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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - CABA Fifth Judicial District County of Twin Falls - State of Idaho	
JUL 30 2010	
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 75-10061A, et al. (see attached list)
	)	(Carmen Creek)
	)	
Case No. 39576	)	ORDER GRANTING MOTION TO
	)	WITHDRAW and
	)	ORDER DENYING MOTION FOR
	)	REHEARING

Order Denying Motion to Remand

On June 11, 2010, the Special Master entered an *Order Denying Motion to Remand Subcases* denying the *Motion to Remand Subcases* filed by the "Burns Group", also known as the "South Side Users." The *Motion* to remand was denied because there was no legal basis pursuant to I.C. § 42-1425(2)(a) since none of the current landowners' water rights existed at the time of an alleged transfer of exchange water from the south side of Carmen Creek to the north side in 1948. Frank Parmenter was then the sole owner of the land. "Hence, the Burns Group cannot claim injury from any accomplished transfer that may have occurred before they purchased their land." *Order Denying Motion*, at 2.

Motion to Withdraw

On June 16, 2010, Robert L. Harris, attorney for the Burns Group, filed his *Motion to Withdraw as Attorney of Record* stating it would be best if he were allowed to withdraw and allow the Burns Group to proceed to trial *pro se*.¹

Motion for Rehearing

On June 18, 2010, John and Ruth Burns, members of the Burns Group but representing themselves, filed a *Motion for Rehearing of Order Denying Motion to Remand Subcases*. They

¹ Trial is set to begin October 27, 2010, 9:00 a.m., at the Lemhi County Courthouse, Salmon, Idaho.

argued remand to the IDWR Director is needed to secure compliance with the mandatory requirements of I.C. § 42-1425(2)(a), to "correct errors of fact, omissions, and generalizations prejudicial to the claimants, and secure the claimants' due process entitlements." *Motion for Rehearing*, at 1.

Response and Opposition

On June 25, 2010, the "Carmen Creek Users", also known as the "Fols Group" or "North Side Users", filed their *Response to Motion to Withdraw as Attorney of Record* and their *Opposition to Motion for Rehearing of Order Denying Motion to Remand Subcases*. First, the Carmen Creek Users do not oppose Mr. Harris' *Motion to Withdraw* so long as the Court makes it clear that each of the Burns Group must proceed individually, unless they retain new counsel, and each *pro se* litigant will be held to the same standard as Idaho attorneys.

Regarding the Burns Group's *Motion for Rehearing*, the Carmen Creek Users argued the Burns Group failed to justify their *Motion* and thereby delay the trial schedule. They suggested the Group merely wants the Court to order IDWR to conduct a trial first instead of the SRBA Court.

Response to Opposition

The Burnses, *pro se*, filed their *Response to Opposition to Motion for Rehearing of Order Denying Motion to Remand Subcases* on June 29, 2010, essentially repeating their earlier arguments and urging their due process right to develop a full and complete administrative record.

Hearing

A hearing on the two *Motions* was held at the SRBA Courthouse in Twin Falls, Idaho, on July 1, 2010. Robert L. Harris appeared for the Burns Group, along with John E. Burns, George Matejko, James and Rowena Quinn, Rick and Linda Rice and William W. Clementz; Travis L. Thompson appeared for the Carmen Creek Users, along with Albert C. Fols; Cathleen and James Tippet and Robert D. Mosher appeared *pro se*; David L. Negri appeared for the United States of America, Department of Interior, Bureau of Land Management; and Garrick L. Baxter appeared for IDWR, along with Suzy Cooley-Denney.

Discussion

No one opposed Mr. Harris' *Motion to Withdraw as Attorney of Record* for the Burns Group. Mr. Burns and the other *pro se* parties at the hearing indicated their understanding that

each member of the Burns Group would now represent themselves and all *pro se* litigants will be held to the same standard as an Idaho attorney.

It is apparent from documents the Burnses submitted with their filings, plus arguments made at the hearing, that the Burnses want to argue their case twice – once before the IDWR Director and a second time before the Special Master. A remand of the subcases to the Director would give the Burnses two “bites at the apple” and allow them to gather more information plus better prepare for eventual trial. But there is no doubt that a remand would delay final resolution when nothing in I.C. § 42-1425(2)(a) “mandates” such process.

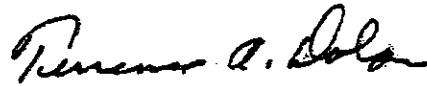
The statute requires a remand only where there is an objection to an accomplished transfer which “injured a water right existing on the date of the change or constituted an enlargement of the original right.” In these subcases, there is conflicting evidence that can be determined only through a full trial and there is no suggestion that the Director is the proper trier of such qualifying fact.

The Director determined the alleged transfer from one parcel to another occurred in 1948, when both parcels were owned by the same person. If that elemental fact is incorrect, as the Burnses suggest, they will have the opportunity to present such evidence at trial before the Special Master. IDWR will first present the basis of its recommendation at trial and then the Burnses will have a full opportunity to rebut the recommendation. IDWR determined there was a transfer – presumably without injury to other water rights or enlargement of the original right – and now the SRBA Court will examine all the facts and determine ownership of the water rights.

THEREFORE, IT IS ORDERED that:

1. Mr. Harris’ *Motion to Withdraw as Attorney of Record* is **granted**; and
2. The Burnses’ *Motion for Rehearing of Order Denying Motion to Remand Subcases* is **denied**.

DATED July 30, 2010.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CARMEN CREEK RIGHTS

Subcase Nos:

75-10061A
75-10061AA
75-10061AC
75-10061AE
75-10061AM
75-10061B
75-10061C
75-10061J
75-10061N
75-10061Q
75-10061R
75-10061T
75-10061X
75-10061Y
75-10061Z
75-10062A
75-10062AA
75-10062AB
75-10062AC
75-10062AL
75-10062C
75-10062H
75-10062L
75-10062P
75-10062R
75-10062V
75-10062W
75-10062X
75-10062Y
75-10136A
75-10136B
75-10137A
75-10137B
75-14025
75-14027
75-14044
75-14046
75-14055
75-14056
75-14057
75-14058
75-14388
75-14441
75-14443
75-14540

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO WITHDRAW AND ORDER DENYING MOTION FOR REHEARING was mailed on July 30, 2010, with sufficient first-class postage to the following:

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CHARLES E HARLING
JAMES DAN EDGREN
JAMES EDGREN & JENNIFER BRADY
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