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Department of Water Resources
Adjudication Bureau

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED 28

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

Case No. 39576

) Subcases: See Exhibit A 30-02045 +

)
) 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contained in this court's prior *Findings of Fact and Conclusions of Law (Facility Volume)* (Feb. 24, 1998) are hereby withdrawn.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 degree in civil engineering. Prior to becoming the Adjudication Chief, Mr. Tuthill was the supervisor with the Western Regional Office of IDWR.

Inaccurate 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).

Inaccurate 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 beneficial 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.

Not
in the
record

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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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. Alfred*, 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.

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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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.

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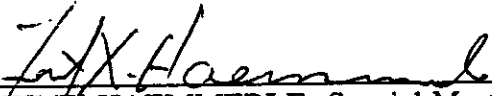
The court expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a license in the SRBA. That issue is not before the court.

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