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APR 27 2004

Department of Water Resources

|                                                                                         |
|-----------------------------------------------------------------------------------------|
| DISTRICT COURT-SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |
| APR 23 2004                                                                             |
| By _____<br>Clerk<br>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

) SPECIAL MASTER'S REPORT  
) AND RECOMMENDATION  
)  
) (RECOMMENDING STATE-LAW  
) BASIS OF DUAL-BASED FEDERAL  
) CLAIM)  
)  
) FINDINGS OF FACT AND  
) CONCLUSIONS OF LAW  
)  
) For Water Rights: 72-14261,  
) 72-14683 and 72-15149

I.

PROCEDURE AND FINDINGS OF FACT

Dual-based Claim

A. The above-captioned water rights were claimed as dual-based stockwater rights, meaning the rights were claimed as federal reserved water rights pursuant to Public Water Reserve (PWR) 107, and alternatively as state-law based rights. The Idaho Department of Water Resource reported the state-law basis for the claims with an 1879 priority date and also with the statement that the right had been claimed as a federal reserved water right pursuant to PWR 107.

B. Objections were filed by the State of Idaho to both the state and federal basis for the claims, raising issues common to all federal stockwater claims based on state-law and

Special Master's Report and Recommendation  
Recommending State-Law Basis of Dual-Based Claim  
Findings of Fact, Conclusions of Law

PWR 107. For purposes of resolution, numerous subcases were consolidated and the issues pertaining to the state-basis and PWR 107 proceeded on different litigation tracks.

### **State-Law Basis**

C. The issues pertaining to the state-law basis for the claims primarily dealt with whether the United States could perfect state-law based stockwater rights prior to June 28, 1934, (the date of enactment of the Taylor Grazing Act), and if so, under what conditions. The above-captioned rights were consolidated for purposes of summary judgment under lead subcase 72-11767, which was consolidated with consolidated subcases 51-04031, 55-04072 and 61-04057. See ***Order Consolidating and Designating Lead Subcases and Resetting Oral Argument on Summary Judgment, Consolidated Subcases 51-04031, 55-04072, 61-04057 and 72-11767 (May 15, 1998)***.

D. Special Master Hammerle, then assigned to the cases recommended that as a matter of law and fact that the priority date for the state-law basis for the water rights was June 28, 1934. See ***Order Granting Summary Judgment and Denying Cross-Motion for Summary Judgment, Consolidated Subcases 51-04031, 55-04072, 61-04057 and 72-11767***. Judge Hurlbutt, then presiding, adopted the report and recommendation and for purposes of appeal, consolidated the cases further with subcases 57-04028B, 57-10587B, 57-10588B, 57-10770B and 72-15929C. The consolidated subcase was designated under lead subcase number 72-15929C. See ***Order Adopting Special Master's Report and Recommendation and Consolidating Subcases, Consolidated Subcase Nos. 72-11767, 51-04031, 55-04072 and 61-04057***. However, because of the pendency of the issues pertaining to the federal reserved basis for the claims, ***Partial Decrees*** could not be issued.

E. The State of Idaho move for I.R.C.P. 54(b) certification of the order for purposes of perfecting an appeal. On December 3, 1998, Judge Hurlbutt issued a ***54(b) Certification for the Order***. The State of Idaho and the United States, as a result of pending settlement negotiations, jointly moved to vacate the ***54(b) Certification***. An ***Order Vacating the 54(b) Certification*** was issued by Judge Wood, then presiding, on January 1, 2000. On

January 10, 2000, the consolidation was removed.

F. On June 11, 1999, and on July 1, 1999, the United States and the State of Idaho filed stipulations resolving objections raised with respect to the state-basis for the claims not covered under consolidated subcases 72-11767, 51-04031, 55-04072 and 61-04057. See *Stipulation to Resolve Objections, Consolidated Subcase Nos. 23-10859, 24-10221, 25-13659, 27-11604 (June 11, 1999)* (resolving state-bases for dual-based claims); *Stipulation to Resolve Objections (July 1, 1999)* (resolving claims made solely pursuant to state law).

G. As a result, the priority dates for the state-law basis for those subcases subject to the *Special Master's Order Granting Summary Judgment on Consolidated Subcases 51-04031, 55-04072, 61-04057 and 72-11767* is June 28, 1934.

#### **Federal Reserved Basis**

H. As concerns the federal reserved basis for the claims, in *U.S. v. Idaho, 131 Idaho 468, 959 P.2d 449 (1998)*, the Idaho Supreme Court held that PWR 107 created a valid basis for federal reserved water rights. In *Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights Consolidated Subcase Nos. 23-10872 et. al. (December 28, 2001))*, Judge Burdick, then presiding, resolved certain issues pertaining to the elements of a PWR 107 federal reserved water right.

I. Pursuant to I.C. 42-1411(A) a hearing was held on the federal reserved basis for the above-captioned rights on December 11, 2003. Prior to the hearing the *Affidavit of Alan R. Bittner* was filed in support of the elements of the water right claim.

#### **Water Right 72-14683**

J. According to the *Bittner affidavit*, the source for water right 72-14683 was appropriated by a private party as of 01-01-1919, albeit the United States has also subsequently appropriated from the same source. Because the source was not "unappropriated" on April 17, 1926, the claim does not establish a valid basis for a federal reserved PWR 107 water right.

**Water Right 72-14261**

K. According to the *Bittner affidavit*, the land surrounding the source for this right was held in private ownership between 10/30/1919, and 4/13/1972. Because the land surrounding the source was not "unreserved" on April 17, 1926, the claim does not establish a valid basis for a federal reserved water right pursuant to PWR 107.

**Water Right 72-15149**

L. According to the *Bittner affidavit*, the source for water right 72-15149 was appropriated by a private party as of 4/1/1923, albeit the United States subsequently appropriated from the same source. Because the source was not "unappropriated" on April 17, 1926, the claim does not establish a ruled basis for a federal reserved water right to PWR 107.

**II.**

**CONCLUSIONS OF LAW AND RECOMMENDATIONS**

For the above-stated reasons, this Special Master concludes that as a matter of law the above-captioned water right claims do not fit the criteria for establishing federal reserved water rights pursuant to PWR 107.

THEREFORE, IT IS RECOMMENDED that the federal reserved basis for the above-captioned rights be disallowed and that the rights be decreed pursuant to state law as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)*.

DATED: April 23, 2004

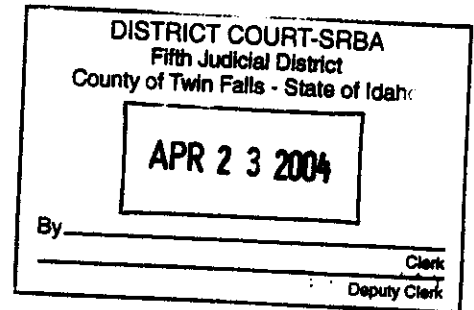


THOMAS R. CUSHMAN  
Special Master  
Snake River Basin Adjudication

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 72-14683



NAME AND ADDRESS: USDI BLM  
IDAHO STATE OFFICE  
1387 S VINNELL WAY  
BOISE, ID 83709-1657

SOURCE: SPRING TRIBUTARY: SPAR CANYON

QUANTITY: 0.02 CFS

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

PRIORITY DATE: 06/28/1934

POINT OF DIVERSION: T11N R20E S19 NENWSW Within Custer County

| PURPOSE AND<br>PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE  | QUANTITY |
|-------------------------------|----------------|----------------|----------|
|                               | Stockwater     | 01-01 TO 12-31 | 0.02 CFS |

PLACE OF USE: Stockwater Within Custer County  
T11N R20E S19 NWSW

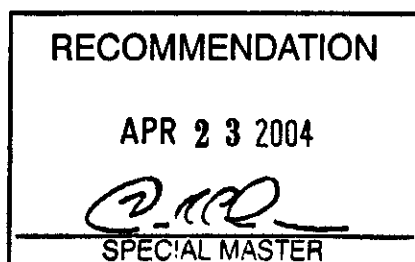
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

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

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS  
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT  
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY  
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE  
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

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.



John M. Melanson  
Presiding Judge of the  
Snake River Basin Adjudication

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 72-15149

DISTRICT COURT-SRBA  
Fifth Judicial District  
County of Twin Falls - State of Idaho

APR 23 2004

By \_\_\_\_\_ Clerk  
Deputy Clerk

NAME AND ADDRESS: USDI BLM  
IDAHO STATE OFFICE  
1387 S VINNELL WAY  
BOISE, ID 83709-1657

SOURCE: SPRING TRIBUTARY: SPRING GULCH

QUANTITY: 0.02 CFS

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

PRIORITY DATE: 06/28/1934

POINT OF DIVERSION: T15N R19E S13 SENENE Within Custer County

| PURPOSE AND<br>PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE  | QUANTITY |
|-------------------------------|----------------|----------------|----------|
|                               | Stockwater     | 01-01 TO 12-31 | 0.02 CFS |

PLACE OF USE: Stockwater Within Custer County  
T15N R19E S13 NENE

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RECOMMENDATION

APR 23 2004

  
SPECIAL MASTER

John M. Melanson  
Presiding Judge of the  
Snake River Basin Adjudication

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 72-14261

DISTRICT COURT-SRBA  
Fifth Judicial District  
County of Twin Falls - State of Idaho

APR 23 2004

By \_\_\_\_\_ Clerk  
Deputy Clerk

NAME AND ADDRESS: USDI BLM  
IDAHO STATE OFFICE  
1387 S VINNELL WAY  
BOISE, ID 83709-1657

SOURCE: SPRING TRIBUTARY: HORSE BASIN CREEK

QUANTITY: 0.02 CFS

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

PRIORITY DATE: 10/30/1934

POINT OF DIVERSION: T10N R19E S23 NESENW Within Custer County

| PURPOSE AND<br>PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE  | QUANTITY |
|-------------------------------|----------------|----------------|----------|
|                               | Stockwater     | 01-01 TO 12-31 | 0.02 CFS |

PLACE OF USE: Stockwater Within Custer County  
T10N R19E S23 SENW

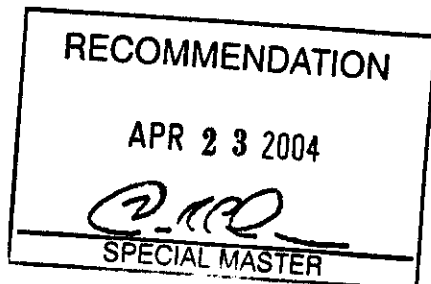
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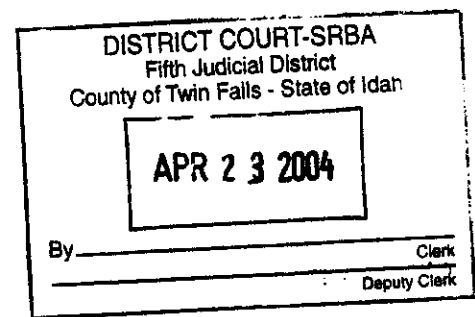
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John M. Melanson  
Presiding Judge of the  
Snake River Basin Adjudication



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 )  
\_\_\_\_\_ )

CERTIFICATE OF MAILING

Water Right(s): 72-14261  
72-14683 72-15149

CERTIFICATE OF MAILING

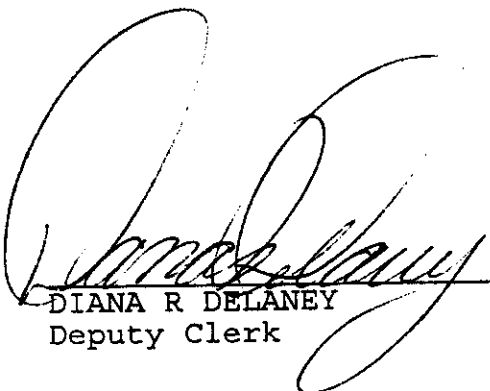
I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on April 26, 2004, with sufficient first-class postage prepaid to the following:

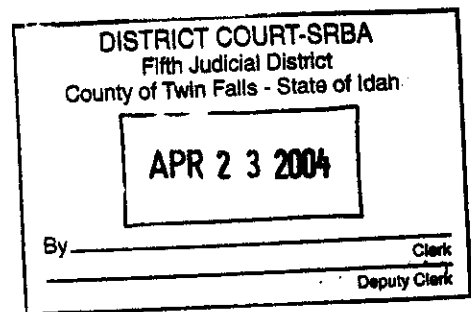
DIRECTOR OF IDWR  
PO BOX 83720  
BOISE, ID 83720-0098

STATE OF IDAHO  
Represented by:  
NATURAL RESOURCES DIV CHIEF  
STATE OF IDAHO  
ATTORNEY GENERAL'S OFFICE  
PO BOX 44449  
BOISE, ID 83711-4449

USDI BLM  
Represented by:  
US DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATL' RESOURCES  
550 WEST FORT STREET, MSC 033  
BOISE, ID 83724

CERTIFICATE OF MAILING

  
PAGE 1  
04/23/04  
DIANA R DELANEY  
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 )  
\_\_\_\_\_ )

NOTICE OF ISSUANCE OF  
SPECIAL MASTER'S  
RECOMMENDATION

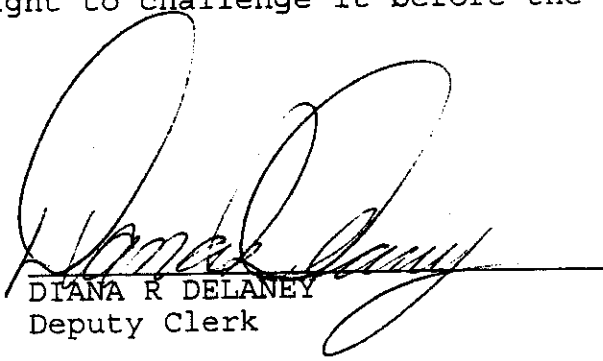
Water Right(s): 72-14261  
72-14683 72-15149

On April 26, 2004, Special Master THOMAS R CUSHMAN issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED April 26, 2004.

  
DIANA R DELANEY  
Deputy Clerk