until 1978 – and then, only “in the vicinity of St. Anthony and Rexburg, Idaho.” I.C. § 42-234 (1978).⁷ It was not until 1994 that the Legislature expanded the recognition of “recharge” as a lawful beneficial use for the State of Idaho and amended section 42-234. *Id.* at § 42-234 (1994). Notwithstanding these legislative actions, the State and ASCC argue that the Legislature’s actions had no meaning. *State Br.* at 15-21; *ASCC Br.* at 12-17. Their argument is that the Legislature’s action was unnecessary – in essence meaningless – because the State had long viewed “recharge” as a beneficial use of water. *Id.* This argument is belied by the fact that the Legislature, in enacting section 42-234, made no reference to any general understanding or recognition of recharge as a beneficial use prior to 1978. If it were true, therefore, that recharge was a recognized beneficial use prior to 1978, the Legislature would have acknowledged as

⁷ *See also*, I.C. § 42-4201 (groundwater recharge district for Gooding, Jerome, and Lincoln counties).

much. *Doe v. Durtschi*, 110 Idaho 466, 478 (1986) (“the legislature is presumed to envision the whole body of the law when it enacts new legislation.”).

Importantly, section 42-234 was not the only recharge statute enacted in 1978. Indeed, the Legislature enacted chapter 42, Title 42, Idaho Code addressing “recharge of ground water basins in Jerome, Lincoln and Gooding Counties.” I.C. § 42-4201 (1978). This section created a recharge district and specifically “authorized [IDWR] to issue to the aquifer recharge district a license.” *Id.* at § 42-4201(2) (1978). In 1994, section 42-4201A was amended “to provide that the Legislature declares that the appropriation and underground storage of water by any person, aquifer recharge district, irrigation district, canal company or water district are a beneficial use.” 1994 S. Law, ch. 274 at 851 (Mar. 30, 1994).⁸ If it were true, as the State and ASCC assert, that recharge was a recognized beneficial use prior to 1978, then the Legislature would have no need to specifically recognize recharge in specific regions and then grant the Director the authority to issue a permit.

The State asserts that the interpretation of what constitutes a beneficial use must be held to a “reasonableness” standard and that “any use of water that is valuable or beneficial in fact can be sufficient to support a lawful appropriation in Idaho.” *State Br.* at 18 (underline in original). The State cites to a treatise and several cases that generally hold that “What is beneficial ... depends upon the facts and circumstances of each case.” *Id.* (quoting *Idaho Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 447-48 (1974) (Bakes, J., concurring)). These arguments, however, do not justify the assertion that a water user can do whatever he wants to with the Idaho’s water resources. First, water in Idaho must be put to a beneficial use. As the State recognized in its briefing, Idaho long ago rejected the notion that water usage must merely be “valuable.” *State Br.* at 18.

⁸ For the Court’s convenience, copies of the 1978 legislation and session laws are attached to this brief.

Second, just because “beneficial use” is “a factual inquiry” does not mean that water users can do anything they want with their water. *See State Br.* at 18. Indeed, Justice Bakes confirmed that, absent a legislative pronouncement of beneficial use, it was the Court’s duty to make that decision. *Idaho Dept. of Parks*, 96 Idaho at 447 (“*we must determine* whether or not the scenic and recreational uses in this case are a ‘beneficial use’”) (emphasis added). Furthermore, in that case, the beneficial use in question – “scenic and recreational purposes” – had been declared a beneficial use by the Legislature. *Id.* Neither the State nor ASCC can point to any judicial or legislative recognition that recharge was a recognized beneficial use prior to 1978.

Finally, these statements cannot be read in a vacuum, as the State suggests. They must be read in light of the fact that the Legislature specifically enacted legislation in 1978 that specifically recognized, for the first time in Idaho statutory and/or judicial law, that recharge is a beneficial use of water. I.C. § 42-234 (1978). Importantly, that legislative recognition only condoned recharge as a beneficial use in a limited geographical regions of the state.⁹ *Id.*

This Legislative action cannot be rendered meaningless by the State’s and ASCC’s arguments. *Farber, supra*. As such, if it is true, as the State and ASCC assert, that recharge was a recognized beneficial use of water in Idaho prior to 1978, then the Legislature’s 1978 enactment of a statute that only recognized recharge as a beneficial use in the St. Anthony and Rexburg areas, as well as Gooding, Jerome, and Lincoln counties, must be read as to mark the end of recharge being recognized as a beneficial use in all other areas of the State. *See Hansen v. Blevins*, 84 Idaho 49, 55 (1962) (holding that “silence of the legislature” lead to the “logical” conclusion that a husband could divest himself of community property). Therefore, from 1978 through 1994, when the section 42-234 was amended to recognize recharge as a beneficial use

⁹ *See also*, I.C. § 42-4201.

statewide, it would have been legally impossible for ASCC to change the nature of use of its irrigation water for recharge purposes, given the limited recognition of where “recharge” could occur in the State.

Despite the lack of statutory support, the State and ASCC cite to the *Rexburg Decree*, a former license, and certain engineering reports recognizing “the potential benefits of recharge” to support their contention that the Legislature’s action in 1978 had no effect on the law in Idaho. None of these documents support their contentions.

First, reliance on the *Rexburg Decree* is misplaced here. *See State Br.* at 19; *ASCC Br.* at 15. The provision quoted by ASCC was specifically limited to three distinct areas of the State – Egin Bench, the land across the Snake River from the Egin Bench and certain land along the Teton River. *Budge Aff.* Ex. 3 at 36-37, ¶ 31. The *Rexburg Decree* specifically recognized that these lands have “a gravel formation differing in character from the majority of the lands watered by the Snake River and its tributaries.” *Id.* As such, it allowed the holders of the water rights to saturate their lands during the spring/early summer months in order to make surface irrigation more efficient. *Id.* Nothing in the decree indicates the water was being diverted for “recharge” purposes to mitigate junior priority ground water use. Moreover, this specific geographical limitation is similar to the 1978 enactment of section 42-234 that was limited to “the vicinity of St. Anthony and Rexburg, Idaho.”

Although the diversion and use of “high flows” were recognized in the Lemhi Decree and the Payette and Reynolds Creek decrees, the water use was part and parcel of the particular surface water irrigation in those basis. Nothing in those decrees indicates the water was being diverted to mitigate junior priority ground water use, the claim ASCC makes here. *See State Br.* at 19. Further, nothing in those decrees justified the results that the Special Master, State and

ASCC demand in this case – recharge through the surface water irrigation rights so that ground water wells could pump water with an earlier priority date to the detriment of other surface water rights.

Second, the reliance on the license for water right 33-2133, which was decreed in the SRBA with a “ground water recharge” purpose of use, and a priority date of 1949 is similarly unpersuasive. *See State Br.* at 19-20; *ASCC Br.* at 15. First, that water right was claimed in the SRBA for “Irrigation Storage” – not recharge. *Thompson Aff.* Ex. D. Furthermore, water right 33-2133 was subject to a transfer prior to being decreed in the SRBA. *See Thompson Aff.* Ex. E. That transfer changed the purpose of use of the water rights from “Soil Root Zone Storage Only” or “Irrigation Storage” to “ground water recharge.” The SRBA Court was thereafter required to decree the water right consistent with the transfer – based on the well settled law of the Court. *Memorandum Decision & Order on Motions for Summary Judgment*, (Subcase Nos. 63-2529, *et al.*) (June 11, 2009) (attempt to challenge licensed diversion volume “constitutes an impermissible collateral attack on the prior administrative proceedings”); *Memorandum Decision and Order on Challenge*; *Order on State's Motion to Dismiss Claimant's Notice of Challenge* (Subcase No. 36-8099) (2000) (IDWR license becomes final when the time to appeal it has expired); *Response to United States Motion for Status Conference*, (Subcase No. 03-10022) (2000) (scope of what can be litigated in SRBA is limited and does not include collateral attacks on previously perfected water rights).

Furthermore, much like the water rights in the *Rexburg Decree* and other decrees discussed above, water right 33-2133 was licensed for “Soil Root Zone Storage Only” to improve efficiencies of surface irrigation – not for recharge to mitigate other ground water diversions. *See Thompson Aff.* Ex. F. In 1951, the State Reclamation Engineer specifically

recognized that the “permit was approved on the basis of root zone storage alone *without claim for ground water storage for subsequent withdrawal by pumping.*” *Id.* (emphasis added).

Finally, the State’s reliance on pre-1978 engineering reports “generally” addressing “potential benefits” of recharge do not justify the creation of a beneficial use. *State Br.* at 20-21. Since recharge was not a recognized beneficial use in Idaho until at least 1978, the Special Master’s recommendation of a recharge right with an 1895 priority is in error.

IV. There is No Evidence in the Record to Support a “Recharge for Irrigation” Purpose of Use.

Under section 42-1425, the “district court shall remand” a water right to the Director when an objection is filed to an accomplished transfer. *See supra.* At this hearing, evidence and testimony will be gathered and the Director will issue a “supplemental report” addressing injury and enlargement issues. *Id.* As a result, the Director can recommend the change or disallow the change. I.C. § 42-1425(2)(a). That decision, however, is based on the evidence presented during the remand hearing.

In this case, no remand hearing was provided and the only evidence in the record consists of responsive affidavits filled with conclusory and unsupported statements to which the Coalition was denied an opportunity to respond. There is no evidence of any field exam. Even the Watermaster reports say the surface water was diverted and used to irrigate the ASCC lands. *Thompson Aff.* Exs. A-C. In short, there is no evidence to support the accomplished transfer to “recharge for irrigation” purposes.

ASCC claims that the Coalition’s failure to provide any response to the affidavits constitutes a failure to rebut the prima facie nature of the Director’s Report for water right 01-23B. This argument, however, ignores the fact that the Special Master refused to remand the water right for a hearing as required by section 42-1425. Furthermore, although the objecting

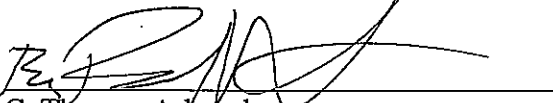
party bears the burden before the SRBA Court with regards to the challenged elements of a water right, the claimant bears the ultimate burden of persuasion on every element of that water right, I.C. § 42-1411(5), and bears the burden of establishing the absence of injury or enlargement at the remand hearing. Absent any evidence to support the claimed accomplished transfer, the Special Master's recommendation is in error.

CONCLUSION

The Special Master failed to comply with the law. There is no basis for refusing to remand pursuant to the accomplished transfer statute. Likewise, there is no basis for a recharge water right that predates the Legislative recognition of recharge as a beneficial use. As such, the recommendation should be reversed.

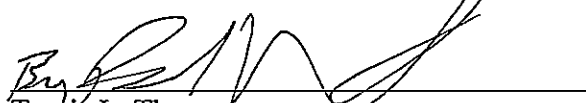
DATED this 11th day of January, 2011.

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CERTIFICATE OF SERVICE

I certify that on January 11, 2011, I served the original and copies of the foregoing to the following persons as indicated:

Original hand delivered to:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

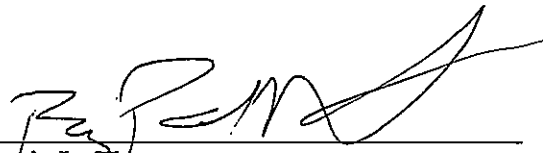
Copies mailed U.S. mail, postage prepaid, to:

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Environment & Natural Resources Division
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Travis L. Thompson

CHAPTER 293

(H.B. No. 474, As Amended, As Amended in the Senate)

AN ACT

RELATING TO RECHARGE OF GROUND WATER BASINS IN JEROME, LINCOLN AND GOODING COUNTIES; AMENDING TITLE 42, IDAHO CODE, BY THE ADDITION THERETO OF A NEW CHAPTER 42, TITLE 42, IDAHO CODE, TO PROVIDE A STATEMENT OF LEGISLATIVE APPROVAL OF THE PROPOSED PROJECT TO RECHARGE GROUND WATER BASINS IN JEROME, LINCOLN AND GOODING COUNTIES, TO DECLARE THE APPROPRIATION AND UNDERGROUND STORAGE OF WATER BY THE AQUIFER RECHARGE DISTRICT FOR PURPOSES OF GROUND WATER RECHARGE A BENEFICIAL USE, TO AUTHORIZE THE DEPARTMENT OF WATER RESOURCES TO ISSUE A PERMIT FOR THE APPROPRIATION AND UNDERGROUND STORAGE OF WATER IN JEROME, LINCOLN, GOODING AND TWIN FALLS COUNTIES, TO PROVIDE FOR REDUCTION OF THE AMOUNT OF WATER WHICH MAY BE APPROPRIATED UNDER CERTAIN CONDITIONS, TO AUTHORIZE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES TO APPROVE, DISAPPROVE OR REQUIRE ALTERATIONS IN THE METHODS EMPLOYED BY THE DISTRICT TO ACHIEVE GROUND WATER RECHARGE AND TO ORDER CESSATION OF OPERATIONS IN THE EVENT OTHER WATER RIGHTS ARE BEING ADVERSELY AFFECTED, TO SPECIFY THE PROCEDURE FOR FORMATION OF THE AQUIFER RECHARGE DISTRICT, TO DESCRIBE THOSE WATER USERS WHO SHALL BE ELIGIBLE TO SIGN THE PETITION FOR FORMATION AND TO BECOME MEMBERS OF THE DISTRICT, TO PROVIDE FOR A HEARING UPON THE PETITION FOR FORMATION AND TO PROVIDE FOR THE ENTRY OF AN ORDER DECLARING OR DENYING THE FORMATION OF THE DISTRICT BY THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES, TO PRESCRIBE THE NUMBER, QUALIFICATIONS AND TERMS OF OFFICE OF THE MEMBERS OF THE BOARD OF DIRECTORS OF THE DISTRICT, TO PROVIDE FOR THE APPOINTMENT OF THE FIRST BOARD BY THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES AND THE ELECTION OF SUBSEQUENT BOARDS, TO PRESCRIBE THE MANNER IN WHICH MUNICIPALITIES INCLUDED WITHIN THE DISTRICT SHALL VOTE FOR DIRECTORS, TO PRESCRIBE THE QUALIFICATIONS FOR VOTING REQUIRED OF MEMBER WATER USERS OTHER THAN MUNICIPALITIES, TO PROVIDE THAT REGISTRATION OF VOTERS SHALL NOT BE REQUIRED, TO PROVIDE FOR NOTICE OF ELECTIONS, TO PROVIDE FOR THE CONDUCT OF ELECTIONS, TO PROVIDE FOR THE CANVASS OF ELECTION RETURNS BY THE BOARD OF DIRECTORS AND THE DECLARATION OF WINNERS, TO PROVIDE FOR OFFICERS, MEETINGS AND COMPENSATION OF THE BOARD OF DIRECTORS AND THE MANNER OF FILLING VACANCIES ON THE BOARD, TO SPECIFY

THE POWERS AND DUTIES OF THE BOARD OF DIRECTORS, TO PROVIDE FOR THE VESTING OF LEGAL TITLE TO PROPERTY ACQUIRED UNDER THE PROVISIONS OF THIS CHAPTER IN THE ACQUIFER RECHARGE DISTRICT, TO EMPOWER THE BOARD OF DIRECTORS TO TAKE CONVEYANCE OF PROPERTY ACQUIRED UNDER THE PROVISIONS OF THIS CHAPTER IN THE NAME OF THE DISTRICT AND TO SUE AND BE SUED, TO PROVIDE FOR LEVY OF ASSESSMENTS, TO EMPOWER THE BOARD OF DIRECTORS TO INCUR INDEBTEDNESS ON BEHALF OF THE DISTRICT AND TO LEVY ASSESSMENTS FOR THE REPAYMENT THEREOF, TO ESTABLISH CERTAIN LEGAL REMEDIES FOR LENDING INSTITUTIONS TO WHICH THE DISTRICT IS INDEBTED, TO PROVIDE THAT ASSESSMENTS SHALL BE LIENS AGAINST THE PROPERTY OF WATER USERS, TO SPECIFY THE DATE BY WHICH ASSESSMENTS MUST BE PAID AND TO PROVIDE FOR THE COLLECTION OF INTEREST AND PENALTIES ON DELINQUENT ASSESSMENTS, TO PROVIDE FOR THE ENTRY OF DELINQUENT ASSESSMENTS UPON THE ASSESSMENT BOOK AND THE FILING OF THE DELINQUENCY LIST WITH THE COUNTY RECORDER, TO PROVIDE FOR REDEMPTION AND SALE OF PROPERTY SUBJECT TO DELINQUENT ASSESSMENTS, TO REQUIRE EACH MUNICIPALITY INCLUDED WITHIN THE DISTRICT TO LEVY A SPECIAL TAX ON TAXABLE PROPERTY WITHIN ITS BOUNDARIES TO PROCURE FUNDS FOR THE PAYMENT OF ASSESSMENTS LEVIED AGAINST IT AND TO EXEMPT MUNICIPALITIES FROM CERTAIN PROVISIONS OF THE CHAPTER, TO EMPOWER THE BOARD OF DIRECTORS TO ENTER INTO CONTRACT WITH CERTAIN INDIVIDUALS AND ENTITIES WHO WISH TO RECEIVE BENEFITS FROM THE DISTRICT, TO SPECIFY THOSE WATER USERS SUBJECT TO INCLUSION WITHIN AND ASSESSMENT BY THE DISTRICT, TO ESTABLISH THE PROCEDURE AND GROUNDS FOR EXCLUSION FROM THE DISTRICT, TO PROVIDE FOR A HEARING ON PETITIONS FOR EXCLUSION AND THE ENTRY OF ORDERS OF EXCLUSION, TO PROVIDE FOR AN APPEAL FROM AN ADVERSE DECISION OF THE BOARD ON A PETITION FOR EXCLUSION, TO DESCRIBE THE EFFECT OF EXCLUSION ON LIABILITY FOR ASSESSMENTS, TO PROVIDE FOR THE TAXATION OF COSTS, TO REQUIRE THE RECORDING OF ANY ORDER OF EXCLUSION, TO PROVIDE SEVERABILITY; AND DECLARING AN EMERGENCY.

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

SECTION 1. That Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 42, title 42, Idaho Code, and to read as follows:

CHAPTER 42
GROUND WATER RECHARGE

42-4201. JEROME, LINCOLN, GOODING AND TWIN FALLS COUN-

TIES -- PROJECT TO RECHARGE GROUND WATER BASINS -- DIRECTOR'S AUTHORITY TO ISSUE PERMIT -- LIMITATIONS. (1) The welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and optimum use of the water resources of this state. The legislature deems it essential therefore that every effort be made to foster and encourage water projects designed to promote these objectives. The legislature hereby acknowledges that the proposed project to recharge ground water basins in Jerome, Lincoln and Gooding counties by means of the storage of unappropriated waters of the Snake River and its tributaries in underground lava beds within that vicinity represents a unique and innovative endeavor to further water conservation and increase the water available for beneficial use. The legislature approves this undertaking as a pilot effort to bring about maximum realization of our water resource potential and finds, in particular, that this project shall serve the interests of the public and advance the multiple use water policy of this state by:

- (a) sustaining and increasing the flow of springs in the general vicinity of the Hagerman Valley;
- (b) increasing the water available for withdrawal from ground water basins located in Jerome, Gooding and Lincoln counties;
- (c) supplementing the supply of water available for irrigation downstream from the Hagerman Valley;
- (d) providing additional aquatic habitats for migratory fowl and wildlife; and
- (e) increasing and sustaining the flow of the Snake River during the summer months and in times of drought when additional flow is needed for the generation of hydroelectric power and the maintenance of water recreation facilities.

(2) In view of the public betterment to be achieved by the completion of this water project, the legislature hereby declares that the appropriation and underground storage of water by the aquifer recharge district hereinafter created for purposes of ground water recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue to the aquifer recharge district a permit, pursuant to section 42-203, Idaho Code, for the appropriation and underground storage of the unappropriated waters of the Snake River in Jerome, Lincoln and Gooding counties and its tributaries in Gooding and Lincoln counties. The department of water resources is further authorized to issue to the aquifer recharge district a license confirming the right to appropriate such waters for the beneficial use herein established upon compliance by the district with the requirements specified in chapter 2, title

42, Idaho Code. The rights acquired by the aquifer recharge district pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those held by any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation.

(3) The director of the department of water resources may regulate the amount of water which the aquifer recharge district may appropriate from the Snake River and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized, but only if the following conditions are met:

(a) the amount of water available for appropriation by the district at the time the reduction is sought exceeds two hundred thousand (200,000) acre feet per year and the reduction, if granted, will not operate to deplete that amount to less than two hundred thousand (200,000) acre feet per year;

(b) the persons or entities seeking the reduction propose to use the water for purposes of surface reservoir storage and appropriation by the district of the entire amount originally authorized will prevent or adversely affect accomplishment of those purposes;

(c) the persons or entities seeking the reduction present substantial and compelling evidence to show that the accomplishment of such purposes will be prevented or adversely affected and the director finds on the basis of such evidence that sufficient justification for the reduction exists.

Even if the foregoing conditions are satisfied and a reduction is granted, such a reduction shall remain in effect only so long as the amount of water available for appropriation by the district exceeds two hundred thousand (200,000) acre feet per year.

The provisions of this subsection shall not apply to appropriation of water by the district from the Big Wood River or the Little Wood River.

(4) To insure that other water rights are not injured by the operations of the aquifer recharge district, the director of the department of water resources shall have the authority to approve, disapprove, or require alterations in the methods employed by the district to achieve ground water recharge. In the event that the director determines that the district's methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing water rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been

accomplished or such adverse effects otherwise have been corrected.

42-4202. AQUIFER RECHARGE DISTRICT -- FORMATION. For purposes of formation of the aquifer recharge district, a petition shall be presented to the department of water resources which shall set forth the object of the organization of the district and the benefits to be provided by the district. The petition shall be accompanied by a map of the proposed district which shall indicate the proposed boundaries of the district, the nature and location of the proposed diversion works and other facilities by means of which water is to be diverted into the recharge area, shall delineate the underground water basin or basins to be affected by the recharge, and shall designate the location of any streams or springs which shall be affected by the recharge. The petition and map shall be accompanied by plans showing the contemplated mode of construction of the diversion works and facilities and an estimate of the cost of constructing such works and facilities, which plans and estimates shall be certified to by an engineer licensed by the state of Idaho.

The petition shall be signed by no less than fifty (50) percent of the water users located within the proposed boundaries of the district. For purposes of this act, "water users" shall include the following:

(1) Individuals, or entities, exclusive of privately owned electrical generating companies, who are the holders of title or evidence of title to property within Jerome, Lincoln, Gooding and Twin Falls counties, but without the boundaries of a municipality, who are the current holders of a right, acquired in accordance with the provisions of chapter 2, title 42, Idaho Code, to appropriate water in an amount equal to or in excess of one (1) cubic foot per second, and who divert water from underground basins within the area of recharge by means of a well or wells, or who divert water from springs or other water courses emerging from such underground basins, or both.

(2) Municipalities located within Jerome, Lincoln, Gooding and Twin Falls counties which obtain water from underground basins in the area of recharge. A municipality may elect to be included within the proposed district by a majority vote of the members of its city council. The mayor of any municipality so electing may sign the petition on behalf of the municipality, and such municipality shall constitute one water user for purposes of securing the minimum number of signatures required for the petition.

42-4203. FORMATION OF DISTRICT -- DECLARATION BY DIREC-

(4) To insure that other water rights are not injured by the operations of the aquifer recharge district, the director of the department of water resources shall have the authority to approve, disapprove, or require alterations in the methods employed by the district to achieve ground water recharge. In the event that the director determines that the district's methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing water rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such adverse effects otherwise have been corrected.

(5) The fee required for an application for a permit to appropriate water as provided in section 42-221, Idaho Code, is hereby waived from the effective date of this act until July 1, 1996, for recharge projects for recharge districts formed under this section.

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

Approved March 30, 1994.

CHAPTER 274
(S.B. No. 1574)

AN ACT

RELATING TO RECHARGE OF GROUND WATER BASINS; AMENDING SECTION 42-4201A, IDAHO CODE, TO PROVIDE FOR ENCOURAGEMENT FOR PERSONS AND ENTITIES TO USE WATER IN A WAY THAT WILL AUGMENT GROUND WATER BASIN RECHARGE, TO PROVIDE THAT THE LEGISLATURE DECLARES THAT THE APPROPRIATION AND UNDERGROUND STORAGE OF WATER BY ANY PERSON, AQUIFER RECHARGE DISTRICT, IRRIGATION DISTRICT, CANAL COMPANY OR WATER DISTRICT ARE A BENEFICIAL USE, TO PROVIDE THE EFFECT OF CERTAIN WATER RIGHTS FOR POWER PURPOSES AND TO PROVIDE THAT THE DIRECTOR MAY REGULATE THE AMOUNT OF WATER WHICH MAY BE DIVERTED FOR RECHARGE PURPOSES; AND DECLARING AN EMERGENCY.

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

SECTION 1. That Section 42-4201A, Idaho Code, be, and the same is hereby amended to read as follows:

42-4201A. RECHARGE OF GROUND WATER BASINS -- DIRECTOR'S AUTHORITY TO ISSUE PERMIT ---LIMITATIONS. (i) The welfare of the people of the state of Idaho is dependent upon the conservation, development, augmentation and optimum use of the water resources of this state. The legislature deems it essential therefore that every effort be made to foster and encourage water projects designed to promote these objectives and water use that will augment ground water basin recharge. The legislature hereby acknowledges that certain water uses and proposed projects to recharge water basins in the state by means of the storage

of unappropriated waters of the public waters of the state in underground aquifers represents a unique and innovative endeavor to further water conservation and increase the water available for beneficial use.

(2) In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by an ~~aquifer recharge district hereinafter created and operated pursuant to the provisions of chapter 42, title 42, Idaho Code~~, any person, aquifer recharge district, irrigation district, canal company or water district for purposes of ground water recharge ~~or by an irrigation district organized and operated pursuant to title 43, Idaho Code~~, shall constitute a beneficial use and hereby authorizes the department of water resources to issue ~~to the aquifer recharge district, or the irrigation district~~, a permit, pursuant to section 42-203, Idaho Code, for the appropriation and underground storage of the unappropriated waters of the state. The department of water resources is further authorized to issue ~~to an aquifer recharge district, or an irrigation district~~, a license confirming the right to appropriate such waters for the beneficial use herein established upon compliance ~~by the district~~ with the requirements specified in chapter 2, title 42, Idaho Code. The rights acquired ~~by an aquifer recharge district, or an irrigation district~~, pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those held ~~by any privately owned electrical generating company to appropriate waters in the reaches downstream from a recharge project diversion for purposes of hydroelectric power generation~~ water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

(3) The director of the department of water resources may regulate the amount of water which an ~~aquifer recharge district, or an irrigation district~~, may ~~divert~~ be diverted for recharge purposes and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized by permit or license. To facilitate necessary financing of an aquifer recharge project, the director may fix a term of years in the permit or license during which the amount of water authorized to be diverted shall not be reduced by the director under the provisions of this subsection.

(4) To insure that other water rights are not injured by the operations of an aquifer recharge project, the director of the department of water resources shall have the authority to approve, disapprove, or require alterations in the methods employed ~~by a district~~ to achieve ground water recharge. In the event that the director determines that the ~~district's~~ methods of operation are adversely affecting existing water rights or are creating conditions adverse to the beneficial use of water under existing water rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such adverse effects otherwise have been corrected.

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

Approved March 30, 1994.

CHAPTER 275
(H.B. No. 886)

AN ACT

RELATING TO HEALTH INSURANCE; AMENDING CHAPTER 28, TITLE 41, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 41-2872, IDAHO CODE, TO PROVIDE HEALTH CARE PROVIDER CONTRACTS WITH QUALIFIED HEALTH CARE PROVIDERS, TO PROVIDE A GRIEVANCE SYSTEM AND TO PROVIDE APPLICATION; AMENDING SECTION 41-3408, IDAHO CODE, TO PROVIDE GROUNDS FOR REFUSING TO CONTRACT AND TO PROVIDE A GRIEVANCE PROCEDURE; AMENDING CHAPTER 39, TITLE 41, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 41-3937, IDAHO CODE, TO PROVIDE HEALTH CARE PROVIDER CONTRACTS WITH QUALIFIED HEALTH CARE PROVIDERS, TO PROVIDE A GRIEVANCE SYSTEM AND TO PROVIDE APPLICATION.

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

SECTION 1. That Chapter 28, Title 41, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 41-2872, Idaho Code, and to read as follows:

41-2872. HEALTH CARE PROVIDER CONTRACTS -- GRIEVANCE PROCEDURE.

(1) Any stock or mutual insurer (hereinafter insurance company) issuing benefits pursuant to the provisions of this chapter shall be ready and willing at all times to enter into health care provider service contracts with all qualified health care providers of the category or categories which are necessary to provide the health care services covered by the insurance company's policy of insurance if such health care providers: are qualified under the laws of the state of Idaho, desire to become participant health care providers of the insurance company, meet the requirements of the insurance company, and practice within the general area served by the insurance company.

(2) Nothing in this section shall preclude an insurance company from refusing to contract with a health care provider who is unqualified or who does not meet the terms and conditions of the participating provider contract of the insurance company or from terminating or refusing to renew the contract of a participating health care provider who is unqualified or who does not comply with, or who refuses to comply with, the terms and conditions of the participating health care provider contract including, but not limited to, practice standards and quality requirements. The contract shall provide for written notice to the participating health care provider setting forth any breach of contract for which the insurance company proposes that the contract be terminated or not renewed and shall provide for a reason-