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DEPARTMENT OF
WATER RESOURCES

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**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 Nos. 37-296A, 37-717,
and 37-1216

**RESPONSE TO MOTION FOR
RECONSIDERATION**

Indian Creek Ranch Owners Association, Inc., (“Homeowners”) by and through counsel of record hereby files its *Response to Motion for Reconsideration* in response to claimant’s (City of Hailey), *Motion for Reconsideration or for Permissive Review* and supporting *Memorandum in Support of Motion for Reconsideration or for Permissive Review* (“City’s Motion”) dated September 13, 2011, seeking reconsideration and review of the Special Master’s August 30, 2011 *Order on Motion to Strike and Motion for Summary Judgment* (“Order”).

INTRODUCTION

On September 13, 2011, the City of Hailey (“City”) filed its motion along with an *Affidavit of Robert R. Hardgrove*, a professional engineer, employed by SPF Water Engineers.

The City's Motion seeks reconsideration and/or a permissive review of the Special Master's Order under I.R.C.P. 11(a)(2)(B), SRBA Administrative Order 1 ("AO1") §9.e and I.A.R. 12.

The subcases relative to the City's Motion have been pending since November of 2007 when Indian Creek Ranch filed objections to the recommendations for the City's water right claims reported in the Director's Reports. The City did not file objections to the initial recommendations.¹

ARGUMENT

The City's Motion puts several issues before the Court on permissive review relating to the *Frost Decree* and *Tucker Decree*, the season of use for right number 37-1216, the amount of water decreed under right number 37-717, and the 1983 Agreement.

The parties and IDWR have undergone extensive discovery spending time and resources to thoroughly investigate, review and litigate the issues. The Department properly examined the evidence and made accurate recommendations for the water rights in its Amended Director's Reports and then explained and confirmed the recommendations again in its Supplemental Director's Report dated December 17, 2010. The Supplemental Report consisted of an extensive review of historical documents including the prior decrees, deeds, maps and the 1983 Agreement.

The Special Master's Order properly found that there was no genuine issues of material fact as to the season of use for water right no. 37-1216 nor to the quantity of water that the City is entitled to under its water rights. As such, the City's Motion should be denied and the *Order* affirmed.

¹ The City did initially file objections regarding the General Provisions on separate streams.

Season of Use for Right No. 37-1216

The City's argument that water right no. 37-1216 is a year-round water right is contrary to the *Tucker Decree*, the *Frost Decree*, the City's historical use of that water right as found by the Court in the *Frost Decree* and the City's claim in the SRBA.

The City argues that the *Tucker Decree* did not specifically determine the season of use for the City's water right (decreed in the *Tucker Decree* to Alturas Water Co.). *Memorandum in Support* at 6. As such, the City wants the Court to infer from the language in the *Tucker Decree* that Alturas was awarded a year-round water right, albeit subordinate to Tucker's water right during the irrigation season. However, the language used in the *Tucker Decree* does refer to a "season." It states that Alturas has a right during that "part of the year" when the "waters [of Indian Creek] are not necessarily and properly and in use for the purpose of irrigation of the lands of said Nancy M. Tucker." *Tucker Decree* at 1-2. The language in the *Tucker Decree* without question gives Nancy M. Tucker an irrigation season water right and gave Alturas a right to use their right during a different "part of the year." The language is clear; the City's argument that the *Tucker Decree* decreed Alturas a year-round use is not viable under the clear language of the decree and does not create any genuine issue of material fact.

The undisputed facts establish, as found by the Special Master, that the City received a "winter season" water right from Alturas which was again confirmed in the *Frost Decree* where the Court found that Alturas had been diverting the water for the past twenty-five years during the winter: "and that during the Winter season it has for more than twenty five years last past used a sufficient amount of water from Indian Creek to fill its pipes to the capacity of said pipes...." *Frost Decree Findings of Fact and Conclusions of Law*; see also *Order* at 6 and 10. This fact, that water right no. 37-1216 is a winter-time use only, is also confirmed by subsequent actions by the City.

In considering this Motion it is important to note that the City's claim in the SRBA for water right no. 37-1216 only claims a period of use for the non-irrigation season, November 1 to March 31. The Court has made it clear through AO1 §4(d)(1)(b) that a claimant may not amend a claim by filing an objection or a response in subcase proceedings. Idaho Code §42-1409A states that a claimant must seek a leave of court prior to amending a claim. *See also Order on Summary Judgment* entered by Special Master Haemmerle on August 28, 1996, In Re Hagerman 24 Subcases (36-3A, et al.) which states that: "...parties must seek leave of the court to amend their claim." *Id.* at 17. "A claim can only be amended by an Amended Notice of Claim." *Id.* at 18. As such, the relief requested in the City's Motion is not properly before the court and must be denied on that basis alone.

In sum, the *Tucker Decree* and the *Frost Decree* both establish that water right no. 37-1216 is a non-irrigation season water right and the City's Motion should be denied.

Amount of Water Under Right No. 37-717

In 1983, the City contractually agreed that the totally quantity for its water rights is 131 miner's inches, or 2.62 cfs, in the 1983 Agreement with the Homeowners. Thus, the 1983 Agreement also establishes that the quantity the City is entitled to for water right no. 37-717 is 1.72 cfs (2.62 cfs minus .09 cfs covered by water right no. 37-1216 for a total of 2.62 cfs). The City's argument that the 1983 Agreement did not address all of its water rights is contrary to its own arguments and the purpose of the 1983 Agreement.

The City states that "Hailey's and Homeowners' task [in the 1983 Agreement was] of dividing Indian Creek's waters between themselves...." *Memorandum* at 10. Yet, the City goes on to argue that in doing so, it was not necessary to actually address all of its Indian Creek rights.

The 1983 Agreement is clear that the City knew and acknowledged that the total water rights for its water rights from Indian Creek was 131 miner's inches (or 2.62 cfs). See *Order* at 9 and 11.

While the City attaches the *Affidavit of Robert R. Hardgrove* ("Affidavit") in an effort to create an issue of fact, the Affidavit is irrelevant and should be struck from the record. The Affidavit presents only a theory as to the capacity of the ten inch pipe put into place by the City in 1907. The data and information reviewed by Mr. Hardgrove is limited and his conclusions are based upon assumptions. Even if it were true that the capacity of the City's pipeline in 1907 was 4.1 cfs, (which the Homeowners dispute) the City agreed to limit its water rights to 131 miner's inches or 2.62 cfs in the 1983 Agreement. Thus, the capacity of the pipe in 1907 is not relevant. The 1983 Agreement establishes that there is no genuine issue of fact as to the proper water right quantity for the City's water rights in the SRBA.

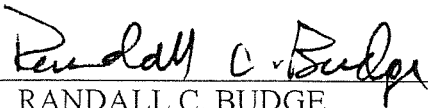
CONCLUSION

It is without dispute that water right no. 37-1216 was limited to the winter part of the year and that the City's water rights total 2.62 cfs (131 miner's inches). The City acknowledged its water rights for a total of 131 miner's inches in the 1983 agreement. Additionally, the City cannot in its Motion attempt to amend its claims, in this case to enlarge the season of use for claim no. 37-1216.

The Special Master did not err in her conclusions and findings in the Order. The record in these subcases supports the Special Master's conclusions and findings. Accordingly, the Order should be affirmed and the City's Motion denied.

DATED this 27th day of September, 2011.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 
RANDALL C. BUDGE

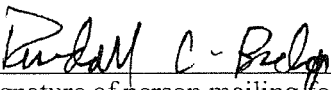
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of September, 2010, I mailed a true and complete copy of the foregoing document, postage prepaid, to each of the following:

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