IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Subcase 65-05663B**
	)	
Case No. 39576	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON CHALLENGE; AND,**
	)	
	)	**ORDER OF PARTIAL DECREE**
_____	)	(Wood v. Troutt)

SUMMARY OF RULINGS: Recommendation of the Special Master that water right 65-05663B was not forfeited or abandoned is **affirmed**. Ruling:

1) The Special Master correctly applied the prior legal ruling of the SRBA District Court as law of the case holding that the five-year statutory period of non-use for establishing forfeiture tolls upon the filing of a claim in the SRBA;
2) Confirming prior ruling of the SRBA District Court that the five-year statutory period of non-use for establishing forfeiture tolls upon the filing of a claim in the SRBA until a partial decree is issued. Decreed rights are not insulated from forfeiture and statute begins to run anew for any period of non-use subsequent to issuance of partial decree;
3) Objector was not precluded from asserting forfeiture prior to the 1989 administrative transfer under the doctrine of judicial estoppel;
4) The Special Master's finding that irrigation took place on subject property between 1986 and 1992 was supported by substantial evidence. Objector did not establish forfeiture by clear and convincing evidence;
5) The use of the subject water right from unauthorized alternative points of diversion did not result in non-use of the subject water right for purposes of forfeiture under the facts and circumstances of the case; and,
6) Issue of "wrongful interference" with use of the water right by Objector is not necessary to resolution of issues in the case.

I.

APPEARANCES

MATT J. HOWARD, Boise, ID, Attorney for Objectors/Challengers, Edward M. Wood and Jean Wood.

CHARLES L. HONSINGER, Ringert Clark Chartered, Boise, ID, Attorney for Claimants/Respondents, Lloyd Kenneth Troutt, Jr., Kevin Troutt, Kathleen Troutt Houk, and Kelly Troutt.

ROGER S. BURDICK, Administrative District Judge and Presiding Judge of the SRBA, Presiding.

II.

PROCEDURAL BACKGROUND AND FACTS

1. At issue on Challenge is whether water right 65-05663B was forfeited for non-use for a consecutive five-year period or abandoned by the Claimants Lloyd Kenneth Troutt, Jr., *et al*. (hereinafter "Troutt").

2. Water right 65-05663 was the "parent" or "root" right for 65-05663B. Water right 65-05663 was an irrigation right for 3.36 cfs with a priority date of May 1, 1902, and a point of diversion on "Camp Creek." The right was used to irrigate property then owned by Troutt and situated in T11N, R4E, sections 8, 9, and 17 in Round Valley, Valley County, Idaho. Water right 65-05663 was partially decreed in the Payette River Adjudication, Gem County Case No. 3667, on October 29, 1986. The Payette River Adjudication was not completed and was subsequently subsumed by the SRBA. *See* ***Order Consolidating the Payette Adjudication,*** *In Re SRBA*, Case No. 39576 (Feb. 8, 2001).

3. In September of 1986, the Objectors/Challengers Edward and Jean Wood (hereinafter "Wood") purchased 640 acres of the Troutt land located in sections 8 and 17, together with 25% of water right 65-05663. The point of diversion for 65-05663 was at a point on Camp Creek located within the NE ¼ of the SW ¼ of section 8, which is a portion of the property acquired by Wood. Upon purchase of the property, Wood erected

an electric fence on the east boundary of property and posted "no trespassing" signs around his property.

4. In 1989, following completion of administrative transfer proceedings, the Idaho Department of Water Resources (IDWR) transferred to Wood the purchased portion of 65-05663 and designated the "split" right as 65-05663A. The remainder of 65-05663 was kept by Troutt to irrigate Troutt's remaining land and designated as 65-05663B. However, as a result of concerns regarding enlargements, IDWR approved Wood's transfer subject to a reduction in the irrigable acreage. In 1996, Wood filed an application with IDWR for an additional water right diverted out of Camp Creek.

5. Troutt filed a claim in the SRBA for water right 65-05663B on October 11, 1996, for 2.48 cfs for the irrigation of pastureland located in sections 8 and 9, with the same priority date, point of diversion and period of use as 65-05663. On March 7, 2000, IDWR filed a *Director's Report* for 65-05663B recommending the right as claimed with the exception that two alternate diversion points on Camp Creek were recommended. One point of diversion was recommended in the SE ¼ of the NE ¼ of the SW ¼ of section 8 and the other point of diversion was located in the SE ¼ of the SE ¼ of the SW ¼ of section 8, both located within the portion of the property acquired by Wood.

6. On April 7, 2000, Wood timely filed an Objection to the *Director's Report* alleging that water right 65-05663B should not exist because the right had not been put to beneficial use for a period of over ten years.

7. A trial was held on the merits before Special Master Thomas Cushman. Special Master Cushman, in his findings of fact and conclusions of law, concluded that the evidence presented at trial would not support a finding of forfeiture or abandonment. As alternative reasons for not finding forfeiture during certain discrete five-year periods of time the Special Master concluded that: 1) Wood was collaterally estopped to assert forfeiture prior to 1986 as a result of the partial decree entered in the Payette River Adjudication; 2) Wood was judicially estopped to assert forfeiture for periods of time prior to the 1989 administrative transfer; 3) that the erection of the electric fence and posting of "no trespassing signs" substantially and wrongfully interfered with Troutt's access to the point of diversion; and 4) that the running of the forfeiture statute tolled at the filing of the claim by Troutt in 1996.

8. The Special Master denied the *Motion to Alter or Amend the Special Master's Recommendation* filed by Wood. Wood now seeks review of the *Special Master's Findings of Fact and Conclusions of Law* on challenge.

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument was held on March 4, 2002. Neither the parties nor the Court requested additional briefing on the matter. Therefore this matter is deemed fully submitted for decision the next business day, or March 5, 2002.

IV.

ISSUES PRESENTED ON CHALLENGE

Wood raised several issues in the *Notice of Challenge*. The Court summarizes these issues as follows.

1. Wood alleges that the relevant time period for examining evidence of forfeiture extended from 1986 through 2001. The Special Master concluded the relevant time for finding forfeiture was shortened by operation of law. In this regard Wood raises the following issues:

A. Whether the Special Master erred in concluding that under principles of judicial estoppel Wood was barred from asserting periods of non-use prior to the 1989 administrative proceeding to split the 65-05663 root right?

B. Whether the Special Master erred in concluding that the filing of Troutt's water right claim in 1996 tolled the running of the forfeiture provisions of Idaho Code section 42-222? This issue is comprised of two sub-issues.

1) Whether the Special Master erred in concluding that the "law of the case" doctrine applied to the instant subcase for purposes of concluding that the running of the forfeiture statute had tolled as a result of the filing of the claim in the SRBA?

2) Whether the ruling of the SRBA District Court issued previously in *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* (Subcases 36-02708 *et al.* (Dec. 29, 1999), and applied by the Special Master, holding that the running of the forfeiture statute as to a particular water right tolled

with the filing of a claim for that water right in the SRBA, was in error?

2. Whether the Special Master erred in concluding that Wood "wrongfully interfered" with Troutt's ability to exercise the water right by denying Troutt access to the point(s) of diversion located on Wood's property through the construction of an electric fence, the posting of no trespassing signs, and conduct involving hostility regarding access to his land?

3. Whether the Special Master erred in failing to find forfeiture where Troutt diverted water from Camp Creek from unauthorized points of diversion by changing the points of diversion for the water right without proper authorization?

4. Whether the Special Master erred in the findings made and the conclusion reached that Wood failed to produce sufficient evidence to meet the clear and convincing evidentiary standard required under Idaho law to prove forfeiture or abandonment?

V.

STANDARD OF REVIEW OF A SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. FINDINGS OF FACT OF A SPECIAL MASTER.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,[1] although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo.* Wright and Miller, Federal Practice and Procedure § 2614 (1995); *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra*, § 2585.

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 582 (1971).

[1] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1st Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor D. Craig Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook." Lewis, Idaho Trial Handbook, § 35.14 (1995), (citing *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.).

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151,153, 922 P.2d 1077, 1079 (Ct. App. 1996).

2. CONCLUSIONS OF LAW OF A SPECIAL MASTER.

In contrast to the standard of review relative to findings of fact, a special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534, 861 P.2d at 104. Stated another way, the conclusions of law of a special master are not protected by or cloaked with the "clearly erroneous" standard. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it

is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

VI.

ANALYSIS AND DISCUSSION

1. THE SPECIAL MASTER DID NOT ERR IN CONCLUDING THAT THE RUNNING OF THE FORFEITURE PERIOD OF I.C. SECTION 42-222 TOLLED WITH THE FILING OF THE CLAIM IN THE SRBA UNTIL SUCH TIME AS A PARTIAL DECREE IS ISSUED.

A. The Special Master did not err in applying the prior ruling of the SRBA as "law of the case."

The Special Master ruled that evidence of non-use after the Troutt claim was filed in 1996 was irrelevant for purposes of proving forfeiture because the running of the five-year statutory forfeiture period was tolled with the filing of the claim in the SRBA. In arriving at this ruling the Special Master applied the prior ruling of the SRBA District Court (Hon. R. Barry Wood) set forth in the *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-02708 *et al.* (Dec. 29, 1999) ("*Facility Volume Decision*") at 26-28. Wood asserts that the Special Master erred by concluding that the prior ruling of the SRBA District Court is binding upon the Special Master. This Court disagrees.

In *Swanson v. Swanson*, 134 Idaho 512, 515-16, 5 P.3d 973, 976-77 (2000), the Idaho Supreme Court stated:

> The doctrine of 'law of the case' is well established in Idaho and provides that 'upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. . . .'

Id. (citing *Suitts v. First Sec. Bank of Idaho*, 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985) (quoting *Fiscus v. Beartooth Elec. Coop., Inc.*, 180 Mont 434, 591 P.2d 196, 197

(1979)). The Supreme Court also rejected the argument that the doctrine did not apply to intermediate appeals from the magistrate to the district court where the case did not reach a higher court. *Id*.

Although the SRBA has the attributes of many individual cases (i.e. subcases), for purposes of compliance with the McCarran Amendment, the SRBA is nonetheless a single case. In the SRBA, although the special master and the district court are not tribunals of independent jurisdiction, the role of the district court in reviewing decisions of the special master is essentially the same as that of a district court's review of a decision of a magistrate pursuant to an intermediate appeal. The district court applies and is bound by the same standard of review in either situation. For purposes of applying law of the case doctrine in the SRBA, this Court finds the two situations indistinguishable. In both situations the application of the doctrine prevents the successive litigation of issues that have yet to reach the Idaho Supreme Court. *Id*. (citing *Insurance Associates Corp. v. Hansen*, 116 Idaho 948, 782 P.2d 1230 (1989)).

The reason for applying law of the case as between special masters and the SRBA District Court is even more compelling. Special masters do not possess authority independent from the jurisdiction of the district court. *Olson v. Idaho Dept. of Water Resources*, 105 Idaho 98, 100, 666 P.2d 188, 190 (1983). Special masters are appointed for a limited purpose pursuant to an order of reference issued by the district court. *Id*. The primary function of a special master is one of fact finding. A special master's conclusions of law are expected to be persuasive but are not binding upon the district court. *Seccombe v. Weekes*, 115 Idaho 433, 434, 767 P.2d 276, 277 (1989)(citing I.R.C.P. 53(b)). Ultimately, the district court is charged with the specific duty of reviewing a special master's conclusions of law. Therefore, it is not within the purview of the authority conferred upon a special master to "reconsider" the prior legal rulings of the district court. Further, much of the benefit realized through the use of special masters is undermined if the district court has to repeatedly set aside a special master's conclusions of law for failing to follow a legal principle already set forth by the district court.

In the SRBA many of the legal issues that arise are of first impression for Idaho and in many instances for the rest of the country as well. For obvious reasons not every decision coming out of the SRBA is appealed. However, until such time as a decision is

appealed and precedent established, rulings by the district court are considered to be law of the case in the SRBA and the special masters are expected to follow such rulings.[2] This requirement has been consistently applied in the SRBA. *See e.g*. ***Order Granting in Part, State's Motion To Alter or Amend***, subcases 35-12939 *et al*. (Dec. 1998)(special master applying law of the case regarding ownership of water rights on public lands); ***Order Granting, in Part, United States Motion to Alter or Amend and State of Idaho Motions to Amend Objections***, subcases 35-12939 *et al*. (Sep. 1999)(addressing reversal of law of the case by Supreme Court).

In a case the magnitude of the SRBA, this requirement provides legal precedence within the SRBA until such time as a legal issue is ultimately decided by a higher court. It provides consistency between the three special masters and avoids the problem of the parties having to relitigate at the district court level issues already decided by the district court as well as the special masters having to revisit the merits of the same legal issues every time the issue arises in a new subcase.[3] This process is essential as a case management tool in the SRBA when the same controlling legal issue arises simultaneously before the three special masters.[4] One of the special masters proceeds with a particular subcase in order to get a ruling on the issue from the district court. With respect to the remaining subcases, the other special masters are required to follow the ruling of the district court. Parties to the other subcases are provided a mechanism for being heard on the legal issue proceeding before the district court. This process avoids

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[2] This is not to say the district court is precluded from reconsidering its prior legal rulings. *See e.g. Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 878 P.2d 762 (1994).

[3] The instant case aptly illustrates the point. This is the second time the issue of the tolling of the running of the forfeiture provision has been at issue in the SRBA. The first time it was not appealed. If the issue is not appealed this time, under Wood's reasoning the special masters would again have to hear argument on the issue every time it arises irrespective of the fact that the district court has already ruled on the issue twice. The issue may arise several more times before it is ultimately appealed. As such, law of the case provides efficiency and consistency to SRBA litigants and keeps the SRBA moving by avoiding having to repeatedly readdress legal issues that have yet to be appealed. Parties disagreeing with a prior legal ruling can preserve the issue before the special master, argue the issue to the district court and appeal. Consequently there is no prejudice to litigants by requiring special masters to follow the legal rulings of the district court.

[4] For example, there are several thousand subcases before the three special masters regarding federal reserved rights under Public Water Reserve 107. Most of these subcases involve the same legal issues. Efficient and timely processing of the caseload dictates that the district court rule on a particular legal issue

potentially inconsistent decisions between the special masters and the needless litigation involved in having to address the same legal issue three separate times. Without such a process the continuous relitigation of the same legal issues would essentially put the SRBA at a standstill. Ultimately, parties are not prejudiced by being foreclosed from repeatedly arguing the same legal issues before a special master because the district court is still charged with the duty of reviewing a special master's conclusions of law.

Although rulings by the district court are considered law of the case for purposes of the proceedings before the special masters, parties to the SRBA who are not initially parties to a subcase where a controlling legal issue of first impression in the SRBA is involved are permitted to enter the subcase to be heard on the issue. Any party to the SRBA that is not already a party to a subcase and disagrees with a special master's conclusions of law can become a party to the subcase by filing a motion to alter or amend. ***SRBA Administrative Order 1, Rules of Procedure*, (Oct. 10, 1997)** (***AO1***) 13. a-c; *see also Memorandum Decision and Order on Challenge*, subcases 36-00061 *et al*. (Sept. 27, 1999) at 7 fn 3 ("*Morris Decision*")(explaining purpose of motion to alter or amend in light of magnitude of SRBA). This enables the party to preserve and raise the issue on a challenge before the Presiding Judge and ultimately on appeal. If the party fails to become involved in a prior subcase involving the particular issue, the party can still raise the same issue in the subcase involving his or her own objection or response. Although the special master will apply the law of the case from the prior ruling of the Presiding Judge, the party has still preserved the right to argue the merits before the Presiding Judge on challenge and the right to appeal. This is exactly what occurred in the instant case. Even though Special Master Cushman applied the prior ruling of the SRBA district court, Wood was able to argue the issue before the SRBA district court and will also be able to raise the issue on appeal.

For the foregoing reasons the Special Master did not err in applying the prior ruling of the Presiding Judge as law of the case.

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only one time and that the special masters apply the ruling. The procedural rules for the SRBA provide a mechanism for interested parties to be heard on the matter before the district court. *See* ***AO1*** 13.a-c.

B. The Court reaffirms the prior SRBA District Court ruling that the running of the forfeiture statute tolls from the time a claim is filed in the SRBA until a partial decree is issued.

1) The "*Facility Volume Decision*."

Troutt filed the claim in the SRBA for water right 65-05663B in 1996. The Special Master ruled that any period of nonuse following the filing of the claim was irrelevant for purposes of considering forfeiture. The Special Master applied the ruling of Judge Wood, the former Presiding Judge of the SRBA, in the *Facility Volume Decision* at 26-28. Wood asserts that this prior ruling was erroneous. Wood argues that the prior ruling incorrectly analogized forfeiture to a cause of action for adverse possession. Wood argues that the forfeiture provisions of Idaho Code section 42-222 are silent as to tolling and points to the Idaho Supreme Court's recent decision in *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001). In *McCray*, the Supreme Court stated in dicta that the issue of whether the filing of a claim in the SRBA tolls the statutory period "involves urging this Court to adopt a new rule of law."[5] *Id.* at 516, 20 P.3d at 700. Lastly, Wood argues that the result of tolling the statutory period with the filing of the claim leads to a result that is inconsistent with the policy of the State of Idaho to make beneficial use of the resource because of the length of time that can elapse between the filing of the claim and the entry of the partial decree. Wood points out that during this entire period a party could elect not to use the water and at the same time not face the risk of forfeiture. This Court disagrees with Wood's arguments and reaffirms the prior ruling in the *Facility Volume Decision*.

In the *Facility Volume Decision*, a trial on the objections was conducted before the special master. Following trial the special master issued findings of fact and conclusions of law and a special master's report and recommendation. A party to the SRBA, who was not previously a party to the subcase before the special master, sought to enter the subcase by filing a motion to alter or amend. As explained above in section VI.1.A, because of the potential for issues of law to arise in any given subcase that could

[5] The statement is dicta because the Court did not address the merits of the tolling issue because the issue was not timely raised.

be controlling in future subcases, (either through law of the case or through an appeal) the procedural rules for the SRBA (*AO1*) are structured to allow parties to enter a subcase following the issuance of the special master's recommendation through a motion to alter or amend. *See* ***AO1*** 13.a-c (any party to SRBA not already party to subcase may file a motion to alter or amend special master's recommendation). The purpose of the motion to alter or amend is to allow the party to be heard on issues of law before the special master, have these same issues heard before the district court on a challenge and also on appeal. In this regard all parties to the SRBA have the opportunity to be heard on a controlling issue of law. However, the purpose of the motion to alter or amend is not to raise new factual issues and/or legal theories and then go back and litigate these facts or new legal theories after a trial or settlement has already concluded. *North Snake Groundwater District v. Gisler*, __ Idaho __, 40 P.3d 105, 108 (2002)(affirming district court regarding purpose of motion to alter or amend).

In the *Facility Volume* case, the party filing the motion to alter or amend sought to raise for the first time the issue of forfeiture of a portion of the water right and introduce evidence in support thereof. The trial on the merits of the subcase had already concluded and the special master declined to go back and reopen the case for the introduction of new evidence and legal theories and denied the motion. The special master correctly ruled that the purpose of the motion to alter or amend was not to raise new legal theories and/or present new evidence and that the movant should have timely filed an objection and initially become a party to the subcase in order to litigate new legal theories or present evidence. On challenge before the district court the movant argued that at the time the objection and response period had closed the five-year statutory period had not yet accrued and correctly asserted that an objection could not be filed based on a cause of action for "anticipatory forfeiture." The movant argued that under the circumstances the special master abused discretion by disallowing the new issue to be raised. The movant also argued that there was no other available forum within which to raise the forfeiture issue and therefore the movant was being denied due process. Further, that if the issue was not presented the partial decree issued for the water right may not reflect the true present status of the water right.

The SRBA district court denied the challenge on two bases. First, that the determination of whether to allow the introduction of new or additional evidence is discretionary with the special master and that the special master did not abuse his discretion. Secondly, the district court ruled as a matter of law that the running of the five-year statutory period had tolled once the claim had been filed until the partial decree had been entered and therefore unless the five-year period accrued prior to the filing of the claim a cause of action for forfeiture did not exist. Once the partial decree is entered the statutory period for non-use begins to run anew. Subject to some elaboration and clarification, this Court adopts and affirms the reasoning set forth in the *Facility Volume Decision.*[6]

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[6] Because of the significance of the issue and the potential for appeal the district court's prior analysis is included in its entirety.

> A claim to a water right made in the SRBA is essentially akin to a quiet title action. *See e.g., Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931) (pre-adjudication quiet title action for water right); *Sutton v. Brown*, 91 Idaho 396, 422 P.2d 63 (1966) (quiet title action can necessarily include claim for water right). A notice of claim is a pleading within the SRBA. *Fort Hall Water Users Ass'n v. United States*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995*) reh'g denied* (1996); AO1 § 2(r). The filing of a notice of claim initiates the procedure for making claim to a water right in the SRBA. I.C. ə 42-1409. A partial decree with a rule 54(b) certificate is akin to a final judgment for purposes of appealing as a matter of right. I.C. ə 42-1412(6); I.R.C.P. 54(b); AO1 əə 14,15. As a result, a water right claimant's action is pending from the time a claim is filed until a partial decree is entered.
>
> It is a settled legal principle that the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action. In *Smith v. Long*, 76 Idaho 265, 281 P.2d 483 (1955), the Idaho Supreme Court held that: "Defendant's title by adverse possession not having matured at the time this action commenced, plaintiffs are entitled to a decree quieting their title as against the claims of the defendants." *Id.* at 494-95, 76 P.2d at 276-77. In *Yorba v. Anaheim Union Water Co.*, 259 P.2d 2 (1953) the California Supreme Court stated: "[O]rdinarily the filing of an action, either by the person asserting a prescriptive right, or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period and the statute will be tolled while the action is actively pending." *Id.* at 5. *See also* 25 Am. Jur. 2d Easements and Licenses ə 69 (suit brought by claimant interrupts prescriptive period); 3 Am. Jur. 2d Adverse Possession ə 127 (effect of suit relates back to date of its commencement, and claimant can acquire no additional advantages by remaining in possession during its pendency). Thus, any period supporting a claim for title by adverse possession or prescription must have accrued prior to the claim being filed. This rule applies to the extent the action is being prosecuted or defended by the legal title holder, and in the event the action is abandoned, the statute is not tolled. 3 Am. Jur. 2d Adverse Possession ə 130.
> Since forfeiture is a species of adverse possession and prescription, it follows that once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree. In *Smith v. Hawkins*, 42 P.

2) Idaho Code section 42-222 is silent on the relationship between the operation of 42-222 and the SRBA because, among other things, the application of 42-222 extends beyond the confines of the SRBA.

Although Idaho Code section 42-222 is silent on the issue of tolling, the application of such a principle does not necessarily require the adoption of a new principle of law, nor is it inconsistent with existing law. The forfeiture provisions of Idaho Code section 42-222 are not unique or specific to the SRBA. In fact the statute does not even address the operation of the SRBA. Idaho Code section 42-222 establishes an administrative procedure for bringing a forfeiture action before the Director of the Idaho Department of Water Resources with the right of judicial review pursuant to the Administrative Procedures Act. The forfeiture provisions of Idaho Code section 42-222 have been in existence in substantially similar form since 1903. The SRBA was commenced in 1986 and is steadily working towards completion. Once completed many of the general adjudication statutes will have fulfilled their intended purpose and become more or less obsolete. However, the forfeiture provisions of Idaho Code section 42-222 will continue to operate just as before the SRBA was commenced. Consequently, the issue turns on the effect of filing a claim in the SRBA, which is akin to a quiet title action, on an existing statute that operates to terminate a property (water) right strictly by operation of law. Although Idaho Code section 42-222 is silent on the matter, there is

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> 453 (1895), the California Supreme Court, in construing California's then existing water right forfeiture statute, applied by analogy the same standards for establishing prescriptive title to real property. *Id.* at 454. In *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931), the Idaho Supreme Court, in resolving a water right transfer claim, concurred with the reasoning of the California Supreme Court in *Smith* which applied the standards of prescription and adverse possession to forfeiture. *Id.* at 488 (citing *Smith v. Hawkins*, 42 P. 453 (1895)). Therefore, pursuant to this reasoning, unless a claimant ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right), any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture. That being the case, NSGWD cannot be denied due process protections for attempting to present itself in a case with a hearing on the merits to assert a cause of action (i.e. partial forfeiture) which has not yet matured. Further, and on the contrary, if the cause of action for forfeiture has ripened before the claim is filed, it is incumbent on the person seeking to prosecute the forfeiture to get timely involved, (i.e. file an objection/response to the quantity element).

Facility Volume Decision at 26-28.

nonetheless an established body of common law that delineates the affect that the filing of a quiet title action has on the running of statutory periods affecting real property. *See infra* sections VI.1.B.3) and 4). Idaho Courts have also historically required that the five-year statutory period contained in earlier versions of Idaho's forfeiture statute fully accrue prior to the filing of a quiet title action in order to support a cause of action for forfeiture. *Id*. Therefore, as set forth below, even though Idaho Code section 42-222 is silent as to the effect of a pending quiet title action, the adoption of a new principle of law is not necessary to find that the running of the statute tolls upon the filing of a claim in the SRBA.

3) Past Idaho courts have applied the rule that the running of the forfeiture statute tolls upon the filing of a quiet title action. This same rule is applied in other jurisdictions with similar forfeiture statutes.

Wood argues that the analogy between forfeiture and adverse possession as discussed in the *Facility Volume Decision* is not a strong analogy. This Court respectfully disagrees. Wood's argument however, first assumes that the *Facility Volume Decision* was fully based on that analogy. The *Facility Volume Decision* did not rely exclusively on drawing an analogy between adverse possession and forfeiture. Idaho Courts have previously acknowledged that the five-year forfeiture period had to fully accrue before the filing of an action to quiet title to water rights.

The case of *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931), involved a suit to quiet title to a water right to determine whether a water right appurtenant to one ranch property was impliedly transferred by operation of law to another ranch property. (Idaho's early forfeiture statute provided that water could be abandoned (forfeited) on one parcel and used on another parcel to effectuate a transfer. *See e.g.* Act of March 8, 1915, ch. 34 § 3264, 1969 Idaho Sess. Laws 104.) At the time of the alleged transfer the same person owned both ranch properties. In determining whether a transfer could be implied under the forfeiture statute the Court's analysis focused on whether there was a consecutive five-year period of non-use on the ranch property to which the water right was appurtenant and a corresponding period of use on the ranch property to which the water was being applied. The Court

limited the relevant time period for considering five consecutive years of non-use and corresponding use to between the period of time the non-use/use was alleged to have started and the time the quiet title action was filed. *Id*. at 492, 6 P.2d at 488. "Therefore no five-year period elapsed . . . between 1926 **and the date of this suit June 6, 1929**." *Id*. (emphasis added). In determining the five-year time standard to be applied the Court followed the reasoning of other courts where the standards of prescription and adverse possession had been applied by analogy to forfeiture provisions. *Id*.

In *Chill v. Jarvis*, 50 Idaho 531, 298 P. 373 (1931), in a quiet title action the Court declined to find a prescriptive title to a water right because the subject water right had been previously statutorily "abandoned" (forfeited) under Idaho's then existing forfeiture statute.[7] The lower court found and the appellate court affirmed that the respondents failed to apply the subject water to a beneficial use "**for a period of more than five years prior to the commencement of the plaintiff's complaint**." *Id*. at 532, 298 P. at 374 (emphasis added).

Other jurisdictions have also tolled the running of the statutory period upon the filing of a claim. In *Smith v. Hawkins*, 42 P. 453, 455-56 (1895), the California Supreme Court held that "[t]he failure of the plaintiffs to make any beneficial use of the water for a period of more than five years next preceding the commencement of the action…results… in a forfeiture of their rights as appropriators." *Id*. Because California's early forfeiture statute did not specify a length of non-use before the water right was forfeited, the *Smith* Court applied by analogy the standards for adverse possession and prescription:

> In this state five years is the period fixed by law for the ripening of an adverse possession into a prescriptive title. Five years is also the period declared by law after which a prescriptive right depending upon enjoyment is lost for non-user; and, for analogous reasons, we consider it to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose.

[7] Historically, courts have used the term abandonment and forfeiture interchangeably. This is because earlier versions of predecessor statutes to Idaho Code section 42-222, used the term "abandonment" as opposed to "forfeiture." The Idaho Supreme Court discussed why past courts used the terms interchangeably in *State v. Hagerman Water Right Owners*, 130 Idaho 727, 729-30 fn.1, 947 P.2d 400, 402-03 fn.1 (1997). As such, the cases have to be read carefully to determine whether the Court was referring to the common law doctrine of abandonment or the statutory cause of action which is today referred to as forfeiture. In *Chill*, the Court was referring to the statute.

Id.

In *Escalante Valley Drainage Area, Water Users Claims Nos. 551, et al., v. Criddle*, 363 P.2d 777 (Utah 1961), in conjunction with a general stream adjudication in Utah, the Utah Supreme Court held that the filing of the state engineer's proposed determination of water rights before the five years had run on Utah's forfeiture statute interrupted the running of the statute. *Id*. at 779. Although general adjudications are structured differently between states, the Utah Court nonetheless recognized that the running of the statute tolled upon the commencement of the action. The above-cases demonstrate that this Court is not the first to find that the running of the statutory forfeiture period tolled upon the commencement of an action to quiet title in a water right.

4) The analogy between adverse possession, prescription and forfeiture for purposes of tolling the running of the statutory period upon the filing of a quiet title action is also appropriate.

In regards to drawing an analogy between adverse possession, prescription and forfeiture for purposes of tolling the running of the applicable statute upon the filing of a quiet title action, Wood argues the analogy is not strong as applied to the SRBA. This Court respectfully disagrees. Causes of action for adverse possession and prescription in effect prevent the record owner against which the action is brought from asserting title to real property against the adverse claimant upon the accrual of the applicable statutory period. The record owner can interrupt the running of the statute by either taking some physical action (e.g. physically interrupt exclusive possession or one of the other elements) or by filing a quiet title action in a court of appropriate jurisdiction. As explained in the *Facility Volume Decision*, it is a general rule that the commencement a quiet title action tolls the running of the statute, so long as the action is being prosecuted. *Facility Volume* at 27 (citing *Smith v. Long*, 76 Idaho 265, 281 P.2d 483 (1955)). Of particular significance is the fact that the record owner need not take the physical action route or otherwise engage in a self-help remedy in order to preserve his or her rights. Simply stated, seeking redress in a court of appropriate jurisdiction so long as the action is prosecuted to a final judgment does not prejudice the record owner.

Although Idaho Code section 42-222 is silent as to this general rule, the underlying concept of avoiding prejudice by coming into court, as opposed to engaging in self-help, applies equally to the running of the forfeiture statute relative to the SRBA. The magnitude and procedural mechanics of the SRBA make the application of this rule even more necessary. Typically, in disputes involving forfeiture, the party asserting the forfeiture is either claiming a right to the water that has been allegedly forfeited or for a more senior priority among the interrelated priorities (*inter sese*) on a given water source. The adverse party may already be making use of the water or benefiting from its non-use. This is a fairly common situation in the SRBA. Under Idaho Code section 42-222, a party can avoid forfeiture by resuming use before the five years has elapsed or before another water user claims the water.[8] However, in lieu of disrupting the status quo of existing uses and potentially breaching the peace, as well as potentially being liable for damages by wrongfully depriving another user of water if the water right is ultimately determined to be forfeited, a party seeking to prevent a forfeiture should be able to file an action akin to a quiet title action (a claim in the SRBA), preserve his or her right and not be prejudiced. Among other things, the SRBA is akin to a *quasi in rem* quiet title action.[9] In *Escalante Valley Drainage Area, Water Users Claims Nos. 551, et al., v. Criddle, supra,* in tolling the forfeiture statute in conjunction with a general adjudication, the Utah Supreme Court reasoned that it would be "arbitrary and anomalous" to require that claimants defending against forfeiture be required to use their water right during the pendency of the adjudication where such use would disrupt the orderly process of distributing water during the pendency of the adjudication. *Id*. at 778.

In the SRBA further difficulty arises if a party takes physical action to resume use before the expiration of the five years and a dispute erupts because the existing uses are disrupted. Parties would be required to take such action if the running of the statute

[8] The Court acknowledges that the issue of resumption of use prior to an intervening claim for the water is currently on appeal. *Sagewillow Inc., v. Idaho Dept. of Water Resources,* 135 Idaho 24, 13 P.3d 855 (2000)(currently on appeal following remand). However, heretofore, the law has supported the resumption defense. *See e.g., Jenkins v. Idaho Dept. of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256 (1982).

[9] Historically, disputes involving water rights were brought pursuant to Idaho's quiet title statutes. I.C. § 6-401 *et seq*. In 1981, Idaho Code section 6-401 was amended to provide that quiet title actions involving water rights shall henceforth be brought under Chapter 14, title 42, Idaho Code.

failed to toll. Because of the number of subcases in the SRBA and the way the SRBA is structured, holding proceedings akin to a preliminary injunction for purposes of fashioning a preliminary or temporary remedy pending the ultimate adjudication of the water right is highly impractical and inconsistent with the timely completion of the SRBA. It is also highly impractical for IDWR to have to file a director's report in advance of the reporting schedule for an individual water right for purposes of conducting preliminary injunction proceedings or other temporary relief or to reinvestigate and re-report a water right claim because a forfeiture period subsequently accrued after the initial director's report was filed.[10] For efficiency and due process concerns, IDWR collectively reports water right claims within a particular subbasin and reporting area. The comprehensive statutory notice requirements of the SRBA make reporting water rights on an individual basis prohibitive not only from an efficiency standpoint but also from a due process perspective. *See* I.C. § 42-1411(6).

Wood also argues that the holding in the *Facilities Volume Decision* is against public policy because of the considerable length of time between when a claim is filed and the time when a partial decree is entered, tolling the statute permits a party to refrain from beneficially using the water right during the entire period. While there may be some validity to this argument, in this Court's view the timely completion of the SRBA outweighs the potential that a period of non-use many be temporarily extended in a few situations.[11] In the instant case, the claim was filed October 11, 1996, IDWR filed the Director's Report March 7, 2000, the objection was filed on April 7, 2000, and the trial on the merits was held March 16, 2001. Hence even if the subject water right was not being put to beneficial use the period between the filing of the claim and the trial on the merits was about five years, six months. Although tolling the statute may allow a period of non-use to be extended during the pendency of the SRBA, even Idaho Code section 42-222 allows for an extension of the forfeiture period for an additional five years and therefore such period of non-use is not necessarily out of line with the policy of the state

[10] IDWR would have to reinvestigate and re-report the water right claim on the granting of a motion to file a late objection based on a newly accrued cause of action for forfeiture because the filing of the director's report is what provides notice to the rest of the SRBA.

[11] Many of the subcases involving considerable lengths of time between the filing of the claim and the entry of partial decree involve federal reserved rights which are not subject to state forfeiture.

of Idaho. For purposes of evaluating policy concerns, the time between the filing of the claim and the issuance of the partial decree in this case is well within that additional time frame and therefore not out of line with public policy.

The SRBA would never be able to be completed if every time a forfeiture period accrued prior to the issuance of the partial decree the Court had to entertain a new cause of action within a particular subcase.[12] Hence from a public policy perspective there is a degree of balancing between the competing interests of temporarily being able to forego the beneficial use of the water and the timely completion of the SRBA. Failure to toll the running of the forfeiture statute during the pendency of the SRBA would inundate the SRBA with motions to file late objections alleging forfeiture at all stages of the proceedings.

The SRBA is a lawsuit not a permanent water court. Because of the magnitude of the case and the way the SRBA is procedurally structured a "point in time" approach must be taken with respect to investigating, reporting, and adjudicating the rights. For example, absent subsequent administrative changes, IDWR reports the status of a water right as of the date of inception of the SRBA.

This does not mean the decreed right is insulated from forfeiture. Once the partial decree is issued for the water right, the non-user has five years within which to put the water to beneficial use before the decreed right is subject to forfeiture. In Idaho a decreed water right is not insulated from forfeiture, however, it has long been established that once the decree is issued the statutory time period for non-use begins to run anew. Thus after the partial decree is issued five years of non-use must accrue before the water right is again subject to forfeiture. In *Graham v. Leek*, 65 Idaho 279, 283, 144 P.2d 475, 479, the Idaho Supreme Court made this point clear in holding: "[A] decreed right is not immune from a showing that it has been abandoned [forfeited], and such showing does not impeach the decree upon which the right was based, **where evidence received with reference to the abandonment [forfeiture] relates to a time subsequent to the**

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[12] Again, this is what occurred in the *Facility Volume Decision*. The party sought to state a new cause of action for forfeiture after the trial on merits had already concluded. The cause of action for forfeiture could not have been brought earlier because the five years had not accrued.

decree." *Id*. (citing *Albrethesen v. Wood River Land Co*., 40 Idaho 49, 231 P.418, 422 (1924))(emphasis added).

For the foregoing reasons, the Court affirms the prior ruling of the *Facility Volume Decision* holding that the running of the statutory forfeiture provision of Idaho Code section 42-222 tolls upon the filing of a claim in the SRBA until a partial decree is entered. After the partial decree is entered the statutory period begins to run anew.

2. THE SPECIAL MASTER ERRED IN CONCLUDING THAT UNDER PRINCIPLES OF JUDICIAL ESTOPPEL WOOD WAS BARRED FROM ASSERTING PERIODS OF NON-USE PRIOR TO THE 1989 ADMINISTRATIVE PROCEEDING TO SPLIT THE 65-05663 ROOT RIGHT.

In 1989, Wood applied for an administrative transfer of the portion of the root right 65-05663 that was purchased in conjunction with his land purchase. The Special Master ruled that under principles of judicial estoppel Wood was precluded from asserting that any period of time that accrued prior to the transfer application could be counted toward the five-year statutory period. The doctrine of judicial estoppel prevents a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding. *Robertson Supply Co. v. Nicholls*, 131 Idaho 99, 101, 952 P.2d 914, 916 (1998)(citing 31 C.J.S. *Estoppel and Waiver* § 139, § 144 (1996)). The Special Master reasoned that in the administrative proceeding Wood took the position that the root right 65-05563 was a valid water right for the purpose of completing the administrative transfer of a portion of the right and then in the subsequent SRBA judicial proceeding, Wood took the inconsistent position that the root right or portion thereof was forfeited for non-use. This Court respectfully disagrees with the Special Master's conclusion and holds that under the circumstances of the transfer proceeding, for purposes of proving forfeiture Wood may present evidence of non-use prior to 1989, but not prior to the date water right 65-05663 was previously decreed in the Payette Adjudication (Oct. 1986).

The purpose of the 1989 administrative proceeding was to transfer ownership of that portion 65-05663 purchased by Wood. Although the transfer provisions of Idaho Code section 42-222 can subject the entire water right to review, an administrative

transfer proceeding is not a judicial quiet title action and as such does not toll the running of the forfeiture statute. *See e.g*. Idaho Op. Atty. Gen. No. 88-4 (1988). Likewise, the issuance of an administrative order completing a transfer does not start a new five-year period as in the case of a judicial decree. Subject to conditions of approval imposed by IDWR to avoid injury or enlargement, the transferee succeeds to the interest held in the water right by the predecessor. Simply stated, the transfer proceeding does not automatically operate to clear the title of adverse claims in the same manner as a quiet title action. For example, if a portion of the root right is being transferred and four years of non-use of the root right have already accrued at the time the transfer is complete, the transferee has one year within which to resume use of the transferred portion of the water right or the right can be subject to forfeiture. If use of the transferred portion of the right is resumed within the year but use of the retained portion of the root right is not, the retained portion can still be subject to forfeiture. In this Court's view, the pursuance of an administrative transfer proceeding without more does not constitute a judicial admission concerning the particular condition of a water right.

In this case, the root water right was valid at the time of the 1989 transfer proceeding because no five-year period of non-beneficial could have possibly accrued. In the 1989 administrative proceeding, Wood took the position that the subject water right was valid for purposes of the transfer. In the present litigation, Wood is not taking the inconsistent position that the water right had been forfeited as of 1989, rather he is taking the position that the five-year time period started to accrue prior to the 1989 administrative proceeding. In other words Wood's current position is that the water right was on its way to being forfeited in 1989, but the forfeiture was not completed by 1989. Therefore, the Court finds that the position assumed by Wood in the 1989 transfer proceeding is not inconsistent with the position Wood has taken in this action.

Based on the foregoing, the Court finds the relevant period for considering forfeiture beginning October 29, 1986, the date the partial decree was issued for water right 65-05663 in the Payette Adjudication and ending October 11, 1996, the date Troutt filed a claim for water right 65-05663B in the SRBA.

3. THE SPECIAL MASTER DID NOT ERR IN FINDING THAT WOOD FAILED TO PROVE FORFEITURE BY CLEAR AND CONVINCING EVIDENCE.

Wood next argues that the Special Master erred in finding that there was insufficient evidence to support a finding of forfeiture or abandonment. This Court respectfully disagrees. The Special Master made the finding that irrigation occurred on the Troutt property from throughout the 1980's at least up until 1992. This Court has reviewed the evidence in detail and concurs with this finding. The Special Master made the additional finding that any periodic non-use or diverting from alternative points of diversion was as a consequence of Wood's own conduct. Consistent with the standard of review of a special master's findings of fact, this Court has reviewed the transcript and the exhibits to determine whether the Special Master's findings are supported by substantial evidence. Pursuant to I.R.C.P. 53(e)(2), the district court shall accept the factual findings of the special master unless they are clearly erroneous. *McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001)(citing *State v. Hagerman Water Right Water Right Owners Inc*., 130 Idaho 736, 740, 947 P.2d 409, 413 (1997)). In *McCray*, the Idaho Supreme Court recently reiterated the elements and the evidentiary standard that must be met by the party asserting forfeiture.

> Forfeiture of water rights is governed by Idaho Code section 42-222(2), which provides that water rights may be lost if they are not applied to the beneficial use for which the rights were appropriated for five continuous years. I.C. § 42-222(2). However, this Court has often repeated its position that forfeiture is not favored in Idaho. *Aberdeen-Springfield Canal Co. v. Piper*, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999). Because of its disfavor for water right forfeiture, Idaho law requires that such actions be proved by clear and convincing evidence. *Id*.

McCray, 135 Idaho at 515, 20 P.3d at 699. Abandonment, as the legal term is now used, is distinguishable from forfeiture in that abandonment is a common law doctrine as opposed to a statutory declaration and is not contingent on a specific period of non-use. Abandonment requires intent to abandon the water right and an actual surrender or relinquishment of the right. Intent to abandon must also be proved by clear and convincing evidence. *State v. Hagerman Right Owners, Inc*., 130 Idaho 727, 729-30 fn. 7, 947 P.2d 400, 402-03 (1997); *Jenkins v. State Department of Water Resources*, 103

Idaho 384, 388, 647 P.2d 1256, 1260 (1982)(citing *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); *Gilbert v. Smith*, 97 Idaho 735 552 P.2d 1220 (1976)).

In *McCray*, the Supreme Court also discussed the weight and effect given to the director's report in the SRBA.

> Upon the filing [of the director's report] with the court, the director's report, except for the explanatory material . . . *shall constitute prima facie evidence of the nature and extent of the water rights* acquired under state law.
> . . .
> Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right. Since the director's report is prima facie evidence of the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report. Any party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection.

Id. at 513-14, 20 P.3d at 697-98 (quoting I.C. § 42-1411(4) and (5)). The *McCray* Court explained further that the *prima facie* status accorded the relevant portions of the director's report constitutes a rebuttable evidentiary presumption shifting the burden of going forward with evidence to the party contesting the director's report. Until the contesting party produces sufficient evidence to rebut the presumption, the facts contained in the director's report are presumed to be correct. However, once rebutted, the presumption disappears and the claimant retains the burden of persuasion on the issue and the facts upon which the presumption is based are weighed with all other facts that may be relevant. *Id*. (citing *Hagerman Water Right Owners, Inc*., 130 Idaho at 736, 947 P.2d at 409.)

A) The evidence presented in support of, and in opposition to forfeiture and abandonment.

In this case, the director's report recommended the elements as claimed by Troutt with one additional point of diversion. Trial Exhibit A1. Wood objected to the recommendation asserting forfeiture based on five consecutive years of non-use. At the

hearing on the merits, Wood presented evidence of five consecutive years of non-use in support of his objection. Troutt presented conflicting evidence.

Wood purchased the west ½ of section 8 in 1986. Camp Creek enters section 8 from the south and flows in a northeasterly direction through the west ½ of section 8, and drops elevation to the valley floor. Camp Creek then leaves the Wood property and crosses into the east ½ of section 8, and continues in a northeasterly direction onto the NE ¼ of section 8, which is owned by Troutt. The irrigation ditch used to deliver water to the Troutt property from Camp Creek originates at a point of diversion on Camp Creek located in the NE ¼ of the SW ¼ of section 8, which is on the Wood property. From the diversion works, the ditch runs parallel to Camp Creek on the Wood property but maintains a little higher elevation than the creek by contouring the side of the valley before dropping elevation. The ditch also crosses into the east ½ of section 8 parallel to the creek but at a higher elevation. At that point the ditch continues to run northeasterly down and across the Troutt property. Trial Exhibit 3 (map depicting respective locations for illustrative purposes), Trial Exhibit 4. The place of use recommended for 65-05663B is 124 acres located in the NE ¼ of section 8. Trial Exhibit A1.

In 1987, Wood began construction of an electric fence running north south between the east and west halves of section 8, separating the Wood property from the Troutt property. The electric fence was characterized as "substantial" and thus apparently more than just an electric "hot wire." The construction of the fence was completed in the fall of 1988. Tr. p. 31. The fence crossed over Camp Creek and the irrigation ditch and the access road at the point where all three leave the west ½ of section 8 and enter the east ½. The fence provided no gate across the road or other access at this point for purposes of maintaining the ditch, diversion works, etc.. Tr. p. 155-56. Edward Wood testified that the sole reason for constructing the fence was to keep the Troutt livestock off his property. Tr. p. 34. Edward Wood testified that he had a "hazy recollection" regarding whether anyone requested access to the point of diversion. "Vaguely, the only person that ever requested access to the diversion point was Ken Troutt, Sr., and he did not really request access to the diversion point." Tr. p. 36. On cross-examination Wood was evasive and argumentative regarding specifics of the incident. Tr. pp. 52-57.

Edward Wood testified that after purchasing the property in 1986 up until 2000 during the spring and summer he walked his property line approximately four times a week in plain view of the Troutt property and never observed any irrigating on the Troutt property. Tr. pp.45-46, 48. He also testified that he enjoyed the isolation of his property and as such whenever he witnessed a person in the vicinity of Camp Creek he viewed the person through binoculars. Tr. p. 59. Jean Wood also testified that since purchasing the property in 1986, she also never witnessed any irrigating taking place on the Troutt property. Tr. p.125.

Wood also introduced into evidence photographs taken in 1992 and 1999, depicting various segments of irrigation pipe in disarray on the Troutt property. The pipes appear to be damaged and unsuitable for irrigating. Trial Exhibits 9 and 10. Edward Wood also testified that as early as 1986 or 1987, the main ditch used to deliver water from Camp Creek to the Troutt property was badly deteriorated in sections, in overall disrepair and full of debris. Tr. pp.27, 37. Wood introduced into evidence photographs depicting segments of the ditch in 1999 on his property in the west ½ of section 8. Trial Exhibit 6, Tr. p. 30. Edward Wood admitted that he did not view the condition of the ditch prior to 1986 and could not verify with certainty whether or not the ditch was capable of delivering water. Tr. pp. 49-51.

Kay Walker, the field agent for IDWR who investigated Troutt's water right claim for purposes of the director's report testified that she conducted a field exam of the Troutt property on August 21, 1999. Tr. p. 91. Walker testified that prior to conducting her investigation she reviewed the documents associated with the 1989 transfer proceedings, including letters sent by Edward Wood indicating that the water right had not been used. Tr. pp. 93-94. Walker testified that because she could not verify use of the water from aerial photographs she conducted an on-site field inspection. Tr. p. 91. Her field investigation consisted primarily of a view of the subject premises and a comparison of the condition of the vegetation on the property with that of surrounding properties where water use had been verified. Tr. pp. 94-95. Walker testified that there were natural grasses located on the Troutt property that could be used to graze livestock and that the condition of the grasses looked no different than the grasses on all other surrounding properties in the area. Tr. pp.105-06. Walker testified that because the

vegetation on surrounding properties all appeared in the same condition and the presence of the irrigation ditches on the property she could not conclude that the water right had been forfeited. Tr. pp. 94-95, 100. In conjunction with her field investigation, Walker prepared a field report form. Trial Exhibit 47. On page two of the form Walker indicated that she did an office verification and "drive by" inspection due to the "forfeiture issue." On page 3, line item H of the report, Walker checked the "yes" box in response to a question regarding whether there had been an indication of a five-year continuous period of non-use. Also, on page 11, line item C, in response to a similar question regarding non-use, Walker also checked the "yes" box. Walker testified, however, that the responses were based solely on Wood's representations regarding non-use in the letter Wood sent to IDWR in conjunction with the prior transfer proceeding and Wood's objection. Tr. p. 108. Walker testified that she could not find evidence of forfeiture based on her personal observation and she did not conduct further inquiry into the alleged forfeiture because of the recent issuance of the partial decree in 1986 and approval of the administrative transfer in 1989. Tr. p. 97. Following her investigation Walker prepared a Claim Profile Report indicating that she could not verify the right had been forfeited even though they received information regarding such. Trial Exhibit 38.

Claude Bryson was in charge of running cattle and irrigating on the Troutt property between 1967 and 1978. Tr. p. 133. Bryson testified that that every spring he had to clean the supply ditch of debris and repair the ditch with a shovel from the damage done by cattle and ground squirrels. Tr. pp. 137-38. Bryson testified that the condition of the ditch on the Wood property depicted in Trial Exhibit 6 appeared worse than when he was irrigating the property. Tr. p. 138. Bryson also testified that irrigating would typically begin in June through the first part of August then there would be no more available water. Tr. p. 140. Bryson testified that he used to also divert water from Camp Creek from the east ½ of section 8 by using boards to raise the level of the water until it spilled in to a different diversion ditch. Tr. pp. 135-34.

Kevin Troutt took over primary responsibility for irrigating in 1979 until about 1985 when his brothers took over the responsibility. Tr. pp. 151-52. Kevin testified that his first encounter with the electric fence occurred in 1988 when he went to get the irrigating started for the season and was concerned that he would not be able to access the

usual point of diversion they previously used for "years and years." Kevin went to ask his father about the fence and his father told him not to cross the fence for "fear of trespassing." Tr. p. 145. Kevin testified that his father stated that he did not have good success obtaining permission to cross the fence. Tr. p.152. Kevin testified that the condition of the ditch depicted in Trial Exhibit 6 was typical of the conditions he encountered each spring. Tr. p. 141.

Ken Troutt, Jr. testified that he had a conversation with his father, Ken Troutt, Sr., regarding a conversation his father had with Edward Wood after Wood purchased the property regarding the problems his father had in gaining permission to access the Wood property. Ken testified that his father was very upset over the conversation. Tr. p. 159. Ken recalled on a later occasion in 1991 helping his father use an irrigation pump to pull water from Camp Creek over to the irrigation ditch. Tr. pp. 159-161, 168. Ken testified that during a period in 1993 he assisted his father in diverting water from the same point of diversion in the east ½ of section 8 referred to by Claude Bryson. Tr. p.162. Ken testified that it was a high water year and he and his father had pretty good success irrigating from this diversion point. Tr. p. 162. His father passed away the next spring. Tr. p. 162. Ken testified regarding an incident when he and some friends rode snowmobiles onto the Wood property and after leaving the Wood property Edward Wood chased them in a pickup. He testified that Edward Wood became violent to the point where Ken became afraid he was going to be harmed. Tr. pp. 165-66.

Kurt Hawkins owned property adjacent to the Troutt property between 1980 and 1995. Hawkins lived on the property continuously except for three months during the winters. Hawkins testified that he witnessed irrigation taking place on the Troutt property on several occasions between 1985 and 1992. Tr. pp. 178-79.

Andy Kendall ran his own cattle on the Troutt property between 1986 and 1989. Kendall testified that he was all over the Troutt property during this time period. He testified that he even did some of the irrigating. Tr. p. 187. Kendall also testified that the irrigation season for irrigating from Camp Creek is short and most of the irrigating is done primarily in the spring. Tr. pp.187-88. Kendall also testified to an incident that occurred when one of his cattle strayed onto the Wood property before the fence was

erected. Edward Wood told Kendall "in no uncertain terms that he was not to go there." Tr. p. 192.

Dan Swain testified that he ran cattle on the Troutt property during the summer of 1989. Swain testified that Ken Troutt, Sr., told Swain that he would irrigate as long into the summer as he could until the water was gone. Tr. p. 195. Swain ran his cattle until the middle of August 1989. Tr. p. 194. Swain paid two thousand dollars for payment of the pasture use in June of 1989. Trial Exhibit 11.

Mike Madrietta testified that in the mid-nineties Mrs. Troutt asked him to do a valuation of the timber on her property. Madrietta was on a snowmobile and accompanied by his young son. Relying on directions given by Mrs. Troutt they inadvertently crossed onto the Wood property. Edward Wood came down in his pickup in a "rage," "cussing" "shaking" and "screaming." Madrietta attempted to explain the circumstances. Wood pursued criminal trespassing charges against Madrietta. Tr. pp.198-202.

B) The evidence presented does not meet the evidentiary standard of clear and convincing evidence for establishing forfeiture or abandonment.

The starting place for considering forfeiture is 1986 after the root right 65-05663 was decreed in the Payette Adjudication. Both Wood and Troutt are bound by that decree. Any period of non-use prior to the entry of the decree cannot be used for purposes of establishing forfeiture in this action. *Graham v. Leek*, 65 Idaho 279, 283, 144 P.2d 475, 479 (1943). The evidence supports a finding that Troutt was irrigating the property from the point of diversion that he had used for "years and years" until the fence was completed in 1988. The evidence also supports a finding that after that time the property was irrigated from two other points of diversion located on the Troutt property, one from a pump and the other from a diversion dam. Aside from testimony from members of the Troutt family, testimony was also presented from disinterested parties. Kurt Hawkins testified that he witnessed irrigating taking place up until 1992. Andy Kendall testified that he ran cattle on the Troutt property between 1986 and 1989, and even did some of the irrigating himself. Dan Swain also ran cattle on the property in

1989 where it was represented that the property would be irrigated as long as Camp Creek could supply water. During this period the property was used to pasture cattle. In fact, Wood built the electric fence for the sole purpose of keeping out the Troutt's cattle. The fact that the Troutt property has been used for cattle grazing during the relevant period is indicative of the fact that irrigation was taking place. In this Court's view, the evidence supports the Special Master's finding that there was some irrigating taking place on the Troutt property between 1986 and 1992, albeit from unauthorized points of diversion after Wood erected the electric fence in 1988.

The conflicting evidence of non-use presented by Wood really distills down to the testimony of Edward and Jean Wood regarding their personal observations of non-use between 1986 and 2000. The statements regarding forfeiture contained in Kay Walker's report were predicated on Edward Wood's representations, not Walker's observations. The photos presented of the irrigation ditch depict its condition in 1999. It is undisputed that Troutt had not used that portion of the ditch since 1988. The Special Master found that the Woods were "mistaken" in their observations regarding non-use. However, after reviewing the record this Court would also discount any weight given to the Wood testimony. Significant to this Court is the testimony of Edward and Jean Wood, both firm in their conviction, to the effect that they carefully monitored any activity on their property as well as the adjacent Troutt property and never observed irrigating taking place. However, from the testimony of the disinterested witnesses it is clear that periodic irrigating did in fact take place between 1986 and 1992. This is inconsistent with the Woods' testimony. Wood then argues that even if irrigating did take place on the Troutt property it was from an unauthorized point of diversion. While this argument raises another independent issue (*see infra*), it does nothing to lend credibility to the Woods' statements regarding their observations. Consequently, even though the evidence is conflicting, there is nonetheless substantial evidence to support the Special Master's finding that irrigation took place periodically between 1986 up through the 1992 irrigation season. Although not a necessary prerequisite to upholding the special master's findings, this Court would have also reached the same result.

Based on irrigating taking place in 1992, the earliest a consecutive five-year period of non-use could have accrued is the end of the 1997 irrigation season. Other than

the testimony of Kay Walker that the property did not appear to be dewatered in 1999, no evidence was presented that irrigation took place on the Troutt property after 1992. The Special Master, following law of the case, correctly concluded that the running of the statute tolled in 1996 upon the filing of the claim.

Alternatively, however, even without the tolling of the statute in 1996, this Court would not have found factually that the evidence would support a finding of continuous non-use after 1996 based on clear and convincing evidence. The only evidence of non-use after 1992 is again the testimony of the Woods, upon which the Special Master apparently placed no weight. Edward and Jean Wood each testified unequivocally that no irrigation took place between 1986 and 2000 and that they consistently observed the Troutt property when walking their fence line. The weight of the evidence, however, is that irrigation did take place on the Troutt property between 1986 and 1992. It would be incongruous to find the Woods' testimony incredible as regarding non-use between the period of 1986 and 1992, but place more weight on the evidence as to any subsequent periods. A court must accept as true the positive, uncontradicted testimony of a credible witness unless his testimony is inherently improbable or rendered so by the facts and circumstances disclosed at the trial. Bell, George M., *Handbook of Evidence for the Idaho Lawyer*, 13 (2d Ed. 1972)(citations omitted). Further, to require Troutt to disprove non-use based on Wood's broad sweeping testimony regarding non-use would also result in an impermissible shifting of the burden of proof.

This Court would also question the credibility of the testimony of Edward Wood that he had a "hazy recollection" and vaguely remembers that the only person requesting access to the point of diversion was Ken Troutt, Sr., and "he did not really request access to the diversion point." Given Edward Wood's preoccupation with people on his property this Court finds it difficult to accept that Wood could not remember every minute detail. Further, it is relatively easy to infer from the testimony that Ken Troutt, Sr., initially sought access to the point of diversion and the response he received from Edward Wood was of such a violent nature that Ken Troutt, Sr., was concerned about his sons going onto the Wood property.

Lastly, evidence of non-use alone is not sufficient to prove forfeiture. In order for a water right to be forfeited water must be available to satisfy the water right during the

alleged period of non-use. Thus low water years and/or the relative priorities on a given source must be taken into account. The testimony indicated that Camp Creek experienced good and bad water years and that even in good years the Creek could not supply water throughout the entire summer. If for example during a dry year there was not water available to use the water right then that year is not considered a period of non-use for purposes of forfeiture. Additionally, the water must also be needed during the period of non-use. In the case of irrigating a pasture, unusually high precipitation within a growing season may alleviate the need to irrigate during the part of the summer the creek is still capable of supplying water. The Court raises this issue because Wood cautioned the Special Master to not be misled by the condition of the vegetation depicted in the photograph exhibits and explained that the property sits in a lowland that receives runoff as well as a lot of precipitation in the spring. Given the fluctuations in the precipitation and the fluctuating supply of water from year to year, the availability and necessity of water during any of the periods in question are relevant to establishing forfeiture by clear and convincing evidence. No such evidence was presented.

In this Court's view, Wood did not prove a consecutive five-year period of non-use by clear and convincing evidence nor is there any evidence of intent to abandon the water right.

C) Under the facts and circumstances of this case, Troutt's use of an unauthorized alternative point of diversion does not result in a forfeiture of the water right.

Wood next argues that even if Troutt did put water 65-05663B to beneficial use that Troutt diverted the water right from an unauthorized point of diversion and therefore any such use cannot be used to defeat forfeiture. Wood cites the holding in *McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001), in support of this proposition. The Special Master made the finding that Troutt used the alternative points of diversion as a result of Wood's wrongful conduct in denying Troutt access to the proper point of diversion and concluded that a party wrongfully interfering with the use of the water of another cannot assert forfeiture of that water right. This Court holds that under the facts and circumstances of this case the use of the water right from the

unauthorized alternative point of diversion did not result in a non-use that can be counted toward the five-year statutory period.

In *McCray*, in defense of a cause of action for forfeiture, the appellant and successor-in-interest to the claimed water rights (McCray) asserted that the use of the water rights at issue was resumed when the respondent (Rosenkrance) used the water rights to irrigate land to which the water rights were not appurtenant. McCray argued that because Rosenkrance was applying more water than that to which he was entitled, the inference was that the excess amount of water being applied was attributable to the use of the water rights at issue. The Idaho Supreme Court disagreed. While the Supreme Court noted that Rosenkrance never sought authorization from IDWR or the water district to change the place of use, the underlying basis for the decision was the determination that because Rosenkrance was applying water to land to which the water rights were not appurtenant, Rosenkrance was not applying the subject water rights. The Supreme Court held, "It is clearly the law in Idaho that a water right cannot be resumed when the facts clearly establish that water was not applied to land to which it was appurtenant." *Id*. at 518, 20 P.3d at 702. Furthermore, there were no additional facts from which to infer that Rosenkrance was using the subject water rights. Rosenkrance did not contend that he believed he was using or otherwise intended to use the water rights claimed by McCray on his own property. Nor did Rosenkrance seek authorization to change the place of use for the water rights.

This Court does not read the ruling in *McCray* to stand for the proposition that the automatic sanction for failing to receive proper authorization prior to changing any element of a water right is forfeiture upon accrual of the five-year period of such unauthorized use. Idaho Code §§ 42-351 and 42-1710B set forth IDWR's enforcement authority as well as the related penalties relative to the situation where water is applied in a manner that does not conform with a valid water right. This Court concedes that an unauthorized change to an element of a water right, depending on the nature and extent of the change, could result in a situation where the water right alleged to be used is in fact not being used, such as occurred in *McCray*. In such a situation, the use of the water does not constitute use of the water right, and therefore could be subject to forfeiture after

a consecutive five-year period of such non-use. However, this is not what occurred in this case.

The facts of this case are distinguishable from those in *McCray*. Troutt was using the water right on the land to which it is appurtenant. There is no evidence from which it could be inferred that Troutt was using a different water right (or use of water with no right at all) as a result of the unauthorized changes in the point of diversion. The previously decreed point of diversion and recommended points of diversion originated upstream on Camp Creek. Troutt moved the point of diversion downstream and pumped the water from Camp Creek into the same ditch used to deliver water from the proper points of diversion. The other unauthorized point of diversion diverted Camp Creek water into another ditch delivering water to the Troutt property to which the right was appurtenant. Troutt essentially just moved the point of diversion of a surface water right downstream (from the west ½ of section 8 to the east ½ of section 8). There is also no evidence regarding whether there were other water rights on Camp Creek injured from the change in point of diversion. Idaho Code section 42-108 allows a water user to change the point of diversion provided there is no injury to other water users. Idaho Code section 42-222 provides a process whereby potential injury is identified and addressed in advance of the user making the change.

While this Court does not condone the unauthorized change in the point of diversion, in this particular case the change in the point of diversion for the consecutive five-year period does not constitute non-use of the water right for purposes of establishing forfeiture. Idaho Code sections 42-108 and 42-222 do not provide for forfeiture of the water right as the sanction for changing the point of diversion without prior authorization. Idaho Code sections 42-351 and 42-1710B set forth the appropriate sanctions. In this case, Troutts were clearly using the same water right (i.e. 65-05663B) on the same land for the same beneficial use and therefore this Court finds that the use from the unauthorized points of diversion in excess of the five-year statutory period did not result in forfeiture of the water right.

Lastly, it should be made clear that this ruling is limited to the issue of whether or not the water right was forfeited and shall not be construed as a judicial order or decree authorizing the change in the point of diversion or otherwise insulating Troutt from

whatever action IDWR may pursue, if any, with respect to the unauthorized point of diversion. Troutt may have a statutory right (*see* I.C. § 49-1102), or other easement by operation of law, to access the correct points of diversion and should either pursue appropriate legal remedies to gain proper access or alternatively seek to have the points of diversion changed through the appropriate administrative processes.

D) The issue of Wood's wrongful interference with use of the water right.

The Special Master concluded additionally that Wood was precluded from asserting forfeiture because Wood wrongfully interfered with Troutt's use of the water right by erecting the fence, posting no-trespassing signs and displaying violent behavior towards people accessing his property. Having decided the merits on other grounds it is not necessary to address the issue.

VIII.
CONCLUSION

For the above stated reasons, this Court affirms the recommendation of the Special Master, except on the issue of judicial estoppel.

IX.
ORDER OF PARTIAL DECREE

THEREFORE, based on the resolution of all pending matters in the above-captioned subcase and this Court's affirmation of the *Special Master's Report and Recommendation* as herein set forth, IT IS ORDERED that water right 65-05663B is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

IT IS SO ORDERED

DATED: MAY _____, 2002

SIGNED:_____

Roger S. Burdick
Administrative District Judge and
Presiding Judge of the Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: MAY _____, 2002

SIGNED:_____

Roger S. Burdick
Administrative District Judge and
Presiding Judge of the Snake River Basin Adjudication