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Department of Water Resources

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**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	)	Subcase Nos. 61-02248B and 61-07189
	)	
	)	RESPONSIVE BRIEF REGARDING CHALLENGE TO
Case No. 39576	)	SPECIAL MASTER'S RECOMMENDATION
_____	)	

DESCRIPTIVE SUMMARY

This is the responsive brief of Magic West, Inc. (Magic West), in opposition to the Notice of Challenge and Opening Brief Re: Challenge to Special Master's Recommendation filed by Mary Batruel, Paul Batruel and Batruel Dairy (the Batruels) in the two above-captioned subcases.

BACKGROUND

The Batruels did not set forth any procedural or factual background in their opening brief. A short summary is therefore provided here. A substantial portion of this background was provided in response to the Batruels' motion to alter or amend and also appears in Section II of the Order Denying Motion to Alter or Amend (August 30, 2000).

Magic West filed claim nos. 61-02248B and 61-07189 in the SRBA. These two water rights are combined for use in Magic West's potato processing plant in Glenns Ferry. Water right no. 61-02248B is a small right for .08 cubic feet per second (cfs) and 8 acre-feet per year (AFY), which has a 1939 priority date. Historically, the primary water right at the Glenns Ferry plant has been 61-07189, a licensed right with a 1974 priority. The right was permitted for .67 cfs, with no express diversion volume limit, for use 10.5 months of the year. Proof of beneficial use for .67 cfs was submitted to IDWR in 1979. Eight years later, in 1987, a licensing field exam was conducted. The right was licensed in 1990, with a diversion rate of .67 cfs and an annual diversion volume of 12.9 AF.

During 1996, Magic West discovered that the annual diversion volume in license no. 61-07189 was not accurate. Records kept since a measuring device was installed in 1996 indicate that more than 300 AFY was being diverted. As a result, Magic West did two things to address the problem: (1) filed a petition with IDWR seeking to amend license no. 61-07189 from 12.9 AFY to recognize the actual beneficial use, which Magic West claimed was about 300 AF; and (2) filed Application for Permit No. 61-07724, seeking permission to pump any additional water that was not ultimately allowed under 61-07189.

After an administrative hearing, the Director issued an amended license in 1999, increasing the volume under 61-07189 from 12.9 AFY to 58 AFY, and also issued a cease and desist order, requiring Magic West to limit its pumping under the two water rights to 66 AFY. Magic West rented 300 AF of water from the State Water Supply Bank during 1999 to make up the difference and avoid any violation of IDWR's order.

The SRBA recommendation for 61-07189 reflected the increase from 12.9 AF to 58 AF and the recommendation for 61-02248B was for 8 AFY, for a total of 66 AFY. Both rights were recommended for use 10.5 months of the year, despite the fact that the plant had been operated year round since at least 1986. Because Magic West believed that the annual volume for the two rights was still much lower than the historic actual use in the plant since 1974, and a decision had not yet been issued regarding Application for Permit No. 61-07724, Magic West filed an objection to the SRBA recommendation for 61-07189, claiming that the annual diversion volume should be 423 AF (year round use at .67 cfs), rather than 58 AF. Magic West also objected to the period of use for both 61-07189 and 61-02248B, claiming that it should be year round instead of 10.5 months of the year, based on the year round use that has existed since at least 1986. The objections were filed on June 15, 1999. The State of Idaho filed responses to both objections, dated July 13, 1999. The Batruels did not file an objection or response, or move to participate in either subcase. An initial hearing was set for February 17, 2000. Notice Setting Subcase(s) for Initial Hearing, Subcase Nos. 61-02248B and 61-07189 (Dec. 14, 1999).

Several local residents filed protests with IDWR in response to Magic West's Application for Permit No. 61-07724 when it was filed during 1996. The Batruels were not among the protestants and did not move to intervene in the matter during the 3 years that it was pending before IDWR. After IDWR's decision regarding the amendment of license no. 61-07189, Magic West was able to reach settlement with the protestants in the spring of 1999 and IDWR subsequently issued Permit No. 61-07724 in August, 1999, for year round use in the amount of 338 AF. One of the conditions of approval provides that the limit on the maximum rate of

diversion and annual pumped volume under Permit No. 61-07724 when combined with License No. 61-07189 and any other water right authorized to use the same point of diversion (i.e., 61-02248B) shall not exceed .67 cfs nor 338 AFY.

Following issuance of the new permit, Magic West was able to enter into Standard Form 5's with the State of Idaho and IDWR for both 61-02248B and 61-07189, which were timely filed before the scheduled Initial Hearing set for February 17, 2000. Order Vacating Initial Hearing, Subcase Nos. 61-02248B and 61-07189 (Feb. 3, 2000). With regard to 61-02248B, the parties and IDWR agreed to a year round season of use, based upon such use occurring prior to the commencement of the SRBA. With regard to 61-07189, the parties and IDWR agreed to the same provision regarding season of use and Magic West agreed to drop its objection to quantity, which had sought 423 AFY, rather than the 58 AFY that was recommended by IDWR and ultimately agreed to. The SF-5s for both rights included a remark limiting the combined use under all three water rights, including the newly issued permit, to .67 cfs and 338 AFY, consistent with the condition that was placed on Permit No. 61-07724 by IDWR in August, 1999.

The Special Master issued his Special Master's Report and Findings of Fact and Conclusions of Law in the two subcases on February 3, 2000, recommending the rights consistent with the SF-5s submitted by the parties and concurred in by IDWR. The Batruels filed their motion to alter or amend, dated March 27, 2000. A hearing on the motion to alter or amend was set for May 11, 2000. Notice Setting Hearing, Subcase Nos. 61-02248B and 61-07189 (March 28, 2000). The Batruels subsequently lodged a brief, dated April 10, 2000, in support of their motion to alter or amend, and Magic West filed a brief in opposition to the motion to alter or

amend on May 25, 2000. Oral argument was held on May 11, 2000. At the hearing, the Special Master requested written comments about the possibility of including statutory language in the recommended decrees. Written comments and responses on this matter were provided by the parties on May 18 and 25, 2000.

The Special Master issued his Order Denying Motion to Alter or Amend and Correcting Clerical Mistake Contained in the Special Master's Recommendation (Order Denying Motion to Alter or Amend) (August 30, 2000). The Batruels filed their Notice of Challenge on September 11, 2000 and the Court thereafter entered its Challenge Scheduling Order (September 22, 2000). The Batruels filed their Opening Brief Re: Challenge to Special Master's Recommendation (Opening Brief), dated November 8, 2000.

STANDARD OF REVIEW

"The Court shall accept the Special Master's findings of fact unless clearly erroneous." SRBA Administrative Order 1, Rules of Procedure (AO1), Sec. 13.f. (Amended 10/16/97). In addition, the Court may accept the Special Master's conclusions of law.

The Court has set forth the standard for considering challenges to decisions on motions to alter or amend. See, Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue, Subcase Nos. 36-02708 et al. (December 29, 1999). In such proceedings, parties are not allowed to advance new legal theories or relitigate the merits of a case. Id. at 20 (citing In Re SRBA Subcases 36-00061, 36-00062, and 36-00063, Memorandum Decision and Order on Challenge (September 27, 1999)). A brand new party to the subcase is

not allowed to step forward for the first time through a motion to alter or amend (or subsequent challenge) and have a new trial. *Id.* at 21.

ARGUMENT

The Batruels' challenge alleges that the Special Master's recommendations -- which were based on Standard Form 5's signed by Magic West, the State of Idaho and IDWR -- suffer from two defects: (1) an increase of the diversion volume for water right nos. 61-02248B and 61-07189; and (2) an expansion of the season of use for 61-07189. Magic West respectfully disagrees with these allegations, as discussed below.

I. The Standard Form 5's and the Special Master's Recommendations Did Not Increase the Diversion Volume For 61-02248B and 61-07189.

The Batruels argue that it was improper for the Special Master to include a combined use remark in his recommendations. This combined use remark limits the use of all three of Magic West's water rights to a total combined diversion rate of .67 cfs and a combined annual volume of 338 AF. The Batruels claim that the remark unlawfully increases the diversion volume for Magic West's water rights. Magic West disagrees.

The quantity element in the Special Master's recommendation for 61-02248B is plainly limited to .08 cfs and 8.0 AFY. This is the same amount that was recommended by IDWR in the Director's Report. The quantity element for 61-07189 is plainly limited to .67 cfs and 58.0 AFY. Again, this is the same amount that was recommended by IDWR.

The combined use remark clarifies that these two rights, when combined with Permit No. 61-07724, are limited to a combined diversion rate of .67 cfs and a combined diversion volume of 338 AFY. A similar limiting remark is included in Permit No. 61-07724.

The partial decrees are allowed to include "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. Sec. 42-1411(2)(j).

Without this combined use remark, confusion is likely to occur in the future regarding administration of these water rights. Water rights 61-02248B and 61-07189 are being decreed for a total of 66 AFY. Permit No. 61-07724, which is the primary right for the Glens Ferry plant now, was issued by IDWR for 338 AFY. Therefore, the partial decrees and the permit will total 404 AFY. Without a remark under the quantity element of these two water rights to clarify that the three rights are limited to a total of 338 AFY, rather than 404 AFY, confusion is more likely to occur in future administration. Presumably, this is why the State of Idaho and IDWR agreed to include the combined use remark in the SF-5s for both water rights. It certainly makes sense. It does not, as Batruels suggest, increase any diversion rate.

The Special Master recognized that the remark does not increase the quantity decreed for 61-02248B or 61-07189. In addition, the Special Master correctly concluded that "the remark is both necessary and clarifying" and is therefore authorized under I.C. Sec. 42-1411(2)(j). Order Denying Motion to Alter or Amend, p. 3.

Batruels argument that Permit No. 61-07724 is being de facto adjudicated by the SRBA Court is unconvincing. Permit No. 61-07724 is not being adjudicated. Indeed, it has not been claimed. Contrary to Batruels' assertions, it is not at all clear to Magic West that it would be allowed to file a claim for Permit No. 61-07724 in the SRBA under the provisions of I.C. Sec. 42-1421. That statute does not discuss permits that are granted after the filing of a director's

report, which is the case here. In any event, such a filing would require permission to file a late claim and Magic West cannot be compelled to file such a motion or a claim for Permit No. 61-07724. That much is clear from the SRBA statutes. Nonetheless, IDWR retains jurisdiction of all permits, including 61-07724, to take action authorized by the conditions contained in any permit. I.C. Sec. 42-1421(4). The combined use remark being included in the partial decrees for Magic West's two claimed water rights from the same point of diversion as Permit No. 61-07724 makes it clear that the three rights are limited to a total of 338 AFY, rather than the 404 AFY that the three rights otherwise add up to. As indicated above, this is necessary for IDWR administration, pursuant to I.C. Sec. 42-1411(2)(j). It also assists IDWR in carrying out the conditions of Permit No. 61-07724 (i.e., the 338 AFY combined use condition), as authorized under I.C. Sec. 42-1421(4).

With regard to Permit No. 61-07724 itself, which authorizes Magic West to divert up to 338 AFY year round to keep its Glenns Ferry potato processing plant in operation, it is worth noting that the permit was issued pursuant to Chapter 2, Title 42, Idaho Code and is a final action of the Idaho Department of Water Resources. The Batruels did not file a protest to the application in 1996 or seek to intervene at any time prior to the Department's final decision in August, 1999, as allowed by I.C. Sec. 42-203A and IDWR's Rules of Procedure. In addition, they did not pursue judicial review of IDWR's decision under the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code. As a result, Batruels' claim that they will be denied due process and that their water right claim will be injured through an increase in Magic West's authorized water rights if the combined use remark is included in the partial decrees for the other two water rights

rings hollow. It is Permit No. 61-07724 -- not the combined use remarks for 61-02248B and 61-07189 -- that authorizes the use of up to 338 AFY by Magic West. This cannot be changed through the Batruels' challenge. The combined use remark does nothing more than clarify the amount of water that may be used under the three water rights, consistent with IDWR's existing conditions on 61-07724.

The Batruels had substantial opportunity to contest Magic West's permit application in the administrative arena and failed to do so. The Department's decision on the permit is final and cannot be revisited in the SRBA. See, Response to United States' Motion for Status Conference and Order on Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments and Orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022 by Judge R. Barry Wood, and Motion to Disqualify Judge Wood, Consolidated Subcase No. 03-10022 (Nez Perce Tribe Off-Reservation Instream Flow Claims), p. 18 n.11 (March 23, 2000) (discussing inability of SRBA Court to review final administrative agency action of IDWR). More importantly, Permit 61-07724 is not before the court and Magic West is not required -- or perhaps even able -- to file a claim for the water right, since it was not applied for until 1996 (after the commencement of the SRBA) and was not issued until August, 1999 (after the issuance of the Director's Report for Basin 61). I.C. Sec. 42-1421.

The Special Master recognized the opportunity that the Batruels had to participate in the administrative process and properly concluded that the SRBA Court does not have jurisdiction over the permit. Order Denying Motion to Alter or Amend, p. 4.

For all of these reasons, Batruels' challenge to the combined use remark clarifying the combined quantity for Magic West's water rights should be denied.

II. The Special Master's Season of Use Recommendation was not in Error.

The Batruels' claim that the SF-5 for 61-07189 unlawfully expands the season of use for water right no. 61-07189. The SF-5 and Special Master's Report recognize a period of use of 12 months, rather than the 10.5 months included in the Director's Report. Interestingly, the Batruels do not complain about the same change in season of use which was made to 61-02248B. Of course, Permit No. 61-07724, the third of the three water rights used in the potato processing plant, is also authorized for year round use.

Magic West filed objections to the recommendations for 61-07189 and 61-07724, claiming that the period of use should be 12 months instead of 10.5 months. The Batruels did not file a response or seek to participate in the subcases. At the time that the Special Master issued his recommendations, there was nothing in the record about the permitting and licensing history of 61-07189. The Batruels cannot attempt to bring in such evidence after the parties have settled the matter. They should not be allowed to relitigate the case now that Magic West has been able to settle with the State of Idaho and IDWR regarding the season of use. This would be inconsistent with the Court's previous rulings, cited above.

Even if the facts were in the record, the Batruels' point about 61-07189 being a permit at the time that the SRBA commenced is interesting trivia, but little more. I.C. Sec. 42-1425, the accomplished transfer statute, discusses "any person entitled to the use of water", not just licensed and decreed water rights. While a permit may not be a fully vested water right, and therefore may

be further conditioned before it is licensed, it does authorize the use of water. I.C. Sec. 42-204. More importantly, when the water is put to beneficial use, the permit ripens into a legal and complete appropriation. See, Speer v. Stephenson, 16 Idaho 707 (1909); Marshall v. Niagra Springs Orchard Co., 22 Idaho 144 (1912); Washington State Sugar Co. v. Goodrich, 27 Idaho 26 (1915); Basinger v. Taylor, 30 Idaho 289 (1917) (discussing the effect of a permit upon completion of the works and application of water to beneficial use). Certainly, a person holding a perfected permit is "entitled to the use of water".

Permit No. 61-07189 authorized Magic West to use water beginning in 1974. Proof of beneficial use was submitted in 1979, well before the commencement of the SRBA. Among its ministerial duties, IDWR conducted a beneficial use exam in 1987 and a license was finally issued in 1990. Magic West switched from a 10.5 month operation to a year round operation no later than 1986. Whether the water right was in the permit or license stage, it was changed prior to the commencement of the SRBA in 1987 and the water right had been put to beneficial use. Therefore, the change should be recognized.

To say that this one water right cannot be used year round, while the other two can, simply because it was a 13-year old permit rather than a license at the time that the SRBA commenced, would make little sense. The right was used year round before the commencement of the SRBA and the change in period of use is properly recognized by the court under I.C. Sec. 42-1425. To conclude otherwise would be to largely defeat the purpose, and plain meaning, of the statute. As a practical reality, because 61-07189 is a licensed right now (and has been since 1990), it would have to proceed under I.C. Sec. 42-222, and would not benefit from the provisions of 42-211, as

suggested by the Batruels. This cannot be the intent of I.C. Sec. 42-1425. It certainly is not the plain meaning.

Alternatively, IDWR has authority to amend permits and licenses. To the extent that the change in period of use under 61-07189 must be recognized as an amendment to the permit or license, IDWR was certainly authorized to do so in entering into the SF-5, providing an alternative ground to recognize year round use under 61-07189.

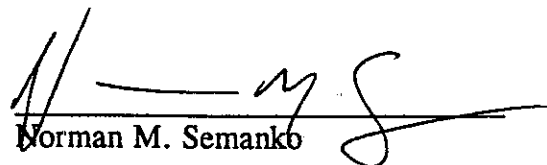
The Special Master noted that Magic West properly raised the issue of period of use by objecting to the Director's Report and that "Batruels were on notice that this issue would be decided as part of the trial or settlement of these subcases." In addition, the Special Master properly concluded that the Batruels "may not use a Motion to Alter or Amend as a method of relitigating matters within subcases [in] which they chose not [to] participate. Facility Volume, Id. at 21." Order Denying Motion to Alter or Amend, p. 4.

As a result, the Batruels' challenge to the Special Master's conclusions regarding the period of use for 61-07189 should be denied.

CONCLUSION

For the reasons set forth above, the Batruels' challenge to the Special Master's recommendation for water right nos. 61-02248B and 61-07189 should be denied.

DATED this 8th day of December, 2000.


Norman M. Semanko

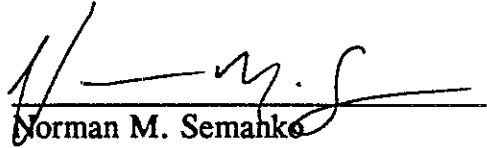
CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2000, I served a copy of the foregoing RESPONSIVE BRIEF REGARDING CHALLENGE TO SPECIAL MASTER'S RECOMMENDATION by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

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