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Department of Water Resources

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DIST. CT. DEPT. SRBA
TWIN FALLS, 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: 61-02248B and 61-07189
	)	
Case No. 39576	)	ORDER DENYING MOTION TO
	)	ALTER OR AMEND AND
	)	CORRECTING CLERICAL MISTAKE
	)	CONTAINED IN THE SPECIAL
	)	MASTER'S RECOMMENDATION

I. APPEARANCES

Norman M. Semanko, Esq., ROSHOLT, ROBERTSON & TUCKER, P.O. Box 1906, Twin Falls, ID 83303-1906, attorney for Magic West, Inc., the claimant/objector.

Matt J. Howard, Esq. 2402 W. Jefferson, Boise, Idaho 83702, attorney for Mary Batruel, Paul Batruel and Batruel Dairy, (Batruels), the movants.

Additionally, Candace McHugh, Esq. and Carter Fritschle, Sr. Agent, from the Idaho Department of Water Resources, were present, telephonically.

II. PROCEDURAL BACKGROUND

This matter came before the Special Master for hearing on a *Motion to Alter or Amend* filed by Batruels on March 27, 2000. Prior to this *Motion* Batruels had not participated in these subcases.

Magic West filed claims numbered 61-02248B and 61-07189 in the SRBA. These claims are combined for use by Magic West's potato processing plant in Glens Ferry. Claim 61-02248B is a small right for 8 cfs, 8 AFY which Magic West purchased in 1974. Claim 61-07189 was based upon a license with a 1974 priority. The license was issued in 1990 with a diversion rate of .67 cfs and an annual diversion volume of 12.9 AF. Believing that the annual flow was inaccurate, Magic West pursued an administrative remedy with IDWR to correct the AF with 61-07189 and filed for an additional permit, (61-07724) for what ever additional water they

deemed necessary beyond was ultimately allowed under the original license. Apparently consistent with the decision in the administrative appeal, the *Director's Report* recommendation in the SRBA for 61-07189 was for 58 AF plus 8 AF for 61-02248B. On June 15, 1999, Magic West filed an *Objection* in the SRBA claiming 423 AF in 61-07189 and 61-02248B and claiming a year-round period of use in both claims. The State of Idaho filed Responses to both Objections on July 13, 1999. The Batruels did not file an Objection, Response, or move to participate in either subcase. Further, Batruels did not file a protest to permit application number 61-07724. In August 1999, IDWR issued Permit number 61-07724 for year round use in the amount 338 AF. One of the conditions of that approval was that the limit on the maximum rate of diversion and annual pumped volume under Permit 61-07724 when combined with licenses 61-07189 and 61-02248B should not exceed .67 cfs nor 338 AFY. Following the issuance of Permit 61-07724, and consistent with it, Magic West, the State of Idaho and IDWR executed SF5s with this court prior to the Initial Hearing set for February 17, 2000. A *Special Master's Report*, was issued on February 3, 2000, recommending the rights consistent with the SF5s. Batruels then entered these subcases on March 27, 2000, by filing the instant *Motion to Alter or Amend*.

III. STANDARD OF REVIEW

The SRBA Court fully addressed the standards to be used by a Special Master on a *Motion to Alter or Amend* in its *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* [Facility Volume Decision], (Subcases 36-02708, *et al.*) (Dec. 29, 1999). That analysis and *Order* are the law of the case. "A brand new party to the subcase is not allowed to step forward for the first time through the motion to alter or amend and have a new trial." *Id.* at 21.

Rule 60(a) I.R.C.P. provides that a court [or special master] may correct a clerical error mistake to a judgment [or master's report] on a motion of a party or its own initiative at any time before an appeal is docketed in the appellate court.

IV. ISSUES PRESENTED

The *Motion to Alter or Amend* by NSGWD raises four issues (and a footnote identifying a clerical mistake) for the Special Master to consider.

1. The *Special Master's Recommendation* for 61-02248B includes a remark under the quantity element, which the movant believes is in error.

2. The *Special Master's Recommendation* includes a combined diversion volume based upon an "unclaimed" permit, i.e. 61-07724, thus depriving the movant of due process right to challenge that "unclaimed" permit amount.

3. That it was error for notice of the SF5 for these subcases not to be reported on the SRBA Docket Sheet, thereby not giving other parties to the SRBA an opportunity to object to the SF5

4. That the *Special Master's Recommendation* for 61-07189 erroneously recommends a year 'round period of use based upon on Idaho Code § 42-1425.

V. DECISION

In footnote number 1 of the instant motion, Batruels assert, and Magic West concurs [in its memorandum], that the Special Master's recommendations for 61-02248B and 61-07189 contain a typographical error concerning Magic West's pending permit number. In the recommendation it appears as 61-07224. The number is, in fact, 61-07724. Pursuant to Rule 60(a) I.R.C.P., the recommendations will be corrected to show the proper number.

The first three issues raised in the *Motion to Alter or Amend* deal with the remark contained in the SF5s and concerning the quantity element in the proposed decrees. Partial decrees may include "such remarks and other matters as are necessary for the 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)(j). Absent the comment, the law would permit Magic West to the use of the sum of AFY in these two rights plus the permitted 338 AFY in 61-07724. The intent of the comment is to treat these three rights concurrently as to AFY, i.e. to limit the total the total AFY to 338 AF, versus the aggregate of 404 AF. Given this anomalous limitation and the participation of IDWR in the execution of the SF5, it is clear that the remark is both necessary and clarifying. While this comment refers to permit 61-07724, the inclusion of this comment does not adjudicate nor vindicate the underlying efficacy of permit number 61-07724. Nor does the remark increase the water quantity decreed for 61-02248B or 61-07189. The quantity element for each of these claims remains as each was recommended by the Director.

Batrueles have not been deprived of any due process regarding permit 61-07724 in the SRBA. That matter has been handled by IDWR as an administrative matter. The Batrueles had the right to protest this permit pursuant to I.C. § 42-203A and the Idaho Administrative Procedure Act, Chapter 52, Title 67 Idaho Code, during its pendency, within IDWR. Whether Batrueles did so or not, the matter may not be reviewed in this venue. The SRBA Court does not have jurisdiction over that permit, nor that administrative process, as IDWR can not be a party within the SRBA.

The issue of the period of use was properly raised by the claimant/objector by its objection. Batrueles were on notice that this issue would be decided as part of the trial or settlement of these subcases. They may not use a *Motion to Alter or Amend* as a method of relitigating matters within subcases which they chose not participate. *Facility Volume, Id.* at 21.

VI. CONCLUSION

The typographical error mentioned in footnote 1 of this instant motion shall be corrected. The substance of the *Motion to Alter or Amend* is **denied** in all respects.

DATED: August 30, 2000



THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

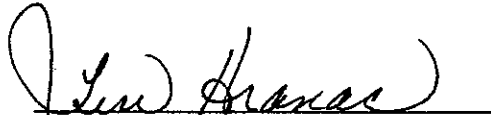
I certify that a true and correct copy of ORDER DENYING MOTION TO ALTER OR AMEND was mailed on August 30, 2000, with sufficient first-class postage prepaid to the following:

Director of IDWR
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Boise, ID 83720-0098

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Boise, ID 83702

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Twin Falls, ID 83303-1906

Norman Semanko
410 S Orchard, Suite 144
Boise, ID 83705


Deputy Clerk

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)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 61-02248B

27 AUG 30 AM 10:25

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

NAME AND ADDRESS: MAGIC WEST INC
PO BOX 475
RUPERT, ID 83350

SOURCE: GROUNDWATER

QUANTITY: 0.08 CFS
8.00 AFY

USE OF THIS RIGHT WITH RIGHTS 61-07189 AND 61-07724 IS
LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 0.67 CFS AND TO A
TOTAL COMBINED ANNUAL DIVERSION VOLUME OF 338 AF.

PRIORITY DATE: 04/03/1939

POINT OF DIVERSION: T05S R10E S29 SWSE Within Elmore County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Industrial	01-01 TO 12-31	0.08 CFS 8.00 AFY

PLACE OF USE: Industrial T05S R10E S29 SWSE Within Elmore County

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

RECOMMENDATION

AUG 30 2000

SPECIAL MASTER

Barry Wood
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

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)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 61-07189

200 AUG 30 AM 10:25

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO

FILED

NAME AND ADDRESS: MAGIC WEST INC
PO BOX 475
RUPERT, ID 83350

SOURCE: GROUNDWATER

QUANTITY: 0.67 CFS
58.00 AFY

USE OF THIS RIGHT WITH RIGHTS 61-022488 AND 61-07724 IS
LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 0.67 CFS AND TO A
TOTAL COMBINED ANNUAL DIVERSION VOLUME OF 338 AF.

PRIORITY DATE: 07/10/1974

POINT OF DIVERSION: T05S R10E S29 SWSE Within Elmore County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Industrial	01-01 TO 12-31	0.67 CFS 58.00 AFY

PLACE OF USE: Industrial T05S R10E S29 SWSE Within Elmore County

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
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Barry Wood
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

