

**SF5 REPORT REGARDING
SUBCASE NOS. 61-02248B and 61-07189**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
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August 24, 2001

INTRODUCTION

The Director of the Idaho Department of Water Resources ("IDWR") submits this report regarding the Standard Forms 5 (SF5s) in subcase numbers 61-02248B and 61-07189. This report was prepared under the supervision of Karl J. Dreher, Director, and David R. Tuthill, Jr., Adjudication Bureau Chief for IDWR.

On March 28, 2001 the Court issued a *Memorandum Decision and Order on Challenge [and] Order of Recommitment to Special Master Cushman*. In that Order, the matter was referred back to the Special Master for further consideration of the following conclusions by the court: 1) the changed season of use in the prior SF5s constituted an enlargement under *Idaho Code* §42-1425, 2) the application of the accomplished transfer statute, *Idaho Code* §42-1425, was not appropriate, and 3) the quantity remark in the prior SF5s was ambiguous. IDWR submits this report to clarify the issues raised by the district court. Although IDWR is submitting this report for clarification, IDWR concurs with the elements of the water rights as set forth in the new SF5s submitted herewith.

BACKGROUND

In February, 1999, IDWR recommended claim number 61-02248B with a flow rate of 0.08 cfs and a volume of 8.0 acre-feet per year. The recommended season of use was August 15 to July 1, or 10.5 months.¹ At the same time, IDWR recommended claim

¹ Originally, Magic West claimed this right with a season of use of 10.5 months, however, in 1997 Magic West amended its claim in the SRBA to increase the season of use to year-round use and to change the purpose of use from irrigation to industrial.

number 61-07189 as was reflected in the license for that right:² 0.67 cfs with an August 15 to July 1 season of use and an annual volume of 58.0 acre-feet per year.

On June 15, 1999, Magic West filed an objection to IDWR's recommendations on claim numbers 61-02248B and 61-07189. Magic West and IDWR discussed settlement of these matters and entered into an agreement as set forth in the SF5s, settling Magic West's objections in February 2000 (prior SF5s.) The prior SF5s were submitted to the SRBA court on February 3, 2000. The Special Master issued his report and recommendation confirming the SF5s. On March 27, 2000, Mary and Paul Batruel and Batruel Dairy (Batruels) filed a Motion to Alter and Amend the Master's Report (Motion to Alter and Amend). The Motion to Alter and Amend was denied on August 30, 2000.

On September 11, 2000, Batruels filed a Notice of Challenge to the Special Master's Report. After the hearing, the district court issued its *Memorandum Decision and Order on Challenge [and] Order of Recommitment to Special Master Cushman* on March 28, 2001. The Decision raised some questions concerning the prior SF5s. This report is intended to clarify some of the issues raised by the district court.

DISCUSSION

Magic West's objection sought to have a longer season of use than what was included in IDWR's recommendations for right numbers 61-02248B and 61-07189.

² Water right 61-07189 was licensed for 0.67 cfs, 12.9 acre-feet per year, with a season of use from August 15 to July 1. Magic West originally claimed this right with an August 15 to July 1 season of use but amended its claim in 1997 for a year-round season of use. On May 1, 1997, Magic West filed with IDWR a Petition for Adjustment and Clarification of Existing Order/License for license number 61-07189 to increase the annual diversion volume from 12.9 acre-feet per year to 270.7 acre-feet per year or to delete the diversion volume altogether. In 1999, after hearing, IDWR issued an order amending the license for water right number 61-07189 increasing the diversion volume from 12.9 acre-feet per year to 58 acre-feet per year. In the SRBA, IDWR recommended claim number 61-07189 as reflected in the order amending the license: 0.67 cfs with an August 15 to July 1 season of use, and an annual volume of 58 acre-feet per year.

Through the negotiation process, SF5s were signed that included a year-round season of use. IDWR concurred with the prior SF5s under an accomplished change in the season of use for the rights from 10.5 months to 12 months pursuant to *Idaho Code*

§42-1425. *Idaho Code* § 42-1425(2) states,

[a]ny changes of . . . nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, *Idaho Code*, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.

IDWR believed that the accomplished change in season of use was reasonable given the fact that there was evidence showing that prior to 1987 Magic West had changed the season of use from 10.5 months to 12 months, without increasing the volume diverted under water rights 61-02248B and 61-07189. And, because these water rights were ground water rights, changing the season of use did not constitute an enlargement because the quantity of water diverted from the aquifer (the volume) remained the same as originally recommended and licensed.

It may seem that increasing the number of months that a water user can use the water automatically constitutes an enlargement, however, the distinction must be made between ground water and surface water when analyzing whether the accomplished change in season of use is an enlargement. In the prior SF5s, the change did not constitute an enlargement because the water rights were ground water rights that had a volume limit for delivery of each right. When a water user diverts from a ground water source, increasing the number of months in the season of use does not normally constitute

an enlargement because the total volume diverted is merely withdrawn over a longer period of time, but no more water is diverted. This change is similar to when a water user adds a point of diversion from a surface source but does not take any more water from the source nor does the change cause any injury to other water users. If a water user added a point of diversion prior to 1987, going from one point of diversion to two points of diversion, without causing injury and the other elements of the water right, such as rate of flow, did not change, then the accomplished transfer statute is used to recognize this change. Adding a point of diversion, in that instance, is not considered an enlargement, just like changing the season of use in this case is not an enlargement because the amount of water under the water right is not increased.

In this case, water right 61-02248B has a flow rate limit of 0.08 cfs and a volume limit of 8.0 acre-feet per year. Water right 61-07189 has a flow rate limit of 0.67 cfs and a volume limit of 58.0 acre-feet per year. Regardless of when during the year either water right is withdrawn from the ground water aquifer the annual volume that can be withdrawn is limited to a total of 66.0 acre-feet (8.0 af + 58.0 af).³ Thus, recognizing the accomplished change to the season of use does not increase the water rights because the amount of water diverted under these rights does not change.

Finally, in the prior SF5s, at the request of Magic West, IDWR added a reference in the quantity remark to permit number 61-07724.⁴ The remark stated that when all three

³ Both water rights are diverted from the same point of diversion.

⁴ On September 27, 1996 Magic West filed an Application for Permit (61-07724) for 0.67 cfs for industrial purposes with a 1/1 to 12/31 (year round) season of use. IDWR approved the permit on August 27, 1999 for 0.67 cfs with a maximum annual diversion volume of 338.0 acre-feet per year.

rights are used together the total acre-feet that Magic West can pump is limited to 338.0 acre-feet per year. ⁵ The point of diversion for permit number 61-07724 is the same well as for water rights 61-02248B and 61-07189. This remark was added to avoid confusion that the three rights were cumulative. If 61-02248B, 61-07189 and permit 61-07724 were treated as cumulative then Magic West would be able to pump 8.0 af + 58.0 af + 338.0 af = 404.0 acre-feet. However, Magic West is limited to a maximum annual volume of 338.0 acre-feet by language contained in permit number 61-07724. This remark has been deleted from the revised SF5s and is deemed unnecessary because when IDWR administers water rights that are used together, limiting language is normally placed on the most junior right, in this instance that would be 61-07724. If Magic West ever chose to sell or move any of these water rights, then an administrative transfer process would be necessary. In that process, IDWR would review all the water rights on the property to determine which rights were limited to what volume amount. Therefore, the administrative process provides sufficient safeguards to prevent any enlargement of the use of any of the water rights in the future, and the limiting condition is not required on the senior water rights.

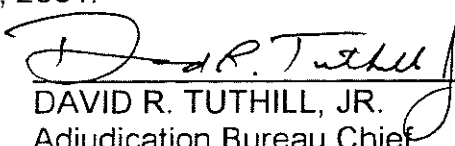
REVISED SF5s

Because Magic West no longer seeks the longer season of use for water rights 61-02248B and 61-07189, revised SF5s are being submitted with the season of use as originally recommended by IDWR. Further any reference to permit number 61-07724 has

⁵ That remark for water right 61-02248 said: "Use of this right with right Nos. 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."

been deleted in the remarks. IDWR concurs with the new SF5s submitted herewith.

DATED this 24th day of August, 2001.


DAVID R. TUTHILL, JR.
Adjudication Bureau Chief

CERTIFICATE OF MAILING

I certify that on 8-24, 2001, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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