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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.: 61-07189 and 61-02248B
	)	
Case No. 39576	)	RESPONSE IN OPPOSITION TO COMMENTS
	)	RE: MOTION TO ALTER OR AMEND
	)	

DESCRIPTIVE SUMMARY

This is Magic West's response in opposition to the Comments Re: Motion to Alter or Amend (May 18, 2000) filed by the Batruels.

RESPONSE IN OPPOSITION

The Batruels have taken a relatively simple request from the Special Master and used it as a vehicle to reargue issues that have already been briefed and argued before the Special Master. They also attempt to insert language that would prejudice Magic West by suggesting that the existing permit decision by the Director can be revisited in the SRBA.

At oral argument on May 11, the Special Master asked for the parties to provide additional clarifying language to make clear that Permit No. 61-07724 has not been claimed or decreed in the SRBA and is still subject to the terms of the permit and any license that is ultimately issued. Counsel for both sides cited and read from provisions of I.C. § 42-1421(3) and (4) at oral argument. While Magic West believes that these provisions speak for

1
2 themselves, are already the law, and do not need to be included in the partial decrees for 61-
3 02248B and 61-07189, Magic West nonetheless agreed that these provisions could be included
4 in the decrees to provide additional clarification about the status of Permit No. 61-07724, if the
5 Court is so inclined.

6 The language proposed by Magic West in its May 18, 2000 filing, Proposed Changes to
7 Remarks in Recommended Partial Decrees, is lifted practically verbatim from the statute and is
8 easily understood, without prejudicing either of the parties. Unfortunately, some of the
9 additional language proposed by the Batruels does not track with the language of the statute and
10 would prejudice Magic West. As a result, these changes should not be adopted. If any changes
11 need to be adopted, Magic West's proposed changes should be made. Otherwise, the
12 recommended partial decrees should be left in tact and Batruels' motion to alter or amend
13 should be denied, as previously briefed and argued by Magic West.

14 Again, the reference to Permit No. 61-07724 in the recommended decrees does not
15 increase the quantities for 61-02248B and 61-07189, as claimed by the Batruels. The combined
16 use remark simply clarifies the maximum amount of water that may be diverted under all water
17 rights, including the permit, which is still subject to departmental scrutiny. This type of remark
18 is entirely appropriate under I.C. § 42-1411(k), as argued previously, and need not be changed.

19 The Batruels' suggestion that language should be included by the Court indicating that
20 Permit No. 61-07724 "may be reduced or eliminated" is entirely inappropriate. Such language
21 does not appear in the statute, is not necessary, and would prejudice Magic West by intimating
22 that such a conclusion may be appropriate for the Department to reach. Stating that the water
23 right (61-07724) is still subject to completion of the appropriation (I.C. § 42-1421(3)) and that
24 the Director retains jurisdiction over the permit or license (I.C. § 42-1421(4)) is wholly
25 adequate to address the "due process" concerns expressed by the Batruels, to the extent those
26 concerns are valid at all.

27 In addition, because 61-07724 has not been claimed and is not before the Court, it
28 cannot be "conditioned upon" anything by the Court, as suggested by the Batruels. The
29 conditions which exist in the permit or that may be included in any license can certainly be
30 recognized by the Court (I.C. § 42-1421(4)), but there is no ability – or need – for the Court to

1
2 include its own conditions on the permit, as suggested by the Batruels. Again, the language
3 provided by Magic West, which tracks precisely the relevant language of I.C. § 42-1421(3) and
4 (4), should be utilized by the Court, if any additional language needs to be included at all.

5 Finally, the last provision recommended by the Batruels is highly problematic, not to
6 mention that it does not appear in I.C. § 42-1421 at all. By stating that any party to the SRBA
7 may later challenge the appropriation of water under Permit No. 61-07724, the Court could
8 allow the Batruels to circumvent any binding effect that the permit may have on them. The
9 permit has been issued, is final, and is binding. If the Batruels choose to attempt to insert
10 themselves in the licensing process, that is their choice and nothing in I.C. § 42-1421(3) or (4)
11 inhibits their ability to do so. Likewise, if the right is later claimed in the SRBA, the Batruels
12 can file an objection. However, the language proposed by the Batruels goes much further by
13 suggesting that the permit itself may be challenged, notwithstanding the fact that the permit was
14 a final administrative decision of the Director, which decision this Court cannot and should not
15 second guess.

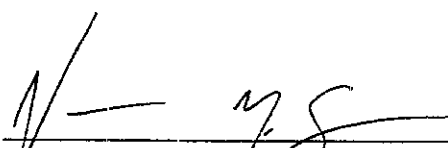
16 Throughout this proceeding, it should be remembered that the Batruels were not a party
17 to these subcases. They should not be allowed to come before the Court now, even after the
18 motion to alter or amend, and propose language which is prejudicial to Magic West and has no
19 basis in I.C. § 42-1421.

20 CONCLUSION

21 For the foregoing reasons, as well as those previously briefed and argued, Magic West
22 respectfully requests that Batruels' motion to alter or amend be denied or, alternatively, that the
23 changes recommended by Magic West in its May 18, 2000 filing be adopted by the Special
24 Master.

25 Dated this 25 day of May, 2000.

26 ROSHOLT, ROBERTSON & TUCKER


Norman M. Semanko, Attorneys for Magic West

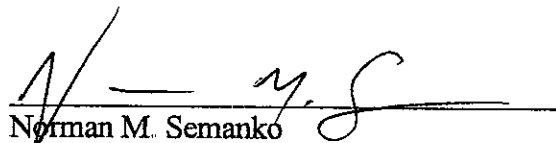
CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of May, 2000, I caused a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO COMMENTS RE: MOTION TO ALTER OR AMEND to be served upon the following persons in the following manner:

Peter Ampe	☐	Hand Deliver
Office of the Attorney General	☒	U.S. Mail
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