

2002 AUG -2 AM 8: 50

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

**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: 36-8139 and 36-8140
	)	
Case No. 39576	)	ORDER ON COURT'S MOTION TO
	)	ALTER OR AMEND JUDGMENT;
	)	I.R.C.P. 59(e)
	)	
	)	ORDER RESCINDING AMENDED
	)	PARTIAL DECREE FOR WATER
	)	RIGHT 36-8139

On June 18, 2002, a hearing was held regarding the above-captioned water rights.¹ The purpose of the hearing was to determine whether the water rights are properly subjected to the inclusion of a "13,000 gallon per day" limitation. At the hearing, Nick Spencer from IDWR provided comment to the Court regarding the limitation in these water rights pursuant to Judge Hurlbutt's ruling in Basin-Wide Issue 12. The Court also heard argument from the claimant, through its counsel, Jason Miciak, regarding whether the inclusion of this limitation was a result of a clerical error. Mr. Miciak also raised an argument that the claimants should be provided the relief sought due to a deficiency of notice arising from the fact that the limitation was not included in the Director's Reports for these water rights. Based upon the comments by Mr. Spencer, and the arguments presented by Mr. Miciak, the Court makes the following findings of fact and conclusions of law:

¹ Subsequent to the hearing, Mr. Miciak informally requested the Court to hold its decision in this matter pending settlement negotiations with IDWR. Mr. Miciak requested the opinion issue on August 2, 2002.

Findings of Fact

1. Water right 36-8140 was licensed on October 16, 1990, with both a commercial and a stockwater purpose of use. Based upon the annual acre-foot volume limitation in the license, it is clear that the stockwater purpose of use in the license is **not** a *de minimis* stock watering use as defined in Idaho Code section 42-1401A(12), rather the quantity of the licensed stockwater right exceeds this statutory definition. This finding is consistent with the representations made by IDWR at the hearing.

2. Water right 36-8139 was licensed on October 16, 1990, with both a domestic and a stockwater purpose of use. Based upon the annual acre-foot volume limitation in the license, it is clear that the stockwater purpose of use in the license is a *de minimis* stock watering use as defined in Idaho Code section 42-1401A(12). This finding is also consistent with the representations made by IDWR.

3. The Director's Report for Basin 36 does not include a "13,000 gallon per day" limitation for any water right reported therein, including the subject water rights. The Department of Water Resources began including the limitation after Special Master Haemmerle issued a *Special Master's Second Amended Recommendation Re: Basin-Wide Issue 12* (August 12, 1996). Although there was a challenge to the Presiding Judge on Basin-Wide Issue 12, the Special Master's recommendation regarding the limitation at issue herein was not challenged.

4. A *Partial Decree* was issued for water right 36-8139 on December 13, 1996. A *Partial Decree* for water right 36-8140 was issued on January 15, 1998. Both *Partial Decrees* contained the "13,000 gallon per day" limitation. The claimant, the McCord Family Partnership, was timely served with copies of these *Partial Decrees*.

5. The claimant did not timely file for any post-judgment relief (e.g., a motion pursuant to I.R.C.P. 59(e)) with respect to any issue it had with the inclusion of the subject limitation, nor did the claimant timely file an appeal to the Idaho Supreme Court following the issuance of the *Partial Decrees*.

6. The *Order Designating Basin-Wide Issue 12* was issued by Judge Hurlbutt on April 5, 1996, and appeared on the Docket Sheet that was published in the first week of May 1996.

Conclusions of Law

1. The stockwater portion of water right 36-8140 is not the type of stockwater right that should include a "13,000 gallon per day" limitation as contemplated in the *Memorandum Decision and Order Re: Basin-Wide Issue 12*. The inclusion of the limitation was the result of a clerical error caused by oversight or omission during the implementation of the order in Basin-Wide Issue 12. IDWR acknowledges the same.

2. The stockwater portion of water right 36-8139 is the type of stockwater right that should include a "13,000 gallon per day" limitation as contemplated in the *Memorandum Decision and Order Re: Basin-Wide Issue 12*. The inclusion of the limitation was not the result of a clerical error as alleged by the claimant.

3. The claimant was provided adequate notice, via service by mail, of the issuance of the respective *Partial Decrees* for these water rights.

4. The claimant was provided adequate notice, via the Docket Sheet, of the designation of Basin-Wide Issue 12. *See Memorandum Decision and Order on Motion to Set Aside Partial Decrees*, Subcases 55-02373 *et al.*, (LU Ranching Co.)(May 1, 2001).

5. The claimant had a duty to carefully review the *Partial Decrees* that were issued for these water rights and to timely seek relief, in accordance with the Idaho Rules of Civil Procedure, regarding any perceived errors in the judgment. No such relief was sought.

Order

The *Amended Partial Decree* issued for water right 36-8140 on May 21, 2002, correctly removed the "13,000 gallon per day" limitation from the stockwater portion of the water right, and hence no further action is required by the Court with respect thereto.

The *Amended Partial Decree* issued for water right 36-8139 on May 21, 2002 improperly removed the "13,000 gallon per day" limitation from the stockwater portion of the water right, and therefore, IT IS HEREBY ORDERED that the *Amended Partial*

Decree is rescinded. The original ***Partial Decree*** for water right 36-8139, issued December 13, 1996, is reinstated.

Dated 8-2-02

A handwritten signature in black ink, appearing to read "R. Burdick", written over a horizontal line.

ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

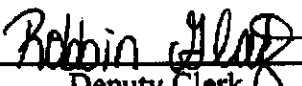
I certify that a true and correct copy of the ORDER ON COURT'S MOTION TO ALTER OR AMEND JUDGMENT; I.R.C.P. 59(e) was mailed on 8/2/02 with sufficient first-class postage to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Jason R. Miciak
PO Box 2632
Twin Falls, ID 83303-2632

U.S. Department of Justice
Environment & Natural Resources Div.
550 W Fort St., MSC 033
Boise, ID 83724

Chief, Natural Resources Div.
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, Idaho 83711-4449


Deputy Clerk

Spencer, Nick

To: jmiciaak@yahoo.com
Subject: 36-8139 (McCord)

Jason, since you haven't returned my call I have decided to communicate this information to you via email.

I have spoken with Dave Tuthill about both (1) your contention that the McCords use over 13,000 gpd during some periods of the year but do not exceed the 9.4 AFA annual diversion volume limiter on the stockwater use under 36-8139, and (2) our discussion that, if this is the case, a possible solution is for your client to file a motion for leave to file an amended claim for a stockwater use exceeding the 13,000 gpd limiter on small stockwater uses but not exceeding the 9.4 AFA annual diversion volume limiter. As to the McCords using more than 13,000 gpd, frankly, Dave is dubious. He says that the 12 gpd quantity per range cow should be ample water even during the hottest weather for the stockwater use of 700 range cows, as licensed. Therefore unless the McCords have expanded their use over what their license calls for, Dave cannot understand how they would exceed 8,400 gpd (12 gpd x 700 cows) let alone 13,000 gpd.

This raises a potential pitfall for the amended claim. If the claim simply provided for stockwater of more than 13,000 gpd for stockwater for 700 range cows (not to exceed an annual diversion volume of 9.4 AFA), without further explanation, it is likely that IDWR would apply its 12 gpd standard for range cows, and then disallow the claim on the basis that it had previously correctly recommended it as a small stockwater right because the use does not exceed 13,000 gpd. Therefore, if your client does choose to seek to file an amended claim, and the motion to amend is granted, it will be crucial for you to provide IDWR with a credible explanation and evidence of how and why the stockwater use exceeds 13,000 gpd for part of the year. Moreover, you will need to show that this is how the right historically has been used—that is, that the use of more than 13,000 gpd during part of the year is how the McCords have always used the right and is not a new use that expands the historic use.

I hope and trust you will find this information of assistance in determining how to proceed.

Sincerely,
Nick Spencer

Spencer, Nick

To: jmiciaak@yahoo.com
Cc: ewildman@srba.state.id.us
Subject: 36-08139 (McCord)

Hi Jason:

You're danged near as bad at returning phone calls as I am!

I'm writing to let you know that IDWR was contacted by the court a number of days ago inquiring into the status of settlement negotiations regarding the McCord water right. I understand that you had earlier contacted the court asking them to hold off on making a decision on your Rule 60(a) motion pending settlement, and the court wanted to know how much longer they should hold off.

I would not characterize the discussions we have been having regarding how your clients' concerns might be resolved by their seeking leave to file an amended claim as "settlement" discussions per se because there really is no nexus between their right to seek leave to file an amended claim and the decision to move forward on the Rule 60(a) motion. In other words they can seek to amend their claim irrespective of what happens with the motion. You don't have to agree to withdraw your motion in exchange for IDWR agreeing to investigate and make a recommendation on an amended claim--we would be required to investigate and recommend the amended claim irrespective of whether you withdraw your motion. On the other hand, since IDWR cannot by law commit itself to reach a preordained result on a matter for administrative determination, we cannot agree in advance to recommend an amended claim in any particular way in exchange for your clients' withdrawing their motion.

Therefore it seems to me that the situation with the motion ought to be analyzed as follows. On the one hand, you can ask the court to go forward and decide the motion. If it rules in your favor then the 13,000 gpd limiter is removed and your client does not need to seek leave to file an amended claim. But even if the court rules against you, you can still go forward and file a motion to amend the claim. Or on the other hand, if for some reason you wish to avoid the risk of an adverse result on your Rule 60(a) motion, you could always withdraw the motion. But even if you chose that route you could still go forward with the amended claim.

In any event we need to let the court know what we want it to do. I think that is entirely your decision. Therefore I would appreciate it if you would contact the court and let them know whether you want them to rule on your motion or whether you are going to withdraw it.

Thanks for your attention.

Best wishes,
Nick Spencer

RECEIVED

MAY - 9 2002

Department of Water Resources

Jason R. Miciak, P.C. ISB #5710
Attorney at Law
392 Falls Avenue
P.O. Box 2632
Twin Falls, Idaho 83303-2632
Telephone: (208) 733-5500
FAX: (208) 733-5553
Email: jmiciak@yahoo.com

Attorney for Claimants

**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: 36-08139

**Motion to Correct
Clerical Error in
Partial Decree**

COMES NOW, the Claimant in the above captioned Subcase to move that this Court utilize the authority granted in I.R.C.P. 60(a) and/or I.R.C.P. 60(b) and correct a clerical error found within the partial decree issued in this Subcase.

The clerical error at issue is the inclusion of the clause limiting the water right to 13,000 gallons per day, which states in total:

THE QUATITY OF WATER UNDER THIS RIGHT SHALL NOT
EXCEED 13,000 GALLONS PER DAY

Partial Decree 36-08139 January 18, 1998 (Exhibit B to the Affidavit of Jason R. Miciak).

The limiting clause is not a valid condition of this water right as is demonstrated by examination of the *Director's Report* in this Subcase. *Exhibit A to the Affidavit of Jason R. Miciak.* The Director's Report does not contain any language referring to a

13,000 gallon limitation. *Id.* No objection was filed in this subcase because the claimant had no notice of such a limitation.

The Court is not constitutionally bound to decree an unobjected to *Director's Report*. *In Re SRBA Case No. 39576*, 128 Idaho 246, 262 P.2d 614, 630 (1995). However the Court would never unilaterally impose an element or restriction in a decree without notifying the claimant. Therefore, any additional limitation found in a *Partial Decree* where there was no *Objection* to the Director's Report must be a clerical error. IRCP 60(a), cited in (A01), is specifically written to remedy instances such as this where a Partial Decree is issued with a clerical error.

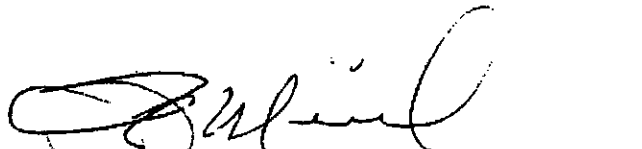
Therefore, the Claimant's respectfully request that this Court issue an Amended Partial Decree which does not contain the 13,000 gallon limitation. Claimants also request that this motion be heard on an expedited basis.

DATED this 3rd day of May, 2002.


JASON R. MICIAK

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of May, 2002, I caused a true and correct copy of the above indicated document to be served by placing the same in the U.S. Mail, postage prepaid, addressed to all parties and counsel listed above, and all parties currently listed on the SRBA website for expedited hearing mailings.


JASON R. MICIAK

RECEIVED

MAY - 9 2002

Department of Water Resources

Jason R. Miciak, P.C. ISB #5710
Attorney at Law
392 Falls Avenue
P.O. Box 2632
Twin Falls, Idaho 83303-2632
Telephone: (208) 733-5500
FAX: (208) 733-5553
Email: jmiciak@yahoo.com

Attorney for Claimants

**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

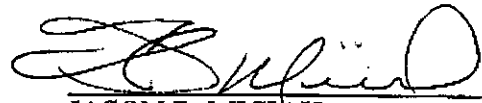
Subcase No: 36-08139

**Affidavit of
Jason R. Miciak**

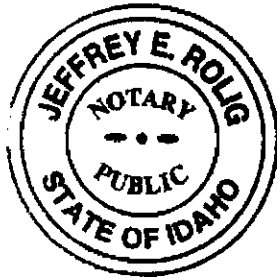
JASON R. MICIAK, being first duly sworn upon oath, deposes and states as follows:

1. Your affiant is a duly licensed attorney in the state of Idaho and make the following declarations based upon personal knowledge.
2. Attached as Exhibit A to this Affidavit is a true and correct copy of the Director's Report issued in subcase No. 36-08139.
3. Attached as Exhibit B to this Affidavit is a true and correct copy of the Partial decree issued in Subcase No. 36-08139.
4. Further You Affiant Sayeth Not:

DATED this 5 day of May, 2002.


JASON R. MICIAK

SUBSCRIBED AND SWORN to before me this 3RD day of
MAY, 2002.




NOTARY PUBLIC FOR IDAHO
Residing at Twin Falls, ID
My commission expires: 2-6-04

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLSIn Re SRBA
Case No. 39576PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 36-081391996 DEC 13 AM 8:46
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED

NAME & ADDRESS: MC CORD FAMILY PARTNERSHIP
3615 SOUTH 2600 EAST
JEROME ID 83338

SOURCE: GROUNDWATER

QUANTITY: 0.06 CFS
11.8 AFYTHE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000
GALLONS PER DAY.

PRIORITY DATE: 01/21/1983

POINT OF DIVERSION: T08S R16E S29 NWNW Within JEROME County

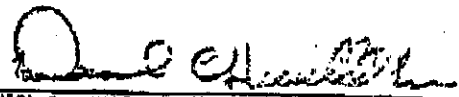
PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	STOCKWATER	01-01 12-31	0.06 CFS
	DOMESTIC 2 HOMES	01-01 12-31	9.4 AFY
			0.06 CFS
			2.4 AFY

PLACE OF USE:	STOCKWATER	Within JEROME County
	T08S R16E S29	NWNW
	DOMESTIC	Within JEROME County
	T08S R16E S29	NWNW

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

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

DATED: DEC 13 1996


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

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.

DATED: DEC 13 1996

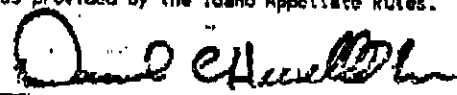

 DANIEL C. HURLBUTT, JR.
 PRESIDING JUDGE
 Snake River Basin Adjudication
PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 36-08139PAGE 1
NOV-26-1996

EXHIBIT B

A/5616MP

TODAY DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAWDATE: NOV-2-1992
PAGE: A-3486NIGHT
NUMBER

NAME & ADDRESS

SOURCE: GROUNDWATER

PRIORITY
DATE PURPOSE OF USE FROM TOMAXIMUM
QUANTITY

BASIS OF CLAIM

36-08139

MC CONO FAMILY PARTNERSHIP
3615 SOUTH 2600 EAST
JEROME ID 83330

01/21/1983 STOCKWATER

01-01 12-31

.06 CFS LICENSE
9.4 AFT CFS

DOMESTIC

01-01 12-31

2.4 AFT CFS
11.0 AFT

TOTAL QUANTITY:

NON-IRRIGATION-USES:
DOMESTIC/ 2 HOMES; STOCKWATER/ 700 RANGE CATTLEPOINT OF DIVERSION:
T08S R16E S29

MAYNARD

PLACE OF USE: STOCKWATER

T08S R16E S29

MAYNARD

PLACE OF USE: DOMESTIC

T08S R16E S29

MAYNARD

01/21/1983 STOCKWATER

01-01 12-31

MC CONO FAMILY PARTNERSHIP
3615 S 2600 E
JEROME ID 83330

COMMERCIAL

01-01 12-31

20.0 AFT CFS
59.4 AFT CFS
79.4 AFT

TOTAL QUANTITY:

NON-IRRIGATION-USES:
STOCKWATER/ 700 DAIRY CATTLE; COMMERCIAL/ DAIRY WARD USEPOINT OF DIVERSION:
T08S R16E S30

SENECA

PLACE OF USE: STOCKWATER

T08S R16E S29
S30MAYNARD
NEKE

PLACE OF USE: COMMERCIAL

T08S R16E S30

EXHIBIT

RECEIVED

MAY - 9 2002

Department of Water Resources

Jason R. Miciak, P.C. ISB #5710
Attorney at Law
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P.O. Box 2632
Twin Falls, Idaho 83303-2632
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Attorney for Claimants

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: 36-08140

Motion to Correct
Clerical Error in
Partial Decree

COMES NOW, the Claimant in the above captioned Subcase to move that this Court utilize the authority granted in I.R.C.P. 60(a) and/or I.R.C.P. 60(b) and correct a clerical error found within the partial decree issued in this Subcase.

The clerical error at issue is the inclusion of the clause limiting the water right to 13,000 gallons per day, which states in total:

THE QUATITY OF WATER UNDER THIS RIGHT SHALL NOT
EXCEED 13,000 GALLONS PER DAY

Partial Decree 36-08140 January 18, 1998 (Exhibit B to the Affidavit of Jason R. Miciak).

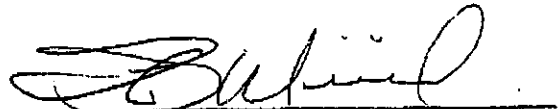
The limiting clause is not a valid condition of this water right as is demonstrated by examination of the *Director's Report* in this Subcase. *Exhibit A to the Affidavit of Jason R. Miciak.* The Director's Report does not contain any language referring to a

13,000 gallon limitation. *Id.* No objection was filed in this subcase because the claimant had no notice of such a limitation.

The Court is not constitutionally bound to decree an unobjected to *Director's Report*. *In Re SRBA Case No. 39576*, 128 Idaho 246, 262 P.2d 614, 630 (1995). However the Court would never unilaterally impose an element or restriction in a decree without notifying the claimant. Therefore, any additional limitation found in a *Partial Decree* where there was no *Objection* to the Director's Report must be a clerical error. IRCP 60(a), cited in (A01), is specifically written to remedy instances such as this where a Partial Decree is issued with a clerical error.

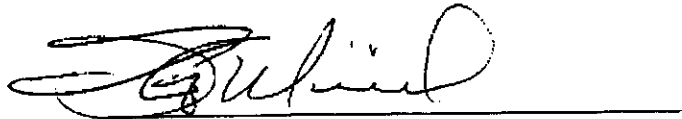
Therefore, the Claimant's respectfully request that this Court issue an Amended Partial Decree which does not contain the 13,000 gallon limitation. Claimants also request that this motion be heard on an expedited basis.

DATED this 3rd day of May, 2002.


JASON R. MICIAK

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of May, 2002, I caused a true and correct copy of the above indicated document to be served by placing the same in the U.S. Mail, postage prepaid, addressed to all parties and counsel listed above, and all parties currently listed on the SRBA website for expedited hearing mailings.


JASON R. MICIAK

RECEIVED

MAY - 9 2002

Department of Water Resources

Jason R. Miciak, P.C. ISB #5710
Attorney at Law
392 Falls Avenue
P.O. Box 2632
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Telephone: (208) 733-5500
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Email: jmiciak@yahoo.com

Attorney for Claimants

**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: 36-08140

Affidavit of
Jason R. Miciak

JASON R. MICIAK, being first duly sworn upon oath, deposes and states as follows:

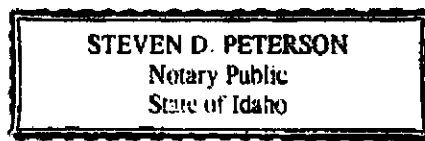
1. Your affiant is a duly licensed attorney in the state of Idaho and make the following declarations based upon personal knowledge.
2. Attached as Exhibit A to this Affidavit is a true and correct copy of the Director's Report issued in subcase No. 36-08140.
3. Attached as Exhibit B to this Affidavit is a true and correct copy of the Partial decree issued in Subcase No. 36-08140.
4. Further You Affiant Sayeth Not:

DATED this 3rd day of May, 2002.

Jason R. Miciak

JASON R. MICIAK

SUBSCRIBED AND SWORN to before me this 2 day of
MAY, 2002.



Steven D. Peterson

NOTARY PUBLIC FOR IDAHO

Residing at: Twin Falls, ID

My commission expires: 5-2-2006

APR-30-92 TUE 10:02 AM SRBA DIST COURT FAX NO. 12087362121 P. 02

AJS856NP

IDaho DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

DATE: NOV-2-1992
PAGE: A-1486

RIGHT NUMBER	NAME & ADDRESS	PRIORITY DATE	PURPOSE OF USE	PERIOD OF USE FROM TO	MAXIMUM QUANTITY	BASIS OF CLAIM
SOURCE: GROUNDWATER						
36-08139	MC CONO FAMILY PARTNERSHIP 3415 SOUTH 2400 EAST JEROME ID 83338	01/21/1983	STOCKWATER DOMESTIC	01-01 12-31	.06	CFS
					9.4	AFY
				01-01 12-31	.06	CFS
					2.4	AFY
				TOTAL QUANTITY:	.06	CFS
					11.8	AFY
NON-IRRIGATION-USES:						
DOMESTIC/ 2 HOMES; STOCKWATER/ 700 RANGE CATTLE						
POINT OF DIVERSION:						
TOBS R16E S29 NWNW						
PLACE OF USE: STOCKWATER						
TOBS R16E S29 NWNW						
PLACE OF USE: DOMESTIC						
TOBS R16E S29 NWNW						
36-08140	MC CONO FAMILY PARTNERSHIP 3415 S 2400 E JEROME ID 83338	01/21/1983	STOCKWATER COMMERCIAL	01-01 12-31	.11	CFS
					20.0	AFY
				01-01 12-31	.11	CFS
					59.4	AFY
				TOTAL QUANTITY:	.11	CFS
					79.4	AFY
NON-IRRIGATION-USES:						
STOCKWATER/ 700 DAIRY CATTLE; COMMERCIAL/ DAIRY BARN USE						
POINT OF DIVERSION:						
TOBS R16E S30 SEENE						
PLACE OF USE: STOCKWATER						
TOBS R16E S29 NWNW						
S30 NENE						
PLACE OF USE: COMMERCIAL						
TOBS R16E S30						

EXHIBIT A

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)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 36-08140

REC'D JUN 15 PM 1:44

NAME & ADDRESS: MC CORD FAMILY PARTNERSHIP
3415 S 2400 E
JEROME ID 83338

SOURCE: GROUNDWATER

QUANTITY: 0.11 CFS
79.4 AFY

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE
SHALL NOT EXCEED 13,300 GALLONS PER DAY.

PRIORITY DATE: 01/21/1983

POINT OF DIVERSION: T08S R16E S30 SEMENE Within GOODING County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
STOCKWATER	01-01 12-31	0.11 CFS 20.0 AFY	
COMMERCIAL	01-01 12-31	0.11 CFS 59.4 AFY	

COMMERCIAL USE IS A DAIRY.

PLACE OF USE: STOCKWATER Within GOODING County
T08S R16E S29 NWNW
S30 NENE
COMMERCIAL Within GOODING County
T08S R16E S30 NENE

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.

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 36-08140

PAGE 1
DEC-29-1997

EXHIBIT B.....

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JUN 11 2002

Jason R. Miciak
Department of Water Resources
Attorney at Law
392 Falls Avenue
P.O. Box 2632
Twin Falls, Idaho 83303-2632
Telephone: (208) 733-5500
FAX: (208) 733-5553
Email: jmiciak@yahoo.com

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DISTRICT COURT-SMA
TWIN FALLS, IDAHO
FILED

Attorney for Claimants

**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: 36-08139 & 36-08140

**Memorandum in Support
of Motion to Correct Clerical
Errors**

COMES NOW, Claimants in the above captioned Subcases by and through their attorney of record, Jason R. Miciak to lodge this *Memorandum in Support of Motion to Correct Clerical Errors* in order to assist the Court in its consideration of the *Motion*. This Memorandum should alleviate the Court's concerns regarding the effect of BWI-12 on the issues inherent to the *Motion*.

ARGUMENT

On May 31st, 2002, the Court issued an *Order Setting Hearing On Court's Motion to Alter or Amend Judgment; I.R.C.P. 59 (e)* in which the Court noted that the limitation sought to be removed from the decree may have been included pursuant to Judge Hurlbutt's

Memorandum Decision and Order RE: Basin Wide Issue-12 (April 25th, 1997). The Court's concern is understandable given the complexity of issues surrounding claims such as these. However, close inspection of the precise issue addressed in BWI-12 and these particular claims vitiates all concern deriving from BWI-12 allowing the Court to feel comfortable that a clerical error resulted in the inclusion of the limitation.¹

This Court properly pointed to Judge Hurlbutt's decision, in particular the portion which found that "the quantity used in cubic feet per second for a *de minimis* claim under I.C. § 42-1401A(12) involving a diversion may be based on any hourly rate so long as the amount is capped to a quantity not to exceed 13,000 gallons per day." *Id.* Focusing on this portion alone might well lead one to conclude that BWI-12 establishes the basis for the inclusion of the relevant limitation. However, reading on through the opinion Judge Hurlbutt noted a critical defining characteristic of *de minimis* claims:

I.C. § 42-1401A(12) defines a class of *de minimis* water rights for treatment in the SRBA. The class includes small rights (13,000 gallons per day or less) diverted solely for stock water or solely for wildlife. *Id.* (Emphasis added.)

Therefore, a *de minimis* claim is one for stockwater use solely or for wildlife solely. Additionally the claim itself must be for less than 13,000 gallons per day.

1. 36-8140

The above defining characteristics of a *de minimis* water right exclude the possibility that water right no. 36-8140 could have been filed as a *de minimis* claim because the claim is for both stockwater and commercial uses as separate uses. The claim specifically sets forth that the commercial use is for "Dairy Barn Use," a separate use with clear intent to divert that is distinct from the "solely" stockwater claims that Judge Hurlbutt addressed.

Additionally, there is another indication within the claim that excludes 36-8140 from the distinct *de minimis* class established by Judge Hurlbutt's order. The claim is for a dairy

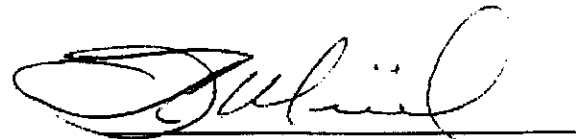
¹ The limitation which claimants seek to have removed is the following: The quality of water under this right shall not exceed 13,000 gallons per day.

with 700 cows. The Department of Water Resources utilizes a "rule of thumb" which allows a minimum of 35 gallons per day per cow. (*See attachment "A"*). Therefore, a 700 cow dairy requires a minimum of 24,500 gallons to operate. This quantity is clearly above the 13,000 gallon limit established for *de minimis* claims and is completely consistent with the .04 cfs claimed for the cows without consideration of the barn. Claimants respectfully assert that there is ample evidence that water right 36-8140 was claimed outside of the class of *de minimis* water rights established in Judge Hurlbutt's *Order*.

2. 36-8139

Initially it would seem that 36-8139 would be more likely to qualify as a *de minimis* right as the purposes of use were domestic and stockwater. However, here again the claim was for .06 cfs, three times more than the 13,000 gallon limitation as demonstrated above and for 500 cows. More importantly, the partial decree was signed on December 13, 1996 along with a Rule 54(b) certificate. The *Memorandum Decision and Order RE: Basin-Wide Issue 12* was signed on April 25, 1997. Therefore, under due process principles of notice and meaningful opportunity to be heard, this Court would never impose a serious limitation any claimant which did not have had notice or opportunity to be heard upon such a limitation. For these reasons, the limitation of 13,000 gallons per day should be lifted from the partial decree to be made consistent with the Director's Report.

7
DATED: June 6, 2002



Jason R. Miciak
Counsel for Claimants

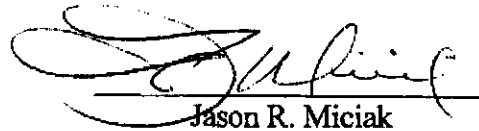
Certificate of Mailing

I HEREBY CERTIFY that on this 7th day of June, 2002, I caused a true and correct copy of the above indicated document to be served by placing the same in the U.S. Mail, postage prepaid, to the following parties.

IDWR DOCUMENT DEPOSITORY
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment & Nat'l Resources Div.
550 W. Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449



Jason R. Miciak

Table 3

NON-IRRIGATION WATER REQUIREMENTS

Types of Establishments	<u>Gallons/day</u>
Airports (per passenger)	3-5
Apartments, multiple family (per resident)	60
Bathhouses (per bather)	10
Camps:	
Construction, semi-permanent (per worker)	50
Day with no meals served (per camper)	15
Luxury (per camper)	100-150
Resorts, day & night, limited plumbing (per camper)	50
Tourist, central bath & toilet facilities (per person)	35
Cottages with seasonal occupancy (per resident)	50
Courts, tourist with individual bath units (per person)	50
Clubs:	
Country (per resident member)	100
Country (per non-resident member)	25
Dwellings:	
Boardinghouses (per boarder)	50
Kitchen requirements (per boarder)	10
Multiple family apartments (per resident)	40
Roominghouses (per resident)	60
Single family (per resident)	50-75
Estates (per resident)	100-150
Hotels:	
With private baths (2 persons/room)	60
Without private baths (per person)	50
Hospitals (per bed)	250-400
Institutions other than hospitals (per person)	75-125
Laundries (per washing/customer)	50

EXHIBITA

Livestock (per animal):	
Cattle (range)	12
Cattle (dairy)	35
Goat	2
Hog	4
Horse	12
Mule	12
Sheep	2
Chickens (per 100)	5-10
Turkeys (per 100)	10-18
Motels:	
With bath, toilet & kitchen facilities (per bed)	50
With bed & toilet (per bed)	40
Parks:	
Overnight with flush toilets (per camper)	25
Trailers with individual bath units (per camper)	50
Picnic:	
With bathhouses, showers & flush toilets (per picnicker)	20
With toilet facilities only (per picnicker)	10
Restaurants:	
With toilet facilities (per patron)	7-10
Without toilet facilities (per patron)	3
With bars & cocktail lounge (additional per patron)	2
Schools:	
Boarding (per pupil)	75-100
Day with cafeteria, gyms & showers (per pupil)	25
Day with cafeteria, no gyms or showers (per pupil)	20
Day without cafeteria, gym or showers (per pupil)	15
Service stations (per vehicle)	10
Stores (per toilet room)	400
Swimming pools (per swimmer)	10
Theaters:	
Drive-in (per car space)	5
Movie (per auditorium seat)	5
Workers:	
Construction (per person/shift)	50
Day (per person/shift)	15

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Idaho Department Of Water Resources
Detail Receipt Summary Screen

Date: 06/10/02
Time: 13:30:58

Rec/No - S002095 AR/No -
From: - MCCORD LAND & LIVESTOCK

Receipt Type - CK Doc/No - 6968
Remarks - TO REPLACE #S002076

MOST CURRENT RECEIPT

Receipt Date: 09/08/1988

Type Of Payment	Fund	FD	PCA	Obj	Subsid	Fee
ADJUDICATION FEE	9337		410162	6490		775.00

Total Due - 775.00

WR/No	WR Fee	WR/No	WR Fee	WR/No	WR Fee
A3607284	331.00	A3607208	234.00	A3607799	90.00
A3604159	25.00	A3608139	25.00	A3608140	70.00

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(GOLD8=Cancel)

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SD-1603-3 Idaho Department Of Water Resources Date: 06/10/02
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Rec/No - S002095 AR/No - Receipt Type - CK Doc/No - 6968
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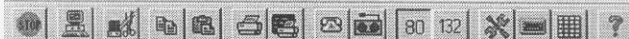
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Date: 06/10/02
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Rec/No - S002095 AR/No -
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A3604159	25.00	A3608139	25.00	A3608140	70.00

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Department of Water Resources

DISTRICT COURT-SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
MAY 31 2002	
By _____	
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

Case No. 39576

) Subcases: 36-8139 and 36-8140
)
) ORDER SETTING HEARING ON
) COURT'S MOTION TO ALTER OR
) AMEND JUDGMENT; I.R.C.P. 59(e)
)

On May 21, 2002, an *Amended Partial Decree* was issued for each of the above-captioned water rights. The previously issued *Partial Decrees* had been amended pursuant to a *Motion to Correct Clerical Error in Partial Decree* filed by the claimant on May 16, 2002. The purported clerical error was the inclusion in the *Partial Decree* of a "13,000 gallon per day" limitation, where such a limitation was not present in the Director's Report.

Upon further review, the Court is not convinced that the inclusion of the limitation is a result of a clerical error. Rather, the limitation may have been included pursuant to Judge Hurlbutt's *Memorandum Decision and Order Re: Basin-Wide Issue 12* (April 25, 1997). In that decision, it was ordered as follows:

The quantity used in cubic feet per second for a *de minimis* claim under I.C. § 42-1401A(12)¹ involving a diversion may be based on any hourly rate so long as the amount is capped to a quantity not to exceed 13,000 gallons per day.

Id (footnote added). The Court has reviewed the notices of claim for these water rights, and there appears to be no indication on the face of the claims whether the rights were claimed for "stock watering use" pursuant to Idaho Code 42-1401A(12) as contemplated by Judge Hurlbutt's decision.

Therefore, IT IS ORDERED that a hearing will be held on this matter on **June 18, 2002 at 1:30 p.m.** at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho.

The claimant should be prepared to discuss, and to present evidence if necessary, as to whether the subject claims are the type contemplated by Judge Hurlbutt's above-quoted ruling. A representative from IDWR shall be present to provide comment on the matter.

Dated May 31, 2002

Roger Burdick

ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication

¹ Idaho Code 42-1401A(12) reads: "Stock watering use" means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

CERTIFICATE OF MAILING

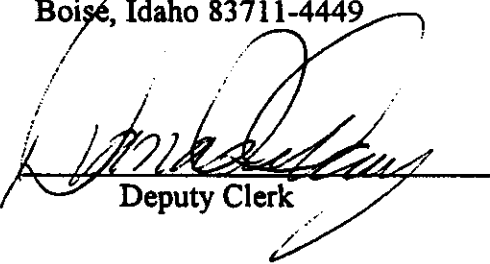
I certify that a true and correct copy of the ORDER SETTING HEARING ON COURT'S MOTION TO ALTER OR AMEND JUDGMENT; I.R.C.P. 59(e) was mailed on May 31, 2002 with sufficient first-class postage to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Jason R. Miciak
PO Box 2632
Twin Falls, ID 83303-2632

U.S. Department of Justice
Environment & Natural Resources Div.
550 W Fort St., MSC 033
Boise, ID 83724

Chief, Natural Resources Div.
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, Idaho 83711-4449


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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
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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

) 91-00012

Case No. 39576

) MEMORANDUM DECISION AND
) ORDER RE: BASIN-WIDE ISSUE 12
)

Lee Leininger, United States Department of Justice, for the United States
David Barber, Idaho Attorney General's Office, for the State of Idaho
Shawn Del Yursa, for the J.R. Simplot Company

I. PROCEDURAL HISTORY

Basin-Wide Issue 12 was designated by the court and referred to Special Master Fritz X. Haemmerle as follows:

- 1) What constitutes a *de minimis* stock water right and may the annual consumptive use volume for such rights be described as "*de minimis*"?
- 2) Is a statement of combined usage necessary for the definition or administration of a *de minimis* water right and, if so, where should it appear in the decree?
- 3) Is it necessary to include the number of head of cattle allowed to describe or administer a *de minimis* water right and, if so, where should it appear in the decree?
- 4) Should the quantity used in cubic feet per second for a *de minimis* water right be based on a 24-hour rate, a 2-hour rate or a set constant based on a 13,000-gallons-per-day rate?

- 5) **Does a water right with a stock watering purpose of use include use for wildlife?**
- 6) **Whether a single water right can be decreed with both a state and federal basis?**

II. DECISION

The only challenge before the court is to issue no. 5 (Section IV, Subsection E) of the Special Master's *Second Amended Recommendation Re: Basin-Wide Issue 12* (August 12, 1996). Initially, the court adopts as its own Section I, Scope of Review; Section II, Procedural Background; and Section III, Standard of Review, of the Special Master's *Second Amended Recommendation Re: Basin-Wide Issue 12*.

To clarify the record, the recommendations contained in Section IV, subsections A - F are adopted by this court as follows:

- A. Annual Volume of Consumptive Use for *De Minimis* Water Rights is Not Required to be Decreed.**

The recommendation in Section IV.A. is adopted in its entirety.

- B. A Statement of Combined Usage for the Definition or Administration of a *De Minimis* Water Right is Not Necessary.**

The recommendation in Section IV.B. is adopted in its entirety.

- C. It is Not Necessary to Include the Number of Cattle in *De Minimis* Claims.**

The recommendation in Section IV.C. is adopted in its entirety.

- D. The Quantity Used in Cubic Feet Per Second for a *De Minimis* Claim Under I.C. § 42-1407A(12) Involving a Diversion May be Based on Any Hourly Rate so Long as the Amount is Capped to a Quantity Not to Exceed 13,000 Gallons Per Day.**

The recommendation in Section IV.D. is adopted in its entirety.

- E. Under a State-Based Appropriation, a Water Right Which Includes Wildlife as a Purpose of Use Can Be Perfected Only Where There is a Diversion Accompanied with an Intent to Use the Water for Wildlife Purposes.**

This recommendation is adopted, in part, and stricken, in part.

The issue addressed by the Special Master in this subsection is set forth in the order of referral as:

- 5) Does a water right with a stock watering purpose of use include use for wildlife?

Order Designating Basin-Wide Issue 12, Referring Matter to Special Master Haemmerle and Setting Hearing (April 5, 1996).

Through briefing and hearing, the question was presented by the parties to the Special Master as 1) whether a wildlife use can exist without a diversion and 2) whether a wildlife purpose of use exists as an incidental use to any stock water claim. In response to the parties' question, the Special Master ruled that 1) a wildlife use can only exist where there has been a diversion and 2) a wildlife use does not exist as an incidental use to a stock water claim under I.C. § 42-1401A(12).

Because the requirement of a diversion to perfect a wildlife use was neither referred to the Special Master nor is its resolution necessary to answer the matter referred, that portion of the recommendation dealing with diversion (page 9, Section E, second paragraph, "the first inquiry . . .," through the second full paragraph on page 10) is stricken as beyond the scope of the referral.¹

This court adopts the Special Master's recommendation in Part E resolving the "second inquiry" (page 10, last paragraph, through page 11).

The United States alleges that the language of I.C. § 42-1401A(12) grants it a wildlife purpose of use as an incident or part of any stock water right. It relies on the statutory language that "[s]tock watering use' means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day." I.C. § 42-1401A(12). Reading the statute in the conjunctive, the United States claims entitlement to a wildlife use as part of each stock watering right. Primary principles of statutory construction require the court to reject the United States' interpretation.²

Using the plain and ordinary meaning of the words in the statute, the word "or" requires reading the act in the disjunctive. Had the legislature meant the statute to be read in the conjunctive, it would have used the word "and." It is unreasonable to read the statute otherwise.

¹ Basin-Wide Issue 12 does not raise the issue of a diversion requirement for instream wildlife uses. This decision neither addresses nor resolves the issue. It has been raised directly in a subcase before a Special Master and is on challenge to this court. It will be resolved in that subcase only.

² The standard used by this court for statutory interpretation is set forth in *Rim View Trout Farms v. Higginson*, 121 Idaho 819, 822 (1992).

Giving effect to all the words used in I.C. § 42-1401A(12) further supports the Special Master's recommendation. This definition of a *de minimis* stock watering and wildlife uses is limited to "the use of water **solely** for livestock or wildlife" I.C. §42-1401A(12) (emphasis added). The correct parsing of the sentence reveals that "solely" modifies both "uses" (livestock and wildlife). Therefore, the correct interpretation of the sentence is that the term "stock watering use" includes uses solely for livestock or solely for wildlife. Solely means only or exclusively. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1387 (College ed. 1962). It does not mean together, part of, or incidental to as suggested by the United States. The plain and ordinary meaning of the terms used does not render wildlife use incidental to or as a part of a stock watering use.

The Special Master insightfully found, and this court has adopted, the correct interplay between the two statutes reviewed as part of this basin-wide issue: I.C. § 42-1401A(12) and I.C. § 42-113. The former defines the term "stock watering use" in the Snake River Basin Adjudication (SRBA) as that class of claims where the diverted use is solely for stock watering or solely for wildlife and where the diversion is 13,000 gallons per day or less. The definition of this class of claims does not eliminate accepted statutory stock watering instream uses which do not require a diversion. I.C. § 42-113. For purposes of the SRBA, the legislature did not include instream stock watering uses in the defined class set by I.C. § 42-1401A(12). Just as with instream stock watering uses, I.C. § 42-1401A(12) is not a legislative pronouncement on instream wildlife claims. I.C. § 42-1401A(12) simply defines a particular class of **diverted** uses for stock watering or wildlife which falls under 13,000 gallons per day. The statute, by its terms, does not address instream uses.

I.C. § 42-1401A(12) defines a class of *de minimis* water rights for treatment in the SRBA. The class includes small rights (13,000 gallons per day or less) diverted solely for stock water or solely for wildlife. The definition does not include lawful instream uses. Similarly, it does not address those single water rights which allow multiple uses.

To clarify, instream stock water rights will be treated the same as diverted stock water rights; that is, as "*de minimis*" (13,000 gallons per day or less) unless the claimant proves a greater quantity and pays the required filing fee for an amount of water in excess of 13,000 gallons per day.

Additionally, claimants may be decreed a water right for more than one use where there is proof of intent as to each of the claimed uses. No right can be decreed for multiple uses where one use is claimed as mere incident of another use.

The recommendation of the Special Master that I.C. § 42-1401A(12) does not allow a wildlife use incidental to a diverted stock water use is adopted. The recommendation that I.C. § 42-113 does not allow a wildlife use incidental to an instream stock watering use is also adopted. A wildlife use requires the intent to put water to that beneficial use and cannot be incidental to a stock watering use. Neither I.C. § 42-1401A(12) nor I.C. § 43-113 dispenses with the intent requirement when perfecting a water right.

The Special Master's recommendation that instream wildlife claims require a diversion is not adopted and is stricken as beyond the call of the question referred.³

F. A Single Water Right Cannot Be Decreed with Both a State and Federal Basis.

This recommendation is adopted in its entirety.

Section V, Summary, is adopted with the exception of Part 5 as discussed above.

III. CONCLUSION

This *Memorandum Decision and Order* constitutes the court's Findings of Fact and Conclusions of Law on Basin-Wide Issue 12.

IT IS SO ORDERED.

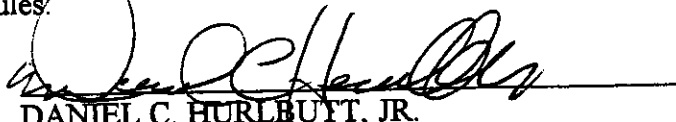
DATED April 25, 1997.


DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

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.

DATED April 25, 1997.


DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

³

This court again reiterates that this decision leaves open the question of whether a wildlife use requires a diversion or may be instream which will be decided in the challenge in subcase 36-15452.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **MEMORANDUM DECISION AND ORDER RE: BASIN-WIDE ISSUE 12** was mailed on April 25, 1997, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Court Certificate of Mailing for Basin-Wide Issue 12


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TWIN FALLS CO., IDAHO
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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 91-00012

Case No. 39576

)
) SPECIAL MASTER'S SECOND
) AMENDED RECOMMENDATION
) RE: BASIN-WIDE ISSUE 12
)

On April 5, 1996, the district court designated Basin-Wide Issue 12 (BWI 12). The purpose of designating BWI 12 was to address the form and content of decrees for state-law based claims to *de minimis* stockwater claims. The issues relating to form and content of stockwater claims were designated as follows:

- 1) What constitutes a *de minimis* stockwater right and may the annual consumptive use volume for such rights be described as "*de minimis*?"
- 2) Is a statement of combined usage necessary for the definition or administration of a *de minimis* water right and, if so, where should it appear in the decree?
- 3) Is it necessary to include the number of head of cattle allowed to describe or administer a *de minimis* water right and, if so, where should it appear in the decree?
- 4) Should the quantity used in cubic feet per second for a *de minimis* water right be based on a 24-hour rate, a 2-hour rate or a set constant based on a 13,000-gallons-per-day rate?

- 5) Does a water right with a stockwatering purpose of use include use for wildlife?
- 6) Whether a single water right can be decreed with both a state and federal basis?

On August 7, 1996, the court heard a *Motion for Reconsideration* filed by the United States. The United States asked the court to reconsider issue four as follows: whether in-stream livestock claims should also be limited to 13, 000 gallons per day and whether decrees involving *de minimis* claims should include a statement that the decreed diversion rate does not reflect actual and historical beneficial use.

I. SCOPE OF REVIEW (DEFINITION OF *DE MINIMIS* CLAIMS)

The issues designated by the court involve *de minimis* stockwater claims. In responding to these issues, the Idaho Department of Water Resources (IDWR) and the parties have operated under various assumptions. IDWR has operated under the assumption that *de minimis* stockwater claims are defined by I.C. § 42-1401A(12). Tr., p. 9, L. 16 - p. 10, L. 4. The parties have operated under the assumption that "in-stream livestock use" as defined by I.C. § 42-113 is included within the definition of "stock watering use" as defined by I.C. § 42-1401A(12).¹ Both of these assumptions are erroneous.

The court concludes that "in-stream livestock use" as defined by I.C. § 42-113 is not included within the definition of "stock watering use" as defined by I.C. § 42-1401A(12). I.C. § 42-1401A reads as follows: "The following terms are defined for purposes of this chapter as follows: (12) 'Stock watering use' means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day" (emphasis added). First, the definitions under I.C. § 42-1401A apply only to Chapter 14, Title 42, "Adjudication of Water Rights." The definition of "in-stream livestock use" under I.C. § 42-113 is provided for under Chapter 1, Title 42, "Appropriation of Water -- General

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The specter that I.C. § 42-1401A(12) does not include in-stream livestock claims was raised by the United States. "Clearly, a physical diversion for livestock or wildlife was not what the legislature intended [under I.C. § 42-1401A(12)]. Such an interpretation would exclude from the definition of 'stock water use' all in-stream claims for stockwater which are the majority of claims to stockwater uses in the SRBA." *United States Reply Brief*, at 5. None of the other participants addressed this argument.

Provisions" and, therefore, would not be covered by the definition of "stock watering use" under I.C. § 42-1401A(12).

Second, applying the clear, unambiguous and literal words of the statute,² the definition of "stock watering use" under I.C. § 42-1401A(12) is limited to claims involving diversions. Since the definition of "in-stream livestock use" under I.C. § 42-113 specifically excludes "the use of any constructed physical diversion works," I.C. § 42-1401A(12) cannot include in-stream livestock claims. The distinction between the two types of claims is relevant when deciding how to decree quantity. *See*, Section IV D, *infra*.

Given the conclusion that I.C. §§ 42-1401A(12) and 42-113 describe two different types of claims, IDWR's assumption that *de minimis* claims are covered only under I.C. § 42-1401A(12) is too narrow. The term *de minimis* refers to "very small or trifling matters."³ Claims under both I.C. § 42-1401A(12) and I.C. § 42-113 involve small or trifling amounts of water. Stockwater claims of all types amount to only 1 to 2 percent of the water claimed in the SRBA. Tr., p. 12, Ll. 13-15. Therefore, any stockwater or livestock claim of any kind, including but not limited to those outlined under I.C. §§ 42-1401A(12) and 42-113, shall be included under the *de minimis* category of claims and covered by the issues presented in this recommendation.⁴

II. PROCEDURAL BACKGROUND

BWI 12 was designated at the request of the United States to address various objections involving *de minimis* claims. The United States filed numerous *de minimis* claims on behalf of the Bureau of Land Management (BLM). Many of these claims are one-party cases where the United States is the claimant and the only objector. Typically, the objections filed by the United States to the director's report could be categorized as follows: (1) the inclusion of cattle under purpose of use, (2) the exclusion of wildlife as a purpose of use and (3) the inclusion of a combined use remark that a particular water right was common to other water rights within a

² The standard used by this court for statutory construction is stated under *Rim View Trout Farm v. Higginson*, 121 Idaho 819, 822, 828 P.2d 848, 851 (1992).

³ The *de minimis* doctrine refers to the Latin phrase *de minimis non curat lex* which means "[t]he law does not care for or take notice of, very small or trifling matters. The law does not concern itself about trifles." BLACKS LAW DICTIONARY 431 (6th ed. 1990).

⁴ As to issue four dealing with how quantity for *de minimis* claims is to be decreed, there is a difference in how claims involving diversion and in-stream flow claims are to be decreed.

particular allotment. The United States also objected to a diversion rate based on a two-hour period. The purpose of BWI 12 is to expedite a resolution of these issues for *de minimis* claims.

In many instances, individual claims filed by the United States are premised on two theories. One theory is based on state grounds or beneficial use. The other theory is based on a federal reservation. These have been referred to as "dual-based" claims. The only difference between the grounds is date of priority. For many claims, the state-based theory has an earlier priority date. The inquiry raised by the court in designating BWI 12 is whether the United States may have a single water right decreed with both a state and federal basis. In addition to enabling the court to respond to specific objections to *de minimis* claims, the purpose of this decision is to direct the court in how to process "dual-based" claims.

III. STANDARD OF REVIEW

Many of the issues designated under BWI 12 involve remarks to specific rights. The Director may include "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(k). For remarks, the court specifically adopts the standard contained under *Silkey v. Tiegs*, 51 Idaho 344, 358, 5 P.2d 1049, 1055 (1931), whereby administrative matters are necessary in the "absence of legislative action on the subject, and of the necessity which manifestly exist[s] for supervising the use of the stream by those having the right to take the water in accordance with the decree. . . ." As to a remark used to define a right, the remark must be reliable and based on fact. Additionally, any administration or definitional remark that results in a vague and inaccurate decree will not be decreed.

IV. RECOMMENDATION

A. Annual Volume of Consumptive Use for *De Minimis* Water Rights is Not Required to be Decreed.

When the *Motion to Designate BWI 12* was filed, the SRBA court was required to decree a specific quantity of water for annual volume of consumptive use for all types of claims. I.C. §§ 42-1411 and 42-1412(6). Because a specific amount of water was difficult to determine for annual volume of consumptive use for *de minimis* claims, the director's report recommended *de minimis* as the annual volume of consumptive use. The problem of decreeing a specific amount of water for *de minimis* claims was resolved by the Idaho Legislature when I.C. § 42-1401A(2)

was amended in 1996 to provide, in pertinent part, that "[t]he 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." See, S.B. 1480, 53rd. Leg., 2nd Reg. Sess., 1996 Idaho Laws. Accordingly, the court finds that the annual volume of consumptive use for *de minimis* claims need not be decreed.

B. A Statement of Combined Usage for the Definition or Administration of a *De Minimis* Water Right is Not Necessary.

The inquiry is whether a statement of combined usage is necessary for the definition or administration of a *de minimis* water right. Typically, a combined usage statement is included in the director's report as a remark to a specific water right. An example of a combined usage statement is as follows: "This right and other rights common to the same grazing allotment shall be limited to the quantity of water beneficially used by the number of stock within the allotment. BLM record ID = 3404583554." See, e.g., Exhibit 4. BLM alleges that such combined usage remarks are not necessary and would result in a vague and inaccurate decree. The State alleges that combined usage remarks are necessary to prevent expansion of a right where there are multiple water rights for the same allotment.

The first inquiry is whether the combined usage remarks are necessary to define or administer a right. The Director may include remarks "as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(k). Such remarks are necessary only in the "absence of legislative action on the subject, and of the necessity which manifestly exist[s] for supervising the use of the stream by those having the right to take the water in accordance with the decree. . . ." *Silkey v. Tiegs*, 51 Idaho 344, 358, 5 P.2d 1049, 1055 (1931). In this case, a remark that water is limited to the amount of water beneficially used is not necessary because Idaho law already limits the use of water to an amount which may be beneficially used. IDAHO CONST. art. XV, § 3; I.C. §§ 42-101 and 42-104. A remark reiterating the law on beneficial use is superfluous and, therefore, unnecessary.

The next inquiry is whether the combined usage remarks are reliable. BLM filed claims to particular water sources. BLM did not file claims for allotments. Exhibit 3 (Affidavit of Gary Madenford). As a result, there was no way to match particular water rights with particular

allotments by reviewing claims. The only way for IDWR to match water rights with allotments was to conduct an independent investigation. As to that investigation, David Shaw testified as follows:

THE COURT: For the federal allotments, were you able to -- or are you able to identify particular water rights associated with those allotments?

A. Sometimes, Your Honor. The allotments, as indicated in the affidavits, do change. Sometimes the maps that we utilized from the BLM to show their project developments also showed allotments; sometimes they didn't. So sometimes the information was available, and sometimes it was not in the information that we reviewed.

Tr., p. 18, Ll. 1-12.

Essentially, IDWR was left guessing as to which water rights were associated with particular allotments. For any *de minimis* stock water right, the court cannot be assured that a *de minimis* stock water right is in fact included in the allotment associated with that decreed right.

Finally, the inclusion of combined usage remarks would result in a vague and unsettled decree. Allotments do not remain fixed over time. Allotment boundaries and the number of cattle that use a particular allotment are subject to change. These changes are based on a number of different land use variables including, but not limited to, availability of vegetative forage, changes in forage due to fire rehabilitation and reseeding, sale or purchase of private property and redistribution of grazing use areas. BLM does not include a measure of water consumed by livestock in the grazing permits because the use of water at any given source is highly variable. Exhibit 3, ¶¶ 6-8, 10.

As a result of these management decisions, water rights associated with particular allotments at the time a decree is entered into may not be the same water rights associated with the same allotments over the course of time. Given these variables, the inclusion of combined usage remarks would lead to a vague and uncertain decree.

For these reasons, the court recommends that combined usage remarks not be included as remarks for *de minimis* claims.

C. It is Not Necessary to Include the Number of Cattle in *De Minimis* Claims.

Originally, IDWR included number of stock as a remark to purpose of use. Subsequently, IDWR proposed to include number of stock as a remark under quantity. The number of stock,

along with other variables, was used to arrive at a diversion rate which attempted to recognize the actual and historic use for a particular stockwater right. During the hearing on this matter, IDWR abandoned number of stock in favor of capping stockwater uses to 13,000 gallons per day for all livestock and wildlife uses regardless of actual historic use. See, Section D, *infra*. Under this method of determining quantity, the parties and IDWR agreed that it is not necessary to include the number of stock as a remark to quantity or purpose of use. The court concurs with this agreement.

Additionally, the inclusion of number of stock would result in an inaccurate decree. Assuming the number of stock were to be included in a decree for a particular right, IDWR was asked if it would be necessary for the right holder to seek an I.C. § 42-222 transfer whenever the number and/or type of stock changed. In response, David Shaw testified that it would not be necessary to obtain a transfer. Tr., p. 21, L. 15 - p. 22, L. 2. Under these circumstances, the number and/or type of stock actually using a particular water right may not be the same number and/or type of stock decreed for a particular right. As a result, any decree including the number and/or type of stock would be inaccurate. The court cannot decree inaccurate provisions.

For all these reasons, the number of stock cannot be included in the final decree.

D. The Quantity Used in Cubic Feet Per Second for a *De Minimis* Claim Under I.C. § 42-1401A(12) Involving a Diversion May be Based on Any Hourly Rate so Long as the Amount is Capped to a Quantity Not to Exceed 13,000 Gallons Per Day.

Prior to the hearing in this matter, BLM, the State and Simplot disagreed as to whether diversion rate should be determined on a two-hour basis or some other time period. IDWR determined quantity assuming a two-hour rate of diversion for every type of stockwater diversion facility. IDWR considered two hours a reasonable rate of diversion for any given facility. Exhibit 4, at 13. The United States correctly pointed out that a two-hour diversion rate extended over 24 hours would exceed the 13,000-gallons-per-day limit on "stock watering use" defined by I.C. § 42-1401A(12). To solve this problem, the parties and IDWR agreed that diversion rate could be determined at a rate other than two hours and that it was not necessary to include stock as a remark to quantity or purpose of use. Tr., p. 27, Ll. 9-25. IDWR recommended, the parties agreed and the court concurs that quantity element for *de minimis* claims involving diversions should be decreed as follows: claimed rate not to exceed 13,000 gallons per day. In cases where

a claim was made assuming a 24-hour diversion rate and where that rate does not reflect the actual diversion rate for a particular facility, the diversion rate should be decreed as follows: actual diversion rate not to exceed 13,000 gallons per day.

The agreement reached by the parties and IDWR covered claims involving diversions under I.C. § 42-1401A(12). Under that statute, there is a cap on use of 13,000 gallons per day. As previously stated, in-stream livestock claims are not covered by I.C. § 42-1401A(12). The result is that the 13,000-gallons-per-day limit on water use described under I.C. § 42-1401A(12) does not apply to in-stream livestock claims. Since I.C. §§ 42-1409(1)(c)(i) and 42-1412(6) require the court to decree "a rate of flow in cubic feet per second" for in-stream flow claims, the diversion rate for in-stream flow claims should be decreed as quantity in terms of cubic feet per second **without** a 13,000-gallons-per-day limitation. While in-stream flow claims are not statutorily limited to 13,000 gallons per day, the United States and Simplot have agreed to voluntarily limit all their in-stream flow claims with a 13,000-gallons-per-day limit.⁵ Therefore, in-stream flow claims for the United States and Simplot shall be decreed as follows: quantity not to exceed 13,000 gallons per day.

For some in-stream flow claims, IDWR calculated quantity assuming a two-hour diversion rate. Such a calculation for in-stream flow claims is erroneous because in-stream flow claims assume a constant flow of water over a 24-hour period. Consequently, IDWR must recalculate quantity for in-stream flow claims using 24 hours as the appropriate time period.

Although the court will decree a specific quantity or diversion rate, the court recognizes that the specific amount decreed may not reflect actual and historical beneficial use. Given the scope of the SRBA and the fact that *de minimis* claims of all types account for only one to two percent of all water claimed in the SRBA, it would be overly burdensome for IDWR, with a finite amount of resources, to investigate each and every *de minimis* claim. Therefore, the decreed

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In addition to the United States and Simplot voluntarily limiting their in-stream livestock claims to 13,000 gallons per day, IDWR asserts that many other claimants should likewise be limited to 13,000 gallons per day for their in-stream livestock claims. During the original claims taking period, certain claimants paid a twenty-five dollar (\$25.00) filing fee under I.C. § 42-1401A(12) (1986). Under the 1986 version of I.C. § 42-1401A(12), the 13,000-gallons-per-day limit applied to in-stream stockwater claims as well as stockwater claims involving diversions. Consequently, IDWR claims that anyone who paid for a stockwater claim under I.C. § 42-1401A(12) (1986) should be limited to 13,000 gallons per day. The court is concerned that claimants who have in-stream flow claims should be able to litigate this issue in the context of subcases or, in the alternative, that the issue be framed adequately and that it be dealt with in a separate basin-wide issue. Under either scenario, the court needs to insure proper due process notice that this issue is pending.

diversion rate or quantity represents the upper limit for every *de minimis* claim and may not reflect the actual or historical beneficial use for any claimant.

E. Under a State-Based Appropriation, a Water Right Which Includes Wildlife as a Purpose of Use Can Be Perfected Only Where There is a Diversion Accompanied with an Intent to Use the Water for Wildlife Purposes.

Many of the stockwater claims filed by the United States include wildlife as a purpose of use. For most of these claims, the water right has been recommended without wildlife as a purpose of use. In response, the United States argues as follows: (1) a wildlife use can exist without a diversion and (2) a wildlife purpose of use exists as an incidental use to any stockwater claim. The State and Simplot argue that a wildlife purpose of use can exist only where there is a diversion for that intended purpose.

The first inquiry is whether wildlife can be included as a purpose of use without a diversion under either a constitutional or statutory appropriation claim.⁶ Generally, a constitutional claim is perfected by compliance with the following requirements: (1) intent to divert, (2) diversion and (3) application of water to a beneficial use. *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680, 619 P.2d 1130 (1974) (quoting 78 AM.JUR.2D *Waters* § 321 (1975)). In *R.T. Nahas Company v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct.App. 1983), the Idaho Court of Appeals created an exception to the diversion requirement for stockwater claims. "We conclude that, for purposes of watering stock, no diversion from a natural watercourse should be required to establish a constitutional appropriation of water." *Id.* at 44.

In citing *Hulet*, the United States attempts to apply the statutory definition of "stock watering use" under I.C. § 42-1401A(12), which includes the term "wildlife," to the *Hulet* court's use of the term "stock." The facts in *Hulet* were limited to cattle. The issue in *Hulet* was limited to a decision as to whether a rancher could obtain a water right for cattle without a diversion. Neither the facts nor the issue before the court addressed wildlife. The exception to the diversion requirement was limited to "stock." Since the statutory definition of "stock watering use" under I.C. § 42-1401A(12) did not exist at the time *Hulet* was decided, the only reasonable interpretation

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The United States is claiming rights to stock/wildlife under a constitutional method of appropriation. Tr., p. 74, Ll. 19-23.

of "stock," given the issue and facts presented, is "all the animals . . . kept and used on a farm; livestock."⁷ WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1791 (2nd ed. 1979).

Furthermore, in citing *Hulet* for the proposition that a wildlife use may be obtained without a diversion, the United States overlooks one very crucial distinction. In *Hulet*, it is clear that the rancher intended to water his stock from the stream in question. The intent to apply water to a beneficial use was accompanied with the physical act of placing cattle near the water source. In this case, the United States is asking the court to accept the proposition that a water right for wildlife exists where there is no diversion or intent to apply water to a beneficial use. Such an interpretation would render the constitutional method of appropriation meaningless. Under that theory, a water right is obtained any time wildlife happens upon a water source and drinks. If the court accepted the United States' position, given the abundance of wildlife in Idaho, then every landowner appurtenant to water would have a water right for wildlife.

For a statutory claim, "[a] permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock." I.C. § 42-113. Webster's Dictionary defines "livestock" as "[d]omestic animals kept for use on a farm or raised for sale and profit." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1059 (2nd ed. 1979). Under the plain and ordinary words of the statute, it is clear that I.C. § 42-113 does not create an exception to the diversion requirement for wildlife.

The second inquiry is whether a wildlife use can exist as an incidental use where the diversion is for stock purposes. The United States alleges that where water is diverted for stock, the purpose of use also includes wildlife even if the person or entity that diverted did not specifically intend wildlife as a purpose of use. The United States relies upon I.C. § 42-1401A(12) which reads as follows: "'stock watering use' means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day." I.C. § 42-1401A(12) (emphasis added). Interpreting I.C. § 42-1401A(12) in the conjunctive, the United States argues that any diversion for stock also includes wildlife as a purpose of use. As pointed out by the State and Simplot, I.C. § 42-1401A(12) is correctly

interpreted in the disjunctive. One may divert for stock or wildlife. The use of the right depends on the reason for the diversion. If the user diverts for stock purposes, then the right is limited to stock. If the user diverts for wildlife purposes, then the right is limited to wildlife. A user could divert for multiple purposes in which case those multiple purposes would be recognized.

The fact that water rights may not include wildlife as a purpose of use does not mean that wildlife will go thirsty. The State best summarized the use of water by wildlife as follows:

Obviously, wildlife drink from stream and water systems. In all likelihood, wildlife consumed the water in Idaho streams for thousands of years before the advent of the prior appropriation doctrine. The mere fact that wildlife may continue to do what it has always done does not, in itself, give rise to a water right. Water rights exist to prioritize the right to use limited resources. By definition, the exercise of a water right contemplates volitional conduct on the part of the party. A water right is not intended to either document or quantify natural occurrences.

State's Reply Brief, at 6.

In summary, the court concludes that a wildlife right under either a constitutional or statutory claim can be perfected only where there is a diversion accompanied with an intent to use the water for wildlife purposes. Absent these factors, a wildlife right can be obtained should the United States establish a reservation for that purpose. "[R]eserved rights, unlike state created appropriative rights, do not depend upon diversion from the stream and application to beneficial use." *Avondale Irrigation District v. North Idaho Properties, Inc.*, 99 Idaho 30, 40, 577 P.2d 9, 19 (1978) (citation omitted).

F. A Single Water Right Cannot Be Decreed with Both a State and Federal Basis.

The United States, through BLM, has numerous "dual-based" claims for the same water. As previously stated, the "dual-based" claims filed by the United States involve individual claims premised on two theories. One theory is based on state grounds while the other theory is based on a federal reservation.⁸ The state theory generally has an earlier priority date. For these "dual-based" claims, the inquiry before the court is as follows: (1) whether an implied or express reserved right exists when the same water source already has been appropriated under state

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Although the United States filed one claim which included two theories, IDWR separated the claim into two separate claims, each having separate claim numbers. The state-based claim was reported in Part One of the *Amended Director's Reports for Reporting Areas 1, 2 and 3 (Basins 34, 57 and 36) (Amended Director's Reports)*. The federal-based claim was reported in Part Two of the *Amended Director's Reports*.

grounds or (2) whether a state-based claim exists where the same water has been reserved. The State and Simplot argue that only the right with the earlier priority date may be decreed.

The first inquiry is whether reserved water rights include water previously appropriated under state grounds. As to implied reservations, this issue was addressed by the United States Supreme Court in *Cappaert v. United States*, 426 U.S. 128 (1976). The court stated:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, **reserves appurtenant water then unappropriated** to the extent needed to accomplish the purpose of the reservation. In so doing the United States **acquires a reserved right in unappropriated water** which vests on the date of the reservation and is superior to the rights of future appropriators.

Id. at 138 (emphasis added).

The holding in *Cappaert* was applied by the Colorado Supreme Court in *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982). In that case, the United States filed "dual-based" claims similar to the claims filed by the United States in the SRBA. *Id.* at 11. As to those "dual-based" claims, the trial court held that the reservations existed but only as to "waters unappropriated at the time of the reservation." *Id.* at 12. In affirming the trial court, the Supreme Court held: "[a]ccordingly, we conclude that the United States possesses reserved rights for its federal reservations in Colorado in waters unappropriated upon the date of reservation of the federal lands from the public domain, and in the amount necessary to achieve the primary purposes of the reservations." *Id.* at 20.

Like implied reservations, express reservations are limited to unappropriated water. For example, Public Water Reserve (PWR) 107, signed by President Coolidge on April 17, 1926, reads as follows:

Every smallest legal subdivision of public land surveys which is **vacant, unappropriated, unreserved public land** and contains a spring or waterhole and all land within one quarter of a mile of every spring or waterhole, located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916.⁹

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In using PWR 107 as an example, this court realizes that the issue of whether PWR 107 reserves exist is currently before the court. In using PWR 107 as an example, the court is making no statement as to the existence of PWR 107 reserves in the State of Idaho.

Public Water Reserve 107 (emphasis added).

On its face, PWR 107 applies only to "vacant, unappropriated, unreserved public land." Therefore, rights appropriated prior to the reservation, including those rights claimed by the United States based on beneficial use, are not included in a PWR 107 reservation.¹⁰

In summary, for both express and implied reservations, the court concludes that a state-based claim for any purpose of use would preclude a federal reservation for the same water where the state-based claim has an earlier priority date. On the other hand, if a federal reservation predates a state-based claim, then the earlier federal reservation precludes the state-based claim. "The right to the use of the unappropriated waters . . . shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted." I.C. § 42-103 (emphasis added).

Based on these principles, "[t]he United States requests that the Court decree its stockwatering rights based upon first established beneficial use." *United States Reply Brief*, at 6. Consequently, if the state-based half of a "dual-based" claim is unobjected to and the state-based claim has an earlier priority date, then the federal reserved claim should be dismissed as a matter of law.¹¹ If the state-based half of a "dual-based" claim is objected to and has an earlier priority date, then the court should determine the state-based claim first.¹² If the court finds that a state-based right exists, then the federal reserved claim should be dismissed as a matter of law. On the other hand, if the federal reserved claim has an earlier priority date, then the federal reserved

¹⁰ It is conceivable that other express water reserves other than PWR 107 may be claimed in the SRBA. However, it is inconceivable that any other express reservation would include appropriated water. Since water rights are a recognized property right, a state-based right made prior to a reservation could not be subsequently reserved unless the person or entity possessing the right were justly compensated. "[T]he usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in Section 14 of article 1 of this constitution." IDAHO CONST. art. XV, § 3.

¹¹ The court does not question the ability of parties to plead alternative and inconsistent theories. See, I.R.C.P. 8(e)(2). However, when the state-based half of the "dual-based" claim is unobjected to, the court questions the reasonableness of continuing to pursue a federal reservation with a subsequent priority date given the holding of *Cappaert v. United States*, 426 U.S. 128 (1976). To avoid the consequences of pursuing federal claims under these circumstances, it would be incumbent for the United States to identify and dismiss all federal reserved "dual-based" claims where there has been no objection to the state-based claim.

¹² For some of the state-based claims, the United States claims the right even though the right may have been perfected by a permittee. The United States asserts that while the permittee put water to a beneficial use, it is the United States, as owner of the land, who owns the water right. This issue of whether the United States can own a water right based on the efforts of its agents is currently being litigated in subcase 57-11124. In some of these cases, the permittee has filed a claim identical to the state-based half of "dual-based" claim filed by the United States. Consequently, for "dual-based" claims, the court needs to identify competing claims filed by private parties.

claim should be determined first. If the court finds that a federal reserved right exists, then the subsequent state-based claim should be dismissed as a matter of law.

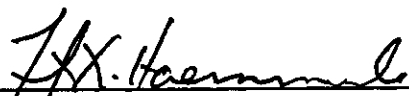
V. SUMMARY

Based on the aforementioned recommendations, the court concludes as follows:

- 1) The annual consumptive use for *de minimis* claims need not be decreed;
- 2) A statement of combined use is not necessary to define or administer a *de minimis* claim;
- 3) The number of stock should not be decreed under any element of a *de minimis* claim;
- 4) The quantity for *de minimis* rights under I.C. § 42-1401A(12) involving diversions should be decreed as claimed rate or actual diversion rate given a particular facility not to exceed 13,000 gallons per day;
- 5) Under a state-based appropriation, a water right which includes wildlife as a purpose of use can be perfected only where there is a diversion accompanied with an intent to use the water for wildlife purposes; and
- 6) A "dual-based" claim for any purpose of use can only be decreed for the claim with the earlier priority date.

IT IS SO RECOMMENDED.

DATED August 12, 1996.



FRITZ X. HAEMMERLE,
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S SECOND AMENDED RECOMMENDATION RE: BASIN-WIDE ISSUE 12 was mailed on August 12, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Idaho Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

Court Certificate of Mailing for Basin-Wide Issue 12



Deputy Clerk

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Department of Water Resources

DISTRICT COURT-SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
MAY 31 2002	
By _____	
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

Case No. 39576

) Subcases: 36-8139 and 36-8140
)
) ORDER SETTING HEARING ON
) COURT'S MOTION TO ALTER OR
) AMEND JUDGMENT; I.R.C.P. 59(e)
)

On May 21, 2002, an *Amended Partial Decree* was issued for each of the above-captioned water rights. The previously issued *Partial Decrees* had been amended pursuant to a *Motion to Correct Clerical Error in Partial Decree* filed by the claimant on May 16, 2002. The purported clerical error was the inclusion in the *Partial Decree* of a "13,000 gallon per day" limitation, where such a limitation was not present in the Director's Report.

Upon further review, the Court is not convinced that the inclusion of the limitation is a result of a clerical error. Rather, the limitation may have been included pursuant to Judge Hurlbutt's *Memorandum Decision and Order Re: Basin-Wide Issue 12* (April 25, 1997). In that decision, it was ordered as follows:

The quantity used in cubic feet per second for a *de minimis* claim under I.C. § 42-1401A(12)¹ involving a diversion may be based on any hourly rate so long as the amount is capped to a quantity not to exceed 13,000 gallons per day.

Id (footnote added). The Court has reviewed the notices of claim for these water rights, and there appears to be no indication on the face of the claims whether the rights were claimed for "stock watering use" pursuant to Idaho Code 42-1401A(12) as contemplated by Judge Hurlbutt's decision.

Therefore, IT IS ORDERED that a hearing will be held on this matter on **June 18, 2002 at 1:30 p.m.** at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho.

The claimant should be prepared to discuss, and to present evidence if necessary, as to whether the subject claims are the type contemplated by Judge Hurlbutt's above-quoted ruling. A representative from IDWR shall be present to provide comment on the matter.

Dated May 31, 2002

Roger Burdick

ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication

¹ Idaho Code 42-1401A(12) reads: "Stock watering use" means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

CERTIFICATE OF MAILING

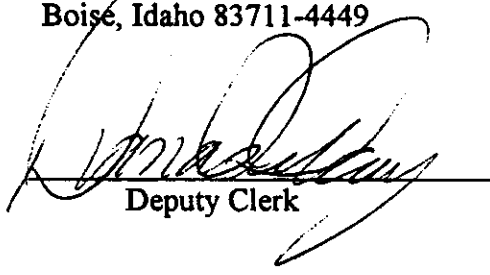
I certify that a true and correct copy of the ORDER SETTING HEARING ON COURT'S MOTION TO ALTER OR AMEND JUDGMENT; I.R.C.P. 59(e) was mailed on May 31, 2002 with sufficient first-class postage to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Jason R. Miciak
PO Box 2632
Twin Falls, ID 83303-2632

U.S. Department of Justice
Environment & Natural Resources Div.
550 W Fort St., MSC 033
Boise, ID 83724

Chief, Natural Resources Div.
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, Idaho 83711-4449


Deputy Clerk

more convenient sub-groupings. As an example, each of the Regions has its own set of Explanatory Conditions for canal deliveries specific to that Region. A separate list of Conditions is also provided for waste water.)

Domestic and/or Stockwater Rights (small D&S)

The small D&S rights verified by our contractor (K. Dunn) prior to recommendation in the Test Basins require very little reformatting. Essentially, the parcel number needs to be moved into the EXP type, along with the number of head of stock. The phrase "1 home" (or its variants) will now appear as part of the Purpose and Period of Use element. Standard Conditions and Remarks must be added to conform to the agreement between IDWR and the Court as to the appearance of the decree. These changes are often made programmatically and these records will be ready for Partial Decree as soon as possible.

Correctional Industries is doing the data-entry of the D&S records that have been verified by the contractor. These records (R-files) will be created using the more current format and will not require reformatting before final review for recommendation to the court.

Domestic and/or Stockwater Uses (when reported with other uses)

IDWR and the Court have reached an agreement on how these rights should look in the decree, and certain Conditions and Remarks must be added to accomplish these changes. Additional data-entry changes are required, as well.

The number of head of stock, any parcel number and all BLM and Forest Service identification numbers will now be reported as an EXplanatory remark. This information will appear on our recommendations but will not appear in the final decree.

The non-irrigation use description for domestic purposes will now appear under the Purpose of Use heading on our reports. To accomplish this, edit the non-irrigation use field leaving only the number of homes, i.e.: 1 home or 2 households, etc. This field is limited to 12 characters; lengthy domestic descriptions will be reported as a USE Remark appearing below the Purpose of Use element. (We're hoping to have a GOLD key choice on AJ2 which will allow us to move non-irrigation uses to a USE remark.)

A variety of Standard Conditions and Remarks are required to get just the right information onto our recommendation of rights with domestic and/or stockwater uses. We have summarized those in the following table:

Use	QNT Condition	GEN Condition
-----	---------------	---------------

Stockwater ¹	N13	N11
Stockwater and other use(s) ²	N05	N08
Part A Domestic	N13	N11
Part A Domestic and Stockwater	N13	N11
Part A Domestic and other use(s)	N12	N10
Part A Domestic and stockwater and other use(s)	N14	N09
Part B Domestic	N06	N11

Irrigation Rights

Rights that include irrigation as a purpose of use are currently being reformatted in the Regions. Standard Remark and Condition types can be taken from the data files as explained above. It may be difficult to classify the type for a "non-standard" Remark. Please contact Don Shaff, or someone on his staff, if you are unsure about the type code for a particular Remark. We can poll the appropriate attorneys and/or administrators to get you an answer ASAP.

Rights with Previous Conditions

Licensed, decreed and transferred rights may come to us with previous conditions that must be included in our recommendations. At this time, previous conditions are being considered on a case-by-case basis. Again, contact State Office staff if you need help.

¹This applies to **small** stockwater rights only (<13,000 gpd).

²This does NOT apply to claims for stockwater and wildlife uses only. Recommendations for rights with only stockwater and wildlife uses should be coded the same as those for stockwater use only.

36-8139 license restricted volume

$$11.8 \text{ AFA} \left(\frac{814r}{365 \text{ days}} \right) \left(\frac{325,850g}{\text{AF}} \right) = 10,534 \text{ g/day}$$

28 gpm (capacity)

$$\frac{28g}{m} \left(\frac{60m}{h} \right) \left(\frac{24h}{\text{day}} \right) = 40,320 \text{ g/day}$$

36-8140 license restricted volume

$$79.4 \text{ AFA} \left(\frac{14r}{365 \text{ day}} \right) \left(\frac{325,850g}{\text{AF}} \right) = 70,883 \text{ g/day}$$

INTER-DEPARTMENT MEMO

TO: Nick Spencer
 FROM: D Jones
Nick,

SUBJECT: Medicial record
 DATE: 3/14/96

I would call your attention to the attached profile report. During review related to the reformatting effort I noticed the "Other Uses" description was not to current standard. Additionally, attract description for the commercial use was written. I have made the necessary edits - and entered a comment. Questions: Can we do this? Do we need to inform you? Answers, comments.

() For your information observations welcome
☒ Response required

signature DJ

AJ0749NP
No. R36-08140

IDAHO DEPARTMENT OF WATER RESOURCES
ADJUDICATION CLAIM PROFILE REPORT
(REGIONAL)

DATE: 08/14/96
PAGE: 1

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	MC CORD FAMILY PARTNERSHIP 3415 S 2400 E JEROME ID 83338 (208) 324-4071	01/21/1983	STOCKWATER COMMERCIAL	01-01 12-31 01-01 12-31	0.11 CFS 0.11 CFS	20.00 AFA 59.40 AFA
TOTAL DIVERSION:					0.11 CFS	79.40 AFA

Water Source: GROUNDWATER

Tributary to:

Stage: LICENSE

Point(s) of Diversion:

T08S R16E 030

SENEHE

GOODING County

Place of use Legal Description for: STOCKWATER

				NE				NW				SW				SE			
T	R	S		Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac		
OBS 16E 29	:			:				:				:				:			
OBS 16E 30	:	S		:				:				:				:			

Place of use Legal Description for: COMMERCIAL

				NE				NW				SW				SE			
T	R	S		Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac		
OBS 16E 30	:	E		:				:				:				:			

POU County: GOODING

Non-Irrigation Uses: STOCKWATER 700 DAIRY CATTLE; COMMERCIAL DAIRY BARN USE

Other Rights: NONE

Conditions of Approval:

Dates: Exam Made Date:

Verified Date:

Objection Filed Date:

Misc: Water District Number:

Field Inspection Flag:
Presumption Flag:

Comments: Date: 08/14/1996 User-ID: DJONES Subject: OTHER USES, PLACE OF USE DESCRIPTIONS
CHANGED OTHER USER DESCRIPTION TO BE CONSISTENT WITH DATA ENTRY
STANDARDS. COMMERCIAL USE TRACT DESCRIPTION WAS OMITTED FROM
INITIAL RECOMMENDATION AND WAS ADDED DURING REFORMATTING CHECK.

Audit: 08/14/96 DJONES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A36-08140
Date Received: 8/30/1988
Receipt No: 500 2076
Received By: Adm

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: MC CORD FAMILY PARTNERSHIP
Address: 3415 SOUTH 2400 EAST
JEROME ID 83338 208-324-4071

2. Date of Priority: JAN 21, 1983

3. Source: GROUNDWATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County
08S	16E	30	SE NE NE		GOODING

5. Description of diverting works:
WELL, PUMP

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or)	A.F.A.
STOCKWATER	01/01	12/31	0.460		
COMMERCIAL	01/01	12/31	0.200		

7. Total Quantity Appropriated is:
0.660 C.F.S. (and/or)

A.F.A.

8. Total consumptive use is

Acres Feet Per Annum.

9. Non-irrigation uses:
S/700 DAIRY, C/ DAIRY BARN USE

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
08S	16E	29 30	NW NW		STOCK COMMER	

A36-08140

Page 1

Date: 08/30/88

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
08S	16E	30	NE NE		STOCK	

11. Place of use in counties: GOODING

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
NONE

14. Remarks:

15. Basis of Claim: PERMIT

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do do not ☒ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 1

For Organizations:

I do solemnly swear or affirm that I am General Partner of McCord Family Partnership, that I have signed the foregoing document in the space below as General Partner of McCord Family Partnership and that the statements contained in the foregoing document are true and correct.

Harriett McCord
Signature of Authorized Agent

General Partner McCord Family Partnership
Title and Organization

8/30/88
Date

State of Idaho
County of Twila Falls } ss.

Subscribed and sworn (or affirmed) before me this 30th day

of Aug 19 88

Al D. Merritt
Notary Public

Seal

Residing at Kimberly, Ida

My Commission Expires 6/22/94

A36-08140

Page 3

Date: 08/30/88

32x10

AJ5809WP
No. R36-08139

IDAHO DEPARTMENT OF WATER RESOURCES
ADJUDICATION CLAIM PROFILE REPORT

DATE: 10/02/96
PAGE: 16

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	MC CORD FAMILY PARTNERSHIP 3415 SOUTH 2400 EAST JEROME ID 83338 (208) 324-4071	01/21/1983	STOCKWATER DOMESTIC	01-01 12-31 01-01 12-31	0.06 CFS 0.06 CFS	9.40 AFA 2.40 AFA
TOTAL DIVERSION:					0.06 CFS	11.80 AFA

Water Source: GROUNDWATER

Tributary to:

Stage: LICENSE

Point(s) of Diversion:

T08S R16E S29

NW1/4NW1/4

JEROME County

Place of Use Legal Description for: STOCKWATER

NE				NW				SW				SE											
T	R	S	Ac	Lt	Ac	Lt	Ac	T	R	S	Ac	Lt	Ac	Lt	Ac	T	R	S	Ac	Lt	Ac	Lt	Ac
NE1/4NW1/4 SENE				NE1/4NW1/4 SENE				NE1/4NW1/4 SENE				NE1/4NW1/4 SENE											
OBS 16E 29				S				S				S											

Place of Use Legal Description for: DOMESTIC

NE				NW				SW				SE											
T	R	S	Ac	Lt	Ac	Lt	Ac	T	R	S	Ac	Lt	Ac	Lt	Ac	T	R	S	Ac	Lt	Ac	Lt	Ac
NE1/4NW1/4 SENE				NE1/4NW1/4 SENE				NE1/4NW1/4 SENE				NE1/4NW1/4 SENE											
OBS 16F 29				D				D				D											

POU County: JEROME

Non-Irrigation Uses: DOMESTIC/ 2 HOMES; [STOCKWATER/ 700 RANGE CATTLE]

Other Rights: NONE

Dates: Exam Made Date: Verified Date: Objection Filed Date:
Misc: Water District Number: Field Inspection Flag: Presumption Flag:
Audit: 09/30/96 DSHAPP

1511
1013

10/4

AJ5856NP

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

DATE: OCT-04-1996
PAGE: A-1

RIGHTS FROM: SOURCE: GROUNDWATER

RIGHT NUMBER: 36-08139

NAME AND ADDRESS: MC CORD FAMILY PARTNERSHIP
3415 SOUTH 2400 EAST
JEROME ID 83338

SOURCE: GROUNDWATER

QUANTITY: 0.06 CFS
11.8 AFT

THE QUANTITY FOR NON/IRRIGATION USE IS LIMITED TO THE AMOUNT BENEFICIALITY
USED FOR: DOMESTIC/ 2 HOMES/ STOCKWATER/ 700 RANGE CATTLE

PRIORITY DATE: 01/21/1983

POINT OF DIVERSION: TOBBS R16E S29 NWNW Within JEROME County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	STOCKWATER	01-01 12-31	0.06 CFS
			9.4 AFT
	DOMESTIC 2 HOMES	01-01 12-31	0.06 CFS
			2.4 AFT

PLACE OF USE: STOCKWATER Within JEROME County
TOBBS R16E S29 NWNW

DOMESTIC Within JEROME County
TOBBS R16E S29 NWNW

EXPLANATORY MATERIAL: BASIS OF CLAIM - LICENSE
STOCKWATER USE FOR 700 RANGE CATTLE

N11
N13

✓ 10/4

32x10

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
ADJUDICATION CLAIM VERIFICATION REPORT

10:56:10
11/19/91

CLAIM NUMBER: A34-08139

WR ELEMENT	FIELD EXAM Y/N	CORRESPONDENCE SENT/RECEIVED BY WHOM/DATE	FIELD EXAM BY WHOM/DATE	CHANGE CLAIM Y/N	VERIFIED BY CODE	COMPLETED REVIEW WHOM/DATE	COMPLETED DATA ENTRY WHOM/DATE	VERIFIED DATE WHOM/DATE
PRIORITY DATE								
POINT OF DIV	Y							
SOURCE								
PLACE OF USE	Y							
DIV. AMOUNT CFR/VOLUME	Y							
CONSUMPTIVE USE								
PURPOSES								
PERIOD OF USE								
BASIS OF CLAIM	Y							
REMARKS								

*VERIFIED BY CODES

- TOPO MAP/ORTHO-PG = 1
- ASCS MAP = 2
- WATERMASTER RECORDS = 3
- NAPP PHOTOS = 4
- FIELD EXAM = 5
- OTHER (SEE REMARKS) = 6

THESE CODES ARE USED TO INDICATE HOW THE FIELD EXAMINER VERIFIED THE INFORMATION
USED FOR THIS FIELD EXAMINATION. INDICATED ARE ALL CODES WHICH APPLY.

*Permit just
licensed.
Recommend
as licensed, based upon
licensing field Exam.*

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A36-08139
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NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: MC CORD FAMILY PARTNERSHIP 208-324-4071
Address: 3415 SOUTH 2400 EAST
JEROME, ID 83338

2. Date of Priority: JAN 21, 1983

3. Source: GROUNDWATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County
08S	16E	29	NW NW NW		JEROME

5. Description of diverting works:
WELL, PUMP

6. Water is used for the following purposes:

Purpose	From	To	C.F.S. (or)	A.F.A.
STOCKWATER	01/01	12/31	0.440	
DOMESTIC	01/01	12/31	0.080	

7. Total Quantity Appropriated is:
0.520 C.F.S. (and/or)

A.F.A.

8. Total consumptive use is Acre Feet Per Annum.

9. Non-irrigation uses:
S/500 RANGE, D/ 2 HOUSES

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
08S	16E	29	NW NW		DOMEST STOCK	

A36-08139

Page 1

Date: 08/30/88

11. Place of use in counties: JEROME

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
NONE

14. Remarks:

15. Basis of Claim: PERMIT

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do ☒ do not ☐ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 1

For Organizations:

I do solemnly swear or affirm that I am General Partner of McCard Family Partnership that I have signed the foregoing document in the space below as General Partner of

McCard Family Partnership and that the statements contained in the foregoing document are true and correct.

Harriett McCard
Signature of Authorized Agent

General Partner, McCard Family Partnership
Title and Organization

8/30/88
Date

State of Idaho)
County of Theriot Falls) SS.

Subscribed and sworn (or affirmed) before me this 30th day
of Aug 19 88

Al S. Mennett
Notary Public

Seal

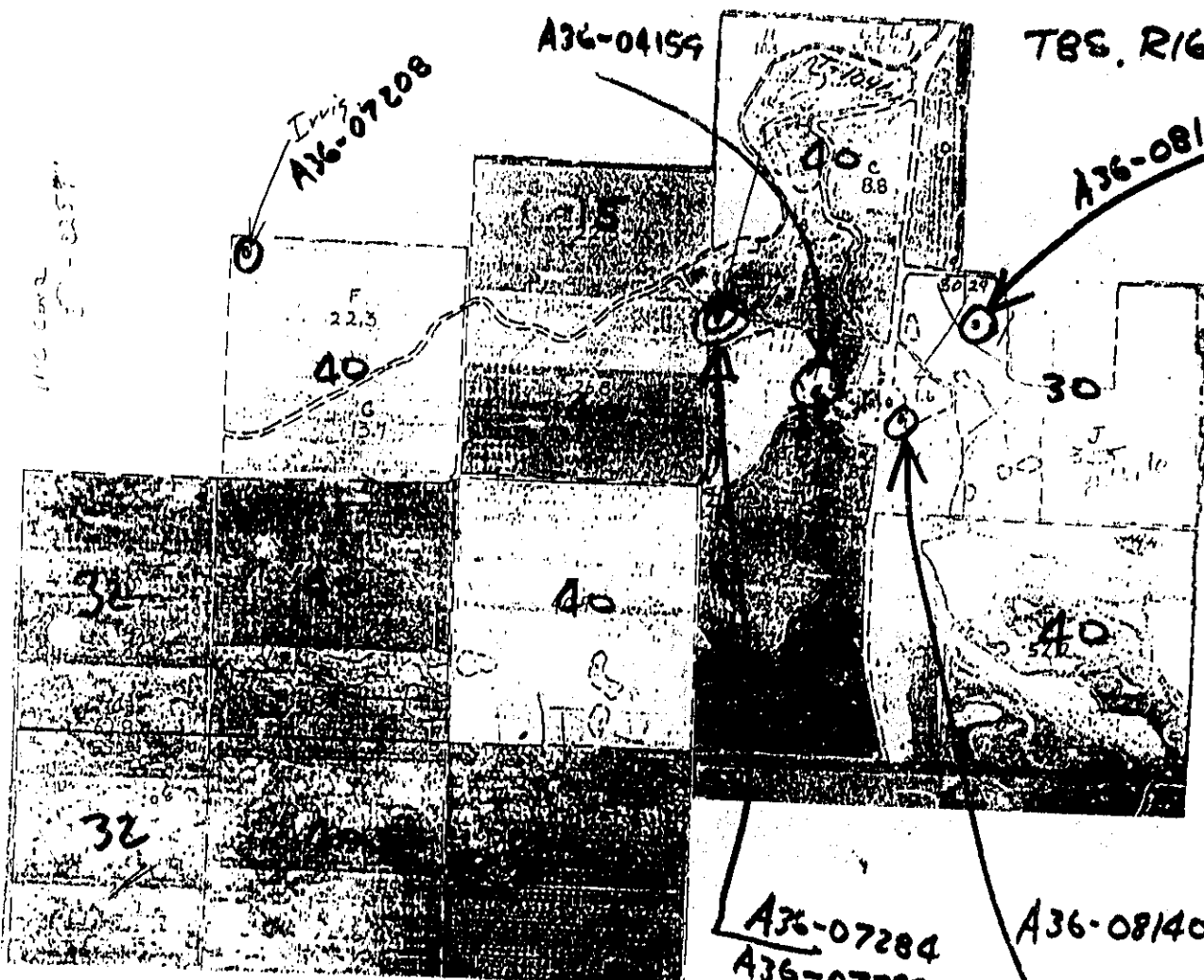
Residing at Kimberly, Id
My Commission Expires 6/30/92

A36-08139

Page 3

Date: 08/30/86

2x



Invis
A36-07208

A36-04154

TBS. RIG E.

A36-08139

A36-07284
A36-07700

A36-08140