

**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	)	<b>MEMORANDUM DECISION AND</b>
	)	<b>ORDER ALLOWING PRESENTATION</b>
	)	<b>OF ADDITIONAL EVIDENCE</b>
	)	<b>REGARDING ENLARGEMENT</b>
	)	
	)	<b>ORDER REQUESTING 706 REPORT</b>
	)	
Case No. 39576	)	<b>ORDER SETTING SCHEDULING</b>
	)	<b>CONFERENCE</b>
	)	
_____	)	<b>Subcase No. 65-05033C</b>

**I. PROCEDURAL HISTORY**

A trial was held in the above-captioned subcase before Special Master Cushman on March 25, 2004. Special Master Cushman issued a *Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law* on June 30, 2004. Thereafter, *Motions to Alter or Amend* were filed by the State of Idaho and by Kyle Ellis. Because of the retirement of Special Master Cushman, the subcase was referred to Special Master Booth on October 14, 2004.

A status conference was held on January 11, 2005. At the status conference, the parties, by and through their respective counsel, discussed the issue of whether there are sufficient facts in the record to allow a finding of whether or not the accomplished transfer sought by Claimants Fredrick and Gloria Ringel (hereinafter "Ringels" or "Claimants") in this subcase would result in an enlargement. Mr. Honsinger, counsel for Claimants, raised an issue regarding the interpretation and application of I.C. § 42-1425, and requested an opportunity to present briefing on the issue. Mr. Honsinger's request was granted, a briefing schedule was set, and the status conference was continued.

Mr. Honsinger timely submitted a *Memorandum Re: I.C. § 42-225 [sic]* on February 22, 2005. Mr. Barber, representing the State of Idaho, timely submitted the *State of Idaho's Memorandum In Response to Claimant Ringels' Memorandum Re: I.C. § 42-225 [sic]* on March 14, 2005. The continued status conference was held on March 18, 2005.

## II. ANALYSIS, FINDINGS, AND CONCLUSIONS

Having reviewed the briefing submitted in this matter, and having reviewed the Director's reports on file, the transcript of the March 25, 2004 trial, and the trial exhibits, this Special Master finds that the current factual record is insufficient for purposes of making a finding as to whether or not the accomplished transfer sought by the Claimants results in an enlargement. It is also concluded that the issue of enlargement is a material issue in this subcase, and it is necessary to make adequate findings pertaining thereto.<sup>1</sup>

As discussed below, it is further the conclusion of this Special Master that failure to strictly adhere to the procedures set forth in I.C. § 42-1425 does not divest the SRBA District Court of jurisdiction to decide whether a claimed accomplished transfer results in an enlargement. Furthermore, it is concluded that the taking of additional testimony and evidence relative to enlargement, at this stage of the proceeding, is consistent with the previous rulings by the SRBA District Court regarding the presentation of testimony and evidence at the motion to alter or amend stage of a proceeding.

### A. Jurisdiction of the SRBA District Court under I.C. § 42-1425.

The Ringels argue that the SRBA District Court does not have jurisdiction in this subcase to determine whether Ringels' claimed accomplished transfer results in an enlargement. This argument is based upon the premise that no objections were filed which were aimed at the claimed accomplished transfer, and therefore the procedures set forth in I.C. § 42-1425 to

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<sup>1</sup> Rule 52(a), Idaho Rules of Civil Procedure, requires that the "court shall find the facts specially and state separately its conclusions of law thereon . . .". The purpose of this requirement is to provide an appellate court with a clear understanding of the trial court's decision so that it may determine whether the trial court applied the proper law in reaching its ultimate judgment. *The Highlands Inc. v. Hosac*, 130 Idaho 67, 70, 936 P.2d 1309, 1312 (1997), citing *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 225, 646 P.2d 988, 996 (1982). The failure of a trial court to make specific findings regarding a material issue will be disregarded only where the answers are clear and obvious from the record. *Id.*, citing *Smith v. Idaho State Univ. Fed. Credit Union*, 114 Idaho 680, 684 n. 4, 760 P.2d 19, 23 n. 4 (1988).

“remand the water right to the Director for further hearing” were never triggered. This Special Master respectfully disagrees with Ringels’ argument.

Idaho Code § 42-1425 states in part:

(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, may be claimed in a 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. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

(a) If an objection is filed to a 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. 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.

The State points out that objections in the SRBA are filed to a Director’s Report, not to a claim, and in this case the Director has not recommended Ringels’ claimed accomplished transfer. In this subcase, it was the Ringels themselves who filed an objection to the *Director’s Report*, objecting that the Director did not recommend the claimed accomplished transfer. The State argues that it was this objection that triggered the review process set forth in the statute. This Special Master agrees. The review process set forth in I.C. § 42-1425 can be triggered in either situation, i.e. where the Director recommends an accomplished transfer and another party to the SRBA objects – and where the Director does not recommend the accomplished transfer and the claimant objects. In any event, both the Claimant and the State point out in their briefing that IDWR has reviewed the claimed accomplished transfer and has filed supplemental reports

with the court. See *Amended Director's Report, Subcase No. 65-05033C*, filed November 2, 2001; and *Supplemental Director's Report Regarding Subcase No. 65-05033C*, filed October 1, 2003.

Finally, it is the opinion of this Special Master that even if the procedures set forth in I.C. § 42-1425 are deviated from or not strictly followed, the result is not jurisdictional.<sup>2</sup> To illustrate this, assume that a claimant filed a claim in the SRBA based upon an accomplished transfer, and assume further that the Director reported the water right as claimed. Lastly, assume that no party to the SRBA filed an objection to the Director's Report. In that situation, where the additional review called for in the statute would never have occurred, the SRBA District Court would still have jurisdiction to review the contents of the Director's Report and apply the law to the facts as established in the report. In the event that there was some error evident from the contents of the report, the SRBA District Court would not be required to decree the water right as reported. *In Re SRBA Case No. 39576*, 128 Idaho 246, 258-259 (1995). Indeed, pursuant to Idaho Rule of Civil Procedure 55(c), the District Court retains the ability to conduct hearings to "establish the truth of any averments by evidence or to make an investigation of any other matter . . ." IRCP 55(c). If the SRBA District Court has the ability for additional review where no objections are filed at all, then clearly the court has jurisdiction to conduct such review as is necessary in the present case, where objections were filed.

In accordance with the foregoing, it is the determination of this Special Master that the SRBA District Court has jurisdiction to evaluate whether or not an enlargement results from Ringels' claimed accomplished transfer, irrespective of the particular procedure that may or may not have heretofore occurred before IDWR.

## **B. The taking of additional evidence.**

The Ringels also argue that the issues raised by the State of Idaho are impermissible at the present (motion to alter or amend) stage of the proceedings. The Ringels base this argument on the SRBA District Court's ruling in the Gisler decision. *Memorandum Decision and Order on Challenge (Gisler)*, Subcase 36-00077D (June 30, 2000). In *Gisler*, the District Court ruled as follows:

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<sup>2</sup> Although the accomplished transfer statute provides for an intermediate step, nothing in the statute prevents IDWR from including a determination of the applicability of an accomplished transfer in its initial recommendation.

This Court previously ruled that assignments of error regarding errors of law made by a special master can be appropriately raised in a motion to alter or amend a special master's recommendation. . . . The situation where a factual finding made by a special master is inconsistent with the factual record is also appropriately raised in a motion to alter or amend. . . . However, litigating issues via a motion to alter or amend which should have been raised before a special master through an objection or response is beyond the scope of a motion to alter or amend. . . . In other words, the motion to alter or amend stage of the proceeding is not a means for developing the factual record and litigating the merits of the claim.

*Id.* (internal citations omitted). The instant case does not present the situation where Special Master Cushman made a factual finding regarding enlargement that is inconsistent with the factual record. In that situation, under the *Gisler* decision, a party could properly raise the issue via a motion to alter or amend. In the present situation, however, Special Master Cushman made no findings whatsoever regarding enlargement. Furthermore, because Idaho Code § 42-1425 cannot be used to confirm a transfer that resulted in an enlargement, such a factual finding is clearly necessary in this case. Finally, the factual record in this case does not contain sufficient facts so as to allow such a finding to be made.<sup>3</sup>

It is entirely consistent with the SRBA District Court's prior rulings to allow a party to assert – via a motion to alter or amend – not only that a special master's finding is inconsistent with the factual record, but also that a special master failed to make a necessary factual finding. Furthermore, where the factual record is insufficient for purposes of making such a finding, the appropriate remedy is to allow additional testimony and evidence to be presented.

Additionally, it should be noted that it is not the State of Idaho, which entered this subcase for the first time via a motion to alter or amend, that is seeking to introduce additional evidence.<sup>4</sup> Rather, it is this Special Master that has concluded, upon a thorough review of the

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<sup>3</sup> The only mention in the record regarding enlargement is the following conclusory statement in the 2003 *Supplemental Director's Report Regarding Subcase No. 65-5033C*, at p. 14: "Furthermore, the Department concludes that any use of water in Township 11 North, Range 4 East, Section 6 is not supported by the facts and would result in an illegal enlargement of the water right since there is no evidence showing that an accomplished transfer from the decreed place of use for water right no. 65-5033 occurred prior to the commencement of the SRBA as required by statute." This conclusion appears to be based upon a legal analysis of whether the Ringels could change the place of use of a water right they did not own at the time, rather than a factual analysis of whether the actual on-the-ground change would result in increased usage of any of the elements of the water right as compared to how it was used prior to any transfer.

<sup>4</sup> The issues raised by the State in this subcase can be summarized as follows:

1) Special Master Cushman's finding of fact that Ringels' change on the ground took place prior to the 1987 irrigation season is clearly erroneous. The State supports this issue with two separate reasons: a) there is no basis

record, that the issue regarding enlargement needs to be resolved. The State specifically points out that it is not raising issues that would require taking additional facts, but rather the State is relying on the current record. *State of Idaho's Memorandum in Response to Claimant Ringels' Memorandum Re: I.C. § 42-225* at p. 11. Nevertheless, it is the opinion of this Special Master that a party entering this subcase for the first time via a motion to alter or amend could properly raise the issue that there are no facts in the record regarding enlargement. Accordingly, the State of Idaho will be allowed full participation at any subsequent evidentiary hearing.

The law of the case in the SRBA prohibits a party from entering a subcase for the first time via a motion to alter or amend, and advancing new legal theories and/or evidence that was discoverable during the pendency of the action, or to allow such a party to have a new trial. *North Snake Ground Water District v. Gisler*, 136 Idaho 747, 750-751, 40 P.3d 105, 108-109, citing *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcases 36-2708 *et al.*, (December 29, 1999). However, there is a significant difference between the situation where a new party challenges the factual findings of a special master, and attempts to introduce new facts into the record to controvert those findings and show error, and the situation where such a party claims that a necessary factual finding was not made, and further claims that there are no facts in the record one way or another from which such a finding could be made. The *Gisler* decision does not prohibit a party from entering a subcase via a motion to alter or amend and seeking to introduce such additional facts.

### III. ORDER REQUESTING 706 REPORT

It is hereby requested of IDWR that an expert report be prepared in accordance with Idaho Rule of Evidence 706, and filed with the court and served upon the parties by April 8, 2005. The scope of the report should be limited to the factual issue of whether Ringels' claimed accomplished transfer would result in an enlargement of the water right.

Further, this Special Master suggests that IDWR engage in the following analysis. Given the situation where water right 65-5033C could not have been forfeited because of insufficient

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under which a natural flow water right can be converted into a storage right; and 2) at the time, the Ringels did not have an ownership interest that would allow the change.

2) The accomplished transfer statute, I.C. § 42-1425 does not allow the addition of a storage component to a water right.

3) Mr. Peterson's filing of a claim in the SRBA in 1988, with no attempt to claim any place of use now sought by the Ringels under an accomplished transfer, operated to revoke any permissive use by the Ringels, thus making any transfer post-1987, and outside the scope of the accomplished transfer statute.

lapse of time between the issuance of the partial decree in the Payette River Basin Adjudication, and the filing of the claim in the Snake River Basin Adjudication,<sup>5</sup> if the Ringels were to seek an administrative transfer before IDWR that would mirror the claimed accomplished transfer pending in the SRBA, would IDWR allow such a transfer? If so, what restrictions or limitations, if any, would be required? Finally, if IDWR would impose restrictions or limitations, would they be for the purpose of mitigating or elimination of any enlargement?

#### **IV. ORDER SETTING SCHEDULING CONFERENCE**

Pursuant to Rule 16, Idaho Rules of Civil Procedure, a scheduling conference will be held on Monday, April 18, at 2:30 p.m. Parties may participate by telephone by dialing 1-225-383-1099, participation code 675342. The parties should be prepared to discuss the following matters:

- 1) The date for an evidentiary hearing for examination of IDWR on its 706 report.
- 2) Whether the Claimants intend to present the testimony of any expert witnesses in rebuttal to IDWR, and if so, any discovery issues that may pertain thereto.
- 3) Any other matters the parties wish to discuss.

Dated March 24, 2005.

/s/Theodore R. Booth  
THEODORE R BOOTH  
Special Master  
Snake River Basin Adjudication

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<sup>5</sup> See *Memorandum Decision and Order on Challenge, Order of Partial Decree (Wood v. Troutt)*, Subcase 65-5663B, (May 9, 2002)(holding that the five-year statutory period of non-use for establishing forfeiture tolls upon the filing of a claim in the SRBA).

## CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ALLOWING PRESENTATION OF ADDITIONAL EVIDENCE REGARDING ENLARGMENT was mailed March 24, 2005, with sufficient first class mail to the following:

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