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RECEIVED
AUG 31 2009
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

Case No. 39576

Subcase No. 2-103

**MOTION TO ALTER OR AMEND
SPECIAL MASTER
RECOMMENDATION FOR
PARTIAL DECREE**

Black Mesa Farms LLC ("Black Mesa Farms" or "Black Mesa"), by and through its counsel Givens Pursley LLP and pursuant to Section 13 of SRBA Administrative Order 1 ("AO1"), hereby moves the Court to alter or amend the Special Master Recommendation for Partial Decree dated July 2, 2009, in the above-captioned subcase. This Motion should be granted because the Special Master Recommendation contains errors of fact and law whose origins date as far back as the original claim in this subcase.

Black Mesa raises three issues with respect to the Special Master Recommendation: (1) there should not be a remark limiting this right's diversion rate to 90.24 cfs combined with other rights; (2) there should be a remark noting that Black Mesa's are the only water rights

historically beneficially used on lands in Section 12, T6S, R12E; and/or (3) the priority date should be February 25, 1963.

This right was not previously objected to. Black Mesa recently retained counsel to review the Special Master Recommendation. Counsel has identified the issues noted above and is filing this Motion, along with a Motion to File a Late Objection and a Motion to File Amended Notice of Claim, to address these issues.

Black Mesa disagrees that the combined diversion rate of this right and others listed in the combined use remark can be limited to 90.24 cfs. In the first place, other rights listed in the recommended remark stating this limitation have not been decreed or recommended for partial decree with such a remark. *See, e.g., Subcase Nos. 2-2209E, 2-10187, 2-10189, 2-10209, 2-10337, 2-10338.* Also, this remark presumably derives from a one-time measurement of diversions from a shared point of diversion at the time of licensing of 2-2209. That measurement was made to confirm whether the pumping station had the capacity to deliver water diverted pursuant to the permit that ultimately was licensed as water right 2-2209, which it did. There is no indication in the Beneficial use field exam that the measured 90.24 cfs flow was the maximum capacity of the pumping station, or that it was taken at a time when other water rights may have been diverted (or not) through the pump or that it described a limit on the quantity of water that would be authorized to be diverted through the facility. Finally, the remark is an inappropriate limitation on right 2-103 under this Court's holding in *Order on Challenge of Facility Volume Issue and Additional Evidence Issue*, Subcase Nos. 36-02708 et al (December 29, 1999). As such, it is an improper limitation on this water right. In addition, it will not assist in administration for the rights listed in the remark to be decreed inconsistently (i.e. some with,

some without the remark). Accordingly, the remark should not be included in this right's partial decree. Black Mesa has filed a Motion for Late Objection to address this.

In addition, Black Mesa believes this right should include a remark stating that this and Black Mesa's other right (2-2209B) are the only rights that historically have been beneficially used to irrigate lands in Section 12, T6S, R12E. This is essential because at least two other claimants' rights have been decreed or recommended for partial decree with places of use that include lands in Section 12. *See, e.g., Subcase Nos. 2-10189, 2-10337.* Black Mesa owns all of Section 12. Its rights (2-103 and 2-2209B) are used to irrigate 1068 acres, including 614 acres in Section 12. The necessary remark will alert IDWR that Black Mesa's rights and others that have been decreed or recommended with a place of use in Section 12 are not "stacked" rights or otherwise supplemental to, or limited by, the other rights. Black Mesa has filed a Motion for Late Objection to address this.

Black Mesa also has filed a Motion to File Amended Notice of Claim to correct the priority date originally claimed for this right. As shown in the Beneficial Use Examiner's Report for right number 2-2209, a copy of which is attached hereto as Exhibit A, the lands in Section 14 were irrigated under that right at the time of its beneficial use field exam. Section 14, however, was not included in the license for 2-2209. The claim for this right (2-103) is intended to cover those Section 14 lands that were not licensed in 2-2209 but that had been found to have been developed and irrigated as authorized under the permit for 2-2209. However, for reasons unknown, 2-103 was incorrectly claimed with a priority date of May 10, 1965 rather than the correct date of February 25, 1963.

Black Mesa respectfully requests that this Court grant its Motion to Alter or Amend in contemplation of allowing it to amend its claim for water right 2-103, whereupon a new

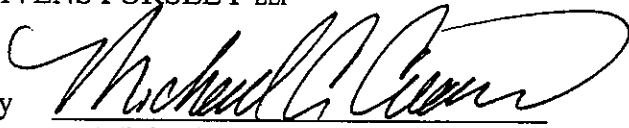
recommendation can be issued and, as necessary, the relatively complex facts and legal issues can be properly and correctly presented to the Court.

DATED this 28th day of August, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By

A handwritten signature in black ink, appearing to read "Michael C. Creamer", written over a horizontal line.

Michael C. Creamer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th of August, 2009, the foregoing was filed, served, or copied as follows:

ORIGINAL FILED

Clerk of Fifth Judicial District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
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Chief of Natural Resource Division
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☐ Hand Delivered
☐ Overnight Mail
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☐ E-mail

USDI Bureau of Reclamation
c/o US Department of Justice
Environment & Natural Resources
550 West Fort Street, MSC 033
Boise, ID 83724
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☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail



Michael C. Creamer

DEPARTMENT OF RECLAMATION

BOISE, IDAHO

02-2209

REPORT OF EXAMINER

Permit No. 30990

This proof is for Completion of Works & Beneficial Use In Water District No.

1. Name of applicant: Cottonwood Canal Company
2. Source of water supply: Snake River
3. Location of point of diversion: Is in the Lot 6 of Section 9
T. 6 S. R. 11 E. B.M. County of Elmore
4. Describe works as they exist, giving dimensions and capacities of same:
Summary: 9-600 HP ELEC VERT TURBINE PUMPS - FROM THE SNAKE RIVER - THROUGH A 44" PENSTOCK APPROX 1/4 MILE & ABOUT 150' - THROUGH 9-100 HP ELECTRIC CENTRIFUGAL BOOSTER PUMPS - 44" PENSTOCK - 3/4 MILE TO THE #1 SUB MAIN LINE BOOSTERS - WEST - THROUGH 6 OTHER SUB LINE DIVERSIONS. AT VARIOUS INTERVALS - SPRINKLER SYSTEM. (NOTE DETAILS)
5. Water is used for: Irrigation
6. State whether or not water has been turned into works of diversion: Yes
7. List legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact number of acres under cultivation in each forty-acre tract. (Describe manner and place of use if other than irrigation):
SE 1/4, W 1/4, E 1/4, SW 1/4 Sec. 1., SE 1/4 Sec. 2., E 1/4, E 1/4 NW 1/4, SW 1/4 Sec. 11., All of Sec. 12., E 1/4, NW 1/4, NE 1/4, Sec. 13., NE 1/4, NE 1/4, NW 1/4, SE 1/4, NE 1/4, SW 1/4 Sec. 14., NE 1/4, NE 1/4, Sec. 24., Twp. 6 S., Rge. 10 E., Lot 7 (SW 1/4), Sec. 6., All of Sec. 7., NE 1/4, SW 1/4, W 1/4, NE 1/4, Sec. 18., Lots 2 (SW 1/4), 3 (NW 1/4) E 1/4, SE 1/4, Sec. 19., NW 1/4, NW 1/4, Sec. 17., W 1/4, Sec. 20., Twp. 6 S., Rge. 11 E.B.M. Making a total of 4480 acres.

(Submit map on attached plat, showing location and details of above description.)

8. What large stream would the water here appropriated finally reach?.....

Remarks: Mr. R. A. NGUMBA, Mrs. PHILIP BUTTERFIELD,
J. E. ANDERSON BIDS WERE CONTACTED.
DESIGN CAPACITY - 40,500 gpm - 90.21 cfs.

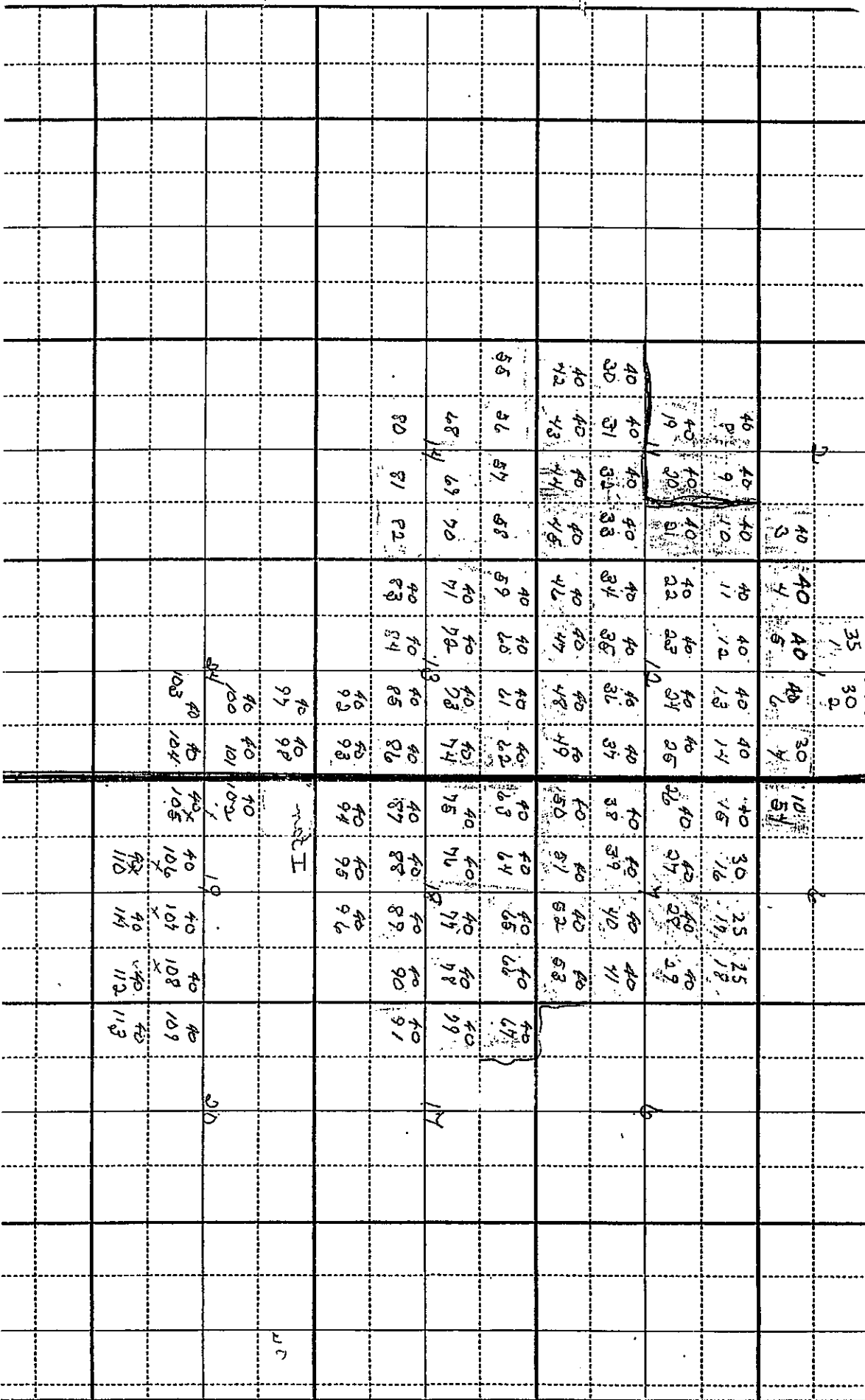
This examination was made on the _____ day of _____ 19____

(Signed) S. D. [illegible] Examiner

Examiner

EXHIBIT

Subcase 2-103



32990

Scale: 2 Inches Equals 1 Mile. Draw Map In Ink.