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 36-00077D
	)	
Case No. 39576	)	**MEMORANDUM DECISION AND ORDER ON CHALLENGE (Gisler)**
_____	)	

I.
APPEARANCES

Dana Hofstetter and Josephine P. Beeman, Beeman & Hofstetter, P.C., Attorneys for Challenger North Snake Ground Water District ("NSGWD").

Patrick D. Brown of Patrick D. Brown, P.C., Jerome, Idaho, for Respondent Bradley and Linda Gisler (referred to collectively as "Claimant" or "Gisler").

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on this matter was heard on May 8, 2000. On May 10, 2000, counsel for NSGWD sent a letter to the Court advising of other subcases having the same or related issues. Since no party has sought additional briefing and the Court has requested none, the matter is deemed fully submitted for decision on the next business day, or May 11, 2000.

III.
BRIEF PROCEDURAL AND FACTUAL BACKGROUND

1. On July 29, 1988, Gisler filed a claim for water right 36-00077C for irrigation and stock water for 4.0 cfs on a total of 69 irrigated acres. The water right was claimed pursuant to 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"). Water right 36-00077C was subsequently split into rights 36-00077D and 36-00077E.

2. The Idaho Department of Water Resources ("IDWR") subsequently issued a *Director's Report* recommending 1.15 cfs on a total of 48 irrigated acres for water right 36-00077D.

3. On April 29, 1993, Gisler filed an *Objection* to the *Director's Report* objecting *inter alia* to the recommended quantity element and the recommended total number of irrigated acres.

4. IDWR filed a *Response* to Gisler's *Objection*.[1] No other objections or responses were filed to the *Director's Report*.

5. Gisler and IDWR ultimately resolved the contested issues in the subcase via stipulation, and executed a Standard Form 5 ("SF5") on October 21, 1997. **AO1 (d)(3)**. Pursuant to the SF5, Gisler and IDWR stipulated to a quantity element of 2.34 cfs on a total of 61 irrigated acres. No trial was held on the matter as a result.

6. On that same day (October 21, 1997), Special Master Haemmerle issued a *Special Masters Report and Recommendation*, recommending that the elements of Gisler's claim be decreed in accordance with the stipulated elements contained in the SF5.

7. On November 28, 1997, North Snake Ground Water District ("NSGWD") filed a *Motion to Alter or Amend* in the subcase, alleging that the diversion rate stipulated to in the SF5 was derived from a gravity or flood irrigation ("gravity irrigation") analysis and that Gisler was actually using sprinkler irrigation, which generally requires less water than gravity irrigation. NSGWD asserted that the evidence of the quantity element was

[1] IDWR was a party to the SRBA at the time the response was filed. In 1994, IDWR's status in the SRBA was changed by statute. *See* I. C. § 42-1401B (1996).

therefore insufficient and that the matter should either be remanded to the Special Master for additional evidence on the quantity element or in the alternative that the partial decree ultimately entered in the subcase contain the following qualifying remark.

> The volume or rate of water diversions allowed for irrigation designated under this right is based on the reasonable amounts that would be needed to supply a surface or "gravity" irrigation system. However, the actual means of irrigation may involve sprinklers or another irrigation method which requires a smaller rate or volume of diversions. In the event of a water shortage, a delivery call for water, or other action to administer water rights, the water right holder shall be entitled to divert no more than the quantity reasonable necessary for the method of irrigation actually employed. This quantity may be less than, and shall never be greater than, the quantity of water designated in the SRBA decree.

In support of the motion, NSGWD filed affidavits from David R. Tuthill, Jr., the Adjudication Bureau Chief from IDWR; Jeff Peppersack, an engineer employed by IDWR; and Steve Clelland, a Senior Water Agent employed by IDWR. The respective affidavits summarily state the following:

> 7(1). Mr. Clelland stated in his affidavit that on August 16, 1990, he conducted a field examination in conjunction with Gisler's claim and observed sprinkler irrigation as the sole method of irrigation.

> 7(2). Mr. Peppersack stated in his affidavit that he performed a "surface irrigation diversion rate analysis" and concluded that a 2.15 cfs diversion rate would be a reasonable diversion rate for gravity irrigation on the place of use.[2] The affidavit also stated that gravity irrigation in the Hagerman area "generally" requires a higher diversion rate than sprinkler irrigation.

> 7(3). Mr. Tuthill in his affidavit states that IDWR's recommendation for water right 36-00077D relied on the gravity irrigation analysis conducted by Mr. Peppersack.

[2] The remaining .19 cfs of the 2.34 cfs recommended by IDWR was for conveyance loss.

8. On March 17, 1998, Special Master Haemmerle issued an *Order on Motions to Alter or Amend* which denied NSGWD's motion in subcase 36-00077D.[3]

9. On March 31, 1998, NSGWD timely filed a *Notice of Challenge* to Special Master Haemmerle's *Order*. On May 26, 1998, NSGWD lodged a *Brief in Support of Notice of Challenge*.

10. On June 17, 1998, and on September 16, 1998, oral argument was heard on the challenge before Judge Hurlbutt, then presiding judge of the SRBA.

11. At the June 17, 1998 hearing, Judge Hurlbutt allowed the parties to submit supplemental briefing and propose qualifying provisions that could be included in the partial decree.

12. On August 31, 1998, NSGWD filed a *Supplemental Brief*.

13. For reasons that are not completely clear, a decision was never issued. On January 1, 1999, Judge Wood became the presiding judge of the SRBA. Later that year this subcase was brought to the Court's attention and the Court held a status conference to determine how the parties wanted to proceed.

14. On September 27, 1999, Gisler filed a *Brief in Response to Challenger's Opening Brief*.

15. On October 22, 1999, NSGWD filed its *Challenge Reply Brief*.

16. On May 8, 2000, oral argument was heard on the challenge, Judge Barry Wood presiding.

[3] The *Order* also ruled on motions to alter or amend filed in subcase nos. 36-00029B and 36-00086C which have subsequently been decreed and are not part of this challenge.

IV.

ISSUES RAISED ON CHALLENGE

In its *Notice of Challenge*, NSGWD initially raised the following issues:

1. Is there substantial evidence to support the Special Master's Recommendation on the quantity element when the recommended diversion rate is based on a "gravity" irrigation analysis but the claimant's water right is actually exercised through sprinkler irrigation which generally utilizes less water than gravity irrigation?

2. Under *Idaho Code* § 42-1411(5), does the filing of a Motion to Alter or Amend shift the ultimate burden of persuasion from the claimant to the party filing the Motion to Alter or Amend?

3. Is the standard of review for a Motion to Alter or Amend: (1) whether the factual findings are supported by substantial evidence or there is an error of law (I.R.C.P., Rule 53(e)(2)); or (2) whether the movant has shown a meritorious case (I.R.C.P., Rule 55(c) or Rule 60(b))?

4. Does the *prima facie* presumption which applies to a *Director's Report* under *Idaho Code* § 42-1411(5) also apply to a Standard Form 5 signed by the Idaho Department of Water Resources?

5. Does the issuance of a *Director's Report* or Standard Form 5 signed by IDWR shift the burden of persuasion from the claimant to the party filing the Motion to Alter or Amend?

6. For a right previously decreed in a private adjudication, does the claimant continue to have the burden of establishing the nature and extent of the right in the SRBA?

7. For a right previously decreed in a private adjudication, is a party contesting the quantity recommended by the Special Master in the SRBA limited to claiming partial forfeiture or can the contesting party claim that the quantity element has been inadequately proven in the SRBA?

8. When a Motion to Alter or Amend a Special Master's Recommendation is filed, is the Special Master limited to affirming or setting aside the recommendation or can the Special Master require further evidentiary hearings?

9. Under *Idaho Code* § 42-220, is it an error of law for the Special Master to rely on the *prima facie* status of the *Director's Report* instead of separately identifying the factual grounds supporting a recommendation of greater than 0.02 cubic feet per second per acre?

10. Is it an error of law to assign to the parties filing a Motion to Alter or Amend the burden of producing evidence that the recommended quantities unnecessarily exceed the statutory standard in *Idaho Code* § 42-220?

The majority of the foregoing procedural issues were previously addressed at length by this Court in the *Memorandum Decision and Order on Challenge*, subcases 36-00061, 36-00062 and 36-00063 (Sept. 9, 1999)("*Morris Decision"*) issued on a challenge also previously filed by NSGWD. In subsequent briefing and at oral argument before this Court, NSGWD consolidated the issues raised into one main underlying issue. *See Challenge Reply Brief* at 2, *Transcript of Proceedings* at 10 (May 8, 2000). NSGWD asserts that IDWR's policy ("sprinkler-flood policy") of recommending irrigation water rights with a quantity necessary for gravity irrigation when the claimant is presently using sprinkler irrigation violates SRBA and IDWR statutory mandates. NSGWD argues that since the quantity of water necessary for gravity irrigation generally exceeds that of sprinkler irrigation, the recommendation contained in the *Director's Report* is not reflective of the actual quantity of water presently being put to beneficial use and therefore IDWR failed to comply with its statutory duty to recommend water rights based on beneficial use.[4] As a result, NSGWD's contends that the Court should place no evidentiary value on IDWR's concurrence on the SF5 and recommit the matter for a trial on the merits.

Also at issue is whether the SRBA partial decree entered in this subcase should include qualifying language to the effect that although the decreed amount is based on gravity irrigation, the actual delivery system may involve sprinklers, and in the event of a

[4] The sprinkler-flood policy being challenged by NSGWD is stated in the August 10, 1999 *Affidavit of David R. Tuthill, Jr.*, filed in the related subcase 36-00035E (*Brown*), wherein it provides: "[i]n this, and similar, subcases where the water right holder (1) is presently irrigating by sprinkler or similar method, but (2) the right which the water right holder is claiming was previously for an irrigation diversion rate of greater than one miners inch per acre (0.02 cfs) for gravity irrigation, and (3) the water right holder has claimed the higher quantity in the SRBA, then IDWR will recommend a reasonable diversion rate for gravity irrigation to provide sufficient water should the water right holder choose in the future to convert back to a gravity irrigation system. *Affidavit of Dave Tuthill* at ¶3. Thus, the instant subcase is a "similar" subcase to the *Brown* subcase, and Mr. Tuthill's affidavit therefore is applicable in the instant subcase.

The result of this policy, according to Mr. Tuthill, is that: "Accordingly, the recommended quantity does not constitute the quantity which the water right holder is presently placing to beneficial use." *Affidavit of Dave Tuthill* at ¶3 (emphasis in original). It is not clear to the Court whether this statement is meant as a generality which may apply to any water right subject to the sprinkler-flood policy, or if Mr. Tuthill's statement is intended to specifically apply to water right 36-00077D. If it is the latter, it is unclear from his affidavit as to how Mr. Tuthill reached this conclusion.

call only the amount necessary for the actual method of irrigation used at the time of the call will be delivered by the watermaster.

V.
STATEMENT OF RELATED SUBCASES

The underlying consolidated issue raised in this subcase 36-00077D ("*Gisler*") is also the underlying issue raised in subcase 36-00035E ("*Brown*"). Since the underlying issue is identical in both subcases and the facts and procedural history are similar, the analysis contained in this memorandum decision is crafted to address both subcases. Accordingly, contemporaneous with the issuance of this Order, the Court issued a truncated order in the *Brown* subcase. The relevant differences between the two subcases are noted where appropriate and addressed accordingly.

VI.
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 filed 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.[5] 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 the Special Master's Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge.**"[6]

[5] 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**.

[6] 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

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.[7]

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 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

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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.

[7] 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.

> 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,[8] although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e., using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo.* Wright and Miller, *supra*, § 2614; *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra*, § 2585.

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

[8] 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 master's 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).

arising upon the report shall thereafter be considered (meaning freely reviewable by the referring district court).[9]

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 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.

[9] 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.

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).

VII.
DISCUSSION

A. Introduction

NSGWD initially characterized IDWR's sprinkler-flood policy in this subcase, as well as the *Brown* subcase, as a "sufficiency of the evidence" issue. Specifically, NSGWD alleged that since IDWR's concurrence with the SF5 approves a quantity (based on gravity irrigation) that differs from the quantity which is presently being used to irrigate the place of use, and since Special Master Haemmerle's recommendation is based on the stipulated elements contained in the SF5, there is insufficient evidence in support of the recommendation and that Gisler has not met his or her burden of persuasion with respect to the elements of the water right. Significant to approaching the issue on a sufficiency of evidence argument is that NSGWD did not become a party to this subcase until after Special Master Haemmerle had issued his report and recommendation, and hence missed its opportunity to present factual evidence to support its position or participate in the SF5 negotiations.

NSGWD now asserts that Special Master Haemmerle's recommendation in this subcase is erroneous as a matter of law. Specifically, NSGWD asserts that IDWR's sprinkler-flood policy violates IDWR's statutory mandate to ensure that water rights are not decreed in excess of the amount actually and currently beneficially used and is therefore legally invalid. *See* I.C. §§ 42-220 and 1402. The position of NSGWD is that there "is no critical factual dispute in this case," and that the legality of IDWR's sprinkler-flood policy is purely a question of law. *Challenge Reply Brief* at 5. Therefore, argues NSGWD, this Court may exercise free review of Special Master Haemmerle's legal determinations rather than applying a "clearly erroneous" standard

which applies to a factual review. As set forth below, whether the issue is approached from a sufficiency of evidence argument or as a straight legal challenge to IDWR's sprinkler-flood policy, procedural problems are created under either approach.

B. Sufficiency of the Evidence

i. Procedurally, NSGWD is prohibited from raising a sufficiency of the evidence argument to a special master's recommendation based on a standard form 5 (SF5).

Administrative Order 1 ("AO1")(4)(d)(3) provides (emphasis in original):

(3) *Stipulated Elements of a Water Right* (Standard Form 5)

Where parties reach an agreement on a contested water right recommendation, they shall file either a stipulation with the court using Standard Form 5 or some other stipulation acceptable to the court. Subcases may also be resolved orally on the record.

(a) Standard Form 5 may only be used if **all** parties have stipulated to **all** elements of **one** water right and may be submitted at any time following the close of the statutory response period.

(b) Standard Form 5 is used to report the stipulated elements of **one** water right acquired under state law or **one** federal reserved water right.

(c) When IDWR does not concur with a proposed settlement, the Presiding Judge or Special Master shall conduct any hearing necessary to determine whether the facts data expert opinions and law support the issuance of a partial decree for the water right as stipulated in the Standard Form 5 or proposed settlement.

AO1(4)(d)(3) (emphasis in original). Special Master Haemmerle's recommendation relied on the SF5 and IDWR's concurrence therewith, as opposed to the *prima facie* weight accorded the *Director's Report.* This Court previously distinguished the evidentiary value of IDWR's concurrence in an SF5 from the *prima facie* weight accorded the *Director's Report*. *See Morris Decision.* In the *Morris Decision*, this Court discussed that IDWR's concurrence with the stipulated elements in an SF5 derives evidentiary value as a result of IDWR's statutorily created status as the Court's expert. I.C. § 42-1401B(1). The Court additionally discussed the ultimate effect of the SF5 is that all objections as between the parties to the subcase are resolved and therefore there is

no need for a trial or hearing on the matter unless IDWR does not concur with the settlement. Since a trial was not held in this subcase, the only "evidence" supporting Special Master Haemmerle's recommendation is IDWR's concurrence with the SF5 and the fact that the respective parties stipulated to the elements of the water right. There is no factual record for this Court to review the propriety of the underlying basis for the SF5 and whether the Special Master correctly concluded that the Claimant satisfied the burden of persuasion as to the elements of the claim.

It is the opinion of this Court that Special Master Haemmerle appropriately based his recommendation on the stipulated elements contained in the SF5, and that IDWR's concurrence therewith constitutes sufficient evidence to meet the requirements of Idaho Code sections 42-220 and 1402. To hold otherwise and permit parties to enter a subcase after the fact finding stage of the process is completed and a special master's recommendation has been issued, and argue that the basis for the SF5 is not supported by "substantial evidence," runs contrary to the entire purpose of the SF5 settlement procedure. Administrative Order 1 only requires a hearing on an SF5 when IDWR does not concur with the stipulated elements. **AO1 (4)(d)(3)(c)**. In the instance where no trial was conducted, there are no facts in the record (other than IDWR's concurrence) of which to weigh the sufficiency. The SF5 could then always be subject to challenge on a "sufficiency of the evidence" argument. This creates several procedural problems. First, the SF5 procedure would be completely undermined. There would be little point in having a policy and procedure directed towards encouraging parties to engage in settlement discussions because of the possibility that the SF5 would be attacked by parties that did not initially enter the subcase and participate in the settlement efforts. The Court could also not expect parties to devote efforts and resources toward settlement if there would remain uncertainty as to the finality of the settlement. A hearing would always have to be conducted in order to alleviate this uncertainty.

Next, and equally important is that such an attack on the SF5 would allow a party who failed to timely enter the subcase and object to the elements of the claim, to wait until the matter has been resolved by the parties that did timely raise objections and then enter the subcase and raise new issues and offer new evidence at that point. In essence a "second bite of the apple." Contesting an SF5 based on the "sufficiency of the evidence"

is really nothing more than a creative attempt to file a late objection (or response) and then have a hearing on the objection (or response). In addition to accuracy, finality in the process is also important. Permitting parties to enter the subcase after the fact finding stage has been completed and then raise new factual issues and further develop the record could potentially result in the subcase never being resolved.

The SF5 procedure contained in AO1 or the Director's duties as defined by Idaho Code do not mandate that IDWR only concur with an SF5 when the elements of the water right are the same as the elements originally reported in the *Director's Report*. AO1(4)(d)(3). Furthermore, if this were the case there would be no need for IDWR's concurrence on an SF5 because a special master could simply compare the elements contained in the SF5 with the elements contained in the *Director's Report*.

Additionally, implicit in the SF5 procedure is that there will be some allowance for compromise between IDWR and the parties to a subcase. In order to avoid a trial, a claimant may agree to a quantity less than claimed and IDWR may concur with a quantity greater than initially recommended in the *Director's Report*. In other words, the quantity ultimately agreed on in the SF5 may differ from the quantity that the evidence would show had a trial been conducted.

This Court acknowledges that it is not bound by the SF5 and has the authority to reject a special master's recommendation. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989). However, the Court's discretion is not without limits. Factual determinations made by a special master are not reviewed *de novo* but rather are reviewed under a clearly erroneous standard. 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). In the situation where IDWR concurs with an SF5, the Court is not required to conduct an evidentiary hearing in order to determine whether the elements can actually be proved. Rather, the Court can rely on IDWR's concurrence in the SF5. Therefore, unless a special master's recommendation raises obvious factual or legal deficiencies, the Court will not recommit for a hearing on the underlying merits of the elements of the claim. For example, such a situation could occur if the quantity element contained in the SF5 exceeds the quantity originally claimed. In this situation notice and due process concerns would implicated because

other parties to the SRBA would not have had notice of the ultimate quantity and as such would have been denied the opportunity to participate in the subcase.[10] In most other situations where a special master's recommendation is based on an SF5 there is no factual record for this Court to review.

Finally, as this Court stated in the *Morris Decision*:

> Furthermore, other SRBA claimants are on notice regarding the parameters of a potential settlement, i.e. that it will fall somewhere between the initial claim and the Director's Report. In these subcases, given that NSGWD had notice (through the SRBA docket procedure) of the quantities claimed by the Claimants, as well as notice of the quantities reported in the Director's Report, it is reasonable for NSGWD (as well as other parties to the SRBA) to anticipate that a settlement may be reached, within these parameters, through the SF5 procedures contained in AO1. Therefore, as to factual issues, NSGWD and others should be charged with knowledge sufficient to alert them to get involved in contested subcases prior to the issuance of the Special Master's Report and Recommendation.

Morris Decision, at 15-16 (footnotes omitted).

ii. NSGWD's assertions and supporting affidavits do not demonstrate clear error even if considered by the Special Master.

The assertions made by NSGWD together with the affidavits of David R. Tuthill, Jr., Jeff Peppersack, and Steve Clelland, do not rise to the level of clear error even if the Special Master took into consideration the facts alleged in the affidavits. The water right at issue was originally perfected through gravity or flood irrigation. Assume for the sake of discussion that on the land in question, gravity irrigation requires a greater quantity of water than sprinkler irrigation. The Idaho Supreme Court has previously ruled that the quantity element of a water right cannot be reduced merely for non-application to a beneficial use regardless of the length of time the non-application continues. *State v. Hagerman Water Users, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). Hence, a perfected water right can only be diminished through forfeiture, abandonment, or adverse possession. This Court previously discussed this issue at length in its decision on facility volume. ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and***

[10] A party to the SRBA may not have objections to the amount originally claimed but may have objected

"Additional Evidence" Issue, subcases 36-02708 *et al*. (December 29, 1999)("*Facility Volume Decision*"). Statutory forfeiture is based on Idaho Code § 42-222(2), wherein it is declared that water rights may be lost if they are not beneficially used for a continuous five-year period. Clear and convincing evidence is required to prove a forfeiture. *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256. Certain defenses to forfeiture are recognized, including wrongful interference of a water right or failure to beneficially apply the water due to circumstances over which the appropriator has no control. *Id*. Abandonment, on the other hand, is a common law doctrine where mere non-use, standing alone, is insufficient to support a diminishment of a water right. Rather, abandonment must be proved by clear and convincing evidence that the appropriator 1) intended to abandon the water right, and 2) actually relinquished or surrendered the right. *Id*.

In turning to the affidavits filed by NSGWD, the affidavit of Steve Clelland states that on one occasion (August 16, 1990) he observed that the place of use in question was being irrigated by a sprinkler system. The affidavit of Jeff Peppersack states that gravity irrigation in the Hagerman area generally requires a higher rate of diversion than sprinkler irrigation. The affidavit of David R. Tuthill states that the quantity element contained in the SF5 was derived from an analysis of the quantity necessary to irrigate the place of use by means of gravity irrigation.

Thus, even if as contended by NSGWD, that IDWR's "sprinkler-flood" policy is contrary to IDWR's statutory duty, NSGWD has not factually demonstrated that the policy, as applied to these particular subcases, has yielded results contrary to Idaho Law. The affidavits do not allege, let alone establish by any meaningful evidentiary foundation, that in this particular subcase, gravity irrigation in fact requires a higher rate of diversion than sprinkler irrigation, rather the affidavits simply state that sprinkler irrigation is "generally" less consumptive. A trial would have to be conducted in order to determine whether gravity irrigation would actually require a higher rate of diversion than sprinkler irrigation for the place of use in question. The Court is not going to reject Special Master

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had the greater quantity ultimately agreed upon been originally claimed.

Haemmerle's recommendation based on generalities and speculation. The standard of review for a special master's factual determinations is "clear error."[11].

Next, even if NSGWD had unequivocally shown that sprinkler irrigation is always less consumptive than gravity irrigation, in order for IDWR's policy to be contrary to its statutory duties, and hence the genesis of an inaccurate or flawed *Director's Report*, there would still have to be a determination that the Claimant either abandoned or forfeited the additional amount that would be required to switch back to gravity irrigation.[12] The affidavit of Steve Clelland states that he observed on a single occasion that sprinkler irrigation was being used. Since partial forfeiture requires a continuous period of five years, the affidavit is clearly insufficient to support a such a finding. Therefore, even if IDWR's sprinkler-flood policy is contrary to Idaho law, this Court cannot make the determination that that Special Master Haemmerle's factual determinations as applied to this particular subcase are clearly erroneous. As explained below, this Court is not persuaded by NSGWD's argument that because they are attacking the legality of the policy from which IDWR arrived at its recommendation as to the ultimate facts in this subcase, this Court may exercise free review of those facts rather that apply a "clear error" standard.

C. NSGWD's challenge is not based on an assignment of error as to purely an issue of law. Further development of the factual record is required. The issues raised should have been timely raised in an objection or response.

NSGWD attempts to characterize the issues raised on challenge as purely issues of law. This Court previously ruled that assignments of error regarding errors of law made by a special master can be appropriately raised in a motion to alter or amend a special master's recommendation. *See Facility Volume Decision* (setting forth in detail the purpose of the motion to alter or amend under AO1). The situation where a factual

[11] At the May 8, 2000, hearing on challenge in this subcase, counsel for NSGWD requested that the Court take "judicial notice" of the fact that sprinkler irrigation is more efficient than gravity irrigation. Transcript of proceedings at p 37, l 17-19. This "fact" is clearly not a candidate for judicial notice. I.R.E. 201. In his affidavit, Jeff Peppersack states that gravity irrigation in the Hagerman valley generally requires a higher rate of diversion than sprinkler irrigation. The use of the word "generally" implies that this "fact" does not apply ubiquitously, and therefore may be unreliable when applied to a particular irrigation right.

finding made by a special master is inconsistent with the factual record is also appropriately raised in a motion to alter or amend. *Id*. However, litigating issues via a motion to alter or amend which should have been raised before a special master through an objection or response is beyond the scope of a motion to alter or amend. *Id*. In other words, the motion to alter or amend stage of the proceeding is not a means for developing the factual record and litigating the merits of the claim. This should be accomplished at a hearing on an objection or response before a special master.

In an attempt to circumvent the procedural scope of the motion to alter or amend, NSGWD argues that the issues raised in its motion to alter or amend and subsequent challenge are purely issues of law and thus are appropriately raised. This Court disagrees with NSGWD's characterization of the issues. As discussed above, without fully developing the factual record it cannot be determined whether IDWR's policy is even relevant in this subcase. For example, in this particular subcase sprinkler irrigation may not require less water than does gravity irrigation. This needs to be decided on a case by case basis. The Court cannot make a determination based on the generalization that sprinkler irrigation requires less water than gravity irrigation. Thus, it is readily apparent that NSGWD's challenge raises more than legal issues.

More importantly, in the SRBA a dispute over IDWR's policy or methodology employed for recommending a water right needs to be raised in an objection or response to a recommendation to overcome the *prima facie* presumption given to the *Director's Report*. This issue is no different than any other objection to a *Director's Report* where IDWR's results are being disputed. For example, assume a *Director's Report* recommends a quantity less than the amount claimed. The claimant objects on the basis that the methodology (i.e., field studies, scientific evaluations, technology, policies and procedures, etc.) employed by IDWR to arrive at the recommended quantity is flawed. The claimant would raise this in their objection. At the hearing held on the objection, the claimant would then have the opportunity to put on evidence of the perceived problems with IDWR's methodology as is relates to that particular claim in order to overcome the *prima facie* weight of the *Director's Report*. Procedurally, this is the appropriate way in

[12] This Court is not deciding the question of whether partial forfeiture occurs where there is a clear and convincing showing of a diminished rate of diversion for the requisite period as a result of a switch from

which a party to a subcase can contest IDWR's methodology used in deriving the elements contained in the *Director's Report*. Even if the evidence put on by an objector required the special master to make legal conclusions regarding IDWR's statutory or administrative responsibilities, such evidence ultimately goes to the facts regarding the elements of the claimed water right. As such, the proceedings necessarily involve resolution of contested issues of fact on which a trial must be conducted as opposed to deciding purely legal issues.

In the instant subcase, NSGWD is attempting to circumvent these procedural requirements relative to fact finding by attempting to characterize inherently factual issues as issues of law.

D. The SRBA Court is not the proper venue to facially challenge IDWR's internal policies or its methodologies employed.

NSGWD argues that IDWR's sprinkler-flood policy is contrary to its statutory duty to report water right claims based on the extent of beneficial use. Specifically, Idaho Code section 42-1401B provides in relevant part:

> The director's role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations **as to the extent of beneficial use** and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

I.C. § 42-1401B(1)(emphasis added). NSGWD contends that IDWR's sprinkler-flood policy does not comport with its statutory duty to "make recommendations as to the extent of beneficial use" because IDWR's recommendation under this policy would be based on gravity irrigation even though the claimant may presently be using sprinkler irrigation. NSGWD asserts that since sprinkler irrigation generally uses less water than gravity irrigation that the recommendation does not accurately reflect the "extent of beneficial use." The SRBA, however, is an improper forum for facially challenging or reviewing the actions of an administrative agency. In the SRBA, a party to a subcase can

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flood to sprinkler.

introduce evidence regarding IDWR's policy at trial in his or her case in chief in an effort to overcome the presumption given the *Director's Report*. Following trial on the objections, if the trier of fact determines that IDWR's policy or methodology yields a result that does not reflect the beneficial use of a particular claim, the presumption created by the *Director's Report* will evaporate. If this occurs frequently in contested subcases IDWR may be inclined to change the policy or methodology at issue. Nonetheless, even assuming *arguendo* that IDWR's policy is totally flawed in a general sense, it must be proved that the result is wrong in this particular subcase; not merely that it could be wrong. IDWR's policy is not on trial, rather it is the elements of the respective water rights that are on trial, and in particular here, it is the quantity element.

A further reason why the SRBA is an improper forum for facially challenging the policies of IDWR is that IDWR would necessarily have to be a party to the subcase in order to defend the policy at issue. Idaho Code section 42-1401B(3) expressly states that the Director cannot be a party to the SRBA. Since IDWR cannot be a party to the SRBA the Claimant would be shouldered with the burden of defending IDWR's policy.[13]

In accordance with the foregoing, the trier of fact weighs the evidentiary value of IDWR's recommendation in the same manner as other evidence is weighed. This may necessarily include evidence of the underlying policies and methodologies used by IDWR in reporting a water right. However, factual issues need to be timely raised before the trier of fact, i.e. the special master. NSGWD did not do this in the instant subcase. Absent timely raising the issues on a subcase by subcase basis, a general review of IDWR's policies and whether they comply with its statutory or administrative duties is beyond the scope of the SRBA. The Court must decide each subcase on its own merits and each is individually fact driven. The review of administrative agency actions must be brought in accordance with the Idaho Administrative Procedures Act, Idaho Code section

[13] Its important to note that NSGWD alleges that IDWR's policy violates Idaho law. The Court would first have to make the determination that IDWR's policy in fact violated Idaho law before the weight given either the *Directors Report* or IDWR's concurrence on the SF5 would be diminished. NSGWD would prefer that this Court rule as a matter of law based on the affidavits submitted and without a hearing that IDWR's policy is *per se* legally invalid and then recommit the subcase so that the Claimant can prove the elements of the water right. However, NSGWD overlooks an essential step in the process. Assuming this Court was vested with the proper jurisdiction, a hearing on the legality of IDWR's policy would have to be conducted, and because IDWR cannot be a party in SRBA, the Claimant would be stuck with defending the policy in order to uphold the SF5.

67-5201 *et seq*. Since IDWR would necessarily be a party to such an action, the SRBA is clearly an improper forum for such judicial review.

In this Court's view, NSGWD blurs the distinction between timely submitting evidence regarding IDWR's policies as they relate to the ultimate factual determinations of the elements of a particular water right, and seeking judicial review of IDWR's administrative agency action. It is in this regard that NSGWD attempts to circumvent the procedural requirements set forth in AO1.

This Court acknowledges that it has the duty to review a special master's recommendation and apply the appropriate standard of review. The Court does not have to accept a special master's recommendation as a ministerial duty. In the event there is no factual record from which to review a special master's recommendation because of an SF5 stipulation, the Court can only look at the parameters defined by the elements claimed, the elements initially reported by the Director, and any objections or responses. If the quantity agreed upon is less than the quantity claimed but more than the quantity recommended in the Director's report there is no basis for the Court to find clear error on a challenge to the "sufficiency of the evidence," or to find misconduct on the part of IDWR and reopen the subcase to litigation on the merits.[14] To do so would not only undermine the SF5 process but also would allow parties to circumvent the procedural requirements of AO1.

E. The qualifying language proposed by NSGWD is not necessary to "define, clarify or administer the water right."

At oral argument on challenge before Judge Hurlbutt, NSGWD proposed that qualifying language be contained in the partial decree where the water right is decreed on the basis of gravity irrigation and the claimant is actually using sprinkler irrigation. NSGWD proposed the following language:

> The volume or rate of water diversions allowed for irrigation designated under this right is based on the reasonable amounts that would

[14] NSGWD cites to this Court's language in the *Morris Decision* wherein the Court states that an indication of misconduct by IDWR may be grounds for setting aside a special master's recommendation based on an SF5. This Court envisions such a circumstance or cause for further investigation in the event that the quantity agreed upon exceeded not only the quantity reported by the Director but also the quantity claimed. In such a circumstance, due process concerns would be raised with respect to other parties to the SRBA.

> be needed to supply a surface or "gravity" irrigation system. However, the actual means of irrigation may involve sprinklers or another irrigation method which requires a smaller rate or volume of diversions. In the event of a water shortage, a delivery call for water, or other action to administer water rights, the water right holder shall be entitled to divert no more than the quantity reasonable necessary for the method of irrigation actually employed. This quantity may be less than, and shall never be greater than, the quantity of water designated in the SRBA decree.

The concern expressed by NSGWD is that in the event the Claimant made a delivery call against junior appropriators, the quantity delivered to the Claimant would be the amount decreed rather than the potentially smaller amount needed at the time of the call for sprinkler irrigation. More specifically, NSGWD's contention is that because there is not necessarily a one to one correlation between the amount of water delivered to fill a senior water right, and the amount of water curtailed from the junior water right against whom a delivery call is made, a significant multiple of the amount delivered to the senior will be deprived from the junior.[15] Therefore, any water delivered above and beyond what is necessary at the time of the call will result in unnecessary and undue hardship to the junior right holder.

Consistent with Special Master Dolan's holding in the related *Brown* subcase, this Court declines to include the proposed qualifying language in the partial decree on the basis that it is not necessary to "define, clarify or administer the water right." *See* ***Order Denying Motion to Alter or Amend***, subcase 36-00035E (August 16, 1993). NSGWD's argument fails in two respects. First, the qualifying language assumes that sprinkler irrigation requires a lesser rate of diversion than does gravity irrigation. However, as to the particular water right in question there are no facts in the record that indicate that sprinkler irrigation requires less water than does gravity irrigation. Moreover, the proposed qualifying language is merely a restatement of existing law. The Court addressed this issue in its ***Memorandum Decision and Order on Challenge***, subcases 36-00003A *et al*. (Nov 23, 1999), wherein it is stated:

[15] At the May 8, 2000, oral argument in this subcase, counsel for NSGWD indicated that for every one cfs delivered to a senior surface water right holder in a call in the Hagerman area, 660 acres of land irrigated by junior groundwater rights would have to be shut-off. Transcript, p. 18. Again, facts such as this, if provable and relevant, could be used at a trial on the merits before the Special Master. However, an assertion such as this brought up for the first time at oral argument on challenge cannot properly be considered by this Court.

> [I]t 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:
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> > A water user is not entitled to waster 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).

Memorandum Decision and Order on Challenge at 41-42. Since as a matter of law a water user can only make a delivery call for the quantity that is being put to beneficial use, NSGWD's concern that without the qualifying language a water user could make a delivery call for a quantity in excess of the amount that can be beneficially used at that time is misplaced. The qualifying language is nothing more than a restatement of Idaho law. Moreover, David R. Tuthill, Jr., in his affidavit of August 10, 1999 in subcase 36-00035E (*Brown*), states:

> The position of IDWR is that the last two sentences of the NSGWD language constitute accurate statements of Idaho law. IDWR construes its statutory authority in the event of a call as precluding it from delivering, or directing the water master to deliver, any quantity greater than what the water right holder making the call can put to actual beneficial use at the time the call is made. Therefore, if the water right holder is irrigating with a sprinkler system, the quantity that can be called out is limited to the quantity which the water right holder can apply to actual beneficial use with that sprinkler system. IDWR's position is that this limitation applies notwithstanding the fact that the water right holder's water right may be decreed listing a higher, gravity irrigation, quantity. IDWR's position is that in the event of a call under these circumstances it will instruct the water master to deliver only the quantity that can be put to actual beneficial use through the sprinkler system.

Affidavit of David R. Tuthill, Jr. at ¶ 4. In paragraph 7 of that same affidavit, Mr. Tuthill states that IDWR does not believe that the proposed language is necessary under

Idaho Code § 42-1411(2)(j) to define, clarify, or administer the water right, but goes on to state that IDWR knows of no reason why it should not be included in the partial decree.

Finally, it is clear that no water user is permitted to take more of the water to which he or she is entitled under his or her appropriation than is necessary at the time for the beneficial use for which he or she has appropriated it. *Glavin v. Salmon River Canal Co., Ltd.*, 44 Idaho 583, 589, 258 P. 532 (1927). The Court calls the parties attention to Idaho Code § 42-916, which provides:

> No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates; and any person using an excess of water, is liable to the owner of such ditch or canal for the value of such excess; and in addition thereto, is liable for all damages sustained by any other person, who would have been entitled to the use of such excess water, as fixed by this section.
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> I.C. § 42-916.

VIII.

CONCLUSIONS AND RULING

For the reasons set forth above, NSGWD's challenge IS HEREBY DENIED. Water right 36-00077D will be decreed as recommended by Special Master Haemmerle in the ***Special Master's Recommendation*** dated October 21, 1997.

IT IS SO ORDERED:

Dated: Friday, June 30, 2000

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