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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

OCT 10 2008

By _____
Clark
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

-) Subcase Nos. 37-00496B, 37-00497B,
-) 37-04248, 37-07767, 37-12111, 37-21123,
-) 37-21125, and 37-21468
-)
-) ORDER GRANTING IN PART AND
-) DENYING IN PART MOTIONS TO
-) AMEND OBJECTIONS
-)
-) ORDER REQUESTING AMENDED
-) DIRECTOR'S REPORT FOR WATER
-) RIGHT CLAIM 37-04248
-)
-) ORDER REQUIRING OBJECTORS TO
-) FILE NEW AMENDED OBJECTIONS
-) CONSISTENT WITH THIS DECISION
-)
-) ORDER DENYING REQUESTS FOR
-) COSTS AND ATTORNEY FEES
-) WITHOUT PREJUDICE

I. BACKGROUND

The Motions to Amend Objections.

On November 14, 2007, the Big Wood Canal Company (hereinafter "BWCC"), through its attorney Craig Hobdey, and Tom O'Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bradshaw, Pepin Corso-Harris (hereinafter "Concerned Water Users"), through their attorney Albert P. Barker, (collectively sometimes referred to as "Objectors"), jointly filed objections to the recommendations in the *Director's Report* in each of the above-captioned subcases. The objections filed in each subcase except 37-12111 (Sinclair Oil Corporation) are identical,

with the boxes checked for priority date and that the water right should not exist. Each objection also states:

Under Idaho Code 42-1501, aesthetic, wildlife and recreation are not beneficial uses authorized by the Idaho legislature or Constitution to be held in the name of private entities. If such uses are allowed, 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.

Regarding the objection filed in 37-12111, the Concerned Water Users and the BWCC checked the boxes to object to the elements of quantity, place of use, and that the water right should not exist. The objection filed in 37-12111 states:

Combined use of this right along with other rights from the same place of use should be limited to one inch or 0.02 cfs per acre, rather than the quantities in the recommendation. Total volume of water delivered to this property from all water rights shall not exceed 3.5 AF per acre. Combined use of this right along with other rights from the same place of use should be limited to one inch or 0.02 cfs per acre, rather than the quantities in the recommendation. Total volume of water delivered to this property from all water rights shall not exceed 3.5 AF per acre.

On June 5, 2008, the BWCC and the Concerned Water Users jointly filed a *Motion to Amend Objection* in each subcase. Attached to the *Motion* in each subcase is a proposed amended objection, which again, with the exception of 37-12111, are identical. The proposed amended objection has the boxes checked for Quantity, Priority Date ("Should be: date of enlargement of the right"), and Purpose of Use, together with 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 can not 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.

Regarding the proposed amended objection lodged in 37-12111, the Concerned Water Users and the BWCC checked the boxes to object to the elements of quantity, priority date (Should be: date of enlargement of water right), purpose of use, and place of use. The statement of reasons supporting objection is the same as the other objections, but with the addition of a sentence under the heading of "Volume / Consumptive Use" which states:

Combined use of this right along with other rights from the same place of use should be limited to one inch or 0.02 cfs per acre, rather than the quantities in the recommendation.

In the *Motions to Amend Objections*, the BWCC and the Concerned Water Users state that their interest in objecting to the water rights with purposes of use of aesthetic, wildlife, and recreation is in regard to the reduction of flows on the Big Wood River, springs, and groundwater, rather than an interest in debating the authority of IDWR "to act without legislative or constitutional authorization to permit private parties to hold water rights for private enjoyment of ponds and streamlets." *Motion to Amend Objections* at 2. The BWCC and the Concerned Water Users further state that they "wish to withdraw their objection to the existence of the water right on those grounds and to

amend their objection to object to the quantity of water used in the ponds and other aesthetic, wildlife, or recreational amenities which exceed rates of use of the original water rights and which exceed the beneficial use requirements of the aesthetic, wildlife or recreational use.” *Id.*

Opposition to the Motions.

On July 25, 2008, the claimant of water rights 37-00496B and 37-00497B (Elise G. Lufkin), through her attorney James P. Speck, filed a *Claimant's and Respondents' Opposition to Objectors' Motion to Amend Objection*. On August 25, 2008, Ms. Lufkin filed a *Claimant's and Respondents' Supplemental Opposition to Objectors' Motion to Amend Objection*, together with the *Affidavit of James P. Speck in Support of Claimant's and Respondents' Supplemental Opposition to Objectors' Motion to Amend Objection*.¹

On June 13, 2008, the claimants of water rights 37-04248 (Evergreen Ventures, LLC), 37-07767 (Flying Heart Ranch II Subdivision Owners Assn), 37-21123 (James and Evelyn Phillips), and 37-21125 (Carol and Howard Knight), through their attorney Fritz X. Haemmerle, filed an *Objection to Motion to Amend*. On August 25, 2008, the Flying Heart Ranch II Subdivision Owners Association filed the *Affidavit of Fritz X. Haemmerle in Opposition to Motion to Amend Objections*.

On June 20, 2008, the claimant of water right 37-21468 (CG-Elkhorn Golf LLC), through its attorney Patrick D. Brown, filed an *Objection to Motion to Amend*.

On July 25, 2008, the claimant of water right 37-12111 (Sinclair Oil Corporation), through its attorneys Scott L. Campbell, Tara Martens, and Dylan B. Lawrence, filed a

¹ At the August 26, 2008, hearing, counsel for the Concerned Water Users, Travis Thompson, moved to strike the August 25, 2008, filings of Ms. Lufkin on the grounds that the documents were not filed within the time limits set forth in I.R.C.P. 7(b)(3)(E), which requires that responsive briefs be filed and served so that they are received by the parties at least seven (7) days prior to the hearing. The Concerned Water Users' *Motion to Strike* is denied on the grounds that Mr. Speck's untimely filing did not cause any prejudice to the Concerned Water Users. Pursuant to I.R.E. 201(c), this Special Master hereby takes judicial notice of the file and record in subcases 37-00494, 37-00495, 37-00577BU, 37-00657B, 37-00833K, and 37-02623. In those subcases, which are proceeding before Special Master Bilyeu, and to which the Concerned Water Users are a party, counsel for the claimant, The Valley Club, Inc., made the same arguments now being made by Mr. Speck on behalf of Ms. Lufkin, and the record reflects that Ms. Lufkin joined in the *Motion to Dismiss* filed by The Valley Club, Inc. Accordingly, the Concerned Water Users have not been prejudiced.

Response in Opposition to Motions to Amend Objections. Also filed were the *Affidavit of Scott L. Campbell*, the *Affidavit of Dylan B. Lawrence*, and the *Affidavit of Tara Martens*.

The arguments raised by the various claimants in opposition to the *Motions to Amend Objections* can be briefly summarized as follows. First, the claimants argue that the BWCC and Concerned Water Users' *Motions* should be evaluated under the standard for filing a late objection (I.R.C.P. 55(c)) rather than under the standard for amendment of a pleading (I.R.C.P. 15(a)).

The Claimants argue that the proposed amended objections do not satisfy the standard of I.R.C.P. 55(c) because the untimely filing was willful, and because the claimants will be prejudiced. Furthermore, the claimants assert that the proposed amended objections do not set forth a meritorious position. For example, the proposed amended objections seek inclusion of a remark concerning water quality, and claimants assert that this position is without merit because water quality is not an element of a water right. The claimants argue that even if the proposed amended objections are reviewed under the standards of I.R.C.P. 15(a), valid positions have not been stated.

II. APPLICABLE STANDARD – I.R.C.P. 15(a) OR I.R.C.P. 55(c)?

The Claimants argue that the *Motions to Amend Objections* should be analyzed under the standards adopted in the SRBA for filing a late objection (I.R.C.P. 55(c)) rather than under the standards for amending a pleading under I.R.C.P. 15(a). In a nutshell, the Claimants' argument is based upon the assertion that the Objectors' *Motions to Amend Objections* seeks to entirely abandon the original basis for the objections (i.e. that the water right should not exist) and replace it with a new and unrelated set of issues. For the reasons set forth below, this Special Master concludes that the applicable rule of civil procedure and associated legal standard is I.R.C.P. 15(a).

Pursuant to SRBA Administrative Order 1, §§ 4(d)(2)(d) and (e), motions to file late claims and motions to file amended claims are reviewed under the criteria of I.R.C.P. 55(c). Although Administrative Order 1 is silent as to the standard for reviewing motions to file late objections, the SRBA Court has adopted the I.R.C.P. 55(c) standard for the review of motions to file late objections. *See Order on Motions to Set Aside Partial*

Decrees and File Late Objections; Order of Reference to Special Master Cushman (A.L. Cattle), Subcase Nos. 65-7267 *et al.* (January 31, 2001). The Claimants' argument is that the proposed amended objections are not amendments at all, but rather are a wholesale replacement of the original objection.

The Claimants' argument would not even be available in an average civil case. A motion to amend a pleading would be analyzed under I.R.C.P. 15(a) even if the proposed amendment arguably made a drastic change in direction. It is only because the I.R.C.P. 55(c) standard is used in the SRBA to review late objections that this argument is even available to the Claimants. In these subcases the BWCC and the Concerned Water Users have timely filed objections. This Special Master is unwilling to embark on a path that would require an analysis as to the degree or nature of a proposed amendment to a previously filed objection as a prerequisite for determining which standard to apply. In other words, it is the opinion of this Special Master that a single review standard is sufficient for analyzing amendments rather than having a two-step process of first analyzing the nature or degree of the proposed amendment for purposes of deciding the applicable standard, and then applying the chosen standard.

III. ANALYSIS

The following section of this decision is organized based upon the issues sought to be raised in the proposed amended objections (which are identical except for 37-12111). The underlying basis for the claims is not the same for each water right, and all of the arguments raised by the claimants do not necessarily apply to all of the items in the proposed amended objections. For this reason, the following analysis "paints with a fine brush." As such, some repetition is inevitable.

The proposed amended objections (except 37-12111) can be summarized and organized as follows:

A. Objection to Quantity

- i. The diversion rate should be the same as an irrigation right.**
- ii. The volume/consumptive use should be limited to 3.5 AFY.**

iii. Measuring devices should be maintained at the point of diversion and the point of discharge.

iv. The right should be regulated by the Water District 37 water master.

B. The priority date should be the date of enlargement of the water right.

C. The purpose of use should include a remark regarding water quality.

Where applicable, the *Motions to Amend Objections* have been analyzed following the above organizational format.

Water Right Claims 37-00496B and 37-00497B (Claimant Elise G. Lufkin).

The *Director's Report* for these two water rights states the basis of claim as "decreed." However, as shown in the *Affidavit of James P. Speck in Support of Claimant's and Respondents' Supplemental Opposition to Objectors' Motion to Amend Claim*, these two water rights went through a transfer proceeding before the Idaho Department of Water Resources (Transfer No. 3810, approved October 28, 1991). Counsel for Elise Lufkin argues that the proposed amended objection does not state a valid claim for the reason that the proposed amended objection constitutes an impermissible collateral attack on the previous administrative proceeding. Elise Lufkin argues that an administrative transfer proceeding mirrors the administrative process for issuing a license, and therefore the law of the case in the SRBA prohibiting collateral attacks on previously issued licenses should apply in the context of administrative transfer proceedings. For the most part, this Special Master agrees with this argument.² However, as set forth below, the proposed amended objections will be allowed to withstand this argument for some purposes.

² It occurs to this Special Master that there may be one potential distinction between the binding effect of a license and that of a transfer proceeding. In an administrative proceeding that culminates with the issuance of a license, necessarily all of the elements of the water right are determined. On the other hand, in a transfer proceeding pursuant to Idaho Code § 42-222, which allows changes in point of diversion, place of use, period of use, or nature of use, it is conceivable that not all of the elements of the water right would be re-examined. For example, in a transfer proceeding to change the place of use of a water right acquired under the constitutional method of appropriation, the priority date of such water right would likely be subject to objection in a post-transfer adjudication of the right. This difference between licensure proceedings and transfer proceedings does not appear to be applicable in these subcases.

A. Quantity.

i. **Diversión Rate:** The diversion rate of these water right claims appears to have been examined in transfer proceeding 3810. Speck Aff. Ex. C. Accordingly, re-litigating the rate of diversion in the SRBA constitutes an impermissible collateral attack on the previous administrative proceeding. Accordingly, the *Motion to Amend Objection* regarding diversion rate for water right claims 37-00496B and 37-00497B is **denied**.

ii. **Volume/Consumptive Use:** The proposed amended objection references both annual diversion volume and annual volume of consumptive use. Annual volume diverted (usually measured in AFY), and annual volume used consumptively are not the same concepts. Water used consumptively refers to water that is not returned to the system (i.e. back to the river or into an aquifer) and therefore not available to other users. In other words, consumptive use refers to water that is lost to evaporation or transpiration.³

Regarding consumptive use, the *Conditions of Approval* for Transfer No. 3810 (Speck Aff. Ex. C) states:

2. The total combined annual consumptive volume of water diverted under Right Nos. 37-0496 & 37-0497 as authorized by this transfer shall not exceed 2.5 acre-feet per acre or a total of 75 acre feet.

Idaho Code § 42-1411(i) states that the Director may include “conditions on the exercise of any water right included in any decree, license, or approved transfer application.” To the extent that the BWCC and the Concerned Water Users are seeking through their proposed amended objection to include a consumptive use limitation which is derived from the above-quoted transfer condition, the *Motion to Amend Objection* is **granted**.

³ Idaho Code § 42-202B defines “consumptive use” as “that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right.”

Regarding an annual diversion volume limitation, neither the *Director's Report* nor the approved *Application of Transfer of Water Right* (Speck Aff. Ex. C) include a limitation on the volume of water that may be diverted annually. The record in these subcases do not contain information about whether the Frost Decree contained any such limitation. Typically, IDWR does not impose annual diversion volume limitations on water rights from surface sources, but does include a volumetric limitation on irrigation water rights from groundwater. See *Deposition of David R. Tuthill*, dated November 26, 2007, Exhibit B to the *Affidavit of Scott L. Campbell in Support of Motion for Summary Judgment*, subcase 63-03174 (filed January 4, 2008). Under Idaho Code § 42-1409(c)(i), the quantity of water for a water right may be described in terms of rate of diversion (CFS) or annual volume of diversion (AFY), or both.

The Objectors appear to be seeking the inclusion of an annual volumetric limitation for these two water rights. Idaho Code § 42-1427 allows the inclusion of elements of water rights that were not specified in a prior decree or license. Accordingly, it is a valid objection to assert that the Director should have included an undefined or omitted element in a director's report.

Therefore, to the extent that the BWCC and the Concerned Water Users are seeking through their proposed amended objection to include an annual volumetric limitation which has heretofore been undefined, the *Motion to Amend Objection* is granted.

iii. Measuring Device: The Conditions of Approval for Transfer No. 3810 (Speck Aff. Ex. C) states:

3. Measuring Devices of a type approved by this Department shall be maintained at the point of diversion and point of discharge to the Big Wood River.

The recommendations in the *Director's Report* for water rights 37-00496B and 37-00497B contain this provision under the "Explanatory Material" section. However, partial decrees issued in the SRBA do not include any remarks that are printed in the *Director's Report* under "Explanatory Material." These remarks are simply maintained in IDWR's database. This Special Master is unaware of any SRBA or IDWR

administrative decisions that address the legal significance of a remark that is in IDWR's database but not in a partial decree. Accordingly, to the extent the Objectors are seeking to have the subject remark included in the partial decrees for these water rights, the *Motion to Amend Objection* is **granted**.

iv. Watermaster Regulation: Objector's are seeking a remark to be included in a partial decree for these rights that states that the water rights will be regulated by the water master of State Water District No. 37. The Conditions of Approval for Transfer No. 3810 (Speck Aff. Ex. C) states:

1. Use of Water under this water right is subject to control by the watermaster of State Water District No. 37, Big Wood River.
4. A lockable device subject to the approval of the Department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control or the diversion. Access must be provided for the watermaster to both the point of diversion and the point of return.

A remark which states that a water right within a water district will be administered by the watermaster of the water district appears to simply be a request that the partial decree contain a restatement of Idaho Law. *See* I.C. § 42-607 ("It shall be the duty of said watermaster to distribute the waters of the . . . water supply comprising a water district . . ."). The law of the case in the SRBA generally disfavors the inclusions of restatements of the law in partial decrees. *See e.g. Memorandum Decision and Order on Challenge (Gisler)* Subcase No. 36-00077D (June 30, 2000).

In the *Memorandum Decision on Cross-Motions for Summary Judgment*, SRBA Subcase No. 91-63 (Sept. 2, 2004) ("Title Issue"), several irrigation entities sought inclusion of a remark that recognized the irrigation entities' ownership interest in the water rights titled in the name of the Bureau of Reclamation. With respect to the inclusion of a remark that simply restates existing law, Judge Melanson wrote:

In the interest of uniformity and brevity, referring to existing law in individual partial decrees is the exception and not the rule. 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.

In the instant matter, the issue of the relationship between the BOR and project water users was never raised or litigated in either the licensing proceedings or in conjunction with the *Bryan Decree*. Project water users were entitled to rely on the backdrop of existing law in defining the relationship between the BOR and project water users, irrespective of whether or not it was incorporated into the decree. . . .

To the extent the Court is now being asked to clarify existing law against which the water right holders were entitled to rely, the Court does not view that as a collateral attack on a prior license or decree. The Court views the matter as a clarification of a prior decree or license. The Court also finds it necessary to include a remark regarding the same so as to avoid having to readdress the issue at some point in the future.

Id. at pp. 29-30.

With regard to subcase nos. 37-00496B and 37-00497B, this Special Master concludes that for purposes of the requirements of I.R.C.P. 15(a), the objection seeking the inclusion of a “watermaster regulation” remark states a valid claim. First, the Objectors should be allowed to present a case that the above-quoted remarks from the *Conditions of Approval* should be included in the partial decrees for the rights. Secondly, the Objectors should be allowed to argue that the inclusion of a remark that restates existing law is allowable pursuant to the discussion of the matter in the *Title Issue* subcase – e.g. that such a remark is necessary “so as to avoid future controversy.” In accordance with the foregoing, the portion of the *Motion to Amend Objection* seeking inclusion of a “watermaster regulation” remark is **granted**.

B. Priority Date. The proposed amended objection states that the priority date for water rights 37-00496B and 37-00497B should be the date of enlargement of the water right. In the SRBA, enlargement claims are governed by Idaho Code § 42-1426. Nothing in the record in these subcases indicates that the claims include an enlargement that occurred prior to November 19, 1987. In this regard, the objection to priority date does not state a valid claim, and the *Motion to Amend Objection* as to priority date is **denied**.

C. Water Quality Remark. The BWCC and the Concerned Water Users seek inclusion of a remark that requires water discharged back into the river to comply with Idaho water quality standards. The Claimants argue that water quality is not an element of a water right and therefore the SRBA lacks jurisdiction to include a water quality remark. For the reasons set forth below, and for purposes of stating a valid claim pursuant to I.R.C.P. 15(a), this Special Master will allow the Objectors to proceed with their “water quality” objection.

While it is true that water quality is not one of the enumerated elements of a water right found in I.C. § 42-1411, the law of the case in the SRBA has not been definitively resolved regarding the inclusion of water quality remark in an SRBA partial decree. In *Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue*, Subcase nos. 36-02708 *et al.*, (December 29, 1999), the Presiding Judge Wood stated:

Second, IDWR’s duty with respect to water quality was outlined by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). In that case, the Supreme Court held that the primary function of “policing water quality” rests with the Department of Health and Welfare [now DEQ and EPA], not with IDWR. *Id.* at 341. The Supreme Court held that “Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet the mandatory water quality standards.” *Id.* However, once the facility is complete, “later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare.” *Id.* In these subcases before the Court, the water rights are not in the permit stage. All the 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.

Facility Volume at pp. 11-12. In the instant subcases, the Objectors are seeking a remark directly addressing water quality, as opposed to the indirect water quality remark that was found to be unnecessary in the *Facility Volume* subcases. Furthermore, it should be

noted that the *Facility Volume* subcases were never appealed to the Idaho Supreme Court. To the extent that the Objectors are seeking the inclusion of a remark that is arguably prohibited under the current law of the case in the SRBA, they should be allowed to make their record for purposes of appeal to the Idaho Supreme Court.

Additionally, there is current authority in Idaho stating that although water quality is not an element of a water right, it may be considered by IDWR regarding administration of water rights between water users. In his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation*, Justice Schroeder, acting as Hearing Officer, stated:

IGWA maintains correctly that quality of water is not one of the elements of a water right. However, the quality of water may be considered in alternative proposals to curtailment. The Spring Users businesses are dependent upon a certain quality of water in order to operate their business. The purpose of the water rights enumerated in their partial decrees is fish propagation. If something happens in nature that prevents the quality of water necessary for fish propagation from coming to them from the springs they are out of luck and most likely out of business. There are no guarantees against natural processes that might alter either the quantity or quality of the water they receive. However, in considering alternate proposals to provide water in a manner different from the practices in place when the rights were licensed and ultimately decreed, the quality of water may be considered. They are adjudicated to have water rights for the purpose of fish propagation. If their rights are met though curtailment they will receive the quality of water that nature provides and that will most likely be suitable for fish propagation. Any alternative to curtailment must accomplish the same result as curtailment. Otherwise the purpose of the water right is defeated.

In the Matter of Distribution of Water to Water Right Nos. 36-02356A, 36-07210, And 36-07427 (Blue Lakes Delivery Call); In the Matter of Distribution of Water to Water Right Nos. 36-04013A, 36-04013B, And 36-07148 (Snake River Farm); And to Water Rights Nos. 36-07083 And 36-07568 (Crystal Springs Farms)(Clear Springs Delivery Call), at p. 22.

The right of water users to receive the quality of water necessary to achieve the purpose of a water right; and the obligation of water users regarding the quality of water returned to the streams and aquifers of the State of Idaho, is a very complicated field of

law that encompasses federal and state regulation as well as issues of administration of rights between water users. It may be an oversimplification to argue that the issue is resolved because water quality is not an element of a water right. Although IDWR is not charged with the duty to police compliance with applicable water quality standards, issues regarding water quality may arise in connection with the administration of water rights as between water users over the ability to use the water right consistent with the decreed purpose of use, irrespective of such water quality standards.

In accordance with the foregoing, and for purposes of I.R.C.P. 15(a), this Special Master concludes that the *Motion to Amend Objection* is **granted** regarding the asserted necessity of a water quality remark.

Water Right Claim 37-07767 (Claimant Flying Heart Ranch II)

The *Director's Report* for water right claim 37-07767 states that the claim is based upon a license. A copy of the license is on file with the Court. Exhibit 2 to the *Affidavit of Fritz X. Haemmerle in Opposition to Motions to Amend Objections*. The license lists only recreation as a purpose of use, and states in a remark that: "Recreation use is for fishing." The purposes of use recommended in the *Director's Report* are Recreation, Aesthetic Storage, and Fish Propagation. The licensed quantity and the recommended quantity are the same – 10 cfs. The recommended quantity for aesthetic storage is 18 AFY. Although the license does not list aesthetic storage as a purpose of use, it does state: "Facility Volume = 820,000 cubic feet." (820,000 cubic feet equals approximately 18.82 acre feet).

A. Quantity.

i. Diversion Rate: The rate of diversion in the license is 10 cfs. The license was issued on March 3, 1993. The Objectors have not alleged that the rate of diversion has been partially forfeited or abandoned. The proposed amended objection appears to be an attempted collateral attack on the license. This Special Master concludes that for purposes of I.R.C.P. 15(a), the proposed amended objection does not state a valid claim, and accordingly the *Motion to Amend Objection* is **denied** regarding rate of diversion.

ii. **Volume/Consumptive Use:** As to the volume of water that may be impounded in the subject storage facility, the license states that the volume of the facility is 820,000 cubic feet. The aesthetic storage purpose of use in the *Director's Report* recommends a volume that is slightly less than the licensed amount. To the extent that the Objector's are seeking a lesser storage volume, the issue has been decided in the licensure proceedings, and cannot be relitigated in the SRBA, and the *Motion to Amend Objections* is **denied** in this regard.

With respect to consumptive use, however, the license contains the following remarks:

5. Use of water under this right shall be non-consumptive.
6. The Director retains jurisdiction over this license to determine whether the use of water is consumptive, and to require measuring devices or testing by the water right holder to determine consumption. If water is being consumed, the Director also retains jurisdiction to require mitigation, or to regulate the right in its priority with other water right of the Big Wood River.

The recommendations in the *Director's Report* for these two rights do not include any remarks regarding the consumptive use of water. To the extent that the Objector's are seeking to have such remarks included in the partial decrees for these rights, the proposed amended objections are valid for purposes of I.R.C.P. 15, and the *Motion to Amend Objections* is **granted** in this regard.

iii. **Measuring Device:** As quoted above, the license for water right 37-07767 has a remark under which IDWR can require the water right holder to install and maintain measuring devices. To the extent the Objectors are seeking to have this remark incorporated into the partial decree, a valid position has been stated. The *Motion to Amend Objection* is **granted** regarding measuring devices.

iv. **Watermaster Regulation:** The license contains the following remark: "Use of water under this right will be regulated by the watermaster of State Water District No. 37." The Objectors are seeking inclusion of this remark in the partial decree for the right. The proposed amended objection states a valid position in this regard, and the *Motion to Amend Objection* is **granted** regarding watermaster regulation.

B. Priority Date. The proposed amended objection states that the priority date for water right 37-07767 should be the date of enlargement of the water right. In the SRBA, enlargement claims are governed by Idaho Code § 42-1426. Nothing in the record in these subcases indicates that the claim includes an enlargement that occurred prior to November 19, 1987. In this regard, the objection to priority date does not state a valid claim, and the *Motion to Amend Objection* as to priority date is **denied**.

C. Water Quality Remark. The license for water right 37-07767 states: “Water discharged into a natural channel must satisfy Idaho water quality standards.” The Objector’s are seeking inclusion a water quality remark in the partial decree for this right. Accordingly, the proposed amended objection states a valid claim regarding water quality, and therefore the *Motion to Amend Objection* is **granted** in this regard.

Water Right Claims 37-21123 and 37-21125 (Claimant Phillips and Knight)

The *Director’s Report* states that these two water right claims were split from former water right 37-00577CD, and that the basis of the claims is a prior decree. The prior decree (presumably the Frost Decree) is not in the record for these subcases. It is the understanding of this Special Master that the aesthetic and recreation purposes of use for these water rights are based upon an accomplished transfer of the nature of use pursuant to I.C. § 42-1425. Accordingly, unlike the Lufkin water rights discussed above, these water right claims do not have the benefit of having gone through a prior administrative transfer proceeding.

Had the claimants or their predecessors-in-interest followed the mandatory statutory procedures found in Idaho Code § 42-222 for changing the nature of use of these water rights, it is conceivable that IDWR would have conditioned the transfer in such a way that might have satisfied the Objectors’ concerns. For example, it is possible that an approval of an administrative transfer would have required the claimants to install lockable measuring devices, or to comply with applicable water quality standards. Because no administrative transfer proceeding has occurred, the adjudication of these rights in the SRBA presents an opportunity for the Objectors to raise issue that could have been raised in an administrative proceeding.

Regarding the Objector's assertion that the priority date of the water rights should be the date of enlargement of the right, there is nothing in the record to suggest that there has been an enlargement of these rights. That being said, I.C. § 42-1425 does not apply to accomplished transfers that involve enlargements. Therefore, the Objector's now have the opportunity to assert that there has been an enlargement, and argue that I.C. § 42-1425 does not apply. Accordingly, the *Motion to Amend Objections* in subcases 37-21123 and 37-21125 is **granted**. **The Clerk of the Court is instructed to file the previously lodged objections.**

Water Right Claim 37-21468 (Claimant CG-Elkhorn Golf LLC)

Water right claim 37-21468 is based upon license no. 37-7148, which was issued on September 10, 1992.

A. Quantity.

i. Diversion Rate: The rate of diversion in the license is 0.40 cfs, and this is the rate of diversion recommended in the *Director's Report*. The Objectors have not alleged that the rate of diversion has been partially forfeited or abandoned. The proposed amended objection appears to be an attempted collateral attack on the license. This Special Master concludes that for purposes of I.R.C.P. 15(a), the proposed amended objection does not state a valid claim, and accordingly the *Motion to Amend Objection* is **denied** regarding rate of diversion.

ii. Volume/Consumptive Use: As to the volume of water that may be impounded in the subject ponds, the license states that the annual volume that may be diverted into storage is 17.5 AFY. The recreation storage purpose of use in the *Director's Report* recommends a volume of 11.80 acre feet.⁴ To the extent that the Objectors are seeking a lesser annual storage volume, the issue has been decided in the

⁴ Water right claim 37-21468 represents a split of licensed right 37-07184. The *Director's Report* for the split recommends the full licensed diversion rate of 0.40 cfs, but only a portion (11.80 AFY out of the licensed 17.5 AFY) of the annual diversion volume. It is the understanding of this Special Master that a portion of the licensed right has not been claimed in the SRBA. It is likely that, absent a late claim, this unclaimed portion of the licensed right will be lost upon completion of the SRBA due to the failure to file a notice of claim. See I.C. § 42-1420.

licensure proceedings and cannot be relitigated in the SRBA.⁵ The *Motion to Amend Objections* is **denied** in this regard.

With respect to consumptive use, however, the license contains the following remark: “6. Use of water under this right shall be non-consumptive.” The recommendation in the *Director’s Report* for this right does not include any remarks regarding the consumptive use of water. To the extent that the Objectors are seeking to have such remarks included in the partial decrees for these rights, the proposed amended objections are valid for purposes of I.R.C.P. 15(a), and the *Motion to Amend Objections* is **granted** in this regard.

iii. Measuring Device: The license issued for water right 37-07148 is silent as to whether or not the licensee is required to install and maintain measuring devices. There can be no question, however, that IDWR has the authority to require a water right holder to install and maintain a suitable measuring device. I.C. § 42-102 and I.C. §§ 42-701 *et seq.* A statement in a partial decree regarding measuring devices would most likely be a restatement of existing law. As discussed above, the law of the case in the SRBA disfavors, but does not absolutely prohibit restatements of law in partial decrees. Accordingly, the *Motion to Amend Objection* is **granted** regarding the inclusion of such a remark

iv. Watermaster Regulation: The license issued for water right 37-07148 contains the following remark: “Use of water under this right will be regulated by the watermaster of State Water District No. 37.” The objector’s are seeking inclusion of this remark in the partial decree for the right. The proposed amended objection states a valid position in this regard, and the *Motion to Amend Objection* is **granted** regarding watermaster regulation.

B. Priority Date. The proposed amended objection states that the priority date for water right 37-21468 should be the date of enlargement of the water right. In the SRBA, enlargement claims are governed by Idaho Code § 42-1426. Nothing in the

⁵ The Objector’s do not appear to be asserting that the Department has incorrectly split the annual storage volume. The claimant of the water right has, however, filed an objection seeking 15.25 AFY rather than the recommended 11.8 AFY.

record in this subcase indicates that the claim includes an enlargement that occurred prior to November 19, 1987. In this regard, the objection to priority date does not state a valid claim, and the *Motion to Amend Objection* as to priority date is **denied**.

C. Water Quality Remark. The license issued for water right 37-07148 is silent with respect to water quality. Based upon the above-discussion regarding water quality the *Motion to Amend Objection* is **granted**.

Water Right Claims 37-12111 (Claimant Sinclair Oil dba Sun Valley Co.)

Water right claim 37-12111 is based upon diversion and application to beneficial use. There is nothing in the record that would indicate that the claimed use of water has been transferred – either administratively or through an accomplished transfer.

A. Quantity.

i. Diversion Rate: The quantity element in the *Director's Report* for this right is expressed in terms of annual volume (AFY) and not in terms of an instantaneous rate of diversion (CFS). The Notice of Claim filed for this water right states that the diversion works is an instream dam. For water rights where the impoundment and storage of water is accomplished by means of an instream dam (as opposed to diversion and conveyance of water to a reservoir not located in the natural channel of the stream), IDWR's standard practice is to define the quantity element only in terms of annual diversion volume. The proposed amended objection asserts that the diversion rate should be one miner's inch per acre of surface area. A dam constructed in the natural channel of a stream "diverts" the entire flow of the stream, whatever that flow may be at any given time. It is not possible to regulate the instantaneous flow of water that enters the reservoir. The only parameter that can be regulated is the flow of water that leaves the reservoir. As such, the proposed amended objection does not state a valid claim, and the *Motion to Amend Objection* is **denied** regarding diversion rate.

ii. Volume/Consumptive Use: The recommendation in the *Director's Report* for this right recommends an annual diversion volume of 110 AFY, with a remark that states: "The capacity of the storage reservoir is 81.0 AF. The reservoir may be refilled multiple times up to the total diversion volume in a single year." The claimant of

the water right has filed a timely objection asserting that the capacity of the reservoir is 82 acre feet. The proposed objection to the annual diversion volume asserts that the annual diversion volume should be 3.5 acre feet per acre, but does not state an asserted total annual diversion volume.

With respect to consumptive use of water, the Notice of Claim for this right states: "Evaporation loss on an annual basis is estimated at 28 acre feet." The *Director's Report* contains no remarks concerning consumptive use of the right. Prior to the amendment of the adjudication statutes in 1997, the "annual volume of consumptive use" was a statutory element of a water right that could have been included in a director's report. See House Bill No. 278, Session Laws Ch. 374, p. 1192. In 2004, the Idaho Legislature passed House Bill No. 636, which amended Idaho Code § 42-202B to state: "Consumptive use is not an element of a water right."

The proposed amended objection raises the question of whether the beneficial use water right at issue, which was perfected on June 30, 1937, is somehow limited or conditioned with respect to historical consumptive use, and if so whether such limitation or condition should be memorialized in a partial decree for the right. The law in Idaho regarding issues of consumptive use are not so well developed that it can be said with any certainty that the proposed amended objection does not state a valid claim. In giving due consideration to the goal of deciding an issue on the merits, it is the opinion of this Special Master that the proposed amended objection states a valid claim for purposes of I.R.C.P. 15(a) regarding annual diversion volume and consumptive use, and accordingly the *Motion to Amend Objection* is **granted** in this regard.

iii. Measuring Device: As stated above, IDWR has the authority to require a water right holder to install and maintain a suitable measuring device. I.C. § 42-102 and I.C. §§ 42-701 *et seq.* A statement in a partial decree regarding measuring devices would most likely be a restatement of existing law. As discussed above, the law of the case in the SRBA disfavors, but does not absolutely prohibit restatements of law in partial decrees. Accordingly, the *Motion to Amend Objection* is **granted** regarding the inclusion of such a remark

iv. Watermaster Regulation: This beneficial use claim is unlike the water rights discussed above that have been licensed or approved for transfer with a “watermaster regulation” condition. Pursuant to Idaho Code § 42-607, the watermaster is charged with the duty of water distribution and regulation. It therefore appears that the proposed amended objection in this regard seeks a restatement of existing law. As previously stated, however, the law of the case in the SRBA does not absolutely prohibit such restatements. Accordingly, the *Motion to Amend Objection* is **granted** regarding the inclusion of such a remark.

B. Priority Date. The proposed amended objection states that the priority date for water right 37-07767 should be the date of enlargement of the water right. In the SRBA, enlargement claims are governed by Idaho Code § 42-1426. Nothing in the record in this subcase indicates that the claim includes an enlargement that occurred prior to November 19, 1987. In this regard, the objection to priority date does not state a valid claim, and the *Motion to Amend Objection* as to priority date is **denied**.

C. Water Quality Remark. Based upon the above-discussion regarding water quality the *Motion to Amend Objection* is **granted**.

D. Place of Use. The proposed amended objection states that the water right should be “[l]imited to original claimed acreage of 115 acres.” As stated above, there is nothing in the record to indicate that the use of water claimed under this right has ever been used for the irrigation of 115 acres of land. Irrigation use has not been claimed nor recommended. For purposes of applying I.R.C.P. 15(a), the proposed amended objection does not state a valid claim regarding the place of use of the right. The *Motion to Amend Objection* is **denied** regarding place of use.

IV. ORDER REQUESTING AMENDED DIRECTOR’S REPORT FOR WATER RIGHT CLAIM 37-04248

The claim for water right 37-04248 is for a source of groundwater, with a purpose of use of “recreation” in an amount of 0.002 cfs (1,291 gal/day). Also claimed is 0.10 cfs

for domestic purposes.⁶ A remark on the claim states:

14. Remarks: A single well provides water to four (4) households (three main residences and one guest house) for domestic use and the irrigation of approximately one acre of lawn. The first house was built and the well drilled approximately June 1, 1940. The other main residences were built in 1949 and 1950. The swimming pool was added with the guest house in 1978.

At the hearing on the *Motions to Amend Objections*, it was represented by the attorney for the claimant that the recreation portion of water right claim 37-04248 is for the swimming pool referenced in the claim. For the reasons set forth below, it is hereby **requested** that IDWR re-examine this water right claim and file an amended director's report in accordance with this *Order*.

It appears to this Special Master that although the claim was filed to include a separate purpose of use for "recreation," the use of water for a swimming pool used in connection with a private residence could be encompassed within water use defined as "domestic." See I.C. § 42-111 (defining "domestic purposes" as "The use of water for homes . . . and any other purpose in connection therewith . . . if the total use is not in excess of thirteen thousand (13,000) gallons per day.") The amount of water claimed for the recreational purpose is very small - .002 cfs running continuously would provide less than 1,300 gallons per day, or one tenth the daily quantity allowed under the "domestic" purpose in the *Director's Report* (The *Director's Report* recommends that the domestic purpose be limited to 13,000 gallons per day.). In accordance with the foregoing, the following are hereby ordered:

1) IDWR shall file an *Amended Director's Report* for water right claim 37-04284 no later than **November 28, 2008**.

2) Notice of the filing of the *Amended Director's Report* shall be published on the Court's Docket Sheet in December, 2008, and **objections to the *Amended Director's Report* shall be filed by December 31, 2008**.

⁶ It is the understanding of this Special Master that an Amended Notice of Claim has been filed which increased the amount of water claimed for irrigation purposes. The Amended Notice of Claim is not in the Court's file.

3) The objection previously filed by the claimant, which objects to the irrigation quantity and the priority date, shall survive the filing of the amended director's report. The objection previously filed by the BWCC and the Concerned Water Users shall not survive the filing of the amended director's report, but rather the BWCC and/or the concerned water users will need to file a new objection should they disagree with the amended director's report.

V. ORDER REQUIRING OBJECTORS TO FILE NEW AMENDED OBJECTIONS CONSISTENT WITH THIS DECISION

As discussed above, the BWCC and the Concerned Water Users filed identical or nearly identical objections in each subcase. This "one size fits all" approach to filing objections in part stems from the SRBA check-the-box objection form. That being said, there is nothing that prevented the Objectors from conducting a closer examination of the water right claims at issue, and tailoring their objections to each subcase. As is apparent from this order, all of the water rights discussed herein are not similarly situated, but rather there are a variety of factual and legal distinctions that may be present.

The *Motions to Amend Objections* have been denied in part and granted in part. The proposed amended objections are not models of clarity and specificity. For these reasons, it is ordered that the Objectors shall prepare and file new amended objections in subcase nos. 37-00496B, 37-00497B, 37-07767, 37-12111, and 37-21468 consistent with this order. **Such new objections shall be filed with the Court and served upon opposing counsel no later than November 21, 2008.** The amended objections, when filed, shall replace and supersede the objections originally filed by the BWCC and the Concerned Water Users. Notice of the filing of the amended objections shall be published on the Court's docket Sheet in December 2008. **Responses to the amended objections shall be due December 19, 2008.**

VI. ORDER DENYING REQUESTS FOR COSTS AND ATTORNEY'S FEES WITHOUT PREJUDICE

The claimants argue that the statement by the BWCC and the Concerned Water Users that they now wish to withdraw their initial objection as to the validity of the water right claims must be viewed as an admission that the position taken in the objection was without merit, and accordingly in connection with dismissal of the objection, the Court should find that it was pursued unreasonably and frivolously and award attorney's fees and costs incurred in connection therewith. The claimants' argument is premised upon I.R.C.P. 41(a), which allows a Court to condition the dismissal of an action "upon such terms and conditions as the court deems proper." I.R.C.P. 41(a)(2).

This Special Master finds I.R.C.P. 41(a) to be inapplicable to the withdrawal of the Objectors' original objection. There has been no dismissal of the action by the Objectors, only a change in direction. Furthermore, the *Motion to Amend Objections* does not seek to withdraw the original objection regardless of whether or not the amendments are allowed, but rather in the event that the *Motions to Amend Objections* had been entirely denied, the original objection would still stand absent some further filing by the Objectors to withdraw the objections. Based on the foregoing, the Claimants' motion for attorney's fees and costs is **denied** without prejudice⁷.

The Sinclair Oil Corporation seeks attorneys fees and costs pursuant to I.R.C.P. 15(a), which allows a court to award costs "as it deems proper" in connection with the amendment of a pleading. Sinclair Oil Corporation asserts that it spent considerable time and effort, including discovery activity, in responding to Objectors' initial legal theory that the subject water rights should not exist. For the reasons set forth below, Sinclair Oil Corporation's motion for attorney's fees and costs is **denied** without prejudice.⁸

First, even though Sinclair Oil Corporation has engaged in discovery in this matter, subcase 37-12111 is still in an early procedural stage. An initial hearing has not been set or held in this subcase. One of the primary purposes of an initial hearing is to

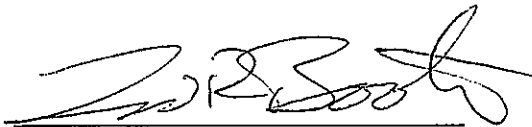
⁷ The requests for attorney's fees and costs are denied "without prejudice" so as to be clear that this Special Master is not now making any findings or conclusions that would prevent the claimants from seeking attorney's fees and costs upon final resolution of the subcases based upon prevailing party analysis.

require a face-to-face meeting between the claimant(s), the objector(s), and the Idaho Department of Water Resources. Settlement of objections is always explored at an initial hearing. Even if settlement is not reached at an initial hearing, the hearing provides an opportunity for the parties to formulate and narrow the issues; to discuss the possibility of obtaining admissions of fact; to discuss the timing of discovery, etc. If it appears that settlement is unlikely, the subcase is set for trial, and a trial scheduling order is issued which typically includes a discovery schedule. Although there is no rule which prevents discovery prior to an initial hearing, such action is highly unusual in the SRBA. The attorneys for Sinclair Oil Corporation are experienced litigators in the SRBA. It is the opinion of this Special Master that the conduct of discovery in this subcase prior to an initial hearing is pursued at the risk that such discovery may ultimately turn out to have been unnecessary.

The second reason for the denial of Sinclair Oil Corporation's request for attorneys fees and costs is that the issue raised in the original objection filed by the BWCC and the Concerned Water Users is now the subject of a designated basin-wide issue proceeding before Judge Melanson. Accordingly, it cannot at this time be determined with any certainty whether such discovery was conducted for naught.

IT IS SO ORDERED

Dated Oct. 10, 2008



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

⁸ See footnote 8, *supra*.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER was mailed on October 10, 2008, with sufficient first-class postage to the following:

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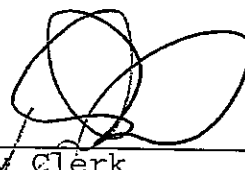
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