

RECEIVED

MAY 5 - 2000

Department of Water Resources

Norman M. Semanko
ROSHOLT ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, Idaho 83303-1906
Telephone: (208) 734-0700
Facsimile: (208) 736-0041
norms@computer-depot.com
ISB #4761

Attorneys for Claimant Magic West, Inc.

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
	)	
	)	MEMORANDUM IN OPPOSITION TO
Case No. 39576	)	MOTION TO ALTER OR AMEND
_____	)	

DESCRIPTIVE SUMMARY

This is the responsive memorandum of Magic West, Inc., in opposition to the motion to alter or amend filed by the Batruels in subcase nos. 61-02248B and 61-07189.

BACKGROUND

The Batruels did not set forth any procedural or factual background in their motion to alter or amend. A short summary is therefore provided here.

Magic West, Inc. 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 cfs/8 AFY, which was purchased by Magic West in 1974 and has a 1939 priority date. Historically, the primary water right at the

1 Glenns Ferry plant has been 61-07189, a licensed right with a 1974 priority. The right was
2 permitted for .67 cfs, with no express diversion volume limit, in 1974, for use 10.5 months
3 of the year. Proof of beneficial use for .67 cfs was submitted to IDWR in 1979. Eight years
4 later, in 1987, a licensing field exam was conducted. The right was licensed in 1990, with
5 a diversion rate of .67 cfs and an annual diversion volume of 12.9 AF.
6

7 During 1996, Magic West discovered that, while the flow rate in license no. 61-07189
8 was accurate, the annual diversion volume was not. Records kept since a measuring device
9 was installed in 1996 indicate that more than 300 AFY was being diverted. As a result,
10 Magic West did two things to address the problem: (1) filed a petition with IDWR seeking
11 to amend license no. 61-07189 from 12.9 AF to recognize the actual beneficial use, which
12 Magic West claimed to be in the neighborhood of 300 AF; and (2) filed Application for
13 Permit No. 61-07724, seeking permission to pump the additional water, above and beyond
14 whatever was ultimately allowed under 61-07189, if such a permit proved necessary.
15
16

17 After an administrative hearing, the Director issued an amended license in 1999,
18 increasing the annual volume under 61-07189 from 12.9 AF to 58 AF, and also issued a
19 cease and desist order, requiring Magic West to limit its annual pumping under the two
20 water rights to 66 AF. Magic West rented 300 AF of water from the State Water Supply
21 Bank during 1999 to make up the difference and avoid any violation of IDWR's order.
22

23 The SRBA recommendation for 61-07189 reflected the increase from 12.9 AF to 58
24 AF and the recommendation for 61-02248B was for 8 AFY, for a total of 66 AFY. Both
25 rights were recommended for use 10.5 months of the year, despite the fact that the plant
26 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

1 plant since 1974, and a decision had not yet been issued regarding Application for Permit
2 No. 61-07724, Magic West filed an objection to the SRBA recommendation for 61-07189,
3 claiming that the annual diversion volume should be 423 AF (year round use at .67 cfs),
4 rather than 58 AF. Magic West also objected to the period of use for both 61-07189 and
5 61-02248B, claiming that it should be year round instead of 10.5 months of the year, based
6 on the year round use that has existed since at least 1986. The objections were filed on
7 June 15, 1999. The State of Idaho filed responses to both objections, dated July 13, 1999.
8 The Batruels did not file an objection or response, or move to participate in either subcase.
9 An initial hearing was set for February 17, 2000. Notice Setting Subcase(s) for Initial
10 Hearing, Subcase Nos. 61-02248B and 61-07189 (Dec. 14, 1999).

13 Several local residents filed protests with IDWR in response to Magic West's
14 Application for Permit No. 61-07724 when it was filed during 1996. The Batruels were not
15 among the protestants and did not move to intervene in the matter during the 3 years that
16 it was pending before IDWR. After IDWR's decision regarding the amendment of license
17 no. 61-07189, Magic West was able to reach settlement with the protestants in the spring of
18 1999 and IDWR subsequently issued Permit No. 61-07724 in August, 1999, for year round
19 use in the amount of 338 AF. One of the conditions of approval provides that the limit on
20 the maximum rate of diversion and annual pumped volume under Permit No. 61-07724 when
21 combined with License No. 61-07189 and any other water right authorized to use the same
22 point of diversion (i.e., 61-02248B) shall not exceed .67 cfs nor 338 AFY.

25 Following issuance of the new permit, Magic West was able to enter into Standard
26 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

1 Initial Hearing, Subcase Nos. 61-02248B and 61-07189 (Feb. 3, 2000). With regard to 61-
2 02248B, the parties and IDWR agreed to a year round season of use, based upon such use
3 occurring prior to the commencement of the SRBA. With regard to 61-07189, the parties
4 and IDWR agreed to the same provision regarding season of use and Magic West agreed
5 to drop its objection to quantity, which had sought 423 AFY, rather than the 58 AFY that
6 was recommended by IDWR and ultimately agreed to. The SF-5s for both rights included
7 a remark limiting the combined use under all three water rights, including the newly issued
8 permit, to .67 cfs and 338 AFY, consistent with the condition that was placed on Permit No.
9 61-07724 by IDWR in August, 1999.

12 The Special Master issued his Special Master's Report and Findings of Fact and
13 Conclusions of Law in the two subcases on February 3, 2000, recommending the rights
14 consistent with the SF-5s submitted by the parties and concurred in by IDWR. The Batruels
15 filed their motion to alter or amend, dated March 27, 2000. A hearing on the motion to
16 alter or amend was set for May 11, 2000. Notice Setting Hearing, Subcase Nos. 61-02248B
17 and 61-07189 (March 28, 2000). The Batruels subsequently lodged a brief, dated April 10,
18 2000, in support of their motion to alter or amend.

20 STANDARD OF REVIEW

21 Motions to alter or amend are reviewed by the Special Master, pursuant to
22 Administrative Order 1 ("AO1"), Sec. 13. The Presiding Judge recently set forth and
23 clarified the standard for considering motions to alter or amend. See, Order on Challenge
24 (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue, Subcase
25 Nos. 36-02708 et al., pp. 20-22 (December 29, 1999). "A motion to alter or amend findings
26 provides a mechanism for the trial court to correct both errors of fact and law short of an

1 appeal. Lowe v. Lym, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982)(citing First
2 Security Bank v. Neibaur, 98 Idaho 598, 570 P.2d 276 (1977))." Id. at 20-21. Parties are not
3 allowed to advance new legal theories or relitigate the merits of a case. Id. at 20 (citing In
4 Re SRBA Subcases 36-00061, 36-00062, and 36-00063, Memorandum Decision and Order
5 on Challenge (September 27, 1999)). A brand new party to the subcase is not allowed to
6 step forward for the first time through a motion to alter or amend and have a new trial. Id.
7 at 21. The determination of whether to grant or deny a motion to alter or amend is left to
8 the discretion of the Special Master. Id.

11 ARGUMENT

12 In their motion to alter or amend, the Batruels request several amendments to the
13 Special Master's recommended partial decrees. Each of these is discussed below.

14 1. The Typographical or Clerical Error Referencing Permit No. 61-07224 Should be
15 Corrected to Properly Reference Permit No. 61-07724.

16 In footnote 1 to their motion, the Batruels point out that the reference to "61-07224"
17 in the combined use remark for both 61-02248B and 61-07189 is mistaken. The reference
18 should instead be to "61-07724", the permitted water right issued to Magic West in August,
19 1999. This typographical or clerical error should be corrected, consistent with the references
20 to 61-07724 included in the SF-5s that were filed by the parties and IDWR.

21 2. The Combined Use Quantity Remark Should not be Deleted or Replaced.

22 The Batruels request that the combined use remark included in both Special Master's
23 recommendations, which limits the use of all three of Magic West's water rights to a total
24 combined diversion rate of .67 cfs and a combined annual volume of 338 AF, be removed.
25
26

1 They claim that the remark "unlawfully increase(s) the diversion volume for both water
2 rights". However, it does no such thing.
3

4 The quantity element for 61-02248B is plainly limited to .08 cfs and 8.0 AFY. This
5 is the same amount that was recommended by IDWR in the Director's Report. The
6 quantity element for 61-07189 is plainly limited to .67 cfs and 58.0 AFY. Again, this is the
7 same amount that was recommended by IDWR in the Director's Report.
8

9 The combined use remark simply clarifies that these two rights, when combined with
10 Permit No. 61-07724, are limited to a total combined diversion rate of .67 cfs and to a total
11 combined annual diversion volume of 338 AF. As stated above, a similar limiting remark
12 is included in Permit No. 61-07724. The partial decrees are allowed to include "such
13 remarks and other matters as are necessary for definition of the right, for clarification of any
14 element of a right, or for administration of the right by the director." I.C. Sec. 42-1411(2)(j).
15 Without this combined use remark, confusion is likely to occur in the future regarding
16 administration of these water rights. Water rights 61-02248B and 61-07189 are being
17 decreed for a total of 66 AFY. Permit No. 61-07724, which is the primary right for the
18 Glenns Ferry plant now, was issued by IDWR for 338 AFY. Therefore, the partial decrees
19 and the permit will total 404 AFY. Without a remark under the quantity element of these
20 two water rights to clarify that the three rights are limited to a total of 338 AFY, rather than
21 404 AFY, confusion is more likely to occur in future administration. Presumably, this is why
22 the State and IDWR agreed to include the combined use remark in the SF-5s for both water
23 rights. It certainly makes sense. It does not, as Batruels suggest, increase any diversion rate.
24
25

26 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

1 not been claimed. Contrary to Batruels' assertions, it is not at all clear to Magic West that
2 it would be allowed to file a claim for Permit No. 61-07724 in the SRBA under the
3 provisions of I.C. Sec. 42-1421. That statute does not discuss permits that are granted after
4 the filing of a director's report, which is the case here. In any event, such a filing would
5 require permission to file a late claim and Magic West cannot be compelled to file such a
6 motion or a claim for Permit No. 61-07724. That much is clear from the SRBA statutes.
7 Nonetheless, IDWR retains jurisdiction of all permits, including 61-07724, to take action
8 authorized by the conditions contained in any permit. I.C. Sec. 42-1421(4). The combined
9 use remark being included in the partial decrees for Magic West's two claimed water rights
10 from the same point of diversion as Permit No. 61-07724 makes it clear that the three rights
11 are limited to a total of 338 AFA, rather than the 404 AFA that the three rights otherwise
12 add up to. As indicated above, this is necessary for administration by IDWR, pursuant to
13 I.C. Sec. 42-1411(2)(j). It also assists IDWR in carrying out the conditions of Permit No.
14 61-07724 (i.e., the 338 AFA combined use condition), as clearly authorized under I.C. Sec.
15 42-1421(4).
16
17
18

19 With regard to Permit No. 61-07724 itself, which authorizes Magic West to divert up
20 to 338 AFA year round to keep its Glens Ferry potato processing plant in operation, it is
21 worth noting that the permit was issued pursuant to Chapter 2, Title 42, Idaho Code and
22 is a final action of the Idaho Department of Water Resources. The Batruels did not file a
23 protest to the application in 1996 or seek to intervene at any time prior to the Department's
24 final decision in August, 1999, as allowed by I.C. Sec. 42-203A and IDWR's Rules of
25 Procedure. In addition, they did not pursue judicial review of IDWR's decision under the
26 Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code. As a result,

1 Batruels' claim that they will be denied due process and that their water right claim will be
2 injured through an increase in Magic West's authorized water rights if the combined use
3 remark is included in the partial decrees for the other two water rights rings hollow. It is
4 Permit No. 61-07724 -- not the combined use remarks for 61-02248B and 61-07189 -- that
5 authorizes the use of up to 338 AFA by Magic West. This cannot be changed through the
6 motion to alter or amend. The combined use remark does nothing more than clarify the
7 amount of water that may be used under the three water rights, consistent with IDWR's
8 existing conditions on 61-07724.
9

10
11 The Batruels had substantial opportunity to contest Magic West's permit application
12 in the administrative arena and failed to do so. The Department's decision on the permit
13 is final and cannot be revisited in the SRBA. See, Response to United States' Motion for
14 Status Conference and Order on Nez Perce Tribe's Motion to Set Aside All Decisions,
15 Judgments and Orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022
16 by Judge R. Barry Wood, and Motion to Disqualify Judge Wood, Consolidated Subcase No.
17 03-10022 (Nez Perce Tribe Off-Reservation Instream Flow Claims), p. 18 n.11 (March 23,
18 2000) (discussing inability of SRBA Court to review final administrative agency action of
19 IDWR). More importantly, Permit 61-07724 is not before the court and Magic West is not
20 required -- or perhaps even able -- to file a claim for the water right, since it was not
21 applied for until 1996 (after the commencement of the SRBA) and was not issued until
22 August, 1999 (after the issuance of the Director's Report for Basin 61). I.C. Sec. 42-1421.
23

24
25 For all of these reasons, Batruels' request to delete the combined use remark
26 clarifying the combined quantity for the three water rights, and replace it with a combined
use remark for the two recommended rights only, should be denied.

1
2 3. The Period of Use Should not be Changed.

3 Batruels claim that the SF-5 for 61-07189 "unlawfully...expand(s) the season of use
4 for 61-07189." The SF-5 and Special Master's Report recognize a period of use of 12
5 months, rather than the 10.5 months included in the Director's Report. Interestingly,
6 Batruels do not complain about the same change in season of use which was made to 61-
7 02248B. Of course, Permit No. 61-07724, the third of the three water rights used in the
8 potato processing plant, is also authorized for year round use.
9

10 Magic West filed objections to the recommendations for 61-07189 and 61-07724,
11 claiming that the period of use should be 12 months instead of 10.5 months. The Batruels
12 did not file a response or seek to participate in the subcases. At the time that the Special
13 Master issued his recommendations, there was nothing in the record about the permitting
14 and licensing history of 61-07189. The Batruels cannot attempt to bring in such evidence
15 at this late date. They should not be allowed to relitigate the case now that Magic West has
16 been able to settle with the State of Idaho and IDWR regarding the season of use. This
17 would be inconsistent with the recent rulings of the Presiding Judge, cited above.
18

19 Even if the facts were in the record, Batruels' point about 61-07189 being a permit
20 at the time that the SRBA commenced is interesting trivia, but little more. I.C. Sec. 42-
21 1425, the accomplished transfer statute, discusses "any person entitled to the use of water",
22 not just licensed and decreed water rights. While a permit may not be a fully vested water
23 right, and therefore may be further conditioned before it is licensed, it does authorize the
24 use of water. I.C. Sec. 42-204. More importantly, when the water is put to beneficial use,
25 the permit ripens into a legal and complete appropriation. See, Speer v. Stephenson, 16
26 Idaho 707 (1909); Marshall v. Niagra Springs Orchard Co., 22 Idaho 144 (1912); Washington

1 State Sugar Co. v. Goodrich, 27 Idaho 26 (1915); Basinger v. Taylor, 30 Idaho 289 (1917)
2
3 (discussing the effect of a permit upon completion of the works and application of water to
4 beneficial use). Certainly, a person holding a perfected permit is "entitled to the use of
5 water".

6 Permit No. 61-07189 authorized Magic West to use water beginning in 1974. Proof
7 of beneficial use was submitted in 1979, well before the commencement of the SRBA.
8 Among its ministerial duties, IDWR conducted a beneficial use exam in 1987 and a license
9 was finally issued in 1990. Magic West switched from a 10.5 month operation to a year
10 round operation no later than 1986. Whether the water right was in the permit or license
11 stage, it was changed prior to the commencement of the SRBA in 1987 and the water right
12 had been put to beneficial use. Therefore, the change should be recognized.
13

14 To say that this one water right cannot be used year round, while the other two can,
15 simply because it was a 13-year old permit rather than a license at the time that the SRBA
16 commenced, would make little sense. The right was used year round before the
17 commencement of the SRBA and the change in period of use is properly recognized by the
18 court under I.C. Sec. 42-1425. To conclude otherwise would be to largely defeat the
19 purpose, and plain meaning, of the statute. As a practical reality, because 61-07189 is a
20 licensed right now (and has been since 1990), it would have to proceed under I.C. Sec. 42-
21 222, and would not benefit from the provisions of 42-211, as suggested by the Batruels. This
22 cannot be the intent of I.C. Sec. 42-1425. It certainly is not the plain meaning.
23

24 Alternatively, IDWR has authority to amend permits and licenses. To the extent that
25 the change in period of use under 61-07189 must be recognized as an amendment to the
26

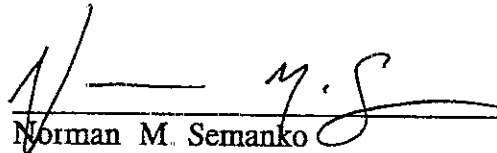
1 permit or license, IDWR was certainly authorized to do so in entering into the SF-5,
2 providing an alternative ground to recognize year round use under 61-07189.
3

4 **CONCLUSION**

5 For the reasons set forth above, Batruels' motion to alter or amend should be denied,
6 except as it may apply to correction of the typographical or clerical error in referencing 61-
7 07724 in the combined use remarks for 61-02248B and 61-07189.
8

9 DATED this 4th day of May, 2000.

10 ROSHOLT, ROBERTSON & TUCKER

11
12
13 
14 Norman M. Semanko
15
16
17
18
19
20
21
22
23
24
25
26

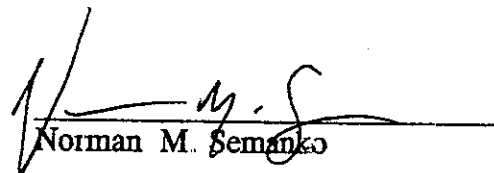
1
2 CERTIFICATE OF SERVICE

3 I hereby certify that on this 4th day of May, 2000, I served a copy of the
4 foregoing MEMORANDUM IN OPPOSITION TO MOTION TO ALTER OR AMEND
5 by depositing same in the United States mail, postage prepaid, in an envelope, addressed
6 to the following:

7 Matt J. Howard
8 2402 W. Jefferson
9 Boise, ID 83702

10 Peter Ampe
11 Office of the Attorney General
12 State of Idaho
13 P.O. Box 44449
14 Boise, Idaho 83711-4449

15 Susan Hamlin
16 Idaho Department of Water Resources
17 P.O. Box 83720
18 Boise, ID 83720

19 
Norman M. Semanko

20 05040001.NMS
21
22
23
24
25
26