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NOV 28 2008

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
NOV 25 2008	
By _____	Clerk
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	) ORDER GRANTING MOTION FOR
	) SUMMARY JUDGMENT
Case No. 39576	)
	) SPECIAL MASTER'S REPORT
	)
	) FINDINGS OF FACT AND
	) CONCLUSIONS OF LAW
	)
_____	) FOR WATER RIGHT 63-31976

A notice of claim was filed for the above-captioned water right by the Boesiger Family Cabin Trust for 0.02 cfs of water from a spring, for heating and domestic purposes. The basis of the claim is beneficial use. The *Director's Report* recommended the water right as claimed. On January 4, 2007, an objection to the *Director's Report* was filed by the Paradise Homeowners Association, Inc. (PHOA), asserting that the water right should not exist. Specifically, the PHOA asserts: 1) that the PHOA is the owner of the land where the claimed point of diversion is located, and no easement exists providing access for the claimant; and 2) that the covenants, conditions, and restrictions of the subdivision prohibit diversions of water other than through the subdivision's common system.

On October 24, 2008, the Boesiger Family Cabin Trust, through its attorney Terri R. Pickens, filed a *Motion for Summary Judgment*, together with a *Memorandum in Support of Motion for Summary Judgment*, and the *Affidavit of Richard Boesiger*. Oral argument on summary judgment was scheduled to be held on November 24, 2008. The objector PHOA did not file any briefing or affidavits in opposition to the claimant's *Motion for Summary Judgment*. For the reason that no documents in opposition to the motion were filed by the objector, this Special Master vacated the hearing on the motion, and will decide the matter without hearing. I.R.C.P. 7(b)(3)(D).

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The undisputed facts on file in this subcase set forth in the *Director's Report* and in the *Affidavit of Richard Boesiger* show that there are no genuine issues as to any material fact, and that the moving party is entitled to judgment as a matter of law. In its objection, the PHOA asserts that the point of diversion is located on land owned by the PHOA, and that the claimant does not have any legal access thereto. The PHOA has not filed any affidavits or other documents backing-up this assertion. The claimant, on the other hand, has filed an affidavit showing that the claimant has diverted water from the subject spring beginning in the 1950's, first as a leaseholder, and subsequently as a property owner in the subdivision. The party opposing a motion for summary judgment may not rest merely on the allegations in the pleadings, but rather the non-moving party must produce evidence to contradict the assertions of the moving party. *Amborse v. Buhl Joint School Dist No. 412*, 126 Idaho 581, 584 (Ct. App. 1985).

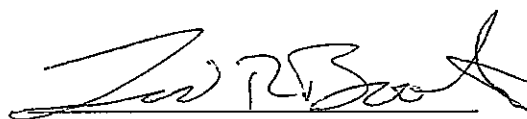
The objection filed by the PHOA also asserts that the diversion of water from the spring by the Boesiger Family Trust is in violation of the covenants, conditions, and restrictions applicable to the property. Attached to the objection is a copy of a document entitled "Amended and Restated Declaration of Covenants, Conditions and Restrictions: Willis Carrie's Paradise Subdivision." The copy of the document in the file does not bear any signatures nor does it bear the file stamp of the Elmore County Recorder. Page 4 of the document states: "No individual water or sewage disposal system shall be permitted on any approved building site."

The PHOA has not filed any affidavits to demonstrate that the Boesiger Family Cabin Trust is a signatory to and bound by the document attached to the objection. However, assuming that the document attached to the objection is a true and correct copy of an agreement to which the Boesiger Family Trust is bound, such an agreement would not invalidate a water right that was established long before the land was subdivided into Willis Carrie's Paradise Subdivision. To the extent that the PHOA, or any of its members assert that the Boesiger Family Trust is in violation of the CC&R's regarding its diversion of water pursuant to water right 63-31976, the PHOA or any of its members could file an action in Elmore County seeking to enforce the CC&R's. The undisputed facts on file in this subcase demonstrate that the Boesiger Family Cabin Trust perfected its water right long before the land became subject to any CC&R's regarding the use of

water, and accordingly such water right should be confirmed by the SRBA District Court. The fact that the continued use of such water right may be in violation of subsequent CC&R's does not invalidate the water right, but rather may give rise to a cause of action to enjoin further use of said water right. In accordance with the foregoing analysis, the Boesiger Family Cabin Trust's *Motion for Summary Judgment* is **granted**, and the objection filed by the PHOA is **dismissed**.

Therefore, based on the file and record herein, IT IS RECOMMENDED that water right 63-31976 be **decreed** with the elements as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*.

Dated Nov. 25, 2008

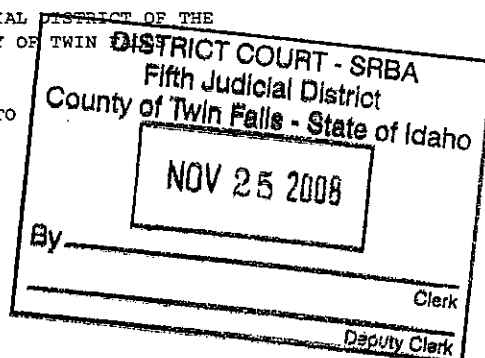
A handwritten signature in black ink, appearing to read 'Theodore R. Booth', written over a horizontal line.

THEODORE R. BOOTH
Special Master
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 63-31976



NAME AND ADDRESS: BOESIGER FAMILY CABIN TRUST
131 E WILLIAMS ST
BOISE, ID 83706

SOURCE: SPRING TRIBUTARY: GROUSE CREEK

QUANTITY: 0.02 CFS

The quantity of water under this right for domestic and heating
uses shall not exceed 13,000 gallons per day.

PRIORITY DATE: 06/01/1958

POINT OF DIVERSION: T03N R10E S33 NWSWNE Within Elmore County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Heating	01-01 TO 12-31	0.02 CFS
	Domestic	01-01 TO 12-31	0.02 CFS

Domestic and heating uses are for 1 home.

PLACE OF USE:	Heating	Within Elmore County
	Same as Domestic	
	Domestic	Within Elmore County
	T03N R10E S33 SWNE	

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

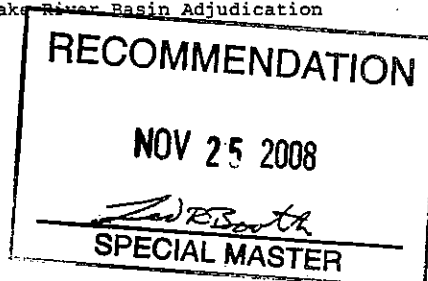
The quantity of water decreed for this water right is not a
determination of historical beneficial use.

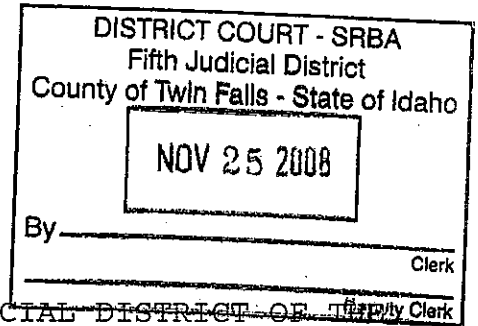
THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

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.

John M. Melanson
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)
_____)

CERTIFICATE OF MAILING

Water Right(s) : 63-31976

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on November 25, 2008, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

BOESIGER FAMILY CABIN TRUST

Represented by:
TERRI PICKENS
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

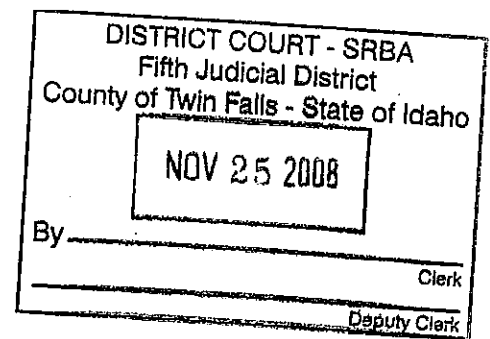
PARADISE HOMEOWNERS ASSN
C/O RANDY FOWERS, PRESIDENT
10071 MARTINGALE DR
BOISE, ID 83709
Phone: 208-322-5408

CERTIFICATE OF MAILING



DIANA R DELANEY
Deputy Clerk

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11/25/08



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)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

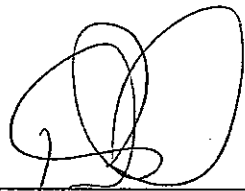
Water Right(s) : 63-31976

On November 25, 2008, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED November 25, 2008.



DIANA R DELANEY
Deputy Clerk