**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**

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

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| In Re SRBA | ) | Subcase No. 36-08099 |
| | ) | |
| | ) | **MEMORANDUM DECISION AND** |
| | ) | **ORDER ON CHALLENGE; ORDER** |
| Case No. 39576 | ) | **ON STATE OF IDAHO'S MOTION** |
| | ) | **TO DISMISS CLAIMANT'S** |
| _____ | ) | **NOTICE OF CHALLENGE** |

## I.
## APPEARANCES

Mr. Patrick D. Brown, P.C., Attorney for Claimant and Challenger River Grove Farms, Inc..

Mr. Peter J. Ampe, Deputy Attorney General, Natural Resources Division, Attorney for Respondent State of Idaho.

## II.
## MATTER DEEMED FULLY SUBMITTED FOR DECISION

This Court having heard oral arguments on the challenge on December 17, 1999, with no party seeking additional briefing and the Court having requested none, the matter is deemed fully submitted for decision on the next business day, or December 20, 1999.

## III.
## STATE OF IDAHO'S MOTION TO DISMISS RIVER CLAIMANT'S NOTICE OF CHALLENGE

On October 13, 1999, the State filed a motion to dismiss the *Notice of Challenge* filed by River Grove Farms, Inc. (hereinafter "River Grove"[1]) on the grounds that River Grove did not participate in the State's *Motion to Alter or Amend* before the Special Master, and that AO1 § 13 makes such participation a prerequisite to a challenge. The State's *Motion to Dismiss Claimant's Notice of Challenge* is DENIED for the following reasons:

First, the purpose of the AO1 provision relied upon by the State (AO1 § 13) is to prevent non-parties to a subcase from becoming a party to a subcase for the first time at the challenge stage. It was not intended to cover the rare situation presented in this case where the claimant (who already is a party to the subcase and who actually participated in the trial of the case) fails to actively participate in a motion to alter or amend.

Second, because this Court has the duty to independently review a special master's findings of fact and conclusions of law (*See Seccombe v. Weeks*, 115 Idaho 433), this Court would rather have the benefit of River Grove's briefing and oral argument on challenge in deciding the substantive issues.

## IV.
## THE STANDARD OF REVIEW OF A SPECIAL MASTER'S REPORT OR RECOMMENDATION IN THE SRBA

### The Significance of the Director's Report in Adjudication of Water Rights in the SRBA

A statement of the standard of review of a special master's report or recommendation regarding water rights claimed under state law in the SRBA begins with an understanding of the statutorily created procedural framework of how a "state based" claim is processed. *See* I.C. §§ 42-1401 to –1428 (1996 & Supp. 1999); SRBA

[1] For the sake of simplicity, a reference to River Grove in this opinion may also refer to River Grove's predecessors-in-interest.

Administrative Order 1, Rules of Procedure (Oct. 16, 1997). The pleadings in an adjudication proceeding consist of such documents as the notices of claim, objections, and responses thereto. *Fort Hall Water Users Ass'n v. U.S.*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995).

Summarily stated, the principal steps in a state based water right claim are as follows:

1. A claim of a water right is filed. I.C. § 42-1409 (Supp. 1999).
2. IDWR makes an examination of the relevant water system and of the claim. I.C. § 42-1410 (1996).
3. As a result of the IDWR examination, a Director's Report is filed. I.C. § 42-1411 (Supp. 1999).
4. Objections and/or Responses to the Director's Report can be filed by the claimant or any other party in the SRBA. I.C. § 42-1412 (Supp. 1999); I.C. § 42-1411(5).
    A. The parties to a subcase can stipulate to the contested elements of a water right by the use of a Standard Form 5. IDWR may concur therewith. AO1(4)(d)(3). If IDWR does not concur, the Court shall conduct any hearing necessary to determine whether a partial decree should be issued. AO1(4)(d)(3)(c).
    B. Uncontested and settled subcases are partially decreed.
5. Contested subcases proceed toward resolution. The District Court may refer these subcases to a special master. I.C. § 42-1412(4)-(5).
    A. Settlement conference.
    B. Scheduling conference.
    C. Trial before a special master.
6. In referred subcases, a **Special Master's Report or Recommendation** is filed with the Court. AO1(13).
7. **Motions to Alter or Amend a Special Master's Report or Recommendation** are filed, heard and ruled upon by a special master. AO1(13).

8. Objections ("Challenges" in the SRBA) to the final **Special Master's Report or Recommendation** are filed with the SRBA District Court. I.R.C.P. 53(e)(2); AO1(13).
9. A decision is made by the District Court on the **Challenge** and a Partial Decree is entered.
10. An appeal to the Idaho Supreme Court may be taken.

As it relates to the standard of review, the Director's Report (step 3 above) is of major significance because by statute, the Director's Report constitutes *prima facie* evidence of the nature and extent of a water right acquired under state law, and therefore constitutes a rebuttable evidentiary presumption. I.C. § 42-1411(4)-(5); s*ee Silverstein v. Carlson*, 118 Idaho 456, 461-62, 797 P.2d 856, 861-62 (1990); *State v. Hagerman Water Right Owners. Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418 (1997). The objecting party has the burden of going forward with evidence to rebut the Director's Report as to all objections filed. I.C. § 42-1411(5). However, I.C. § 42-1411(5) is silent as to the quantum of proof necessary to overcome the presumption raised by the Director's Report. If a statute is silent as to the quantum of proof necessary to overcome a presumption, then the presumption is overcome when the "opponent introduces substantial evidence of the nonexistence of the fact [presumed]." *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986), *citing* Committee Comment to I.R.E. 301. Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 938 (1993). "When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *Hagerman Water Right Owners. Inc.*, 130 Idaho at 745, 947 P.2d at 418. If the presumption is overcome by the objector, then the claimant has the "ultimate burden of persuasion for each element of a water right." I.C. § 42-1411(5). That is, when the *prima facie* evidence is rebutted by competent evidence, the issue is decided, like other issues, on the sum of the proof. *See* D. Craig Lewis, Idaho Trial Handbook, § 12.5 (1995), *citing Reddy v. Johnston*, 77 Idaho 402, 293 P.2d 945 (1956).

Therefore, from the "get-go," a special master's evidentiary view of an "objected to" subcase is directly affected by the content of the Director's Report, who filed the objection (i.e. who has the burden of going forward with the evidence), and to which elements of the claim the objection is directed (i.e. the scope of the objection). I.C. § 42-1411(5). In turn, a review of a **Special Master's Report or Recommendation** by the District Court is likewise influenced by the procedural history of the particular subcase(s).

**Special Master's Report or Recommendations (as to the unobjected to portion of Director's Report)**

I.C. § 42-1411(4) purports to mandate that the unobjected to portions of the Director's Report be decreed as reported. Normally, this is exactly what happens. However, despite the unyielding language of this statute, the SRBA district court retains discretion to apply law to facts and render its own conclusions regarding unobjected to water rights. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995), *citing* I.R.C.P. 55. Additionally, I.C. § 42-1412(7) allows the district court to delay entry of partial decrees for those portions of the Director's Report for which no objection has been field if the district court determines that the unobjected claim may be affected by the outcome of a contested matter.

**Special Master's Report or Recommendations (as to the objected to portion of Director's Report)**

Because the district court has the duty to independently review a special master's report, the findings of fact and conclusions of law contained therein do not stand automatically approved in the absence of a challenge. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989); C. Wright and A. Miller, Federal Practice and Procedure § 2612 (1995).

Under I.R.C.P. 53(e)(2), written objections/challenges may be served upon all other parties within fourteen (14) days of service of the notice of the filing of a special

master's report.[2] It should be noted, however, that AO1(13)(a) provides that "**[f]ailure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend the Special Master's Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge.**"[3]

Applications to the referring district court for "action upon the report" are covered by I.R.C.P. 53(e)(2), and are to be by motion. The court, **after hearing**, has a wide range of actions available. The court 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 to a special master with instructions. I.R.C.P. 53(e)(2). Where a challenge to a special master's report is filed, a district court must hold a hearing on the issues raised therein. *See Kieffer v. Sears Roebuck & Co.*, 873 F.2d 954, 956 (6th Cir. 1989). Of course, the parties could waive oral argument and submit the challenge on the briefs.[4]

**Findings of Fact of the Special Master**

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone*,

[2] If a **Motion to Alter or Amend a Special Master's Recommendation** is timely filed under AO1(13)(a), the time to file a challenge under I.R.C.P. 53(e)(2) is suspended until the special master files a decision on the **Motion to Alter or Amend**.

[3] It may seem anomalous that actual participation in a **Motion to Alter or Amend** is a prerequisite to a Rule 53(e)(2) challenge in the SRBA, but such a challenge or objection is not a prerequisite to appellate review. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989) (holding that objections to findings and conclusions of the master are not required to preserve an issue for appeal). The following reasons, however, explain this apparent anomaly: First, because of the large and complex nature of the SRBA litigation, and the potential that a large number of parties may have an interest in a particular issue or subcase before a special master, it is necessary for those interested parties to involve themselves in the proceedings before the special master, at least at the **Motion to Alter or Amend** stage. *See* AO1 (13)(a). Allowing interested parties to sit back and wait for the special master's final report and then file a challenge with the district court would cause unjustifiable expense and delay. Second, the district court has the affirmative duty to independently review the special master's report (irrespective of whether it has been challenged) using the clearly erroneous standard as to findings of fact and a free review of the conclusions of law. Upon such review, the district court may, on its own initiative, adopt, modify, or reject the report, receive further evidence, or refer it back to the special master. In contrast, an appellate court – which is not a fact finding court – is limited to the record before it in deciding whether the trial court's findings are clearly erroneous and/or whether the conclusions of law are incorrect.

[4] If no party files a challenge to a special masters report and recommendation, the court will not usually hold a hearing under I.R.C.P. 53(e)(2). As a practical matter, such a hearing would accomplish little, if anything; it would not be an efficient use of judicial resources, and would create unnecessary expense for the litigants.

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

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

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

A special master's findings which a district court adopts in a non-jury action are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,[5] although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. Wright and Miller, *supra*, § 2614; *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100,

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

123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra*, § 2585.

With respect to stipulated facts, I.R.C.P. 53(e)(4) provides that when parties stipulate that a special master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered (meaning freely reviewable by the referring district court).[6]

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

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

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is

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[6] Read literally, this rule absolutely requires a referring district court to accept stipulated facts without any question. While this would be the result in the vast majority of cases, it is logical that the intent of this rule is much like the "uncontradicted testimony rule" of evidence. This "rule" is that "[t]he uncontradicted testimony of a credible witness must be accepted by the trier of fact unless the testimony is 'inherently improbable, or rendered so by facts and circumstances disclosed at the hearing . . . or impeached by any of the modes known to the law." *Faber v. State*, 107 Idaho 823, 824, 693 P.2d 469, 470 (Ct. App. 1984), *citing Dinnen v. Finch*, 100 Idaho 620, 626-627, 603 P.2d 575, 581-82 (1979). *See also Russ v. Brown*, 96 Idaho 369, 373, 529 P.2d 765, 769 (1974) ("[T]he trial court must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable or impeached"); *Roemer v. Green Pastures Farms, Inc.*, 97 Idaho 591, 593, 548 P.2d 857, 859 (1976) ("The district court, sitting as a trier of fact, may reject uncontradicted testimony of a witness if the testimony is inherently improbable."); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998) ("[I]t has long been recognized that unless a witness's testimony is inherently improbable, or rendered so by facts and circumstances disclosed at trial, the trier of fact must accept as true the positive, uncontradicted testimony of a credible witness."); Wright and Miller, Federal Practice and Procedure § 2586 (1995) ("The court need not accept even uncontradicted and unimpeached testimony if it is from an interested party or is inherently improbable."). Hence, a reviewing district court, through its inherent powers and sitting as the final arbiter of all the issues, could reject stipulated facts which were inherently improbable and/or which would result in a fraud being perpetrated on the court or on others.

less clear. Professor Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook." Lewis, Idaho Trial Handbook, § 35.14 (1995), *citing Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), *citing* Idaho Appellate Handbook § 3.3.4.2.

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

**Conclusions of Law of the Special Master**

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

**Label is not Decisive**

Plainly, the label put on a determination by a special master is not decisive. Therefore, if a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

**Mixed Questions of Fact and Law**

There is substantial authority that "mixed questions of fact and law" are not protected by the "clearly erroneous" standard and are freely reviewable. Wright and Miller, *supra*, § 2589; *U.S. v. Ekwunoh*, 12 F.3d 368, 372 (2nd Cir. 1993).

**The Bottom Line Regarding Findings of Fact and Conclusions of Law**

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

**Standard of Review Regarding Admission or Exclusion of Evidence**

A district court reviews a special master's decision admitting or excluding evidence, including the testimony of expert witnesses, under the abuse of discretion standard. This is the same standard that is used by an appellate court to review such decisions made by a trial court. *Morris by and through Morris v. Thomas*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997), *citing Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

In *Burgess*, the Idaho Supreme Court articulated the following test for whether a trial court (and likewise a special master) has abused its discretion:

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

*Burgess*, 127 Idaho at 573, *citing Rhodehouse v. Stutts*, 125 Idaho 208, 213, 868 P.2d 1224, 1229 (1994).

A trial court, and likewise a special master, may exclude or strike evidence upon the motion of a party. Furthermore, a trial court or special master may exclude evidence offered by a party on its own authority, without a motion to strike or an objection made

by the opposing party. *Morris*, 130 Idaho at 144, 937 P.2d at 1218, *citing Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782-83, 839 P.2d 1192, 1196-97 (1992).

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. I.R.C.P. 61; I.R.E. 103; *Burgess*, 127 Idaho at 574, 903 P.2d at 739; *Hake v. DeLane*, 117 Idaho 1058, 1065, 793 P.2d 1230, 1237 (1990); *Morris*, 130 Idaho at 144, 937 P.2d at 1218.

## V.
## BRIEF PROCEDURAL AND FACTUAL BACKGROUND

1. River Grove's predecessor-in-interest (Indian Point Associates) filed an Application for Permit with IDWR on July 12, 1982, seeking to appropriate 2.0 cfs from Billingsley Creek for a hydropower purpose of use. At the point of diversion from Billingsley Creek, the water was to be conveyed through the Barlogi ditch to a point of re-diversion into another ditch and ultimately to the proposed power plant.

2. This permit was approved by IDWR on October 18, 1983, for 2.0 cfs and included the following subordination language: "Use of water under this permit is subordinated to future diversion of water for irrigation or other consumptive beneficial uses." In approving the permit, IDWR also inserted the condition that "[t]he permit holder shall either install a measuring device or an access port or provide a certified measurement or computation of flow based upon system design to be prepared by a professional engineer."

3. River Grove's predecessor-in-interest had completed construction of the diversion works and applied the water to beneficial use on or before February 26, 1985, this being the date that IDWR conducted an on-site beneficial use examination. The Beneficial Use Field Report indicates that the flow was measured as "1.92 cfs going into pipeline used for power." *See* Trial Exhibit 1 (Beneficial Use Field Report).

4. On April 18, 1985, IDWR sent a letter to River Grove's predecessor-in-interest (Paul E. Watkins), which reiterated that a licensing examination had been completed on February 26, 1985, with a measurement of "1.92 cfs of water going into the pipeline to your power plant, (2,367 [sic 2.367] cfs total flow minus 0.443 cfs going over the weir with the pipeline full)." This letter also stated that "[y]our water license will not be issued for some time due to the Swan Falls water rights dispute. However, your water right is protected by the timely filing of your proof of beneficial use." Trial Exhibit 5 (letter from IDWR to Paul E. Watkins) (which this Court interprets to mean that the permitee had complied with the time requirements of I.C. § 42-204 and did not need to seek an extension of time to complete the works).

5. IDWR issued a Water Right License to River Grove's predecessor-in-interest (Paul and Inez Watkins) on April 3, 1991, for 1.92 cfs. This license contains the following language: "The water right confirmed in this license for hydropower purposes shall be junior and subordinate to all rights to the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this license and shall not give rise to any right or claim against any future rights to the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this license."

6. Neither River Grove nor the their predecessors-in-interest contested, in an administrative proceeding or otherwise, IDWR's inclusion of the subordination clauses contained in either the permit or the license.

7. A Notice of Claim to a Water Right was filed in the SRBA for water right no. 36-08099 by Paul Watkins and Inez Watkins on July 6, 1988, which claimed 2.0 cfs for power purposes.

8. An Amended Notice of Claim to a Water Right was filed in the SRBA for water right no. 36-08099 by Paul Watkins and Inez Watkins on December 7, 1997. On December 11, 1997 Special Master Haemmerle issued an *Order*

*Granting Late Filing of Amended Claims*. This Amended Notice of Claim claimed 1.92 cfs measured at the penstock, or alternatively 2.53 cfs measured at the point of diversion from Billingsley Creek. Additionally, the remark section of this Amended Notice states that "[t]here is no authority for subordination, & it was accomplished without statutory or constitutional due process. There should be no subordination."

9. On April 29, 1993, Paul Watkins and Inez Watkins filed an Objection to the Director's Report as to Quantity, Priority Date, Consumptive Use, Remarks, and Other.

10. On September 10, 1993, Keith Higginson, Director of IDWR filed a Response to Objection.

11. The initial Director's Report (November 2, 1992) for this water right was for 1.92 cfs with a remark that "0.24 cfs of right no. 36-00106 is limited to use for conveyance losses in delivery of this [36-08099] right ." The initial Director's Report also included a remark which recited the subordination language contained in the license.

12. The Supplemental Director's Report for Water Right Nos. 36-00106 and 36-08099 (February 2, 1998) recommended that the water right be decreed for 1.92 cfs, with at remark that "the appropriator is entitled to the quantity of water described for power purposes at point of measurement in the penstock, so long as the quantity diverted at the point of diversion does not constitute unreasonable waste." (Penstock meaning the point where the water actually enters the hydropower plant and not the point of diversion out of Billingsley Creek.) This Supplemental Director's Report also contained the subordination language.

13. The Amended Director's Report (May 15, 1998) recommends that the water right be decreed for 1.92 cfs, and also contains the same "measurement" remark as found in the Supplemental Director's Report. Also, this Amended Director's Report contains the subordination language.

14. Numerous proceedings were held before the Special Master, including a trial held on May 24, 1999, culminating in a *Special Master's Report and Recommendation* (June 7, 1999), which recommended that the water right be decreed for 2.51 cfs (1.92 cfs measured in the penstock plus a conveyance loss of 0.59 cfs). Furthermore, the Special Master recommended that the water right be decreed without the subordination remark.

15. On July 28, 1999, the State filed a *Motion to Alter or Amend*, arguing that the water right should be decreed as it was licensed, i.e. for 1.92 cfs and with the subordination remark.

16. On August 20, 1999, Special Master Haemmerle issued an *Order Granting Motion to Alter or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation*, which stated that "[w]ater right 36-08099 should be decreed as reported in the Director's Report including the [subordination remark]." Attached to this *Order* was a *Special Master's Recommendation* which was at variance with the Amended Director's Report in that it stated a quantity of 2.51 cfs rather than 1.92 cfs.

17. On August 30, 1999, the State filed a *Motion to Correct Clerical Error* pursuant to I.R.C.P. 60(a), pointing out this discrepancy. This Motion was granted by Special Master Cushman on October 5, 1999, correcting the *Recommendation* to provide for 1.92 cfs.

18. On September 3, 1999, River Grove filed its *Notice of Challenge*.

## VI.
## ISSUES PRESENTED

In its *Notice of Challenge,* River Grove states the following issues:

1. Did the Special Master err in concluding the subordination and quantity issues were not properly before this Court due to a lack of jurisdiction?

2. Did the Special Master err in holding the Claimant could not "collaterally attack" or challenge the subordination provisions recommended?

3. Did the Special Master err in concluding that the Claimant is barred from challenging the subordination provisions and quantity because it had failed to exhaust administrative remedies?

4. Did the Special Master err in recommending the right be decreed as recommended, given undisputed facts and law establish IDWR acted beyond its authority in licensing and recommending subordination?

5. Did the Special Master err by failing to find and/or conclude that the statute upon which IDWR relied to confer authority for subordination is inapplicable and may not be retroactively applied to this water right?

6. Did the Special Master err by recommending subordination under I.C. Section 42-203A, *et seq*. given the mandates of those statutes were admittedly not followed by IDWR?

These issues are addressed below as the "subordination remark" issue and the "conveyance loss" issue.

## VII.
## DECISION

### 1. Subordination Remark Issue

In his *Order Granting Motion to Alter or Amend*, Special Master Haemmerle held that River Grove's objection to the subordination remark contained in the Director's Report constitutes an impermissible collateral attack on an administrative agency's

(IDWR's) action.[7] Specifically, and citing to a previous decision, Special Master Haemmerle held:

> If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative [review] and, if necessary, a judicial review of the license. I.C. §§ 42-1701A and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote omitted] *See e.g. Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

***Supplemental Findings of Fact and Conclusions of Law*** (Facility Volume)(Subcases 36-02048 et.al.)(July 31, 1998) at 11-12 (Subsequently adopted by the District Court in *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, (December 29, 1999). This Court has reviewed this conclusion of law by the Special Master, and concurs therewith.

River Grove's claim in the SRBA to water right 36-08099 is predicated on the license issued April 3, 1991. The license, in turn, is predicated on the permit issued October 18, 1983. River Grove's objection to the subordination remark contained in the Director's Report is a very belated attempt to seek judicial review of an administrative agency's decision (IDWR). River Grove and/or its predecessors-in-interest failed to timely request a hearing pursuant to I.C. § 42-1701A, which allows for administrative review of IDWR's decisions in accordance with the Idaho Administrative Procedures Act, I.C. §§ 67-5201 to 67-5292 ("APA"). An opportunity for such a hearing presented

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[7] The Special Master also held that:

> [E]ven if special circumstances existed excusing [River Grove] from exhausting its administrative remedies in this case, such as a claim that IDWR lacked statutory or constitutional authority to subordinate the water right under Idaho Code § 42-203, [River Grove] would have had to pursue its claim in front of a court other than the SRBA where IDWR could be made a party to defend its actions. *See. e.g. Twin Falls Canal Co. v. Idaho Dep't of Water Resources*, 127 Idaho 688, 905 P.2d 89 (1995). Simply stated, the SRBA is not the proper forum for judicial review of agency determinations addressing conditions attached to licenses.

***Order Granting Motion to Alter or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation***, (August 20, 1999). River Grove argues that this conclusion of law is incorrect. However, because other issues in this case are dispositive, the Court declines to address this particular issue.

itself when the application for permit was approved (October 18, 1983) and when the license was issued (April 3, 1991). Upon approval of the permit, River Grove's predecessor-in-interest undertook construction of its hydropower facility with full awareness of the subordination condition imposed by IDWR. The permitee did not seek judicial review (of either the permit or the license) in accordance with the APA. At the time, former I.C. § 67-5215 also required exhaustion of administrative remedies as a prerequisite to judicial review.[8] This section further required a petition for judicial review to be filed with the district court within 30 days after the service of the final agency decision. The license on which River Grove's claim is predicated became final after the time for seeking review expired. Accordingly, this Court does not have jurisdiction to go back and review IDWR's decision at this point in time. *See Fairway Development Co. v. Bannock County*, 119 Idaho 121 (1990)(absent exceptions to the exhaustion doctrine, the district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted).

River Grove argues that this Court should depart from the general rule that administrative remedies should be exhausted because IDWR did not have the authority to place the subordination condition in either the permit or the license in the first instance (i.e. IDWR acted *ultra vires*). River Grove relies on *Bohemian Breweries v. Koehler*, 80 Idaho 438, 332 P.2d 875, which states that:

> While as a general rule administrative remedies should be exhausted before resort is had to the courts to challenge the validity of administrative acts, such a rule is not absolute and will be departed from where the interests of justice so require, and the rule does not apply unless the administrative agency acts within its authority.

*Id*. at 446, 332 P.2d 883. River Grove's reliance on the "*ultra vires*" exception to the general rule is misplaced for the following reasons:

[8] The current statutory provision requiring exhaustion of administrative remedies is I.C. § 67-5271 (1995 & Supp. 1999).

**A. The rule requiring exhaustion of administrative remedies should be departed from only in situations where adherence to the rule would cause irreparable injury.**

At oral argument on challenge, Counsel for the State argued that a party seeking deviation from the exhaustion of administrative remedies rule must also show that irreparable injury would result if the party were not allowed to seek review directly from a court. This Court agrees. Counsel for the State directed this Court to *Williams v. State*, 95 Idaho 5, 501 P.2d 203 (1972), and *Grever v. Idaho Telephone Company*, 94 Idaho 900, 490 P.2d 1256 (1972) for this proposition. In *Williams*, the Idaho Supreme Court discussed the above quoted language from *Bohemian Breweries*, and stated that "[t]he application of [the] doctrine [allowing departure from the rule requiring exhaustion of administrative remedies] should be limited to those situations where requiring the exhaustion of administrative remedies would occasion delay which would cause irreparable injury regardless of the outcome of the proceedings." *Williams*, 95 Idaho at 8. Indeed, even in the *Bohemian Breweries* case, the Idaho Supreme Court found that "[t]he threatened action of the Commissioner [of Law Enforcement] in this case would cause the brewery irreparable injury in loss of capital investment, money, business earnings and good will." *Bohemian Breweries*, 80 Idaho at 446. This "irreparable injury" standard was reiterated in *Grever*, 94 Idaho at 903. *See also Arnzen v. State*, 123 Idaho 899, 906-907, 854 P.2d 242, 249-250. In the case at bar, the fact that River Grove's predecessors-in-interest took no action when the permit was issued, administratively or otherwise, to contest IDWR's action, unequivocally demonstrates that this is not one of those situations where administrative remedies need not be exhausted. In other words, River Grove cannot be allowed to construct its diversion works and hydropower facility with full knowledge of the subordination condition, and then wait nearly ten years[9] before coming into court and asking for review of an administrative agency's action. River Grove clearly has not satisfied the irreparable injury standard in this case.

[9] IDWR approved the Application for Permit on October 18, 1983, and the subordination provision was objected to for the first time on April 29, 1993.

**B. In 1983, when the application for permit was approved, IDWR had the lawful authority to subordinate the priority of water rights used for power purposes.**

Prior to the enactment of I.C. § 42-203B(6) (July 1, 1985)(a legislative declaration that IDWR has authority to subordinate hydropower rights), IDWR was authorized to condition approval of hydropower permits upon subordination of priority to subsequent non-hydropower water uses. The source of this authority is twofold. The first source, as urged by the State's counsel, is Art. 15, § 3 of the Idaho Constitution, which states that:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, **except that the state may regulate and limit the use thereof for power purposes**. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution. (emphasis added).

Counsel for the State argues that this Article has provided IDWR with the authority to subordinate hydropower water uses since its enactment in 1928. River Grove argues that IDWR cannot derive authority from this constitutional provision without first being filtered through a specific legislative enactment, which did not occur until the passage of I.C. § 42-203B in 1985. At oral argument on challenge, counsel for River Grove relied on *Beker Industries, Inc. v. Georgetown Irrigation District*, 101 Idaho 187, 610 P.2d 546 (1980), for the proposition that IDWR cannot glean lawful authority or direction directly from the Constitution. However, this Court is not persuaded that *Beker Industries* stands for the proposition so asserted. In *Beker Industries*, the Idaho Supreme

Court looked to the legislative history of the statutory provision at issue,[10] and determined that by striking certain language in the final version of a bill, the legislature specifically intended that IDWR not have the particular authority at issue. No constitutional provision was at issue in *Beker Industries*.

While it may be somewhat unusual for an administrative agency to derive authority directly from a constitutional provision, there is no question that administrative agencies are constrained thereby. As such, IDWR is required to look to constitutional pronouncements for guidance when exercising its discretion. As explained below, IDWR has been granted the discretion to place reasonable conditions upon the applications to appropriate the waters of this state. While the policy statements found in the Constitution may not be intended to speak directly to IDWR, the exercise of discretion requires adherence thereto, and so does ordinary common sense.

The second pre-1985 source of authority for IDWR to subordinate hydropower uses was I.C. § 42-203 (now codified as I.C. § 42-203A(5) (1996 & Supp. 1999)), which states in relevant part that "[i]n all applications whether protested or not protested, where the proposed use is such . . . that it will conflict with the **local public interest**, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use . . . the director of the department of water resources . . . may grant a

[10] In *Beker Industries*, the statutory provisions at issue was were I.C. §§ 42-108 and 42-222(1).

permit **upon conditions**."[11] This "local public interest" consideration was adopted by the legislature in 1978, and has been interpreted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441. In *Shokal*, the Court considered whether the "local public interest" included consideration of effluent discharge from a proposed fish

[11] At the time the Application for Permit was approved (October 18, 1983), I.C. § 42-203 read in its entirety as follows: 42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. On and after the passage, approval and effective date of this section, upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying the number of the application and the date of filing thereof, the name and post-office address of the applicant, the source of the water supply, the amount of water to be appropriated, in general the nature of the proposed use, the approximate location of the point of diversion, and the point of use, stating in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice. The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. This notice shall be published at least once each week for two (2) successive weeks.

Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the new and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (1) that it will reduce the quantity of water under existing water rights, or (2) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (3) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (4) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (5) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use. The director of the department of water resources may reject such application and refuse issuance of permit therefor, or may partially approve and grant permit for a less quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

Any person or corporation who has formally appeared at the hearing, feeling aggrieved by the judgment of the director of the department of water resources may seek judicial review thereof in accordance with section 42-1701A(4), Idaho Code.

propagation facility. In its analysis, the Court approvingly cited two cases from other jurisdictions, *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943), and *East Bay Municipal Utility District v. Department of Public Works*, 1 Cal.2d 476, 35 P.2d 1027 (1934), both of which interpreted similar statutory provisions. In *Tanner*, the Utah Supreme Court analyzed Utah's statutory provision which requires the State Engineer to reject applications which "would prove detrimental to the public welfare." *Tanner*, 136 P.2d at 962 (citing Utah Code Ann. § 100-3-8 (1943) (currently designated as Utah Code Ann. § 73-3-8)). The Utah Court held that under this statutory provision, the plaintiff's application to appropriate water for hydropower purposes could be subordinated to water rights which may be acquired by competing appropriators under subsequent applications.

Similarly, in *East Bay*, the California Supreme Court interpreted a statutory provision which stated in part that "[t]he [state water] commissioner shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest." *East Bay*, 35 P.2d at 1028 (citing Section 15( St. 1913, p. 1021) as amended (St. 1921, p. 443). Relying on this statutory mandate, the state water commissioner had inserted the following language into a permit issued for hydropower purposes: "The right to store and use water for power purposes under this permit shall not interfere with future appropriations of said water for agricultural or municipal purposes." *East Bay*, 35 P.2d at 1027. In upholding the state water commissioner's action, the California Court stated that:

> Of course, it must always be kept in mind that the state cannot arbitrarily, and upon caprice only, reject an application. Clearly, the manner in which the unappropriated waters of the streams of the state shall be distributed among the applicants therefor involves questions of policy, and the Legislature, in the interest of public welfare, may prescribe reasonable conditions and priorities in such distribution. . . . Where the facts justify the action, the water authority should be allowed to impose, in the public interest, the restrictions and conditions provided for in the act.

*Id*. at 1029.

In *Shokal*, although the Idaho Supreme Court was considering water quality rather than subordination of hydropower rights, the Court stated that: "Both the Utah and California Supreme Courts have upheld state water agencies which had granted

[hydropower] appropriations subject to future appropriations for uses of greater importance – in effect prioritizing among uses according to the public interest. . . . The Director of Water Resources has the same considerable flexibility and authority . . . to protect the public interest."

### C. In 1991, when the license was actually issued, IDWR had the authority to subordinate the priority of water rights used for power purposes.

It is clear that IDWR had the authority, pursuant to I.C. § 42-203B(6), to require subordination of River Grove's hydropower right in 1991 when the license was actually issued. River Grove asserts that its right became vested on or before February 26, 1985, and therefore I.C. § 42-203B(6) cannot not be applied retroactively to its water right. River Grove cites *Cantlin v. Cater*, 88 Idaho 179, 186 (1964) for the proposition that its water right vested as of the date its diversion works were complete and the water was beneficially used (i.e. on or before February 26, 1985).

In *Cantlin*, the Idaho Supreme Court made the statement that "[b]y actually diverting and applying water to a beneficial use, a legal appropriation is made, notwithstanding application was not made to the State Reclamation Engineer to prosecute such appropriation." *Id.* (citing *Furey v. Taylor*, 22 Idaho 605 (1912))(obviously addressing the constitutional method of appropriation which existed prior to 1971). Despite this language, the facts of *Cantlin* belie Claimant's proposition because Cantlin had obtained a permit to appropriate water. Eighteen months later Cantlin submitted proof of completion of the diversion works and sought to submit proof of application of water to beneficial use. Nevertheless, it is quite clear that any property right granted by Cantlin's permit had not vested, because the State Engineer revoked the permit upon determination that all the water in the particular source had already been appropriated, i.e. the permit should not have been issued in the first place.

River Grove also cites to *Crane Falls Power & Irrig. Co., Ltd. v. Snake River Irrig. Co., Ltd.*, 24 Idaho 63, reh'g granted 24 Idaho 77, 81 (1913); *Furey v. Taylor*, 22 Idaho 606, 610-11 (1912); *Nielsen v. Parker*, 19 Idaho 727, 731 (1911); *Sandpoint Water & Light Co. v. Panhndle Dev. Co.*, 11 Idaho 405, 413 (1905). All of these cases make

statements which are intended to compare the two methods previously available to appropriate water in the State of Idaho (i.e. through the permit process or by the constitutional method of diversion and application to beneficial use). River Grove's assertion that a water right vests upon application to beneficial use, and not upon issuance of a license by IDWR, may well be a correct statement of the law as to water appropriations made under the constitutional method (versus the permit method) and made prior to the 1971 statutory amendments making the permit process the exclusive method of appropriation. To the extent that the cases cited by River Grove correctly state the law as it existed prior to 1971, this aspect of these cases was legally altered by the legislature upon enactment of the aforementioned statutory amendments. Furthermore, the cases cited by River Grove are limited in that they all deal with some aspect of the constitutional method of appropriation, whereas River Grove's water right was acquired solely under the permit system. As discussed in detail below, it is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested. Therefore, this Court holds that River Grove's water right could not have vested until IDWR issued the license on April 3, 1991. The following reasons support this holding:

**i. Statutory Scheme**. In 1971 the legislature amended I.C. §§ 42-103 and 42-201 to the effect that surface water rights could thereafter only be acquired by following the application, permit, and license procedures set forth in Title 42 of the Idaho Code. Chapter 2 of Title 42 sets forth the steps that must be completed before a water right comes into existence. Briefly, one who wishes to appropriate the unappropriated waters of this state must first make application to IDWR for a permit, and include certain information such as the source, point of diversion, purpose of use, etc. I.C. § 42-202. IDWR then publishes notice of the proposed diversion, inviting interested parties to protest the application. I.C. § 42-203A(1)-(4). IDWR then considers the application, protest or not, and makes various findings as to whether (a) the proposed diversion will reduce the quantity of water for existing water rights, (b) the water supply is sufficient for the proposed use, (c) the application is made in good faith, (d) the applicant has sufficient financial resources, (e) the proposal will not conflict with the local public interest, and (f)

the proposal is not contrary to conservation of water resources. I.C. § 42-203A(5). Depending upon these findings, IDWR can approve, partially approve, approve upon conditions, or reject the application. *Id*. Upon approval, the applicant has a specified period of time to construct the proposed diversion works. I.C. § 42-204. Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is to then carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, **IDWR may refuse to issue the license**. I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . .." It is clear from this statutory scheme that it is the intent of the legislature that all of the steps -- **including issuance of the license** -- be completed before the water right vests, and until such time the right to the use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.

**ii. Idaho Case Law.** The following cases further support the proposition that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR. *Hardy v. Higginson*, 123 Idaho 485 (1993)(Director can properly impose conditions on request to amend water permit, because permittee only has an inchoate right, not a vested right); *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623 (1981)(Director could consider the "local public interest," even though authority to do so was not granted by legislature until after applicant had applied for permit, because vesting of applicant's right was "contingent upon future statutory adherence and issuance of a license"); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927)(statutory amendments, which increased the time allowable to submit proof of application to beneficial use, were not unconstitutionally retroactive, because permittee has an inchoate

right, not a completed appropriation); s*ee also Keller v. Magic Water Co.*, 92 Idaho 276 (1968).

**iii. Authority from other jurisdictions**. The Supreme Courts in Utah and Oregon have both reached the conclusion that a water right does not vest until the license is issued. *Little v. Greene & Weed Investment*, 839 P.2d 791 (Utah 1992); *Green v. Wheeler*, 458 P.2d 938 (Oregon 1969). The issue in *Little* was at what point in the statutory process for acquiring a water right does the right become appurtenant to land. In order to decide this question, the Utah Supreme Court had to decide whether the water right at issue became perfected at the point in time when the diversion works were completed and the water was put to beneficial use, or rather when the state engineer issued the certificate of appropriation (license). The Utah Supreme Court held that the water right remained inchoate until all of the statutory steps had been completed, including issuance of the certificate of appropriation.

The Supreme Court of Oregon reached the same conclusion in *Green v. Wheeler*, 458 P.2d 938. Green's predecessor-in-interest (Redwine) had a permit to appropriate groundwater. Redwine had completed the construction of the well and applied the water to a beneficial use (irrigation), but failed to properly notify the state engineer (Wheeler) of such completion. After the time for completion had elapsed, the state engineer implemented the statutory process for canceling the permit. Green argued that because the water had been applied to beneficial use, the right had vested and could not be cancelled. The Oregon Supreme Court disagreed, holding that "the legislative assembly intended the water right certificate, not the permit, even when followed by a beneficial use, to mark the point at which a water right becomes vested." *Id*. at 940.

In conclusion, for all these reasons, it is clear that a right to use the waters of this State remains inchoate until a license is actually issued by IDWR. Furthermore, River Grove could have sought some form of remedy such as a writ of mandamus back in 1985 if it thought it was being injured by IDWR's delay in issuing a license.

**2. Conveyance Loss**

River Grove asserts that the Special Master erred in recommending the water right as 1.92 cfs measured at the place of use (i.e. the penstock). River Grove argues that a conveyance loss of 0.59 cfs should be added to the water right, for a total of 2.51 cfs. The State argues that River Grove is bound by the terms of its license, and that because administrative remedies were not sought, judicial modification of the license to increase the quantity element in the SRBA is inappropriate. Furthermore, the State asserts that because the Application for Permit sought to appropriate 2.0 cfs (measured at the point of diversion), and the permit was approved for 2.0 cfs (measured at the point of diversion)[12], the maximum possible quantity that can be lawfully decreed in the SRBA is 2.0 cfs (measured at the point of diversion). River Grove agrees that Idaho law mandates that a water right is to be measured at the point of diversion, but that IDWR erred when the license was issued with the quantity of 1.92 cfs measured at the place of use rather than the point of diversion, and therefore the quantity element needs to be increased to provide a sufficient amount of water for conveyance loss to be able to get the 1.92 cfs at the penstock.

River Grove is correct in its assertion that a water right is to be measured at the point of diversion, not at the place of use. *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900)(to prevent waste, water must be measured at the point of diversion); *Bennett v. Nourse*, 22 Idaho 249, 125 P 1038 (1912); *Glenn Dale Ranches, Inc., v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972). Despite this longstanding Idaho law, IDWR issued the license for 1.92 cfs, which is the quantity that was measured by the IDWR field examiner as the quantity "going into pipeline used for power." *See* Trial Exhibit 1 (Beneficial Use Field Report).

[12] The Application for Permit requested 2 cfs from Billingsley Creek, to be diverted at "existing headgate/diversion to Barlogi ditch to owners ditch." Although not expressly stated therein, the 2 cfs requested would have to be the quantity which the permitee sought to appropriate from Billingsley Creek at the point of diversion. When IDWR approved the permit, it inserted a condition that "[t]he permit holder shall either install a measuring device or an access port or provide a certified measurement or computation of flow based upon system design to be prepared by a professional engineer." It is unclear from the face of the Permit as to whether this condition was for the purpose of measuring the water at the place of use or at the point of diversion. If this condition was intended to provide a measurement at the place of use, then it would necessarily have to be in addition to the required measurement at the point of diversion.

On the other hand, the State is correct in its assertion that the maximum quantity that can be decreed to River Grove is 2.0 cfs, because this is the maximum amount asked for in the application for permit. An SRBA decree which exceeded this amount would implicate significant due process concerns in that the permit process is designed to allow interested parties to protest the issuance of a permit. In other words, it is unknown whether there may have been interested parties who would have protested the application for permit if the permit had sought more than 2.0 cfs. This Court cannot bypass the statutory permit process by awarding more water than was initially requested.

Because Idaho law directs that this water right should be measured at the point of diversion, and because this water right cannot be decreed for more than 2.0 cfs, this Court holds that the water right should be decreed in the SRBA as 2.0 cfs measured at the point of diversion.

## VIII.
## CONCLUSION

River Grove was issued a permit to appropriate water for hydropower purposes with the condition that any rights acquired under the permit would be subordinated to future rights for any other purpose. River Grove constructed its diversion works and hydropower facility in light of this condition. If River Grove was aggrieved by IDWR's action, it should have protested this action when the permit was issued, and certainly before it broke the first soil in construction. It would be unfair to other water users who

may be affected by River Grove's appropriation if the terms and conditions of the permit are disregarded after its issuance.[13]

As to the license, River Grove complains that IDWR improperly delayed issuance of the license until after IDWR was given the specific authority to subordinate hydropower water rights under I.C. § 42-203B. If this complaint has merit, the appropriate remedy would have been for River Grove to file a writ of mandamus in 1985 compelling IDWR to issue the license at that point in time. However, given the Swan Falls litigation then in progress, and considering the subordination condition in the permit, it may have been quite difficult to demonstrate an abuse of discretion on the Director's part in delaying issuance of the license.

As to the conveyance loss issue, this Court agrees that the license should have been issued with the water being measured where it is diverted from Billingsley Creek. However, because the permit sought to appropriate 2.0 cfs, this is the maximum that can be decreed for this right. As explained in this opinion, one of the functions of the permit process is to safeguard the rights of other water users who may be affected by new appropriations. Such water users need to rest assured that a water right acquired under a permit will not exceed the terms and conditions of that permit. It is the State's duty as trustee of the waters of this state to ensure that the permit process is strictly complied with.

[13] Although not raised by the State, it appears to this Court that the evidence of River Grove's conduct in this case may satisfy the elements of quasi-estoppel. *See Obray v. Mitchell*, 98 Idaho 533, 567 P.2d 1284 (1977); *Keesee v. Fetzek*, 111 Idaho 360, 723 P.2d 904 (1986). The elements of quasi-estoppel are (1) a change in position by the party against whom quasi-estoppel is being asserted, (2) which reaps an unconscionable advantage for that party, or imposes an unconscionable disadvantage upon another, and (3) reliance on the position formerly taken. In the case at bar, River Grove has clearly changed its position regarding the subordination of its water right. The fact that River Grove did not object to the inclusion of the subordination provision in the permit and that the hydropower facility was subsequently constructed in light of the subordination condition in the permit, demonstrates that River Grove initially accepted the condition. As to an unconscionable disadvantage to another and reliance on the former position, River Grove's failure to timely raise objections enabled River Grove to bypass the due process protections implicit in the process. Accordingly, prejudice and reliance may be presumed where the State holds the waters in trust for the benefit of its citizens, and where it is the notice requirements in the permit process that allow others to evaluate whether they will protest an application, and it is unknown whether any particular individual may have been disadvantaged by relying on River Grove's former position regarding subordination. Further, under *Cantlin v. Carter*, 88 Idaho 179, interested parties could have sought to have the permit vacated.

IT IS SO ORDERED:

DATED: JANUARY 11, 2000.

_____

BARRY WOOD
ADMINISTRATIVE DISTRICT JUDGE
AND
PRESIDING JUDGE OF THE
SNAKE RIVER BASIN ADJUDICATION