

A. LYNNE KROGH
SUSAN E. HAMLIN
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 327-7900
FAX: (208) 327-7866

Attorneys for IDWR

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) Sub-case Nos.: 34-10807, 34-10717
) 34-12425, 34-12429
Case No. 39576)
) IDWR'S SECOND BRIEF RE:
) ELEMENTS OF SMALL DOMESTIC
) AND STOCKWATER RIGHTS
_____)

DESCRIPTIVE SUMMARY

This document is IDWR's second brief regarding the elements of small domestic and stockwater rights, submitted pursuant to the order of the special master at the hearing on the Standard Form 5 submitted in subcase nos. 34-12425 and 34-12429. Per the special master's instructions, this brief supplements IDWR's Brief Re: Elements of Small Domestic and Stockwater Rights, filed in subcase nos. 34-10717 and 34-10807 (IDWR's previous brief). IDWR's previous brief is incorporated herein by reference.

A. Quantification of Stockwater Use

The starting point for the quantification of water for stock use is the gallon per day per head standards published by the United States Environmental Protection Agency.¹ The standard for range cattle, for example, is 12 gallons per day per head.

Both the notices of claims and the director's recommendations are required to state the diversion rate in cfs (cubic feet per second) for domestic and/or stockwater (D&S) rights.² As noted in IDWR's previous brief, the diversion rate in cfs for stockwater rights is not properly determined by a simple conversion to the lowest diversion rate that is capable of producing 12 gallons per day per head. A higher diversion rate is often required, generally due to one or both of the following factors.

1. A reasonable diversion rate is one that allows delivery of the required volume in a reasonable period of time. Delivery systems vary from appropriator to appropriator, with the result that either the diversion rate, or the period of time each day that water is "on" will also vary. For example, one appropriator may pump groundwater to stock troughs, turning the water on full blast to fill the troughs in a short period. Another appropriator might divert water continuously, at the lowest rate necessary to keep water in the troughs. Other appropriators use "demand systems;" water comes on automatically when a float in the trough drops and shuts off automatically when the float rises.

2. A reasonable diversion rate includes reasonable conveyance losses in the delivery of water from the source to the cattle. Conveyance losses will also vary from appropriator to appropriator depending on the water delivery system. For example, an appropriator who pumps water directly from a well to stock troughs will have virtually no conveyance losses. Another appropriator whose stock drink from a quarter-mile ditch may have substantial conveyance losses, and may require continuous diversion at a higher rate to maintain a flow of water in the ditch.

¹ ENVIRONMENTAL PROTECTION AGENCY, U.S. DEPARTMENT OF INTERIOR, PUB. NO. epa-570/9-82-004, MANUAL OF INDIVIDUAL WATER SUPPLY SYSTEMS 485-487 (1982).

² Idaho Code §§ 42-1409(2)(c) and 42-1411(2)(c).

Due to these differences in delivery systems, a "standard" for determining what constitutes a reasonable diversion rate for a given number of stock will be a **range** of diversion rates. Generally, the minimum is the rate necessary to produce the standard diversion volume, assuming no conveyance losses and continuous diversion. To establish a maximum, IDWR used the two-hour formula as described in its previous brief. Thus, a diversion rate up to 0.24 cfs is reasonable for watering 2000 cattle; another appropriator, with 2000 head but with a different delivery system, may need only 0.04 cfs. Thus, although two appropriators may have water rights for the same number of stock, they may appropriately have different diversion rates because their delivery systems are different.

B. Investigation and Recommendation of Claims by IDWR

Absent IDWR's investigation and reporting function, the burden would be on each claimant to submit, and upon the court to take, evidence as necessary to determine each element of each water right. To promote the accuracy and consistency of water right decrees and to minimize the burden on claimants and the court in a water right adjudication, the state has made the specialized expertise of IDWR available through IDWR's investigation and reporting function.

The resources the state has made available for that function, however, are limited. IDWR has the duty to do a reasonable investigation within the spending authority granted by legislative appropriation. Those resources are not sufficient for IDWR to exhaustively investigate each and every potentially relevant fact as to each and every claim and to make a conclusive determination of the water right. Rather, IDWR reviews the claim and the information already available to IDWR, and conducts such further investigation as is

reasonable to determine whether there is sufficient information to support recommendation of the water right as claimed.

To make the most effective use of the available resources, IDWR must make determinations as to what is a reasonable level of investigation for various classes of claims. IDWR has employed two primary mechanisms to identify a reasonable level of further investigation. First, IDWR has developed standards for various types of uses, requiring less information to support a claim to water within those standards and more information to support a claim outside those standards. Second, IDWR has adopted a "tier" approach, identifying classes of claims which for various reasons merit further investigation.

Generally, with claims based on beneficial use, IDWR conducts a "licensing type" field exam,³ and contacts the claimant to obtain information supporting the priority date claimed. This level of effort is invested because there has been no prior administrative or judicial confirmation of the existence and extent of the water right.⁴

Generally, with water rights that have been previously confirmed by license or decree, IDWR begins its examination by comparing the claim to information already available to IDWR. Other information includes, for example, IDWR's decree files; license, permit and transfer⁵ files; remote sensing, including Landsat Imagery of irrigated acres and

³ A licensing type field exam includes examination/confirmation of the source, point(s) of diversion, purpose(s) of use, place(s) of use, and an examination of the water delivery system.

⁴ A lesser investigation is made of beneficial use claims for D&S use up to 0.24 cfs, as described further below.

⁵ Transfer is a term commonly used to refer to changes in use pursuant to Idaho Code §42-222.

aerial photography; water master reports; etc. If there are discrepancies⁶ between the claim and information already available to IDWR, IDWR conducts further investigation to resolve the discrepancy, which generally includes a field exam and/or contacting the claimant for further information. Thus, where there has been prior judicial or administrative confirmation of the existence and extent of the water rights, IDWR uses information already available to IDWR to limit its review to issues identified by its discrepancy analysis.

For D&S claims up to 0.24 cfs, IDWR employs a more summary review.⁷ Generally, where 1) information is available that confirms the claimed use, 2) the diversion rate claimed is within the range of what constitutes a reasonable diversion rate for the use claimed, and 3) the right is not otherwise inconsistent with information already available to IDWR (for example, licenses, decrees, statutes, etc.), then IDWR recommends the right with the claimed diversion rate. IDWR does not do a field exam including measurement of the diversion rate and evaluation of the delivery system for each D&S claim up to 0.24 cfs. The more summary review of such claims is reasonable because D&S uses are small and numerous, and seldom either contested or administered.⁸

⁶ Typical discrepancies include, for example, an unapproved change in use, evidence of non-use which could give rise to an issue of forfeiture/abandonment, omission of elements in prior decrees or licenses that are required to be determined by the current adjudication statute, etc.

⁷ A quick perusal of the director's reports in the test basins shows that the vast majority of D&S claims are recommended with diversion rates of 0.02 to 0.08 cfs. Because a convenient cut-off was necessary to identify the claims to receive a more summary review, IDWR used the 2 hour formula as described in its previous brief.

⁸ Prior to commencement of the adjudication, the legislature devised a fee schedule intended to fund IDWR's services in the adjudication. Idaho Code §42-1414. A more limited review of D&S claims is consistent with this fee schedule, which sets forth a flat \$25 fee for such claims instead of the \$50 flat fee plus variable fee based on purpose of use that is provided for other types of claims.

Finally, IDWR uses both the court-ordered notice of error process and the statutory objection process to identify claims which merit further review. If this further review yields further information that supports a different description of the water right, then IDWR will revise its recommendation (in the case of a notice of error) or enter into a stipulation (in the case of an objection), consistent with the further information.

C. Effect of Idaho Code §42-111

There appears to be a continuing concern that rights or portions of rights recommended for D&S use are limited to 13,000 gallons per day, and that the description of water rights somehow needs to incorporate this limitation. This concern is unwarranted.

As noted in IDWR's previous brief, Idaho Code §42-111 defines domestic use only for purposes of certain enumerated sections of title 42. In water rights adjudications, it defines domestic use only for purposes of determining whether a claim is subject to deferral or to determine the applicable claim filing fee. Since a D&S claim is required to state a diversion rate only in CFS, and not AFY (acre feet per year), a "bright line" conversion formula was required for purposes of determining the claim fee. For that purpose, IDWR used the two-hour formula described in its previous brief.

Once a notice of claim is filed, however, IDWR did not investigate each D&S claim to ascertain whether it fell above or below 13,000 gallons per day. This would have required a huge investment of resources to examine the nature and operation of each claimant's system to determine the diversion volume of the claimed D&S use. This would in

turn have been a huge waste of resources, when recommendation of a claimed right for purposes other than storage is not required to include an annual diversion volume.⁹

The only water rights that are by law limited to a diversion volume of 13,000 gallons per day are D&S claims to groundwater based on beneficial use with a priority after the effective date of the mandatory permit statute.¹⁰ In the unlikely event that determination of diversion volume for D&S rights becomes necessary for the administration of water rights at some future date, it will be possible to readily identify the rights subject to that limitation at that time.

At this point, to impose a 13,000 gallon per day limit on all rights recommended for D&S use up to 0.24 cfs is not only unnecessary, but inaccurate. For example, an appropriator with 1,000 head of cattle might pump 0.24 cfs from a well directly into stock troughs, filling the tank after one hour in the morning, and filling them again after one hour of pumping in the evening. As to this appropriator, the limitation would be accurate. Another appropriator might be watering her stock from a quarter-mile long ditch, requiring continuous diversion of .24 cfs to maintain a flow of water sufficient to enable the cattle to drink along the length of the ditch. As to this second appropriator, the 13,000 gallon per day limit would be too low. A third appropriator might periodically pump .02 cfs from a well directly into stock troughs for watering 100 head. As to this appropriator, the 13,000 gallon per day limit would be too high. Finally, since IDWR did not investigate to determine the diversion volume of each D&S right up to 0.24 cfs, IDWR does not have

⁹ Idaho Code §42-1411(2).

¹⁰ The effective date of the mandatory permit statute is March 25, 1963. See Idaho Code §42-229.

sufficient information, without further and costly investigation, to identify each right that is accurately limited to a diversion volume of 13,000 gallons per day and each right that is not.

Similarly, to impose a two-hour per day diversion limit to restrict D&S rights to 13,000 gallons per day is not only inaccurate but unreasonable. Limiting an appropriator to diverting water for two hours each day deprives the appropriator of reasonable flexibility in the operation of the system for no legally-mandated purpose, and imposes a restriction that is for all practical purposes unenforceable.

It must be remembered that the purpose of describing a water right in a decree is to accurately record an actual water use. IDWR has described stockwater rights with the flexibility, when claimed and when reasonable, to accommodate the manner in which water is actually used, but nonetheless limiting the water right overall by specifying the type and number of livestock served. As more fully explained in IDWR's previous brief, this further description of non-irrigation uses is a more effective and convenient means to limit annual diversion volume both for purposes of adjudication and administration.

D. Consumptive Use for D&S Rights

The only non-consumptive portion of the 12 gallons per day per head ingested by cattle is the animal waste. If it is assumed that all the moisture from solid waste evaporates, then the determinative factor is liquid waste. If it is assumed that all the liquid waste evaporates rather than seeping into the ground, then the consumptive use would be the full 12 gallons per day per head. If it is assumed that the appropriator maintains the full number of head year-round (which is frequently not the case), 12 gallons per day converts to 0.0134 AFY per head. If it is assumed that all of the liquid waste seeps into the ground, then the

non-consumptive portion would be 2.14 gallon per day per head; stated alternatively, the consumptive portion of the 12 gallons per day per head would be 9.86 gallons per day per animal.¹¹ If it is assumed that the appropriator has the full number of head throughout the year (which is frequently not the case), 9.86 gallons per day converts to 0.0110 AFY per head. Since the sole purpose for including consumptive use is as a rebuttable presumption in future transfer proceedings,¹² any margin of error should be resolved by using the smaller of the two measures to avoid an inappropriate shifting of the burden of proof in a future transfer proceeding.

As noted in IDWR's previous brief, IDWR did not include an annual volume of consumptive use in AFY for claims for D&S up to 0.24 cfs. Rather, it included a general provision stating that where consumptive use is not stated for a right or a portion of a right, the consumptive use is deemed to be "de minimis." At the hearing on the Standard Form 5, the special master inquired whether IDWR could devise language that would put an appropriate "cap" on annual volume of consumptive use in AFY for claims in this category. IDWR has concluded that such a "cap" would be inappropriate, for the following reasons.

First, as previously noted, the sole purpose for including annual volume of consumptive use is as a rebuttable presumption in future transfer proceedings. In such proceedings, the applicant bears the burden of satisfying a number of statutory criteria, including no enlargement and no injury to other water rights. A significant increase in

¹¹ Prepared using information from AMERICAN SOCIETY OF AGRICULTURAL ENGINEERS STANDARDS 39th ED., ASAE D384.1, MANURE PRODUCTION AND CHARACTERISTICS (39th ed. 1992).

¹² Idaho Code §42-1401A(2).

consumptive use from the proposed change would result in injury to other water rights. If consumptive use is determined in this adjudication as the maximum possible consumptive use for a given class of right, then it will be possible for the actual consumptive use to be less than the decreed consumptive use. This in effect shifts the burden in the transfer proceeding to an objector to show the actual consumptive use.

Without waiving any objection to such a procedure, if the special master chooses to include a provision as to the standard annual volume of consumptive use for stockwater purposes, then the provision should state that annual volume of consumptive use for cattle is 0.0110 AFY per head. Since this "standard" annual consumptive use volume for stockwater is equal to approximately 82% of the standard gallon per day diversion volume, it might be assumed that an appropriate standard for other types of stock would be based on 82% of the standard gallon per day diversion volume for that type of stock.

Although it is possible to devise a standard for annual volume of consumptive use in AFY per head for stockwater, IDWR has not been able to identify an appropriate standard for domestic use. The primary consumptive component of domestic use is the water consumed by plants, people, and animals associated with the household; the remainder of the water diverted for household use (i.e., washing and waste disposal) is generally returned to the system through sewage and/or septic systems. Typically, the most significant consumptive component of domestic use is lawn and garden watering. Outdoor lawn and garden use may vary from 0 to 1/2 acre, and the standard annual volume of consumptive use is 2.0 to 3.0 AFY per acre, depending on the area of the state in which the use is located. Thus, the annual volume of consumptive use for this component of domestic use may vary

from 0 to 1.5 AFY. The other component of consumptive use for domestic purposes is water ingested by people and animals associated with the household that is not discharged in the form of human/animal waste. A standard for this component of consumptive use is not readily ascertainable for domestic water rights as a class, because domestic rights can include multiple households, and a household can include multiple humans and other animals. Since the number of human and other occupants is not known, calculating an annual consumptive use volume based on a percentage of human and other occupants is not possible.

"De minimis" remains the most appropriate description of annual volume of consumptive use for D&S rights. Quickly summarizing IDWR's previous brief: 1) section 42-1411(2) requires a recommendation as to consumptive use, but does not require that it be stated in AFY, unlike the quantity element of the statute; provisions of the statute; 2) there is precedent in Idaho that a numeric quantification is not required where it serves no practical purpose; 3) consumptive use is included in a decree only as a rebuttable presumption for purposes of future transfer proceedings, and instances where the consumptive use of a D&S right may be significant can more appropriately be determined on a case-by-case basis at the time of the transfer proceeding; 4) annual volume of consumptive use is not necessary for the administration of water rights, which is the primary purpose for which rights are adjudicated; 5) rights for D&S use are extremely numerous, but the individual and cumulative impact of such uses is limited; 6) determining a numeric description of consumptive use for D&S rights would be extremely costly; and 7) this cost is unwarranted

given the limited impact of such rights and the limited purpose for which annual volume of consumptive use is to be determined.¹³

Because the term "de minimis" appears to be generating some confusion, perhaps the same result could be achieved by defining rights or portions of rights for domestic and/or stockwater purposes as "non-consumptive." Use of this term, however, could create the impression that annual volume of consumptive use is equal to zero, which would be inaccurate. Therefore, if the term "non-consumptive" is used, the decree should contain further language clarifying that non-consumptive means that the annual volume of consumptive use is presumed to be insignificant, which presumption can be rebutted in future transfer proceedings pursuant to Idaho Code §42-222.

E. U.S.' Objection to Quantification of "De Minimis" Rights

The United States in its brief regarding the Standard Form 5 hearing seeks to challenge the manner in which consumptive use is quantified for rights or portions of rights for D&S uses. The U.S. has not previously raised this objection, either in this subcase or the hundreds of other subcases in which it has filed objections. Thus, the U.S. has failed not

¹³ IDWR's construction of the statute is entitled to great weight, pursuant to the standard set forth in *J.R. Simplot Co., Inc. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991). The standard is met in that: 1) the agency is entrusted to administer the statute at issue, in that the statute at issue vests IDWR with the authority to investigate and recommend the claims; 2) the agency's construction is reasonable, for the reasons noted in text above; 3) the statutory language does not expressly treat the precise question at issue, stating that consumptive use shall be determined but not stating how it will be determined, unlike other quantity provisions of the statute; and 4) rationales underlying the rule of deference are present. These rationales include: 1) the agency interpretation is a practical interpretation, for the reasons previously noted; 2) IDWR has specialized expertise in the determination of water rights; and 3) the legislature is charged with knowledge of how its statutes are interpreted, and here the legislature revised the adjudication statute after the filing of the three test basin reports, altering the statute only to provide more discretion to IDWR in the description of the water rights, not to more specifically identify the manner in which consumptive use is to be determined. Idaho Code §42-1411(2) (1994 Supp.); Idaho Code §42-1411(2) (1995 Supp.).

only to follow the statutorily mandated objection procedure, but has also failed to follow court rules for the filing of a late objection.

Moreover, the U.S. seeks to raise this issue solely in this subcase and only after it has signed a stipulation expressly agreeing to the description of this element as "de minimis." This is nothing short of bad faith on the part of the U.S., to the prejudice of both IDWR and the claimant.¹⁴

The U.S. asserts that claims recommended as "de minimis" should be limited to a diversion rate of 0.02 cfs, 14.56 acre feet per year¹⁵ and 1000 head of cattle. As more fully explained above, its reliance upon section 42-111 is misplaced, and such limitations on D&S rights are neither accurate nor legally mandated.

In support of its argument, the United States claims that it used and relied upon a diversion rate of 0.02 cfs as the amount of water for its "de minimis" D&S claims, because it was unaware of IDWR's two-hour formula. This assertion is frivolous. First, as noted above, the definition in 42-111 is for purposes of determining the applicable filing fee and whether a claim is subject to deferral. The claims in question were not deferred and were not subject to a filing fee, so the U.S. had no cause for concern as to this limitation.

¹⁴ Although I.R.C.P. 15(a) allows for amendment of pleadings, such amendment requires either leave of the court or permission of the adverse party; and although the rule states that leave shall be freely given, it further provides for such leave only when justice so requires. Justice is denied, rather than served, when a party is in effect allowed to amend its pleadings to assert issues inconsistent with its express stipulation. In addition,

¹⁵ It is unclear whether the United States asserts this figure as a limitation on annual diversion volume, annual volume of consumptive use, or both.

Second, the standard diversion volumes for stockwater, and the formula for converting these diversion volumes to diversion rates, is set forth in IDWR's Idaho Water Law Handbook, which was provided to the U.S. shortly after the commencement of the adjudication and which is cited in the United States' brief. This information was again provided to the U.S. in IDWR'S Responses to Basin-Wide Interrogatories of the United States in August of 1992. Third, one can but assume that somewhere in the entire United States Department of Agriculture there are personnel with sufficient expertise to assist in the preparation of the United States' stockwater claims. Moreover, assuming that the U.S. incorrectly prepared its claims, the appropriate remedy is not an attack on others' claims, but to seek leave to properly file its own claims.

The U.S. further asserts that a maximum annual volume of consumptive use for "de minimis" rights can easily be calculated by assuming full consumption of the 13,000 gallons per day diversion volume limit. Such a calculation is indeed easy. Application of such a limitation, however, is unreasonable and inappropriate. It is unreasonable because, to identify those rights to which the limitation is applicable would require a huge investment of resources to determine which domestic and stockwater rights have an actual diversion volume of up to 13,000 gallons per day. As noted above, such an investment is unnecessary when diversion volume is not required to be determined for D&S rights. It is inappropriate because, where actual consumptive use is less, it has the effect of shifting the burden of proof in a transfer proceeding from the applicant to an objector, as more fully explained above.

Finally, if the U.S. believes that a numeric quantification of annual volume of consumptive use for D&S rights is so important, one cannot help but wonder why the United States' D&S claims omitted a numeric quantity for this element from their claims. Counsel for the U.S. suggested at the hearing that they thought IDWR might supply this element for them. With respect to the United States' claims to D&S rights appropriated under state law, IDWR did so, describing this element as "de minimis." Again, the U.S. filed no objections raising this issue with respect to IDWR's recommendations of hundreds of such claims. With respect to the United States' claims to D&S rights reserved under federal law, IDWR may only abstract the claim without changing it in any substantive manner.¹⁶ Since numeric quantification of annual volume of consumptive use for D&S claims is unnecessary for the United States' claims, it should be similarly unnecessary for the claims of others.

F. Natural flow vs. Storage

At the hearing on the Standard Form 5 for right no. 34-12429, the special master requested clarification as to 1) why the purpose of use includes stockwater and stockwater storage, 2) whether the place of use listed for stockwater storage is the place of storage or the place where cattle drink, and 3) whether the recommended diversion rate of 0.04 cfs for 2000 head of stock is inconsistent with other rights in which IDWR has recommended 0.24 cfs 2000 head of stock.

Where water is diverted and stored for later use, the description of the right includes storage as a purpose of use. The description of the purpose of use also includes a

¹⁶ Idaho Code §42-1411(3).

description of the ultimate use of the stored water, which in this case is stockwater. Thus, water diverted and stored for later use by stock is described in this water right as stockwater storage. The amount of water stored is a volume; thus, stockwater storage is quantified as a diversion volume in AFY, as required by Idaho Code §42-1409(2). Rights that do not include storage as a purpose of use are referred to as natural flow or direct flow rights. With natural flow rights, the appropriator is entitled to divert water in accordance with her priority when the appropriator has a current need for the water. If a direct flow appropriator does not have a current use, she must leave the water in the stream for use by others; the appropriator cannot divert and store the water until later when the need arises. In this instance, the claimant has a direct flow appropriation for stock purposes, and in addition has appropriated water for storage in stock ponds.

Generally, the description of the place of use for stockwater storage indicates the place where the stored water is used; it does not necessarily indicate the place where water is stored. In this instance, however, the cattle drink from the ponds, so the place of use also happens to be the location of the ponds. (In some instances, the location where water is stored is different than the place of use because the water is diverted from storage and conveyed to the place of use.)

The recommendation of 0.04 cfs for 2000 head of stock in this right is not inconsistent with the recommendation of 0.24 cfs for 2000 head of stock in other rights. As noted above, a reasonable diversion rate for stockwater purposes is not based solely on the number of head of stock, since some appropriators may have a system that uses a higher diversion rate to produce the required diversion volume in a shorter period of time, and

because a reasonable diversion rate includes reasonable conveyance losses that may differ among different diversion systems. In this instance, 0.04 cfs was the diversion rate claimed, and it is capable of producing 12 gallons per day per head for 2000 head of stock.

G. Sufficiency of Standard Form 5 (SF5)

IDWR recognizes the authority and responsibility of the court to review Standard Form Fives to ensure the fair and accurate determination of water rights. IDWR is greatly concerned, however, that hearings are to be set for all Standard Form Fives with the expectation that the parties (and particularly IDWR) will "prove up" the water right as described in the Standard Form Five to the extent necessary for the special master to enter findings of fact and conclusions of law as to the nature and extent of each water right. Implementation of the court's settlement procedure in this manner would be an expensive and unnecessary burden for IDWR, the court, and the parties.¹⁷

The law favors the avoidance or settlement of litigation, and compromises in good faith are ordinarily sustained as being upon a sufficient consideration without looking to the merits of controversy; otherwise compromises and settlements would be of little or no effect. *Moran v. Copeman*, 55 Idaho 785, 790, 47 P.2d 920 (1935). Stipulations for settlement of litigation are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown. *Kershaw v. Pierce Cattle Co.*, 87 Idaho 323, 328, 393 P.2d 31 (1964). Because of the obvious public policy favoring amicable settlement of

¹⁷ Approximately 169,000 claims have been filed in the SRBA. It can be reasonably assumed that the average objection rate will be about 10%, with the result that there will be approximately 16,900 subcases in the SRBA. It can be reasonably assumed that at least 90% of these subcases will settle, with the result that approximately 15,210 Standard Form Fives will be filed in the SBRA.

litigation, agreements accomplishing such result will be disregarded only for the strongest of reasons, which reasons must be shown by clear, satisfactory, and convincing evidence.

Lomas & Nettleton Co. v. Tiger Enterprises, Inc., 99 Idaho 539, 542, 585 P.2d 949 (1978).

The sole **contested** issue in these subcases is the inclusion of federal lands in the description of the water rights in the director's report. This issue has been resolved by an agreement to remove the federal lands from the description of the right.¹⁸ There are instances in which a claimant can establish a right to the use of water on federal lands; there are also instances in which a claimant cannot establish a right to the use of water on federal lands. A final determination of whether, in a particular instance, an appropriator has properly established such a right can involve issues of law of general significance, as well as issues of fact and law peculiar to that particular claim. In this instance, the claimant and the objector have chosen to resolve the issue through a good faith compromise of contested issues of fact and law. Where the SF5 describes an element of the right differently than described in the director's report, the basis for that element is therefore correctly described as the stipulation of the parties. As to these elements, there is no longer any contested issue requiring judicial resolution. Compelling the parties to "prove up" the appropriateness of this resolution would in effect require the parties to litigate an issue they have chosen not to litigate.¹⁹ It defeats the purpose of settlement agreements, which is to avoid the cost to all

¹⁸ With respect to claim no. 34-12425, this resulted in removal of the claim.

¹⁹ Further, it could result in a judicial determination of an issue of general significance in a setting where there is insufficient adversity to ensure that the issue is thoroughly addressed.

concerned of litigating the merits of the controversy, as well as defeating the judicial policy to encourage settlements.

The remaining elements of the water rights are **uncontested**. The basis for these elements is described in the SF5 in the manner required in the instructions for the SF5, which is "as recommended in the director's report." The adjudication statute provides that uncontested portions of the director's report are "admitted as true facts."²⁰ Since the nature and extent of the water right is the ultimate fact to be determined, these elements have been admitted as true facts. Under traditional rules of civil procedure, water right adjudications were extremely burdensome for the claimants and the court because the claimants were required to submit and the court was required to take evidence as necessary to determine each water right. The adjudication statute minimizes the burden on the claimant and the court by providing a report/objection procedure that identifies contested issues that merit the expenditure of resources on the part of IDWR, the parties, and the court to achieve a judicial resolution. Requiring the parties to "prove up" uncontested elements defeats the economies that this statutory procedure is intended to achieve.

More importantly, such wide-open hearings invite parties to raise objections to a water right for the first time in a hearing on an SF5, which is exactly what happened in this case. As noted above, the assertion of such objections is contrary to both the adjudication statute and the rules of civil procedure, and result in substantial prejudice to other parties

²⁰ Idaho Code §42-1412(9).

who were entitled to rely on the express agreement of the signatories but must nonetheless incur substantial costs in responding to the inappropriate assertion of such objections.

The Idaho Supreme Court has characterized the role of IDWR as akin to a stakeholder, whose sole interest is in the accurate determination of water rights.²¹ As a signatory to an SF5, IDWR reviews the proposed SF5 to ensure that it is not inconsistent with available information and with laws/policies/standards governing the recommendation of claims. The settlement procedure thus incorporates an appropriate mechanism to ensure that stipulations are reasonable and therefore an adequate basis for entry of judgment.²²

Where IDWR has signed a stipulation, it has fully complied with its responsibilities to promote the accurate determination of water rights by reviewing and signing off on the stipulation. In an effort to minimize the costs to all concerned, IDWR has made a large investment of its resources in settlement efforts. If IDWR were further required to "prove up" these stipulations, it would unnecessarily divert the available resources away from IDWR's duties with regard to the investigation of unreported and reported but contested claims.

²¹ *Idaho Department of Water Resources v. United States*, 122 Idaho 116, 122, 832 P.2d 289 (1992), *rev'd on other grounds* ___ U.S. ___, 113 S.Ct. 1893 (1993).

²² Generally, courts have expressed a policy of deference to the specialized expertise of an administrative agency which has concluded that the settlement is appropriate. See e.g. *Conservation Law Foundation of New England, Inc. v. Franklin*, 989 F.2d 54, 58 (1st Cir. 1990); *Securities and Exchange Commission v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689, 81 S.Ct. 1309 (1961). Courts in western states have also expressed a policy of deference to the findings of the state water resource agency in water right adjudications. E.g. *In re Bassett Creek and its Tributaries in White Pine County*, 62 Nev. 456, 155 P.2d 324, 325 (1945); *In re Waters of Tualatin River and its Tributaries*, 229 Or. 81, 366 P.2d 174, 179 (1961); *In re Adjudication of the Water Rights of the Upper Guadalupe River Segment of the Guadalupe River Basin*, 625 S.W.2d 353, 3663-364 (Tex.Civ.App. 1981), *aff'd* 642 S.W.2d 438 (Tex. 1982).

Given IDWR's available resources, the burden to "prove up" a stipulation will ultimately fall to the claimants/objectors. As noted by the Idaho Supreme Court, IDWR's only interest is in promoting the accurate determination of water rights; it does not share the claimants' interest in ensuring that the existence and extent of any particular right is judicially confirmed. Although the SF5 expressly notes that stipulations will not be automatically approved by the court, the parties nonetheless have a reasonable expectation that the filing of an SF5 will not engender substantial further costs, since the whole point of a stipulation is to limit the parties' additional costs by compromising contested issues.

Due to the interrelationship of the water rights to be determined in the SRBA, the determination of any one water right has the potential to affect others who are not parties to the subcase. The court therefore has a legitimate concern as to the effect that judgments based on stipulations could have on third parties. However, the potential for such effect is no greater with a judgment entered after stipulation than with a judgment entered after litigation. In either event, the adjudication statute and the court's SRBA Administrative Order No. 1 already provide procedures to protect the interest of third parties. First, the docket sheet provides notice to other claimants of both the objections and responses, allowing other claimants the opportunity to intervene; second, the docket sheet provides notice to other claimants of entry of a special master's report, at which point any claimant may file a notice of challenge to the report. The resources of IDWR, the parties, and the court might be most efficiently spent by reserving a more detailed judicial review of stipulations to those instances in which a third party has identified a harmful and inappropriate effect from the stipulation through a challenge to the special master's report.

As previously noted, IDWR acknowledges the authority and responsibility of the court to review Standard Form Fives. In conducting this review, however, the court should be guided by the following two principles. First, to avoid substantial prejudice to the parties to a stipulation, a signatory to the stipulation should not be heard to challenge the description of the water right as set forth in the stipulation, absent properly raised and clearly proven defenses to the validity of stipulation, such as duress, fraud, etc.²³ Second, to avoid unnecessary cost to IDWR, the parties, and the court, the court's review of an SF5 should begin, and absent compelling reasons to the contrary should also end, with the presumption that the SF5 is valid and that the description of the water right contained therein is accurate. This presumption arises by virtue of 1) established judicial precedent, which favors entry of judgment upon stipulation of the parties absent a compelling reason to do otherwise, and 2) the adjudication statute, which provides for entry of judgment in accordance with the director's report absent objection. Such a presumption is reasonable, because the SF5 is based on 1) IDWR's investigation and review, and 2) the voluntary and good faith agreement of IDWR and the parties.

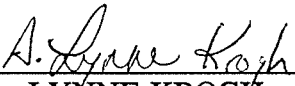
H. Conclusion

IDWR reaffirms its continuing commitment to the cooperative efforts of the court and the parties to resolve subcases through the settlement procedure established by the court's SRBA Administrative Order No. 9. IDWR hopes that the court will consider the thoughts

²³ Where the parties to legal controversy, in good faith enter into a contract compromising and settling their adverse claims, such agreement is binding upon the parties, and, in the absence of fraud, duress, or undue influence, is enforceable either at law or in equity according to the nature of the case. *Wilson v. Bogert*, 81 Idaho 535, 347 P.2d 341 (1959).

and concerns expressed in this brief in the implementation of this procedure in the test basins. Where, as here, the stipulation is reasonable and was entered into voluntarily and in good faith, IDWR respectfully submits that the special master has sufficient basis upon which to issue its report recommending that these water rights be decreed as described in the Standard Form Fives.

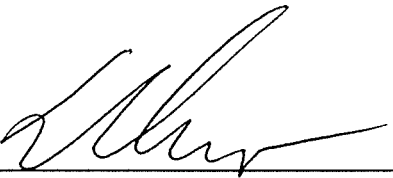
DATED this 21st day of April, 1995.


A. LYNNE KROGH
Deputy Attorney General

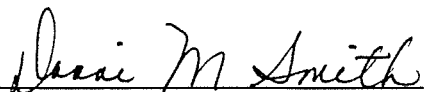
State of Idaho)
) ss.
County of ADA)

David B. Shaw, being first duly sworn, upon oath, deposes and says:

That I am the Adjudication Bureau Chief for IDWR, and that I have read the foregoing memorandum, know its contents, and that the statements contained therein are true to the best of my knowledge and belief.


DAVID B. SHAW
Adjudication Bureau Chief

Subscribed and sworn to before me this 21st day of April, 1995.


Notary Public for Idaho
Residing at: BOISE ID
My commission expires: 12/5/2000

Certificate of Mailing

I certify that on the 21st day of April, 1995, I mailed copies of the foregoing document, including all attachments, with sufficient first class postage, to the following:

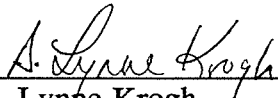
Chief, Natural Resources Div.
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

M.B. Hiller
P.O. Box 52020
Idaho Falls, ID 83405-2020

U.S. Dept. of Justice
Env't & Natural Resources Div.
550 West Fort St., Box 33
Boise, ID 83724

Bret & Jolene Zollinger
Star Route
Mackay, ID 83251

P.U. Ranch
4500 Imperial Avenue
San Diego, CA 92113
(Previous brief included)



A. Lynne Krogh