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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	)	Subcase No. 36-10664
	)	
Case No. 39576	)	IDWR'S COMMENTS ON AND REQUEST FOR
	)	CLARIFICATION OF THE PRELIMINARY
		SPECIAL MASTER'S REPORT AND
		RECOMMENDATION

DESCRIPTIVE SUMMARY

The following document constitutes the comments on and request for clarification of the Preliminary Special Master's Report and Recommendation for water right no. 36-10664 by the Director of the Idaho Department of Water Resources (IDWR).

DISCUSSION

The Director concurs in the recommendation by the Special Master that Perry and Margaret Patterson be adjudicated the water right as set out in the Preliminary Special Master's Report. The Director further concurs with the conclusion by the Special Master that the water right is based on license nos. 36-07409 and 36-07631 and the approved transfers of a portion of these

licenses designated as license nos. 36-07409B and 36-07631B. The Director requests however that the Special Master clarify the basis for reaching this conclusion.

The Special Master's Preliminary Report and Recommendation states that "The Patterson land should never have been included in either license in the first place." See Preliminary Report and Recommendation at 9. As a result the Special Master concludes that the licenses are partially invalid. *Id.* The Special Master then concludes, however, that water was beneficially applied to 1.6 acres of the Patterson land "in accordance with the terms of" and "under the licenses." *Id.* at 9 and 10.

The Director is concerned by the inconsistency in these conclusions. If licenses never covered Patterson's land then the Pattersons could not now have a water right arising out of the licenses. Nor could the Special Master recognize a beneficial use water right because the Pattersons' use occurred after the mandatory permit statute was in effect. Consequently, an ambiguity regarding the actual basis of the Pattersons' water right exists. The Director believes this problem can be resolved by clarifying the Special Master's Report.

The Director concurs with the conclusion of the Special Master that not all of the 38 acres of Pattersons' land as identified under the licenses should have been included in the licenses. However, as recognized by the Special Master, at least

1.6 acres of the Pattersons' land has been irrigated in accordance with the terms of and under the licenses. In addition to the evidence presented at the trial, this conclusion is supported by review of the aerial photography between 1975 and 1983 which indicates that a portion of the 40 acres owned by Pattersons was irrigated. The SRBA field exam also indicated that the pivot supplying water under the license included a narrow strip of Pattersons' land within its sweep. Specifically, the track of the pivot was still evident in the southern portion of Pattersons' land.¹ Hence, while perhaps not all of the Pattersons' 38 acres should not have been licensed, certainly some of the land was properly within the scope of the licenses.

In 1985 Patterson applied for and received a transfer of the point of diversion to his forty acres. See nos. 36-07409B and 36-07631B. A well is located within Pattersons' forty acre tract and is used to supply water to the Pattersons' 1.6 acres. Hence, the requirements of the transfer were fulfilled.

The Pattersons' 1.6 acres is located in the north portion of their 40 acre tract whereas the land originally irrigated is located in the south portion of the 40 acre tract. Pattersons therefore irrigate a different portion of the 40 acre tract than originally irrigated under the licenses. However, it has been the practice of the IDWR to describe the place of use as a number

¹ If the Special Master deems it appropriate, the Director will submit additional evidence supporting these facts.

of acres within a specific 40 acre tract, and to not necessarily describe the location of these acres within that tract. Since Pattersons are using the water within the 40 acre tract for which it was licensed, the fact that they are using it on a different 1.6 acres should not be of concern. To the extent it is of concern, the actual place of use can be accommodated by I.C. § 42-1425.

CONCLUSION

The Director is concerned that the Special Master's preliminary report and recommendation can lead to the conclusion that the Pattersons are not entitled to any water because none of their land was properly included under the licenses. The Director does not believe that is the intent of the Special Master. Nor do the facts support this conclusion. The Director therefore requests that the Special Master clarify his report and recommendation so that it is clear that at least the 1.6 acres of the Pattersons' land was properly included within the scope of the licenses.

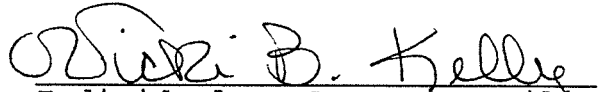
Dated this 1st day of February, 1996.


Richard B. Burleigh
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of the foregoing document to each person at the address listed below by mailing in the U.S. Mail with the correct postage affixed thereto on the 1st day of February, 1996.

Perry and Margaret Patterson
1745 East, 3100 South
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Individual or Attorney Mailing
the Document