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

	)	**Subcases 61-02248B and 61-07189**
	)	**(Batruel Challenge)**
In Re SRBA	)	
	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON CHALLENGE**
Case No. 39576	)	
	)	**ORDER OF RECOMMITMENT TO**
	)	**SPECIAL MASTER CUSHMAN**
_____	)	

I.
SUMMARY

This matter is before the court on the *Notice of Challenge* filed by Batruel Dairy, Paul Batruel and Mary Batruel (the Batruels) challenging Special Master Cushman's recommendations regarding claim nos. 61-07189 and 61-02248B. For the reasons discussed below, the August 30, 2000, order is reversed and the matter recommitted to the Special Master.

II.
APPEARANCES

Matt Howard on behalf of Batruel Dairy, Paul Batruel and Mary Batruel.

Norm Semanko on behalf of Magic West, Incorporated.

Peter Ampe, Deputy Attorney General, on behalf of the State of Idaho.

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

This Court having heard oral arguments on the challenge on Tuesday, February 20, 2001, 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 Wednesday, February 21, 2001.

IV.
STANDARD OF REVIEW

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). Nevertheless, in Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). While the phrase "clearly erroneous" is not defined in the rule, 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." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

In contrast to the standard of review relative to findings of fact, the conclusions of law stated in a special master's report, while persuasive, are not binding upon a district court. The district court will adopt a special master's conclusions of law only to the extent that those conclusions correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). In other words, the district court exercises free review over conclusions of law made by a special master. *Higley*, 124 Idaho at 534, 861 P.2d at 104.

While Rule 53(e)(2) of the Idaho Rules of Civil Procedure (I.R.C.P.) gives a party fourteen (14) days to serve written objections to a special master's report on all other parties, ***Administrative Order 1*** provides that the "[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." ***AO1***(13)(a).

Where a challenge to a special master's report is filed, the district court must hold a hearing on the issues raised therein (unless the parties waive oral argument and submit the challenge on the briefs). *See Kieffer v. Sears Roebuck & Co.*, 873 F.2d 954, 956 (6th Cir. 1989). After the hearing, 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 master] with instructions." I.R.C.P. 53(e)(2).

V.
BRIEF PROCEDURAL AND FACTUAL BACKGROUND

1. Magic West, Inc. (Magic West) filed claims 61-02248B and 61-07189 in the SRBA. The two claims are for combined use at Magic West's potato processing plant in Glenns Ferry, Idaho. Both claims are for groundwater with the same point of diversion.

2. Claim 61-02248B is a licensed right purchased by Magic West in 1974. In 1989, Magic West filed a claim in the SRBA for 61-02248B. The claim was for a priority date of 1939, a diversion rate of 0.40 cubic feet per second (cfs), an irrigation purpose of use, and a period of use from April 1 to November 1. In 1997, Magic West amended its claim to reflect an industrial purpose of use and a year round period of use.

3. Claim 61-07189 is also based on a licensed report. The right was permitted for 0.67 cfs, with no express volume limitation and a period of use of 10.5 months. Proof of beneficial use for 0.67 cfs was submitted to the Idaho Department of Water Resources (IDWR) in 1979. In 1989, Magic West filed in the SRBA a claim for 61-07189, claiming a priority date of 1974, a diversion rate of 0.67 cfs, an industrial purpose of use, and a period of use of August 15 to July 1, or 10.5 months. In 1990, the right was licensed with a diversion rate of 0.67 cfs and an annual diversion volume of 12.9 acre-feet per year (AFY).

4. In 1996, Magic West asserted that the annual diversion volume for license 61-07189 was inaccurate and filed a petition with IDWR seeking to amend the annual diversion volume from 12.9 AFY to 300 AFY to more accurately reflect the annual volume historically diverted. It is not clear from the record whether Magic West sought to correct the season of use in the license. Magic West also filed an application for

permit 61-07724 to obtain any additional water not ultimately allowed under 61-07189. Several parties filed protests to the permit application, which proceeded before IDWR.

5. In 1997, Magic West amended claim 61-07189 to reflect a year-round period of use.

6. In 1999, following administrative proceedings, the Director of IDWR issued an *Amended License* increasing the diversion volume for 61-07189 from 12.9 AFY to 58 AFY. It is not in the record whether Magic West appealed the administrative ruling. The Director also issued a cease and desist order requiring Magic West to limit its annual pumping in accordance with 61-07189 and 61-02248B.

7. On February 12, 1999, IDWR issued *Director's Reports* for 61-07189 and 61-02248B. The *Director's Report* for 61-07189 recommended the increase from 12.9 AFY to 58 AFY. The *Director's Report* for 61-02248B recommend a diversion rate of 0.08 cfs with an annual diversion volume of 8.0 AFY. The Director recommended both rights have periods of use from August 15 to July 1, or 10.5 months. The recommended remark for both rights indicated the same point of diversion but did not include a combined diversion limitation.

8. On June 15, 1999, Magic West filed objections to the Director's recommendations for both 61-07189 and 61-02248B. Magic West asserted in regard to 61-07189 that the quantity should be 423 AFY and the period of use should be year-round. Magic West claimed that the processing plant had used the water year-round since 1986 and, therefore, had changed the period of use pursuant to the accomplished transfer statute, I.C. § 42-1425. In regards to 61-02248B, Magic West also asserted a year-round season of use based upon the same reasoning.

9. In August 1999, IDWR issued permit number 61-07724 to Magic West for year-round use in the amount of 0.67 cfs and 338 AFY. To date, the permitted right has not been claimed in the SRBA. One of the conditions for issuing the permit was that the limit on the maximum rate of diversion and annual pumped volume under Permit 61-07724 when combined with claims 61-07189 and 61-02248B should not exceed 0.67 cfs nor 338 AFY. (In other words, using all three rights, Magic West would be able to pump 0.67 cfs year-round—up to a total annual volume of 338 AF—but no more).

10. Following the issuance of permit no. 61-07724, and consistent with the permit, Magic West, the State of Idaho ("the State"), and IDWR executed Standard Form 5s (SF5s), *Stipulated Elements of a Water Right*, and filed those SF5s with the Court prior to the Initial Hearing set for February 17, 2000. Magic West, the State and IDWR agreed in the SF5s that the period of use for claims 61-07189 and 61-02248B had increased to a full year prior to commencement of the SRBA. A ***Special Master's Report*** was issued on February 3, 2000, recommending the rights consistent with the SF5s. Specifically, for claim 61-07189, the Special Master recommended a quantity of use 0.67 cfs and 58.0 AFY; and for 61-02248B, the Special Master recommended a quantity of 0.08 cfs and 8.0 AFY. Per the stipulation contained in the SF5s, the Special Master recommended a year-round period of use for both claims.

11. On March 27, 2000, Mary Batruel, Paul Batruel, and Batruel Dairy ("the Batruels") filed a *Motion to Alter or Amend* with the Special Master. Prior to the filing of their *Motion*, the Batruels had not filed an objection, response, or in any way moved or acted to participate in either subcase.

12. On August 30, 2000, the Special Master issued an ***Order Denying Motion to Alter or Amend and Correcting Clerical Mistake Contained in the Special Master's Recommendation***.

13. On September 11, 2000, the Batruels filed a *Notice of Challenge* with this court. The Batruels' *Opening Brief re: Challenge to Special Master's Recommendation* was lodged with the court on November 13, 2000. The State and Magic West submitted responsive briefs on December 8, 2000.

14. Oral argument was held before this Court on February 20, 2001.

VI.
ISSUES PRESENTED

In their *Notice of Challenge*, the Batruels set forth the following issues:

1. Whether the Special Master erred in recommending the quantity element of an unclaimed permit (61-07724) under the quantity remarks for water rights 61-02248B and 61-07189, which resulted in an increase of the total combined diversion volume from 66 acre-feet-per-year (AFY) to 338 AFY?

2. Whether the recommendation of the quantity element of an unclaimed permit (61-07724) violates constitutional due process protections of notice and a meaningful opportunity to object to the quantity allowed by the permit?

3. Whether the recommendation of the quantity element of an unclaimed permit (61-07724) violates the statutory procedures set forth in Chapter 14, Title 42, Idaho Code, which require, at a minimum, that the permit be subject to the claim, director's report, and objection processes before being decreed in the SRBA?

4. Whether the Special Master erred in concluding that the remark, which included a recommendation of the quantity element of unclaimed permit no. 61-07724, was necessary and clarifying?

5. Whether the Special Master erred by failing to include language expressly mandated by Idaho Code § 42-1421(3) to be inserted into decrees for "any claimed water right for which proof of beneficial use has not been filed" (i.e., a permit), and failing to include additional clarifying language set forth in the Batruels' *Comments Re: Motion to Alter or Amend* dated May 18, 2000?

6. Whether the Special Master erred in recommending a year-round season of use for water right no. 61-07189 based on Idaho Code § 42-1425.

At the February 20, 2001, hearing, the issue was also raised as to due process in regard to the stipulation between the parties: that is, whether the Batruels' right to notice and due process was violated by the State and Magic West stipulating to a year-round season of use when the *Director's Report* recommended only a 10 ½ month season of use.

These issues are addressed below as the "increased diversion volume" issue and the "season of use" issue. The Court will first take up the issue of the season of use.

VII.
DECISION

A. SEASON OF USE.

1. The Special Master Did Not Err in Accepting the Stipulation as to the Season of Use.

The Batruels argue that the special master erred in recommending a year-round season of use for water right no. 61-07189. Specifically, the Batruels contend that the period of use for 61-07189 cannot be enlarged by application of the accomplished transfer statute, Idaho Code § 42-1425, because the period of use was not year-round prior to the initiation of the SRBA. To support their claim, the Batruels point to the *Notice of Claim* filed by Magic West on October 3, 1989, indicating that claim no. 61-07189 only had a season of use of 10.5 months. The Batruels argue that the original *Notice of Claim* acts as a judicial admission.

a. The season of use set forth in the original claim does not act as a judicial admission.

The question of whether a statement constitutes a judicial admission is a matter of law. *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Ct. App. 1997). "A judicial admission is a formal act or statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." *Id.* (citations omitted). In order to constitute a judicial admission, a statement by a party must be (1) clear, (2) deliberate, (3) unequivocal, and (4) about a concrete fact within that party's knowledge. *Id.* at 619. A statement in a pleading may act as a judicial admission. *See, e.g., McLean v. City of Spirit Lake*, 91 Idaho 779, 430 P.2d 670 (1967) (holding that answer by defendant stating that it had received notice of suit as required by statute was judicial admission by which the city was bound); *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 930 P.2d 1361 (Ct. App. 1997) (holding in action regarding a salary dispute that the plaintiff's allegation in complaint that he had been paid a certain amount as evidenced by defendant's tax record was a binding judicial admission despite evidence that the tax record was fraudulently prepared). A notice of claim is akin to a pleading—it is the mechanism by which a party

brings a claim in the SRBA, I.C. § 42-1409, and may be amended. I.C. § 42-1409A. *See also Fort Hall Water Users Ass'n v. U.S.*, 129 Idaho 39, 921 P.2d 739 (1996) (stating that notices of claim, objections, and responses comprise pleadings in a water adjudication proceeding).

In this case, it would appear that the 1989 *Notice of Claim* filed by Magic West is a judicial admission because it is a pleading in a judicial action; the statement of the dates of the season of use are clear, deliberate and unequivocal; and the information is clearly a concrete fact within Magic West's knowledge. However, unlike *McLean* and *Strouse v. K-Tek*, the claim here was amended to change the "admission." There are numerous reasons the information in a notice of claim may need to be amended: the claimant may have been mistaken as to the information; the claimant may lack evidence to support a greater claim; the claimant may merely be copying information from an earlier permit or license, but not asserting any changes that have occurred; the claimant may be unaware of his or her rights to assert a greater claim; and so on. Nevertheless, once the claim has been amended, the Court looks to the amended claim, not the original. *See Andrews v. Moore*, 14 Idaho 465, 94 P. 579 (1908) (holding that where a complaint is amended, it takes the place of the original complaint). Having changed the asserted season of use in its amended claim, Magic West is no longer bound by the statement of the season of use in its original claim. Thus, while the information in the original claim may be evidence, it does not constitute a judicial admission.

b. The Special Master did not err by accepting the facts stipulated to in the SF5.

This Court has previously discussed the acceptance of stipulated evidence. *See* ***Memorandum Decision and Order On Challenge (Gisler),*** subcase 36-00077D (June 30, 2000); ***Memorandum Decision and Order on Challenge (Morris)***, subcases 36-00061 *et al.* (Sept. 27, 1999). In ***Gisler***, this Court reasoned that it did not have to accept a stipulated fact in all cases, but analogized it to the "uncontradicted testimony rule" of evidence: that the Court must accept the stipulation unless the stipulated facts were inherently improbable or would result in a fraud being perpetrated on the court or others. *Id.* at 13, n. 9. The Special Master in this subcase had before him the original 1989

Notice of Claim in 61-07189 setting forth a 10.5 month season of use, clearly contradicting the *Amended Notice of Claim* and the facts stipulated to in the SF5. As the fact-finder, it was the Special Master's prerogative to draw inferences of credibility from the documentary evidence, and his findings of fact based on those inferences will be set-aside only upon a showing that they are clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) (under F.R.C.P. 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses); D. CRAIG 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)) (stating that the "clearly erroneous standard" applies to documentary evidence).

After Magic West had received its license for 61-07189, Magic West attempted to correct through an administrative process perceived errors in the annual diversion volume set forth in the license. ***Order Denying Motion to Alter or Amend***, subcases 61-02248B and 61-07189 (Aug. 30, 2000) at 1. Magic West also filed an amended claim with IDWR on April 4, 1997. Finally, Magic West filed an *Objection* to the *Director's Report* in regard to this matter, claiming an increased volume of water and an increased season of use. *Id.* at 2. It was within the Special Master's discretion to accept a stipulation of fact that the season of use had increased to 12 months prior to the commencement of the SRBA and discount the information in the original *Notice of Claim* for 61-07189. If the Batruels wished to contest the stipulation, they should have done so through a trial before the Special Master. While reasonable minds may differ as to the import of the season of use set forth in the original *Notice of Claim*, it could be concluded that because Magic West amended its claim and sought to increase the season of use contained in the license, that the information in the original *Notice of Claim* was incorrect but the facts stipulated to by the parties was correct. Therefore, this Court finds that the Batruels have failed to show that the Special Master's findings of fact were clearly erroneous. *See Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974). However, as discussed below in section 3, the Court finds that the Special Master's recommendation constitutes an enlargement making I.C. § 42-1425 inapplicable to the facts of this subcase, and requiring the matter be recommitted to the Special Master.

2. The Stipulation Of Facts Did Not Violate The Batruels' Right To Due Process.

At the February 20, 2001, hearing, the issue was raised as to whether the Batruels' due process rights were violated because of a lack of notice of the terms of the SF5. This Court has previously ruled that when a party makes a claim as to an element of a water right, but IDWR makes a different recommendation, a party entering a subcase via a motion to alter or amend does not suffer a lack of notice if the original parties later stipulate to a value greater than IDWR's recommendation but less than or equal to that set forth in the *Notice of Claim. See* ***Memorandum Decision and Order On Challenge (Gisler),*** subcase 36-00077D (June 30, 2000); ***Memorandum Decision and Order on Challenge (Morris)***, subcase 36-00061, *et al*. (Sept. 27, 1999). In this subcase, an amended claim had been filed claiming a year-round season of use. The Batruels could have entered the subcase to challenge Magic West's claim, but did not. Although IDWR recommended a different season of use, the Batruels knew or should have known that if Magic West challenged the *Director's Report*, IDWR, the State, and Magic West might compromise and stipulate to a season of use up to and including the claimed year-round season of use. Therefore, the Court finds that the Batruels had sufficient notice of the possible terms of an SF5, and that the Batruels right to due process was not violated. As will be discussed below, there may, however, be due process rights implicated as a result of irregularities in applying Idaho's "amnesty statutes," I.C. §§ 42-1425 and 1426.

3. The Lengthened Season Of Use Was An Enlargement.

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). The district court will adopt a special master's conclusions of law only to the extent that those conclusions correctly state the law. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993).

Idaho Code § 42-1425, the accomplished transfer statute, waives the procedural requirements of I.C. §§ 42-108 and 42-222, where a "change in place of use, point of diversion, nature or purpose of use or period of use of a water right" occurred prior to the commencement of the Snake River Basin Adjudication, provided that no other existing water rights were injured by the change. I.C. § 42-1425(2). "The purpose of I.C. § 42-1425 is to streamline the adjudication process by providing a substitute for the transfer process required by I.C. § 42-222 and to protect existing water uses which were the result of past transfers, regardless of compliance with statutory mandates." *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996). It is not applicable to any claim based upon an enlargement of use. I.C. § 42-1425(2)(b).

The mandatory permit requirements of I.C. §§ 42-201 and 42-229 may be waived for enlargements made prior to the commencement of the Snake River Basin Adjudication pursuant to I.C. § 42-1426. However, I.C. § 42-1426 does not permit a modification of the existing water right, but rather "a new water right may be decreed for the enlarged use of the original water right . . . with a priority date as of the date of completion of the enlargement of use." I.C. § 42-1426(2). (Idaho Code § 42-1426 also imposes certain procedural requirements that must be fulfilled prior to a party obtaining a right under that statute).

Although the term "enlargement" is not defined in the § 42-1425, the Idaho Supreme Court in *Fremont-Madison* defined "enlargement" as "any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means." *Fremont-Madison Irr. Dist.*, 129 Idaho at 458, 926 P.2d at 1305. "An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion." *Id.* In other words, a "change" in the period of use under I.C. § 42-1425 contemplates a situation where the season of use is shifted or split, but where the total duration of the period remains the same, whereas an increase in the duration—i.e., a longer season of use—is an enlargement; thus, the necessity to set forth the dates of the season of use with specificity. *See A&B Irrigation Dist. v. Idaho Conservation League,* 131 Idaho 411, 958 P.2d 568 (1997), *vacated in part on reh'g* (1998) (rejecting in opinion on rehearing the use of a

general term—"irrigation season"—to describe the period of use of a water right, but requiring that the period of use be delineated by specific dates).

An increased season of use may enlarge a water right by increasing the volume of water actually diverted, or by increasing the beneficial use by permitting a water-user to engage in that beneficial use over a greater period of time. The reason the latter acts as an enlargement is that:

> [O]ne may make a prior appropriation of a certain quantity of water to be used for a designated period of time, and that another person may make an appropriation of a like quantity from the same source during another period and as to that quantity be a prior appropriator himself. In other words, there is no difference in principle between an appropriation measured by quantity and one measured by time, and so appropriations may be made of the same water by different parties for different periods.

Wells A. Hutchins, *The Idaho Law of Water Rights,* 5 IDAHO L. REV. 1, 41 (Fall 1968). In other words, a water-user that increases his or her season of use takes water that is or could be appropriated by someone else; thus, assuming a party comes within the provisions of the amnesty statutes, the necessity to obtain an additional water right for the enlargement under I.C. § 42-1426, rather than merely altering an existing water right under I.C. § 42-1425.

The facts of this case show that the original season of use for license 61-07189 was from August 15 to July 1, or 10.5 months; and for license 61-02248B, it was from April 1 to November 1, or 7 months. The *Director's Reports* for the respective claims recommended a 10.5-month season of use for both claims. The Special Master found that the season of use had increased to year-round prior to the commencement of the SRBA. The Special Master recommended a year-round season of use for both claims, modifying the claims pursuant to I.C. § 42-1425. However, the longer duration agreed to in the SF5s and contained in the ***Special Master's Report*** is not a "change" of the period, but an enlargement. Accordingly, the Special Master erred in applying I.C. § 42-1425 and recommending a year-round season of use for 61-02248B and 61-07189. Whether Magic West may make use of I.C. § 42-1426 is a matter to be determined upon remand.[1]

[1] While Magic West has pursued an administrative appeal in regard to the period of use for 61-07189, the use of I.C. § 42-1426 would not constitute an impermissible collateral attack on the underlying license

B. INCREASED DIVERSION VOLUME.

1. Because the Special Master Did Not Decree the Quantity of Permit 61-07724, There Is No Violation of Due Process.

The Batruels have objected to the references in the ***Special Master's Report*** to the total quantity limits of permit 61-07724 when administered together with water rights 61-07189 and 61-02248B. The Batruels claim that those comments by the Special Master constitute a decree of the quantity element of permit 61-07724 in violation of the Batruels' statutory and due process rights and the statutory procedures set forth in Chapter 14, Title 42, Idaho Code, requiring a permit be subject to the claim, director's report, and objection processes before being decreed in the SRBA. The validity of the Batruels' arguments rest, of course, on whether the comments made by the Special Master act as a decree of the quantity elements of permit 61-07724.

Partial decrees may contain "conditions on the exercise of any water right included in any decree, license, or approved transfer application" or "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(i) and (j). The remarks objected to by the Batruels limits the total combined diversion rate and volume of license nos. 61-07189 and 61-02248B when used with permit 61-07724. The remarks are a condition on the exercise of the rights and intended to assist the director to administer the right in accordance with the provisions of permit 61-07724 and the stipulation entered into by Magic West. Because the remarks act to limit the diversion rather than create a right to divert some quantity of water, the remarks do not act as a partial decree of permit 61-07724. Therefore, this Court finds that because permit 61-07724 has not been decreed, the remarks in the ***Special Master's Report*** do not violate the Batruels' statutory or constitutional rights to due process.

2. The Remarks Are Ambiguous.

The Batruels also object to the remarks by the Special Master regarding permit 61-07724 limiting the three claims to a total of 0.67 cfs and 338 AFY, contending that

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because, under I.C. § 42-1426, the claimant obtains a different water right, but does not relitigate the underlying license.

those remarks are not necessary and clarifying, but rather increase confusion. As discussed above, the remarks regarding the limitation on the rate and volume of the diversions under licenses 61-07189 and 61-02248B with permit 61-07724 are conditions as to the exercise of the water rights and can be characterized as remarks necessary to the administration of the rights. *See* I.C. § 42-1411(2)(i) and (j). Certainly some remark is necessary to give notice that the three claims are to be administered together. Nonetheless, the provisions in a partial decree must be set forth with "the certainty required for a decree which will have application in perpetuity." *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1997) *vacated in part on reh'g* (1998). Thus, the issue is whether the remarks are clarifying, or if they create confusion or are otherwise ambiguous.

As discussed above, the Batruels have objected to the remarks containing a quantity element for the combined claims. The remarks do not serve to adjudicate the claim. Nevertheless, by including a specific quantity in the remark, it gives the appearance of a right to the quantity set forth, although Magic Valley may later be awarded a lesser quantity. This is of special concern in this case because the limiting remark is set out in the quantity section of the Special Master's recommendation rather than that section reserved for other provisions necessary for the definition or administration of the water right. Thus, should Magic West eventually be awarded less water in 61-07724 (the 1999 permit) so that the combined diversion volume of the three claims is less than 338 AFY, the limiting remark would be ambiguous.

Finally, the remark serves to limit the water available under the three claims; individually, the three claims add up to more than 338 AFY, 0.67 cfs, but are limited to only that diversion volume and rate. Yet the remarks by the Special Master do not address the allocation of the limitation among the three claims should Magic West sell one or more of the water rights: Is the 1999 permit to wholly bear the limitation, or is the limitation allocated pro rata among the three claims, or is some other allocation appropriate? Failure to determine the allocation is, by itself, cause for confusion and creates an ambiguity.

In sum, the Court finds the remarks to be confusing and ambiguous because they create the appearance of a right to a certain quantity of water and because the limiting remarks do not address the allocation of the limitation among the three claims.

3. The Special Master Did Not Err by Not Including the Additional Clarifying Language Requested by the Batruels.

The final issue raised by the Batruels is a claim that the Special Master erred by failing to include language expressly mandated by Idaho Code § 42-1421(3) to be inserted into decrees for "any claimed water right for which proof of beneficial use has not been filed" (i.e., a permit), and failing to include additional clarifying language set forth in the Batruels' *Comments Re: Motion to Alter or Amend* lodged with this court on May 18, 2000.

Idaho Code Section 42-1421(3) states:

> The district court shall decree any claimed water right for which proof of beneficial use has not been filed, but shall state that the right is conditioned upon completion of the appropriation in accordance with the laws of the state governing the appropriation of water and that the decreed right shall be subject to the terms of the license to appropriate water that is ultimately issued.

The claims before the Court, 61-07189 and 61-02248B, are licenses for which beneficial use has been established. *See Director's Report for Right No. 61-07189* and *Director's Report for Right No. 61-02248B.* Therefore, I.C. § 42-1421(3) is inapplicable to the ***Special Master's Reports*** at issue.

In their *Comments Re: Motion to Alter or Amend*, the Batruels suggest that language similar to that in I.C. § 42-1421(3) be included in the partial decree and that the Court include language "clarifying" that parties are not barred from objecting or contesting the 1999 permit or to eliminate altogether any reference to the 1999 permit.

As pointed out above, I.C. § 42-1421(3) is inapplicable to the licenses at issue here. Some remark is necessary to show that the three claims are to be administered together, but a comment that a party may later object to the quantity given under the 1999 permit is unnecessary to the adjudication or administration of claims 61-07189 and 61-

02248B. Accordingly, it was not error for the Special Master to reject the language proposed by the Batruels.

VII.
CONCLUSION

The Court finds that the Special Master did not err in accepting the stipulation as to the season of use contained in the SF5s, and that the Batruels had sufficient notice that the parties might stipulate to a year-round season of use. The Court finds that the remarks limiting the volume and rate of diversion of licenses 61-07189 and 61-02248B when used in combination with permit 61-07724 are ambiguous, but, because the remarks do not establish a right to divert water, do not act as a decree of a water right. Because the remarks are not a decree of a water right, the Batruels statutory and constitutional rights to due process have not been violated by the inclusions of those remarks in the ***Special Master's Report***. Furthermore, the Court finds that the Special Master was not required to use the special language set forth in I.C. § 42-1421(3) nor the language requested by the Batruels. However, because the Court finds that the Special Master erred in applying the accomplished transfer statute, I.C. § 42-1425, to an enlargement of the season of use of license 61-07189 and 61-02248B, and because of the ambiguous nature of the Special Master's remarks, the matter must be recommitted to Special Master Cushman.

VIII.
ORDER OF RECOMMITMENT TO SPECIAL MASTER CUSHMAN

IT IS HEREBY ORDERED that the subcases at issue are recommitted to Special Master Thomas R. Cushman for further proceedings consistent with this opinion.

DATED:

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ROGER S. BURDICK
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication