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	)	Subcases 36-00061, 36-00062
	)	and 36-00063
Case No. 39576	)	
	)	**MEMORANDUM DECISION AND**
_____	)	**ORDER ON CHALLENGE**

Challenge to the Special Master's ***Order on Motions to Alter or Amend*** in subcases 36-00061, 36-00062 and 36-00063.

Appearances:

JOSEPHINE P. BEEMAN AND DANA L. HOFSTETTER, Beeman & Hofstetter, P.C., Boise, Idaho, for Challengers North Snake Ground Water District, May Farms, Ltd., and Faulkner Land and Livestock Company.

PATRICK D. BROWN, Patrick D. Brown, P.C., Jerome, Idaho, for Respondents Howard and Rhonda Morris.

I.

NORTH SNAKE GROUND WATER DISTRICT'S CHALLENGE

This is a Challenge by North Snake Ground Water District, May Farms, Ltd., and Faulkner Land and Livestock Company (collectively referred to hereinafter as "NSGWD") to Special Master Haemmerle's ***Order on Motions to Alter or Amend*** in subcases 36-00061, 36-00062, and 36-00063, filed May 21, 1999.

II.

BRIEF PROCEDURAL BACKGROUND

On August 26, 1988, Howard and Rhonda Morris ("Claimants") filed notices of claim to water right nos. 36-00061, 36-00062 and 36-00063.[1] These water rights were previously decreed in *New International Mortgage Bank v. Idaho Power Co.*, In Equity No. 1602 (D. Idaho March 22, 1932) (unpublished opinion) ("*New International* decree"). The priority dates for these water rights are December 12, 1901; May 1, 1912; and November 1, 1915; respectively. The decreed place of use for each of these water rights is on the same common tract of farm ground. The quantities claimed in the SRBA were in the same amounts as decreed in the *New International* decree. The Idaho Department of Water Resources ("IDWR" or "Director") issued a Director's Report that varied from the Claimants' claims, and the Claimants filed objections. No other parties to the SRBA filed objections or responses to these three claims. Subsequently, the Claimants stipulated to the elements of each of these contested water rights using the Standard Form 5 ("SF5") procedures contained in SRBA Administrative Order 1 ("AO1"), and IDWR concurred therewith. *See* AO1(4)(d)(3) (Oct. 16, 1997). Special Master Haemmerle then issued a recommendation that reflected the stipulated elements. NSGWD supplied a table in its brief which summarizes these procedural steps. This table is reproduced below:

Subcase No.	SRBA Claim	Director's Report	Standard Form 5	Special Master's Recommendation
36-00061	2.22 cfs; 125 acres	2.22 cfs; 121 acres	2.22 cfs; 123 acres	2.22 cfs; 123 acres
36-00062	0.28 cfs; 125 acres	0.20 cfs; 121 acres	0.28 cfs; 123 acres	0.28 cfs; 123 acres
36-00063	0.80 cfs; 125 acres	Disallowed	0.80 cfs; 123 acres	0.80 cfs; 123 acres
TOTAL	3.30 cfs; 125 acres	2.42 cfs; 121 acres	3.30 cfs; 123 acres	3.30 cfs; 123 acres

NSGWD, who did not participate in these subcases before the Special Master, timely filed *Motions to Alter or Amend ("Motions")* pursuant to AO1(13). These *Motions* allege that the Special Master's Recommendations do not reflect the Claimants'

[1] These subcases were among the twenty-four (24) subcases involved in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997).

actual beneficial use of water in that the Recommendations are based on gravity irrigation, whereas the actual present water delivery system is sprinkler irrigation, and that there was insufficient proof in the record to justify the quantities of water recommended. NSGWD sought to introduce additional evidence in the form of affidavits from Jeff Peppersack, Steve Clelland, and David R. Tuthill. On May 21, 1999, the Special Master issued an ***Order on Motions to Alter or Amend*** denying NSGWD's *Motion*s and striking the aforementioned affidavits. NSGWD timely filed a *Notice of Challenge* on June 4, 1999.

The *Challenge* was argued before this Court on August 26 , 1999. This Court deemed this matter fully submitted for decision on the next business day following the argument on *Challenge*, or on August 27, 1999.

III.

ISSUES RAISED ON CHALLENGE AND RELIEF REQUESTED

In its *Notice of Challenge*, NSGWD listed two separate issues. Those issues were stated as follows:

> 1. Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA: Rule 59(e), I.R.C.P., which applies post-judgment, or Rule 53(e)(2), which applies to special masters' reports?
>
> 2. Did the special master err in ruling that the Standard Form 5's filed in these subcases constitute *prima facie* evidence under Idaho Code Section 42-1411(5)?

Relief Requested by NSGWD

NSGWD requests that this Court remand these subcases to the Special Master for the purpose of taking additional evidence to establish that the water right quantities reflect the actual beneficial use for sprinkler irrigation on the property.

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 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.[2] 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.**"[3]

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*

[2] 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**.

[3] 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.

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.[4]

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 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

[4] 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.

whether they are supported by substantial,[5] 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 arising

[5] 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).

upon the report shall thereafter be considered (meaning freely reviewable by the referring district court).[6]

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.

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[6] 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).

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.
THE EVIDENTIARY VALUE OF IDWR'S CONCURRENCE IN A STANDARD FORM 5 IN THE SRBA

NSGWD challenges the Special Master's conclusion of law that an SF5 (with which IDWR concurs) is entitled to *prima facie* weight under I.C. § 42-1411(4)-(5). *Order on Motions to Alter or Amend* at 3. Related to this issue are NSGWD's assertions that: (1) the Special Master should have conducted an evidentiary hearing to discover the facts underlying the quantities agreed to in the SF5's and; (2) IDWR violated its statutory responsibility by entering into SF5's for quantities greater than the inch-per-acre standard under I.C. § 42-220.

The evidentiary value of IDWR's concurrence with an SF5

The issue as stated by NSGWD is: "Did the special master err in ruling that the Standard Form 5's filed in these subcases constitute *prima facie* evidence under Idaho Code Section 42-1411(5)?" For the reasons explained below, this Court holds that IDWR's concurrence with an SF5 has evidentiary value on its own, and therefore it is unnecessary in this case to decide whether such evidentiary value is derived from I.C. § 42-1411(4)-(5).

An SF5 provides a method whereby the parties to a contested subcase can stipulate to the elements of a water right. If IDWR agrees with the stipulated elements,

they can concur therewith by signing the SF5. Although the Director of the IDWR is not a party in the SRBA, he is an "independent expert and technical assistant [who] assure[s] that claims to water rights acquired under state law are accurately reported . . ." I.C. § 42-1401B(1). When IDWR signs an SF5 and states that its contents are true, it has evidentiary value that this Court is entitled to rely upon.[7]

NSGWD stated at oral argument that the SF5's in these subcases have no evidentiary value whatsoever, and therefore the only evidence upon which this Court can rely is the initial Director's Report.[8] Assuming *arguendo* that the SF5's in these subcases cannot be taken as substantive evidence, they nevertheless diminish the value of the Director's Report because they are inconsistent with it. If the Director's Report has been impeached, at least to some extent, by a subsequent inconsistent SF5 in which IDWR concurs, then arguably there may be no competent evidence in these subcases on which this Court can rely. If this position of NSGWD were accepted, given a court's duty to independently review a special master's findings of fact under I.R.C.P. 53(e)(2), this Court could never accept a special master's recommendation (based solely upon an SF5) in a single-party subcase[9] where IDWR and the party entered into an SF5 that differs from the Director's Report, because there would be no competent evidence to support it. *See* I.R.C.P. 53(e)(2); *Seccombe v. Weeks*, 115 Idaho at 435, 767 P.2d at 278.

Stated yet another way, and as noted later in this *Memorandum Decision* (*see infra* note 16), the Idaho Supreme Court has ruled that summary judgment proceedings in single-party subcases are not allowed. Therefore, if a claimant in a single-party subcase is precluded from both summary judgment and settlement, single-party subcases could never be settled and a formal trial would always be required. For example, assume that the

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[7] Idaho Rules of Evidence 704 and 705 lend further support to the conclusion that a court can rely upon IDWR's concurrence with an SF5. Rule 704 indicates that expert testimony can "embrace the ultimate issue to be decided by the trier of fact." Rule 705 states that an "expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data . . ."

[8] What NSGWD overlooks is that a prior decree – although not conclusive – evidences a legal right to the use of water. *See Hagerman Water Right Owners, Inc.*, 130 Idaho at 741, 947 P.2d at 414. As such, the *New International* decree provides evidence which supports the Claimants claims and the subsequent SF5's.

[9] "single-party subcase" meaning subcases (such as the ones at issue) where the claimant and the sole objector are the same person or entity and there have been no other objections or responses filed.

Directors Report for a hypothetical claim contained a typographical error in the legal description of the point of diversion, the claimant objected thereto, and no other objections or responses were filed. Assume further that IDWR ultimately agreed with the claimant as to the correct description of the point of diversion. What would typically happen in this scenario is that the single party and IDWR would enter into an SF5 (stating the correctly claimed point of diversion), the special master would issue a report that reflected the elements contained in the SF5, and the district court would issue a partial decree based on the special master's recommendation. The position advocated by NSGWD would prohibit this settlement procedure, and a trial would be required every time the SF5 differed from the Director's Report.

NSGWD also argues that because an SF5 is not subject to the same notice and objection procedures as is the initial Director's Report, it cannot be afforded the *prima facie* presumption enjoyed by the Director's Report. As stated above, in these subcases it is unnecessary to decide whether an SF5 derives evidentiary value from the statutory presumption given to the Director's Report under I.C. §§ 42-1411(4)-(5). Nevertheless, this Court will address NSGWD's argument as it pertains to whether IDWR's concurrence in an SF5 has any evidentiary value in the absence of a statutory presumption. NSGWD correctly points out that "[w]ithout notice through the SRBA docket procedure, other SRBA claimants would not receive notice of the filing of the Standard Form 5's until the issuance of the Special Master's Report and Recommendation." *Brief for Challenger* at 18. Although other SRBA claimants do not receive notice of the actual filing of an SF5, they should reasonably expect a settlement may be reached in any contested subcase. 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.[10] 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.[11] Therefore, as to factual issues,[12] 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.

At oral argument, counsel for NSGWD asserted that it would be impossible to anticipatorily involve itself in every contested subcase, and therefore they should be allowed to intervene for the first time only after a special master issues a report. What NSGWD overlooks is the simplicity of the procedures that would make them a party to subcases in which they have an interest. In those cases where they disagree with the Director's Report, they can file an objection. I.C. § 42-1412(1) In contested subcases where NSGWD agrees with the Director's Report (as in the subcases *sub judice*), they can file a Response (Standard Form 2) which, in essence, would state: "We agree with the Director's Report." I.C. § 42-1412(2). By doing this, NSGWD, with minimal effort, would become a party to the subcase, and an SF5 could not be entered into without their involvement (an SF5 may only be used if **all** parties to a subcase enter into the stipulation). AO1(4)(d)(3)(a). At oral argument, counsel for NSGWD further stated that the reason NSGWD did not get involved at the beginning of these subcases was because they agreed with the Director's Report. Therefore, any suggestion by NSGWD that it is too onerous of a task to identify and investigate subcases in which they may have an interest and to get involved therein at the objection / response stage is misleading. Obviously NSGWD had

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[10] Obviously, other SRBA claimants would not have notice in the event that an SF5 (concurred with by IDWR) was filed that fell outside of these parameters. For example, if a claimant's initial claim was for 5 cfs, and the Director's Report recommended 4 cfs, other claimants would not expect IDWR to concur with an SF5 which recommended 6 cfs.

[11] This Court recognizes that in these subcases, the SF5's were for 3.30 cfs as claimed by the Claimants, but the place of use was reduced from 125 to 123 acres. This reduction in irrigated acreage results in a very small increase in the quantity of water per acre.

[12] As to a special master's conclusions of law, other SRBA claimants may not be able to anticipate what these conclusions might be. For example, assume that a special master's recommendation contained a conclusion of law stating that gravity irrigation is not a beneficial use because there are more efficient ways to apply water. Perhaps in that event, other SRBA claimants who were not parties to the particular subcase arguably should be allowed a chance to present their legal positions in a motion to alter or amend a special master's recommendation.

to have knowledge of these pending subcases and their contents to have made the decision to not get involved because they agreed with the Director's Report.

Should the Special Master conduct an evidentiary hearing regarding the SF5's?

The *Special Master's Reports* in these subcases do not contain any specific findings of fact other than a simple acceptance of the SF5's and the water right elements contained therein. NSGWD argues that because the record does not substantiate the quantities agreed to in the SF5's, the Special Master should have conducted an evidentiary hearing to discover the underlying facts. In one-party subcases such as these, this is an unworkable solution. This sort of evidentiary hearing would require a special master to conduct an inquisition (rather than a trial) without the benefit of evidence being presented by opposing parties. Furthermore, the result of the hearing would be known up front, because the party to the subcase and IDWR would only present evidence to support the conclusion already reached in the SF5. This Court is not inclined to pursue a factual inquiry into a water right where the party to a subcase and IDWR have determined that further investigation is unwarranted.

Furthermore, such a requirement is not contemplated by the procedural rules found in AO1. AO1(4)(d)(3) states that "[w]hen IDWR does not concur with a [Standard Form 5], 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. . ." AO1 is silent on the procedures to be used where IDWR does concur with an SF5, but the negative implication of this language is that it is unnecessary for the Special Master or this Court to conduct this inquiry, i.e. that IDWR's concurrence in an SF5 should be treated as substantial and competent evidence of the nature and extent of a water right.

The inch-per-acre standard under I.C. § 42-220

NSGWD argues that IDWR violated its statutory responsibility to confirm current actual beneficial use under I.C. § 42-220 by failing to substantiate the quantities agreed upon in the SF5's. *Brief for Challenger* at 15-16. I.C. § 42-220 states that:

> [N]o license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water . . . unless it can be shown to the satisfaction of the department of water resources in granting such licenses, and to the court in making such decree, that a greater amount is necessary.

I.C. § 42-220 (1996). As recommended, each of the rights in these subcases exceed one inch per acre (.02 cfs). The question that presents itself is: what quantum of proof is required by I.C. § 42-220 to "satisfy" a court that a decree which exceeds the inch-per-acre standard should be issued? In other words, is a conclusory statement by IDWR (in the form of a concurrence with an SF5) sufficient proof to meet the requirement of I.C. § 42-220?

Because of limited resources, IDWR has adopted procedures to determine what is a reasonable level of investigation for any given claim. *See Report Regarding Claim to Water Right No. 36-00061*, Appendix A (Investigation and Recommendation of Claims Generally) (July 1, 1996).[13] IDWR interprets I.C. §§ 42-1410 & 42-1412 to provide the legal authority for these procedures. I.C. § 42-1410 (1996) (which provides the Director with discretion to determine the level of IDWR's investigation) & I.C. § 42-1412 (Supp. 1999) (which authorizes IDWR to file supplemental reports with the court, and provides that the court or a party may request the Director to present the basis for the recommendations in the director's report). IDWR is responsible to fulfill its statutory obligations using the resources available to it. This necessarily entails some discretion to determine how much of these resources will be spent on any particular claim.

This Court has not been presented with any evidence which suggests that the Director has abused this discretion or has otherwise failed to fulfill his statutory responsibilities in investigating the water rights at issue in these subcases. IDWR's

[13] These reports were prepared by IDWR and referred to by the parties as "706 Reports." *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 735, 744 n. 4 (1997).

concurrence with the SF5's constitutes an ultimate statement by IDWR that the quantities reported therein are for a beneficial use. This statement also indicates that IDWR is satisfied with the level of investigation conducted and that no further inquiry into the facts is needed. This ultimate statement by IDWR remained uncontradicted in the proceedings before the Special Master. Therefore, where IDWR's final statement is uncontradicted, and there is no indication that IDWR has been derelict in performing an adequate investigation, this Court is not inclined to undertake its own factual investigation to pick up where IDWR left off. It would create an unreasonable burden on those who involved themselves in the subcase to allow the desired tactics of NSGWD (i.e. to sit back until the Special Master has issued his recommendation, and then force a rehearing on those factual issues they disagree with). Given the massive number of subcases involved in the adjudication, such tactics would greatly increase the expense and time necessary to complete each subcase.

The statutory scheme of the adjudication statutes generally provides a further indication that it is within the discretion of this Court to rely on uncontradicted conclusory statements by IDWR. I.C. §§ 42-1401 to –1428. For example, I.C. § 42-1411(4) states that '[t]he unobjected to portions of the director's report shall be decreed as reported." This provision has been interpreted by the Idaho Supreme Court to be one of discretion, not an absolute mandate. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995) (the procedure to be followed by the district court where no objection has been raised is set out in I.R.C.P. 55, which retains in the court the inherent power to apply law to facts and render a decision). In other words, the district court may, but is not required to, decree the unobjected to portions of the Director's Report as reported. Note that this statutory provision applies to **all** unobjected to portions of the Director's Report, not just those that do not exceed the inch-per-acre standard. If I.C. § 42-220 were interpreted as NSGWD suggests, this Court would lose its discretion to decree unobjected to water rights (which exceed the inch-per-acre standard) as recommended in the Director's Report. NSGWD position would require this Court to make an exhaustive investigation into the facts underlying the Director's Report in every

instance where the reported amount exceeds the inch-per-acre standard. This is clearly not the intent of the legislature.

If NSGWD had made themselves a party to these subcases (by filing responses to the objections), they would have been in a position to discover the facts which underlie IDWR's concurrence in the SF5's. This is directly provided for in I.C. § 42-1412(4). This statute provides that "a party [to an objected to subcase] may request the director or his designee to present the basis for the recommendations in the director's report."[14] I.C. § 42-1412(4). If NSGWD wants disclosure of the facts underlying IDWR's concurrence in an SF5, they need to involve themselves in the objection / response stage of the proceedings. While it is the goal of this Court to ensure that water rights are reported as accurately as is practicable, it is not the function of this Court to operate in the manner urged by NSGWD.

For all these reasons, *Challenge* issue no. 2 is overruled.

VI.
THE STANDARD FOR ALLOWING THE INTRODUCTION OF ADDITIONAL EVIDENCE (BY A NONPARTY TO A SUBCASE) IN CONJUNCTION WITH A MOTION TO ALTER OR AMEND A SPECIAL MASTER'S FINDINGS OF FACT.

NSGWD challenges the Special Master's conclusion of law that a motion to alter or amend a special master's report is treated as a motion under I.R.C.P. 59(e). The issue as stated by NSGWD is: "Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA: Rule 59(e), I.R.C.P., which applies post-judgment, or Rule 53(e)(2), which applies to special masters' reports?" As will become apparent from the discussion below, the issue can be

[14] While a literal reading of I.C. § 42-1412(4) suggests that it applies only to the "director's report," it would seem that the provision is equally applicable to statements made by IDWR in the form of a concurrence in an SF5.

more narrowly stated as: What standard should a special master apply to determine if a nonparty to a subcase should be allowed to introduce additional evidence in conjunction with a motion to alter or amend the findings of fact contained in a special master's report?[15]

As a preliminary matter, it should be noted that there are procedural peculiarities that arise in the context of a general adjudication such as the SRBA that don't often arise in other litigation. An example of this is found in *Hagerman Water Right Owners. Inc.*, in which these subcases were directly involved. In that case, the Idaho Supreme Court held that summary judgement is an inappropriate procedure for resolving one-party subcases, and an evidentiary hearing must be conducted (unless settled).[16] *Hagerman Water Right Owners. Inc.*, 130 Idaho at 745, 947 P.2d at 418. The procedural rules under which the SRBA operates (i.e. the Idaho Rules of Civil Procedure, the Idaho Rules of Evidence, and Administrative Order 1) are not all inclusive. These rules do not contemplate everything that might occur in the SRBA. "Not everything that happens in a lawsuit will fit neatly under a particular rule." *Davison's Air Service, Inc., v. Montierth*, 119 Idaho 967, 968, 812 P.2d 274, 275 (1991).

With this in mind we move to the issue at hand. This court has contemplated several rules that may apply in these subcases -- some of which may be applied directly, and some of which may be applied by analogy. In particular, this Court has considered Rules 53(e)(2), 52(b), 59(a), and 59(e) of the Idaho Rules of Civil Procedure, as well as a "motion to reopen," which is a creature of case law. *See Id*. Each of these rules are discussed below.

Rule 53(e)(2)

[15] This opinion does not address the question of what standard should apply to the introduction of additional evidence when challenging a special master's conclusions of law.

[16] In stating summary judgment is inappropriate and that an evidentiary hearing must be conducted in one-party subcases, it is doubtful that the Idaho Supreme Court intended to preclude settlement of such subcases. *Hagerman Water Right Owners. Inc.*, 130 Idaho at 745, 947 P.2d at 418.

I.R.C.P. 53(e)(2) states that:

> In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within fourteen (14) days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing 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 with instructions.

I.R.C.P. 53(e)(2). NSGWD advocates that this rule should provide the standard which governs the introduction of additional evidence in conjunction with a **Motion to Alter or Amend a Special Master's Recommendation** under AO1(13). NSGWD takes at least two tacks to reach this conclusion. One of NSGWD's arguments rests on the reference made to Rule 6(d) in Rule 53(e)(2). Rule 6(d) states in part that "[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion . . ." From this language, NSGWD concludes that objections to a special master's report may be accompanied by supporting affidavits placing additional evidence in the record. However, this Court interprets the above quoted language from Rule 6(d) simply to mean that in those situations in which supporting affidavits are appropriate, the motion and the affidavits will be served contemporaneously. Rule 6(d) does not provide an absolute right to file affidavits in all circumstances.

Another argument made by NSGWD's is that because a district judge may consider additional evidence under this I.R.C.P. 53(e)(2), it would be incongruous to not allow a special master to hear the same evidence on a motion to alter or amend. However, Rule 53(e)(2) does not give the district court unfettered discretion in reviewing a special master's report as to factual determinations. As explained in Section IV of this opinion, 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 at 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d, 101, 104 (Ct. App. 1993). Under the "clearly erroneous" standard, the district court, when reviewing a special master's recommendation, initially looks only to what is

contained in the record. In other words, before receiving further evidence, the district court must first determine that the record does not support the special master's recommendation.

In the SRBA, a special master is the finder of fact (as directed by the Order of Reference) -- and a special master's findings of fact are not merely advisory opinions. When I.R.C.P. 53(e)(2) is viewed in light of the applicable standard of review, it is not incongruous for a district judge to be able to consider additional evidence while a special master cannot, because a district judge can hear additional evidence **only** when a special master's findings of fact are clearly erroneous or not supported by substantial evidence, or arguably if there was an absolute failure to make the findings necessary to support a conclusion of law.

Motion to Reopen

While the Idaho Rules of Civil Procedure do not explicitly mention a "motion to reopen," a literal reading of I.R.C.P. 59(a) indicates that in a case tried without a jury, the trial judge may reopen the case to take additional evidence. *Davison's Air Service, Inc., v. Montierth*, 119 Idaho 991, 992, 812 P.2d 298, 299 (Ct. App. 1991). Furthermore, the Supreme Court of Idaho has recognized the inherent "power of a court to reopen a case prior to a final judgment." *Davison's Air Service, Inc., v. Montierth*, 119 Idaho 967, 968, 812 P.2d 274, 275 (1991). Nevertheless, it is not appropriate for a trial court to reopen a case and take additional evidence in the absence of some reasonable excuse by the movant. These excuses include "oversight, inability to produce evidence, ignorance of evidence, or excusable neglect." *Davison*, 119 Idaho at 993, *citing Allen v. Burggraf Const. Co*., 106 Idaho 451, 680 P.2d 873 (Ct. App. 1984); *see also* D. Craig Lewis, Idaho Trial Handbook, § 28.10 (1995).

At first glance, NSGWD's *Motions to Alter or Amend* before the Special Master appear to fit nicely into the "motion to reopen" category, especially considering that there has not been a final judgment in these subcases. Upon closer examination, however, this

Court rejects the proposition that such *Motions* constitute motions to reopen for the following reasons.

First, the typical motion to reopen contemplates that only those who were actively involved at trial (i.e. parties to the subcase before a special master in the SRBA) should be allowed to reopen. It is quite a different picture when a nonparty to the trial is the one who asks for the case to be reopened. At this stage in the proceedings, reopening these subcases for the purpose of taking additional evidence would require a completely new trial[17] with full opportunity for the Claimants to respond.

Second, in a motion to reopen, a court has the case under advisement, and is not bound in the same way that this Court is bound to accept the Special Master's recommendation as to facts found. As reiterated several times in this opinion, this Court is required to accept the Special Master's findings of fact unless clearly erroneous (i.e. not supported by substantial evidence). I.R.C.P. 53(e)(2); *Seccombe*, 115 Idaho at 435, 767 P.2d at 278. As a prerequisite to rejecting, modifying, or receiving further evidence in connection with a special master's findings of fact, a court must first determine that such findings are clearly erroneous. Therefore, while a special master's findings of fact are clearly not "final," they do have some attributes of finality when compared to findings of fact made by a court in a case taken under advisement. Because of this additional degree of finality afforded a special master's findings of fact, the *Motions* filed by NSGWD cannot be considered to be motions to reopen, and the standard that pertains to allowing additional evidence in conjunction with a motion to reopen is inappropriate in these subcases.[18]

Rule 59(a)

[17] Because these subcases were settled via the SF5's there never was a first trial. This fact, however, is irrelevant. Every other claimant in the SRBA had notice of these subcases and an opportunity to be heard in the proceedings before the Special Master.

[18] Even if this "motion to reopen" standard for allowing additional evidence were applicable in these subcases (i.e. oversight, inability to produce evidence, ignorance of evidence, or excusable neglect), NSGWD has not provided any reasonable excuse for their failure to submit evidence in the proceedings before the Special Master.

As noted above, allowing NSGWD to introduce additional evidence after the Special Master has issued his recommendation would, as a practical matter, necessitate holding a completely new trial. Therefore, this Court has looked to I.R.C.P. 59(a) to illuminate the issue at hand.

As a preliminary matter, it is important to distinguish between a motion for a new trial under Rule 59(a) and a motion to reopen. A motion for a new trial under Rule 59(a) is distinct from a motion to reopen to take additional evidence, in that a motion under Rule 59(a) is made only after the entry of a judgment, whereas a motion to reopen is typically made while the judge has the case under advisement. *Davison's Air Service, Inc.*, 119 Idaho at 968, 812 P.2d at 275 (reopening a case to admit additional evidence is not analogous to granting a new trial); 12 *Moore's Federal Practice*, 59.13[3][c] (Matthew Bender 3d ed.).

The situation presented by these subcases does not fit neatly into either category -- i.e. there is neither a judgment nor is the case "under advisement" in the typical sense. However, because a special master's findings of fact stand unless clearly erroneous, Rule 59(a) is arguably applicable in these subcases.

A trial court has broad discretion to determine whether a new trial should be granted. *Bott v. Idaho State Bldg. Authority*, 128 Idaho 580, 589, 917 P.2d 737, 746 (1996). Under Federal Rule of Civil Procedure 59(a) (which is not as detailed as I.R.C.P. 59(a)), in a nonjury action, a motion for a new trial should be based on a manifest mistake of fact or error of law. 12 *Moore's Federal Practice*, 59.13[3][a] (Matthew Bender 3d ed.), *citing Ball v. Interoceana Corp*., 71 F3d 73, 76 (2nd Cir. 1995), *cert. denied*, 117 S. Ct. 169 (1996) (in nonjury actions, reasons for granting motion must be substantial); *Burzynski v. Traners*, 111 F.R.D. 15, 17 (S.D.N.Y. 1986) (substantial reasons required to set aside judgment); *Hager v. Paul Revere Life Ins. Co*., 489 F. Supp. 317, 321 (D. Tenn. 1977), *aff'd without op*., 615 F2d 1360 (6th Cir. 1980) (substantial reasons required to set aside judgment).

In contrast to Fed. R. Civ. P. 59(a), I.R.C.P. 59(a) includes a list of reasons for which a new trial may be granted, one of which is "[i]nsufficiency of the evidence to justify the . . . decision." NSGWD contends that there is no evidence in the record to show that

the quantities recommended by the Special Master conform to what is actually beneficially used. *Brief for Challenger* at 4. This contention is necessarily predicated upon the proposition that an SF5 has no evidentiary value. As stated earlier in this opinion, however, IDWR's concurrence with the uncontradicted SF5's in these subcases does constitute substantial evidence. Therefore, assuming that NSGWD's *Motions* can properly be addressed under Rule 59(a), the *Motions* were properly denied.

Rule 59(e)

In his ***Order on Motions to Alter or Amend***, the Special Master held that a motion to alter or amend under AO1(13)(a) is treated as a motion to alter or amend a judgment under I.R.C.P. 59(e). The Special Master's opinion correctly stated that the purpose of an I.R.C.P. 59(e) motion is to correct errors of fact or law that occurred in the proceedings. *First Sec. Bank of Idaho v. Webster*, 119 Idaho 262, 266, 805 P.2d 468, 472 (1991), *citing First Sec. Bank v. Neibaur*, 98 Idaho 598, 603, 570 P.2d 276, 281 (1977). As to the allowance of additional evidence, "[c]onsideration of I.R.C.P. 59(e) motions must be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based." *Id., citing Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 800 P.2d 1026 (1990). NSGWD correctly points out that I.R.C.P. 59(e) applies only post-judgment, and that a special master's recommendation is not a "judgment" as defined in I.R.C.P. 54(a).

Because of this limitation, Rule 59(e) is not literally applicable to NSGWD's *Motions to Alter or Amend*. However, due to the fact that a special master's findings of fact are final unless determined to be clearly erroneous, Rule 59(e) addresses itself to situations that are clearly analogous to what NSGWD is attempting in these subcases. Furthermore, by the orders of reference, the special masters function much like a trial judge, they just cannot enter a final judgment. As such, Rule 59(e) is instructive as to the appropriate standard for allowing a nonparty to a subcase to submit additional evidence in conjunction with a motion to alter or amend under AO1(13). Rule 59(e) provides an extraordinary remedy, and in the interests of finality and conservation of judicial resources,

it should be used sparingly. 12 *Moore's Federal Practice*, 59.30[4] (Matthew Bender 3d ed.), *citing Wendy's Int'l, Inc., v. Nu-Cape Const., Inc.*, 169 F.R.D. 680, 685 (M.D. Fla. 1996). The same interests of finality and conservation of judicial resources are present in the orders of a special master, although such orders are not covered by a literal reading of Rule 59(e). Just as a Rule 59(e) motion may not be used as an opportunity to present evidence that could reasonably have been presented before the entry of judgment, a motion to alter or amend a special masters report does not provide such an opportunity.

Rule 52(b)

This Court has also considered whether NSGWD's *Motions* could be addressed by I.R.C.P. 52(b). For the reasons explained below, this Court holds that Rule 52(b) appropriately addresses the question of whether NSGWD should be allowed to introduce additional evidence in its *Motions*.

A motion is made under Rule 52(b) for the purpose of amending findings or conclusions, or making additional findings or conclusions. I.R.C.P. 52(b). Under Federal Rule of Civil Procedure 52(b) -- which is identical to I.R.C.P. 52(b) -- such a motion can be made prior to the entry of judgment. 9 *Moore's Federal Practice*, 52.61[2] (Matthew Bender 3d ed.), *citing Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (9th Cir. 1983); *Jetero Const. Co. v. South Memphis Lumber Co.*, 531 F2d 1348 (6th Cir. 1976). Essentially, a motion under Rule 52(b) allows a court to correct or augment its findings so that an appellate court may have a clear understanding of how the trial court arrived at its decision. 9 *Moore's Federal Practice* 52.60[3]. The Rule is not intended to allow parties to advance new theories or relitigate the merits of a case. *Id*.

There are four recognized grounds for properly granting a motion under Rule 52(b): (1) correction of manifest error; (2) newly discovered evidence; (3) change in law; and (4) supplement or amplify findings. *Id.* at 52.60[4][a]-[d]. Of these four grounds, the only one that is arguably applicable in these subcases is "correction of manifest error." In substance, NSGWD claims that the Special Master erred in that there is insufficient evidence to support the recommendation of quantities greater than the

statutory inch-per-acre standard under I.C. § 42-220. *Brief for Challenger* at 4. Under Rule 52(b), NSGWD has the burden to "demonstrate some reason why the court [or special master] should alter its prior decision and also must set forth facts or law of a strongly convincing nature." 9 *Moore's Federal Practice* 52.60[4][a], *citing Dale and Selby Superette & Deli v. United States Dep't of Agric.*, 838 F. Supp. 1346, 1347 (D. Minn. 1993). Furthermore, a court (or a special master) should look only to evidence in the record when considering a motion to amend findings of fact. *Id., citing United States Gypsum Co. v. Schiavo Bros. Inc.*, 668 F.2d 172, 180 (3d Cir 1981), *cert. denied* , 456 U.S. 961 (1982); *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1220 (5th Cir. 1986); *Dale and Selby Superette & Deli v. United States Dep't of Agric.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993); *Estate of Pidcock v. Sunnyland America Inc.*, 726 F. Supp. 1322, 1334 (S.D. Ga. 1989).

Based on the legal arguments and affidavits presented by NSGWD, this court is not convinced that such an error has manifested itself. As to an error of law, as stated earlier in this opinion, IDWR's concurrence in the uncontradicted SF5's is sufficient evidence to support the Special Master's Recommendations in these subcases. As to a factual error, NSGWD has not pointed to anything in the record which demonstrates that a factual error has been made. However, even if the affidavits of Jeff Peppersack, Steve Clelland, and David R. Tuthill (which were stricken by the Special Master) are considered, NSGWD still has failed to demonstrate that a manifest error has been made.

This Court has read the aforementioned affidavits, and the most that can be said about them is that they show there is a possibility that the Special Master may have reached a different conclusion had NSGWD been involved. They do not show that an error **has been** made. In his affidavit, Jeff Peppersack states that on November 20, 1997, he conducted a diversion rate analysis of the water rights involved in these subcases based "almost exclusively on 'gravity' irrigation practices." *Affidavit of Jeff Peppersack*, ¶ 9. Based on this analysis, Peppersack determined that a diversion rate of 4.94 cfs would be reasonable for "gravity" irrigation of the 123 acres involved. *Id*. (Recall from the table above that the Claimants claimed, and the Special Master recommended 3.30 cfs.) Steve Clelland states that he "observed sprinklers as being the sole mechanism for irrigation of

the associated place of use." *Affidavit of Steve Clelland*, ¶ 4. Jeff Peppersack states that "**generally** surface or 'gravity' irrigation systems, such as corrugates and furrows, in the Hagerman Valley require a higher diversion rate than sprinkler systems . . ." *Affidavit of Jeff Peppersack*, ¶ 12 (*emphasis added*). Finally, David Tuthill's affidavit indicates that IDWR took into consideration the gravity irrigation diversion rate of 4.94 cfs when it signed the SF5's in these subcases. *Affidavit of David Tuthill*, ¶ 5-7.

Given what is stated in these affidavits, this Court recognizes that there is a possibility that the result in these subcases may have been different had NSGWD involved themselves before the Special Master. However, NSGWD has not shown that, with respect to the particular water rights at issue, the 3.30 cfs recommended by Special Master Haemmerle exceeds the amount of water actually beneficially used. It is not enough to put forth the general proposition that sprinkler irrigation is more efficient than flood irrigation. In this regard, NSGWD has not met its burden under Rule 52(b) of showing that an error has, in fact, been made.

For all these reasons, *Challenge* issue no. 1 is overruled.

VII.
CONCLUSION

For reasons that are not apparent to this Court, NSGWD elected not to involve themselves in the proceedings before the Special Master. NSGWD decided to make themselves heard only after discovering that the Special Master recommended quantities greater that those contained in the Directors' Report. In a contested subcase, it should come as no surprise to NSGWD that this is a possibility. NSGWD had notice of the quantities claimed by the Claimants, notice of the quantities reported in the Director's Report, and notice that these subcases were contested. Furthermore, NSGWD should be well aware that a contested subcase may be settled via an SF5, and that IDWR may

concur with that settlement. Having this knowledge, it should be clear to NSGWD of the need to involve themselves in the trial proceedings before the Special Master. NSGWD could have protected themselves by simply filing with the Court (and serving on the parties) a *Response to Objection* (AO1 Standard Form 2) that, in essence, would state: "NSGWD agrees with the Director's Report in this subcase." Had they done this, an SF5 could not have been entered into without the signature of NSGWD.

This Court appreciates the fact that "[t]he NSGWD and its members whose water rights are generally junior to the surface water uses in the Hagerman area have a fundamental interest in ensuring that the Hagerman area surface water rights are accurately decreed." *Brief for Challenger* at 2. However, to protect this interest, the onus is on the NSGWD to become a party to those subcases in which it has such an interest. By failing to do so, NSGWD runs the risk that such subcases will be settled without their participation. The SF5 settlement procedures can greatly expedite the disposition of a subcase, and are routinely used in this Court. Where the parties to a subcase and IDWR agree upon the factual elements of a water right in a subcase, and this agreement is presented to a special master in the form of an SF5, it would be impractical to require the special master to force the parties and IDWR into a further factual inquiry for the purpose of protecting the interests of a nonparty to the subcase who knew of the proceedings, claims to have a direct interest therein, and yet failed to participate.

IT IS SO ORDERED:

DATED: _____.

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