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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	)	Sub-case No.: 34-10030
	)	
Case No. 39576	)	IDWR'S BRIEF RE:
	)	ELEMENTS OF IRRIGATION RIGHTS
_____	)	

DESCRIPTIVE SUMMARY

This document is IDWR's brief regarding the elements of irrigation rights, submitted in lieu of an amended Standard Form 5 pursuant to the order of the special master dated March 22, 1995.

A. Annual volume of consumptive use

Annual volume of consumptive use for this right is stated in the remarks section of IDWR's recommendation. The remarks recommended for this right are discussed below.

B. Elements

The language in the remarks section of IDWR's recommendation can be integrated with the enumerated elements of this right as follows. The need for each of the remarks is

addressed in the sections below.

Element 3 (quantity):

Use of this right with rights listed below is limited to a total combined diversion rate of 12.8 cfs. Combined right nos.: 34-00084, 34-0000293, 34-00294, 34-00767, 34-000768, 34-02245.

Element 5 (point of diversion):

Right no. 34-02245 is also diverted through point of diversion described above.

Element 8 (place of use):

Use of this right with rights listed below is limited to the irrigation of 320 acres in a single irrigation season. Combined right nos.: 34-00084, 34-0000293, 34-00294, 34-00767, 34-000768, 34-02245.

Element 9 (annual volume of consumptive use):

Use of this right with rights listed below is limited to a total combined annual consumptive use volume of 800 AF. Combined right nos.: 34-00084, 34-0000293, 34-00294, 34-00767, 34-000768, 34-02245.

C. Combined Use Remarks Generally

The combined use of multiple water rights for irrigation of the same lands can be illustrated most simply with the following example.

Claimant A has a surface water right to 0.80 cfs for the irrigation of 40 acres (the statutory standard of 0.02 cfs per acre). Due to the relatively late priority of the water right, however, in many years there is insufficient water to fill the claimant's right throughout the irrigation season; late in the season in some years there is no water pursuant to this right. Claimant A therefore acquires an additional right to 0.80 cfs from groundwater for the irrigation of the same 40 acres (the statutory standard of 0.02 cfs per acre). The claimant needs 0.02 cfs per acre to irrigate the 40 acres, for a total beneficial use of 0.80 cfs. The claimant's surface water is delivered through a gravity system, but the groundwater is

pumped, so the claimant uses surface water as long as it is available, using groundwater only as needed, to avoid the pumping cost from the groundwater use.

IDWR would recommend the surface water right for the full 0.80 cfs for the irrigation of 40 acres; IDWR would also recommend the groundwater right for the full 0.80 cfs for the irrigation of 40 acres. But, since the total beneficial use under both rights is 0.02 cfs per acre for the irrigation of 40 acres, IDWR includes a remark limiting the total diversion rate to 0.80 cfs, and the total irrigation to 40 acres. This allows the claimant to take the full amount needed from surface water, or from groundwater, or some combination of both, but prevents the claimant from using more than the 0.80 cfs that can be beneficially used on 40 acres from both sources. Recommendation of the rights in this manner accurately reflects actual use and allows the water user a reasonable level of flexibility in the use of water. At the same time, it avoids the possible misconception that the appropriator is entitled to the sum of the diversion rates (0.80 cfs + 0.80 cfs, for a total diversion rate of 1.60 cfs) or that the appropriator is entitled to use water on the sum of the irrigated acres (40 acres + 40 acres for a total of 80 acres), either of which would be double the actual beneficial use under the two water rights.

With multiple rights for irrigation of the same parcel, IDWR does not state the annual volume of consumptive use for each right. Rather, IDWR includes a remark in each right stating the total annual volume of consumptive use under both rights. In this example, if the standard consumptive use volume in the area where the place of use is located is 2.5 afy (acre-feet per year) per acre, IDWR would recommend 100 afy (2.5 afy times 40 acres) for the two rights.

IDWR does not state a consumptive use for each right individually because the portion of the total annual volume of consumptive use that is actually consumed under each water right cannot reasonably be determined. In a wet year, most of the water supply may be provided by surface water; in a dry year most of the water supply may be provided by ground water. The consumptive use volume provided by each right will vary from year to year depending on the portion of the total water supply provided under each water right in any given year. But since the rights are used in combination, the essential limit is the total annual consumptive use volume from both rights.

Idaho Code §42-1401A(3) provides that annual volume of consumptive use is included solely as a rebuttable presumption for purposes of future transfers (changes in use) pursuant to Idaho Code §42-222. The two primary limitations on a proposed transfer are that the change not result in an expansion or in injury to other water rights. In a future transfer proceeding, the claimant would therefore have to show that a proposed transfer of either or both water rights would not result in a total consumptive use greater than 100 AFY. A proposed transfer that would result in the irrigation of more than 40 acres would be an enlargement in use of the right and would presumptively cause injury by increasing the total annual volume of consumptive use under the two rights.

D. Combined Use Remarks for the Bitton Water Rights

The above example illustrates the application of combined use remarks in a simple factual setting. The facts can become much more complicated. It is not uncommon for an appropriator to acquire various parcels of land over time, sometimes with appurtenant water rights and sometimes without. The appropriator may bring the "dry" land under irrigation

by trying to "spread" the appropriator's existing water rights or by acquiring water rights appurtenant to other lands and transferring the water rights to the appropriator's lands, or a combination of both. The appropriator may integrate the irrigation systems so that all of the water rights can be used on all of the appropriator's lands, or may maintain separate systems for different lands and/or different sources of water, or may have partially overlapping diversion systems from different sources. In the Big Lost River Valley, where there has been a great deal of "trade" in both land and water rights, both together and separately, complicated fact patterns are the norm.

In this instance, the Bittons have claimed and were recommended a total of 7 water rights for the irrigation of 320 acres of land. Five of the water rights are from the Big Lost River. Right no. 34-00084 was originally decreed to irrigate lands in 4 quarter-quarter sections (3.2 cfs for 160 acres); none of the water right is used on the original lands and is instead now used on the 320 acres currently owned by the Bittons. Right nos. 34-00293 and 34-00294 were originally decreed to irrigate lands in five quarter-quarter sections (4 cfs for 200 acres); the water rights are now used on the 320 acres currently owned by the Bittons, which include the original place of use. Right nos. 34-00767 and 34-00768 were originally decreed to irrigate lands in 7 quarter-quarter sections (5.6 cfs for 280 acres); the water right is now used on the 320 acres currently owned by the Bittons, which include some, but not all, of the original place of use.¹

¹ Water rights 34-00084, 34-00293, and 34-00294 have priorities that for the Big Lost River are relatively late; water is generally available for these rights only in the early part of the irrigation season. Water rights 34-00767 and 34-00768 have earlier priorities and therefore offer a more secure but not totally reliable water supply.

Thus, these Big Lost River rights were originally decreed for a total of 12.8 cfs for lands in 16 quarter-quarter sections (640 acres, or approximately 0.02 cfs per acre); the water rights have now been consolidated and all are used for irrigation of the same 320 acres, for a total of 0.04 cfs per acre. Idaho Code §42-220 provides that water rights can be decreed for more than 0.02 cfs per acre only where the claimant demonstrates that more is reasonably necessary. In this instance, IDWR recommended the full decreed amount for the 320 acres currently irrigated due to conveyance losses in the delivery of water between the place of use and the point of diversion.²

The claimant also has an alternative source of water for a portion of these lands under the remaining two Grant Creek water rights. Right no. 34-00769, the subject of this subcase, was originally decreed for use on the same lands as right nos. 34-00767 and 43-00768; it is now used on 115 of the 320 acres now owned by the Bittons. Water right no. 34-02245 was licensed for use on 21 acres; although the place of use has changed somewhat it was originally and continues to be used on 21 acres within the same 115 acres to which 34-00769 is appurtenant. The total of the two Grant Creek rights is 0.80 cfs.

The sum of the diversion rates for all seven water rights is 13.6 cfs; the total combined diversion rate for all seven water rights is nonetheless limited to 0.04 cfs per acre, or a total of 12.8 cfs. Thus, for 115 acres out of the 320 acre total, the appropriator can choose to use either Grant Creek water or Big Lost River water, or some combination of both. The claimant may not, however, divert more than a total of 12.8 cfs at any one time

² Although total use under all the water rights has shrunk from a possible maximum of 640 acres to the current 320 acres, use of each of these water rights on the full 320 acres is an expansion in use of each of the individual water rights.

from both sources. The remarks therefore limit the total combined diversion rate under all rights to 12.8 cfs.

In addition, since all of the water rights are used on the same 320 acres, each water right contains a remark limiting the total combined use of all of the rights to 320 acres. Similarly, each water right contains a remark limiting total combined annual consumptive use to 800 AF (the standard 2.5 afy per acre for this area times 320 acres).³

E. Point of diversion

As noted above, the recommendation for this right includes a remark noting that right no. 34-02245 (the other Grant Creek water right) is also diverted through the same point of diversion. The Big Lost River Rights also contain a remark noting that water is delivered through the Bartlett-Bitton and/or Kent ditches.

Technically, these remarks are not necessary to define the water right. They do, however, provide useful information that further describes the water right.

With respect to the Grant Creek water rights (34-00769 and 34-002245), the point of diversion for each right is described as the same quarter-quarter section. One could not determine from the quarter-quarter description alone whether both rights are diverted from the same point, or from different points located in the same quarter-quarter section. The remark clarifies that both rights are indeed diverted at the same point of diversion.

With respect to the Big Lost River water rights, the points of diversion are again described by quarter-quarter. Where there is a name in common usage for the canal or ditch

³ Because consumptive use is the measure of the water consumed by the growing of crops, the recommended consumptive use does not vary due to conveyance losses as does the recommended diversion rate.

that conveys the water between the point of diversion and the place of use, IDWR includes this information in a remark. In Basin 34, for example, many of the surface water rights (and some of the ground water rights) are conveyed through 22 relatively large canals operated and maintained by the Big Lost River Irrigation District that have commonly known names. Inclusion of this information in remarks allows claimants and objectors to more readily "locate" the water rights by reference to these conveyance systems.

The name of the ditch, however, is not simply an alternate description of the point of diversion. The point of diversion is the point at which water is diverted from the natural water source; the named ditch merely describes all or part of the system that conveys the water from the point of diversion to the place of use. In some instances, water is diverted from the source (such as ground water), and then delivered to the named ditch, for conveyance either to the appropriator's place of use, or in some instances to an extension ditch that then conveys the water to the appropriator's place of use. This information is nonetheless appropriately included under the point of diversion element, because it is information as to the diversion system.

As noted above, this information is not technically required to define the water right, but it does provide useful information. IDWR is aware of no statute or judicial precedent that would prohibit the inclusion of such information in the description of the right so long as that information is accurate.

By including this information in the description of the water right, IDWR is not inviting the court to address matters of administration more appropriately left to IDWR and/or the watermaster. In this context, "administration" means the distribution of water

from the public water sources to the canals and ditches of the appropriators, in accordance with rights of appropriation, pursuant to Idaho Code Title 42, chapter 6. IDWR is not inviting the court to address the manner in which IDWR and/or the watermasters carry out their duties regarding the distribution of water. The purpose of these remarks is merely to further describe the water right in a manner familiar to water users in the area.

F. 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 (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 the water right. Specifically, IDWR is concerned that language recommended in the remarks section of a water right must in each case be shown to be necessary to define the water right even where that portion of IDWR's recommendation is uncontested. Such a procedure would be an expensive and unnecessary burden for IDWR, the court, and the parties.⁴

In this subcase, the United States filed the only objection to this water right. The United States sought and was granted leave to withdraw its objection, and was dismissed as a party from the subcase. By virtue of the United States withdrawal of its objection, the director's recommendation as to this water right is no longer contested. The basis for the

⁴ Approximately 169,000 claims have been filed in the SRBA. It can reasonably be 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 reasonably be 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 SRBA.

water right is therefore correctly described in the SF5 in the manner required in the instructions to the SF5, which is "as recommended in the director's report."⁵ The adjudication statute provides that uncontested portions of the director's report are "admitted as true facts."⁶ Since the nature and extent of the water right is the ultimate fact to be determined, all elements of the water right, including those specified in the remarks section, are admitted as true facts.⁷

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 claimants and the court by providing a report/objection procedure that identifies contested issues that merit the expenditure of

⁵ Pursuant to the special master's instruction in other subcases, the SF5 does not list each element and repeat the basis for that element, but simply includes a single line providing that IDWR and the claimant agree that the entire water right is as described in the director's report.

⁶ Idaho Code §42-1412(9).

⁷ Idaho Code §42-1411(2) provides for IDWR to prepare recommendations as to certain enumerated elements, and in addition authorizes IDWR to include such other matters as are necessary to define the water rights. The language included in the remarks section of IDWR's recommendation further defines the enumerated elements and is necessary to define the water right as explained in previous sections of this brief. Even if the appropriateness of including these remarks is considered an issue of law, rather than an issue of fact, 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 above; 3) the statutory language does not expressly treat the precise question at issue, authorizing IDWR to include other matters necessary to define the right but not expressly defining or limiting the other matters; 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 expressly acknowledge IDWR's discretion, and expressly allowing IDWR to include informational language. Idaho Code §42-1411(2) (1994 Supp.); Idaho Code §42-1411(1)&(2) (1995 Supp.).

resources on the part of IDWR, the parties, and the court to achieve judicial resolution. Requiring the parties to "prove up" uncontested water rights defeats the economies that the statutory procedure was intended to achieve.

As noted by the Idaho Supreme Court, IDWR's only interest is in the accurate determination of water rights; it does not share the claimants' interest in ensuring that any particular right is judicially confirmed.⁸ IDWR has fully complied with its responsibility to promote the accurate determination of water rights by investigating and preparing its recommendation of this right, by further reviewing its recommendation in response to the filing of an objection, and preparing and filing the SF5. 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. Given IDWR's available resources, the burden to "prove up" a stipulation will ultimately fall to the claimants.

Compelling the parties to "prove up" the stipulation would in effect require the parties to litigate issues they have chosen not to litigate, either by not objecting to the director's report or by entering into a stipulation. It defeats the purpose of settlement agreements, which is to avoid the cost to all concerned of litigating the merits of the controversy.⁹ The burden on IDWR and the claimant seems particularly unfair in the present case, since the only reason this water right is on the contested subcase track is due to an objection by the

⁸ 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).

⁹ 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.

United States which it has withdrawn, and based on which it has been dismissed from the proceeding without fear of further costs from a contested subcase proceeding that it instigated.

Established judicial precedent recognizes a strong judicial policy to encourage settlement. 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.¹⁰ Stipulations for settlement of litigation are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown.¹¹ Because of the obvious public policy favoring amicable settlement of 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.¹² Courts have expressed a policy of deference to the specialized expertise of an administrative agency which has concluded that the settlement is appropriate.¹³ Courts in western states have also expressed a policy of deference to the findings of the state water resource agency in water right adjudications.¹⁴

¹⁰ Moran v. Copeman, 55 Idaho 785, 790, 47 P.2d 920 (1935).

¹¹ Kershaw v. Pierce Cattle Co., 87 Idaho 323, 328, 393 P.2d 31 (1964).

¹² Lomas & Nettleton Co. v. Tiger Enterprises, Inc., 99 Idaho 539, 542, 585 P.2d 949 (1978).

¹³ 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).

¹⁴ 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).

As previously noted, IDWR acknowledges the authority and responsibility of the court to review Standard Form Fives. But 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.¹⁵ 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.

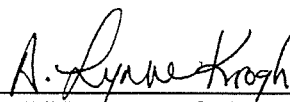
G. Conclusion

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 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

¹⁵ 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.

to issue its report recommending that this water right be decreed as described in the Standard Form Five.

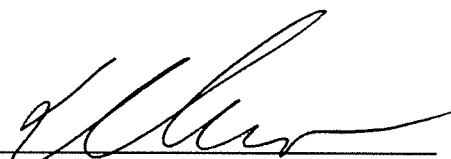
DATED this 27th day of April, 1995.


A. LYNNE KROGH
Deputy Attorney General

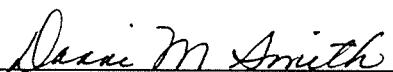
State of Idaho)
) ss.
County of ADA)

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 27th 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 28th day of April, 1995, I mailed copies of the foregoing document, including all attachments, with sufficient first class postage, to the following:

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