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Attorney for Mary Batruel, Paul Batruel, and Batruel Dairy

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
)
) COMMENTS RE: MOTION TO ALTER OR
) AMEND
)
)
)
)

DESCRIPTIVE SUMMARY

At the May 11, 2000, hearing held on the motion to alter or amend in the above-captioned subcases, the Special Master instructed the parties to submit proposed language for the quantity remark for water right nos. 61-02248B and 61-07189. Pursuant to that instruction, Mary Batruel, Paul Batruel, and Batruel Dairy, (the Batruels) by and through their undersigned counsel, submit the following comments for the Court's consideration.

COMMENTS

The Batruels submit the following two options for conditional language for the Court's consideration:

OPTION 1

If the Court ultimately determines that the combined quantities for 61-02248B and 61-07189 may be increased based on a remark referencing an unclaimed permit (no. 61-7724), and that such remark is in fact necessary to define, clarify, or administer the water rights pursuant to Idaho Code § 42-1411(k), then conditional language should be inserted into the partial decrees that protects against two unintended consequences

First, conditional language should be inserted into the partial decrees to make clear that the quantity of water attributable to the permit is subject to change and/or be eliminated pursuant to laws governing the processing of permits by the Idaho Department of Water Resources (IDWR). To accomplish that objective, the language proposed below closely tracks the language of Idaho Code § 42-1421(3), with some needed additional language. That subsection expressly provides language that must be inserted into a decree for a permit that is claimed in the SRBA

Second, conditional language should be inserted into the partial decrees to make clear that no party in the SRBA, including the Batruels, is precluded from filing an objection to the permit, 61-07724, should that permit ever be properly claimed, noticed, and recommended in the SRBA. This conditional language is necessary to mitigate what would otherwise be a denial of due process to the parties in the SRBA because there was never any notice of, or opportunity to object to, the quantity element of permit no. 61-07724.

Based on the foregoing considerations, the following proposed language is submitted for the Court's consideration:

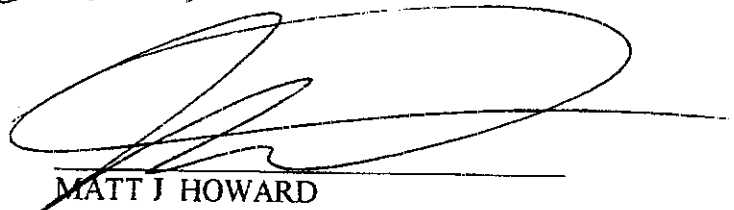
Use of this right with rights nos. 61-02248B [or 61-07189] and permit no. 61-07724 is limited to a total combined diversion rate of 0.67 cfs and to a total combined annual diversion volume of 338 AF; *provided however*, that the combined diversion volume attributable to permit no. 61-07724 is conditioned upon, and may be reduced or eliminated pursuant to, completion of the appropriation in accordance with the laws of the state governing the appropriation of water and that this decreed right shall be subject to the terms of the license to appropriate water that is ultimately issued; *provided further* that this decree does not preclude any party to the SRBA from subsequently contesting in any judicial proceeding the appropriation of water under permit no. 61-07724.

OPTION 2

Another option, which is the preferred option, is to eliminate reference to permit no. 61-07724 completely because it is not necessary to define, administer, or clarify the water rights for 61-02248B or 61-07189. Under this option, Magic West can still currently divert 338 AF. But the SRBA decrees will properly reflect that only the 66 AF is attributable to the two claimed water rights, 61-02248B and 61-07189. The remaining diversion volume, up to 338 AF, will be based solely on permit no. 61-07724, which is subject to change or be eliminated in the future. Based on those considerations, the following proposed language is submitted for the Court's consideration:

Use of this right with right no. 61-02248B [or 61-07189] is limited to a total combined diversion rate of 0.67 cfs and to a total combined annual diversion volume of 66 AF.

RESPECTUFLY SUBMITTED this 18 day of May, 2000



MATT J HOWARD

CERTIFICATE OF SERVICE

The undersigned certifies that on the 18 day of May, 2000, a true and correct copy of the within COMMENTS RE: MOTION TO ALTER OR AMEND was sent to the following person(s) by the method indicated below:

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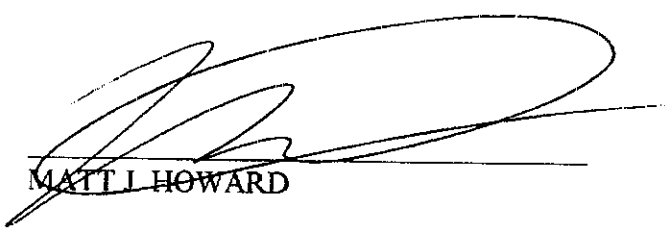
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RE:	
Comments - Subcase Nos. 61-02248B/61-07189	

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NOTES/COMMENTS:

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