

JAN 09 1998

256

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)
) PARTIAL DECREE PURSUANT TO 1998 JAN -7 PM 9:03
) I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 36-00084 DISTRICT COURT - SRBA
) TWIN FALLS CO., IDAHO

FILED

NAME & ADDRESS: SHELBY WISE
JOAN WISE
RT 1 BOX 240
HAGERMAN ID 83332

SOURCE: LEN LEWIS SPRING TRIBUTARY: RILEY CREEK

QUANTITY: 1.4 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

USE OF THIS RIGHT WITH RIGHT NOS. 36-00012, 36-00030,
36-00043A, 36-00104A AND 36-00104B FOR STOCKWATER OR OTHER
NON-IRRIGATION PURPOSES OUTSIDE OF THE IRRIGATION SEASON SHALL BE
LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 4.0 CFS.

PRIORITY DATE: 09/01/1889

POINT OF DIVERSION: T08S R14E S06 SESWNE Within GOODING County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	IRRIGATION	Irrigation Season	1.4 CFS
STOCKWATER	STOCKWATER	01-01 12-31	0.02 CFS

PLACE OF USE: IRRIGATION Within GOODING County
T07S R13E S36 SWNE 7 SENW 16
23 ACRES TOTAL

Place of use for STOCKWATER is same as IRRIGATION

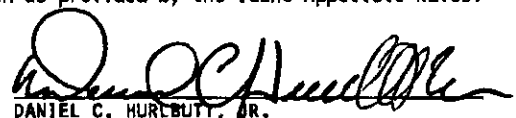
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL
USE.

THE OPERATION AND ADMINISTRATION OF THIS WATER RIGHT IS ALSO
SUBJECT TO THE STIPULATION DATED SEPTEMBER 11, 1996, AMONG THE
UNITED STATES OF AMERICA AND THE CLAIMANTS UNDER THE BRAILSFORD
DITCH, WHICH IS ON FILE IN THE RECORDS OF THE CLERK AND RECORDER,
GOODING CO, IDAHO.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


DANIEL C. HURLBUTT, JR.
PRESIDING JUDGE
Snake River Basin Adjudication

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 36-00084

PAGE 1
DEC-10-1997

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ONLY HALF
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JUL -1 PM 3:18

DISTRICT COURT-SRBA
TWIN FALLS COUNTY, IDAHO
FILED _____

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00003A

In Re SRBA

Twin Falls County Civil Case No. 39576

Sub-Case No. 36-00003A

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources

Karl J. Dreher, Director

David B. Shaw, Adjudication Bureau Chief

David R. Tuthill Jr., Acting Adjudication Bureau Chief

July 1, 1996

COPY

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00003A

The Director of the Idaho Department of Water Resources (IDWR) submits this report regarding claim to water right no. 36-00003A in response to the request of Special Master Haemmerle, pursuant to Idaho Code §42-1412(4) and the court's Order Re: Contested Claims for Amounts Claimed in Excess of .02 CFS. This report was prepared under the supervision of Karl J. Dreher, Director, David B. Shaw, the Adjudication Bureau Chief, and David R. Tuthill Jr., the Acting Adjudication Bureau Chief for IDWR. The following persons assisted in the preparation of the following portions of this report:

David B. Shaw, Adjudication Bureau Chief, reviewed and verified this Report Regarding Claim to Water Right No. 36-00003A. Mr. Shaw reviewed and verified IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights, which is incorporated by reference herein. The Affidavit of David B. Shaw describes Mr. Shaw's education and work experience, and is incorporated by reference herein. Mr. Shaw also reviewed IDWR's Report Regarding Evaluation of Irrigation Diversion Rates, described below.

Jeff Peppersack, Adjudication Engineer, prepared and verified IDWR's Report Regarding Evaluation of Irrigation Diversion Rates, which is incorporated by reference herein. The Affidavit of Jeff Peppersack describes Mr. Peppersack's education and work experience, and is incorporated by reference herein. Mr. Peppersack also reviewed IDWR's Report Regarding Consumptive Use for Irrigation in the Hagerman Area, described below.

David R. Tuthill Jr., Acting Adjudication Bureau Chief, prepared IDWR's Report Regarding Consumptive Use for Irrigation in the Hagerman Area, which is incorporated by reference herein. Mr. Tuthill also reviewed this Report Regarding Claim To Water Right No. 36-00003A. The Affidavit of David R. Tuthill Jr. describes Mr. Tuthill's education and work experience, and is incorporated by reference herein.

Marci S. Sterling, Adjudication Engineer, prepared and verified Appendix B, which describes the application of IDWR's methodology for evaluation of irrigation diversion rates to claim no. 36-00003A. Appendix B is attached hereto and incorporated by reference herein. The Affidavit of Marci S. Sterling describes Ms. Sterling's education and work experience, and is incorporated by reference herein.

Steven C. Clelland, Senior Water Resource Agent, investigated and prepared the preliminary recommendation for claim no. 36-00003A, and prepared Appendix C. The Affidavit of Steven C. Clelland describes Mr. Clelland's education and work experience, and is incorporated by reference herein. The affidavit also includes a general description of his investigation of claims in the Hagerman area. The Affidavit

of Steven C. Clelland Regarding Claim No. 36-00003A describes Mr. Clelland's investigation of the quantity of this water right; it is attached hereto and incorporated herein by reference.

I. INVESTIGATION AND RECOMMENDATION OF CLAIMS GENERALLY

IDWR's general methodology for the investigation and recommendation of claims is described in Appendix A, which is incorporated herein by reference.

II. WATER RIGHT NO. 36-00003A

As noted in Appendix A, IDWR's general methodology for the investigation and recommendation of claims includes a further review of water right recommendations to which an objection is filed. As a result of further information obtained during this review, IDWR has prepared a revised recommendation of right no. 36-00003A, which is set forth in Appendix D. The revised recommendation shows both the original text from the Director's Report for Reporting Area 3 (Basin 36) and the revised recommendation, with deleted text shown in an overstrike format and new text underlined. The revisions to each element and the basis for those revisions is described below.

A. Basis of Claim

Claim no. 36-00003A was filed with IDWR by Edna M. Rea on August 4, 1988.¹ The claim is to a portion of one of three rights decreed to the New International Mortgage Bank in the *New International Mortgage* decree, entered in 1932.² The water rights decreed to the bank are numbered in IDWR's files as water right nos. 36-00001, 36-00002, and 36-00003. The first two rights are to water from Riley Creek, the third is to water from Billingsley Creek. All were decreed for use on the same lands, and all were decreed for irrigation "and for domestic and other purposes thereon." Water right nos. 36-00001 and 36-00002 were claimed by and recommended to Buckeye Farms, Inc.³ Portions of right no. 36-00003 were claimed

¹ The original notice of claim is currently located in the files of the SRBA District Court, attached to IDWR's response to the claimant's objection.

² *New International Mortgage Bank v. Idaho Power Co., et al.*, Equity No. 1602 (D.S.Id. 1932), at pp. 3-4.

³ Objections were filed to both 36-00001 and 36-00002; SF5s have been filed and the special master has issued preliminary special master's reports in both subcases.

by and recommended to various claimants (some of which recommendations are contested), and are further described below.

B. Name and Address of Claimant

The name and address of the claimant set forth in the claimant's motion for summary judgment is the same as recommended in the director's report.

C. Source of Water

The source of water set forth in the claimant's motion for summary judgment is Billingsley Creek. The source of water is described in the director's report as Billingsley Creek tributary to Snake River.

The director's report includes the body of water to which the source of the right is tributary for each water right in the director's report, except for rights to ground water. IDWR adopted this standard for the description of the source of water rights because there are so many instances, sometimes in the same administrative basin, where different surface water sources bear the same name.⁴

D. Date of Priority

The priority date set forth in the claimant's motion for summary judgment is the same as recommended in the director's report.

E. Point of Diversion

The point of diversion set forth in the claimant's motion for summary judgment is the same as recommended in the director's report.

F. Purpose of Use

The purposes of use stated on the notice of claim were irrigation and stockwater. The purposes of use recommended in the director's report include both of the claimed purposes of use. The objection sought to add domestic as a purpose of use. The claimant's motion for summary judgment no longer seeks to add

⁴ IDWR relied upon the following in reaching its conclusion: Idaho Code §42-1411(2) (which provides that the director shall determine the source of the right to the extent the director deems appropriate to define and administer water rights acquired under state law).

domestic, but now seeks to add wildlife, recreation, aesthetics, and "diversion system maintenance."⁵

The description of the purposes of use of this right in the decree is ambiguous in that it describes the purposes of use for the three New International Mortgage Bank rights as irrigation "and domestic and other purposes," rather than specifically identifying each purpose of use for each right.⁶ IDWR's investigation confirmed the use of water for irrigation and stockwater purposes, as further described below in the sections addressing quantity and place of use. Neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for the other purposes listed in the motion, either pursuant to the right as originally appropriated or as currently used.⁷ Such information is necessary not only to confirm the use but to quantify the amount of water beneficially used for that purpose.

G. Quantity of Water Used

The notice of claim states a quantity of 1.60 cfs for irrigation, 0.04 cfs for stockwater, and a total quantity of 1.60 cfs. The quantity recommended in the director's report is 0.41 cfs for irrigation, 0.02 cfs for stockwater during the irrigation season and 0.17 cfs outside the irrigation season, and a total quantity of 0.41 cfs. The objection does not state the quantity claimed. The claimant's motion for summary

⁵ The filing fee for claims other than small domestic and stockwater claims consists of a flat \$50.00 fee, plus a variable fee of \$1.00 per acre for any claimed irrigation use, plus a per cfs variable fee for other claimed purposes of use. The filing fee for small domestic and stockwater rights is \$25.00; no filing fee is required for portions of rights for small domestic and stockwater uses. The filing fee paid for this claim was limited to the purposes of use claimed in the notice of claim, and no filing fee was paid for the stockwater portion. Filing fees are set forth in Idaho Code §42-1414 and IDWR's Adjudication Rules, IDAPA 37.03.01 *et seq.*

⁶ IDWR relied upon the following in reaching its conclusion: *Morgan v. Udy*, 58 Idaho 670, 79 P.2d 295 (1938) (a water right decree that omitted the description of the point of diversion necessarily determined the point of diversion but was ambiguous as to its location).

⁷ IDWR relies upon the following in reaching this conclusion: Idaho Code §42-1427 (which allows an ambiguity in a prior decree or license to be resolved based on current beneficial use); the statement of the Presiding Judge that this section "cannot change or exceed the previously decreed or recorded element of the decreed or licensed right" nor "be used to claim an expansion of use beyond the beneficial use existing at the time the right was originally memorialized in a decree or license," Revised Memorandum Decision and Order on Basin-Wide Issue 4, dated May 17, 1995, at page 9; and the statement of the Presiding Judge that, "the purpose of use is defined by the intentional application of water to an intended beneficial use of water," Memorandum Decision and Order Re: Basin-Wide Issue 5, dated April 26, 1996, at page 8.

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00003A

judgment states a total quantity of 1.6 cfs, but does not state a quantity for each purpose of use.

1. Splits of Water Right No. 36-00003

As noted above, various portions of right no. 36-00003 were claimed by and recommended to various claimants. The splits are listed below. The first column shows the quantity claimed; the second column shows the quantity recommended in the director's report. The quantity listed under other is further described in the table. Water rights listed with an asterisk are contested.

<u>Right no.</u>	<u>Claim</u>	<u>Report</u>	<u>Other</u>	
36-00003A*	1.60	0.41	0.45	Amount under other is from revised recommendation included with this report.
36-00003B*	7.16	5.00		This subcase is assigned to S.M. Dolan.
36-00003C*	0.30	0.30	0.30	Summary judgment motion shows same total quantity as recommended.
36-00003D	0.24	0.24	0.24	Uncontested, so amount under other is same as claim/report.
36-00003E*	0.20	0.20	0.20	Summary judgment motion shows same total quantity as recommended.
36-00003F*	0.80	0.80	0.80	Summary judgment motion shows same total quantity as recommended.
36-00003G*	0.40	0.12		Trial has been held before S.M. Dolan; preliminary master's report is pending.
36-00003H*	12.0	8.37	11.9	Amount under other is amount from SF5 and preliminary master's report.
36-00003J*	4.00	0.46		IDWR has received a notice of change in ownership splitting this right into K, M and L. This right is part of the group for which 706 reports are due 09/01/1996.
Total	26.70	15.9	19.47	

The quantity decreed for right no. 36-00003 in the *New International Mortgage* decree is 20 cfs. The total quantity of water claimed in all claims based on the decree is 26.70 cfs, which exceeds the decreed amount of the water right by 6.70 cfs. For this reason, IDWR previously proposed that contested water rights in the Hagerman area be grouped by ditch for scheduling purposes to facilitate resolution of quantity issues for those rights. IDWR recommended a total of 15.9 cfs pursuant to the various claims to portions of right no. 36-00003; 19.47 cfs of the total 20 cfs decreed has been allocated among the claimants to these rights as a result of further proceedings in the various subcases.

The decreed place of use of this right contains 1342.8 acres. Using the decreed rate of diversion and the decreed place of use, the per acre rate of diversion is approximately 0.015 cfs per acre. The claimant's lands as described in the deed attached to the motion for summary judgment contain 40 acres. These 40 acres are

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00003A

within the decreed place of use. Based on the description of the claimant's lands in the deed, the claimant's proportionate share of water right no. 36-00003 is approximately 0.6 cfs.⁸ (As noted below in section 1, however, this right is used for the irrigation of only 13 acres.)

In this instance, the deed purports to convey 1.6 cfs of right no. 36-00003 from a predecessor of the claimant to the claimant. IDWR does not have information indicating whether or how this portion of right no. 36-00003 came to be appurtenant to the claimant's lands. IDWR did not previously request this information from the claimants of the portions of right no. 36-00003 because the total amount IDWR found to be beneficially used under all the claimed portions of right no. 36-00003 did not exceed the decreed 20.00 cfs.⁹

2. Quantity for each purpose of use

The director's report includes a quantity for each purpose of use in addition to the total quantity. This information is appropriate and necessary to indicate whether and to what extent the total quantity or any portion of the total quantity is used for multiple purposes, or whether and to what extent the total quantity is allocated among the listed purposes of use. For example, if a claimant diverted one cfs through a hydropower facility and then used that same water for irrigation, the amount for each purpose of use would be 1 cfs, with a total diversion rate of 1 cfs. If a claimant diverted one cfs, but used one-half in a hydropower facility and the other half for irrigation, the amount for each purpose of use would be 0.5 cfs, with a total diversion rate of 1 cfs.

Omission of a quantity for each purpose of use would result in ambiguities in the definition of the right that could result in enlargements in use that would result in expansion of the right and injury to other water users. In the example above, assume the claimant who used one-half of a 1 cfs right in a hydropower facility and the other half for irrigation decided to start using the full cfs in a hydropower facility,

⁸ IDWR relied on the following in reaching its conclusion: *Koon v. Empey*, 40 Idaho 6, 231 P. 1097 (1924) (a conveyance of land conveys the appurtenant right absent express provision to the contrary); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984) (division of tract of land to which water is appurtenant works a division of the water right in the same proportion as the land is divided, absent express provision to the contrary.)

⁹ IDWR does not require all claimants to submit information showing a "chain of title" demonstrating ownership of all or part of a previously decreed or licensed right in its investigation of the claims. Generally, IDWR requires information as to ownership as part of the investigation of claims only where there are competing claims to the same water right.

followed by use of the full cfs for irrigation. If the hydropower use were a year-round use, then the use of the irrigation half outside the irrigation season for hydropower use would result in injury to junior water users outside the irrigation season who were previously subject to a prior use of one-half cfs who are now subject to a prior use of 1 cfs. In addition, if the half cfs formerly used only for hydropower were also used for irrigation, junior water users during the irrigation season would be injured by the use of this half cfs for a more consumptive purpose.¹⁰

3. Quantity for irrigation

As noted above, the director's report recommended a quantity of 0.41 cfs for irrigation. This includes 0.26 cfs (0.02 cfs per acre) for the on-farm diversion requirement (the amount of water needed at the place of use), and 0.15 cfs for conveyance losses (an additional amount of water needed at the point of diversion to deliver the amount needed at the place of use). IDWR has conducted further analysis of the quantity for irrigation due to further information IDWR received subsequent to its original analysis. Based on this further analysis, IDWR recommends a quantity of 0.45 cfs for irrigation. This includes 0.30 for the on-farm diversion requirement (0.023 cfs per acre) and 0.15 cfs for conveyance losses.

IDWR's methodology for investigating and recommending claims to water for irrigation in excess of 0.02 cfs per acre is described in IDWR's Report Regarding Evaluation of Irrigation Diversion Rates.¹¹ The application of that methodology to this claim is described in Appendix B. Neither the claimant nor IDWR's investigation has yielded information which would confirm beneficial use of a greater quantity for irrigation.

As described in Appendix B, the application of IDWR's methodology for evaluation of irrigation diversion rates resulted in the recommendation of an additional 0.15 cfs for conveyance losses. IDWR determined the total conveyance losses for the ditch through which this right is delivered, and allocated that total among the various rights to water delivered through the same ditch. Further information as to other rights delivered through the same ditch is provided in subsection 5 below.

¹⁰ This further quantification is provided pursuant to Idaho Code §42-1411(2)(c) (which provides for IDWR to determine the quantity of water used to the extent the director deems appropriate to define and administer the water right).

¹¹ IDWR relied upon the following in reaching its conclusions: Idaho Code §42-220 (which provides that no license or decree will be issued confirming a right to more than 0.02 cfs per acre for irrigation unless it can be shown that a greater amount is necessary) and Idaho Code §42-1402 (which limits the amount of water allotted by a decree to the amount of water beneficially used).

4. Quantity for stockwater

As noted above, IDWR recommended 0.02 cfs for stockwater during the irrigation season, and 0.17 cfs for stockwater outside the irrigation season. The 0.17 cfs for stockwater use outside the irrigation season includes 0.02 cfs for stockwater use (the same quantity recommended during the irrigation season) and an additional 0.15 cfs for conveyance losses (which is included in the quantity recommended for irrigation during the irrigation season). In addition, the recommendation includes a further description of non-irrigation uses, which states: STOCKWATER, 19 RANGE CATTLE.

DISCUSSION
OF
STOCKWATER
REMARK

P. 10
HAS
EXPLANATION
OF WHY

This right was claimed for 0.04 cfs for stockwater for 19 head of range cattle. IDWR recommended 0.02 cfs based on its guidelines for quantity for stockwater use. 0.02 cfs is the standard for 0-50 head of range cattle. The guidelines for quantity for stockwater use are described in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights. The basis for the additional amount recommended for conveyance losses is described in Appendix B. Neither the claimant nor IDWR's investigation has yielded information which would confirm beneficial use of a greater quantity for stockwater.

The director recommends the following as an alternative method to describe the quantity of water used for stockwater purposes, which has been used in the recommendation of other claims to water rights in the test basins. First, the diversion rate for stockwater would be described as 0.02 cfs, based on the IDWR's standard for 0-50 head of range cattle (omitting the additional 0.15 cfs for conveyance losses). The quantity element would also include the following language:

THE APPROPRIATOR IS ENTITLED TO THE AMOUNT OF WATER DESCRIBED HEREIN FOR STOCKWATER PURPOSES AT A POINT OF MEASUREMENT WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED HEREIN.

THE PORTION OF THIS RIGHT FOR STOCKWATER PURPOSES MAY BE DIVERTED SO LONG AS THE AMOUNT OF WATER DIVERTED AT THE POINT OF DIVERSION FOR STOCKWATER PURPOSES DOES NOT CONSTITUTE UNREASONABLE WASTE AND DOES NOT CONFLICT WITH THE PUBLIC INTEREST, AS DETERMINED BY THE DIRECTOR.

Generally, a water right is measured at the point of diversion. The first sentence above provides for measurement at the place of use. Pursuant to this language, the claimant may divert at the point of diversion whatever quantity is

necessary to provide 0.02 cfs at the place of use, subject to the total quantity of 0.45 cfs.

Although a water right is generally measured at the point of diversion, there are some exceptional circumstances where quantification at the point of diversion is so difficult that a decree or license will expressly provide for measurement of the right at another location. Where a decree or license provides for measurement of the right at another location, the claimant may divert at the point of diversion the amount necessary to deliver the decreed or licensed quantity at the point of measurement.

IDWR has used this alternative method to describe quantity for stockwater use where an irrigation ditch with substantial conveyance losses that carries a relatively large amount of water for irrigation pursuant to numerous water rights during the irrigation season is used to deliver a relatively small amount of water for a number of small stockwater rights outside the irrigation season.

In such circumstances, determining a reasonable efficiency for the delivery of stockwater outside the irrigation system is difficult, because the relative efficiencies of the conveyance loss during the irrigation season and outside the irrigation season are markedly different. For example, in the present case, where the on-farm requirement for irrigation is 0.30 cfs, and the total amount recommended for irrigation is 0.45, then the additional amount recommended for conveyance losses (0.15 cfs) is one-half the amount actually needed at the place of use. Outside the irrigation season, where the amount of water needed for stock at the place of use is 0.02 cfs, and the total amount recommended for stockwater is 0.17 cfs, then the additional amount recommended for conveyance losses (0.15 cfs) is more than 7 times the amount actually needed at the place of use. Determination of an appropriate allocation of the total conveyance loss on the ditch among the various water rights on the ditch is also more difficult outside the irrigation season, because not all rights on the ditch include stockwater outside the irrigation season, and those claimants who do have such rights do not necessarily have stock every winter or divert water for stock throughout the winter. When the total amount of water needed at the places of use for all stockwater uses on the ditch is then compared to the total conveyance loss on the ditch, the conveyance loss may be tens of times the amount of water needed at the places of use.

Using this alternative method of quantification in these circumstances, the amount of water reasonably needed for irrigation becomes the outside limit of the amount of water reasonably needed for stockwater. This allows the water users on the ditch to continue to use a large irrigation ditch for the delivery of small stockwater rights outside the irrigation season. At the same time, however, it leaves a great deal

of opportunity for waste. Therefore, if the exceptional step is taken to quantify the right at the place of use, then exceptional steps must also be taken to prevent unreasonable waste in the exercise of those rights. For this reason, where the recommendation provides for quantification of the stockwater portion of the right at the place of use, the second sentence in the language stated above is also included, which expressly notes the authority of the director to administer distribution of water for stockwater uses so as to prevent unreasonable waste. Although this additional language is a statement of existing law, it is appropriate and necessary to define and administer the water rights so that the quantification of stockwater at the place of use is not later construed to be a conclusive determination of the reasonableness of the amount of water diverted at the point of diversion under any and all circumstances.¹²

Finally, as previously noted above, the director's report includes a further description of non-irrigation uses by number and type of head which is not included in the claimant's motion for summary judgment. This language is appropriate and necessary regardless of whether the quantity for stock is described as originally recommended in the director's report or whether the quantity is described using the alternative method described above. The further description of non-irrigation uses is based in part on the notice of claim. Additional information as to the basis for the further description of non-irrigation uses is set forth in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights. As part of Basin Wide Issue 12, however, IDWR has proposed that the further description of non-irrigation uses be rephrased as: THE QUANTITY FOR NON-IRRIGATION USE IS LIMITED TO THE AMOUNT OF WATER BENEFICIALLY USED FOR: STOCKWATER, 19 RANGE CATTLE. The basis for this rephrasing is also described in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights.¹³

¹² IDWR relies upon the following in reaching its conclusion: Idaho Code §42-1411(2), which provides that IDWR shall determine the quantity of water used to the extent the director deems *appropriate and proper* to define and administer water rights acquired under state law, and Idaho Code §42-1412(6), which provides that the decree shall contain or incorporate a statement of each element of a water right as stated in section 42-1411, as contrasted with language later in section 42-1412 providing for the inclusion of general provisions to the extent *necessary* to define and administer water rights.

¹³ Special Master Haemmerle has issued his recommendation regarding Basin Wide Issue 12; a motion by the United States for reconsideration is pending.

5. Quantity for other purposes

As to the quantity for other purposes of use stated in the claimant's motion for summary judgment, neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for other purposes, as noted in section F above. Therefore, IDWR does not have information that would confirm the quantity used for the other purposes.

6. Other rights delivered through same ditch

As noted in Appendix B, IDWR determined the total conveyance losses for the ditch through which this right is delivered, and allocated that total among the various rights to water delivered through the same ditch. For this reason, IDWR previously proposed that contested water rights in the Hagerman area be grouped by ditch for scheduling purposes to facilitate resolution of quantity issues for those rights. Water right 36-00003A is delivered through the Buckeye ditch. Appendix C is a schematic which shows the water rights delivered through the Buckeye ditch, and which includes a variety of information as to the water rights listed.

7. Total quantity

As noted above, the director's report recommended 0.41 cfs for irrigation, 0.02 cfs for stockwater within the irrigation season and 0.17 cfs for stockwater outside the irrigation season, for a total quantity of 0.041 cfs. As also noted above, this report recommends 0.45 cfs for irrigation, and 0.02 cfs for stockwater to be measured at the place of use, resulting in a total quantity of 0.45 cfs. As these numbers demonstrate, the quantity for irrigation and the quantity for stockwater is not additive; in other words, of the total amount recommended, all may be used for irrigation, or a portion may be used for irrigation and a portion for stockwater. This is consistent with the manner in which rights for irrigation and stockwater are used, where livestock water from the irrigation system; it is also the manner in which this water right was claimed.

H. Period of Year Water is Used for Each Purpose of Use

1. Irrigation

Both the notice of claim and director's report state a period of use of 3/15 to 11/15 for irrigation. The claimant's objection states a period of use of 1/1 to 12/31. The claimant's motion for summary judgment states the period of use as "the

irrigation season." The *New International Mortgage* decree does not state a period of use for irrigation.

The recommended season of use is consistent with season of use standards for irrigation developed by IDWR for various climatic regions throughout the state, which are based on a 75% chance of a 24 degree Fahrenheit frost. In addition, the director's report included general provision 12b, which allowed use of water for irrigation outside the season of use stated in the description of the individual right subject to certain conditions. In the Memorandum Decision and Order Re: Basin-Wide Issue 5, the Presiding Judge concluded that general provision 12 is not necessary and would not be decreed. This decision further provided that "all decrees for irrigation in the SRBA shall set the period of use as the "irrigation season." Order, pp. 15-16. The district court denied a subsequent motion for permission to appeal the decision. Pending any further proceedings on the decision, any further statement of the basis for IDWR's recommendation as to the season of use for irrigation appears to be unnecessary.

2. Stockwater

The notice of claim states a period of use 1/1 to 12/31 for stockwater. The claimant's motion for summary judgment states the period of use as year-round, which is for all intents and purposes the same as recommended in the director's report, which included a quantity for stockwater both within and outside the irrigation season.

3. Other purposes

As to the season of use for other purposes of use stated in the claimant's motion for summary judgment, neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for other purposes, as noted in section F above. Therefore, IDWR does not have information that would confirm the season of use for the other purposes.

I. Legal Description of the Place of Use

1. Irrigation

The legal description under item 8 in the claimant's motion for summary judgment is the same as the legal description of the place of use for irrigation recommended in the director's report. The number of acres following the legal description is the same as the number of irrigated acres per 40-acre subdivision recommended in the director's report; both list the number of irrigated acres as 13.

2. Stockwater

The legal description of the place of use for stockwater recommended in the director's report is the same quarter-quarter section (40-acre tract) as the place of use for irrigation. The recommended place of use for stockwater is the same as the claimed place of use, and the claimant did not object to the recommended place of use for stockwater. In the claimant's motion for summary judgment, the claimant asserts that stockwater is used in the same quarter section where there are irrigated acres. Neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for stockwater purposes pursuant to this right on the other three quarter-quarter sections within the quarter section.

3. Other purposes

As to the legal description of the place of use for other purposes of use stated in the claimant's motion for summary judgment, neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for other purposes, as noted in section F above. Therefore, IDWR does not have information that would confirm the place of use for the other purposes.

J. Annual Volume of Consumptive Use

The notice of claim states an annual volume of consumptive use of 39 AFY, or 3.0 AFY per irrigated acre. The annual volume of consumptive use recommended in the director's report is the same. The claimant's objection contests the recommended consumptive use, but does not state an amount. The claimant's motion for summary judgment states an amount of 58.5 AFY, or 4.5 AFY per acre. The Affidavit of Charles E. Brockway, submitted by the claimant in support of the motion for summary judgment, states "that 3.75 acre feet per acre per annum is the amount of consumptive use that is reasonable [in the Hagerman area] based upon a yield of ten tons [of alfalfa] per acre." Applying this standard, the total annual consumptive use volume would be 48.75 AFY.

IDWR developed standards for annual volume of consumptive use for the various climatic areas throughout the state. The standard for the area in which the claimant's place of use is located is 3.0 AFY. IDWR's recommendation is based on this standard. The development of IDWR's standards for annual volume of consumptive use is described in IDWR's Report Regarding Evaluation of Irrigation Diversion Rates. IDWR has conducted further analysis of the annual volume of consumptive use based on further information IDWR received subsequent to its

original analysis. The further analysis is described in IDWR's Report Regarding Consumptive Use for Irrigation in the Hagerman Area. Based on this further analysis, IDWR recommends an annual volume of consumptive use of 3.5 AFY per acre, for a total of 45.5 AFY for this right.

In response to the request of the Presiding Judge, the director filed an Amended Director's Report for Reporting Area 3 (Basin 36), which substantially reduced the number of general provisions in the director's report. Attachment 2 to the amended report explains the changes made to the general provisions, and further explains the changes to the list of recommended rights necessitated by the changes to the general provisions. The amended report deleted General Provision 14, which established that the recommended consumptive use is for the irrigation portion of the right only. As a result, the description of the annual volume of consumptive use for this right should contain the following language:

THE CONSUMPTIVE USE VOLUME IS ONLY FOR THE IRRIGATION PORTION OF THIS RIGHT.¹⁴

K. Conditions on the Exercise of the Right and Other Necessary Matters

The recommendation of this right in the director's report includes the following remarks:

WATER IS DELIVERED THROUGH THE BUCKEYE DITCH.
0.15 CFS OF THIS RIGHT IS LIMITED TO USE FOR CONVEYANCE LOSSES IN DELIVERY OF THIS RIGHT.

The claimant's objection seeks deletion of the conveyance loss remark. The claimant's motion for summary judgment seeks deletion of both remarks.

In response to the request of the Presiding Judge, the director filed an Amended Director's Report for Reporting Area 3 (Basin 36), which substantially reduced the number of general provisions in the director's report. Attachment 2 to the amended report explains the changes made to the general provisions, and further explains changes to the list of recommended rights necessitated by the changes to the general provisions. The amended report deleted General Provision 16, which set forth certain provisions as to conveyance losses. The conveyance loss remark in the

WHY
CONVEYANCE
LOSS
REMARK
WAS
DROPPED

¹⁴ IDWR relied upon the following in reaching its conclusion: Idaho Code §42-1401A (Supp. 1996) (which provides that the determination of the annual volume of consumptive use for all uses of water other than irrigation need not be decreed unless reported in the director's report).

description of the individual right was a corollary to the general provision. As a result, the remark in the description of this right as to conveyance losses is no longer necessary. (Deletion of the remark does not change IDWR's recommendation as to the quantity for this right.)

In response to the request of the Presiding Judge, IDWR submitted IDWR's Report for September 19, 1995 Status Conference. In this report, IDWR indicated that it had reviewed its use of remarks in the description of the individual water right, both to address concerns identified by the court, and to separate explanatory material from material the Director recommends be included in the decree of water rights pursuant to the 1994 amendments to the adjudication statute.¹⁵ The remark identifying the common name of the ditch through which the water right is delivered is explanatory material.

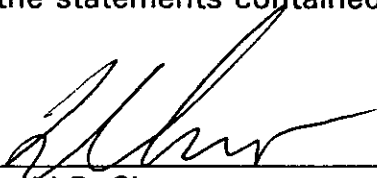
¹⁵ See Idaho Code §42-1411 (which addresses the form and content of director's reports).

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00003A

State of Idaho)
) ss.
County of Ada)

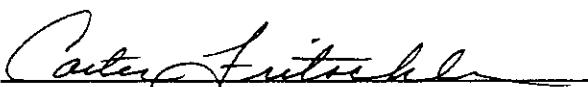
David B. Shaw, being first duly sworn, upon oath, deposes and says:

That I am the Adjudication Bureau Chief for IDWR, that I have read the foregoing report, know its contents, and that the statements contained therein are true to the best of my knowledge and belief.



David B. Shaw

Subscribed and sworn to before me this 1st day of July, 1996.

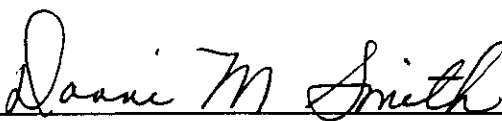


Notary Public for Idaho
Residing at: Kuna, Id
My commission expires: 3-21-2000

Certificate of Service

I certify that on the 1st day of July, 1996, I hand-delivered copies of the foregoing document, including all attachments to the following:

Patrick D. Brown
133 Shoshone St North
Twin Falls, ID 83303



Person delivering document(s)