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2001 FEB 15 PM 2:49
DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILE

**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	)	SPECIAL MASTER'S REPORT
	)	
Case No. 39576	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	
	)	For Water Rights: 33-07206 and 33-07207

I. PROCEDURAL BACKGROUND

Claims were filed in the SRBA for 33-07206 and 33-07207 by the State of Idaho Water Resource Board. Both claims were licensed prior to being filed in the SRBA. The Idaho Department of Water Resources issued a *Director's Report* recommending both claims. The claimant Idaho Water Resource Board filed timely Objections to the *Director's Report* stating that the instream flow description should have been described as it was on the license for each claim. In March 2000, the Idaho Water Resource Board and IDWR submitted a *Standard Form 5* settlement agreement describing each element of 33-07206 and 33-07207. A hearing was held November 11, 2000.

This *Special Master's Report and Recommendation* analyzes the terms of the settlement. Specifically, the terms "upper reach" and "lower reach" were not defined in the *Standard Form 5* for 33-07206. The place of use element was missing for both water rights. However, *Amended Standard Forms 5* were submitted February 5, 2001, which set forth the place of use element. A letter dated February 8, 2001, clarifies the phrases "upper reach" and "lower reach" for 33-07206. Finally, there was language in the "other purposes" element of both the *Standard Forms 5* and *Amended Standard Forms 5* which may alter this Court's jurisdiction.

II. ANALYSIS OF ELEMENTS

A. 33-07206

The *Standard Form 5* for claim 33-07206 included a description for quantity measured at the "upper end of reach" and a description for a different quantity measured at the "lower end of reach." The *Standard Form 5*, however, did not define the "upper reach" or the "lower reach." At the hearing on November 11, 2000, the Idaho Water Resource Board concurred that an *Amended Standard Form 5* be submitted to define the "upper reach" and the "lower reach."

In addition, the *Standard Form 5* did not include any description for the place of use element. At the hearing on November 11, 2000, the Idaho Water Resource Board concurred that a place of use element is required. The claimant agreed to submit an *Amended Standard Form 5* to include a place of use.

An *Amended Standard Form 5* was filed February 5, 2001. The *Amended Standard Form 5* did not define the "upper reach" or the "lower reach," although the place of use was described. A letter was received from the Idaho Water Resource Board on February 9, 2001, that explained the phrase "upper reach" is synonymous with the phrase "begin of stream flow" under the point of diversion element. The Idaho Water Resource Board stated that unlike water right 33-07207, the instream flow of 33-07206 is not segmented into multiple reaches, but is a single stretch of stream. The Idaho Water Resource Board agreed that the quantity element should contain the following language: "The minimum flow at the beginning instream point of the place of use is 5.5 cfs. The minimum flow at the ending instream flow point of the place of use is 3.0 cfs." As counsel for the Board explains, "this language should make the partial decree internally consistent by using the same language under the Quantity, Point of Diversion and Place of Use elements." This Special Master concurs and adopts the language proposed in the February 9, 2001, letter for the quantity element.

B. 33-07207

Claim 33-07207 included periods of use for a minimum stream flow for an "upper reach" and a "lower reach." The *Standard Form 5* defined the "upper reach" as beginning in T10N, R26E, S33, SESE and running to the point where water from Dry Creek is injected into Wet Creek in T10N, R26E, S36, NESE. The *Standard Form 5* defined the "lower reach" as beginning at the point where water from Dry Creek is injected into Wet Creek in T10N, R26E,

S36, NESE and running to T09N, R27E, S04, SWNE. The *Standard Form 5* did not include any description for the place of use element. At the hearing on November 11, 2000, the Idaho Water Resource Board agreed to describe the place of use in an *Amended Standard Form 5*. An *Amended Standard Form 5* was filed on February 5, 2001, which described the place of use.

III. ANALYSIS OF OTHER PROVISIONS SECTION

The claims, *Standard Forms 5* and *Amended Standard Forms 5* for 33-07206 and 33-07207 included language under the section "other provisions necessary for definition or administration of this water right" which seems to alter the jurisdiction of the SRBA Court and the Director of IDWR:

✓ The Director retains jurisdiction, as described below, to review and amend any and all parameters of this water right. The Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to this water right. The petition must set forth any significant change in circumstances and evidence of the public interest supporting the proposed amendment. The Director will notify the general public and specific persons or known interested parties of the proposed change, and conduct a hearing for the purpose of determining whether the water right should be amended in the public interest. The burden of proof at the hearing shall be upon the persons or parties seeking the amendment to establish that the amendment of this water right would be in the public interest.

Amended Standard Form 5 at 1

A hearing was held on November 11, 2000 regarding whether the proposed language violated the separation of powers doctrine or impermissibly altered jurisdiction of the SRBA District Court. The Idaho Water Resource Board argued that the language merely provides notice that there may be post-decree administrative changes to the determination of "public interest." The Idaho Water Resource Board argued that the proposed language did not violate separation of powers or alter the Court's jurisdiction, but merely advised parties of potential post-decree actions of IDWR. The Idaho Water Resource Board explained that the language was contained in the permit and license of both rights.

The Special Master set a deadline of December 13, 2000, for parties to submit briefs on the legality of the proposed language and to augment the record.¹ The deadline was extended to

¹ The parties were asked to augment the record because neither the permits nor the licenses from which the proposed language originated were of record.

December 22, 2000. The Idaho Water Resource Board did not augment the record and did not provide briefing to the court. IDWR provided a *Supplemental Director's Report* explaining its view of the proposed language and attaching the permits and licenses.

A. IDWR'S STATUTORY AUTHORITY TO APPROVE MINIMUM INSTREAM USES.

Idaho law provides for minimum instream uses in I.C. §§ 42-1501 - 1505. The Idaho Water Resource Board has authority to appropriate minimum stream flows of unappropriated waters of any stream by submitting an application to the Director of the Idaho Department of Water Resources. I.C. § 42-1503. The Director may approve applications for minimum stream flow if the appropriation meets the criteria of I.C. § 42-1503:

- a) It will not interfere with any vested water right permit, or water right application with earlier priority;
- b) It is in the public, as opposed to private, interest;
- c) It is necessary for the preservation of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of the stream;
- d) It is the minimum flow or lake level, not the ideal or most desirable flow or level; and
- e) It is capable of being maintained as evidenced by records of stream flows and water levels and the existing or future establishment of necessary gauging stations and bench marks.

I.C. § 42-1503.

The Idaho Water Resource Board filed applications for minimum stream flows for both 33-07206 and 33-07207. Permits for both 33-07206 and 33-07207 were approved in Final Orders of the Director dated October 1, 1993. *Supplemental Director's Report*, Attachments 2A and 2B, 3A & 3B (Amended Permits). IDWR issued licenses for both 33-07206 and 33-07207 on August 24, 1995. *Supplemental Director's Report*, Attachments 4A and 4B. The licenses include language similar but not identical to the proposed language in the *Standard Forms 5*.

The Director retains jurisdiction, as described (sic) below, to review and amend any and all parameters of this right. The Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to the right. The petition must set forth any significant change in circumstances and evidence of the public interest supporting the proposed amendment. The Director will notify the general public and specific persons or known interested parties of the proposed change, and conduct a hearing for the purpose of determining whether the right

should be amended in the public interest. The burden of proof at the hearing shall be upon the persons or parties seeking the amendment to establish that the amendment of the right would be in the public interest.

Supplemental Director's Report Attachments 4A and 4B.

B. HISTORICAL BACKGROUND OF PROPOSED LANGUAGE

The *Supplemental Director's Report* states that the proposed language was included in minimum stream flow water rights beginning in the early 1980s. The *Supplemental Director's Report* asserts that the former Director of IDWR included the proposed language when approving instream flow rights because he believed that locking these rights in perpetuity would "actually be against the public interest." *Supplemental Director's Report 1-2.*

The intent of the public interest condition was to allow the Water Board to amend its water rights through an administrative proceeding before IDWR, should the public interest with regard to these water rights ever change.

Supplemental Director's Report at 2. According to IDWR, this condition was included under the Director's authority to impose conditions under I.C. § 42-1503.

C. JURISDICTION OF SRBA COURT

The questions at issue are whether the proposed language is necessary to define or administer these water rights, and if so, whether the proposed language impermissibly alters the jurisdiction of the SRBA Court. The Idaho Water Resource Board asserts the language is meant only to provide notice to water users of possible future administrative action of IDWR. The Board says the proposed language is similar to warning water users about administrative transfer proceedings.

It is instructive to compare a warning about transfers to the proposed language.² Language reminding water users that I.C. § 42-222 is the law would seem unnecessary to define any element of a water right or to administer rights. If no transfer were attempted in the future, the language would be irrelevant. If a transfer were attempted in the future, the application of I.C. § 42-222 would not depend on whether the language was included in a decree. Idaho Code § 42-222 sets forth the law on transfers whether or not it is stated in a decree. Similarly, the language proposed here is unnecessary to define any element of these water rights or to administer them. If

² This Special Master is unaware of any language which has been proposed to warn water users about future transfer proceedings that would require an administrative hearing pursuant to I.C. § 42-222.

I.C. §§ 42-1501 - 1505 gives IDWR authority to alter its determination of the public interest, that is the law regardless of whether the proposed language is in the decree. Therefore, if the proposed language merely provides notice of possible administrative action which is lawful under the statute, the proposed language is unnecessary to define or administer these rights.

Another reading of the proposed language is that it goes beyond mere notice of post-administrative actions. The language seems to ask the Court to create a new mechanism for IDWR to periodically review these rights as to its determination of the public interest. State-based minimum instream flow rights are a statutory creation. The statute does not set forth an administrative mechanism for periodic review of the public interest. Since the statute creating this type of right does not provide an extraordinary procedure for periodic review, such a mechanism should be left to the legislative branch empowered to make laws, not the judiciary.

The second question is whether the proposed language impermissibly alters the jurisdiction of the SRBA Court. Normally only a court can alter an order or decree. An administrative agency does not have authority to alter a judicial decree.³ The proposed language "[t]he Director retains jurisdiction, as described below, to review and amend any and all parameters of this water right . . ." goes beyond recognizing the agency's administrative functions and attempts to alter the jurisdiction of the SRBA Court.

The jurisdiction of the SRBA Court was analyzed by the Idaho Supreme Court in *In re SRBA Case No. 39576 (Basin-Wide Issues 2 and 3)*, 128 Idaho 246, 912 P.2d 614 (1995). The Supreme Court held that article V, Section 13 of the Idaho Constitution provides a shared power between the coordinate branches to enact "methods of proceeding" in the district courts. *Id.* at 253. The Court recognized that legislative provisions may provide methods of proceeding only in cases where the Idaho Rules of Civil Procedure have not so provided. *Id.* at 257.

3 In contrast, administrative agencies do have authority to conduct administrative hearings on water rights pertaining to certain post-decree conduct. Transfer proceedings are an example. Such proceedings do not alter judicial decrees, but recognize changes which occur to a usufructuary right after a decree is entered. In addition, the Director has authority to retain jurisdiction of the administrative permitting and licensing processes. This decision in no way limits IDWR's ability to retain jurisdiction of or to amend permits or licenses. The sole focus is IDWR's ability to impose its jurisdiction after judicial decrees are issued.

In the water rights at issue here, the relevant procedure is post-judgment relief. The Idaho Rules of Civil Procedure already provide for post-judgment relief. Idaho Rule of Civil Procedure 60(a) allows for relief from judgments or orders in instances of clerical mistakes that arise from oversight or omission. Idaho Rule of Civil Procedure 60(b) allows for relief from final judgments or orders for mistake, newly discovered evidence, fraud, misrepresentation or other misconduct, when the judgment is void, when the judgment has been satisfied, released or discharged; or for any other reason justifying relief from the operation of the judgment. Since the Idaho Rules of Civil Procedure provide a process for post-judgment relief, it is improper for another branch of government to usurp that process. This Special Master must, therefore, strike that portion of the proposed language which alters the Court's authority over post-judgment relief.

IV. CONCLUSION

The SRBA District Court has authority to include in decrees "those provisions necessary for the executive to administer the rights decreed." *Id.* However, the jurisdictional language proposed in the *Standard Forms 5* and previously included in the permits and licenses for these rights does not define or provide for the efficient administration of water rights. The language attempts to grant IDWR post-decree authority to change elements of a water right. IDWR has statutory authority to make certain administrative determinations after decrees are issued; however, it may not alter jurisdiction of the SRBA District Court.

The Supreme Court has emphasized the importance of maintaining the judicial function in the judicial branch. "The judicial power of this state is specifically conferred by the Idaho Constitution upon the courts, and cannot be constitutionally conferred upon any other department or agency." *Id.* at 259 (emphasis added).

This Special Master follows the Idaho Supreme Court's strong policy regarding the inherent authority of the courts. Therefore, the proposed language is stricken as not necessary to define or administer these rights and as an impermissible usurpation of the Court's authority.

DATED February 15, 2001.


BRIGETTE BILVEU, Special Master
Snake River Basin Adjudication

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)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 33-07207

2001 FEB 15 PM 2:49

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME AND ADDRESS: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
STATEHOUSE
BOISE, ID 83720

SOURCE: WET CREEK TRIBUTARY: LITTLE LOST RIVER

QUANTITY: 15.00 CFS

PRIORITY DATE: 04/20/1992

POINT OF DIVERSION: T09N R27E S04 SWNE (Instream Ending Point) Within Butte County
T10N R26E S33 SESE (Instream Beginning Point)
S36 NESE (Instream Ending Point)
NESE (Instream Beginning Point)

THE UPPER REACH OF THIS MINIMUM STREAM FLOW BEGINS IN T10N,
R26E, S33, AND RUNS TO THE POINT WHERE WATER FROM DRY CREEK IS
INJECTED INTO WET CREEK IN T10N, R26E, S36, NESE; THE LOWER REACH
RUNS FROM THIS POINT TO T09N, R27E, S04 SWNE.

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Minimum Stream Flow	01-01 TO 12-31	10.00 CFS
Minimum Stream Flow	10-01 TO 05-01	4.00 CFS
Minimum Stream Flow	05-02 TO 09-30	15.00 CFS

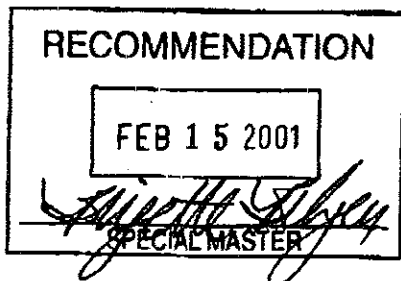
USE OF WATER UNDER THIS RIGHT SHALL BE NON-CONSUMPTIVE
QUANTITY IN THE UPPER REACH IS 10.0 CFS.
QUANTITY IN THE LOWER REACH (10-01 TO 5-01) IS 4.0 CFS.
QUANTITY IN THE LOWER REACH (5-02 TO 9-30) IS 15.0 CFS.

PLACE OF USE:

PLACE OF USE IS WITHING THE REACH BETWEEN THE BEGINNING
INSTREAM POINT AND THE ENDING INSTREAM POINT DESCRIBED FOR THE
POINTS OF DIVERSION FOR THIS RIGHT

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).



SRBA PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 33-07207

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Feb-15-2001

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) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 33-07206

2001 FEB 15 PM 2:49

DISTRICT COURT-SRBA
TWIN FALLS COUNTY
FILED _____

NAME AND ADDRESS: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
STATEHOUSE
BOISE, ID 83720

SOURCE: BADGER CREEK TRIBUTARY: LITTLE LOST RIVER

QUANTITY: 5.50 CFS

THE MINIMUM FLOW AT THE BEGINNING INSTREAM POINT OF THE PLACE OF USE IS 5.50 CFS. THE MINIMUM FLOW AT THE ENDING INSTREAM FLOW POINT OF THE PLACE OF USE IS 3.0 CFS.

PRIORITY DATE: 10/03/1991

POINT OF DIVERSION: T09N R27E S34 NW3/4SE (Instream Ending Point) Within Butte County
R28E S20 NE3/4SW (Instream Beginning Point)

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Minimum Stream Flow	01-01 TO 12-31	5.50 CFS

USE OF WATER UNDER THIS RIGHT SHALL BE NON-CONSUMPTIVE.

PLACE OF USE:

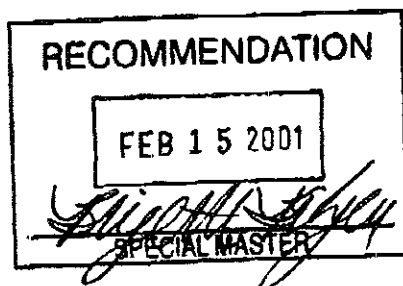
PLACE OF USE IS WITHIN THE REACH BETWEEN THE BEGINNING
INSTREAM POINT AND THE ENDING INSTREAM POINT DESCRIBED FOR THE
POINTS OF DIVERSION FOR THIS RIGHT.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.R.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

SRBA PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 33-07206

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DISTRICT COURT-SRBA
TWIN FALLS CO, IDAHO

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)

CERTIFICATE OF MAILING

Case No. 39576)

Water Right(s): 33-07206

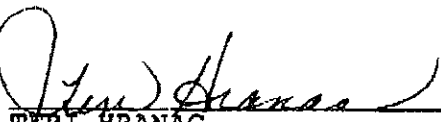
33-07207

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on February 15, 2001, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

IDAHO WATER RESOURCE BOARD
Represented by:
PETER J. AMPE
PO BOX 83720
BOISE, ID 83720-0010
Phone: 208-334-2400


TERI HRANAC
Deputy Clerk

CERTIFICATE OF MAILING

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Department of Water Resources

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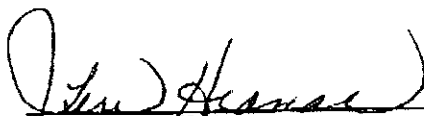
DISTRICT COURT-SRBA
TWIN FALLS, IDAHOIN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLSIn Re SRBA
Case No. 39576NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATIONWater Right(s): 33-07206
33-07207

On February 15, 2001, Special Master BRIGETTE BILYEU issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure 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.

DATED February 15, 2001.


TERI HRANAC
Deputy Clerk

NOTICE OF ISSUANCE

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