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. 36-00003A, 36-00003B,
Case No. 39576	)	36-00003C, 36-00003F, 36-00003K,
	)	36-00003L, and 36-00003M
_____	)	

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

Appearances:

Mr. Peter J. Ampe, Deputy Attorney General, Natural Resources Division, Attorney for the State of Idaho

Ms. Dana L. Hofstetter, Beeman & Hofstetter, P.C., Attorney for North Snake Ground Water District, May Farms, Ltd., and Faulkner Land and Livestock Company

Mr. Patrick D. Brown, P.C., Attorney for Lynn Babington, David Kingston, Edna Rea (Verl Bell), and Doyt Simcoe

I.
BRIEF PROCEDURAL BACKGROUND

1. On July 29, 1998, Special Master Haemmerle issued ***Findings of Fact and Conclusions of Law*** regarding water rights 36-00003A, Edna Rea, Claimant; 36-00003B and 36-00003K, Kingston Properties L.P., Claimant; 36-00003C and 36-00003L, Lynn and Kathy Babington, Claimants; 36-00003D, Thomas and Terri Harbison, Claimants; 36-00003F and 36-00003M, Doyt and Roxie Simcoe, Claimants (hereinafter "Claimants").

2. On February 8, 1999, Special Master Haemmerle issued ***Special Master's Report(s)*** for these subcases.

3. On March 26 and 29, 1999, *Motions to Alter or Amend* were filed by the State of Idaho ("State"), and the North Snake Ground Water District, May Farms, Ltd., and Faulkner Land and Livestock Company (collectively referred to as "NSGWD").

4. On July 16, 1999, Special Master Haemmerle entered an ***Order Denying Motions to Alter or Amend***.

5. On July 30, 1999, the State filed separate *Notices of Challenge* to rights 36-00003A, 36-00003B, 36-00003K and combined *Notices of Challenge* to rights 36-00003C and 36-00003L, and 36-00003F and 36-00003M.

6. On July 30, 1999, NSGWD filed its *Notice of Challenge* to subcases 36-00003A, B, C, D, F, J, K, L, and M. On August 20, 1999, NSGWD filed an *Amended Notice of Challenge* dropping (dismissing) its Challenge to rights 36-00003D and 36-00003J.

7. In accordance with a briefing schedule, counsel for the respective parties lodged briefs with the Court.

8. On September 22, 1999, the Court heard oral arguments on the Challenges.

9. On September 30, 1999, the Court issued an ***Order for Additional Information and/or Clarification on Challenge***.

10. Responses to the Court's ***Order for Additional Information and/or Clarification on Challenge*** were filed by the parties on October 15, 1999. No Party objected to or challenged the accuracy of any of the supplemental materials presented. In addition, the State filed a *Motion for the Court to Take Judicial Notice of Adjudicative Facts*.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Responses to the Court's ***Order for Additional Information and/or Clarification on Challenge*** were filed by the parties on October 15, 1999. Therefore, this matter is deemed fully submitted for decision on the next business day, or October 18, 1999.

III.
STATE OF IDAHO'S MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Pursuant to I.R.E. 201, the State has moved for the Court to take judicial notice of the following adjudicative facts:

a. *Complaint* in New International Mortgage Bank v. Idaho Power Co., District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("*Complaint*").

b. *Stipulation for Decree* in New International Mortgage Bank v. Idaho Power Co., District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932).

c. *Answer* in New International Mortgage Bank v. Idaho Power Co., District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("*Answer*").

d. *Findings of Fact* in New International Mortgage Bank v. Idaho Power Co., District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932).

e. *Plat of Mineral Survey No. 801*, filed in the U.S. Land Office at Hailey, Idaho, January 2, 1890.

f. *Plat of Mineral Survey No. 1*, filed in U.S. Land Office at Hailey, Idaho, November 20, 1884.

g. *Master Title Plat, Township 7 South, Range 13 East, of the Boise Meridian, Idaho.*

h. *Answer and Counter-Claim of Defendant Idaho Power Co.* in New International Mortgage Bank v. Idaho Power Co., District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932).

No party sought an opportunity to be heard on this request. I.R.E. 201(e). Therefore, the State's *Motion for the Court to Take Judicial Notice of Adjudicative Facts* is hereby **GRANTED**. I.R.E. 201(b), (d), and (f).

IV.

THE STANDARD OF REVIEW OF A SPECIAL MASTER'S REPORT OR RECOMMENDATION IN THE SRBA

The Significance of the Director's Report in Adjudication of Water Rights in the SRBA

A statement of the standard of review of a special master's report or recommendation regarding water rights claimed under state law in the SRBA begins with an understanding of the statutorily created procedural framework of how a "state based" claim is processed. *See* I.C. §§ 42-1401 to –1428 (1996 & Supp. 1999); SRBA Administrative Order 1, Rules of Procedure (Oct. 16, 1997). The pleadings in an adjudication proceeding consist of such documents as the notices of claim, objections, and responses thereto. *Fort Hall Water Users Ass'n v. U.S.*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995).

Summarily stated, the principal steps in a state based water right claim are as follows:

1. A claim of a water right is filed. I.C. § 42-1409 (Supp. 1999).
2. IDWR makes an examination of the relevant water system and of the claim. I.C. § 42-1410 (1996).

3. As a result of the IDWR examination, a Director's Report is filed. I.C. § 42-1411 (Supp. 1999).
4. Objections and/or Responses to the Director's Report can be filed by the claimant or any other party in the SRBA. I.C. § 42-1412 (Supp. 1999); I.C. § 42-1411(5).
    A. The parties to a subcase can stipulate to the contested elements of a water right by the use of a Standard Form 5. IDWR may concur therewith. AO1(4)(d)(3). If IDWR does not concur, the Court shall conduct any hearing necessary to determine whether a partial decree should be issued. AO1(4)(d)(3)(c).
    B. Uncontested and settled subcases are partially decreed.
5. Contested subcases proceed toward resolution. The District Court may refer these subcases to a special master. I.C. § 42-1412(4)-(5).
        A. Settlement conference.
        B. Scheduling conference.
        C. Trial before a special master.
6. In referred subcases, a **Special Master's Report or Recommendation** is filed with the Court. AO1(13).
7. **Motions to Alter or Amend a Special Master's Report or Recommendation** are filed, heard and ruled upon by a special master. AO1(13).
8. Objections ("Challenges" in the SRBA) to the final **Special Master's Report or Recommendation** are filed with the SRBA District Court. I.R.C.P. 53(e)(2); AO1(13).
9. A decision is made by the District Court on the **Challenge** and a Partial Decree is entered.
10. An appeal to the Idaho Supreme Court may be taken.

As it relates to the standard of review, the Director's Report (step 3 above) is of major significance because by statute, the Director's Report constitutes *prima facie* evidence of the nature and extent of a water right acquired under state law, and therefore constitutes a rebuttable evidentiary presumption. I.C. § 42-1411(4)-(5); s*ee Silverstein v. Carlson*, 118 Idaho 456, 461-62, 797 P.2d 856, 861-62 (1990); *State v. Hagerman Water Right Owners. Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418 (1997). The objecting party has the burden of going forward with evidence to rebut the Director's Report as to all objections filed. I.C. § 42-1411(5). However, I.C. § 42-1411(5) is silent as to the quantum of proof necessary to overcome the presumption raised by the Director's Report. If a statute is silent as to the quantum of proof necessary to overcome a presumption, then the presumption is overcome when the "opponent introduces substantial evidence of the nonexistence of the fact [presumed]." *Bongiovi v. Jamison,* 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986), *citing* Committee Comment to I.R.E. 301. Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 938 (1993). "When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *Hagerman Water Right Owners. Inc.*, 130 Idaho at 745, 947 P.2d at 418. If the presumption is overcome by the objector, then the claimant has the "ultimate burden of persuasion for each element of a water right." I.C. § 42-1411(5). That is, when the *prima facie* evidence is rebutted by competent evidence, the issue is decided, like other issues, on the sum of the proof. *See* D. Craig Lewis, Idaho Trial Handbook, § 12.5 (1995), *citing Reddy v. Johnston*, 77 Idaho 402, 293 P.2d 945 (1956).

Therefore, from the "get-go," a special master's evidentiary view of an "objected to" subcase is directly affected by the content of the Director's Report, who filed the objection (i.e. who has the burden of going forward with the evidence), and to which elements of the claim the objection is directed (i.e. the scope of the objection). I.C. § 42-1411(5). In turn, a review of a **Special Master's Report or Recommendation**

by the District Court is likewise influenced by the procedural history of the particular subcase(s).

Special Master's Report or Recommendations (as to the unobjected to portion of Director's Report)

I.C. § 42-1411(4) purports to mandate that the unobjected to portions of the Director's Report be decreed as reported. Normally, this is exactly what happens. However, despite the unyielding language of this statute, the SRBA district court retains discretion to apply law to facts and render its own conclusions regarding unobjected to water rights. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995), *citing* I.R.C.P. 55. Additionally, I.C. § 42-1412(7) allows the district court to delay entry of partial decrees for those portions of the Director's Report for which no objection has been field if the district court determines that the unobjected claim may be affected by the outcome of a contested matter.

Special Master's Report or Recommendations (as to the objected to portion of Director's Report)

Because the district court has the duty to independently review a special master's report, the findings of fact and conclusions of law contained therein do not stand automatically approved in the absence of a challenge. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989); C. Wright and A. Miller, Federal Practice and Procedure § 2612 (1995).

Under I.R.C.P. 53(e)(2), written objections/challenges may be served upon all other parties within fourteen (14) days of service of the notice of the filing of a special master's report.[1] It should be noted, however, that AO1(13)(a) provides that "**[f]ailure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend***

[1] If a **Motion to Alter or Amend a Special Master's Recommendation** is timely filed under AO1(13)(a), the time to file a challenge under I.R.C.P. 53(e)(2) is suspended until the special master files a decision on the **Motion to Alter or Amend**.

the Special Master's Recommendation **shall constitute a waiver of the right to challenge it before the Presiding Judge.**"[2]

Applications to the referring district court for "action upon the report" are covered by I.R.C.P. 53(e)(2), and are to be by motion. The court, **after hearing**, has a wide range of actions available. The court may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it to a special master with instructions. I.R.C.P. 53(e)(2). Where a challenge to a special master's report is filed, a district court must hold a hearing on the issues raised therein. *See Kieffer v. Sears Roebuck & Co.*, 873 F.2d 954, 956 (6th Cir. 1989). Of course, the parties could waive oral argument and submit the challenge on the briefs.[3]

Findings of Fact of the Special Master

In Idaho, the 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); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States

[2] It may seem anomalous that actual participation in a **Motion to Alter or Amend** is a prerequisite to a Rule 53(e)(2) challenge in the SRBA, but such a challenge or objection is not a prerequisite to appellate review. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989) (holding that objections to findings and conclusions of the master are not required to preserve an issue for appeal). The following reasons, however, explain this apparent anomaly: First, because of the large and complex nature of the SRBA litigation, and the potential that a large number of parties may have an interest in a particular issue or subcase before a special master, it is necessary for those interested parties to involve themselves in the proceedings before the special master, at least at the **Motion to Alter or Amend** stage. *See* AO1 (13)(a). Allowing interested parties to sit back and wait for the special master's final report and then file a challenge with the district court would cause unjustifiable expense and delay. Second, the district court has the affirmative duty to independently review the special master's report (irrespective of whether it has been challenged) using the clearly erroneous standard as to findings of fact and a free review of the conclusions of law. Upon such review, the district court may, on its own initiative, adopt, modify, or reject the report, receive further evidence, or refer it back to the special master. In contrast, an appellate court – which is not a fact finding court – is limited to the record before it in deciding whether the trial court's findings are clearly erroneous and/or whether the conclusions of law are incorrect.

[3] If no party files a challenge to a special masters report and recommendation, the court will not usually hold a hearing under I.R.C.P. 53(e)(2). As a practical matter, such a hearing would accomplish little, if anything; it would not be an efficient use of judicial resources, and would create unnecessary expense for the litigants.

Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

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

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

A special master's findings which a district court adopts in a non-jury action are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,[4] although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo.* Wright and Miller, *supra*, § 2614; *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v.*

[4] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special masters findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

Zant, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra*, § 2585.

With respect to stipulated facts, I.R.C.P. 53(e)(4) provides that when parties stipulate that a special master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered (meaning freely reviewable by the referring district court).[5]

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 582 (1971).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1st Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does

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[5] Read literally, this rule absolutely requires a referring district court to accept stipulated facts without any question. While this would be the result in the vast majority of cases, it is logical that the intent of this rule is much like the "uncontradicted testimony rule" of evidence. This "rule" is that "[t]he uncontradicted testimony of a credible witness must be accepted by the trier of fact unless the testimony is 'inherently improbable, or rendered so by facts and circumstances disclosed at the hearing . . . or impeached by any of the modes known to the law." *Faber v. State*, 107 Idaho 823, 824, 693 P.2d 469, 470 (Ct. App. 1984), *citing Dinnen v. Finch*, 100 Idaho 620, 626-627, 603 P.2d 575, 581-82 (1979). *See also Russ v. Brown*, 96 Idaho 369, 373, 529 P.2d 765, 769 (1974) ("[T]he trial court must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable or impeached"); *Roemer v. Green Pastures Farms, Inc.*, 97 Idaho 591, 593, 548 P.2d 857, 859 (1976) ("The district court, sitting as a trier of fact, may reject uncontradicted testimony of a witness if the testimony is inherently improbable."); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998) ("[I]t has long been recognized that unless a witness's testimony is inherently improbable, or rendered so by facts and circumstances disclosed at trial, the trier of fact must accept as true the positive, uncontradicted testimony of a credible witness."); Wright and Miller, Federal Practice and Procedure § 2586 (1995) ("The court need not accept even uncontradicted and unimpeached testimony if it is from an interested party or is inherently improbable."). Hence, a reviewing district court, through its inherent powers and sitting as the final arbiter of all the issues, could reject stipulated facts which were inherently improbable and/or which would result in a fraud being perpetrated on the court or on others.

not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook." Lewis, Idaho Trial Handbook, § 35.14 (1995), *citing Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), *citing* Idaho Appellate Handbook § 3.3.4.2.

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151,153, 922 P.2d 1077, 1079 (Ct. App. 1996).

Conclusions of Law of the Special Master

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

Label is not Decisive

Plainly, the label put on a determination by a special master is not decisive. Therefore, if a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

Mixed Questions of Fact and Law

There is substantial authority that "mixed questions of fact and law" are not protected by the "clearly erroneous" standard and are freely reviewable. Wright and Miller, *supra*, § 2589; *U.S. v. Ekwunoh*, 12 F.3d 368, 372 (2nd Cir. 1993).

The Bottom Line Regarding Findings of Fact and Conclusions of Law

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

Standard of Review Regarding Admission or Exclusion of Evidence

A district court reviews a special master's decision admitting or excluding evidence, including the testimony of expert witnesses, under the abuse of discretion standard. This is the same standard that is used by an appellate court to review such decisions made by a trial court. *Morris by and through Morris v. Thomas*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997), *citing Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

In *Burgess*, the Idaho Supreme Court articulated the following test for whether a trial court (and likewise a special master) has abused its discretion:

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Burgess, 127 Idaho at 573, *citing Rhodehouse v. Stutts*, 125 Idaho 208, 213, 868 P.2d 1224, 1229 (1994).

A trial court, and likewise a special master, may exclude or strike evidence upon the motion of a party. Furthermore, a trial court or special master may exclude evidence

offered by a party on its own authority, without a motion to strike or an objection made by the opposing party. *Morris*, 130 Idaho at 144, 937 P.2d at 1218, *citing Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782-83, 839 P.2d 1192, 1196-97 (1992).

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. I.R.C.P. 61; I.R.E. 103; *Burgess*, 127 Idaho at 574, 903 P.2d at 739; *Hake v. DeLane*, 117 Idaho 1058, 1065, 793 P.2d 1230, 1237 (1990); *Morris*, 130 Idaho at 144, 937 P.2d at 1218.

V.
STATEMENT OF ISSUES BY NSGWD

As previously mentioned, NSGWD filed one combined *Amended Notice of Challenge*. It listed the issues as follows:

1. Numerous different parties claimed a portion of the previously decreed Water Right No. 36-00003, and the entire quantity of the right has been allocated among various parties. Are claimants of portions of Water Right No. 36-0000E barred from receiving more than the proportional share of the 20 cubic feet per second ("cfs") originally decreed to Water Right No. 36-00003?

2. Absent the filing of claims in the SRBA for Water Right Nos. 36-00005 and 36-00019, can Water Right Nos. 36-00005 and 36-00019 be allocated to portions of Water Right No. 36-00003 in the SRBA?

3. Was it error for the Special Master to recommend a diversion rate based on a gravity irrigation analysis when the claimant's water right is actually exercised in part through sprinkler irrigation which generally uses less water than gravity irrigation? Was it error for the Special Master not to address, by qualifying language or by another legal means, that in the event of a water call, the water quantity associated with actual beneficial use will apply?

4. Have the claimants met the burden of persuasion with respect to the quantity element as required by *Idaho Code* § 42-1411(5)?

5. With respect to Water Right No. 36-00003B, should a fish propagation purpose of use have been recommended as of the claimed priority date of September 10, 1884?

6. Is the Motion to Alter or Amend governed by Rule 59(e), I.R.C.P.?

VI.
ISSUES PRESENTED BY THE STATE

As previously mentioned, the State filed five (5) different *Notices of Challenge*, some with the same or similar issues stated and others with issues unique to the particular subcase(s).

Subcase 36-00003A, Claimant Edna Rea

1. Since 20.0 cfs was originally decreed to water right 36-0003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United Sates for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-0003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Is the claimant of water right 36-00003A bound by *res judicata* from re-litigating the quantity of water necessary to irrigate her property?

3. Where IDWR has recommended the full decreed quantity to the various claimants of the 03 Right, and the claimant of water right 36-00003A failed to object or otherwise contest any other claim to the 03 Right, has the claimant effectively waived her right to contest IDWR's quantity recommendation for water right 36-00003A?

4. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?

6. Does a decree for more than 0.41 cfs for water right 36-00003A constitute an impermissible enlargement to the 03 Right?

7. Did the Special Master err in his finding that water rights 36-00005 and 36-00019 from the New Int'l Decree and the 03 Right all share the same place of use?

8. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water right 36-00003A even though these rights were not claimed?

9. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

10. Does a decree for more than 0.41 cfs for water right 36-00003A constitute an impermissible enlargement to water right 36-00005 and 36-00019 from the New Int'l Decree?

11. If Claimant is permitted to re-litigate the quantity of water necessary to irrigate her property, has Claimant met her burden of proof as to the quantity element through testimony that a computer program determines that quantities ranging from 1 to 12 inches per acre could be used to irrigate the property?

Relief Requested

The State of Idaho respectfully requests that this Court decree water right 36-00003A as recommended by IDWR.

Subcase 36-00003B, Claimant David Kingston and/or Kingston Properties, L.P.

1. Since 20.0 cfs was originally decreed to water right 36-00003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-00003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Is the claimant of water right 36-00003B bound by *res judicata* from re-litigating the quantity of water necessary to irrigate its property?

3. Where IDWR has recommended the full decreed amount to the various claimants of the 03 Right, and the claimant of water right 36-00003B failed to object or otherwise contest any other claim to the 03 Right, has the claimant effectively waived its right to contest IDWR's quantity recommendation for water right 36-00003B?

4. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?

6. Does a decree for more than 5.0 cfs for water right 36-00003B constitute an impermissible enlargement to the 03 Right?

7. Did the Special Master err in his finding that water rights 36-00005 and 36-00019 from the New Int'l Decree and the 03 Right all share the same place of use?

8. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water right 36-00003B even though these rights were not claimed?

9. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

10. Does a decree for more than 5.0 cfs for water right 36-00003B constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

11. If Claimant is permitted to re-litigate the quantity of water necessary to irrigate its property, has Claimant met its burden of proof as to the quantity element through testimony that a computer program determines that quantities ranging from 0.5 to 6.5 inches per acre could be used to irrigate the property?

12. Does Idaho Code § 42-1427(1)(b), the legislative findings portion of Idaho Code § 42-1427, permit the claimant of water right 36-00003B to add purposes of use to the 03 Right independent of a recommendation from IDWR?

13. Does the addition of a year-round fish propagation use to the 03 Right constitute and impermissible enlargement to the 03 Right?

14. Does Idaho Code § 42-1427 apply to "vague" elements in prior decrees or licenses?

15. Can Idaho Code § 42-1427 ever be used to add purposes of use to prior decreed or licensed water rights?

16. Has Claimant met its burden of proof as to the quantity of water beneficially used for fish propagation?

Relief Requested

The State of Idaho respectfully requests that this Court decree water right 36-00003B as recommended by IDWR.

Subcases 36-00003C and 36-00003L, Claimants Lynn and Kathy Babington

1. Since 20.0 cfs was originally decreed to water right 36-00003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-00003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Are the claimants of water rights 36-00003C and 36-00003L bound by *res judicata* from relitigating the quantity of water necessary to irrigate their property?

3. Did the Special Master err in considering any evidence concerning the claim to water right 36-00003C since no outstanding objections were at issue at the time of trial?

4. Where IDWR has recommended the full decreed quantity to the various claimants of the 03 Right, and the claimants of water rights 36-00003C and 36-00003L failed to object or otherwise contest any other claim to 03 Right, have the claimants effectively waived their right to contest IDWR's quantity recommendation for water rights 36-00003C and 36-00003L?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

6. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?

7. Does a decree for more than 0.3 cfs for water right 36-00003C constitute an impermissible enlargement to the 03 right?

8. Does a decree for more than 0.43 cfs for water right 36-00003L constitute an impermissible enlargement to the 03 Right?

9. Did the Special Master err in his finding that water rights 36-00005 and 36-00019 from the New Int'l Decree and the 03 Right all share the same place of use?

10. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water rights 36-00003C and 36-00003L even though these rights were not claimed?

11. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

12. Does a decree for more than 0.3 cfs for water right 36-00003C constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

13. Does a decree for more than 0.43 cfs for water right 36-00003L constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

14. Does the combining of water right 36-00003C and water right 36-00003L require an application with IDWR pursuant to Idaho Code § 42-222?

15. If Claimant is permitted to combine water rights 36-00003C and 36-00003L and to relitigate the quantity of water necessary to irrigate their property, have the claimants met their burden of proof as to the quantity element through testimony that a computer program determines that quantities ranging from 1.25 to 15.75 inches per acre could be used to irrigate the property?

Relief Requested

The State of Idaho respectfully requests that this Court decree water rights 36-00003C and 36-00003L as separate water rights, each as recommended by IDWR.

Subcase 36-00003F and 36-00003M, Claimants Doyt and Roxie Simcoe

1. Since 20.0 cfs was originally decreed to water right 36-00003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-00003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Are the claimants of water rights 36-00003F and 36-00003M bound by *res judicata* from relitigating the quantity of water necessary to irrigate their property?

3. Did the Special Master err in considering any evidence concerning the claim to water right 36-00003F since no outstanding objections were at issue at the time of trial?

4. Where IDWR has recommended the full decreed quantity to the various claimants of the 03 Right, and Claimants of water rights 36-00003F and 36-00003M failed to object or otherwise contest any other claim to the 03 Right, have Claimants effectively waived their right to contest IDWR's quantity recommendation for water rights 36-00003F and 36-00003M?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

6. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?

7. Does a decree for more than 0.8 cfs for water right 36-00003F constitute an impermissible enlargement to the 03 Right?

8. Does a decree for more than 0.50 cfs for water right 36-00003M constitute an impermissible enlargement to the 03 Right?

9. Did the Special Master err in finding that water rights 36-00005 and 36-000019 from the new Int'l Decree and the 03 Right all share the same place of use?

10. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water rights 36-00003F and 36-00003M even though these rights were not claimed?

11. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

12. Does a decree for more than 0.8 cfs for water right 36-00003F constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

13. Does a decree for more than 0.50 cfs for water right 36-00003M constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

14. Does the combining of water rights 36-00003F and water rights 36-00003M require an application with IDWR pursuant to Idaho Code § 42-222?

15. If claimant is permitted to combine water rights 36-00005F and 36-00003M and relitigate the quantity of water necessary to irrigate their property, have the claimants met their burden of proof as to the quantity element through testimony and that a computer program determines that quantities ranging from 0.90 to 12.5 inches per acre could be used to irrigate the property?

Relief Requested

The State of Idaho respectfully requests that this Court decree water rights 36-00003F and 36-00003M as separate water rights, each as recommended by IDWR.

Subcase 36-00003K, Claimant David Kingston and/or Kingston Properties, L.P.

1. Since 20.0 cfs was originally decreed to water right 36-0003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-0003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Is the claimant of water right 36-00003K bound by *res judicata* from re-litigating the quantity of water necessary to irrigate its property?

3. Did the Special Master err by recommending a larger number of acres than recommended by IDWR when no objection was filed to the place of use for water right 36-00003K?

4. Where IDWR has recommended the full decreed quantity to the various claimants of the 03 Right, and Claimant of water right 36-00003K failed to object of

otherwise contest any other claim to the 03 Right, has Claimant effectively waived its right to contest IDWR's quantity recommendation for water right 36-00003K?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

6. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?

7. Does a decree for more than 0.03 cfs for water right 36-00003K constitute an impermissible enlargement to the 03 Right?

8. Did the Special Master err in his finding that water rights 36-00005 and 36-000019 from the New Int'l Decree and the 03 Right all share the same place of use?

9. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water right 36-00003K even though these rights were not claimed?

10. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

11. Does a decree for more than 0.03 cfs for water right 36-00003K constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

12. If Claimant is permitted to re-litigate the quantity of water necessary to irrigate its property, has Claimant met its burden of proof as to the quantity element through testimony that a computer program determines that quantities ranging from 0.5 to 6.5 inches per acre could be used to irrigate the property?

Relief Requested

The State of Idaho respectfully requests that this Court decree water right 36-00003K as recommended by IDWR.

VII.
CATEGORIZATION OF ISSUES BY CLAIMANTS

In their Response Brief to Challenges, at page 17, the Claimants have broadly categorized the issues as the following:

1. Are the Challengers estopped from asserting *res judicata* or any other affirmative defense as being preclusive of the quantities recommended by the Special Master in the absence of an objection prior to trial?

2. Was it error for the Special Master to consider unclaimed water right numbers 36-00005 and 36-00019 when the claim numbers had been assigned by IDWR?

3. Can the Challengers raise evidentiary objections where they declined the many opportunities afforded them to file objections and actually participate in the trial and no objections were raised at trial?

4. Is there substantial evidence in the record to support the Special Master's Findings of fact?

5. Did the Special Master properly apply Idaho Code § 42-1427 in these subcases?

VIII.
CATEGORIZATION OF ISSUES BY THE COURT

Because many of the State's issues apply to more than one subcase, and because some of the NSGWD's issues are essentially the same as some of the State's issues, the Court has consolidated and restated the issues as follows:

Issue No. 1: Are the claimants to the 03 right bound by the New Int'l Decree to a percentage share of the 03 right, the cumulative total of which cannot exceed of 20 cfs?

Issue No. 2: Does the failure of each Claimant under the 03 right to object to competing claims under the 03 right constitute a waiver of the right to contest IDWR's quantity recommendation for that Claimant's own claim?

Issue No. 3: Where the Claimants have collectively over-claimed the 03 right, should

other parties in the SRBA be required to prove which claim(s) under the 03 right is (are) excessive in order to avoid over-allocation of the 03 right?

Issue No. 4: Absent the filing of claims in the SRBA for the 05 and 19 rights, can such rights be used to cover over-allocation of the 03 right?

Issue No. 5, Part 1: Was it error for the Special Master to recommend a diversion rate based on a gravity irrigation analysis when the Claimant's water right is actually exercised in part through sprinkler irrigation which generally uses less water than gravity irrigation?

Issue No. 5, Part 2: Was it error for the Special Master not to address, by qualifying language or by another legal means, that in the event of a water call, the water quantity associated with actual beneficial use will apply?

Issue No. 6: Have the Claimants met the burden of persuasion with respect to the quantity element as required by I.C. § 42-1411(5)?

Issue No. 7: Does a decree for more than X cfs for water right 36-00003(respective split) constitute an impermissible enlargement to the 03 right?

Issue No. 8: Does the combining of water right 36-00003C with 36-00003L, and water right 36-00003F with 36-00003M, require an application with IDWR pursuant to I.C. § 42-222?

Issue No. 9: Is a Motion to Alter or Amend before a special master in the SRBA governed by I.R.C.P. 59(e)?

Issue No. 10: Did the Special Master err in considering any evidence concerning the claim to water right 36-00003C and 36-00003F since no outstanding objections were at issue at time of trial?

Issue No. 11: With respect to water right No. 36-00003B, should a fish propagation purpose of use have been recommended as of the claimed priority date of September 10, 1884?

IX.
THE NEW INTERNATIONAL DECREE

The claims to the water rights at issue in these challenges are derived from the decree entered in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"). By a review of that decree, it appears to the Court that the plaintiff therein, New International Mortgage Bank, received three water rights, two from Riley Creek and one from Billingsley Creek, as described on pages 2 and 3 of the New Int'l Decree. The third right, from Billingsley Creek and described on page 4 of the New Int'l Decree, was assigned the water right number 36-00003 (the "03" right) by IDWR prior to the SRBA adjudication process. *Affidavit* of Steve Clelland ¶ 3 (October 15, 1999). It has a priority date of September 10, 1884. Numerous other rights were also decreed in the New Int'l Decree. In order of listing in the Decree, Amanda J. Gooding is listed as the fifth right, for 3 cfs from Billingsley Creek with a priority date of September 10, 1884. This right was assigned number 36-00005 (the "05" right) by IDWR. The nineteenth and twentieth rights listed in the New Int'l Decree were to Harlan Bell for 2.16 cfs from Billingsley Creek and 0.5 cfs from Riley Creek, respectively. These rights were assigned numbers 36-00019 (the "019" right) and 36-00020 (the "020" right) by IDWR.

The following table summarizes those portions of the New Int'l Decree which are relevant to these Challenges:

Number Assigned by IDWR	Decreed to:	Quantity (cfs)	Source	Point of Diversion[6]	Priority Date
36-00001	New International Mortgage Bank	12	Riley Creek	Hunt Ditch	May 1, 1883
36-00002	New International Mortgage Bank	12	Riley Creek	Pipe Ditch	October 1, 1908
36-00003	New International Mortgage Bank	20	Billingsley Creek	Buckeye Ditch	September 10, 1884
36-00005	Amanda J. Gooding	3	Billingsley Creek	Buckeye Ditch	September 10, 1884
36-00019	Harlan Bell	2.16	Billingsley Creek	Buckeye Ditch	September 10, 1884
36-00020[7]	Harlan Bell	0.5	Riley Creek	Pipe Ditch	October 1, 1908

The places of use decreed in the New Int'l Decree for the various rights are as follows:

36-00001, 36-00002, and 36-00003

SW1/4 of NE1/4; NW1/4 of SE1/4; S1/2 of NW1/4; N1/2 of SW1/4, Section 27; SE1/4 of NE1/4; NE1/4 of SE1/4; Lots 4, 5, 8, and 9, all in Section 28; Lots 1,4, 5, and 8; SE1/4 of SE1/4, all in Sec. 33; Lots 1, 2, 3, 4, 5, and 7; SE1/4 of NW1/4; NE1/4; N1/2 of NW1/4, all in Sec. 34; SW1/4 of NW1/4 and NW1/4 of SW1/4 of Section 35, all in Township 7 South, Range 13 E. B. M. Terrace Bar, Big Foot Bar, Union Bar and

[6] For the first three rights listed in the New Int'l Decree, the point of diversion is described by quarter-quarter section. For the remaining rights at issue the point of diversion is described by ditch. To keep it simple, for all the rights in the above table the point of diversion is described by ditch. The point of diversion for the Hunt, Pipe, and Buckeye ditches is particularly described in the New Int'l *Findings of Fact* at section 7.

[7] Although the 020 right is not at issue in these Challenges, it is listed in the above table because it was decreed in the New Int'l Decree for the same place of use as the 019 right.

Comstock Placer Mining Claims according to plat of Mineral survey No. 1, Lot 37, filed in U.S. Land Office at Hailey, Idaho, November 20, 1884; Starr Hunt, Jack Rabbitt and Fractional Terrace Bar Placer Mining Claims according to plat of mineral survey No. 801, Lot 38, filed in U.S. Land Office at Hailey, Idaho, January 2, 1890; all in Township 7 South, Range 13, E. B. M. All islands in Snake River South of said Section 33, Township 7 South, Range 13 E. B. M., **excepting tracts 16, 27, 37, 124, and 125 of Map of Buckeye Ranch recorded in Book 1 of Plats, page 44, in the office of the County Recorder of Lincoln County, Idaho.**

(emphasis added).

36-00005

South Half of Southwest Quarter (S1/2SW1/4) and South Half of Southeast Quarter (S1/2SE1/4) of Section 27, Township 7 South, Range 13 E.B.M.

36-00019 and 36-00020

Lots 16, in the SW1/4 of the SW1/4 of the NW1/4 and Lots 27 and 37 in the W1/2 of the NW1/4 of the SW1/4, in Sec. 27, Twp. 7 S. R. 13 E. B. M., the same being Acreage Tracts shown on the map or plat of Buckeye Ranch on file in the office of the Recorder of Gooding County, Idaho.

The evidence is clear that, as decreed in the New Int'l Decree, the 01, 02, and 03 rights all share the same place of use, and this place of use is separate and distinct from the place of use of the 05, 019, and 020 rights. Note that the description of the place of use for the 01, 02, and 03 rights contains an exclusion of certain lands, which is in bold typeface above. Note also that the place of use for the 019 and 020 rights is wholly within the place of use which is excluded from the 01, 02, and 03 rights.[8]

[8] Although there is a variation between the description of the exclusion for the 01, 02, and 03 rights, and the description of the 019 and 020 rights, the evidence reveals that they describe the same place on planet earth (with the exception of "tracts 124 and 125"). *See Affidavit* of Steve Clelland ¶ 8 (October 15, 1999) ("In my examination of all information and maps provided to IDWR during my investigation . . . I determined that the place of use decreed to 36-00019 [and 36-00020] (lots 16, 27, and 37) in the New International Decree are the same tracts excluded from the place of use of 36-00003 [and 36-00001 and 36-00002] (Tracts 16, 27, and 37) in the New International Decree.").

X.
BRIEF HISTORY OF THE 01, 02, 03, 05, 019, and 020 RIGHTS IN THE SRBA

36-00001

Water right no. 36-00001 was claimed in the SRBA by Buckeye Farms, Inc. ("Buckeye Farms") on September 1, 1988, for a quantity of 12 cfs from Riley Creek. The place of use claimed was for lands within the boundaries of the place of use decreed for the first three rights listed in the New Int'l Decree. In addition, Buckeye Farms also claimed a place of use for this right on lands outside of the boundaries of the place of use originally decreed in the New Int'l Mortgage Decree. The additional place of use claimed by Buckeye Farms was the 160 acres which were decreed to Amanda J. Gooding (the 05 right) in the New Int'l Decree. Buckeye Farms, however, claimed a different point of diversion than as decreed to the 05 right. A partial decree was issued for this water right on February 10, 1997, for a quantity of 12 cfs. The place of use decreed in the SRBA includes 152 acres within the 160 acre place of use originally decreed to Amanda J. Gooding in the New Int'l Decree.

36-00002

Water right no. 36-00002 was claimed in the SRBA by Buckeye Farms on September 1, 1988, for a quantity of 12 cfs from Riley Creek. The place of use claimed was for lands within the boundaries of the place of use decreed for the first three rights listed in the New Int'l Decree. In addition, Buckeye Farms also claimed a place of use for this right on lands outside of the boundaries of the place of use originally decreed in the New Int'l Mortgage Decree. The claimed place of use was identical to that claimed by Buckeye Farms for right no. 36-00001. The additional place of use claimed by Buckeye Farms was the 160 acres which were decreed to Amanda J. Gooding (the 05 right) in the New Int'l Decree. Again, Buckeye Farms claimed a different point of diversion than as decreed to the 05 right. A partial decree was issued for this water right on March 6, 1997, for a quantity of 10.45 cfs. The place of use decreed in the SRBA includes 152 acres

within the 160 acre place of use originally decreed to Amanda J. Gooding in the New Int'l Decree.

36-00003

Water right 36-00003 has been split into numerous parts. Attached as Exhibit A to *Memorandum in Support of State of Idaho's Motion to Alter or Amend* (April 9, 1999) is the following chart of the 03 rights, which is reproduced here to provide a graphic aid to understanding the procedural history of the respective subcases involving the 03 rights.

Claim to the 03 Split Rights	**Current Claimant**	**Claim**		**IDWR Rec**		**SM Rec**	
		CFS	**Acres**	**CFS**	**Acres**	**CFS**	**Acres**
A	Rea	1.6	13	0.41	13	1.6	13
B	Kingston	7.16	129	5.0	129	7.16	129
C	Babington	0.30	10	0.30	10	1.62	24
D	Harbison	0.24	10	0.24	2	0.24	8.4
E	Vernon	0.20	10	0.20	5	0.20	6
F	Simcoe	0.80	40	0.80	40	2.56	58
G	Lloyd	0.40	20	0.19	3	0.19	3
H	Buckey Farms	12.0	455	11.9	290	11.9	290
J	Gardner	Split into	K, L & M				
K	Kingston	0.92	10	0.03	1	0.92	7
L	Babington	1.32	27.5	0.43	14	0	0
M	Simcoe	1.76	18.5	0.50	18	0	0
TOTALS		**26.7**	**743**	**20**	**526**	**26.39**	**538.4**

The 03 split rights which are not at issue in these challenges are D, E, G, H, and J. As to rights 03D and 03J[9], they were originally listed in NSGWD's *Notice of Challenge*, but they were subsequently dropped when NSGWD filed an *Amended Notice of Challenge* on August 20, 1999.

As to right nos. 36-00003E (Vernon) and 36-00003G (Lloyd), the evidence shows that these rights have been moved to a new place of use outside of the original place of use for 36-00003. *Affidavit of Steve Clelland* ¶¶ 12-13. With respect to right no. 36-00003G, a letter from H.F. LeMoyne to George Lemmon as water master (April 14, 1959) shows that 20 inches of water from Billingsley Creek, with a priority date of September 10, 1884, had been sold and moved to a new place of use. *Id*. at Exhibit 2. A partial decree, with a Rule 54(b) certificate, was entered in the SRBA for right no. 36-00003G on November 21, 1997. With respect to rights no. 36-00003E, Steve Clelland states in his affidavit that the "Claimant confirmed that 36-00003E had been purchase from the 36-00003 right and moved to a new place of use." *Id.* at ¶ 13. The Special Master has issued a recommendation for right no. 36-00003E, but a partial decree has not been entered.

As to right no. 36-00003H, a partial decree, with a Rule 54(b) certificate, was entered in the SRBA to Buckeye Farms on March 6, 1997, for a quantity of 11.9 cfs, and a place of use of 260 acres. One acre out of the 260 acres is within the place of use originally decreed to Amanda J. Gooding (the 05 right) in the New Int'l Decree. (Buckeye Farms' water right claim for the entire 260 acres was made under the 03 Right and not the 05, 019 or 020 rights.).

36-00019 and 36-00020

As to water right nos. 36-00019 and 36-00020, no claims have been made in the SRBA which correspond to these right numbers. However, as discussed herein, it appears that the places of use recommended by the Special Master for right nos. 36-00003B and

[9] Water right 36-00003J was originally claimed for 4.0 cfs on 56 acres. It was subsequently split into the K, L, and M rights, and as such J itself has been recommended as disallowed.

36-00003D include land that are within the place of use originally decreed to Harlan Bell (the 019 and 020 rights) in the New Int'l Decree.

XI.
BRIEF STATEMENT OF FACTS

On November 2, 1992, IDWR filed Director's Reports in each of the subcases at issue. By the objection deadline date of May 1, 1993, each claimant (of the 03 right) had objected to the Director's Report for their own claims. Even though all of the Claimants claims are purportedly derived from New International Mortgage Company's third decreed right (03) (page 4 of the New Int'l Decree) from Billingsley Creek with a priority date of September 10, 1884, none of the Claimants objected to any competing claims under the 03 right. Thus, as pointed out in the "03" table above, the various claimants "over-claimed" this 20 cfs right by claiming a total of 26.7 cfs, or by 6.7 cfs. Over the course of the next three years, various legal proceedings occurred, including the appeal in some of these subcases to the Idaho Supreme Court. That case, commonly referred to as the "24 Hagerman Subcases," 130 Idaho 736, 947 P.2d 409 (1997), held, among other things, that since IDWR was no longer a party to the SRBA, evidentiary hearings must be held in contested "one party" subcases to support claims which differed from the Director's Report.

Additionally, neither of the challengers herein filed objections or responses, nor have they otherwise sought to participate in these subcases since the 24 Hagerman Subcases decision from the Supreme Court, until the Motion to Alter or Amend stage when it came to light that the Special Master had recommended a total of 26.39 cfs for these rights, when the "03" rights were derived from the New Int'l Decree right of 20 cfs. In an attempt to make up the shortage (26.39 cfs - 20 cfs or 6.39 cfs) by his recommendation which is .31 cfs less than claimed, the Special Master recommended decreeing the 3 cfs from 36-00005 and the 2.16 cfs from 36-00019, both of which were not allegedly claimed by anyone in the SRBA and hence, not reported by IDWR. It

should be noted that the places of use under the 05 and 019 rights were claimed, and that it was IDWR who assigned the right numbers.

Of course, as one can readily discern from the *Notices of Challenge*, a host of other issues are also presented. However, it is fairly apparent that the two primary triggering events were the 6.7 cfs over-claim, the 6.31 over-claim ultimately recommended by the Special Master, and the attempted use of the "05" right and the "019" right to cover (most of) this "overage."

Lastly, despite claiming water rights pursuant to the New Int'l Decree, the record is void as to the chain of title vesting respective shares of the previously decreed water right in the Claimants.

XII.
DECISION

Issue No. 1: Are the claimants to the 03 right bound by the New Int'l Decree to a percentage share of the 03 right, the cumulative total of which cannot exceed of 20 cfs?

The Claimants to the 03 right are bound by the New Int'l Decree to a cumulative total of 20 cfs between them. The water right elements decreed in the New Int'l Decree are *res judicata* as between the parties and privies to that Decree, and the Claimants are bound thereby as to any water right elements **definitively** adjudged by the New Int'l Court.[10] The New Int'l Decree is the progenitor of the water right claims at issue in this Challenge. Because these claims arises from a prior decree, this Court cannot allocate more water to them than is available from their origin. In other words, each Claimant is purportedly tracing the title to their water right back to the third right listed in the New Int'l Decree with an 1884 priority date, and the sum of the claims cannot exceed the 20 cfs on which they are based. To hold otherwise would be to allow the Claimants of the 03

[10] The Claimants are not bound by the New Int'l Decree as to any water right elements which were undefined by that Decree. Likewise, the Claimants are not bound by the New Int'l Decree as to water right claims which do not purport to rely on that Decree, if any.

right to unilaterally expand the quantity element previously decreed, while maintaining the ancient priority date, or place an additional burden on the water master to administer the rights collectively, not to exceed the 20 cfs total.

It is a longstanding rule of law that a claimant to a water right -- which has been established by a predecessor-in-interest -- must show continuity of title in order to claim such right. *See e.g. Union Mill & Mining Co. v. Danberg et. al.*, 81 F. 73, 103 (D. Nevada)(1897)("the law is well settled that the respondents cannot avail themselves of the rights of these early settlers, with whom they have in no manner connected themselves by title"), *citing Lobdell v. Hall*, 3 Nev. 507; *Chiatovich v. Davis*, 28 P. 239, 240; *Salina Creek Irr. Co. v. Salina Stock Co.*, 27 P. 578; *Smith v. O'Hara*, 43 Cal. 371; *Burnham v. Freeman*, 19 P. 761; Gould, Waters, § 234; Black's Pom. Water Rights, § 60; Kinney on Irr. § 253. Where there is a prior decree in the chain of title of a water right, the claimant only need trace their title to such decree, and is relieved from tracing the title all the way back to the water right's inception, at least as to those elements of the water right which were defined in the prior decree. In the SRBA, the Director's Report constitutes *prima facie* evidence of the nature and extent of a water right. I.C. 42-1411(4) (Supp. 1999). Implicit in this evidentiary presumption is that claimant is the owner of the water right as reported. However, in the subcases at issue in this Challenge, where the Claimants are claiming ownership of a greater quantity than that reported by the Director, the Claimants are necessarily required to prove such ownership.

Hence, in claiming a portion of a previously decreed – and then subdivided – water right, each of the Claimants are required to produce evidence which demonstrates their ownership of a share of such right. Each Claimant has the burden to show privity of estate with the party to whom the water right was originally decreed (i.e. New International Mortgage Bank). This may be done by showing express conveyances of the water right in each deed or other conveying instrument in the chain of title. If all of the prior conveyances are silent regarding the portion of any water right that is appurtenant to a particular Claimant's land, then by operation of law that Claimant would receive a percentage share that correlates to the amount of land received. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916 (1984); *Hunt v. Bremer*, 47 Idaho 490, 493, 276 P. 964

(1929)("A division of a tract of land to which water is appurtenant, without segregating or reserving the water right, works a division of such water right in proportion as the land is divided."). On the other hand, some of the conveyances may have expressly included all or most of the water rights, and the others being silent would be construed as conveying less water. In any event, the Claimants are not entitled to a "fresh start" in showing the quantity of water necessary to irrigate their land, where the water rights they claim stem from a prior decree. For example, Edna Rae's percentage share of the 03 right is the maximum quantity that can be decreed to her in the SRBA under water right no. 36-00003A. Of course, the Director of IDWR, based on his findings, may recommend less than such percentage share. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 741, 947 P.2d 409 (1997).

Therefore, the first step that should be undertaken in sorting out the 03 rights is to make factual findings as to the percentage share of each successor-in-interest to the subject water rights decreed in the in the New Int'l Decree. Although the record in these subcases contains some of the conveyances under which a particular Claimant is asserting ownership of a water right, no Claimant has submitted conveyances connecting themselves with New International Mortgage Bank. For example, for water right no. 36-00003C, the record contains an affidavit of Lynn Babington (May 7, 1996), attached to which is a copy of a deed purporting to convey certain real property "[t]ogther with 15 shares of Buckeye Ditch water."[11] Also attached is a copy of page 4 of the New Int'l Decree (page 4 contains the 03 right). The affiant states that "I acquired that water right as successor in interest in the real property to New International Mortgage Bank." However, simply presenting the New Int'l Decree and the last deed in a chain of title, without showing anything in-between, is wholly insufficient, as a matter of law, to demonstrate privity of estate in a water right once owned by New International Mortgage Bank.

Several matters further complicate the process of finding the share of the water for which each Claimant may be entitled, but the task is not insurmountable. Among other things, there is the question of whether each of the Claimant's claims really are for 03

[11] There is no evidence in the record regarding what measure of water constitutes a "share."

water. As explained elsewhere in this opinion, it appears to the Court that water right nos. 36-00003B and 36-00003D include land within the place of use of the 019 and 020 rights. Another possibility that strikes this Court is that some of the Claimant's claims may be appropriately classified as claims for water under the 01 or 02 rights. Verl Bell testified that some of the land in question had been watered via a pipeline that took water out of Riley Creek line, but when it subsequently fell into disrepair in the late 1930's, the land serviced by this pipe began to receive water out of the Buckeye Ditch. (Buckeye Ditch water comes out of Billingsley Creek and the pipeline came out of Riley Creek.) Tr. p. 277 ll. 12-17. If this is in fact what happened, it is unclear why the Claimant's affected by this did not claim water under the 01 or 02 rights, with an accomplished transfer (I.C. § 42-1425) of the point of diversion.

Second, the process is further complicated by the fact that partial decrees for 12 cfs of the 01 right, 10.45 cfs of the 02 right, and 11.9 cfs of the 03 right have already been issued to Buckeye Farms; and a partial decree for 0.19 cfs of the 03 right has been issued to Cleve Lloyd. Granted, all of the claims to the 01, 02, 03, 05, 019, and 020 are somewhat interrelated and should have all been joined in one action. However, the fact that partial decrees have been issued is not an insurmountable obstacle to a fair and just adjudication of these water rights. Claimants assert that because all claims to 03 water are not before the Court, it is now impossible to determine each Claimant's percentage share of the 03 right, and therefore they should be allowed to prosecute their claims without regard to these partial decrees. *Brief for Respondent* at 20. Implicit in Claimant's assertion is that some of the water decreed to Buckeye Farms and/or Cleve Lloyd may rightfully belong to some or all of the other Claimants. However, unlike the case of *Harvey v. Deseret Sheep Co.*, 40 Idaho 450, 234 P. 146 (1925), Claimants have not shown (or even attempted to show) facts which support the conclusion that water belonging to Claimants has been decreed to Buckeye Farms and/or Cleve Lloyd. Again, this cannot be determined until all of the deeds in the chain of title tracing back to the New Int'l Decree have been compared. Furthermore, the record indicates that, prior to entry of the partial decree for water right no. 36-00003H (Buckeye Farms), counsel for Claimants was aware that Buckeye Farms was claiming a significant portion of the 03 right. This is

evident from counsel's statements made during the September 26, 1996 Scheduling Conference. Tr. p. 24, ll. 8-22. The partial decree for water right no. 36-00003H was not entered until March 6, 1997. Having knowledge of a pending partial decree for Buckeye Farms, it was incumbent upon Claimants to bring to the Court's attention at that time that entry of such a partial decree should be stayed until a resolution had been made regarding other 03 rights. It is difficult for the Claimants to now argue that they are somehow prejudiced by Buckeye Farms' water rights, especially given that none objected to Buckeye Farms' claims and none asked the Court to stay a resolution until all rights were decided.

Claimants argue that they are not bound by *res judicata* because, under I.R.C.P 8(c), Challengers cannot raise the issue for the first time in a Motion to Alter or Amend. This argument fails for the simple reason that the Challengers were not parties to these subcases prior to the Motion to Alter or Amend stage. Claimants assert that "the Challengers in this action stood idly by despite many opportunities to participate." *Brief for Respondent* at 18. However, with respect to the issue of whether the New Int'l Decree puts a cap on the amount of water that may be claimed under it, the Challengers are not precluded from asserting *res judicata* for the first time in a Motion to Alter or Amend. The Special Master concluded that "every claimant should be entitled to prove their share of the previously decreed water rights independent[ly] . . ." (i.e. without regard to the overall cap of 20 cfs). The Challengers could not have anticipated that the Special Master would arrive at this conclusion of law, and it would be unfair to deny them the opportunity to refute the Special Master's conclusion of law in a Motion to Alter or Amend. Finally, this Court is not required to accept a special master's report and recommendation, whether there is a challenge or not. Simply put, this Court cannot decree more water than exists.

Issue No. 2: Does the failure of each Claimant to the 03 right to object to competing claims to the 03 right constitute a waiver of the right to contest IDWR's quantity recommendation for that Claimant's own claim?

Although it clearly would have been helpful in adjudicating the water rights at

issue, the Claimants are not required to object to competing claims to the 03 right, and failure to do so does not constitute a waiver of the right of each Claimant to object to IDWR's quantity recommendation for their own claim. The State has not directed the Court to any authority that dictates otherwise. To the contrary, competing claimants to a property right in Idaho are required to demonstrate their ownership of the property right on the strength of their own title, and not on the weakness of the competitor's title. *Rice v. Hill City Stock Yards Co.*, 121 Idaho 576, 582, 826 P.2d 1288 (1991), *rehearing denied* March 27, 1992, *citing Owen v. Boydstun*, 102 Idaho 31, 624 P.2d 413 (1981); *Pincock v. Pocatello Gold and Copper Min. Co., Inc.*, 100 Idaho 325, 597 P.2d 211 (1979); *Nelson v. Enders*, 82 Idaho 285, 353 P.2d 401 (1960). Thus, while not technically required to object, the end result may essentially be the same, i.e., by not objecting, and given the cap, these Claimants may well have prejudiced themselves. With a "cap" of 20 cfs with claims totaling 26 cfs, and with nobody objecting, the desired result is like a "sweet heart decree" (commonly seen in private adjudications) in the SRBA; a result which is repugnant to this Court's statutory duties. To be clear, and by way of example, assume 10 claimants are on a common ditch with a 100 inches of water maximum. Each claimant claims 15 inches of water. Nobody on the ditch objects. Out of "thin air", is this Court to decree 150 inches of water where the "Creator" only put 100?

Issue No. 3: Where the Claimants have collectively over-claimed the 03 right, should other parties in the SRBA be required to prove which claim(s) to the 03 right is excessive in order to avoid over-allocation of the 03 right?

As stated elsewhere in this opinion, the cumulative total of all claims for water rights based on the third right listed in the New Int'l Decree cannot exceed 20 cfs. Therefore, there is not an issue as to who has to prove what in order to avoid over-allocating the 03 right. Clearly, if any of the Claimants have appropriated "new" or "additional" water not claimed under the 03 right, a separate notice of claim for this supplemental right would have to be made in the SRBA, and would necessarily have a priority date sometime after the 1932 date of the New Int'l Decree.

Issue No. 4: Absent the filing of claims in the SRBA for the 05 and 19 rights, can such rights be used to cover over-allocation of the 03 right?

In the abstract, the answer to this question is no, the 05 and 019 rights cannot be allocated to cover claims which exceed the 20 cfs available under the 03 right. However, it appears to the Court that claims may have been made to the 05 and 019 rights in the SRBA, in the sense that water rights were claimed under the New Int'l Decree for their respective places of use, but that such claims were erroneously made under incorrect right numbers and/or that IDWR may have erroneously assigned the wrong number.

As to the 05 right, Buckeye Farms claimed water rights in the SRBA appurtenant to the place of use to which the fifth water right listed in the New Int'l Decree (the Amanda J. Gooding right) was originally appurtenant. As noted in Section X of this opinion, partial decrees have been issued to Buckeye Farms which, on their face, transferred water from the 01, 02, and 03 rights to the place of use to which the 05 right was originally appurtenant. This Court has carefully reviewed the SRBA files for water right nos. 36-00001, 36-00002, and 36-00003H, and is unable to find any basis for a transfer of these rights to the place of use to which the 05 right is appurtenant. If such a transfer has taken place, the Court can find no indication that the accomplished transfer statute (I.C. § 42-1425) has been complied with. It strikes this Court that the explanation for this apparent transfer may simply be an error arising from oversight in reading the places of use listed in the New Int'l Decree.

Nevertheless, it is of no import to the subcases at issue as to whether the 05 right was, in fact, claimed by Buckeye Farms (albeit possibly under an incorrect right number), or whether, in fact, nobody has made a claim to the 05 right. The record indicates that none of the pending Claimants own land within the original place of use for the 05 right, nor has any of the pending Claimants shown ownership of 05 water with a transfer of the place of use to their land. Therefore, it is clear that the 05 right cannot be used to satisfy the pending Claimant's claims. Furthermore, it is not even clear as to whether the 05 right still exists, as the water presently irrigating[12] the 05 place of use is both from a different

12 Furthermore, it is not even clear that the 05 place of use is being irrigated at all. Steve Clelland

point of diversion and from a different water source, i.e. Riley Creek instead of Billingsley Creek via the Buckeye Ditch.

As to the 019 (and perhaps the 020) right, it appears that claims may have been made in the SRBA for water rights on the place of use to which the 019 and 020 rights are appurtenant. Specifically, water right nos. 36-00003B and 36-00003D appear to include land within the place of use of the 019 and 020 rights. *Affidavit of Steve Clelland* ¶ 6 (October 15, 1999). A careful review of the files for water right nos. 36-00003B and 36-00003D provides no indication as to why the portions of these rights within the place of use for the 019 and 020 rights have been recommended as part of the 03 group of rights. Again, the explanation for this may simply be error due to oversight by either the Claimant, IDWR, or both. The genesis of this apparent error (i.e. who assigned the water right number to the claim) is immaterial. The fact remains that water rights with an "03" number were reported in the Director's Report and recommended by the Special Master for use on lands to which the 019 and 020 rights are appurtenant. There is no indication in the record which shows that 03 water has been purposefully transferred to the land to which the 019 and 020 were originally appurtenant.

What is important at this point is to make sure that claims numbers in the SRBA accurately reflect the specific right in the New Int'l Decree on which they are based. Therefore, the Special Master on remand is instructed to determine whether 03 water has been transferred onto 019 land, and if not, then to segregate out of the these rights a quantity of water which corresponds to the amount of 019 land. Obviously this task will require the expertise and cooperation of IDWR. Further, the Claimants of right nos. 36-00003B and 36-00003D should be allowed to file late claims based on the 019 (and possibly the 020) rights. As to any 03 water that may be "freed up" as a result of

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states in his affidavit that " The [05] place of use is being irrigated with Riley Creek Water." *See Affidavit* of Steve Clelland ¶ 9. In contrast, counsel for Claimants contends that "the 36-00005 place of use has been dewatered, except for one acre described in the partial decree to 36-00003H (SWSW§27)." *See* Claimants' *Response to Order for Additional Information and/or Clarification on Challenge* at 4. Either scenario is probative of the possibility that the 05 right may no longer exist.

diminishment of claim nos. 36-00003B and 36-00003D, all competing claimants to the 03 water should be allowed an opportunity to prove ownership and use of such water.[13]

Issue No. 5, Part 1: Was it error for the Special Master to recommend a diversion rate based on a gravity irrigation analysis when the Claimant's water right is actually exercised in part through sprinkler irrigation which generally uses less water than gravity irrigation?

In these subcases, the Special Master did not make specific findings as to the type of water delivery system used by each of the claimants. However, the record indicates that the Simcoes utilize a sprinkler delivery system for water right nos. 36-00003F and 36-00003M. *Findings of Fact and Conclusions of Law* at 11. As to the other water rights at issue, apparently some of them are applied using gated pipe and furrows, as well as with sprinklers. For example, Mr. Babington testified that "[w]e've irrigated in two different ways. We did put a . . . pressure pump in to where we can sprinkler irrigate; and that's our majority use. We have . . . in 1997 irrigated with gated pipe." Tr. p. 359, ll. 8-12. Also, Mr. Harbison testified that he has used both gravity and sprinkler irrigation since 1993. Tr. p. 379, l. 23 – p. 380, l. 6.

The evidence put on by the Claimants regarding quantity consisted of expert testimony by Dr. Charles Brockway, Jr ("Dr. Brockway"). Dr. Brockway had conducted

[13] The Court has struggled with the question of whether the remaining Claimant's should be allowed to make a claim for any water that may be "freed up" as a result of diminishment of water right nos. 36-00003B and 36-00003D. Weighing against these Claimant's is the fact that they have had their day in court to prove ownership of their percentage share of the 03 right. While very interesting, the testimony of Dr. Brockway goes to how much water each Claimant needs, or his land can use, and has absolutely nothing to do with how much (if any) water each Claimant owns as a successor-in-interest to water rights owned by New International Mortgage Bank. Weighing in favor of allowing the Claimants to prove, on remand to the Special Master, that they are entitled to any "freed up" water, is the fact that the quantities reported for the 03 rights in the Director's Report were not based on an examination of the chain of title of each of the Claimants. Although the facts which underlie the Director's Report are not in the record, what is clear is that an examination of the respective titles is not among these underling facts. The fact that IDWR's recommendations add up to exactly 20 cfs for the 03 rights indicates that IDWR was aware of the overall limit imposed by the New Int'l Decree, but that IDWR was not aware as to how actual ownership of this 20 cfs has been affected by conveyances and conduct subsequent to 1932. Therefore, it is unknown whether IDWR's recommendation would have added up to exactly 20 cfs if portions of water right nos. 36-00003B and 36-00003D had been reported out under a 019 or 020 number. For this reason, the Court will allow any water "freed up" to potentially be reallocated among the various Claimants, assuming adequate proof is made as to ownership and beneficial use of such water.

what he calls an "excess flow sensitivity analysis" to determine a range of diversion rates for the subject water rights. This analysis assumed a furrow irrigation system, irrespective of what type of delivery system is actually being used with each particular right. In essence, NSGWD asserts that because sprinkler irrigation is generally more efficient than gravity irrigation, Dr. Brockway's analysis cannot yield accurate results regarding actual beneficial use, at least for those rights where sprinklers are used.

The facts in the record are insufficient to allow this Court to answer the question posed by NSGWD as it may apply to each of these particular subcases. The evidence put on by the Claimants cannot be viewed as if it were in a vacuum. That is, the starting point for each of the rights claimed must necessarily be a determination as to each Claimant's percentage share -- shown through their chain of title -- of a previously decreed right. Once each of the Claimants have made a satisfactory showing as to ownership of a portion of a previously the decreed right, the evidence they have produced may be relevant in the event that a particular Claimant's percentage share is greater than IDWR's recommendation. If, on the other hand, the Claimant's claimed share under the 03 right is less than or equal to IDWR's recommendation, evidence put on by the respective Claimant to show that their present 03 right "use needs" exceeds the previously decreed amount, would be irrelevant. In this event, it would not matter whether the Claimants' evidence employed absolutely recognized sound scientific principles, or whether it was based on interpreting patterns of scattered chicken bones, i.e. "junk science." Therefore, until each of the Claimants has shown privity of estate and ownership of a portion of the original 03 right, this Court cannot properly evaluate the relevancy of Dr. Brockway's analysis.

Issue No. 5, Part 2: Was it error for the Special Master not to address, by qualifying language or by another legal means, that in the event of a water call, the water quantity associated with actual beneficial use will apply?

The Special Master did not err by failing to address, by qualifying language or other legal means, that in the event of a water call, the quantity associated with actual beneficial use will apply. As a preliminary matter, the Court assumes that NSGWD intends the phrase "qualifying language" to mean a remark put in the decree pursuant to

I.C. § 42-1411(2)(j) (Supp. 1999) as incorporated by I.C. § 42-1412(6) (Supp. 1999). NSGWD did not elaborate on what it means by the phrase "other legal means."

Implicit in the quantity element, as contained in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: "Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed.'" *State v. Hagerman Water Right Owners*, 130 Idaho 727, 730, 947 P.2d 400, 403 (1997), *quoting* I.C. § 42-1402. However, the quantity element in a water right necessarily sets the "peak" limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time (i.e. there is no right to divert water that will be wasted). *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568 (1997). The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short results in a loss or reduction to the water right. *State v. Hagerman Water Right Owners*, at 730, 947 P.2d at 403.

Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to "call,") more water than can be beneficially applied. Stated another way, a water user has no right to waste water. In *State v. Hagerman Water Right Owners*, 130 Idaho at 735, 947 P.2d at 408, the Idaho Supreme Court stated:

> A water user is not entitled to waste water.. . . .It follows that a water right holder cannot avoid a partial forfeiture by wasting that portion of his or her water right that cannot be put to beneficial use during any part of the statutory period. If a water user cannot apply a portion of the water right to beneficial use during any part of the statutory period, but must waste the

> water in order to divert the full amount of the water right, a forfeiture has taken place.

Id. (citations omitted).

NSGWD has not convinced this Court that it is necessary to have a restatement of this principal on the face of a water right decree. More importantly, the quantity element of a water right does not contemplate minute by minute, or hour by hour, limitations on diversions, as this truly would be an administrative nightmare.

Issue No. 6: Have the Claimants met the burden of persuasion with respect to the quantity element as required by I.C. § 42-1411(5)?

I.C. § 42-1411(5) states that "[e]ach claimant of a water right acquired under state law has the ultimate burden of persuasion for each element for a water right. Since the director's report is prima facie evidence for the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report." I.C. § 42-1411(5). Because these subcases are being remanded to the Special Master for further findings, it is unnecessary at this time to opine whether the Claimants have met the burden imposed on them by I.C. § 42-1411(5).

Issue No. 7: Does a decree for more than X cfs for water right 36-00003(respective split) constitute an impermissible enlargement to the 03 right?

Because these subcases are being remanded to Special Master Cushman for further proceedings, the Court finds that it is unnecessary to decide this issue at this time.

Issue No. 8: Does the combining of water right 36-00003C with 36-00003L, and water right 36-00003F with 36-00003M, require an application with IDWR pursuant to I.C. § 42-222?

Because these subcases are being remanded to Special Master Cushman for further proceedings, the Court finds that it is unnecessary to decide this issue at this time.

Issue No. 9: Is a Motion to Alter or Amend before a special master in the SRBA governed by I.R.C.P. 59(e)?

The Court notes that although NSGWD has listed this issue, their brief contains no argument on this point. However, to the extent that it may answer the question posed by NSGWD, the Court incorporates herein the relevant portions of its ***Memorandum Decision and Order on Challenge*** in subcases 36-00061, 36-00062, and 36-00063, (*NSGWD v. Howard and Rhonda Morris*) (Sept. 27, 1999). It is clear that the standard has to be either I.R.C.P. 52(b) or 59(e). The Court recognizes that I.R.C.P. 59(e) speaks in terms of altering or amending a "judgment," and that special masters do not enter judgments. However, the proceedings in the SRBA are unique, and by way of analogy, by the order of reference to the special masters, their function relative to the presiding judge is much like a magistrate's function in an ordinary civil proceeding. Therefore, to some extent, an SRBA special master's report and recommendation is analogous to a magistrate's judgment which is then appealed to the district court.

Issue No. 10: Did the Special Master err in considering any evidence concerning the claim to water right 36-00003C and 36-00003F since no outstanding objections were at issue at time of trial?

Because these subcases are being remanded to Special Master Cushman for further proceedings, the Court finds that it is unnecessary to decide this issue at this time.

Issue No. 11: With respect to water right No. 36-00003B, should a fish propagation purpose of use have been recommended as of the claimed priority date of September 10, 1884?

The claim for the 36-00003B water right included fish propagation as a purpose of use. IDWR did not recommend fish propagation as a purpose of use. The 36-00003B claim is based on the New Int'l Decree. The Decree states that the purposes of use for the described rights include "irrigation," "domestic" and "other purposes." However, the Decree does not specifically designate a particular purpose of use for each described water right. Rather, the purpose of use language collectively modifies several of the described

rights, including the 36-00003 right. (The 36-00003B right comprises part of the original 36-00003 right.) Therefore, the specific purpose for each described right cannot be directly ascertained from the face of the Decree.

The Special Master ruled that fish propagation could be included as an "other purpose" as the term is used in the Decree. The basis for the ruling was twofold. First, the Special Master relied on the operation of I.C. § 42-1427 (1996 & Supp. 1999)[14]. The provisions of I.C. § 42-1427 require the director's recommendation to include those elements of a water right not included in a prior decree based on the extent of the beneficial use of the water right as of the date of the SRBA was commenced on November 19, 1987. The Special Master made the finding, based on the evidence presented, that there were ponds in place which had historically been used for fish propagation on

[14] Idaho Code § 42-1427 provides in its entirety:

> **Descriptions of water rights—Reporting and decreeing elements of a decreed or licensed water right.—** (1)Legislative findings:
>
> (a) The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and courts have made this original description of a water right more specific by the addition of other elements. Because of the increasing demand for water, it is important that the elements of a water right be standardized to allow for fair and efficient administration of the limited water supply. One (1) purpose of chapter 14, title 42, Idaho Code, is to establish, through an adjudication a uniform description for surface water rights, ground water rights and water rights which include storage.
>
> (b) Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established, because water delivery has occurred based upon historic water use patterns and custom, and because attempts to define elements of a water right based upon unknown conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of the commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.
>
> (2) If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1409, Idaho Code, the director shall include in his report recommendations for those elements not defined by the prior license or decree based on the extent of beneficial use of the water right as of the date of the commencement of an adjudication.

November 19, 1987. Although the director's recommendation did not include fish propagation as a purpose of use, the Special Master permitted the Claimant to present evidence regarding the purpose of use on November 19, 1987, in order to establish the purpose of use element pursuant to I.C. § 42-1427. Based on the evidence presented that there were ponds in existence on November 19, 1987, the Special Master ruled that the Claimant established fish propagation as a purpose of use. As a result, the Challengers raised issues regarding the proper scope and application of I.C. § 42-1427. Namely, whether a claimant can independently rely on operation of I.C. § 42-1427 for establishing an element of a water right irrespective of the director's recommendation, and also, whether the statute can apply to "vague elements" in prior decrees as opposed to omitted or undefined elements.

The second basis for the Special Master's ruling was the finding that the water right was historically being used for fish propagation prior to the entry of the Decree in 1932. This aspect of the ruling raised issues regarding the interpretation of the Decree and in particular, the scope of the term "other purposes." This basis for the ruling, however, essentially renders the application of I.C. § 42-1427, (and the issues raised by its application), irrelevant for purposes of this challenge. By way of explanation, historically fewer elements were required to describe a water right than are required today. Consequently, it follows that older decrees being relied on for establishing water rights may not contain all the elements that are presently required for defining a water right. The purpose of I.C. § 42-1427 is to attempt to remedy the situation where the passage of time makes it difficult to obtain evidence necessary to establish the element not defined in a prior decree. *See Fremont-Madison Irrig. Dist. V. Idaho Groundwater Appropriators, Inc.*, 129 Idaho 454, 463, 926 P.2d 1301, 1310 (1996).

In this case, however, the Claimant did present evidence that one of the purposes of use for the water right prior to 1932 was fish propagation. Tr. p. 298-299. As such, reliance of the provisions of I.C. § 42-1427, together with evidence of the purpose of use on the date of the commencement of the SRBA becomes unnecessary. Accordingly, a ruling on the scope and application of the statute is also unnecessary. The focus then turns to the interpretation of the Decree and how the purpose of use element is defined

therein.

In reviewing the Decree, the Court makes the following observations. As to purpose of use element, the Decree is both vague and internally inconsistent. The Decree is vague in that it does not designate a particular purpose of use for each decreed water right. Rather the Decree states that the described water rights, including the place of use covered by the 36-00003B right, can be used for "irrigation", "domestic" and "other purposes." The Decree is also internally inconsistent in that in the next immediate section sets forth that the water for the same described property is "necessary for . . . proper irrigation and cultivation." This observation is also consistent with the issues raised by the Challengers in regards to the application of I.C. § 42-1427, wherein it is admitted the purpose of use element is somewhat defined, albeit inadequately. Consequently, one interpretation is that the Decree was not intended to designate or otherwise provide a specific limitation on the purpose of use. However, even if it was ultimately the intent that the Decree specifically define or limit the purpose of use, as a matter of law, the Decree could not be *res judicata* as to this particular element. In actions to determine and settle water rights, it is a settled principle of law that decrees and judgments "should be so definite and certain as to the exact rights of each party as to constitute an estoppel between the parties, and to be a full, complete, and definite adjudication of the entire subject matter, as between the parties to the action." *See* 3 Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1563 (2d ed. 1912). Since the Decree has limited probative value with respect to establishing the purpose of use element, a claimant relying on the *Decree* must necessarily establish purpose of use through additional evidence.

In regards to interpreting the meaning of "other purposes," absent speculation, the Court cannot determine its intended meaning. The Court acknowledges canons of interpretation wherein a general term, which follows a list of specific terms, is not interpreted in its broadest sense. *See e.g.*, *Pepple v. Headrick*, 64 Idaho 132, 135, 128 P.2d 757, 760 (1942)(discussing generally the *ejusdem generis* rule of statutory construction). Rather, the general term is interpreted to limit the specific terms to a particular class of things. In this case however, the smallest common class shared by "irrigation" and "domestic" is the purpose of use. Consequently, this canon of

interpretation also provides little guidance.

Based on the foregoing reasons, the Court rules that the New Int'l Decree does not sufficiently define the purpose of use element as to the 36-00003B water right so as to preclude the Claimant from establishing the purpose of use element. In this regard, the element should be treated just the same as if the Decree were silent as to purpose of use. In other words, if the Decree were silent on the purpose of use, the Claimant would necessarily be required to present evidence on that element, notwithstanding the Decree. As such, any purpose for which the water right was being used at the time the Decree was entered is within the scope of the Decree. The one *caveat* is that the "other purposes" language cannot be construed to mean that a Claimant has the right to change the purpose of use following the entry of the Decree. This would exceed the authority of the court which entered the Decree. Since, the Claimant in this case put on evidence of fish propagation as a purpose of use, prior to the entry of the Decree, this Court holds, consistent with the Special Master's ruling, that fish propagation is a purpose of use within the meaning of the Decree. Accordingly, to the extent fish propagation historically took place prior to the entry of the Decree, this would not constitute an impermissible enlargement of use based on the purpose of use.[15] The Court makes no ruling as to a specific quantity for that purpose, as additional findings are required on this issue.

[15] The Court acknowledges that the provisions of I.C. § 42-1427 do not authorize an impermissible enlargement of use. Again, however, the basis for this ruling is not predicated on the operation of I.C. § 42-1427.

XIII.
ORDER OF RECOMMITMENT WITH INSTRUCTIONS TO SPECIAL MASTER CUSHMAN

It is ORDERED that the subcases at issue in this Challenge be recommitted to Special Master Thomas R. Cushman[16] for further proceedings consistent with this opinion.

IT IS SO ORDERED:

DATED: _____.

_____
BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

[16] It should be noted that Special Master Haemmerle, who is no longer working in the SRBA, originally heard these subcases. Special Master Cushman is his replacement.