



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
ALAN G. LANCE

June 6, 2002

Special Master Brigitte Bilyeu
Snake River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
Twin Falls, Idaho 83303-2707

*Re: Supplemental Director's Report for 31-7605, 31-7607, 31-7608, 31-7613
and 31-7616*

Dear Special Master Bilyeu:

As you and I discussed, I have enclosed a Substituted Supplemental Director's Report Regarding Subcase Nos. 31-7605, 31-7607, 31-7608, 31-7613 and 31-7616. This Substituted Report corrects footnote 1 and deletes the first sentence on page 5, which is a repeat of the last sentence on page 4. Footnotes 4 and 5 did not change.

If you have any further questions concerning this matter please call me at (208) 327-5404.

Very Truly Yours,

A handwritten signature in cursive script, reading "Candice M. McHugh".
Candice M. McHugh

cc: Blaine and Connie Larsen
Larry Brown
Natural Resources Division, AGO

**SUBSTITUTED
SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
SUBCASE NOS. 31-7605, 31-7607, 31-7608, 31-7613 and 31-7616**

In Re SRBA
Twin Falls County Civil Case No. 39576
Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
David R. Tuthill Jr., Adjudication Bureau Chief

June 5, 2002

INTRODUCTION

The Director of the Idaho Department of Water Resources (“IDWR” or “the Department”) submits this Supplemental Director’s Report Regarding Subcase Nos. . 31-7605, 31-7607, 31-7608, 31-7613 and 31-7616 in accordance with Idaho Code § 42-1412(4) and Administrative Order 1. This report is submitted in response to Special Master Bilyeu’s *Order Setting subcase Deadlines and Notice of Hearing* dated March 27, 2002 which requests that IDWR submit a Supplemental Director’s Report explaining certain remarks contained in the water right recommendations.

This report was prepared under the supervision of Karl J. Dreher, Director, and David R. Tuthill Jr., Adjudication Bureau Chief for IDWR. The following IDWR employees have knowledge of the information contained in portions of this report: Bill Ondrechen and David R. Tuthill, Jr., Adjudication Bureau Chief.

PROCEDURAL HISTORY

Water right claim numbers 31-7605, 31-7607, 31-7608, 31-7613 and 31-7616 were reported in IDWR’s May, 2001, Director’s Report for Irrigation and Other Water Rights, Reporting Area 8, IDWR Basin 31. On September 7, 2001, the United States Bureau of Land Management filed objections to these water rights stating that a portion of the place of use was on BLM property. After further investigation and negotiation among the parties, settlement was reached on these water rights which added a remark to the place of use element that limited the use of water to the east half of the SENE, S28 T9N, R 36E.

The SF5s were signed by the parties and IDWR concurred with the settlements. On January 17, 2002, the SF5s were filed. On March 27, 2002, Special Master Bilyeu

set a status conference on the SF5s concerning a remark under the quantity element of these water rights as well as a remark under the season of use element of these water rights. The Court requested a Supplemental Director's Report to explain the quantity remark that states that the volume will be limited to a certain acre feet per year "when averaged over a rolling five year period" and to explain the early and late irrigation season language contained on these water rights.

DISCUSSION

This report will first discuss the quantity remark that limits the water rights to a certain volume over a rolling five year period and will then discuss the season of use remark concerning late and early irrigation use.

AVERAGE OVER A ROLLING FIVE YEAR PERIOD

The Department's recommendations of claim numbers 31-7605, 31-7607, 31-7608, 31-7613 and 31-7616 followed an administrative action dated April 28, 1995. The administrative action included applications for new water rights, several transfers of existing water rights and amendments to several approved transfers. The quantity remark in these water rights that refers to an average over a rolling five year period was a result of settlement of this complex administrative proceeding involving multiple parties. This remark was carried over in the SRBA recommendations and is a necessary limitation on the water rights.

There are several uncontested overlapping water rights to these subcases.¹ In December 1994, Blaine Larsen, the owner and claimant of the above listed water rights,

¹ The uncontested overlaps are: 31-7052C, 31-7052N, 31-7214B, 31-7214D, 31-7368A 31-7369E, 31-7369C, 31-7369F, 31-7439B, 31-7606, 31-7609, 31-7610A, 31-7611, 31-7612A, 31-7614, 31-7615A, 31-7617, 31-7618A, 31-7619, 31-7620A, 31-7621A, 31-7622A, 31-7623, 31-7624, 31-7625, 31-7626, 31-

filed a Water Right Application for Permit, an Application to Transfer Water Rights and an Amendment of Water Right Permits involving several water rights.² (“applications”) Several protests were filed to Mr. Larsen’s applications in early 1995.³ Settlement negotiations between Mr. Larsen and the Protestants resulted in the addition of language in several water rights. One of the remarks added as a result of the administrative settlement is the remark that is the subject of this report.

The remark in question is:

*The combined use of rights listed below shall not exceed 7,540 AF per year when averaged over a rolling five year period.*⁴

This remark is specifically referenced in the administrative settlement agreement between the parties which states that the remark means the average over any five year period shall not exceed 7,540 acre-feet per year and thus the total gross pumpage shall

7627A, 31-7628, 31-7629, 31-7630, 31-7631, 31-7632, 31-7633, 31-7634, 31-7636, 31-7637 and 31-7638A

² Mr. Larsen’s application was for Water Rights Application for Permit numbers 31-42, 31-49, 31-50, 31-106, 31-114, 31-247, 31-248, 32-7022, 31-7052, 32-7057, 32-7078, 32-7079, 32-7094, 32-7118, 32-7119, 31-7214, 32-7368, 31-7369, Transfer Numbers 4496, 4497, 4498, 4499, 4500, 4501, 4502, 4503, 4504, 4506, 4507, 4510, 4511, 4512, 4513, 4515, 4517, 4531, 4533, 4534, 4535, 4538, 4539, and Amendment of Water Right Permit Numbers 32-7056, 32-7093, 32-7095, 32-7022 and 31-7439. The subcases of this report relate as follows: Subcases 31-7605 and 31-7606 were part of Permit 32-7022; Subcase 31-7608 was part of Water Right Application for Permit 32-7057; Subcase 31-7613 was part of Permit 32-7095 and Subcase 31-7616 was part of Permit 32-7094: they were renumbered when the water rights changed from Basin 32 to Basin 31.

³ Protestants were: U.S. Fish and Wildlife Service, Idaho Department of Fish & Game, Owlsey Canal Company, Jackett Canal Company, Holley Water Users, Jefferson Irrigation Company, Producers Canal Company, Montevue Canal Company, Independent Water Users of Mud Lake, Inc., and Margaret, David and James F. Hagenbarth.

⁴ An SF5 was filed April 15, 2002 in Subcase number 31-7052P which also includes this remark. Two other subcases also contain this language: 31-7368C and 31-7635A. Several uncontested overlapping water rights also contain a remark which refers to a rolling five year period: 31-7052C, 31-7052N, 31-7214B, 31-7214D, 31-7368A, 31-7369C, 31-7369E, 31-7369F, 31-7606, 31-7609, 31-7610A, 31-7611, 31-7612A, 31-7614, 31-7615A, 31-7617, 31-7618A, 31-7619, 31-7620A, 31-7621A, 31-7622A, 31-7623, 31-7624, 31-7625, 31-7626, 31-7627A, 31-7628, 31-7629, 31-7630, 31-7631, 31-7632, 31-7633, 31-7634, 31-7636, 31-7637, and 31-7638A.

not exceed 37,700 acre-feet of water over any five year period.⁵ The Department representative then memorialized the conditions in a memorandum that set forth the actual text of the remark.

The phrase “rolling five year period” indicates that the average consists of the most recent five years and is not a fixed five year period.

Example:

<i>Year 1</i>	<i>Year 2</i>	<i>Year 3</i>	<i>Year 4</i>	<i>Year 5</i>	<i>Year 6</i>
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When determining the allowable pumpage in a given year, say Year 5, the Department totals the pumped volumes for the previous four years and subtracts that quantity from 37,700 acre-feet, the maximum allowable pumpage over a five year period. That remaining quantity is the maximum annual amount that can be pumped in that year and not violate the constraint that the average pumpage over any five year period not exceed 7,540 acre-feet. The next year, Year 6, the Years 2 through Year 5 are totaled and subtracted from 37,700 acre-feet to determine the allowable volume for Year 6.

Thus, including the phrase “rolling five year period” assures the Department, the former Protestants and the claimant that no consecutive five year period will exceed the combined volume limitation. This limitation was necessary to resolve the protests to the administrative proceeding and thus was carried over in the Department’s recommendations in the SRBA and should be partially decreed with the limitation as it is currently phrased.

⁵ The Remark in Subcase 31-7605 and overlapping subcase 31-7368C and uncontested overlapping water rights 31-7052C, 31-7052N, 31-7214B, 31-7214D, 31-7368A, 31-7369C, 31-7369E, 31-7369F, 31-7619, 31-7624, 31-7626, 31-7628, 31-7629, 31-7630, 31-7631, 31-7632, 31-7633, 31-7634, 31-7636, and 31-7637 limits the volume over the rolling five year period to 7,270.6 acre-feet per year. This limit of 7,270.6 acre-feet per year is an error however, and the limit should be changed to 7,301.3 acre-feet per year when averaged over a rolling five year period. The best process to resolve this error can be discussed at the May 14, 2002 status conference. The annual volume is lower in these water rights due to two administrative transfers that occurred after the settlement was reached. Transfer 5018 and 5029 changed the combination of water rights resulting in a reduction in the maximum volume per year.

EARLY AND LATE SEASON IRRIGATION LANGUAGE

IDWR recommends the licensed season of use for all licensed irrigation water rights. If an irrigation water right has been transferred pursuant to Idaho Code § 42-222, the season of use in the transfer approval is recommended.

If a water right is licensed with an irrigation season of use *shorter* than IDWR's standard season for an area the following remark, in most instances, is placed under the irrigation season of use element on the recommendation:

The use of water for irrigation under this right may begin as early as [standard irrigation start date] and may continue to as late as [standard irrigation end date] provided other elements of the right are not exceeded. The use of water for irrigation before [licensed or decreed irrigation start date] and after [licensed or decreed irrigation end date] under this remark is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date a partial decree is entered for this right.

This remark is not placed on a water right that has a short season of use for a particular reason, i.e. as a result of a contested case hearing involving a protested application for permit or transfer, a settlement of a contested case hearing, a specific finding that the shorter season is necessary, or to prevent interference with other water rights.

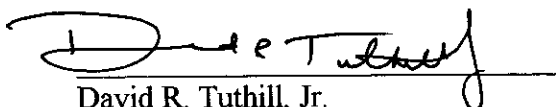
In the case of water right numbers 31-7605, 31-7607, 31-7608, 31-7613 and 31-7616 the above remark was inserted in order to allow these licensed water rights to be used for the longer, standard season of use in the area, which will assist in administration of the water rights for this particular region. These water rights were originally licensed with a season of use of April 15 to October 15. As reflected in the remark, use of water prior to April 15 and after October 15 has a priority date of when the partial decree for these rights is entered, likely sometime in the year 2002.

CONCLUSION

The quantity remark that refers to a rolling five year average provides necessary assurance to the claimant, former protestants and the Department that the annual volume will not exceed 7,450 acre-feet per year over any five year period and specifically will not exceed that annual volume in the most recent five years. This remark was appropriately included in the recommendation for these subcases and was properly carried over in the executed SF5s and should remain in the water rights.

The season of use remark provides for consistent administration of a season of use in an area as explained above, and was properly included in the recommendations and carried over in the executed SF5s for these water rights.

Submitted this 5th day of June, 2002.

A handwritten signature in black ink, appearing to read "David R. Tuthill, Jr.", written over a horizontal line.

David R. Tuthill, Jr.
Adjudication Bureau Chief

CERTIFICATE OF MAILING

I certify that on June 6, 2002 I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
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P. O. Box 2707
Twin Falls, Idaho 83303-2707

2. Copies to:

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Signature of person or attorney mailing the form