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JAN 28 2011

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. 47-15262

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

Robert & Kathi Meyers Ltd. Family Partnership ("Meyers"), by and through its counsel Givens Pursley LLP, and pursuant to Section 13 of SRBA Administrative Order 1 ("AO1") and the Notice of Issuance of Special Master's Recommendation dated December 15, 2010, hereby moves the Court to alter or amend the Special Master's Recommendation for Partial Decree dated December 15, 2010, in subcase no. 47-15262. This Motion should be granted because the Meyers have recently determined that the subject water right was incorrectly recommended by the Idaho Department of Water Resources ("IDWR") for the same purpose and place of use as Meyers' water right no. 47-2137. Granting this Motion is necessary to prevent issuance of any decree for claimed water right 47-15262 because its decree by the Court very likely would preclude Meyers from transferring and exercising its senior water right no. 47-2137.

Water right nos. 47-15262 and 47-2137 both have been recommended by IDWR with a place of use that includes that same lands in the SWNW of Section 22, T11S, R18E, B.M. ("SWNW Section 22"). Right no. 47-2137 was recommended with a 1918 priority date based on a license originally developed on the SWNW of Section 22 by Meyers' predecessor-in-interest. Claim no. 47-15262 was recommended a 1947 priority date based on a beneficial use claim made by the original claimant, Lex Christensen.

On December 13, 1988, Ronald Yanke, then the owner of the SWNW Section 22, filed an SRBA claim for right no. 47-2137.

On December 11, 1989, Ron and Linda Yanke conveyed by warranty deed to Ken Mulberry Enterprises, Inc. ("Mulberry") certain lands lying north of Rock Creek and their appurtenant water rights, *together with all* of licensed right no. 47-2137. The Yankes retained the SWNW of Section 22, however. A copy of the Yanke to Mulberry deed is attached to the Affidavit of Michael C. Creamer filed contemporaneously herewith as Exhibit A ("Creamer Affidavit"). Thereafter, Mulberry, and then Meyers (Mulberry's successor), continuously used right no. 47-2137 to irrigate lands north of Rock Creek conveyed by the Yankes to Mulberry (the NWNW of Section 22).

On April 9, 1992, Mulberry filed a transfer application to change right no. 47-2137's place of use from the SWNW of Section 22 to the NWNW of Section 22 ("Transfer"). That claim was protested by parties for reasons unrelated to the instant claims, and the transfer application has been pending processing ever since.

In 1991, Ron and Linda Yanke deeded to Lex and Pam Christiansen (together, "Christiansen") the SWNW of Section 22. A copy of this deed is attached as Exhibit B to Creamer Affidavit. The Purchase and Sale Agreement ("PSA") that preceded this conveyance, a

copy of which is attached as Exhibit C to Creamer Affidavit, expressly stated “NO WATER SHARES TO TRANSFER.”

Mulberry and Christiansen both filed notices of change in water right ownership with IDWR for right no. 47-2137 to put the water right in their respective names. IDWR determined that right 47-2137 was owned by Mulberry because it had been expressly conveyed to Mulberry in 1989—prior to the conveyance of the SWNW of Section 22 to Christiansen in 1991. A copy of a Deputy Attorney General’s memorandum detailing this analysis is attached as Exhibit D to Creamer Affidavit. IDWR also notified Christensen that if Christensen disputed this determination, Christensen should file a competing claim in the SRBA. A copy of IDWR’s notification to Christensen is attached as Exhibit E to Creamer Affidavit.

The SRBA claim to right no. 47-2137 filed by Mulberry’s predecessor, Yanke, was changed to reflect Mulberry as the claimant pursuant to his requested change in ownership.

Thereafter, in April 1992, Christiansen filed an SRBA claim for an irrigation water right for the SWNW of Section 22 and for other lands asserting a beneficial use claim with a 1940 priority date, which claim was assigned no. 47-15262. The claimed sources were springs, an unnamed stream, and wastewater from right no. 47-02479A, all of which were tributary to Rock Creek. Based on several affidavits of persons who said that the SWNW of Section 22 and the other claimed places of use were being irrigated from springs and an unnamed stream during the 1940s, see Exhibit F to Creamer Affidavit, IDWR recommended claimed right 47-15262 to Christensen for the SWNW Section 22 with a 1947 priority date and sourced from an unnamed stream tributary to Rock Creek. Mulberry did not file an objection in the SRBA to IDWR’s recommendation of the water right 47-15262—which on its face appeared to be a different water right with a different priority date.

On November 8, 2010, in connection with the Transfer, IDWR served Mulberry and Meyers with an Order to Show Cause, attached as Exhibit G to Creamer Affidavit, which, among other things, indicated that water right no. 47-2137 cannot be transferred to the NWNW of Section 22 as requested because IDWR now considers it to be “stacked” with Christiansen’s recommended water right no. 47-15262 and, therefore, the Transfer could result in an enlargement if the two rights now were “unstacked.” This was the first time that Meyers learned that Christensen’s claimed right no. 47-15262 might somehow preclude the Transfer and continued beneficial use of the senior 47-2137 right on Meyers’ property in the NWNW of Section 22. Meyers, as successor-in-interest to Mulberry, responded to the Show Cause Order and has conducted an investigation of the 47-15262 claim, including an inquiry into, among other things, the agreements and conveyances between Yankes and Mulberry and Yankes and Christensens—which were not before IDWR when it made its claims investigations—and now makes this Motion to Alter or Amend so that the Court and IDWR and will have the opportunity to give further and full consideration to the propriety of the Christensen claim and its relationship to Meyers’ right no. 47-2137.

Meyers has acted diligently in pursuing this Motion as soon as it became aware of the circumstances and in seeking out the facts presented above and would be severely prejudiced in pursuing the pending Transfer and continuing the beneficial use of Meyers’ water right 47-2137 if the 47-15262 claim is decreed as recommended.

For the foregoing reasons, Meyers respectfully requests that this Motion to Alter or Amend be granted and that IDWR be ordered to conduct further investigation into claim no. 47-15262 and issue an amended Director’s Report setting forth its findings and recommendation.

Meyers also has filed a Motion to File a Late Objection to claim No. 47-16262 contemporaneously with this Motion to Alter or Amend to preserve all rights and avenues for an appropriate resolution of the now-disputed Christensen claim.

Respectfully submitted this 27th day of January, 2011.

GIVENS PURSLEY LLP

By 

Michael C. Creamer

*Attorneys for Claimant Robert & Kathi
Meyers Ltd. Family Partnership*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2011, the foregoing was filed, served, or copied as follows:

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