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DEPARTMENT OF  
WATER RESOURCES

|                                                                                           |       |
|-------------------------------------------------------------------------------------------|-------|
| DISTRICT COURT - SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |       |
| SEP 28 2009                                                                               |       |
| By _____                                                                                  | Clark |
| 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     | ) | Subcases 75-4471 and 75-10475 |
|                | ) | (Silver Peak Ranch Trust)     |
| Case No. 39576 | ) |                               |
|                | ) | SPECIAL MASTER REPORT         |

Findings of Fact

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, Reporting Area 23, Basin 75* on January 11, 2007. The Director recommended the two claims to the Silver Peak Ranch Trust, c/o Myrthus and Ron Austin, 63 Highway 93 North, Salmon, Idaho, 83467-5292, for 2.5 cfs of waste water and 1.94 cfs from Jesse Creek to irrigate 130.4 acres and 122.2 acres in Lemhi County from April 1 to October 31 or November 1 with priority dates of April 1, 1941, and April 1, 1894, based on beneficial use and a decree.<sup>1</sup>

Objections

75-10475

On October 15, 2007, Robert L. Blackadar filed an *Objection* in subcase 75-10475 alleging the water right should not exist:

<sup>1</sup> See Lemhi County *Decree*, Miller v. Long, entered by District Judge George W. Edgington on June 19, 1925.

Case No. 94-00004 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls Memorandum Decision and Order Granting Partial Summary Judgment.<sup>2</sup>

#### 75-4471

On October 16, 2007, Mr. Blackadar filed an *Objection* in subcase 74-4471 objecting to point of diversion, place of use and alleging the water right should not exist:

Waste water is not subject to demand; since the Norton Ditch bisects the property, it constrains area of use; this water right has the potential to be a liability for the public and I would encourage the State of Idaho, Department of Transportation to intervene on behalf of the public.

#### Supplemental Director's Report

IDWR filed its *Supplemental Director's Report Regarding Subcase Nos. 75-4471 and 75-10475* on March 2, 2009. To start with, IDWR wrote that it partially agrees with Mr. Blackadar and amended its recommendations as follows:

|                      | <u>Original</u>        | <u>Amended</u>                                                                                                                 |
|----------------------|------------------------|--------------------------------------------------------------------------------------------------------------------------------|
| <b>75-10475</b>      |                        |                                                                                                                                |
| quantity             | <del>1.94 cfs</del>    | 1.44 cfs                                                                                                                       |
| place of use         | <del>122.2 acres</del> | 29.7 acres                                                                                                                     |
|                      |                        | Right Nos. 75-4471 and 75-10475 are limited to the irrigation of a combined total of 29.7 acres in a single irrigation season. |
| explanatory material |                        | Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.                                    |
| <b>75-4471</b>       |                        |                                                                                                                                |
| quantity             | <del>2.5 cfs</del>     | .6 cfs                                                                                                                         |
| priority date        | <del>04/01/1941</del>  | 04/01/1942                                                                                                                     |
| period of use        | <del>04/01-11/01</del> | 04/01 10/31                                                                                                                    |
| place of use         | <del>130.4 acres</del> | 29.7 acres                                                                                                                     |
|                      |                        | Right Nos. 75-4471 and 75-10475 are limited to the irrigation of a combined total of 29.7 acres in a single irrigation season. |

#### 75-10475

IDWR amended its recommendation of 74-10475 because it agreed that one of the decreed water rights (75-9), included as a basis of Silver Peak Ranch's claim, was essentially

<sup>2</sup> See *Memorandum Decision and Order Granting Partial Summary Judgment, Order Denying Motion to Suppress Evidence, Blackadar v. Austin*, case no. 94-00004, entered by former SRBA Presiding Judge Daniel C. Hurlbutt, Jr., on July 7, 1995.

disallowed by Judge Hurlbutt in 1995.<sup>3</sup> However, Judge Hurlbutt left the second decreed water right (75-3) reported to be a basis for 74-10475, undetermined: “The record in this case does not contain sufficient evidence to rule upon the ownership or validity of a claim to water right no. 75-00003.” *Memorandum Decision*, at 7. Given those facts, IDWR wrote:

The Department agrees with Mr. Blackadar that the decision in SRBA Subcase 94-00004 is applicable. The Department also agrees the portion of this claim [75-10475] linked to decreed right 75-9 should be disallowed because of the SRBA Court’s decision on summary judgment. However, the Court’s order leaves open the question of the validity of 75-3.

*Supplemental Director’s Report*, at 4.

Mr. Blackadar argued that Silver Peak Ranch’s recommended place of use based on decreed water right 75-3 should not have included three parcels not included in the *Miller v. Long Decree*. In response, IDWR wrote that most of the recommended place of use lies within those three parcels because water delivery records support the claim that there was a transfer<sup>4</sup> of the 1894 water from the place of use described in the *Miller v. Long* decree to the Silver Peak Ranch property:

[T]here are extensive historical records showing this right has been delivered to the predecessors of Silver Creek [Peak] Ranch Trust. These records, coupled with the fact that no one contested the historic delivery of this water right for decades, no one else claimed this water right for themselves and the decreed place of use is no longer irrigated, leads the Department to conclude this portion of the water right should be recommended as valid to Silver Peak Ranch Trust.

*Supplemental Director’s Report*, at 6.

Next, Mr. Blackadar argued that Silver Peak Ranch cannot be the owners of water right 75-3 because William Boomer, the original decreed owner, sold his and his wife’s “first right water” to the City of Salmon for \$4,400 in 1937. *Report*, attachment D and Blackadar Exhibit 5; also see Blackadar Exhibit 6.

IDWR answered that argument four ways. First, water right 75-3 is actually “eighth right water” from Jesse Creek, not the “first right water” deeded to the City. Second, water right 75-3 was recorded in a wholly separate Book of Judgments than cited in the Boomer deed of their

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<sup>3</sup> Judge Hurlbutt found that 75-9 was not appurtenant to Myrthus Austin’s land, now owned by Silver Peak Ranch, because the deed from the Gilmore & Pittsburg (or Pittsburgh) Railroad Company to Matthias Austin (Myrthus Austin’s brother) excluded and reserved all decreed water rights. Also see Blackadar Exhibit 7; decreed water right 75-9 was Salmon River water, not water from Jesse Creek. For a more complete discussion of this history, see IDWR’s *Supplemental Director’s Report*, at 2-4.

<sup>4</sup> See I.C. § 42-1425, accomplished transfers prior to November 19, 1987.

water right to the City. Third, the deed said the water right the Boomers sold to the City was not less than 22 inches, while water right 75-3 is 72 inches. And fourth, IDWR records show water right 75-3 being delivered for many decades to the Austin family, not the City.

Thus, given the ambiguities surrounding the deed and the fact that this water has historically been delivered to the Austin family, the Department believes that this water should be recommended to Silver Creek [Peak] Ranch Trust.

*Supplemental Director's Report*, at 8.

#### 75-4471

Mr. Blackadar objected to the recommended point of diversion. He felt it should be the point where the water is taken from the Farmer's Ditch and not where the Farmer's Ditch diverts from Jesse Creek.

That issue was addressed in the *Special Master Report and Recommendation*, subcases 75-14, *et al.*, dated September 23, 2009. There, the Special Master agreed with IDWR's finding "that from the actual physical topography and history of water delivery, the characteristics of Farmer's Ditch are those of a ditch and not a natural channel." *Special Master Report*, at 7. Therefore, the correct point of diversion for all but one of those rights, as well as 75-4471, should be as recommended by IDWR – where the Farmer's Ditch diverts from Jesse Creek.

IDWR then summarized Mr. Blackadar's remaining objections to their recommendation of 75-4471: "waste water being subject to demand, limiting the place of use to that constrained by the Norton Ditch, and the waste water posing a liability for the public." *Supplemental Director's Report*, at 9.

On the first point, IDWR noted that in Idaho and the SRBA, waste water can be decreed as a water right subject to the original appropriator recapturing the water for reuse. In support, it cited *A&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005). It also mentioned that Ron Austin, head trustee for Silver Peak Ranch, understands that the source of waste water appurtenant to his land may stop at any time.

As to Mr. Blackadar's second point, that Silver Peak Ranch's water right 75-4471 "should be limited to property south and west of the Norton Ditch about 15 acres," IDWR met with Mr. Austin and he agreed he does not irrigate land east of the Norton Ditch with Jesse

Creek water. Mr. Austin also agreed to alter the place of use to Silver Peak Ranch's 29.7 acres west of the Norton Ditch and IDWR amended its recommendation to match.<sup>5</sup>

On Mr. Blackadar's third point concerning public safety, IDWR wrote simply: The issue of ditch safety, while always important, is outside the scope of this adjudication and must be addressed outside the SRBA. The Department sees no reason to modify its recommendation to address this issue.

*Supplemental Director's Report*, at 10.

## **Trial**

A trial on Mr. Blackadar's *Objections* in subcases 74-10475 and 75-4471 was held on July 17, 2009, in Salmon, Idaho. Mr. Blackadar appeared *pro se*, along with Matt McKeegan; Ron Austin (Silver Peak Ranch) appeared *pro se*; and Garrick L. Baxter appeared for IDWR, along with Monica Van Bussum and Suzy Cooley-Denney.

Before the actual trial began, Mr. Blackadar, IDWR representatives and the Special Master conducted a site visit that included viewing the length of Farmer's Ditch and IDWR's recommended places of use for the two claims.<sup>6</sup>

At trial, IDWR's *Supplemental Director's Report* (I.R.E. 706 Report) was admitted in lieu of extended testimony by senior water resource agent Ms. Van Bussum. She confirmed the contents of the *Report*, including its amended recommendations. *Report*, attachments E and F.

In subcase 75-10475, Mr. Blackadar argued there was a mistake in which County Recorder Book of Judgments the *Miller v. Long Decree* was recorded, the book cited in the 1937 deed ("Indenture") of first water from the Boomers to the City of Salmon. To him, this suggested the Boomers actually deeded water right 75-3; hence, Silver Peak Ranch cannot claim water right 75-3 as a basis for water right 75-10475 as recommended by IDWR. He also argued the Boomers sold 22 inches of Jesse Creek water and abandoned the rest.

During the site visit and at trial, Mr. Blackadar expressed a major concern for public safety because of the open ditch conveying waste water claimed by Silver Peak Ranch in subcase 75-4471. Where the ditch runs alongside US Highway 93 in front of businesses and offices, he said it potentially endangers motorists and the public generally.

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<sup>5</sup> At trial, Ron Austin said Silver Peak Ranch cannot use the Norton Ditch because it is too low and pumping the water too expensive.

<sup>6</sup> This site visit was combined with a site visit as part of the trial in subcases 75-14, *et al.*, begun the day before.

Near the close of trial, Ron Austin, head trustee of Silver Peak Ranch, asked to say a few words, so the Special Master called him as a witness for the Court. Mr. Austin said Silver Peak Ranch's waste water claim 75-4471 will not affect Mr. Blackadar because it is essentially a high water claim. Silver Peak Ranch is at the end of the ditch, he understands it is waste water and they have been using the water for years without objections.

### Conclusions of Law

#### 75-10475

There is no evidence to support Mr. Blackadar's assertion that the Boomers sold water right 75-3 to the City of Salmon. The facts that the water has historically been delivered to the Austin family and the City never called for the water suggest otherwise.

Further, the record supports IDWR's conclusion that decreed water right 75-3 can be a basis for Silver Peaks Ranch's claim 75-10475. Water delivery records as far back as 1944, and before show W.D. Boomer, the original decreed owner of the water right, receiving 1894 water. Within three years, Mr. Boomer's name disappears from the records and Matt Austin appears for the first time as the owner of the water right. *Supplemental Director's Report*, attachment C.

The logical conclusion is that water right 75-3 was transferred from the Boomers' land to Matt Austin's land which now belongs to Silver Peak Ranch. IDWR correctly concluded that there was a valid accomplished transfer from decreed land to land not included in the decree in accordance with I.C. § 42-1425.

#### 75-4471

Mr. Blackadar's objections to Silver Peak Ranch's waste water claim were clearly addressed by IDWR in its *Supplemental Director's Report* and the Special Master adopts them wholly, including Ron Austin's concession on place of use. But Mr. Blackadar's argument stating "waste water is not subject to demand" warrants further discussion.

On its face, Mr. Blackadar's argument is correct, that a waste water appropriator cannot demand delivery of the water. Generally speaking, under certain circumstances, waste water may be stopped at any time. But in case Mr. Blackadar has suggested that waste water cannot be lawfully appropriated, it might be useful to consider some broad principles of water law.

The general rule is that one may recapture and reuse seepage and “waste” water so long as it is recaptured and reused within the original land and for the original purpose of the right. As soon as the water leaves the appropriator’s land and is in or destined for a natural stream it becomes subject to appropriation by others [citations omitted].

David H. Getches, *Water Law*, 114 (2<sup>nd</sup> ed., West 1990).

The term “waste water” includes the tail water left at the end of an irrigated field, the seepage water that leaks out of canals, the excess water applied to crops that percolates into the soil, and waste water generated by industrial processes or by a municipality.

...

An appropriation of waste water by a third party will be allowed following release of the waste water by the original appropriator back into an aquifer or natural stream. An important caveat is that the new appropriator has no guarantee that the waste water will continue to be available. For instance, the original appropriator who generates the waste water could cease diverting altogether so as to leave the new appropriator without a water source. Likewise, the original appropriator might alter his or her operation to reduce the amount of waste water generated (e.g., by ditch lining). Finally, the original appropriator may recapture the waste before it leaves his or her control.

Jeffrey C. Fereday, Christopher H. Meyer and Michael C. Creamer, Givens Pursley, LLP, *Water Law Handbook, the Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho*, 149-151 (March 15, 2007).

Silver Peak Ranch Trust is entitled to partial decrees adjudicating water rights as recommended by IDWR in its *Supplemental Director’s Report*, attachments E and F, and as described in the attached *Special Master Recommendations for Partial Decrees for Water Rights 75-4471 and 75-10475*.<sup>7</sup>

DATED September 28, 2009.

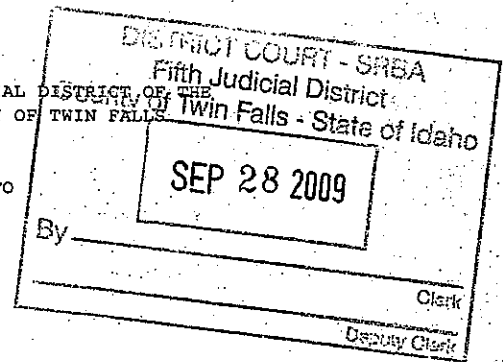


TERRENCE A. DOLAN  
Special Master  
Snake River Basin Adjudication

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<sup>7</sup> Water Right 75-10475 was recommended in the September 23, 2009 *Special Master Report and Recommendation*, subcases 75-14 et al., as an uncontested overlapping claim. Since the trial in 75-14, et al., IDWR amended its recommendation of 75-10475 and the attached recommendation reflects that change.

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 75-10475

NAME AND ADDRESS: SILVER PEAK RANCH TRUST  
C/O MYRTHUS AUSTIN/RON AUSTIN  
63 HWY 93 N  
SALMON, ID 83467-5292

SOURCE: JESSE CREEK TRIBUTARY: SALMON RIVER

QUANTITY: 1.44 CFS

PRIORITY DATE: 04/01/1894

POINT OF DIVERSION: T21N R22E S01 SWNW Within Lemhi County

| PURPOSE AND PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE  | QUANTITY |
|----------------------------|----------------|----------------|----------|
|                            | Irrigation     | 04-01 TO 10-31 | 1.44 CFS |

| PLACE OF USE: | Irrigation              | Within Lemhi County |
|---------------|-------------------------|---------------------|
|               | T22N R22E S31 SENE 20.0 | NESE 9.3            |
|               | S32 LOT 6 (NWSW) 0.4    |                     |
|               | 29.7 Acres Total        |                     |

RIGHT NOS. 75-4471 AND 75-10475 ARE LIMITED TO THE IRRIGATION  
OF A COMBINED TOTAL OF 29.7 ACRES IN A SINGLE IRRIGATION SEASON.

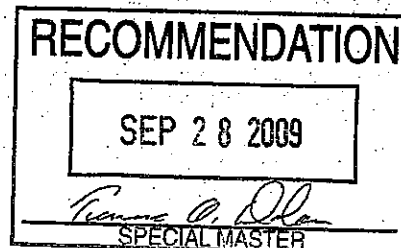
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

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).

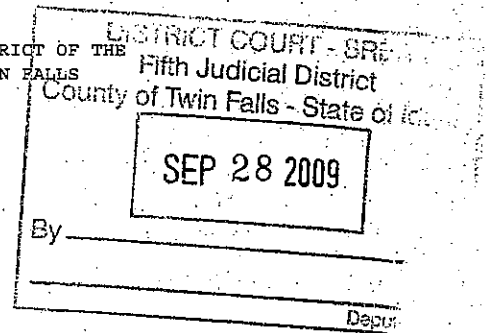
RULE 54(b) CERTIFICATE

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



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 75-04471

NAME AND ADDRESS: SILVER PEAK RANCH TRUST  
C/O MYRTHUS AUSTIN/RON AUSTIN  
63 HWY 93 N  
SALMON, ID 83467-5292

SOURCE: WASTE WATER TRIBUTARY: SALMON RIVER

QUANTITY: 0.60 CFS

PRIORITY DATE: 04/01/1942

POINT OF DIVERSION: T22N R22E S31 SESW Within Lemhi County

| PURPOSE AND PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE  | QUANTITY |
|----------------------------|----------------|----------------|----------|
|                            | Irrigation     | 04-01 TO 11-01 | 0.60 CFS |

| PLACE OF USE: | Irrigation              | Within Lemhi County |
|---------------|-------------------------|---------------------|
|               | T22N R22E S31 SENE 20.0 | NESE 9.3            |
|               | S32 LOT 6 (NWSW) 0.4    |                     |
|               | 29.7 Acres Total        |                     |

RIGHT NOS. 75-4471 AND 75-10475 ARE LIMITED TO THE IRRIGATION  
OF A COMBINED TOTAL OF 29.7 ACRES IN A SINGLE IRRIGATION SEASON.

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

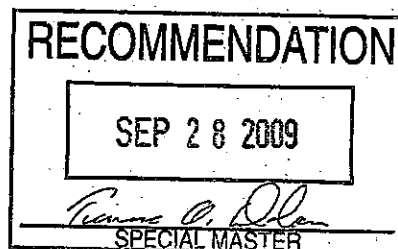
This right remains subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place or manner of wasting it, or to recapture it.

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



|                                                                                           |              |
|-------------------------------------------------------------------------------------------|--------------|
| DISTRICT COURT - SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |              |
| SEP 28 2009                                                                               |              |
| 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 )  
 )  
Case No. 39576 )  
 )  
\_\_\_\_\_ )

NOTICE OF ISSUANCE OF  
SPECIAL MASTER'S  
RECOMMENDATION

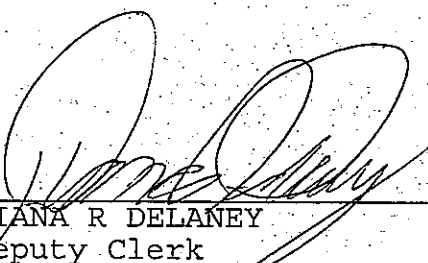
Water Right(s): 75-04471  
75-10475

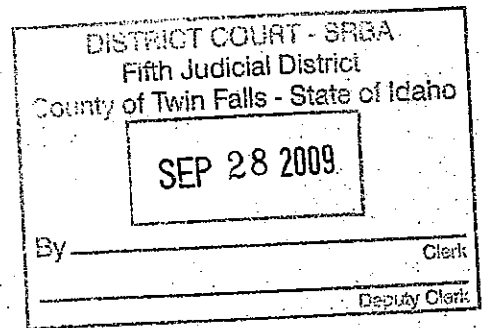
On September 28, 2009, Special Master TERRENCE A. DOLAN issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

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 September 28, 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): 75-04471  
75-10475

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 September 28, 2009, with sufficient first-class postage prepaid to the following:

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

SILVER PEAK RANCH TRUST  
C/O MYRTHUS AUSTIN/RON AUSTIN  
63 HWY 93 N  
SALMON, ID 83467-5292  
Phone: 208-756-3368

ROBERT L BLACKADAR  
10 N CHEROKEE RD  
SALMON, ID 83467  
Phone: 208-756-4967

CERTIFICATE OF MAILING

A handwritten signature in black ink, appearing to read "Diana R. Delaney".

DIANA R DELANEY  
Deputy Clerk

PAGE 1  
09/28/09