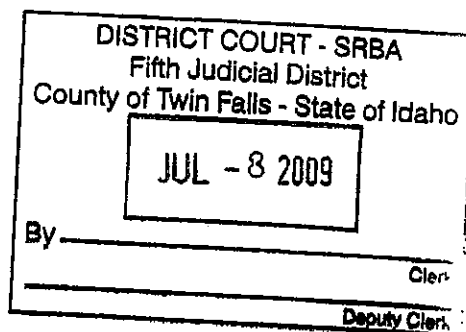


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DEPARTMENT OF
WATER RESOURCES



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) Subcases 63-31194A and 63-31194B
Case No. 39576) MEMORANDUM DECISION AND
ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT
SPECIAL MASTER'S REPORT AND
RECOMMENDATION

I. APPEARANCES

Richard W. Stover, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, for
claimant Sundance Investments Ltd.

Jon Gould, Ringert Law Chartered, for claimant / objector L. Darwin McKay.

II. PROCEDURAL AND FACTUAL BACKGROUND

The above-captioned subcases involve a dispute over the ownership of a water right between L. Darwin McKay¹ (hereinafter "McKay") and Sundance Investments Ltd. (hereinafter "Sundance"). The water right at issue was licensed (amended) to McKay on February 1, 2000, with a priority date of July 22, 1988. The amended license authorizes the diversion of 0.84 cfs and 297 AFY of groundwater for the irrigation of 66 acres, with a place of use located in the SENW and the NENW quarter-quarters of Township 03N, Range 01E, Section 21. *Affidavit of Richard W. Stover in Support of Sundance Investments Ltd's Motion for Summary Judgment*, Ex. B (hereinafter "Stover Aff.").

¹ Darwin McKay is the president of the Turf Company (McKay Aff. ¶ 2), and as used herein "McKay" refers to both Darin McKay personally as well as the Turf Company, unless the particular context indicates otherwise.

McKay and Sundance both filed claims in the SRBA based upon the license, each claiming 0.62 cfs and 218.2 AFY for the irrigation of 48.5 acres.²

The *Director's Report* recommended water right 63-31194B (Sundance's claim) as claimed; and recommended that water right claim 63-31194A (McKay's claim) be disallowed. McKay timely filed objections to the *Director's Report*, asserting ownership of the subject water right.

McKay is the president of Turf Company, which is a commercial sod provider. *Affidavit of L. Darwin McKay* p.1 (hereinafter "*McKay Aff.*"). In connection with the sod farming operation, McKay filed an application for permit (no. 63-10666) in July of 1988 for the right to appropriate groundwater for use of 71 acres of farm land that he was leasing from HCM Investments. *Id.* The permit was approved on October 6, 1988. The following year Turf Company began leasing an adjacent piece of farm ground, and McKay filed an amended application for permit for the purpose of moving the place of use to this new land. The Department approved this amendment on November 22, 1989. *Id.* Although the land leased by McKay had existing surface water deliverable by the Nampa & Meridian Irrigation District, such surface water supply is inadequate for growing sod because it contains weed seeds and pesticide residue that damage the sod, and because water is needed outside of Nampa & Meridian Irrigation District's standard irrigation season. *Id.*, p. 2.

The owner of the land leased by the Turf Company beginning in 1989 was TCM Joint Venture. *McKay Aff.* p.2. McKay grew sod on the land leased from TCM Joint Venture from 1989 through the growing season of 1999, at which time his lease with TCM Joint Venture was terminated. *Id.* After the 1999 growing season, McKay removed his pump and capped the well. *Id.*, p. 3. In the years following 1999, McKay sold and conveyed portions of the licensed water right to the LDS Church, and to Developers Diversified Realty, TCFM Associates, and Hermes Associates. Those conveyances are not at issue in this proceeding. The remaining portion of the licensed right at issue in these proceedings has not been used since the conclusion of the 1999

² The SRBA claims made by McKay and Sundance do not match the licensed quantities and acreage due to conveyances by McKay of portions of the licensed right. Those other conveyances are not at issue.

growing season, nor has McKay sought to transfer the place of use of the water right to other land.

The license for water right 63-10666 was initially issued by IDWR on August 23, 1995. *Stover Aff.* Ex. A. The license as originally issued was subject to conditions that made the right to the use of groundwater supplemental to the use of surface water on the land. On January 5, 2000, McKay filed a petition with the Department to remove those conditions. On February 1, 2000, the Department issued its *Preliminary Order Correcting License*, finding that water right 63-10666 was not developed for use as a supplement to a surface water source. Also on that date the Department issued an *Amended License* which omitted the conditions that had made the right a supplemental water right. The license as originally issued and as amended states: "This water right is appurtenant to the described place of use."

In addition to being the lessee of the land owned by TCM Joint Venture, McKay was also a 2.5% owner of TCM Joint Venture. *McKay Aff.*, p. 5. McKay never conveyed the subject water right to his lessee, TCM Joint Venture. *Id.* p. 4. In 2000, the real property underlying the place of use for the subject water right was being marketed for sale, and Sundance began to consider potential purchase of the land. *Anderson Aff.*, ¶ 3. On January 9, 2003, Sundance entered into a contract with thirteen (13) individual property owners, including McKay, for the purchase and sale of the land. *Anderson Aff.* ¶ 5. In anticipation of the sale of the property, and for purposes of facilitating 1031 exchange requirements, the owners of TCM Joint Venture executed an Agreement of Co-Tenancy. *Anderson Aff.*, Ex. C. The Agreement of Co-Tenancy terminated the TCM Joint Venture, and stated that each of the thirteen (13) cotenants would own an undivided interest in the real property in a specified percentage amount. The Co-Tenancy Agreement appointed Jack E. Miller as having the authority to make the ordinary and usual decisions concerning the property, but that Mr. Miller would not have the authority to sell the property without the written consent of cotenants holding at least 70% of the ownership interest in the property.

In connection with the sale of the land to Sundance, and for purposes of providing Mr. Miller the authority to sell the land, the thirteen (13) cotenants executed a document

entitled "Action by Cotenants" in which the thirteen (13) cotenants approved the Purchase and Sale Agreement with Sundance, ratified the execution and delivery of said Purchase and Sale Agreement, and authorized Jack E. Miller to execute and deliver the same to buyer Sundance. McKay signed the Action by Cotenants. *Anderson Aff.*, Ex. D.

The Purchase and Sale Agreement between the thirteen (13) cotenants and Sundance identifies the property being purchased as follows:

A. Seller owns as tenants-in-common that certain property depicted on Exhibit A, attached hereto and made a part hereof, (the "Property"), consisting of approximately 78.39 acres.

1. PROPERTY TO BE PURCHASED. Buyer agrees to purchase and Seller agrees to sell, the Property, together with all easements rights, mineral rights, other appurtenances, water and water rights appurtenant to or used on the Property and all shares, certificates, and other documents evidencing such water rights.

Anderson Aff. Ex. C. The Purchase and Sale Agreement also states:

12. MISCELLANEOUS. . . . This written Agreement, including all exhibits attached hereto and documents to be delivered pursuant hereto, shall constitute the entire agreement and understanding of the parties, and there are no other prior or contemporaneous written or oral agreements not contained herein.

Id. The conveyance of the real property from the thirteen (13) cotenants to Sundance was effectuated in February of 2003 through the execution and delivery of seventy-four (74) deeds. *Anderson Aff.* Ex. E and F. McKay and the Turf Corporation executed ten (10) of those deeds. *Anderson Aff.* Ex. E. Each of the deeds specifically state that appurtenances are included with the conveyance, and none of the deeds exclude any water rights. In his affidavit, McKay states: "It was not my intention to convey, transfer, assign or relinquish any portion of my water right to Sundance or the Turf Company with the conveyances from the Co-Tenants to Sundance." *McKay Aff.* ¶ 48.

III. ISSUE PRESENTED

Was the subject water right conveyed via the deeds executed by McKay and/or the Turf Corporation and delivered to Sundance?

IV. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

V. ANALYSIS

Sundance argues that the subject water right was appurtenant to the land that was conveyed from the thirteen (13) cotenants to Sundance and therefore the water right passed with the conveyance. For the reasons set forth herein, this Special Master concludes that the subject water right was conveyed from Darwin McKay and/or the Turf Corporation to Sundance via the deeds executed by McKay and delivered to Sundance and therefore Sundance's *Motion for Summary Judgment* is **granted**.

At the outset, it should be noted that it is undisputed that prior to the conveyance to Sundance, McKay and/or the Turf Corporation was the sole owner of the subject water right. The affidavits on file show that McKay developed the water right as a lessee and that he never conveyed the water right to the TCM Joint Venture nor did he convey the

right to any or all of the other twelve (12) cotenants. Accordingly, the deeds from the remaining cotenants to Sundance did not convey the subject water right because those cotenants did not own the water right, McKay did.

A water right is legally treated in the same manner as an interest in real property and accordingly can only be conveyed in the same manner as real property. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151 (1952). Title to real property may be transferred by contract or deed of the owners, adverse possession, or operation of law. *Id.* (citations omitted). However, in the situation where a water right is an appurtenance to real property, it can be conveyed without expressly mentioning the water right in the deed which conveys the real property to which the right is appurtenant. In *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007), the Idaho Supreme Court stated: “Unless [water rights] are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed . . .” *Id.*, 144 Idaho at 14, 156 P.3d at 515.

The rules of construction for deeds and other instruments have been summed up by the Idaho Supreme Court as follows:

The legal effect of an unambiguous written document must be decided by the trial court as a question of law. If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact. In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties. If the language of a deed is plain and unambiguous, the intention of the parties must be ascertained from the deed itself and extrinsic evidence is not admissible. Uncertainties should be treated as ambiguities; such ambiguities are subject to be cleared up by resort to the intention of the parties as gathered from the deed, from the circumstances attending and leading up to its execution, from the subject matter, and from the situation of the parties at the time.

Benninger v. Derifield, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (internal citations omitted). The analysis as to whether the subject water right was conveyed from McKay to Sundance necessarily begins with an examination of the ten (10) deeds executed by McKay. The first four deeds set forth in Exhibit “E” to the *Anderson*

Affidavit are quitclaim deeds from McKay to the Turf Corporation; two deeds conveying parcel 1 and two deeds conveying parcel 2.³ The next two deeds are warranty deeds from the Turf Corporation to Sundance; one for parcel 1 and one for parcel 2. Following are two quitclaim deeds from the Turf Corporation to Sundance, again one deed for parcel 1 and one deed for parcel 2. The final two deeds are quitclaim deeds from McKay and his wife, Patricia E. McKay to Sundance. Each of these deeds states that the property is being conveyed with appurtenances. The deeds do not expressly mention water rights.

Although there are no obvious ambiguities or uncertainties discernable from the face of these deeds, McKay asserts in this proceeding that he did not intend to convey the subject water right to Sundance. *McKay Aff.* ¶ 48. Therefore McKay has demonstrated an uncertainty as to what water rights, if any, passed as appurtenances with the conveyance of the land. The above-quoted rules of construction state that this uncertainty is to be treated as an ambiguity; that the interpretation of an ambiguous deed is a question of fact; and extrinsic evidence (i.e. evidence beyond the four corners of the deeds) may therefore be considered.

The first place to look and the most likely place to find an expression of the parties intent as to what water rights were intended to be conveyed as appurtenances is the Purchase and Sale Agreement. As stated above, the Purchase and Sale Agreement describes the property to be purchased as the land “together with all . . . water and water rights appurtenant to or used on the Property and all shares, certificates, and other documents evidencing such water rights.” In other words, the Purchase and Sale Agreement identifies the water rights to be transferred in two ways: (1) appurtenant to the property, or (2) used on the property.

Sundance argues that the subject water right transferred from McKay to Sundance as an appurtenance to the land. Sundance bases this argument on condition number 1 of the amended license, which states: “This water right is appurtenant to the described place of use.” Sundance also cites to Idaho Code § 42-220, which states that “all rights to water confirmed under the provisions of this chapter . . . shall become appurtenant to, and

³ The legal description of parcels conveyed in the first two of these deeds from McKay to Turf Corporation excepts a portion of land lying within Overland Road right of way. The other two do not have this exception.

shall pass with a conveyance of, the land for which the right of use is granted.” I.C. § 42-220; *See also* I.C. § 42-101 (Water rights “shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . .”). Sundance also argues that McKay’s objection constitutes an impermissible collateral attack on the license because the license states that the water right is appurtenant to the place of use. McKay argues that the water right could not have passed as an appurtenance because there was no unity of title between the owners of the land (the thirteen (13) cotenants) and the owner of the water right (McKay). In other words, McKay asserts that the thirteen (13) cotenants could not convey what they did not own.

In the *Memorandum Decision and Order on Challenge*, Subcases 55-10288B *et al.*, (April 25, 2000), then SRBA Presiding Judge Wood stated:

In situations where unity of title does not exist between the water right and the land on which the water is used it is paradoxical or nonsensical to characterize the water right as being “appurtenant” to the land on which the water right is being used. The legal effect of characterizing a water right appurtenant to a parcel of land is to create a legal relationship whereby the water right automatically passes with a conveyance of land unless it is otherwise specifically excluded. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). However, in the absence of unity of title between the water right and the land on which the water right is used, as a matter of law the water right cannot automatically pass as an appurtenance to the land via the instrument conveying the land. The landowner cannot convey something he/she does not own. Kinney’s treatise states:

The doctrine is well settled in the States of the arid region, that a water right used in connection with a certain tract of land for the irrigation thereof, where necessary to the beneficial enjoyment of the land, together with the ditch, canal or other works necessary to conduct the water to the place of use, become appurtenances to the land, **provided that they are owned by the same parties. But they must be the property of the owner of the land to which it is claimed they are appurtenant, and not the property of another.**

Clesson S. Kinney, *Kinney on Irrigation and Water Rights*, § 1011 (2nd Ed. 1912)(emphasis added). Also:

[W]here one in possession of a tract of land, simply under a contract from the owner, appropriates and uses water upon the land, such a water right

does not become appurtenant to such lands, without a conveyance in writing to the owner of the lands, there being no unity of title.

Kinney at § 1020.

The legal result of having non-unity of title between the water right and its place of use is at best ambiguous as to whether the water right is appurtenant to the land. Arguable, non-unity of title effectuates a severance of any alleged appurtenancy relationship. At a minimum, an examination of the intent of the grantor is required to determine if the water right was transferred.

Id., at 15-16. Judge Wood also discussed therein the application of Idaho Code §§ 42-220 and 42-101 in the situation where there is not unity of title between the water right and the land that constitutes the place of use, stating that “even if an appurtenancy relationship were established by operation of law it is clearly severable.” *Id.*, at 17, citing *Hard v. Boise City Irr. & Land Co.*, 9 Idaho 589, 601, 76 P. 331 (1904); *Frank v. Hicks*, 35 P.475, 483 (Wyo. 1894); *Kinney* at § 1015. Generally speaking, the land to which a water right is appurtenant and the land that constitutes the place of use are usually, but not always one in the same. In the situation where the water right and the land comprising the place of use are not owned by the same party a water right could not be conveyed as an appurtenance by the owner of the land. Also, in Idaho it is possible for a water right to be appurtenant to land that does not comprise the place of use. *See Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) (stockwater rights used on federal grazing allotments passed as an appurtenance to the livestock owners’ patented property).

Under the particular facts in the record in the instant subcase, it is not accurate to state that there was no unity of title between the land being conveyed to Sundance and the water right. Although McKay separately appropriated and owned the subject water right apart from his lessor, TCM Joint Venture, the TCM Joint Venture was terminated under the Agreement of Co-Tenancy, and the land was conveyed to Sundance by the thirteen (13) cotenants. McKay was one of the thirteen (13) cotenants by virtue of having a 2.5% ownership interest in the land. Therefore, while the other twelve (12) cotenants could not have conveyed McKay’s water right for the reason that they did not have an ownership

interest in the right, it was certainly possible for McKay to have intended to convey the subject water right as an appurtenance to his undivided 1/40th interest in the land. The issue of whether McKay had such an intent is a question of fact to be determined by the trier of fact. The deeds executed by McKay state that he is conveying the land "with appurtenances." As explained above, there is uncertainty in this case as to whether the subject water right was intended to be conveyed as an appurtenance to the land. In turning to the Purchase and Sale Agreement the question is likewise not clearly answered because the Agreement also uses the same terminology – i.e. the property to be purchased as described in the Agreement includes water rights "appurtenant to" the land. There is a disputed question of material fact as to whether McKay intended to convey the water right to Sundance as an appurtenance to the land described in the deeds executed by McKay, and therefore the question of whether the water right was appurtenant to the land at the time of the conveyance cannot be decided on summary judgment. Stated another way, neither the appurtenancy clause in the deeds nor the phrase "appurtenant to" in the Agreement clearly identify the water right(s), if any, that were to be conveyed to Sundance.

That being said, it is the opinion of this Special Master that this subcase can still be decided on summary judgment. The Purchase and Sale Agreement also describes the water rights that were to be conveyed to Sundance as water rights "used on" the land. Unlike the phrase "appurtenant to," the phrase "used on" can be used to ascertain, with certainty and specificity, what water rights were intended by the parties to be included as part of the property being conveyed to Sundance.

One of the statutorily defined elements of a water right is the place of use. I.C. § 42-1411(2)(h). Often the term "appurtenant" is loosely used to refer to the place of use, but the concepts are separate and distinct. As explained by Judge Wood in the *Memorandum Decision and Order on Challenge*, Subcases 55-10288B *et al.*:

[T]he concept of 'appurtenance' is distinct from the concept of 'place of use.' The consequence of deeming a water right as appurtenant to land is to create a legal relationship whereby the water right automatically passes with a conveyance of that land, unless specifically excluded. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). The consequence of defining a particular tract of land as the 'place of use' for a water right is

to create a legal relationship whereby the use of the water cannot be relocated (transferred) to other land without following the procedures mandated by Idaho Code § 42-222. Place of use is a statutory element of a water right; appurtenancy is not. See I.C. § 42-1411(2)(h).

Id., at fn. 13. It is undisputed in this subcase that the place of use for the subject water right, as licensed and as reported in the *Director's Report* for Sundance's claim 63-31194B, is entirely within and upon the land purchased by Sundance. Therefore, there can be no dispute about what was meant by the phrase "water rights . . . used on the Property," as that phrase was used by the parties in the Purchase and Sale Agreement.

This Special Master recognizes that McKay has filed an affidavit in which he states that it was not his intent to convey the subject water right to Sundance. This Statement by McKay does not, however, create a genuine issue of material fact that would defeat summary judgment. The Purchase and Sale Agreement was an integrated document by reason of the merger clause quoted in the previous section of this opinion. The merger clause definitively establishes that the parties have agreed that the contract contains the parties' entire agreement, and therefore the contract is complete upon its face. *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). Accordingly, parol evidence of McKay's understanding or intent cannot be considered and is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract. *Id.* In a summary judgment proceeding, "the Court will consider only that material contained in the affidavits or depositions which is based upon personal knowledge and which would be admissible at trial." *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 847 P. 2d 1156 (1993). In the instant subcase, the words of the Purchase and Sale Agreement are clear and unambiguous – the parties intended that any "water rights . . . used on the Property" would be conveyed to Sundance. Again, it is undisputed that the place of use for the subject water right is located wholly upon the land conveyed to Sundance, and McKay never transferred the water right to other land prior to the land having been sold to Sundance.

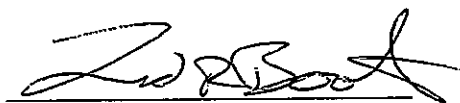
In sum, neither the deeds nor the Purchase and Sale Agreement specifically identify what water rights, if any, were intended to be conveyed to Sundance as an appurtenance to the land, and therefore that question cannot be decided on summary

judgment. That being said, the Purchase and Sale Agreement also defines the water rights to be conveyed to Sundance as the "water rights . . . used on the Property." Because the place of use for the subject water right is wholly upon the land purchased by Sundance, such land is the only place that the water right can be used, irrespective of whether or not the water right is appurtenant to the land. Accordingly, the subject water right was unambiguously identified in the Purchase and Sale Agreement as part of the property being purchased by Sundance.

VI. REPORT AND RECOMMENDATION

Based on the file and record herein, IT IS RECOMMENDED that water right 63-31194B be decreed with the elements as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)*. IT IS FURTHER RECOMMENDED that the SRBA District Court enter a final order disallowing water right claim 63-31194A with prejudice.

Dated July 8, 2009



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)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 63-31194B

NAME AND ADDRESS: SUNDANCE INVESTMENTS LTD
PARTNERSHIP
9100 W BLACKEAGLE DR
BOISE, ID 83709

SOURCE: GROUND WATER

QUANTITY: 0.62 CFS
218.20 AFY

This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the lands herein.

PRIORITY DATE: 07/22/1988

POINT OF DIVERSION: T03N R01E S21 NENW Within Ada County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	0.62 CFS 218.20 AFY

The use of water for irrigation under this right may begin as early as March 1 , provided other elements of the right are not exceeded. The use of water before March 15 under this remark is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date a partial decree is entered for this right.

PLACE OF USE:	Irrigation	Within Ada County
	T03N R01E S21	NENW 20.5
	48.5 Acres Total	SENW 28.0

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

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

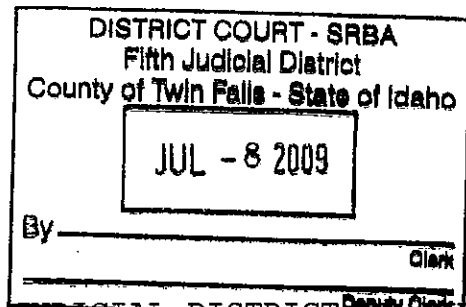
With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment 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

RECOMMENDATION

JUL - 8 2009

Lawrence B. Smith
SPECIAL MASTER



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
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): 63-31194A
63-31194B

On July 08, 2009, 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.

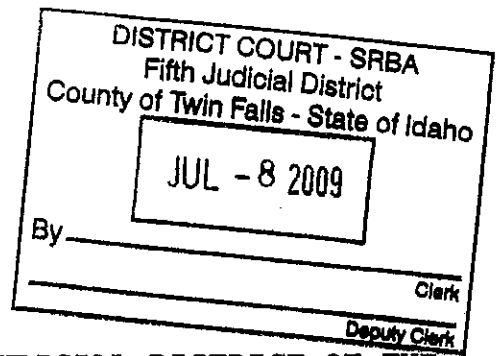
Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

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 July 08, 2009.



DIANA R DELANEY
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)
)
Case No. 39576)
_____)

CERTIFICATE OF MAILING

Water Right(s) : 63-31194A
63-31194B

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 July 08, 2009, with sufficient first-class postage prepaid to the following:

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

L DARWIN MC KAY
Represented by:
JON C GOULD
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE, ID 83701

SUNDANCE INVESTMENTS LTD
Represented by:
STOVER, RICHARD W
EBERLE BERLIN KADING TURNBOW
PO BOX 1368
BOISE, ID 83701-1368

CERTIFICATE OF MAILING

A handwritten signature in cursive script, appearing to read "Diana R. Delaney".
DIANA R DELANEY
Deputy Clerk