IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK ASTORQUIA, Petitioner, vs. STATE OF IDAHO, DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho, Respondent. IN THE MATTER OF WATER RIGHT LICENSE NO. 37-7460 IN THE NAME OF FRANK ASTORQUIA AND/OR JOSEPHINE ASTORQUIA	Case No. CV-WA-2012-14102 **MEMORANDUM DECISION AND ORDER**

Holding: The Respondent's *Amended Preliminary Order*, dated June 25, 2012, is **affirmed.**

Appearances:

Josephine P. Beeman, Beeman & Associates, P.C., Boise, Idaho, attorneys for Petitioner.

Andrea L. Courtney and Garrick L. Baxter, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for Respondent.

I.

STATEMENT OF THE CASE

A. Nature of the case.

This case originated on August 6, 2012, when Petitioner Frank Astorquia filed a *Petition* with the Ada County district court seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("IDWR" or "Department"). The case was reassigned by the clerk of the Ada County district court to this Court on August 10, 2012.[1] The order under review is the Respondent's *Amended Preliminary Order* issued on June 25, 2012, in the matter of water right license no. 37-7460 in the name of Frank Astorquia and/or Josephine Astorquia. In the *Amended Preliminary Order*, the Respondent affirmed the issuance of water right license no. 37-7460 with a priority date of July 3, 2002, and confirmed a rate of diversion under the license of 3.33 cfs. The Petitioner asserts that the *Amended Preliminary Order* is contrary to law and requests that this Court set aside the *Order* and remand the matter for further proceedings.

B. Course of proceedings and statement of facts.

This matter concerns an application to appropriate water. The application process began on October 20, 1975, when the Petitioner filed an *Application for Permit* with the Department seeking to appropriate 6.40 cfs of groundwater for the irrigation of 320 acres. R., 1-4. On December 5, 1975, the Department approved the application and issued permit no. 37-7460, subject to the following condition: "Proof of construction of works and application of water to beneficial use shall be submitted on or before December 1, 1980." R., 4. On September 30, 1980, the Department notified the Petitioner via letter that he had not yet submitted proof of beneficial use under his permit. R., 16. The correspondence reiterated that the deadline for submitting such proof was December 1, 1980. R., 16. However, the Petitioner failed to provide proof of beneficial use to the Department before the deadline, and by letter dated December 4, 1980, the Department notified the Petitioner that his permit had lapsed. R., 18.

On January 5, 1981, the Petitioner filed a *Request* with the Department seeking an extension until December 1, 1985, in which to submit proof of beneficial use under the permit. R., 19. In the *Request*, the Petitioner stated that he completed the following work under the

[1] The case was reassigned pursuant to the Idaho Supreme Court Administrative Order Dated December 9, 2009, entitled: *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review From the Department of Water Resources Involving Administration of Water Rights.*

permit: "Well has been dug, and 200 acres are being irrigation." *Id.* The Petitioner further provided that the remainder of the work had not been completed "[b]ecause of moratorium on new power hookups, I cannot get enough electrical power to pump water for the other 120 acres." *Id.*

On January 9, 1981, the Department reinstated the permit, advanced the priority date to November 26, 1975 (pursuant to Idaho Code § 42-218a), and extended the deadline for submission of proof of beneficial use under the permit until January 1, 1984. *Id.* The Department's action in this respect was conveyed to the Petitioner via correspondence dated January 12, 1981, along with the following explanation:

> Enclosed is a copy of the approved request for extension of time. The permit has been reinstated with an advance in priority to November 26, 1975 and the time within which to submit the statement of beneficial use is extended to January 1, 1984.
>
> The approval of the extension of time is based upon the moratorium by Idaho Power Company against new power hookups. In order for the Department to consider any future requests for an extension of time due to the moratorium, it will be necessary for you to submit evidence together with your request that you have applied to Idaho Power Company and have been denied a power hookup.

R., 20. On October 31, 1983, the Department notified the Petitioner that he had not submitted proof of beneficial use under his extension, and reminded him of the upcoming deadline. R., 21. The notification explained that either the beneficial use postcard or a request for extension of time must be received by the Department on or before January 1, 1984, or the Department would send notice that permit had lapsed. *Id.* Further, that within sixty days of the notice the permit would no longer be in effect. *Id.* Notwithstanding, the Petitioner failed to submit proof of beneficial use or request a further extension of time on or before the January 1, 1984, deadline. R., 22. By letter dated January 4, 1984, the Department notified the Petitioner that his permit had again lapsed. R., 22.

No action was taken by the Petitioner thereafter until July 3, 2002, when he filed a *Petition* with the Department requesting that permit no. 37-7460 be reinstated with a priority date of November 26, 1975. R., 42-49. On that same date, the Petitioner submitted a *Proof of Beneficial Use* form, asserting the use of 4.0 cfs of groundwater for the irrigation of 200 acres under the permit. R., 50. The Department subsequently entered a *Preliminary Order* reinstating permit no. 37-7460 and advancing the priority date of the permit to July 3, 2002. R., 55-57. The

Petitioner filed an exception to the *Preliminary Order*, asserting that the Department failed to address his argument to reinstate the permit with the original priority date. R., 69-71. On September 25, 2002, the Director (Karl Dreher at the time) issued a *Final Order* denying the Petitioner's exception and concluding that permit no. 37-7460 should be reinstated with the priority date advanced to July 3, 2002, pursuant to Idaho Code § 42-218a. R., 85-89.

On October 23, 2002, the Petitioner filed a *Petition* in Ada County Case No. CV-0C-2002-8301D seeking judicial review of the Director's September 25, 2002, *Final Order*. R., 93-102. The parties in that case stipulated to stay the judicial review proceeding "pending final action on the Petitioner's claim to water right no. 37-7460 before the Snake River Basin Adjudication District Court." R., 114. However, before the resolution of claim no. 37-7460 in the Snake River Basin Adjudication ("SRBA"), an *Order* was entered dismissing that judicial review proceeding without prejudice and remanding the matter to the Department "with full authority to consider further proceedings consistent with the intention stated by both counsel at the aforementioned status conference."[2] R., 136. However, no proceedings on remand occurred.[3]

The record reflects that no further formal actions were taken by the Department or the Petitioner until July 6, 2011, when the Department issued the license for water right no. 37-7460. R., 153. The water right was licensed for 3.06 cfs or 800 acre feet annually of groundwater for the irrigation of 258 acres with a priority date of July 3, 2002. *Id.* On July 21, 2011, the Petitioner filed a *Request for Hearing* with the Department to contest the priority date and quantity elements of the license. R., 156-179. A hearing was held before the Department on March 13, 2012. Tr., 1-59. At the hearing, the Petitioner argued that the Department's refusal to reinstate the permit with a November 26, 1975, priority date was arbitrary, capricious and an abuse of discretion. Tr., 34-38. The Department issued its *Preliminary Order* on the contest on May 24, 2012. R., 372-381. The *Preliminary Order* affirmed the issuance of water right license no. 37-7460 with a priority date of July 3, 2002, and increased the rate of diversion under the license to 3.33 cfs. R., 380. The Petitioner subsequently sought reconsideration before Department. R., 382-384.

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[2] The intention of the parties in dismissing and remanding the matter to the Department is unknown to this court as it is not in the record in the above-captioned matter.

[3] The reason why no proceedings occurred on remand is not clear from the record. However, the fact that no proceedings occurred on remand is not placed at issue in this proceeding.

On June 25, 2012, the Department entered the *Amended Preliminary Order* from which judicial review is presently sought. R., 403–414. In the *Amended Preliminary Order*, the Department affirmed the issuance of water right license no. 37-7460 with a priority date of July 3, 2002, and increased the rate of diversion under the license to 3.33 cfs. *Id.* On August 6, 2012, the Petitioner filed the instant *Petition for Judicial Review*. R., 181. The parties briefed the issues and a hearing on the *Petition* was held before this Court on April 8, 2013.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held on April 8, 2013. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or April 9, 2013.

III.
APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson,* 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) not supported by substantial evidence on the record as a whole; or,

(e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda,* 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the party has been prejudiced. Idaho Code § 67-5279(4). *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.[4] *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.* 132 Idaho 552, 976 P.2d 477 (1999).

IV.
ANALYSIS AND DISCUSSION

The Petitioner raises the following issues in his briefing on judicial review: (1) whether this judicial review proceeding should be stayed pending the final determination of SRBA claim no. 37-7460; (2) whether the issue of the rate of diversion for water right 37-7460 should be remanded to the Department for further consideration of additional evidence; and (3) whether the Department's refusal to reinstate a November 26, 1975, priority date for water right 37-7460 is arbitrary, capricious and an abuse of discretion. Each will be addressed in turn.

A. Request to stay this judicial review proceeding.

A threshold issue before the Court is whether this judicial review proceeding should be stayed pending final resolution of the Petitioner's SRBA claim for water right 37-7460. The Petitioner argues that a stay is appropriate on the grounds that the SRBA has equitable jurisdiction to find and decree a priority date of November 26, 1975 for the Petitioner's water right claim notwithstanding the fact that the Department has licensed the right with a July 3, 2002, priority date. This Court disagrees.

The decision as to whether to grant a stay of proceedings pending resolution of related proceedings in another court is left to the sound discretion of the court. *Continental Casualty*

[4] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – 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 hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. *See eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

Co. v. Brady, 127 Idaho 830, 834, 907 P.2d 807, 811 (1995). The statutory authority to determine the priority date of a licensed water right rests with the Director. I.C. § 42-219. In this case, it is the Director's decision to license water right no. 37-7460 with a July 3, 2002, priority date (as opposed to November 26, 1975) with which the Petitioner is aggrieved. Idaho Code § 42-1701A(4) provides that any person who is aggrieved by a final decision or order of the director is entitled to judicial review and directs that "judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code." To the extent Petitioner wants to assert that the priority date for his water right should be November 26, 1975, the proper venue in which to make such an assertion is in this judicial review proceeding in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

Moreover, it has long been law of the case that the SRBA will not serve as a mechanism to collaterally attack an element of a water right license:

> If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701A and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946. If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attach on the license. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

Supplemental Findings of Fact and Conclusions of Law, subcase nos. 36-2048 et. al., pp. 11–12 (July 31, 1998)[5] (subsequently adopted by the SRBA District Court in *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcase nos. 36-2048, et. al., p. 18 (Dec. 29, 1999)).[6] Pursuant to the law of the case, the Petitioner cannot stay this proceeding to collaterally attack the license in the SRBA in hopes of receiving a different outcome. Rather, as stated above, the Petitioner's appropriate avenue for redress with respect to the licensed priority date is through the instant judicial review proceeding.

Notwithstanding the above, the Petitioner argues that the SRBA district court has equitable jurisdiction to decree his water right with a priority date of November 26, 1975, under its holding in SRBA subcase nos. 61-2248B and 61-7189 (hereinafter, "the Magic West Case"). However, the Petitioner misconstrues those cases. In the Magic West Case, the Claimant

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[5] A copy of the *Supplemental Findings of Fact and Conclusions of Law* is attached hereto as Exhibit 1.
[6] A copy of the *Order on Challenge* is attached hereto as Exhibit 2.

claimed water rights 61-2248B and 61-7189 in the SRBA for year round industrial use.[7] *Memorandum Decision and Order on Challenge*, subcase nos. 61-2248B and 61-7189, pp.3-4 (March 28, 2001).[8] However, the rights were licensed for a 10.5 month period of use, and the Director recommended the rights in the SRBA with a 10.5 month period of use. *Id.* at 4. The Claimant objected to the recommendations, asserting that it had used water under the rights year round since 1986 and, therefore, had changed the period of use pursuant to Idaho's accomplished transfer statute, Idaho Code § 42-1425. *Id.* The parties to the Magic West Case subsequently executed and filed *Standard Form 5s*, agreeing that the period of use for the two claims had increased to year round use prior to the commencement of the SRBA. *Id.* at 5.

The Special Master in the Magic West Case accepted the parties' *SF5s* and recommended the two claims with a year round period of use. *Id.* In doing so, he found that the period of use under the claims had increased to year round prior to the commencement of the SRBA, consistent with Idaho Code § 42-1425. *Id.* at 12. On Challenge, the SRBA District Court ultimately upheld the Special Master's determination.[9] As a result, the water right claims in the Magic West Case were partially decreed with a year round period of use, even though they were licensed with shorter period of use, based on the claimant's successful assertion of an Idaho Code § 42-1425 accomplished transfer. *Partial Decree*, subcase nos. 61-2248B and 61-7189 (January 4, 2002).

The distinguishing factor between the Magic West Case and this case is that the Magic West Case involved an Idaho Code § 42-1425 accomplished transfer. The accomplished transfer statute specifically authorizes a claimant in the SRBA to claim a change in the place of use, point of diversion, nature or purpose of use, or period of use of their water right, provided (1) that the change was made prior to the commencement of the SRBA and (2) no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. I.C. § 42-1425(2). The claimant in the Magic West Case did not collaterally attack its licenses in the SRBA, but rather successfully asserted a statutorily authorized accomplished transfer.

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[7] In the original claims, Magic West sought a 10.5 month period of use, which was later amended via the filing of Amended Claims to year round.

[8] A copy of the *Memorandum Decision and Order on Challenge* is attached hereto as Exhibit 3.

[9] While the Court originally held that the Special Master erred in his application of Idaho Code § 42-1425 on the grounds that the claimed increase of use should be considered under Idaho Code § 42-1426 as an enlargement, the Court subsequently reversed itself in this respect. *Order Modifying Memorandum Decision and Order on Challenge*, subcase nos. 61-2248B and 61-7189.

Although the SRBA Court exercises jurisdiction over claims based on permits, that jurisdiction is qualified. The SRBA Court is authorized to issue a partial decree for a claim based on a permit but any such decree issued for the claim remains subject to any terms and conditions ultimately placed in the post-decree license once issued. *See* I.C. § 42-1421.[10] The licensure proceedings are not completed in the SRBA but continue to proceed administratively before the Department with a right of judicial review, provided that any judicial review is required to take place outside of the SRBA. *See* I.C. § 42-1401D.

In this case, there is no accomplished transfer that could be claimed in, or addressed by, the SRBA Court under Idaho Code § 42-1425. In fact, there can be no accomplished transfer under Idaho Code § 42-1425 with respect to the priority date element of a water right. Further, the SRBA is not the appropriate forum for reviewing the actions of the Department in conjunction with the permitting process on which the claim is based. Therefore, the Petitioner's appropriate avenue for redress with respect to the licensed priority date is through the instant judicial review proceeding under Idaho Code § 42-1701A(4) and Idaho Code § 67-5270. Based on the foregoing, the Petitioner's request to stay this proceeding is denied.

B. Request for remand with respect to the licensed rate of diversion.

With respect to the licensed rate of diversion, the Petitioner requests that this Court remand this matter to the Department for consideration of additional evidence, specifically a pump curve for the Petitioner's system as designed and constructed in 1976. Under Idaho law, "judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this chapter [I.C. § 67–5275(1)], supplemented by additional evidence taken pursuant to section 67-5276, Idaho Code." I.C. § 67-5277. Idaho Code § 67-5276 provides:

> (1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

[10] Although the process is authorized by statute, in order to avoid any confusion caused by the issuance of the license after the partial-decree where the content of the license differs from the partial decree, the SRBA has adopted a practice of staying the issuance of the partial decree until after the license is issued.

> (a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.
>
> (b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.
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> (2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

I.C. § 67-5276. The decision to admit additional evidence and remand under the above statute is left to the sound discretion of the reviewing court. *Crown Point Development, Inc. v. City of Sun Valley*, 144 Idaho 72, 75, 156 P.3d 573, 577 (2007).

As an initial matter, the Court notes that the Petitioner did not make "application" under Idaho Code § 67-5276 to the Court for leave to present additional evidence. Rather the Petitioner simply included argument as part of its opening brief on judicial review that the case be remanded to the Department for its consideration of the pump curve, without reference to Idaho Code § 67-5276. Furthermore, the Petitioner has failed to provide a copy of the pump curve to this Court for its consideration. Therefore, it is not possible for this Court to assess the materiality of the evidence. For these reasons, the Petitioner's argument that this case should be remanded for consideration of a pump curve in unavailing.

The Petitioner has also failed to show to the satisfaction of the Court good reasons for his failure to present the pump curve before the Department.[11] The extent of the Petitioner's argument regarding his failure to present the pump curve before the Department is as follows:

> After the March 2012 hearing but before the August 6, 2012 appeal deadline, the Layne Pump Company provided to the Astorquias a copy of the pump curve for the system as designed and constructed in 1976. This information was not available to the Astorquias, through no fault of their own, when this matter was heard.

Petitioner's *Opening Brief*, p. 5. However, aside from the conclusory statement that "this information was not available to the Astorquias, through no fault of their own, when this matter was heard" the record contains no evidence as to why this pump curve was not, or could not have been, acquired by the Petitioner prior to the hearing before the Department.

[11] The Petitioner does not assert that the additional evidence of the pump curve be admitted and the case remanded due to an alleged irregularity in the procedure before the agency.

To the contrary, the record establishes that the Petitioner had more than ample time to acquire and submit a pump curve to the Department before the hearing on March 13, 2012. The Petitioner submitted proof of beneficial use under the permit on July 3, 2002. R., 50. The Department conducted a field exam under the permit on November 25, 2005. R., 116-118. Issues regarding quantity were raised and known to the Petitioner at the field exam. R., 116-118. Thereafter, a hearing on the Petitioner's contest of the license was not held until March 13, 2012. Tr., 1-59. At a minimum, the Petitioner had from November 25, 2005 until March 13, 2012 to acquire and submit a pump curve to the Department. He did not, and aside from the Petitioner's conclusory and unsupported statement, there is no evidence in the record as to why he did not, or to establish that he was precluded from timely obtaining a pump curve. The Court finds that the Petitioner has failed to establish good reasons for his failure to obtain a pump curve and timely present to the Department. Therefore, in an exercise of its discretion, this Court denies the Petitioner's request to remand this proceeding to the Department.

C. Whether the Department's refusal to reinstate a November 26, 1975, priority date for water right 37-7460 is arbitrary, capricious or an abuse of discretion.

The Petitioner argues that the Respondent's refusal to reinstate the original November 26, 1975, priority date for water right 37-7460 is arbitrary, capricious and an abuse of discretion. Central to the Petitioner's argument is his contention that the Respondent erred in refusing to grant his January 5, 1981, request for a five year extension of time in which to submit proof of beneficial use under the permit. The Petitioner further asserts that that the Respondent's refusal to reinstate the original November 26, 1975, priority date for water right 37-7460 constitutes an unlawful taking without compensation under the United States and Idaho Constitutions. For the reasons set forth below, this Court finds that the Petitioner has failed to establish that the Respondent erred in a manner specified in Idaho Code § 67-5279(3), or that a substantial right of the Petitioner has been prejudiced.

i. Petitioner failed to timely contest the Director's determination with respect to his January 5, 1981, request for a five year extension of time, and cannot raise the issue for the first time here.

The Petitioner asserts that the Respondent's refusal to grant his January 5, 1981 request for a five year extension of time was done without a rational basis and constituted a violation of the Equal Protection Clauses of the United States and Idaho Constitutions. The record in this case reflects that after the Petitioner's permit lapsed for the first time in 1980, the Petitioner filed a *Request* with the Department asking for a five year extension of time to submit proof of beneficial use. R., 19. The *Request* was submitted on January 5, 1981. *Id.* The Department determined to reinstate the Petitioner's permit based on the *Request*, but only granted a three year extension of time to submit proof of beneficial use, as opposed to the five year extension requested. *Id.* The Department's decision in this respect was made on January 9, 1981, well over thirty years ago. *Id.* The record establishes that the Petitioner did not contest the Department's decision before the Department at the time, nor did the Petitioner attempt to seek judicial review of the decision.

At the time the Petitioner filed his request for extension of time, Idaho Code § 42-204 (1980) provided that the Department may grant an extension of time for proof of beneficial use "not exceeding five years beyond the date originally set for completion of works and application of the water to full beneficial use . . . ." 1980 Idaho Sess. Law Ch. 238. However, of more significance to this proceeding, that statute also afforded the Petitioner an opportunity to be heard before the Department in the event he was aggrieved by the Department's response to his request, as well as a right of judicial review to the district court:

> Any applicant feeling himself aggrieved by the indorsement made by the department of water resources upon his application may request a hearing before the director in accordance with section 42-1701A(3), Idaho Code, for the purpose of contesting the indorsement and may seek judicial review pursuant to section 42-1701A(4), Idaho Code, of any final decision of the director following the hearing.

Idaho Code § 42-204 (1980).

At the time, Idaho Code 42-1701A(3) & (4), which are expressly referred to in the above-quoted statute provided as follows:

> (3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any applicant for any permit, license, certificate,

approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by a denial or conditional approval ordered by the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the denial or conditional approval upon filing with the director, within fifteen (15) days after receipt of the denial or conditional approval, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing may be had pursuant to subsection (4) of this section.

(4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in sections 67-5215 and 67-5216, Idaho Code.

I.C. § 42-1701A(3) & (4) (1980).[12]

In this instance, the Petitioner attempts to call into question the propriety of a decision made the Department over thirty years ago. If the Petitioner wished to contest the propriety of the Department's action on his 1981 request for extension of time to submit beneficial use, he was required to do so in conformity with the above-quoted statutes. However, the record reflects that the Petitioner failed to timely request a hearing before the Director to contest the decision in accordance with Idaho Code § 42-1701A(3) (1980), and did not attempt to timely seek judicial review pursuant to Idaho Code § 42-1701A(4) (1980). Any attempt to now raise the issue for the first time cannot be maintained. The Petitioner did not previously exhaust his available administrative remedies, and raising the issue in this proceeding constitutes an impermissible collateral attack on the Department's January 9, 1981, decision. *See e.g.*, *Mosman v. Mathison*, 96 Idaho 76, 87, 408 P.2d 450,456 (1965) (where no appeal was timely taken from the action of the commissioners of the Cramont Scenic Highway District, respondent's attempt to raise defects in the proceedings could not be subsequently raised by a collateral attack); *State v. Concrete Processors, Inc.*, 85 Idaho 277, 282, 379 P.2d 89, 91 (1963) ("Generally the administrative remedies provided . . . must be exhausted before the courts will act to prevent the invasion of any asserted constitutional or property right"). Therefore, the Court does not reach this issue.

[12] 1980 Idaho Sess. Law Ch. 238.

ii. Takings argument.

The Petitioner next argues that the Respondent's refusal to reinstate the original November 26, 1975, priority date for water right 37-7460 constitutes an unlawful taking without compensation under the United States and Idaho Constitutions. It is unclear from the Petitioner's briefing exactly what action on the part of the Department he claims constitutes an unlawful taking. To the extent the Petitioner is arguing that the Department's 1981 decision to grant a three year extension of time to submit proof of beneficial, as opposed to a five year extension, constitutes a taking, that argument cannot now be raised for the first time in this proceeding for the reasons set forth in the preceding section.

To the extent the Petitioner is arguing that the Department's 2002 refusal to reinstate the permit for water right 37-7460 with a November 26, 1975, priority date constitutes an unlawful taking, the Petitioner's argument is unavailing. The Department's 2002 *Final Order* determining that permit no. 37-7460 should be reinstated with the priority date advanced to July 3, 2002, was issued in the permitting stage of the right. The Idaho Supreme Court has instructed that a water right applicant does not receive a vested right in water "until the statutory procedures for obtaining a license are completed, including the issuance of the license." *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 271, 255 P.3d 1152, 1165 (2011). Since the Petitioner cannot establish he had a vested right with a November 26, 1975, priority date at the time the Department reinstated his permit in 2002, he cannot maintain an action against the Respondent for a taking of private property. *See e.g., Tyrolean Associates v. City of Ketchum*, 100 Idaho 703, 704–705, 604 P.2d 717, 718–719 (1979) (providing that before claiming a taking of private property, a plaintiff must first establish a vested property right).

Furthermore, the Department was statutorily required to advance the priority date to July 3, 2002, when it reinstated the permit in 2002. At the time, Idaho Code § 42-218a provided:

> A permit upon which the proof of beneficial use has not been submitted, or a request for extension of time has not been received on or before the date set for such proof, shall lapse and be of no further force nor effect. Notice of said lapsing shall be sent by the department to the permit holder at the address of record by regular mail provided:
>
> 1. That within sixty (60) days after such notice of lapsing the department may, upon a showing of reasonable cause, reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof;

> 2. That upon receipt of proof of beneficial use after sixty (60) days after such notice of lapsing, the director shall require sufficient evidence to be submitted by the permit holder to clearly establish the extent of beneficial use made during the time authorized by the permit and any extensions of time previously approved. Upon finding that beneficial use had occurred during the authorized period and upon a showing of reasonable cause for filing a late proof of beneficial use, *the director may reinstate the permit with the priority date advanced to the day that proof of beneficial use was received;*
>
> 3. *The original priority date of a lapsed permit shall not be reinstated except upon a showing of error or mistake of the department.*

I.C. § 42-218a (1983) (emphasis added).[13]

In this case, by letter dated January 4, 1984, the Department notified the Petitioner that his permit had lapsed. R., 22. No action was taken by the Petitioner thereafter until July 3, 2002, when he filed a *Petition* with the Department requesting that permit no. 37-7460 be reinstated with a November 26, 1975, priority date, and submitted a proof of beneficial use form. R., 42-50. Thus, the Petitioner submitted his proof of beneficial use well after sixty days had passed following his notification that his permit had lapsed in 1984. Under Idaho Code § 42-218(a)(2) and (3), the Department, upon allowing reinstatement, was required to advance the priority date of the permit to the day that proof of beneficial use was received, July 3, 2002.

Since the Petitioner has failed to show that the Respondent erred in a manner specified in Idaho Code § 67-5279(3), or that a substantial right of his has been prejudiced, he is not entitled to the relief he seeks and the Respondent's *Amended Preliminary Order*, dated June 25, 2012, must be affirmed.

D. Attorney fees.

The Respondent requests an award of attorney's fees on judicial review pursuant to Idaho Code § 12-117(1). That section provides as follows:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

[13] 1983 Idaho Session Laws, Ch. 157, § 1.

I.C. § 12-117(1). The decision to grant or deny a request for attorney fees under Idaho Code § 12-117 is left to the sound discretion of the court. *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012).

The Court finds that the Respondent is the prevailing party in this matter. The Court further finds that the Petitioner acted without a reasonable basis in fact or law in pursuing this judicial review proceeding. The bulk of the Petitioner's argument on judicial review improperly raises arguments that should have been raised and contested long ago, but were not due to the inaction of the Petitioner. The Petitioner's primary argument on judicial review contests an order issued by the Respondent over thirty years ago. For the reasons stated above, this argument was made without a reasonable basis in fact or law since the Petitioner clearly failed to exhaust his administrative remedies at the time, or timely seek judicial review of that order. The Petitioner's takings argument is also made without a basis in fact or law. That argument cannot be maintained under well-established case law since the Petitioner has failed to establish he had a vested right in the water under the permit at the time the Department reinstated his permit with a November 26, 1975, priority date. Last, the Petitioner's argument that this matter be stayed and his argument that it be remanded likewise lacked a reasonable basis in fact or law for the reasons set forth in this decision. Therefore, the Court in its discretion finds that an award of attorney fees to the Respondent is warranted under Idaho Code § 12-117(1).

V.
CONCLUSION

Based on the foregoing, the Respondent's *Amended Preliminary Order*, dated June 25, 2012, is **affirmed.** The Respondent's request for attorney fees is **granted.**

Dated May 7, 2013

ERIC J. WILDMAN
District Judge

1998 JUL 31 AM 10:46

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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: See Exhibit A**
	)	
Case No. 39576	)	**SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (FACILITY VOLUME)**
	)	
	)	

I. PROCEDURAL BACKGROUND

All water rights listed in Exhibit A are claimed by Clear Springs Foods, Inc. (Claimant) and are used for fish propagation. Numerous objections were filed. This matter relates to objections filed by Claimant to the remarks addressing facility volume. IDWR gave several reasons for including facility volume as a remark. Those reasons were to administer water quality, define consumptive use, benefit the local public interest, and establish the extent of beneficial use. Claimant alleges that facility volume is not necessary to define or administer these water rights. The objections were tried before the court on February 9, 1998. After the trial, it was discovered that the testimony of David Tuthill, Jr. was not recorded. Therefore, on July 28, 1998, the court again took the testimony of Mr. Tuthill. All findings of fact relating to Mr. Tuthill's testimony contained in this courts prior ***Findings of Fact and Conclusions of Law (Facility Volume)*** (Feb. 24, 1998) are hereby withdrawn.

II. STANDARD FOR INCLUSION OF REMARK

The Director of the Idaho Department of Water Resources (IDWR) may include "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(k). The claimant bears the "burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in the director's report." I.C. § 42-1411(5).

III. FINDINGS OF FACT

1. David Tuthill, Jr., is the Adjudication Chief for IDWR. Mr. Tuthill has a bachelor of science degree in agricultural engineering and a master of science decree in civil engineering. Prior to becoming the Adjudication Chief, Mr. Tuthill was the supervisor with the Western Regional Office of IDWR.

2. Mr. Tuthill is familiar with the water rights before the court. On direct examination, Mr. Tuthill gave several reasons for the inclusion of facility volume as a remark: (1) to preserve water quality, (2) to measure consumptive use, (3) to protect the public interest, and (4) to define the extent of beneficial use (mitigation).

3. IDWR offered Exhibits 2, 3, and 4 which are water licenses issued for water rights 36-07201, 36-07218, and 36-07568 respectively. The water licenses included facility volume for each right. The remarks read as follows: license 36-7201, "ponds (6) Volume = 5652 cubic feet"; license 36-7218, "Facility Volume = 335,504 cubic feet"; and license 36-7568, "Facility Volume is 9.9 acre feet." There is no additional language included in the licenses addressing whether these volumes are restrictions on any element of the license. Claimant did not appeal any of the licenses. Water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148 are all based on licenses which did not include any remark addressing facility volume. Water rights 36-04013A, 36-04013B, and 36-04013C are beneficial use claims.

4. Prior to 1979, IDWR did not have a policy for fish production facilities. In 1979, Mr. Tuthill drafted a policy memorandum addressing fish production facilities. The memorandum was drafted to address specific concerns regarding water quality. Mr. Tuthill drafted the memorandum even though he has no expertise in water quality, and he concedes that he did not consult or rely on anyone with expertise in water quality prior to drafting the memorandum.

5. Mr. Tuthill admitted that IDWR does not administer water quality. Water quality is administered by the Department of Environmental Quality (DEQ) and the Environmental Protection Agency (EPA).

6. Mr. Tuthill testified that fish propagation facilities do not involve a storage component.

7. The recommendations for these subcases were made in 1992. The only concern IDWR had with fish facility volume from 1979 to the time the recommendations were made for

these subcases was water quality. These concerns were reflected in a March 21, 1997, letter from Mr. Tuthill to parties interested in fish facility volume provisions. Mr. Tuthill wrote, "The Department is open to discussion of alternative mechanisms for quantifying the water quality impacts of fish propagation facilities, to enable proper protection for and distribution of water rights." Claimant's Exhibit 1. No mention was made in the letter as to the need for fish facility volumes as to anything other than water quality.

8. The basis of IDWR's recommendation changed after April, 1997. Mr. Tuthill sent out another letter to interested parties soliciting comments on fish production facilities. The question posed was whether IDWR should continue to "recommend facility volume as a parameter of fish propagation rights." Claimant's Exhibit 3. The only comment returned was a telephone call from Josephine Beeman, attorney for the North Snake Ground Water District (NSGWD). Ms. Beeman suggested that facility volume was important to define the extent of beneficial use. Prior to this one telephone conversation in 1997, there is no evidence that IDWR ever considered facility volume as a way of defining the extent of benefical use.

9. In addition to concerns about water quality, IDWR recommended facility volume to define the extent of beneficial use in case of mitigation for damages caused by junior right holders to the senior fish propagation facilities. Mitigation means the payment junior users would make to senior users for decreased fish production caused by a lack of water in times of water scarcity. IDWR believes that facility volume can be used for mitigation purposes even though IDWR admits they have no legal authority to require mitigation in lieu of delivering water "first in time, first in right." Furthermore, IDWR admits that junior users cannot require senior users to accept mitigation in lieu of delivering water in the case of a call made by senior water users.

10. The reason for including fish facility volume, for purposes of administration, changed over the course of Mr. Tuthill's testimony. At first, Mr. Tuthill testified that fish facility volume provisions are necessary when fish facility volumes are increased. In the case of expanded volume, Mr. Tuthill testified that a user increasing volume would have to go through a transfer proceeding under I.C. § 42-222. This was true if the use of the expanded facility was for fish production or for the sole purpose of controlling water quality. On cross-examination, Mr. Tuthill admitted that expanded fish facility volume does not fit within the plain meaning of I.C. § 42-222 for invoking a transfer proceeding.

11. Based on a leading question posed by IDWR's attorney on re-direct examination, Mr. Tuthill changed his opinion and testified that a fish propagator expanding fish facility volume for the purpose of increasing fish production would have to obtain a new water right. This is true even though the expanded fish facility would not increase the amount of water diverted or consumptive use of the water right. On the other hand, a fish propagator increasing facility volume for the sole purpose of controlling water quality would not have to get a new water right. Mr. Tuthill would not answer the direct question of whether this type of expansion would require a transfer under I.C. § 42-222 or some other administrative device.

12. Absent an increase in fish production, IDWR was not concerned with facility volume as it relates to water quantity. For example, a hypothetical scenario was posed to Mr. Tuthill by the court. The court asked Mr. Tuthill to assume two identical fish propagators. Both propagators expand their facility volume to the exact same degree. Fish propagator A increased facility volume for the purpose of increased fish production. Fish propagator B increased facility volume for the sole purpose of controlling water quality. For both propagators, the diversion rate is not expanded even though fish facility volume increases. According to Mr. Tuthill, fish propagator A would be required to obtain a new water right. Fish propagator B would be allowed to expand without obtaining a new water right.

13. As rationale for IDWR's position, IDWR analogized expanded fish production to an expanded industrial use. IDWR stated that if an industrial facility expanded, it would be required to obtain a new water right. The difference between an expanded industrial use and an expanded fish production facility relates to consumptive use. Fish production facilities with concrete raceways, like Clear Springs, do not involve any consumptive use, unlike industrial uses. IDWR concedes that the Clear Springs facilities do not involve any consumptive use. Furthermore, if facility volume is expanded, the use of the expanded right does not involve any increased use or diversion of water. As a matter of policy, IDWR does not consider any use a consumptive use where water is held less than 24-hours. Since fish propagators flush their system every 2-hours, the use of water by fish propagators, according to the policy of IDWR, does not involve a consumptive use.

14. IDWR also analogized their position to an irrigator who increases field size to increase production. If the irrigator increases field size, then that irrigator must obtain a new

water right. Again, the major difference between an irrigator and a fish propagator is that irrigation uses involve a consumptive use. As previously indicated, fish propagation facilities like Clear Springs do not involve a consumptive use.

15. Claimant called Terry Huddleston. Mr Huddleston is employed by Claimant as the farm operations manager. Mr. Huddleston has been employed by Claimant for 21 years. Mr. Huddleston has a bachelor of science degree in zoology and a master of science degree in fish culture and disease.

16. Mr. Huddleston testified that the water quality of the fish propagation ponds is regulated by the Department of Environmental Quality (DEQ) and the Environmental Protection Agency (EPA). Mr. Huddleston was one of the primary authors of the waste management guidelines for aquaculture which have been adopted by DEQ. The guidelines are used to determine whether a facility is in compliance with DEQ regulations. Claimant has a National Pollution Discharge Elimination System (NPDES) permit, issued by the EPA, to operate its facility. The Idaho State Department of Environmental Quality contracts with EPA to ensure compliance.

17. Mr. Huddleston opined that facility volume has little, if any, affect on water quality. According to Mr. Huddleston, water quality is affected mostly by the type of fish produced, the feed delivery systems, the ability to re-oxygenate water, and the management of the particular facility. To illustrate the lack of correlation between facility volume and fish production as both relate to water quality, Mr. Huddleston testified that in one instance fish production increased from 1 million pounds to 2.7 million pounds. At the same time, facility volume decreased by 50 percent. The amount of water used decreased from 114 cfs to 100 cfs. Although production increased, water quality improved in that there was a 74 percent reduction in total suspended solids.

18. Mr. Huddleston testified that a restriction in facility volume could hamper fish production without any benefit to improving water quality. For example, Mr. Huddleston explained that there is a growing market for the production of sturgeon. To produce sturgeon, facility volume would have to be increased. This could be accomplished without any affect on water quality.

19. On December 17, 1996, Mr. Huddleston met with Mr. Tuthill and other representatives from IDWR regarding facility volume. At that time, the regulation of water quality was the only reason given for the inclusion of facility volume remarks. Mr. Huddleston first became aware of IDWR's reason to include facility volume to define the extent of fish production in January of 1998.

IV. CONCLUSIONS OF LAW

A. WATER QUALITY

There are numerous reasons why facility volume shall not be included for purposes of regulating water quality. The primary reason is that IDWR is not in the business of regulating water quality. IDWR's duty with respect to water quality was outlined by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). In that case, the Court held that the primary function of "policing water quality" rests with the Department of Health and Welfare [now DEQ and EPA], not with IDWR. *Id.* at 341. The court held that "Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet the mandatory water quality standards." *Id.*

However, once the facility is complete, "later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare." *Id.* In this case, the water rights are not in the permit stage. All the water rights have ripened into licenses. Since the water rights have vested and the structures are complete, it is not the current function of IDWR to police water quality. Water quality is policed by DEQ and EPA.

Furthermore, even if IDWR could regulate water quality, there is no showing that facility volume is rationally related to water quality. Mr. Tuthill admitted that he is not an expert in water quality, and he could not cite to any scientific or technical studies indicating a nexus between facility volume and water quality. On the other hand, Claimant presented concrete evidence that fish production and facility volume are not, in any way, related to water quality. Claimant established that fish production could be increased in smaller facilities while using less water. Although fish production increased, water quality improved.

For these reasons, the court finds that facility volume is not required to regulate water quality.

B. BENEFICIAL USE - MITIGATION

Until 1997, the purpose for including facility volume in the Director's Report was to administer water quality. After one phone call from the attorney for the NSGWD, IDWR included facility volume to define the extent of beneficial use for the purpose of mitigation. In other words, if the Claimant made a call on junior water users, the junior users could offer money for lost fish production instead of delivering water. There is no question that water users may engage in mitigation between themselves in lieu of a formal call on water being made. However, IDWR admits that it cannot force mitigation in lieu of performing its duty to deliver water should a senior user make a call. The right of water users to have water delivered "first in time, first in right" is constitutionally guaranteed. IDAHO CONS., art. VX, § 3; *In Re SRBA Case No. 39576*, 125 Idaho 392, 871 P.2d 809 (1994). Since IDWR has no authority to force mitigation, it is not necessary to include facility volume for purpose of water administration. Even if IDWR could force mitigation, as previously indicated, there is no rational relationship between facility volume and fish production.

For these reasons, facility volume is not necessary for purposes of mitigation.

C. DEFINING THE RIGHT - APPLYING FOR NEW WATER RIGHTS

IDWR alleges that facility volume must be included to trigger a fish propagator obtaining a new water right anytime fish production and facility volume are increased. As previously indicated, IDWR is not concerned about increased facility volume as it relates solely to water quantity. IDWR is only concerned when the fish propagator increases fish production. *See Findings of Fact* ¶¶ 12-14. The logical extension of this assertion places IDWR in the business of regulating fish production.[1]

IDWR's duties do not include regulating production. IDWR may only involve itself in production if the increased production involves the use of more water. If a production facility increases its water usage above its original appropriation of water, then obviously that producer will be required to apply for a new water right to satisfy the increased water use. On the other hand, if a water user increases production without increasing the original water right, then IDWR may not involve itself in the user's business.

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1 If IDWR is going to involve itself in fish production, then it must also require new water rights for any other type of water user (i.e. stockmen, irrigators, etc.) who increases production.

Here, IDWR admits that these particular fish production facilities do not involve any consumptive use. If the facilities are expanded, the diversion rate remains the same. Simply stated, no more water is diverted as a result of the expanded production of fish. If no more water is diverted and the use of the facility remains fish production, then IDWR may not, as a matter of law, require a new water right. I.C. § 42-201.

D. CONSUMPTIVE USE

At the commencement of the SRBA, consumptive use was an element of a water right. I.C. § 42-1411(2)(I) (1986). In 1997, consumptive use was removed as an element of a water right for purposes of the SRBA. *See*, 1997 Sess. Law, ch. 374, § 4, p. 1192. Even if consumptive use was an element, there is no showing that fish propagation ponds involve any consumptive use. All the ponds at issue are concrete facilities. For these type of facilities, there is no measuring device available that can measure any amount of water that may theoretically be consumed by fish propagation.

For these reasons, facility volume is not necessary to quantify consumptive use.

E. PUBLIC TRUST

For those licenses which did not include facility volume at the time they were issued, facility volume cannot be included as a remark. First, the SRBA Court has no jurisdiction to consider the public trust. *In Re SRBA Case No. 39576*, 128 Idaho 155, 911 P.2d 748 (1995). "The district court correctly concluded that the public trust is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants." *Id.* at 156. Second, even if IDWR could inject the local public interest into the SRBA, IDWR cannot reevaluate a vested water right under the local public interest, absent the right being voluntarily submitted in a transfer proceeding under I.C. § 42-222, or when an application for a new water right is made. I.C. § 42-203A(5).

The parameters of IDWR's ability to evaluate water rights under the local public trust was addressed in *Matter of Hidden Springs Trout Ranch, Inc., v. Alred*, 102 Idaho 623, 636 P.2d 745 (1981). In that case, the applicant had applied for a water permit. While the application was pending, the Idaho Legislature adopted I.C. § 42-203(5), the provision addressing the local public interest. Before the permit was issued, IDWR reopened the permit for public input as to whether the application satisfied the local public interest. The applicant appealed the decision of IDWR.

The decision of IDWR to reopen public comment on the application was upheld. Distinguishing between a fully vested licensed right from a permitted and inchoate right, the Idaho Supreme Court held that the permit could be evaluated according to the local public interest standards set forth under I.C. § 42-203(5). However, the Court held that the public interest could not be considered with respect to "a right arising to any vested level."

> Initially, it is important to note that we do not discuss the status of one who has acquired an adjudicated right, a licensed right or an unadjudicated "constitutional" right to water as defined in Idaho statutes or the Idaho Constitution . . .
>
> A permit applicant applying to appropriate water has no prior individually vested right to the water at the time of application; the applicant does not already own the water. The applicant's status is therefore not analogous for example to that of a landowner who has a vested right to put the land he owns to whatever use is permitted by the zoning ordinances in effect at the time the landowner makes application for a building permit .
>
> . . . .
>
> . . . **[The filing of an application] . . . is not therefore a right arising to any vested level which would preclude application of the [the local public interest].**

Id. at 624-625 (emphasis added).

In this case, water rights 36-07201, 36-07218, and 36-07568 had facility volume remarks inserted at the time the licenses were issued. The remaining water rights including 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148, 36-04013A, 36-04013B, and 36-04013C were either licenses which did not have facility volume inserted at the time the licenses were issued, or the rights are claimed through beneficial use. Because these rights vested prior to insertion of the facility volume remarks, Claimant is entitled to use these rights under the conditions which existed when the water rights vested. Any attempt to condition vested water rights under the public trust would be analogous to newly enacted zoning ordinances applying retroactively to preexisting land uses as discussed in *Alred*.

For these reasons, the facility volume remarks cannot be considered under the local public interest.

E. NATURE OF USE

IDWR stated that nature of use has been used in the past as a reason to include facility volume. The rationale is that IDWR would consider an increase in facility volume as being a change in nature of use requiring a transfer under I.C. § 42-222. A change in facility volume is not the type of change contemplated under I.C. § 42-222. A change in nature or purpose of use occurs when, for example, a user changes from an irrigation use to a domestic use, a change from an irrigation use to a manufacturing use, or a change from a domestic use to a municipal use, etc. Going from a fish propagation use to a fish propagation use is not a change in nature of use contemplated under I.C. § 42-222.

F. THE LICENSES

As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director's Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.

The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right." I.C. § 42-220.[2] As applied, IDWR is part of the "state" as the word is used in I.C. § 42-220.[3] As between the two statutes, there is a conflict only when a remark redefines the use of a licensed water right. Under these circumstances, the question is which statute controls.

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2 *In Re SRBA Case No. 39576* (24 Hagerman Subcases),130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court held that "[n]owhere in Title 42 is the Director 'obligated to accept a prior decree' issued in a private adjudication 'as being conclusive proof of the nature of a water right.'" *Id.* at 414. Unlike prior decrees, Title 42 does require the state to accept license as conclusive proof of a user's right to use water as stated in the license. I.C. § 42-220.

3 For purposes of the adjudication of water right under Title 42, Chapter 14, Idaho Code, IDWR has been separated from other state agencies. I.C. § 42-1401B. Under the adjudication statutes, however, the Director's role is to report "claims to water rights acquired under state law." I.C. § 42-1401B. Here, the licenses were acquired and perfected under state law. These licenses are binding on the state and constitute *prima facie* evidence of the water right and should be reported accordingly. I.C. § 42-220.

The inquiry involves principles of statutory construction. "It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute." *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409, 416 (1997). "[T]o the extent that two statutes conflict, the more specific governs over the more general." *Id.* Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state.[4] Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license.

A similar issue was addressed by the Idaho Supreme Court in *In Re SRBA Case No. 39576* (Basin-Wide Issue 5B), __ Idaho __, 951 P.2d 943 (1998). In that case, the issue was whether the court was required to decree certain general provisions contained in a prior decree. Addressing the legitimate and potential need for general provisions, the Court stated: "Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property." *Id.* at 4 (citations omitted). Remarks are much like general provisions. Both may be used to further define a water right. I.C. §§ 42-1411(2)(k) and 42-1411(3). Like a prior decree, any attempt to redefine a license would be "tantamount" to altering a real property right.

In this case, IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220. The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred.*

Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that

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[4] There are exceptions to the finality of a license in that the use of a license may change subjecting the license to claims of abandonment, forfeiture, adverse possession, estoppel, or waste. Also, a license is subject to review in a transfer proceeding. I.C. § 42-222.

party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946. If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license.[5] *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). In this case, Claimant did not appeal the remarks addressing facility volume for water rights 36-07201, 36-07218, and 36-07568. Therefore, Claimant is bound by the licenses for these rights.

In evaluating the licenses where facility volume was included when the licenses were issued, the court notes that there is no express provision in the licenses indicating the relevance of the remarks. As previously indicated, the court cannot find any rational reason why the remarks exist. When confronted with an ambiguous element contained in a prior decree or license, the court may clarify the ambiguous element or provision. I.C. § 42-1427(b). Therefore, to clarify this ambiguity, the court will recommend that facility volume be included for water right numbers 36-07201, 36-07218, and 36-07568 with the following additional language: "The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume."

For these reasons, the licenses at issue are final and binding on both the Claimant and IDWR.

V. CONCLUSION - ORDER

As a matter of law, Claimant has met its burden in establishing that facility volume is not necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the Director. Independent of these legal reasons and with the exception of the public trust, Claimant has also established, as a matter of fact, that facility volume is not necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the Director.

---

5 The court expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a license in the SRBA. That issue is not before the court.

Consistent with these findings, the court orders as follows:

1. For water rights 36-07201, 36-07218, and 36-07568, facility volume remarks shall be included with the following additional language: "The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume."

2. For water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, 36-07148, 36-04013A, 36-04013B, and 36-04013C the facility volume remarks shall be not be decreed.

IT IS SO RECOMMENDED.

DATED July 31, 1998.

FRITZ X. HAEMMERLE, Special Master
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

36-02048
36-02703
36-02708
36-04013A
36-04013B
36-04013C
36-07040
36-07083
36-07148
36-07201
36-07218
36-07568

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW (FACILITY VOLUME) was mailed on July 31, 1998, with sufficient first-class postage to the following:

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Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	**Subcase Nos. 36-02708, 36-07201, 36-07218, 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148, 36-07568, 36-07071, 36-02356, 36-07210, 36-07427, 36-07720, 36-02659, 36-07004, 36-07080 and 36-07731**
Case No. 39576	**ORDER ON CHALLENGE (Consolidated Issues) OF "FACILITY VOLUME" ISSUE AND "ADDITIONAL EVIDENCE" ISSUE**

I.
APPEARANCES

Professor D. Craig Lewis, Esq., Moscow, Idaho, and Ms. Dana Hofstetter, Esq., Beeman & Hofstetter, Boise, Idaho, for North Snake Ground Water District, May Farms Ltd., and Faulkner Land & Livestock Company

Mr. Daniel Steenson, Esq., Ringert Clark, Boise, Idaho, for Clear Lakes Trout Company

Mr. Norman Semanko, Esq., Rosholt Robertson & Tucker, Twin Falls, Idaho, for Clear Springs Foods Inc. and Blue Lakes Trout Farm Inc.

Mr. Patrick Brown, Esq., Jerome, Idaho, for John W. Jones Jr.

II.
ORAL ARGUMENT AND MATTER DEEMD FULLY SUBMITTED FOR DECISION

Oral argument on this Consolidated Challenge was held in open court on November 1, 1999. At the conclusion of argument, no party sought to present additional briefing or authorities

and, the Court having requested none, this matter is deemed fully submitted for decision on the next business day, or November 2, 1999.

III.
ISSUES PRESENTED

This Challenge on Consolidated Issues was filed by the North Snake Ground Water District ("NSGWD") on behalf of its members, including Faulkner Land & Livestock Company and May Farms Ltd. The 20 subcases listed in the caption above involve water rights for fish propagation facilities in the Hagerman area of Idaho.

NSGWD raises two consolidated issues in these fish propagation subcases.

1. Did the [respective][1] Special Master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director"? Idaho Code § 42-1411(2)(j) (Supp. 1998)? ("facility volume" issue).

2. 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), I.R.C.P. which applies to special master's reports? ("additional evidence" issue).

IV.
"FACILITY VOLUME" ISSUE

THE ISSUE

As noted above, the issue is stated by NSGWD to be:

Did the [respective] Special Master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for

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1 The Court uses the phrase "respective Special Master" because each of the three Special Masters then in the SRBA were assigned to one or more of the various subcases and issued reports and recommendations in these subcases. Because these two issues are common between the subcases and because each of the Special Masters ultimately ruled against including a facility volume remark, or allowing additional evidence at the motion to alter or amend stage, the subcases were consolidated on appeal for these two consolidated issues. Special Master Haemmerle heard Clear Springs Foods Inc. subcases 36-04013A, 36-07148, 36-07040, 36-07201, 36-07568, 36-02703, 36-04013B, 36-02708, 36-07218, 36-02048, and 36-04013C; Special Master Bilyeu heard John W. Jones Jr. subcase 36-07071; and Special Master Dolan heard Blue Lakes Trout Farm Inc. subcases 36-07720, 36-07427, 36-07210, and 36-02356 and Clear Lakes Trout Co. subcases 36-02659, 36-07004, 36-07080, and 36-07731. For reasons unknown to this Court, the then Presiding Judge did not reference all of these subcases to one Special Master.

administration of the right by the director"? Idaho Code § 42-1411(2)(j) (Supp. 1998).

ELEMENTS OF A WATER RIGHT – I.C. § 42-1411(2)(a)-(j)

Also as noted above, these consolidated subcases deal with fish propagation facilities in the Hagerman valley.

When the respective water right claims were reported out by the Director (IDWR), each included a facility volume remark.

"Facility volume" is not defined by statute or appellate case law and is not a specifically enumerated element of a water right under I.C. § 42-1411(2)(a)-(j). That statute provides:

> (2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:
> (a) the name and address of the claimant;
> (b) the source of water;
> (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
> (d) the date of priority;
> (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
> (f) the purpose of use;
> (g) the period of the year when water is used for such purposes;
> (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;
> (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
> (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

IDWR concluded that a facility volume limitation was necessary for each of these rights to define one or more of the elements -- quantity, nature or purpose of use, or place of use. In the alternative, IDWR included facility volume as necessary to further define or administer each of these rights.

THE NATURE OF FACILITY VOLUME REMARK

It is unnecessary for the Court to enumerate each of the twenty (20) claimed rights and the specific language actually appearing in each right, because it is the general concept which is being decided here, and not the proposed individual language on each right.[2] The following examples are provided for illustrative purposes:

Example 1: 36-02356

By Blue Lakes Trout Farm Inc.'s ("Blue Lakes") second amended notice of claim under 36-02356, it claimed a total of 100 cfs from Alpheus Creek for fish propagation, domestic and commercial uses with a priority date of May 29, 1958, based on a license. In his *Amended Director's Report Regarding Claim to Water Right No. 36-02356*, dated July 7, 1997, the Director recommended the claim as filed. However, under the quantity element, the Director included the language -- facility volume 10.66 af. The Director also described the non-irrigation uses: "commercial/fish facility; domestic/2 homes; fish/49 ponds, hatch." The single contested issue was whether facility volume should be decreed by the SRBA Court for fish propagation water rights.

Example 2: 36-07210

Blue Lakes filed its claim under 36-07210 claiming 45 cfs from Alpheus Creek for fish propagation with a priority date of November 17, 1971, based on a license. The Director recommended the claim as filed, but under remarks, the Director included the same language as before -- facility volume 10.66 af. The Director described the non-irrigation uses: "fish/49 ponds, 38 hatchery tanks."

Example 3: 36-07427

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2 It should be noted here that some of the licensed rights contained a facility volume remark in the actual license which was issued by IDWR and the license holder did not object to its inclusion. For others, the licenses were issued with no such remark.

Under 36-07427, Blue Lakes claimed 52.23 cfs from Alpheus Creek for fish propagation with a priority date of December 28, 1973, based on a license. Again, the Director recommended the claim as filed, but with the remark – facility volume 3.67 af. The Director described the non-irrigation uses: "fish/commercial fish facility, 10 ponds @ 20' X 200' X 4'." The Director also included under remarks: "A measuring device of a type approved by IDWR shall be maintained as part of the diverting works."

Example 4: 36-07720

Under 36-07720, Blue Lakes claimed 37.1 cfs from waste water for fish propagation with a priority date of June 8, 1977, based on a license. Unlike before, in the remarks section of the *claim*, Blue Lakes stated: "facility volume = 1.5 af, water used under this license if discharged into a natural channel shall meet Idaho water quality standards." The Director recommended the claim as filed, but with facility volume 1.16 af. The Director described the non-irrigation uses: "fish propagation/10 ponds @ 14' x 120' x 3'." Under remarks, the Director also stated: "Return flow if discharged to a surface water system shall meet Idaho water quality standards."

THE STANDARD OF REVIEW

A. Statutory Construction

As noted earlier, IDWR included a facility volume limitation on these rights based upon the assertion that it was necessary to define elements of the rights or as necessary to define or administer the right pursuant to I.C. § 42-1411(2) and, as such, the interpretation of I.C. § 42-1411 is a question of law. Statutory interpretation begins with the words of the statute, giving the language of the statute plain, obvious, and rational meaning. If statutory language is clear and unambiguous, a court applies the statute without engaging in any statutory construction. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). Further, I.C. § 73-113 provides that "[w]ords and phrases are construed according to the context and the approved usage of the language." If it is necessary for the court to construe a statute, then it will attempt to ascertain legislative intent. 130 Idaho at 733. "In construing a statute, the court may

examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute." *Id.*

A basic rule of statutory construction is that the application of a statute is an aid to construction, especially where the public relies on that application over a long period of time. *Id.* at 733. Where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time, it will be regarded as important in arriving at the proper construction of a statute. *Id.* at 734.

The Idaho Supreme Court has recently emphasized that it will accord deference to agency construction of a statute when certain conditions are met. An agency's construction of a statute will be given great weight if:

1) the agency has been entrusted with responsibility to administer the statute at issue;

2) the agency's construction of the statute is reasonable;

3) the statutory language at issue does not expressly treat the precise question at issue; and,

4) any of the rationales underlying the rule of deference are present.

Id. at 734.

B. Asserted Elements of a Water Right

Again, as noted above, IDWR concluded that a facility volume limitation was necessary for these rights to define one or more of the elements -- quantity, nature or purpose of use, or place of use; or, in the alternative, necessary to further define or administer these rights (in water parlance, what is commonly referred to as a "remark," as opposed to a more specific and traditional element of a water right such as source or quantity).

With respect to the "remark" section, or I.C. § 42-1411(2)(j), there are three (3) possible statutory components which need to be examined. They are:

1) whether the remark is necessary for definition of the right, or

2) whether the remark is necessary for clarification of any element of a right, or

3) whether the remark is necessary for the administration of the right by the Director.

The records in these subcases, as the Court understands them, appear to establish the following basic concepts of facility volume as that term is used in these water right claims for fish propagation.

Facility volume appears to be an expression of the size (dimensions) of a given fish facility by stating the maximum existing capacity or water volume of particular fish facility ponds, raceways, settlement basins, and the like, including in some instances also an inventory of the number of ponds, tanks or raceways serviced by a particular water right, **at the point in time** when the Director issued his report for that water right claim.

Exhibit 14 in the Blue Lakes subcases is an Administrator's Memorandum from IDWR dated August 9, 1979. It states in part:

> It is difficult to calculate water needs for fish farming since production is usually based on the amount of water available rather than the amount of land or the size of the facilities.

As such, IDWR has historically admitted that fish production (pounds of fish raised) is, in reality, not dependant on the size of a given facility, rather production is mostly dependant on the flow rate of available water.

Additionally, the record is clear and it is uncontradicted that the particular water users at issue use all available water from its source, not in excess of the limits of their respective licenses or beneficial use claims. The record is equally clear and uncontradicted that the available water from the respective sources fluctuates from time to time, either as a result of naturally occurring climatic conditions or by diversions by other users, or both.

IDWR has as a "rule of thumb" that it will not specify a storage component in a water right if a facility will fill in a day (not greater than 24 hours) given the direct flow rate or if a facility does not hold the same water more than a day. *See Reporter's Transcript, Re: Trial on the Merits in Subcase Nos. 36-2356, 36-7210, 7427 & 7720* (September 4, 1997) at page 105-108. Obviously a bright-line rule is necessary for determining when a storage component is needed to describe a water right because there is potentially some "storage" involved in all water rights, whether describing a reservoir, a fish propagation pond, or the charging of an irrigation system. In all of these facilities at issue, the water is turned over many times each day from the

direct flow right, usually at least twelve (12) times per day. As such, in accordance with the policy of IDWR, none are considered storage rights; i.e., they do not have a storage component.

Lastly, it is universally agreed that these water uses for fish propagation are both beneficial and non-consumptive. There is obviously some water consumed and/or lost by evaporation, but it is so negligible that it cannot be accurately measured, and that is the basis for IDWR considering these uses as non-consumptive.

THE QUANTITY ELEMENT – I.C. § 42-1411(2)(c)

The quantity element, as claimed by the respective claimants in these subcases, was reported out by the Director as claimed. No objections were filed to the quantity element of these Director's Reports. As such, the claimants involved in this Challenge argue that quantity was never at issue and was not tried before the respective Special Masters.

Diversion rate is an instantaneous measurement called cubic feet per second (cfs) and is the legal standard for the measurement of water in this state. I.C. § 42-102. Diversion volume is calculated by the diversion rate (cfs) over a one-year period of time, and it is measured in acre feet per year (afy). When the licenses at issue here were issued, they were licensed for diversion rates with diversion volumes consistent with a full year's use.

IDWR's inclusion of a facility volume remark was, in part, stated by Mr. Tuthill of IDWR, to further define the quantity element, i.e., to add a "third parameter" (cfs, afy and facility volume). I.C. § 42-1411(2)(c) defines the manner in which quantity shall be described as:

> [T]he quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right.

Where statutory language is clear and unambiguous, the court applies the statute without engaging in statutory construction, giving the language its plain, obvious, and rational meaning. 130 Idaho at 733. The statute requires quantity to be measured by rate of diversion or flow in cfs or afy. I.C. § 42-1411(2)(c) does not include facility volume as a prescribed method of measuring quantity. This Court holds that the plain meaning of the statute does not provide for describing or

limiting quantity by facility volume.[3] Nor has it been rationally established that a facility volume remark would assist in further defining the fish propagation right as to quantity because, by definition, it is a non-consumptive use and the water used is not stored; it simply flows through the facility and is discharged at the end of the facility. As such, the quantity element of the right (so long as it is applied to its intended beneficial use and is not wasted) could not be abused so long as the diversion rate did not exceed the allowable cfs, regardless of the number or size of the ponds, raceways, etc. It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the additional ponds or raceways were to actually grow fish in, it would be an increase in facility volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water.

Finally, it bears repeating that production of fish is primarily related to the rate of flow, not the size of the facility.

THE NATURE OR PURPOSE OF USE ELEMENT – I.C. § 42-1411(2)(f)

IDWR asserted that the nature of use element has been used in the past as a reason and part of its rationale to include a facility volume remark. The rationale is that IDWR would consider an increase in facility volume as being a change in nature of use requiring a transfer under I.C. § 42-222. A change in facility volume is clearly not the type of change contemplated under I.C. § 42-222. A change in nature or purpose of use occurs when, for example, a user changes from an irrigation use to a domestic or manufacturing use, etc. Going from a fish

3 As discussed below, a facility volume limitation is not really a limitation of quantity, rather it is a limitation on

propagation use to an increased or different fish propagation use is not a change in nature of use contemplated under I.C. § 42-222 and does not support the rationale.

It is inconceivable that a farmer changing a crop from pasture to alfalfa on a licensed place of use would constitute a change in the nature of use. Likewise inconceivable would be the notion that changing seed varieties of the same crop in an effort to increase production would be a change in the nature or purpose of use.

Finally, as Special Master Bilyeu noted, "the plain meaning of 'purpose of use' in I.C. § 42-1411(2)(f) requires water rights be described by broad category of use such as mining, domestic, or irrigation, and does not require minute details of operation such as number of ditches, sprinklers, or facility volume limitations." *Special Master Report*, 36-07071, page 5, May 19, 1998.

THE PLACE OF USE ELEMENT – I.C. § 42-1411(2)(h)

IDWR also asserted that it included a facility volume remark to further define the place of use. I.C. § 42-1411(2)(h) establishes that place of use shall be described by:

> [A] legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code.

I.C. § 42-1411(2)(h) does not include facility volume as a prescribed method of describing the place of use. This Court holds that the plain meaning of the statute requires a standard legal description for the place of use, not a facility volume limitation. Furthermore, an examination of the respective Director's Reports reveals that IDWR describes the place of use by legal description and not by a description of the fish facility.

Again, the non-consumptive use of water by fish propagators in the water claims before the Court needs to be kept in mind. Fish propagation rights are unlike water rights for irrigation which are limited by acres, which is because irrigation rights are clearly a consumptive use. If an irrigator irrigates more/additional acres, then by definition more water will be consumed because more acres are irrigated, and less will be available in the overall water system.

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the utility of the water given the quantity element of the right.

A domestic user, whose use is considered to be *de minimis*, and hence essentially non-consumptive, who constructs an addition to his house, is not considered to have changed the place of use. Likewise, a fish propagator using five connected raceways instead of four could not rationally be considered to have changed the place of use.

"REMARKS" – OTHER MATTERS NECESSARY TO DEFINE OR ADMINISTER – I.C. § 42-1411(2)(j)

I.C. § 42-1411(2)(j) provides for the inclusion of "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." IDWR also asserted that it included facility volume as a "matter necessary to define or administer." As stated under the Standard of Review above, the query is whether a facility volume limitation is necessary to define a water right, to clarify an element, or to administer this right. Keeping in mind, as discussed above, facility volume does not define or clarify quantity, nature or purpose of use, or place of use, therefore, the first two factors, define or clarify, have been answered. Therefore, the necessity of the facility volume remark for administration is addressed.

A. Water Quality

IDWR asserts that a facility volume remark is necessary for administration of water quality.

There are at least three significant reasons why IDWR's position on quality is wrong.

First, there is no showing that facility volume is rationally related to water quality; i.e., there is no nexus between the two. From the record, it clearly appears that water quality is primarily a function of the fish husbandry practices employed, not the physical size of the facility. Therefore, to be legally necessary there would have to be this nexus.

Second, IDWR's duty with respect to water quality was outlined by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). In that case, the Supreme Court held that the primary function of "policing water quality" rests with the Department of Health and Welfare [now DEQ and EPA], not with IDWR. *Id.* at 341. The Supreme Court held that "Water Resources should condition the issuance of a permit on a showing by the applicant that a

proposed facility will meet the mandatory water quality standards." *Id.* However, once the facility is complete, "later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare." *Id.* In these subcases before the Court, the water rights are not in the permit stage. All the water rights have ripened into licenses, or were beneficial use claims. Since the water rights have vested and the structures are complete, it is not the current function of IDWR to police water quality. Water quality is policed by DEQ and EPA. As such, if there were to be a legitimate remark in either a permit or a license relative to water quality, it would not be directed to the existing size of the facility, but rather would be directed that the facility, regardless of its size, would be managed to meet required water quality standards.

The third reason is that water quality is a question of fact. In *Randall v. Northfork Placers*, 60 Idaho 305, 91 P.2d 368 (1939), the Idaho Supreme Court considered an action for damages to a downstream user's lands and irrigation ditches alleged to have been caused by mud and silt being deposited into the Northfork River by an upstream mining operation, which deposits then washed downstream into the irrigation ditches.

The Supreme Court stated:

> Numerous authorities announce the doctrine that while a proper use of the water of a stream for mining purposes necessarily contaminates it to some extent, such contamination or deterioration of the quality of the water cannot be carried to such a degree as to inflict substantial injury upon another user of the water of said stream. (citations omitted). We believe the rule stated in *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 Pac. 465; Id.; 230 U.S. 46, 33 Sup. Ct. 1004, 57 L. ed. 1384, is controlling in this case, namely:
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> "We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, *or even some degree of interference, so long as such do no substantial damage.*" (emphasis theirs).
>
> "**What deterioration in quality would injuriously affect the water for irrigation, and whether or not the deterioration to which the defendant company subjected the waters in question injured the land of the plaintiff, were matters of fact;**". (citation omitted).
>
> The author of *Hill v. Standard Mining Co., supra*, closes his dissertation with reference to the sufficiency of the complaint therein referring to Lindly on Mines and Cooley on Torts, as follows:

> "The right to the use of a stream for depositing debris from mines is discussed in section 840, volume 2, of Lindly on Mines. Many cases from the various states of the Union are cited and discussed by the author. He closes his text as follows: 'No **positive rule of law can be laid down to define and regulate such use with entire precision. As to this, all courts agree. It is a question of fact to be determined by the jury.**' This conclusion certainly seems reasonable and logical.

Id. at 311, 312 and 313 (bold emphasis added).

The same reasoning applies to the fish propagator's use of water which is returned to the stream. Questions of excessive pollution in a water source are questions of fact to be made on a case-by-case basis, at least for the use of water for fish propagation. As such, a "one size fits all" rule in the form of a facility volume remark is wholly inapplicable. All of the evidence is to the effect that the size of the facility has no demonstrable effect on water quality. How an individual facility is managed or mismanaged clearly does impact water quality and a facility volume remark adds nothing.

B. Local Public Interest

In *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995), the Idaho Supreme Court held that the public trust is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants. Thus, the SRBA lacks jurisdiction to consider the public trust in the adjudication of these claims.

Pursuant to *Matter of Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 636 P.2d 745 (1981), specifically dealing with statutory local public interest, the Supreme Court held that the public interest could not be considered with respect to rights which had vested. All of the claims here have vested into licenses and/or are beneficial use claims. They are not applications to appropriate water or a permit, and this is not a transfer proceeding under I.C. § 42-222. As such, facility volume remarks cannot be considered under the local public interest.

C. Mitigation

It is essentially undisputed that until 1997, IDWR's stated purpose for including a facility volume remark was to regulate water quality. However, since 1997 IDWR has asserted that a

facility volume remark helps to "define the extent of beneficial use" for purposes of mitigation[4] in time of water shortage. In other words, if a senior fish propagator made a water delivery call on junior water users, the junior users could offer mitigation in the form of money instead of ceasing their use of the called water. However, while mitigation may be voluntarily exercised between private parties, IDWR freely admits it cannot compel a senior user to accept mitigation in the event of a water delivery call. The right of senior water right holders to have water delivered "first in time, first in right" is constitutionally protected. Idaho Constitution, Art. VX. § 3. Therefore, since IDWR has no authority to compel mitigation, this cannot serve as a legal basis for the inclusion of a facility volume remark.

Licenses Issued With and Licenses Issued Without the Facility Volume Remark

As stated earlier in this Decision, some of the water rights licenses were issued with a facility volume remark which was not challenged by the license holder at the time. Other licenses were issued without the facility volume remark and the remark appeared for the very first time in the Director's Report for the respective claimed right.

In his July 31, 1998, *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)*, then Special Master Haemmerle ruled as follows:

> F. THE LICENSES
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> As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director's Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.
>
> The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right." I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the "state" as the word is used in I.C. § 42-220 [footnote 3 cited]. As between the two statutes, there is a conflict only when a remark redefines the use

4 *See generally, Rules For Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, *et seq.*.

of a licensed water right. Under these circumstances, the question is which statute controls.

The inquiry involves principles of statutory construction. "It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute." *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409, 416 (1997). "[T]o the extent that two statutes conflict, the more specific governs over the more general." *Id.* Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state [footnote 4 cited].

[footnote 2] *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court held that "[n]owhere in Title 42 is the Director 'obligated to accept a prior decree' issued in a private adjudication 'as being conclusive proof of the nature of a water right.'" *Id.* at 414. Unlike prior decrees, Title 42 does require the state to accept license as conclusive proof of a user's right to use water as stated in the license. I.C. § 42-220.

[footnote 3] For purposes of the adjudication of water right under Title 42, Chapter 14, Idaho Code, IDWR has been separated from other state agencies. I.C. § 42-1401B. Under the adjudication statutes, however, the Director's role is to report "claims to water rights acquired under state law." I.C. § 42-1401B. Here, the licenses were acquired and perfected under state law. These licenses are binding on the state and constitute *prima facie* evidence of the water right and should be reported accordingly. I.C. § 42-220.

[footnote 4] There are exceptions to the finality of a license in that the use of a license may change subjecting the license to claims of abandonment, forfeiture, adverse possession, estoppel, or waste. Also, a license is subject to review in a transfer proceeding. I.C. § 42-222.

Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license. A similar issue was addressed by the Idaho Supreme Court in *In Re SRBA Case No. 39576* (Basin-Wide Issue 5B), __ Idaho __, 951 P.2d 943 (1998). In that case, the issue was whether the court was required to decree certain general provisions contained in a prior decree. Addressing the legitimate and potential need for general provisions, the Court stated: "Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property." *Id.* at 4 (citations omitted). Remarks are much like general provisions. Both may be used to further define a water right. I.C. §§ 42-1411(2)(k) and 42-1411(3). Like a prior decree, any attempt to redefine a license would be "tantamount" to altering a real property right. In this case, IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220. The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred.*

Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). In this case, Claimant did not appeal the remarks addressing facility volume for water rights 36-07201, 36-07218, and 36-07568. Therefore, Claimant is bound by the licenses for these rights.

In evaluating the licenses where facility volume was included when the licenses were issued, the court notes that there is no express provision in the licenses indicating the relevance of the remarks. As previously indicated, the court cannot find any rational reason why the remarks exist. When confronted with an ambiguous element contained in a prior decree or license, the court may clarify the ambiguous element or provision. I.C. § 42-1427(b). Therefore, to clarify this ambiguity, the court will recommend that facility volume be included for water right numbers 36-07201, 36-07218, and 36-07568 with the following additional language: "The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume."

For these reasons, the licenses at issue are final and binding on both the Claimant and IDWR.

[footnote 5] The court expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a license in the SRBA. That issue is not before the court.

As to those licenses which contained a facility volume remark when issued, Special Master Haemmerle held that the remark must remain in the license, but it is ambiguous, and because it was ambiguous the Court could clarify the remark. I.C. § 42-1427(1)(b). The clarifying remark was to be:

> The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume.

This Court agrees with the Special Master that the remark must remain in the license but can be clarified for the following reasons. First, by adopting this recommended language it confirms that the "claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right" I.C. § 42-1427(1)(b). The supporting reasons again need to be restated here.

1. The use of water for fish propagation is a non-consumptive use.
2. There is no storage component; regardless of the size of the facility, the water just continuously flows through and is "turned over" at lease twelve (12) different times each day.
3. The user continuously uses all available water up to the limit of his right; water flows primarily affect production, not the size of the facility.

In other words, it would be like having a water right for 100 cfs flowing out of a spring in the Snake River Canyon wall which then flows into a large pipe, flows the length of the pipe, and then discharges off the user's property. Does it make a difference if the user increases the length of the pipe from 200 feet to 400 feet? Or if a hydropower plant with one generator were able to place two generators in the stream instead of one?

The court cannot limit "the extent of beneficial use of the water right" in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right. In fact, the stronger argument is presented in *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 208; 252 P.865 (1926):

> It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it. What constitutes a reasonable use of water is a question of fact, and depends upon the circumstances of each case. No person is entitled to use more water than good husbandry requires.

In other words, because the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these circumstances can economically produce 200 pounds of fish versus 100, there is no legitimate policy in water law for not allowing this to occur.

CONCLUSION AS TO FACILITY VOLUME

Each of the respective Special Masters determined that the Claimants have met their burden in establishing that facility volume is not necessary as a traditional element of a water right, I.C. § 42-1411(2)(a)(b), or as a remark for the definition of the right, for clarification of any element of a right, or for administration of the right by the Director, I.C. § 42-1411(a)(j). Each of the Special Masters has cited to various portions of the evidence produced in their respective trials/hearings. Each has used their own factual and legal basis for their respective conclusions that facility volume remarks should not be included.

This Court adopts each of the respective Special Master's Reports and Recommendations including the underlying findings of fact and conclusions of law upon which they are based. There is no basis to find that their respective findings of fact are clearly erroneous or that their respective conclusions of law are not correct.

V.

"ADDITIONAL EVIDENCE" ISSUE

THE ISSUE

NSGWD sought to have the respective Special Masters consider additional evidence in the form of testimony and affidavits in support of its *motion to alter or amend* filed in the various subcases. Each of the respective Special Masters refused to consider additional evidence. Two of the Special Masters ruled that I.R.C.P. 59(e) governed motions to alter or amend Special Master's Reports. Another Special Master reviewed the motion under I.R.C.P. 53(e)(2) and also applied the "good cause" standard contained in I.R.C.P. 55(c). As noted above, the consolidated issue is stated in the Challenge to be:

> 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), I.R.C.P. which applies to special master's reports?

STANDARDS OF REVIEW

Regarding I.R.C.P. 53(e)(2), Administrative Order 1 (AO1) § 13(f) provides:

> The court shall accept the Special Master's findings of fact unless clearly erroneous. The court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions. I.R.C.P. 53(e)(2).

I.R.C.P. 53(e)(2) provides:

> 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 the 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 reject it in whole or in part or may receive further evidence or may recommit it with instructions.

In *Seccombe v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989), the Court of Appeals stated:

> The appointment of a master does not displace the district court's role as the ultimate trier of fact. Under I.R.C.P. 53(e)(2), the district court is mandated to accept the master's findings of fact unless clearly erroneous; consequently, the trial court must independently review the evidence to determine whether the findings were supported by substantial evidence. The master's conclusions of law, however, carry no weight with the trial court. Therefore, Rule 53(e)(2) permits the court to adopt the master's report, modify it, supplement it with further evidence, recommit it to the master with instructions, or reject it in whole or in part.

Id. at 435, 767 P.2d 278.

Regarding I.R.C.P. 59(e):

> A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that has occurred in its proceedings; it therefore provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

Coeur d'Alene Min. Co. v. First Nat'l. Bank of N. Idaho, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)(quoting *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (1982)).

ANALYSIS – MOTION TO ALTER OR AMEND

The issue regarding the appropriate standard for allowing the introduction of additional evidence in conjunction with a motion to alter or amend the findings of fact and conclusions of law of a special master is not one of first impression for this Court. This issue was previously analyzed in detail in *In Re SRBA Subcases 36-00061, 36-00062, and 36-00063, Memorandum Decision and Order on Challenge* (September 27, 1999) *("Memorandum Order")*. NSGWD was also a party to those subcases. In the *Memorandum Order*, this Court discussed the procedural rules and accompanying standards which arguably could apply in the context of a motion to alter or amend a special master's recommendation brought pursuant to AO1 § 13(a). *Memorandum Order at* 20-29. The Court's entire discussion will not be reiterated here. In sum, this Court ruled that the standards of I.R.C.P. 59(e) were instructive in the context of a motion to alter or amend a special masters findings of fact and conclusions of law, but that the Rule did not literally apply because a prior judgment is not entered at the special master stage of the proceeding. *Memorandum Order* at 26-27. This Court also noted that I.R.C.P. 59(e) does not provide a procedure for the introduction of additional evidence. *Id.* Rather, that in accordance with existing precedent, I.R.C.P. 59(e) motions apply to the findings of fact and conclusions of law based on the status of the existing record. *See e.g., Idaho First Nat'l. Bank v. David Steed & Assoc.*, 121 Idaho 356, 361, 825 P.2d 79, 84 (1992) (citing *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990)(trial court lacks jurisdiction to consider new facts in conjunction with a motion to alter or amend pursuant to I.R.C.P. 59(e)). This Court held that I.R.C.P. 52(b) more appropriately applied to the circumstances surrounding AO1 § 13(a), in particular because a motion to alter or amend can be brought pursuant to I.R.C.P. 52(b) prior to the entry of judgment. *Memorandum Order* at 27-28. However, the applicable standard for amending the findings of fact, whether prior to, or post-judgment, is effectively the same. 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. The Rule is not intended to allow parties to advance new legal theories or relitigate the merits of a case. *See Memorandum Order* at 27 (citing *9 Moore's Federal Practice* 52.60 (party may move to amend findings of fact, even if modified or additional findings would effectively reverse the judgment)). A motion to alter or amend findings provides a mechanism for the trial court to correct both errors of fact and law

short of an appeal. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982)(citing *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977)).

This Court, in the *Memorandum Order*, also discussed the four grounds for properly granting a motion to amend findings pursuant to I.R.C.P. 52(b): (1) correction of manifest error; (2) newly discovered evidence; (3) change in law; and (4) supplement or amplify findings. *Id.* at 27 (citing *9 Moore's Federal Practice* 52.60[4][a]-[d]). The two grounds which would arguably apply in the context of the instant subcases are the correction of a manifest error and newly discovered evidence. In regards to considering whether to amend the findings on the basis of a manifest error, the trial court considers only the evidence contained in the record. *9 Moore's Federal Practice* 52.60[4][a]. In regards to a motion to amend based on newly discovered evidence, the movant may not introduce evidence that was available at trial but not proferred. Further, it is improper for a party to move to amend in order to advance new theories based on evidence that was proffered at trial or to reassert arguments already rejected by the court. *Id.* at 52.60[4][b].

Lastly, and of significance, is that the determination of whether to grant or deny a motion to amend findings of fact or a judgment is left to the discretion of the trial court (special master) and is therefore reviewed under a "manifest abuse of discretion standard." *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982). As such, to the extent a special master disallows new evidence in conjunction with a motion to alter or amend brought pursuant to AO1 § 13(a) on the grounds that the proponent is seeking to advance a new legal theory or introduce evidence that was otherwise available at trial, there can be no manifest abuse of discretion. Simply stated, the Rule does not provide a mechanism for advancing new legal theories and/or evidence that was discoverable during the pendency of the action, or to allow a brand new party to the subcase to step forward for the first time and have a new trial.

The proper application and standards of I.R.C.P. 53(e)(2) were also set forth in detail in the Court's *Memorandum Order*. However, since I.R.C.P. 53(e)(2) is specifically directed at the district court (as opposed to a special master), the rule has no application towards establishing a standard or mechanism for the submission of additional evidence at the special master's level of the proceeding absent a directive from the district court. Further, as this Court previously pointed out in its *Memorandum Order*, the district court does not have unfettered discretion to modify the

findings of a special master. *Memorandum Order* at 22-23. Rather, the District Court must accept a special master's findings of fact unless clearly erroneous. *Id.*; A01 § 13(f); I.R.C.P 53(e)(2); *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989).

ANALYSIS – MOTION FOR RECONSIDERATION

Unlike a motion to alter or amend findings, a motion for reconsideration brought pursuant I.R.C.P. 11(a)(2)(B) provides a mechanism for the trial court to consider new or additional facts in support of the motion that bear on the correctness of the interlocutory order. *See Coeur d'Alene Min. Co. v. First Nat'l. Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)(distinguishing applicable standards between I.R.C.P. 59(e) motion to alter or amend and I.R.C.P. 11(a)(2)(B) motion for reconsideration). The burden is on the moving party to bring to the trial court's attention to the new facts. *Id.* In *Coeur d'Alene Min. Co.*, the Idaho Supreme Court in distinguishing a motion to alter or amend from a motion for reconsideration, stated:

> A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Id. (citing *J.I. Case Company v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955)). Although I.R.C.P. 11(a)(2)(B) permits the introduction of additional evidence, that particular procedural rule is not available to a party seeking to participate in a subcase pursuant to AO1 § 13. AO1 § 13(a) provides:

> Any party to the adjudication not already a party to the subcase may file a *Motion to Alter or Amend* within 21 days from the date the ***Special Master's Recommendation*** appears on the Docket Sheet. Any party to the adjudication not already a party to the subcase may respond to a *Motion to Alter or Amend* by filing a *Notice of Participation* which shall set forth the party's name; the water right number; the name, address and telephone number of the attorney; and a short statement of the party's position on the issues presented in the *Motion to Alter or Amend*.

SUMMARY OF THE RESPECTIVE MOTIONS

Although a motion to reconsider is more akin to what NSGWD is seeking from the Court, in accordance with AO1 § 13(a), a party not already a party to a subcase participates in

subsequent proceedings in the subcase by filing, or responding to, a **motion to alter or amend.** The rule does not provide for initiating participation through a different procedural rule, including a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). Since a motion to alter or amend is limited to the record before the court (special master) and does not provide for the introduction of new or additional evidence, a party is limited in that regard. As a related matter, a party cannot subsequently file a motion for reconsideration of a court's ruling on motions brought pursuant to I.R.C.P. 59(e) or 52(b). *See* I.R.C.P. 11(a)(2)(B)(rule does not permit reconsideration of an order entered pursuant to Rules 59(e) and 52(b)). Furthermore, from a practical standpoint, in the context of the SRBA, a procedure allowing new parties to enter a subcase following the recommendation being issued by a special master which permits the new parties to advance new legal theories and evidence in support of those theories would (to put it kindly) result in an inefficient use of judicial resources as well as prejudice to the parties to the subcase by requiring the parties to relitigate their claims or go back to court to defend against issues that were never initially raised.

DUE PROCESS IMPLICATIONS

At oral argument on the Challenge, NSGWD additionally argued that the failure of the respective Special Masters to consider additional or new evidence in conjunction with a motion to alter or amend also raised due process implications. Specifically, NSGWD argued that it would be precluded from getting evidence before the Court of a claimant's actual use of water over a given period of time. The implication being that a claimant has been historically using a lesser quantity of water than the quantity reflected in the claimant's license or prior decree. NSGWD argues that if a special master declines to consider the additional evidence, a special master (and the district court on Challenge) does not have all the relevant evidence necessary to ascertain the truth, but also the net effect is that NSGWD is essentially barred from asserting its legal claim or cause of action based on the proffered evidence (i.e. partial forfeiture or as styled by NSGWD "extent of beneficial use"). Specifically, NSWGD argues it would be forever precluded from raising its legal claim because if the evidence is not admitted by either a special master or at the subsequent direction of the district court, once the partial decree is entered, the claim is barred by principles of *res judicata*. Hence the contention of due process violations.

This due process argument fails for several reasons. First, nothing prevented NSGWD from filing a response to an objection (or an objection) to the Director's Report and becoming involved in the subcase at its inception. This is true even if NSGWD was in agreement with the Director's Report as it had the opportunity to file a response to an objection. Consequently, under any stretch of the imagination NSGWD cannot claim due process violations for any evidence (or cause of action) that was available as of the date of expiration for filing responses to objections to the Director's Report. Further, NSGWD would also have available the option to file a motion to file a late objection based on the discovery of new evidence even after the expiration of the filing date for objections and responses. Simply put, NSGWD could have become timely involved in these subcases and properly raised any related issues before the matter went to trial before the respective Special Masters. NSGWD readily admits, however, that its practice has been to not get involved in the subcase until the special master has issued his or her recommendation; which by orders of reference in these subcases, the evidentiary trial has been held, findings of fact and conclusions of law have been made, and the respective Special Master's Reports and Recommendations have been prepared and filed. In the event NSGWD disagrees with the recommendation, NSGWD then becomes engaged in the subcase via a motion to alter or amend pursuant to AO1 § 13 and then seeks to introduce new or additional evidence and/or raise new legal theories. In one of the consolidated subcases, NSGWD made its strategy readily apparent. NSGWD responded to the Special Master's inquiry as follows (with emphasis):

> **The [Special Master]:** So your strategy is to sit back – although the statute defines time periods to get in the case, you [NSGWD] sit back, wait and see what happens; the case is tried; and then if you get a result you don't like, you ask that it be tried again.
>
> **Ms. Hofstetter: I would say that that's absolutely correct.** I have no – because it's humanly impossible for private parties to get anticipatorily involved in every single subcase that may affect their interests ultimately.

See Reporter's Transcript, Re: Challenge to Recommendations Made by Special Master Fritz Haemmerle in Subcase Nos. 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148, and 36-07568, by North Snake Ground Water District (November 17, 1997) at page 77.

Additionally:

> **The [Special Master]:** So every single right that's recommended is subject to a second trial any time before a final decree in the SRBA is entered?
>
> **Ms. Hofstetter:** Potentially, if warranted if the first trial was not adequate and that's demonstrated, yes. That's a possibility.

Id. at pp. 88-89.

Thus it is clear from the record NSGWD made a conscious determination not to become involved in the various subcases. Consequently, NSGWD's due process arguments relating to any available evidence or cause of action that existed prior to expiration of the date for filing objections are without merit. Further, no due process violations are implicated during the pendency of the special master's proceedings for available evidence or causes of action if NSGWD failed to become involved in the proceeding via a motion to file a late objection or a motion to participate, pursuant to AO1. *See e.g.*, AO1 §10(k)(Motion to Participate).

The crux of NSGWD's argument, however, pertains to the introduction of evidence which did not become relevant, or the raising of new causes of action which did not allegedly become ripe, until after the expiration of the time for filing responses to objections to the Director's Report. This situation arises in the context of a cause of action for partial forfeiture pursuant to I.C. § 42-222(2) and related case law. *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). To place the matter in proper perspective, NSGWD contends that the evidence sought to be introduced in the consolidated cases was probative of the claimant's "extent of beneficial use." However, as noted in the preceding sections of this opinion "extent of beneficial use" is not an element of a water right. Furthermore, the respective Special Masters already conducted hearings on the quantity element. In this Court's view, although being couched in the phrase "extent of beneficial use," NSGWD is really attempting to raise a cause of action for partial forfeiture or abandonment, or in the alternative, to relitigate the quantity issue. By way of explanation, any evidence that a claimant is using less water than the quantity for which the claimant was previously licensed or decreed, by definition must be in support of an action for partial forfeiture (or abandonment). Partial forfeiture, abandonment or adverse possession are the only cognizable legal theories by which a diminishment could be obtained. In *State v. Hagerman Water Users, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court specifically

held 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. *Id.* at 743, 947 P.2d at 416. Rather, that I.C. § 42-222(2) provides for the loss of water rights for failure to apply the water to a beneficial use for the five (5) year prescriptive period. *Id.* The Supreme Court set forth its reasoning as follows:

> To interpret references to "beneficial use" throughout Title 42 as providing the means by which a water right may be statutorily lost or reduced regardless of the length of time the non-application continues would render the five-year period set forth in I.C. § 42-222(2) meaningless and neglect clear direction from the legislature.

Id. (citing *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539, 797 P.2d 1385, 1387 (1990)). Therefore, unless NSGWD is asserting either partial forfeiture or abandonment of a previously licensed right, evidence of "extent of beneficial use," is irrelevant. Secondly, whether labeling the diminished use as "partial forfeiture" or "extent of beneficial use," unless the five year statutory period has elapsed, there is no cause of action and any related evidence would again be irrelevant. Simply put, there is no legal cause of action for an "anticipatory" partial forfeiture. Lastly, NSGWD also argued (again without referring specifically to "partial forfeiture") that due process concerns are also implicated because NSGWD cannot assert "partial forfeiture" as an objection, or later in the course of the proceedings, until the statutory period has actually elapsed. NSGWD argues that this situation would arise in the event that the five year statutory period does not entirely run until after the objection period has elapsed. In this situation, NSGWD argues that it could never assert a cause of action for "partial forfeiture" (a.k.a. "extent of beneficial use") because an objection can not be filed prior to the statutory period having elapsed because no cause of action has yet matured. Thus, if a special master does not allow the admission of evidence pertaining to the partial forfeiture after the statutory period has elapsed, then NSGWD is essentially forever barred from asserting a "partial forfeiture" or "extent of beneficial use" issue which did not actually ripen until after the expiration of the objection period.

This argument fails because it overlooks the effect that the filing of a claim in the SRBA has on the running of the forfeiture statute. A claim to a water right made in the SRBA is essentially akin to a quiet title action. *See e.g., Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931) (pre-adjudication quiet title action for water

right); *Sutton v. Brown*, 91 Idaho 396, 422 P.2d 63 (1966) (quiet title action can necessarily include claim for water right). A notice of claim is a pleading within the SRBA. *Fort Hall Water Users Ass'n v. United States*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995) *reh'g denied* (1996); AO1 § 2(r). The filing of a notice of claim initiates the procedure for making claim to a water right in the SRBA. I.C. § 42-1409. A partial decree with a rule 54(b) certificate is akin to a final judgment for purposes of appealing as a matter of right. I.C. § 42-1412(6); I.R.C.P. 54(b); AO1 §§ 14,15. As a result, a water right claimant's action is pending from the time a claim is filed until a partial decree is entered.

It is a settled legal principle that the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action. In *Smith v. Long*, 76 Idaho 265, 281 P.2d 483 (1955), the Idaho Supreme Court held that: "Defendant's title by adverse possession not having matured at the time this action commenced, plaintiffs are entitled to a decree quieting their title as against the claims of the defendants." *Id.* at 494-95, 76 P.2d at 276-77. In *Yorba v. Anaheim Union Water Co.*, 259 P.2d 2 (1953) the California Supreme Court stated: "[O]rdinarily the filing of an action, either by the person asserting a prescriptive right, or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period and the statute will be tolled while the action is actively pending." *Id.* at 5. *See also* 25 Am. Jur. 2d Easements and Licenses § 69 (suit brought by claimant interrupts prescriptive period); 3 Am. Jur. 2d Adverse Possession § 127 (effect of suit relates back to date of its commencement, and claimant can acquire no additional advantages by remaining in possession during its pendency). Thus, any period supporting a claim for title by adverse possession or prescription must have accrued prior to the claim being filed. This rule applies to the extent the action is being prosecuted or defended by the legal title holder, and in the event the action is abandoned, the statute is not tolled. 3 Am. Jur. 2d Adverse Possession § 130.

Since forfeiture is a species of adverse possession and prescription, it follows that once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree. In *Smith v. Hawkins*, 42 P. 453 (1895), the California Supreme Court, in construing California's then existing water right forfeiture statute, applied by

analogy the same standards for establishing prescriptive title to real property. *Id.* at 454. In *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931), the Idaho Supreme Court, in resolving a water right transfer claim, concurred with the reasoning of the California Supreme Court in *Smith* which applied the standards of prescription and adverse possession to forfeiture. *Id.* at 488 (citing *Smith v. Hawkins*, 42 P. 453 (1895)). Therefore, pursuant to this reasoning, unless a claimant ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right), any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture. That being the case, NSGWD cannot be denied due process protections for attempting to present itself in a case with a hearing on the merits to assert a cause of action (i.e. partial forfeiture) which has not yet matured. Further, and on the contrary, if the cause of action for forfeiture has ripened before the claim is filed, it is incumbent on the person seeking to prosecute the forfeiture to get timely involved, (i.e. file an objection/response to the quantity element).

Finally, even if the forfeiture statute were not tolled during the pendency of the proceeding, the decision whether or not to admit new or additional evidence is discretionary with the trial court or in these subcases, the respective Special Masters. Although a motion pursuant to I.R.C.P. 60(b)(2) (i.e. motion to set aside a judgment based on the newly discovered evidence) does not technically apply in this situation, the standard for granting a Rule 60(b) motion is instructive in explaining the deficiency in the due process argument advanced by NSGWD. For example, the due process argument raised by NSGWD could arise in the context of any garden variety legal proceeding where new evidence giving rise to a new legal cause of action or defense which was not previously asserted is discovered after entry of judgment. Similarly, in that particular situation, if the court denies the Rule 60(b) motion, the movant may also be forever precluded from subsequently raising the new legal claim or defense based on the newly discovered evidence. Despite this consequence, the determination whether to grant a Rule 60(b)(2) motion is still discretionary with the court as opposed to a non-discretionary entitlement. *See Roberts v. Bonneville County*, 125 Idaho 588, 592, 873 P.2d 842 (1994)(trial court did not abuse discretion in denying motion based on newly discovered evidence); *Knight Insurance Inc. v. Knight*, 109 Idaho 56, 58-59, 704 P.2d 960, 962-63 (Ct.App. 1985)(distinguishing between discretionary relief and non-discretionary entitlement to relief pursuant to I.R.C.P. 60(b)); 12 Moore's Federal

Practice § 60.22[1] (except for motion under 60(b)(4), decision as to whether relief should be granted is discretionary)). Consequently, the denial of a Rule 60(b)(2) motion based on the discovery of new evidence does not automatically entitle the movant to have the judgment set aside and a new hearing to present the new evidence. However, if the denial of the motion was considered a denial of due process it would seem that the judgment should be set aside as a matter of course. This is not the case. Rather, the court reviews the evidence in the context of the factors set forth in Rule 60(b)(2) to determine whether or not the evidence should be considered. In sum, since this determination is left to the discretion of the court, the denial of the motion cannot result in a denial of due process.

Next in determining whether the respective Special Masters did in fact abuse discretion in failing to admit and consider the new or additional evidence, the following factors were present. Hearings had already been conducted on the merits, including on the quantity element. NSGWD was not entirely clear as to the legal theory it was advancing in support of a diminishment in quantity. As previously explained, as a matter of law, "extent of beneficial use" by itself is not a viable theory for diminishing a water right. Furthermore, if NSGWD were in fact asserting an "extent of beneficial use" argument then evidence of a prescriptive period is irrelevant, and any evidence offered in support of the "extent of beneficial use" could not be considered "newly discovered" because evidence of the various fish propagating practices was available prior to the commencement of the proceedings. On the other hand, if NSGWD was in fact asserting a claim for partial forfeiture in which a prescriptive period is relevant, the evidence before the respective Special Masters was that the various claimants during the relevant time periods were using all available water such that any reduction in use was based solely on availability in which case partial forfeiture does not result. *See Hodge v. Trail Creek Irrigation Co.*, 78 Idaho 10, 16, 297 P.2d 524, 530 (1956)(holding no forfeiture where non-user is prevented from exercising his right to the water by circumstances over which he has no control). Since partial forfeiture must be proved by clear and convincing evidence, NSGWD's alleged newly discovered evidence would have had no impact on the outcome of the recommendations made by the respective Special Masters. *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982)(clear and convincing proof is required to support a forfeiture). Based on the foregoing, this court cannot find that NSGWD's due process rights were violated.

CONCLUSION AS TO THE "ADDITIONAL EVIDENCE" ISSUE

In conclusion, AO1 § 13(a) provides a mechanism for new parties to enter a subcase following a hearing on the merits and the issuance of the Special Master's Recommendation. A motion to alter or amend under either I.R.C.P. 59(e) or 52(b) does not contemplate the admission of new or additional evidence to advance new legal theories or relitigate the merits of a case. Rather, the tribunal is limited to the existing record. AO1 § 13(a) does not provide for a new party to enter a subcase on a motion for reconsideration (as opposed to a motion to alter or amend). The standards between a motion to alter or amend and a motion for reconsideration are clearly distinguishable. I.R.C.P. 53(e)(2) does not provide a mechanism for a special master to admit new evidence absent a directive from the district court. As such, the respective Special Masters did not err in refusing to admit evidence supporting the advancement of a new legal theory.

Lastly, due process concerns were not implicated because NSGWD could have entered the subcase prior to the hearing on the merits or the cause of action had not ripened by the time the claim was filed. Further any evidence pertaining to an alleged diminishment in quantity following the filing of a claim is irrelevant for establishing a partial forfeiture. Accordingly, the respective Special Masters did not err in refusing to admit NSGWD's evidence pertaining to "extent of beneficial use" subsequent to the hearing on the merits.

IT IS SO ORDERED.

Dated December 29, 1999.

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

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER ON CHALLENGE (CONSOLIDATED ISSUES) OF "FACILITY VOLUME" ISSUE AND "ADDITIONAL EVIDENCE" ISSUE** were mailed on December 29, 1999, with sufficient first-class postage to the following:

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Deputy Clerk of the Court

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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 61-02248B and 61-07189 (Batruel Challenge)
Case No. 39576	MEMORANDUM DECISION AND ORDER ON CHALLENGE
	ORDER OF RECOMMITMENT TO SPECIAL MASTER CUSHMAN

I.
SUMMARY

This matter is before the court on the *Notice of Challenge* filed by Batruel Dairy, Paul Batruel and Mary Batruel (the Batruels) challenging Special Master Cushman's recommendations regarding claim nos. 61-07189 and 61-02248B. For the reasons discussed below, the August 30, 2000, order is reversed and the matter recommitted to the Special Master.

II.
APPEARANCES

Matt Howard on behalf of Batruel Dairy, Paul Batruel and Mary Batruel.

Norm Semanko on behalf of Magic West, Incorporated.

Peter Ampe, Deputy Attorney General, on behalf of the State of Idaho.

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

This Court having heard oral arguments on the challenge on Tuesday, February 20, 2001, with no party seeking additional briefing and the Court having

EXHIBIT 3 tabbies

requested none, the matter is deemed fully submitted for decision on the next business day, or Wednesday, February 21, 2001.

IV.
STANDARD OF REVIEW

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). Nevertheless, 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). While the phrase "clearly erroneous" is not defined in the rule, 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." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

In contrast to the standard of review relative to findings of fact, the conclusions of law stated in a special master's report, while persuasive, are not binding upon a district court. The district court will adopt a special master's conclusions of law only to the extent that those conclusions correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). In other words, the district court exercises free review over conclusions of law made by a special master. *Higley*, 124 Idaho at 534, 861 P.2d at 104.

While Rule 53(e)(2) of the Idaho Rules of Civil Procedure (I.R.C.P.) gives a party fourteen (14) days to serve written objections to a special master's report on all other parties, ***Administrative Order 1*** provides that the "[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." ***AOI***(13)(a).

Where a challenge to a special master's report is filed, the district court must hold a hearing on the issues raised therein (unless the parties waive oral argument and submit the challenge on the briefs). *See Kieffer v. Sears Roebuck & Co.*, 873 F.2d 954, 956 (6th Cir. 1989). After the hearing, 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 the special master] with instructions." I.R.C.P. 53(e)(2).

V.
BRIEF PROCEDURAL AND FACTUAL BACKGROUND

1. Magic West, Inc. (Magic West) filed claims 61-02248B and 61-07189 in the SRBA. The two claims are for combined use at Magic West's potato processing plant in Glenns Ferry, Idaho. Both claims are for groundwater with the same point of diversion.

2. Claim 61-02248B is a licensed right purchased by Magic West in 1974. In 1989, Magic West filed a claim in the SRBA for 61-02248B. The claim was for a priority date of 1939, a diversion rate of 0.40 cubic feet per second (cfs), an irrigation purpose of use, and a period of use from April 1 to November 1. In 1997, Magic West amended its claim to reflect an industrial purpose of use and a year round period of use.

3. Claim 61-07189 is also based on a licensed report. The right was permitted for 0.67 cfs, with no express volume limitation and a period of use of 10.5 months. Proof of beneficial use for 0.67 cfs was submitted to the Idaho Department of Water Resources (IDWR) in 1979. In 1989, Magic West filed in the SRBA a claim for 61-07189, claiming a priority date of 1974, a diversion rate of 0.67 cfs, an industrial purpose of use, and a period of use of August 15 to July 1, or 10.5 months. In 1990, the right was licensed with a diversion rate of 0.67 cfs and an annual diversion volume of 12.9 acre-feet per year (AFY).

4. In 1996, Magic West asserted that the annual diversion volume for license 61-07189 was inaccurate and filed a petition with IDWR seeking to amend the annual diversion volume from 12.9 AFY to 300 AFY to more accurately reflect the annual volume historically diverted. It is not clear from the record whether Magic West sought to correct the season of use in the license. Magic West also filed an application for

permit 61-07724 to obtain any additional water not ultimately allowed under 61-07189. Several parties filed protests to the permit application, which proceeded before IDWR.

5. In 1997, Magic West amended claim 61-07189 to reflect a year-round period of use.

6. In 1999, following administrative proceedings, the Director of IDWR issued an *Amended License* increasing the diversion volume for 61-07189 from 12.9 AFY to 58 AFY. It is not in the record whether Magic West appealed the administrative ruling. The Director also issued a cease and desist order requiring Magic West to limit its annual pumping in accordance with 61-07189 and 61-02248B.

7. On February 12, 1999, IDWR issued *Director's Reports* for 61-07189 and 61-02248B. The *Director's Report* for 61-07189 recommended the increase from 12.9 AFY to 58 AFY. The *Director's Report* for 61-02248B recommend a diversion rate of 0.08 cfs with an annual diversion volume of 8.0 AFY. The Director recommended both rights have periods of use from August 15 to July 1, or 10.5 months. The recommended remark for both rights indicated the same point of diversion but did not include a combined diversion limitation.

8. On June 15, 1999, Magic West filed objections to the Director's recommendations for both 61-07189 and 61-02248B. Magic West asserted in regard to 61-07189 that the quantity should be 423 AFY and the period of use should be year-round. Magic West claimed that the processing plant had used the water year-round since 1986 and, therefore, had changed the period of use pursuant to the accomplished transfer statute, I.C. § 42-1425. In regards to 61-02248B, Magic West also asserted a year-round season of use based upon the same reasoning.

9. In August 1999, IDWR issued permit number 61-07724 to Magic West for year-round use in the amount of 0.67 cfs and 338 AFY. To date, the permitted right has not been claimed in the SRBA. One of the conditions for issuing the permit was that the limit on the maximum rate of diversion and annual pumped volume under Permit 61-07724 when combined with claims 61-07189 and 61-02248B should not exceed 0.67 cfs nor 338 AFY. (In other words, using all three rights, Magic West would be able to pump 0.67 cfs year-round—up to a total annual volume of 338 AF—but no more).

10. Following the issuance of permit no. 61-07724, and consistent with the permit, Magic West, the State of Idaho ("the State"), and IDWR executed Standard Form 5s (SF5s), *Stipulated Elements of a Water Right*, and filed those SF5s with the Court prior to the Initial Hearing set for February 17, 2000. Magic West, the State and IDWR agreed in the SF5s that the period of use for claims 61-07189 and 61-02248B had increased to a full year prior to commencement of the SRBA. A ***Special Master's Report*** was issued on February 3, 2000, recommending the rights consistent with the SF5s. Specifically, for claim 61-07189, the Special Master recommended a quantity of use 0.67 cfs and 58.0 AFY; and for 61-02248B, the Special Master recommended a quantity of 0.08 cfs and 8.0 AFY. Per the stipulation contained in the SF5s, the Special Master recommended a year-round period of use for both claims.

11. On March 27, 2000, Mary Batruel, Paul Batruel, and Batruel Dairy ("the Batruels") filed a *Motion to Alter or Amend* with the Special Master. Prior to the filing of their *Motion*, the Batruels had not filed an objection, response, or in any way moved or acted to participate in either subcase.

12. On August 30, 2000, the Special Master issued an ***Order Denying Motion to Alter or Amend and Correcting Clerical Mistake Contained in the Special Master's Recommendation.***

13. On September 11, 2000, the Batruels filed a *Notice of Challenge* with this court. The Batruels' *Opening Brief re: Challenge to Special Master's Recommendation* was lodged with the court on November 13, 2000. The State and Magic West submitted responsive briefs on December 8, 2000.

14. Oral argument was held before this Court on February 20, 2001.

VI.
ISSUES PRESENTED

In their *Notice of Challenge*, the Batruels set forth the following issues:

1. Whether the Special Master erred in recommending the quantity element of an unclaimed permit (61-07724) under the quantity remarks for water rights 61-02248B and 61-07189, which resulted in an increase of the total combined diversion volume from 66 acre-feet-per-year (AFY) to 338 AFY?

2. Whether the recommendation of the quantity element of an unclaimed permit (61-07724) violates constitutional due process protections of notice and a meaningful opportunity to object to the quantity allowed by the permit?

3. Whether the recommendation of the quantity element of an unclaimed permit (61-07724) violates the statutory procedures set forth in Chapter 14, Title 42, Idaho Code, which require, at a minimum, that the permit be subject to the claim, director's report, and objection processes before being decreed in the SRBA?

4. Whether the Special Master erred in concluding that the remark, which included a recommendation of the quantity element of unclaimed permit no. 61-07724, was necessary and clarifying?

5. Whether the Special Master erred by failing to include language expressly mandated by Idaho Code § 42-1421(3) to be inserted into decrees for "any claimed water right for which proof of beneficial use has not been filed" (i.e., a permit), and failing to include additional clarifying language set forth in the Batruels' *Comments Re: Motion to Alter or Amend* dated May 18, 2000?

6. Whether the Special Master erred in recommending a year-round season of use for water right no. 61-07189 based on Idaho Code § 42-1425.

At the February 20, 2001, hearing, the issue was also raised as to due process in regard to the stipulation between the parties: that is, whether the Batruels' right to notice and due process was violated by the State and Magic West stipulating to a year-round season of use when the *Director's Report* recommended only a 10 ½ month season of use.

These issues are addressed below as the "increased diversion volume" issue and the "season of use" issue. The Court will first take up the issue of the season of use.

VII.
DECISION

A. Season of Use.

1. The Special Master Did Not Err in Accepting the Stipulation as to the Season of Use.

The Batruels argue that the special master erred in recommending a year-round season of use for water right no. 61-07189. Specifically, the Batruels contend that the period of use for 61-07189 cannot be enlarged by application of the accomplished transfer statute, Idaho Code § 42-1425, because the period of use was not year-round prior to the initiation of the SRBA. To support their claim, the Batruels point to the *Notice of Claim* filed by Magic West on October 3, 1989, indicating that claim no. 61-07189 only had a season of use of 10.5 months. The Batruels argue that the original *Notice of Claim* acts as a judicial admission.

a. The season of use set forth in the original claim does not act as a judicial admission.

The question of whether a statement constitutes a judicial admission is a matter of law. *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Ct. App. 1997). "A judicial admission is a formal act or statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." *Id.* (citations omitted). In order to constitute a judicial admission, a statement by a party must be (1) clear, (2) deliberate, (3) unequivocal, and (4) about a concrete fact within that party's knowledge. *Id.* at 619. A statement in a pleading may act as a judicial admission. *See, e.g., McLean v. City of Spirit Lake*, 91 Idaho 779, 430 P.2d 670 (1967) (holding that answer by defendant stating that it had received notice of suit as required by statute was judicial admission by which the city was bound); *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 930 P.2d 1361 (Ct. App. 1997) (holding in action regarding a salary dispute that the plaintiff's allegation in complaint that he had been paid a certain amount as evidenced by defendant's tax record was a binding judicial admission despite evidence that the tax record was fraudulently prepared). A notice of claim is akin to a pleading—it is the mechanism by which a party

brings a claim in the SRBA, I.C. § 42-1409, and may be amended. I.C. § 42-1409A. *See also Fort Hall Water Users Ass'n v. U.S.*, 129 Idaho 39, 921 P.2d 739 (1996) (stating that notices of claim, objections, and responses comprise pleadings in a water adjudication proceeding).

In this case, it would appear that the 1989 *Notice of Claim* filed by Magic West is a judicial admission because it is a pleading in a judicial action; the statement of the dates of the season of use are clear, deliberate and unequivocal; and the information is clearly a concrete fact within Magic West's knowledge. However, unlike *McLean* and *Strouse v. K-Tek*, the claim here was amended to change the "admission." There are numerous reasons the information in a notice of claim may need to be amended: the claimant may have been mistaken as to the information; the claimant may lack evidence to support a greater claim; the claimant may merely be copying information from an earlier permit or license, but not asserting any changes that have occurred; the claimant may be unaware of his or her rights to assert a greater claim; and so on. Nevertheless, once the claim has been amended, the Court looks to the amended claim, not the original. *See Andrews v. Moore*, 14 Idaho 465, 94 P. 579 (1908) (holding that where a complaint is amended, it takes the place of the original complaint). Having changed the asserted season of use in its amended claim, Magic West is no longer bound by the statement of the season of use in its original claim. Thus, while the information in the original claim may be evidence, it does not constitute a judicial admission.

b. The Special Master did not err by accepting the facts stipulated to in the SF5.

This Court has previously discussed the acceptance of stipulated evidence. *See **Memorandum Decision and Order On Challenge (Gisler)**,* subcase 36-00077D (June 30, 2000); ***Memorandum Decision and Order on Challenge (Morris)***, subcases 36-00061 *et al.* (Sept. 27, 1999). In ***Gisler***, this Court reasoned that it did not have to accept a stipulated fact in all cases, but analogized it to the "uncontradicted testimony rule" of evidence: that the Court must accept the stipulation unless the stipulated facts were inherently improbable or would result in a fraud being perpetrated on the court or others. *Id.* at 13, n. 9. The Special Master in this subcase had before him the original 1989

Notice of Claim in 61-07189 setting forth a 10.5 month season of use, clearly contradicting the *Amended Notice of Claim* and the facts stipulated to in the SF5. As the fact-finder, it was the Special Master's prerogative to draw inferences of credibility from the documentary evidence, and his findings of fact based on those inferences will be set-aside only upon a showing that they are clearly erroneous. *See Anderson v. Bessemer City,* 470 U.S. 564, 574 (1985) (under F.R.C.P. 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses); D. CRAIG 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)) (stating that the "clearly erroneous standard" applies to documentary evidence).

After Magic West had received its license for 61-07189, Magic West attempted to correct through an administrative process perceived errors in the annual diversion volume set forth in the license. ***Order Denying Motion to Alter or Amend,*** subcases 61-02248B and 61-07189 (Aug. 30, 2000) at 1. Magic West also filed an amended claim with IDWR on April 4, 1997. Finally, Magic West filed an *Objection* to the *Director's Report* in regard to this matter, claiming an increased volume of water and an increased season of use. *Id.* at 2. It was within the Special Master's discretion to accept a stipulation of fact that the season of use had increased to 12 months prior to the commencement of the SRBA and discount the information in the original *Notice of Claim* for 61-07189. If the Batruels wished to contest the stipulation, they should have done so through a trial before the Special Master. While reasonable minds may differ as to the import of the season of use set forth in the original *Notice of Claim,* it could be concluded that because Magic West amended its claim and sought to increase the season of use contained in the license, that the information in the original *Notice of Claim* was incorrect but the facts stipulated to by the parties was correct. Therefore, this Court finds that the Batruels have failed to show that the Special Master's findings of fact were clearly erroneous. *See Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974). However, as discussed below in section 3, the Court finds that the Special Master's recommendation constitutes an enlargement making I.C. § 42-1425 inapplicable to the facts of this subcase, and requiring the matter be recommitted to the Special Master.

2. The Stipulation Of Facts Did Not Violate The Batruels' Right To Due Process.

At the February 20, 2001, hearing, the issue was raised as to whether the Batruels' due process rights were violated because of a lack of notice of the terms of the SF5. This Court has previously ruled that when a party makes a claim as to an element of a water right, but IDWR makes a different recommendation, a party entering a subcase via a motion to alter or amend does not suffer a lack of notice if the original parties later stipulate to a value greater than IDWR's recommendation but less than or equal to that set forth in the *Notice of Claim*. *See* ***Memorandum Decision and Order On Challenge (Gisler)***, subcase 36-00077D (June 30, 2000); ***Memorandum Decision and Order on Challenge (Morris)***, subcase 36-00061, *et al.* (Sept. 27, 1999). In this subcase, an amended claim had been filed claiming a year-round season of use. The Batruels could have entered the subcase to challenge Magic West's claim, but did not. Although IDWR recommended a different season of use, the Batruels knew or should have known that if Magic West challenged the *Director's Report*, IDWR, the State, and Magic West might compromise and stipulate to a season of use up to and including the claimed year-round season of use. Therefore, the Court finds that the Batruels had sufficient notice of the possible terms of an SF5, and that the Batruels right to due process was not violated. As will be discussed below, there may, however, be due process rights implicated as a result of irregularities in applying Idaho's "amnesty statutes," I.C. §§ 42-1425 and 1426.

3. The Lengthened Season Of Use Was An Enlargement.

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). The district court will adopt a special master's conclusions of law only to the extent that those conclusions correctly state the law. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993).

Idaho Code § 42-1425, the accomplished transfer statute, waives the procedural requirements of I.C. §§ 42-108 and 42-222, where a "change in place of use, point of diversion, nature or purpose of use or period of use of a water right" occurred prior to the commencement of the Snake River Basin Adjudication, provided that no other existing water rights were injured by the change. I.C. § 42-1425(2). "The purpose of I.C. § 42-1425 is to streamline the adjudication process by providing a substitute for the transfer process required by I.C. § 42-222 and to protect existing water uses which were the result of past transfers, regardless of compliance with statutory mandates." *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). It is not applicable to any claim based upon an enlargement of use. I.C. § 42-1425(2)(b).

The mandatory permit requirements of I.C. §§ 42-201 and 42-229 may be waived for enlargements made prior to the commencement of the Snake River Basin Adjudication pursuant to I.C. § 42-1426. However, I.C. § 42-1426 does not permit a modification of the existing water right, but rather "a new water right may be decreed for the enlarged use of the original water right . . . with a priority date as of the date of completion of the enlargement of use." I.C. § 42-1426(2). (Idaho Code § 42-1426 also imposes certain procedural requirements that must be fulfilled prior to a party obtaining a right under that statute).

Although the term "enlargement" is not defined in the § 42-1425, the Idaho Supreme Court in *Fremont-Madison* defined "enlargement" as "any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means." *Fremont-Madison Irr. Dist.*, 129 Idaho at 458, 926 P.2d at 1305. "An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion." *Id.* In other words, a "change" in the period of use under I.C. § 42-1425 contemplates a situation where the season of use is shifted or split, but where the total duration of the period remains the same, whereas an increase in the duration—i.e., a longer season of use—is an enlargement; thus, the necessity to set forth the dates of the season of use with specificity. *See A&B Irrigation Dist. v. Idaho Conservation League,* 131 Idaho 411, 958 P.2d 568 (1997), *vacated in part on reh'g* (1998) (rejecting in opinion on rehearing the use of a

general term—"irrigation season"—to describe the period of use of a water right, but requiring that the period of use be delineated by specific dates).

An increased season of use may enlarge a water right by increasing the volume of water actually diverted, or by increasing the beneficial use by permitting a water-user to engage in that beneficial use over a greater period of time. The reason the latter acts as an enlargement is that:

> [O]ne may make a prior appropriation of a certain quantity of water to be used for a designated period of time, and that another person may make an appropriation of a like quantity from the same source during another period and as to that quantity be a prior appropriator himself. In other words, there is no difference in principle between an appropriation measured by quantity and one measured by time, and so appropriations may be made of the same water by different parties for different periods.

Wells A. Hutchins, *The Idaho Law of Water Rights,* 5 IDAHO L. REV. 1, 41 (Fall 1968). In other words, a water-user that increases his or her season of use takes water that is or could be appropriated by someone else; thus, assuming a party comes within the provisions of the amnesty statutes, the necessity to obtain an additional water right for the enlargement under I.C. § 42-1426, rather than merely altering an existing water right under I.C. § 42-1425.

The facts of this case show that the original season of use for license 61-07189 was from August 15 to July 1, or 10.5 months; and for license 61-02248B, it was from April 1 to November 1, or 7 months. The *Director's Reports* for the respective claims recommended a 10.5-month season of use for both claims. The Special Master found that the season of use had increased to year-round prior to the commencement of the SRBA. The Special Master recommended a year-round season of use for both claims, modifying the claims pursuant to I.C. § 42-1425. However, the longer duration agreed to in the SF5s and contained in the ***Special Master's Report*** is not a "change" of the period, but an enlargement. Accordingly, the Special Master erred in applying I.C. § 42-1425 and recommending a year-round season of use for 61-02248B and 61-07189. Whether Magic West may make use of I.C. § 42-1426 is a matter to be determined upon remand.[1]

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[1] While Magic West has pursued an administrative appeal in regard to the period of use for 61-07189, the use of I.C. § 42-1426 would not constitute an impermissible collateral attack on the underlying license

B. INCREASED DIVERSION VOLUME.

1. Because the Special Master Did Not Decree the Quantity of Permit 61-07724, There Is No Violation of Due Process.

The Batruels have objected to the references in the ***Special Master's Report*** to the total quantity limits of permit 61-07724 when administered together with water rights 61-07189 and 61-02248B. The Batruels claim that those comments by the Special Master constitute a decree of the quantity element of permit 61-07724 in violation of the Batruels' statutory and due process rights and the statutory procedures set forth in Chapter 14, Title 42, Idaho Code, requiring a permit be subject to the claim, director's report, and objection processes before being decreed in the SRBA. The validity of the Batruels' arguments rest, of course, on whether the comments made by the Special Master act as a decree of the quantity elements of permit 61-07724.

Partial decrees may contain "conditions on the exercise of any water right included in any decree, license, or approved transfer application" or "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(i) and (j). The remarks objected to by the Batruels limits the total combined diversion rate and volume of license nos. 61-07189 and 61-02248B when used with permit 61-07724. The remarks are a condition on the exercise of the rights and intended to assist the director to administer the right in accordance with the provisions of permit 61-07724 and the stipulation entered into by Magic West. Because the remarks act to limit the diversion rather than create a right to divert some quantity of water, the remarks do not act as a partial decree of permit 61-07724. Therefore, this Court finds that because permit 61-07724 has not been decreed, the remarks in the ***Special Master's Report*** do not violate the Batruels' statutory or constitutional rights to due process.

2. The Remarks Are Ambiguous.

The Batruels also object to the remarks by the Special Master regarding permit 61-07724 limiting the three claims to a total of 0.67 cfs and 338 AFY, contending that

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because, under I.C. § 42-1426, the claimant obtains a different water right, but does not relitigate the underlying license.

those remarks are not necessary and clarifying, but rather increase confusion. As discussed above, the remarks regarding the limitation on the rate and volume of the diversions under licenses 61-07189 and 61-02248B with permit 61-07724 are conditions as to the exercise of the water rights and can be characterized as remarks necessary to the administration of the rights. *See* I.C. § 42-1411(2)(i) and (j). Certainly some remark is necessary to give notice that the three claims are to be administered together. Nonetheless, the provisions in a partial decree must be set forth with "the certainty required for a decree which will have application in perpetuity." *A&B Irrigation Dist. v. Idaho Conservation League,* 131 Idaho 411, 423, 958 P.2d 568, 580 (1997) *vacated in part on reh'g* (1998). Thus, the issue is whether the remarks are clarifying, or if they create confusion or are otherwise ambiguous.

As discussed above, the Batruels have objected to the remarks containing a quantity element for the combined claims. The remarks do not serve to adjudicate the claim. Nevertheless, by including a specific quantity in the remark, it gives the appearance of a right to the quantity set forth, although Magic Valley may later be awarded a lesser quantity. This is of special concern in this case because the limiting remark is set out in the quantity section of the Special Master's recommendation rather than that section reserved for other provisions necessary for the definition or administration of the water right. Thus, should Magic West eventually be awarded less water in 61-07724 (the 1999 permit) so that the combined diversion volume of the three claims is less than 338 AFY, the limiting remark would be ambiguous.

Finally, the remark serves to limit the water available under the three claims; individually, the three claims add up to more than 338 AFY, 0.67 cfs, but are limited to only that diversion volume and rate. Yet the remarks by the Special Master do not address the allocation of the limitation among the three claims should Magic West sell one or more of the water rights: Is the 1999 permit to wholly bear the limitation, or is the limitation allocated pro rata among the three claims, or is some other allocation appropriate? Failure to determine the allocation is, by itself, cause for confusion and creates an ambiguity.

In sum, the Court finds the remarks to be confusing and ambiguous because they create the appearance of a right to a certain quantity of water and because the limiting remarks do not address the allocation of the limitation among the three claims.

3. The Special Master Did Not Err by Not Including the Additional Clarifying Language Requested by the Batruels.

The final issue raised by the Batruels is a claim that the Special Master erred by failing to include language expressly mandated by Idaho Code § 42-1421(3) to be inserted into decrees for "any claimed water right for which proof of beneficial use has not been filed" (i.e., a permit), and failing to include additional clarifying language set forth in the Batruels' *Comments Re: Motion to Alter or Amend* lodged with this court on May 18, 2000.

Idaho Code Section 42-1421(3) states:

> The district court shall decree any claimed water right for which proof of beneficial use has not been filed, but shall state that the right is conditioned upon completion of the appropriation in accordance with the laws of the state governing the appropriation of water and that the decreed right shall be subject to the terms of the license to appropriate water that is ultimately issued.

The claims before the Court, 61-07189 and 61-02248B, are licenses for which beneficial use has been established. *See Director's Report for Right No. 61-07189* and *Director's Report for Right No. 61-02248B.* Therefore, I.C. § 42-1421(3) is inapplicable to the ***Special Master's Reports*** at issue.

In their *Comments Re: Motion to Alter or Amend*, the Batruels suggest that language similar to that in I.C. § 42-1421(3) be included in the partial decree and that the Court include language "clarifying" that parties are not barred from objecting or contesting the 1999 permit or to eliminate altogether any reference to the 1999 permit.

As pointed out above, I.C. § 42-1421(3) is inapplicable to the licenses at issue here. Some remark is necessary to show that the three claims are to be administered together, but a comment that a party may later object to the quantity given under the 1999 permit is unnecessary to the adjudication or administration of claims 61-07189 and 61-

02248B. Accordingly, it was not error for the Special Master to reject the language proposed by the Batruels.

VII.
CONCLUSION

The Court finds that the Special Master did not err in accepting the stipulation as to the season of use contained in the SF5s, and that the Batruels had sufficient notice that the parties might stipulate to a year-round season of use. The Court finds that the remarks limiting the volume and rate of diversion of licenses 61-07189 and 61-02248B when used in combination with permit 61-07724 are ambiguous, but, because the remarks do not establish a right to divert water, do not act as a decree of a water right. Because the remarks are not a decree of a water right, the Batruels statutory and constitutional rights to due process have not been violated by the inclusions of those remarks in the ***Special Master's Report***. Furthermore, the Court finds that the Special Master was not required to use the special language set forth in I.C. § 42-1421(3) nor the language requested by the Batruels. However, because the Court finds that the Special Master erred in applying the accomplished transfer statute, I.C. § 42-1425, to an enlargement of the season of use of license 61-07189 and 61-02248B, and because of the ambiguous nature of the Special Master's remarks, the matter must be recommitted to Special Master Cushman.

VIII.
ORDER OF RECOMMITMENT TO SPECIAL MASTER CUSHMAN

IT IS HEREBY ORDERED that the subcases at issue are recommitted to Special Master Thomas R. Cushman for further proceedings consistent with this opinion.

DATED: 3-28-01

R. Burdick

ROGER S. BURDICK
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE ORDER OF RECOMMITMENT TO SPECIAL MASTER was mailed on March 28, 2001, with sufficient first-class postage to the following:

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I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on May 07, 2013, with sufficient first-class postage to the following:

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