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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

Case No 39576

) Subcase Nos 61-02248B and 61-07189

)

) OPENING BRIEF RE: CHALLENGE

) TO SPECIAL MASTER'S

) RECOMMENDATION

)

)

)

DESCRIPTIVE SUMMARY

Mary Batruel, Paul Batruel, and Batruel Dairy, (the Batruels) by and through their undersigned counsel, submit this brief in support of their challenge to the Special Master's recommendations of 61-02248B and 61-07189.

The Special Master's recommendations are based on Standard Form 5's that improperly increase the diversion volume for both water rights and expand the season of use for 61-07189. The increased diversion volume and expanded season of use violate Chapter 14, Title 42, Idaho

Code and the method by which the expanded uses were reported in the Snake River Basin Adjudication (SRBA) constitute a denial of due process

DISCUSSION

I. THE INCREASED DIVERSION VOLUME FOR 61-02248B AND 61-07189 CANNOT BE BASED ON AN "UNCLAIMED" WATER RIGHT PERMIT.

Water right nos. 61-02248B and 61-07189 were recommended with a "combined" diversion volume of 338 acre feet per year (AFY). That combined diversion volume exceeds the individual volume limits of both water rights. For example, only 8 AFY can be diverted under 61-02248B and only 58 AFY is allowed under 61-07189. Combined they total only 66 AFY, which is less than the 338 AFY recommended in the remarks section under the quantity element for both water rights.

The additional diversion volume in excess of 66 AFY is the product of a third water right, no. 61-07724, that appears in the quantity remark:

Use of this right with rights nos. 61-02248B [or 61-07189] and 61-07724 is limited to a total combined annual diversion volume of 338 AF

(emphasis added) The problem, however, is that this third water right, no. 61-07724, referenced in the remark, does not exist in the SRBA. It is not a claim, recommendation, or decree in the adjudication. Quite the opposite. IDWR records show that 61-07724 is a newly-issued permit acquired by Magic West on August 27, 1999, that has not been claimed in the SRBA.

Because 61-07724 has not been claimed in the adjudication, parties in the SRBA have had no notice that it or any of its elements would be decreed in the SRBA. Permit no. 61-07724 allows withdrawal of a much greater volume (338 AFY) than the smaller volume (66 AFY) allowed under Magic West's other two water rights (61-02248B and 61-07189) diverted from the

same well. This greater volume under 61-07724 threatens to interfere with other water rights and thereby deprive other water users of their right to exercise their senior water rights.

Because this threatened deprivation affects real property rights in the Snake River Basin, the holders of water rights in the SRBA are entitled to constitutional due process protections, which afford them notice of, and a meaningful opportunity to object to, the volume of water permitted under 61-07724 before that volume is decreed in the SRBA. *See e.g., Lowder v Minidoka County Joint School Dist.*, 132 Idaho 834, 840, 979 P.2d 1192, 1198 (1999) (“A person must receive notice and an opportunity for a hearing before he is deprived of any significant property interest”).

The adjudication statutes, Chapter 14, Title 42, Idaho Code, set forth the due process procedures in the SRBA. At the heart of that process is notice of, and an opportunity to object to, water right recommendations—two fundamental steps that were ignored in these subcases. In this case, if Magic West desires to have the diversion volume allowed by 61-07724 decreed in the SRBA, it must follow the procedure set out in the adjudication statutes. That procedure begins with filing a notice of claim for the permit. Idaho Code § 42-1421 expressly allows a claimant to file a notice of claim for an “unperfected water right” (i.e. a permit) in the SRBA, and Idaho Code § 42-1409A allows the Court to grant the late filing of such a claim. Once claimed, IDWR conducts its investigation (I.C. § 42-1410), issues and provides notice of its recommendation (I.C. § 42-1411), and parties are given an opportunity to file objections (I.C. § 42-1412).

That entire statutory process was sidestepped in these subcases. Rather than file a notice of claim for its permit (61-07724), Magic West grabbed the diversion volume from that permit, pasted it onto Standard Form 5’s for its two smaller water rights (61-02248B and 61-07189), and

now seeks to have that diversion volume decreed by the Court, and thereby deprive parties, including the Batruels, of notice and a meaningful opportunity to contest the diversion volume for 61-07724 in the SRBA.

In addition to lack of notice, SRBA parties have had no opportunity to file objections to the quantity allowed by 61-07724. Assuming a claim is subsequently filed for 61-07724, and IDWR recommends the permit with a diversion volume of 338 AFY, parties in the SRBA will be given an opportunity to file objections to that recommendation. *See e.g.*, Idaho Code § 42-1412. In this case, there was no opportunity to file objections to the diversion volume for 61-07724. That diversion volume and water right came in the backdoor in the form quantity remarks under 61-02248B and 61-07189 in two Standard Form 5's that were never noticed on the docket sheet. There was never any time to file objections because the Special Master's recommendations for 61-02248B and 61-07189 provided the only notice that the diversion volume for 61-07724 was headed for decree in the SRBA.

Because permit no. 61-07724 has not been claimed in the SRBA and has not followed the due process regimen set forth in the adjudication statutes, it cannot serve as a basis for the increased diversion volume for 61-02248B and 61-07189. When permit no. 61-07724 is removed from the quantity remarks, neither 61-02248B nor 61-07189 can support a combined diversion volume of 338 AFY. Therefore, the combined diversion volume for 61-02248B and 61-07189 must be limited to 66 AFY.

Moreover, the Special Master erred in concluding that the remark, which included the additional quantity under 61-07724, was necessary and clarifying. More accurately, the remark creates confusion. For example, does reference to the 338 AFY mean that the Court has actually "decreed" that quantity and thus prevented IDWR from later reducing that amount through the

licensing process for permit no. 61-07724? The Special Master believes not. But the problem is there is nothing on the face of the proposed decrees for 61-02248B and 61-07189 which expressly state that the quantity element is subject to change during the licensing process for 61-07724.

For instance, suppose the decrees are issued as recommended by the Special Master, and IDWR subsequently determines through the licensing process to deny the licensure of permit no. 61-07724. At that point, it could be argued by Magic West that the SRBA decrees have already determined that 338 AFY can be put to beneficial use, and therefore, IDWR cannot prevent Magic West from diverting the entire 338 AFY. That is not a result contemplated by the Special Master, but without the clarifying language required by Idaho Code § 42-1421(3) that result may not be prevented.

Finally, the Special Master's belief that inclusion of the quantity element of 61-07724 was needed to prevent an aggregation of the water rights is not supported by the record. There was never any possibility that the quantities of the three water rights—61-02248B, 61-07189, and 61-07724—would be aggregated to allow a total diversion of 404 AFY. The permit for 61-07724 expressly stated that the maximum diversion volume for 61-07724 when combined with any other water right from the same point of diversion could not exceed 338 AFY. Therefore, there was absolutely no basis or need for further clarification.

II. THE SEASON OF USE FOR A "PERMIT" CANNOT BE ENLARGED BY THE ACCOMPLISHED TRANSFER STATUTE, I.C. § 42-1425.

Idaho Code § 42-1425 ("the accomplished transfer statute") waives the otherwise mandatory requirements of Idaho Code §§ 42-108 and 42-222 ("the transfer statutes") for changes to established water rights that occurred prior to commencement of the SRBA. Importantly, the transfer statutes apply only to changes made to established water rights, i.e.,

water rights based on a license, beneficial use, or decree. For instance, Idaho Code § 42-222 states:

42-222. Change in . . . period of use . . . of water under established rights . . .

Any person, entitled to the use of water whether represented by license . . . beneficial use . . . or by decree . . . who shall desire to change . . . the period of use . . . shall first make application to the department.

(emphasis added). Because the transfer statutes apply only to established water rights, the waiver under the accomplished transfer statute is similarly limited to changes made to established water rights on or before commencement of the SRBA.

Conversely, the accomplished transfer statute provides no waiver for changes made to unperfected water rights (i.e., water right permits) that occurred on or before commencement of the SRBA. The accomplished transfer statute, by its own terms, waives only the requirements of the transfer statutes. It does not waive the requirements to be followed when making changes to a water right permit. Those changes are governed exclusively by Idaho Code § 42-211, which states:

42-211. Amended application or permit . . .

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use . . . he shall file an application for amendment upon forms to be furnished by the department . . .

(emphasis added). Nowhere in the accomplished transfer statute is there a waiver of the requirements of Idaho Code § 42-211. Because there is no waiver of those provisions, Idaho Code § 42-211 provides the exclusive means for making changes to water right permits.

In this case, water right no. 61-07189 was only a permit at the time the SRBA commenced in November 1987. Therefore, Idaho Code § 42-211 provided the exclusive means for changing the period of use for that permit. In the original director's report, IDWR correctly

recommended an 08-15 to 07-01 period of use for 61-07189, which was the period of use permitted and later licensed for the water right. However, in a Standard Form 5 subsequently executed by the parties, the period of use was extended to a year 'round season. The explanatory language in the Standard Form 5 makes clear that the expanded season was based on the accomplished transfer statute:

Right includes accomplished change in season of use pursuant to Section 42-1425, Idaho Code.

(underline in original)

The Standard Form 5, on which the Special Master's recommendation is based, violates the provisions of Idaho Code § 42-211, which provided the exclusive method for changing the season of use for permit no. 61-07189 on or before November 19, 1987. The accomplished transfer statute, Idaho Code § 42-1425, has no application to changes to water right permits, and therefore, provided an inappropriate basis for recommending an expanded season of use.

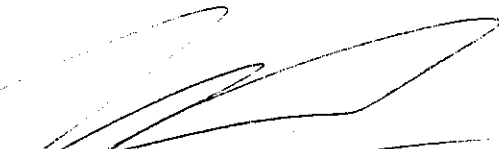
The Special Master concluded that this Court's facility volume decision¹ prevented the Batruels from challenging this issue on a motion to alter or amend. That conclusion is in error. The Batruels are not attempting to relitigate factual issues. The Batruels are simply stating that based on the facts in the record, the law was incorrectly applied. This is a pure legal issue, including application of law to facts, over which a reviewing court exercises free review. *Marshall v. Blair*, 130 Idaho 675, 679, 946 P 2d 975, 979 (1997); IDAHO APPELLATE HANDBOOK § 4 2 2

¹ *Order on Challenge of Facility Volume Issue and Additional Evidence Issue* (Subcase 36-02708 et al) (Dec. 29, 1999).

CONCLUSION

Because the expansions in diversion volume and season of use threaten the Batruels' senior ground water right, no. 61-11877, which is located near Magic West's ground water well for 61-02248B and 61-07189, the Batruels respectfully request that the Court remand the recommendations to the Special Master with instructions to grant the Motion to Alter or Amend.

DATED this 8 day of November, 2000


MATT J. HOWARD

CERTIFICATE OF SERVICE

The undersigned certifies that on the 8 day of November, 2000, a true and correct copy of the within MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND was sent to the following person(s) by the method indicated below:

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