IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 42772-2015

IN THE MATTER OF DISTRIBUTION OF WATER TO WATER RIGHT NOS. 36-02551 & 36-07694 (Rangen, Inc.)
IDWR Docket No. CM-DC-2011-004

RANGEN, INC.

Petitioner / Appellant,

v.

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources

Respondents / Respondents on Appeal,

v.

IDAHO GROUND WATER APPROPRIATORS, INC., FREMONT-MADISON IRRIGATION DISTRICT, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, TWIN FALLS CANAL COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, MINIDOKA IRRIGATION DISTRICT, and CITY OF POCATELLO,

Intervenors / Respondents on Appeal.

IGWA's Response to Rangen's Opening Brief

Appeal from Twin Falls County case no. CV-2014-1338
(Consolidated Gooding County case no. CV-2014-179)

Honorable Eric J. Wildman, District Judge, Presiding.

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RESPONSE ARGUMENT

1. The name "Martin-Curren Tunnel" refers to the man-made tunnel into the basalt cliff above Rangen's fish hatchery, not Billingsley Creek.

The SRBA partial decrees for Rangen's water rights list "Martin-Curren Tunnel" as the source of water.[1] The Director of the Idaho Department of Water Resources (IDWR) found that this name refers to the "large, excavated conduit constructed high on the canyon rim and extends approximately 300 feet into the canyon wall."[2] Since it is the only source of water listed on Rangen's decrees, the Director ruled that Rangen is authorized to divert "only water discharging from the Curren Tunnel."[3]

Rangen contends this was an error, claiming the name "Martin-Curren Tunnel" refers not only to the tunnel, but also to Billingsley Creek and the springs at the head of Billingsley Creek.[4] Rangen's objective is to obtain authorization to divert water from Billingsley Creek even though its water rights do not include a point of diversion from Billingsley Creek or identify Billingsley Creek as a source of water. To try and achieve this objective, Rangen contends "the term 'Martin-Curren Tunnel' constitutes a latent referential ambiguity."[5]

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[1] Final Order at 5 (R. Vol. 21 p. 4162).

[2] Final Order at 5 ¶ 16 (R. Vol. 21 p. 4161).

[3] Final Order at 33, ¶18 (R. Vol. 21 p. 4190 ¶ 18).

[4] *Rangen's Opening Brief* at 7, 12.

[5] *Id*. at 7.

Rangen's latent ambiguity argument is a two-step process. First, Rangen must prove "that the latent ambiguity actually existed."[6] This requires demonstrating that the name "Martin-Curren Tunnel," though clear on its face, "loses that clarity when applied to the facts as they exist."[7] Only after passing this hurdle will courts consider "what was intended by the ambiguous statement."[8]

The district court thoroughly considered and rejected Rangen's latent ambiguity argument.[9] Its detailed and sound analysis is incorporated herein by reference.[10] In addition, IGWA wishes to make the following points.

1.1 A latent ambiguity cannot be established by evidence of intent.

As just mentioned, courts will not consider what was intended by a particular statement until *after* it is proven to be ambiguous. Thus, evidence of intent cannot be used to establish a latent ambiguity. Indeed, it would upend the parol evidence rule if parties could sidestep it simply by alleging a latent ambiguity, then present extrinsic evidence of their intent to establish the purported ambiguity. The parol evidence rule is not so lenient:

> A contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract, or, more generally, the contract's meaning. A contract is not ambigu-

[6] Rangen Opening Br. at 11 (quoting *Snoderly v. Bower*, 30 Idaho 484, 487 (Idaho 1917)).

[7] *Knipe Land Co. v. Robertson*, 151 Idaho 449, 455 (Idaho 2011).

[8] *Id.*

[9] Clerk's R. pp. 678-681.

[10] *Id.*

> ous simply because the parties urge varying interpretations. A mere disagreement between the parties as to the meaning of a disputed contractual provision is not enough to support a claim that the contractual language is ambiguous, as any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of its terms.[11]

Consequently, the latent ambiguity doctrine is narrowly limited to circumstances where the provision becomes unclear "when applied to the facts as they exist."

1.2 There is only one reasonable meaning of "Martin-Curren Tunnel" when applied to the facts as they exist.

Rangen contends there is a "latent referential ambiguity," meaning uncertainty as to what the name "Martin-Curren Tunnel" refers to.[12] When a referential latent ambiguity is alleged, the court must determine whether the reference is legitimately susceptible to two different meanings. Rangen acknowledges this, stating: "This Court should find that the local name 'Martin-Curren Tunnel' is reasonably susceptible to at least two different meanings depending upon the context in which it is used."[13]

Rangen falls short, however, in proving two different meanings of "Martin-Curren Tunnel" *when applied to the facts as they exist*. As explained below, there is only one reasonable meaning of the name "Martin-Curren Tunnel" under the facts as they exist because (a) there is only one tunnel within the 10-acre tract that identifies Rangen's point of diversion; (b) Rangen's authorized diversion structures do not collect water from

[11] 17A Am Jur 2d Contracts § 331 (internal citations omitted).

[12] Rangen Opening Br. p. 7.

[13] Rangen Opening Br. p. 14.

Billingsley Creek; (c) Rangen's partial decrees distinguish between the Martin-Curren Tunnel and Billingsley Creek; (d) all other water rights with "Martin-Curren Tunnel" as the source receive water from the tunnel alone; and (e) IDWR's Water Appropriation Rules limit the name "Martin-Curren Tunnel" to the tunnel alone.

A. There is only one tunnel within the 10-acre tract that identifies Rangen's point of diversion.

Rangen cites the case of *Raffles v. Wichelhaus*, where two parties contracted for the shipment of goods on a ship named "Peerless," but did not specify which of the two ships named "Peerless" they were referring to.[14] However, unlike *Raffles*, there is only one tunnel within the 10-acre tract that identifies Rangen's point of diversion. As noted by the district court, "this is not a case where two or more tunnels exist within Rangen's authorized point of diversion, and it is unclear to which one the Partial Decrees refer."[15]

Rangen also cites *Williams v. Idaho Potato Starch Co.*, where the parties contracted for the drilling of a well "sufficiently straight to accommodate a ten inch pump," but didn't specify which type of ten inch pump they were referring to.[16] Again, however, there is no confusion as to what "Martin-Curren Tunnel" refers to since there is only one tunnel within the 10-acre tract that identifies Rangen's authorized point of diversion. This alone repudiates Rangen's latent ambiguity argument.

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[14] *See* Rangen Opening Br. p. 10 (citing *Ambiguity and Misunderstandings in the Law*, Thomas Jefferson L.R., Vol. 26, No. 1, p. 2 (2002).)

[15] Clerk's R. p. 679.

[16] *See* Rangen Opening Br. pp. 11-12 (citing *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13 (1952).)

B. Rangen's authorized diversion facilities do not collect water from springs or Billingsley Creek.

Rangen's water right decrees place its authorized point of diversion in the SESWNW of Section 32.[17] Rangen has two diversion structures within this 10-acre tract: a white PVC pipe inside the tunnel itself, and a concrete collection box (the "Rangen Box") located downhill from the tunnel opening that collects water that discharges from the tunnel.[18] Since these structures only capture water that emanates from the tunnel, the only meaning of "Martin-Curren Tunnel" *as applied to the facts as they exist* is the tunnel itself.

C. Rangen's partial decrees distinguish between the Martin-Curren Tunnel and Billingsley Creek.

Including Billingsley Creek as part of the Martin-Curren Tunnel makes Rangen's own water rights self-contradictory and confusing. Rangen water right decrees identify the source as: "Martin-Curren Tunnel[;] *Tributary*: Billingsley Creek."[19] This description verifies that the Martin-Curren Tunnel is separate from Billingsley Creek. Thus, under the plain language of Rangen's water right decrees, the source Martin-Curren Tunnel cannot include Billingsley Creek.

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[17] Exs. 1026 & 1028.

[18] Exs. 1445A, 1445B, 1290 , 1291, and 1453; Agency R., Vol. 21, p. 4161, ¶¶ 17-18.

[19] Exs. 1026, 1028 (emphasis added).

D. All other water rights with "Martin-Curren Tunnel" as the source receive water from the tunnel alone.

Rangen's water rights are not the only rights that have "Martin-Curren Tunnel" as the source. There are nine others, all of which receive water from the tunnel alone.[20] Treating "Martin-Curren Tunnel" as an umbrella term to describe multiple water sources creates confusion as to the source of these water rights, whereas the name loses no clarity when used to describe the tunnel specifically.

E. IDWR's Water Appropriation Rules limit the name "Martin-Curren Tunnel" to the tunnel alone.

IDWR Adjudication Rule 60.02.c.i allows water sources to be identified by the name in local common usage only if no official name is listed on the U.S. Geological Survey Quadrangle map.[21] Billingsley Creek is listed on the USGS quad map; therefore, any diversion from Billingsley Creek must identify Billingsley Creek as the source of water. Thus, Adjudication Rule 60.02.c.i does not permit a diversion from Billingsley Creek to identify "Martin-Curren Tunnel" (a name in local common usage) as the source.

In addition, IDWR Adjudication Rule 60.02.c.ii requires water users to identify each source if the water delivery system diverts water from multiple sources.[22] Accordingly, in other instances where a tunnel and natural springs are located near each other, the SRBA partial decrees identify the tunnel and spring as separate sources of water. For

[20] Ex. 2401 at 94.

[21] IDAPA 37.03.01.060.02.c.

[22] IDAPA 37.03.01.060.02.c.ii.

example, water right no. 36-7071 identifies the Hoagland Tunnel and adjacent the Weatherby Springs as separate water sources with separate points of diversion.[23] Similarly, water right no. 36-131 identifies "Spring 8" and "Spring 9" as separate sources, listing two different points of diversions within the same 10-acre tract.[24]

If Rangen claimed the right to divert water from Billingsley Creek in addition to the Martin-Curren Tunnel, it had a duty under the Adjudication Rules to list both sources and points of diversion. If there were errors or deficiencies in Rangen's water right licenses, the SRBA provided an opportunity to correct them.

Rangen's failure to comply with the Adjudication Rules does not create ambiguity. Indeed, there would be no debate about the meaning of Martin-Curren Tunnel if Rangen had properly claimed two points of diversion from two sources, as the Rules require.

It is not this Court's duty to stretch the doctrine of latent ambiguity to effectively add a source that Rangen failed to claim in the SRBA, nor is it Rangen's privilege to bootstrap its error into a water right that is better than what is shown on its decrees. Therefore, this Court should uphold the Director's and the district court's finding that the name "Martin-Curren Tunnel" unambiguously refers to the man-made tunnel excavated into the basalt cliff above Rangen's fish hatchery.

[23] Clerk's R., pp. 632-633.

[24] Clerk's R., pp. 636-637.

1.3 The permit and license for water right 36-7694 do not support Rangen's argument that "Martin-Curren Tunnel" refers to Billingsley Creek in addition to the tunnel.

Rangen contends that the water right application and license for its water right number 36-7694 show that "Martin-Curren Tunnel" refers to Billingsley Creek.[25] This argument should be ignored because it does not demonstrate an inability to apply the plain meaning of the name to the facts as they exist. However, it bears mentioning that the water right documents do not support Rangen's position. The permit identifies the source as "underground springs," with a handwritten note: "Curren Tunnel."[26] Rangen's assertion that this is a reference to the *above-ground* springs is illogical. If the intent was to identify above-ground springs, there is no reason to describe them as "underground." These documents merely show that the Martin-Curren Tunnel was sometimes referred to as an underground spring.

1.4 If a latent ambiguity exists, the Court must remand the issue to determine what was intended.

In the event this Court accepts Rangen's latent ambiguity argument, Rangen asks it to then resolve the ambiguity in its favor.[27] This is an improper request. Since the Director found no ambiguity to exist, he did not consider intent. If this Court reverses the Di-

[25] Rangen Opening Br. p. 14.

[26] Ex. 1029, p. 31.

[27] Rangen Opening Br. p. 15.

rector, finding a latent ambiguity to exist, the case must be remanded to the Director to make additional findings of fact concerning intent.

2. Idaho law does not allow Rangen to divert water from unauthorized points of diversion.

Rangen contends it "should be allowed to use the Bridge Dam because it is part of a diversion structure that lies partially within the ten acre tract."[28] According to Rangen, "A water right holder can have a source of water that is not within the tract identified for its point of diversion."[29] This is true, of course, since many sources flow through multiple tracts of land. This does not mean, however, that Rangen can divert water from locations outside the point of diversion listed in its water right decrees. The district court had no trouble dismissing Rangen's novel argument on this point:

> The record establishes that the Bridge Diversion is a separate and distinct diversion structure that is not physically connected to the Farmers' Box or the Rangen Box. The record further establishes that the Bridge Diversion is located outside of the ten-acre tract identified on Rangen's *Partial Decrees* as its authorized point of diversion. Ex.1446B and 1446C. There is simply no legal basis for Rangen's argument that it can use the Bridge Diversion to collect and divert water even though that diversion structure is not located within its decreed point of diversion. Such an argument ignores the purpose of the identifying with particularity the point of diversion element of a decreed water right. If Rangen believed that the ten-acre tract identified in its *Partial Decrees* inadequately described its historic points of diversion, or that its *Partial Decrees* inadequately described its water source, it was

[28] Rangen Opening Br. p. 19.

[29] *Id*. at 20.

> Rangen's responsibility to raise those issues at the proper time, and in the proper venue - the SRBA.[30]

Little more needs to be said, but three points bear mentioning.

First, the point of diversion from a natural waterway defines the source. Judge Barry Wood made this clear in the SRBA: "... Clear Lakes' subjective intent as to which particular spring it was diverting from does not establish the source. The point of diversion establishes the source."[31] If Rangen desired authorization to divert water from Billingsley Creek, it had an obligation to ensure its SRBA decrees included a point of diversion from Billingsley Creek. It did not.

Second, if Rangen desired to utilize Billingsley Creek as part of its distribution system by injecting water from the Martin-Curren Tunnel into Billingsley Creek and then re-diverting it at the Bridge Dam, Rangen had an obligation to ensure its SRBA decrees include a point of injection and a point of re-diversion accordingly. Under Idaho law, once water enters a natural waterway it becomes part of the public water supply and available for appropriation. Water can be transported through natural waterways, but only if the water user maintains control and dominion over it.[32] This requires strict measurement of water injected into and re-diverted from the natural waterway, with points of

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[30] Clerk's R., p. 682.

[31] *Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge*, In re SRBA case no. 39576, subcase nos. 36-2708 & 36-7218 (Fifth Jud. Dist., Twin Falls County) (August 15, 2000), attached hereto as Appendix A, at 11.

[32] Idaho Code § 42-105(1).

injection and re-diversion identified in the water right license or decree. Rangen's water rights do not include points of injection or re-diversion, nor does Rangen measure or control water that it purports to transport through Billingsley Creek.

Third, the fact that Billingsley Creek has supplied a majority of the water used in Rangen's fish hatchery does not create authorization for Rangen to divert water from sources and points of diversion that are not listed on its water right decrees. Whether Rangen was negligent or whether it employed a miscalculated strategy when it obtained water rights that list only Martin-Curren Tunnel as the source, it is bound by those decrees. IGWA's members are all too familiar with the harsh consequences of a failure to properly protect their interests in the SRBA, having learned in *Clear Springs Foods, Inc. v. Spackman* that the State of Idaho's assurances that non-consumptive fish propagation rights were not permitted to curtail consumptive groundwater use, and that groundwater use would be protected as long as minimum Snake River flows at Swan Falls Dam are sustained, were nullified because groundwater users did not ask the SRBA court to add conditions to that effect on the partial decrees of spring-fed fish propagation water rights like Rangen's.[33]

In sum, without authorized points of injection and re-diversion, Rangen has no legal authority to transport water from the tunnel through Billingsley Creek. The Director and the district court understand this, which is why they rejected Rangen's argument

[33] *Clear Springs Foods, Inc. v. Spackman*, 50 Idaho 790 (2011).

that Billingsley Creek is part of its conveyance system. IGWA respectfully asks this Court to uphold their ruling on this issue.

3. The doctrine of quasi-estoppel does not require IDWR to violate the SRBA partial decrees issued for Rangen's water rights.

Rangen contends that IDWR should be estopped from limiting Rangen's water rights to the Martin-Curren Tunnel, citing IDWR's purported awareness that Rangen historically diverted water from Billingsley Creek in addition to the Tunnel.[34] In other words, Rangen claims the IDWR should be required to allow Rangen to use water in ways that violate its SRBA decrees. The district court soundly rejected this argument, and its analysis is incorporated herein by reference.[35] IGWA wishes to add only two points.

First, IDWR's awareness that Rangen's flow measurements included flows in Billingsley Creek does not amount to formal approval of Rangen's use of Billingsley Creek.[36] The site visits by IDWR employees Yenter and Luke that Rangen cites were not made in response to a complaint about illegal water use.[37] They were investigating measurement protocol, not scrutinizing Rangen's decrees.

While IDWR may be criticized for not discovering Rangen's unauthorized use of Billingsley Creek water, this type of omission certainly does not rise to the level of a

[34] Rangen Opening Br. at 30-31.
[35] Clerk's R., Vol. _, pp. 686-688.
[36] Rangen Opening Br. at 32-34.
[37] Rangen Opening Br. p. 30-31.

"great wrong or injustice" as existed in *Boise City v. Wilkinson*.[38] IDWR likely was not particularly concerned with scrutinizing Rangen's diversion structures, since Rangen's water rights are considered non-consumptive. Moreover, it is not realistic to expect IDWR personnel to dissect every aspect of water use any time they make a site visit. This Court acknowledged as much in *Sagewillow v. IDWR* (which Rangen cited to the district court but not here), when it declined to require the IDWR to evaluate forfeiture at every turn:

> It would be a substantial burden upon the Department to require that in response to every transfer application it conducted investigation into whether the water right(s) involved had been lost or reduced by forfeiture or abandonment.[39]

Second, Rangen offers no legal support for its argument that the doctrine of quasi-estoppel can be used to force IDWR to administer water rights in a manner that violates SRBA decrees. "A decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system."[40] Rangen litigated its water right claims in the SRBA court, and is now bound by them.

Therefore, IGWA respectfully asks this Court to reject Rangen's argument that the doctrine of quasi-estoppel requires IDWR to distribute water to Rangen in a way that violates its SRBA decrees.

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[38] 16 Idaho 150, 176, 102 P. 148, 157 (1909).

[39] *Sagewillow v. Idaho Dep't of Water Res.*, 138 Idaho 831, 845 (2003).

[40] *In re Delivery Call of A&B Irrigation Dist.*, 153 Idaho 500, 515, 284 P.3d 224, 240 (2012).

4. The Director's adoption of Sullivan's regression analysis is a reasonable exercise of discretion, based on substantial evidence.

The Director adopted expert witness Greg Sullivan's regression analysis to correct an error in Rangen's water measurements.[41] Rangen contends this ruling is not supported by substantial evidence, arguing that the Director could have alternatively utilized an IDWR staff analysis that was made earlier in time and did not have the benefit of all of the data available to Sullivan.[42]

Rangen disparages Sullivan's analysis as an "evolving opinion," when in reality it was the result of newly discovered evidence presented at the hearing of Rangen's flawed water measuring procedures. This evidence enabled a more accurate calculation of the magnitude of Rangen's measurement errors.

A detailed response to the Rangen's criticisms of Sullivan's analysis is unnecessary because the standard of review is not whether this Court agrees that Sullivan's analysis is the best; it is whether there is substantial evidence in the record to support the Director's adoption of it.[43]

The Director accepted Sullivan's analysis for three reasons.[44] First, all of the parties acknowledged that Rangen's measurement data significantly under-calculated actual

[41] Rangen Opening Br. p. 31 et. seq.
[42] *Id*. at
[43] Idaho Code § 67-5279(3)(e).
[44] Agency R., Vol. 21, p. 4180.

water flows from the Rangen Model cell.[45] Second, using Rangen's incorrect measurement data would result in "Rangen benefiting from its own under-reporting of flows if mitigation by direct flow to Rangen is provided in lieu of curtailment."[46] Third, the Director concluded that Sullivan's regression line was the most accurate correction of Rangen's under-calculated measurements.[47] The district court decision cites substantial evidence in the record supporting this, which need not be repeated here.[48]

While Rangen would prefer a windfall from its erroneous water measurements, it is entirely reasonable for the Director to correct for the error. The Director's adoption of Sullivan's regression analysis is reasonable and supported by substantial evidence; therefore, IGWA respectfully asks the Court to sustain it.

5. The determination that junior users are using water efficiently and without waste is supported by substantial evidence.

Rangen claims there is not substantial evidence to support the Director's determination that junior groundwater users are using water efficiently and without waste, per CM Rule 40.03.[49] Yet, representatives of North Snake Ground Water District and IGWA both testified that groundwater users are forced to use water efficiently due to pumping costs (unlike Rangen, which pays nothing to extract water from the ESPA and does a poor

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] Clerk's R., pp. 688-691.

[49] Rangen Opening Br. pp. 41-44.

job of measuring and managing its water supplies). Lynn Carlquist, Chairman of North Snake Ground Water District, testified that it costs an average of $160.00 per acre to operate and maintain his wells.[50] Tim Deeg, President of IGWA, testified that the cost to pump, maintain, and operate his wells is about $200.00 per acre.[51] This testimony is representative of all groundwater users, for whom pumping costs provide a substantial incentive to not divert any more water than is needed to raise the crop being irrigated.

Rangen argues this is insufficient, contending IGWA must put on evidence of the irrigation practices on each groundwater-irrigated acre across the Snake River Plain to show it is being irrigated efficiently. This, of course, is an entirely unrealistic request. It would have required weeks, if not months, of unnecessary testimony to simply confirm undisputed facts regarding the efficiency of junior groundwater use.

If Rangen had reason to believe junior groundwater pumpers are wasting water, it was welcome to proffer evidence to contradict the testimony of Carlquist and Deeg. Rangen made no such offer, and without any contradictory evidence, this testimony of Carlquist and Deeg is sufficient for the Director to conclude that groundwater users are using water efficiently and without waste.

[50] Carlquist, Tr. Pp. 1676:19-22, 1710:7-16.

[51] Deeg, Tr. Pp. 1747:16-1748:6, 1753:21-1754:4, 1763:10-16, 1765:5-22.

Therefore, IGWA respectfully asks the Court to not set aside the rulings of the Director and the district court on this issue.[52]

CONCLUSION

For the foregoing reasons, IGWA asks this Court to rule as follows:

A. Decline to reverse the Director's finding that the name "Martin-Curren Tunnel" unambiguously refers to the man-made tunnel above Rangen.

B. Decline to reverse the Director's conclusion that Rangen cannot divert water from sources or points of diversion that are not included in its water rights.

C. Decline to reverse the Director's conclusion find that the doctrine of quasi-estoppel does not obligate IDWR to administer water in a way that violates Rangen's water right decrees.

D. Decline to reverse the Director's discretionary decision to utilize Sullivan's regression analysis to correct for Rangen's erroneous water measurements.

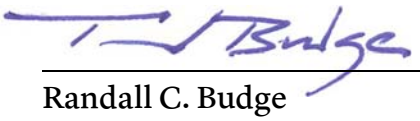
E. Decline to reverse the Director's finding that junior groundwater users are using water efficiently and without waste.

F. Deny Rangen's request for attorney fees and costs.

[52] Clerk's R., p. 24.

RESPECTFULLY SUBMITTED this 27th day of May, 2015.

RACINE OLSON NYE BUDGE & BAILEY, CHARTERED



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CERTIFICATE OF SERVICE

I CERTIFY that on this 27th day of May, 2015, the above document was served on the following persons in the manner indicated:

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Appendix A

***Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Orde on Challenge (Clear Lakes v. Clear Springs / Separate Source),* In re SRBA case no. 39576, subcase nos. 36-2708 & 36-7218 (Fifth Jud. Dist., Twin Falls County) (August 15, 2000)**

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 No. 36-02708 and 36-07218**
	)	
Case No. 39576	**)**	**ORDER ON MOTION TO ALTER OR**
	)	**AMEND JUDGMENT OR IN THE**
	)	**ALTERNATIVE, MOTION TO**
	)	**RECONSIDER MEMORANDUM**
	)	**DECISION AND ORDER ON**
	)	**CHALLENGE (Clear Lakes v. Clear**
_____	**)**	**Springs / Separate Source)**

Ruling:

Motion to Alter or Amend the Judgment, or in the alternative, Motion to Reconsider Memorandum Decision and Order, **Denied.**

Appearances:

Mr. Daniel V. Steenson and Mr. Charles L. Honsinger, Ringert Clark Chartered, Boise, Idaho, attorneys for Clear Lakes Trout Company, Inc. Mr. Steenson argued.

Mr. John C. Hepworth and Ms. Robin M. Brody, Hepworth, Lezamiz & Hohnhorst Chartered, Twin Falls, Idaho, attorneys for Clear Springs Foods, Inc. Ms. Brody argued.

Barry Wood, Administrative District Judge and Presiding Judge of the SRBA, presiding.

I.
BRIEF PROCEDURAL BACKGROUND

1. Clear Springs Foods, Inc., (hereinafter Clear Springs) filed claims in the SRBA for water rights 36-02708, 36-07201 and 36-07218. On November 2, 1992, the Director of the Idaho Department of Water Resources (IDWR) filed *Director's Report for Reporting Area 3* recommending Clear Springs' claims 36-02708, 36-07201 and

36-07218. On May 3, 1993, Clear Lakes, Inc., (hereinafter Clear Lakes) filed objections to those recommendations in which Clear Lakes objected to both the "source" and "point of diversion" elements of IDWR's recommendations, stating that water right 36-02708 and 36-07218 are diverted from a separate source than Clear Lakes' water right 36-07004. Clear Lakes requested language clarifying that "fact" in the decrees of water rights 36-02708 and 36-07218.[1]

2. During the trial held on the merits, Special Master Haemmerle granted *Clear Springs' Motion for Involuntary Dismissal*, finding that there were not separate sources for Clear Springs' rights 36-02708, 36-07201 and 36-07218 and Clear Lakes' 36-07004 right. On August 21, 1998, the Special Master issued written *Findings of Fact and Conclusions of Law on Involuntary Dismissal*. On August 28, 1998, the Special Master entered his ***Special Master's Report and Recommendations*** recommending water rights 36-02708, 36-07201 and 36-07218 for partial decree as reported by IDWR. On September 28, 1998, Clear Lakes filed a *Motion to Alter or Amend Special Master's Recommendation.*

3. On January 14, 1999, Clear Lakes filed a *Notice of Challenge* to the Special Master's ***Order Granting in Part, Denying in Part, Motion to Alter or Amend*** (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source) issued on December 31, 1998, in subcases 36-02708, 36-07201 and 36-07218.

4. On July 9, 1999, following briefing and two oral arguments, this Court issued a ***Memorandum Decision and Order on Challenge*** in subcases 36-02708, 36-07201, and 36-07218 (***Memorandum Decision***). The Partial Decrees were issued in these subcases

[1] Clear Lakes' objection to the "source," "point of diversion," and "remarks" elements of IDWR's recommendation of Clear Springs' water right 36-07201 stated that the recommendation did not specify that the source for Clear Springs' water right 36-07201 was part of the source for Clear Lakes' water right 36-02659, and requested clarifying language in the decree of Clear Springs' water right 36-07201. Water right 36-07201 is from the Brailsford stream. The Court in its ***Memorandum Decision*** ruled that the Brailsford stream is a separate source from the other water rights at issue here. Clear Lakes did not raise issues pertaining to water right 36-07201 in its present motion.

on April 10, 2000.[2] (The delay between the issuance of the Partial Decrees and the ***Memorandum Decision*** was the result of the subcases being consolidated with other subcases for purposes of addressing the issue of "facility volume." The subcases were not ripe for entry of Partial Decree until the facility volume issue had also been resolved.).

5. On April 24, 2000, Clear Lakes timely filed a *Motion to Alter or Amend Judgment, or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge* (*Motion to Alter or Amend Judgment*) in subcases 36-02708, 36-07201 and 36-07218, which is now before the Court. The motion was filed pursuant to I.R.C.P. 59(e), and in the alternative, pursuant to I.R.C.P. 11(a)(2).

6. On May 8, 2000, Clear Lakes lodged a brief in support of its *Motion to Alter or Amend Judgment*. On June 13, 2000, Clear Springs lodged a response brief. On June 26, 2000, Clear Lakes lodged a reply brief.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument was held in open court on July 6, 2000. At the conclusion of the hearing, no party requested additional briefing and the Court having requested none, this matter is deemed fully submitted for decision the next business day, or July 7, 2000.

III.
ISSUES RAISED / ASSIGNMENT OF ERROR / RELIEF REQUESTED

Clear Lakes, through its motion, seeks to have this Court amend its ***Memorandum Decision*** to provide that "the source for Clear Springs' water rights 36-02708 and

[2] A more comprehensive procedural history is set forth in the ***Memorandum Decision***.

36-07218 should be administered separately from the source for Clear Lakes' water right 36-07004, and that Clear Springs' water rights 36-02708 and 36-07218 should be decreed with only one point of diversion."

As grounds for its motion, Clear Lakes asserts the following:

> The first ground for this motion is that the Court's conclusion that Clear Springs' water right nos. 36-02708 and 36-07218 have the same source as Clear Lakes' water right no. 36-07004 … cannot be reconciled with the clear and undisputed fact that Clear Springs' water rights were perfected in the western stream and that Clear Lakes' water right was established in the eastern stream, and that these two streams were physically separated so that the diversion from one stream could not affect the flow of water in the other steam [sic]. The second ground for this motion is that the Court has failed to consider or address the undisputed evidence that Clear Springs has never attempted or claimed the right to divert any of the water flowing in the eastern stream or the springs flowing into the eastern stream. This undisputed evidence includes the testimony of Jess Eastman, Clear Springs Chairman of the Board and developer of Clear Springs' water rights. Mr. Eastman's testimony unequivocally establishes that the eastern stream and its tributary springs have never been part of the source for Clear Springs' water rights. These errors are compounded by the Court's erroneous finding that Clear Springs' water rights include points of diversion that have never existed, but could, if decreed, enable Clear Springs to take eastern stream water that Clear Springs has never before used or claimed.

V.

DISCUSSION

Preliminarily, this Court has considered the arguments raised by Clear Lakes and again meticulously reviewed the evidence supporting the Special Master's factual findings and legal conclusions and the Special Master's Recommendation. The Court denies Clear Lake's motion for the reasons set forth in the ***Memorandum Decision*****.** This Court set forth in detail the facts and legal reasoning supporting its ruling upholding the Special Master's findings and has little to add herein other than to respond to the arguments raised by Clear Lakes and clarify Clear Lakes' misconception about the source element.

Secondly, it should be underscored that this Court was not the actual trier of fact and did not make the actual findings of fact, although the Court recognizes that 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 v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989). The point being this Court reviewed the findings of fact under the clearly erroneous standard.

A.

THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE SPECIAL MASTER'S RECOMMENDATION.

The starting point for this Court's review of a special master's report or recommendation is the standard of review. In the ***Memorandum Decision***, this Court set forth in explicit detail the appropriate standard of review for the district court's review of a special master's report or recommendation in the SRBA.[3] ***Memorandum Decision*** at 7-15. This Court also set forth in equal detail the operation and evidentiary effect of the Director's Report. ***Memorandum Decision*** at 9-11. This Court then set forth verbatim the findings of fact made by the Special Master. ***Memorandum Decision*** at 15-18. Following a second, thorough review of the evidence, this Court again concludes that there is substantial (if not overwhelming) evidence supporting the Special Master's findings.[4] In fact, the evidence presented would not overcome the presumption created by the Director's Report. I.C. § 42-1411 (4). Each of Clear Lakes' arguments is addressed below.

[3] The standard of review is important in this case because, pursuant to this motion, Clear Lakes is challenging the evidence supporting the factual findings of the Special Master. Namely, Clear Lakes contends that the evidence established that the respective diversions of Clear Lakes and Clear Springs are derived from independent sources.

[4] In reviewing the evidence independent of the Special Master's findings, this Court still arrives at the same result.

B.

THE RESPECTIVE WATER RIGHTS OF CLEAR LAKES AND CLEAR SPRINGS ARE NOT DERIVED FROM INDEPENDENT SOURCES.

Clear Lakes' first assignment of error is that this Court's conclusion that Clear Springs' water rights 36-02708 and 36-07218 have the same source as Clear Lakes' water right 36-07004 "cannot be reconciled with the clear and undisputed fact that Clear Springs' water rights were perfected in the western stream and Clear Lakes' water right was established in the eastern stream, and the two streams were physically separated so that the diversion from one stream could not affect the flow of water in the other steam [sic]."

Clear Lakes' argument fails in several respects. First, Clear Lakes' argument confuses the distinction and legal effect of the "point of diversion" and "source" elements of a water right. Clear Lakes argues that, historically, the eastern and western streams were physically separated and the diversion by Clear Lakes from the eastern stream would not affect the flow of water to Clear Springs' from the western stream and *vice versa*. As such, Clear Lakes reasons that the two streams legally constitute independent sources. This reasoning, however, oversimplifies the definition of "source." This Court agrees that one of the attributes of independent sources can be and often is that a diversion from one source will not affect the flow to the diversion from the other source. However, the same result is also possible, (as in this case) as between two diversions from the same water source.

An example of such a situation occurs where a stream flow divides into two separate channels, a west channel and an east channel.[5] Assume a senior appropriator has a point of diversion downstream from the fork on the west channel. A junior appropriator's point of diversion is also downstream from the fork but located on the east channel. The "source" for the two water rights is the same common stream. *See Malad Valley Irr. Co. v. Campbell*, 2 Idaho 411, 415, 18 P. 52, 56 (1888)(rights of prior appropriator from natural streams also extend to tributaries); *Scott v. Watkins*, 63 Idaho 506, 517, 122 P.2d 220, 231 (1942)(particular source supplying natural water course is

[5] This decision uses the terms "stream" and "channel" synonymously.

immaterial). However, because both points of diversion are located below the divide in the stream, no matter how much water the junior diverts, the senior's water supply will not be affected because of the natural flow of the water between the respective channels. Even in times of shortage, for purposes of administering the respective water rights, the senior could not make a successful delivery call against the junior, as the call would be "futile." Stated differently, cutting off the junior's water supply at the point of diversion would not increase the senior's water supply. *See United States v. Haga*, 276 F. 41, 43 (D. Idaho 1921)(holding appropriator on main channel can complain of diversion from tributary when tributary, if not interfered with, would make contribution to main channel). Furthermore, the senior would not be able to manipulate the actual flow of water down the respective channels to increase the flow in the west channel, as the senior would be changing the point of diversion. The junior is protected by the "no injury rule" and could enjoin the senior from changing the point of diversion. *See e.g., Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9-10, 154 P.2d 507, 515-16 (1944)(citing *Crockett v. Jones*, 47 Idaho 497, 277 P. 550; *Morris v. Bean*, 146 F. 42)(holding a subsequent appropriator has a vested right to a continuance of conditions as they existed when he made his appropriation). In essence, the junior is protected by the respective location of the diversion works on the common source.

In the event that the junior relocates his point of diversion upstream from where the stream divides, the situation has a potentially different outcome. The junior is not afforded the same protection previously created by the natural flow of the stream. Now cutting off the junior's water supply may well increase the senior's water supply. The junior could argue that based on the present stream flow level even though he is located above the fork in the stream, the water that he is diverting mostly, or even entirely, flows down the eastern channel and, thus, shutting off his diversion works would not increase flows to the senior. Depending on where the junior relocated his diversion works, this may be true. However, this issue is addressed administratively pursuant to IDWR's procedures for making a "delivery call," and not through the SRBA. The junior would have the opportunity to try to show that the call would be futile. In any event, the source of water for the two diversion works is nonetheless the same.

In taking a variation to the above example, suppose both the junior and senior decide to modify their respective diversion works by altering the natural course of the stream and constructing a reservoir from which both intend to divert. The modifications again eliminate the protection afforded the junior by the natural fork in the stream. The source is the same and the junior has permitted the senior to change his point of diversion despite the potential for injury. This is what occurred between Clear Lakes and Clear Springs in the instant case -- the natural flow of the stream has been altered. The evidence is unequivocal that the source for both the "eastern" and "western" channels is a series of springs scattered along the canyon wall. Historically, the springs discharged water that collected and formed a channel. Clear Lakes argues that the springs did not collect into a common channel, but rather, collected into two separate channels created by an underwater formation, which caused the flows to divide into two separate channels.[6] The Special Master found, and this Court affirmed, that historically the springs flowed and collected into a common channel that subsequently divided into the eastern and western channels from which Clear Lakes and Clear Springs diverted. There is substantial evidence in the record to support this finding as addressed at length in the ***Memorandum Decision***.

Although the evidence supports the finding that the water was commingled into a single channel, Clear Lakes' own description of the stream conditions in existence prior to the stream alterations would not establish the existence of two independent sources for the respective water rights of Clear Lakes and Clear Springs. First, the source for the water rights of both Clear Lakes and Clear Springs is the series of springs scattered along the canyon wall.[7] The source is not the alleged separate streams. The water rights extend

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[6] Clear Lakes argues the situation is analogous to the situation where springs form two separate creeks which are administered as independent sources. Clear Lakes cites examples such as Riley Creek and Billingsley Creek, which are located in the Hagerman Valley, as well as the Brailsford Channel, which this Court also ruled as being a separate source.

[7] This Court has previously ruled in this case that when one speaks of a water "source," it is imperative to examine the context in which the term "source" is being applied. In the ***Memorandum Decision and Order on Challenge*** in these subcases filed July 9, 1999, this Court stated at page 29:

> An additional point of clarification on this "source" issue may be useful. Clearly, "source" may have different meanings in different situations. As Mr. Hardy noted, the Snake River Aquifer is **the** source (singular) for all relevant springs and stream flows (plural) involved in these subcases. The springs are discharged at various points across the north rim or wall of the Snake River Canyon. But because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four

to tributaries. *Malad Valley Irr. Co*, at 415, 18 P. at 56; *Scott* at 517, 122 P.2d at 231; *Haga*, 276 F. at 43. This source is common to both Clear Lakes and Clear Springs. The respective claims, permit applications, and Director's Reports for both Clear Lakes and Clear Springs do not identify particular springs as being the source. The evidence offered at trial also supports that the source is the series of springs. Neither the permit applications, licenses, or Director's Reports, specifically identify or even delineate that a particular spring fed a particular channel. The record is also bereft of any evidence or argument that remotely suggests that a certain spring fed a particular channel. There is also no evidence in the record that would demonstrate the historical flows down the respective streams. All the evidence suggests that the water was co-mingled before flowing into the respective streams. Clear Lakes' position is even more tenuous because it admits that the division creating the separate streams was "underwater." This is clearly evidence of the water co-mingling after leaving the springs and prior to forming the separate streams.[8] Thus, to even begin to make an argument for independent sources,

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> rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source." It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

Useful by way of analogy is the United States Supreme Court's decision in *Kaiser Aetna et al. v. United States*, 444 U.S. 164, 100 S. Ct. 383 (1979) in discussing the concept of navigable waters wherein Justice Rehnquist wrote:

> The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket. 408 F. Supp., at 48-49**.** As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case." Id., at 49.

444 U.S. at 170, 171.

[8] Since the "division" was located underwater there was clearly co-mingling of the water. Therefore to some extent all the water flowing from the springs was tributary to both channels. At the hearing on the Challenge counsel for Clear Lakes stated:

Mr. Honsinger: Our position Your Honor, is that these springs discharged, hit the ground, did not form a pool, but instead, separated, flowing to the east and west, to the east and west.

The Court: But it was all underwater?

Clear Lakes would first have to establish which particular springs fed the particular channel from which Clear Lakes was diverting. The record would not support the conclusion that only certain springs fed a particular channel, the evidence is to the contrary. Since the water co-mingled prior to, and contemporaneously with, the formation of the two channels, the respective channels more accurately constitute different points of diversion along a common source as opposed to independent sources. If the underwater division creating the two streams still existed today, as in the above hypothetical, Clear Lakes might in all likelihood be insulated from a delivery call by Clear Springs because both parties diverted downstream of the underwater division. As a result, cutting off Clear Lakes' water supply at the historical point of diversion would not increase the water supply to Clear Springs. The source is the same, the difference is that Clear Lakes would have been protected by the respective points of diversion in relation to the natural conditions in existence prior to the stream alterations. Clear Lakes would also be protected by the "no injury rule" in the event Clear Springs attempted to move its point of diversion above the underwater division. However, once Clear Lakes consented to the modification of the stream and the diversion works, any protections afforded by the historical stream conditions were eliminated. Following the stream modifications, cutting off Clear Lakes' water supply may well increase Clear Springs' water supply in times of shortage. However, this process is an administrative determination and not an issue to be decided in the SRBA.

Mr. Honsinger: The point at which the streams were separated was under water, yes, Your Honor. But eastern water flowed to the east. Western water flowed to the west. It wasn't co-mingled. It flowed to the east and west around the island.

Tr., at pp. 19 and 20.

Clear Lakes' position does not make sense. Clearly, the above description of the historical conditions argued by counsel indicates that some of the water was co-mingled (i.e., the factual description is inconsistent with the conclusion). Thus the springs are tributary to the respective channels. However, even if the water was not co-mingled, the historical conditions are no longer in existence and as the conditions exist today the water is co-mingled. Since there is no evidence in the record about the historical flows down the respective channels, even if the Court concluded the channels were in fact derived from independent sources, the Court would have no way of determining the scope of the respective rights. The evidence does not show which particular springs fed each channel.

Lastly, this is not a situation where Clear Lakes intended to appropriate water from specific springs, then co-mingle the water with other spring water in the natural channel and then divert the water downstream. The co-mingling of water prior to its ultimate use is well recognized in Idaho. I.C. § 42-105; *Keller v. Magic Water Co. Inc.*, 92 Idaho 276, 284, 441 P.2d 725, 733 (1968). However, Clear Lakes' subjective intent as to which particular spring it was diverting from does not establish the source. The point of diversion establishes the source. Thus, in order to properly claim water from a particular spring, Clear Lakes would have had to physically divert the water from a particular spring, prior to it being co-mingled with the water discharged from the other springs. Clear Lakes could then co-mingle the diverted water with other spring water below the physical diversion, and then reclaim the water downstream.

C.
EVEN IF THE TWO STREAMS HISTORICALLY COULD HAVE BEEN CONSIDERED INDEPENDENT SOURCES, SUBSEQUENT STREAM MODIFICATIONS HAVE CREATED A SINGLE SOURCE.

Historically, even if for the sake of argument the two streams could be considered independent sources, subsequent stream modifications have eliminated the conditions which resulted in the two alleged sources. Clear Lakes argues that an independent source exists where the diversion from one source will not affect the flow of water to another source. If independent sources do in fact exist, then Clear Springs' diversion should not affect Clear Lakes' water supply. Thus, Clear Lakes has nothing to be concerned about because even if the two diversions are labeled as being from the same source, any delivery call made by Clear Springs would be futile.

Alternatively, if the conditions have been modified such that Clear Lakes' diversion can potentially affect Clear Springs' senior right, then pursuant to Clear Lakes' own reasoning the two sources cannot be independent. If this is the case, then Clear Lakes is asking this Court to decree its water right based on historical conditions that are no longer in existence and to which Clear Lakes consented to being changed. The problem with this approach, even if this Court were to adopt Clear Lakes' position, is that the historical conditions become crucial for defining the scope of the respective rights so

that each can be administered accordingly. The respective quantities which flowed down the two channels during seasonal fluctuations and dry years would have to be determined. Suppose during dry years 75% flowed down the west channel and 25 % flowed down the east channel. The administration of the respective rights would have to take these factors into consideration. Since there is very little evidence of the historical conditions, the Court would have no way of making these determinations. There is a complete failure of proof as to these factors.

Lastly, even if Clear Lakes' partial decree indicated a different source than Clear Springs' partial decree, the source element contained in the partial decree would not necessarily be dispositive as to whether Clear Springs could make a call. Clear Lakes' may be able to hold up its decree indicating a separate source as a starting point for a defense, but Clear Springs could still demonstrate that its senior right was being affected by Clear Lakes' diversion. Again, this is determined administratively.

D.

THE TESTIMONY OF JEFF EASTMAN DOES NOT SUPPORT THE CLAIM OF INDEPENDENT SOURCES.

Clear Lakes also argues that this Court failed to consider the testimony of Jeff Eastman. Clear Lakes argues that Mr. Eastman's testimony "unequivocally establishes that the eastern stream and its tributary springs have never been part of the source for Clear Springs' water rights." Important to the Court's decision was the historical conditions in existence prior to the modifications. The Court found the testimony of Earl Hardy to be the most probative and illustrative of the historical conditions. The testimony of Mr. Eastman is consistent with the testimony of Mr. Hardy in that Mr. Eastman's testimony also established factually that the water flowing from the series of springs flowed around various islands prior to flowing into the separate channels. *Tr*. pp. 401-402. Mr. Eastman also testified that the source for both streams was the Snake River Aquifer, which he considered to be one source. *Tr*. pp. 400-401. Thus, Mr. Eastman's

testimony, although not as illustrative as the testimony of Mr. Hardy, nonetheless supports the Court's ruling.[9]

E.

ISSUES PERTAINING TO POINTS OF DIVERSION ARE NOT PROPERLY BEFORE THE COURT.

Clear Lakes has also raised the issue of the "Court's erroneous finding that Clear Springs' water rights include points of diversion that have never existed. . . ." Although in the Court's view Clear Lakes has attempted to blur the distinction between the point of diversion and source elements, issues pertaining to points of diversion were not properly before the Court on Challenge and therefore will not be addressed pursuant to the instant motion. The Court previously discussed this issue in the ***Memorandum Decision*** and will defer to its prior ruling on the matter.

IV.
CONCLUSION

For the reasons set forth above, Clear Lakes' motion to alter or amend the judgment or in the alternative to reconsider the ***Memorandum Decision***, is hereby DENIED.

IT IS SO ORDERED:

DATED: August 15, 2000.

_____
BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

[9] Because of the *prima facie* presumption accorded the Director's Report, the burden for any lack of factual clarity clearly rests with Clear Lakes.