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DEPARTMENT OF
WATER RESOURCES

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**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	)	Subcases No. 1-4, 1-10, 1-209 (Twin Falls Canal Co.)
	)	
	)	POCATELLO'S RESPONSE TO TFCC'S MOTION
Case No. 39576	)	FOR PROTECTIVE ORDER
_____	)	

COMES NOW, The City of Pocatello ("Pocatello"), by and through its undersigned counsel, and hereby submits this Response to Twin Falls Canal Company's ("TFCC") Motion for Protective Order.

INTRODUCTION

Pocatello's discovery requests were propounded to TFCC because of a recent order on judicial review by the Minidoka County District Court of an Idaho Department of Water Resources ("IDWR") final order on a delivery call, regarding the scope of evidence to be

litigated in a SRBA sub-case. See Exhs. 1 and 2 to Affidavit of Sarah A. Klahn (“Klahn Affidavit”), (“A&B Decision”).

Pocatello acknowledges that, as TFCC has argued, there are SRBA decisions that appear to stand for the proposition that the factual inquiry in an SRBA sub-case is limited to pre-1987 evidence¹. However, the A&B Decision contradicts the SRBA decisions cited by TFCC.

In the A&B Decision, the Court explained that the determination of the beneficial use in the SRBA decree must be given legal effect by IDWR in future delivery call proceedings so as to prevent the claimant from having to re-litigate the elements of its water right:

Assume for the sake of discussion that [a senior appropriator] claimed the 36-2080 right in the SRBA with a diversion rate of 0.88 miner’s inches per acre. The Director investigated the claim, and recommended a diversion rate of 0.75 miner’s inches. [The senior] filed an objection [and] IGWA, the City of Pocatello and Fremont Madison *et al.* file responses and a trial is held. At trial, A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner’s inches. The respondents present conflicting evidence [and] [u]ltimately, the SRBA Court finds that A & B established a quantity of 0.88 miner’s inches Six months later A & B . . . seeks administration from the Department. . . . At the hearing experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture, etc. Déjà vu? The example illustrates that under the Director’s application of the CMR the senior can be forced to relitigate the exact same issue when proving up the elements of the water right and when subsequently seeking administration for the same right.

Exh. 1 to Klahn Affidavit at 36-37 (emphasis added).

The A&B Decision is problematic because it holds the Director and water users responsible for issues that the SRBA Court has barred parties from litigating in the SRBA. Yet, it is also the law in Idaho that a litigant can only be bound by claims made and litigated in a

¹ “The doctrine of ‘law of the case’ is well established in Idaho” *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000) (citations omitted). As stated by the SRBA Court in *Wood v. Troutt*, the special master cannot “‘reconsider’ the prior legal rulings of the district court. . . . this requirement provides legal precedence within the SRBA until such time as a legal issue is ultimately decided by a higher court.” *Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Troutt)*, subcase no. 65-05663B at 9-10 (May 9, 2002). However, “[p]arties disagreeing with a prior legal ruling can preserve the issue before the special master, argue the issue to the district court and appeal. Consequently there is no prejudice to litigants by requiring special masters to follow the legal rulings of the district court.” *Id.* at 9 n.3.

particular case. *See Navarro v. Yonkers*, 144 Idaho 882, 885, 173 P.3d 1141, 1144 (2007) (Pursuant to the principles of claim and issue preclusion, “a valid final judgment rendered on the merits . . . is an absolute bar to a subsequent action between the same parties upon the same claim.’ . . . [and] estopp[s] a person from arguing a finding or verdict that has already been rendered.” (citations omitted)).

Because TFCC will rely on the SRBA determination of “beneficial use” in seeking future administrative determinations, the record must be clear as to the specific temporal limitation on the evidence relied on by the Special Master in issuing any partial decree. If the SRBA inquiry, as suggested by the A&B Decision, must take into account the extent of TFCC’s actual and current day beneficial use, Pocatello must be afforded an opportunity to litigate the present day irrigation needs and practices of TFCC: otherwise, there is no “déjà vu” in a future delivery call proceeding. Therefore Pocatello respectfully requests that the Special Master: a) order TFCC to answer the discovery to which it objects; or, in the alternative, b) rule that litigation of the beneficial use of the above-captioned claims is affirmatively limited to pre-1987 evidence.

ARGUMENT

I. POCATELLO OBJECTED TO THE ELEMENTS OF TFCC’S CLAIMS AND SEEKS DISCOVERY REGARDING THE “EXTENT OF BENEFICIAL USE” OCCURING UNDER TFCC’S CLAIMS.

In the instant matter, TFCC has filed claims with the SRBA for a cumulative diversion rate of 3,780 cfs for irrigation of 201,500 acres, and the Director has recommended that the Special Master enter partial decrees for a cumulative diversion rate of 3,780 cfs for irrigation of 196,162 acres. Pocatello objected to the quantity and place of use elements of TFCC’s claim²,

² Pocatello filed an objection in subcase 1-209 contesting the place of use and quantity elements of that claim. Pocatello filed a motion to participate in subcase nos. 1-4 and 1-10, and pursuant to the Court’s Order Granting City of Pocatello’s Motion to Participate dated March 26, 2008, Pocatello’s participation in those subcases is limited to litigating the issues raised by other objectors and the claimant before and during trial.

and in relation to that objection, seeks discovery of information related to TFCC's present day irrigation practices under the above-captioned claims including, *inter alia*, (1) the current capacity of TFCC's system, (2) current number of irrigated acres, and (3) current historical consumptive use under the above-captioned SRBA claims. *See* Exh. A to Affidavit of Paul L. Arrington ("Arrington Affidavit") attached to *Memorandum in Support of TFCC's Motion for Protective Order* ("Memorandum in Support").

It is undisputed that IDWR did not complete any investigation of the quantity element of TFCC's claims beyond a review of pre-1987 diversion records, and it is also undisputed that the Director's recommendations regarding place of use in TFCC's subcases are based solely on pre-1987 data. *Memorandum in Support* at 7-9. On November 3, 2012, IDWR issued a Supplemental Director's Report in the above-captioned subcases, establishing that IDWR based its recommendations on "TFCC's water right decrees, diversion records, and aerial imagery" as of 1987. Exh. 3 to Klahn Affidavit at 2; *see also* *Memorandum in Support* at 7, 9, and 12. Douglas Jones, one of the IDWR agents responsible for the Director's recommendations in these subcases, confirmed that in developing the place of use element for these subcases, "[m]y bright line focus was the land-use practice and the extent of irrigation in 1987." Exh. C to Arrington Affidavit at 42, lines 2-3. Michael Holliday, an IDWR agent that was also responsible for developing the Director's recommendations, confirmed that the Department did not consider any post-1987 beneficial use information in making its recommendations. Exh. D to Arrington Affidavit at 39.

However, the A&B Decision seems to say that IDWR is obligated to recommend the amount of water needed for beneficial use and that the litigants in the SRBA are not only allowed to litigate the amount of water needed, but are obligated to do so:

Further, [t]he director shall make recommendations *as to the extent of beneficial use and administration of each water right under state law*. . . . I.C. § 41-1401B.

....

Accordingly, both Idaho's licensure and adjudication statutory *schemes expressly take into account the extent of the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used*. **In sum, the quantity specified in a decree of an adjudicated water right is a judicial determination of beneficial use consistent with the purpose of use for the water right.**

Exh. 1 to Klahn Affidavit at 29-30 (bold and underline emphasis in original, italicized emphasis added). Thus, Pocatello seeks the ability to challenge TFCC's quantity and place of use claims on the basis of pre- and post-claim information. For example, it is undisputed that diversion records reflect that the total flow rate of 3780 cfs for TFCC's claims has not been diverted since 1976. Exh. 20 to Michael Warren Holliday Deposition (Dec. 19, 2011), attached as Exh. 4 to Klahn Affidavit. Further, whatever the pre-claim total acreage associated with TFCC's place of use, Pocatello contends on information and belief that as much as 10% of those acres may be non-irrigable due to land use changes. Decrees are more than simply paper reflections of a "point in time"—they are measures of a property right; if the measure is limited to the extent of the property right as it was used 25 years ago it complicates the problem of future reliance on the decree unless the decree specifically says so.

II. THE EXTENT OF INQUIRY ALLOWED TO SUPPORT AN OBJECTION TO A SRBA CLAIM IS THE SUBJECT OF CONFLICTING DISTRICT COURT OPINIONS.

In an *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* entered December 29, 1999 ("Facility Volume Decision"), in response to a challenge on a motion to alter or amend, the SRBA Court went to great lengths to evaluate what types of information and challenges may be made regarding a quantity claim.

Among other things, the SRBA Court concluded that “extent of beneficial use” is not an element of a water right and:

“[A]ny evidence that a claimant is using less water than the quantity for which the claimant was previously licensed or decreed, by definition must be in support of an action for partial forfeiture (or abandonment). Partial forfeiture, abandonment or adverse possession are the only cognizable legal theories by which a diminishment could be obtained.

Facility Volume Decision at 25, attached as Exh. 5 to Klahn Affidavit.

By contrast, the A&B Decision found that issues related to the quantity claim may (and indeed suggested they must) be litigated at the SRBA: “the appropriate time for contesting the Department’s recommendation as to quantity was in the adjudication.” Exh. 2 to Klahn Affidavit at 15 (citing I.C. §§ 42-220, 42-1420). Further: “[i]ssues pertaining to necessary quantity, beneficial use, evapotranspiration of crops, waste and the like should have been identified in [the] Director’s recommendation and ultimately litigated in the context of the SRBA proceedings.” Exh. 1 to Klahn Affidavit at 37 (emphasis added). In order to litigate TFCC’s quantity claims so that any partial decree represents “a quantitative determination of beneficial use,” including any elements of the claim that have “changed” since a prior decree or license and amount to “partial forfeiture,” Pocatello must be able to discover and offer at trial post-1987 evidence. Exh. 2 to Klahn Affidavit at 18.

Here, Pocatello has filed an objection to the quantity and place of use elements of TFCC’s water right claims; pursuant to the A&B Decision, Pocatello must be afforded the right to litigate this extent of TFCC’s beneficial use. If juniors are to be bound by the determinations of the SRBA decrees, they must be allowed to admit evidence of a claimant’s actual beneficial use requirements at the time the SRBA decree is entered. In the case at hand, if (1) Pocatello is not allowed to discover TFCC’s “extent of beneficial use” under present day conditions, and (2) pursuant to the A&B Decision, TFCC’s partial decree is considered a “quantitative

determination” of the extent of TFCC’s beneficial use, Pocatello will effectively be bound by the findings of the partial decree on issues that it was not allowed to litigate. *Id.*

To highlight the conflict between existing SRBA precedent and the A&B Decision regarding the extent to which the quantity element may be disputed in the SRBA, Pocatello has attached Table A, which excerpts relevant portions of the Facilities Volume and A&B decisions. Exhs. 1, 2, and 5 to Klahn Affidavit.

III. IDAHO SUPREME COURT DECISIONS AND STATUTORY PROVISIONS SUGGEST THAT RELIANCE ON POST-1987 EVIDENCE IS APPROPRIATE.

Despite the Facilities Volume and *Trout v. Wood* decisions in the SRBA, decision, it is worth noting that the Idaho Supreme Court has affirmed entry of a partial decree where the SRBA Court found forfeiture based on post-1987 years of non-use. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001). In *Rosenkrance*, the Director recommended that two claims be partially forfeited because of lack of consistent irrigation from 1986-1990. On appeal, the claimants asked the Court to “adopt a new rule of law that would require the five-year statutory period for water rights forfeiture to be tolled by the filing of a claim with the SRBA district court.” *Id.* at 516, 20 P.3d at 700. The Idaho Supreme Court declined to decide the issue because it was not raised prior to the appeal and because it “involves urging this Court to adopt a new rule of law.” *Id.* As such, the relevancy of post-1987 evidence in the SRBA is an open question under published Idaho law, even if the “law of the case” in the SRBA is otherwise. As such, *Rosenkrance* establishes that as far as the Idaho Supreme Court is concerned, the question of the admissibility of post-1987 evidence is, at best, an open question of law, and at worst, considered otherwise admissible.

Further, the statutory arguments presented by TFCC are not supported by the very statutory language TFCC relies on. TFCC argues that because the Director’s recommendations

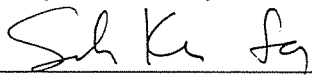
are to be based on a snapshot of time, no post-1987 evidence is relevant in the SRBA. Memorandum in Support at 2. This argument ignores the plain language of the very statutory authority that TFCC relies upon. I.C. § 42-1427 involves how the SRBA is to decree and the Director is to determine “*previously undefined* elements of existing water rights”—it does not address the relevance of post-1987 changes in the beneficial use of a vested water right.

CONCLUSION

Pursuant to the A&B Decision, Pocatello must contest any element of TFCC’s claimed water rights that it believes are in excess of TFCC’s actual beneficial use. Accordingly it has served TFCC with discovery to investigate TFCC’s present day irrigation needs and practices. If this Court should find that the scope of inquiry in this matter is limited to determining TFCC’s beneficial use as of 1987, Pocatello requests that the Court issue an order affirmatively stating this conclusion so that the record is clear what is being determined in any partial decree entered in this matter.

Dated this 1st day of March, 2012.

CITY OF POCATELLO ATTORNEY’S OFFICE
Attorneys for the City of Pocatello

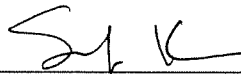
By _____
A. Dean Tranmer

WHITE & JANKOWSKI, L.L.P.
Attorneys for the City of Pocatello

By _____
Sarah A. Klahn

CERTIFICATE OF MAILING / SERVICE

I hereby certify that on this 1st day of March, 2012, a true and correct copy of **Pocatello's Response to TFCC's Motion for Protective Order and Affidavit of Sarah A. Klahn for SRBA Surface Water Coalition Water Rights Cases [subcases 1-4, 1-10, 1-209]** was served by U.S. Mail, postage pre-paid and addressed to the following [except where noted]:



Sarah A. Klahn

Clerk of SRBA Court PO Box 2707 253 3 rd Ave North Twin Falls ID 83303-2707 Phone 208-736-3011 [original & 3 copies via Federal Express]	IDWR Repository PO Box 83720 Boise ID 83720-0098
Travis L. Thompson Barker Rosholt & Simpson LLP 113 Main Ave W, Ste 303 PO Box 485 Twin Falls ID 83303-0485 Facsimile 208-735-2444 [Twin Falls Canal Company] [via Federal Express]	Roger D. Ling Attorney at Law PO Box 623 Rupert ID 83350 Facsimile: 208-436-6804 [Burley Irr Dist]
Jerry R. Rigby Rigby Andrus & Moeller 25 N 2 nd E PO Box 250 Rexburg ID 83440-0250 [Blackfoot Irr Co, Fremont-Madison Irr; United Canal Co]	Randall C. Budge Candice McHugh Racine Olson Nye Budge & Bailey 101 S Capitol Blvd Ste 300 Boise ID 83702 Fax: 208-433-0167 [“Ground Water Districts”]
A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 [City of Pocatello]	Robert L. Harris 1000 Riverwalk Dr Ste 200 PO Box 50130 Idaho Falls ID 83405 [Independent Water Users, Mud Lake Water Users Inc, Jefferson Irr Dist, Montevue Canal Co]
US Department of Justice Environment & Natural Resources 550 W Fort St MSC 033 Boise ID 83724 [US, USDI Bureau of Reclamation]	State of Idaho – Natural Resources Div Chief 700 W Jefferson Room 210 PO Box 44449 Boise ID 83711-4449 Phone: 208-334-2400 [State of Idaho]
	Director of IDWR PO Box 83720 Boise ID 83720-0098

**COMPARISON OF RELEVANT HOLDINGS ON
FACILITIES VOLUME¹ AND A&B ORDER² AND A&B ORDER ON REHEARING³**

<u>ISSUE</u>	<u>FACILITIES VOLUME</u>	<u>A&B ORDER</u>	<u>A&B ORDER ON REHEARING</u>
Is beneficial use (<i>i.e.</i> , TFCC's claim and the Idaho Department of Water Resources' recommendation for 3780 cfs) properly an issue in the SRBA?	"[A]s noted in the preceding sections of this opinion 'extent of beneficial use' is not an element of a water right." Exh. 5 at 25.	Idaho's adjudication statutes require the Director to "make recommendations as to the extent of beneficial use and administration of each water right." Exh. 1 at 29 (quoting I.C. § 42-1401B(1)). "[T]he quantity specified in a decree of an adjudicated water right is a <u>judicial determination of beneficial use</u> consistent with the purpose of use for the water right." Exh. 1 at 30 (emphasis in original).	"The Ground Water Users also argue that the quantity element [in a partial decree] is a maximum which provides for the highest degree of flexibility to provide for the most water intensive use within the scope of the purpose of use. . . . The argument ignores both the purpose of the decree as well as the <u>scope of the issues raised in a general adjudication</u> [T]he appropriate time for <u>contesting the Department's recommendation as to quantity</u> was in the adjudication." Exh. 2 at 15 (citing I.C. §§ 42-220 and 42-1420) (emphasis added).

¹ Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue (Exhibit 5 to March 1, 2012 Affidavit of Sarah A. Klahn).

² Memorandum Decision and Order on Petition for Judicial Review, *A&B Irrigation District v. Idaho Department of Water Resources*, Case No. 2009-000647 (5th Jud. Dist. May 4, 2010) (Hon. J. Wildman) (judicial review of Final Order in A&B Delivery Call) (Exhibit 1 to March 1, 2012 Affidavit of Sarah A. Klahn).

³ Memorandum Decision and Order on Petitions for Rehearing, *A&B Irrigation District v. Idaho Department of Water Resources*, Case No. 2009-000647 (5th Jud. Dist. Nov. 2, 2010) (Hon. J. Wildman) (Exhibit 2 to March 1, 2012 Affidavit of Sarah A. Klahn).

<u>ISSUE</u>	<u>FACILITIES VOLUME</u>	<u>A&B ORDER</u>	<u>A&B ORDER ON REHEARING</u>
Must the SRBA issue a partial decree for the claimed and recommended amounts <i>unless</i> an objector demonstrates the quantity should be reduced based on forfeiture?	“[A]ny evidence that a claimant is using less water than the quantity for which the claimant was previously licensed or decreed, by definition must be in support of an action for partial forfeiture (or abandonment). Partial forfeiture, abandonment or adverse possession are the only cognizable legal theories by which a diminishment could be obtained. . . . the Idaho Supreme Court specifically held that the quantity element of a water right cannot be reduced merely for non-application to a beneficial use regardless of the length of time the non-application continues.” Exh. 5 at 25-26 (citing <i>State v. Hagerman Water Users, Inc.</i>, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997)). “<u>Therefore, unless NSGWD is asserting either partial forfeiture or abandonment of a previously licensed right, evidence of ‘extent of beneficial use’ is irrelevant.</u> Secondly, whether labeling the diminished use as ‘partial forfeiture’ or ‘extent of beneficial use,’ unless the five year statutory period has elapsed, there is no cause of action and any related evidence would again be irrelevant.” Exh. 5 at 26 (emphasis added).	“Issues pertaining to necessary quantity, beneficial use, waste evapotranspiration of crops, waste and the like should have been identified in [the] Director’s recommendation and ultimately litigated in the context of the SRBA proceedings.” Exh. 1 at 37.	“The Director’s recommendation as to quantity, whether or not an in-depth field investigation was conducted in preparing the recommendation, is by no means the final word on the matter. The quantity recommendation is subject to objections by the claimant and any other party to the adjudication. If such an objection is made it may be litigated and determined by the Court. <u>Issues such as waste (i.e. reasonableness of conveyance works), duty of water, partial forfeiture, and excessive conveyance loss can and have been litigated in the SRBA whether or not they were considered in the Director’s recommendation.</u> . . . Accordingly, the degree to which the quantity element is scrutinized varies among the decrees issued in the SRBA. <u>Nonetheless, parties were provided the opportunity to raise and litigate issues affecting quantity.</u>” Exh. 2 at 18 (emphasis added).

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**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	)	Subcases No. 1-4, 1-10, and 1-209 (Twin Falls Canal Co.)
	)	
	)	AFFIDAVIT OF SARAH A. KLAHN
Case No. 39576	)	
_____	)	

STATE OF COLORADO	)
	) ss.
County of Denver	)

SARAH ANN KLAHN, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record for the City of Pocatello. I am over the age of 18 and state the following based upon my own personal knowledge.

2. Attached hereto as Exhibit 1 is a true and correct copy of a Memorandum Decision and Order on Petition for Judicial Review, *A&B Irrigation District v. Idaho Department of Water Resources*, Case No. 2009-000647 (5th Jud. Dist. May 4, 2010) (Hon. J. Wildman).

3. Attached hereto as Exhibit 2 is a true and correct copy of a Memorandum Decision and Order on Petitions for Rehearing, *A&B Irrigation District v. Idaho Department of Water Resources*, Case No. 2009-000647 (5th Jud. Dist. Nov. 2, 2010) (Hon. J. Wildman).

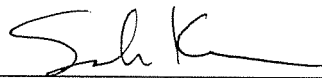
4. Attached hereto as Exhibit 3 is a true and correct copy of a Supplemental Director's Report issued in subcase nos. 1-4, 1-10 and 1-209 (Nov. 3, 2011).

5. Attached hereto as Exhibit 4 is a true and correct copy of Exhibit 20, *Maximum Monthly Diversion 1950-2000, 13087500 South Side Twin Falls Canal*, from the Deposition of Michael Warren Holliday in subcase nos. 1-4, 1-10 and 1-209 (5th Jud. Dist. Dec. 19, 2012).

6. Attached hereto as Exhibit 5 is a true and correct copy of an Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue in subcase nos. 36-02708 et al. (5th Jud. Dist. Dec. 29, 1999).

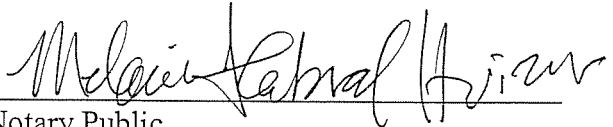
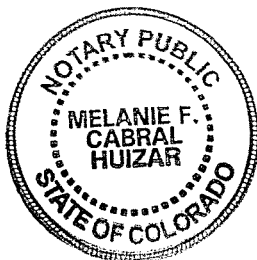
Further your affiant sayeth naught.

DATED this 1st day of March, 2012.



Sarah A. Klahn

Subscribed and sworn to before me by Sarah A. Klahn this 1st day of March, 2012.



Notary Public

My commission expires: June 10, 2014

FILED-DISTRICT COURT
CASE #

DUANE SIMMONS, CLERK
SE, DEPUTY

EXHIBIT 1

The Director erred in failing to apply proper evidentiary standard of clear and convincing evidence in finding of no material injury to A & B's right. Remanded for purpose of applying correct evidentiary standard.

The Director did not err by analyzing material injury to the 36-2080 right in cumulative as opposed to analyzing injury separately to the 177 points of diversion based on the way in which the right was licensed and decreed.

The Director did not err by failing to designate a Ground Water Management Area pursuant to I.C. § 42-233b.

Appearances:

John K. Simpson, Travis L. Thompson, Paul Arrington, Sarah W. Higer, Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, on behalf of Petitioner A & B Irrigation District, ("A & B"), (Travis Thompson argued);

Phillip J. Rassier, Chris M. Bromley, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources, ("Director," "IDWR" or "Department") (Chris M. Bromley argued);

Randall C. Budge, Candice M. McHugh, Scott J. Smith, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, on behalf of Respondent Idaho Ground Water Appropriators, Inc. ("IGWA") (Candice M. McHugh argued);

Sarah A. Klahn, White & Jankowski, LLP, Denver, Colorado, A. Dean Tramner, Pocatello, Idaho, on behalf of Respondent City of Pocatello ("City of Pocatello") (Sara A. Klahn argued);

Jerry R. Rigby, Rigby, Andrus & Rigby, Chartered, Rexburg, Idaho, on behalf of Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, and Stan D. Neville, ("Fremont-Madison *et. al.*").

I.
STATEMENT OF THE CASE

A. Nature of the Case

This case is a proceeding for judicial review of the *Final Order Regarding the A & B Delivery Call* ("*Final Order*") issued June 30, 2009, by David R. Tuthill, Jr., Director of IDWR. Record ("R.") R. 3318-3325. Following the retirement of Director Tuthill on June 30, 2009, Gary Spackman was appointed Interim Director. The *Final Order* was issued at the conclusion of proceedings relating to a *Petition for Delivery Call* originally filed with the Department by A & B on July 26, 1994. R. 12-14. The *Petition for Delivery Call* also requested that the Director designate the Eastern Snake Plain Aquifer ("ESPA") as a Ground Water Management Area ("GWMA") pursuant to Idaho Code § 42-233b. The *Final Order* denied both the delivery call and the request for GWMA designation. On August 31, 2009, A & B filed the instant *Notice of Appeal and Petition for Judicial Review of Agency Action* ("*Petition for Judicial Review*") pursuant to the Idaho Administrative Procedure Act, Title 67, Chap 52, Idaho Code.

B. Course of Proceedings

On June 26, 1994, A & B filed the *Petition for Delivery Call* seeking administration of ground water rights diverting from the ESPA that were junior in priority to water right 36-2080, as well as GWMA designation of the ESPA. R. 12-14. The *Petition* alleged *inter alia* that junior priority ground water pumping from the ESPA had lowered the water table an average of 20 feet and in excess of 40 feet in some areas. The *Petition* also alleges that the declines in the water table level resulted in reducing A & B's diversions from its authorized 1,100 cfs to 974 cfs and reduced diversions from 40 wells serving approximately 21,000 acres to a diversion rate insufficient to irrigate the lands served by the wells. R. 13.

Notice of the filing was served on approximately 7,200 holders of water rights who divert from the ESPA with priorities junior to September 16, 1994. R. 669. Responses were received from over 200 junior water right holders or entities representing water right holders. *Id.* Thereafter, A & B, IDWR and the participating respondents

entered into a stipulation, which among other things, stayed the *Petition for Delivery Call* until such time as any party filed a *Motion to Proceed* to have the stay lifted. R. 1106.

On March 16, 2007, A & B filed a *Motion to Proceed* with the Department, moving to lift the stay agreed to by the parties. Following a status conference on the *Motion to Proceed*, the Director issued an order lifting the stay. *Id.* On January 29, 2008, the Director issued an *Order* (“*January 29, Order*”) denying A & B’s *Petition for Delivery Call* and request for GWMA designation. R. 1105-1151. The *January 29, Order* concluded, based on the application of the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 (“CMR”), that A & B’s 36-2080 water right had not suffered “material injury.” *Id.* at 1151. In response, A & B requested an administrative hearing challenging the *January 29, Order*. R. 1182. An evidentiary hearing was conducted December 3 through 17, 2008, before Hearing Officer Gerald F. Schroeder (“Hearing Officer”). Respondents IGWA, City of Pocatello and Fremont Madison *et. al.* participated in the hearing. R. 116-17.

On March 27, 2009, the Hearing Officer entered his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendations* (“*Recommended Order*”). R. 3078-3120. The *Recommended Order* agreed with the conclusion of the Director’s *January 29, Order*, that A & B’s water right no. 36-2080 had not suffered material injury and that designation of a GWMA would not add any benefit to the management of the ESPA that could not already be accomplished through the water districts already in existence. *Id.* On May 29, 2009, the Hearing Officer issued an *Order Granting in Part and Denying in Part A & B’s Petition for Reconsideration*, correcting certain errors in the *Recommended Order* but otherwise affirming the *Recommended Order*. R. 3231-3233. On June 19, 2009, the Hearing Officer issued a response to *A & B’s Petition for Clarification* which clarified the Hearing Officer’s use of the term “total project failure.” R. 3262. A & B filed exceptions to the *Recommended Order* on June 30, 2009. R. 3318. On June 30, 2009, the Director issued the *Final Order* accepting all substantive recommendations of the Hearing Officer. On August 4, 2009, the Director issued an *Order Denying Petition for Reconsideration* making the *June 30, 2009, Order*, final. R. 3360.

On August 31, 2009, A & B timely filed the *Petition for Judicial Review* now before the Court. IGWA, City of Pocatello and Fremont-Madison *et. al.* all appear as Respondents. This case was assigned to the undersigned Judge in his capacity as a District Judge and not in his capacity as Presiding Judge of the Snake River Basin Adjudication ("SRBA").

C. Statement of Relevant Facts

1. A & B Irrigation Project

The North Side Pumping Division of the Minidoka Project was developed by the United States Bureau of Reclamation ("USBOR"). The project was completed in 1963. A & B is an irrigation district organized by the landowners of the North Side Pumping Division of the Minidoka Project. The USBOR transferred operation and maintenance of the project to A & B in 1966 pursuant to a repayment contract. The project consists of two units. Unit A serves approximately 15,000 acres with surface water diverted from the Snake River. Unit B serves approximately 66,000 acres with ground water pumped from the ESPA primarily authorized under the 36-2080 water right.¹

2. Water Right 36-2080

Water right 36-2080 is a ground water right held in trust by the USBOR for the benefit of the landowners within A & B Irrigation District. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). The right was decreed with a priority date of September 9, 1948, and cumulatively authorizes the diversion of 1100 cfs from 177 separate points of diversion (wells) for the irrigation of 62,604.3 acres from April 1 to October 31. The decreed quantity calculates to 0.88 miner's inches per acre.² A partial decree was issued for the right in the SRBA on May 7, 2003. Exh. 139.

A subsequent administrative transfer approved the use of up to 188 wells and expanded the authorized number of acres to 66,686.2. A & B currently operates 177

¹ Unit B is also irrigated with other ground water rights, including enlargement rights, which cumulatively authorize the irrigation of 66,686.2 acres. R. 1112.

² This is calculated as follows: $1,100 \text{ cfs} / 62,604.3 \text{ acres} = .0176 \text{ cfs}$ or 0.88 (0.0176/.02) miner's inches per acre. However, this is an average, as not all wells produce 0.88 inches per acre some produce more and others less. R. 3108. Well capacity ranges from 0.8 cfs to 10.6 cfs. R. 3093

wells. R. 3081. The place of use for all points of diversion is described as “the boundary of A & B Irrigation District service area pursuant to Section 43-323, Idaho Code.” R. 3094. As a result, water diverted from any one of the wells is appurtenant to all acres within the place of use. R. 3092. The rate of diversion for the right is decreed in the cumulative and does not ascribe any rate of diversion to a particular well. The USBOR applied to have the right licensed in this manner to provide for the greatest amount of flexibility in distributing water throughout the project. R. 3093-94; Exh. 157D.

Despite being decreed in this manner, the Unit B ground water project is not a system of interconnected wells. The Unit is comprised of 130 independent well systems. R. 3093. A well system consists of one or more wells that provide water to a distribution system that services a particular number of acres. On average, five farm units are served from each well system. Eighty-eight of the systems consist of a single well. Approximately 40 of the systems consist of two wells. The Unit has two or three systems comprised of three wells. R. 3092-93. Water delivery for the average well system requires less than one mile of canal with a capacity of 5.6 cfs. R. 3095. Although not all of A & B’s wells are underperforming, because of the design of the system and the geographic layout of the lands within the Unit, water cannot readily be distributed throughout the Unit from areas served by wells capable of pumping more than required for the area of service, to areas served by underperforming wells. R. 3095.

3. Historical Development of the Unit B Ground Water Project System

The Unit B ground water project was originally designed as an open discharge system where water was pumped from the ground into surface ponds and delivered through open lateral systems to the user. R. 3098. Irrigation was initially accomplished by gravity flow. R. 3099. Gravity flow has been replaced by more efficient sprinkler systems. R. 3099. As of 2007, only 3 to 4 percent of the irrigation in Unit B was gravity flow. *Id.* The original conveyance system included 109.71 miles of laterals and 333 miles of drains. The current system includes 51 miles of laterals, 138 miles of drains and 27 miles of distribution piping. Sixty-nine water injection wells have also been eliminated and the water applied to other purposes. R. 3099. In sum, the current system

is more efficient than the original system. Conveyance loss system wide is between 3 and 5 percent. R. 3099. These efficiencies reduced the amount of water re-entering the ESPA. R. 3102.

A & B maintains the Unit B ground water project system on an annual basis including a "rectification" program for underperforming wells. The rectification program includes deepening wells, drilling new wells and increasing horsepower to existing pumps. A & B's criteria for rectification targets wells delivering below 0.75 miner's inches per acre. R. 3101.

4. Declines in ESPA Levels

The project was developed when water levels in the ESPA were at their peak. Gravity flow irrigation from the Snake River resulted in significant amounts of recharge to the ESPA. Ground water pumping was also limited. Since that time changes in irrigation practices reducing incidental recharge, ground water pumping and drought have all contributed to declines in aquifer levels. Declines in aquifer levels since the wells were installed range from 8.5 feet to 46.4 feet. Although the overall annual recharge to the ESPA exceeds depletions from ground water pumping, less water enters the project area than leaves the area. Despite declines in certain areas the aquifer is not being "mined" by ground water pumping. R. 3113.

5. A & B's Delivery Call

The declines in aquifer levels have resulted in A & B being unable to pump the full amount of its authorized rate of diversion during peak demand periods. The declines reduced cumulative withdrawals from 1,100 cfs (0.88 miner's inches per acre) to 974 cfs (0.78 miner's inches per acre) for the entire project. Depletions have also resulted in some wells being abandoned. The shortages are not uniform throughout the project. A & B alleges ground water pumping by juniors has materially injured the 36-2080 water right. R. 3113. However, certain areas within the project, which lie over hydrogeologic regions of poor transmissivity, have realized the greatest shortages. These areas are primarily located in the southwest region of the project but shortages are not exclusively limited to that area. R. 3111; Exh. 200N & 216.

D. Decision of the Director

The Hearing Officer's *Recommended Order* determined the following: 1) A & B's 36-2080 right was subject to the provisions of the Idaho Ground Water Act (I.C. §§ 42-226 *et seq.*) ("GWA") and A & B's wells had not exceeded reasonable pumping levels; 2) 0.75 miner's inches per acre was the minimum quantity necessary to satisfy A & B's water requirements despite the 36-2080 right being decreed in the aggregate for 0.88 miner's inches per acre; 3) inherent hydrogeologic conditions making pumping difficult in certain areas of the project was not a basis for curtailment; 4) A & B was required to take reasonable measures to move water to underperforming areas within the project; 5) A & B had not suffered material injury to its senior water right; and 6) no additional benefit to the management of the ESPA would result from the formation of a GWMA. R. 3078. In the *Final Order* the Director accepted all substantive recommendations of the Hearing Officer. R. 3318.

II.

ISSUES PRESENTED ON APPEAL

A & B raises the following issues on appeal:

- A. Whether the Director erred in concluding that the provisions of the GWA apply to pre-enactment water rights?
- B. Whether the Director unconstitutionally applied the CMR by disregarding the proper presumptions and burdens of proof resulting in: (i) reducing A&B's diversion rate per acre from 0.88 to 0.75 miner's inches; (ii) creating a new "failure of the project" standard for injury; and (iii) using a "minimum amount needed" for crop maturity standard?
- C. Whether the Director erred in failing to separately analyze A & B's 177 individual points of diversion, as opposed to cumulatively, for purposes of determining injury to A & B's senior water right?

- D. Whether the Director erred and unconstitutionally applied the CMR by concluding that A & B must interconnect individual wells or well systems across the project before a delivery call can be filed even though water right 36-2080 was developed, licensed and decreed with as many as 130 individual well systems?
- E. Whether the Director erred in finding that A & B has not been required to pump water beyond a "reasonable ground water pumping level" even though (1) the Director provided no factual support for this conclusion, (2) the evidence demonstrates that A&B has been forced to drill wells deeper and even abandon wells as water supplies become more and more depleted, and (3) no such level has ever been determined as required by Idaho Code § 42-226?
- F. Whether the Director erred in failing to designate all or a portion of the ESPA as a GWMA pursuant to Idaho Code § 42-233b?
- G. Whether the Director violated I.C. § 42-231 by failing to protect the ESPA, set a reasonable pumping level or designate a GWMA?
- H. Whether the Director erred by failing to issue a final order in compliance with I.C. § 67-5248?

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument before the District Court in this matter was held March 2, 2010. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, this matter is deemed fully submitted for decision on the next business day or March 3, 2010.

IV.

APPLICABLE STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act (IDAPA), Chapter 52, Title 67, I.C. § 42-1701A(4). Under IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The Court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or,
- (e) arbitrary, capricious, or an abuse of discretion.

Idaho Code § 67-5279(3); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

The petitioner or appellant must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the party has been prejudiced. I.C. § 67-5279(4). *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record.³ *Id.* The Petitioner (the party challenging the agency decision) also bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs*. 132 Idaho 552, 976 P.2d 477 (1999).

The Idaho Supreme Court has summarized these points as follows:

³ Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, special master, or hearing officer – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds *must* conclude, only that they *could* conclude. Therefore, a hearing officer's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusions the hearing officer reached. See *eg. Mann v. Safeway Stores, Inc.* 95 Idaho 732, 518 P.2d 1194 (1974); see also *Evans v. Hara's Inc.*, 125 Idaho 473, 478, 849 P.2d 934, 939 (1993).

The Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. The Court instead defers to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence in the record.... The party attacking the Board's decision must first illustrate that the Board erred in a manner specified in Idaho Code Section 67-5279(3), and then that a substantial right has been prejudiced.

Urrutia v. Blaine County, 134 Idaho 353, 2 P.3d 738 (2000) (citations omitted); *see also*, *Cooper v. Board of Professional Discipline*, 134 Idaho 449, 4 P.3d 561 (2000).

If the agency action is not affirmed, it shall be set aside in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs of Ada Co.*, 128 Idaho 517, 519, 915 P.2d 1375, 1377 (Ct.App. 1996).

V.

ANALYSIS AND DISCUSSION

A. The Director Did Not Err in Concluding the GWA Applies to the Administration of the Right to Use Water Rights Pre-dating its Enactment.

A & B argues the Director erred in adopting the Hearing Officer's conclusion that the GWA applies to water rights appropriated prior to its enactment. Water right 36-2080 has a priority date of September 9, 1948. The GWA was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, pp. 423-29 (codified as Idaho Code §§ 42-226 *et. seq.*). The significance of whether the GWA applies to water rights established prior to its enactment comes from I.C. § 42-226 which was amended in 1953 to provide:

[W]hile the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, *but early appropriators of underground water shall be protected in the maintenance of reasonable pumping levels* as may be established by the state reclamation engineer as herein provided.

1953 Idaho Sess. Laws, ch. 182, p. 278 (emphasis added).⁴

A & B argues that because water right 36-2080 was established prior to the enactment of the GWA, the right is not subject to the “reasonable pumping level” provision of I.C. § 42-226. A & B argues instead that the right is protected to historic pumping levels as provided by common law. In support of its argument, A & B cites to the plain language of the 1987 amendment to I.C. § 42-226, which remains in the current version of the statute, and provides: “This act shall not affect the rights to the use of ground water in this state acquired before its enactment.” 1987 Idaho Sess. Laws Ch. 347, p. 743. Among other things, A & B also points out where this same provision has been cited to by both the Idaho Supreme Court and the SRBA District Court for the proposition that the GWA does not apply to water rights pre-existing its enactment. *See Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994); *In re: SRBA Case No. 39576, Order on Cross Motions for Summary Judgment*, Subcase No. 91-00005, p.22 (July 2, 2001)(citing *Musser*). The issue of whether the GWA applies to pre-existing water rights is a question of law over which a reviewing court exercises free review. *Farber v. Idaho State Insurance Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). Moreover, the issue requires a comprehensive review of the GWA in its entirety.

1. Application of Standards of Statutory Interpretation to the GWA.

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. *Farber* at 310, 208 P.3d at 292 (2009) (citing *Payette River Prop. Owners Ass’n v. Bd. Of Comm’rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)). Statutory interpretation begins with the literal language of the statute. *Id.* (citing *Paolini v. Albertson’s, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006)). When the statutory language is unambiguous, the clearly expressed intent of the

⁴ The original language has since been amended but not in substance. I.C. § 42-226 currently provides:

[W]hile the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. *Prior appropriators of underground water shall be protected in the maintenance of reasonable pumping levels* as may be established by the director of the department of water resources as herein provided.

legislative body must be given effect, and the court need not consider rules of statutory construction. *Id.* (citing *Payette River*, 132 Idaho at 557, 976 P.2d at 483). Statutory provisions should not be read in isolation, but must be interpreted in the context of the entire document. *Id.* (citing *Westerburg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988)). The statute should be considered as a whole and the words given their plain, usual, ordinary meaning. *Id.* A statute is passed as a whole and not in parts or sections. Each part or section should therefore be construed in connection with every other part or section so as to produce a harmonious whole. It is not proper to confine interpretation to the one section to be construed. SUTHERLAND, STAT. CONST. § 46:05 (6th ed. 2001).

2. When Construed in its Entirety, it is Clear the Legislature Intended the GWA to Apply to the *Administration* of All Rights to the Use of Ground Water Whenever or However Acquired.

The language of the 1987 amendment to I.C. § 42-226, which provides “[t]his act shall not affect the rights to the use of ground water in this state acquired before its enactment” appears, when read in isolation, to exempt water rights existing prior to the enactment of the GWA from its application. However, when construing the Act in its entirety, and specifically taking into account the plain language of I.C. § 42-229, it becomes clear that the Legislature intended a distinction between the “right to the use of ground water” and the “*administration* of all rights to the use of ground water.” This distinction is significant in that the plain language of the Act makes clear that the Act applies retroactively to the later category unless specifically exempted.

Prior to the enactment of the GWA in 1951, Idaho did not have a statutory scheme in place specifically governing the appropriation and administration of ground water. In discussing the enactment of the GWA in 1951, the Idaho Supreme Court has noted that:

In the years since World War II, most western states have enacted legislation establishing administrative controls over ground water withdrawals . . . Idaho was in the vanguard of this movement when we enacted our Ground Water Act in 1951 I.C. §42-226 et seq.

Baker v. Ore-Ida Food, 95 Idaho 575, 580, 513 P.2d 627, 632 (1973).

In its original form, Section 1 of the Act (now codified as I.C. § 42-226) re-affirmed that the traditional policies of this state pertaining to the beneficial use of water through appropriation apply to ground water:

Section 1 GROUND WATERS ARE PUBLIC WATERS

It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.

1951 Idaho Sess. Law, ch. 200, pp. 423-424. (emphasis added).

Section 1 of the Act was subsequently amended by the Legislature in 1953, 1980, and 1987.⁵ The phrase: "*All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed*" remained in force until the 1987 amendment when that provision was replaced by the following provision now at issue: "*This act shall not affect the rights to the use of ground water in this state acquired before its enactment.*" 1987 Idaho See. Laws ch. 347, p. 743. (emphasis added). By its plain language, the 1987 amendment applies only to "the rights to the use of ground water."

In its original form, Section 4 of the Act (now codified as I.C. § 42-229) provided as follows:

Section 4. METHODS OF APPROPRIATION

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriations may be perfected by means of diversion and application to beneficial use or by means of the application permit and license procedure in this act provided. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of chapter 2 of title 42, Idaho Code, may be completed under the provisions of said chapter 2 and rights to the use of ground water may be thereby acquired. But the administration of all rights to the use of ground water, whenever or

⁵ In 1953, Section 1 was amended to include the "full economic development" and "reasonable ground water pumping levels" provisions. See *Supra* fn. 4

however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provision of this act.

1951 Idaho Sess. Laws, ch. 200, p.424. (emphasis added). The plain language of the last sentence of this provision specifically addresses and applies to “the *administration*” of the right to the use of ground water. The last sentence of the original Section 4 has remained unchanged and appears in its original form in the current version of I.C. § 42-229.

When the two above-mentioned provisions are read in conjunction it is clear that the last sentence of I.C. § 42-226 governs the applicability of the GWA to rights to the use of ground water acquired before its enactment, whereas the last sentence of I.C. § 42-229 applies to the *administration* of rights to the use of ground water acquired before its enactment. By its plain language then, the GWA applies to the *administration* of rights to the use of ground water “whenever or however” acquired. I.C. § 42-229.

A & B’s argument that the 1987 amendment language to what is now I.C. § 42-229 excludes the application of the GWA from pre-existing water rights leads to two problematic results. First, the interpretation renders the “whenever or however acquired” language of the last sentence of I.C. § 42-229, which pertains to the administration of the right to use ground water, meaningless. Courts must give effect to all the words and provisions of a statute so that none will be void, superfluous or redundant. *Faber*, 147 Idaho at 310, 208 P.3d at 293. Second, the argument results in the conclusion that pre-existing water rights are insulated from *all* administrative provisions enumerated in the GWA, including but not limited to provisions regarding the equipping of wells with flow valves, rights of inspection by IDWR, maintenance of casings, pipes, fittings, etc. *See* I.C. § 42-237a.g. This conclusion leads to an absurd result and must be rejected. As shown above, the Director has the authority under the GWA to administer rights to the use of ground water “whenever or however acquired.”

3. Within the Structure of the GWA, the Management of Ground Water Pumping Levels was Intended to be Addressed under the Purview of the *Administration* of Ground Water Rights.

The GWA vests the Director with a number of enumerated powers and responsibilities associated with the supervision and administration of ground water rights. Of significance to the facts of this case, the maintenance of ground water levels is one such power:

To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the director finds it is in the public interest and if it satisfies the following criteria

I.C. § 42-237a.g.⁶

Within the structure of the GWA, the management of ground water pumping levels was therefore intended to be addressed under the purview of the *administration* of groundwater rights. Although (as is discussed below) the common law may have protected the means of diversion of senior appropriators to historic pumping levels, ground water pumping levels have never been treated as an element of a water right, nor have pumping levels been memorialized in any decree or license. *See. e.g.* I.C. § 42-1409 (required elements in Notice of Claim – no reference to well depth); I.C. § 42-222 (setting forth changes to water right requiring transfer proceeding – no reference to well depth); I.C. § 42-202 (contents of permit application – no reference to well depth). Likewise in *Baker v. Ore-Idaho Foods*, the Idaho Supreme Court recognized most western states, including the state of Idaho via the GWA “have enacted legislation establishing *administrative* controls over ground water withdrawals.” *Baker*, 95 Idaho at 580, 513 P.2d at 632 (emphasis added).

⁶ This provision was originally included in the 1953 version of the GWA and read the same except that it referred to the “state reclamation engineer.”

The fact that (1) pumping level is not considered an element of a right, (2) the GWA delegated a number of duties to IDWR associated with the maintenance of ground water levels, and (3) the acknowledgement by the Idaho Supreme Court that the GWA established administrative controls over the withdrawal of groundwater in *Baker v. Ore-Ida Foods* all strongly suggest that the issues pertaining to ground water levels fall under the category of the administration of the right to the use of ground water. The plain language of I.C. § 42-229 makes clear that the *administration* of the right to the use of ground water shall be governed by the GWA “whenever or however” the water right was acquired.

4. The Case Law Applying the GWA is Consistent with this Interpretation.

The limited case law applying the provisions of the GWA is consistent with the conclusion that the management of ground water levels is a matter of administration and therefore is subject to the retroactive application of the GWA. In *Noh v. Stoner*, 53 Idaho 651, 26 P. 531 (1933), prior to the enactment of GWA in 1951, the Idaho Supreme Court addressed the issue of maintenance of water tables in a dispute involving a junior well interfering with a senior ground water right. The Court held that senior well owners were protected absolutely to the extent of their historical pumping level. Junior well owners could not be enjoined from pumping so long as they held the senior harmless for the cost of modifying or lowering the senior’s means of diversion such that the senior received the same flow of water. *Id.* at 657, 26 P.2d at 1114.

In *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973), the Idaho Supreme Court addressed the application of the GWA in a dispute between ground water pumpers over the maintenance of ground water tables. The Court concluded the GWA was “consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest.” *Id.* at 584, 513 P.2d at 636 (citing Idaho Const. Art. 15 § 7). The Court held:

[A] senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to

accept some modification of their rights in order to achieve the goal of full economic development. . . .

In the enactment of the Ground Water Act, the Idaho legislature decided, as a matter of public policy, that it may sometimes be necessary to modify private property rights in ground water to promote full economic development of the resource

We conclude that our legislature attempted to protect historic water rights while at the same time promoting full economic development of ground water. Priority rights in ground water are and will be protected insofar as they comply with reasonable pumping levels. Put otherwise, although a senior may have a prior right to ground water, if his means of diversion demands an unreasonable pumping level his historic means of diversion will not be protected.

Id. at 584, 513 P.2d at 636 (citations omitted). The Court determined the holding in *Noh* was “inconsistent with the full economic development of our ground water resources” and that “the Ground Water Act was intended to eliminate the harsh doctrine of *Noh*.” *Id.* at 581-82, 513 P.2d at 633-34. Further:

Where the clear implication of a legislative act is to change the common law rule we recognize the modification because the legislature has the power to abrogate the common law. . . . We hold *Noh* to be inconsistent with the constitutionally enunciated policy of optimum development of water resources in the public interest. *Noh* is further inconsistent with the GWA.

Id. at 583, 513 P.2d at 635 (citations omitted). Although the Court never specifically addressed the issue of whether or not the reasonable pumping level provisions of the GWA were intended to apply to pre-existing rights, two of the senior rights held by the plaintiffs who made the delivery call had priorities pre-dating the enactment of the GWA. Consequently the Court did in fact apply the reasonable pumping provision to pre-existing rights. While the case is not dispositive of the issue, the ruling makes it clear that the Legislature through the enactment of the GWA modified the common law rule in *Noh*.

In *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), a subsequent case involving a delivery call by a holder of a domestic ground water right, the Idaho Supreme Court applied the historic pumping level rule in *Noh* to the circumstance where it was

determined that the GWA did not apply. In *Parker*, the senior domestic water right had a priority date of 1964. The Idaho Supreme Court held that prior to the 1978 amendment the GWA did not apply to domestic wells. In reaching the holding the Court relied on the original 1951 version of the GWA which provided an exclusion for domestic use until 1978 when the GWA was amended to eliminate the exclusion.⁷ *Id.* at 510, 650 P.2d 652. The Court held that the 1951 version of the language excluding domestic wells to be unambiguous. *Id.* at 511, 650 P.2d 653. After determining that the GWA did not apply the Court distinguished the holding in *Baker* and applied the ruling in *Noh*.

Although this Court in *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 581-83, 513 P.2d 627, 633-35 (1973), held that *Noh* is not applicable to cases determined under the reasonable pumping level provisions of the Ground Water Act, *Noh* is applicable to circumstances such as these in which [the GWA] does not apply.

Id. at 513, 650 P.2d 655. On first impression the holding in *Parker* appears inconsistent with the holding in *Baker*, which arguably overruled the rule in *Noh* independent of the GWA. However, it is important to note that prior to the 1978 amendment, the GWA did not apply in any respect, retroactively or otherwise to domestic wells. This blanket exclusion was solely limited to domestic wells. Accordingly, the holding in *Parker* is consistent with *Baker* for purposes of applying the GWA to water rights that are not expressly exempt from its application.

5. The *Musser* Decision

The issue of whether the GWA was intended to apply retroactively to the administration of pre-existing rights has never been squarely addressed by the Idaho Supreme Court. However, as correctly argued by A & B, the Idaho Supreme Court decided the case of *Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994), in part, on the basis that the “statute [I.C. § 42-226] does not affect the rights to the use of ground water acquired before enactment of the statute.” *Id.* at 396, 871 P.2d at 813 (citing the language of the 1987 amendment to I.C. § 42-226). In *Musser*, the Director

⁷ Section 2 of the original version of the GWA provided an exclusion for domestic wells as follows: “The excavation and opening of wells and withdrawal of water therefrom for domestic purposes *shall not be in any way affected by this act.*” 1951 Idaho Sess. Laws, ch. 200, p. 424 (now codified as I.C. § 42-227)

refused to honor the demand for a delivery call initiated by a senior surface user. The Director reasoned he lacked the authorization to conjunctively administer ground and surface water within a water district without a formal hydrologic determination that conjunctive management was appropriate. *Id.* at 394, 871 P.2d at 811. The district court issued a writ of mandate, ordering the Director to administer the rights. The Director appealed. *Id.*

On appeal, the Director argued that although he had a mandatory statutory duty to administer water within a water district, I.C. § 42-226 left to the Director's discretion the means used to respond to delivery calls. The Supreme Court rejected the argument citing the principle that, although certain details regarding how an agency is to carry out a mandatory duty are left to the agency's discretion such, is not a basis for relief from mandamus. *Id.* at 394-395, 871 P.2d at 811-12 (citations omitted). The Supreme Court held:

This principle applies to this case. The director's duty pursuant to I.C. § 42-602 is clear and executive. Although the details of the performance of the duty are left to the director's discretion, the director has the duty to distribute water.

Id. The basis for the holding is the Director's duty to distribute water pursuant to I.C. § 42-602. The Court then goes on to address the Director's explanation for refusal to honor the demand:

The director defended his refusal to honor the Mussers' demand by claiming that a 'policy' of the department prevented him from taking action. In his testimony at the hearing to consider whether the writ would issue, the director referred to I.C. § 42-226 and stated 'a decision has to be made in the public interest as to whether those who are impacted by ground water development are unreasonably blocking full use of the resource.'

We note that the original version of what is now I.C. § 42-226 was enacted in 1951. 1951 Idaho Sess. Laws, ch. 200, § 1, p. 423. *Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute. Therefore, we fail to see how I.C. § 42-226 in anyway affects the director's duty to distribute water to the Mussers, whose priority date is April 1, 1892.*

(emphasis added). In 1978, I.C. § 42-227 was amended to eliminate the exclusion. 1978 Idaho Sess. Laws, ch. 323, p. 819.

Id. at 396, 871 P.2d at 813 (emphasis added).

This language is compelling if read outside of the context of the entire GWA. It is important to note, however, that *Musser* was decided based on principles governing mandamus in relation to the Director's duty to distribute water in water districts pursuant to I.C. § 42-602 and not the application of the GWA. In citing to I.C. § 42-226, the Court was responding to one of the defenses raised by the Director. Since enactment, the GWA has undergone several amendments and I.C. § 42-226 is only one component of the act. The application of I.C. § 42-226 or the GWA was not before the Court in *Musser*. Accordingly, the Court did not have the occasion to analyze the issue in the framework of the entire GWA, nor was it necessary.⁸ As shown above, it is clear when read in its entirety that the intent of the legislature in passing the GWA was to distinguish between the right to the use of ground water and the administration of the right to the use of ground water. It is also clear that under the plain language of I.C. § 42-229 the GWA applies to the administration of all rights to the use of ground water whenever or however acquired.

6. The More Reasonable Interpretation and Purpose of the Language of the 1987 Amendment.

As noted previously, the GWA was the first statutory scheme in place specifically governing the appropriation and administration of ground water. However, the GWA was not the first authorization of the ability to appropriate a ground water right. The more reasonable interpretation of the intent of the original language "[a]ll rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed" was to acknowledge this very point and eliminate any confusion that ground water rights of existing holders were unauthorized or that existing right holders would have to make application under the GWA. While this interpretation is straight forward, the confusion arises as a result of the 1987 amendment, which when read independently from the rest of the act, appears to exempt pre-existing

⁸ The SRBA also cited *Musser* for the proposition that the 1951 GWA did not apply to pre-existing water rights. The issue of the retroactive application of the GWA was not before the Court. In Re: SRBA Case

rights from the GWA. However, the more plausible justification behind the amendment and its choice of language was to avoid confusion in the forthcoming SRBA. Namely, that the validated and confirmed language could be construed as a legislative determination of the validity of pre-existing rights. Accordingly, this Court concludes that both the original language and the 1987 amendment were not intended to exempt pre-existing rights from the application of the GWA but rather to establish that pre-existing rights were acknowledged as valid and not supplanted by the operation of the GWA. Therefore this Court holds the Director did not err in concluding that the reasonable pumping level provisions of the GWA apply to pre-enactment water rights.

B. The Director did not err in determining that A & B had not been required to pump below a reasonable pumping level. This determination however, is dependent on the Director's material injury analysis and his determination that there is sufficient water available to supply 0.75 miner's inches per acre.

A & B argues the Director erred by concluding A & B had not been forced to exceed reasonable ground water pumping levels to satisfy its right without first establishing a reasonable ground water pumping level from which to make the determination. In his *January 29, 2008 Order*, the Director determined "[a]lthough ground water levels throughout the ESPA have declined from their highest levels reached in the 1950's, ground water levels generally remain of pre-irrigation developmental levels. There is no indication that ground water levels in the ESPA exceed reasonable ground water levels required to be protected under the provisions of Idaho Code § 42-226." R. 1109. In the *Recommended Order*, the Hearing Officer determined: 1) A & B is not protected to historic levels; 2) that the aquifer is not being mined in that more water enters the aquifer than is being removed by ground water pumping; and 3) that A & B's poorest performing wells could not be used as a measure for establishing the reasonableness of the ground water levels. R. 3113. Ultimately the Hearing Officer concluded "[t]he right to water [quantity] established in the partial decree remains, but that right is dependent upon A & B's ability to reach the water from those wells or to

No. 39576, *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits*, Subcase 91-00005 (Basin-Wide Issue 5) (July 2, 2001), p.22.

import it from other wells." *Id.* The Director adopted the Hearing Officer's recommendation in the *Final Order*. R. 3321.

Idaho Code § 42-237a.g. sets forth the Director's duties with respect to establishing ground water levels:

In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources *in his sole discretion* is empowered .

...

g. To supervise and control the exercise and administration of all rights to the use of ground waters *and in the exercise of this discretionary power* he may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he *may* establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, *contrary to the declared policy of this act*⁹, the present or future use of any prior surface or ground water right *or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated rate of future natural recharge.*

(emphasis added). Accordingly, the GWA does not mandate that the Director establish ground water levels automatically as a matter of course in conjunction with a delivery call by a ground water pumper.

The Hearing Officer's conclusion that reasonable pumping levels had not been exceeded was based on the finding that sufficient water was available satisfy the 36-2080 right at current pumping levels following the consideration of factors associated with the material injury analysis. In light of this finding the Hearing Officer concluded it was not necessary for the Director to establish a reasonable level in conjunction with the delivery call. This Court agrees and affirms the determination, subject to one proviso.

⁹ The policy of the GWA is included in I.C. § 42-226 which provides in relevant part: "Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided."

The Director's conclusion is based on two threshold determinations made in conjunction with the material injury analysis. First, the Director's determination that sufficient water exists at current pumping levels relies on the finding that 0.75 miner's inches per acre is sufficient quantity to satisfy the purpose of use for the 36-2080 right despite the right being decreed for 0.88 miner's inches per acre. Second, the Director's determination that it was appropriate to analyze injury cumulatively based on injury to the entire right as opposed to evaluating injury to the 177 separate points of diversion. The significance of which would require A & B to move available water around within the project from wells capable of over performing to those areas served by underperforming wells. In other words injury would not be determined without looking at the depletive effects to entire right as opposed to individual points of diversion. These threshold issues are addressed separately in this opinion. To the extent the Director erred in either of these determinations it may require that the Director revisit the issue of the reasonableness of the pumping levels.

C. The Director erred in failing to apply the constitutionally protected presumptions and burdens of proof.

A & B argues the Director unconstitutionally applied the CMR by failing to apply the proper presumptions and burdens of proof resulting the reduced diversion rate per acre for the 36-2080 right from 0.88 to 0.75 miner's inches. This Court agrees. The 36-2080 right was licensed and ultimately decreed with a diversion rate of 0.88 miner's inches per acre for the 62,604.3 acre place of use.¹⁰ Following application of the CMR, Rule 42 in particular, the Director determined that 0.75 miner's inches met A & B's minimum irrigation needs. The 0.75 miner's inches per acre, among other things, was therefore used to arrive at the finding of no material injury.

1. The CMR, Material Injury, and Efficient use of Water Without Waste.

¹⁰ The fact that the right was decreed for 1,100 cfs to a 62,604.3 place of use involves a separate issue addressed later in this opinion.

The 36-2080 right is included in an organized water district. CMR Rule 40 pertains to responses to delivery calls in organized water districts, and in relevant part provides as follows:

040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).

01. Responding To a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of a diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering *material injury*, and upon a finding by the Director as provided in Rule 42 that *material injury* is occurring, the Director, through the water master, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district

IDAPA 37.03.11.040.01.a (emphasis added). CMR Rule 040.03 provides:

Reasonable exercise of rights. In determining whether diversion and the use of water under rights will be regulated under Subsection 040.01.a. or 040.01.b, the Director shall consider whether the petitioner making the delivery call is *suffering material injury to a senior-priority water right and is diverting and using water efficiently without waste*, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. *The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.*

IDAPA 37.03.11.040.03. (emphasis added). CMR 010.14 defines "*material injury*" as: "*Hindrance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho Law, as set for in Rule 42.*" IDAPA 37.03.11.010.14 (emphasis added).

CMR Rule 42 sets forth the factors for determining material injury and the use of water efficiently without waste as follows:

042. DETERMINING MATERIAL INJURY AND REASONABLENESS OF WATER DIVERSIONS (RULE 42).

01. Factors. Factors the Director may consider in determining whether the holders of water rights are *suffering material injury and using water efficiently without waste*, include but are not limited to:

a. The amount of water available in the source from which the water is diverted.

b. The effort or expense of the holder of the water right to divert the water from the source.

c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year cumulative impacts of all ground water withdrawals from an area having a common ground water supply.

d. If for irrigation, the rate of diversion compared to the acreage of the land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.

e. The amount of water being diverted and used compared to other rights.

f. The existence of water measuring and recording devices.

g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices. . . .

h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

IDAPA 37.03.11.042.01.a.-h.

2. *American Falls Reservoir Dist. No. 2 v. IDWR*

In *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007) (*AFRD #2*), the Idaho Supreme Court addressed the constitutionality of the CMR in the context of a facial challenge. The issue arose as a result of senior surface right holders challenging the constitutionality of the CMR because the Rules required the senior making the call to prove material injury after the Director requested information from the surface users for the prior fifteen irrigation seasons instead of automatically giving effect to the decreed elements of the water right. The district court held the CMR to be facially unconstitutional for failing to “also integrate the concomitant tenets and procedures relating to a delivery call, which have historically been necessary to give effect to the constitutional protections pertaining to senior water rights. . . .” *Id.* at 870, 154 P.3d at 441. The district court held that “under these circumstances, no burden equates to impermissible burden shifting.” *Id.* at 873, 154 P.3d at 444.

On appeal, the Idaho Supreme Court held that the CMR were not facially defective for failure to include the applicable burdens of proof and evidentiary standards based on the application of principles unique to facial challenges. Integral to the Supreme Court’s determination was the recognition that:

CM Rule 20.02 provides that: ‘[T]hese rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law.’ ‘Idaho law’ as defined by CM Rule 10.12 means ‘[T]he constitution, statutes, administrative rules and case law of Idaho.’ Thus, the Rules incorporate by reference and to the extent the Constitution, statutes and case law have identified the proper presumptions, burdens of proof, evidentiary standards and time parameters, those are part of the CM Rules.’

Id. at 873, 154 P.3d at 444. Accordingly, even though the CMR do not expressly address the burdens and presumptions the Director could still apply the CMR in a constitutional manner by including the constitutional burdens and presumptions. The Court then held that “the Rules do not permit or direct the shifting of the burden of proof . . .

[r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules.” *Id.* at 874, 154 P.3d at 445 (emphasis added). Further:

The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has. . . . While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, the burden is not on the senior water rights holder to re-prove an adjudicated right. The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by which to determine "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts [others]." *A & B Irrigation Dist.*, 131 Idaho at 422, 958 P.2d at 579. Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call.

Id. at 877-78, 154 P.3d at 448-49 (emphasis added).

3. The Significance of a Licensed or Decreed Water Right.

In applying the factors as set forth in CMR Rule 42, the Director concluded that despite a decreed rate of diversion of 0.88 miner's inches per acre, the minimum rate of diversion per acre that would satisfy A & B's irrigation requirements was 0.75 miner's inches. The Director concluded sufficient water supply was available to provide the 0.75 miner's inches and denied A & B's delivery call. The issue arises as a result of the variance between the quantity decreed for the water right and the quantity the Director determined was actually needed to accomplish the decreed purpose of use, or put differently, the quantity that could be put to beneficial use.

As part of Idaho's licensure statutes the permit holder is required to make proof of beneficial use and the Department is required to examine such use. I.C. § 42-219. Idaho Code § 42-219 provides:

[U]pon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law

has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall . . . state . . . the purpose for which such water is used, the quantity of water which may be used, *which in no case shall be an amount in excess of the amount that has been beneficially applied.*

Id. (emphasis added). Idaho Code § 42-220 provides that “[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right” Further, “neither such licensee nor anyone claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed” I.C. § 42-220.

Idaho’s adjudication statutes require the Director to evaluate the extent and nature of each water right for which a claim was filed based on state law. I.C. § 42-1410. The Department’s role in the adjudication “is that of an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported.” Further, [t]he director shall make recommendations as to the extent of beneficial use and administration of each water right under state law. . . . I.C. § 41-1401B. Idaho Code § 42-1402 provides: “The right confirmed by such decree . . . shall describe the land to which such water shall become appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed” Idaho Code § 42-1411 requires the Director to prepare and file a director’s report which among other things determines the quantity of water used. The statute further provides that “[e]ach claimant of a water right has the ultimate burden of persuasion for each element of the water right.” Further, that because the “director’s report is prima facie evidence of the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director’s report.” I.C. § 42-1411(5). Finally, Idaho Code § 42-1420 provides “the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system.” I.C. § 42-1420.

Accordingly, both Idaho's licensure and adjudication statutory schemes expressly take into account the extent of the beneficial use in regards to the quantity element of a water right and expressly prohibit quantity from exceeding the amount that can be beneficially used. **In sum, the quantity specified in a decree of an adjudicated water right is a judicial determination of beneficial use consistent with the purpose of use for the water right.**

4. The License or Decree However, is not Conclusive as to the Quantity Put to Beneficial Use Due to Post-Decree Factors.

Although a license or decree among other things includes a determination of beneficial use for a water right, it is not conclusive that the water user is actually putting the full quantity to beneficial use. In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court acknowledged in the context of the SRBA that the Director was not obligated to accept a prior decree as conclusive proof of a water right because water rights can be lost or reduced based on evidence that the water right has been forfeited. *Id.* at 741, 947 P.2d at 414. The Supreme Court acknowledged this same point in *AFRD#2* noting that there may be post-adjudication factors relevant to the determination of how much water is actually needed. *AFRD#2* at 878, 154 P.3d at 449.

Conditions surrounding the use of water are not static. Post-adjudication circumstances can result where a senior may not require the full quantity decreed. The most obvious example would be if the senior is not irrigating the full number of acres for which the right was decreed. Efficiencies, new technologies and improvements in delivery systems that reduce conveyance losses can result in a circumstance where the full decreed quantity may not be required to irrigate the total number of decreed acres. The subsequent lining or piping of a ditch or the conversion from gravity fed furrow irrigation to sprinkler irrigation can reduce the quantity of water needed to accomplish the purpose of use for which the right was decreed.¹¹ Year to year variations in water

¹¹ Also, the rate of diversion for an irrigation water right sets a maximum rate of diversion to satisfy the peak water demand for the most water intensive crop grown in the region. In the event the senior is irrigating a less water intensive crop, the maximum rate of diversion may not be required. However, this limitation is less significant in the administration of ground water and tempered by the fact that any relief

requirements also result from the types of crops that may be planted. The Idaho Legislature specifically acknowledged water users could reduce water requirements through the implementation of efficiencies and authorized the ability to expand irrigated acreage so long as the rate of diversion was not increased. *See* I.C. § 42-1426.

In this case, the Director determined that A & B successfully implemented a number of measures that have reduced the amount of water required to irrigate the 62,604.3 acres: including the conversion of 1440 acres from ground to surface water irrigation; reduction of conveyance losses from approximately 8 percent to 3 percent; conversion of 96 percent of the irrigation systems to sprinkler; and the re-use of drain water. R. 1148. It should therefore come as no surprise that a water user can require less water than the decreed quantity to accomplish the purpose for which the right was decreed. As such, the quantity reflected in a license or decree is not conclusive as to whether or not all of the water diverted is being put to beneficial use in any given irrigation season.

5. Waste Results from the Failure to Put the Full Diverted Quantity to Beneficial Use.

If circumstances do not require the full amount of the decreed quantity to accomplish the purpose of use but the senior nonetheless continues to divert the decreed quantity, the issue is one of waste. The wasting of water is not only contrary to Idaho law but it is a recognized defense to a delivery call. In *Martiny v. Wells*, 91 Idaho 215, 218-19, 419 P.2d 470 (1966), the Idaho Supreme Court held:

Wasting of irrigation water is disapproved by the constitution and laws of this state. As we said in *Mountain Home Irrigation District v. Duffy*, supra, *it is the duty of a prior appropriator of water to allow the use of such water by a junior appropriator at times when the prior appropriator has no immediate need for the use thereof.*

Id. (emphasis added). Simply put, a water user has no right to waste water. If more water is being diverted than can be put to beneficial use, the result is waste.

from regulation of junior wells is typically not instantaneous. Therefore, even though a senior may not be irrigating the most water intensive crop in the current irrigation season administration needs to take into account the ability of a senior to rotate to a more water intensive crop in the next irrigation season.

Consequently, Idaho law prohibits a senior from calling for the regulation of juniors for more water than can be put to beneficial use.

This exact issue was addressed in context of the SRBA. The SRBA Court addressed the issue of whether or not partial decrees should include a remark qualifying that the amount of water that could be sought incident to a delivery call was limited to the quantity that could be beneficially used as opposed to the quantity actually stated in the decree. The Hon. R. Barry Wood presiding, expressly rejected the necessity of such a remark based on the following reasoning:

Implicit in the quantity element in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: 'Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed'.' State v. Hagerman Water Right Owners, 130 Idaho 727, 730, 947 P.2d 400, 403 (1997); quoting I.C. § 42-1402. However, the quantity element in a water right necessarily sets the 'peak' limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time (i.e. there is no right to divert water that will be wasted). A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 415, 958 P.2d 568 (1997). The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short result in a loss or reduction to the water right. State v. Hagerman Water Right Owners, at 730, 947 P.2d at 403.

Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water. In State v. Hagerman Water Rights Owners, 130 Idaho at 735, 947 P.2d at 408, the Idaho Supreme Court stated:

A water user is not entitled to waste water...It follows that a water right holder cannot avoid a partial forfeiture by wasting portion of his or her water right that cannot be put

to beneficial use during any part of the statutory period. If a water user cannot apply a portion of the water right to beneficial use during any part of the statutory period, but must waste the water in order to divert the full amount of the water right, forfeiture has taken place.

Id. (citations omitted).

NSGWD has not convinced this Court that it is necessary to have a restatement of this principal on the face of a water right decree. More importantly, the quantity element of a water right does not contemplate minute by minute, or hour by hour, limitations on diversions, as this truly would be an administrative nightmare.

American Falls Reservoir District # 2 v. IDWR, Gooding Dist. Court Case No. CV-2005-0000600, page 95 (June 2, 2006) (Hon. R. Barry Wood) (quoting *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999)) (emphasis in original). The significance of the decision is the recognition that the partial decree is a determination of beneficial use. The inclusion of the remark would require the senior to "prove up" the extent of beneficial use every time administration is sought. The decision did not reject the argument that the senior has no right to call for water that is not or will not be put to beneficial use. However, implicit in the rejection of the remark is the recognition that the senior's failure to put the decreed quantity to beneficial use is a defense to a delivery call. The SRBA Court rejected the inclusion of an undefined limitation on the decreed quantity requiring the senior making the call to re-establish the extent of beneficial use.

In sum, if a water user is not making beneficial use of the water diverted, irrespective of the quantity decreed, the result is waste. Idaho law prohibits a senior from depriving a junior appropriator of water if the water called for is not being put to beneficial use. Therefore a decree or license does not insulate a senior appropriator from an allegation of waste or the failure to put the decreed quantity to beneficial use. Waste or the failure to put the decreed quantity to beneficial use is a defense to a delivery call.

6. The Burden to Establish Waste as a Defense is on the Junior Appropriator and Must be Shown by Clear and Convincing Evidence.

Idaho law provides that the burden of establishing waste is on the junior appropriator. *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). Idaho law has also consistently required that incident to a delivery call the burden is on the junior to establish by clear and convincing evidence that the diverting of water by the junior will not injure the right of the senior appropriator on the same source. *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964); *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908); *Moe v. Harger*, 10 Idaho 302, 7 P. 645 (1904). Accordingly whether the junior's defense is that there is no injury because the diversions of the junior do not physically interfere with the right of the senior (i.e futile call) or that the senior is not injured because the senior is putting less than the decreed quantity of water to beneficial use or wasting water, that burden rests on the junior. Clear and convincing evidence refers to a degree of proof greater than a mere preponderance of the evidence or evidence indicating that the thing to be proved is highly probable or reasonably certain. *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008); *Idaho State Bar v. Top*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996).

A determination that a portion of a decreed water right is being wasted (or is not being put to beneficial use) is a diminishment of a property right. The decreed quantity is reduced by the amount determined not being put to beneficial use. Whether the senior is deprived of water for part of an irrigation season, an entire irrigation season or the quantity element is permanently reduced through a finding of partial forfeiture, the senior's right to divert water up to the decreed quantity is nonetheless diminished.¹² The

¹² The counter-argument raised by Respondents is that there is not a diminishment in the property right because the senior's property right is limited to the amount that can be put to beneficial use. While that may be true, the argument overlooks the fact that the decree is a determination of the beneficial use subject to various defenses. The burden is on the junior to show by clear and convincing evidence that less than the decreed amount is being put beneficial use. To conclude otherwise accords no presumptive weight to the decree. This is precisely the reason why the SRBA Court rejected including a remark expressly limiting quantity to that put to beneficial use. The inclusion of such a remark would have resulted in an unlawful shifting of the burden of proof by making the senior re-prove quantity in conjunction with a delivery call. Simply put, the senior is entitled to the quantity reflected in the decree unless it can be shown by clear and convincing evidence that the full quantity is not or would not be put to beneficial use. The process gives proper presumptive weight to the decree and at the same time takes into account that the decree is not conclusive. However, the standard of proof (clear and convincing evidence) required for establishing that less than the decreed quantity is being put to beneficial use is much higher than the standard of proof (preponderance) initially required in the adjudication and distinguishes what is truly a defense to the right from a re-adjudication of the right.

Idaho Supreme Court has consistently held that actions resulting in the diminishment of a water right must be proved by clear and convincing evidence. Forfeiture or abandonment of a water right must be established by a standard of clear and convincing evidence. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984); *Jenkins v. IDWR*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). The same is true with respect to establishing prescriptive title to the water right of another. *Gilbert* at 739, 552 P.2d at 1224 (citing *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945)). Similarly, a futile call defense requires a showing of clear and convincing evidence that diversions by a junior appropriator will not injure the rights of a senior appropriator.

The application of the clear and convincing standard of proof only makes sense from a common sense perspective. If the Director determines that a senior can satisfy the decreed purpose of use on less than the decreed quantity reflected, he needs to be certain to a standard of clear and convincing evidence. In making a determination of whether or not to regulate juniors, the Director is required to evaluate whether the quantity available meets or exceeds the quantity the senior can put to beneficial use. If the Director regulates juniors to satisfy the senior's decreed quantity there is no risk of injury to the senior. However, if the Director regulates juniors to satisfy a quantity less than decreed, there is risk to the senior that the Director's determination is incorrect. There is no remedy for the senior if the Director's determination turns out to be in error and the senior comes up short of water during the irrigation season. Any burden of this uncertainty should be borne by the junior. The only way to eliminate risk to the senior while at the same time give effect to full economic development and optimum use of the water resources is to require a high degree of certainty supporting the Director's determination. Put differently, if the Director has a high degree of certainty that the senior is exceeding beneficial use requirements then there is no risk of injury to the senior. However, if the Director's determination is only based on a finding "more probable than not," the senior's right is put at risk and the junior is essentially accorded the benefit of that uncertainty. The requisite high standard accords appropriate presumptive weight to the decree.

7. Reconciling the Alleged Disparity Between the Decreed Quantity and the Quantity of Water Actually Required to Satisfy the Purpose of Use Consistent with Idaho Law and Without Re-Adjudicating the Quantity Element.

In recognizing that a difference can exist between the decreed quantity and the quantity put to beneficial use, the question becomes how the Director can give proper effect to the decree and still administer to the quantity put to beneficial use without resulting in a *de facto* re-adjudication of the water right? The answer lies in the application of the constitutionally engrained presumptions and burdens of proof.

The following example illustrates the conundrum that occurs when proper effect is not given to the decree. Assume for the sake of discussion that A & B claimed the 36-2080 right in the SRBA with a diversion rate of 0.88 miner's inches per acre. The Director investigated the claim and recommended a diversion rate of 0.75 miner's inches. A & B filed an objection to the recommendation. IGWA, the City of Pocatello and Fremont Madison *et al.* file responses and a trial is held. At trial A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner's inches. The respondents present conflicting evidence including expert testimony that 0.75 miner's inches or less is sufficient to accomplish the purpose of use. The experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture etc. Ultimately, the SRBA Court finds that A & B established a quantity of 0.88 miner's inches by a preponderance of the evidence and issues a partial decree for that quantity. Six months later A & B is unable to pump the full decreed quantity and seeks administration from the Department. The Director performs a "material injury" analysis and concludes that 0.75 miner's inches is sufficient to satisfy A & B's purposes of use. A & B disagrees with the determination and requests a hearing. At the hearing A & B presents its case including expert testimony in support of the claim that the requisite rate of diversion is 0.88 miner's inches. The respondent's present conflicting evidence, including the expert testimony that 0.75 miner's inches or less would be sufficient to accomplish the purpose of use. The experts present opinions on the amount of water necessary to raise crops to maturity, the significance of soil moisture etc. Déjà Vu? Ultimately the Director concludes by a preponderance of the evidence that 0.75 miner's inch per acre is sufficient. The example illustrates that under

the Director's application of the CMR the senior can be forced to re-litigate the exact same issue when proving up the elements of the water right and when subsequently seeking administration for the same right.

In this case the Hearing Officer's recommendation acknowledged that "the analysis of experts varies dramatically" on the amount of water needed to meet the minimum requirements for the crops. "Farmers with comparable experience differ on the amount needed to meet minimum requirements. Experts with comparable education have similar disagreements." R. 3109. The Hearing Officer ultimately concluded "the Director's determination is supported by substantial evidence." R. 3110. No reference was made to the evidentiary standard applied.

In *AFRD #2* the Supreme Court made it clear that the CMR should not be read to require the senior to re-prove or re-adjudicate a decreed right but also acknowledged that there may be post-adjudication factors relevant to the determination of how much water is actually needed. At the district court level in *AFRD#2* Judge Wood opined that "a decreed water right is far more than a right to have another lawsuit only this time with the Director." *American Falls Reservoir District # 2 v. IDWR*, at 93. Absent the application of an evidentiary standard of clear and convincing evidence this Court has difficulty distinguishing how this is not a re-adjudication of A & B's right. Issues pertaining to necessary quantity, beneficial use, evapotranspiration of crops, waste and the like should have been identified in Director's recommendation and ultimately litigated in the context of the SRBA proceedings. The Director reasons that it is not a re-adjudication of A & B's right because A & B still has the right to divert up to the full 0.88 miner's inches when water is available but that the Director will only consider the administration of junior's based on the determination of actual need of the senior, which is the 0.75 miner's inch per acre. This Court fails to see the distinction. In a prior appropriation system a water right becomes meaningless if not honored in times of shortage. The call is the means by which effect is given to the priority date. The priority date is the essence of a water right in a prior appropriation system.

The problem arises with the initial determination of "material injury." In *AFRD #2* the Supreme Court held once the initial determination is made that "material injury" is occurring or will occur, the junior then bears the burden of proving that the call would be

futile or to challenge, in some other constitutionally permissible way, the senior's call. *AFRD #2*, 143 Idaho at 878, 154 P.3d at 449. However, the Director's "threshold" material injury determination includes what would otherwise be a defense to a delivery call. The problem with this approach is that it circumvents the constitutionally inculcated presumptions and burdens of proof.

The CMR distinguish between "material injury" and "using a water right efficiently without waste." CMR Rule 010.14 defines "material injury" as "hindrance to or impact upon the exercise of a water right caused by the use of water by another person." CMR Rule 010.25 defines "water right" as the legal right to divert and use . . . the public waters of the state of Idaho where such right is evidenced by a decree, permit or license" Prior to regulating junior rights in an organized water district, CMR Rule 040.03 requires the Director to consider whether the senior is suffering "material injury" *and* "is diverting and using water efficiently and without waste." The factors in Rule 042.01 also provides "[f]actors the Director may consider in determining whether holders of water rights are suffering material injury *and* using water efficiently without waste include. . . ." (emphasis added). Although the CMR address the two concepts in conjunction with each other, the Supreme Court held the rules cannot be read as a burden shifting provision to require the senior to re-prove or re-adjudicate his right. *AFRD#2* 143 Idaho at 877-78, 154 P.3d at 448-49.

Therefore, this Court holds that in order to give the proper presumptive weight to a decree any finding by the Director that the quantity decreed exceeds that being put to beneficial use must be supported by clear and convincing evidence. Accordingly, this Court holds the Director erred by failing to apply the correct presumptions and burdens of proof. The case is remanded for this purpose.

D. The Director Did Not Err by Failing to Separately Consider Depletions to Individual Points of Diversion For Purposes of Determining Material Injury to the 36-2080 Right.

A & B argues the Director erred in failing to determine material injury based on depletions to the 177 individual points of diversion as opposed to determining injury

based on depletions to the cumulative decreed quantity. A & B argues further that the Director erred by requiring that A & B take reasonable steps to interconnect individual wells or systems within the Unit prior to seeking regulation of junior pumpers. The Hearing Officer concluded that it was proper to consider the system as a whole but that consideration must be given to account for the fact that water from one well is not accessible to the entire acreage:

Considering the fact that the project was developed, licensed and partially decreed as a system of separate wells with multiple points of diversion, it is not A & B's obligation to show interconnection of the entire system to defend its water rights and establish material injury. However, it is equally clear that the licensing requested by the Bureau of Reclamation envisioned flexibility in moving water from one location to another. Consequently, there is an obligation of A & B to take reasonable steps to maximize the use of that flexibility to move water within the system before it can seek curtailment or compensation from juniors. A & B has some interconnection within the system to utilize the water it can pump. But the record does not establish whether further interconnection is either financially or technically practical.

R. 3096. This Court agrees that the system must be considered as a whole based on the way in which the water right is decreed. Further, that the extent to which the Director may require A & B to move water around within the Unit prior to regulating junior pumpers is left to the discretion of the Director. The Director concluded that A & B must make reasonable efforts to maximize interconnection of the system and placed the burden on A & B to demonstrate where interconnection is not physically or financially practical. The Director did not abuse discretion in imposing such a requirement.

The way in which the 36-2080 water right was licensed and ultimately decreed in the SRBA is not typical. The partial decree does not define or limit the place of use for any of the 177 points of diversion within the boundaries of the Unit. Instead, the decree lists the 177 different points of diversion and describes the place of use as "the boundary of A & B Irrigation District service area pursuant to Section 43-323, Idaho Code." See Exh. 139. The legal effect is that water diverted from any one of the points of diversion is appurtenant to and therefore can be used on any and all of the 62,604.3 acres within the defined place of use. The license or partial decree also does not describe or assign a rate of diversion or volumetric limitation to any of the individual points of diversion. Instead,

the right is licensed and decreed at the cumulative diversion rate of 1,100 cfs with a 250,417.20 AFY limitation for the entire water right. The legal effect is that up to the full rate of diversion can be diverted from any combination of the 177 points of diversion up to the AFY volumetric limitation and applied to any of the lands within the Unit.

Structuring the right in this manner was not due to oversight. The USBOR applied for the right to be licensed as such in order to provide for the greatest amount of flexibility in distributing water throughout the project. R. 3093-94. In a response from the USBOR to the Department regarding the permit application, the USBOR states:

We emphasize that the project is one integrated system, physically, operationally, and financially. Some lands, depending on project requirements, can be served from water from several wells. Therefore, it is impractical and undesirable to designate precise land area within the project served by each of the specific wells on the list.

Exh. 157D.

Although decreed as such, the Unit presently does not consist of a system of interconnected wells and due to the geographic terrain, water cannot presently readily be distributed throughout the entire project from any particular well or system. Nonetheless, the right is essentially decreed as having alternative points of diversion for the 1100 cfs for the entire 62,604.3 acres. Therefore, because no rate of diversion or volumetric limitation is decreed to a particular point of diversion, A & B has no basis on which to seek regulation of juniors in order to divert a particular rate of diversion from a particular point of diversion, provided a sufficient quantity can be diverted through the various alternative points of diversion that are appurtenant to the same lands. Simply put, based on the way in which the right is decreed A & B does not get to dictate particular quantities that need to be diverted from particular points of diversion.

If A & B wishes to have its right administered on a more regionalized basis, it would be incumbent on A & B undergo a transfer proceeding to have particular points of diversion assigned to more discrete places of use within the Unit. The drawback would be that A & B may have to forgo the high degree of flexibility it currently holds with respect to the use of the water within the project. The current flexibility with respect to the use of the right results in uncertainty over the availability of water to subsequent appropriators because A & B is authorized under the right to divert up to its decreed

amount from any combination of its points of diversion at its discretion. However, A & B can't have it both ways. Flexibility has its benefits and burdens. The Director also has flexibility when it comes to responding to requests for regulation. Until such time as the right is defined with more particularity, the extent to which the Director can require interconnectedness is left to his discretion.

1. Issues with Respect to Enlargement Claims.

Another problem with seeking regulation of juniors to satisfy underperforming wells is that A & B has been allowed to establish enlargement claims pursuant to I.C. § 42-1426, based on areas of the project that produce water in excess of what is required in a particular area of the project. A & B irrigates approximately 2000 enlargement acres. The way in which the right is decreed creates an anomaly whereby A & B seeks regulation of juniors to satisfy underperforming points of diversion for the 36-2080 right while at the same time continues to irrigate enlargement acres from alternative points of diversion authorized under the same right. The indirect result is that the enlargement rights are protected under the September 9, 1948, priority date and the subordination provision that applies to all enlargement rights is circumvented.¹³ Accordingly, prior to seeking regulation of pumpers junior to September 9, 1948, it would be incumbent on A & B to first apply the water servicing the enlargement acres on its original lands or alternatively to factor that quantity of water used in conjunction with the enlargement acres into the Director's material injury analysis in determining water shortages, if any, to the 36-2080 right. Thereafter, if there is insufficient water to satisfy the enlargement

¹³ The following subordination remark is included in all enlargement rights perfected pursuant to I.C. § 42-1426:

This water right is subordinate to all other water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to section 42-1426, Idaho Code, the earlier priority is the superior right.

The remark was included in decrees for enlargement rights following the Idaho Supreme Court's holding in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). Ironically the inclusion of the remark was challenged by A & B in the SRBA with respect to its enlargement claims stemming from the 36-2080 right. *In Re: SRBA Case No. 39576, Order on Challenge, (A & B) Irr. Dist.*, Subcase Nos. 36-2080 *et. al.* (April 25, 2003) (Hon. Roger S. Burdick). The inclusion of the remark was affirmed by the Idaho Supreme Court in *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist. et. al.*, 141 Idaho 746, 118 P.3d 78 (2005).

rights A & B can seek administration in accordance with the priority limitations assigned to the enlargement acres.

Therefore, based on the way in which the right is structured and in giving proper legal effect to the decree, this Court holds the Director did not err in considering the project as a whole for purposes of determining material injury.

2. The Director Erred in Applying a "Failure of the Project Standard."

A & B argues that the Hearing Officer erred by applying a failure of the project standard. The Hearing Officer concluded:

There is evidence that in 2007 there was 5000 acres in Unit B that were being served by well systems that delivered less than 0.75 miner's inches per acre. The limited amount of this acreage is a result of costly rectification efforts. . . . The wells that are short in the production of water that are unlikely to be susceptible to successful remediation are limited to the southern portion of the project. They do not serve a sufficient portion of the project to deem their failure a failure of the project as a whole considering the terms of the license and partial decrees.

R. 3097. A & B also notes that underperforming wells are not just located in the southern part the Unit but rather are located throughout the project. *See* Exh. 200N & 216.

Whether or not the Hearing Officer actually applied or relied on a "failure of the project standard" or was making a finding of fact is not entirely clear.¹⁴ However, A & B is correct in that there is not a recognized legal basis for applying a failure of the project standard - even based on the way in which A & B's right is decreed. The fact that an injury may be arguably be so slight as to represent only a small portion of the overall project is irrelevant. Injury to a water right is still injury. However, as previously discussed, the Director must evaluate material injury from the perspective that A & B has

¹⁴ The Hearing Officer's Response to A & B's Petition for Clarification states:

In context the finding that there has not been a 'total project failure' is a finding of fact, not a measure of material injury. Material injury may occur before a total project failure. It is a finding made because of the extensive evidence offered concerning the nature and operation of the project, not as a threshold requirement before curtailment or mitigation can be sought.

R. 3262.

the obligation to move water around within the Unit as all points of diversion are appurtenant to all lands within the Unit. If performing wells are capable of producing sufficient water to compensate for underperforming areas then injury may not exist. Alternatively, if performing wells are incapable of producing additional water needed to compensate for underperforming wells then injury may exist. This Court recognizes, however, that the regulation of juniors to increase performance of underperforming wells located in regions of poor transmissivity may be subject to a futile call defense.¹⁵

In sum, aside from there being no legally recognized *de minimus* threshold exclusion for finding injury, based on this Court's analysis there is no reason to engage in a "failure of the project" standard, as established legal principles governing water law adequately address the issue.

E. The Director Did Not Err in Failing to Designate All or a Portion of the ESPA as a Ground Water Management Area (GWMA) Pursuant to Idaho Code § 42-231.

A & B next argues that the Director erred by failing to designate a GWMA for either all or a portion of the ESPA. The Director concluded that the designation of a GWMA was not necessary because the water rights are now included in an organized water district. The Director reasoned that the designation of a GWMA would not confer any additional management function that is not already available in an organized water district. This Court agrees.

The decision of whether or not to designate a GWMA is discretionary with the Director. Idaho Code § 42-231 sets forth the duties of the Director with respect to the management of ground water:

It shall likewise be the duty of the [Director] to control the appropriation and use of the ground water of this state as in this [GWA] provided and to

¹⁵ CMR 010.08 defines "Futile Call" as:

A delivery call made by a holder of a senior-priority surface or ground water right that, for physical or hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior- priority ground water rights or that would result in waste of the resource.

IDAPA 37.03.11.010.08.

do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this [GWA].

Idaho Code § 42-237a defines the power of the Director with respect to carrying out the provisions of the GWA:

In the administration and enforcement of this act and in effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources *in his sole discretion*, is empowered:

...
g. To supervise and control the exercise and administration of all rights to the use of ground waters *and in the exercise of this discretionary power he may* initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. ...

(emphasis added). Idaho Code § 42-233a provides:

When a 'critical ground water area'¹⁶ is designated by the [Director], or at anytime thereafter during the existence of the designation, the director *may approve a ground water management plan for the area*. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and any other hydraulically connected sources of water.

(emphasis added).

¹⁶ Idaho Code § 42-233a defines "critical ground water area" as:

[A]ny ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

Idaho Code § 42-233b sets forth the conditions for the designation of a GWMA.¹⁷ In this case, the Director determined factually that despite declines, the aquifer was neither being mined nor that reasonable pumping levels had been exceeded. Further that a moratorium on new permit applications was in effect. Hence, the aquifer was not approaching critical ground water area conditions thereby triggering the need for the designation of a GWMA. However, even if the Director concluded aquifer levels met the criteria of a critical ground water area, the designation of a GWMA is still not mandatory. The designation of a GWMA is one of the tools or mechanisms available to the Director for carrying out his duty to manage the aquifer as required by I.C. § 42-231.

Another mechanism available is the creation of an organized water district pursuant to I.C. § 42-602.¹⁸ Unlike the designation of a GWMA, the Director is required

¹⁷ Idaho Code § 42-233b provides as follows:

Ground water management area. — 'Ground water management area' is defined as any ground water basin or designated part thereof which the director of the department of water resources *has determined may be approaching the conditions of a critical ground water area.*

When a ground water management area is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director *may* approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.

Applications for permits made within a ground water management area shall be approved by the director only after he has determined on an individual basis that sufficient water is available and that other prior water rights will not be injured.

The director *may* require all water right holders within a designated water management area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.

The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a water management area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. . . .

(emphasis added).

¹⁸ Idaho Code § 42-602 *et seq.* sets forth the requirements for the creation and distribution of water in water districts as follows:

Director of the department of water resources to supervise water distribution within water districts. — The director of the department of water resources shall have direction

to create water districts. I.C. § 42-604.¹⁹ However, the creation of water districts only applies with respect to adjudicated water rights.²⁰ I.C. § 42-604. Because a GWMA designation does not have the same restriction, the designation of a GWMA has been used as a mechanism prior to water rights being decreed in the SRBA and included in the boundaries of an organized water district. However, the position of the Director is that after an organized water district is created as required then a GWMA is no longer necessary:

Following the creation of water districts in accordance with chapter 6, title 42, Idaho Code, the Director rescinded, in whole or in part, his orders that

and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

(emphasis added). Idaho Code § 42-607 governs the distribution of water within a water district:

Distribution of water. — It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom *according to the prior rights of each respectively*.

...

(emphasis added).

¹⁹ Idaho Code § 42-604 requires the creation of water districts:

Creation of water districts. — The director of the department of water resources *shall divide the state into water districts* in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream of water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: *provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.*

(emphasis added).

²⁰ Prior to entry of the final decree in the SRBA the Department has sought interim administration from the SRBA Court, pursuant to I.C. § 42-1417, prior to creating water districts.

created the American Falls and Thousand Springs Ground Water Management Areas. The Director determined that preserving the ground water management areas was no longer necessary to administer water rights for the protection of senior surface and ground water rights because administration of such rights is now accomplished through the operation of water districts.

R.1110.

Water District Nos. 100, 110, 120, 130 and 140 were either established or boundaries revised between February 19, 2002, and December 20, 2006, in order to provide for the administration of water rights diverting from the ESPA. There has also been in effect since 1992 a moratorium on permit applications for new water rights developed from the ESPA.

At the hearing Tim Luke from the Department testified as to the administrative difference between a GWMA and an organized water district:

Q. No effective difference between what you can do administratively in a water district and ground water management area?

A. I think anything that you do in a ground water management area can also be done in a water district.

Q. Greater flexibility of the water district.

A. I think so.

Tr. pp. 1324-25.

In regards to flexibility, the CMR expressly distinguish between delivery calls made within an organized water district (CMR 040), from those made in a ground water management area (CMR 041). The process for responding to a delivery call in an organized water district requires less procedural components prior to the regulation of junior water users.

The Hearing Officer ultimately concluded that “[t]he benefit of designating the ESPA as a [GWMA] is not apparent. There may be no harm in doing so, but it would appear to add an administrative overlay without identifiable benefits.” R. 3116. This Court agrees.

For the above-stated reasons, the Director did not abuse discretion by failing to designate the ESPA as a GWMA, and his decision is therefore affirmed.

F. The Director's *Final Order* Complies with Idaho Code § 67-5248(1).

Idaho Code § 67-5248(1)(a) provides in relevant part that an order must be in writing and shall include "a reasoned statement in support of the decision." It further provides that findings of fact, if set forth in statutory language, "shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings." *Id.* A & B argues that certain conclusions set forth in the *Final Order* do not comply with Idaho Code § 67-5248(1)(a) on the grounds that they are not supported by reasoned statements. At issue is the Director's conclusion that "[t]he record does not support the relief requested by A & B in its Exceptions Brief," and his conclusion that the Hearing Officer's interpretations of "the State Constitution, Idaho Statutes and the Conjunctive Management Rules" in previous delivery call proceedings will not be incorporated into the *Final Order*. R. at 3322.

With respect to the conclusion that "[t]he record does not support the relief requested by A & B in its Exceptions Brief," A & B reads this statement in isolation. Such a reading is too narrow. The *Final Order* expressly incorporates "the Findings of Fact entered previously by the Director and recommendations of the Hearing Officer," as well as the "Conclusions of Law set forth in the Director's orders in the above-captioned matter" unless expressly modified by the *Final Order*. R. at 3321 & 3322.

Aside from a couple newly raised procedural issues which were specifically addressed in the *Final Order*,²¹ A & B's Exceptions Brief asserts the same substantive arguments it set forth at hearing before the Hearing Officer, in its *Petition for Reconsideration*, and in its *Petition for Clarification*. These arguments have been fully addressed, and reasoned statements supporting the resulting conclusions set forth, by the Director in his *January 29, Order*, as well as by the Hearing Examiner in his *Recommended Order*, his *Order on Clarification* and his *Order on Reconsideration*. Indeed, A & B does not identify any *specific* exception set forth in its Exceptions Brief that it alleges has not been addressed in this matter or that the resulting conclusion has

not been supported with a reasoned statement. The Director is not required to engage in the needless duplication of established findings where, as here, he incorporates by reference and accepts findings of fact and conclusions of law previously entered in the same matter.

Likewise, the conclusion that the Hearing Officer's interpretations of "the State Constitution, Idaho Statutes and the Conjunctive Management Rules" in previous delivery call proceedings will not be incorporated into the *Final Order* complies with Idaho Code § 67-5248(1)(a). The Director supported his conclusion with reasoned statements, including but not limited to, that the records developed in the other delivery call proceedings are distinct from the record developed in this proceeding.

Accordingly, the Director did not err by failing to issue a final order in compliance with I.C. § 67-5248.

VI.

CONCLUSION AND INSTRUCTIONS ON REMAND

In conclusion, this Court holds and provides the following instructions on remand:

1. The decision of the Director that the 1951 GWA applies to the administration of pre-enactment water rights is **affirmed**.
2. The Director erred by failing to apply the evidentiary standard of clear and convincing evidence in conjunction with the finding that the quantity decreed to A & B's 36-2080 exceeds the quantity being put to beneficial use for purposes of determining material injury. The case is remanded for the limited purpose of the Director to apply the appropriate evidentiary standard to the existing record. No further evidence is required.
3. The decision of the Director that A & B has not been required to exceed reasonable pumping levels is **affirmed**. This is based on the finding of no material injury

²¹ These procedural issues revolve around the Director's ability to shorten time to file exceptions.

3. The decision of the Director that A & B has not been required to exceed reasonable pumping levels is **affirmed**. This is based on the finding of no material injury at existing pumping levels. On remand, following the application of the appropriate evidentiary standard a finding of material injury may require that the Director reevaluate this determination.
4. The decision of the Director to evaluate material injury to the 36-2080 water right based on depletion to the cumulative quantity as opposed to determining injury based on depletions to individual points of diversion is **affirmed**. The decision of the Director to require A & B to take reasonable steps to move water from performing to underperforming areas or alternatively demonstrate physical or financial impracticability is **affirmed**.
5. The decision of the Director not to designate the ESPA as a GWMA is **affirmed**.
6. The Director did not fail to issue a final order in compliance with I.C. § 67-5248.

IT IS SO ORDERED

Dated May 4, 2010



ERIC J. WILDMAN
Presiding Judge of the Snake River Basin
Adjudication

DEPARTMENT OF
WATER RESOURCES

FILED-DISTRICT COURT
CASE # _____

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Chris M. Bromley, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, on behalf of Respondents Idaho Department of Water Resources, and Gary Spackman in his capacity as Interim Director of the Idaho Department of Water Resources, (“Director,” “IDWR” or “Department”);

Randall C. Budge, Candice M. McHugh, Scott J. Smith, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, on behalf of Respondent Idaho Ground Water Appropriators, Inc. (“IGWA”);

Sarah A. Klahn, White & Jankowski, LLP, Denver, Colorado, A. Dean Tramner, Pocatello, Idaho, on behalf of Respondent City of Pocatello (“City of Pocatello”);

Jerry R. Rigby, Rigby, Andrus & Rigby, Chartered, Rexburg, Idaho, on behalf of Fremont Madison Irrigation District, Robert & Sue Huskinson, Sun-Glo Industries, Val Schwendiman Farms, Inc., Darrell C. Neville, Scott C. Neville, and Stan D. Neville, (“Fremont-Madison *et. al.*”).

I. PROCEDURE

A. Issue on rehearing.

On rehearing this Court is asked by the Department, IGWA and the City of Pocatello (collectively as “Ground Water Users”) to reconsider its ruling in the *Memorandum Decision and Order on Petition for Judicial Review* (May 4, 2010) (“*Order*”) regarding the appropriate burden of proof and evidentiary standards applied in a delivery call made pursuant to the Department’s *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11. (“CMR”). In particular, the issue pertains to the standard of proof and burdens necessary to support a determination of no material injury when the determination relies on a finding by the Director that the water requirements of the senior right holder initiating the call can be satisfied with less than the decreed quantity. This Court held that such a finding must be supported by clear and convincing evidence. The issue on rehearing therefore involves the significance of a partial decree in a delivery call proceeding made pursuant to the CMR, and the standard of proof required to support a determination by the Director that the senior user initiating the call requires less water than previously decreed.

B. The purpose of the remand.

The *Order* remanded the case to the Director for application of the standard of proof to his determination that A & B could get by with less water than decreed to it in the SRBA. In the June 30, 2009, Final Order, the Director did not state the evidentiary standard applied. In *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 843, 70 P.3d 669, 681 (2003) the Idaho Supreme Court held that where the Department failed to state whether or not its findings were based on clear and convincing evidence it was outside the role of the reviewing court to review the evidence and decide whether there was clear and convincing evidence supporting the Department's findings. Following *Sagewillow*, this Court did not review the evidence to determine whether the above-mentioned finding was supported by clear and convincing evidence, but rather remanded the case to the Director to make such a determination.

C. The reasoning supporting the Order.

This Court reasoned that a decreed quantity in a SRBA decree is a judicial determination of the quantity of water put to beneficial use consistent with the purpose of use for which the right was decreed. Therefore, any determination that a senior right holder can accomplish the purpose of use for the water right on a quantity less than decreed would be akin to a finding of waste because the senior would not be making beneficial use of the entire decreed quantity. No material injury to the senior water right would inure and junior rights could not be regulated to satisfy the senior's decreed quantity. In the *Order*, the Court held that a finding of waste requires the higher standard of clear and convincing evidence.

The holding reconciled the objectives of giving proper effect and certainty to the adjudicated elements of a water right while at the same time also giving effect to the CMR by acknowledging that a quantity less than decreed may be all that is necessary to satisfy a senior right at the time a delivery call is made. The reasoning, however, placed any risk of uncertainty in the Director's determination resulting in the senior having an insufficient water supply on junior water rights. Absent a higher standard, the senior making the call can be put in the position of re-proving or re-litigating quantity

requirements for a particular water right. Simply put, if the Director is going to administer to provide the senior with less than the decreed quantity, taking into account the implementation of any reasonable measures imposed on the senior, the Director should be convinced to a high degree of certainty that his determination will provide the senior with sufficient water to accomplish the purpose of use. The high degree of certainty is necessary because a water right is a valuable property right. If the Director is turns out to be incorrect in his determination that senior can get by with less than the decreed quantity of water, the senior will receive less water than he would otherwise be entitled under the decree. Under those circumstances the senior is in effect deprived a portion of his property right. Such diminishment of the senior's right should only be made through the evidentiary standard of clear and convincing evidence.

II. CLARIFICATION, RESPONSES TO ISSUES RAISED AND DISCUSSION

A. The clear and convincing standard does not guarantee the senior the decreed quantity nor does it require that the Director administer according to strict priority.

The Ground Water Users argue the Court's *Order* results in requiring that the Director administer strictly to the decree unless juniors intervene and demonstrate by clear and convincing evidence less water is necessary. This argument misunderstands the Court's *Order*.

1. The presumptions and burdens of proof were not clearly addressed in the administrative proceedings as required by AFRD #2.

This Court previously discussed the significance of the Idaho Supreme Court's decision in *American Falls Reservoir District No. 2. v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007) (*AFRD #2*). *Order*, 27-28. The Supreme Court held that the CMR survived a facial challenge despite the lack of stated burdens of proof and evidentiary standards applicable to a delivery call. Nevertheless, the Court recognized that the Department is

still required to apply the proper evidentiary standards and burdens of proof in order to apply the CMR in a constitutional or “as applied” manner. In the instant case, the evidentiary standards and burdens of proof were not clearly articulated by the Director.

i. Administration of rights in an organized water district does not avoid the application of the established burdens of proof.

The CMR distinguish between whether or not administration is sought in an organized water district. (*Compare* CMR Rule 40 and Rule 30). The initiation of a contested case is not required in an organized water district. This is significant because in an organized water district, water rights must first be adjudicated. *See* I.C. § 42-604 (requirements for water district). In responding to a delivery call in an organized water district, the Director is required to make findings and to administer rights through a water master if material injury is found. This is accomplished without the initiation of a contested case process. In *AFRD #2* the Idaho Supreme Court held that “[r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules. There is simply no basis from which to conclude the Director can never apply the proper evidentiary standard in responding to a delivery call.” *Id.* at 874, 154 P.3d at 445. Therefore, whether or not a junior intervenes in the proceedings, the Director must give effect to established evidentiary burdens and presumptions.

ii. The CMR do not modify the burdens or presumptions applied in a delivery call.

The Ground Water Users argue that the burden of proof is a preponderance of the evidence as it is the appropriate evidentiary standard in most administrative proceedings. The Ground Water Users additionally assert that the evidentiary standards that apply to the administration of ground water rights are different from those involving solely surface water administration. The Ground Water Users also argue the cases relied on by the Court in the *Order* only address surface to surface administration and that different

burdens and evidentiary standards apply in cases involving ground water administration. This Court disagrees that different burdens and evidentiary standards apply.

Again, in *AFRD #2* the Supreme Court did not hold that a different set of evidentiary standards and burdens apply to the administration of ground water. The Supreme Court held that the CMR were not unconstitutional for failing to articulate the appropriate standards and burdens. The Court added that “[r]equirements pertaining to the standard of proof and who bears it have been developed over the years and are to be read into the CM Rules.” *Id.* at 874, 154 P.3d at 445. This statement is unequivocal. The argument that the CMR modify historically developed burdens and presumptions is inconsistent with that holding.

The City of Pocatello argues that the burden is on the senior to prove material injury. *Pocatello Opening Brief* at 10-11. In *AFRD #2* American Falls argued that specific provisions of the CMR squarely contradict Idaho law by placing the burden of proving material injury on the senior making the call. The Supreme Court held “[n]owhere do the Rules state that the senior must prove material injury before the Director will make such a finding. To the contrary, this Court must presume the Director will act in accordance with Idaho law, as he is directed to do under CM Rule 20.02. . . . [O]ur analysis is limited to the rules as written, or ‘on their face,’ and the rules do not permit or direct the shifting of the burden of proof.” *Id.* at 873-74, 154 P.3d at 444-45. Accordingly, the express provisions of the CMR do not operate to modify the historically recognized burdens and presumptions.

Finally, the issue before this Court does not deal with the complexities and uncertainties posed by the hydraulic interrelation of ground and surface water. On rehearing, the issue focuses solely on the presumptive weight accorded a partial decree and the standard of proof required to support a determination that the senior initiating the call requires less water than previously decreed. At issue is the quantity of water necessary to accomplish the senior’s purpose of use.

- iii. **The Court’s *Order* does not result in the Director administering rights strictly in accordance with the decreed quantity.**

The Court's *Order* does not conclude that a senior right holder is guaranteed the maximum quantity decreed or that the Director is required to administer strictly according to the decree. Rather, the *Order* concludes that the decreed quantity includes a quantitative determination of beneficial use resulting in a presumption that the senior is entitled to that decreed quantity. The *Order* contemplates that there are indeed circumstances where the senior making the call may not at the present time require the full decreed quantity and therefore is not entitled to administration based on the full decreed quantity. The *Order* holds, however, that any determination by the Director that the senior is entitled to less than the decreed quantity needs to be supported by a high degree of certainty.

The clear and convincing evidentiary standard is not an insurmountable standard. The Department is not new to the administration of water and should be able to determine present water requirements taking into account multiple factors including the existing conveyance system. If the senior right holder has made efficiencies or changes to a delivery system resulting in the conservation of water, such should be no more difficult to establish at the higher evidentiary standard. Therefore the senior is not guaranteed the decreed quantity nor is the Director required to administer strictly in accordance with the decreed quantity. While a senior may not be guaranteed the decreed quantity in a delivery call, he should have assurances that any reduced quantity determined to be sufficient to satisfy current needs is indeed sufficient. Otherwise what occurs is a redistribution of the senior right to be apportioned among junior rights. The apportionment of water among users as common property was rejected by the Idaho Supreme Court in the early stages of water development. *Kirk v. Bartholomew*, 3 Idaho 367, 29 P. 40 (1892).

iv. The application of a clear and convincing standard does not turn a delivery call proceeding into a hearing on forfeiture.

The Ground Water Users argue that the Court's ruling essentially turns a delivery call into a proceeding on forfeiture. The Ground Water Users argue that that the Court's reliance on waste is in error because in a delivery call the senior's water right is not permanently reduced. This argument misses the point of the ruling. The Court simply

held that the quantity element represents a quantitative determination of beneficial use. In the delivery call, the senior's present water requirements are at issue. If it is determined that the senior's present use does not require the full decreed quantity, then the quantity called for in excess of the senior's present needs would not be put to beneficial use or put differently would be wasted. One leading commentator in analyzing the development of the use of the concepts of reasonable use and economical use in association with beneficial use among various western states, including Idaho, states:

As considered and applied in these decisions, economical use is an antonym of waste. If an appropriator wastes, he necessarily is not using it economically. As he has no right to waste water unreasonably or unnecessarily, then of necessity he must make economical as well as reasonable and beneficial use. . . . The limitation of the appropriative right to economical and reasonable use thus precludes any waste of water that can reasonably be avoided. The use of water is so necessary as to preclude its being allowed to run to waste. Its 'full beneficial and economical use requires' that when the wants of one appropriator are supplied, another may be permitted to use the flow.

Wells A. Hutchins, *Water Rights in the Western Nineteen States*, Vol I, 502 (1971). The holdings of the SRBA District Court have historically viewed waste and beneficial use in this manner. For example, the SRBA Court rejected the inclusion of a remark in partial decrees which specified that the quantity sought in a delivery call is limited to that which the senior right holder put to beneficial use. The SRBA Court reasoned that the remark was not necessary because it was a restatement of the law and held "that a senior has no right to divert, (and therefore to 'call,') more water than can be beneficially applied. Stated another way, a water user has no right to waste water." **Order** at 32 (quoting *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Facts; Order of Recommitment with Instructions to Special Master Cushman* (Nov. 23, 1999)).

It is apparent that water quantity can be reduced based on a waste analysis without resulting in a permanent reduction of the water right through partial forfeiture. Only if the waste occurs for the statutory period can forfeiture be asserted. However, whether the senior's right is permanently reduced through partial forfeiture or is only temporarily reduced through administration in times of shortage and the reduction leaves the senior

with an insufficient water supply to satisfy present needs, the property right is nonetheless diminished.

B. The historically developed burdens and presumptions.

On rehearing, the parties identify those cases that address the burdens of proof and evidentiary standards applicable to disputes between competing water users under Idaho law. A review of these cases is worthwhile.

The early case of *Moe v. Harger*, 10 Idaho 302, 77 P. 645 (1904) addressed a dispute between surface water users on a common source, the Big Lost River. The case was commenced by certain senior water appropriators to enjoin certain junior water appropriators from diverting water to the alleged injury of the seniors' rights of use. With respect to the applicable burdens of proof and evidentiary standards, the Court instructed that once the senior appropriators' rights of use are established, the burden shifts to the junior to prove by clear and convincing evidence that his use will not injure the seniors' rights of use:

So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that the claimant is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. The subsequent appropriator, who claims that such diversion will not injure the prior appropriator below him, should be required to establish that fact by clear and convincing evidence.

Id. at 307, 77 P. at 647 (emphasis added).

In *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568 (1908) the Idaho Supreme Court again addressed a dispute between surface water users. With respect to the applicable burdens of proof and evidentiary standards, the Court instructed, consistent with *Moe*, that the burden is on the party alleging that his appropriation will not injure a prior appropriator's right of use to prove the same by clear and convincing evidence:

It seems self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and, where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or

prejudice a prior appropriator, he should, as we observed in *Moe v. Harger*, 10 Idaho, 305, 77 Pac. 645, produce ‘clear and convincing evidence’ showing that the prior appropriator would not be injured or affected by the diversion.’ The burden is on him to show such facts.

Id. at 149, 96 P. at 571–72 (emphasis added).

Neil v. Hyde, 32 Idaho 576, 186 P. 710 (1920) and *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216 (1921) likewise involved disputes between surface water users on common sources. The junior appropriators in those cases argued that their use did not injure the senior users. The Idaho Supreme Court directed in both cases that the burden of proof rested on the junior appropriators to show that their use did not injure the seniors, and held that the juniors in both cases failed to carry their burden.¹ *Neil*, 32 Idaho at 587, 186 P. at 713; *Jackson*, 33 Idaho at 528, 196 at 217.

A different issue than those addressed by the Court in the above-mentioned cases arose in the context of a dispute between two groups of artesian groundwater users in *Jones v. Vanausdeln*, 28 Idaho 743, 156 P. 615 (1916). In that case, the ultimate issue was one of hydrologic connectivity; that is, whether the respective artesian basins from which plaintiffs and defendants received their water were hydraulically connected:

The ultimate fact in issue was whether the [defendants’] wells drew their supply from the same underground flow as [plaintiffs’] wells, thereby causing a diminution in the flow of the [plaintiffs’] wells.

Id. at 751, 156 P. at 618. The district court denied plaintiffs’ request that the defendants’ use be enjoined on the grounds that no subterranean connection existed between the respective artesian basins and that, as a result, the two groups received their water from separate and unconnected sources. *Id.* at 747–48, 156 at 616. The Idaho Supreme Court confirmed, providing that when the issue is whether two sources are hydraulically connected, the burden of proof is on the senior appropriator to establish that such a connection exists before a junior’s use will be enjoined. *Id.* at 749, 156 at 617.

The Idaho Supreme Court again took up a dispute between various artesian groundwater users in *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931) (“*Silkey I*”) and *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037 (1934) (“*Silkey II*”). In that case, the district

¹ Although the Court directed that the burden of proof rested with the junior appropriators, in neither case did the Court specify the applicable evidentiary standard the juniors had to meet.

court adjudicated the rights of the parties, entered a decree curtailing the rights of several of the junior appropriators at the request of the senior appropriator and retained jurisdiction over the case to adjust the allowance of water permitted each user if necessary. *Silkey I*, 51 Idaho at 348–49, 5 P.2d at 1051. Unlike *Jones*, connectivity of source was not the ultimate issue in *Silkey*. Indeed, the district court found, and the Idaho Supreme Court affirmed, that “the waters flowing from the artesian well of each party is derived from the same source, and the supply of said wells constitutes one interdependent and connected source of supply.” *Id.* at 348, 5 P.2d at 1051.

The appeal in *Silkey II* arose when the junior appropriators curtailed in *Silkey I* moved the district court under its retained jurisdiction to modify its earlier decree to permit them to use more water. *Silkey II*, 54 Idaho at 127, 28 P.2d at 1037. The junior appropriators argued that such additional use would not deplete the amount of water available to the senior appropriator. *Id.* The Idaho Supreme Court affirmed the district court’s denial of the junior appropriators’ motion, holding that the juniors failed to sustain their burden of proving that their use would not injure the senior’s use:

The burden was on appellants herein to sustain their motion by direct and convincing testimony, this language in *Moe v. Harger*, 10 Idaho, 302, 77 P. 645, 646, being particularly apt: “This court has uniformly adhered to the principle, announced both in the Constitution and by the statute, that the first appropriator has the first right; and it would take more than a theory, and in fact clear and convincing evidence, in any given case, showing that the prior appropriator would not be injured or affected by the diversion of a subsequent appropriator, before we would depart from a rule so just and equitable in its application, and so generally and uniformly applied by the courts.

Id. at 128–29, 28 P.2d at 1038. Consistent with *Moe*, the Court again made clear that the standard of proof was clear and convincing evidence if the juniors wished to prove that their use would not injure the senior appropriator.

The case history can be reconciled. *Jones* instructs that the initial burden rests upon the senior appropriator to establish that he and the junior appropriator receive water from the same hydraulically connected source. Once it is determined that the senior and junior derive water from a common source, as was the case in all of the above-mentioned cases except for *Jones*, the burden rests on the junior appropriator to prove by clear and convincing evidence that his use will not injure the senior’s right of use. One leading

commentator on the subject has summarized the application of the burdens of proof as follows:

[W]hen a senior appropriator seeks to enjoin a junior diversion, the senior – the person seeking judicial intervention to change an existing situation – must prove the water sources for the two diversions are connected. But once hydrologic connection is shown, it becomes probable that the junior diversion interferes with the senior right, if the senior’s source is fully appropriated by rights prior to the junior diversion. Then the junior appropriator – the person arguing against probabilities – must show his particular water use somehow does not cause interference.

Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L.Rev. 63, 92–93 (1987).

It is significant that this Court established the hydrologic connection in *Memorandum Decision and Order of Partial Decree* in Basin Wide Issue No. 5 “Connected Sources General Provision” for the Snake River Basin. Among other things, the general provision identifies hydraulically connected ground and surface sources in the Snake River Basin for the purposes of administration and defining the legal relationship between connected sources. In pertinent part, the general provision provides as follows:

Except as otherwise specified above, all other water rights within Basin ____ will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

(emphasis added). A *Partial Decree for Connected Sources* is issued for each basin within the Snake River Basin. Thus, unless water rights are listed as “otherwise specified” in the *Partial Decree for Connected Sources* for a given basin that the source from which a junior appropriator receives his water shall be administered separately from all other water rights in the Snake River Basin, the issue of whether or not the senior and junior divert water from a common source has already been answered in the positive. This is also consistent with the provisions of the Ground Water Act, IC. § 42-237a.g. which requires the Director to determine areas of the state having a common ground water supply. When it is determined that the area having a common ground water supply affects the flow of water in any stream in an organized water district, then the Director includes the stream in the water district. Conversely, when it is determined that the area having a common ground water supply does not affect the flow of a stream in an

organized water district, then the Director incorporates the area in a separate district. Under such circumstances, the senior appropriator's burden of proof to establish a common source is satisfied.

The burden is then on the junior right holder to show by clear and convincing evidence that his use will not injure the senior's right. One way in which this may be demonstrated is by showing that the senior's present water use does not require the full decreed quantity. A clear and convincing standard is consistent with the historically recognized burdens of proof and also insures that any amount determined to be sufficient to accomplish the present use is in fact sufficient.

C. The significance of the decree issued in a general adjudication in a delivery call.

The Ground Water Users argue the purpose and significance of a partial decree issued in a general adjudication differs substantially from its purpose and significance in delivery call proceedings. Specifically, the Ground Water Users assert the adjudication only establishes the historical maximum quantity that can be put to beneficial use. They argue that a delivery call proceeding, in contrast, requires that the Director examine the senior's current beneficial use requirements which may vary from the decreed quantity. The argument is that the decree is only conclusive as to historical maximum beneficial use for the water right and has little or no relevance as to present beneficial use requirements for the same right. This Court agrees that an appropriator's present water requirements can vary from the quantity reflected in the decree after taking into account such considerations such as post decree factors. However, the Ground Water User's characterization of decrees minimizes their intended purpose, undermines the certainty of the decrees and disregards that the issues that can be raised in a general adjudication pertaining to the quantity element extend beyond the maximum quantity that was historically put to beneficial use.

1. **Idaho law contemplates certainty and finality so that water rights can be administered according to the decrees.**

Idaho Code § 42-1420 provides: “[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system. . . .” In *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998), the Idaho Supreme Court pronounced that “[f]inality in water rights is essential.” Further, “[a] decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for the source of the water. . . . If the provisions define a water right, it is essential that the provisions are in the decree, *since the water master is to distribute water according to the adjudication decree.*” *Id.* (citations omitted) (emphasis added). Clearly Idaho law contemplates certainty and finality of water right decrees for effective administration. Absent a higher evidentiary standard, any certainty and finality in the decree is undermined.

The position advocated by the Ground Water Users would significantly minimize the purpose and utility of the decree in times of shortage and any reliance on the decree for effective administration, particularly in a water district, is undermined. If the sole purpose of the decreed quantity is to identify the maximum quantity when sufficient water is available, the result is that the decreed quantity has little probative or presumptive weight and litigation over the senior’s present needs would be a virtual necessity in every delivery call. This is contrary to the holding in *AFRD #2*, which provides that: “The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has The presumption under Idaho law is that the senior is entitled to his decreed water right, but there may be some post-adjudication factors which are relevant to how much water is actually needed.” *Id.* at 877-78, 154 P.3d at 448-49

2. The quantity element is a quantitative determination of beneficial use.

The argument against applying the clear and convincing standard erroneously assumes that the decreed quantity element is not a quantitative determination of beneficial use. The argument assumes that the Department’s role in the SRBA is to recommend water rights based on established historical maximum beneficial use rather than present beneficial use requirements. For example, the Ground Water Users assert

that recommendations for previously decreed and licensed rights were recommended based on the previously decreed or licensed quantity. As such, the last field examination for the right could have taken place as long ago when the right was previously decreed or licensed. Since that time, the right holder could have made efficiencies to the conveyance system thereby requiring less water than was decreed or licensed. An example is converting from gravity irrigation to sprinkler irrigation or a tiled ditch system. As a result, the Ground Water Users argue that the decreed quantity in the SRBA may not reflect the quantity of water that is actually put to beneficial use. The Ground Water Users also argue that the quantity element is a maximum which provides for the highest degree of flexibility to provide for the most water intensive use within the scope of the purpose of use. For example, a quantity sufficient to allow an irrigator to rotate crops allows for growing the most water intensive crop in the hottest part of the irrigation season.

The argument ignores both the purpose of the decree as well as the scope of the issues raised in a general adjudication. This Court previously discussed the Department's statutory directive in issuing licenses and recommendations which limit the quantity to the amount of water beneficially used. *Order* at 28-30. Idaho Code § 42-220 provides:

[W]hen water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to use more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the [Department] in granting such license *and to the court in making such decree*, that a greater amount is necessary. . . .

I.C. § 42-220 (emphasis added). Idaho Code § 42-1420 provides “the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system.” As such, the appropriate time for contesting the Department's recommendation as to quantity was in the adjudication. I.C. § 42-1420.

Case law also supports the proposition that the quantity element in a decree represents a quantitative determination of beneficial use. Issues over excess quantity arise in proceedings relating to the adjudication of rights. In *Abbott v. Reedy*, 9 Idaho 577, 75 P. 764 (1904), in an adjudication to determine the respective rights on Soldier Creek in Blaine County, the Idaho Supreme Court held:

It is true that he said he had been using about two inches per acre, but the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it. The inquiry was, therefore, not what he had used, but how much was actually necessary. There was a clear and substantial conflict in the evidence as to the quantity of water per acre necessary for the successful irrigation of appellant's lands.

Id. at 578, 75 P. at 765. The issue arose in the context of an adjudication as opposed to a delivery call proceeding.

The case of *Farmers Cooperative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 P. 481 (1909), involved the adjudication of water rights on the Boise River. At issue was whether the quantity decreed for certain classes of rights exceeded the duty of water for the purpose of use of the rights. In deciding whether or not to grant a new trial on the issue, the Court relied on the following:

In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. Economy must be required and demanded in the use of application of water. Water users should not be allowed an excessive quantity of water to compensate for and counterbalance their neglect or indolence in the preparation of their lands for the successful and economical application of the water. One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water.

Farmers at 535-36, 102 P. 483-89. Again, the issue arose in the context of an adjudication as opposed to a delivery call proceeding. *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 F. 30 (D. Idaho 1917), involved an action to quiet title of water rights held on Goose Creek in Idaho and Nevada. In applying Idaho law, the Court held:

Much is said about the duty of water. . . . The Land and Stock Company insists that the duty of water should still be measured by the old method of irrigation of pasture and the native grasses for the production of hay, which was by the flooding system, that allowed the water to cover the surface of the soil, and actually to remain thereon for considerable periods of time. This method is being disapproved of in more recent years as wasteful and not an economical use. No person is entitled to more water

than he is able to apply to a reasonable and economical use. True, it may be that good results are obtainable from the former method, but that does not augur that just as good results may not be secured by a much more moderate use, which would leave a large quantity of water for others, who need it as much as the Land & Stock Company.

Id. at 33-34.

In *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918), one of the issues before the Idaho Supreme Court was the sufficiency of the evidence supporting the adjudicated quantity of a beneficial use claim, the Court reasoned:

‘The quantity of water decreed to an appropriator, in an action wherein priority of appropriation is the issue, should be upon the basis of cubic feet per second of time of the water actually applied to a beneficial use, and should be definite and certain as to the quantity appropriated and necessarily used by the appropriator.’

Id. at 15, 178 P. at 86. (quoting *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912)).

Further:

Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.

Id. at 15. Kinney on Irrigation provides with respect to economic use and the suppression of waste:

[T]he Courts have been and are now being called upon to fix by decrees the duty of water for certain tracts of land. . . . In fixing the duty of water for a certain tract of land, such an amount per acre should be awarded, within the lawful claim of the prior appropriator, as is essential or necessary for the proper irrigation of the land on which the water is used, and upon which the duty is being fixed; which water, when economically applied without waste, will result in the successful growing of crops on the land. Further than this, as far as the rights of the prior appropriator are concerned, the courts should not and can not lawfully go, where the result would be in cutting down the quantity of water to which the prior appropriator is entitled and reasonably needs for his purpose and the awarding of a certain amount of his water to subsequent appropriators.

2 Kinney on Irrigation and Water Rights § 905 at 1595-96 (2nd ed. 1912).

The Ground Water Users assume that the quantity element of decreed water rights is not reflective of present needs, or is “bloated” (i.e. in excess of the quantity needed) or at a minimum always represents a quantity which provides for the highest degree of flexibility in order to allow for the most water intensive use within the scope of the purpose of use. The argument oversimplifies what takes place in the SRBA. Water rights are claimed based on permits and licenses, prior decrees in both private and general adjudications), beneficial use, posted notice, and adverse possession, mesne deed conveyances, splits of property and appurtenant rights etc. As a result, the quantity claimed for one water right may include excessive water for a particular purpose while for another water right the quantity may provide for little or no flexibility. Therefore the amount of excess water, if any, or the degree of flexibility built into the quantity element of partial decree issued in the SRBA could be in actuality “all over the map.”

The Director’s recommendation as to quantity, whether or not an in-depth field investigation was conducted in preparing the recommendation, is by no means the final word on the matter. The quantity recommendation is subject to objections by the claimant and any other party to the adjudication. If such an objection is made it may be litigated and determined by the Court. Issues such as waste (i.e. reasonableness of conveyance works), duty of water, partial forfeiture, and excessive conveyance loss can and have been litigated in the SRBA whether or not they were considered in the Director’s recommendation. If the Director makes a recommendation based on a prior license where the delivery system that has since changed (i.e. gravity to sprinkler), third parties can object and assert partial forfeiture of any quantity no longer put to beneficial use. Accordingly, the degree to which the quantity element is scrutinized varies among the decrees issued in the SRBA. Nonetheless, parties were provided the opportunity to raise and litigate issues affecting quantity. Consequently, the partial decree issued in the SRBA is consistent with Idaho law and represents a quantitative determination of beneficial use.

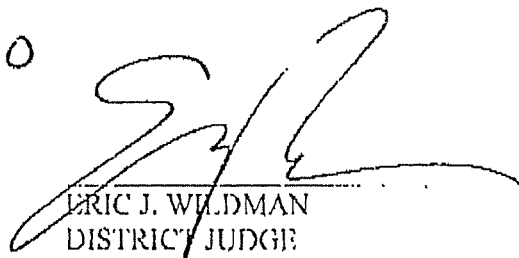
The result is that the issues litigated and evidence presented in support of the quantity element in the adjudication can be exactly the same as the issues presented and the evidence relied upon in conjunction with the delivery call. As such, depending on the

particular case, the argument that the issues are distinguishable because the issue in the adjudication is historical maximum beneficial use and in a delivery call only present need is at issue may be a difference in label only.

III. CONCLUSION

In sum, the application of a clear and convincing standard to the determination that a senior can get by with less water than decreed is consistent with the established presumptions and standards of proof. The standard reconciles giving the proper presumptive weight to the quantity decreed while at the same time allowing the Director to take into account such considerations as post-decree factors and in particular waste under the CMR. The standard avoids putting the senior right holder in the position of re-defending or re-litigating that which was already established in the adjudication. It avoids the risk that an erroneous determination will leave the senior short of water to which he was otherwise entitled, thereby promoting certainty and stability of water rights. The standard provides for effective timely administration by reducing contests to the sufficiency of the Director's findings. The Director's determination in an organized water district will be difficult to challenge by either the senior or junior sought to be enjoined. The alternative is a system which lacks certainty in water rights. For these reasons the Court affirms its prior decision on this issue and *denies the Petitions for Rehearing.*

DATED: November 2, 2010


ERIC J. WILDMAN
DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of November, 2010, she caused a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER ON PETITIONS FOR REHEARING on the persons listed below by mailing in the United States mail, first class, thereto to the parties at the indicated address:

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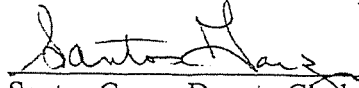
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Santos Garza, Deputy Clerk

NOV 10 2011

**SUPPLEMENTAL DIRECTOR'S REPORT
REGARDING SUBCASE NOS. 01-04, 01-10, and 01-209**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Gary Spackman, Interim Director
Carter Fritschle, Manager, Adjudication Section

November 3, 2011

I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, the Director of the Idaho Department of Water Resources ("Department") submits this amended Supplemental Director's Report ("Report") regarding subcase numbers 01-04, 01-10, and 01-209. This Report was prepared under the supervision of Gary Spackman, Interim Director, and Carter Fritschle, Manager, Adjudication Section. Douglas R. Jones, Technical Engineer 1, Southern Region Office in Twin Falls, and Michael W. Holliday, Water Rights Supervisor, Eastern Region Office in Idaho Falls, have knowledge of the information contained in the Report.

II. SUMMARY OF THE ISSUE

The Twin Falls Canal Company ("TFCC") holds three previously decreed natural flow rights from the Snake River that authorize diversion of 3,780 cfs. As recommended, TFCC is authorized to irrigate 196,162 acres with its previously decreed water rights. The Department based its recommendations on TFCC's water right decrees, diversion records, and aerial imagery.

III. FACTUAL AND PROCEDURAL BACKGROUND

On August 11, 1989, TFCC filed claims in the SRBA for water right numbers 01-4, 01-10, and 01-209. On May 15, 2006, the Department recommended those claims to the SRBA District Court in its Director's Report for Basin 01, Part 1, Irrigation and Other Uses.

A. Water Right No. 01-04

Objections to the Department's recommendation for 01-04 were filed by TFCC, the Ground Water Districts ("GWD"),¹ and the United States of America, Bureau of Land

¹ On April 23, 2008, the Idaho Ground Water Appropriators, Inc. ("IGWA") filed a *Motion to Substitute Parties*. On May 28, 2008, the Court issued its *Order Granting IGWA's Motion for Substitution of Parties* allowing

Management (“BLM”). TFCC objected to the place of use (“POU”) element. BLM also objected to the POU element; asserting that BLM is the owner of a portion of lands located within the claimed place of use.

Pertinent to this proceeding, the GWD objected to the POU element; asserting that, for purposes of a conjunctive administration delivery call, the irrigation requirement should be limited to actual irrigated acres. The GWD also objected that, for purposes of a conjunctive administration delivery call, TFCC’s irrigation requirement, at the head gate, should not exceed 5/8 miner’s inch per acre. Lastly, the Ground Water Districts sought a condition stating that the water right should not be entitled to make a delivery call against junior priority water rights.

While not an objector to this subcase, the City of Pocatello (“Pocatello”) was authorized to participate in this proceeding by this Court’s March 28, 2008 *Order Granting City of Pocatello’s Motion to Participate*.

B. Water Right No. 01-10

Objections to the Department’s recommendation for 01-10 were filed by BLM, GWD, and TFCC. TFCC objected to the POU element and the second paragraph of the other provisions necessary component of the recommendation.² BLM also objected to the POU element; asserting that BLM is the owner of a portion of lands located within the claimed place of use.

Pertinent to this proceeding, the GWD objected to the POU element; asserting that, for purposes of a conjunctive administration delivery call, the irrigation requirement should be limited to actual irrigated acres. The GWD also objected that, for purposes of a conjunctive

Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey-Valley Irrigation District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District (hereinafter referred to as “GWD”) in the place and stead of IGWA.

² It has been agreed upon by the parties and the Department that this provision, regarding the Eagle decree, is not necessary and should be deleted from the recommendation.

administration delivery call, TFCC's irrigation requirement, at the head gate, should not exceed 5/8 miner's inch per acre. Lastly, the Ground Water Districts sought a condition stating that the water right should not be entitled to make a delivery call against junior priority water rights.

While not an objector to this subcase, Pocatello was authorized to participate in this proceeding by this Court's March 28, 2008 *Order Granting City of Pocatello's Motion to Participate* on March 28, 2008.

C. Water Right No. 01-209

An Amended Director's Report was filed on December 21, 2006. The sole purpose of the Amended Director's Report was to add a remark concerning the Minidoka credit.³

Objections to the Department's recommendation for 01-209 were filed by TFCC, GWD, and BLM. TFCC objected to the POU element. BLM also objected to the POU element; asserting that the BLM is the owner of a portion of lands located within the claimed place of use.

Pertinent to this proceeding, the GWD objected to the POU element; asserting that, for purposes of a conjunctive administration delivery call, the irrigation requirement should be limited to actual irrigated acres. The GWD also objected that, for purposes of a conjunctive administration delivery call, TFCC's irrigation requirement, at the head gate, should not exceed 5/8 miner's inch per acre. The GWD sought a condition stating that this water right should not be entitled to make a delivery call against junior priority water rights. Lastly, the GWD sought a condition stating that, for purposes of a conjunctive administration delivery call, consideration should be given to the history and seasonal availability of water diversions.

³ Trial was held on the "Minidoka Credit Remark" on May 18, 2009, and the *Special Master Report and Partial Recommendation* ("Minidoka Credit Remark") was issued on February 2, 2010. The *Order Granting Motion to Alter or Amend and Amended Special Master Report and Recommendation* ("Minidoka Return Flow Credit Remark") was issued on May 7, 2010.

On May 21, 2008, Pocatello was authorized by the Court to broaden its objection beyond the Minidoka credit issue. Pocatello's amended objection took issue with the quantity element of the recommendation. Pocatello asserted that the decreed quantity is a maximum and does not create a guaranteed right to call for the full amount of water at all times between March 15 and November 15. Pocatello also asserted that TFCC should be required to demonstrate that its historical operations were consistent with the claimed amounts in light of crops raised, application methods, weather conditions, and system losses. Thus, the recommended quantity should be reduced if TFCC failed to support its claims. With regard to the POU element, Pocatello stated that the acreage indicated is not based on actual historically irrigated acreage. Conditions should be added requiring proof of actual consistent historical irrigation of the identified area; or in the alternative, acreage should be reduced to reflect actually historically irrigated acreage.

IV. DISCUSSION

A. TFCC's Water Rights

TFCC holds three natural flow rights from the Snake River authorizing diversion of 3,780 cfs. TFCC's most senior right, 01-209 (10/11/1900), was decreed in the case *Twin Falls Canal Company v. Charles N. Foster, et al.* (Fourth Jud. Dist. 1913), and authorizes diversion of 3,000 cfs.⁴ The *Foster* decree described a general place of use for water right 01-209 by Township, Range, and Section.

TFCC's next most senior right (12/22/1915), was originally licensed by the Department on April 5, 1923 as water right 01-2027.⁵ The license authorized the diversion of an additional

⁴ Attached hereto as Attachment 1 is a true and correct excerpted copy of the *Foster* decree.

⁵ Attached hereto as Attachment 2 is a true and correct copy of the license for 01-2027.

600 cfs for irrigation on 5,329 quarter-quarters. In the "Remarks" section of the "Application for Permit,"⁶ it was stated as follows:

NOTE 2. The main canal of the Twin Falls Canal Company System now has a carrying capacity of 3300 second feet. It is the intention to enlarge the same to 3600 second feet. The present appropriation consists of 3000 second feet, with a loss in transmission, making about 2100 second feet available for distribution. The contract right held by water users on the project is 1/80th second foot per acre, measured one half mile from the place of intended use. The number of acres under the canal system at present constructed is about 240,000. About 198,000 acres have contract right (sic). The additional lands intended to be irrigated are about 40,000 acres. The amount herein applied for is necessary to be added to the present water appropriation of the Twin Falls Canal System in order to supply lands now holding contract rights with an ample supply and also to cover lands under the system that have no contract rights.

Two years after the Department issued its license for water right 01-2027, the right was decreed by the federal district court in the case *Woodville Canal Company v. Clark and Edwards Canal and Irrigation Company, A Corporation, et al.* (D. Idaho 1925).⁷ The *Woodville* decree conformed, in part, with the license by authorizing the diversion of 600 cfs under the priority date 12/22/1915. The water right was renumbered from 01-2027 to 01-04. Unlike the license, no place of use was described. The right decreed in *Woodville* was made appurtenant to the lands described in *Foster*. The *Foster* decree was attached to the *Woodville* decree; thereby recognizing TFCC's senior water right, 01-209.

TFCC's most junior water right, 01-10 (4/1/1939), was decreed by the court in *Burley Irrigation District et al. v. Henry Eagle* (Fifth Jud. Dist. 1968), and authorizes diversion of 180 cfs.⁸ In *Eagle*, the court specifically referenced the *Foster* and *Woodville* decrees, asserting, "All the parties Plaintiff herein have accepted as binding upon them the provisions of all prior decrees

⁶ Attached hereto as Attachment 3 is a true and correct copy of the application for permit for 01-2027.

⁷ Attached hereto as Attachment 4 is a true and correct excerpted copy of the *Woodville* decree.

⁸ Attached hereto as Attachment 5 is a true and correct excerpted copy of the *Eagle* decree.

which have been entered with respect to the waters of the Snake River and its tributaries above Milner Dam” *Eagle* at 1-2. The *Eagle* decree specifically described TFCC’s water right 01-04 from the *Woodville* decree.

B. The Department’s SRBA Recommendations

On August 11, 1989, TFCC submitted SRBA claims to the Department for 01-04, 01-10, and 01-209. On May 11, 2006, the Department recommended TFCC’s SRBA claims as follows.

i. Period of Use

The standard Period of Use for irrigation for lands located downstream from the boundary between basins 35 and 36 is March 15 to November 15. TFCC is located downstream from the boundary of basins 35 and 36. Therefore, the Department recommended the standard irrigation season, March 15 to November 15.

ii. Place of Use

To determine the POU, the Department reviewed the original claims submitted by TFCC, which sought approximately 201,500 acres for irrigation purposes. The claimed acres were compiled in a notebook and submitted by TFCC with its notices of claim. In reviewing the claims, the Department compared the claimed POU with 1987/1988 National Aerial Photography Program (“NAPP”) images in the Department’s possession. The 1987 photography was taken during two days in June, one day in July, and one day in August. The 1988 photography was taken during one day in August. When there were ambiguities with the 1987/1988 NAPP imagery (due to resolution, rectification, or land use pattern uncertainties), imagery from 1992 and 2004 was examined in order to aid in interpreting what was occurring on the ground. The Department’s POU recommendation is based on the extent of irrigation as of 1987.

In order to analyze the claimed POU, the Department created a basic shape file that incorporated each claimed quarter-quarter ("QQ"). Areas within each QQ that were not or could not be irrigated were removed from the shape. These areas included canyon walls and bottoms, main canal footprints, highways, and county roads. Farmsteads, laterals, access roads, areas near fences, streams, and stackyards were not removed from the shape. Those acres were not removed from the shape because they were often temporary or subject to change in location or character; thus, irrigation could recommence as shareholders' land use priorities changed. The Department did not analyze in detail which QQs were irrigated by overlapping, private water rights. However, as will be explained below, in certain areas where few acres were claimed, but many acres were irrigated, overlapping private water rights were taken into account.

After removing the above-mentioned acres, the Department then reviewed the shape file to determine the number of acres irrigated in each QQ. In some instances, the number of acres claimed in each QQ were the same as the number of acres the Department found were irrigated. In other instances, the number of claimed acres were greater or lesser than the number of acres the Department found were irrigated in each QQ. In those instances, the Department recommended the number of acres it determined were irrigated.

Attached hereto as Attachment 6 is a "screen shot" of the Department's POU analysis for TFCC. The underlying NAPP imagery was taken on June 24, 1987. Attachment 6 shows five common examples, found during the review process, of differences between claimed acres and recommended acres. In Example 1, three QQs in Section 35 were claimed, but sixteen QQs were recommended. All of Section 35 was recommended because the unclaimed lands were subsequently identified by TFCC during the review process as having shares transferred there by the city of Twin Falls. During claim review, the Department requested additional information

from TFCC regarding the location of municipal shareholders' claimed irrigation use within city service areas. TFCC responded with updated maps showing irrigated tracts upon which municipal shareholders' shares were transferred with authorization from TFCC.

In Example 2, 63.5 acres were claimed, but no acres were recommended because the imagery showed the lands were not irrigated. Further analysis showed that the lands in question were owned by a federal entity. A closer examination of the original claimed POU revealed that the lands were not in fact claimed. It has since been determined by the Department that it erred at some point in transcribing or data entering the map data into the tabular claim format. It was correct to not recognize irrigation acreage in a circumstance like this as no irrigation was occurring and none was originally claimed.

In Example 3, even though 37 acres were claimed, imagery showed that the entire 40-acre tract was irrigated; therefore, 40 acres were recommended.

In Example 4, even though 36.6 acres were claimed, imagery showed that 32.3 acres irrigated; therefore, 32.3 acres were recommended.

Previously it was mentioned that consideration was given to overlapping, private water rights where fewer acres were claimed and many more were irrigated. Example 5 portrays this circumstance. In Example 5, the Department only recommended as many acres as were claimed. During investigation, it was found that several private water rights were appurtenant to the properties in addition to TFCC shares; therefore, the Department recommended the one acre that was claimed.

Based on the Department's review, it was determined that TFCC's POU as of 1987 was 196,162 acres.

iii. Point of Diversion

TFCC diverts water from the Snake River at the Twin Falls Southside Canal, located in Twin Falls County. The recommendations for 01-04 and 01-10 reflect this fact. The recommendation for 01-209 has the correct legal description for the point of diversion, but states that the location of the diversion is in Cassia County. The recommendation for 01-209 should be corrected to reflect that the point of diversion is located in Twin Falls County.

iv. Priority Date

The previous decrees established the priority dates for TFCC's claimed water rights: 01-209 (10/11/1900); 01-04 (12/22/1915); and, 01-10 (4/1/1939). Water District 01 delivery records show delivery in accordance with the previously decreed priority dates. Therefore, the Department recommended the previously decreed priority dates.

v. Purpose of Use

TFCC diverts water for use by its shareholders for irrigation; therefore, the Department recommended irrigation as the purpose of use.

vi. Quantity

TFCC previously decreed water rights authorize a combined diversion of 3,780 cfs. Water District 01 delivery records show historical delivery of TFCC's three previously decreed water rights, in amounts consistent with the prior decrees. Therefore, the diversion rates were recommended as claimed and previously decreed.

vii. Source

The Snake River was recommended as the source for these water rights because the prior decrees established that TFCC is authorized to divert water from the Snake River. Water District 01 delivery records show delivery of Snake River water to TFCC.

C. The Surface Water Coalition Delivery Call

On January 14, 2005, seven irrigation entities referred to as the Surface Water Coalition (“SWC”)⁹ filed a letter and petition for delivery call with former Director Karl J. Dreher, seeking conjunctive administration of ground water rights diverting from the Eastern Snake Plain Aquifer. TFCC is part of the SWC. On May 15, 2006, the Director’s Report for Basin 01 was filed with the SRBA. The Director’s Report for Basin 01 contained the recommendations for TFCC.

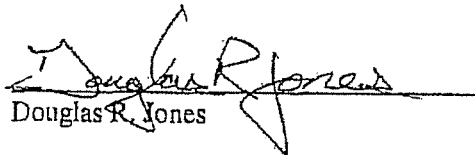
Since the filing of the Director’s Report for Basin 01, the Director has been conjunctively administering ground water and surface water rights in response to the SWC delivery call. Subsequent to the filing of the Director’s Report for Basin 01, an administrative and judicial record was created in response to the SWC delivery call. Part of the SWC delivery call is on appeal before the Idaho Supreme Court in Docket No. 38191-2010. Pending the outcome of the Supreme Court case, other issues stayed on judicial review before the Honorable Eric. J. Wildman in Case No. 2010-382 will be addressed. The Director’s SRBA recommendations for the water rights held by TFCC did not take into consideration the administrative or judicial records.

⁹ The SWC is made up of the A&B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and TFCC.

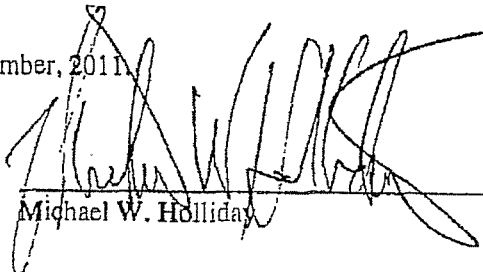
IV. CONCLUSION

The Department's recommendation for subcase numbers 01-04, 01-10, and 01-209 are based on the *Foster*, *Woodville*, and *Eagle* decrees, and the place of use as of 1987. The Department respectfully requests that the Court partially decree TFCC's rights as recommended.

Submitted this 3rd day of November, 2011.


Douglas R. Jones

Submitted this 3RD day of November, 2011.


Michael W. Holliday

CERTIFICATE OF SERVICE

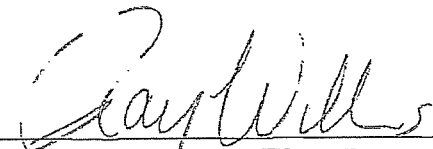
I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 3rd day of November, 2011.

Document Served:

Supplemental Director's Report Regarding Subcase Nos. 01-04, 01-10, and 01-209.

Persons Served:

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Idaho Department of Water Resources

ATTACHMENT 1

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, STATE OF IDAHO,

IN AND FOR THE COUNTY OF TWIN FALLS.

.....
TWIN FALLS CANAL COMPANY,
A corporation, Plaintiff,

Vs.

CHARLES M. FOSTER, et al,
Defendants.
.....

Went to District
STIPULATION.

WHEREAS, The Twin Falls North Side Land & Water Company and the North Side Canal Company, Limited, when in entering into this stipulation are desirous of giving their reasons for the same, which are as follows, to-wit:

1. A contract has been entered into between the Kuhn Irrigation and Canal Company, the Twin Falls Canal Company and the United States for the storage of water at Jackson Lake Reservoir in which contract it is provided that the priority claimed by the Twin Falls North Side Land and Water Company by virtue of the Perrine Water Filing of June 25, 1900, for 3,000 second feet of the waters of Snake River should not be enforced as against the Minidoka Project and in lieu thereof that the canal of said company should receive certain stored water.

2. The circumstances under which the tracts of land under the canal of the Twin Falls Canal Company and the Twin Falls North Side Land & Water Company were developed would make it inequitable for the Twin Falls North Side Land & Water Company to claim a priority over the Twin Falls Canal Company.

For these reasons as between these parties and owing to their contractual relations this stipulation and decree is agreed to, the Twin Falls North Side Land and Water Company and the North Side Canal Company not waiving as to any other canals than the canals of the Twin Falls Canal Company and the Minidoka Project, its right to a priority of June 25, 1900, to which it claims a valid right.

MAY 13 1906

Said reason is given for the purpose of making a record of the same and not for the purpose of affecting any of the terms and conditions of this stipulation.

The Twin Falls North Side Canal Company, Limited, for itself stipulates that the Right No. 2, B., in the annexed decree shall be used on what is known as the First Segregation under the said Company's canal and on only 32,000 acres in said segregation.

NOW, THEREFORE, it is hereby stipulated and agreed that the attached form of judgment shall be entered in the above entitled cause of action, and that the making and filing of Findings of Fact and Conclusions of Law are hereby waived.

Dated June 13, 1913.

A. M. Bowen, Cavenish, Blake & MacLane,
Attorneys for Plaintiff.

C. H. Lingenfelter and B. E. Stoutemyer,
Attorneys for certain defendants.

S. R. Keys,
Attorneys for certain defendants.

John E. Williams,
Attorney for certain defendants.

C. O. Longley,
Attorney for certain defendants.

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

.....
TWIN FALLS CANAL COMPANY, Plaintiff, .
Vs. . D E C R E E .
CHARLES H. FOSTER, et al, Defendants. .
.....

This cause having come on to be heard this 13th day of June, 1913, upon the amended complaint of the plaintiff, the Twin Falls Canal Company; the answer and cross-complaint of the Twin Falls North Side Land & Water Company, a Delaware corporation, and the North Side Canal Company, an Idaho corporation; the answer and cross-complaint, Asabel S. Abbott, Josie N. Acuff, and others, claiming rights in the Snake River by reason of the Minidoka Reclamation Project of the United States (as filed by C. H. Lingenfelter and S. L. Tipton and B. E. Stoutemyer, attorneys), including the Secretary of the Interior of the United States and P. M. Fogg, Engineer employed by the United States in charge of the Minidoka dam on the Snake River; the answer and cross-complaint of John Rohling, A. Kennedy, and others, (as filed by J. C. Rogers, Attorney), also claiming rights by reason of said Minidoka Reclamation Project; the answer and cross-complaint of J. H. Day, Clarence E. Williams, and others (filed by C. O. Longley, Attorney); the answer and cross-complaint in intervention of Charles W. Arthur; and the answer of Oscar F. Anderson; Cavenah, Blake, and MacLane and A. M. Bowen appearing as counsel for the plaintiffs, S. H. Hays, appearing as counsel for the defendants, the Twin Falls North Side Land & Water Company, and the North Side Canal Company, C. H. Lingenfelter and B. E. Stoutemyer appearing as counsel for the Secretary of Interior and for P. M. Fogg and other defendants represented by them, J. C. Rogers appearing for the defendants represented by him, C. O. Longley appearing as counsel for the defendants represented by him, John E. Williams appearing for the defendant, C. W. Arthur; and all other defendants herein having been regularly served with summons and not answering or

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in the Sections 5 and 6 and 8 in Twp. 9 S., Range 15 E., and Sec. 1, Twp. 9 E., Range 14 E. B. M., in the following amount, from the following date: 2 second feet from the 1st day of November, 1889 hereby designated as Right No. 1.

1 209

WATER RIGHT NO. 2.

~~0.1-113-1119~~ That the plaintiff, TWIN FALLS CANAL COMPANY be and it is hereby awarded the use of said waters of the natural flow of said Snake River diverted at the Milner Dam on the South Side of the Snake River, through what is commonly known as the Twin Falls South Side Canal, for use upon the lands lying in Twin Falls County, Idaho, South of the Snake River and East of Little Salmon River, to-wit: Sections 27, 28, 29, 30, 31, 32, 33, 34 in Township Ten (10) South, Range Twenty-one (21) East of Boise Meridian; Sections 31, 34, 35, 36, 25, in Township Ten (10) South Range Twenty (20) East of Boise Meridian; Sections 2, 3, 4, 5, 6, 7, 8, 9, 17, 18, 19, 20, in Township Eleven (11) South, Range Twenty (20) East of Boise Meridian, Sections 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, in Township Ten (10) South, Range Nineteen (19) East of Boise Meridian; Sections 1, 12, 13 in Township Eleven (11) South, Range Nineteen (19) East of Boise Meridian; Sections 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, in Township Ten (10) South, Range Eighteen (18) East of Boise Meridian, Sections Nos. One (1) to Thirty-three (33) inclusive in Township Eleven (11) South, Range Eighteen (18) East of Boise Meridian; Sections Nos. Twenty-nine (29) to Thirty-six (36) inclusive, in Township nine (9) South, Range Seventeen (17) East of Boise Meridian; All of said Township in Township Ten South (10 S.) Range Seventeen (17) East of Boise Meridian; Sections Nos. One (1) to Fifteen (15) inclusive and Section Twenty-four (24) in Township Eleven (11) South, Range Seventeen (17), East of Boise Meridian; Sections Sixteen (16) to Thirty-six (36) inclusive in Township Nine (9) South, Range Sixteen (16) East of Boise Meridian; Sections Nos. One (1) to Thirty-six (36) inclusive in Township Ten (10) South Range Sixteen (16) East of Boise Meridian; Sections 1, 2, 12, in Township Eleven (11) South, Range Sixteen (16) East of Boise Meridian; Sections Nos. Five (5) to Thirty-six

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(36) inclusive in Township Nine (9) South, Range Fifteen (15) East of Boise Meridian; Sections Nos. One (1) to Thirty-six (36) inclusive in Township Ten (10) South, Range Fifteen (15) East of Boise Meridian; Sections 5, 6, 7, in Township Eleven (11) South, Range Fifteen (15) East of Boise Meridian; Sections Twenty-eight (28) to Thirty-three (33) inclusive, Township Eight (8) South, Range Fourteen (14) East of Boise Meridian; Sections Four (4) to thirty-six inclusive, and Section One (1) Township Nine (9) South, Range Fourteen (14) East of Boise Meridian; Sections Nos. One (1) to Thirty-six (36), inclusive in Township Ten (10) South, Range Fourteen (14) East of Boise Meridian; Sections One (1) to Twelve (12) inclusive, and Seventeen (17) to Twenty (20) inclusive in Township Eleven (11) South, Range Fourteen (14) East of Boise Meridian; Sections 1, 12, 13, 14, 23, 24, 25, 36, in Township Nine (9) South, Range Thirteen (13) East of Boise Meridian; Sections 1, 2, 10, 11, 12, 13, 14, 15, 16, 22, 23, 21, 24, 25, 26, 27, 28, 33, 34, 35, 36, in Township Ten (10) South, Range Thirteen (13) East of Boise Meridian; Sections 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 24, in Township Eleven (11) South, Range Thirteen (13) East of Boise Meridian; All of Township Nine (9) South, Range 18 East of Boise Meridian; and all other lands lying North of the Main and Highline canals of the plaintiff's canal system, South of said Snake River and East of said Little Salmon River; in the following amount from the following date: 3,000 second feet from October 11, 1900, and hereby designated

1 210 Right No. 2A.

That the defendants, The TWIN FALLS NORTH SIDE LAND & WATER COMPANY and the NORTH SIDE CANAL COMPANY, LIMITED, be and are hereby awarded the use of said waters of the natural flow of said Snake River diverted from a point on said Snake River at the Milner Dam on the North Side of the Snake River, through what is commonly known as the North Side Twin Falls Canal, for use upon lands lying on the North Side of Snake River and between said river and the following described lines; Commencing at a point where the West line of Section Three (3), Township Ten (10) South, Range Eighteen (18) East, B.M.; running thence North to the Northwest corner of Section Twenty-seven (27) in said township; thence East to the Northeast corner, Section Twenty-five (25), Township Nine (9) South, Range

to decree
handing & conveying
deed to plaintiff
at p/c.

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a Misdemeanor', the amount of the natural flow to be determined as such natural flow would be, if unaffected by the diversions or acts of the parties hereto or any or either of them or by the release of stored water, the natural flow to which the Twin Falls Projects are entitled to be measured to them at the Milner Dam."

It is further ORDERED, ADJUDGED AND DECREED that the rights and priorities hereinbefore determined and awarded be and the same are each of them quieted and conformed as against each and every party hereto; and furthermore that each and all claims to the waters of the Snake River by each or all of said parties, adverse to the rights herein awarded and determined, be and they are hereby held for naught and such parties forever barred from asserting same.

Done in open Court this 20th day of June, 1913. By the Court.

Edward A. Walters,
District Judge.

RECORDED

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ATTACHMENT 2

Copy

STATE OF IDAHO

License and Certificate of Water Right

Water License No. 11888

Amount 600 second feet

Water District No. 10-A

Priority 12-22-1915

THIS IS TO CERTIFY that George E. Harlan of Twin Falls, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated December 22, 1915; that Permit No. 11888 was issued under said application; that Certificate of Completion of works, with a carrying capacity of 600 second feet, was issued thereunder on March 16, 1921, showing that said works were completed on the 29th day of May, 1920; and that on the 10th day of January, 1923, Twin Falls Canal Company of Twin Falls, State of Idaho, made proof to the satisfaction of the Commissioner of Reclamation of Idaho, of a right to the use of the waters of Snake River, a tributary of Columbia River, for the purpose of irrigation, under Use Permit No. 11888 of the State Engineer, and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Engineer of Idaho and entered of record in Volume 6 of Licenses, at page 6044, on the 5th day of April, 1923.

The right hereby confirmed dates from December 22, 1915.

The Point of Diversion is located at Milner Dam, south end of which bears North 31° 42' West 1484 feet from Corner common to Sections 28, 29, 32 and 33, Township 10 South, Range 21 East, Boise Meridian, County of Cassia.

That the amount of water to which such right is entitled and hereby confirmed, for the purpose aforesaid, is limited to an

21888

amount actually needed and beneficially used for said purposes,
and shall not exceed 600 cubic feet per second.

Description and location of use:

Township 8 South, Range 14 East, B. M.

Sec. 31 East $1/2$ -SE $1/4$
32 SW $1/4$ SW $1/4$
33 Lot 7

Township 9 South, Range 13 East, B. M.

Sec. 1 Lot 5, NE $1/4$ SE $1/4$; S $1/2$ SE $1/4$
12 NE $1/4$; SE $1/4$ NW $1/4$; E $1/2$ SE $1/4$
13 NE $1/4$; SE $1/4$ NW $1/4$; NE $1/4$ SW $1/4$; S $1/2$ SW $1/4$; SE $1/4$
24 All
23 SE $1/4$ NE $1/4$; E $1/2$ SE $1/4$
25 NW $1/4$; N $1/2$ SW $1/4$
26 NE $1/4$ NE $1/4$
36 E $1/2$ SW $1/4$; SE $1/4$

Township 9 South, Range 14 East, B. M.

Sec. 1 Lot 9
5 W $1/2$ -W $1/2$ -E $1/2$
6 Lot 1; S $1/2$ NE $1/4$; S $1/2$ NW $1/4$; S $1/2$ Section.
7 All
8 W $1/2$ W $1/2$; NE $1/4$ NW $1/4$
10 S $1/2$ NE $1/4$
11 SE $1/4$ NE $1/4$; E $1/2$ SW $1/4$; SE $1/4$
12 NE $1/4$ NE $1/4$; S $1/2$ NE $1/4$; E $1/2$ NW $1/4$; SW $1/4$ NW $1/4$; N $1/2$ SW $1/4$; N $1/2$ SE $1/4$; SW $1/4$ SE $1/4$
13 NE $1/4$; E $1/2$ NW $1/4$; SW $1/4$ NW $1/4$; SW $1/4$; SE $1/4$
14 NE $1/4$; N $1/2$ NW $1/4$; SW $1/4$ NW $1/4$; SW $1/4$; W $1/2$ SE $1/4$
15 N $1/2$ NW $1/4$; SE $1/4$ NW $1/4$; SW $1/4$ NE $1/4$; SE $1/4$ SW $1/4$; NW $1/4$ SE $1/4$; S $1/2$ SE $1/4$
16 E $1/2$ NE $1/4$; NW $1/4$ NE $1/4$; NE $1/4$ NW $1/4$; S $1/2$ NW $1/4$; SW $1/4$; SE $1/4$
17 NW $1/4$; N $1/2$ SW $1/4$; SW $1/4$ SW $1/4$
18 NE $1/4$; NW $1/4$; N $1/2$ SW $1/4$; SE $1/4$ SW $1/4$; Entire SE $1/4$
19 NE $1/4$; NW $1/4$ NW $1/4$; S $1/2$ NW $1/4$; N $1/2$ SW $1/4$; SE $1/4$ SW $1/4$; SE $1/4$
20 NE $1/4$; NW $1/4$ NW $1/4$; S $1/2$ NW $1/4$; SW $1/4$; SE $1/4$
21 W $1/2$ NW $1/4$; NW $1/4$ SW $1/4$; S $1/2$ SW $1/4$; NE $1/4$ SE $1/4$
22 N $1/2$ NE $1/4$; SW $1/4$ NE $1/4$; S $1/2$ NW $1/4$; NW $1/4$ SW $1/4$; S $1/2$ SW $1/4$; NE $1/4$ SE $1/4$
23 N $1/2$ NE $1/4$; SW $1/4$ NE $1/4$; NE $1/4$ NW $1/4$; S $1/2$ NW $1/4$; NE $1/4$ SE $1/4$
24 N $1/2$ of Section; E $1/2$ SW $1/4$; SE $1/4$
25 All
26 NE $1/4$ NE $1/4$; S $1/2$ NE $1/4$; W $1/2$ NW $1/4$; S $1/2$ of Section
27 E $1/2$ NE $1/4$; NE $1/4$ SW $1/4$; S $1/2$ SW $1/4$; SE $1/4$
28 S $1/2$ NE $1/4$; NE $1/4$; S $1/2$ of Section
29 All
30 NE $1/4$; E $1/2$ NW $1/4$; S $1/2$ of Section
31 All
32 All
33 All
34 All
35 All
36 All

Township 9 South, Range 15 East

Sec. 12 Lot 5; SW-SW
11 E $\frac{1}{2}$ SW; SW-SW; Lot 4
10 SW; Lot 8, S $\frac{1}{2}$ SE
9 Lot 2; S $\frac{1}{2}$ of Section
8 S $\frac{1}{2}$ -NE; NW $\frac{1}{4}$; S $\frac{1}{2}$ of Section
7 NE $\frac{1}{4}$; N $\frac{1}{2}$ -NW; SE-NW; NE-SW; S $\frac{1}{2}$ -SW; SE $\frac{1}{4}$
18 NE $\frac{1}{4}$; N $\frac{1}{2}$ -NW; SW $\frac{1}{4}$ NW; SW $\frac{1}{4}$; SE $\frac{1}{4}$
17 All
16 All
15 All
14 SE-NE; NW-NW; S $\frac{1}{2}$ -NW; SW $\frac{1}{4}$; E $\frac{1}{2}$ -SE
13 NW-NE; S $\frac{1}{2}$ -NE; NW $\frac{1}{4}$; S $\frac{1}{2}$ of Section
24 All
23 E $\frac{1}{2}$ -NE; NW $\frac{1}{4}$; SW $\frac{1}{4}$; NE $\frac{1}{4}$ -SE
22 All
21 All
20 All
19 All
30 All
29 All
28 All
27 All
26 All
25 All
31 All
32 All
33 All
34 All
35 All
36 E $\frac{1}{2}$ -NE; NW $\frac{1}{4}$; S $\frac{1}{2}$ of section

Township 9 South, Range 16 East

Sec. 16 Lots 5 and 6
17 Lots 5, 6, 7, and 8
18 Lot 3 and 4; SE $\frac{1}{4}$ -NW; SW $\frac{1}{4}$; SW-SE; Lots 6 & 9
19 All
20 All
21 All
22 Lots 3 & 4; S $\frac{1}{2}$ of Section
23 Lots 2, 3, 4, & 5, SW-SW
25 S $\frac{1}{2}$ -NE; SW-NW; Entire S $\frac{1}{2}$
26 All
27 All
28 All
29 All
30 All
31 All
32 All
33 All
34 All
35 All
36 All

Township 9 South, Range 16

Township 9 South, Range 17 East

Sec. 29 NW-SW; S₂-SW; S₂-SE
30 SW-NE; S₂-NW; S₂ of Section
31 All
32 All
33 W₂-NW; S₂ entire
34 Lots 3 and 4; S₂-SW; Lots 5 and 6
35 Lots 5, 6, 7, 8 and 9

Township 10 South, Range 13 East

Sec. 1 NE₁; SE-NW; Entire S₂
2 E₂-SW; SE₁
10 NE-SE; S₂-SE
11 NE; S₂-NW; SW₁; N₂-SE; SW-SE
12 NE₁; E₂-NW; NW-NW; NE-SW; N₂-SE; SE-SE
13 E₂-NE; SE-SW; SE₁
14 N₂-NW; SW-NW; NW-SW; S₂-SW
15 NE₁; S₂-NW; Entire S₂
16 SE-NE; NE-SE; S₂-SE
21 NE₁; E₂-SE
22 All
23 All
24 Entire N₂; SW₁; NW-SE; S₂-SE
25 NW-NE; S₂-NE; NW₁; SW₁; SE₁
26 All
27 All
28 E₂-E₂
33 E₂-NE; SE₁
34 All
35 All
36 All

Township 10 South, Range 14 East

Sec. 1 All
2 All
3 All
4 All
5 All
6 All
7 All
8 All
9 All
10 All
11 All
12 All
13 All
14 All
15 All
16 All
17 All
18 All
19 NE; N₂-NW; S₂-SW
20 Entire N₂; N₂-SW; SE-SW; SE₁
21 All
22 All
23 All
24 All
25 All

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Township 10 South, Range 14 East (Cont.)

Sec. 26 All
27 All
28 All
29 NE $\frac{1}{4}$; E $\frac{1}{2}$ -NW; Entire S $\frac{1}{2}$
30 S $\frac{1}{2}$ -NW; Entire S $\frac{1}{2}$
31 All
32 All
33 All
34 All
35 All
36 All

Township 10 South, Range 15 East

All of Township 10 South, Range 15, except SE-NW Sec. 34

Township 10 South, Range 16 East

All of Township 10 South, Range 16 Except SW-SE Sec. 34

Township 10 South, Range 17 East

Sec. 1 S $\frac{1}{2}$ -NW; S $\frac{1}{2}$ of Section
2 All
3 All
4 All
5 All
6 All
7 All
8 All
9 All
10 All
11 All
12 All
13 All
14 All
15 All
16 All
17 All
18 All
Entire S $\frac{1}{2}$ of Township 10, Range 17

Township 10 South, Range 18 East

Sec. 4 NW-SW; S $\frac{1}{2}$ -SW; SW $\frac{1}{4}$ -SE $\frac{1}{4}$
5 Entire S $\frac{1}{2}$
6 SW-NE; Entire S $\frac{1}{2}$
7 All
8 All
9 All
10 SW-NW; NW-SW; S $\frac{1}{2}$ -SW; SE $\frac{1}{4}$
11 NE-SW; S $\frac{1}{2}$ -SW; SE $\frac{1}{4}$
12 SW-SW;
13 All
14 All
15 All
16 All
17 All
18 All
The entire S $\frac{1}{2}$ of Township 10

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Township 10 South, Range 19 East

Sec. 15 Lot 2
16 Lots 4 & 5; SW $\frac{1}{4}$; NW-SE; SW-SE; Lot 10
17 Lots 3, 4, 5 & 6; S $\frac{1}{2}$ NE; S $\frac{1}{2}$ NW; Entire S $\frac{1}{2}$ of Sec.
18 All
19 All
20 All
21 N $\frac{1}{2}$ -NE; SW-NE; NW $\frac{1}{4}$; N $\frac{1}{2}$ -SW; NW-SE
22 NE $\frac{1}{4}$; N $\frac{1}{2}$ -NW; SE-NW; W $\frac{1}{2}$ -SW; NE-SE
23 Lots 3 and 4, Entire S $\frac{1}{2}$ of Section
24 Lot 2;
25 Lot 3; NW $\frac{1}{4}$; SW $\frac{1}{4}$; Lots 6 and 7.
26 E $\frac{1}{2}$ -NE; NE-SE
29 N $\frac{1}{2}$ -NE; N $\frac{1}{2}$ -NW; SW-NW
30 All
31 NW-NE; NW $\frac{1}{4}$; Lots 3 and 4
36 W $\frac{1}{2}$ -NE; Lot 3; E $\frac{1}{2}$ -NW; SE $\frac{1}{4}$

Township 10 South, Range 20 East

Sec. 26 Lot 3
25 Lots 5, 6, 7 and 8; S $\frac{1}{2}$ -SE
31 Lots 4, 8, 9 and 10
33 Lot 4,
34 Lots 5, 6, 7 and 8;
35 Lots 1, 5, 6 and 7. SE-NE; NE-SW
36 NW-NW

Township 11 South, Range 13 East

Sec. 1 All
2 All
3 Entire N $\frac{1}{2}$; N $\frac{1}{2}$ -SW; SE-SW; N $\frac{1}{2}$ -SE; SE-SE
10 NE-NW
11 NE $\frac{1}{4}$; N $\frac{1}{2}$ -NW; SW $\frac{1}{4}$ -NW; E $\frac{1}{2}$ -SW; SE $\frac{1}{4}$
12 All
13 N $\frac{1}{2}$ -entire
14 NE-NE

Township 11 South, Range 14 East

Sec. 1 All
2 All
3 All
4 All
5 NE-NE; S $\frac{1}{2}$ -NE; NW $\frac{1}{4}$; entire S $\frac{1}{2}$ of Section
6 All
7 All
8 All
9 All
10 Entire N $\frac{1}{2}$; N $\frac{1}{2}$ -SW; SW-SW
11 N $\frac{1}{2}$ -NE; SE-NE; NW $\frac{1}{4}$; NW-SW
12 N $\frac{1}{2}$ -NE; SW-NE; NW $\frac{1}{4}$; S $\frac{1}{2}$ -SE
16 NW-NW
17 N $\frac{1}{2}$ -NE; SW-NE; NW $\frac{1}{4}$; N $\frac{1}{2}$ -SW; SW-SW
18 All
19 E $\frac{1}{2}$ -NE; NW $\frac{1}{4}$
20 NW $\frac{1}{4}$

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Township 11 South, Range 15 East

Sec. 5 Entire N $\frac{1}{2}$
6 All
7 NW-NW

Township 11 South, Range 16 East

Sec. 1 All
2 NE $\frac{1}{4}$; N $\frac{1}{2}$ -NW; SE-NW
12 N $\frac{1}{2}$ -NE

Township 11 South, Range 17 East

Sec. 1 All
2 All
3 All
4 All
5 All
6 All
7 N $\frac{1}{2}$ -N $\frac{1}{2}$
8 N $\frac{1}{2}$ -N $\frac{1}{2}$
9 N $\frac{1}{2}$ -N $\frac{1}{2}$; S $\frac{1}{2}$ -NE
10 All
11 All
12 All
13 All
14 NE $\frac{1}{4}$; N $\frac{1}{2}$ -NW; N $\frac{1}{2}$ -SE; SE-SE
15 N $\frac{1}{2}$ -NE
24 NE-NE; S $\frac{1}{2}$ -NE

Township 11 South, Range 18 East

Sec. 1 Lot 2; SW-NE; NW $\frac{1}{4}$; SW $\frac{1}{4}$
2 All
3 All
4 All
5 All
6 All
7 All
8 All
9 All
10 All
11 All
12 Entire W $\frac{1}{2}$ of Section W $\frac{1}{2}$ -SE
13 N $\frac{1}{2}$ -entire of section; SW; W $\frac{1}{2}$ -SE
14 Entire E $\frac{1}{2}$
15 NW-NE; entire W $\frac{1}{2}$ of section
16 All
17 N $\frac{1}{2}$ -NE; SW-NE; NW $\frac{1}{4}$; Entire S $\frac{1}{2}$ of section
18 All
19 NE $\frac{1}{4}$; E $\frac{1}{2}$ -NW; W $\frac{1}{2}$ -SE; SE-SE
20 N $\frac{1}{2}$ -N $\frac{1}{2}$; SE-NE; N $\frac{1}{2}$ -S $\frac{1}{2}$; S $\frac{1}{2}$ -SW; SE-SE
21 N $\frac{1}{2}$ -N $\frac{1}{2}$; SE $\frac{1}{4}$
22 N $\frac{1}{2}$ -NW; SW-SW
23 NE $\frac{1}{4}$; NE-SE
24 W $\frac{1}{2}$ -NW; NW-SW
25 NW $\frac{1}{4}$
26 SE-NE; NW $\frac{1}{4}$; NW-SW

Township 11 South, Range 18 East (Cont.)

Sec. 27 NE $\frac{1}{4}$; SW $\frac{1}{4}$; N $\frac{1}{2}$ -SE
28 All
29 NE $\frac{1}{4}$; N $\frac{1}{2}$ -NW; SW-NW; W $\frac{1}{2}$ -SW; SE-SW; E $\frac{1}{2}$ -SE
30 N $\frac{1}{2}$ -NE; SW-NE; NW-SE
32 E $\frac{1}{2}$ -NE; N $\frac{1}{2}$ -NW
33 NE $\frac{1}{4}$ -NE; SW-NE; NW $\frac{1}{4}$

Township 11 South, Range 19 East

Sec. 1 NE $\frac{1}{4}$; SE $\frac{1}{4}$
12 NE $\frac{1}{4}$; N $\frac{1}{2}$ -SE; SE-SE
13 E $\frac{1}{2}$ -NE; NE-SE

Township 11 South, Range 20 East

Sec. 3 Lots 3 and 4, SW-NW
4 NE $\frac{1}{4}$; N $\frac{1}{2}$ -SW; SW-SW; NW-SE
5 Lots 3 and 4, S $\frac{1}{2}$ -SW; S $\frac{1}{2}$ -SE
6 Lots 2, 3, 4, 5, 6, SE-NW; NE-SW; Lot 7; SE-SW; W $\frac{1}{2}$ -SE; SE-SE
7 All
8 NE; Entire W $\frac{1}{2}$ of section
17 NW $\frac{1}{4}$
18 N $\frac{1}{2}$ of section; N $\frac{1}{2}$ -SE
19 N $\frac{1}{2}$ -N $\frac{1}{2}$
20 N $\frac{1}{2}$ -N $\frac{1}{2}$

The right to the use of the water aforesaid hereby confirmed is restricted to the lands or place of use herein described, as provided by the laws of Idaho,

WITNESS the seal and signature of the Commissioner of Reclamation, affixed at Boise, Idaho, this 5th day of April, 1923.

Commissioner of Reclamation

ATTACHMENT 3

No. 17169

APPLICATION FOR PERMIT 01-2027

TO APPROPRIATE THE PUBLIC WATERS OF THE STATE OF IDAHO

1. Name of applicant: Geo. E. Harlan,

Postoffice address: Twin Falls

County: Twin Falls

State: Idaho

I. If applicant is a corporation, give

(a) Date and place of incorporation:

(b) The amount of capital stock:

(c) The amount paid in:

(d) Names and addresses of directors:

II. The financial resources of the applicant are: (a) Cash on hand:

(b) Treasury stock:

(c) Bonds to be issued:

(d) Other resources:

2. The quantity of water claimed is Six hundred (600) cubic feet per second.

3. Source of water supply: Snake River

4. Location of point of diversion: Milner Dam, Twin Falls County, Idaho, South end of which bears N. 31° 2' W. 1484 ft. from the corner common to Secs. 28, 29, 32, and 33, Twp. 10, S. R. 21 E. B.M.

~~County of~~

5. To be used for: Irrigation.

I. Irrigation and domestic use: (a) Amount of land to be irrigated:

282,000 acres.

(b) In the following legal subdivisions: See Note 1.

II. Mining, milling, power, manufacturing, transportation or other purposes:

(a) At what point:

(b) Amount of power to be generated:

H. P. under ft. head

(c) Is water to be returned to any stream?
point of return:

(d) If so, name stream and locate

6. Estimated cost of works: \$200,000.00

7. Description of works for diversion:

I. Kind of works: Canals, flumes, pipes and pumps and dam, some of which are now constructed.

II. Dimensions of works:

(a) Height of dam 85. feet, length of dam at top abt. 1000 feet,

length of dam at bottom 1000 feet. Material used in construction: Earth and rock fill, same being already constructed and used as apart of the Twin Falls Canal System.

(b) Capacity of reservoir -- acres feet. (c) Size of headgate, width 80 feet,

Height 10 feet. (d) Conduit Ditch width at bottom 80 feet,

width at water line 120 feet, depth of water 10 feet; diameter of pipe

(See Note 3) inches; average grade per mile is .75 feet. Length of conduit is 75 miles, and it crosses the following quarter sections: (See Note 3.)

8. The time required for the completion of the construction of such work is 5 years.

9. Time required for the complete application of the water to the proposed use is 2 additional years.

BE IT KNOWN That the undersigned hereby makes application for a permit to appropriate the public waters of the State of Idaho as herein set forth.

George E. Harlan

Applicant.

By A.M. Bowen,

Agent.

Date of first receipt at office of State Engineer 4:30 P.M. Dec. 22, 1915.

Returned to applicant for correction

Corrected application received

APPROVAL OF STATE ENGINEER

The number of this permit is 11888

Recorded in Book 40 Page 11888 Approved January 10, 1916.

This is to certify that I have examined the within application for a permit to appropriate the public waters of the State of Idaho, and hereby approve the same, subject to the following limitations and conditions:

Bond in the sum of \$1200.00 to be filed on or before March 10, 1916.

Work to begin on or before and to continue diligently and uninterruptedly to completion, unless temporarily interrupted by circumstances over which permit holder has no control.

One-fifth of the work above specified to be completed on or before July 10, 1918

The whole of said work to be completed on or before January 10, 1921.

Beneficial use of water appropriated in accordance herewith, to be made on or before January 10, 1923.

Witness my hand this 10th day of January, 1916.

J.H. SMITH.

State Engineer.

Remarks:

NOTE 1: The lands, intended to be irrigated by the water here applied for consist of all the land lying South of the Snake River and North of the main and high land canals of the Twin Falls Canal System in said Twin Falls County and East of the Salmon River; also other lands not now covered by the said canal system, all of which will be irrigated by the use of the present Twin Falls Canal System and an additional system of pumps, canals, ditches, flumes and other irrigation works. A complete list of lands to be irrigated is annexed hereto.

NOTE 2. The main canal of the Twin Falls Canal System now has a carrying capacity of 3300 second feet. It is the intention to enlarge the same to 3600 second feet. The present appropriation consists of 3000 second feet, with a loss in transmission, making about 2100 second feet available for distribution. The contract right held by water users on the project is 1/80th second foot per acre, measured one-half mile from the place of intended use. The number of acres under the canal system as at present constructed is about 240,000. About 198,000 acres have contract right. The additional lands intended to be irrigated are about 40,000 acres. The amount herein applied for is necessary to be added to the present water appropriation of the Twin Falls Canal System in order to supply lands now holding contract rights with an ample supply and also to cover lands under the system that have no contract rights.

NOTE 3. Main canal to cover the new lands has a width at bottom of 20 ft.; width at water line, 50 ft; depth of water 5 ft.; average grade per mile, 2 ft. and it crosses the following quarter section:

Twp. 10 S., R. 19 E.: SE $\frac{1}{4}$ Sec. 21; NE $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 28; SW $\frac{1}{4}$ Sec. 31; NE $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 32; NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 33; NW $\frac{1}{4}$, NE $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 34; and SW $\frac{1}{4}$ Sec. 35.

Twp. 11 S., R. 19 E.: SW $\frac{1}{4}$ Sec. 1; SE $\frac{1}{4}$, SW $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 2; NE $\frac{1}{4}$, SE $\frac{1}{4}$, SW $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 5, NE $\frac{1}{4}$, and NW $\frac{1}{4}$, Sec. 6; SE $\frac{1}{4}$ Sec. 8; SW $\frac{1}{4}$ Sec. 9; NW $\frac{1}{4}$, and SW $\frac{1}{4}$ Sec. 11; NE $\frac{1}{4}$, SE $\frac{1}{4}$, and SW $\frac{1}{4}$ Sec. 15; SE $\frac{1}{4}$, SW $\frac{1}{4}$, and NW $\frac{1}{4}$ Sec. 16; NE $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 17; NE $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 18; SE $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 19; NE $\frac{1}{4}$, SE $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 20; NW $\frac{1}{4}$ Sec. 21; NE $\frac{1}{4}$ Sec. 22; NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 23; NW $\frac{1}{4}$, NE $\frac{1}{4}$, SE $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 24; NW $\frac{1}{4}$ Sec. 25; SE $\frac{1}{4}$, SW $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 26; SW $\frac{1}{4}$ Sec. 28; NE $\frac{1}{4}$ Sec. 29; SE $\frac{1}{4}$ Sec. 31, SW $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 32; NW $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 33; SW $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 34; NW $\frac{1}{4}$, SW $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 35; SW $\frac{1}{4}$ Sec. 36.

Twp. 12 S., R. 19 E: NE $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 1; NW $\frac{1}{4}$ Sec. 3; NE $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 4; NE $\frac{1}{4}$ Sec. 5; NE $\frac{1}{4}$ Sec. 6.

Twp. 10 S., R. 20 E: SW $\frac{1}{4}$ Sec. 36;

Twp. 11 S., R. 20 E: NE $\frac{1}{4}$ Sec. 1; SE $\frac{1}{4}$ Sec. 10; SW $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 11; SW $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 12; SE $\frac{1}{4}$ Sec. 13; SW $\frac{1}{4}$, NW $\frac{1}{4}$, and NE $\frac{1}{4}$ Sec. 15; NW $\frac{1}{4}$, NE $\frac{1}{4}$, SE $\frac{1}{4}$, and SW $\frac{1}{4}$ Sec. 16; NW $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 21; NE $\frac{1}{4}$ Sec. 22; NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 23; NW $\frac{1}{4}$, SE $\frac{1}{4}$, SW $\frac{1}{4}$, and NE $\frac{1}{4}$ Sec. 24; NE $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 26; SW $\frac{1}{4}$ Sec. 27; SE $\frac{1}{4}$, NE $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 28; SE $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 29; NE $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 32; NW $\frac{1}{4}$, SW $\frac{1}{4}$, SE $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 34; NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 35;

Twp. 12 S., R. 20 E. NW $\frac{1}{4}$ Sec. 3; NE $\frac{1}{4}$, SE $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 4; NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 5; SE $\frac{1}{4}$, NE $\frac{1}{4}$, NW $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 6;
 Twp. 10 S., R. 21 E. SW $\frac{1}{4}$ Sec. 29; NW $\frac{1}{4}$, SW $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 32; SE $\frac{1}{4}$ Sec. 33; SW $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 34;
 Twp. 11 S., R. 21 E. NE $\frac{1}{4}$ and NW $\frac{1}{4}$ Sec. 4; NE $\frac{1}{4}$, NW $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 5; NW $\frac{1}{4}$, SW $\frac{1}{4}$, SE $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 6;
 And on the original Twin Falls Tract as shown by the map filed with this application.

LIST OF LANDS TO BE IRRIGATED:

Twp. 9 S., R. 13 E.: E $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 1; E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ Sec. 12, all of Secs. 13, 24, and 25; E $\frac{1}{2}$ and N $\frac{1}{2}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 36.
 Twp. 10 S., R. 13 E.: E $\frac{1}{2}$ and SW $\frac{1}{4}$ Sec. 1; SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 2; E $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 10; all of Secs. 11 to 15 inc. SE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16; SW $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 21; all of Secs. 22 to 27 inc., NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 28; E $\frac{1}{2}$ SW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 33; and all of Secs. 34, 35, and 36.
 Twp. 11 S., R. 13 E.: All of Secs. 1, 2, and 3; E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 4; NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 10; all of Secs. 11 and 12, N $\frac{1}{2}$ and N $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 13; N $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 14;
 Twp. 8 S., R. 14 E.: E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, and NE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31; all of Sec. 32 and W $\frac{1}{2}$ of W $\frac{1}{2}$ Sec. 33.
 Twp. 9 S., R. 14 E.: W $\frac{1}{2}$ of W $\frac{1}{2}$ Sec. 4; all of Secs. 5 to 9 inc.; S $\frac{1}{2}$ N $\frac{1}{2}$ and S $\frac{1}{2}$ Sec. 10; S $\frac{1}{2}$ N $\frac{1}{2}$ and S $\frac{1}{2}$ Sec. 11; all of secs. 12 to 36 inc.
 Twp. 10 S., R. 14 E. Entire.
 Twp. 11 S., R. 14 E.: All of Secs. 1 to 8 inc.; SW $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ S $\frac{1}{2}$ and N $\frac{1}{2}$ Sec. 9; NW $\frac{1}{4}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ Sec. 10; NW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ and N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 11;
 Twp. 9 S., R. 15 E. S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 5; S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 6; All of Sec. 7; SE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$; NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 8; S $\frac{1}{2}$ Sec. 9; S $\frac{1}{2}$ Sec. 10; S $\frac{1}{2}$ Sec. 11; NW $\frac{1}{4}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 12; and all of Secs. 13 to 36 inc.
 Twp. 10 S., R. 15 E. All of Secs. 1 to 26 inc.; N $\frac{1}{2}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$; and N $\frac{1}{2}$ Sec. 27; N $\frac{1}{2}$ SE $\frac{1}{4}$; SW $\frac{1}{4}$ and N $\frac{1}{2}$ Sec. 28; all of Secs. 29, 30 and 31; NW $\frac{1}{4}$ SE $\frac{1}{4}$; SW $\frac{1}{4}$; and N $\frac{1}{2}$ Sec. 32; N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 33; N $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 35; S $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 36;
 Twp. 9 S., R. 16 E. S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 17; W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18; all of Secs. 19, 20 and 21; SW $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 22; N $\frac{1}{2}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 23; all of Secs. 25 to 36 inc.
 Twp. 10 S., R. 16 E. All of Secs. 1 to 30 inc. N $\frac{1}{2}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ NE $\frac{1}{4}$; and SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31; N $\frac{1}{2}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$; and N $\frac{1}{2}$ Sec. 32; and all of Secs. 33 to 36 inc.
 Twp. 11 S., R. 16 E.; N $\frac{1}{2}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$; NW $\frac{1}{4}$; and E $\frac{1}{2}$ Sec. 1; E $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 2; N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 12;
 Twp. 9 S., R. 17 E. S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 29; S $\frac{1}{2}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 30; all of Secs. 31 and 32; SE $\frac{1}{4}$ and W $\frac{1}{2}$, Sec. 33; N $\frac{1}{2}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 34; S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 35; and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 36.
 Twp. 10 S., R. 17 E. Entire.
 Twp. 11 S., R. 17 E. All of Secs. 1 to 6 inc.; N $\frac{1}{2}$ N $\frac{1}{2}$ Sec. 7; N $\frac{1}{2}$ N $\frac{1}{2}$ Sec. 8; N $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 9; all of Secs. 10 to 13 inc. N $\frac{1}{2}$ NW $\frac{1}{4}$; NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 14.
 Twp. 10 S., R. 18 E. W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 3; S $\frac{1}{2}$ NE $\frac{1}{4}$; NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 4; all of Secs. 5 to 9 inc. S $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, and S $\frac{1}{2}$ Sec. 10; S $\frac{1}{2}$ N $\frac{1}{2}$ and S $\frac{1}{2}$ Sec. 11; NW $\frac{1}{4}$ SW $\frac{1}{4}$; S $\frac{1}{2}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 12; and all of Secs. 13 to 36 inc.
 Twp. 11 S., R. 18 E.: All of Secs. 1 to 18 inc.; N $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 19; all of secs. 20 to 23 inc. N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ and N $\frac{1}{2}$ Sec. 24; N $\frac{1}{2}$ SE $\frac{1}{4}$; SW $\frac{1}{4}$ and N $\frac{1}{2}$ Sec. 27; all of Secs. 28 and 29; E $\frac{1}{2}$ Sec. 30; N $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 31; N $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 32; NE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$, and NW $\frac{1}{4}$, Sec. 33;
 Twp. 10 S., R. 19 E.: S $\frac{1}{2}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 16; all of Secs. 17 to 22 inc. S $\frac{1}{2}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 23; SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 24; SW $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ and W $\frac{1}{2}$ Sec. 25; all of secs. 26 to 31 inc. N $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, and W $\frac{1}{2}$ Sec. 32; NW $\frac{1}{4}$ NW $\frac{1}{4}$, and N $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 33; N $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 34; and all of secs. 35, and 36.

- Twp. 11 S. R. 19 E.: All of Sec. 1; E $\frac{1}{2}$ W $\frac{1}{2}$, and E $\frac{1}{2}$ Sec. 2; W $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 5; All of Secs. 6 and 7; SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, and W $\frac{1}{2}$ Sec. 8; E $\frac{1}{2}$ W $\frac{1}{2}$ and E $\frac{1}{2}$ Sec. 11; all of Secs. 12, 13, and 14; SE $\frac{1}{4}$ NE $\frac{1}{4}$, and S $\frac{1}{2}$ Sec. 15; S $\frac{1}{2}$ Sec. 1 all of secs. 17 to 28 inc.; E $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, and E $\frac{1}{2}$ Sec. 29; E $\frac{1}{2}$ SE $\frac{1}{4}$, and NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 30; SW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 31; all of secs. 32 and 33; NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, and W $\frac{1}{2}$ Sec. 34; N $\frac{1}{2}$ Sec. 35; N $\frac{1}{2}$ S $\frac{1}{2}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{2}$ Sec. 36.
- Twp. 10 S., R. 20 E.: SE $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 25; S $\frac{1}{2}$ S $\frac{1}{2}$, Sec. 34; NE $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 35; and all of Sec. 36;
- Twp. 11 S., R. 20 E.: All of Secs. 1, 2 and 3; SW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 4; S $\frac{1}{2}$ Sec. 5; W $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ and W $\frac{1}{2}$ Sec. 6; all of Secs. 7 to 15 inc. NW $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, and E $\frac{1}{2}$ Sec. 16; N $\frac{1}{2}$ Sec. 17 N $\frac{1}{2}$ Sec. 18; all of Secs. 19 to 24 inc.; all of secs. 26 to 29 inc.; E $\frac{1}{2}$ E $\frac{1}{2}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, and NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 30; E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and E $\frac{1}{2}$ Sec. 31; all of secs. 32, 33 and 34.
- Twp. 10 S., R. 21 E.: W $\frac{1}{2}$ Sec. 27; S $\frac{1}{2}$ Sec. 28; SE $\frac{1}{4}$ Sec. 29; S $\frac{1}{2}$ Sec. 30; all of Secs. 31, 32 and 33; and W $\frac{1}{2}$ Sec. 34;
- Twp. 11 S., R. 21 E. All of Sec. 6;

I, George E. HARLAN, holder of permit No. 11888, granted by the State Engineer of the State of Idaho, upon my application for the use of the waters of Snake River, do hereby assign, set over, and deliver the same and all my right, title claim and interest in and to the same to the Twin Falls Canal Company.

Dated February 20, 1916.

George E. HARLAN.

State of Idaho

County of Twin Falls, S S:

On this 9th day of March 1916, personally appeared before me, W.O. Taylor, a Notary Public, in and for Twin Falls County, State of Idaho, George E. Harlan, the signer of the above and foregoing assignment, and duly acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal this 8th day of March, 1916.

W.O. Taylor.

Notary Public.

(SEAL)

Received and filed for record in the office of the State Engineer at Boise, Idaho, at 9:00 A.M. March, 10, 1916.

J.H. Smith,

State Engineer.

Proof Completion of Works made: May 29, 1920.
 Certificate of completion of works issued: March 16, 1921.

Permit No. 11888

CERTIFICATE OF COMPLETION OF WORKS.

TO ALL WHOM IT MAY CONCERN:

This is to certify that Twin Falls Canal Company, of Twin Falls, County of Twin Falls, and State of Idaho, the holder of Permit No. 11888, issued upon Application No. 17169, bearing date of priority of December 22, 1915, authorizing the diversion of 600 second feet of the waters of Snake River, County of Twin Falls, State of Idaho, for irrigation and domestic purposes, has fully complied with the provisions of the laws of the State of Idaho relating to the proof of completion of the works of diversion set out and described in said Permit; that said works are adequate for diverting and conveying to the place of intended use 600 second feet of the waters Snake River; that the point of diversion of said waters is at Milner Dam, in Twin Falls County, Idaho, and that the lands proposed to be irrigated by the use of said water are described as follows, to-wit: (See List of Lands Attached.)

Witness my hand this 16th day of March, A. D. 1921.

W. G. SWENDSEN,
 Commissioner of Reclamation.

EXHIBIT "A"

LIST OF LANDS TO BE IRRIGATED.

Twp. 9 S., R. 13 E; E $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 1; E $\frac{1}{2}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ Sec. 12, all of Secs. 13, 24 and 25; E $\frac{1}{2}$ and N $\frac{1}{2}$ W $\frac{1}{2}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 36.

Twp. 10 S., R. 13 E; E $\frac{1}{2}$ and SW $\frac{1}{4}$ Sec. 1; SE $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 2; E $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 10; all of Secs. 11 to 15, inc.; SE $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16; SW $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 21; all of Secs 22 to 27, inc.; NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 28; E $\frac{1}{2}$ SW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 33; and all of Secs 34, 35 and 36.

Twp. 11 S., R. 13 E: All of Secs. 1, 2 and 3; E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 4; NW $\frac{1}{4}$ and E $\frac{1}{2}$ Sec. 10; all of Secs. 11 and 12, E $\frac{1}{2}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 13; E $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 14;

Twp. 8 S., R. 14 E; E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31; all of Sec. 32 and W $\frac{1}{2}$ of W $\frac{1}{2}$ Sec. 33;

Twp. 9 S., R. 14 E: W $\frac{1}{2}$ of W $\frac{1}{2}$ Sec. 4; all of Secs. 5 to 9, inc.; S $\frac{1}{2}$ N $\frac{1}{2}$ and S $\frac{1}{2}$ Sec. 10; S $\frac{1}{2}$ N $\frac{1}{2}$ and S $\frac{1}{2}$ Sec. 11; all of Secs. 12 to 36, inc.

Twp. 10 S., R. 14 E: Entire.

Twp. 11 S., R. 14 E: All of Secs. 1 to 8, inc.; SW $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ S $\frac{1}{2}$ and N $\frac{1}{2}$ Sec. 9; NW $\frac{1}{4}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ Sec. 10; NW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ and N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 11;

Twp. 9 S., R. 15 E: S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 5; S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 6; All of Sec. 7; SE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$; NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 8; S $\frac{1}{2}$ Sec. 9; S $\frac{1}{2}$ Sec. 10; S $\frac{1}{2}$ Sec. 11; NW $\frac{1}{4}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 12; and all of Secs. 13 to 36, inc.

Twp. 10 S., R. 15 E: All of Secs. 1 to 26, inc.; N $\frac{1}{2}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$; and N $\frac{1}{2}$ Sec. 27; N $\frac{1}{2}$ SW $\frac{1}{4}$; SW $\frac{1}{4}$ and N $\frac{1}{2}$ Sec. 28; all of Secs. 29, 30 and 31; NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$; and N $\frac{1}{2}$ Sec. 32; N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 33; N $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 35; S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 36.

Twp. 9 S., R. 16 E: S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 17; W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18; all of Secs. 19, 20 and 21; SW $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 22; N $\frac{1}{2}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 23; all of Secs. 25 to 36, inc.

Twp. 10 S., R. 16 E: all of Secs. 1 to 30, inc.; N $\frac{1}{2}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ NE $\frac{1}{4}$; and SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 31; N $\frac{1}{2}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$; and N $\frac{1}{2}$ Sec. 32; and all of Secs. 33 to 36, inc.

Twp. 11 S., R. 16 E; N $\frac{1}{2}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$; NW $\frac{1}{4}$; and E $\frac{1}{2}$ Sec. 1; E $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 2; N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 12.

Twp. 9 S., R. 17 E: S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 29; S $\frac{1}{2}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 30; all of Secs. 31 and 32; SE $\frac{1}{4}$ and W $\frac{1}{2}$ Sec. 33; N $\frac{1}{2}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 34; S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 35; and S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 36.

Twp. 10 S., R. 17 E: Entire.

Twp. 11 S., R. 17 E: All of Secs. 1 to 6, inc.; N $\frac{1}{2}$ N $\frac{1}{2}$ Sec. 7; N $\frac{1}{2}$ N $\frac{1}{2}$ Sec. 8; N $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 9; all of Secs. 10 to 13, inc. N $\frac{1}{2}$ NW $\frac{1}{4}$; NE $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 14.

Twp. 10 S., R. 18 E: W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 3; S $\frac{1}{2}$ NE $\frac{1}{4}$; NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 4; all of Secs. 5 to 9, inc.; S $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 10; S $\frac{1}{2}$ N $\frac{1}{2}$ and S $\frac{1}{2}$ Sec. 11; NW $\frac{1}{4}$ SW $\frac{1}{4}$; S $\frac{1}{2}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 12, and all of Secs. 13 to 36, inc.

Twp. 11 S., R. 18 E: all of Sec. 1 to 18, inc.; N $\frac{1}{2}$ NW $\frac{1}{4}$, SENW and E $\frac{1}{2}$ of Sec. 19; all of Secs. 20 to 23, inc.; SW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ of Sec. 24; N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ and N $\frac{1}{2}$ of Sec. 27; all of Secs. 28 and 29; E $\frac{1}{2}$ of Sec. 30; N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 31; N $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 32; NENE, W $\frac{1}{2}$ NE and NW $\frac{1}{4}$ Sec. 2

Twp. 10 S., R. 19 E: S $\frac{1}{2}$ NW and S $\frac{1}{2}$ Sec. 16; all of Secs. 17, 18, 19 and 20; N $\frac{1}{2}$ NE, SWNE, NW $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 21; N $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$ NE, SENW, N $\frac{1}{2}$ SE and SESE Sec. 22; S $\frac{1}{2}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 23; SWSW Sec. 24; W $\frac{1}{2}$ SE and W $\frac{1}{2}$ Sec. 25; E $\frac{1}{2}$ Sec. 26; N $\frac{1}{2}$ N $\frac{1}{2}$ and SWNW Sec. 29; all of Sec. 30; NW $\frac{1}{4}$, NWNE, W $\frac{1}{2}$ Sec. 31;

Twp. 11 S., R. 19 E: S $\frac{1}{2}$ Sec. 1; NE $\frac{1}{4}$, E $\frac{1}{2}$ SE, NWSE Sec. 12; E $\frac{1}{2}$ NE Sec. 13;

Twp. 10 S., R. 20 E: SE $\frac{1}{4}$, S $\frac{1}{2}$ SW Sec. 25; S $\frac{1}{2}$ S $\frac{1}{2}$ Sec. 34; NENE, S $\frac{1}{2}$ NE, SENW, N $\frac{1}{2}$ SW and SWSW Sec. 35; NWNW Sec. 36;

Twp. 11 S., R. 20 E: N $\frac{1}{2}$ NW and SWNW Sec. 3; NE $\frac{1}{4}$, SENW, N $\frac{1}{2}$ SW, SWSW and NWSE Sec. 4; S $\frac{1}{2}$ Sec. 5; W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ and W $\frac{1}{2}$ Sec. 6; all of Sec. 7; W $\frac{1}{2}$, NE $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 8; NWNW Sec. 9; NW $\frac{1}{4}$ Sec. 17; N $\frac{1}{2}$ Sec. 18; N $\frac{1}{2}$ N $\frac{1}{2}$ Sec. 19; N $\frac{1}{2}$ N $\frac{1}{2}$ Sec. 20.

Twp. 10 S., R. 21 E: N $\frac{1}{2}$ SW, NWSE Sec. 29; S $\frac{1}{2}$ NW, N $\frac{1}{2}$ SW and N $\frac{1}{2}$ Sec. 30;

LICENSE ISSUED FOR 600 SEC. FT.

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ATTACHMENT 4

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF IDAHO, EASTERN DIVISION.

WOODVILLE CANAL COMPANY,
A CORPORATION,
vs. Plaintiff,

CLARK AND EDWARDS CANAL AND
IRRIGATION COMPANY, A CORPORATION,
ET AL,
Defendants.

DECREED 661

This cause came on to be heard this 25th day of June, 1929, Paul T. Peterson of Idaho Falls, Idaho, appearing for the Plaintiff and F. L. Soule of St. Anthony, Idaho, appearing for the Defendant and Cross Complainant North Fork Reservoir Company, John F. MacLaine of Salt Lake City, Utah and Clency St. Clair of Idaho Falls, Idaho, appearing for the Defendant and Cross Complainant Utah Power & Light Co., F. A. Miller of St. Anthony, Idaho and B. H. Miller of Idaho Falls, Idaho, appearing for the Defendants and Cross Complainants Enterprise Irrigation District, Roxanna Canal Company, Farmers Friend Canal Company, Ltd., and Consolidated Farmers Canal Company, C. W. Poole of Rexburg, Idaho, appearing for the Defendants and Cross Complainants City of Rexburg and Rexburg Irrigation Co., Geo. H. Lowe of Ogden, Utah, appearing for the Defendant and Cross Complainant Twin Groves Canal and Irrigation Co., B. E. Stoutemyer, District Counsel for the United States Reclamation Service of Portland, Oregon, and H. E. Ray, United States District Attorney for the District of Idaho appearing for the Defendants The Secretary of the Interior of the United States, S. T. Lowe of Burley, Idaho, appearing for the Defendants and Cross Complainants Minidoka Irrigation District and Burley Irrigation District, James R. Bothwell of Twin Falls, Idaho appearing for the defendants Twin Falls Canal Company and American Falls Reservoir District, Walters, Parry & Thoman, C. A. Parry of Twin Falls, Idaho and A. B. Barclay of Jerome, Idaho, appearing for the Defendants North Side Canal Company, F. J. Cowen of Blackfoot, Idaho appearing for the Defendants and Cross Complainants Peoples Canal Co., Watson Slough Ditch Company, Danskin Ditch Co., and New Laneside Canal Co., N. D. Jackson of St. Anthony, Idaho, appearing for the Defendants and Cross Complainants Wm. B. Reyburn, William Kooch and Fannie B. Proufort, O. A. Johannessen of Idaho Falls, Idaho appearing for himself as a Defendant and for the Defendants Long Island Canal Company and Independent Irrigation Company and Otto E. McCutcheon of Idaho Falls, Idaho, appearing for the following named Defendants, J. H. Stone Ditch, Butler Island Canal Company, Enterprise Canal Company, Clark and Edwards Canal and Irrigating Company, Dits LaBelle Irrigation Company, Lowder Slough Canal Company, North Rigby Irrigation Canal Company, West LaBelle Irrigation Company, Parks and Lewisville Irrigation Company, Progressive Irrigation District, Kite and Nord Ditch Company, White Ditch, Rudy Canal and Irrigation Company, LaBelle Irrigation Company, Cheney Ditch, Farmers Friend Irrigation Company, Burgess Canal and Irrigating Company, Snake River Valley Irrigation District, Reid Canal Company, Texas Slough Irrigation Canal Company,

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It is understood, however, that each of the parties to this stipulation reserves the right to contest any and all claims of any and all parties who do not join in this stipulation.

4
It is further stipulated and agreed that there shall be decreed in the above entitled cause of action, to the Secretary of the Interior of the United States, and his successors in office, for use upon the various projects which have heretofore or may hereafter become entitled to the same by reason of contracts with the United States therefor, the water filed upon by the United States in connection with the construction of the American Falls Reservoir under permit number 15134, and reservoir permit number R-269, under date of priority of March 30th, 1921, the amount of water to be decreed to the Secretary of the Interior of the United States and his successor in office for such use under said date of priority of March 30th, 1921, to be One Million Seven Hundred Thousand (1,700,000) acre-feet per annum for storage in the American Falls Reservoir and Eight Thousand (8,000) second feet for direct diversion. It is understood and agreed that paragraph two hereof does not apply to the said rights of priority of March 30, 1921, provided for in this paragraph or the rights decreed in the Foster and Rexburg decrees.

5
The rights decreed to the parties to this stipulation or their predecessors in interest in that certain decree commonly known as the Foster decree and in that certain decree commonly known as the Rexburg decree, both as to the dates of priority and amounts of the rights are recognized and binding upon all of the parties of this stipulation, to the same extent as if the said rights included in the said Foster decree had been included in the said Rexburg decree and the said rights in the Rexburg decree had been included in the Foster decree, and it is agreed that all of the provisions of both decrees shall be considered binding upon all of the parties to this stipulation, but all the parties to this stipulation reserve the right to contest each and every right claimed by parties who do not join in this stipulation.

6
It is further stipulated and agreed that there is at present an action pending in the United States District Court in and for the District of Idaho, Southern Division, wherein the North Side Canal Company, Limited, is plaintiff, and Twin Falls Canal Company, et al., are defendants, which said action is being brought to alter or change certain provisions of the Foster Decree to give and allow North Side Canal Company, Limited, in addition to the maximum right of 3000 cubic feet per second, provided in the Foster decree, a further and additional right of 300 cubic feet to be diverted at Milner Dam with a priority of December 22, 1915; and that there is at present pending an action in the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Twin Falls, wherein Twin Falls Canal Company is plaintiff and G. Clyde Baldwin, et al., are defendants in which a decree is sought to be entered giving and granting unto the said Twin Falls Canal Company, in addition to the right granted it under the Foster decree, a further right of 600 cubic feet per second, to be diverted at Milner Dam, with a priority date of December 22, 1915.

And it is stipulated and agreed that said rights in this paragraph above mentioned and each of them, shall be for the purpose of this stipulation, and the decree to be entered herein deemed to be of the same force and effect as if they had been included in the original Foster Decree; and that wherever the term "Foster Decree" is used herein, it shall be deemed to include the two rights in this paragraph above mentioned and that

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said rights shall have any and all rights and privileges herein granted to the other rights enumerated in the said Foster decree, and that said rights shall be decreed herein as follows:

Twin Falls Canal Co., 600 sec. ft., priority date, Dec. 22, 1915.

North Side Canal Co., 300 sec. ft., priority date, Dec. 22, 1915.

7

It is further stipulated and agreed that nothing herein contained shall be deemed to in any way waive, limit, change or vary any right or rights that the North Side Canal Company, Limited, may obtain under that certain permit No. 15001, with a priority date of August 6, 1920, for the diversion of 1500 cubic feet per second of flow of the waters of Snake River at or near Milner Dam, (which said permit is claimed to be a valid and subsisting permit at this time), if, as and when actual diversions are made thereunder or proofs are submitted thereunder or license issued thereon, in conformity with the Statutes of the State of Idaho.

8

It is stipulated and agreed that the rights of contract holders and any others beneficially interested, now or hereafter claiming or having storage reservoir rights in American Falls Reservoir shall not be affected or determined by the decree to be entered in this action, as to the use to be made of the waters decreed, under such decree, to the Secretary of the Interior under permits described in paragraph No. 4, of this stipulation, the same being permits No. 15134 and R-269.

9

Should the proposed reservoir at Beehler Meadows be constructed nothing herein contained will be construed to determine the extent of the rights or priorities under permits No. 15134 and R-269 as against the said Beehler Meadows Reservoir but that question shall be left for further determination.

Paul T. Peterson, Attorney for Plaintiff, Woodville Canal Company.
F. L. Soule, Attorney for Defendant and Cross Complainant, North Fork Reservoir Company.

John F. MacLane and Clency St. Clair, Attorneys for Defendant and Cross Complainant, Utah Power & Light Co.

F. A. Miller & B. H. Miller, Attorneys for Defendant and Cross Complainant, Enterprise Irrigation District, Roxana Canal Company, Farmers Friend Canal Co., and Consolidated Farmers Canal Co.

C. W. Poole, Attorney for Defendant and Cross Complainant, City of Rexburg and Rexburg Irrigation Co.

Geo. H. Lowe, Attorney for Defendant and Cross Complainant, Twin Groves Canal and Irrigation Co.

B. E. Stoutemyer, H. E. Ray, Attorneys for Defendant, The Secretary of the Interior of the United States.

S. T. Lowe, Attorney for Defendants, Minidoka Irrigation District and Burley Irrigation District.

James R. Bothwell, Attorney for Defendant, Twin Falls Canal Company.

Walters, Parry & Thoman, A. B. Barclay, Attorneys for Defendant, North Side Canal Company.

F. J. Cowen, Attorney for Defendant, Peoples Canal Co., Watson Slough Ditch Co., Danskin Ditch Co., New Lavastide Canal Co.

N. D. Jackson, Attorney for Defendant, Wm. B. Reyburn.

N. D. Jackson, Attorney for Defendants, William Knoch and Fannie B. Preufert.

James R. Bothwell, Attorney for Defendant, American Falls Reservoir District.

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designated by the Commissioner of Reclamation of the State of Idaho as application No. 22927, and water permit No. 16190 issued January 30th, 1925, by the Commissioner of Reclamation of the State of Idaho, to be diverted by means of a dam located in the channel of Snake River, the center of which bears south 60° 44' W. 2299 feet from the quarter section corner on the North boundary line of Section 15, Township 1 North, Range 37 East Boise Base and Meridian, for use at the Gem State power plant, and returned to the channel of said stream at a point which bears south 55° 34' W. 7814 feet from the quarter section corner on the North boundary line of Section 15, Township 1 North, Range 37 East Boise Base and Meridian.

All of the rights hereby awarded and decreed are made subject to the terms of the stipulation incorporated herein and made a part hereof.

To the Secretary of the Interior of the United States of America, and his successor in office, for use upon the various projects which have heretofore or may hereafter become entitled to the same by reason of contracts with the United States therefor, the water filed upon by the United States in connection with the construction of the American Falls Reservoir under permit number 16134, and reservoir permit number R-269, under date of priority of March 30th, 1921, the amount of water to be decreed to the Secretary of the Interior of the United States and his successors in office for such use under said date of priority of March 30th, 1921, to be one million seven hundred thousand (1,700,000) acre-feet per annum for storage in the American Falls Reservoir and eight thousand (8,000) second-feet for direct diversion. It is understood and agreed that paragraph two of the stipulation herein does not apply to the said rights of priority of March 30, 1921, provided for in this paragraph or the rights decreed in the Foster and Rexburg decrees.

Further ordered, adjudged and decreed that the rights decreed to the parties who joined in the foregoing stipulation, or their predecessors in interest in that certain decree commonly known as the Foster Decree, and in that certain decree commonly known as the Rexburg Decree, both as to the dates of priority and the amounts of the rights are recognized and binding upon all of the parties who signed said stipulation to the same extent as if the said rights included in the said Foster Decree had been included in the said Rexburg Decree, and said rights in the Rexburg Decree had been included in the Foster Decree; and that as between the parties to the said stipulation, it is ordered, adjudged and decreed that all of the provisions of both decrees shall be considered binding upon said parties.

Further ordered, adjudged and decreed that there be and there hereby awarded to the Twin Falls Canal Company 600 cubic feet per second of the waters of Snake River to be diverted at the Milner Dam, with a priority date of December 22nd, 1915; and there is hereby awarded to the defendant and cross complainant, North Side Canal Company, 300 cubic feet per second of the waters of Snake River to be diverted at the Milner Dam, with a priority date of December 22nd, 1915. The right to use the waters hereby awarded to said Twin Falls Canal Company and North Side Canal Company are hereby made appurtenances of the lands irrigated by the respective canals as described in the said Foster Decree.

Further ordered, adjudged and decreed that the rights decreed to the several parties in the said decrees known as the Foster Decree, copy of which is hereto attached and made a part hereof, are recognized and confirmed by all parties to this action; and that the said Foster Decree is hereby made a part of this decree and all the provisions thereof are hereby declared to be binding upon all of the parties to this action; the rights therein decreed to be subject, however, to such rights as were decreed under the said Rexburg Decree under dates of priority earlier than the

RECORDED

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priorities awarded under the said Foster Decree; that a copy of said Rexburg Decree is hereto attached and made a part hereof, and the said Rexburg Decree, and all the provisions thereof are hereby declared to be binding upon all of the parties to this action, subject, however, to such rights of priority date as were established in the said Foster Decree.

And it is further ordered, adjudged and decreed that all the rights and priorities awarded both in the Foster Decree and the Rexburg Decree be subject to all the terms and conditions set out in the said decrees as if hereby co-related and combined as one decree, and all the rights awarded in both decrees shall be considered binding upon all the parties to this action and shall be given effect in the amounts and under the respective dates of priority awarded in each of said decrees, with the same force and effect as if all of such rights described in the Foster Decree and the Rexburg Decree respectively, in their respective amounts and respective priorities, had been awarded in single decree.

Nothing herein contained shall be deemed to in any way waive, limit, change or vary any right or rights that the North Side Canal Company, Limited, may obtain under that certain permit No. 15001, with a priority date of August 6, 1920, for the diversion of 1500 cubic feet per second of time of the waters of Snake River at or near Milner Dam, (which said permit is claimed to be a valid and subsisting permit at this time) if, as and when actual diversions are made thereunder or proofs are submitted thereunder or license issued thereon, in conformity with the Statutes of the State of Idaho.

The Foster Decree, to which reference is made herein, includes a decree dated June 20th, 1913, signed by Edward A. Walters, District Judge, and an amendment thereto, dated September 12th, 1916, signed by Wm. A. Babcock, District Judge, and is annexed hereto marked Exhibits "A" and "B." The Rexburg Decree aforesaid is annexed hereto as Exhibit "C." (See Decree 711201-B)

The court retains jurisdiction of the cause for one year for the purpose of making corrections to this decree. By agreement of counsel, and it is hereby ordered, that the defaults of the Idaho Irrigation District and the Aberdeen-Springfield Canal Company, are hereby entered.

Each party shall pay his own costs.

24-0153 There is hereby decreed to defendant and cross complainant William P. Curteman 150 inches of the waters of Duck Creek under State of Idaho license No. 12778, priority date Aug. 17th, 1912, for use on the following described lands: S½ SE¼, NE¼ of SE¼, Section 23; NW¼ SW¼, Section 24, Tp. 15 N., R. 42 E. B. M.

Done in open court this 25th day of June, 1920.

CHARLES C. CAVANAH,
District Judge.

EXHIBIT A

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

TWIN FALLS CANAL COMPANY,
Plaintiff,

vs.

CHARLES N. FOSTER, ET AL.,
Defendants.

DECREE

This cause having come on to be heard this 13th day of June, 1912, upon the amended complaint of the plaintiff, the Twin Falls Canal Company; the answer and cross complaint of the Twin Falls Land and Water Company, a Delaware corporation, and the North Side Canal

Company, an Idaho corporation, by reason of the filing by C. H. (attorneys), including P. M. Fogg, and Mindoka dam (John Rohling, ney), also claimant; the answer and others (filed in intervention) Anderson, Cave counsel for the defendants, The North Side Canal Company, appearing as co-defendant; other defendants represented by defendants represented by C. W. A. (lawyer) served was heretofore and cross-examination support of the and defendant and certain and certain and awarded; the decision of this being fully and
Ordered,

That each of the complainants to the severally and jointly application

That the cultivation in second-year several parcels

That the is entitled to diversion to

That the attorneys, counsel, joined and use of the whenever there with parties to

It is hereto ordered waters of

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ATTACHMENT 5

Department of Reclamation

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

BURLEY IRRIGATION DISTRICT, et al,

DISTRICT COURT
Plaintiffs, **FINDINGS OF FACT**

Fifth Judicial District
County of Twin Falls, State of Idaho

vs.

AND

HENRY EAGLE, Watermaster, Water
District No. 36, State of Idaho, By **LANCASTER** **CONCLUSIONS OF LAW**
Defendant.

James W. Lancaster
Clerk
Deputy Clerk

This matter having come on regularly before the Court and it
appearing that the defendant has filed herein a disclaimer of any interest
adverse to the plaintiffs and proof having been submitted in the form of a
Stipulation by all of the plaintiffs and the Court, being fully advised in the
premises, makes and enters the following:

FINDINGS OF FACT

I.

(a) The priority of the right to use waters of the Snake River and
its tributaries with points of diversion at or upstream from Milner Dam
have been determined by decrees of Courts of competent jurisdiction (including
but not limited to the decree in the case entitled Twin Falls Canal Company
v. Charles N. Foster, et al, entered in the District Court of the Fourth
Judicial District Court of the State of Idaho, in and for the County of Twin
Falls on June 20, 1913, hereafter called "Foster Decree") and thereafter
numerous parties have acquired rights to the use of the waters of said
Snake River and its tributaries with points of diversion at Milner Dam or
above.

(b) The parties Plaintiff herein are persons who have so acquired
such water rights and that they have brought this action under and pursuant to
provisions of Idaho Code Section 42-1405.

II.

All the parties Plaintiff herein have accepted as binding upon them

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1 the provisions of all prior decrees which have been entered with respect to the
2 waters of Snake River and its tributaries above Milner Dam, including, parti-
3 cularly, but not limited to (1) The Foster decree mentioned in the preceding
4 paragraph ; (2) The decree entered in the District Court of the Sixth Judicial
5 District of the State of Idaho in and for the County of Fremont in the case
6 entitled Rexburg Irrigation Company, et al, vs. Teton Irrigation Canal Company,
7 et al, filed December 16, 1910, (hereinafter "Rexburg Decree"); and (3) The
8 decree entered in that certain case entitled Woodville Canal Company vs. Clark
9 and Edwards Canal and Irrigation Company, et al, in the District Court of the
10 United States for the District of Idaho, Eastern Division, on June 25, 1929,
11 (hereinafter "Woodville Decree") and all other prior valid decrees of such water.

12
13 III.

14 (a) Defendant, Henry Eagle, is now and has been at all times since
15 March 3, 1959, the duly qualified and acting Watermaster of Water District
16 No. 36 of the State of Idaho; said District being duly created and existing under
17 the laws of the State of Idaho for the purpose of distributing the waters within its
18 boundaries, including all of the waters referred to and affected by this action.

19 (b) All of the lands of the parties Plaintiff hereinafter described
20 are located within the boundaries of, and irrigated by the waters of Snake River
21 and its tributaries within, said Water District No. 36.

22
23 IV.

24 Proper and sufficient notice of the pendency and purpose of the
25 above-entitled action was published in newspapers having general circulation in
26 the counties of Power, Cassia, Minidoka, Twin Falls, Jerome, Blaine, Gooding,
27 Lincoln and Elmore, Idaho, and that all provisions of Idaho Code Section
28 42-1405 relating to notice and publication of notice have been complied with.

29
30 V.

31 The Plaintiffs herein comprise all persons diverting water from,
32 and claiming or asserting rights to divert water from, the Snake River and its
33 tributaries above Milner Dam and within the boundaries of said Water District

RECORDED

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1 No. 36, according to the records and files of defendant Henry Eagle; and
2 comprise, collectively, all presently known parties who are or will be affected
3 by the entry of the Decree entered herein.

4
5 VI.

6 (a) Plaintiffs herein have over a period of many years, cooperated,
7 planned and worked for a common, fair, equitable and just plan designed to
8 result in the most efficient, fair and complete beneficial use of all the waters of
9 the Snake River and its tributaries.

10 (b) Such cooperative planning and adjustment of rights, then,
11 present and future, became and was particularly necessary prior to, and in
12 connection with the planning for the Palisades Reservoir, the securing of
13 Congressional authorization and appropriation for said reservoir and the irri-
14 gation projects related thereto and authorized in connection therewith, including
15 particularly, but not limited to, the irrigation project, known as the Minidoka
16 North Side Extension, hereinafter particularly described as being owned and
17 operated by the A & B Irrigation District.

18 (c) In connection with the establishment of the water rights for
19 said Palisades Reservoir, it was particularly necessary for the parties
20 Plaintiff to agree among themselves, and avoid extensive, expensive and delaying
21 litigation by so agreeing upon a common priority date for those persons who
22 were using, or were making plans to construct projects and perfect rights to
23 use, the so-called "Flood Water Rights," being those waters of the river which
24 were only available during periods of high flow; and which the parties Plaintiff
25 had been using to the best of their ability and to the extent of their irrigation
26 works, or were planning to use as projects were constructed; and that the
27 parties Plaintiff did at such time agree on a common priority date of April 1,
28 1939, for such rights, which said agreement has been acted upon by all of the
29 parties Plaintiff hereto continuously, and deliveries have been made in
30 accordance therewith by defendant Henry Eagle.

31 (d) It was also known and agreed that as a result of the construction
32 of Palisades Reservoir, it would be to the best interests of all water users to

- 3 -
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1 A. TWIN FALLS CANAL COMPANY

2 Twin Falls Canal Company shall have the right to divert and use
3 600 cubic feet per second (being the right recognized in paragraph 6 of the
4 Woodville Decree) with a priority date of December 22, 1915.

5 B. NORTH SIDE CANAL COMPANY

6 North Side Canal Company shall have the right to divert and use
7 300 cubic feet per second (being the right recognized in paragraph 6 of the
8 Woodville Decree) with a priority date of December 23, 1915.

9 C. NORTH SIDE CANAL COMPANY

10 North Side Canal Company shall have the right to divert and use
11 1260 cubic feet per second (being the right recognized in paragraph 7 of the
12 Woodville Decree) with a priority date of August 6, 1920.

13 D. AMERICAN FALLS RESERVOIR DISTRICT NO. 2

14 American Falls Reservoir District No. 2 is entitled to have the
15 right to divert as natural flow during each irrigation season under water
16 license No. 15134, having a March 30, 1921, priority, as follows: From May 1
17 of each irrigation season continuing during that season so long as there is
18 natural flow available for that priority, the first 1,700 cubic feet per second of
19 flow to be available one-half (1/2) to American Falls Reservoir District No. 2
20 and one-half (1/2) to American Falls Reservoir, except that in any year in
21 which American Falls Reservoir is full to capacity on April 30 or fills after that
22 date, taking into account any water that may be temporarily stored to its credit
23 in upstream reservoirs, all water diverted by American Falls Reservoir
24 District No. 2 within the maximum of 1,700 cubic feet per second during the
25 year prior to the initial storage draft on American Falls Reservoir after the
26 reservoir finally fills in that year shall be considered as natural flow under
27 water license No. 15134. Nothing herein shall prevent American Falls
28 Reservoir District No. 2 from diverting water under said license prior to
29 May 1 of a given irrigation season but all such diversions shall be charged as
30 storage in the event the reservoir is not full on April 30 of that season or does
31 not fill after April 30 of that season.

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1 Water available at American Falls Reservoir for the March 30,
2 1921, priority under water license No. 15134, other than that to be available to
3 American Falls Reservoir District No. 2 as above provided, to be available for
4 storage in American Falls Reservoir.

5
6 II.

7 The following parties are entitled to divert and use, pro rata, the
8 waters of the Snake River in the amounts listed, with the same priority date of
9 April 1, 1939, which water shall be diverted at the point and be appurtenant to
10 the lands described in the Decree made and entered of even date herewith:

11 A. BURLEY IRRIGATION DISTRICT

12 The Burley Irrigation District shall have the right to divert and use
13 153.4 cubic feet per second.

14 B. MINIDOKA IRRIGATION DISTRICT

15 The Minidoka Irrigation District shall have the right to divert and
16 use 266.60 cubic feet per second.

17 C. MILNER LOW- LIFT IRRIGATION DISTRICT

18 The Milner Low- Lift Irrigation District shall have the right to
19 divert and use 121.00 cubic feet per second.

20 D. TWIN FALLS CANAL COMPANY

21 The Twin Falls Canal Company shall have the right to divert and
22 use 180 cubic feet per second.

23 E. CLARENCE TILLEY

24 Clarence Tilley shall have the right to divert and use 7.0 cubic
25 feet per second.

26 F. WILLIAM KENDALL

27 William Kendall shall have the right to divert and use 4.00 cubic
28 feet per second.

29 G. FALLS IRRIGATION DISTRICT

30 The Falls Irrigation District shall have the right to divert and use
31 125.00 cubic feet per second.

32 H. A & B IRRIGATION DISTRICT

The A & B Irrigation District shall have the right to divert and use
267.00 cubic feet per second.

MAY 13 1936

1 I. OTIS ORTON

2 Otis Orton shall have the right to divert and use 4.00 cubic
3 feet per second.

4 III.

5 The contracts between the individual parties and the United States
6 of America, Bureau of Reclamation, and the Memorandum of Agreement between
7 the Bureau of Indian Affairs and the Bureau of Reclamation are valid and binding
8 upon the parties thereto, and constitute a scheme or plan for the administration
9 of the Snake River and as such, are binding upon all persons claiming rights to
10 the use of the waters of the Snake River and its tributaries above Milner Dam.

11 IV.

12 Let Decree be entered accordingly.

13 Done this 10th day of July, 1968.

14
15 S/ Theron W Ward
16 District Judge

17
18 State of Idaho } ss.
19 County of Twin Falls }

20 I hereby verify the foregoing to be a full, true and correct
21 copy of the original on file in the above entitled action.

22 H. A. LANCASTER

23 Clerk of the District Court

24 Quill
25 Deputy

MAY 13 1968

ATTACHMENT 6

[illegible]

Example 1: City of Twin Falls' shares designated place of use (Not all QQs claimed).

Example 2: Claimed acres but no irrigation detected, none recommended.

Example 3: Recommended more acres than claimed.

Example 4: Recommended fewer acres than claimed.

Example 5: Overlapping, private water right with few acres claimed.

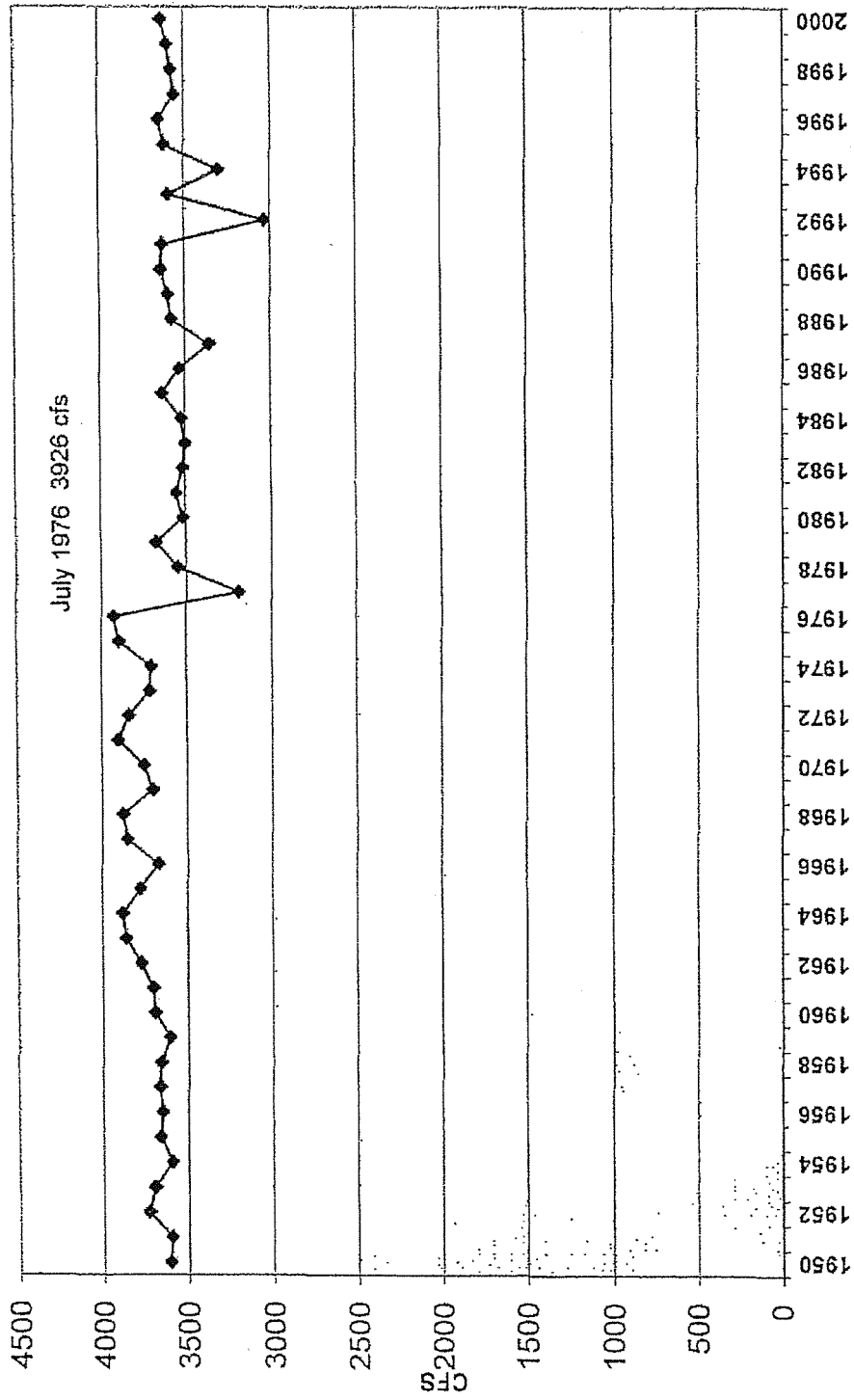
Supplemental Director's Report

Imagery: 6/24/1987 NAPP

Douglas Jones

10-20-2011

MAXIMUM MONTHLY DIVERSION 1950-2000
13087500 SOUTH SIDE TWIN FALLS CANAL



Exh. No. 20
Date 12/19/11
Name Hollis Jay
M & M Court Reporting

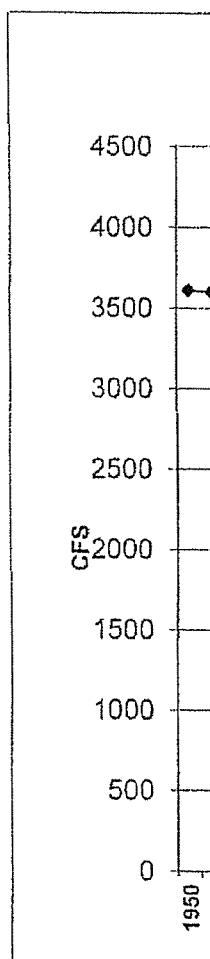
130875 00 HIST ORIC DI VERSION SOUTH SIDE TW IN FALLS CANAL AT MIL

W-YR	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY
1950	813	511	511	457	436	311	1141	3163
1951	974	565	537	507	486	452	1437	3074
1952	1177	442	496	488	429	467	988	3492
1953	1330	561	504	501	463	446	1746	3324
1954	1137	561	490	517	479	478	1807	3545
1955	958	548	566	382	391	325	676	3040
1956	870	494	428	450	402	242	1748	3365
1957	849	492	436	411	436	298	1020	3131
1958	813	459	449	447	344	317	1425	3394
1959	1169	492	455	424	391	398	1980	3012
1960	559	486	511	446	443	324	1590	3373
1961	1049	353	397	26	9	15	1807	3155
1962	877	210	8	10	16	21	1644	3186
1963	1164	623	16	2	2	99	1284	3134
1964	1571	583	192	7	0	0	682	3209
1965	1521	487	169	11	7	205	1645	3402
1966	1748	936	281	2	2	76	2353	3578
1967	1555	380	124	2	2	215	1697	3272
1968	1482	570	189	2	2	168	1780	3570
1969	1369	598	122	2	2	80	2096	3653
1970	1039	506	194	2	2	111	1341	3153
1971	1182	502	172	2	2	26	1039	3025
1972	1106	442	101	0	0	28	1437	3422
1973	971	482	62	0	0	23	1008	3371
1974	1065	511	127	0	0	33	1060	3461
1975	1190	539	98	0	49	60	482	1659
1976	1151	556	197	0	0	70	509	3305
1977	1016	506	163	0	70	485	2329	2887
1978	600	92	0	0	0	50	674	3070
1979	1077	13	73	0	0	2	961	3277
1980	1420	20	0	0	0	85	1366	3110
1981	1218	22	0	0	0	44	1538	3075
1982	1135	0	0	0	0	0	274	2898
1983	789	0	0	0	0	21	771	2518
1984	1197	0	0	0	0	0	402	2355
1985	1021	0	0	0	0	0	820	3261
1986	1259	254	0	0	0	33	1469	3118
1987	1212	71	0	0	0	146	1723	3140
1988	1190	0	0	0	0	36	1299	2997
1989	1000	0	0	0	0	55	788	3098
1990	1465	0	0	0	0	166	1823	3092
1991	1522	108	0	0	0	63	1244	2792
1992	1290	0	0	0	0	47	2045	3038
1993	971	0	0	0	0	0	314	2521
1994	1439	0	0	0	0	88	1812	2716
1995	953	0	0	0	0	0	950	2246
1996	1574	0	0	0	0	223	1202	2994
1997	1673	0	0	0	200	381	1423	2988
1998	1342	434	0	0	0	597	907	2217

1999	1244	3	0	0	362	598	1134	2368
2000	1690	0	0	0	0	81	1679	3070
AVERAGE: 1950-2000	1176	302	158	100	106	166	1301	3065

NER ((CFS)

JUN	JUL	AUG	SEP	ANN		
3381	3609	3565	2764	20662	1950	3609
3366	3602	3427	2818	21245	1951	3602
3558	3687	3732	2901	21857	1952	3732
3096	3697	3648	2808	22123	1953	3697
3144	3565	3596	2748	22066	1954	3596
3408	3571	3664	2855	20384	1955	3664
3321	3654	3459	2595	21028	1956	3654
3301	3666	3537	2647	20223	1957	3666
3302	3659	3495	2415	20520	1958	3659
3191	3609	3458	2151	20731	1959	3609
3376	3695	3493	2680	20976	1960	3695
3191	3702	3321	1855	18879	1961	3702
3217	3773	3620	3037	19618	1962	3773
3131	3863	3570	2719	19607	1963	3863
3112	3882	3786	2988	20012	1964	3882
3410	3776	3560	2674	20868	1965	3776
3193	3669	3563	2764	22166	1966	3669
3206	3851	3807	3129	21240	1967	3851
3422	3880	3137	2632	20831	1968	3880
3304	3697	3702	2633	21257	1969	3702
3259	3716	3752	2420	19494	1970	3752
3292	3905	3867	2754	19769	1971	3905
3302	3843	3628	2522	19831	1972	3843
3309	3716	3516	2511	18969	1973	3716
3411	3708	3510	2591	19477	1974	3708
3255	3897	3776	2961	17967	1975	3897
3566	3926	3471	2452	19203	1976	3926
2959	3196	3074	1823	18508	1977	3196
3270	3550	3484	1726	16517	1978	3550
3516	3677	2615	2559	17771	1979	3677
2806	3519	3415	2193	17935	1980	3519
3131	3555	3518	2842	18942	1981	3555
3171	3467	3518	2575	17038	1982	3518
3304	3501	3267	2803	16975	1983	3501
2749	3524	3370	2749	16346	1984	3524
3363	3636	3527	2314	17943	1985	3636
3279	3537	3404	2563	18914	1986	3537
3169	3363	3314	2533	18671	1987	3363
3296	3583	3197	1985	17583	1988	3583
3406	3602	3565	2689	18204	1989	3602
3121	3643	3508	2682	19500	1990	3643
3418	3580	3633	2701	19061	1991	3633
2759	2786	2731	1788	16484	1992	3038
3059	3596	3449	3012	16921	1993	3596
3032	3303	3183	2492	18064	1994	3303
2696	3622	3617	3008	17091	1995	3622
3432	3653	3492	2706	19274	1996	3653
3136	3560	3310	2504	19174	1997	3560
2798	3575	3580	2583	18032	1998	3580



3203	3601	3391	2726	18631	1999	3601
3532	3635	3445	2668	19700	2000	3635
3228	3629	3476	2591	19300		3926

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. 36-02708, 36-07201, 36-07218, 36-02048,
	)	36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040,
	)	36-07148, 36-07568, 36-07071, 36-02356, 36-07210, 36-
	)	07427, 36-07720, 36-02659, 36-07004, 36-07080 and 36-
	)	07731
Case No. 39576	)	
	)	ORDER ON CHALLENGE (Consolidated Issues) OF
	)	"FACILITY VOLUME" ISSUE AND "ADDITIONAL
	)	EVIDENCE" ISSUE

**I.
APPEARANCES**

Professor D. Craig Lewis, Esq., Moscow, Idaho, and Ms. Dana Hofstetter, Esq., Beeman & Hofstetter, Boise, Idaho, for North Snake Ground Water District, May Farms Ltd., and Faulkner Land & Livestock Company

Mr. Daniel Steenson, Esq., Ringert Clark, Boise, Idaho, for Clear Lakes Trout Company

Mr. Norman Semanko, Esq., Rosholt Robertson & Tucker, Twin Falls, Idaho, for Clear Springs Foods Inc. and Blue Lakes Trout Farm Inc.

Mr. Patrick Brown, Esq., Jerome, Idaho, for John W. Jones Jr.

**II.
ORAL ARGUMENT AND
MATTER DEEMD FULLY SUBMITTED FOR DECISION**

Oral argument on this Consolidated Challenge was held in open court on November 1, 1999. At the conclusion of argument, no party sought to present additional briefing or authorities

and, the Court having requested none, this matter is deemed fully submitted for decision on the next business day, or November 2, 1999.

III. ISSUES PRESENTED

This Challenge on Consolidated Issues was filed by the North Snake Ground Water District ("NSGWD") on behalf of its members, including Faulkner Land & Livestock Company and May Farms Ltd. The 20 subcases listed in the caption above involve water rights for fish propagation facilities in the Hagerman area of Idaho.

NSGWD raises two consolidated issues in these fish propagation subcases.

1. Did the [respective]¹ Special Master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director"? Idaho Code § 42-1411(2)(j) (Supp. 1998)? ("facility volume" issue).
2. Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA, Rule 59(e), I.R.C.P. which applies post-judgment, or Rule 53(e)(2), I.R.C.P. which applies to special master's reports? ("additional evidence" issue).

IV. "FACILITY VOLUME" ISSUE

THE ISSUE

As noted above, the issue is stated by NSGWD to be:

Did the [respective] Special Master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for

¹ The Court uses the phrase "respective Special Master" because each of the three Special Masters then in the SRBA were assigned to one or more of the various subcases and issued reports and recommendations in these subcases. Because these two issues are common between the subcases and because each of the Special Masters ultimately ruled against including a facility volume remark, or allowing additional evidence at the motion to alter or amend stage, the subcases were consolidated on appeal for these two consolidated issues. Special Master Haemmerle heard Clear Springs Foods Inc. subcases 36-04013A, 36-07148, 36-07040, 36-07201, 36-07568, 36-02703, 36-04013B, 36-02708, 36-07218, 36-02048, and 36-04013C; Special Master Bilyeu heard John W. Jones Jr. subcase 36-07071; and Special Master Dolan heard Blue Lakes Trout Farm Inc. subcases 36-07720, 36-07427, 36-07210, and 36-02356 and Clear Lakes Trout Co. subcases 36-02659, 36-07004, 36-07080, and 36-07731. For reasons unknown to this Court, the then Presiding Judge did not reference all of these subcases to one Special Master.

administration of the right by the director"? Idaho Code § 42-1411(2)(j) (Supp. 1998).

ELEMENTS OF A WATER RIGHT – I.C. § 42-1411(2)(a)-(j)

Also as noted above, these consolidated subcases deal with fish propagation facilities in the Hagerman valley.

When the respective water right claims were reported out by the Director (IDWR), each included a facility volume remark.

"Facility volume" is not defined by statute or appellate case law and is not a specifically enumerated element of a water right under I.C. § 42-1411(2)(a)-(j). That statute provides:

(2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

- (a) the name and address of the claimant;
- (b) the source of water;
- (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;
- (g) the period of the year when water is used for such purposes;
- (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;
- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

IDWR concluded that a facility volume limitation was necessary for each of these rights to define one or more of the elements -- quantity, nature or purpose of use, or place of use. In the alternative, IDWR included facility volume as necessary to further define or administer each of these rights.

THE NATURE OF FACILITY VOLUME REMARK

It is unnecessary for the Court to enumerate each of the twenty (20) claimed rights and the specific language actually appearing in each right, because it is the general concept which is being decided here, and not the proposed individual language on each right.² The following examples are provided for illustrative purposes:

Example 1: 36-02356

By Blue Lakes Trout Farm Inc.'s ("Blue Lakes") second amended notice of claim under 36-02356, it claimed a total of 100 cfs from Alpheus Creek for fish propagation, domestic and commercial uses with a priority date of May 29, 1958, based on a license. In his *Amended Director's Report Regarding Claim to Water Right No. 36-02356*, dated July 7, 1997, the Director recommended the claim as filed. However, under the quantity element, the Director included the language -- facility volume 10.66 af. The Director also described the non-irrigation uses: "commercial/fish facility; domestic/2 homes; fish/49 ponds, hatch." The single contested issue was whether facility volume should be decreed by the SRBA Court for fish propagation water rights.

Example 2: 36-07210

Blue Lakes filed its claim under 36-07210 claiming 45 cfs from Alpheus Creek for fish propagation with a priority date of November 17, 1971, based on a license. The Director recommended the claim as filed, but under remarks, the Director included the same language as before -- facility volume 10.66 af. The Director described the non-irrigation uses: "fish/49 ponds, 38 hatchery tanks."

Example 3: 36-07427

² It should be noted here that some of the licensed rights contained a facility volume remark in the actual license which was issued by IDWR and the license holder did not object to its inclusion. For others, the licenses were issued with no such remark.

Under 36-07427, Blue Lakes claimed 52.23 cfs from Alpheus Creek for fish propagation with a priority date of December 28, 1973, based on a license. Again, the Director recommended the claim as filed, but with the remark -- facility volume 3.67 af. The Director described the non-irrigation uses: "fish/commercial fish facility, 10 ponds @ 20' X 200' X 4'." The Director also included under remarks: "A measuring device of a type approved by IDWR shall be maintained as part of the diverting works."

Example 4: 36-07720

Under 36-07720, Blue Lakes claimed 37.1 cfs from waste water for fish propagation with a priority date of June 8, 1977, based on a license. Unlike before, in the remarks section of the *claim*, Blue Lakes stated: "facility volume = 1.5 af, water used under this license if discharged into a natural channel shall meet Idaho water quality standards." The Director recommended the claim as filed, but with facility volume 1.16 af. The Director described the non-irrigation uses: "fish propagation/10 ponds @ 14' x 120' x 3'." Under remarks, the Director also stated: "Return flow if discharged to a surface water system shall meet Idaho water quality standards."

THE STANDARD OF REVIEW

A. Statutory Construction

As noted earlier, IDWR included a facility volume limitation on these rights based upon the assertion that it was necessary to define elements of the rights or as necessary to define or administer the right pursuant to I.C. § 42-1411(2) and, as such, the interpretation of I.C. § 42-1411 is a question of law. Statutory interpretation begins with the words of the statute, giving the language of the statute plain, obvious, and rational meaning. If statutory language is clear and unambiguous, a court applies the statute without engaging in any statutory construction. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). Further, I.C. § 73-113 provides that "[w]ords and phrases are construed according to the context and the approved usage of the language." If it is necessary for the court to construe a statute, then it will attempt to ascertain legislative intent. 130 Idaho at 733. "In construing a statute, the court may

examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute." *Id.*

A basic rule of statutory construction is that the application of a statute is an aid to construction, especially where the public relies on that application over a long period of time. *Id.* at 733. Where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time, it will be regarded as important in arriving at the proper construction of a statute. *Id.* at 734.

The Idaho Supreme Court has recently emphasized that it will accord deference to agency construction of a statute when certain conditions are met. An agency's construction of a statute will be given great weight if:

- 1) the agency has been entrusted with responsibility to administer the statute at issue;
- 2) the agency's construction of the statute is reasonable;
- 3) the statutory language at issue does not expressly treat the precise question at issue;
- and,
- 4) any of the rationales underlying the rule of deference are present.

Id. at 734.

B. Asserted Elements of a Water Right

Again, as noted above, IDWR concluded that a facility volume limitation was necessary for these rights to define one or more of the elements -- quantity, nature or purpose of use, or place of use; or, in the alternative, necessary to further define or administer these rights (in water parlance, what is commonly referred to as a "remark," as opposed to a more specific and traditional element of a water right such as source or quantity).

With respect to the "remark" section, or I.C. § 42-1411(2)(j), there are three (3) possible statutory components which need to be examined. They are:

- 1) whether the remark is necessary for definition of the right, or
- 2) whether the remark is necessary for clarification of any element of a right, or
- 3) whether the remark is necessary for the administration of the right by the Director.

BASIC CONCEPTS OF FACILITY VOLUME IN FISH PROPAGATION

The records in these subcases, as the Court understands them, appear to establish the following basic concepts of facility volume as that term is used in these water right claims for fish propagation.

Facility volume appears to be an expression of the size (dimensions) of a given fish facility by stating the maximum existing capacity or water volume of particular fish facility ponds, raceways, settlement basins, and the like, including in some instances also an inventory of the number of ponds, tanks or raceways serviced by a particular water right, **at the point in time** when the Director issued his report for that water right claim.

Exhibit 14 in the Blue Lakes subcases is an Administrator's Memorandum from IDWR dated August 9, 1979. It states in part:

It is difficult to calculate water needs for fish farming since production is usually based on the amount of water available rather than the amount of land or the size of the facilities.

As such, IDWR has historically admitted that fish production (pounds of fish raised) is, in reality, not dependant on the size of a given facility, rather production is mostly dependant on the flow rate of available water.

Additionally, the record is clear and it is uncontradicted that the particular water users at issue use all available water from its source, not in excess of the limits of their respective licenses or beneficial use claims. The record is equally clear and uncontradicted that the available water from the respective sources fluctuates from time to time, either as a result of naturally occurring climatic conditions or by diversions by other users, or both.

IDWR has as a "rule of thumb" that it will not specify a storage component in a water right if a facility will fill in a day (not greater than 24 hours) given the direct flow rate or if a facility does not hold the same water more than a day. *See Reporter's Transcript, Re: Trial on the Merits in Subcase Nos. 36-2356, 36-7210, 7427 & 7720* (September 4, 1997) at page 105-108. Obviously a bright-line rule is necessary for determining when a storage component is needed to describe a water right because there is potentially some "storage" involved in all water rights, whether describing a reservoir, a fish propagation pond, or the charging of an irrigation system. In all of these facilities at issue, the water is turned over many times each day from the

direct flow right, usually at least twelve (12) times per day. As such, in accordance with the policy of IDWR, none are considered storage rights; i.e., they do not have a storage component.

Lastly, it is universally agreed that these water uses for fish propagation are both beneficial and non-consumptive. There is obviously some water consumed and/or lost by evaporation, but it is so negligible that it cannot be accurately measured, and that is the basis for IDWR considering these uses as non-consumptive.

THE QUANTITY ELEMENT – I.C. § 42-1411(2)(C)

The quantity element, as claimed by the respective claimants in these subcases, was reported out by the Director as claimed. No objections were filed to the quantity element of these Director's Reports. As such, the claimants involved in this Challenge argue that quantity was never at issue and was not tried before the respective Special Masters.

Diversion rate is an instantaneous measurement called cubic feet per second (cfs) and is the legal standard for the measurement of water in this state. I.C. § 42-102. Diversion volume is calculated by the diversion rate (cfs) over a one-year period of time, and it is measured in acre feet per year (afy). When the licenses at issue here were issued, they were licensed for diversion rates with diversion volumes consistent with a full year's use.

IDWR's inclusion of a facility volume remark was, in part, stated by Mr. Tuthill of IDWR, to further define the quantity element, i.e., to add a "third parameter" (cfs, afy and facility volume). I.C. § 42-1411(2)(c) defines the manner in which quantity shall be described as:

[T]he quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right.

Where statutory language is clear and unambiguous, the court applies the statute without engaging in statutory construction, giving the language its plain, obvious, and rational meaning. 130 Idaho at 733. The statute requires quantity to be measured by rate of diversion or flow in cfs or afy. I.C. § 42-1411(2)(c) does not include facility volume as a prescribed method of measuring quantity. This Court holds that the plain meaning of the statute does not provide for describing or

limiting quantity by facility volume.³ Nor has it been rationally established that a facility volume remark would assist in further defining the fish propagation right as to quantity because, by definition, it is a non-consumptive use and the water used is not stored; it simply flows through the facility and is discharged at the end of the facility. As such, the quantity element of the right (so long as it is applied to its intended beneficial use and is not wasted) could not be abused so long as the diversion rate did not exceed the allowable cfs, regardless of the number or size of the ponds, raceways, etc. It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the additional ponds or raceways were to actually grow fish in, it would be an increase in facility volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water.

Finally, it bears repeating that production of fish is primarily related to the rate of flow, not the size of the facility.

THE NATURE OR PURPOSE OF USE ELEMENT – I.C. § 42-1411(2)(f)

IDWR asserted that the nature of use element has been used in the past as a reason and part of its rationale to include a facility volume remark. The rationale is that IDWR would consider an increase in facility volume as being a change in nature of use requiring a transfer under I.C. § 42-222. A change in facility volume is clearly not the type of change contemplated under I.C. § 42-222. A change in nature or purpose of use occurs when, for example, a user changes from an irrigation use to a domestic or manufacturing use, etc. Going from a fish

3 As discussed below, a facility volume limitation is not really a limitation of quantity, rather it is a limitation on

propagation use to an increased or different fish propagation use is not a change in nature of use contemplated under I.C. § 42-222 and does not support the rationale.

It is inconceivable that a farmer changing a crop from pasture to alfalfa on a licensed place of use would constitute a change in the nature of use. Likewise inconceivable would be the notion that changing seed varieties of the same crop in an effort to increase production would be a change in the nature or purpose of use.

Finally, as Special Master Bilyeu noted, "the plain meaning of 'purpose of use' in I.C. § 42-1411(2)(f) requires water rights be described by broad category of use such as mining, domestic, or irrigation, and does not require minute details of operation such as number of ditches, sprinklers, or facility volume limitations." *Special Master Report*, 36-07071, page 5, May 19, 1998.

THE PLACE OF USE ELEMENT – I.C. § 42-1411(2)(h)

IDWR also asserted that it included a facility volume remark to further define the place of use. I.C. § 42-1411(2)(h) establishes that place of use shall be described by:

[A] legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code.

I.C. § 42-1411(2)(h) does not include facility volume as a prescribed method of describing the place of use. This Court holds that the plain meaning of the statute requires a standard legal description for the place of use, not a facility volume limitation. Furthermore, an examination of the respective Director's Reports reveals that IDWR describes the place of use by legal description and not by a description of the fish facility.

Again, the non-consumptive use of water by fish propagators in the water claims before the Court needs to be kept in mind. Fish propagation rights are unlike water rights for irrigation which are limited by acres, which is because irrigation rights are clearly a consumptive use. If an irrigator irrigates more/additional acres, then by definition more water will be consumed because more acres are irrigated, and less will be available in the overall water system.

the utility of the water given the quantity element of the right.

A domestic user, whose use is considered to be *de minimis*, and hence essentially non-consumptive, who constructs an addition to his house, is not considered to have changed the place of use. Likewise, a fish propagator using five connected raceways instead of four could not rationally be considered to have changed the place of use.

“REMARKS” -- OTHER MATTERS NECESSARY TO DEFINE OR ADMINISTER – I.C. § 42-1411(2)(j)

I.C. § 42-1411(2)(j) provides for the inclusion of "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." IDWR also asserted that it included facility volume as a "matter necessary to define or administer." As stated under the Standard of Review above, the query is whether a facility volume limitation is necessary to define a water right, to clarify an element, or to administer this right. Keeping in mind, as discussed above, facility volume does not define or clarify quantity, nature or purpose of use, or place of use, therefore, the first two factors, define or clarify, have been answered. Therefore, the necessity of the facility volume remark for administration is addressed.

A. Water Quality

IDWR asserts that a facility volume remark is necessary for administration of water quality.

There are at least three significant reasons why IDWR's position on quality is wrong.

First, there is no showing that facility volume is rationally related to water quality; i.e., there is no nexus between the two. From the record, it clearly appears that water quality is primarily a function of the fish husbandry practices employed, not the physical size of the facility. Therefore, to be legally necessary there would have to be this nexus.

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 water rights have ripened into licenses, or were beneficial use claims. Since the water rights have vested and the structures are complete, it is not the current function of IDWR to police water quality. Water quality is policed by DEQ and EPA. As such, if there were to be a legitimate remark in either a permit or a license relative to water quality, it would not be directed to the existing size of the facility, but rather would be directed that the facility, regardless of its size, would be managed to meet required water quality standards.

The third reason is that water quality is a question of fact. In *Randall v. Northfork Placers*, 60 Idaho 305, 91 P.2d 368 (1939), the Idaho Supreme Court considered an action for damages to a downstream user's lands and irrigation ditches alleged to have been caused by mud and silt being deposited into the Northfork River by an upstream mining operation, which deposits then washed downstream into the irrigation ditches.

The Supreme Court stated:

Numerous authorities announce the doctrine that while a proper use of the water of a stream for mining purposes necessarily contaminates it to some extent, such contamination or deterioration of the quality of the water cannot be carried to such a degree as to inflict substantial injury upon another user of the water of said stream. (citations omitted). We believe the rule stated in *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 Pac. 465; *Id.*; 230 U.S. 46, 33 Sup. Ct. 1004, 57 L. ed. 1384, is controlling in this case, namely:

"We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, *or even some degree of interference, so long as such do no substantial damage.*" (emphasis theirs).

"What deterioration in quality would injuriously affect the water for irrigation, and whether or not the deterioration to which the defendant company subjected the waters in question injured the land of the plaintiff, were matters of fact;" (citation omitted).

The author of *Hill v. Standard Mining Co.*, *supra*, closes his dissertation with reference to the sufficiency of the complaint therein referring to Lindly on Mines and Cooley on Torts, as follows:

"The right to the use of a stream for depositing debris from mines is discussed in section 840, volume 2, of Lindly on Mines. Many cases from the various states of the Union are cited and discussed by the author. He closes his text as follows: '**No positive rule of law can be laid down to define and regulate such use with entire precision. As to this, all courts agree. It is a question of fact to be determined by the jury.**' This conclusion certainly seems reasonable and logical.

Id. at 311, 312 and 313 (bold emphasis added).

The same reasoning applies to the fish propagator's use of water which is returned to the stream. Questions of excessive pollution in a water source are questions of fact to be made on a case-by-case basis, at least for the use of water for fish propagation. As such, a "one size fits all" rule in the form of a facility volume remark is wholly inapplicable. All of the evidence is to the effect that the size of the facility has no demonstrable effect on water quality. How an individual facility is managed or mismanaged clearly does impact water quality and a facility volume remark adds nothing.

B. Local Public Interest

In *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995), the Idaho Supreme Court held that the public trust is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants. Thus, the SRBA lacks jurisdiction to consider the public trust in the adjudication of these claims.

Pursuant to *Matter of Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 636 P.2d 745 (1981), specifically dealing with statutory local public interest, the Supreme Court held that the public interest could not be considered with respect to rights which had vested. All of the claims here have vested into licenses and/or are beneficial use claims. They are not applications to appropriate water or a permit, and this is not a transfer proceeding under I.C. § 42-222. As such, facility volume remarks cannot be considered under the local public interest.

C. Mitigation

It is essentially undisputed that until 1997, IDWR's stated purpose for including a facility volume remark was to regulate water quality. However, since 1997 IDWR has asserted that a

facility volume remark helps to “define the extent of beneficial use” for purposes of mitigation⁴ in time of water shortage. In other words, if a senior fish propagator made a water delivery call on junior water users, the junior users could offer mitigation in the form of money instead of ceasing their use of the called water. However, while mitigation may be voluntarily exercised between private parties, IDWR freely admits it cannot compel a senior user to accept mitigation in the event of a water delivery call. The right of senior water right holders to have water delivered “first in time, first in right” is constitutionally protected. Idaho Constitution, Art. VX. § 3. Therefore, since IDWR has no authority to compel mitigation, this cannot serve as a legal basis for the inclusion of a facility volume remark.

Licenses Issued With and Licenses Issued Without the Facility Volume Remark

As stated earlier in this Decision, some of the water rights licenses were issued with a facility volume remark which was not challenged by the license holder at the time. Other licenses were issued without the facility volume remark and the remark appeared for the very first time in the Director’s Report for the respective claimed right.

In his July 31, 1998, *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)*, then Special Master Haemmerle ruled as follows:

F. THE LICENSES

As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director’s Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.

The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right.” I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the “state” as the word is used in I.C. § 42-220 [footnote 3 cited]. As between the two statutes, there is a conflict only when a remark redefines the use

⁴ See generally, *Rules For Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, *et seq.*

of a licensed water right. Under these circumstances, the question is which statute controls.

The inquiry involves principles of statutory construction. "It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute." *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409, 416 (1997). "[T]o the extent that two statutes conflict, the more specific governs over the more general." *Id.* Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state [footnote 4 cited].

[footnote 2] *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court held that "[n]owhere in Title 42 is the Director 'obligated to accept a prior decree' issued in a private adjudication 'as being conclusive proof of the nature of a water right.'" *Id.* at 414. Unlike prior decrees, Title 42 does require the state to accept license as conclusive proof of a user's right to use water as stated in the license. I.C. § 42-220.

[footnote 3] For purposes of the adjudication of water right under Title 42, Chapter 14, Idaho Code, IDWR has been separated from other state agencies. I.C. § 42-1401B. Under the adjudication statutes, however, the Director's role is to report "claims to water rights acquired under state law." I.C. § 42-1401B. Here, the licenses were acquired and perfected under state law. These licenses are binding on the state and constitute *prima facie* evidence of the water right and should be reported accordingly. I.C. § 42-220.

[footnote 4] There are exceptions to the finality of a license in that the use of a license may change subjecting the license to claims of abandonment, forfeiture, adverse possession, estoppel, or waste. Also, a license is subject to review in a transfer proceeding. I.C. § 42-222.

Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license. A similar issue was addressed by the Idaho Supreme Court in *In Re SRBA Case No. 39576* (Basin-Wide Issue 5B), ___ Idaho ___, 951 P.2d 943 (1998). In that case, the issue was whether the court was required to decree certain general provisions contained in a prior decree. Addressing the legitimate and potential need for general provisions, the Court stated: "Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property." *Id.* at 4 (citations omitted). Remarks are much like general provisions. Both may be used to further define a water right. I.C. §§ 42-1411(2)(k) and 42-1411(3). Like a prior decree, any attempt to redefine a license would be "tantamount" to altering a real property right. In this case, IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220. The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. See e.g., *Matter of Hidden Springs Trout Ranch, Inc., v. Alfred*.

Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. See e.g., *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). In this case, Claimant did not appeal the remarks addressing facility volume for water rights 36-07201, 36-07218, and 36-07568. Therefore, Claimant is bound by the licenses for these rights.

In evaluating the licenses where facility volume was included when the licenses were issued, the court notes that there is no express provision in the licenses indicating the relevance of the remarks. As previously indicated, the court cannot find any rational reason why the remarks exist. When confronted with an ambiguous element contained in a prior decree or license, the court may clarify the ambiguous element or provision. I.C. § 42-1427(b). Therefore, to clarify this ambiguity, the

[footnote 5] The court expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a license in the SRBA. That issue is not before the court.

court will recommend that facility volume be included for water right numbers 36-07201, 36-07218, and 36-07568 with the following additional language: "The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume."

For these reasons, the licenses at issue are final and binding on both the Claimant and IDWR.

As to those licenses which contained a facility volume remark when issued, Special Master Haemmerle held that the remark must remain in the license, but it is ambiguous, and because it was ambiguous the Court could clarify the remark. I.C. § 42-1427(1)(b). The clarifying remark was to be:

The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume.

This Court agrees with the Special Master that the remark must remain in the license but can be clarified for the following reasons. First, by adopting this recommended language it confirms that the “claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right” I.C. § 42-1427(1)(b). The supporting reasons again need to be restated here.

1. The use of water for fish propagation is a non-consumptive use.
2. There is no storage component; regardless of the size of the facility, the water just continuously flows through and is “turned over” at least twelve (12) different times each day.
3. The user continuously uses all available water up to the limit of his right; water flows primarily affect production, not the size of the facility.

In other words, it would be like having a water right for 100 cfs flowing out of a spring in the Snake River Canyon wall which then flows into a large pipe, flows the length of the pipe, and then discharges off the user’s property. Does it make a difference if the user increases the length of the pipe from 200 feet to 400 feet? Or if a hydropower plant with one generator were able to place two generators in the stream instead of one?

The court cannot limit “the extent of beneficial use of the water right” in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right. In fact, the stronger argument is presented in *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 208; 252 P.865 (1926):

It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it. What constitutes a reasonable use of water is a question of fact, and depends upon the circumstances of each case. No person is entitled to use more water than good husbandry requires.

In other words, because the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these circumstances can economically produce 200 pounds of fish versus 100, there is no legitimate policy in water law for not allowing this to occur.

CONCLUSION AS TO FACILITY VOLUME

Each of the respective Special Masters determined that the Claimants have met their burden in establishing that facility volume is not necessary as a traditional element of a water right, I.C. § 42-1411(2)(a)(b), or as a remark for the definition of the right, for clarification of any element of a right, or for administration of the right by the Director, I.C. § 42-1411(a)(j). Each of the Special Masters has cited to various portions of the evidence produced in their respective trials/hearings. Each has used their own factual and legal basis for their respective conclusions that facility volume remarks should not be included.

This Court adopts each of the respective Special Master's Reports and Recommendations including the underlying findings of fact and conclusions of law upon which they are based. There is no basis to find that their respective findings of fact are clearly erroneous or that their respective conclusions of law are not correct.

V.

"ADDITIONAL EVIDENCE" ISSUE

THE ISSUE

NSGWD sought to have the respective Special Masters consider additional evidence in the form of testimony and affidavits in support of its *motion to alter or amend* filed in the various subcases. Each of the respective Special Masters refused to consider additional evidence. Two of the Special Masters ruled that I.R.C.P. 59(e) governed motions to alter or amend Special Master's Reports. Another Special Master reviewed the motion under I.R.C.P. 53(e)(2) and also applied the "good cause" standard contained in I.R.C.P. 55(c). As noted above, the consolidated issue is stated in the Challenge to be:

Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA, Rule 59(e), I.R.C.P. which applies post-judgment, or Rule 53(e)(2), I.R.C.P. which applies to special master's reports?

STANDARDS OF REVIEW

Regarding I.R.C.P. 53(e)(2), Administrative Order 1 (AO1) § 13(f) provides:

The court shall accept the Special Master's findings of fact unless clearly erroneous. The court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions. I.R.C.P. 53(e)(2).

I.R.C.P. 53(e)(2) provides:

In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within fourteen (14) days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon the objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or reject it in whole or in part or may receive further evidence or may recommit it with instructions.

In *Seccombe v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989), the Court of Appeals stated:

The appointment of a master does not displace the district court's role as the ultimate trier of fact. Under I.R.C.P. 53(e)(2), the district court is mandated to accept the master's findings of fact unless clearly erroneous; consequently, the trial court must independently review the evidence to determine whether the findings were supported by substantial evidence. The master's conclusions of law, however, carry no weight with the trial court. Therefore, Rule 53(e)(2) permits the court to adopt the master's report, modify it, supplement it with further evidence, recommit it to the master with instructions, or reject it in whole or in part.

Id. at 435, 767 P.2d 278.

Regarding I.R.C.P. 59(e):

A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that has occurred in its proceedings; it therefore provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

Coeur d'Alene Min. Co. v. First Nat'l. Bank of N. Idaho, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)(quoting *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (1982)).

ANALYSIS—MOTION TO ALTER OR AMEND

The issue regarding the appropriate standard for allowing the introduction of additional evidence in conjunction with a motion to alter or amend the findings of fact and conclusions of law of a special master is not one of first impression for this Court. This issue was previously analyzed in detail in *In Re SRBA Subcases 36-00061, 36-00062, and 36-00063, Memorandum Decision and Order on Challenge* (September 27, 1999) (“*Memorandum Order*”). NSGWD was also a party to those subcases. In the *Memorandum Order*, this Court discussed the procedural rules and accompanying standards which arguably could apply in the context of a motion to alter or amend a special master’s recommendation brought pursuant to AO1 § 13(a). *Memorandum Order* at 20-29. The Court’s entire discussion will not be reiterated here. In sum, this Court ruled that the standards of I.R.C.P. 59(e) were instructive in the context of a motion to alter or amend a special masters findings of fact and conclusions of law, but that the Rule did not literally apply because a prior judgment is not entered at the special master stage of the proceeding. *Memorandum Order* at 26-27. This Court also noted that I.R.C.P. 59(e) does not provide a procedure for the introduction of additional evidence. *Id.* Rather, that in accordance with existing precedent, I.R.C.P. 59(e) motions apply to the findings of fact and conclusions of law based on the status of the existing record. *See e.g., Idaho First Nat’l. Bank v. David Steed & Assoc.*, 121 Idaho 356, 361, 825 P.2d 79, 84 (1992) (citing *Coeur d’Alene Mining Co. v. First Nat’l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990)(trial court lacks jurisdiction to consider new facts in conjunction with a motion to alter or amend pursuant to I.R.C.P. 59(e)). This Court held that I.R.C.P. 52(b) more appropriately applied to the circumstances surrounding AO1 § 13(a), in particular because a motion to alter or amend can be brought pursuant to I.R.C.P. 52(b) prior to the entry of judgment. *Memorandum Order* at 27-28. However, the applicable standard for amending the findings of fact, whether prior to, or post-judgment, is effectively the same. Rule 52(b) allows a court to correct or augment its findings so that an appellate court may have a clear understanding of how the trial court arrived at its decision. The Rule is not intended to allow parties to advance new legal theories or relitigate the merits of a case. *See Memorandum Order* at 27 (citing 9 *Moore’s Federal Practice* 52.60 (party may move to amend findings of fact, even if modified or additional findings would effectively reverse the judgment)). A motion to alter or amend findings provides a mechanism for the trial court to correct both errors of fact and law

short of an appeal. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982)(citing *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977)).

This Court, in the *Memorandum Order*, also discussed the four grounds for properly granting a motion to amend findings pursuant to I.R.C.P. 52(b): (1) correction of manifest error; (2) newly discovered evidence; (3) change in law; and (4) supplement or amplify findings. *Id.* at 27 (citing *9 Moore's Federal Practice* 52.60[4][a]-[d]). The two grounds which would arguably apply in the context of the instant subcases are the correction of a manifest error and newly discovered evidence. In regards to considering whether to amend the findings on the basis of a manifest error, the trial court considers only the evidence contained in the record. *9 Moore's Federal Practice* 52.60[4][a]. In regards to a motion to amend based on newly discovered evidence, the movant may not introduce evidence that was available at trial but not proffered. Further, it is improper for a party to move to amend in order to advance new theories based on evidence that was proffered at trial or to reassert arguments already rejected by the court. *Id.* at 52.60[4][b].

Lastly, and of significance, is that the determination of whether to grant or deny a motion to amend findings of fact or a judgment is left to the discretion of the trial court (special master) and is therefore reviewed under a "manifest abuse of discretion standard." *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982). As such, to the extent a special master disallows new evidence in conjunction with a motion to alter or amend brought pursuant to AO1 § 13(a) on the grounds that the proponent is seeking to advance a new legal theory or introduce evidence that was otherwise available at trial, there can be no manifest abuse of discretion. Simply stated, the Rule does not provide a mechanism for advancing new legal theories and/or evidence that was discoverable during the pendency of the action, or to allow a brand new party to the subcase to step forward for the first time and have a new trial.

The proper application and standards of I.R.C.P. 53(e)(2) were also set forth in detail in the Court's *Memorandum Order*. However, since I.R.C.P. 53(e)(2) is specifically directed at the district court (as opposed to a special master), the rule has no application towards establishing a standard or mechanism for the submission of additional evidence at the special master's level of the proceeding absent a directive from the district court. Further, as this Court previously pointed out in its *Memorandum Order*, the district court does not have unfettered discretion to modify the

findings of a special master. *Memorandum Order* at 22-23. Rather, the District Court must accept a special master's findings of fact unless clearly erroneous. *Id.*; AO1 § 13(f); I.R.C.P. 53(e)(2); *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989).

ANALYSIS -- MOTION FOR RECONSIDERATION

Unlike a motion to alter or amend findings, a motion for reconsideration brought pursuant I.R.C.P. 11(a)(2)(B) provides a mechanism for the trial court to consider new or additional facts in support of the motion that bear on the correctness of the interlocutory order. *See Coeur d'Alene Min. Co. v. First Nat'l. Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)(distinguishing applicable standards between I.R.C.P. 59(e) motion to alter or amend and I.R.C.P. 11(a)(2)(B) motion for reconsideration). The burden is on the moving party to bring to the trial court's attention to the new facts. *Id.* In *Coeur d'Alene Min. Co.*, the Idaho Supreme Court in distinguishing a motion to alter or amend from a motion for reconsideration, stated:

A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Id. (citing *J.I. Case Company v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955)). Although I.R.C.P. 11(a)(2)(B) permits the introduction of additional evidence, that particular procedural rule is not available to a party seeking to participate in a subcase pursuant to AO1 § 13. AO1 § 13(a) provides:

Any party to the adjudication not already a party to the subcase may file a *Motion to Alter or Amend* within 21 days from the date the ***Special Master's Recommendation*** appears on the Docket Sheet. Any party to the adjudication not already a party to the subcase may respond to a *Motion to Alter or Amend* by filing a *Notice of Participation* which shall set forth the party's name; the water right number; the name, address and telephone number of the attorney; and a short statement of the party's position on the issues presented in the *Motion to Alter or Amend*.

SUMMARY OF THE RESPECTIVE MOTIONS

Although a motion to reconsider is more akin to what NSGWD is seeking from the Court, in accordance with AO1 § 13(a), a party not already a party to a subcase participates in

subsequent proceedings in the subcase by filing, or responding to, a **motion to alter or amend**. The rule does not provide for initiating participation through a different procedural rule, including a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). Since a motion to alter or amend is limited to the record before the court (special master) and does not provide for the introduction of new or additional evidence, a party is limited in that regard. As a related matter, a party cannot subsequently file a motion for reconsideration of a court's ruling on motions brought pursuant to I.R.C.P. 59(e) or 52(b). *See* I.R.C.P. 11(a)(2)(B)(rule does not permit reconsideration of an order entered pursuant to Rules 59(e) and 52(b)). Furthermore, from a practical standpoint, in the context of the SRBA, a procedure allowing new parties to enter a subcase following the recommendation being issued by a special master which permits the new parties to advance new legal theories and evidence in support of those theories would (to put it kindly) result in an inefficient use of judicial resources as well as prejudice to the parties to the subcase by requiring the parties to relitigate their claims or go back to court to defend against issues that were never initially raised.

DUE PROCESS IMPLICATIONS

At oral argument on the Challenge, NSGWD additionally argued that the failure of the respective Special Masters to consider additional or new evidence in conjunction with a motion to alter or amend also raised due process implications. Specifically, NSGWD argued that it would be precluded from getting evidence before the Court of a claimant's actual use of water over a given period of time. The implication being that a claimant has been historically using a lesser quantity of water than the quantity reflected in the claimant's license or prior decree. NSGWD argues that if a special master declines to consider the additional evidence, a special master (and the district court on Challenge) does not have all the relevant evidence necessary to ascertain the truth, but also the net effect is that NSGWD is essentially barred from asserting its legal claim or cause of action based on the proffered evidence (i.e. partial forfeiture or as styled by NSGWD "extent of beneficial use"). Specifically, NSGWD argues it would be forever precluded from raising its legal claim because if the evidence is not admitted by either a special master or at the subsequent direction of the district court, once the partial decree is entered, the claim is barred by principles of *res judicata*. Hence the contention of due process violations.

This due process argument fails for several reasons. First, nothing prevented NSGWD from filing a response to an objection (or an objection) to the Director's Report and becoming involved in the subcase at its inception. This is true even if NSGWD was in agreement with the Director's Report as it had the opportunity to file a response to an objection. Consequently, under any stretch of the imagination NSGWD cannot claim due process violations for any evidence (or cause of action) that was available as of the date of expiration for filing responses to objections to the Director's Report. Further, NSGWD would also have available the option to file a motion to file a late objection based on the discovery of new evidence even after the expiration of the filing date for objections and responses. Simply put, NSGWD could have become timely involved in these subcases and properly raised any related issues before the matter went to trial before the respective Special Masters. NSGWD readily admits, however, that its practice has been to not get involved in the subcase until the special master has issued his or her recommendation; which by orders of reference in these subcases, the evidentiary trial has been held, findings of fact and conclusions of law have been made, and the respective Special Master's Reports and Recommendations have been prepared and filed. In the event NSGWD disagrees with the recommendation, NSGWD then becomes engaged in the subcase via a motion to alter or amend pursuant to AO1 § 13 and then seeks to introduce new or additional evidence and/or raise new legal theories. In one of the consolidated subcases, NSGWD made its strategy readily apparent. NSGWD responded to the Special Master's inquiry as follows (with emphasis):

The [Special Master]: So your strategy is to sit back – although the statute defines time periods to get in the case, you [NSGWD] sit back, wait and see what happens; the case is tried; and then if you get a result you don't like, you ask that it be tried again.

Ms. Hofstetter: I would say that that's absolutely correct. I have no – because it's humanly impossible for private parties to get anticipatorily involved in every single subcase that may affect their interests ultimately.

See Reporter's Transcript, Re: Challenge to Recommendations Made by Special Master Fritz Haemmerle in Subcase Nos. 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148, and 36-07568, by North Snake Ground Water District (November 17, 1997) at page 77.

Additionally:

The [Special Master]: So every single right that's recommended is subject to a second trial any time before a final decree in the SRBA is entered?

Ms. Hofstetter: Potentially, if warranted if the first trial was not adequate and that's demonstrated, yes. That's a possibility.

Id. at pp. 88-89.

Thus it is clear from the record NSGWD made a conscious determination not to become involved in the various subcases. Consequently, NSGWD's due process arguments relating to any available evidence or cause of action that existed prior to expiration of the date for filing objections are without merit. Further, no due process violations are implicated during the pendency of the special master's proceedings for available evidence or causes of action if NSGWD failed to become involved in the proceeding via a motion to file a late objection or a motion to participate, pursuant to AO1. *See e.g.*, AO1 §10(k)(Motion to Participate).

The crux of NSGWD's argument, however, pertains to the introduction of evidence which did not become relevant, or the raising of new causes of action which did not allegedly become ripe, until after the expiration of the time for filing responses to objections to the Director's Report. This situation arises in the context of a cause of action for partial forfeiture pursuant to I.C. § 42-222(2) and related case law. *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). To place the matter in proper perspective, NSGWD contends that the evidence sought to be introduced in the consolidated cases was probative of the claimant's "extent of beneficial use." However, as noted in the preceding sections of this opinion "extent of beneficial use" is not an element of a water right. Furthermore, the respective Special Masters already conducted hearings on the quantity element. In this Court's view, although being couched in the phrase "extent of beneficial use," NSGWD is really attempting to raise a cause of action for partial forfeiture or abandonment, or in the alternative, to relitigate the quantity issue. By way of explanation, any evidence that a claimant is using less water than the quantity for which the claimant was previously licensed or decreed, by definition must be in support of an action for partial forfeiture (or abandonment). Partial forfeiture, abandonment or adverse possession are the only cognizable legal theories by which a diminishment could be obtained. In *State v. Hagerman Water Users, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court specifically

held that the quantity element of a water right cannot be reduced merely for non-application to a beneficial use regardless of the length of time the non-application continues. *Id.* at 743, 947 P.2d at 416. Rather, that I.C. § 42-222(2) provides for the loss of water rights for failure to apply the water to a beneficial use for the five (5) year prescriptive period. *Id.* The Supreme Court set forth its reasoning as follows:

To interpret references to “beneficial use” throughout Title 42 as providing the means by which a water right may be statutorily lost or reduced regardless of the length of time the non-application continues would render the five-year period set forth in I.C. § 42-222(2) meaningless and neglect clear direction from the legislature.

Id. (citing *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539, 797 P.2d 1385, 1387 (1990)). Therefore, unless NSGWD is asserting either partial forfeiture or abandonment of a previously licensed right, evidence of “extent of beneficial use,” is irrelevant. Secondly, whether labeling the diminished use as “partial forfeiture” or “extent of beneficial use,” unless the five year statutory period has elapsed, there is no cause of action and any related evidence would again be irrelevant. Simply put, there is no legal cause of action for an “anticipatory” partial forfeiture. Lastly, NSGWD also argued (again without referring specifically to “partial forfeiture”) that due process concerns are also implicated because NSGWD cannot assert “partial forfeiture” as an objection, or later in the course of the proceedings, until the statutory period has actually elapsed. NSGWD argues that this situation would arise in the event that the five year statutory period does not entirely run until after the objection period has elapsed. In this situation, NSGWD argues that it could never assert a cause of action for “partial forfeiture” (a.k.a. “extent of beneficial use”) because an objection can not be filed prior to the statutory period having elapsed because no cause of action has yet matured. Thus, if a special master does not allow the admission of evidence pertaining to the partial forfeiture after the statutory period has elapsed, then NSGWD is essentially forever barred from asserting a “partial forfeiture” or “extent of beneficial use” issue which did not actually ripen until after the expiration of the objection period.

This argument fails because it overlooks the effect that the filing of a claim in the SRBA has on the running of the forfeiture statute. A claim to a water right made in the SRBA is essentially akin to a quiet title action. *See e.g., Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931) (pre-adjudication quiet title action for water

right); *Sutton v. Brown*, 91 Idaho 396, 422 P.2d 63 (1966) (quiet title action can necessarily include claim for water right). A notice of claim is a pleading within the SRBA. *Fort Hall Water Users Ass'n v. United States*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995) *reh'g denied* (1996); AO1 § 2(r). The filing of a notice of claim initiates the procedure for making claim to a water right in the SRBA. I.C. § 42-1409. A partial decree with a rule 54(b) certificate is akin to a final judgment for purposes of appealing as a matter of right. I.C. § 42-1412(6); I.R.C.P. 54(b); AO1 §§ 14,15. As a result, a water right claimant's action is pending from the time a claim is filed until a partial decree is entered.

It is a settled legal principle that the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action. In *Smith v. Long*, 76 Idaho 265, 281 P.2d 483 (1955), the Idaho Supreme Court held that: "Defendant's title by adverse possession not having matured at the time this action commenced, plaintiffs are entitled to a decree quieting their title as against the claims of the defendants." *Id.* at 494-95, 76 P.2d at 276-77. In *Yorba v. Anaheim Union Water Co.*, 259 P.2d 2 (1953) the California Supreme Court stated: "[O]rdinarily the filing of an action, either by the person asserting a prescriptive right, or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period and the statute will be tolled while the action is actively pending." *Id.* at 5. *See also* 25 Am. Jur. 2d Easements and Licenses § 69 (suit brought by claimant interrupts prescriptive period); 3 Am. Jur. 2d Adverse Possession § 127 (effect of suit relates back to date of its commencement, and claimant can acquire no additional advantages by remaining in possession during its pendency). Thus, any period supporting a claim for title by adverse possession or prescription must have accrued prior to the claim being filed. This rule applies to the extent the action is being prosecuted or defended by the legal title holder, and in the event the action is abandoned, the statute is not tolled. 3 Am. Jur. 2d Adverse Possession § 130.

Since forfeiture is a species of adverse possession and prescription, it follows that once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree. In *Smith v. Hawkins*, 42 P. 453 (1895), the California Supreme Court, in construing California's then existing water right forfeiture statute, applied by

analogy the same standards for establishing prescriptive title to real property. *Id.* at 454. In *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931), the Idaho Supreme Court, in resolving a water right transfer claim, concurred with the reasoning of the California Supreme Court in *Smith* which applied the standards of prescription and adverse possession to forfeiture. *Id.* at 488 (citing *Smith v. Hawkins*, 42 P. 453 (1895)). Therefore, pursuant to this reasoning, unless a claimant ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right), any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture. That being the case, NSGWD cannot be denied due process protections for attempting to present itself in a case with a hearing on the merits to assert a cause of action (i.e. partial forfeiture) which has not yet matured. Further, and on the contrary, if the cause of action for forfeiture has ripened before the claim is filed, it is incumbent on the person seeking to prosecute the forfeiture to get timely involved, (i.e. file an objection/response to the quantity element).

Finally, even if the forfeiture statute were not tolled during the pendency of the proceeding, the decision whether or not to admit new or additional evidence is discretionary with the trial court or in these subcases, the respective Special Masters. Although a motion pursuant to I.R.C.P. 60(b)(2) (i.e. motion to set aside a judgment based on the newly discovered evidence) does not technically apply in this situation, the standard for granting a Rule 60(b) motion is instructive in explaining the deficiency in the due process argument advanced by NSGWD. For example, the due process argument raised by NSGWD could arise in the context of any garden variety legal proceeding where new evidence giving rise to a new legal cause of action or defense which was not previously asserted is discovered after entry of judgment. Similarly, in that particular situation, if the court denies the Rule 60(b) motion, the movant may also be forever precluded from subsequently raising the new legal claim or defense based on the newly discovered evidence. Despite this consequence, the determination whether to grant a Rule 60(b)(2) motion is still discretionary with the court as opposed to a non-discretionary entitlement. *See Roberts v. Bonneville County*, 125 Idaho 588, 592, 873 P.2d 842 (1994)(trial court did not abuse discretion in denying motion based on newly discovered evidence); *Knight Insurance Inc. v. Knight*, 109 Idaho 56, 58-59, 704 P.2d 960, 962-63 (Ct.App. 1985)(distinguishing between discretionary relief and non-discretionary entitlement to relief pursuant to I.R.C.P. 60(b)); 12 Moore's Federal

Practice 3d§ 60.22[1] (except for motion under 60(b)(4), decision as to whether relief should be granted is discretionary)). Consequently, the denial of a Rule 60(b)(2) motion based on the discovery of new evidence does not automatically entitle the movant to have the judgment set aside and a new hearing to present the new evidence. However, if the denial of the motion was considered a denial of due process it would seem that the judgment should be set aside as a matter of course. This is not the case. Rather, the court reviews the evidence in the context of the factors set forth in Rule 60(b)(2) to determine whether or not the evidence should be considered. In sum, since this determination is left to the discretion of the court, the denial of the motion cannot result in a denial of due process.

Next in determining whether the respective Special Masters did in fact abuse discretion in failing to admit and consider the new or additional evidence, the following factors were present. Hearings had already been conducted on the merits, including on the quantity element. NSGWD was not entirely clear as to the legal theory it was advancing in support of a diminishment in quantity. As previously explained, as a matter of law, “extent of beneficial use” by itself is not a viable theory for diminishing a water right. Furthermore, if NSGWD were in fact asserting an “extent of beneficial use” argument then evidence of a prescriptive period is irrelevant, and any evidence offered in support of the “extent of beneficial use” could not be considered “newly discovered” because evidence of the various fish propagating practices was available prior to the commencement of the proceedings. On the other hand, if NSGWD was in fact asserting a claim for partial forfeiture in which a prescriptive period is relevant, the evidence before the respective Special Masters was that the various claimants during the relevant time periods were using all available water such that any reduction in use was based solely on availability in which case partial forfeiture does not result. *See Hodge v. Trail Creek Irrigation Co.*, 78 Idaho 10, 16, 297 P.2d 524, 530 (1956)(holding no forfeiture where non-user is prevented from exercising his right to the water by circumstances over which he has no control). Since partial forfeiture must be proved by clear and convincing evidence, NSGWD’s alleged newly discovered evidence would have had no impact on the outcome of the recommendations made by the respective Special Masters. *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982)(clear and convincing proof is required to support a forfeiture). Based on the foregoing, this court cannot find that NSGWD’s due process rights were violated.

CONCLUSION AS TO THE "ADDITIONAL EVIDENCE" ISSUE

In conclusion, AO1 § 13(a) provides a mechanism for new parties to enter a subcase following a hearing on the merits and the issuance of the Special Master's Recommendation. A motion to alter or amend under either I.R.C.P. 59(e) or 52(b) does not contemplate the admission of new or additional evidence to advance new legal theories or relitigate the merits of a case. Rather, the tribunal is limited to the existing record. AO1 § 13(a) does not provide for a new party to enter a subcase on a motion for reconsideration (as opposed to a motion to alter or amend). The standards between a motion to alter or amend and a motion for reconsideration are clearly distinguishable. I.R.C.P. 53(e)(2) does not provide a mechanism for a special master to admit new evidence absent a directive from the district court. As such, the respective Special Masters did not err in refusing to admit evidence supporting the advancement of a new legal theory.

Lastly, due process concerns were not implicated because NSGWD could have entered the subcase prior to the hearing on the merits or the cause of action had not ripened by the time the claim was filed. Further any evidence pertaining to an alleged diminishment in quantity following the filing of a claim is irrelevant for establishing a partial forfeiture. Accordingly, the respective Special Masters did not err in refusing to admit NSGWD's evidence pertaining to "extent of beneficial use" subsequent to the hearing on the merits.

IT IS SO ORDERED.

Dated: December 29, 1999.

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication