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May 21, 2010

Clerk of the District Court-SRBA
Fifth Judicial District
County of Twin Falls- State of Idaho
253 Third Avenue North
PO Box 2707
Twin Falls, Idaho 83303

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAY 24 2010	
By _____	Clerk
_____	Deputy Clerk

In Re SRBA Case No. 39576

**Motion to Alter or Amend
SPECIAL MASTER'S RECOMMENDATION**

Motions to the Court:

- 1) That the Court order the withholding of any partial decrees for claims under this case pending the disposition of the two private party civil lawsuits filed by lower Wallace Creek water users against upper Wallace Creek water users. These lawsuits allege damages to plaintiffs' properties by defendants due to waste of water and over watering of areas that were never historically irrigated. Claims for expanded water rights in those same areas by the defendants named in both lawsuits are now recommended to be partially decreed by IDWR. Extensive property damage has occurred on properties owned by Farley, Shefts, McClain/Wong, and Waite due to water waste and over watering within the Upper Wallace Creek use area.

I believe that these two lawsuits will establish as fact the exhibits that I presented in SRBA Case No 39576 proving lack of historic beneficial use on the claimants' properties (Gooby, Odell, Barinaga/Williams, Bourdon, Sneed, Marcus/Sims/Slavin) and two of the three previously issued partial decrees (Olsen, Maulem.)

- 2) That the Court rescind or order the withholding of any partial decrees for claims under this case until IDWR can submit photo documentation in support of Mr. Bill Maxwell Junior's testimony that would override the photo documentation that I have provided as evidence to the contrary in exhibits given to the Court, evidence that clearly controverts Mr. Maxwell Junior's testimony. What exhibits or photo documentation did Mr. Maxwell Junior submit in support of his testimony? I am a thirty year resident of the Upper Wallace Creek water use area. From 1981 to 1985, my wife Gail was employed by Mr. Bud Leslie to irrigate all of the historically irrigated land in the subdivision. From 1985 until 1992, my wife and I were both employed by Bill Maxwell Senior to irrigate all

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of the historically irrigated land in the subdivision, again, the exact area involved in this dispute—and yet it seems my exhibits and testimony have been ignored by IDWR in making their recommendations. During this same period, Mr. Maxwell *Senior* was running his ranch and actively managing the subdivision properties. Mr. Maxwell *Junior*, who testified at the trial, was teaching school and was not actively involved in the day-to-day activities on the ranch or the subdivided properties served by the upper and lower Wallace Creek irrigation infrastructure. During the time period from 1985 to 1992, I was much more involved in the irrigation of the areas in question than was Mr. Maxwell *Junior*. Mr. Maxwell *Junior's* testimony, given without and in lieu of photographic evidence presented by me to the contrary, in no way gives *prima facie* weight to Ms. Van Bussum's findings, many of which are in error. As stated by Special Master Dolan, Mr. Maxwell is not a mapping expert. Nor do I recall Mrs. Van Bussum describing herself as an expert witness in her field. I respectfully suggest that determinations of fact and deliberations as important as these deserve a thorough review by experts.

The Sanderson ditch never carried more water than was used to irrigate plus or minus 20 acres, and never after July 4th during the first 17 years of my residence on the property from 1980 to 1997—*bracketing the year 1987*. Twenty of those acres are on my property. **The 32 acres within the Sanderson patent that was irrigated historically was never irrigated all at one time.**

Subsequent to the Court's issuing its new draft partial decrees, attempts by Mr. Gooby, Mr. Maulem and Mr. Bourdon to convey approximately 2.0 cfs through the Sanderson Ditch resulted in a blowout of the ditch bank on Saturday, May 1, 2010. Mr. Bill Maxwell Junior, who discovered it, notified me of this occurrence. It appears that this blowout was the result of heavy equipment being used on multiple occasions to increase the capacity on this and other portions of the ditch by the Savage Ranch Water Users Association (SRWUA), weakening the base slope. When Mr. Maxwell took emergency action to shut off the flow of water at the diversion point on US Forest Service lands, the head gate had been opened to maximum flow.

Mr. Gooby, Mr. Maulem and Mr. Bourdon were wasting this water as none was being applied for irrigation on any of the users' properties. Additionally, having increased the volumetric capacity and the flow of water within the ditch well beyond what it has ever historically carried, they caused damage to the ditch and *extensive* damage to the U.S. Forest Service Lands it crosses.

The Sanderson ditch was historically maintained with hand tools, i.e., a shovel. It could NEVER have supported all of the claims now made by all of the new users that are represented in this and other Upper Wallace Creek cases.

- 3) That the Court order the withholding of any partial decrees for claims under this case because three partial decrees for this use area (Olsen, Geidel and Maulem) were issued but IDWR failed to notify me that they had been issued. A discontinuance of service was issued to IDWR by my prior attorney, Kent Foster, but IDWR lost this notice.

- 4) That the Court order the withholding of any partial decrees for claims under this case until the evidence that I have submitted in exhibits A through V be given proper consideration by IDWR.
- 5) That the Court order the withholding of any partial decrees for claims under this case until the evidence I have submitted regarding the Sanderson patent is reexamined. A priority date of 1923 is not applicable to claims within use areas outside the boundary of the original Sanderson patent, and certainly not on ground that was not irrigated until after the turn of the century (year 2000.)

WHY WERE ALL OF THESE PROPERTIES' CLAIMS GIVEN THE SAME 1923 PRIORITY DATE?

- 6) That the Court order the withholding of any partial decrees for claims under this case until IDWR justifies its use of ArcGIS technology in determining the recommendations made in this case. The methodology used by IDWR technicians to determine areas of historic use has resulted in inaccurate conclusions by IDWR, which the Court has used in the determination of the outcome of this case. ***My own initial recommendation incorrectly identified the only unirrigated ground on my property as the only ground to be recommended!*** My own recommendation was subsequently changed after ground truthing.
- 7) That the court order the withholding of any partial decrees for claims under this case until the recommendations for all claims may be scrutinized after surveying in, then ground truthing the recommended partial decree areas in conjunction with use of 1987 aerial photography by a qualified botanist. The methodology used by IDWR technicians to determine areas of historic use has resulted in inaccurate conclusions by IDWR—including my own as in #5 above—which the Court has used in the determination of the outcome of this case. Numerous areas outside the Sanderson patent that are now recommended were not historically irrigated, as indicated clearly in my testimony and the photographic exhibits I provided. IDWR is now issuing recommendations for large areas of sage steppe that were never irrigated until after the year 2000. These areas have been interpreted by IDWR as irrigated lands when in fact, they were (at best) historically dry land pasture. Other areas recommended for rights were never irrigated due to extreme slope.
- 8) That the court order a reexamination of all of the draft partial decrees issued for the Upper Wallace Creek use area for properties that claim to have been served by the Sanderson Ditch, because evidence presented at trial **does not** *“support IDWR’s recommendation of these five Upper Wallace Creek claims.”* Additionally, due to actions by IDWR attorney Mr. Garrick Baxter, evidence that should have been presented—in the form of my own testimony—was not presented. Prior to the trial proceedings held by Special Master Dolan on September 30, 2009, I was asked by attorney Baxter to leave the courtroom for an off-the-record discussion. In the hall, Mr. Baxter, supported by Atty. Rigby and in the presence of Atty. Slavin, posed to me an implied threat that, *“...If you’re going to argue the Sanderson homestead patent thing, you will be breaking your own knees... we have already issued partial decrees, Mr. Waite. The earliest priority date you are going to get is 1954. Mr. Rigby followed with, “How many times do you run over a dead cat?” Mr. Slavin followed with*

"Jeff, what they're saying is true.. if you argue the Sanderson lands thing.. so you need to think about it. Everybody else will be ahead of you."

The implication was that since IDWR had already issued (uncontested) partial decrees—the ones that I did not get notice of—that they were going to block/not allow my arguments, and that I would then be given a later priority date (1954 or *"perhaps as late as 1968"* versus 1923) than everyone else for the same water. And this in spite of the fact that I hold the only right to convey water through the Sanderson Ditch, granted to me through the Use and Maintenance Agreement signed by the U.S. Forest Service in accordance with the Colorado Ditch Bill, on the authority of the U.S. Congress. I feel that I was taken advantage of because I had no attorney. This discussion should have been held on the record before Special Master Dolan. I was admonished not to argue the information I now give immediately below:

Sanderson patent properties:

Waite: All of the Waite property was within the Sanderson patent, including **20 acres** that have historically been irrigated.

Olsen: Only **3 acres** of the current recommendation were a part of the Sanderson patent*. Contrary to IDWR's ArcGIS facilitated determination, none of the other Olsen property was irrigated during my residence here from 1980 to 2003.

Maulem: I sold Mr. Maulem **5 acres** (only) of the ground historically irrigated under the Sanderson patent, as was noted on Mr. Maulem's deed of trust*. Contrary to IDWR's ArcGIS facilitated determination, none of the other Maulem property was irrigated during my residence here from 1980 to 2003.

Bourdon: Only **2 acres** of Bourdon property is within the Sanderson patent area*. Contrary to IDWR's ArcGIS facilitated determination, none of the other Bourdon property was irrigated during my residence here from 1980 to 2003. A temporary watering attempt by Slavin in/about 1994 resulted in a massive mudslide. Another watering attempt by Miller in/about 2002 to 2003 resulted in a second massive mudslide. Note: Mr. Bourdon's watering in 2004-2005 resulted in a third mudslide.

**The Olsen, Bourdon, and Maulem recommendations and draft partial decrees drastically exceed the amounts of acreage historically irrigated under the Sanderson patent.*

Geidel: Mr. Geidel's property (**2 acres**) was part of the Sanderson patent. During the period from 1985 to 1992, the Geidel property was periodically watered, but only prior to July 4th each year, and only if there was enough water (the Sanderson Ditch was ordered shut off each year on July 4 by Bill Maxwell Senior.)

Farley (riverfront): was irrigated by recovered tailwater from an existing draw, said draw now completely covered by the mudslide that emanated on the Bourdon property.

Waite, 20 acres; Olsen, 3 acres; Maulem, 5 acres; Bourdon, 2 acres; Geidel, 2 acres.

The total irrigated acreage within the original Sanderson patent was 32 acres.

Non-Sanderson patent properties

Gooby: All Gooby property lies outside the Sanderson patent area, and was not irrigated until the SRBA claims were filed and the initial water delivery system was constructed around the year 2002.

Sneed: This property was never a part of the Sanderson patent. This property was never irrigated with water from the Sanderson ditch during my residence here from 1980 to present. Testimony by Bill Maxwell Junior at trial confirmed this, at which time, a partial decree having already been issued, Special Master Dolan was prompted to ask Attorney Baxter "What are you going to do about that, Mr. Baxter." (paraphrased)

Marcus/Sims/Slavin: This property was never a part of the Sanderson patent. This property was never irrigated with water from the Sanderson ditch during my residence here from 1980 to present. The water that Marcus/Sims/Slavin have claimed actually drained through a gully to the Farley property (riverfront).

Barinaga/Williams: This property was never a part of the Sanderson patent. This property was never irrigated with water from the Sanderson ditch during my residence here from 1980 to present.

Odell: This property was never a part of the Sanderson patent. This property was never irrigated with water from the Sanderson ditch during my residence here from 1980 to present.

AGAIN, WHY WERE ALL THESE PROPERTIES' CLAIMS GIVEN THE SAME 1923 PRIORITY DATE?

On page 3 of the Court's findings of fact, under Trial, Special Master Dolan *states* "Mrs. Van Bussum, a senior water resource agent for IDWR, presented the basis for IDWR's recommendations of these Upper Wallace Creek claims. All the parcels were once part of the Joseph Sanderson Homestead patented on April 17, 1923."

This information is incorrect. All of the parcels **were not** once part of the Sanderson patent. And thus, as was stated in Special Master Dolan's request for suggestions, "*The uniform priority date of 1923 recommended...*" **does not** make sense "*..from a fairness standpoint..*"

The Sanderson claim dated 1923 was **specific to** (historic) Government Lots #5, #10 and #11. Most of IDWR's current recommendations **are not** on ground contained within those lots. Sanderson homestead claims were conditional upon congressional approval granted through the patent and the Colorado Ditch bill. These rights to covey are neither transferable nor applicable to adjacent lands. And thus, "*Evidence presented at trial..*" **does not** "*..support IDWR's recommendation of these five Upper Wallace Creek claims.*"

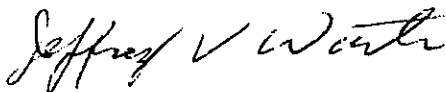
On page 7, Special Master Dolan states "*Throughout the testimony, it was evident that most of the land was not irrigated as early as 1923, but instead the lands were irrigated as the water delivery system was developed and expanded over the years.*" That statement is only partially true, as the majority of the water use area delivery system was installed beginning in the year 2002. Mr. Waite's testimony and Exhibit I "*1923 Sanderson Homestead up to 2000 (77 years) and New Claim Assertions actual Extensions since 2002*" clearly shows the expansions made in 2002 after the SRBA claims process was entered into by Gooby, Olsen, and Bourdon to run water to their properties in order to prove beneficial use.

Also on page 7, "*According to Mr. Waite, some undetermined lands on or near the Sanderson Homestead were possibly irrigated as early as 1918 from placer mining ditches.*" **This is not**

what Mr. Waite stated during the trial. Mr. Waite stated that “..earlier than 1918, there were placer mining sites served by ditches and pipes outside the Sanderson Homestead.”

The Barinega/Williams and Odell properties are examples of mining claims that can be found in the Lemhi County mining records. Exhibits presented by Barinega Atty. Rigby show hydraulic mining pipes that were left after the mining sites were abandoned. The implication is that these pipes carried agricultural water. In truth, these pipes and many more like them left around the subdivision were used to hydraulically mine numerous placer sites (still visible) for gold, not used to irrigate for agricultural use. **Mr. Waite did not state** that *“It would not be a stretch to imagine small plots along those ditches crossing the Homestead and beyond having gardens to grow subsistence crops.”* This statement seems almost nonsensical, as though to invoke a vision of aboriginals camped somewhere along the bison migration routes. To my knowledge, no one presented any such archaeological evidence during the trial to suggest this. What happened to the concept of continuous beneficial use versus abandonment? The only habitation and homestead on or around the Sanderson site for the 83 years prior to 1994 (arrival of Gooby) was the Sanderson homestead, which I have currently occupied for the past 30 years.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jeffrey V. Waite".

Jeffrey V. Waite