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WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
APR - 4 2011
By _____ Clerk Deputy Clerk

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

In Re SRBA) Subcase Nos. 01-23B, 01-297, 35-2543 and 35-4246
Case No. 39576) (Aberdeen-Springfield Canal Co.)
)
) MEMORANDUM DECISION AND ORDER ON
) CHALLENGE
)
)
_____)

Holding: Recommitted to Special Master for additional evidence and findings on basis of recharge.

Appearances:

Travis L. Thompson of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

W. Kent Fletcher of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

Randall C. Budge of Racine Olson Nye Budge & Bailey Chartered, Pocatello, Idaho, attorneys for Aberdeen-Springfield Canal Company.

Harriet A. Hensley, Deputy Attorney General of the State of Idaho, Natural Resources Division, Boise, Idaho, attorney for the State of Idaho.

Andrea L. Courtney, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorney for the Idaho Department of Water Resources.

I.

PROCEDURAL BACKGROUND

1. This matter concerns certain water rights claimed in the Snake River Basin Adjudication (“SRBA”) by the Aberdeen-Springfield Canal Company (“ASCC”).

2. On June 23, 1999, the Director of the Idaho Department of Water Resources (“IDWR” or “Director”) filed his *Director’s Report for Irrigation and Other Uses, Reporting Area 5 (IDWR Basin 35)*, recommending water rights 35-2543 and 35-4246 in the name of the ASCC.

3. On May 15, 2006, IDWR filed its *Director’s Report, Irrigation and Other Uses, IDWR Lower Basin 01*, recommending water rights 01-23B and 01-297 in the name of the ASCC.

4. The water rights were recommended by the Director with the following elements:

Right	Source	Purpose and Period of Use	Quantity	Priority	Place of Use
01-23B	Snake River	Irrigation (04/01 – 10/31) Recharge for irrigation (04/01 – 10/31)	1,172.10 cfs 501.80 cfs	02/06/1895	58,942 acres
01-297	Snake River	Irrigation (04/01 – 10/31) Recharge for irrigation (04/01 – 10/31)	230.00 cfs 230.00 cfs	04/01/1939	58,942 acres
35-2543	Groundwater	Irrigation (04/01 – 10/31)	6.00 cfs 2,400.00 afy	08/07/1958	37,798 acres
35-4246	Groundwater	Irrigation(04/01 – 10/31)	2.44 cfs 976.00 afy	10/15/1934	37,798 acres

5. The Director recommended that the following remark be included under the quantity and place of use elements of water rights 01-23B and 01-297: “Diversion of rights 01-23B and 01-297 for the purpose of recharge for irrigation is authorized for a maximum of 501.8 cfs / 21,094 acres.”

6. Also with respect to water rights 01-23B and 01-297 the Director included a remark in the recommendation that stated: “Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code.”

7. Various *Objections* to the recommendations for the above-captioned water rights were subsequently filed. These initial *Objections* were subsequently resolved by the filing of a *Stipulation to Resolve Objection*.¹

8. On June 21, 2007, the ASCC was granted leave to amend its claims for the above-captioned water rights “to more accurately [identify] the place of use resulting in a larger number of acres than originally claimed.”

9. On March 25, 2008, IDWR filed *Amended Director’s Reports* for the above-captioned claims in response to the amended claims. The above-captioned water rights were recommended by the Director in the *Amended Director’s Reports* with the following elements:

Right	Source	Purpose and Period of Use	Quantity	Priority	Place of Use
01-23B	Snake River	Irrigation (04/01 – 10/31) Recharge for irrigation (04/01 – 10/31)	1,172.1 cfs 389.5 cfs	02/06/1895	61,772.6 acres
01-297	Snake River	Irrigation (04/01 – 10/31)	230.00 cfs	04/01/1939	61,772.6 acres
35-2543	Groundwater	Irrigation (04/01 – 10/31)	6.00 cfs 2,547.00 afy	08/07/1958	61,772.6 acres
35-4246	Groundwater	Irrigation(04/01 – 10/31)	2.44 cfs 155.00 afy	10/15/1934	61,772.6 acres

10. The Director recommended that the following remark be included under the place of use element of water right 01-23B: “Diversion of this right for the purpose of recharge for irrigation is authorized for a maximum of 17,161.6 acres.”

11. Consistent with the original *Director’s Reports*, the *Amended Director’s Reports* for water rights 01-23B and 01-297 included a remark in the recommendation that stated: “Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code.”

12. On April 28, 2008, the A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, American Falls Reservoir District #2, Twin Falls Canal Company, and North Side Canal Company (collectively the “Surface Water Coalition” or “SWC”) filed *Objections* to the Director’s amended recommendations for water right claims 01-23B and 01-297, objecting to priority date, purpose of use, place of use and remarks.

¹ *Objections* to the initial recommendations were made by the United States Bureau of Reclamation and the United States Bureau of Land Management, objecting to the place of use element. A *Stipulation to Resolve Objection* was subsequently filed resolving these *Objections*.

13. Also on April 28, 2008, all the members of the SWC, less the Minidoka Irrigation District, filed *Objections* to the Director's amended recommendations for water right claims 35-2543 and 35-4246, objecting to place of use and remarks.

14. On July 16, 2008, the Special Master entered an *Order* permitting the State of Idaho to file *Late Responses* to the *Objections* filed in each of the above-captioned subcases. The State of Idaho subsequently filed *Late Responses* in all four subcases.

15. On March 26, 2009, the ASCC filed a *Motion for Summary Judgment* along with supporting documents in all four of the above-captioned subcases, requesting an order granting a partial decree for each water right be issued consistent with the recommendations in the *Amended Director's Reports*.

16. On March 27, 2009, the SWC filed a *Motion for Summary Judgment* along with supporting documents in subcase 01-23B. The SWC argued that water right 01-23B cannot include a "recharge for irrigation" purpose of use as a matter of law, and that the "recharge for irrigation" purpose of use should be dismissed.

17. The State of Idaho filed its *Brief in Response* to the *Summary Judgment Motions* in all four subcases on April 16, 2009. The State's brief identified the primary issue in the subcases as whether the Director's amended recommendation for water right 01-23B correctly included "recharge for irrigation" as a purpose of use.

18. The SWC filed its *Response* to the ASCC's *Motion for Summary Judgment* on April 16, 2009, and the ASCC filed its *Response Brief* on April 17, 2009 in subcase 01-23B. The SWC filed its *Reply* in subcase 01-23B on April 23, 2009. The ASCC filed its *Reply* on May 4, 2009.

19. On June 11, 2009, the Special Master entered an *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike Affidavits*, holding that ASCC is entitled to partial summary judgment as a matter of law in subcases 01-23B and 01-297. In that *Order*, the Special Master concluded that (1) recharge for irrigation was recognized as a beneficial use of water before the enactment of the groundwater recharge statute in 1978, and (2) a portion of the ASCC's diversion from the Snake River decreed "for irrigation and other purposes" in water right 01-23B was lawfully changed to "recharge for irrigation" with a priority date of February 6, 1895.

20. In addition, the Special Master found that remanding the matter to the IDWR Director under Idaho Code § 42-1425 would only serve to delay resolution of the claim because the Director has already filed his report with his findings and conclusions in the form of his *Amended Director's Report*. He further found that remand was unnecessary because the SWC offered no evidence of injury or enlargement of the diversion due to the transfer.

21. On January 8, 2010, the Special Master entered an *Order* denying a *Motion for Reconsideration* filed by the SWC. On August 31, 2010, the Special Master entered an *Order* denying a *Motion to Alter or Amend* filed by the SWC.

22. On April 23, 2010, the Special Master entered a *Special Master's Report* in subcases 01-23B and 01-297.

23. The SWC timely filed a *Notice of Challenge* with this Court, challenging the Special Master's *Special Master Report* and his *Order Denying Joint Motion to Alter or Amend*.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on January 18, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or January 19, 2011.

III.

STANDARD OF REVIEW

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.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the

prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

The Special Master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the Special Master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the Special Master's conclusions of law is one of free review. *Id.*

IV. ISSUES RAISED ON CHALLENGE

1. Whether the Special Master erred in recommending a "recharge for irrigation" purpose of use which is contrary to the purpose of use previously decreed for the water right?

2. Whether the Special Master erred in recommending a purpose of use of "recharge for irrigation" with a priority of 1895 when "recharge" was not a statutorily recognized beneficial use in Idaho until at least 1978?

3. Whether there are sufficient facts in the record to support the finding that ASCC changed the nature of a portion of its diversion from "irrigation" to "recharge for irrigation" at a time prior to November 19, 1987, as required by Idaho Code § 42-1425, in order to avoid the requirements of Idaho Code § 42-222?

4. Whether the Special Master erred by declining to remand water right 01-23B to IDWR under Idaho Code § 42-1425?

V. DISCUSSION

A. Factual Background.

The 01-23B claim is the only water right claim at issue in this case. Historical background surrounding the use of ASCC's rights is necessary for context. ASCC is a Carey Act canal company that provides water to 486 shareholders within its service area for the irrigation of 61,722.6 total acres. Water is delivered through water right 01-23B, 01-297, 35-2543 and 35-4246. Water right claim 01-23B is a surface right diverted from the Snake River. The right authorizes the diversion of 1,172.1 cfs and the place of use is the entire 61,722.6 acres. The right was originally decreed on December 19, 1910, (as part of a larger right) in the *Rexburg Irrigation Company et. al. v. Teton Irrigation Canal Company et. al.* ("Rexburg Decree") adjudication with a February 6, 1895, priority date and a purpose of use described as "irrigation and other purposes." The water right was reaffirmed in the *Aberdeen-Springfield Canal Company et. al. v. Henry Eagle* adjudication ("Eagle Decree") on March 12, 1969. Water right claim 01-297 is also a surface right diverted from the Snake River. The right is based on a prior decree with an "irrigation" purpose of use, and the place of use is appurtenant to the same 61,722.6 acres. The right authorizes the diversion of 230 cfs with an April 1, 1939, priority date. The combined quantity of ASCC's two surface rights is sufficient to irrigate the entire 61,722.6 acres. *Holliday Aff.*, p. 3.

Water right claims 35-4246 and 35-2543 are groundwater rights used in conjunction with the two surface rights on the same 61,722.6 acre place of use. Both have an "irrigation" purpose of use. Water right 35-4246 is based on beneficial use for 2,440 cfs with an October 15, 1934, priority date. Water right 35-2543 was previously licensed for a quantity of 6 cfs with an August 7, 1958, priority date and with the source described as "groundwater."² In addition, ASCC operates four "recovery wells" that pump directly into the canal system and are used to supplement the supply of water to shareholders located at the bottom third of the system when shortfalls occur. These wells

² The source is not described with any more particularity such as reclaimed water, reuse, wastewater, return flow, storage etc. nor does the license include any remarks more particularly defining the source.

are not licensed and operate as recovery wells authorized pursuant to Idaho Code § 42-228.³

Beginning in the 1950's and prior to November 19, 1987, individual ASCC shareholders drilled and licensed groundwater wells to supplement portions of the same 61,722.6 acres to which ASCC's shares are appurtenant.⁴ The reason for drilling these supplemental wells was explained as follows:

These claimants, who were also Company shareholders over a long period of time prior to 1987, converted in part or in full their lands covered by Company shares to ground water irrigation wells which were developed to supplement their surface rights delivered by the Company. This was accomplished by these claimants and shareholders to provide for irrigation efficiencies and/or because of difficulties experienced by the Company at times in delivering full supplies to their headgates due to their locations on the system, particularly at peak demand.

2nd Howser Aff. at 4. One hundred and twenty-six (126) of these wells were licensed.

The licenses were issued in the name of the individual shareholders instead of in the name of ASCC. Nothing in the record suggests that the source for the rights, as originally licensed, was anything other than groundwater or subterranean water.

Moreover nothing in the record identifies the source as derived from the same source as ASCC's surface rights.⁵

Despite the application of groundwater by shareholders to all or part of the same acreage previously irrigated with ASCC water shares, ASCC made no corresponding

³ Idaho Code § 42-228 exempts from the mandatory licensing process for establishing a water right through the drilling of wells and withdrawal of water "for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use on or drainage of lands to which the established water rights of the parties constructing the wells are appurtenant" I.C. § 42-228.

⁴ The record is not entirely clear as to the underlying basis for the water rights (i.e. license, prior decree or beneficial use), however, ASCC states in briefing that "all of the wells of ASCC shareholders in Consolidated Subcase 35-2315 were licensed with priority dates prior to 1987 as evidence by records of the Department." *Claimant's Brief in Response to Objector's Brief on Challenge* at 17. These groundwater rights are at issue in consolidated subcase 35-02315 which involves 126 similarly situated subcases where ASCC objected to the recommended source element.

⁵ The sources were not described with any more particularity such as reclaimed water, reuse, wastewater, return flow, storage etc., nor do the licenses include any remarks more particularly defining the source. In fact, the 126 groundwater claims were recommended in the *Director's Report* with the source defined as "groundwater." ASCC filed objections to the 126 recommendations asserting that the source element should include a remark specifying that the source includes groundwater recovered from ASCC's surface irrigation works for use on land to which shares of ASCC are appurtenant and that the recovered water should be administered separately from all other rights in Basin 35 and the Snake River Basin.

reduction in the quantity of its surface diversion rights, including the 01-23B right, nor did it increase the number of irrigated acres of the place of use. *Dreher Aff.*, p. 2.

Approximately 67% of the surface water now diverted and channeled through ASCC's conveyance canals eventually seeps into the groundwater system. This 67% averages about 180,000 AFA. 2nd *Howser Aff.*, p. 5; *Olenichak Aff.*, p. 2., also *State of Idaho Aff.*, Ex. 1 (*Dreher Aff.*, p. 2) ("a portion of the diversion provides incidental recharge to the Eastern Snake Plain Aquifer"). The record does not reflect how much recharge seeped into the groundwater system prior to shareholders using groundwater.

ASCC filed its original *Notice of Claim* for water right 01-23B in the SRBA on May 8, 1990, claiming only "irrigation" as a purpose of use. The *Director's Report for Irrigation and Other Uses, Reporting Area 5 (IDWR Basin 35)* was filed June 13, 1999, which included recommendations for the 126 groundwater claims filed by ASCC's shareholders. The claims were recommended by IDWR with the source described as "groundwater." ASCC filed *Objections* to the Director's recommendations for the 126 claims on the basis that the recommendations should include a remark specifying that the source includes water recovered from ASCC's surface diversion works for use on land to which shares of ASCC are appurtenant. The *Objections* also asserted that the recovered water should be administered separately from all other rights in Basin 35 and the Snake River Basin.

On June 7, 2002, in resolution of ASCC's *Objections*, ASCC, IDWR and the State of Idaho entered into a *Settlement Agreement* agreeing that IDWR would recommend "recharge for irrigation" in the forthcoming *Director's Report* for Basin 01 as a purpose of use for ASCC's surface rights 01-23B and 01-297 in addition to "irrigation," pursuant to the accomplished transfer provisions of Idaho Code § 42-1425. *Thompson Aff.*, Ex. E. The *Settlement Agreement* provided that:

Existing ground water rights used for irrigation within the service area of the Canal Company on lands paying assessments to the Canal Company and to which the Canal Company's surface rights have remained appurtenant will be given mitigation credit for the amount of water recharged against ground water depletions arising from the authorized diversion and use of ground water.

Id. at 4. The *Settlement Agreement* provided that once the SRBA Court issued partial decrees consistent with the *Agreement's* terms, ASCC would withdraw its objections. *Id.* at 5. The *Settlement Agreement* recognized that the recommendations “will not automatically result in approval by the SRBA District Court of IDWR’s recommendation for the Canal Company’s Basin 01 rights.” *Id.* On May 15, 2006, IDWR filed the *Director’s Report, Irrigation and Other Uses, IDWR Lower Basin 01*, recommending the additional purpose of use of “irrigation for recharge” with the following 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.” On June 21, 2007, ASCC was granted leave to amend its claims in order to claim additional acres. Despite the *Settlement Agreement* and IDWR’s prior recommendation, ASCC claimed only “irrigation” as a purpose of use in the amended claims. On March 25, 2008, IDWR filed *Amended Director’s Reports* in response to the amended claims, which again included the “recharge for irrigation purpose of use.” Thereafter, the members of the SWC filed *Objections*, contesting priority date, purpose of use, place of use and remarks.

B. The Special Master did not err in applying Idaho Code § 42-1425 by recommending a purpose of use not previously recognized by a prior decree or by statute.

The SWC argues the Special Master erred in applying the accomplished transfer provisions of Idaho Code § 42-1425 by recommending a “recharge for irrigation” purpose of use for water right claim 01-23B relating back to the original 1895 priority date when that specific purpose of use was not decreed in either the *Rexburg Decree* or the *Eagle Decree*. The SWC also argues the Special Master erred by recommending a “recharge for irrigation” purpose of use relating back to the original 1895 priority date when groundwater recharge was not authorized by statute as a beneficial use until at least 1978. This Court finds both arguments contrary to the express purpose of the accomplished transfer provisions of Idaho Code § 42-1425.

1. The purpose of Idaho Code § 42-1425 is to effectuate a change to an element of a water right.

The accomplished transfer provisions of Idaho Code § 42-1425 provide in relevant part as follows:

1) Legislative findings regarding accomplished transfers and the public interest.

(a) The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, and the northern Idaho adjudications, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code.

(b) The legislature finds 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. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.

(c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The 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.

(2) Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, and prior to January 1, 2006, for the northern Idaho adjudications authorized by section 42-1406B, Idaho Code, may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were

injured and the change did not result in an enlargement of the original right.

The arguments raised by the SWC ignore the purpose of the accomplished transfer statute. The express purpose of the accomplished transfer statute is as a substitute for the transfer provisions of Idaho Code § 42-222. Idaho Code § 42-1425 authorizes a change to one or more elements of a water right and authorizes that the change retains the original priority date (as opposed to creating a new right with a date of change priority) provided the change does not enlarge the use of the right or result in injury to other water rights. For purposes of Idaho Code § 42-1425, the previously unauthorized change must have occurred at a point in time prior to the commencement of the SRBA in 1987.

The fact that a prior decree did not identify the claimed change is entirely predictable. The statute does not limit changes in water rights to those rights not previously decreed. The express purpose of the statute is to recognize changes to water rights previously established “by decree of the court or under provisions of the constitution and statutes of this state” and to allow changed rights to maintain the original priority date, provided no existing rights are injured. The application of the statute cannot be construed as a collateral attack on a prior decree or license because the purpose of the statute is to authorize a change to a previously decreed or licensed element of the right.⁶ The statute expressly authorizes changes to an element of the right different from that previously licensed or decreed.

⁶ In this case the prior decrees would not be conclusive as to the decreed purpose of use because the purpose of use for I-23B right was previously decreed as “irrigation and other purposes.” The “other purposes” language is common in older decrees. This Court has previously ruled that the use of the term “other purposes” is vague and therefore allowed the claimant to present evidence regarding the use of the right at the time the decree was entered. *See Memorandum Decision and Order on Challenge; Order Granting State of Idaho’s Motion for the Court to Take Judicial Notice of Adjudicative Facts; Order Of Recommitment with Instructions to Special Master Cushman*, Subcase Nos. 36-00003A *et. al.* (Nov. 23, 1999), pp. 43-47. In that case, a claim for fish propagation was based on a portion of right decreed (*New International Decree*) in 1932 with the purpose of use described as irrigation, domestic and “other purposes.” The claimant was allowed to present evidence that the right was being used for fish propagation prior to the time the decree was entered.

Whether or not the use now being claimed was recognized as a beneficial use at the time the original right was established is not relevant to an accomplished transfer.⁷ For purposes of applying Idaho Code § 42-1425, what is relevant is whether the accomplished change to the element of the water right occurred prior to November 19, 1987. The purpose of use need not be recognized as a beneficial use at the time the right was originally appropriated in order for the priority date to relate back. However, the use must be recognized as a beneficial use pursuant to state law at the time of the change. Therefore the key issue is whether a water right for groundwater recharge could be established without compliance with the groundwater recharge statutes.

2. A water right for groundwater recharge could be recognized as a beneficial use prior to the enactment of the recharge statutes provided there was an identifiable “beneficial use” to the appropriator.

The SWC argues that groundwater recharge was not recognized as a beneficial use of water prior to 1978 when legislation declared groundwater recharge as a beneficial use. This Court agrees in part, and disagrees in part. The Court holds that prior to the legislative declaration of recharge as a beneficial use, water rights for recharge purposes could be established would depending on the facts and circumstances surrounding the particular use of the right.

a. Legislative declaration that groundwater recharge is a beneficial use and authorization of groundwater recharge permits.

In 1978, the Idaho Legislature enacted Idaho Code § 42-234 recognizing ground water recharge as a beneficial use specifically in the vicinity of St. Anthony and Rexburg. The statute was enacted in conjunction with a groundwater recharge project. The statute authorized IDWR to issue a permit for the appropriation and underground storage of water for the purpose of recharging groundwater in furtherance of the pilot groundwater recharge project. 1978 Idaho Sess. Laws, ch. 366, p. 955 (codified as I.C. § 42-234). In 1982, the Legislature enacted Idaho Code § 42-4201A expanding the authorization of the beneficial use of groundwater recharge to aquifer recharge districts.

⁷ The Court also fails to see how it would be relevant in a transfer pursuant to Idaho Code § 42-222 provided the sought after change to the water right would not result in injury to existing users.

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DIRECTOR’S AUTHORITY TO ISSUE PERMIT – LIMITATIONS

(2) . . . [T]he legislature hereby declares that the appropriation and underground storage of water by an aquifer recharge district hereinafter created for purposes of groundwater recharge shall constitute a beneficial use and hereby authorizes the department of water resources to issue 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 state.

1982 Idaho Sess. Laws, ch. 204, pp. 538-539 (codified as I.C. § 42-4201A). The authorization, however, was not without limitation or regulation:

(3) The director . . . may regulate the amount of water which the aquifer recharge district may appropriate and may reduce such amount, even though there is sufficient water to supply the entire amount originally authorized.

(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 groundwater recharge. In the event that the district [sic] (should read 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 rights, the director shall order the cessation of operations until such alterations as may be ordered by the director have been accomplished or such effects otherwise have been corrected.

Id. at 539. In 1985, Idaho Code § 42-4201A was amended to include groundwater recharge projects operated by irrigation districts in addition to aquifer recharge districts. 1985 Idaho Sess. Laws, ch. 120, pp. 292-293. In 1994, Idaho Code § 42-4201A was amended to extend beyond water appropriations for proposed recharge projects to “certain water uses and proposed projects to recharge basins” as well as to apply to “any person, aquifer recharge district, irrigation district canal company or water district,” subject to the same limitations and regulations. 1994 Idaho Sess. Laws, ch. 274, pp. 851-852.

In 1994, Idaho Code § 42-234 was also amended to expand recognition of groundwater recharge as a beneficial use beyond the vicinity of St. Anthony and Rexburg to recharge projects in groundwater basins throughout the rest of the state. 1994 Idaho Sess. Laws, ch. 433, p. 1397. The following amendment was also included recognizing “incidental” recharge as being in the public interest but subject to the limitation that such recharge is not the basis for a new or expanded right:

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

1994 Idaho Sess. Laws, ch. 433, p. 1397 (emphasis added). The impact of the amendment is recognition that there is a distinction in the law between the treatment of groundwater recharge that is purposeful, and recharge that is incidental as a result of a different beneficial use of water.⁸ A plain reading of the amendment expressly prohibits the issuance of a separate water right or the expansion of an existing right for incidental recharge despite incidental recharge being in the public interest.

In 2009, the legislature amended Idaho Code § 42-234 expanding the recognition of groundwater recharge as a beneficial use of water beyond recharge projects and incorporating the same limitations and regulations included in Idaho Code § 42-4201A. The legislature also repealed Idaho Code § 42-4201A. 2009 Idaho Sess. Laws, ch. 242, p. 743.

- b. Beneficial uses of water are not limited to those expressly enumerated in the Idaho Constitution, authorized by statute or authorized by the Idaho Supreme Court.**

⁸ The term “incidental” as commonly used in the context of water law means a use of water that is secondary to a primary use. For example, water in a ditch diverted for the primary purpose of irrigation may be used for the incidental watering of livestock. Incidental recharge distinguishes that which incidental or unintended from that which is conducted for a specific purpose.

Idaho Code § 42-104 provides that an appropriation of water must be for “some useful or beneficial purpose” but does not define what constitutes a beneficial purpose. The issue of whether beneficial uses for water rights are limited to those specifically enumerated in Article 15 § 3 of the Idaho Constitution⁹ and those expressly added by statute and/or affirmed by the Idaho Supreme Court has already been addressed in the SRBA and remains law-of-the-case. In *Memorandum Decision and Order on Cross-Motions for Summary Judgment Re: Bureau of Reclamation Streamflow Maintenance Claim*, Subcase No. 63-03618 (Lucky Peak Reservoir) (Sept. 23, 2008) (“*Lucky Peak*”), this Court upheld a claim for stream flow maintenance based on a license that did not comply with the Idaho Minimum Stream Flow Act, I.C. § 42-1501 *et. seq.* (“Act”). The license did not comply with I.C. § 42-1501 because it was not issued in the name of the Idaho Water Resource Board. At issue in *Lucky Peak* was whether IDWR exceeded its authority by issuing the license. This Court upheld the license reasoning that the Act constituted the first legislative declaration of in-stream flows being a beneficial use of water. However, this Court emphasized that the Act was not the exclusive means by which such a right could be appropriated. *Id.* at 29-30. The *Lucky Peak* decision relied on *State of Idaho, Dep’t of Parks v. Idaho Dep’t of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) (“*Malad Canyon*”). In that case, Justice Bakes in a special concurrence stated: “I therefore conclude that the uses other than those enumerated in Article 15 § 3, can be beneficial uses.” *Id.* at 29 (citing *Malad Canyon* at 447, 530 P.2d at 931 (Bakes special concurrence)). He also stated:

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

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

⁹ Article 15 § 3 of the Idaho Constitution recognizes the following purposes of use: domestic, agricultural, manufacturing, mining and milling connected with mining.

time may, because of changed conditions, become a waste of water at a later time.

Id. at 29, fn. 5. (quoting *Malad Canyon* at 448-49, 530 P.2d at 932-33).

This Court reasoned that the Idaho Minimum Stream Flow Act waived the diversion requirement for establishing an in-stream flow water right. *Id.* at 30. *See also In Re: SRBA Case No 39576, Minidoka National Wildlife Refuge, State v. U.S.* 134 Idaho 106, 996 P.2d 806 (2000) (“*Smith Springs*”) (defining the Idaho Minimum Stream Flow Act as one of the two exceptions to the diversion the requirement, the other being stock-watering). This Court ruled that the facts in *Lucky Peak* pertained to releases of impounded water from a dam and therefore the Idaho Minimum Stream Flow Act, I.C. § 42-1501, did not apply. *Id.* at 19.

Later this Court applied similar reasoning regarding claims for aesthetic, recreational and wildlife or “ARW” water rights where a diversion is involved. Although the ARW Basin-Wide Issue was ultimately decided pursuant to an agreement of the parties, the Court nonetheless made factual findings and legal conclusions in support of entry of the decree. *Consent Decree Re: Aesthetic, Recreation, and Wildlife (ARW) Purposes of Use*, Basin-Wide Issue No. 00-91014 (Feb 20, 2009). This Court held:

Idaho Code § 42-104 provides that an appropriation must be for a beneficial purpose. However, the statute does not list or otherwise limit what constitutes a beneficial purpose, although there are other statutes which place limits on uses, such as for hydropower and minimum stream flows. The Idaho Supreme Court has held that the beneficial purposes of use listed in Article 15 § 3 are not exhaustive. *State Dept of Parks* at 444, 530 P.2d at 928. Against this background, it is reasonable (absent a provision of law to the contrary) to conclude that the list of what constitutes a beneficial use may be expanded via the administrative licensure process. The Director of IDWR is vested with the authority to review permit applications and approve licenses for new appropriations. This process provides other water users the opportunity to protest applications and seek judicial review. The process exists independently of any ongoing adjudication and will continue after the SRBA has concluded. Accordingly, it would seem that this is one manner in which the states develops a consensus on what constitutes a legally cognizable beneficial use.

Id. at 7-8. The legal conclusion was qualified as follows:

This particular conclusion of law is intended for the purpose of showing there is an *arguable basis* in law which supports the issuance of the consent decree, and shall not be interpreted as a ruling by this Court that IDWR, through the licensure process, determines what constitutes beneficial use. The statement merely recognizes that there is a lengthy history of a significant number of licenses being issued for ARW purposes, whereby judicial review was not sought, and/or subsequent legislative or administrative actions were not taken.

Id. fn. 4.

Based on the *Malad Canyon* reasoning and its subsequent application in the SRBA, what qualifies as a beneficial use is not limited to those purposes enumerated in the constitution, by statute or affirmed by the Idaho Supreme Court. However, just because a particular use is now recognized as beneficial, does not mean that the use was always beneficial. Whether a particular use is beneficial depends on the particular facts and circumstances.

c. A water right for groundwater recharge may be established through means other than the groundwater recharge statutes.

Whether or not recharge qualifies as a beneficial use, outside the groundwater recharge statutes, depends on the facts and circumstances surrounding the purpose and use of the recharge. Prior to enactment of the groundwater recharge statutes, some irrigators historically engaged in and relied on the purposeful and deliberate recharging of groundwater tables as a component of their historical irrigation practice. These practices included recharging groundwater early in the season when sufficient water was available for the purpose of raising water table levels to supplement surface irrigation later in the season when less water was available, as well as for re-diversion and use at a later time in lieu of unavailable storage water. In some areas of the state, irrigation may not have been practical without the utilization of such recharge practices. Some of these uses of water have been approved by the Courts and the Department. *See Budge Aff.*, Exhibit 1 (license issued in 1954 for soil root zone storage with a 1949 priority); Exhibit 2 (SRBA partial decree issued for groundwater recharge with 1954 priority); Exhibit 3, pp. 36-37 (sub-irrigation of lands recognized in the *Rexburg Decree*). As early as 1951, the state

recognized the drilling of wells, without a permit for a water right, for recovering groundwater resulting from irrigation. The water was used on lands to which established rights were appurtenant. 1951 Idaho Sess. Laws Ch. 200, p.151 codified as I.C. § 42-228. A claimant may therefore establish facts supporting a finding of a recharge purpose of use based on beneficial use without a specific legislative statute. Whether or not the particular use is determined to be beneficial would depend on the particular facts and circumstances. This Court therefore concludes that a water right for groundwater recharge may under certain circumstances be established independent of the groundwater recharge statutes.

However, such a claim would require a showing establishing a benefit to the appropriator derived from use of the recharge. Put differently, the claimant must demonstrate an identifiable useful or beneficial purpose to the appropriator for the recharge at the time of the appropriation. The claimant could not rely on subsequent legislation to establish that a benefit occurred to the public at large. Thus the mere assertion that the deliberate discharge of water into the aquifer or the incidental seepage of water into the aquifer is now deemed to be in the public interest is not enough. The claimant would need to show that a tangible purpose and benefit to the appropriator was derived from the recharge. If the claim is not based on the “appropriator’s” use of recharge, but relies entirely on a legislative declaration, the Court would conclude that the sole basis for the claim is the statute. Therefore the claim would be entirely subject to the statutory constraints and limitations. The circumstances that occurred in both *Lucky Peak* and the ARW highlight this distinction. In *Lucky Peak*, the claimant went through the permit and license process specifying the reason and purpose of use for the appropriation. Similarly, the ARW rights were based on information about how the claimants were specifically using the water. A significant number of the ARW claims were based on licenses where the claimant previously sought an appropriation with IDWR for a particular ARW use. The beneficial uses were established independent of reliance on a legislative declaration.

Groundwater recharge presents a unique set of circumstances because recharge can exist without the appropriator or anyone else actually making further use of or benefitting from the recharged groundwater. Suppose a claimant deliberately diverts

surface water into a fissure in the ground without further purpose, use or re-use of the water. The groundwater table may be rising, but there is no identifiable use or need for the recharged groundwater. Present day legislation may well recognize that conduct as being in the public interest because it now results in a benefit to the public at large. However, absent legislative authorization, this practice would likely not be considered beneficial.¹⁰

A claim for storage illustrates another example. Storage of water may certainly be a beneficial use. However, storage for the mere sake of storage, without an identifiable accompanying use or purpose, would call into question whether the “use” was beneficial. In such a case, the water is diverted and stored, but it is not put to use by the “appropriator.” Similarly, recharging groundwater without an identifiable use or benefit to the appropriator fails to support a beneficial use in the absence of specific legislation.

Incidental recharge resulting from an existing beneficial use provides another such example. In many cases, aquifer recharge is purely an incidental result associated with the beneficial use of an existing right. The law allows the original appropriator under the existing irrigation right to recapture and reuse that water provided the use is consistent with the existing water right and does not expand the use of the existing right. *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005). Such use is considered a complement to the existing irrigation right as opposed to a new or additional use. In the event the appropriator does not recapture and reuse the water, the result is that the water seeps into and recharges the aquifer. The Legislature has also now recognized incidental recharge as being in the public interest, albeit subject to constraints and limitations. Prior to such legislation, the excess water recharging the aquifer may well have been viewed as a diversion of too much water for the purpose of use of the existing irrigation right. *A & B Irr. Dist.* at 752, 118 P.3d at 84 (“[s]hould A & B find itself in the unique situation of having more excess drain and/or waste water than it can reuse on its appropriated properties, Idaho law requires the district to diminish its diversion”).

¹⁰ The Idaho Legislature has now determined that groundwater recharge without further use by the appropriator is a beneficial use, but for reasons discussed elsewhere in this opinion, that authorization likely came about as a result of changes in conditions which did not previously exist.

It is erroneous to assume that a legislative declaration of beneficial use always acknowledges a use of water that was previously overlooked as beneficial and therefore can be used to retroactively justify a use previously considered wasteful. Such legislative declarations can result in response to conditions which did not previously exist. What is considered waste in one generation can become a beneficial use for a later generation based on changed conditions. *Malad Canyon* at 448-49, 530 P.2d at 932-33. In this instance, the adoption and implementation of a comprehensive state water plan, the full development of the Eastern Snake Plain Aquifer (ESPA), a better understanding of the ESPA, and the implementation of conjunctive management of ground and surface water all arguably constituted changed conditions giving rise to a change in policy on groundwater recharge. Prior to the existence of these conditions and statutes recharge may have constituted waste absent a showing that the water was actually being put to use by the appropriator. Prior to the development and use of groundwater, the diversion of surface water to the detriment of a subsequent downstream appropriator would have been viewed quite differently.

In sum, this Court holds a claimant may establish a groundwater recharge right prior to the enactment of the recharge statutes. However, but such right requires a showing of beneficial use by the appropriator beyond mere reliance on a later legislative directive that the diversion is now considered a benefit to the public at large. If the statute is the sole justification for establishing beneficial use, then the claim is subject to the limitations and constraints of that legislation.

C. Genuine issues of material fact exist with respect to whether ASCC changed its purpose of use to include “recharge for irrigation” prior to the commencement of the SRBA on November 19, 1987, or whether recharge was merely incidental to its irrigation practices.

The SWC argues that the facts in the record are insufficient to support a finding that ASCC changed the purpose of use of the 01-23B right to include “recharge for irrigation” prior to November 19, 1987. For the reasons discussed below, this Court finds genuine issues of material fact exist with respect to whether ASCC conducted purposeful recharge prior to November 19, 1987, in conjunction with its irrigation delivery practices, or was instead merely incidental recharge. The facts of record are insufficient to

distinguish between the two. The distinction is significant because ASCC relies on the provisions of the accomplished transfer statute as the support for its “recharge for irrigation” purpose of use claim.

1. Genuine issues of material fact exist with respect to whether the recharge claimed by ASCC prior to November 19, 1987, was incidental to its operation.

The issues in this case were decided on summary judgment. ASCC and the SWC each moved for summary judgment on separate issues. Accordingly, all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Brown v. City of Pocatello*, 148 Idaho 802, 806, 229 P.3d 1164, 1168 (2010). The burden of proving the absence of material facts is on the moving party. *Id.* The party opposing summary judgment “must respond to the summary judgment with specific facts showing there is a genuine issue for trial.” *Id.* (quoting *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000)). ASCC moved for summary judgment asserting partial decrees should be entered according to the elements recommended in the *Amended Director’s Reports*. ASCC filed affidavits in support of its *Motion* and relied on the *prima facie* weight accorded the *Amended Director’s Report*. The SWC moved for summary judgment asserting as a matter of law that ASCC’s rights could not be decreed with a “recharge for irrigation” purpose of use with the priority date from two prior decrees that did not describe recharge as a purpose of use.

ASCC asserted its irrigation practices included diverting a portion of the 01-23B right for recharge in order to supply the groundwater source pumped by shareholders and applied to shareholder lands. However, the Court finds the facts to be inconclusive because conflicting inferences can be drawn from the facts. As noted previously, an appropriator is entitled to recapture and reapply water under its existing right. For purposes of establishing recharge ASCC may have been able to re-apply the water through the use of recovery wells authorized pursuant to Idaho Code § 42-228, as it was already operating four such wells. However, that is not what occurred with respect to the 126 shareholder wells.

For purposes of applying the accomplished transfer statute, there has been no showing of an actual physical change in the use of the 01-23B right by ASCC. The “change” that is alleged to have occurred is that the diversion of the full quantity of the surface right allegedly continued after the issuance of the groundwater licenses to ASCC’s shareholders. The licenses were issued in the name of the shareholders instead of in the name of ASCC. Nothing in the record shows that the source for any of the rights, as originally licensed, was described as anything other than ground or subterranean water. The source was not identified as being related to the same source as ASCC’s surface rights. That is the reason ASCC objected to the recommendations. Although ASCC objected to the source recommendation for the individual licensed rights in the SRBA, the record is not clear as to whether ASCC filed protests in the licensure proceedings on the same issue. The record does not show the issuance of the licenses was conditioned on ASCC continuing to divert the full quantity of its surface rights thereby acknowledging that the source of the groundwater rights was supplied in part or in whole by ASCC’s surface rights through re-diversion. For purposes of the licensure proceedings, existing water users were put on notice that the water pumped from the individual wells would assume a date of permit priority date as opposed to a re-diversion of a portion of ASCC’s surface right with an earlier priority. The licenses have legal significance.

ASCC now avers that it continued to divert the full quantity of the 01-23B right after the wells were drilled. However, ASCC also states that “water is diverted only at times when the Company’s shareholders need the water for beneficial use.” *Howser Aff.*, p. 2. Further, “At all times prior to and after November 19, 1987, the Company has diverted and delivered to the Company’s shareholders as needed water available up to the authorized maximum quantity available. . . .” 2nd *Howser Aff.*, p. 4. At times a portion of the surface right was placed in the Water Supply Bank as opposed to being used for recharge. *Olenciak Aff.*, p. 2. Therefore, one reasonable inference is that the water was managed to meet the demands of the shareholders irrigating with surface water and did not take into account depletions caused by groundwater pumping. When surface irrigators did not require water it was either not diverted or it was placed in the water bank.

ASCC does not specify exactly when the accomplished transfer from irrigation to recharge for irrigation is alleged to have occurred. Only that “At all times prior to and after November 19, 1987” the Company delivered as needed up to the maximum quantity of 1,172.1 cfs for irrigation purposes and 389.5 cfs for recharge for irrigation. A prior decree does not bar the application of the accomplished transfer statute because the alleged transfer can take place after the decree was entered but prior to November 19, 1987. However, a prior decree is nonetheless probative as to whether the recharge was purposeful or incidental to ASCC’s operation. Shareholder wells were drilled as early as the 1950’s, but ASCC did not seek to have any change in purpose of use identified in the *Eagle Decree* in 1969 after being put on notice that shareholder licenses did not identify the source as being a part of ASCC’s surface right. The wells were drilled between 1950 and November 19, 1987, however, just because ASCC continued to deliver the shares instead of correspondingly reducing its surface diversions does not alone show the shares were diverted for recharge. An assumption that water was diverted for recharge is countered by common practices of carriage or head which is required to operate the delivery system. This is required whether or not all shareholders are diverting the surface water and applying it to their lands. In fact, Idaho Code § 42- 1201 requires that a water delivery entity keep its system charged. Thus one inference that can reasonably be drawn from the facts is that the claimed recharge resulting from the use of the 01-23B right is incidental recharge associated with ASCC’s delivery practices.

The Director’s recommendation in this case was based on a negotiated settlement with ASCC. The State of Idaho filed the *Affidavit of Karl J. Dreher*, then Director responsible for overseeing the preparation and submission of the recommendations to the Court. Director Dreher stated his basis for approving the settlement: “I concluded that the accomplished transfer was justified because ASCC shareholders continue to pay assessments and ASCC diverted the full amount of water authorized under water right number 1-23B in most years. *Thus a portion of the diversion provided incidental recharge to the Eastern Snake Plain Aquifer. . . .* The change from irrigation to recharge for irrigation took place prior to November 19, 1987.” *Dreher Aff.*, p. 2 (emphasis added). It appears the Director’s recommendation relied on the incidental recharge benefits associated with ASCC’s delivery practices. ASCC’s general manager

acknowledged in his affidavit that the diversion for recharge is derivative of ASCC's surface water irrigation diversions and is based on a formula developed by IDWR for calculating recharge. *Howser Aff.*, p. 2. ASCC does not offer any formula or methodology used to determine recharge benefits to its shareholders, nor does ASCC describe any efforts it undertook to facilitate recharge other than run water through its delivery system. There is no evidence of the implementation of a recharge program or project.

These facts are not conclusive. These facts do not show whether ASCC was purposefully engaged in recharging the groundwater for use by its shareholders or whether the recharge was merely incidental to its overall delivery operation. In construing all inferences in favor of the non-moving party, the Court finds there are genuine issues of material fact with respect to whether the recharge claimed by ASCC prior to November 19, 1987, was incidental.

2. Incidental recharge cannot be used under the provisions of the accomplished transfer statute to expand the purpose of use of a water right.

A determination that the claimed recharge is the result of incidental recharge is significant because incidental recharge cannot be used to expand an existing water right. ASCC's claim is not based on a beneficial use claim for recharge but rather on a transfer of an existing irrigation right to include the additional purpose of use of recharge for irrigation. The claim relies solely on the accomplished transfer provisions of Idaho Code § 42-1425 because a formal transfer was not sought in accordance with Idaho Code § 42-222. The 1994 amendment to I.C. § 42-234 expressly prohibits the issuance of a separate water right or the expansion of an existing right based on incidental recharge.

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

1994 Idaho Sess. Laws, ch. 433, p. 1397 (emphasis added).

The statute went into effect April 7, 1994, and was therefore in force at the time the provisions of the accomplished transfer statute on which ASCC relies went into effect on April 12, 1994. *See* 1994 Idaho Sess. Laws, ch. 455, p. 1478. Any claim based on the accomplished transfer provisions of Idaho Code § 42-1425 would be subject to the limitations and constraints imposed by Idaho Code § 42-234. As such, the accomplished transfer provisions of Idaho Code § 42-1425 cannot be used as the basis to expand an existing right based on incidental recharge. Accordingly, if ASCC's claim is determined to be based on incidental recharge then such a transfer would not be authorized by statute.

The record is insufficient to determine whether the recharge was incidental. Accordingly, the case is therefore remanded to the Special Master for further development of a factual record surrounding the development of the recharge and a determination on the basis for the recharge. The Court notes the motions for summary judgment were filed after the discovery deadline had expired, and neither party had conducted any timely discovery. Because this case raises issues of first impression a more complete record is desirable. The issues in this case need to be decided on a more complete record. The Court therefore leaves it to the discretion of the Special Master to determine the scope and timing of additional limited discovery.

D. The Special Master erred by refusing to remand water right 01-23B to IDWR under the particular circumstances of this case.

For the reason discussed below this Court concludes that the Special Master erred by not remanding to IDWR. However, at the time the Special Master did not have the benefit of this Court's ruling regarding the scope and purpose of the remand. Under ordinary circumstances, the Special Master's refusal to remand would be appropriate since the request for remand occurred well after discovery and the period for filing dispositive motions had closed. The request was made approximately a month before trial. Ordinarily, such late timing of a remand request would properly result in a denial by the Special Master on the grounds that the remand would delay the trial. As explained below, the remand hearing is not the first examination of injury or enlargement conducted by IDWR. As is explained below, the purpose of the remand hearing is not to serve as a

process for IDWR's initial inquiry into injury or enlargement. In this case, however, certain procedural nuances require this Court to allow the opportunity for a remand.

1. The nature of the objection must relate to alleged injury or enlargement as a result of the accomplished transfer in order to trigger an automatic remand.

The SWC argues Idaho Code § 42-1425 mandates a remand to IDWR whenever an objection is filed to a recommendation for place of use, point of diversion, nature or purpose of use or period of use that is based on an accomplished transfer. The surface water coalition argues a mere objection is the sole triggering requirement for the remand. This Court disagrees and holds that given the limited purpose of the hearing, the objection must relate to injury or enlargement to trigger the remand under Idaho Code § 42-1425.

The statute provides in relevant part:

Except for the consent requirements of section 42-108, Idaho Code, all requirements of section 42-108 and section 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

(a) If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, *the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.* After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.

(b) This section is not applicable to any claim based upon an enlargement of use.

I.C. § 42-1425 (emphasis added).

The statute must be considered as a whole. *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 311 (2009). The purpose of the remand is limited to a determination as to

“whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.” The statute thus provides for a hearing of limited scope. Clearly, unless the objection alleges that the claimed transfer results in injury or enlargement, there is no purpose for a remand. It follows that the statute limits the remand requirement to circumstances where the objection asserts that the accomplished transfer results in injury or enlargement as opposed to an objection on a basis other than injury or enlargement. A mere objection is not enough to trigger a remand. An objection to one of the elements may be for any number of reasons. An objection to the place of use could be based on an incorrect legal description or encroachment on the land of another. An objection to the purpose of use could be that the right is not being used in conjunction with the purpose as claimed. Such objections do not trigger a remand. One of the issues in this case is whether or not as a matter of law groundwater recharge right can be established outside the groundwater recharge statutes.

The SRBA utilizes a simplified “check the box” notice pleading. *See SRBA*

Administrative Order 1, Rules of Procedure (“AO1”), Standard Form 1 Objection.

Therefore it may not be readily ascertainable from the face of the pleading whether it raises issues of injury or enlargement. In a recent subcase, the Special Master required that the party seeking a remand file a more definite statement “as to the exact nature of the injury or enlargement alleged to have occurred, and also a statement as to how said injury arises from the change in point of diversion for these rights.” *Memorandum Decision and Order on Motions for Summary Judgment: Order Requiring Pioneer to File a Statement Regarding Injury or Enlargement; Order Setting Status Conference*, Subcase 63-00166A *et. al.* (Oct. 22, 2010). The Special Master required an additional statement regarding injury or enlargement:

Pioneer asserts that the procedures set forth in I.C. § 42-1425 are to be automatically implemented by the SRBA District Court whenever an objection is filed to a water right recommendation that is based on an accomplished transfer. Pioneer’s argument overlooks that in these particular subcases the Court’s file lacked sufficient information to determine whether these subcases should be remanded to IDWR for a hearing pursuant to I.C. § 42-1425. . . . Pioneer’s objection does not specify the nature of its objection to the claimed point of diversion. Pioneer did not fill out the line on the objection form where it asks what Pioneer assert[s] the point of diversion “Should be.” In other words, the

objection filed by Pioneer gives no indication that the reason it is objecting to Franklin and Mason's claimed point of diversion is injury or enlargement occasioned by an unauthorized change; as opposed to perhaps an allegation that the point of diversion was simply described in the wrong quarter quarter.

Under I.C. § 42-1425, the purposes for which a water right claim is to be remanded to IDWR for further proceedings are very limited – to determine whether the change resulted in injury or enlargement. Prior to Pioneer's request for remand, the Court could not have simply guessed or presupposed that Pioneer was asserting that unauthorized change in point of diversion has resulted in injury or enlargement.

Id. at 10-11. This Court concurs with the reasoning. The objections in this case are similarly vague as to injury or enlargement. More importantly, however, in an attempt to clarify the basis for the objections the SWC filed a *Notice of Filing Initial Reasons Supporting Objections* but did not identify injury or enlargement as a basis its objections nor did it request a remand for further inquiry by IDWR. *Budge Aff.* Exhibit C. The Special Master would not have known that injury or enlargement were even at issue.

The SWC argues that it is not incumbent on the party opposing the accomplished transfer to conduct extensive discovery to determine whether the claim for an accomplished transfer results in injury or enlargement but rather that is the responsibility of IDWR to investigate both issues. The SWC argues therefore that the remand is automatic. The argument ignores that Idaho Code § 42-1425 requires that the Court remand if an objection is filed to a "*recommendation*" for a change in the place of use, point of diversion, purpose of use or period of use. (emphasis added). The statute uses the term "*recommendation*" as opposed to the term "*claim*."¹¹ The distinction is significant. Where a "*recommendation*" is filed, IDWR has conducted an independent review of the claim and recommended the elements based on that review. In contrast, the use of the term "*claim*" implies no such independent review was conducted. This distinction is exemplified in the SRBA with respect to claims established under federal law and those based on state law. IDWR does not conduct an independent review of

¹¹ The original version of the statute used the term "*claim*." The statute was amended in 2006 and replaced the term "*claim*" with the term "*recommendation*." 2006 Idaho Sess. Laws, ch. 222, p. 663. The amendment, however, did not change how IDWR reported accomplished transfers but rather the change reflected the practice that was already in place. In this case the SWC filed its objections in 2008 after the amendment of the statute.

claims based on federal law. As such, no director's report recommendation is prepared. The objection is then filed to the "claim." I.C. § 42-1411A (8). The claim carries no *prima facie* weight. I.C. § 42-1411A(12). By comparison, objections to claims based on state law, where IDWR has conducted an independent review, are filed to the recommendation in the director's report. I.C. § 42-1412. Unlike a federal claim, the director's report carries *prima facie* weight. Idaho Code § 42-1425 acknowledges this distinction. The statute recognizes that when a claim is filed based on an accomplished transfer, IDWR reviews the claim to determine whether or not the transfer will result in injury to existing rights or an enlargement of the original right. The accomplished transfer may be recommended disallowed or may be allowed with such restrictions as to avoid injury to existing users. Simply put, a claim for an accomplished transfer is not "rubberstamped" by IDWR even before a third party files an objection. It follows then that the purpose of the remand is not to provide IDWR with the first opportunity to examine injury or enlargement because IDWR has already examined the claim for injury or enlargement. The purpose of the remand is for IDWR to examine the objection to injury or enlargement and to consider additional information relating to these assertions.

In construing the statute as a whole, this Court considered the limited purpose of the remand hearing, and the fact that IDWR considers injury and enlargement prior to filing the Director's Report. It is clear that the objection to the accomplished transfer must allege potential injury or enlargement as one of the bases for the objection otherwise the Court finds there would be no apparent basis for the Special Master to automatically remand the matter to IDWR for "further hearing."¹² The Special Master is not precluded however, from *sua sponte* remanding the matter for further inquiry on injury and enlargement, nor is a party precluded from requesting remand for further inquiry into these issues.¹³

¹² As a matter of course in the SRBA, the Special Master would not automatically remand to IDWR without first hearing from the parties on whether or not to remand. In many cases parties prefer to address injury or enlargement in the proceedings before the Special Master or just request a supplemental director's report and the opportunity to submit any additional information to IDWR.

¹³ However, as explained elsewhere in this opinion any such requests for remand should be timely made.

2. The “further hearing” contemplated by I.C. § 42-1425 is not a separate formal administrative proceeding but rather the opportunity to submit information and/or argument to the Director that may have not been otherwise considered in preparing the Director’s Report.

a. The remand procedure contemplated by Idaho Code § 42-1425 is not a separate formal administrative proceeding under the Administrative Procedures Act.

Idaho Code § 42-1425 sets forth a procedure for claiming a previously unauthorized transfer of the place of use, point of diversion, purpose of use or period of use, elements of a water right in lieu of following the formal administrative transfer requirements of Idaho Code § 42-222. The statute expressly acknowledges that “examination of these changes by the director through the procedures of section 42-222, would be impractical and unduly burdensome” and authorizes that the change “be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code.” The statute provides that following the hearing, the director is to file a “supplemental report.” A supplemental report is a procedural component of a general adjudication. Idaho Code 42-1412 (4) provides: “Following expiration of the period for filing objections. . . . The court may request the director to conduct a further investigation and to submit a supplemental report for any water right acquired under state law that is the subject of an objection.” I.C. § 42-1412 (4). It is clear the procedures set forth in Idaho Code § 42-1425 were not intended to require independent administrative proceedings, and do not trigger a separate right of review pursuant to the Administrative Procedures Act. Rather the procedures are intended to be integrated with the general adjudication. *See Memorandum Decision and Order on Challenge (City Of Pocatello)*, subcases 29-00271, *et al.*, p. 9 (Nov. 9, 2009) (holding application of Idaho Code § 42-1425 should be read in the context of the rest of the SRBA adjudication processes). To conclude otherwise would vitiate the purpose of the process set forth in the statute by substituting one administrative proceeding for another. There are procedures in place for allowing administrative transfers to proceed concurrently with the adjudication; however Idaho Code § 42-1425 does not provide one of them. *See e.g. AOI 17 b.(3)*.

b. The “further hearing” requirement is met where the objector has an opportunity to submit information on injury or enlargement.

The statute requires remand to IDWR for “further hearing” but does not define the scope of the hearing. The language implies that one “hearing” has already occurred. In the adjudication process the only “hearing” that occurs prior to the deadline for filing objections, is the procedure relating to the claims taking process and IDWR’s investigation of the claims. During the investigative process, the claimant is afforded an opportunity to present information to be considered by IDWR in support of the claim. This opportunity is particularly important in the context of an accomplished transfer because IDWR may have no record of the change to the water right. However, no formal hearing is conducted as part of investigative process nor is the claimant at that point authorized to conduct formal discovery to present a case to IDWR in support of the claim. The culmination of the investigation results in the issuance of a director’s report.

In most instances, IDWR obtains information from the claimant during this procedure.

Prior to the filing of objections, IDWR may have limited information identifying objectors or the information they have to support allegations of injury or enlargement.

The remand contemplated under Idaho Code § 42-1425 provides IDWR an opportunity to consider this information in conjunction with its prior investigation. Thus use of the term “further hearing” implies a proceeding no broader in scope than originally occurred at the investigative stage of the proceedings. Namely, parties are accorded the opportunity to submit information and argument to IDWR regarding injury and enlargement. The culmination of the “further hearing” results in the issuance of an amended or supplemental report to the adjudication court.

Therefore, the Court concludes that the scope of the remand hearing contemplated under Idaho Code § 42-1425 is no broader than that associated with the preparation of a director’s report or in the preparation of a supplemental director’s report. The parties have the opportunity to submit information and argument to IDWR regarding injury or enlargement. IDWR considers the information and argument and files an amended or supplemental report with the Court, and the case proceeds through the adjudication process.

c. The Special Master erred by refusing to remand to IDWR.

The Special Master did not grant the SWC's request for remand due to the late stage of the proceedings. The refusal for remand was based on the SWC's failure to show or even allege injury or enlargement in conjunction with its request. On August 8, 2008, the SWC filed a *Notice of Filing Initial Reasons Supporting Objections* but did not identify injury or enlargement as a basis for the objection. *Budge Aff.* Exhibit C. The Special Master issued a scheduling order on September 2, 2008. The scheduling order set discovery cut off for March 6, 2009, the deadline for filing dispositive motions for March 27, 2009, the pre-trial conference for May 21, 2009, and the trial to commence June 8, 2009. On April 23, 2009, in a response brief to ASCC's motion for summary judgment the SWC alleged for the first time if the SWC's motion for summary judgment was denied the matter must remand to IDWR for a hearing on injury or enlargement. The SWC did not allege how the accomplished transfer would result in injury or enlargement. The Special Master denied the request because he determined it would result in delay and because IDWR had already considered injury and enlargement in the *Amended Director's Report*.

Under ordinary circumstances, this Court would agree with the Special Master's reasoning that there would be no basis for remand. The remand request came well after discovery had closed and the trial date was a little over a month away. Granting the request at that point would have resulted in delayed the trial. The SWC had ample opportunity to request a remand prior to or during the discovery process. However, the recommendation in the *Amended Director's Report* in this case was based on a negotiated settlement between ASCC, the State of Idaho and IDWR as opposed to an independent objective examination. This undermines the previously discussed reasoning for not automatically remanding to IDWR, namely that IDWR has already investigated for injury or enlargement. Moreover, it gives *prima facie* weight to a negotiated settlement entered into prior to the filing of a director's report and the opportunity for objections.

The settlement agreement was reached in 2002. The settlement involves mitigation credits and implicates the conjunctive administration of ground and surface water. For all intents and purposes the *Amended Director's Report* based on the settlement was prepared in 2002. Former Director Dreher concludes in his affidavit "the

accomplished change in purpose of use from irrigation to recharge for a portion of ASCC's water rights did not injure other water rights or result in an enlargement because of the amount of water ASCC diverted and consumptively used." *Dreher Aff.*, p. 2. Since 2002, as a result of the interim administration of water rights and the implementation of conjunctive management of ground and surface water, the understanding of what constitutes injury to an existing water right has evolved. This Court has ruled on what constitutes injury to other rights since that time.¹⁴ Despite these developments, IDWR is in the awkward position of defending an old settlement instead of re-evaluating whether its terms would result in injury to existing users or enlargement.

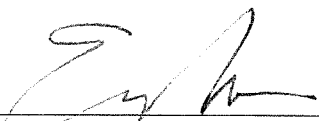
For these reasons the Court orders that on recommitment to the Special Master, the matter be remanded to IDWR for a supplemental report if so requested by the parties.

VI. CONCLUSION AND ORDER

For the above stated reasons the matter is recommitted to the Special Master for further proceedings and the development of a record consistent with this opinion.

IT IS SO ORDERED

DATED: April 4, 2011



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

¹⁴ In *City of Pocatello* this Court ruled that injury to an existing water right is not limited to the situation where immediate physical interference occurs between water rights on the date of the change but rather includes the diminished effects on existing priorities in times of administration, including the ability to pump out of priority in times of shortage. *Id.* at 14.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE was mailed on April 04, 2011, with sufficient first-class postage to the following:

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