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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - JUDICIAL	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
OCT 10 2008	
By _____	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	)	ORDER GRANTING MOTION TO AMEND
	)	OBJECTIONS
	)	
	)	ORDER DENYING REQUESTS FOR COSTS
	)	AND ATTORNEY FEES WITHOUT
Case No. 39576	)	PREJUDICE
	)	
	)	SUBCASE NOS.: EXHIBIT A

I. PROCEDURAL BACKGROUND

These subcases were claimed by multiple parties in Basin 37. In November 2007, the Big Wood Canal Company and Tom O’Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw, and Pepin Corso-Harris (hereafter “Objectors”) filed timely objections to the *Director’s Reports* on purpose of use, arguing that aesthetic, recreation, and wildlife purposes are not authorized uses. The validity of aesthetic, recreation, or wildlife purposes was designated as a Basin-Wide Issue as follows: “**May any person establish diversionary water rights, including to and from storage, for aesthetic, recreational or wildlife purposes?**” See *Order Designating Basin-Wide Issue; Staying Proceedings and Setting Status Conference* (Case No. 00-91014) (July 10, 2008).

Subsequently, Objectors moved to amend the *Objections* to focus on the elements of these subcases rather than the validity of aesthetic, recreation, or wildlife purposes. The Objectors lodged identical proposed *Amended Objections* for each subcase. The proposed *Amended Objections* include check marks under the quantity, priority date, and purpose of use elements. The original *Objections* primarily focused on whether aesthetic, recreational, and

wildlife uses were valid. However, some of the previous *Objections* also focused on individual elements. For example, the original *Objection* for 37-154C contained an objection to the quantity element. A second *Objection* filed in 37-154C by the Objectors contained an objection to priority date and to the existence of the right. For 37-494, the original *Objection* was to quantity and purpose of use. The attached section stated that "the right cannot carry a priority date earlier than the first date that the legislature authorized that beneficial use to be held by a private party."

The Objectors filed proposed *Amended Objections* which are attached to the *Motion to Amend Objection*. The proposed *Amended Objections* appear to be identical. The proposed *Amended Objections* have the boxes checked for quantity, priority date and purpose of use and state the following:

Diversion Rate:

Should be set at the same diversion rate as an irrigation right: one inch per acre for every acre of surface area of the aesthetic, recreation or wildlife use, not to exceed the right from which the aesthetic, recreation or wildlife use is derived, and not to exceed the actual beneficial use. Conveyance loss cannot exceed the original right's conveyance loss.

Volume/Consumptive Use:

Should be limited to the irrigation annual total volume of 3.5 feet per acre, not to exceed the right from which the aesthetic, recreation or wildlife use is derived, and not to exceed the actual beneficial use.

Measurement:

A single measuring device is not sufficient to adequately measure the usage by ponds and other aesthetic streamlets. Flow measuring devices specified by the Department and/or water master should be installed at the point of diversion (from stream/or to storage) and the point of discharge back to the natural stream. The measuring devices should provide a means of measurement and lockable controlling works to provide suitable control of diversion.

Administration:

The water right should be regulated by the water master of State Water District No. 37.

Water Quality:

The water used under said right when discharged back to a natural channel should comply with Idaho Water Quality Standards. The monitoring of the standards should be allowable and conducted by the Idaho Department of Water Resources and/or the Idaho Department of Environmental Quality.

The Claimants argue that the *Amended Objections* should not be allowed. They assert that the *Amended Objections* raise totally new issues and should, thus, be decided under the standard for late objections. The Claimants argue that Objectors willfully failed to raise the *Amended Objections* prior to the deadline, that the amendments lack merit, and that the lateness of the *Amended Objections* would unduly prejudice claimants. Thus, Claimants argue the proposed *Amended Objections* do not satisfy the I.R.C.P. 55(c) standard and should be rejected. The Claimants ask the court for attorney fees and costs.

II. STANDARD OF REVIEW

The Claimants characterize the *Motion to Amend Objections* as a withdrawal of the original *Objections* and a request to file late *Objections*. The Claimants argue that the *Motion* is not an amendment to the original *Objections*, “but instead completely changes the basis for their *Objections* by eliminating the discrete legal argument they first raised and asserting all new grounds for objecting.” Therefore, Claimants request that the *Motion* be viewed as a motion for late objection under I.R.C.P. 55(c).

The Objectors disagree, asserting this is a standard request to amend *Objections*. Objectors assert that the *Amended Objections* are closely related to the original *Objections*. “There are a number of common issues between whether such rights can be recognized as beneficial use for aesthetic, wildlife, or recreation purposes, and if so under what circumstances, and the more narrow question of what circumstances, and in particular how much water diversion to these uses is appropriate, if such use is recognized.” Therefore, Objectors urge the court to decide the *Motion* under I.R.C.P. 15(a).

This is a *Motion to Amend Objections*. It does not appear that the Objectors are pursuing entirely unrelated issues. The original *Objections* were timely, and the proposed *Amended Objections* seek to raise issues which are related to and follow logically from the question of whether aesthetic, recreation, and wildlife are valid purposes. If aesthetic, recreation, and wildlife uses are valid, the next logical question is “what are the elements of those rights?” Accordingly, this Special Master applies the standard for amending pleadings established in I.R.C.P. 15(a).

A court generally considers whether the allegations sought to be added to the pleading state a valid claim. See *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991). A court does not usually consider the sufficiency of evidence supporting the claim when deciding a motion to amend. Consideration of the sufficiency of evidence is more properly determined at the summary judgment stage. *Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 61 P.3d 557 (2002).

III. ANALYSIS

A. Rule 15(a)

Although the court has discretion in allowing amendments, I.R.C.P. 15(a) establishes that "leave shall be freely given when justice so requires." Rule 15(a) establishes a rather lenient standard for amending pleadings.

In these subcases, the original *Objections* raise the threshold question of whether aesthetic, wildlife, and recreation are appropriate beneficial uses for individually held Idaho water rights. The *Amended Objections* assume that the Basin-Wide Issue will determine the validity of these aesthetic, wildlife, and recreation rights. Thus, the proposed *Amended Objections* ask the next questions. If these are valid beneficial uses, how much diversion and volume is appropriate for each right? In addition, which provisions are necessary to define or administer these water rights?

B. Prejudice

The Special Master was asked to consider prejudice to the opposing party in deciding whether it is just to allow these amendments. The Claimants assert that considerable time and effort have been exerted in discovery. They argue that it would be prejudicial to allow amendments to the *Objections* because new discovery would have to be pursued to address the new issues. It should be noted that the current proceedings are in the very early stages. Initial Hearings have not taken place, and no trial dates or other deadlines have been set. Therefore, the court finds no prejudice given the early nature of the proceedings.

C. Claims Asserted

The issues raised in the proposed *Amended Objections* are essentially these:

1. Objection to Quantity/Volume.
 - a. Should the diversion rate be the same as diversion for an irrigation right?
 - b. Should the volume or consumptive use be limited to 3.5 AFY?
 - c. Should measuring devices be required at the points of diversion and points of discharge?
2. Objection to Priority
3. Objection to lack of remark on Water Quality

The Claimants argue that some of the issues raised by the *Amended Objections* lack merit, and they request that those portions of the *Amended Objections* be disallowed.

Claimants oppose allowing *Amended Objections* to volume. They argue that the *Amended Objections* improperly assert those rights should have the same quantity limitations as irrigation rights. Claimants also assert that since consumptive use is no longer an element of a water right, the volume/consumptive use *Objection* should be dismissed. They also oppose *Amended Objections* on the issues of measuring devices and water quality standards. Claimants argue that these issues are meritless.

1. Volume

In ruling on a *Motion to Amend Objection*, the court may consider whether the claims asserted in the *Amended Objections* are valid. Idaho Code § 42-1411(2)(c) establishes quantity and volume as statutory elements of water rights.

(2) The director shall determine the following elements . . .

. . . .

(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;

The proposed *Amended Objections* refer to both annual diversion volume and annual volume of consumptive use. Consumptive use is not currently a statutory element of a water right. However, volume limitations are referred to in the statute. Annual volume diverted (AFY) and annual consumptive use are not the same concepts. Annual volume refers to the total volume of water used in a year. Annual consumptive use is the amount of water not returned to the river or aquifer and, thus, not available to other users. See I.C. § 42-202B. Although consumptive use is not an element, it is sometimes analyzed in administrative transfer proceedings. Accordingly, IDWR sometimes includes a consumptive use limit in its Conditions of Approval for a transfer. The SRBA has generally allowed conditions approved in prior administrative hearings to be recognized in water right decrees. In those circumstances, an *Objection* asserting a consumptive use limit may have a valid basis.

2. Measuring Devices

Claimants argue that *Objections* to the absence of language requiring a measuring device lacks merit. They complain that Objectors have no basis for such a remark as a blanket requirement. The SRBA statutes do not specifically list measuring devices as an element of a water right; however, I.C. § 42-1411(2) does provide for other provisions necessary to define or administer.

(2) The director shall determine . . .

. . . .

(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.

I.C. 42-11(2)(j). IDWR sometimes requires measuring devices as a Condition of Approval for transfers. Furthermore, some *Partial Decrees* in the SRBA have included sections requiring a measuring device. Additionally, IDWR sometimes retains a requirement for a measuring device under its “Explanatory Material” section. The “Explanatory Material” section is not part of the elements of a right, but is maintained in IDWR’s data base. Accordingly, the portion of the *Amended Objections* seeking inclusion of a measuring device remark should not

be stricken. However, the Court recognizes that Objectors should specify the subcases in which they request the measuring device remark.

3. Priority Date

Objectors seek to object to priority stating that the date should be the date of the “enlargement of water right.” Claimants say this objection is without merit because the Objectors have not asserted a basis for suggesting an enlargement has occurred. Claimants also point out the legal hurdles Objectors might face for those rights which are based on licenses or transfers. Neither the Claimants nor the Objectors provided specifics on priority for individual subcases. Therefore, the court is without a sufficient basis to deny the *Amended Objections* on the priority date issue. Since priority is a statutory element of a water right, it is assumed that the parties have a legitimate dispute regarding this element. Accordingly, an objection on priority may state a valid basis.

4. Water Quality

The issue of whether SRBA decrees should include water quality standards is problematic. The SRBA does not generally include water quality as an element in *Partial Decrees*, except where a water quality condition was contained in a prior license or transfer decision. Idaho’s water statutes do not refer to water quality. I.C. § 42-1411(2) sets forth the elements of a state-based water right:

(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 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 the right, or for administration of the right by the director.

I.C. § 42-1411(2). Water quality is not a statutory element of a water right. Additionally, IDWR did not include water quality standards in the *Director's Reports*. The *Amended Objections* seek to add a remark which would impose water quality standards as follows:

The water used under said right when discharged back to a natural channel should comply with Idaho Water Quality Standards. The monitoring of the standards should be allowable and conducted by the Idaho Department of Water Resources and/or the Idaho Department of Environmental Quality.

Proposed *Amended Objection* at 3.

Water quality is generally outside the scope of the elements to be determined in the SRBA. The District Court acknowledged limits to water quality issues in the SRBA in *Order on Challenge (Consolidated Issues) of "Facility Volume Issue and "Additional Evidence" Issue* (Subcase No. 36-02708) (Dec. 29, 1999). In that decision, Presiding Judge Barry Wood recognized IDWR's limited role in policing 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 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." 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.

Id. at 11-12. Finally, Judge Wood noted that whether a water user manages a water right in compliance with water quality standards is very fact specific.

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.

Id. at 13.

It appears that compliance with water quality standards is a prerequisite for a water permit. However, once a water right has vested, IDWR does not police compliance with water quality standards. The Idaho Department of Environment Quality and the Environmental Protection Agency oversee water quality.

It is unclear from the record why Objectors seek to have a water quality remark added to these rights. Applicable state and federal laws generally apply to water rights even if a restatement of the law is absent from a decree. The SRBA Court has generally not embellished *Partial Decrees* with restatements of existing law. See *Memorandum Decision on Cross-Motions for Summary Judgment* (Case No. 91-63) (Sept 2, 2004). However, Judge Melanson has allowed such statements of law in limited instances.

The Court generally views it as unnecessary because parties have the right to rely on the backdrop of existing law for the definition and administration of their water right. The exception is when the application of the existing law is at issue. Without clarification of applicable law, the issues raised here potentially make the decree ambiguous without a clarifying remark. In such cases the Court allows a clarifying remark so as to avoid future controversy.

Id. at 29-30.

In summary, water quality standards are not statutory elements of water rights in Idaho. The SRBA disfavors embellishing *Partial Decrees* with restatements of existing law. If Objectors seek to merely restate the law, it is probably unnecessary to litigate whether to include the proposed remark on water quality. However, Objectors should be allowed to show that a remark is appropriate as a Condition of Approval from a prior transfer. Additionally, Objectors

should be allowed to argue that a remark restating the law is necessary to “avoid future controversy.” Therefore, the court declines to dismiss the proposed objections addressing water quality.

D. Costs and Attorney Fees

Claimants decry Objectors’ decision to put on hold the issue of validity of ARW claims. They argue that this strategy is an admission that the first *Objections* were without merit. They urge the court to find that this position was pursued unreasonably and frivolously. In addition, Claimants assert the *Amended Objections* are meritless. Thus, they ask the court to award attorney fees and costs.

The Court is not convinced that Objectors’ change in focus on purpose of use shows the litigation was pursued unreasonably or without merit. Objectors seem to have merely changed focus in response to the Basin-Wide Issue designation. Furthermore, the *Motion to Amend Objections* appears to try to refine the pleadings.

Although Claimants have engaged in discovery and additional legal work, these subcases are still in the earliest procedural stages. Initial Hearings set by the Court often require a face-to-face meeting between the parties and IDWR. Settlement of *Objections* is always explored at these hearings and is often successful. Where settlement is not reached at the Initial Hearing, the parties usually gain a better understanding of the disagreement and can narrow the issues. Although discovery is not prohibited prior to Initial Hearings, extensive discovery prior to Initial Hearings is unusual in the SRBA.

Furthermore, the parties continue to participate in the Basin-Wide Issue designated by the SRBA Court. That issue involves the validity of aesthetic, recreational, and wildlife purposes. Given the continued participation by these parties in the overarching issue, it is premature to say that the discovery and other legal work were pursued in vain.

Therefore, the request for costs and attorney fees is **denied** without prejudice.

IV. FINDINGS

The court finds that the *Motion to Amend Objections* asserts a valid request to amend the existing *Objections*. Thus, under I.R.C.P. 15(a), “justice requires” that Objectors be allowed to amend their *Objections*. In reaching this conclusion, the court has considered the possibility of prejudice to other parties. Considerable time and effort have been exerted in the

discovery process as it relates to whether aesthetics, wildlife, and recreation purposes are valid. Indeed, a Basin-Wide Issue has been designated. However, these subcases are all at the initial stages, and the court finds no prejudice has occurred to other parties by allowing the *Amended Objections*.

Claimants argue that the *Amended Objections* are without merit, but did not address individual subcases. Claimants point out, however, that the *Amended Objections* do not address the specifics of each case. Instead they are seemingly "one-size-fits-all" because one standard *Amended Objection* was apparently duplicated for every subcase. It was evident at oral argument that Objectors did not intend for every element checked to be at issue for every subcase. Accordingly, the court **grants** the *Motion to Amend Objection* as to the quantity, volume, measuring device, priority, and water quality issues. However, Objectors should prepare new *Amended Objections* which delineate the specific issues raised in each subcase. These shall be filed with the court and served on the parties **by November 21, 2008**. The new *Amended Objections* shall replace and supersede those originally lodged. Notice of filing the new *Amended Objections* shall be reported in the Docket Sheet for December 2008. Responses to the new *Amended Objections* shall be **due December 19, 2008**.

THEREFORE, the *Motions to Amend Objection* are **granted**.

The court declines to award attorney fees at this time.

DATED: October 10, 2008.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

37-00154C 37-19740
37-00415 37-20866
37-00416 37-21124
37-00494 37-21329
37-00495 37-21331
37-00496F 37-21614
37-00509 37-22044
37-00577BV 37-22128
37-00577CH
37-00577CK
37-00657B
37-00685C
37-00713D
37-00833K
37-00863F
37-02418
37-02446
37-02473K
37-02609A
37-02623
37-02627C
37-02632
37-04016
37-04100
37-04130
37-04131
37-04150
37-04184
37-04265
37-04368B
37-04369
37-04440
37-07168
37-07201
37-07296B
37-07493
37-07707
37-07733
37-07792
37-07836
37-07882
37-08119
37-08217
37-08248
37-08249
37-08252
37-08254
37-12130
37-12873
37-14278

(Subcase list: MOTIONAMEN)
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CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO AMEND OBJECTIONS; ORDER DENYING REQUESTS FOR COSTS & FEES was mailed on October 10, 2008, with sufficient first-class postage to the following:

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ORDER

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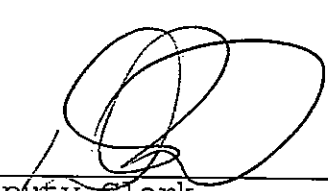
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