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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

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: 34-00600 and 34-00606
	)	
Case No. 39576	)	ORDER DENYING ROSENKRANCE'S
	)	MOTION TO ALTER OR AMEND;
	)	GRANTING McCRAY'S MOTION TO
	)	ALTER OR AMEND IN PART;
	)	DENYING McCRAY'S MOTION TO
_____	)	ALTER OR AMEND IN PART

I. PROCEDURAL BACKGROUND

An *Amended Special Master's Report and Recommendation* was issued for these two water rights February 27, 1998. *Motions to Alter or Amend* were filed by claimant Matea McCray Partners and by Doug and Shane Rosenkrance and James Lambert (hereafter collectively referred to as "Rosenkrance"). Carroll Palmer did not file a motion.

II. FACTUAL CONCLUSIONS CHALLENGED BY ROSENKRANCE

A. IRRIGATION IN 1990

Rosenkrance's *Motion to Alter or Amend* requests the court amend its Findings and Conclusions to indicate that no irrigation occurred in 1990. The court declines to alter or amend its Findings and Conclusions with respect to irrigation of these rights in 1990. Although there was conflicting evidence as to whether the property was irrigated in 1990, it is the duty of the trier of fact to weigh the evidence. The court did so with respect to the issue of irrigation in 1990 and declines to alter or amend its recommendation.

B. EXTENT OF IRRIGATION IN 1990

Rosenkrance requests that the court amend its Findings and Conclusions to reduce the number of acres found based on the extent of irrigation in 1990. The court found the extent of irrigation in 1990 was 25 acres. Rosenkrance urges a finding of 10 to 15 acres asserting that Dale Smith did not testify about how many acres were irrigated in that time frame, and further asserting that Gerald Storer estimated the most that could be irrigated was 10 to 15 acres. The court understood Dale Smith's testimony to refer to 1990 when he estimated that between 20 and 30 acres were irrigated. Although there was conflicting evidence as to the extent of irrigation in 1990, it is the duty of the trier of fact to weigh the evidence. The court did so with respect to the extent of irrigation in 1990 and declines to alter or amend its recommendation.

C. FORFEITURE

Rosenkrance requests that the court amend its conclusion that these water rights had not been forfeited in their entirety. Rosenkrance bases this request on evidence that these irrigation rights were not used in 1991, 1992, 1993, 1994, and 1995. Rosenkrance urges the court to alter its conclusion that the five-year statutory period for forfeiture essentially was "tolled" by the SRBA *Memorandum Decision and Order Granting Idaho Department of Water Resources' Motion for Interim Administration with Limitations* (Dec. 18, 1992) (hereafter referred to as *Order on Interim Administration*). The court declines to amend its recommendation.

The *Order on Interim Administration* orders IDWR to administer water rights in Basin 34 according to the *Director's Report*. The *Order on Interim Administration* permitted the orderly administration of water rights during the pendency of the SRBA. The *Order on Interim Administration* does not usurp the right of water users to maintain objections to rights which were recommended forfeited. If the *Order on Interim Administration* did not toll the five-year period for forfeiture, water users would be required to disobey a court order to avoid forfeiture. Once the SRBA District Court issued its *Order on Interim Administration*, it acted as a legal defense to forfeiture for those rights which were recommended forfeited in the *Director's Report*.

Rosenkrance argues that water users must petition the court for relief from its *Order on Interim Administration* in order to toll the forfeiture statute. Here, McCray's predecessor filed an objection to the conclusion of forfeiture. The filing of an objection is a request for relief of

court. This Special Master concludes that the *Order on Interim Administration* tolls the forfeiture statute for those rights which were recommended forfeited. If there is a further requirement that water users ask for relief from the *Order on Interim Administration*, the filing of an objection fulfills it. Thus, the court declines to alter or amend its conclusion of law that the five-year period for forfeiture is tolled by the *Order on Interim Administration*.

In summary, the court denies Rosenkrance's *Motion to Alter or Amend* with respect to irrigation in 1990, the extent of irrigation in 1990, and the finding on forfeiture.

III. FACTUAL CHALLENGES BY McCRAY PARTNERS

Matea McCray Partners' (hereafter McCray) *Motion to Alter or Amend* requests the court amend its Findings and Conclusions on multiple issues.

A. TO ADD FINDINGS REGARDING ADMINISTRATION IN BASIN 34

McCray requests that the court amend its Findings and Conclusions to add a finding that "Alder Creek is tributary to the Big Lost River and is administered as a single water system" based on General Provision 4 (sic) in Basin 34. General Provision 2 in Basin 34 sets forth the manner in which surface water is to be administered. Although this general provision was discussed in a recent Supreme Court decision, *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998), that administrative provision was remanded for findings. *Id.* at 951 P.2d 947, 948. The propriety of this general provision has not been ruled on by the SRBA Court. The court declines to add this finding.

B. SUFFICIENCY OF WATER

McCray requests that the court add a finding that prior to 1976, the quantity of Alder Creek water to which the property was entitled for its irrigation was usually insufficient to irrigate all of the property, requiring a supplemental supply of water from a groundwater source. The court weighed the evidence and declines to amend its findings.

C. SHANE ROSENKRANCE'S CLAIM TO ALDER CREEK WATER

McCray requests that the court amend its findings and conclusions to add the following:

That Doug Rosenkrance, a participant in these proceedings, is a claimant to a right to use Alder Creek water for irrigation and is the watermaster for Water District 34 in which Alder Creek is a part, and has been the watermaster for Water District 34 at all times herein mentioned. That Shane Rosenkrance, a participant, is the son

of Doug Rosenkrance and is a claimant to a right to Alder Creek Water. That prior to May 27, 1992, the only water right adjudicated, decreed, or evidenced by permit or license issued by the Department of Water Resources for Shane Rosenkrance for use of Alder Creek Water was Water Right No. 34-00682B, a decreed right for .24 cfs with a priority date of June 1, 1909.

The court amends its findings to add:

In 1991 and 1992, the only decreed Alder Creek water right owned by Shane Rosenkrance was a 1909 right for .24 cfs. However, Shane also had a beneficial use or constitutional water right with Alder Creek as the source. During these years, Shane's father Doug Rosenkrance was the watermaster for Water District 34.

D. IRRIGATION IN 1986 AND 1987

McCray requests that the court delete the finding that the property was not irrigated in 1986 and 1987. There was conflicting evidence regarding irrigation in 1986 and 1987. The court weighed the evidence and declines to alter or amend its findings.

E. IRRIGATION IN 1989 AND 1990

McCray requests that the court amend its finding regarding irrigation in 1989 and 1990. There was conflicting evidence regarding whether there was irrigation in 1989 and 1990. The court weighed the evidence and declines to amend its findings.

F. OBSERVATIONS OF GERALD STORER

McCray requests that the court amend its findings and conclusions to add additional observations regarding the ability of "Dale (sic) Storer" to observe the point of diversion on the property. The court weighed the evidence and declines to amend its findings.

G. DATE OF IDWR INVESTIGATION

McCray requests that the court amend its findings and determine that IDWR's field investigation of these water rights could have occurred in either 1990 or 1991. Although there was conflicting evidence as to whether the investigation occurred in 1990 or 1991, the court weighed the evidence and determined the investigation occurred in 1990. The court declines to amend its findings.

H. IDWR RELIANCE ON STATEMENT REGARDING NONUSE

McCray requests that the court add a finding that IDWR relied on an erroneous statement that the water from Alder Creek had not been used on the property since 1982. Although IDWR may have obtained this information, the court declines to include McCray's proposed findings since any reliance on this statement did not influence IDWR's investigation or change its recommendation of forfeiture.

I. SHANE ROSENKRANCE'S LEASE

McCray requests that the court substitute findings regarding Shane Rosenkrance's lease of the property in 1991 and 1992 for two paragraphs advocated by McCray:

In 1991 and 1992, Shane Rosenkrance leased the property from Farm Home Administration pursuant to a written lease which required Shane Rosenkrance to maintain the fences and sprinkler equipment on the leased premises. The term of the lease in 1991 was from June 20, 1991 to October 1, 1991, and the term of the lease in 1992 was from June 3, 1992 to December 31, 1992.

And to further add:

In 1991 and 1992, Shane Rosenkrance was entitled to receive only .24 cfs of water (12 inches) from Alder Creek for use on his own property through the Darlington Ditch, which water was to be delivered by his father, the watermaster pursuant to Section 42-607, Idaho Code, and Shane Rosenkrance Water Right No. 34-00682B. However, Shane Rosenkrance and Doug Rosenkrance took the liberty of transferring water appurtenant to the property being leased and caused that water to be delivered to Shane through the Darlington Ditch for use on property owned by Shane Rosenkrance, for the irrigation of potatoes being grown on said property by Shane. As there was a severe drought affecting the flows of Alder Creek in 1991 and 1992, Doug Rosenkrance had a duty to close all headgates of ditches or other diversions for any other water rights that were later claimed by Shane Rosenkrance under the provisions of Section 42-607, Idaho Code.

The court found that Shane Rosenkrance leased the property in 1991 and 1992. However, there was conflicting evidence as to whether Shane Rosenkrance used the McCray water rights on his own land or whether he used his own Alder Creek rights on his land. The court weighed the evidence and found Shane Rosenkrance used his own rights on his property. The court declines to amend its findings.

J. ABANDONMENT

McCray requests that the court amend its findings regarding abandonment and replace it with a finding that there was insufficient evidence to find that any of McCray's Alder Creek water rights were abandoned. The court weighed the evidence regarding abandonment and declines to amend its findings.

K. IRRIGATION IN 1990

McCray requests that the court amend its findings regarding irrigation in 1990. There was conflicting evidence regarding whether these water rights were used in 1990. The court weighed the evidence and made a finding as to irrigation in 1990. The court declines to amend its findings.

L. ALLEGED RESUMPTION OF USE IN 1991 AND 1992

McCray requests that the court amend its findings regarding whether Shane Rosenkrance used these water rights in 1991 and 1992 on his own land. There was conflicting evidence regarding which water rights Shane Rosenkrance used on his property in 1991 and 1992. The court weighed the evidence and found that Rosenkrance used his own water rights, both the decreed right and the constitutional right, in 1991 and 1992. The court declines to amend its findings.

M. CHANGE IN POINT OF DIVERSION BY DALE SMITH IN 1990

McCray requests that the court amend its findings regarding changing the point of diversion by Dale Smith in 1990. McCray explained that its argument regarding changed points of diversion was not referring to the change from groundwater to surface water, but a change in where the surface water was diverted. The court deletes the first full paragraph on page 7 as it appears to address an argument McCray did not intend to advance.

N. PROPERTY WAS IN A CONDITION PERMITTING IRRIGATION OF THE ENTIRE ACREAGE

McCray requests that the court add a finding that "All of the property can be irrigated with Alder Creek water in the event Alder Creek water has sufficient flows in any given year." There was conflicting testimony on the condition of the property and as to whether the condition of the ditches permitted irrigation of the entire acreage. The court weighed the evidence and declines to add this finding.

O. MORE ON RESUMPTION OF USE IN 1991 AND 1992

McCray requests that the court amend its findings regarding Shane Rosenkrance's use of Alder Creek water on his land in 1991 and 1992. McCray urges a finding that:

Shane Rosenkrance did use Alder Creek water in 1991 and 1992 and the only water rights which would have entitled him to use the quantities of Alder Creek water that he used was the decreed rights appurtenant to the property being leased by Shane Rosenkrance from Farm Home Administration.

The court weighed the evidence regarding Shane Rosenkrance's irrigation in 1990 and 1991 and declines to amend its findings.

P. NATURAL PRECIPITATION

McCray requests that the court alter its findings to delete reference to the property being irrigated in 1995 by natural precipitation. McCray concedes that no one diverted water for the property in 1995, but points out that the property was watered by flood waters. The court amends this finding, because the testimony referred to "flood waters" in 1995.

Q. ELEMENTS

McCray requests that the court amend its findings to change the elements of these water rights. The court has weighed the evidence and applied the law and declines to amend the elements of these rights.

IV. SUMMARY

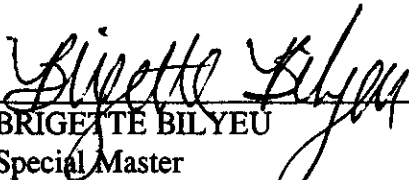
In conclusion, the court **grants** McCray's *Motion to Alter or Amend* on the following points:

- 1) To indicate that Doug Rosenkrance was the watermaster in Water District 34.
- 2) To indicate that Shane Rosenkrance had one decreed water right on Alder Creek and one beneficial use right on Alder Creek.
- 3) To delete references in the *Amended Special Master's Report and Recommendation* regarding an argument on change in point of diversion which McCray did not intend to advance.
- 4) To delete references to natural precipitation watering the property in 1995.

All other aspects of McCray's *Motion to Alter or Amend* are **denied**.

The court **denies** Rosenkrance's *Motion to Alter or Amend* regarding irrigation in 1990, the extent of irrigation in 1990, and the finding on forfeiture.

DATED June 10, 1998.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

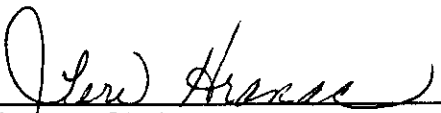
CERTIFICATE OF MAILING

I certify that a true and correct copy of ORDER DENYING ROSENKRANCE'S MOTION TO ALTER OR AMEND; GRANTING McCRAY'S MOTION TO ALTER OR AMEND IN PART; DENYING McCRAY'S MOTION TO ALTER OR AMEND IN PART was mailed on June 10, 1998, with sufficient first-class postage prepaid to the following:

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