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DEPARTMENT OF  
WATER RESOURCES

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| DISTRICT COURT - SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |              |
| JUN 11 2009                                                                               |              |
| By _____                                                                                  | Clerk        |
| _____                                                                                     | 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     | ) Subcase Nos. 63-02529, 63-03323, 63-03324, |
|                | ) and 63-10435                               |
| Case No. 39576 | )                                            |
|                | ) MEMORANDUM DECISION AND                    |
|                | ) ORDER ON MOTIONS FOR SUMMARY               |
|                | ) JUDGMENT                                   |
|                | )                                            |
|                | ) ORDER DENYING MOTION TO                    |
|                | ) STRIKE                                     |
|                | )                                            |
|                | ) SPECIAL MASTER'S REPORT AND                |
|                | ) RECOMMENDATION FOR WATER                   |
|                | ) RIGHTS 63-02529 and 63-10435               |
|                | )                                            |
|                | ) ORDER SETTING SCHEDULING                   |
|                | ) CONFERENCE IN SUBCASES 63-03323            |
|                | ) and 63-03324                               |

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**I. APPEARANCES**

Scott L. Campbell and Dylan B. Lawrence, Moffat, Thomas, Barrett, Rock & Fields, Chartered, Boise, Idaho, for claimants/objectors Pioneer Irrigation District, Jerry L. Tlucek, Mary Lou Tlucek, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek.

David J. Barber, Deputy Attorney General for respondent State of Idaho.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

**General Description and Background.**

Each of the four water right claims in this proceeding are based upon licenses previously issued by IDWR. In three of the four licenses, the quantity of water authorized to be diverted is expressed solely in terms of cubic feet per second (cfs), and not in terms of acre-feet per year (AFY). That is, three of the licenses did not include an

annual diversion volume (sometimes referred to herein as “ADV”). However, in the *Director’s Report* recommendation for each of these rights, IDWR added an annual diversion volume under the quantity element for the right.

The Idaho Department of Water Resources has a longstanding policy that the proper administration of irrigation water rights with a source of groundwater requires that the quantity element be expressed in terms of both cubic feet per second and acre-feet per year. See *Deposition Testimony of Director Tuthill, Aff. of Scott Campbell, Ex. B, subcase 63-03174 (Jan. 4, 2008)*. Many older licenses issued for irrigation groundwater rights, however, were issued without having the quantity element described in terms of an annual diversion volume. In the SRBA, IDWR has conformed these older licenses to the current policy of including an ADV by recommending an ADV in the director’s report for such rights.

IDWR uses a two-step process to determine an annual diversion volume for irrigation groundwater rights that did not have a ADV limitation set forth in the license. First, IDWR determines the amount of water capable of being diverted based upon the system capacity – i.e. the volume of water that could be diverted if water were continuously pumped from the groundwater well beginning on the first day of the irrigation season and ending on the last day of the irrigation season. The calculation to determine system capacity is rate of flow (cfs) multiplied by the number of days in the irrigation season multiplied by a conversion factor of 1.9835. IDWR refers to this method as the “system capacity method.” *Affidavit of Jan Shute Dated March 11, 2009*.

The next step in the two step process is to estimate the maximum amount of water that can be beneficially used by the irrigator. To do this, IDWR multiplies the number of acres allowed to be irrigated under the right by a beneficial use standard developed by IDWR for a particular geographical area of the state. For the Treasure Valley area, this beneficial use standard is 4.5 acre feet per acre. IDWR refers to this calculation as the “beneficial use method.” The Department then compares the results of these two calculations and includes the smaller amount in its director’s report recommendation. *Id.*

As to the remaining water right claim, the license previously issued did have an annually diversion volume which was carried over in the *Director’s Report* for the right,

but the license also had a remark allowing IDWR to make future adjustments to the annual diversion volume. This remark was not carried over in the *Director's Report*.

In all four of these subcases, the claimants filed objections to the inclusion of an annual diversion volume limitation. The State of Idaho filed responses in essence stating that the State of Idaho agrees with the *Director's Report* for these rights. Each of these water right claims are described in more detail below.

#### **Water Right Claim 63-02529.**

The license for water right 63-02529 was issued to the Pioneer Irrigation District by the State of Idaho, Department of Water Resources (Department of Reclamation), on February 6, 1943. *Lawrence Aff.*, Ex. A. The license allows for the diversion of groundwater from 27 points of diversion for the irrigation of land within the irrigation system of the Pioneer Irrigation District. The water right is for irrigation and domestic purposes and is limited to an amount actually needed for those purposes, not to exceed 87.1 cfs. The license does not specify a period of use, nor does the license describe or limit the annual diversion volume – i.e. there is no AFY designation on the face of the license.

The *Director's Report* recommended the claim essentially as licensed (i.e. 87.1 cfs of groundwater for the irrigation of land within the digital boundary of the Pioneer Irrigation District), with the exception that the quantity element therein states “44,918.30 AFY.” The annual diversion volume recommended in the *Director's Report* is based upon the capacity of the system. In other words, if the Pioneer Irrigation District turned all of the pumps on at full capacity on day one of the irrigation season, and ran the pumps 24/7 until the last day of the irrigation season, the amount of water that would be diverted would be 44,918.30 acre-feet.

The Pioneer Irrigation District, through its attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, and period of year elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume.

The annual diversion volume recommended in the *Director's Report* for this right of 44,918.30 AFY is really not a limitation at all, rather it simply expresses the same

quantity of water using different terms – acre feet per year rather than cubic feet per second. In its briefing, however, the Pioneer Irrigation District further explains the basis for its objection, stating that:

The problem . . . is that IDWR has extended the irrigation season for Basin 63 in the past, and may do so again in the future:

Q. I think, in the previous deposition, you mentioned some updates [to the 4.5 AFA standard] in the 1996 to 1997 time frame. I do not think you and Scott [Campbell] really went into what those updates were. Can you summarize what the updates were that occurred in the late '90's?

A. What is happening is I am expecting that climate change will occur. We appear to be in climate change. I would expect that, over time, the season of use will perhaps lengthen some and that the growing units will perhaps modify some.

Tuthill Dep., p. 55, LL. 9-13; p. 59, LL. 7-11. Once water right 63-02529 is decreed with the annual diversion volume limitation, that limitation is then forever a legally-binding restriction upon the use of that right. Knowing that seasons of use have been extended in the past, and may be extended again in the future, it makes little sense to impose a new annual volume limitation upon that right . . .

*Brief in Support of Motion for Summary Judgment*, pp 27-28. In other words, the use of water by the Pioneer Irrigation District cannot presently be affected by the recommended annual diversion volume based upon the current 260 day irrigation period of use; rather the concern is that future climatic conditions may make it possible or desirable to irrigate beyond this 260 day period. If this occurs the Pioneer Irrigation District does not want to be stuck with an annual diversion volume limitation that is based upon a 260 day irrigation period.

The State of Idaho timely filed a response to the objection filed by Pioneer Irrigation District.

#### **Water Right Claims 63-03323 and 63-03324.**

The licenses for water rights 63-03323 and 63-03324 were both issued Kenneth D. Casper on February 11, 1965, and both have a priority date of January 2, 1963.

*Lawrence Aff.* Ex. D and G. These two rights have the same 247 acre licensed place of use. The place of use recommended in the *Director's Report* for these rights consists of a permissible place of use of 285 acres, with a combined use limitation of 247 acres within the 285 acre place of use. The change in the place of use was recommended as an accomplished transfer pursuant to I.C. § 42-1425. *Lawrence Aff.* Ex. F and I.

Water right 63-03323 was licensed for 2.4 cfs, and the same was recommended in the *Director's Report*. Water right 63-03324 was licensed for 2.03 cfs, and again the same was recommended in the *Director's Report*. The combined diversion rate of these two water rights of 4.43 cfs will provide approximately 0.018 cfs per acre, or 9/10<sup>th</sup> of an inch per acre.

The licenses issued for water rights 63-03323 and 63-03324 do not specify a period of use. The *Director's Report* recommended a period of use for each right of March 1 to November 15, i.e. a 260 day period. The combined system capacity of these two rights in terms of AFY is 2,284.6 AFY, or 9.25 AFA. The *Director's Report* recommended that these two rights be limited to a combined annual diversion volume of 1,111.5 AF, which was derived by multiplying the number of acres by the beneficial use standard for the Treasure Valley area (247 acres X 4.5 AFA = 1,111.5 AFY).

The current owners of water rights 63-03323 and 63-03324, Jerry L. Tlucek and Mary Lou Tlucek, through their attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, period of year, and place of use elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume, whether singular or combined. The State of Idaho timely filed a response to the objection filed by Jerry and Mary Lou Tlucek.

#### **Water Right Claim 63-10435.**

Water right license 63-10435 was issued to Richard and Janice Reineke on December 12, 1990, with a priority date of May 9, 1987. *Lawrence Aff.* Ex. J. The license provides for the irrigation of 68 acres, with a rate of diversion of 0.74 cfs and an annual diversion volume of 306.0 AF. The licensed period of use is March 15 to November 15. The *Director's Report* recommended the claim as licensed with two exceptions: (1) a shoulder remark was added to the period of use allowing water use to

begin March 1; and (2) the following remark from the license was omitted from the *Director's Report*:

The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

The current owners of water right 63-10435, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek, through their attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, and period of year elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume. The State of Idaho timely filed a response to the objection filed by Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek.

### III. PROCEEDINGS ON SUMMARY JUDGMENT

On March 12, 2009, the State of Idaho filed its *Motion for Partial Summary Judgment*, together with a brief in support thereof. Also on March 12, 2009, the Claimants filed a *Motion for Summary Judgment* together with a brief in support thereof. On March 26, 2009, each party filed responsive briefing. Oral argument was heard on April 16, 2009.

### IV. ISSUES PRESENTED

Both the water right Claimants and the State of Idaho raise the issue of whether the director is authorized to recommend in a director's report that the quantity element of an irrigation groundwater right include an annual diversion volume where the license for such right did not specify an annual diversion volume.

Additionally, the Claimants raise the issue of whether the responses filed by the State of Idaho are barred by the procedural statutes governing the SRBA.

Finally, the State of Idaho raises the issue of whether the objection filed by the Claimants to the *Director's Report* for water right claim 63-10435 constitutes an impermissible collateral attack on the license issued for that right.

## V. STANDARD OF REVIEW ON SUMMARY JUDGMENT

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

## VI. ANALYSIS

**1. IDWR has the authority to describe the quantity of a water right using an annual diversion volume in a director's report even though the license for such right did not describe the quantity with an annual diversion volume.**

Idaho Code § 42-1411 requires the director to prepare a director's report for water right claims acquired under state law, and sets forth the procedures and authority for making a determination as to the elements of claimed water rights. Idaho Code § 42-1411 states, in part, as follows:

(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:

...

(c) the quantity of water used describing the rate of water diversion . . .  
in cubic feet per second or annual volume of diversion . . . in acre-

feet per year as necessary for the proper administration of the water right;

Idaho Code § 42-1411. Thus while the statute lists the water right elements to be determined by the director, the director is provided some flexibility in describing the elements to provide for the proper administration of the rights. Specifically, with respect to the quantity element, the statute allows the director to describe quantity in terms of an instantaneous rate of diversion (cfs) or in terms of an annual volume in acre-feet per year as necessary for proper administration of the rights. As to irrigation water rights with a source of groundwater, the director has made a determination that the quantity element needs to include an annual volume of diversion, as reflected in IDWR's longstanding policy that the quantity element of such rights be described both in terms of instantaneous rate of flow in cubic feet per second, and in terms of annual volume of diversion in acre-feet per year. In his deposition testimony, Director Tuthill describes the policy as dating back to the early 1970's. *Aff. of Scott Campbell, Ex. B, subcase 63-03174 (Jan. 4, 2008)*.

The methodology used by IDWR to determine the annual diversion volume for irrigation groundwater rights is described by Water Rights Supervisor Jan Shurte as follows:

2. The preparation of a recommendation for a water right in the SRBA with a ground water source involve several steps. If a water right in question with a ground water source had an annual volume of diversion for irrigation described in the original license, the IDWR would use that amount in its recommendation for an annual volume of diversion for irrigation limitation. In the absence of an annual volume of diversion for irrigation limitation in the license, IDWR's procedure for calculating a ground water volume is a two step process. IDWR first calculates a volume by multiplying the number of days in the irrigation season by the rate of flow and multiplying that number by a conversion value of 1.9835 to convert to acre feet. This calculation reflects the amount of acre feet capable of being diverted based upon system capacity (hereinafter referred to as "system capacity method"). IDWR then calculates a volume by multiplying the number of acres of irrigated land and multiplying that amount by the Department's beneficial use standard for the area (hereinafter referred to as "beneficial use method"). This calculation reflects the amount of water that can be beneficially used by the irrigator. IDWR then compares the two calculations and uses the smaller of the two amounts for the recommended volume in the SRBA. Thus, the volume is limited to the lesser of the system capacity or the amount of water IDWR has determined that can be beneficially used.

*Affidavit of Jan Shurte Dated March 11, 2009* at 2, 6. As to the particular water rights at issue, Supervisor Shurte states:

7. The methods and amounts of the annual diversion volume for irrigation for these four water rights may be summarized as follows:

| Water right number | Limitation amount   | Method                           |
|--------------------|---------------------|----------------------------------|
| 63-02529           | 44,918.30 acre feet | System capacity method           |
| 63-03323           | 1,111.50 acre feet  | Beneficial use method            |
| 63-03324           | 1,111.50 acre feet  | Beneficial use method            |
| 63-10435           | 306 acre feet       | License contained the limitation |

*Id.* As to the beneficial use standard described by Supervisor Shurte and used in the “beneficial use method” calculation, Engineer Jeff Peppersack, IDWR Water Allocations Bureau Chief, states that IDWR has determined that 4.5 acre feet per year is the standard for the maximum amount of water that can be beneficially used in the Treasure Valley area. This determination is based upon a study of crop consumptive irrigation requirements conducted by Richard C. Allen, Ph.D., P.E., and Charles Brockway, Ph.D., P.E. The determination is also based upon an expected irrigation system efficiency of 70 to 75 percent, such expectation being derived from published values for modern irrigation systems. *Affidavit of Jeff Peppersack Dated March 11, 2009* at 3-4.

The Claimants argue that Idaho Code § 42-1411 does not require the Department to impose an annual diversion volume limitation because the language of the statute states that the quantity element be expressed in terms of cubic feet per second “or” acre-feet per year. The Claimants reason that because the subject water right licenses had a quantity element expressed solely in terms of cubic feet per second, the rights are already limited to the amount of water that could be diverted over the course of an irrigation season given the diversion rate – i.e. the system capacity. While it is true that Idaho Code § 42-1411 does not require the Department to use an annual diversion volume to describe the quantity element of all water rights, the Department has clearly determined that such

a description is appropriate and proper to define and administer irrigation water rights with a source of groundwater, including the four rights at issue herein. Because the director has made a determination that irrigation groundwater rights need to be described with an annual diversion volume, any such right previously licensed without an ADV has been so licensed with an undefined or undescribed element. Idaho Code § 42-1427 instructs the director as to how to go about reporting undefined elements in previously licensed or decreed water rights.

The operative portion of Idaho Code § 42-1427 states:

(2) If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1409, Idaho Code, the director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication.

Idaho Code § 42-1427. Section 42-1427(2) incorporates Section 42-1409 as the list of elements that shall appear of the standard notice of claim form. The list of elements in Section 42-1409 is the same list of elements that are required to be included in a director's report under Section 42-1411(2). As to the quantity element, Section 42-1409 states in relevant part:

The quantity of water claimed to be used for water rights acquired under state law shall describe the rate of diversion . . . in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year, or both;

Idaho Code § 42-1409 . The claimants argue that because the above-quoted statute uses the term "or" an annual diversion volume is not a required element. The claimants state that: "From the Idaho Legislature's perspective, it is perfectly acceptable for a water right to be recommended with a diversion rate expressed only in cubic feet per second." While it may be true that the quantity element of some water rights in Idaho may be acceptably described solely in terms of diversion rate measured in cubic feet per second, this is not true for groundwater irrigation water rights, where the director has determined that an annual diversion volume measured in acre-feet per year is necessary for the proper administration of this category of water rights. Accordingly, Idaho Code § 42-1427

provides the authority and procedure to determine the previously undefined annual diversion volume for the subject water rights.

For purposes of determining such previously undefined elements, Idaho Code § 42-1427 instructs the director to look to the extent of beneficial use of the rights as of the date of the commencement of an adjudication. In the SRBA that date is November 19, 1987. In other words, the maximum allowable annual diversion volume for an irrigation groundwater right where such volume is undefined in the license would be set at the maximum amount that had been diverted during any irrigation season that occurred prior to the commencement of the SRBA.

#### **Water Rights 63-03323 and 63-03324.**

The record reflects that for water rights 63-03323 and 63-03324, the Department used the so-called “beneficial use method” based upon IDWR’s standard of 4.5 acre-feet per acre for the Treasure Valley area.<sup>1</sup> The Claimants argue that IDWR’s 4.5 AFA standard is an unreliable metric for quantifying beneficial use and therefore cannot be used as a basis for making a determination as to the potential amount of water that may be beneficially used by the irrigator. The record is clear that IDWR did not conduct any particularized factual investigation into the historical water use practices during the claim review and recommendation process. See Tuthill Dep., p. 34, LL 2-4, Ex. M to *Lawrence Aff.*

The Claimants may well be correct that IDWR’s 4.5 AFA standard is unreliable regarding the extent of beneficial use for water rights 63-03323 and 63-03324, however this is not an issue that may be resolved on summary judgment. If the Claimants of water rights 63-03323 and 63-03324 assert that IDWR got it wrong, then they will have an opportunity at trial to present evidence in that regard. Until that time, the *Director’s Report* is presumed to be correct pursuant to Idaho Code § 42-1411(4).

The crux of the Claimants’ argument is that Idaho Code § 42-220 prevents the Department from adding a new restrictive annual diversion volume limitation onto the subject water right licenses. Idaho Code § 42-220 states that water right licenses are

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<sup>1</sup> It should be noted that Idaho Code § 42-1401B(1) states that the director “may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.”

*“binding upon the state* as to the right of such licensee to use the amount of water mentioned therein . . .” The Claimants also rely upon the SRBA District Court decision in the Facility Volume case to support the proposition that the Department cannot use the SRBA to impose a new condition upon a water right that would “redefine the use of a previously issued license . . .” *Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue*, Subcase 36-02708 *et al.*, December 29, 1999)(hereinafter “Facility Volume Order”). The Facility Volume Order recognizes, however, that while Idaho Code § 42-220 prevents a previously licensed water right from being redefined in the SRBA, neither the Facility Volume Order nor Idaho Code § 42-220 prevent the SRBA adjudication process from being used to determine and define any previously undefined elements of a water right.

The Claimants’ position is that the previously issued licenses (particularly for 63-03323 and 63-03324) allow for the diversion of water 24/7 beginning on the first day of the irrigation season and ending on the last day of the season, and any annual diversion volume that is less than that amount (i.e. less than the capacity of the system) imposes a new condition or restriction in violation of Idaho Code § 42-220 and the Facility Volume Order. The relevant inquiry then, is whether or not the licenses issued for water right 63-03323 and 63-03324 would allow for the diversion of an annual volume of water equal to the capacity of the system to divert water.<sup>2</sup> Each of the licenses for water rights 63-03323 and 63-03324 contains the following statement as to quantity:

That the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed [2.4 for 63-03323 and 2.03 for 63-03324] cubic feet per second.

*Lawrence Aff.* Ex D and G. The licenses themselves contain an undefined limitation of an “amount actually needed and beneficially used . . .” and shall not exceed the stated rate of diversion. The Claimants essentially argue that such “amount needed and beneficially used . . .” is equal to the capacity of the system, not some lesser amount. The

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<sup>2</sup> The Claimants’ expert Scott N. King, P.E. opines: “Provided that typical irrigation efficiency of sprinkler irrigation systems can range from 50% to 87%, total annual diversion water requirements for alfalfa and other highly-consumptive crops when irrigated with typical sprinkler systems could range from 4.6 to 8 acre-feet per acre.” As noted above, the combined system capacity for water rights 63-03323 and 63-03324

*Director's Report* indicates that such amount is 4.5 acre-feet per acre. It is the opinion of this Special Master that the Department is authorized, pursuant to Idaho Code §§ 42-1411 and 42-1427, to numerically define in terms of acre-feet per year the quantity of water described in the license as the "amount needed and beneficially used . . ." The Claimants may well be correct that such amount is greater than 4.5 AFA, but this is an issue of fact that cannot be resolved on summary judgment. Under Idaho Code § 42-1427, the Legislature has directed that this factual question can be answered by looking to the extent of beneficial use prior to the commencement of the SRBA. The *Director's Report* is presumed to be correct, and the Claimants have the burden of demonstrating that during any of the 26 irrigation seasons beginning in 1963 and ending in 1989 (for water rights 63-03323 and 63-03324) more than 4.5 acre feet per acre was actually beneficially used. In accordance with the foregoing, the Claimant's motion for summary judgment is **denied** and the State of Idaho's motion for summary judgment is **granted** with respect to water right claims 63-03323 and 63-03324.

#### **Water Right 63-02529.**

As to water right claim 63-02529, Claimant Pioneer Irrigation District objected to the quantity and the period of use recommended in the *Director's Report*. The essence of Pioneer Irrigation District's objection is that IDWR may, at some time in the future, extend the period of use for this water right to allow for the use of water earlier (than the recommended beginning date of March 1) or later (than the recommended ending date of November 15) if climate change creates conditions under which such water could potentially be beneficially used. Pioneer Irrigation District is not asserting that the irrigation period of use recommended in the *Director's Report* (3-1 to 11-15) restricts the right beyond what has been historically used, nor beyond what can presently be used based upon the current climate of the Treasure Valley.

*In A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568, the Idaho Supreme Court held that the period of use for water rights decreed in the SRBA be identified by specific dates, rather than simply being identified as "irrigation

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is 2,284.6 AFY, or 9.25 AFA. In other words, the system capacity exceeds even the maximum amount that could be beneficially used as stated by Engineer King.

season.” 131 Idaho at 424. As stated above, the license issued for water right 63-02529 did not identify any particular period of use. The *Director's Report* recommended a period of use beginning March 1 and ending on November 15, a period of 260 days. The recommendation in the *Director's Report* is presumed to be correct. I.C. § 42-1411(4). The annual diversion volume recommended in the *Director's Report* of 44,918.30 AFA does not limit the use of water under this right, rather it simply restates the amount of water that can physically be diverted during those 260 days.

Claimant Pioneer Irrigation District objects to the inclusion of the recommended annual diversion volume out of concern that IDWR may lengthen the irrigation season for this water right should changes in climatic conditions yield a longer growing season. Pioneer Irrigation District has not, however, informed this Special Master of any basis in Idaho law that would allow IDWR to alter a period of use decreed in the SRBA after such decree has been entered. Pioneer Irrigation District has also not demonstrated how such legal authority on the part of IDWR, should it exist, would be consistent with the Idaho Supreme Court's ruling that irrigation water rights in the SRBA need to be decreed with specifically identified periods of use. Finally, Pioneer Irrigation District has not presented any basis in Idaho law, nor does this Special Master know of any such basis, that would allow a water right to be decreed in the SRBA with a period of use that includes not only the present growing season, but also is expanded to include an anticipated future growing season.

Simply stated, the annual diversion volume recommend in the *Director's Report* for water right 63-02529 is not a new restriction or limitation on the right, rather it is simply a restatement of the amount of water that can physically be diverted during the 260 day irrigation season. There is no basis in Idaho law for a post-decree expansion of the period of use by IDWR; nor is there a legal basis for an SRBA partial decree to include an anticipatorily expanded period of use to account for speculation as to the length of future growing seasons. In accordance with the foregoing, Pioneer Irrigation District's motion for summary judgment is **denied** with respect to water right claim 63-02529.

**2. The objection filed by the claimants to the *Director's Report* for water right claim 63-10435 constitutes an impermissible collateral attack on the license issued for that right.**

As to water right claim 63-10435, the annual diversion volume recommended in the *Director's Report* of 306 AFA is the same limitation that was set forth in the license. As stated above, the license also contained the following remark:

The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

This remark was omitted from the *Director's Report*. The objection filed by the Claimants Rebekah Tlucek, Kevin Tlucek, Shelly Tlucek, and Byron Tlucek states that they are "objecting to the inclusion of the annual volumetric limitation in the amount of 306.00 afy, as such appears under the Quantity and Purpose and Period of Use elements of the Director's Report." Although the above-quoted objection appears to pray for a remedy of deleting the annual diversion volume limitation in its entirety, it is the understanding of this Special Master based upon Claimant's briefing and upon comments made at oral argument on summary judgment that the Claimants also pray for alternative relief in the form of carrying the subject remark over to the SRBA partial decree for the right. See *Claimant's Opening Brief*, at 7 ([T]he Director's Report does not contain the above-quoted language from Condition 1 of the license.").

To the extent that the relief sought by the Claimants is deletion of the licensed annual diversion volume, the State of Idaho asserts in its motion for summary judgment that this constitutes an impermissible collateral attack on the prior administrative proceedings. To the extent that the Claimants are seeking inclusion of the subject remark in the SRBA partial decree for water right 63-10435, the State of Idaho in its response brief asserts that this issue is not properly before the Court because the Claimants did not assert this concern in their objection. *State of Idaho's Brief in Response* at 19.

This Special Master agrees with the State of Idaho that deletion of the annual diversion volume in this SRBA proceeding would constitute an impermissible collateral

attack on the prior administrative licensure proceeding, and therefore the remedy sought by the claimants of such deletion is simply not available. On the other hand, this Special Master disagrees with the State of Idaho's assertion that the alternative relief of including the subject remark is not properly before the SRBA Court. The basis of the Claimants objection to the inclusion of an annual diversion volume was that the license contained the remark, and the *Director's Report* did not. If the license issued for the right did not have the remark then the Claimants would not even have a colorable argument that the SRBA decree should omit the previously licensed annual diversion volume.

The inquiry is whether or not the SRBA partial decree to be issued for water 63-10435 should contain the subject remark. This Special Master would surmise that the intent of IDWR in including the remark in the license was that the remark could only operate in one direction – to decrease the annual diversion volume under the right. It could further be surmised that by not including the remark in the *Director's Report*, IDWR intends to waive any further ability to decrease such annual diversion volume. This Special Master is not willing, however, to engage in such speculation. The plain words of the remark simply do not limit the operation of the remark to only a downward adjustment of the annual diversion volume. The last sentence of the remark states: "The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency." Thus, the diversion volume may be adjusted for one of two reasons: (1) "to more accurately describe the beneficial use . . ." or (2) "to implement accepted standards of diversion efficiency." While it is unlikely that the second reason would ever require an upward adjustment of the annual diversion volume, it is certainly possible that the first reason of accurately describing the beneficial use could result in an upward adjustment. Additionally, the remark does not specify the procedural mechanisms that would be employed by the Department to effectuate an adjustment -- whether up or down -- as contemplated in the remark. There is not anything on the face of the remark that would prevent the owner of the right from petitioning IDWR to initiate an administrative proceeding to make such adjustment.

Accordingly, because the remark can be read to reserve a future opportunity in the water right owner to request that the Department make an adjustment to the annual

diversion volume set forth in the license, it is the opinion of this Special Master that such opportunity should not be eliminated in the SRBA, but rather the SRBA partial decree should incorporate the subject remark.

**3. The *Responses* filed by the State of Idaho are not barred by the procedural statutes governing the SRBA.**

The Claimants assert that IDWR is making an “end run” around Idaho Code § 42-1401B --which directs that the director shall not be a party to a general stream adjudication -- by having the Idaho Attorney General’s office file responses and pursue litigation in these subcases. For the reasons set forth below, this Special Master holds that the participation of the State of Idaho through the Attorney General’s office in these subcases is proper and not in violation of Idaho Code § 42-1401B.

Idaho Code 42-1401B states:

**Role of the director in an adjudication.** – (1) The director’s role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

(2) The director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication.

(3) The director shall not be a party to an adjudication.

Idaho Code § 42-1401C states:

**Role of state agencies other than the Idaho department of water resources in an adjudication.** – (1) Each state agency, and the Idaho water resource board may file a claim and appear separately in any adjudication through the attorney general. This section shall not apply to the Idaho department of water resources.

(2) The attorney general may appear in any adjudication and shall represent the position of the state of Idaho.

The objections filed by the Claimants assert that the director is without authority to limit or describe the annual diversion volume of a previously licensed irrigation ground water right where the license contained no such description or limitation. This

objection necessarily implicates IDWR's longstanding policy that the proper administration of irrigation groundwater rights requires that the quantity elements of such rights include an annual diversion volume. The Attorney General's office filed responses in these subcases for the purpose of protecting IDWR's ability to effectuate this policy as to these water rights as well as other water right claims that are similarly situated to the instant subcases – i.e. previously licensed irrigation ground water rights with no annual diversion volume set forth in the license. The Claimants argue that because this policy was developed and is implemented by the director, Idaho Code § 42-1401B prevents both IDWR and the Attorney General's office from appearing as a party in these subcases.

The State of Idaho argues that resolution of this issue is a matter of statutory interpretation. Specifically, the State argues:

The issue raised is primarily an issue of statutory interpretation, and '[t]he interpretation of a statute is a question of law over which we [the court] exercise free review . . . . This Court must construe a statute to give effect to the intent of the legislature . . . . It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.' *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006) (citations omitted). 'Statutes that are *in pari materia* must be construed together to effect legislative intent. Statutes are *in pari materia* if they relate to the same subject.' Here, the Idaho Legislature enacted Idaho Code §§ 42-1401B and 42-1401C in the same act, and both sections relate to the authority of the State to participate in a general adjudication of water rights. Thus, these two sections are *in pari materia* and must be construed together.

*State's Brief in Response* at 10. Under these two statutes, although the director (and hence the Idaho Department of Water resources) cannot be a party, the State of Idaho through the Attorney General's office may appear and have its position represented. The question presented here is whether the State of Idaho may appear and assert a position relative to a policy determination in the situation where such policy determination originated within the Department. This Special Master holds that the appearance of the State of Idaho under Idaho Code § 42-1401C is proper in these subcases and the State may have its position represented despite the fact that the policy sought to be protected by the State originated within the Department.

Under the Constitution and statutes of the state of Idaho, the State of Idaho is vested with ownership and control of all waters of the state. *See* Const. Art. XV §1; Idaho Code § 42-101. The State of Idaho has created an executive branch department (IDWR) to effectuate the State's responsibility to supervise and control the appropriation of water for beneficial use, and the administration of water so appropriated. In this case, the director has determined that in order to properly administer irrigation groundwater rights, the quantity of such rights needs to be described in terms of an annual volume of diversion. The State has appeared in these subcases to protect its ability to effectuate this policy. There are really only two possibilities as to whence this policy may have arisen – the Idaho Legislature or the Department of Water Resources under authority granted by the Legislature. The fact that the particular policy involved in the instant subcases arose within the Department rather than having been specifically articulated by the Legislature does not diminish the fact that such a policy has been determined to be necessary to carry-out the State's Constitutional and statutory responsibilities.

Idaho Code § 42-1401C unequivocally states that the position of the State of Idaho may be represented in an adjudication through the Attorney General's office. The statute does not provide for any threshold inquiry or examination of the position of the State and whether such position is also the position of the Department. This Special Master is unwilling to engraft such an inquiry onto the statute. In accordance with the foregoing, this Special Master holds that the appearance of the State of Idaho through the Attorney General's office is proper in these subcases pursuant to Idaho Code § 42-1401C; that such appearance is not in violation of Idaho Code § 42-1401B; and the Claimants motion for summary judgment on this issue is **denied**.

## **VII. ORDER DENYING MOTION TO STRIKE**

On April 2, 2009, the Claimants filed a *Motion to Strike*, seeking to strike the following: (1) a portion of the *State of Idaho's Brief in Response to Claimant's Motion for Summary Judgment* wherein the State discusses "problem soils" at the place of use for water rights 63-03323 and 63-03324 and excerpts a discussion of soils from the deposition of the Claimants' expert witness Terry Scanlan; (2) a portion of the *Affidavit of David J. Barber Dated March 25, 2009*, and Attachment II thereto, wherein the State

attaches excerpts and exhibits from the deposition of Terry Scanlan related to soils; and (3) the statement of p. 19 of the *State's Brief in Response* that, "[h]e [Terry Scanlan] also acknowledged that the place of use for water right nos. 63-03323 and 63-03324 has significant impairments related to the shallow soils and other factor's that limit irrigation." The Claimants assert that the above-enumerated references regarding soils are not relevant to the legal issue of whether the quantity element of a previously licensed water right may be recommended by the Department (and decreed in the SRBA) with an annual diversion volume where the license described the quantity only in terms of cubic feet per second. The Claimants argue that the references to and discussions of the soils at the place of use for water rights 63-03323 and 63-03324 should be stricken because such references are irrelevant and therefore inadmissible pursuant to I.R.E. 402. The Claimants state that the discussion of soils "is simply a factual issue that the State is attempting to manufacture in order to survive summary judgment." *Motion to Strike* at 5.

The State of Idaho points out in its *Brief in Opposition to Motion to Strike* that the State moved for summary judgment on two finite legal issues, and did not include any information regarding soils in the materials filed in support of its motion. *State of Idaho's Brief in Opposition to Motion to Strike* at 5. The Claimants argue in their *Brief in Support of Motion for Summary Judgment* that "[IDWR's 4.5 AFA standard for Basin 63] is an unreliable metric for quantifying beneficial use under Section 42-1401B, and should therefore not provide a basis for imposing a new restriction on previously-licensed water rights." *Id.* at 20. In other words, the Claimants argue that as a matter of law IDWR cannot recommend an annual diversion volume in the *Director's Report* because the standard used by IDWR in quantifying such annual diversion volume is unreliable. The State asserts that it submitted the information sought to be stricken in response to this argument made by the Claimants. The State states: "The State wanted to make sure that the district court was aware that there are other factual issues related to the amount of water that the claimants can beneficially use on their own land and that these factual issues could not be resolved by a summary judgment proceeding because of the existence of these material facts that the claimants' own expert acknowledged." *Brief in Opposition to Motion to Strike* at 6.

As discussed above, this Special Master agrees with the State that the reliability of the methodology used by IDWR in determining an annual diversion volume to be recommended in a director's report is not a factor that can preclude IDWR from making such a recommendation as a matter of law. Simply stated, if IDWR has the authority to recommend an annual diversion volume, then any issues regarding the reliability or correctness of IDWR's recommendation necessarily involve questions of fact that cannot be resolved on summary judgment. The State is not manufacturing an issue of fact for purposes of surviving summary judgment; rather upon a determination that IDWR may, as a matter of law, recommend an ADV for these water rights, the next step in the process is to provide the Claimants with the opportunity to present testimony and evidence at trial to demonstrate that the particular ADV recommended by IDWR is incorrect.

While the Claimants' correctly assert that the information regarding soils is irrelevant to the question of law presented in these summary judgment proceedings, such information may be relevant to the question of fact that arises upon a determination that IDWR is authorized to recommend an annual diversion volume for these water rights. Therefore the Claimants' assertion of irrelevancy is misplaced. The information regarding soils in the record has had no bearing on this Special Master's ruling herein. Likewise, striking the information from the record will also have no bearing. Therefore, in accordance with the foregoing and in an exercise of discretion the Claimants' *Motion to Strike* is **denied**.

## VIII. CONCLUSION AND ORDER

In accordance with the foregoing this Special Master holds: (1) that the director is authorized by Idaho Code § 42-1411 to include an annual diversion volume in the director's report for the subject irrigation groundwater rights; (2) that pursuant to Idaho Code § 42-1427 the proper measure of the annual diversion volume in a contested subcase is the extent of beneficial use prior to the commencement of the adjudication; and that the numerical description of a previously undefined annual diversion volume is not in violation of Idaho Code § 42-220.

As to water right 63-02529, the State's motion for summary judgment is **granted**, and the Claimants' motion for summary judgment is **denied**. A *Special Master's Report and Recommendation* is herein made for water right 63-02529.

As to water right claims 63-03323 and 63-03324, the State's motion for partial summary judgment is **granted**, and the Claimants' motion for summary judgment is **denied**. However, factual issues remain to be resolved. Specifically, the SRBA partial decree for these water rights will include an annual diversion volume under the quantity element, and the Claimants are entitled to an evidentiary hearing to rebut the presumption of the *Director's Report* and to put on evidence of pre-1987 water use pursuant to Idaho Code § 42-1427. In addition, the Claimants objected to the place of use recommended in the *Director's Report*, and there is no indication in the Court's file that the place of use objection has been resolved.

As to water right claim 63-10435, the State's motion for summary judgment is **granted** with respect to deletion of the annual diversion volume in the SRBA decree (i.e. the State's collateral attack argument). The Claimants' motion for summary judgment is **denied** with respect to deletion of the annual diversion volume, but **granted** to the extent that the subject remark from the license is carried forward to the SRBA partial decree. A *Special Master's Report and Recommendation* is herein made for water right 63-10435.

Finally, the Claimants' motion for summary judgment is **denied** with respect to the issues raised regarding Idaho Code §§ 42-1401B and 42-1401C.

## IX.

### ORDER SETTING SCHEDULING CONFERENCE

A scheduling conference will be held in subcase nos. 63-03323 and 63-03324 on **August 25, 2009 at 10:30 AM Mountain Time** at the Snake River Basin Adjudication Courthouse, 253 3<sup>rd</sup> Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 225-383-1099 and when prompted entering the code 675342.

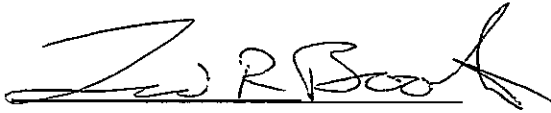
X.

**REPORT AND RECOMMENDATION FOR 63-02529 AND 63-10435**

Based on the file and record herein, IT IS RECOMMENDED that water rights 63-02529 and 63-10435 be **decreed** with the elements as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)*.

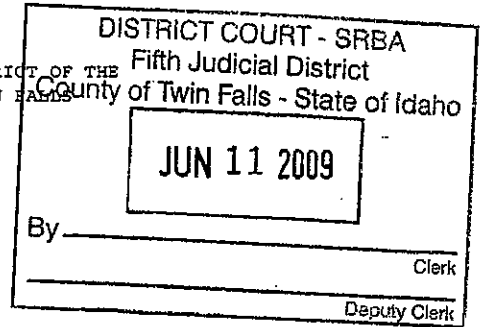
Dated.

June 11, 2009

A handwritten signature in black ink, appearing to read 'T. R. Booth', with a stylized flourish at the end.

THEODORE R. BOOTH  
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 )  
 ) PARTIAL DECREE PURSUANT TO  
 ) I.R.C.P. 54(b) FOR  
Case No. 39576 )  
 )  
 ) Water Right 63-02529

NAME AND ADDRESS: PIONEER IRRIGATION DISTRICT  
PO BOX 426  
CALDWELL, ID 83606

SOURCE: GROUND WATER

QUANTITY: 87.10 CFS  
44918.30 AFY

PRIORITY DATE: 12/21/1936

POINT OF DIVERSION: T03N R01W S07 NWNW Within Canyon County  
R02W S01 SWSE  
S02 SWSW  
S04 NWSW  
S10 SWNE  
S11 SESW  
S14 SWSW  
S15 SWSE  
S19 NENE  
S21 NENW  
S22 SWNE  
R03W S03 NWNW  
S11 NESE  
T04N R01W S30 SESW  
R02W S26 NESW  
S27 SWSE  
NENW  
S33 NWNE  
S34 SESW  
S35 SESW  
S36 SENE  
SWNW  
NESW  
R03W S25 NESE  
R04W S22 SESE  
S25 SENW  
S26 SENE

| PURPOSE AND PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE  | QUANTITY                  |
|----------------------------|----------------|----------------|---------------------------|
|                            | Irrigation     | 03-01 TO 11-15 | 87.10 CFS<br>44918.30 AFY |

PLACE OF USE:

The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary. This right can be used to irrigate up to 34,204.61 acres within the boundary of the Pioneer Irrigation District.

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).

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.

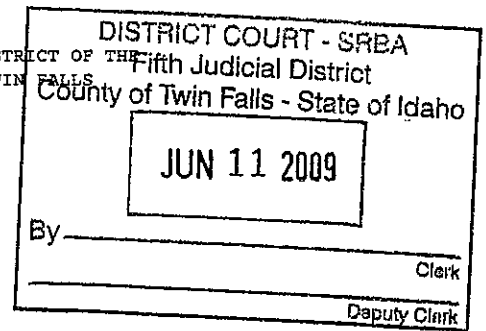
John M. Melanson  
Presiding Judge of the  
Snake River Basin Adjudication

RECOMMENDATION

JUN 11 2009

*David B. Smith*  
SPECIAL MASTER

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 63-10435

NAME AND ADDRESS: BYRON TLUCEK  
KEVIN TLUCEK  
REBEKAH TLUCEK  
SHELLEY TLUCEK  
4619 S CAN-ADA  
MELBA, ID 83641

SOURCE: GROUND WATER

QUANTITY: 0.74 CFS  
306.00 AFY

The annual diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

PRIORITY DATE: 05/09/1987

POINT OF DIVERSION: T01S R01W S18 NENW Within Ada County

| PURPOSE AND PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE  | QUANTITY               |
|----------------------------|----------------|----------------|------------------------|
|                            | Irrigation     | 03-15 TO 11-15 | 0.74 CFS<br>306.00 AFY |

The use of water for irrigation under this right may begin as early as March 1, provided other elements of the right are not exceeded. The use of water before March 15 under this remark is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date a partial decree is entered for this right.

| PLACE OF USE: | Irrigation       | Within Ada County                  |
|---------------|------------------|------------------------------------|
|               | T01S R01W S18    | NWNE 4.0<br>NENW 34.0<br>NWNW 30.0 |
|               | 68.0 Acres Total |                                    |

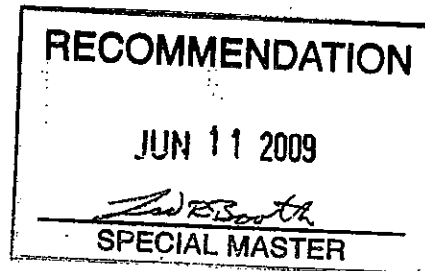
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

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).

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.

John M. Melanson  
Presiding Judge of the  
Snake River Basin Adjudication



|                                                                                           |       |
|-------------------------------------------------------------------------------------------|-------|
| DISTRICT COURT - SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |       |
| JUN 11 2009                                                                               |       |
| By _____                                                                                  | Clerk |
| _____<br>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 )  
\_\_\_\_\_ )

NOTICE OF ISSUANCE OF  
SPECIAL MASTER'S  
RECOMMENDATION

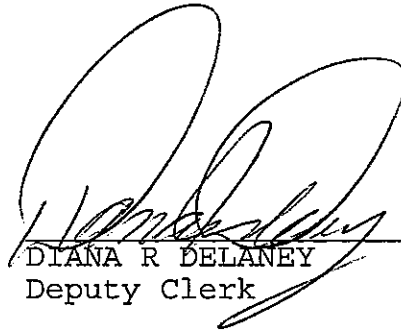
Water Right(s): 63-02529  
63-10435

On June 11, 2009, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (A01), 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 June 11, 2009.

  
\_\_\_\_\_  
DIANA R DELANEY  
Deputy Clerk

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION; ORDER DENYING MOTION; SPECIAL MASTER REPORT & RECOMMEND; ORDER SETTING HEARING was mailed on June 11, 2009, with sufficient first-class postage to the following:

STATE OF IDAHO

Represented by:  
NATURAL RESOURCES DIV CHIEF  
STATE OF IDAHO  
ATTORNEY GENERAL'S OFFICE  
PO BOX 44449  
BOISE, ID 83711-4449

JERRY L TLUCEK  
MARY LOU TLUCEK  
PIONEER IRRIGATION DISTRICT

Represented by:  
SCOTT L CAMPBELL  
101 S CAPITOL BLVD 10TH FLOOR  
PO BOX 829  
BOISE, ID 83701-0829  
Phone: 208-345-2000

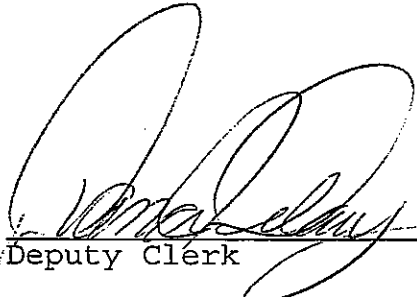
DIRECTOR OF IDWR  
PO BOX 83720  
BOISE, ID 83720-0098

SUNNY SLOPE FRUIT CO INC  
14068 SUNNY SLOPE RD  
CALDWELL, ID 83605

ORDER

Page 1 6/11/09

FILE COPY FOR 01540

  
Deputy Clerk