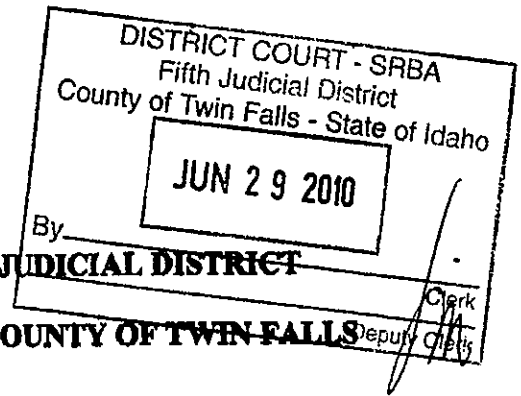


John E. Burns & Ruth C. Burns
 Box 264
 Carmen, Idaho 83462



**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

**Subcases 75-10061A, et al. (See Exhibit A)
 (Carmen Creek)**

**RESPONSE TO OPPOSITION TO MOTION FOR
 REHEARING OF ORDER DENYING MOTION
 TO REMAND SUBCASES**

COMES NOW JOHN E. & RUTH C. BURNS, holders of Decreed Water Rights in Water District 75-D and claimants thereof in the SRBA, who by and through themselves, file this *Response to Opposition to Motion for Rehearing of Order Denying Motion to Remand Subcases*.

On June 11, 2010, Special Master Terrance A. Dolan denied the Claimants' *Motion to Remand Subcases to the Director of IDWR* filed on May 11, 2010, by Robert L. Harris, attorney of record for John E. & Ruth C. Burns, George Matejko, Rick & Linda Rice, Robert M. & Jaqueline D. Ernest, William W. Clementz, and James R. & Rowena D. Quinn. Hearing on the motion was held in Twin Falls on June 3, 2010. Mr. Harris represented the *South Side Group* by telephone.

The Court's Order of June 11, 2010, denied the motion of *South Side Group* for remand to the Director, IDWR, in accordance with the mandatory provisions of I.C. 42-1425(2)(a). Claimants seek *Rehearing* of the Court's denial of the *Remand*. Failure to comply with the requirements of the Statute will deny Claimants' right of due process and preclude a complete and accurate administrative record prior to trial. In addition, the Court, in denying the *Motion for Remand* relied upon prejudicial errors of fact, omissions, and generalizations presented at the hearing.

Contrary to the convoluted reasoning and narrative presented by the Fols Group in its opposition to the *Motion for Rehearing*, the Statutory Requirement of I.C. 42-1425(2)(a) is clear and concise. The Respondent's statements and rationale for opposing the *Motion for Rehearing* are faulty for a number of reasons:

RESPONSE TO OPPOSITION TO MOTION FOR REHEARING OF ORDER DENYING REMAND. PAGE 1 OF 5.

RESPONSE

1. **The language of Idaho Code Section 42-1425(2)(a) is concise and unambiguous.** The statute states, "If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, **the District Court shall remand the water right to the director for further hearing** to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right."

Claimant's respectfully disagree with the Court's interpretation that language in 42-1425(2), preceding the quotation above, somehow modifies or renders moot the remand requirements that follow in 42-1425(2)(a.) The former deals with the circumstances under which a claim of accomplished transfer may be made, while the latter deals with specific remand and administrative hearing requirements in the event accomplished transfer **has been recommended by the Director.**

2. **Claimants are entitled to due process and the development of a full and complete administrative record.** The SRBA Court, in its Order of May 25, 2010, noted that "Members of the Burns Group" had filed objections to the Supplemental Director's Report, and the Court further stated that in regard to the distribution of Exchange Water Rights there is an **"undeveloped record at this stage of proceedings."**

The SRBA Court Presiding Judge, in further discussion of the Director's recommendations, also took specific note of the substantial changes between the original *Director's Report* and the *Supplemental Director's Report*, and observed that the **"direct conflict in the two recommendations lessens the weight of the more recent Supplemental Director's Report."** The findings of the SRBA Court as described in detail in the May 25, 2010, Order by Presiding Judge Wildman can only be construed to reinforce the need for development of a proper and complete record by means of the Department hearing.

3. **The inability of counsel participating in the hearing on June 3 to respond with actual facts was very obvious, notwithstanding the Court's efforts to obtain clarity.**

Referring to that discussion and uncertainty, the Court in its Order of June 11, 2010, states, "There was **general agreement that the land was first subdivided in the 1970's** when certain parcels were allocated their share of the 1875 and 1882 exchange water." With respect, the first sale of land from the Palmer homestead was made in 1915, **not the "1970's"** as stated in the Court's order. In fact, several sales by Mr. Frank Parmenter in the 1960's also took place on the South Side, contrary to the order's language.

Major acquisitions by Mr. Parmenter in 1946, 1951, and 1954, resulted in his ownership of some 650 contiguous acres. **Significant additional water rights, including additional "exchange water," came with those lands.** The impression that the 160 acre Palmer homestead and the 40 acre 1912 Desert Land Patent passed through the decades as a unified and separate block up to the filing of the Ajax Peak Subdivision in 1980 is erroneous. This is simply not the factual case.

In the 1970's, the entire Parmenter holdings were broken up and the residual portion of the original Palmer homestead passed through additional owners. Ultimately, in 1979 the remainder of the homestead was acquired by Maurice Foland and the Ajax Peak subdivision was platted. **Some 23 land transactions took place involving the original homestead prior to the subdivision.**

In 1980 Mr. Foland secured patent to two contiguous BLM tracts and included them in the Ajax Peak Subdivision. These North Side tracts have also been recommended for exchange rights by the Department. Mr. Parmenter did not own these lands.

4. The statute is clear that enlargement is a significant aspect that must be considered in a Director's hearing involving objections to accomplished transfer recommendations. Claimants' *Motion to Remand Subcases to The Director of IDWR* of May 11, 2010, clearly includes enlargement:

"...hereby moves the Court to remand the above subcases to the Director of the Idaho Department of Water Resources for a hearing to determine whether the Department's accomplished transfer findings contained in their Supplemental 706 Report submitted to the Court in January of 2010 injured existing water rights or constituted an enlargement of original rights."

In addition, Claimants' *Reply to Response to Objector's Motion to Remand Subcases to the Director of IDWR...* of June 1, 2010, reiterates the statutory requirement that the question of **enlargement of original rights** shall be examined through the required hearing. The language of the statute does not provide for a prediction of the possible outcome of the required hearing or the granting or denial of the hearing on some sort of prior assessment. Contrary to the Fols Group assertion, the concept of enlargement involves more than acreage.

5. The chain of evidence is clear and complete: No water was ever transferred, in 1948 or any other year. The Burns Group has consistently provided evidence to the Department, counsel for the Department, and counsel for the Fols Group that no transfer has taken place. The insertion of 1948 is simply a transparent attempt to skirt the requirements of the statute containing the remand requirement. Even, if an argument for 1948 could be rationally made, it would not obviate the requirement by law for the administrative hearing.

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Movants *John & Ruth Burns* have recently obtained additional evidence illustrating beyond question that no prior owner of the homestead ever transferred water rights or intended to transfer rights from the South Side to the lands on the North Side as claimed by the Fols Group. See Exhibit B (Second Affidavit by Robert Parmenter) and Exhibit C (Affidavit by Kim Wolfley.)

6. **The 1982 Abstract of Water Rights for Carmen Creek can not continue to be ignored.** Counsel for the Fols Group, and indeed the Department, studiously seek to bypass and ignore the Abstract, as well as the earlier 1969 Abstract and the extensive Departmental correspondence on the Abstract itself, appurtenant shares in Carmen Creek, and involvement by the Regional Watermaster in Carmen Creek matters.

The importance of the 1982 Abstract was clearly referenced by the SRBA Presiding Judge in his Order of May 25, 2010, concerning Interim Management in Carmen Creek. The Opinion states, in part: **"The 1982 IDWR Abstract identified the place of use of the Exchange Water Rights as those owned by the Burns Group located on the South Side of Carmen Creek."**

The notion that the Abstract is somehow irrelevant, and that allegations of a 1948 transfer, albeit unsupported, in reality are controlling, flies in the face of logic and demonstrable facts. The SRBA Court recognizes the critical nature of the IDWR 1982 Abstract, noting that the **1982 Abstract was "specifically prepared by IDWR for purposes of distributing the Exchange Water Rights."** The Abstract, of course, was known to the Fols Group and their predecessors in interest at the time of their purchases that they were not within the place of use defined in the Carmen Creek Decree or affirmed in the 1982 Abstract.

7. **Counsel for the Fols Group makes much of a presumed Trial delay,** and claims that the Burns Group agrees granting the *Motion for Remand* could result in delay. We do not know if the Department could proceed expeditiously or not, but regardless **that is no reason for denial of Remand.** We are compelled to note that the previous **Two Trial Dates** were not met due to the requests of Counsel for the Fols Group and the **Department's Failure** to meet the Court ordered deadline for preparation of the 706 Report by **Over Six Months.** We further note that the due date for the 706 Report was merely ignored, with resultant expense and impact of the parties to this action.

THEREFORE, Claimants respectfully ask that the Court grant the requested rehearing and permit argument on the *Request for Remand to the Director*. In the alternative, Claimants request that the Court on consideration of the facts in the record and described herein proceed expeditiously and grant the *Request for Remand* to the Director in order that the hearing may be scheduled without further delay.

RESPECTFULLY SUBMITTED this _____ day of June, 2010.

**JOHN E. & RUTH C. BURNS
S/ JOHN E. BURNS**

JOHN E. BURNS

S/ RUTH C. BURNS

RUTH C. BURNS

SUBSCRIBED AND SWORN to before me this 29 day of June, 2010.

S/ BILL ALLEN

Notary public for Idaho
Residing at: Salmon, Idaho
My Commission Expires: 2/19/15 _____

(SEAL)

Statement of Kim Wolfley
P.O. Box 410336
Big Water, Utah 84741

I recently spoke with John Burns of Carmen, Idaho by telephone. I understand he resides on Carmen Creek Road on a portion of the property which my wife and I formerly owned.

I purchased the property in 1977 and resided in the house which Mr. Frank Parmenter built in the mid-1940's. He sold the property and house to the Merrick's and Ihli's in 1976, who in turn sold it to me less some parcels which they sold prior to my purchase.

The property was well irrigated and had abundant water. We raised two crops of Alfalfa hay, milked 30 head of dairy cows in the milk barn below the house, and ran range cattle on the adjacent government land and up Carmen Creek under permit.

Irrigation water was supplied through two ditches that traversed the land from the northeast end to the boundary of the Aldous Ranch below. The bottom ditch had a fish screen and ran below the shop building and house and above the milk barn. It passed onto the properties owned by Mr. Gary Anderson and Mr. Tim Jewell, and then onto the Aldous property. The upper ditch entered the top end of the field in back of the house and served to irrigate the field, orchard, garden, and area surrounding the house.

The top ditch crossed under the Carmen Creek Road and ran parallel to the road until it crossed back into the top of the Anderson property. It then provided water to the Jewell land and entered the Aldous Ranch.

The ditches always flowed, and even in periods of less moisture we would coordinate timing with neighbors to ensure sufficient irrigation water.

I also had considerable experience on the Keystone Ranch and was well aware of the importance of water rights. The property had good water rights, which were intact when I purchased the house and land. To the best of my knowledge, none were ever abandoned or given up in any way, as that would destroy the value of the property.

Signed: _____

Kim Wolfley
Box 410336
Big Water, Utah 84741

Notary: _____

Notary Public, Residing At: P.O. Box 1180

Page, Az 86040

Date: June 21
March, 2010

My Commission Expires: 3-5-11



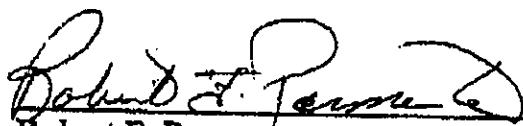
Second Statement of Robert F. Parmenter
10129 Highway 41 North
Dillon, Montana 59725

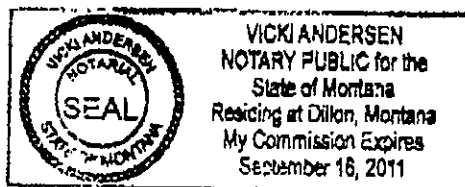
On the evening June 25, 2010, I called Mr. John Burns at his home in Carmen, Idaho. He resides in the same house that was built by my father, Mr. Frank Parmenter. In 1947 my father purchased the Cooper place of some 350 acres on Carmen Creek. The lands purchased included most of the original 160 acre Palmer Homestead, with decreed water rights as per the 1902 Carmen Creek Decree.

The purpose of my call was to advise Mr. Burns that to the best of my knowledge no water rights were transferred from the property as Mr. Al Fols is alleging. I made it clear that it would have made no sense to move water rights from the South Side of Carmen Creek to some other location because the house, garden, and orchard were on the South Side of the Creek.

Mr. Fols and I spoke about this recently, and I advised him that the affidavit I signed for him was incorrect and no transfer took place, there was never any intent to transfer the water rights, and any attempt to suggest or claim otherwise was incorrect.

Subscribed and sworn to me this 28 day of June, 2010


Robert F. Parmenter



Notary: Vicki Andersen

Notary Public Residing At: Dillon

My Commission Expires: 9-16-2011