

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

In Re SRBA)	Subcases 36-02708, 36-07201 and 36-
)	07218
Case No. 39576)	
)	MEMORANDUM DECISION AND
_____)	ORDER ON CHALLENGE

Challenge to the Special Master’s *Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source)* in subcases 36-02708, 36-07201 and 36-07218.

Appearances:

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

Patrick D. Brown of Parker, Warr & Brown, LLP, Twin Falls, Idaho, for Respondent Clear Springs Foods, Inc.

**I.
CLEAR LAKES’ CHALLENGE**

This is a challenge by Clear Lakes Trout Company, Inc., (hereinafter Clear Lakes) to Special Master Haemmerle’s *Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source)* in subcases 36-02708, 36-07201 and 36-07218 filed December 31, 1998.

II.

BRIEF PROCEDURAL BACKGROUND

Clear Springs Foods Inc. (hereinafter Clear Springs) filed for water rights 36-02708, 36-07201 and 36-07218. On November 2, 1992, the Director of the Idaho Department of Water Resources filed the *Director's Report for Reporting Area 3* recommending Clear Springs' claims 36-02708, 36-07201 and 36-07218. On May 3, 1993, Clear Lakes filed objections to those recommendations in which Clear Lakes objected to the following aspects of IDWR's recommendations:

A. Clear Springs' Water Rights 36-02708 and 36-07218 vs. Clear Lakes' Water Right 36-07004

Clear Lakes objected to both the "source" and "point of diversion" elements of IDWR's recommendations, stating that water rights 36-02708 and 36-07218 are diverted from a separate source than is Clear Lakes' water right 36-07004 and requesting language clarifying that fact in the decrees of water rights 36-02708 and 36-07218.

B. Clear Springs Water Right 36-07201 vs. Clear Lakes Water Right 36-02659

Clear Lakes objected to the "source," "point of diversion" and "remarks" elements of IDWR's recommendation of Clear Springs' water right 36-07201 stating that the recommendation did not specify that the source for Clear Springs' water right 36-07201 was part of the source for Clear Lakes' water right 36-02659, and requesting clarifying language in the decree of Clear Springs' water right 36-07201.

At the trial on the merits before the Special Master, Clear Lakes presented its case in chief through three witnesses: Earl Hardy, Sherl Chapman and Jess Eastman. Clear Springs then presented Jess Eastman as its first witness. After questioning Mr. Eastman, Clear Springs moved for an involuntary dismissal. The Special Master granted Clear Springs' *Motion for Involuntary Dismissal*, finding that there were not separate sources for Clear Springs' rights 36-02708, 36-07201 and 36-07218 and Clear Lakes' right 36-07004. *Reporter's Transcript of July 14, 1998*, pp. 471-474.

Though the Special Master granted Clear Springs' *Motion for Involuntary Dismissal* from the bench on July 14, 1998, on August 21, 1998, he issued written *Findings of Fact and Conclusions of Law on Involuntary Dismissal*. On August 28, 1998, the Special Master then entered his *Special Master's Report and Recommendations* recommending water rights 36-02708, 36-07201 and 36-07218 for partial decree as reported by IDWR. The *Special Master's Recommendations* were docketed on the September, 1998 SRBA District Court Docket Sheet. Clear Lakes filed its *Motion to Alter or Amend Special Master's Recommendations* on September 28, 1998. A hearing on the *Motion to Alter or Amend Special Master's Recommendations* was held on December 14, 1998, and the Special Master entered the *Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source)* on December 31, 1998. Clear Lakes timely filed its *Notice of Challenge* on January 14, 1999.

Pursuant to the *Notice of Challenge*, reporter's transcripts of the July 13 and 14, 1998 trial (hereinafter cited as "RT"), and the June 30, 1998 hearing on motions *in limine* were lodged with the court. Later, pursuant to this Court's *Order Granting Motion to Supplement the Record*, a transcript from the July 13, 1998 hearing on motions *in limine* was lodged with the court. The exhibits referred to in this decision are those introduced and admitted into evidence at trial before the Special Master.

The challenge was argued before this Court on May 26, 1999. After the arguments, the Court requested a Reporter's Transcript of the May 26, 1999 arguments. In writing this decision on the challenge, the Court still had questions relative to certain legal positions and factual assertions of the respective parties. In an attempt to clarify these matters, the Court, of its own initiative, requested additional oral argument. After notice to the parties and IDWR, additional oral argument on challenge was held on June 24, 1999. At that oral argument, each party declined the opportunity for additional briefing on the issue of point of diversion, but Mr. Brown, on behalf of Clear Springs, requested this Court review a prior decision of Judge Daniel C. Hurlbutt Jr., regarding the issue of appropriation of private waters (I.C. §§ 42-212 and 42-213). Mr. Honsinger, on behalf of Clear Lakes, had no objection so long as he was also provided a copy of that decision. This Court agreed to review that prior decision once a copy was obtained. The

Court received a copy on June 24, 1999, together with a cover letter. Mr. Honsinger wrote the Court a letter dated June 30, 1999, on behalf of Clear Lakes, objecting to the cover letter. The Court places no emphasis on the cover letter of Mr. Brown and therefore Mr. Honsinger's concerns need not be addressed. As such, the Court deemed this matter fully submitted for decision on the next business day following the supplemental argument on challenge, or on June 25, 1999.

III.

ISSUES RAISED ON CHALLENGE AND RELIEF REQUESTED

The only *Notice of Challenge* filed in this matter was filed by Clear Lakes on January 14, 1999. In its *Notice of Challenge*, Clear Lakes listed eighteen (18) separate issues. Those issues were stated as follows:

1. The *Dismissal* and *Order* err in according *prima facie* weight to the portion of the Director's Report listing the source element of water right numbers 36-02708, 36-07201 and 36-07218 as "springs," and err in concluding that Clear Lakes failed to meet its burden to identify the different sources from which Clear Springs' and Clear Lakes' water rights were historically and are currently diverted.

2. The *Dismissal* and *Order* fail to make any findings regarding the source of the water rights at issue: Clear Springs' water right numbers 36-02708, 36-07201 and 36-07218.

3. The *Dismissal* and *Order* err in finding that there were not historically and are not currently separate sources for Clear Springs' water right numbers 36-02708 and 36-07218 and Clear Lakes' water right number 36-07004.

4. The *Dismissal* and *Order* err in that the presumption under the authorities cited in the *Dismissal* and the *Order* that all water within the Snake River Basin is connected does not constitute, mandate, or imply a presumption that Clear Springs' water rights and Clear Lakes' water rights have the same source.

5. The *Dismissal* and *Order* fail to find that the source for Clear Springs' water right numbers 36-02708 and 36-07218 is the western stream.

6. The *Dismissal* and *Order* fail to find that Clear Springs never attempted to divert water from the eastern stream.

7. The *Dismissal* and *Order* fail to find that water flowing through the former eastern stream did not historically, and cannot currently contribute to the source of Clear Springs' water right numbers 36-02708 and 36-07218.

8. The *Dismissal*, the *Order*, and the *Special Master's Report and Recommendation* for water right number 36-07201 fail to find and specify, consistent with the evidence, that the source element for water right number 36-07201 is separate from the source for water right numbers 36-02659, 36-02708 and 36-07218, and the source for water right number 36-07004.

9. The *Dismissal* and *Order* err in finding that precise location of the "division point" is necessary to demonstrate that there were and are separate sources for Clear Springs' and Clear Lakes' water rights.

10. The *Dismissal* and *Order* err in concluding that there is no method by which to administer the historic separate sources.

11. The *Dismissal* and *Order* err in concluding that Clear Lakes is estopped from claiming two separate sources.

12. The *Dismissal* and *Order* erroneously identify and describe the historic and current location and configuration of Clear Lakes' diversions.

13. The *Dismissal*, the *Order*, and the *Special Master's Reports and Recommendations* fail to find, consistent with the evidence, that only one point of diversion exists for water right numbers 36-02708 and 36-07218.

14. The *Dismissal* errs in concluding that Clear Lakes water right nos. 36-02659 and 36-07004 have the same points of diversion because the licenses for each of those water rights describe the points of diversion as being within the same quarter quarter section.

15. The *Dismissal* and *Order* err in failing to find that the permit to appropriate water right no. 36-07004 entitles Clear Lakes to first priority to the source from which that water right was historically and is currently diverted.

16. The *Dismissal* and *Order* err with respect to their conclusions regarding the applicability of Idaho Code Sections 42-212 and 42-213 to Clear Springs' water rights.

17. The *Order* errs with respect to its factual findings and legal conclusions that the point of diversion for water right nos. 36-02708, 36-07201 and 36-07218 is not at issue. Specifically, the *Order* errs in finding or concluding that either Clear Lakes or its counsel in any way waived its objections to the points of diversion for Clear Springs' water rights, that either Clear Lakes or its counsel in any way admitted that the points of diversion for Clear Springs' water rights was not at issue, or that the written agreement referred to as Exhibit O in any way resolves Clear Lakes' objections to the points of diversion for Clear Springs' water rights.

18. The *Order Granting in Part, and Denying in Part, Motions in Limine and Motions to Compel Discovery* erred in excluding the documents and film produced by Clear Lakes for any reason.

Relief Requested by Clear Lakes

Clear Lakes respectfully requests that this Court decree [Clear Springs'] water right numbers 36-02708, 36-07201 and 36-07218 in the following manners:

1. Points of Diversion

Consistent with the evidence, there should be only one Point of Diversion listed for [Clear Springs'] water right numbers 36-02708 and 36-07218. The other Points of Diversion listed should be deleted from the Special Master's Recommendations for both rights.

2. Remarks

[Clear Springs'] Water Right Numbers 36-02708 and 36-07218 should each contain the following remark:

THIS WATER RIGHT AND WATER RIGHT NUMBER 36-07004 ARE DIVERTED FROM SEPARATE SOURCES.

[Clear Springs'] Water right no. 36-07201 should contain the following remark:

THIS WATER RIGHT IS DIVERTED FROM A SEPARATE SOURCE THAN THE SOURCE FOR WATER RIGHT NUMBERS 36-02659, 36-02708, AND 36-07218 AND THE SOURCE FOR WATER RIGHT NUMBER 36-07004.

Notice of Challenge, pages 5 and 6, (bracketed portion added for clarification).

Issues stated by Clear Springs

Clear Springs, in its *Brief in Response to Clear Lakes' Opening Brief* stated the following:

This is a case about two fish propagation facilities, and the interconnection of the spring system that supplies water to both of those facilities. Challenger, Clear Lakes raises two primary issues:

(1) Did Special Master Haemmerle err by holding Clear Lakes had not proved that water from one of its rights, 36-07004, was from a separate source than the other water rights serving the two facilities?;

(2) Did the Special master err in holding that Clear Lakes' counsel waived any objections to Clear Springs' point of diversion element, and, even if not waived, were issues about points of

diversion barred by a prior settlement agreement between the parties to resolve litigation about trespass and points of diversion?

Brief in Response, lodged May 3, 1999, pages 1 and 2.

Relief Requested by Clear Springs:

This Court is therefore respectfully requested to hold the Findings of Fact are not clearly erroneous and, based upon those findings, confirm and adopt the Master's Conclusions of Law as this Court's own conclusions. The Challenge should be denied in all regards.

Response Brief, lodged May 3, 1999, page 2.

While Clear Lakes listed 18 specific issues on appeal, at oral argument on the challenge held on May 26, 1999, counsel for Clear Lakes essentially argued just two broad issues, those being the same two stated by Clear Springs and which are consistent with the two requests for relief stated by Clear Lakes. *See* Transcript of May 26, 1999, hearing, pages 4 and 5.

Therefore, this Court will address these two primary issues, which are labeled the "source" issue and the "point of diversion" issue. To the extent it is necessary to expressly discuss any of the enumerated eighteen issues on challenge (which I find in reality to be sub-issues on the two primary issues), it will be done.

IV.

**THE STANDARD OF REVIEW OF A SPECIAL MATERS'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 claim is processed. *See* I.C. § 42-1401, et. seq., and SRBA Administrative Order 1, Rules of Procedure ("AO-1"). 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 (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.
2. IDWR makes an examination of the relevant water system and of the claim. I.C. §§ 42-1410.
3. As a result of the IDWR examination, a Director's Report is filed. I.C. § 42-1411.
4. Objections and/or Responses to the Director's Report can be filed by the claimant or any other litigant in the SRBA. I.C. §§ 42-1412 and 42-1411(5).
 - A. The subcase can be settled at this point by the use of a Standard Form 5. AO-1.
 - 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 the special master.
6. In referred subcases, a special master's Report or Recommendation is filed with the Court. AO-1(13).
7. Motions to Alter or Amend the special master's Report or Recommendation are filed, heard and ruled upon by the special master. AO-1(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), AO-1(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 the water right acquired under state law, and therefore constitutes a rebuttable evidentiary presumption. I.C. § 42-1411(4). See *Silverstein v. Carlson*, 118 Idaho 456, 462 (1990), and more recently, *State v. Hagerman Water Right Owners*, 130 Idaho 736 (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, 738-39, (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, (1993). “When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue.” *Hagerman*, 130 Idaho at 745. 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 Craig Lewis, *Idaho Trial Handbook*, § 12.5 (1995), citing *Reddy v. Johnston*, 77 Idaho 402 (1956).

Therefore, from the “get-go,” the 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 a district court is likewise influenced by the procedural history of the particular subcase(s).

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

Because the trial court (referring district court) is the final arbiter of all issues, the findings of fact and conclusions of law contained in the special master's report do not stand automatically approved even in the absence of an objection or challenge. The district court must independently review the special master's report and accept it if it is supported by substantial evidence. C. Wright and A. Miller, Federal Practice and Procedure § 2612 (1995). Again, I.C. § 42-1411(4) mandates that the unobjected to portions of the Director's Report be decreed as reported.

Under I.R.C.P. 53(e)(2), written objections ("Challenges" in the SRBA) may be served upon all other parties within fourteen (14) days of service of the notice of the filing of the special master's report.¹ It should be noted, however, that AO-1 (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.*"²

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 the special

¹ If a Motion to Alter or Amend the special master's Recommendation is timely filed under AO-1(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.

² 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 (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 AO-1 (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.

master with instructions. Where a challenge to a special master's report is filed, the district court must hold a hearing on the objections raised in the Challenge. *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.

Findings of Fact of the Special Master

In Idaho, the district court is required to adopt the special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377 (1991); *Higley v. Woodard*, 124 Idaho 531, 534 (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, 68 S.Ct. 525, 542, 92 L.Ed. 746 (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 (2d Cir. 1945) (L. Hand, J.).

The special master's findings which the district court adopts in a non-jury action are considered to be the finding of the district court. I.R.C.P. 52(a); *Seccombe v. Weeks*, 115 Idaho 433, 435 (Ct. App. 1989); *Higley v. Woodard*, 124 Idaho 531, 534 (Ct. App. 1993). Consequently, the district court's standard for reviewing the special master's findings of fact is to determine whether they are supported by substantial³, although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435; *Higley*, 124 Idaho at 534.

³ 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,

In other words, a referring district court reviews the findings of a special master 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. The appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. Wright and Miller, *supra*, § 2614; *Zenith Radio Corp. Hazletine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed. 2d 129 (1969). The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223, 108 S.Ct. 1771, 1777, 100 L.Ed. 2d 249 (1988). The 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).⁴

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 were

only if the evidence is so weak that reasonable minds could not reach the same conclusion the master has, are the master's findings properly rejected. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732. See also *Evans v. Hara's Inc.*, 123 Idaho 473, 478 (1993).

⁴ 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 (Ct. App. 1984) citing *Dinnen v. Finch*, 100 Idaho 620, 626-627 (1979). See also *Russ v. Brown*, 96 Idaho 369, 373 (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 (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. Hoglelund*, 131 Idaho 700 (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.

clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876, (7th Cir. 1970), *cert. denied*, 91 S.Ct. 582.

In the application of the above principles, due regard must be given to the opportunity the 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 US 564, 574, 105 S.Ct. 1504, 84 L.Ed 2d 518 (1985). The rule in Idaho is less clear. Professor Lewis states that “[u]nlike Fed.R.Civ.Pro. 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 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.

The party challenging the findings has the burden of showing error, and the 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 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151,153 (Ct. App. 1996).

Conclusions of Law of the Special Master

In contrast to the standard of review relative to findings of fact, the special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive. This permits the district court to adopt the special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378; *Higley*, 124 Idaho at 534. Accordingly, the district court's standard of review of the trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534. Stated another way, the conclusions of law of the 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 the 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 (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, (1997), citing *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, (1995).

In *Burgess*, the Idaho Supreme Court articulated the following test for whether a trial court (and likewise the 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, (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, citing *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782-83, (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; *Hake v. DeLane*, 117 Idaho 1058, 1065, (1990); *Morris*, 130 Idaho at 144.

V.

THE MASTER'S FINDINGS OF FACT

The Special Master's "final" or "settled" findings of fact in the present subcases are set forth in his *Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact, Conclusions of Law on Involuntary Dismissal - Source)*, filed December 31, 1998, pages 2 through 5.

For clarity and ease of review, they are set forth verbatim here. Recall, however, that it was Clear Lakes which objected to Clear Springs' claimed rights as recommended by the Director .

III. FINDINGS OF FACT

1. Both Clear Springs and Clear Lakes operate fish production facilities. Only water rights claimed by Clear Springs are at issue. However, to understand the dispute, water rights claimed by Clear Lakes were considered. In order of priority, the relevant water rights are as follows:

36-02659 (Clear Lakes), 100 cfs, June 23, 1966;

36-02708 (Clear Springs), 200 cfs, September 28, 1966;

36-07004 (Clear Lakes), 75 cfs, July 21, 1967;
36-07201 (Clear Springs) 10 cfs, August 4, 1971;
36-07218 (Clear Springs), 75 cfs, January 24, 1972.

Clear Lakes alleges that water right 36-07004 is “physically separated, by natural geographic conditions, from the source of water” claimed by Clear Springs. See Clear Lakes Objections. Water quantity is not at issue.

2. The place of use for both Clear Springs and Clear Lakes is located in the Snake River Canyon north of Buhl, Idaho. All the water used by both Clear Lakes and Clear Springs originates from springs flowing from the Snake River Plain Aquifer. Prior to development of the rights, the water from all the springs ran into a channel of water, flowed between three separate islands, emptied into Clear Springs Lake, and then ultimately emptied into the Snake River. Exhibit Y.⁵
3. Earl Hardy participated in the development of Clear Lakes’ water rights. Mr. Hardy testified that prior to any development of water rights 36-02659 and 36-07004, there were two stream flows from the original stream channel. Mr. Hardy testified that there was an underwater division point in the stream channel creating a “western” and “eastern” flow. (Tr., p. 44, Ll. 12-13). According to Mr. Hardy, this division point was located at the point marked “1” on Exhibit GG, Attachment A. (Tr., p. 43, LL. 14-23).
4. After the close of Clear Lakes’ case, the historic dividing point between the eastern and western flows remained unclear. According to Mr. Hardy, the historic dividing point was located 80 feet from the gate on the western dyke. (Tr., p. 122, Ll. 3-6). Clear Lakes’ expert hydrologist, Sheryl Chapman, gave several opinions on the historic dividing point. One estimate was that the historic dividing point was located 30-40 feet to the east of where Mr. Hardy estimated the historic dividing point (100-120 feet from the gate on the western dyke). (Tr., p. 352, Ll. 15-21). Mr. Chapman’s other estimate was that the dividing point was located somewhere between the “highest western flow” and the “highest eastern flow” as depicted in Exhibit B. (Tr., p. 318, L. 3 - p. 319, L. 4).
5. When water rights 36-02659 and 36-07004 were first developed, Clear Lakes created two pools, a western and an eastern pool. The result of this construction was the elimination one of the

⁵ During supplemental oral argument held on June 24, 1999, counsel for both Clear Lakes and Clear Springs agreed that the Special Master was mistaken as to the correct name of the lake. The correct name is Clear Lake and not Clear Springs Lake. Therefore, this decision will refer to the lake as Clear Lake.

three islands and of the three original stream channels. As to the eastern pool, the construction performed by Clear Lakes consists of several dams which are actually a single diversion structure. This single diversion structure includes the dam in the eastern stream, which is then connected to a dam on the south side of the stream channel, which is then connected to the dam located in the western stream. Exhibit AA. "But for" this one continuous structure, there would not be an eastern pool. (Tr., p. 327, Ll. 18-25). The result of this diversion structure was that all the water contained in the western pool originates entirely from the original western flow, while water contained in the eastern pool originates from both the original western and eastern flows.

6. While there may have been two separate stream flows after Clear Lakes' initial development, the final and current diversion structures created by Clear Lakes for water rights 36-02659 and 36-07004 eliminated the eastern flow. (Tr., p. 300, Ll. 8-15). Any water that flowed east is currently contained in the eastern pool. The historic eastern and western flows are commingled in the eastern pool. (Tr., p. 302, L. 20 - 303, L. 4). Based on the development of water rights 36-02659 and 36-07004, Mr. Chapman conceded that whatever dividing point which may have existed does not exist today. (Tr., p. 330, Ll. 2-6).
7. As to the water in the eastern pool, there is no way to determine how much of the water is from the eastern or western flow. (Tr. p. 223, Ll. 17-21; p. 225, Ll. 4-8). There is no way to determine whether water right 36-07004 uses water only from the eastern source, or that water right 36-02659 uses water only from the western source. (Tr., p. 222, L. 19 - p. 223, L. 2). Because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as "western" or "eastern" water. (Tr., p. 332, Ll. 3-10).
8. There are two discharge points from the eastern pool. Part of water right 36-02659 is diverted out of flumes from the eastern pool. The other part of 36-02659 is diverted out of a gate located in the western pool. All of water right 36-07004 is diverted out of gates located in the eastern pool. Mr. Chapman conceded that there are no current discharge points into the Clear Lakes' facility located within the eastern pool at any point east of the historic dividing point. (Tr., p. 322, L. 2 - p. 324, L. 2). State differently, the discharge points for water right 36-07004 are located to the west of the alleged historic dividing point.
9. In addition to the source element, Clear Lakes also objected to point of diversion. At the start of the trial, Clear Lakes' attorney

unequivocally stated that source was the only element in dispute. (Tr., p. 2, Ll. 11-13). Furthermore, any and all disputes regarding point of diversion were settled by the parties in an agreement dated March 13, 1980. Exhibit O. In that agreement, Clear Lakes acknowledged the validity of Clear Springs' points of diversion.

VI.

REVIEW OF THE CHALLENGES AND ALLEGED DEFICIENCIES OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SPECIAL MASTER REGARDING THE SOURCE ISSUE

Clear Springs' Rights 36-02708 and 36-07218

This Court has reviewed the Special Master's findings of fact as to the source issue of Clear Springs' rights 36-02708 and 36-07218 and determined that they are supported by substantial evidence.

Initially, it should be noted that much is made by Clear Lakes of the opinions of Mr. Hardy and its expert Sherl Chapman as to the source issue; and more specifically, their respective definitions of what constitutes a source. In this regard, this Court looks in part to the standard stated in the Idaho Civil Jury Instructions, IDJI 124, which provides as follows:

A witness who has special knowledge in a particular matter may give his opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled. (Emphasis added).

While the trial before the Special Master was obviously not a jury trial, the Special Master was the trier of fact and the same rule applies.

Additionally, under the facts and circumstances of these specific subcases, the issue of the "source" of water for the claimed water rights (I.C. § 42-1409(b)) presents both questions of fact and law. As such, it is for the Court (and in the first instance, the Special Master) to interpret and determine the issue of law, not an expert witness.

More importantly, however, is the following excerpt from the transcript of July 13, 1998, trial which this Court finds to be instructive. Mr. Steenson is the attorney for the objector Clear Lakes. Mr. Hardy was the owner and developer of the objector Clear Lakes.

Mr. Hardy described the origins of the subject water as follows:

Q. (BY MR. STEENSON) With the other aquaculture facilities that you've developed, have there been stream flows – let me back up.

Where do the stream flows that you've discussed and identified on this photograph, where do they come from?

A. (BY MR. EARL HARDY) Well, they come from the Snake River Aquifer that – or they're discharged at various points across the north rim or wall of the Snake River Canyon.

Q. And are you aware of other areas along the Snake River that also have streams resulting from spring discharges?

A. Streams?

Q. Correct.

A. Well, they all form streams. It's a matter of distance; but the spring flow is the exit. They come together and usually form, do form a stream path or multiple streams or flows into the river system. And they vary with each site.

Riley Creek and the Billingsley Creek spring discharges are the two that come to my mind that run the greatest distance, because they run several miles. Others, of course, may be close to the river; or they may be, oh, different distances. No two sites are alike.

RT, pg. 25, L.15 to pg. 26, L. 17.

As to where the springs relevant to these subcases actually discharged in the canyon, Mr. Hardy testified:

Q. (BY MR. STEENSON) Yes. Who owned the property where the springs were located that discharged north of the Clear Springs and Clear Lakes facility?

A. (BY EARL HARDY) I understand the Idaho Power.

RT, pg. 47, LL. 8-11.

As to the springs collecting into a natural water course, Mr. Hardy testified:

Q. (BY MR. STEENSON) Your initial observations of the west and east streams that you've described, **tell me what you recall through your observations that is of significance regarding those streams.**

A. (BY EARL HARDY) **Well, they divided on the north end of the island** and formed a stream flow. The north end of the island was the beginning of the stream flow of the west flow and the east flow.

Q. And **describe for me that point of division**, if you would.

A. It was very deep. This photograph – when I say “deep,” I mean **the water course at that point was narrow**; and you had to stand on the bank and look down into it. It's not the way you look at it today by any means.

(DISCUSSION HAD OFF THE RECORD)

A. This photograph shows it better than some of the others that we've looked at because of the – there aren't so many shadows. It also shows that eastern leg of the stream coming in that I talked about a couple times clearer.

There was a natural rise in the ground. There was an old dividing point that came above the water. I looked at it many times. For some reason I didn't take a photograph, but I wasn't anticipating the problem we're looking at today.

The ground came to a high point, maybe a foot of water over it; but there was water over it. The water over the point was static. And then it just gradually flowed to each side as the stream grade increased.

Obviously it couldn't flow either way if there hadn't been a stream forming or if the streambed was low enough to carry the water away. And, of course, it continued to fall away and form the stream as it went down through each water course.

Q. And **how wide was the channel at the point where the division was** that you've just described?

A. **Well, very narrow. I recall 10 feet or less as I remember it.** It wasn't very wide.

Q. And standing on the ground **looking at the point of division in the channel above the island**, how far down were you looking from ground to water level?

A. Well, I haven't thought of it in that way. Probably 10, 15 feet.

Q. And is that 10 feet, 10, 15 feet from the water level to the bank of **the channel**?

A. As I remember, it was very steep. It was very steep. And you looked, **had to look down into it. You couldn't see it**

from, certainly couldn't see it from the road. You couldn't see it if you were back from the bank.

Q. And how, standing on the ground, did you discern – what did you see that you discerned to see that the water was flowing in separate directions at that point of division?

A. Oh, visually. And, of course, as I said, the stream gradients were away from that point; so naturally anything that came into the stream, it was going to flow downhill. Visually you could see it.

RT, pg. 38, L. 21 to page 41, L. 4. (Emphasis added).

Mr. Hardy went on to state:

Q. (MR. STEENSON) Okay, Now, there is a “No. 1” on the attachment.

Are you familiar with that marking?

A. (MR. EARL HARDY) Well, that's was an approximate. And anything I've ever stated on that point is an **approximate point where the stream is divided.**

RT, pg. 43, LL. 18-23. (Emphasis added).

Finally Mr. Hardy testified:

Q. (MR. STEENSON) And when you say “where that actually was,” do you mean the point of division? Is that –

A. (MR. EARL HARDY) As I described, **the division was a, was a rise in the ground under the water. So there was water over it, but not very much water.** And then it just gradually flowed off and picked up velocity as the streams came into each side of the division. So looking at the aerial photograph, it's, of course, not – you can't see a rise in the ground to make that division.

Q. Okay. Then is the purpose –

A. There had to be, **there had to be something to divide that water.**

RT, pg. 44, LL. 10-22. (Emphasis added).

The Court has read the transcript of the trial before the Special Master, and throughout Mr. Hardy's testimony, there is continued reference to this “division” point. The record is clear that after the water divided, it formed a western stream and an eastern stream, and which two streams formed an island. It is Mr. Hardy's position that each of these streams is a separate source, the western stream for right 36-02659 and the eastern

stream for right 36-07004. See generally Reporter's Transcript of the July 13, 1998 hearing, pages 115 through 130.

Simply put (the Brailsford stream, Clear Springs right 36-07201 will be discussed later), water from numerous springs discharged out of the canyon wall on property owned by Idaho Power and then collected into **one** channel or common body of water. Mr. Hardy acknowledges that this was the "original stream channel." As pointed out above, Mr. Hardy described this channel as being about ten feet wide. RT, pp. 39 & 40. Substantial evidence supports this finding. Once in this channel, or natural water course [as defined in *Scott v. Watkins*, 63 Idaho 506, 517 (1942), and *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484 (1909)], because of some unknown underwater geological feature, the water in this course then "braided" or "divided" into separate streams, creating an island. One need only ask the elementary question: How could **"that water" divide** if it was not all in one channel or pool immediately before the underwater point of division? See RT, pg., 44, LL. 21 and 22. The streams then flowed again into a common body of water called Clear Lake. From Clear Lake, the water drained into the Snake River.

Essential to the understanding of the issue is a quick review of the priority dates of the respective claims. They are:

36-02659 (Clear Lakes), 100 cfs, June 23, 1966;
36-02708 (Clear Springs), 200 cfs, September 28, 1966;
36-07004 (Clear Lakes), 75 cfs, July 21, 1967;
36-07201 (Clear Springs), 10 cfs, August 4, 1971; and
36-07218 (Clear Springs), 75 cfs, January 24, 1972.

Clear Lakes' right 36-02659 and Clear Springs' rights 36-02708 and 36-07218 are diverted at the area of what was originally the "western" stream or from the western side of the pool. It is claimed that Clear Lakes' right 36-07004 is taken from what was originally the "eastern" stream, or from the east side of the pool. Clear Lakes' motive was characterized as:

Clear Lakes seeks to have remarks added to Clear Springs' water rights describing their sources as separate from the source of Clear Lakes' water right no. 36-07004 to ensure that this water right is not subject to curtailment in times of water shortage to deliver Clear Springs' water rights.

Clear Lakes' *Brief in Support of Challenge*, lodged April 12, 1999, page 3.

As pointed out by a portion of the transcript from the July 13 and 14 1998, trial (before the Special Master) recited above, Mr. Hardy on behalf of Clear Lakes conceded the spring water originally collected and commingled in one common channel or pool, but because of some underwater geologic feature, the water then discharged from the common pool by separate streams for a short distance before it again accumulated in one common pool, Clear Lake. Clear Lakes wants right 36-07004 to be decreed from an entirely different source so as to avoid the priority date of Clear Springs' right 36-02708, even though they both come out of this original common pool or water course. That is to say, even though the two rights were diverted from different sides of a common pool.

Clear Lakes argued in its Brief that the Special Master failed to make findings of fact as to the source of Clear Springs' water rights. To the contrary, the Special Master specifically found:

[A]ll water used by both Clear Lakes and Clear Springs originates from springs flowing from the Snake Plain Aquifer. Prior to development of the rights, the water from the springs ran into a channel of water, flowed between three separate islands, emptied into Clear Spring Lake, and then ultimately emptied into the Snake River. Exhibit Y.⁶

Decision on Motion to Alter or Amend, Findings of Fact No. 2, page 3, December 31, 1998. (Emphasis added).

The **source** of all four of the subject rights (again, exclusive of the Brailsford stream, which is the source of Clear Springs' right 36-02701) is **the common** water channel before it divides into the respective streams. The source is not defined by which side of the common channel the water is diverted or from which braid of the common channel water is diverted.

The Special Master also found that the location of the historic dividing point between the eastern and western flows remained unclear (Finding No. 4), but it no longer exists today (Finding No. 6). Additionally, the Special Master found that as to the so-called eastern pool, there is no way to determine how much of the water is from the

eastern or western flows. And because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as “western” or “eastern” water (Finding No. 7). These findings are supported by substantial evidence as well.

This Court has reviewed the evidentiary record in these subcases and based upon the foregoing discussion, denies challenge issues 1, 2, 3, 5, 6, 7, 10, 11, and 15.

As to challenge issue 4, which discusses the presumption “that all water within the Snake River Basin is connected, does not constitute, mandate, or imply a presumption that Clear Springs’ water rights and Clear Lakes’ water rights have the same source,” this Court also denies this challenge. Specifically, this Court finds that the issue was decided by the Special Master not upon the operation of this presumption. Rather, the determination of the source issue was based upon a direct finding of fact that:

[P]rior to development of the right, the water from all the springs ran into a **channel of water**, flowed between three separate islands, emptied into Clear Lake, and then ultimately emptied into the Snake River. Exhibit Y.

Findings of Fact No. 2, page 3, December 31, 1998 Order. See also Finding No. 3 wherein Mr. Hardy (of Clear Lakes) testified that there were “two stream flows from **the original stream channel.**” (Emphasis added).

Challenge issue 9, is to the effect that the Special Master erred in finding that the precise location of the “division point” is necessary to demonstrate that there were and are separate sources for Clear Springs’ and Clear Lakes’ water rights. This Court denies this challenge on two bases. The first basis is that where the water is diverted from or after it leaves this relatively small common pool or channel of water does not create a separate source. The second basis is that even though there was a claimed underwater geologic feature which caused water to flow from this common pool or channel into different streams, because of all of the alterations made by Clear Lakes to the original or natural water course, no water for Clear Lakes’ right 36-07004 is diverted on the eastern side of any claimed historic dividing point. See Special Master’s Findings of Fact No. 8, and see discussion on Conclusions of Law, Source, pages 5, 6 and 7 of the December 31, 1998 Order.

⁶ Again, see the clarification of footnote 5.

Therefore, this Court adopts both IDWR and the Special Master's Recommendations that Clear Lakes' water rights 36-02659 and 36-07004, and Clear Springs' water rights 36-02708 and 36-07218 all come from the same source.

Clear Springs Right 36-07201 (Brailsford Stream)

The basis of the dispute over the source of this water right is somewhat difficult for this Court to grasp (Challenge Issue No. 8).

First, for all five of the water rights involved (the two of Clear Lakes and the three of Clear Springs), the Director's Report lists the "source" as: "Source: Springs—Tributary: Clear Lakes."⁷

Second, Clear Lakes' objection to Clear Springs' water right 36-07201, filed May 3, 1993, stated that Clear Lakes objected to the source, to the legal description of the point(s) of diversion, and to the "remark" listed with the water right. For reasons supporting the objection, Clear Lakes stated:

Report does not show that source for this right originally flowed into source for right no. 36-02659.

And for requested changes to the Director's Report, Clear Lakes' objection stated:

Change items 2, 5 and 11 to show that the source for this right is part of the source for right No. 36-02659.

Third, in its *Response to Objection* (Standard Form 2) filed September 1, 1993, Clear Springs stated:

The claimant Clear Springs, Foods, Inc., denies that the source of this right ever flowed into the source for right no. 36-02659; and that IDWR should show that the two rights are part of the same source.

Fourth, Special Master Haemmerle, in his findings of fact in the December 31, 1998 Order, other than stating its date of priority and the amount of the right, does not specifically mention 36-07201. Finding no. 2 stated in relevant part:

⁷ Again, it is this Court's understanding that this reference is to, and should be, "Clear Lake," not "Clear Lakes" or "Clear Spring Lake." See footnote 5. However, this confusion over the correct name is clearly understandable if one reviews Exhibits 16a, 16b, 16c, and 16d. Using 16d as an example, this packet

All the water ... originates from springs flowing from the Snake River Plain Aquifer. Prior to the development of the rights, the water from **all** the springs ran into **a** channel of water, flowed between three separate islands, emptied into Clear Springs Lake, and then ultimately emptied into the Snake River. (Emphasis added).

In his conclusions of law, Special Master Haemmerle stated:

The issue for these water rights is whether the source for Clear Springs' water rights 36-02708, 36-07201, and 36-07218 is different than the source of Clear Lakes' water right 36-07004.

December 31, 1998 Order, page 5.

Special Master Haemmerle ultimately stated:

For all these reasons, the court finds that 36-07004 is not diverted out of a different source than water rights 36-02708, 36-07201 and 36-07218, the water rights claimed by Clear Springs. The source element for each water right shall be reported as stated in the Director's Report for each water right. (December 31, 1998 Order, pages 7 and 8.)

Fifth, Clear Lakes Challenge Issue Nos. 2 and 8 stated:

2. The *Dismissal* and *Order* fail to make any findings regarding the source of the water rights at issue: Clear Springs' water right numbers 36-02708, 36-07201 and 36-07218.

8. The *Dismissal*, and the *Order*, and the *Special Master's Report and Recommendation* for water right number 36-07201 **fail to find and specify, consistent with the evidence, that the source element for water right number 36-07201 is separate from the source for water right numbers 36-02659, 36-02708 and 36-07218, and the source for water right number 36-07004.** (Emphasis added).

(**Note** that Challenge Issue No. 8 is the exact opposite of Clear Lakes' original objection filed May 3, 1993).

Sixth, during the oral argument on challenge held on May 26, 1999, the following took place:

[Mr. Honsinger, for Clear Lakes]

As to 07201 the parties agree that 07201 is diverted from a source that is separate from all other Clear Springs and Clear Lakes

contains several maps. One refers to the lake as "Clear Lake" and another as "Clear Lakes." Also, much of the official correspondence from IDWR refers to the lake as "Clear Lakes."

water rights; yet the special master's recommendation lists the source as the same as it is for 02708, 07218 and the Clear Lakes water rights, that is springs tributary to Clear Lakes. We would ask that that language be included in that right as well to provide that the sources are separate.

Reporter's Transcript, p. 4, ll. 19 to p. 5, ll. 5.

THE COURT: Before you go any further—

MR. HONSINGER: Yes, Your Honor.

THE COURT: -- is it correct, Mr. Brown, that you agree that 07201 is diverted from a separate source?

Reporter's Transcript, p. 5, ll. 21-25.

MR. BROWN: No . We—what we say is that it has to be administered separately, not because it's separate but because downstream on that there are other senior rights.

In other words, the Brailsford rights are senior to everybody. We have to use the water and return it to them on down that channel.

Reporter's Transcript, p. 6, ll. 11-17.

MR. HONSINGER: But that there wasn't a common pool, that that couldn't be commingled and put through all four streams.

It's—the Brailsford stream, I think, is completely separate. There never was a separate pool or a common pool for the Brailsford stream.

Reporter's Transcript, p. 17, ll. 10-15.

Seventh, in the supplemental oral argument held on June 24, 1999, the following discussion was reported:

THE COURT: Okay. Is the 7201 right—is it your claim, Mr. Brown, that that stream, the Brailsford stream, actually ran into this so-called what you claim is the common pool of water that the remainder of the rights come out of?

MR. BROWN: No, Your Honor. Our contention is, and I think the record is undisputed on this, is that Brailsford stream originally flowed to the west, looped back in and eventually came back into Clear Lake. I understand now it is diverted by the present owners of the Brailsford property, and any unused water goes directly in the Snake River.

Our contention is not that it is a separate source. We simply say because the most senior right is the Brailsford property right down there, we're not subject to a call by any other senior rights include Clear Lakes as long as those other people are taking the water.

Reporter's Transcript, p. 6, l. 15 to p. 7, l. 7.

[THE COURT]

What I'm trying to understand is does anybody claim that the Brailsford stream ever ran into—whether it's one big pool created by the western and eastern stream or there are two separate pools created by the western and eastern stream, **does anybody claim the Brailsford stream ever ran into this so-called western pool or common pool?**

MR HONSINGER: Your Honor, **speaking for Clear Lakes, the answer is no.** It is our understanding that **the Brailsford stream never ran into, never ran towards the east into either of those sources.**

MR BROWN: **The answer is, if I remember the question, is also no. The Brailsford stream flows—the Brailsford stream historically first joined up with the other water down in Clear Lake.**

Reporter's Transcript, p. 8, l. 13 to p. 9, l. 2. (Emphasis added).

What is confusing is that Clear Lakes originally objected to Clear Springs' claim on May 3, 1993, because the Director **did not** recommend that the source for 36-07201 flowed into the source for 36-02659 (the so-called western stream). However, the position Clear Lakes took at the trial before the Special Master, in their motions to alter or amend before the Special Master, and now in the Challenge before this Court, is exactly the opposite of their objection, i.e., that the two rights are from entirely different sources. On the other hand, Clear Springs has always maintained that the two flows (the Brailsford stream or 36-07201, and the so-called "western stream" or Clear Lakes' claimed right 36-02659) were separate and never commingled until they reached Clear Lake proper. However, despite this geologic feature that the two streams never mixed until reaching Clear Lake, Clear Springs asserts that these two rights have the same source, they just need to be administered separately.

Therefore, as it relates to the Clear Springs' right 36-07201, the Director's Report is correct that the source of all of the water for the claimed rights is springs which are

tributary to Clear Lake. This is misleading, however, because of the natural geologic conditions. Namely, the Brailsford Stream, or what is sometimes referred to as the “far western stream,” which is the source of Clear Springs’ right 36-07201, **never** ran into the channel or pool of water from which Clear Lakes’ rights 36-02659 and 36-07004 and Clear Springs’ rights 36-02708 and 36-07218 are diverted. To the contrary, it flows to the west of this pool and eventually enters Clear Lake at a point well below the diversion works of the other four rights. For these reasons, Clear Lakes’ challenge regarding Challenge Issue No. 8, the source of Clear Springs’ right 36-07201, is granted; for purposes of administration, it is clearly from a separate “source” than the other four rights.

An additional point of clarification on this “source” issue may be useful. Clearly, “source” may have different meanings in different situations. As Mr. Hardy noted, the Snake River Aquifer is **the** source (singular) for all the relevant springs and stream flows (plural) involved in these subcases. The springs are discharged at various points across the north rim or wall of the Snake River Canyon. But because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different “source”. It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

VII.

REVIEW OF THE CHALLENGES AND ALLEGED DEFICIENCIES OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SPECIAL MASTER REGARDING THE POINTS OF DIVERSION ISSUES

Clear Springs’ Rights 36-02708 and 36-07218

Abandonment of these issues

Clear Lakes' Challenge issues 12, 13, 14 and 17 deal with claimed errors of the Special Master in regard to the point of diversion element for rights 36-02708 and 36-07218. The Special Master found Clear Lakes had abandoned their objections to point of diversion. The record in this case clearly supports that finding and this Court adopts the finding. Specifically, the following excerpts from the records unequivocally support this finding.

First, on June 29, 1998, Clear Lakes filed its *Pre-trial Memorandum*. That memorandum stated in relevant part as follows:

(6) (A) The purpose of this litigation is to resolve **the issue of whether the source** for Clear Springs' water right nos. 36-02708 and 36-07218 are separate from the source for Clear Lakes' water right no 36-07004, and if so, to determine language to be placed in the decree of water right nos. 36-02708 and 36-07218 to assist the Idaho Department of Water Resources in the administration of water right nos. 36-02708, 36-07218 and 36-07004.

(B) **Clear Lakes asserts** that Clear Springs' water right nos. 36-02708 and 36-07218 are diverted from a **separate source** than that from which water right no. 36-07004 is diverted. Thus Clear Lakes asserts that the water rights must be decreed with language assuring that IDWR will be able to administer the water separately. The basis on which Clear Lakes relies is the fact that water right no. 36-07004 was originally established and beneficially used from a completely different source with a different point of diversion than were water right nos. 36-02708 and 36-07218, and that Clear Lakes has continued to divert water right no. 36-07004 from that separate source with a different point of diversion than that from the through which Clear Springs' water rights are diverted.

....

(E) **The issue of fact remaining to be litigated at trial is:** Whether Clear Lakes' water right no. 36-07004 is diverted from a separate **source** than that from which Clear Springs' water right nos. 36-02708 and 36-07218 is diverted.

(F) **The issues of law remaining to be litigated at trial are:**
(1) Whether Clear Springs can maintain that the **source** for water right nos. 36-02708 and 36-07218 is "springs" when Clear Springs neither owned nor had specific permission to appropriate water right nos. 36-02708 and 36-07218 from springs on those lands as required by law (2) The appropriate language to insert as remarks in water

right nos. 36-02708 and 36-07218 to ensure separate administration of those rights from water right no. 36-07004.

(Emphasis added).

Second, Clear Springs filed its *Pre-trial Memorandum* on June 29, 1998, in which it stated in relevant part:

6. A. Nature of the Action: Dispute regarding Clear Lakes' objections to **source**. Clear Lakes contends one of its claims, 36-07004, is from a source separate from the claims in these subcases. Consequently, Clear Lakes contends remarks are necessary for administration. Clear Lakes essentially claims 36-07004 is from a different source, and therefore not junior to Clear Springs' water rights.

B. Statement of Claims: See A Above.

....

E. Issues of Fact Remaining to be Litigated at Trial: Whether right 36-07004 is from a **separate source**, and otherwise how to administer it in relation to the Clear Springs' rights.

F. Issues of Law to be Litigated at Trial: Not known.

(Emphasis added).

Third, on July 3, 1998, Clear Lakes filed its trial brief. Page 1, thereof, stated as follows:

This document is Clear Lakes Trout Company's Pre-trial Brief advising the court of matters of law in the above captioned subcases.

I. Statement of Issues

The sole issue in this proceeding is whether the source of Clear Springs Foods Inc.'s (hereinafter Clear Springs) licensed water right nos. 36-02708 and 36-07218 is separate from the source of Clear Lakes Trout Co.'s (hereinafter Clear Lakes) licensed water right no. 36-07004. The evidence will show that Clear Springs' water right nos. 36-02708 and 36-07218 were appropriated from and perfected in a stream fed by springs. Clear Springs is not entitled to divert water from the source of water right no. 36-07004, because Clear Lakes appropriated from and perfected that right in a separate stream fed by separate springs, and because Clear Springs never diverted and never had a right to divert water from that separate source.

Fourth, the trial on the merits before Special Master Haemmerle commenced on July 13, 1998. The following is from the Reporter's Transcript of that trial:

THE COURT: All right. Let's go on the record. We're on the record.

Mr. Steenson, do you have any opening statements you wish to make to the court?

MR. STEENSON: Briefly, Your Honor.

THE COURT: You may.

MR. STEENSON: Your Honor, we've filed --

MR. BROWN: Your Honor, excuse me. Before we start, do I correctly understand we bifurcated?

THE COURT: Yes. Let's clarify that order.

There was a motion in limine to exclude certain evidence relating to quantity. Both parties have agreed that quantity is not an issue in this case unless the court makes a finding that the sources are in fact separate as alleged by Clear Lakes.

Mr. Steenson, is that your understanding?

MR. STEENSON: That's correct.

THE COURT: Mr. Brown, is that your understanding?

MR. BROWN: My understanding is the measurements are not --

THE COURT: The measurements are not.

MR. BROWN: -- are not at issue. The quantity element of the water right 7004 is not at issue.

THE COURT: And neither are any measurements at this time.

MR. BROWN: That's right.

THE COURT: All right. Mr. Steenson

MR. STEENSON: **Your Honor, the sole issue in our opinion, as we've discussed is the question of source.**

(RT, p. 1, l. 6 to p. 2, l. 13). (Emphasis added).

The Special Master also found that any and all disputes as to the point of diversion element were resolved in an agreement entered into between the parties in a prior cause of action. Exhibit O. The Special Master held that because the agreement specifically acknowledged the then existing dispute between the parties and then acknowledged the validity of the points of diversion claimed by Clear Springs, Clear Lakes could not now contest the validity of the points of diversion (is now estopped). This Court has read Exhibit O in its entirety and agrees.

Because the issues were unequivocally waived by Clear Lakes, and therefore not tried to the Special Master, and because Exhibit O resolved these disputes, the Special Master's recommendations in this regard are adopted.

One final matter was not mentioned by the Special Master. While this Court recognizes that Clear Lakes' claimed water rights are not directly at issue in this challenge, the Director's Reports described both of Clear Lakes' rights within three quarter -quarters (three different ten-acre parcels) as the points of diversion. IDWR did the same for Clear Springs' claimed rights diverted from this common pool or channel, i.e., listed three different ten-acre parcels as the points of diversion . The Court recognizes that there are a total of four different 10-acre parcels described which cover the four rights. So, for whatever effect it may have, IDWR treated both claimants similarly.

In conclusion, these points of diversion will be decreed as reported.

Objection to Points of Diversion - 36-07201, Brailsford Stream

Clear Lakes also challenged the *Special Master's Recommendation* as to the points of diversion claimed by Clear Springs for 36-07201. Aside from all of the other matters of waiver, the agreement evidenced by Exhibit O, etc., the following discussion regarding points of diversion is from the transcript of the May 26, 1999 argument on challenge:

MR. BROWN: Third page. He lists it on there. Okay.

This one, the 10 cfs, 7201, okay, that is—that supplies—over here are the processing buildings.

THE COURT: Okay.

MR. BROWN: Okay. That has one pipe that comes like this, one pipe that comes like this—

THE COURT: Okay.

MR. BROWN: -- collecting water here and here. **I would say that's two points of diversion.** I would say that this, this continuous pool—

THE COURT: **And you don't have any disagreement with that; right?**

MR. HONSINGER: **With 7201, we have no disagreement,** Your Honor.

THE COURT: All right. So, now bring me the one that we're disagreeing on.

MR. BROWN: Okay. This is what's called the western pool.

THE COURT: But what right is it? Is it the 7208 or 2708?

MR. HONSINGER: And 7218.

THE COURT: This one and this one.

MR. HONSINGER: Yes.

(RT, p. 44, l. 13 to p. 45, l. 12). (Emphasis added.)

An independent review of the record reveals there are, in fact, two points of diversion for this right. Counsel for Clear Lakes conceded that Clear Lakes had no disagreement. For these reasons, Clear Lakes' challenge to the Special Master's Recommendations for this right are overruled and denied in all respects.

VIII.

CLEAR LAKES' CHALLENGE REGARDING PRIVATE WATERS, I.C. §§ 42-212 AND 42-213

This challenge is relevant only to Clear Springs' claimed rights 36-02708 and 36-07218. This Court can find no reference to this issue in Clear Lakes' *Objections*, filed May 3, 1993; however, it appears the matter was argued to the Special Master and he ruled on the issue. Therefore, this Court will discuss the issue.

As to this issue, the Special Master held as follows:

Even if the objection to the point of diversion element had not been abandoned, Clear Springs would prevail. Because the springs from which Clear Springs originally perfected their rights were once owned by Idaho Power Company, Clear Lakes alleged that Clear Springs was required to obtain a right-of-way from Idaho Power to properly perfect the right. *See* I.C. § 42-213 (requires parties obtaining right to private water to obtain a right-of-way from the owner of the land where the springs originate).

At one point, the springs did flow out of the Snake River Aquifer onto private lands. However, water from those springs flowed off that land and into a natural stream channel which then flowed into the Snake River. Because Clear Springs developed its right out of springs which flowed into a natural stream channel, it was not required to obtain a right-of-way in order to claim the spring as the source of the water. "[I]t is also well settled that the waters of natural springs, which form a natural stream or streams flowing off

of the premises on which they arise, are public waters subject to acquirement by appropriation, diversion and application to a beneficial use.” *Jones v. McIntire*, 60 Idaho 338, 352, 91 P.2d 373 (1939); I.C. § 42-101. Because the water flowed off of private land, the fact that the springs originated on private property does not prevent Clear Springs from claiming the springs as the source for its water rights.

Therefore, the point of diversion for all the rights shall be decreed as recommended in the Director's Report.

(December 31, 1998, Order, page 8).

Clear Lakes' position, with respect to the private water issue, was stated by Mr. Steenson on pages 143 through 154 of the Reporter's Transcript of July 13, 1998. The gist of his argument is that **if the source** of Clear Springs' water rights are “springs” (as opposed to a natural stream channel), the only springs involved are located on the private property of Idaho Power, and Clear Springs did not get the requisite permission (I.C. §§ 42-212 and 42-213) from Idaho Power to trespass on their land to appropriate the water. On the other hand, **if the source** is a natural stream channel (Clear Lakes' contends it should be the so-called western stream, down stream or after the so-called historic point of division), then Clear Lakes abandoned the private waters issue. In fact, Mr. Steenson stated directly that Clear Lakes was not contesting the permits and licenses (RT, pg. 144, ll. 18-22); and it was Clear Lakes' position that Clear Springs in fact appropriated from a natural stream channel (RT, pg. 143, ll. 21-25).

To determine what are private waters under I.C. § 42-212, it is useful to compare it to I.C. § 42-101 as to what waters are subject to appropriation. *See Jones v. McIntire*, 60 Idaho 338 at 352, 353 (1939). It is also useful to read *Bassett v. Swenson*, 51 Idaho 256 (1931), and *Lemmon v. Hardy*, 95 Idaho 778 (1974), for the rule that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid.

Depending upon the particular facts and circumstances of a given case, this Court finds the legal issues may be separable. In other words, one issue may be whether the water is appropriable, i.e., private water under I.C. § 42-212 vs. “public” water defined by I.C. § 42-101. It may be an entirely different issue whether the public water has been

lawfully appropriated, i.e., whether there is a problem because the right was initiated by trespass.

It is true that Clear Springs claimed the source of these two respective water rights as “Springs (Clear Springs) Trib. to: Clear Lakes.” *See Notices of Claim*, filed August 24, 1988. For context purposes only, and again recognizing Clear Lakes’ water rights are not directly at issue in this Challenge, Clear Lakes in its respective *Notice of Claim of Water Right* listed as to source: “Source of water supply (a) Clear Lakes Springs which is tributary to (b) Snake River.” *See Notice of Claim*, filed September 1, 1988. The point being, each claimant described the exact same source, or “Clear Springs.”

The evidence is overwhelming that before or above the actual point(s) where both parties appropriated their respective water, the springs had accumulated into what this Court and Mr. Hardy have described as a common pool or a natural stream channel. And this is before the channel braided around several islands and again commingled in Clear Lake and then discharged into the Snake River. Because Clear Lakes appropriated the water **after** it accumulated and formed a natural water course, I.C. §§ 42-212 and 42-213 are not applicable. *See also Jones v. McIntire*, 60 Idaho 338, 352 (1939); I.C. § 42-101. There is no evidence of trespass.

Other evidence also demonstrates that Clear Lakes’ position concerning private waters is untenable. Specifically, Exhibits 16a and 16b are the respective applications for Clear Lakes’ two water rights (Exhibit 16b, 36-02659, was originally applied for by Richard Kaster, but was subsequently assigned to Clear Lakes). Each application reads in relevant part: “Application for Permit to appropriate the **Public Waters** of the State of Idaho.” *See also* the September 14, 1967 letter from IDWR to Clear Lakes Trout Company, Inc., wherein direct reference is made to “your application to appropriate the **public waters** of the State of Idaho,” (located in Exhibit 16a). (Emphasis added).

Given that Clear Lakes applied to appropriate **public waters** (a clear admission the water is public), and given their appropriation is from the same natural stream channel as Clear Springs’ two rights (the same source), to now argue an issue of private waters is wholly without merit.

This court affirms the *Special Master's Recommendation* that the water appropriated by Clear Springs is not private water and Challenge Issue No. 16 is overruled.

IX.

**CHALLENGE ISSUE 18, CLAIMED ERROR IN
EXCLUDING DOCUMENTS AND FILM**

As noted earlier, the Standard of Review for this challenge is one of abuse of discretion. Clear Lakes did not mention any claimed error in the Special Master's exclusion of documents or film in its briefing on challenge. Neither did it argue the matter at hearing. But more importantly, Clear Lakes failed to demonstrate that any such exclusion impacted a substantial right of Clear Lakes which might warrant recommitment to the Special Master, or would in any way change the outcome of these subcases. In fact, Clear Lakes did not request such a recommitment.

For all of these reasons, challenge issue 18 is overruled.

IT IS SO ORDERED:

DATED: _____.

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