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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.: 34-10803
	)	
Case No. 39576	)	IDWR'S BRIEF RE:
	)	ELEMENTS OF STOCKWATER RIGHTS
_____	)	

DESCRIPTIVE SUMMARY

This document is IDWR's brief regarding the elements of stockwater rights, submitted pursuant to the order of the special master at the hearing on the Standard Form 5 submitted in this subcase.

A. Remarks

The special master asked questions concerning the meaning and propriety of remarks included in the director's report of this right, and also included in the Standard Form 5 for this right. The remarks fall into three basic categories, and each category is separately addressed in the following three sections.

B. Remarks as to Quantity of Water

The first two sentences of the remarks provide as follows:

The appropriator is entitled to the amount of water described above for stockwater purposes at a point of measurement where the delivery ditch enters the place of use described above. The portion of this right for stockwater purposes may be diverted so long as the amount of water diverted at the point of diversion for stockwater purposes does not constitute unreasonable waste and does not conflict with the public interest, as determined by the director.

Generally, a water right is measured at the point of diversion.¹ Where a decree or license states a quantity for a water right, and does not state a point of measurement, the point of measurement is presumed to be the point of diversion. Thus, the water right includes the amount of water required for the use at the place of use, and also includes reasonable losses in the conveyance of the water from the point of diversion to the place of use. The appropriator cannot in effect increase the quantity of the water right by measuring the right at some point between the point of diversion and the place of use. The policies underlying the rule is certainty in the distribution of water and the prevention of unreasonable waste of water.²

There are instances, however, in which a decree or license describes a water right with a point of measurement at some point other than the point of diversion. This exception to the general rule typically occurs in instances where for some reason the water right is not reasonably quantifiable and/or measurable at the point of diversion.

In Basin 34, there are a number of large and lengthy canals, each of which delivers water to multiple water users for irrigation and stockwater purposes, and which have

¹ Idaho Code §42-110.

² See *Basinger v. Taylor*, 30 Idaho 289, 300, 164 P. 522 (1917).

substantial conveyance losses. During the irrigation season, there is a large flow in the canal that delivers water for irrigation and stock; outside the irrigation season, there is a much smaller flow in the canal that delivers water just for stock.

Application of IDWR's standard amounts for stockwater use to these rights or portions of rights for stockwater purposes would result in rights or portions of rights up to 0.24 cfs for stockwater purposes - in other words, these rights or portions of rights are small stockwater uses. In these circumstances, recommendation of the standard amount for stockwater, measured at the point of diversion, would be inadequate due to the conveyance losses between the point of diversion and place of use. Determination of the amount of water required at the point of diversion for each right to deliver the amount required at the place of use is not reasonably feasible, as the following example illustrates.

Assume that Canal Z is one mile long, that the conveyance losses are consistent along the length of the canal, and that conveyance losses along the entire length of the canal is 4 cfs. Further assume that there are 5 claimants with rights to use of water for stock outside the irrigation season, each of whom need 0.04 cfs at the place of use. Finally, assume claimant A is located at the head of the canal, Claimant B is located a quarter-mile down the canal, Claimant C is a half-mile down the canal, Claimant D at three-quarters of a mile, and Claimant E at the end.³

³ For the sake of simplicity, the example describes a hypothetical but nonetheless representative situation. Real-life examples from the Big Lost River are far more complicated. Conveyance losses often are not consistent along the entire length of a canal. For example, the size of the ditch may vary, becoming smaller the further down the ditch, or soil conditions may vary in different segments of the ditch. Conveyance losses in a single ditch often vary depending on the time of the year. For example, during and after the irrigation season, conveyance losses in earthen ditches are lower because the bottom and sides of the canal are saturated, but at the beginning of the irrigation season the losses are much higher because more of canal is dry. Conveyance losses may also vary depending on the amount of water in the ditch, and the amount of water in the

The amount of water each appropriator alone would require at the point of diversion would be as follows:

Claimant A - 0.04 cfs
Claimant B - 1.04 cfs
Claimant C - 2.04 cfs
Claimant D - 3.04 cfs
Claimant E - 4.04 cfs

Determination of the rights in this manner would result in a total recommendation of 10.20 cfs for the five appropriators. The total actual beneficial use, however, is only 4.20 cfs. 0.20 cfs is the amount the appropriators require at their places of use, 4 cfs is the conveyance losses which all of the appropriators share. Thus, recommendation of the amount of water required at the point of diversion would result in an inflated description of the total amount of the water rights.

Another option would be to allocate the 4 cfs conveyance losses among the appropriators. The amount of water for each appropriator would therefore be as follows:

Claimant A - 0.04 cfs
Claimant B - 1.04 cfs
Claimant C - 1.04 cfs
Claimant D - 1.04 cfs
Claimant E - 1.04 cfs

Determination of the rights in this manner would result in a total recommendation of 4.20 cfs, which is consistent with the total amount of water beneficially used. However, this method assumes that all of the appropriators are always using water at the same time. If any appropriator up the canal is not using water, then the appropriators below will not receive

ditch may vary from year to year or within a single year. In real-life situations, determination of actual conveyance loss for small stockwater rights would be very complicated, and such effort would be unreasonable given the large number and small impact of such rights.

sufficient water. For example, if Claimant B is not diverting water, then only 3.16 cfs would be diverted at the point of diversion. Since 4 cfs is required to deliver water to Claimant E, the water diverted would not be sufficient to reach Claimant E's place of use.

To resolve this dilemma, IDWR recommended the standard amount for stockwater purposes, and included a remark providing that the amount is to be measured at the point where the ditch enters the place of use. This accurately reflects actual use, without inflating the total amount of all the rights on the ditch, while allowing for actual conveyance losses between the point of diversion and the place of use for any or all of the appropriators on the canal.

But as noted above, an appropriator is limited to **reasonable** conveyance losses, and the policy underlying the general rule that water rights are measured at the point of diversion is for the purpose of preventing unreasonable waste. An absolute right on the part of the water users to divert whatever water is necessary at the point of diversion to deliver the amount required at the place of use could in some circumstances result in unreasonable waste through conveyance losses between the point of diversion and the place of use.

For example, lack of adequate maintenance of the canal could result in a substantial increase in conveyance losses, which would in turn result in a need to divert more water at the point of diversion to deliver the amount required at the place of use. The director's report resolves this dilemma by including a remark allowing diversion only so long as the amount diverted does not constitute unreasonable waste, as determined by the director.

C. Remarks as to Point of Diversion

The third sentence of the remarks provides as follows:

Water is delivered through Nielsen Ditch.

Technically, this remark is not necessary to define the water right. It does, however, provide useful information that further describes the water right.

There are numerous rights recommended in the director's report that are diverted by and delivered through the Nielsen Ditch. The point of diversion for each right diverted by the Nielsen ditch is described as the same quarter-quarter section. One could not determine from the quarter-quarter description alone whether these rights are diverted from the same point, or from different points located in the same quarter-quarter section. The remark clarifies that the rights are indeed diverted at the same point of diversion.

In Basin 34, many of the surface water rights (and some of the ground water rights) are conveyed through relatively large canals 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.

D. Remarks as to Old Right Numbers

The fourth sentence of the remarks provides as follows:

This right is a combination of old right nos. 34-00675, 34-00677.

Technically, this remark is not necessary to define the water right. It does, however, provide information that is useful to claimants and objectors in reviewing the director's report, and to persons researching water right records.

Rights to the use of the Big Lost River and its tributaries were adjudicated in the case of Utah Construction Co. v. Abbott, Equity No. 222 (D.E.Id. 1923). Subsequent to the

issuance of the decree, IDWR assigned water right numbers to each water right described in the decree for reference purposes. Where two or more water rights were decreed from the same source with the same priority date, and were claimed in the SRBA for use at the same place of use, the claimant was allowed to claim the rights as a single water right on a single notice of claim, and thereby avoid the payment of an additional \$50.00 per claim. To create a "track" from the original multiple rights to the single right, IDWR included a remark indicating the old right numbers.

Because IDWR has used these water right numbers for many years, many claimants have come to identify the water right by the number assigned by IDWR based on the original decree. Therefore, inclusion of this information is useful for claimants and objectors in reviewing the director's report because it helps to identify the recommended water right by a familiar reference.

Inclusion of this information also helps to provide a historical track for the water right. It is not unusual for questions as to the administration of water rights to arise after entry of a decree of water rights, which questions require a historical analysis of the water right and/or the manner in which it was administered. This information allows a person conducting such research to readily identify the historical origin of the water right by reference to the previous water right number.

E. 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.⁵ The United States has in effect withdrawn its objection by joining in a stipulation of the parties that the water right is as recommended in the director's report. The director's recommendation is therefore for all practical purposes uncontested. The basis for the 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."⁶ The adjudication statute provides that uncontested portions of the director's report are "admitted as true facts."⁷ Since the nature and extent of the water right is the ultimate fact to be determined, all

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.

⁵ The claimants also filed an objection listing the claimants' water right number. The objection actually seeks to object to claims by the United States, and the listing of the claimants' water right number on the objection was an error.

⁶ 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.

⁷ Idaho Code §42-1412(9).

elements of the water right, including those specified in the remarks section, are admitted as true facts.⁸

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 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

⁸ 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.).

particular right is judicially confirmed.⁹ 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.¹⁰

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.¹¹ Stipulations for settlement of litigation are regarded with favor by the courts and

⁹ *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).

¹⁰ 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.

¹¹ *Moran v. Copeman*, 55 Idaho 785, 790, 47 P.2d 920 (1935).

will be enforced unless good cause to the contrary is shown.¹² 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.¹³ Courts have expressed a policy of deference to the specialized expertise of an administrative agency which has concluded that the settlement is appropriate.¹⁴ Courts in western states have also expressed a policy of deference to the findings of the state water resource agency in water right adjudications.¹⁵

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.¹⁶ This presumption arises by virtue of 1)

¹² *Kershaw v. Pierce Cattle Co.*, 87 Idaho 323, 328, 393 P.2d 31 (1964).

¹³ *Lomas & Nettleton Co. v. Tiger Enterprises, Inc.*, 99 Idaho 539, 542, 585 P.2d 949 (1978).

¹⁴ *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).

¹⁵ *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).

¹⁶ 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

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.

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

DATED this 17th day of May, 1995.



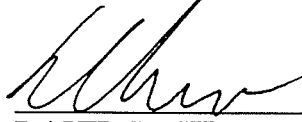
A. LYNNE KROGH
Deputy Attorney General

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.

State of Idaho)
) ss.
County of ADA)

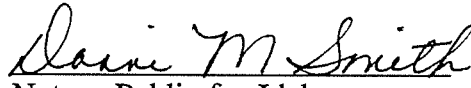
David B. Shaw, being first duly sworn, upon oath, deposes and says:

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 12th day of March, 1994.5.



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

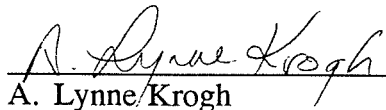
Certificate of Mailing

I certify that on the 12th day of March, 1995, I mailed copies of the foregoing document, including all attachments, with sufficient first-class postage, to the following:

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A. Lynne Krogh

Case Title	County/ Civil Number	Issues on Appeal
Rim View Trout Co. v. IDWR	Ada County No. 94822	Appeal of letter approving design concept for measuring devices subject to conditions. Includes appeal of original order requiring measuring devices, which was previously dismissed in Ada County Civil No. 92847, which dismissal was upheld in S.C. No. 18704. IDWR filed notice of appearance August 22, 1991. Status report filed September 16, 1992. Case put on inactive calendar on April 19, 1993. Case to be dismissed upon SRBA Court approval of stipulated agreement on Niagara Springs.
Molyneux v. Peck, et al	Blaine County No. CV 93-00373	Appeal from denial of transfer filed March 22, 1993. IDWR filed a Notice of Appearance March 26, 1993. Motion to take additional evidence filed May 12, 1993. Motion argued September 29, 1993. Matter returned to IDWR to take additional evidence on October 22, 1993. Hearing held February 3, 1994. Attorneys stipulated to submit prepared water district information. IDWR recommended decision issued August 8, 1994. IDWR order requesting proposals to avoid injury to existing rights September 13, 1994. Waiting for issuance of IDWR final decision on remand.
Terteling Trust No. 7 v. IDWR	Ada County Case No. 97293	Appeal from order regulating groundwater. Appeal was filed November 24, 1993. IDWR filed notice of appearance on December 13, 1993. Quail Hollow filed joinder in Petition for Review and Notice of Appearance on December 22, 1993. Flora, Inc. filed Notice of Appearance on December 27, 1993. Order Governing Judicial Review entered on January 3, 1994. Transcript and record filed with court May 18, 1994. Appellant's brief filed June 20, 1994. Court entered order staying brief schedule on July 18, 1994. Court granted Quail Hollow's motion to join appeal on August 22, 1994. Parties are pursuing resolution of the issues on appeal. Status conference held on April 3, 1995.
Branson v. IDWR, et al.	Ada County Case No. 97509 Supreme Court No. 21732	Appeal of decision issuing a permit for use of water emanating from a mine tunnel. Notice of appeal filed February 25, 1994. Court issued decision on October 24, 1994 affirming IDWR. Decision appealed to Supreme Court on December 2, 1994. Clerk's Amended Record on Appeal filed April 7, 1995. Appellant's brief April 20, 1995. IDWR's brief due May 18, 1995.