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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)
)
Case No. 39576)
_____)

Subcase Nos. 61-02248B and 61-07189

STATE OF IDAHO'S RESPONSE
BRIEF ON CHALLENGE

COMES NOW the State of Idaho by Counsel and pursuant to the Court's *Challenge Scheduling Order*, Subcase Nos. 61-02248B and 61-07189 (September 22, 2000) and responds to Mary Batruel, Paul Batruel and Batruel Dairy's ("Batruel") *Opening Brief Re: Challenge to Special Master's Recommendation ("Brief")*, Subcase Nos. 61-02248B and 61-07189 (November 8, 2000).

BRIEF FACTUAL AND PROCEDURAL HISTORY

Pursuant to the applicable statutes, claimant Magic West, Inc. ("Magic West") filed claim nos. 61-02248B and 61-07189 in the SRBA. These water rights are combined for use at the same place of use, Magic West's potato processing plant in Glenns Ferry, Idaho. *Order Denying Motion to Alter or Amend and Correcting Clerical Mistake Contained in the Special Master's Recommendation*, Subcase Nos. 61-02248B and 61-07189 (August 30, 2000) ("*Order Denying Motion to Alter or Amend*") at 1. Water right no. 61-02248B is a relatively small water right with a maximum flow of .08 cubic feet per second ("cfs") and a maximum volume of 8 acre feet per year ("AFY"). Id. The water right has a priority date of 1939. The primary water right at the Glenns Ferry plant is no. 61-07189, a licensed right with a 1974 priority. The permit for water right no. 61-07189 allowed 0.67 cfs with no express diversions volume limit. Proof of beneficial use for .67 cfs was submitted to IDWR in 1979. In 1987, a licensing field exam was conducted. Water right no. 61-07189 was licensed in 1990, with a diversion rate of .67 cfs and a diversion volume of 12.9 AFY. Id.

In 1996, Magic West asserted that the annual diversion volume in the license for water right no. 61-07189 was inaccurate. Id. Magic West then filed a petition with IDWR seeking to amend license no. 61-07189 from 12.9 AFY to approximately 300 AFY. *Order Denying Motion to Alter or Amend* at 1-2. Magic West also filed an application for permit no. 61-07724, seeking to pump additional water above and beyond whatever was ultimately allowed under water right no. 61-07189. Id. In 1999, after an administrative hearing, the Director of the IDWR issued an amended license for water right no. 61-07189, increasing the volume from 12.9 AFY to 58 AFY, and further issued a cease and desist order, requiring Magic West to limit its annual pumping

under water right nos. 61-07189 and 61-02248B. After this order was issued, Magic West rented from the State Water Supply Bank water it required in excess of these two licenses.

In due course, IDWR issued its Director's Reports for water right nos. 61-07189 and 61-02248B. The Director's Report for water right no. 61-07189 acknowledged the increase from 12.9 AFY to 58 AFY. The Director's Report for water right no. 61-02248B was for 8 AFY. Both rights were recommended with a season of use lasting approximately 10.5 months. The Recommended remarks noted that these two rights are diverted through the same point of diversion, but no combined volume limitation was placed on the rights.

Magic West then filed *Objections* (June 15, 1999) to both recommendations. Magic West objected to the quantity (claiming a volume of 423 AFY, not the 58 AFY recommended) and the period of use (claiming year round use, not the 10.5 months recommended) in water right no. 61-07189. In water right no. 61-02248B, Magic West objected to the period of use (claiming year round use, not the 10.5 months recommended). The State of Idaho then filed a timely *Response* (July 14, 1999) to each objection. Batruel did not file any objection to the Director's Reports, nor did Batruel file a *Response* or attempt to intervene in the pending subcases. *Order Denying Motion to Alter or Amend* at 2.

During this time period, Magic West's application for permit no. 61-07724 was proceeding through the administrative process. Several persons filed Protests to the Application when it was filed in 1996. Again, Batruel did not file a Protest to the application for permit, nor did they move to intervene during the three years the matter was pending before IDWR. Id. After IDWR amended the volume limitation on water right no. 61-07189, a settlement was reached with the protestants to the application for permit no. 61-07724. IDWR then issued permit no. 61-07189 for year round use with a volume limitation of 338 AFY. Id. One of the

conditions of the approval of that permit provides that the limit on the maximum rate of diversion and annual volume under permit no. 61-07724, when combined with water right no. 61-07189 and any other water right authorized to use the same point of diversion (water right no. 61-02248B) shall not exceed 0.67 cfs or 338 AFY. Id.

After the permit was issued, Magic West, the State of Idaho and IDWR entered into negotiations regarding water right nos. 61-02248B and 61-07189. The parties to the Subcase and IDWR executed a settlement agreement in the form of Standard Forms 5 and filed the agreements with the Court on or about February 3, 2000. In both water right nos. 61-02248B and 61-07189, the parties and IDWR agreed to a year round season of use, based upon such use occurring prior to the commencement of the SRBA. See, I.C. § 42-1425. Further, in water right no. 61-07189, Magic West agreed to drop its objection to the quantity element and retain the 58 AFY volume limitation. As part of the negotiations, Magic West agreed to accept a remark in both water right no. 61-07189 and water right no. 61-02248B stating: "Use of this right with Rights 61-07189 and 61-07224 is limited to a total combined diversion rate of 0.67 cfs and to a total combined annual diversion volume of 338 af."

The Special Master then issued the *Special Master's Report, Findings of Fact and Conclusions of Law* (February 3, 2000) for water right nos. 61-02248B and 61-07189. The Special Master adopted in full the Standard Forms 5 submitted by the parties and IDWR, including all conditions placed on the rights.¹

¹ As part of the *Motion to Alter or Amend*, Batruel pointed out what appeared to be a typographical error in the original *Special Master's Recommendation*. The quantity remarks for both 61-02248B and 61-07189 referred to 61-07224. The remark should have referred to 61-07724. *Motion to Alter or Amend Special Master's Recommendations* at 2 n 1. All parties and IDWR agreed that this was in fact a simple typographical error and the Special Master corrected the error in the *Order Denying Motion to Alter or Amend and Correcting Clerical Mistake*.

Pursuant to A.O. 1 § 13(a), Batruel filed a *Motion to Alter or Amend Special Master's Recommendations*, Subcase Nos. 61-02248B and 61-07189 (March 27, 2000). Hearing on the *Motion to Alter or Amend* was held May 11, 2000. During the hearing, the Special Master proposed some language that he would consider placing in the recommended partial decree to resolve the dispute. The Special Master then gave all parties an opportunity to file written briefs on the issue. Batruel, Magic West, and the State all filed written briefs. See, Proposed Changes to Remarks in Recommended Partial Decrees, Subcase Nos. 61-07189 and 61-02248B (May 18, 2000); *Comments re: Motion to Alter or Amend*, Subcase Nos. 61-07189 and 61-02248B (May 18, 2000); and *State of Idaho's Response to Proposed Changes to Remarks*, Subcase Nos. 61-07189 and 61-02248B (May 24, 2000); *Objection to Language Proposed by Magic West*, Subcase Nos. 61-07189 and 61-02248B (May 25, 2000); *Response in Opposition to Comments re: Motion to Alter or Amend*, Subcase Nos. 61-07189 and 61-02248B (May 25, 2000).

After due consideration, the Special Master issued his *Order Denying Motion to Alter or Amend*. The Special Master denied Batruel's *Motion to Alter or Amend* in full.² *Order Denying Motion to Alter or Amend* at 4. Batruel then timely filed a *Notice of Challenge*, Subcase Nos. 61-02248B and 61-07189 (September 11, 2000) and an *Opening Brief re: Challenge to Special Master's Recommendation*, Subcase Nos. 61-02248B and 61-07189 (November 8, 2000) ("*Batruel's Brief*").

² Except correcting the typographical error as noted in footnote 1, above.

STANDARD OF REVIEW

The District Court has the duty to independently review a special master's report; the findings of fact and conclusion 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). Pursuant to I.R.C.P. 53(e)(2) and A.O. 1 § 13(c), written objections and/or challenges may be served upon all other parties within fourteen days of the notice of filing of a special master's report.

The District Court is required to adopt a special master's finding 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); Higley v. Woodard, 124 Idaho 531, 545, 861 P.2d 101, 104 (Ct. App. 1993). Idaho law does not define the term "clearly erroneous". However, the United States Supreme Court states 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 (1948).

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. A reviewing district court, through its inherent powers and sitting as the final arbiter of all the issues, can only reject stipulated facts that were inherently improbable or that would result in a fraud being perpetrated upon the court or upon others. *Memorandum Decision and Order on Challenge (Gissler)*, Subcase No. 36-00077D (June 30, 2000) at 12-13 n.9. IDWR's concurrence with the stipulated elements in a Standard Form 5

derives evidentiary value as a result of IDWR's statutorily created status as the Court's expert. Id. at 16, citing I.C. § 42-1401B(1).

A special master's finding which a district court adopts in a non-jury action are considered to be the findings of the district court. I.R.C.P. 52(a); Seccombe, 115 Idaho at 4356, 767 P.2d at 278; Higley, 124 Idaho at 534, 861 P.2d at 104. Therefore, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial, although perhaps conflicting, evidence.

Conclusions of law, however, are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. Oakley Valley Stone, Inc., 120 Idaho at 378, 816 P.2d at 334; Higley, 124 Idaho at 534, 861 P.2d at 104. Therefore, a district court's standard of review of a trial court's or special master's conclusions of law is one of free review.

ARGUMENT AND AUTHORITY

I. The Special Master Properly Recommended the Remarks Regarding the Combined Use Annual Volume of Diversion for these Water Rights.

Batrue is apparently under the mistaken impression that the remark "Use of this right with Rights 61-07189 and 61-07224 is limited to a total combined diversion rate of 0.67 cfs and to a total combined annual diversion volume of 338 af" somehow increases the diversion volume for water right nos. 61-02248B and 61-07189. The contrary is actually true.

As recommended, no more than 8 AFY can be diverted under water right no. 61-02248B. When 8 acre feet have been diverted within a calendar year no additional water may be diverted under this water right. Similarly, no more than 58 AFY can be diverted under water right no.

61-07724. When these limits are reached, Magic West cannot pump any additional water under these rights. Just looking at these two rights, and without any limiting remark, Magic West could divert up to 66 AFY. Permit no. 61-07724 limits its use to 338 AFY. Therefore, when the permit is added in, it would be permissible for Magic West to divert up to 404 AFY, if there is no limiting language.

What the limiting remarks do, however, is reduce the volume of water Magic West may divert under the three water rights to 338 AFY, a reduction of 66 AFY between the three rights. Nor do the remarks somehow increase the volume that Magic West may divert under one or more of the individual water rights. The total combined volume that may be diverted under water right nos. 61-02248B and 61-07189 remains 66 AFY. It is only by diverting water under permit no. 61-07724 that the 66 AFY can be exceeded, and then only by a total of 272 AFY, rather than the total an additional 338 AFY allowed under permit no. 61-07724.

Therefore, not only do the limiting remarks not increase the volume of water that may be diverted under either water right 61-02248B or 61-07189, the remarks reduce the total that may be diverted under all three of the rights. As the remarks do not increase any volume of water, but in fact decreases the volume, there can be no adverse affects on other existing water rights and Batruel's due process concerns are misplaced.

II. The Season of Use for a Permit May Be Enlarged in the SRBA by the Accomplished Transfer Statute, I.C. § 42-1425.

Batruel correctly notes that the Idaho legislature has, in certain circumstances, waived otherwise mandatory requirements of the Idaho Code by enacting "the accomplished transfer statute." I.C. § 42-1425. However, Batruel is incorrect in arguing that I.C. § 42-1425 is limited

to so called “established water rights, i.e., water rights based on a license, beneficial use, or decree.” *Batrue* Brief at 5-6.

The legislature clearly intended I.C. § 42-1425 to apply to permits, as well as licensed rights:

Any change of place of use, point of diversion, nature or purpose of use or **period of use** of a water right **by any person entitled to use of water** or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.

I.C. § 42-1425(2) (emphasis added).

Because Batrue chose not to become involved in these subcases prior to the submission of *Standard Forms 5* and the issuance of a *Special Master's Report*, he cannot now contest any factual findings. *Memorandum Decision and Order on Challenge (Gissler)*, Subcase No. 36-00077D (June 30, 2000) at 16-17; *Order on Challenge of Facility Volume Issue and Additional Evidence Issue*, Subcase Nos. 36-02708 *et al.* (December 29, 1999). Therefore, Batrue must accept that the increase in season of use was commenced prior to November 19, 1987, and that this change did not injure any water rights in existence at the time of the transfer. Batrue therefore has no other choice but to argue that somehow the clear language of the statute and intent of the Legislature does not apply to these two water rights.

Whether or not water right no. 61-07189 was a permit at the time of the commencement of the SRBA is immaterial to application of I.C. § 42-1425. By its own terms, I.C. § 42-1425 applies to “any person entitled to the use of water.” *Id.* It is not limited solely to licensed or decreed water rights. A permit may not yet be a fully vested water right, however it does

authorize the “use of water.” I.C. § 42-204. Further, when the water is put to beneficial use, the permit ripens into a legal and complete appropriation. See, Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909); Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 P. 208 (1912). Although IDWR may impose conditions or limitations on the permit before it becomes a license, it does, nevertheless, entitle a person to the use of water.

The legislative history of I.C. § 42-1425 confirms this interpretation: “[t]his proposed legislation will protect significant investments by water users and tax base for local governments by helping to **maintain status quo** water uses.” *Statement of Purpose/Fiscal Note*, H.B. 969 (emphasis added). The legislature was concerned with maintaining the status quo as it existed as of November 27, 2000. The legislature was not concerned with the fine distinctions between permits and licenses. The provisions of I.C. § 42-1425 should “be liberally construed, with a view to effect their objects and to promote justice.” I.C. 73-102(1). Therefore, the Court should uphold the Special Master and find that the intent of the legislature was to maintain the status quo for all those with a right to use water, whether by permit, license, decree or beneficial use.

Further, the use of the term “established rights” in the caption of I. C. § 42-1425 is also irrelevant. If by using a certain term in the caption of the statute, the legislature desired to limit the reach of I.C. § 42-1425 only to licensed, decreed or beneficial use water rights, the term the legislature would have used is “vested water rights.” A permit represents permission from the state to put water to beneficial use, but it does not become a “vested water right” until the permit ripens into a license. Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909); Marshall v. Niagara Springs Orchard Co., 22 Idaho 144, 125 P. 208 (1912); Basinger v. Taylor, 30 Idaho 289, 164 P. 522 (1917); Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915). This is the term that would result in the interpretation argued by Batruel, not “established rights.”

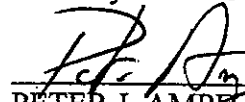
Finally, there has been no denial of opportunity to object or protest the quantity of water allowed under permit no. 61-07724. Batruel have sat on their rights throughout this entire process. Numerous other parties filed protests to the application for permit no. 61-07724. Batruel did not. There has been no allegation or showing of fact that the notice under application for permit no. 61-07724 failed to meet minimum due process requirements, because it did meet those minimum requirements. Batruel ignored the proceedings and did nothing until it was too late. Batruel is simply attempting to use the SRBA to make up for his lack of care and sleeping on his rights in the administrative proceedings for permit no. 61-07724. Such action, attacking a previous administrative decision in the SRBA, is not allowed. See, Memorandum Decision on Challenge and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's notice of Challenge, Subcase No. 36-08099 (January 11, 2000).

CONCLUSION

WHEREFORE, the State respectfully requests that the Court deny the *Challenge* and issue a partial decree as recommended by the Special Master.

DATED this 7th day of December 2000.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December 2000, I caused to be served a true and correct copy of the foregoing **STATE OF IDAHO'S RESPONSE BRIEF ON CHALLENGE** to the following addressees by the method indicated:

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