

EXHIBIT E

North Snake Ground Water District,
Faulkner Land and Livestock
Company and May Farms, Ltd.

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY

In Re SRBA)	Subcase Nos. 36-02708, 36-07201, 36-
)	07218, 36-02048, 36-02703, 36-04013A, 36-
Case No. 39576)	04013B, 36-04013C, 36-07040, 36-07148,
)	36-07568, 36-07071, 36-02356, 36-07210,
)	36-07427, 36-07720, 36-02659, 36-07004,
)	36-07080, and 36-07731
)	
)	Brief in Support of Notice of
_____)	Challenge (Consolidated Issues)

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Brief in Support of Notice of Challenge on Consolidated Issues

This Brief in Support of Notice of Challenge on Consolidated Issues is filed by the North Snake Ground Water District ("NSGWD") on behalf of its members, including Faulkner Land & Livestock Company and May Farms, Ltd. The 20 subcases listed above involve water rights for fish propagation facilities in the Hagerman area of Idaho.

This brief addresses two consolidated issues in these fish propagation subcases.

1. Did the special master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director?" *Idaho Code* § 42-1411(2)(j) (*Supp. 1998*). ("facility volume" issue)
2. Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA, *Rule 59(e), I.R.C.P.* which applies post-judgment, or *Rule 53(e)(2), I.R.C.P.*, which applies to special masters' reports? ("additional evidence" issue)

This Brief is supported by four Affidavits of David Shaw, the Affidavit of Brett Rowley, the Affidavit of Dana L. Hofstetter, and the Affidavit of Josephine P. Beeman filed contemporaneously herewith and other matters of record.

I. BACKGROUND

A. The Facility Volume Issue and the Additional Evidence Issue Arise from the NSGWD's Fundamental Interest in Ensuring that Water Rights are Accurately Decreed In the SRBA.

The NSGWD was established on February 12, 1996 pursuant to the ground water district statutes in *Idaho Code*, Title 42, Chapter 52. The NSGWD, which includes lands irrigated by ground water in Jerome, Gooding, and Lincoln Counties in Idaho, has the authority, *inter alia*, "to represent district members, with respect to their individual water rights, in general water right adjudications and other legal and administrative proceedings or before political bodies." *Idaho*

Code § 42-5224(6). NSGWD members include Faulkner Land & Livestock Company and May Farms, Ltd., as well as other claimants in the SRBA. NSGWD members hold ground water rights from the Eastern Snake Plain Aquifer diverted within the boundaries of the NSGWD.

Ground water uses in Idaho are generally junior to surface water uses since historically, the more readily accessible surface waters were developed first with ground water uses developed later as surface waters became fully appropriated. Fereday & Creamer, "Swan Falls in 3-D: A New Look at the Historical, Legal & Practical Dimensions of Idaho's Biggest Water Rights Controversy," 28 *Idaho L. Rev.* 574, 579-89 (1991-92). The NSGWD and its members, whose water rights are generally junior to the surface water uses in the Hagerman area, have a fundamental interest in ensuring that Hagerman area surface water rights, like the fish propagation rights in these subcases, are accurately decreed. NSGWD members have a direct interest in this matter since their own water rights may be subject to restriction to supply senior users in nearby Hagerman the quantities decreed in the SRBA. *See Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

The NSGWD and its members filed Motions to Alter or Amend and Notices of Challenge in these subcases as a result of their ongoing interest in ensuring that the water right quantities decreed for senior rights in the SRBA accurately reflect the amounts of water which are actually beneficially used. The "facility volume" issue and the "additional evidence" issue have arisen from these Motions to Alter or Amend and Notices of Challenge.

Without facility volume descriptors in the water rights, fish propagation facilities may be able to enlarge their beneficial uses and thereby subject junior users to water use restriction or mitigation, not just for the water quantities associated with original facility volumes, but also for

additional water quantities associated with facility expansions. Requiring junior users to supply or mitigate additional water use enlargements post-dating their own priority dates would violate the fundamental “first in time, first in right” underpinnings of the prior appropriation doctrine. Designating facility volumes in SRBA decrees would help avoid this inappropriate outcome. The evidence in these subcases did not support the decision to delete the facility volume remarks included in the Director’s Report recommendations.

Without accurate evidence, the quantities decreed in the SRBA may not reflect amounts actually used for beneficial purposes. The Special Master recommendations of diversion rates in these subcases were based on records which contain no evidence of diversion rates subsequent to the 1992 SRBA Basin 36 Director’s Report. The NSGWD submitted recent evidence showing that the diversion rates recommended by the Special Masters exceeded the quantities actually beneficially used since 1992. Despite these considerations, the Special Masters refused to consider the evidence submitted by NSGWD.

B. Standard of Review: The Court Exercises Free Review of Both the “Facility Volume” Issue (a Mixed Issue of Law and Fact) and the “Additional Evidence” Issue (a Pure Legal Issue).

On a Notice of Challenge, the standard in I.R.C.P. 53(e)(2) applies. *See*, SRBA Administrative Order 1, Section 13(f). Under this standard, the court accepts the Special Master’s findings of fact unless clearly erroneous while the Master’s conclusions of law carry no weight with the trial court. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989). Mixed issues of law and fact, or in other words, circumstances involving the application of the law to the facts, are not protected by the “clearly erroneous” standard and are freely reviewable. Idaho Law Foundation, Inc., *Idaho Appellate Handbook* (1996) at 4-6 citing to 9A.

Wright & Miller, *Federal Practice and Procedure* § 2589, p.608 (1995). See, e.g., Bumgarner v. Bumgarner, 124 Idaho 629, 637, 862 P.2d 321, 329 (Ct. App. 1993).

The “facility volume” issue involves a mixed question of law and fact. The legal standard involved is *Idaho Code* § 42-1411(2)(j). Is facility volume “necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director?” *Idaho Code* § 42-1411(2)(j) (Supp. 1998). That legal determination must be informed by factual information concerning water right definition, clarification and administration. Thus, the application of the law to the facts with respect to facility volume is subject to free review.

The “additional evidence” issue, however, involves a pure question of procedural law. There, the legal issue is whether Rule 59(e), I.R.C.P. which applies post-judgment governs the submission of evidence in conjunction with motions to alter or amend Special Master’s reports in the SRBA or whether Rule 53(e)(2) which applies to Special Master’s reports governs. The Court also exercises free review with respect to this legal question.

C. **Procedural Histories and Subcase Records: All 20 Subcases Had Single-Party Trials on Facility Volume and Were Decided Without Evidence of Diversion Rates for the Five+ Years Subsequent to the 1992 Director’s Report.**

1. **Clear Springs Foods Subcases - 36-02708, 36-07201, 36-07218, 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148 and 36-07568.**
 - a. **The Claimant objected to facility volume remarks although five of the Claimant’s SRBA Notices of Claim included such remarks.**

The 1992 Basin 36 Director’s Report recommendations for all fish propagation water rights included facility volume remarks. For five of the eleven Clear Springs Foods rights

involved here (Nos. 36-07040, 36-07568, 36-02708, 36-07201 and 36-07218), facility volume quantities had even been included in Clear Springs Foods' SRBA Notices of Claim.¹

Nevertheless, in April 1993, Clear Springs Foods filed objections to the Director's Report recommendations, including comments that facility volume was not an element of fish propagation water rights and could not be imposed as a limitation on the rights.² Some of the licenses for Clear Springs Foods' rights also had facility volume designations (e.g., nos. 36-07218 and 36-07201.)³

**b. At trial, all competent evidence before the
Special Master supported the inclusion of
facility volume remarks.**

On February 9, 1998, a trial in the Clear Springs Foods subcases was held solely on the issue of facility volume. Although Clear Springs Foods originally had objected to several aspects of the Director's Report recommendations, at the time of trial, it appears that Clear Springs Foods had resolved many of the issues by stipulation with the Idaho Department of Water Resources ("IDWR"). Accordingly, the sole issue addressed at trial was the facility

¹The SRBA Notice of Claim is generally included in the SRBA Court's records as an attachment to IDWR's Response to Objection.

²Although SRBA Administrative Order 1 ("A.O.1"), § 4(d)(1)(b) specifically states that "[a] claimant **may not** amend a claim by filing an objection or a response," Clear Springs Foods never filed a motion to amend the five claims which included facility volumes. Thus, it was error to allow Clear Springs Foods to object to facility volume without requiring it to file motions to amend its claims to delete the facility volume remarks. This issue is raised on Challenge but it is not one of the consolidated issues.

³Director's Report facility volume designations based on water right licenses concern *Idaho Code § 42-1411(2)(i) (Supp. 1998)*, an issue which was raised on Challenge but was not included in this consolidation.

volume designations which appeared in the “remarks” section of the Director’s Report recommendations. The trial on facility volume proceeded as a one-party proceeding with Clear Springs Foods being the only party represented.

Clear Springs Foods called one witness, Terry Huddleston, Clear Spring Foods’ farm operations manager. Tr. (Clear Springs), p. 16, LL.10-11.⁴ Mr. Huddleston has an undergraduate degree in zoology and a Master’s degree in fish culture and disease. Tr. (Clear Springs), p. 17, LL.14-16. Mr. Huddleston provided an unsubstantiated anecdote about a purported situation where fish production was increased while facility volume decreased. Tr. (Clear Springs), p. 28. However, Mr. Huddleston did not testify about the potential impact on upstream junior users if no facility volume is designated. The Special Master summarizes Mr. Huddleston’s testimony as addressing water quality only. Tr.(Clear Springs), p. 278, LL.5-7. Mr. Huddleston’s testimony did not address the fundamental legal question at issue: Whether a facility volume remark was “necessary for the definition of the right, for clarification of any element of the right, or for administration of the right by the director” under Idaho Code § 42-1411(2)(j). Further, Mr. Huddleston, a fish propagation facility operator, was not even qualified to address this key adjudication issue relating to the definition, description and administration of water rights.

⁴With respect to the Clear Spring subcases, unless otherwise noted, transcript references to the eight Clear Springs subcases (36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148 and 36-07568) Challenge transcript rather than to the three (36-02708, 36-07201 and 36-07218) Clear Springs subcases Challenge transcript. The eight Clear Springs and three Clear Springs subcase transcripts are identical up to the Motion to Alter or Amend proceedings. The three Clear springs subcases apparently proceeded on a somewhat different time frame due to Clear Lakes’ objections to source and point of diversion.

The Affidavit of David R. Tuthill, Jr., the Adjudication Bureau Chief for IDWR, was filed with the SRBA Court on or about December 16, 1997, and was proffered at the trial to substantiate the basis for IDWR's facility volume recommendations. It explained that facility volume remarks were necessary to describe water right quantities and enable water right administration. The Court did not admit the Affidavit of David R. Tuthill into evidence.⁵ Tr.(Clear Springs 8), p. 15, LL.19-20, 306, L.25 - p. 307, L.10; Tr. (Clear Springs 3), p.3, LL.19-21. Attached to that Affidavit was a Supplemental Director's Report to the SRBA District Court.

The portion of the audio tapes of the trial concerning Mr. Tuthill's testimony were defective. As a result of the NSGWD's Motions to Alter or Amend, it became necessary to retake this testimony so that a complete record would be available. On July 24, 1998, the NSGWD filed a Motion to Participate in the retaking of Mr. Tuthill's testimony. The Special Master denied that Motion, finding that it was "not timely."⁶ Tr.(Clear Springs), p. 91, LL.10-

⁵The ruling denying the admissibility of the Affidavit of David Tuthill was in error in light of the two recent Supreme Court decisions confirming the admissibility of IDWR reports and affidavits. *In Re: SRBA (Partial Forfeiture)*, 130 Idaho 727, 947 P.2d 400 (1997); *In Re: SRBA (24 Hagerman Subcases)*, 130 Idaho 736, 746, 947 P.2d 409, 419 (1997). This ruling not admitting David Tuthill's Affidavit also is particularly puzzling in light of the Special Master's December 9, 1997 Order requiring IDWR to submit affidavits by December 30, 1997. The Special Master's ruling concerning David Tuthill's Affidavit was one of the issues raised by the NSGWD on Challenge. Similar Affidavits of David Tuthill were admitted into evidence by the other Special Masters in the subcases involved here.

⁶In its Notice of Challenge the NSGWD asserts it was error for the Special Master to deny this Motion to Participate which would have enabled the NSGWD to participate in the retaking of David Tuthill's testimony. The NSGWD asserts that the Motion was timely, having been filed and heard prior to the scheduled retaking of Mr. Tuthill's testimony. This issue is not one of the consolidated issues addressed in this Brief.

During the retaking of his testimony, Mr. Tuthill testified that facility volume remarks were important for describing the extent of beneficial use of fish propagation rights:

THE COURT: Elaborate, please, what your reasons are in no uncertain terms for including facility volume.

A. The primary reason for including facility volume is to define extent of beneficial use.

Tr. (Clear Springs), p. 123, LL.14-18 (emphasis added). *See also, e.g.*, Tr., p. 111, L.19 - p. 112, L.2; and p. 166, LL.7-10.

Mr. Tuthill also bluntly noted that facility volume designations were necessary for administration of the water rights in the future:

From my perspective, the facility-volume parameter is necessary to define the extent of beneficial use for these water rights. The impact – my understanding of the question is what would be the impact if the facility volume is not included. And to answer that, from my perspective the water rights would not be adequately defined to be able to administer these water rights in the future if facility volume is not included.

Tr. (Clear Springs), p. 111, L. 19 - p. 112, L.2 (emphasis added).

Mr. Tuthill also explained that facility volume provides additional clarification concerning the quantity element and that rate of flow and diverted volume alone are not sufficient to define the quantity element for fish propagation rights:

Relative to the water right itself, it is due to the lack of clarity from rate of flow and volume that we need another parameter from my standpoint. Rate of flow and volume do not provide sufficient clarity in amount of water that can be diverted for the use for fish facility water rights.

Tr. (Clear Springs), p. 124, L.21 - p. 125, L.1. *See also* Tr. (Clear Springs), p. 132, LL.3-7.

While Mr. Tuthill noted that initially the facility volume designation was instituted for water quality reasons, he added that now the need for it is recognized to be larger than just water quality:

At that time [1979] it was initiated for water quality. Now we recognize that the need really is more than that. It's to establish the extent of beneficial use.

Tr. (Clear Springs), p. 189, LL. 19-22.

Mr. Tuthill concluded that without the fish volume language, a fish propagation right potentially could be expanded "inappropriately." Tr. (Clear Springs), p. 112, LL.20-22. Mr. Tuthill additionally recognized that facility volume expansions pose the risk of increased annual volume water demand:

THE COURT: Right. And if an operator doesn't propose to change the diversion rate, either what's diverted or what's returned, there's no real concern about quantity.

A. Likely what happens when additional ponds are utilized, likely there's going to be an increased annual-volume demand from the source. Because there is more facility to provide water for.

THE COURT: If there's no consumptive use and you're not changing your diversion rate, how does that occur? I mean if the diversion rate is something that occurs 24 hours a day, seven days a week, how does that change?

A. In some cases the whole source is not diverted, but only part of what's available, what's needed. And with twice the facilities, there are occasions when there will be more of a call on the water.

Tr. (Clear Springs), p. 192, L.16 - p. 193, L.8.

Mr. Tuthill further analogized the facility volume quantity to the designation of irrigated

acres that is typically found today on irrigation water rights:

[B]y including facility volume, we're clarifying the extent of beneficial use to describe the water rights much, in a very similar way to those irrigation rights that didn't previously have irrigated acres identified. The 1910 irrigation water right licenses don't show number of irrigated acres. As we recommend them to the court, we are showing irrigated acres.

So we're clarifying those water rights to define extent of beneficial use. If 20 acres were always irrigated and if it wasn't shown in the 1910 license, then our showing it today doesn't further restrict the rights. We're just describing them as they always existed.

In a similar way for the fish propagation rights, our identifying facility volume doesn't further restrict them. To me, it describes the extent of beneficial use by adding that parameter.

Tr. (Clear Springs), p. 125, L. 23 - p. 126, L. 19.

c. **The Special Master's recommendations
were not supported by the record.**

The Special Master reissued his Findings of Fact and Conclusions of Law several times, largely due to the retaking of Mr. Tuthill's testimony.⁷ In the final Findings of Fact and Conclusions of Law filed October 7, 1998, the Special Master found that facility volume quantities were not necessary. With respect to beneficial use, the Special Master believed that using facility volume to define the extent of beneficial use was important to IDWR only for purposes of mitigation. The Special Master stated: "Since IDWR has no authority to force mitigation, it is not necessary to include facility volume for purposes of water administration."

⁷ The NSGWD was not served with the July 31, 1998 *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* even though their Motion to Alter or Amend was pending. The failure to have served the NSGWD constituted error which limited the NSGWD's ability to effectively participate in the proceedings. This issue is raised on Challenge but is not addressed in this Brief.

Amended Supplemental Findings of Fact and Conclusions of Law, at 7. The Special Master also concluded that even if IDWR could force mitigation, there was no rational relationship between facility volume and fish production. *Id.* The Special Master's comments appear to presuppose that mitigation is always associated with compensation. However, mitigation can also involve the supply of substitute water to fulfill any shortfalls. The Special Master's decision did not address the possible relationship between increases in facility volume and the need to provide increased substitute water for mitigation. Also, the Special Master's decision did not address the distinct possibility that unless facility volume designations exist, junior users can be subject to restriction of their own water rights to supply enlarged water uses, especially if mitigation is not possible.

The Special Master further concluded that since these fish propagation rights involve non-consumptive uses, IDWR essentially is attempting to regulate production, rather than water use. *Id.* at 7-8. The Special Master's conclusion fails to recognize that even non-consumptive rights can adversely impact junior users. For example, a senior user potentially can attempt to curtail a junior's water use in order to obtain the amount of water the senior was decree even if the decree exceeds the senior's actual use. That is why even in non-consumptive water use situations, it is important to accurately define the extent of the senior's water right.

Further the Special Master erroneously found that "Absent an increase in fish production, IDWR was not concerned with facility volume as it relates to water quantity." *Amended Supplemental Findings of Fact and Conclusions of Law*, at 4. He also erroneously found, based on the testimony of David Tuthill, that "if facility volume is expanded, the use of the expanded right does not involve any increased use or diversion of water." *Id.* Based on these and other

erroneous factual findings concerning the testimony of David Tuthill, the Special Master concluded that facility volume was unnecessary. The following table summarizes some of these erroneous findings and identifies citations to David Tuthill's testimony which are inconsistent with these findings:

Erroneous Finding	Relevant Testimony
<p>"Absent an increase in fish production, IDWR was not concerned with facility volume as it relates to water quantity." <i>Findings</i>, at 4.</p>	<p>This finding suggests that IDWR was not concerned with increases in water quantity that are unassociated with increases in production. Actually, David Tuthill's testimony did not address this matter. Rather, he distinguished increases in facility volume for water quality purposes from increases in facility volume for increased production. IDWR views the construction of settling ponds for water quality purposes as different from expanding the extent of beneficial use for fish production. Tr. (Clear Springs), p. 120, LL.8-18; p. 174, L.5 - p. 175, L.4.</p>
<p>"[I]f facility volume is expanded, the use of the expanded right does not involve any increased use or diversion of water." <i>Findings</i>, at 4.</p>	<p>Mr. Tuthill actually testified that when additional fish ponds are utilized, "likely there's going to be an increased annual-volume demand from the source. Because there is more facility to provide water for." Tr. (Clear Springs), p. 192, LL.20-23.</p>
<p>"Based on a leading question posed by IDWR's attorney on re-direct examination, Mr. Tuthill changed his opinion and testified that a fish propagator expanding fish facility volume for the purpose of increasing fish production would have to obtain a new water right." <i>Findings</i>, at 4.</p>	<p>Actually, Mr. Tuthill's statement on re-direct is consistent with his prior testimony. See, e.g., p. 119, LL.15-20.</p>
<p>"Prior to this one telephone conversation in 1997 [from Josephine Beeman], there is no evidence that IDWR ever considered facility volume as a way of defining the extent of beneficial use." <i>Findings</i>, at 3.</p>	<p>A review of an IDWR April 22, 1997 letter (Claimant's Trial Exhibit 3) indicates that prior to the phone call with Ms. Beeman, IDWR already had noted the relationship between facility volume and the extent of beneficial use. The April 22, 1997 letter which prompted Ms. Beeman's call noted that IDWR had identified several concerns relating to the facility volume parameter, including: "whether deletion of the parameter will possibly result in increased beneficial use of the right. . . ." Claimant's Trial Exhibit 3.</p>

The Special Master's conclusions concerning the facility volume designation do not comport with the evidence. David Tuthill's testimony actually establishes numerous grounds for

inclusion of a facility volume designation. Mr. Tuthill, Adjudication Chief for the Idaho Department of Water Resources, certainly was qualified to address whether a facility volume designation is “necessary for definition of the right, for clarification of any element of the right, or for administration of the right by the director” under *Idaho Code* § 42-1411(2)(j). Mr. Tuthill’s also unadmitted affidavit supports the inclusion of facility volume designation on all three of the statutory prongs (definition, clarification, and administration). On the other hand, Clear Springs Foods’ sole witness, Mr. Huddleston, did not address the key issues nor was he even qualified to address them. Quite simply, the Special Master’s decision to delete the facility volume designations is inconsistent with the evidence.

The Special Master noted that three of the Clear Springs water rights at issue here have water licenses which designated facility volumes (36-07201, 36-07218 and 36-07568). *Amended Supplemental Findings of Fact and Conclusions of Law (October 7, 1998)*, at 2. The Special Master found that the claimant was bound by the facility volume quantities in these two licenses because the claimant did not appeal the licenses. *Id.* at 12. The Special Master concluded that facility volume quantities for these three rights had to be included in the decree but then undermined the meaning of these facility volume remarks by indicating that the facility volume remarks would be accompanied by the following language:

The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume.

Id. at 12. This language, by stating that facility volume “cannot be used to limit any element of

this water right,” implicitly acknowledges that facility volume can help define actual beneficial use and operate to prevent future water right expansions. If facility volume was irrelevant to preventing water right expansions, these additional comments would be unnecessary. By including these additional comments, the Special Master undermines the utility of the facility volume designation.

d. **The NSGWD’s Motions to Alter or Amend and Associated Affidavits, presented evidence confirming actual beneficial use and the need for facility volume remarks.**

The Affidavit of Brett Rowley, a fish propagation operator in Texas, submitted in support of the NSGWD’s Motions to Alter or Amend substantiated that an increase in fish propagation facility size “generally is associated with the use of additional water to operate the additional facility volume.” *Affidavit of Brett Rowley*, at 2. Mr. Rowley’s affidavit further noted that: “Increases in facility volume size generally are associated with water flow increases because it takes additional water to fill up the additional volume and maintain water velocities, and also because increases in facility volume generally are undertaken to increase fish production. Increased water flows are necessary to provide adequate dissolved oxygen and flush out the additional quantity of fish wastes that are typically associated with increases in fish production.” *Id.*, at 2-3. Mr. Rowley’s affidavit confirmed the connection between facility volume increases and water usage described in David Tuthill’s affidavit and testimony: “With increased facility volume and the generally increased levels of fish production associated with enlarged facilities, greater flow rates are required on average to maintain acceptable conditions in the raceways and ponds.” *Id.*, at 3.

The Affidavits of David Shaw, also submitted in support of the NSGWD's Motions to Alter or Amend, confirmed that during recent years, Clear Springs Foods' Snake River, Crystal Springs and Middle Hatcheries had been operating both before and after issuance of the Basin 36 Director's Report in 1992, well below the cubic feet per second ("cfs") diversion rates identified in the Special Master's recommendations. Further, the Affidavits of David Shaw identified seasonal variations in water use. Mr. Shaw's Affidavits indicated that the facilities' water use peaks during certain months. David Shaw's Affidavits supported the conclusion that the Special Master's diversion rate recommendations did not describe the quantities actually beneficially used under Clear Springs Foods water rights.

The Affidavit of Dana L. Hofstetter also was submitted in conjunction with NSGWD's Motion to Alter or Amend filed in three Clear Springs subcases (36-02708, 36-07201 and 36-07218). This Affidavit included documents from the IDWR licensing files for these water rights in which Clear Springs Foods or its predecessors in interest had made admissions concerning facility volumes and seasonal flow fluctuations. The license file for one of the Middle Hatchery's water rights (36-07218) includes documentation by Clear Springs Foods' own representatives acknowledging that an additional water right was being sought to allow for an expansion of the facility. *Affidavit of Dana L. Hofstetter*, Exhibits A and C. These admissions confirm the relationship between facility volume expansion and increased water use. Another document in the license file for the Middle Hatchery's Water Right No. 36-07218 also establishes the seasonal nature of the water supply and that the licensed quantity (later used in the Director's Report and the Special Master's Report) was determined during maximum flows in October. *Affidavit of Dana L. Hofstetter*, Exhibit B.

e. **The Special Master erroneously denied
the NSGWD's Motions to Alter or Amend.**

The Special Master decided that the NSGWD could not submit new evidence in support of its Motion to Alter or Amend. *Order Denying Motion to Alter or Amend (October 7, 1998 - 8 Clear Springs Subcases), (January 27, 1999 - 3 Clear Springs Subcases)*. Thus, the affidavits submitted in support of NSGWD's Motion to Alter or Amend, the Affidavits of Brett Rowley and the Affidavits of David Shaw, were stricken, and the NSGWD was not allowed to call David Shaw to provide additional testimony as it had indicated it intended to do. The Affidavit of Dana L. Hofstetter submitted in the three Clear Springs subcases was not expressly stricken but since its substance also was not addressed, it effectively was stricken. The Special Master found that a Motion to Alter or Amend in the SRBA is subject to the post-judgment standard of I.R.C.P. Rule 59(e).

In denying the Motions to Alter or Amend, the Special Master also refused to reconsider his findings with respect to facility volume. He reasserted his finding that, "In terms of water quantity, facility volume was not at issue." *Order Denying Motion to Alter or Amend (October 7, 1998 - 8 Clear Springs)*, at 1. Further, he found that the NSGWD did not attempt to participate in the original trial and could not attempt to "inject issues into the case which were never directly or indirectly raised." *Id.* at 4; *Order Denying Motion to Alter or Amend (January 27, 1999 - 3 Clear Springs)*, at 12.

2. Jones Hatchery Subcase - 36-07071.

- a. The Director's Report recommended a facility volume which was not specifically objected to by the claimant.

Claimant Jones filed an objection to the Director's Report recommendation for 36-07071, which included a general objection to the remarks section. Although, the objection form requires a specific description of how the objector wishes the Director's Report to be changed, the claimant identified revisions to other portions of the remarks section but did not indicate on the objection form that facility volume should be deleted. However, the facility volume remark was later determined to be at issue. Tr. (Jones), p. 149, LL.14-18.

Although the claimant originally had objected to several aspects of the Director's Report recommendation, at the time of trial, it appears that the claimant contested only the facility volume aspect of the Director's Report. *Id.* Again, the trial on facility volume proceeded as a one-party proceeding with the water right claimant being the only party represented.

- b. At trial, all competent evidence before the Special Master supported the facility volume remark.

The Affidavit of David R. Tuthill, Jr., the Adjudication Bureau Chief for the Idaho Department of Water Resources, was lodged with the Court and then proffered at the trial by IDWR. The Affidavit explained why facility volume was necessary to describe water right quantity and enable water right administration. The Special Master initially did not admit the Affidavit of David R. Tuthill at trial, but later reversed that decision in her written decision.⁸ See

⁸ The Special Master's Report appears to have reversed her prior ruling as a result of the Supreme Court decision in *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1997). *Special*
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also Tr. (Jones), p. 202, L.20 - p. 204, L.24. A copy of the Affidavit of David R. Tuthill submitted in the Jones Hatchery subcase is attached hereto as Exhibit A.

At trial, Mr. Tuthill testified that the facility volume was important along with other parameters for describing the extent of beneficial use of a fish propagation right:

Q. (BY MR. HONSINGER) Mr. Tuthill, earlier you stated that one of the reasons the department – or one of the primary reasons the department recommends facility volume in fish propagation water rights was to quantify the extent of beneficial use.

Can you expound on the extent of beneficial use measured by a facility volume parameter of a fish propagation water right?

A. Yes. With each water right in the SRBA in the state, we are recommending to the court the description of the water right to describe extent of beneficial use. For irrigation, that description includes rate of flow, in many cases volume, and number of acres.

For fish propagation, our description [sic] to recommend extent of beneficial use includes rate of flow, volume diverted, and facility volume. We feel that just rate of flow and volume diverted does not fully describe the extent of beneficial use.

Tr. (Jones), p. 206, L.9 - p. 207, L.2. Much of Mr. Tuthill's other testimony on direct examination by IDWR was objected to for various reasons and was included in an offer of proof. See, e.g., Tr. (Jones), pp. 208-219.

Although the Special Master ultimately found the facility volume remark to be unnecessary, the Special Master's Finding of Fact acknowledged, based on the testimony of David Tuthill, that "IDWR has determined that the extent of beneficial use of fish propagation

Master's Report, at 4, n.2. Another recent Supreme Court decision also confirms the admissibility of the Affidavit of David Tuthill. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 746, 947 P.2d 409, 419 (1997).

rights is best defined by rate of flow, volume diverted, and facility volume.” *Special Master’s Report and Recommendation* (May 19, 1998 - 36-07071), at 4.

The Claimant Jones called one witness, Mark Daily, who was responsible for water quality compliance at the claimant’s fish hatchery. Tr., pp. 237-53. Mr. Daily did not testify about the relationship between facility volume and the quantity of water used or the potential impact on upstream junior users if no facility volume is designated. The Special Master summarized Mr. Daily’s testimony as indicating that flexibility in facility volume is necessary for water quality reasons:

It is Daily’s opinion that facility volume parameters do not directly correlate with water quality or consumptive use. Fish hatcheries require flexibility in facility volume to improve water quality and living conditions for fish. For example, increasing facility volume by deepening a facility could take stress off fish and allow for change in methods of feeding and oxygen intake. Such increased facility volume would improve water quality.

Special Master’s Report and Recommendation, at 4-5.

Although Mr. Daily discussed the claimant’s preference for facility volume flexibility, he did not address the fundamental legal question at issue: facility volume’s relationship to water right administration, definition or clarification.

c. The Special Master’s recommendations were not supported by the record.

Although, according to statute, remarks should supplement other statutorily designated elements, the Special Master concluded, that facility volume was not justified as a remark since it was not expressly statutorily identified as an element of the water right. *Special Master’s Report and Recommendations*, (Jones) at 3 and 5. With regard to water right administration, the Special

Master also concluded that a facility volume designation would not be necessary for water right administration involving Idaho Code § 42-222 transfers “since a change in facility volume is not a change in nature or purpose of use.” *Id.*, at 6. This conclusion is inconsistent with the Special Master’s other finding that, “In case of a transfer, IDWR is charged with examining the evidence to determine whether any other water rights are injured, and to decide whether the transfer would constitute an enlargement of the original right.” *Id.*

d. **The NSGWD’s Motion to Alter or Amend and Associated Affidavits attempted to identify for the Special Master errors in the recommendation.**

Again, the Affidavit of Brett Rowley, a fish propagation operator in Texas, was submitted in support of the NSGWD’s Motion to Alter or Amend to substantiate that an increase in fish propagation facility size “generally is associated with the use of additional water to operate the additional facility volume.” *Affidavit of Brett Rowley*, at 2. Mr. Rowley’s affidavit confirmed the connection between facility volume increases and water usage described in David Tuthill’s affidavit and testimony: “With increased facility volume and the generally increased levels of fish production associated with enlarged facilities, greater flow rates are required on average to maintain acceptable conditions in the raceways and ponds.” *Id.*, at 3. *See also Affidavit of David R. Tuthill, Jr.*, p. 3, ¶ 8 (Exhibit A hereto).

The Affidavit of David Shaw, also submitted in support of the NSGWD’s Motion to Alter or Amend, confirmed that during recent years, the Jones hatchery had been operating well below the 73.05 cubic feet per second (“cfs”) diversion rate identified in the Special Master’s Recommendation for 36-07071. In fact Mr. Shaw’s Affidavit substantiated that the average rate

of diversion did not exceed 50 cfs during the years 1994 - 1998. Further, the Affidavit of David Shaw identified the seasonal variation in water use at the Jones hatchery. Mr. Shaw's affidavit indicated that the facility's water use peaked during October, November and December and typically was lowest April through August. David Shaw's affidavit supported the conclusion that the current recommendation of 73.05 cfs was not adequate to describe the quantity actually beneficially used under this water right.

e. **The Special Master erroneously denied the NSGWD's Motion to Alter or Amend.**

The Special Master originally set an evidentiary hearing on the Motion to Alter or Amend. *See Order Setting Subcase Deadlines and Setting Hearing on Motion to Alter or Amend* (36-07071). However, in response to the claimant's Motion to Vacate Evidentiary Hearing on Motion to Alter or Amend, the Special Master decided that the NSGWD could not submit new evidence in support of its Motion to Alter or Amend. *Order Concerning Evidentiary Hearing* (36-07071). Thus, the two affidavits submitted in support of NSGWD's Motion to Alter or Amend, the Affidavit of Brett Rowley and the Affidavit of David Shaw, were stricken, and the NSGWD was not able to call David Tuthill and David Shaw to provide additional testimony as it had indicated it intended to do on its witness and exhibit list filed with the court. *See NSGWD's Witnesses and Exhibits for Hearing on Motion to Alter or Amend* (36-07071). The NSGWD ultimately included the Affidavit of Brett Rowley and Affidavit of David Shaw as well as summaries of the intended testimony of David Tuthill and David Shaw as part of its offers of proof at the July 17, 1998 Motion to Alter or Amend hearing. Tr. (Jones), pp. 356-359; p. 367, LL. 13-15.

As described in the offer of proof, David Tuthill was going to testify further concerning how the diversion rate recommended for the right would need to be reassessed and redefined in light of the removal of facility volume. Tr. (Jones), p. 356, L.12 - p. 357, L.1. Mr. Tuthill also was to testify concerning the IDWR diversion measurement records for this facility. Tr., (Jones) p. 358, LL.5-20. David Shaw's testimony was going to include both IDWR and Idaho Division of Environmental Quality water measurement records for the John Jones Hatchery covering the years 1984 through 1998. Tr. (Jones), p. 357, LL.9-18. This data indicated that over this period of time, the facility had been operating substantially below the 73.05 cfs that is in the Special Master's recommendation. David Shaw's testimony would concern both the need for a facility volume designation and the need to reassess the legitimacy of the 73.05 cfs designation in light of this data. Tr. (Jones), p. 357, L.2 - p. 358, L. 20.

The Special Master's denial of the NSGWD's Motion to Alter or Amend with respect to the diversion rate stemmed from her decision not to allow the evidence concerning actual beneficial use to be presented. She applied a good cause standard requiring a showing of both "good cause for untimeliness and the existence of a meritorious position." *Order Denying Motion to Alter or Amend* (36-07071), at 1-3. She found that the NSGWD did not show good cause for untimeliness with respect to the diversion rate issue. *Id.* at 3. She also noted that the Affidavit of David Shaw presented with the Motion to Alter or Amend included less than five full years of usage data. *Id.* at 5.

The Special Master's decision, however, did not address the five full years of data since the original objection deadline of May 1, 1993 which only recently had become available and about which David Shaw and David Tuthill were prepared to testify at the Motion to Alter or

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Amend hearing. Certainly, the introduction of this five years of data, which alone constituted a cause of action and which could be available only sometime after the end of May 1998, could not have been deemed to be untimely. *See In Re: SRBA* (24 Hagerman Subcases), 130 Idaho 736, 743, 947 P.2d 409, 416 (1997). There was no way this cause of action could have been raised any earlier than June of 1998 and this data was included in the offer of proof at the hearing on July 17, 1998.

With respect to the facility volume issue, the Special Master indicated that this matter had been fully addressed at trial and, therefore, could not be addressed through the introduction of new evidence under a Motion to Alter or Amend. This contrasts with Special Master Haemmerle's finding in the Clear Spring subcases that "with respect to quantity, facility volume was not at issue" and that the NSGWD was attempting "to inject issues into the case which were never directly or indirectly raised." *Order Denying Motion to Alter or Amend* (October 7, 1998) (Clear Springs) at 1 and 4.

- 3 **Blue Lakes Subcases - 36-02356, 36-07210, 36-07427
and 36-07720 and Clear Lakes Subcases - 36-02659,
36-07004, 36-07080, and 36-07731.**
 - a. **At trial, all competent evidence before the
Special Master supported the inclusion of
facility volume remarks.**

On September 14, 1997, a trial was held solely on the issue of the necessity of facility volume designations in the Blue Lakes subcases. The parties represented were Blue Lakes, and an intervenor, Clear Lakes, another claimant of fish propagation rights who shared Blue Lakes' interest in removing the facility volume designations. Clear Lakes and IDWR later agreed to adopt the record, including testimony and exhibits, of the Blue Lakes facility volume trial in lieu

of having another facility volume trial for the Clear Lakes subcases. Tr. (Clear Lakes), p. 273, L. 20 - p. 274, L. 4.

It was agreed that the previously filed Affidavit of David Tuthill and IDWR's attached Report regarding facility volume (Exhibit B hereto) would substitute for direct testimony by David Tuthill at the trial. Tr. (Blue Lakes), p. 170, L. 2 - p. 172, L.3. Clear Lakes' and Blue Lakes' water right licenses were admitted into evidence. Tr. (Blue Lakes), p. 157, LL. 3 - 18 and p. 159, LL. 4 - 15. Tr. (Clear Lakes), p. 273, LL. 20 - 23.

One of Blue Lakes' licenses (36-07720) included a facility volume designation. Blue Lakes' corresponding SRBA Notice of Claim for that right included a facility volume remark. For three of four Clear Lakes' rights at issue, facility volume quantities had been designated in the water right license. For the fourth right (No. 36-07004), a facility volume quantity did not appear on the face of the license, but this water right covered the same fish propagation raceways as a subsequently issued license (No. 36-02659) which specified a facility volume of 26 acre feet.

The Affidavit and accompanying Report concerning facility volume of Adjudication Bureau Chief, David R. Tuthill, Jr., explained the basis for IDWR's inclusion of facility volume quantities for fish propagation rights. The Report explained that IDWR's facility volume quantities for fish propagation rights were made pursuant to *Idaho Code* §§ 42-1411(2)(j) and (k) (later recodified (i) and (j)).

The Report gave a number of legal and factual reasons for IDWR's recommendation of facility volume designations for fish propagation rights, including the possible injury to junior water users resulting from facility expansion:

Significant expansions in facility volume can result in injury to other water users, even when there is no increase in diversion rate, by increasing the diversion volume (generally by diverting the same diversion rate for longer periods of time), by increasing the consumptive use (generally due to treatment required to meet water quality standards

prior to discharge into a water source), or by decreasing water quality. . . .

An increase in facility volume may result in an increase in production. An increase in production may affect other water users should a senior fish propagator make a call on the resource. If a water right holder junior to the fish propagator is required to mitigate injury to the senior fish propagator, mitigation for increased production from the increase in facility volume would injure the junior.

Report (Exhibit B hereto), p. 4. ¶¶ 9 & 11.

The IDWR Report described injury to other water rights and quantification issues as primary reasons for inclusion of facility volume descriptors, while water quality reasons were described as only complementary to this primary purpose:

An increase in facility volume at a fish propagation facility alerts IDWR to a potential change in the beneficial use of the associated water right, and gives it the ability to determine whether the increase results in an expansion of the water and injury to other users, because of either water quantity or water quality impacts, or both.
IDWR considers the water quality aspect as complementary to the primary purpose for inclusion of facility volume descriptors in water rights; that of defining the extent of beneficial use.

Water rights should explicitly describe fish propagation facility volume to allow for effective protection of water rights and water users that may be impacted by the fish propagation use. This is the most convenient and effective means to define and administer water rights with sufficient specificity to prevent significant expansions in facility volume that may result in enlargement in use of the right or injury to other water rights.

Id., p. 5, ¶¶ 2 and 5 (emphasis added).

On cross-examination Mr. Tuthill testified that the facility volume remark relates to more than the issue of water quality. Importantly, it serves as an indicator of the extent of beneficial use of the fish propagation water right. Tr. (Blue Lakes), p. 191, LL. 21-22.

Mr. Tuthill further testified that without facility volume remarks, fish hatcheries may be

able to expand their facilities by adding more ponds or raceways and then require upstream ground water users to provide additional water to cover those expanded uses:

If a fish propagation facility adds 10 new ponds in 1997, should 1970 ground water rights cease pumping to allow those ponds to be receiving water? That's our concern.

Tr. (Blue Lakes), p. 315, LL. 6-9.

Mr. Tuthill testified that the facility volume remark for fish propagation water rights is analogous to identifying the number of irrigated acres for irrigation water rights; both provide more accurate measurements of the extent of beneficial use:

This parameter [facility volume] sets a benchmark just as acres irrigated set a benchmark for irrigation. We don't measure acres irrigated routinely. But if a problem comes up with a water right or it's contested in some way, then we look at the acres irrigated to see if that water right is used within the parameters of the right.

Tr. (Blue Lakes), p. 222, LL. 6-12.

The facility volume remark, according to Mr. Tuthill, protects other water right users from impacts and unwarranted mitigation caused by fish facility expansions:

What we've done so far is measure the facility. If there are ten raceways and each one is 1 acre-foot in volume, then that would be the 10 acre-feet. So that's a measure at that point in time of the facility volume.

In 20 years if there is delivery of water based on some lack of water availability, say for example the supply is diminished to the springs because of ground water pumping, and if mitigation is required then, then our sense is that the upstream pumpers should only be required to mitigate for the 10 acres of facility, not for 10 new acres of facility that have been added in the intervening years. So that's one protection that we could see as being a benefit of adding a facility-volume parameter.

Tr. (Blue Lakes), p. 298, LL. 6-20.

The facility volume remark also allows the public and the Director to review proposed facility expansions to determine the potential impact of those facility expansions on other water users before they occur. Mr. Tuthill explained:

[T]he existing right is limited to however many ponds are there now. And if more ponds are to be added, those should be added under either new water rights or through a transfer process where the public and the department can look at the impact, water right impact of adding the new ponds.

And, to me, that's really what this parameter boils down to, is do we issue decrees for water rights that could be added to or additional ponds that could be added; or are we saying that the limit of the right exists as it is now. And if more ponds are to be added, then those should have additional water rights either by transfer or by application.

Tr. (Blue Lakes), p. 303, LL. 1-14).

Further, Mr. Tuthill explained that fish propagators may oppose the facility volume remarks since the remarks would enable IDWR to review proposed facility expansions for potential injuries to other water users.

The option the fish propagation water-right holders want to retain is to enlarge those facilities under the existing right. And what we're saying by adding the facility-volume parameter is the department has to review that if an enlargement is requested. And that's a restriction that's unwanted by the fish propagation water-right holders.

Tr. (Blue Lakes), p. 317, LL. 22 - p. 318, LL. 3.

Blue Lakes called only one witness, James E. Parsons. Mr. Parson's experience involved his work with Blue Lakes as its technical and research director and then an additional 14 years working in the "technical side of aquaculture." Tr. (Blue Lakes) p. 348, LL. 11 - 25. Mr. Parsons provided virtually no testimony to refute Mr. Tuthill's testimony and affidavit relating

to the need to have a facility volume remark to avoid potential impacts to upstream ground water users. Mr. Parson's testimony dealt primarily with water quality issues involving the Blue Lakes facility. Clear Lakes' witness, Harold Johnson, an accountant and an office manager for Idaho Trout Processors, an organization with responsibility for fish propagation facilities including Clear Lakes', provided similar testimony relating to water quality at the Clear Lakes facilities. Tr. (Blue Lakes) p. 364, LL. 9-10.

b. The Special Master's recommendations were not supported by the record.

The Special Master subsequently issued decisions overturning the Director's determinations that facility volume remarks were necessary to define, clarify and administer fish propagation water rights. *Special Master's Report (Amended)* (Blue Lakes - March 18, 1998); *Special Master's Report* (Clear Lakes - March 3, 1998.) As reflected in his Reports, the Special Master believed that the fish facility remarks dealt primarily with water *quality*. *Special Master's Report (Amended)* (Blue Lakes) at 12. Based on that assumption, he reasoned that because the Department of Environmental Quality (DEQ) regulates water quality, facility volume remarks were not necessary. *Special Master's Report (Amended)* (Blue Lakes) at 12.

Problematic is the Special Master's failure to fully account for the water *quantification* evidence supporting the facility volume remark. Although Mr. Tuthill's affidavit and testimony stated that the facility volume remark was needed to protect other users from potential injury resulting from fish facility expansions, the Special Master did not address this issue. In his Conclusions of Law, the Special Master briefly touched on the water quantification aspects of the facility volume remarks, but even this discussion did not address potential impacts to upstream ground water users from possible facility expansions. *See, id.*

c. **NSGWD's Motion to Alter or Amend**

The proceedings on the NSGWD's Motion to Alter or Amend in the Blue Lakes and Clear Lakes subcases followed a similar path as the proceedings in the Clear Springs and Jones subcases. The Special Master ruled that David Shaw could not testify concerning publicly available water usage data for the facilities on the basis of Rule 59(e). Tr. (Blue Lakes), p. 492, LL.22-24. Counsel for the NSGWD submitted an offer of proof concerning his testimony and charts. Tr. (Blue Lakes), pp. 501-509. Although the NSGWD had requested that Mr. Shaw's live testimony be taken as part of the offer of proof, this request was denied. Tr. (Blue Lakes), pp. 496-500.

d. **The Special Master Erroneously Denied
the NSGWD's Motion to Alter or Amend.**

In his *Order Denying North Snake Ground Water District's Motions to Alter or Amend* (Blue Lakes and Clear Lakes, July 9, 1998) at 5, the Special Master reiterated his oral ruling that Rule 59(e) applies to Motions to Alter or Amend a Special Master's Recommendation. He further reaffirmed his previous conclusion that facility volume was not warranted. In this regard, he asserted that the NSGWD was attempting to reduce these fish propagation rights based on facility volume "without proof of forfeiture or abandonment." *Id.* He further concluded that Clear Lakes and Blue Lakes were "entitled to beneficially use up to the licensed amount without further limits or qualifications." *Id.* at 6.

Actually the NSGWD was not, through the facility volume mechanism, attempting to reduce water rights, but rather, was attempting to define their nature and extent more fully. Facility volume assists in defining the licensed water right, but does not serve to reduce a

licensed right for an existing facility.

II. LEGAL ARGUMENT

A. Evidence may be admitted in support of a Motion to Alter or Amend a Special Master's Report.

All three Special Masters refused to accept evidence proffered by NSGWD in support of its Motion to Alter or Amend. Special Masters Haemmerle and Dolan ruled that I.R.C.P. 59(e) governed the review of Motions to Alter or Amend Special Master's Reports and that pursuant to Rule 59(e) the additional evidence submitted by NSGWD could not be considered. Special Master Bilyeu, on the other hand, reviewed the NSGWD's Motion to Alter or Amend under the standards in Rule 53(e)(2), I.R.C.P. but applied the good cause standard in Rule 55(c), I.R.C.P. for the consideration of new evidence on quantity during the Motion to Alter or Amend proceeding. *Order re: Motion to Alter or Amend (Jones, September 11, 1998)* at 3. Special Master Bilyeu rejected consideration of the NSGWD's evidence, finding that there was no good cause for the untimeliness since "[m]ovants could have filed timely objections to the quantity element and could have participated on the issue of remarks such as facility volume." *Id.* at 6.

Although Rule 59(e) does concern Motions to Alter or Amend judgments, it does not and cannot, address Motions to Alter or Amend Special Masters' Reports in the SRBA. Quite simply, a judgment is different from a Special Master's Report and a Motion to Alter or Amend a judgment is a different beast than a Motion to Alter or Amend an SRBA Special Master's Report. On the other hand, Rule 53(e)(2) applies to the review of Special Masters' Reports. Also, there is no question that under Rule 53(e)(2) additional evidence can be submitted in conjunction with review of Special Masters' Reports.

1. SRBA statutes, the Rules of Procedure and SRBA Administrative Order 1 explicitly provide for the consideration of additional evidence in reviewing a Special Master's recommendation.

Applicable SRBA statutes, the Idaho Rules of Civil Procedure and SRBA Administrative Order 1 all confirm the legitimacy of submitting additional evidence in support of objections to Special Masters' Reports.

Rule 53(e)(2), I.R.C.P., which applies when a court reviews objections to a Special Master's Report, provides that objections to Special Master's Reports "shall be by motion and upon notice as prescribed in Rule 6(d)." In turn, Rule 6(d) specifically provides for the filing of motions accompanied by supporting affidavits: "When a motion is supported by affidavit, the affidavit shall be served with the motion. . . ." Rule 6(d), I.R.C.P. (emphasis added). Thus, it is indisputable that objections to a Special Master's Report may be accompanied by supporting affidavits at least when those objections are considered by a District Judge. Rule 43(e) also indicates that oral testimony may be considered in conjunction with motions, including, presumably, motions under Rule 53(e)(2). Additionally, both Rule 53(e)(2) and A.O.1 explicitly recognize that further evidence may be necessary upon a District Judge's review. "The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." Rule 53(e)(2), I.R.C.P. (emphasis added); *see also*, A.O.1, § 13(f).

While SRBA Administrative Order 1 provides that I.R.C.P. 53(e)(2) is the governing standard for challenging the Special Master's recommendations to the Presiding Judge, A.O. 1 actually does not specify the standard that applies to a Special Master's review under a Motion to

Alter or Amend. Since affidavits may be submitted with an objection to a Special Master's Report to the district judge and since a District Judge may consider additional evidence, it certainly appears appropriate that additional evidence also can be submitted with a Motion to Alter or Amend considered by a Special Master. The application of the Rule 59(e) standard to Motions to Alter or Amend Special Master's reports is inconsistent with the fact finding duties of Special Masters. The role of a special master is primarily that of an assistant to the district court. See I.R.C.P. 53(b); see also *Seccombe v. Weeks*, 115 Idaho 433, 435, 676 P.2d 276, 278 (Ct. App. 1989). The Special Master assists the court by engaging in fact finding and obtaining additional facts. *Seccombe*, 115 Idaho at 435, 676 P.2d at 278. However, the role of a Special Master is always limited to that of an assistant—not an ultimate trier of fact. *Id.* The Idaho Supreme Court summarized the role of a Special Master this way:

The purpose of a master is to assist the district court in obtaining facts where complicated issues or exceptional circumstances require it. I.R.C.P. 53(b). The appointment of a master does not displace the district court's role as the ultimate trier of fact.

Id. (emphasis added). It would be incongruous for the Judge to be able to consider additional evidence in conjunction with objections to Special Masters' Reports when the Judge's assistant factfinders cannot.

A Special Master has an inherent obligation to forward to the Presiding Judge as complete and as accurate a recommendation as possible. The consideration of affidavits that will later be reviewed by the district judge should assist the Special Master in achieving a correct result. Consideration of additional evidence by the Special Master at the Motion to Alter or Amend stage in the SRBA can preclude the need for a subsequent challenge to the District Judge

or a subsequent remand by the District Judge to the Special Master to address this same evidence. The fact that a trial in district court has been concluded does not necessarily preclude the possibility of reopening a case for the admission of additional evidence. *Davidson's Air Service, Inc. v. Montierth*, 119 Idaho 967, 968, 812 P.2d 274, 275 (1991). A Special Master's Report occurs at an even earlier stage in the proceedings, and should certainly permit the admission of additional evidence.

The SRBA statutes confirm that additional evidence can be considered at the stage where a Special Master reviews his or her own decision. The SRBA statutes indicate that "Objections to and hearing on the special master's report shall be governed by rule 53(e) of the Idaho rules of civil procedure." *Idaho Code* § 42-1422(3). It is noteworthy that *Idaho Code* § 42-1422(3) does not specifically distinguish between objections on Special Masters' Reports heard by the District judge and objections to Special Masters' Reports that would be heard by the Special Master. Rather, this statutory language broadly suggests that all objections on a Special Master's Report are governed by the Rule 53(e) procedure, which in turn references Rule 6(d) providing for the filing of affidavits.

By its express terms, Rule 59(e) applies only post-judgment and thus, cannot possibly apply to an objection to a Special Master's recommendation. Rule 59(e) has no application to Special Master's reports, which by definition are not "judgments." The definition of "judgment" under the Idaho Rules of Civil Procedure specifically excludes Special Master's reports:

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. *A judgment shall not contain* a recital of pleadings, the *report of a master*, or the record of prior proceedings.

I. R.C.P. Rule 54(a) (emphasis added). Rule 59(e) actually applies in limited circumstances

during a very limited post-judgment period. Further, Rule 59(e) does not govern all post-judgment proceedings. Under other rules, parties can even be allowed to submit additional evidence post-judgment. *See Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982).

Motions to Alter or Amend a Special Master's report under A.O.1 and Motions to Alter or Amend under Rule 59(e) share little more than a moniker. Rule 59(e) applies during a limited period of time post-judgment, whereas a Motion to Alter or Amend in the SRBA occurs prior to when the District Judge even considers a subcase. *See Fajardo Shopping Center v. Sun Alliance Insurance Co.*, 999 F. Supp. 213, 222 (D. P.R. 1998) ("Once a Special Master renders a report, his findings are not automatically held to be conclusive. The Court must confirm such findings for them to be valid.") (aff'd by *Fajardo Shopping Center v. Sun Alliance Ins. Co.*, ___ F.3d ___, 1999 WL 44722 (1st Cir. 1999)). In determining whether Rule 59 applies, the label of the motion is not controlling; rather, the substance of the motion and whether it seeks a change in the district court's decision is key:

In determining whether a motion is brought under Rule 59, we look beyond the form of the motion to the substance of the relief requested. *Munden v. Ultra Alaska Assoc.*, 849 F.2d 383, 386 (9th Cir. 1988). Where, as in petitioner's case, the motion requests a substantive change in the district court's decision, it may be considered under Rule 59(e). *Id.* at 387 (emphasis added); *see Cooper v. Singer*, 689 F.2d 929, 930 (10th Cir. 1982) (motion that questions correctness of judgment is a Rule 59 motion, no matter what the label). . . .

Hannon v. Maschner, 981 F.2d 1142, 1144 n.2 (10th Cir. 1992) (emphasis added).

Where, as here, certain water right elements may have been addressed in single party proceedings where the claimant is the only party involved, the submission of affidavits or other

additional evidence in conjunction with the Special Master's review of his or her own decision can be even more important than in typical litigation. *See State of Idaho v. Hagerman Water Right Owners*, 130 Idaho 736, 744-45, 947 P.2d 409, 417-18 (1997) ("One-party subcases are not adversarial proceedings in which the claimant is pitted against the Director. . . . In one-party subcases such as this . . . summary judgment is an inappropriate procedure and an evidentiary hearing must be conducted."). The submission of affidavits in the context of a Motion to Alter or Amend enables parties to the SRBA, other than the claimant, to identify information that was not, but should have been, considered by the Special Master in single party proceedings.

In order to identify errors in the record, it is frequently necessary to resort to extrinsic evidence. For example, the Affidavits of David Shaw provide publically available data, data that was not included in the previous SRBA proceedings, concerning the actual quantities beneficially used by the respective facilities. Without this additional evidence it would be virtually impossible to identify, based on the prior record, why the diversion rate quantities were in error.

The Affidavit of Dana L. Hofstetter submitted in three of the Clear Springs subcases identified admissions made by Clear Springs Foods or its predecessors in interest concerning facility volumes and seasonal fluctuations in water supply. This is important information that was not made available in the one-party trials, but this information nevertheless bears on the facility volume issue which was under consideration by the Special Master. Documents attached to the Affidavit of Josephine P. Beeman (filed in support of this Brief and the associated Motion) further corroborate the seasonal fluctuations in water usage at Clear Springs' facilities and also the potential for increased water usage with increases in facility volume. Exhibit B to the Brief in Support of Notice of Challenge (Consolidated Issues) - 35 -

Affidavit of Josephine P. Beeman includes a statement submitted on behalf of Clear Springs' predecessor in interest that: "Annual production, therefore, increased by about 40% and was brought about by a 60% increase in rearing capacity and a 40% increase in water flow." This information was not offered at Clear Springs' facility volume trial; but was pertinent to those proceedings.

Demonstrating the difficulty of identifying errors in the Special Master's recommendation without further evidence, both Blue Lakes and Clear Lakes have relied on additional evidence to support their own Motions to Alter or Amend filed in these subcases. In December 1997, Blue Lakes, filed a Motion to Alter or Amend the Special Master's Recommendation for 36-02356 to increase the annual diversion volume for its domestic uses. In support of its motion, Blue Lakes submitted new evidence in the form of affidavits. (Attached hereto as Exhibit C.) The Special Master granted the motion and made reference to the supporting affidavits in his Order Granting the Motion to Alter or Amend. However, the same Special Master has refused to even consider the evidence submitted by NSGWD in support of its Motion to Alter or Amend based on his ruling that Rule 59(e) bars the admission of new evidence on a Motion to Alter or Amend a Special Master's Report.

Clear Lakes, while it did not submit affidavits in support of its Motion to Alter or Amend, did attach additional evidence in the form of an aerial photograph to its Motion to Alter or Amend. (Attached as Exhibit D hereto). Certainly such an attempt to submit additional evidence without an adequate foundation cannot be acceptable under any circumstances. However, the submission of the aerial photography demonstrates the need to resort to information outside the record to identify errors or omissions in Special Master's

recommendations. Indeed, it is the very gaps in the record that in many instances may result in the need to correct the Special Master's Report.

2. **The Special Master Should Consider Recent Data Reflecting the Extent of Actual Beneficial Use Unless the Effective Date of SRBA Decrees will be Prior to 1993.**

The essential function of the SRBA is to assess and confirm the extent and nature of water rights based on actual beneficial uses. In the SRBA, issues of forfeiture, abandonment, adverse possession, and estoppel are very often intertwined with proving the nature and extent of water rights. Consideration of recent evidence concerning actual beneficial use at these facilities is important for reaching recommendations that reflect actual beneficial use. The statutory definition of "general adjudication" confirms that the fundamental purpose of a proceeding like the SRBA is to determine the "extent and priority of the rights":

"General adjudication" means an action both for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, except as provided section 42-1420, Idaho Code, and for the administration of those rights.

Idaho Code § 42-1401A(5) (Supp. 1998) (emphasis added). Idaho statutes repeatedly declare that in assessing the extent and priority of rights, actual beneficial use provides the yardstick for measuring those rights:

In allotting the waters of any water system by the district court according the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied. . . . The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed. . . .

Idaho Code § 42-1402.

The water right elements decreed, including the quantity of water, then provide the basis for subsequent administration and distribution of water:

Upon entry of a final decree, the director shall administer the water rights by distributing water in accordance with the final decree and with title 42, Idaho Code.

Idaho Code § 42-1413(2). In a recent decision the Idaho Supreme Court emphasized that water rights ultimately will be administered based on the provisions in the SRBA decree:

A decree is important to the continued efficient administration of a water right. The watermaster must look to the decree for instructions as to the source of the water. *Stethem v. Skinner*, 11 Idaho 374, 379, 82 P. 451, 452 (1905). If the provisions define a water right, it is essential that the provisions are in the decree, since the watermaster is to distribute water according to the adjudication or decree. I.C. § 42-607 (1997).

In re: SRBA (Basin-Wide Issue #5B), 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). If SRBA decrees are to reflect actual beneficial uses as of the date they are issued, the Special Masters should consider evidence of causes of action which have accrued prior to when a partial decree is issued but after the objection deadline.

The SRBA statutes are designed to ensure that the final decree accurately confirms actual beneficial uses. Since the final decree will be used to allocate water, it is important that the decree accurately reflects actual beneficial uses. If senior water users are decreed quantities in excess of what they actually beneficially use, junior users face the risk of being curtailed to supply senior users more water than is actually warranted. The very purpose and legitimacy of the SRBA depends on the Court accurately confirming the "nature and extent" of actual beneficial uses.

As described in the Affidavits and offers of proof, David Shaw would have provided information concerning actual water usage data including both before and after the filing of the

Director's Report (November 1992) and the close of the Director's Report objection period for Basin 36 (May 1, 1993). The evidence was offered in support of the NSGWD's Motions to Alter or Amend for the purpose of identifying matters in the Special Master's Reports that warranted further evidentiary proceeding for causes of action arising subsequent to 1992 and 1993. The following chart illustrates the diversion rate discrepancies between the Special Master's Reports and David Shaw's findings of actual use.

Facility	Special Master's Reports Diversion Rate (cfs)	David Shaw's Actual Use Determinations Based on Discharge Monitoring Reports Average Maximums in June 1999 Affidavits (cfs)
Clear Springs Middle Hatchery	251.55	202.45
Clear Springs Snake River Hatchery	116	106.17
Clear Springs Crystal Springs Hatchery	335.10	243.65
Jones Hatchery	73.05	47.82
Blue Lakes Hatchery	234.33	163.20
Clear Lakes Hatchery	175	167.77

Ultimately, it is necessary to consider this data to avoid subjecting junior water users to restriction for water quantities in excess of what the senior water right holders actually beneficially use.

Further, with respect to the five years subsequent to the Director's Report and the five years subsequent to the objections deadline, a mechanism needs to be provided to submit

information to the Court. The NSGWD's attempts to file late objections concerning this data also were denied. *Order Denying Motion to File Late Objections* (36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C and 36-07568, February 12, 1999); *Order Denying Motion to File Late Objections* (36-02708, 36-07218, and 36-07201, January 27, 1999), *Order Denying Motion to File Late Objection* (36-07071, December 15, 1998).

Unless the effective date of the SRBA decrees for these water rights is determined to be prior to 1993, the Special Master's quantity recommendations need to be re-evaluated in light of the five years of data since the objection deadline in 1993. This five-year period constitutes a new cause of action that did not accrue until May 1, 1998. Partial forfeiture or other causes of action requiring a five-year accrual period could not have been raised for the five-year period after the objection deadline until after May 1, 1998.

B. Fish Propagation Facility Volume Remarks are Necessary For Definition of the Rights, for Clarification of the Quantity Element, and for Administration.

1. Facility volume designations would help protect upstream junior ground water users from injury as a result of water right expansion.

Under the prior appropriation doctrine, junior water right holders may be subject to restriction or curtailment to supply a senior water right holder's full complement of water. However, the junior user generally is required to supply only the amount of water associated with the senior user's actual beneficial use. Fish facility volume designations help define the scope of the beneficial use which existed when the junior water right was established. Without a facility volume designation, junior users may be subjected to more restriction or greater mitigation costs due to future facility expansions. For this reason, facility volume remarks are necessary for the

definition of fish propagation rights, for clarification of the quantity element and for administration of fish propagation rights. *Idaho Code* § 42-1411(2)(j).

As noted in the Idaho Supreme Court's recent SRBA 24 Hagerman subcases decision, the determination of one water right can have rippling impacts on the rights of other water right holders:

Insomuch as this Court has acknowledged that water rights in the Snake River basin are interrelated, *In Re Snake River Basin Water System*, 115 Idaho 1, 7, 746 P.2d 78, 84 (1988), the Director's factual findings as to one water right holder impact the rights of other water right holders.

In Re: SRBA (24 Hagerman Subcases), 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). In *Musser v. Higginson*, 125 Idaho 392, 394, 871 P.2d 809, 811 (1994), Hagerman area spring users sought delivery of their full decreed water rights by controlling water distribution from the Eastern Snake Plain Aquifer. The *Musser* case illustrates the kind of impact that holders of senior decreed rights in the Hagerman area can have on the ground water users of the Eastern Snake Plain Aquifer.

IDWR's conjunctive management rules, which were promulgated in response to the *Musser* case, address water distribution issues in areas deemed to have a "common ground water supply" such as the Eastern Snake Plain Aquifer. Areas having a common ground water supply include those "within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source." IDAPA 37.03.11.010.01. In the rules, the Eastern Snake Plain Aquifer is declared to be an area having a common ground water supply. IDAPA 37.03.11.050.01. Where senior priority water right holders issue a delivery call from an area having a common ground water supply, the conjunctive management rules provide

that the diversion and use of junior priority ground water rights may be regulated or junior water users may be required to provide mitigation in order to continue to divert their water rights.

IDAPA 37.03.11.040.01. Mitigation includes “actions and measures to prevent, or compensate holders of senior-priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply.” IDAPA 37.03.11.010.15.

Under this regulatory regime, junior ground water users on the Eastern Snake Plain Aquifer, like the members of the NSGWD, may be subject to water use restriction or may be required to provide mitigation in the form of alternative water supplies or compensation to senior holders of fish propagation rights. If fish propagation facilities are allowed to expand under senior water rights, then junior ground water users may be subject to additional restriction and/or additional mitigation to correspond with the increases in facility size.

As in *Musser*, the fish propagation rights at issue in these subcases are diverted from springs in the Hagerman area. Also as in *Musser*, the right holder potentially may issue a delivery call against the Eastern Snake Plain Aquifer if its full decreed rights are not being satisfied. If these fish propagation rights do not include facility volume quantities, junior users may be required to supply or mitigate not just the quantities of water utilized by the facilities now, but also additional quantities associated with subsequent facility expansions.

The following hypothetical example helps illustrate the undesirable outcomes that can occur without facility volume designations: Suppose that in 1965, when a fish propagation right for 100 cubic feet per second (“cfs”) was established, a facility had a volume of 10 acre-feet

capable of producing 500 fish annually.⁹ While the water right allowed a maximum diversion of 100 cfs, the fish propagation operations did not require diversion of 100 cfs continuously and frequently used water at a much reduced rate whether because of seasonal fluctuations in water supply or for other reasons. The average diversion rate for the facility as constructed in 1965 was 50 cfs. In the year 2000, suppose demand for fish production increases. The fish facility owners consider an expansion of their facility to produce more fish. They propose to double the facility size to 20 acre-feet so that they can produce 1,000 fish a year instead of just 500. Because of the larger facility size and the larger number of fish that would be present, it is anticipated that the average diversion rate will need to increase to 75 cfs although the fish propagation facility could continue to operate within the water right's maximum allowed diversion rate of 100 cfs. With the expansion, the fish propagation facility would hold more water and would also be diverting more water from the source.

As a result of the expansion under the 1965 priority, a ground water user with a 1975 priority may be subject not only to the original right, which averaged 50 cfs for 500 fish, but also to the expanded use of 75 cfs average for 1,000 fish even though this expanded use post-dated the 1975 priority. The junior ground water user would be subject to restriction to supply not just an average of 50 cfs to the fish propagation facility, but now, as a result of the expansion, would be subject to curtailment to supply the increased average of 75 cfs. Thus, the ground water user may be required to use less water himself, and irrigate less land as a result of the fish propagation

⁹ The figures used in this hypothetical are for illustrative purposes. The quantities do not reflect conditions at a specific fish propagation facility. Nevertheless, these hypothetical quantities illustrate the kind of injuries to junior users that could occur without facility volume remarks.

facility expansion.

Similar effects would occur if, instead of restricting the ground water user's water use, mitigation is offered to the fish propagation facility. After the expansion, the ground water user may be required to provide compensation to the fish facility for its inability to produce the full 1,000 fish a year. Thus, as a result of facility expansion, the ground water user's compensation obligations have increased two-fold over the annual 500 fish quantity that the facility originally was capable of producing. If, instead, the ground water user mitigates by purchasing and providing alternative water sources for the fish propagation facility, the ground water user will be injured by having to provide an average of 75 cfs of replacement water instead of only 50 cfs. These are the kinds of injuries to junior users that can occur if no fish facility volume is designated in SRBA decrees.

Facility volume designations are necessary to define the beneficial use of fish propagation rights, and to clarify that the rates of diversion and diverted volumes as of the effective date of the SRBA decree are associated with stated facility volumes. Administration of these rights requires the facility volume data to effectuate the "first in time is first in right" principle in a future water call.

2. **The Claimants never rebutted the presumptive correctness of the facility volume remarks in the Director's Report with competent evidence.**

The SRBA statutes put the burden of going forward with evidence on the one challenging the Director's Report: "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." *Idaho Code § 42-1411(5)*. Additionally, the water right claimant has the ultimate burden of persuasion for each element of a water right. *Id.* In these subcases, each of the claimants provided only one witness. However, none of these witnesses testified concerning the key legal standard at issue: whether facility volume remarks were necessary for definition of the rights, for clarification of any element of the rights, or for administration of the rights by the director. Thus, the claimants did not meet either their burdens of production or persuasion.

Clear Springs' witness, Terry Huddleston, testified primarily concerning facility volume's relationship to fish production and water quality issues. The closest he came to discussing matters concerning water right definition or administration was the following remark:

Q. Why is it that you or Clear Springs opposes implementation of a facility volume limit?

A. Well, because facility volume simply is not representative of extent of beneficial use or of production capacity.

Tr. (Clear Springs), p. 29, LL. 18-22. Although this conclusory remark does refer to the "extent of beneficial use" it does not specifically address water right definition or water right administration issues.

In another instance, Mr. Huddleston provided an unsubstantiated anecdote concerning a purported instance where facility volume was reduced but fish production increased. Tr. (Clear Springs), p. 28, LL. 4 - p. 29, LL. 4. Even if Mr. Huddleston's anecdote would have been properly substantiated, it does not concern possible water use enlargement associated with facility volume expansion. The anecdote relates to a situation involving a reduced facility volume. A facility volume limitation in a water right would not affect an operator's ability to

reduce facility volume and increase production. Rather, a facility volume designation is needed to define the actual beneficial use so that junior users would not be subject to any increased water use due to facility enlargement.

Jones' single witness, Mark Daily, testified primarily concerning water quality matters. The closest he came to addressing water right definition, administration or clarification matters involved the following response to a leading question.

Q. Can you tell me from that information [facility volume of 200,000] whether or not there might be a change in the way in which the facility affects a downstream user?

A. No.

Tr. (Jones) p. 251, LL. 8 - 11. It is not clear from Mr. Daily's response whether he was responding that there was no change or whether he was responding that he could not tell whether there might be a change. In any event, Mr. Daily's testimony did not address the extensive reasons provided in Mr. Tuthill's Affidavit and testimony concerning why facility volume was necessary for water right definition, administration and clarification.

Clear Lakes' witness, Harold Johnson, testified primarily concerning water quality issues. In response to Mr. Steenson's key question concerning including facility volume as a parameter in a water right, Mr. Johnson admitted that he did not understand the issue:

Q. Harold, do you have any other comment regarding this idea of including fish facility volume as a parameter in an aquaculture facility's water right?

A. My only thought is I'm not—I just don't understand what the need for it is. We have a permit or a license to divert so many cfs of water. That's what we're licensed for. . . .

Tr. (Blue Lakes), p. 385, LL. 9 - 18.

James E. Parsons, Blue Lakes' witness, testified concerning water quality, water velocity and fish production but never really addressed facility volume in the context of water right definition, water right clarification or water right administration. The closest he came to testifying concerning these matters is as follows:

Q. Does your facility volume-- it's changed over the years. Has it impacted any water rights to your knowledge, the changes in facility volume, over time?

A. None that I'm aware of.

Tr. (Blue Lakes), p. 351, L. 24 - p. 352, L. 2.

In summary, none of the four witnesses presented by the claimants addressed the key matter at hand concerning facility volume's relationship to water right definition, clarification and administration. There was some sparse tangential testimony. However, none of this testimony constituted evidence that would rebut the Director's Report recommendations which found facility volume necessary for definition, clarification and administration of fish propagation rights. David Tuthill's Affidavit and testimony, on the other hand, specifically described why facility volume designations would assist IDWR in ensuring that the fish facilities would not be expanded to the potential injury of junior ground water users, like the upstream ground water users who are members of the North Snake Ground Water District.

3. **None of the Claimants' Witnesses were Qualified to Address Whether Facility Volume was Necessary for Water Right Definition, Clarification or Administration.**

Although each of the four of the claimants' witnesses had some kind of experience relating to fish propagation, none of them were qualified as experts in matters relating to water

right definition or administration. For this reason, none of the witnesses even qualified to give expert opinions concerning these matters.

It is fundamental that an expert witness must be qualified as an expert in the subject matter at hand. The Case law indicates that a tight fit is required between the subject matter at issue and the expert witnesses' qualifications. In one case, the credit manager of a hospital was deemed to be unqualified to testify concerning whether the charges claimed by the hospital were reasonable and whether the medical treatment was necessary: "At bottom, the problem with the witness was not that she was not an expert, but rather that she was not competent to testify as to the issue before the county board, i.e, necessity and reasonableness of the charges." *IHC Hospitals, Inc. v. Board of Commissioners*, 108 Idaho 136, 143, 697 P.2d 1150, 1157 (1985) overruled on other grounds, *Intermountain Health Care v. Bd. Of Commrs.*, 108 Idaho 757, 702 P.2d 795 (1985). In another case, a civil engineer with experience as a tractor mechanic and in accident reconstruction was determined not to be qualified for assessing the useful life span of agricultural tractors while he was deemed qualified to give an opinion regarding the existence of a design defect. *West v. Sonke*, 132 Idaho 133, 139, 968 P.2d 228, 234 (1998). In another case, an expert with a degree in chemistry and experience as a farmer and as an agronomist, did not have the necessary expert qualifications to render an expert opinion regarding hydrology and the frequency of flooding in the Mud Lake Basin. *Marty v. State*, 122 Idaho 766, 768-69, 838 P.2d 1384, 1386-87 (1992). By analogy, the testimony on behalf of the fish facilities, focused on fish production and water quality at individual facilities, but did not address the fundamental question of the definition and administration of water rights within an interconnected resource.

Clear Springs' witness was its farm operations manager. He had degrees in zoology and fish

culture and disease. Tr. (Clear Springs), pp. 16-17. Although his testimony indicates he was involved in using water under Clear Springs' water rights by way of measuring and submitting flow reports, there is no indication on the record that he had any experience with matters concerning water right administration or definition. In other words, he cannot be expected to be qualified on matters relating to why facility volume designations are needed in fish propagation rights in order to protect the interests of junior water users.

Jones's witness had degrees in physics and he had some knowledge of chemistry and biology. Tr. (Jones), pp. 237-238. He also had experience with fish propagation through his work at the Jones Hatchery. However, again, his testimony does not reveal any qualifications on matters relating to water right administration or definition. Clear Lakes' witness was an office manager involved with several hatchery facilities. Tr. (Blue Lakes), p. 364. Blue Lakes' witness was the research and technical director for its trout farm and had other experience with fish propagation facilities. Tr. (Blue Lakes), pp. 348-49. Again, however, these witnesses exhibited no expert knowledge of water right administration.

David Tuthill, Adjudication Chief for IDWR, in his testimony and affidavit, recounted his substantial experience in matters concerning water right administration and definition. In order to appropriately address this testimony and the facility volume remarks in the Director's Report, the claimants should have asked experts involved in water right definition or administration to testify. A former IDWR official could be a potential expert in this regard. Further, water right administrators from out of state could also be qualified. However, the witnesses who actually testified were not qualified to address the issue at hand.

The NSGWD includes junior users who may be subject to water restriction or the provision

of mitigation to supply senior fish propagation rights in the Hagerman area. Without a facility volume descriptor in the water rights, fish propagation facilities may be able to enlarge their beneficial use and thereby subject junior users to restriction, not just for the quantities associated with the original facility volume, but also for any additional quantities needed as a result of facility expansion. Requiring junior users to supply or mitigate additional water uses post-dating their own priority dates would violate the fundamental "first in time, first in right" underpinnings of the prior appropriation doctrine. Designating facility volumes would avoid this inappropriate outcome.

III. CONCLUSION

For the foregoing reasons, these subcases should be remanded for further evidentiary hearings on diversion rates and facility volume remarks should be added to the Special Masters' Recommendations.

DATED this 8th day of June, 1999.

BEEMAN & HOFSTETTER, P.C.

By Josephine P. Beeman
Josephine P. Beeman

By Dana Hofstetter
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 1999, I caused to be served copies of the foregoing **Brief in Support of Notice of Challenge (Consolidated Issues)** by the method indicated below upon:

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