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Names of Parties Filing Document:

Department of Water Resources

UNITED STATES OF AMERICA

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

In Re SRBA	) Subcase Numbers: See Attached Exhibit A
	)
	) UNITED STATES' MEMORANDUM
	) IN OPPOSITION TO THE STATE OF
	) IDAHO'S MOTION FOR AN ORDER
	) DENYING LEAVE TO FILE LATE
Case No. 39576	) NOTICES OF CLAIM IN BASIN 34
_____	) AND REQUIRING A STATUS REPORT

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I. INTRODUCTION.

The State of Idaho recently filed a Motion for an Order Denying Leave to File Late Notice of Claim in Basin 34 and Requiring a Status Report and a Brief in Support of Motion Re Stock Watering Claims in the above-captioned subcases. The purpose of this Memorandum is to oppose the State of Idaho's Motion. The Affidavit of Fredric W. Price in Support of the United States' Memorandum is filed herewith.

II. ARGUMENT.

A. UNITED STATES RESPONSE TO THE STATE OF IDAHO'S STATEMENT OF FACTS.

The State of Idaho's Statement of Facts is generally correct. State of Idaho's Brief in Support of Motion Re Stock Water Claims, In Re SRBA, Subcase No. 34-13676, et al (hereinafter "States' Brief"), p. 2. In Basin 34, the United States Department of the Interior, Bureau of Land Management (hereinafter "BLM") filed 1,146 claims. Affidavit of Fredric W. Price (hereinafter "Price Aff."), p. 7. Approximately 845 of the claims were based upon state law and Public Water Reserve 107 (hereinafter "PWR 107"). Price Aff., p. 7. PWR 107 reserves springs and water holes located on public land for livestock watering purposes. United States v. State, 131 Idaho 468, 959 P.2d 449 (1998). The BLM then withdrew 229 of the dual-based claims because further field investigation revealed that the withdrawn claims were not properly based upon PWR 107. Price Aff., p. 7. Thus, there were 616 BLM claims in Basin 34 based upon state law and PWR 107. Price Aff., p. 7.

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The State of Idaho mistakenly estimates that the BLM “filed over 10,000 notices of claim based on PWR 107 in the SRBA.” States’ Brief, p. 2. The BLM initially filed approximately 9,482 claims based upon PWR 107, then withdrew all but about 6,500 PWR 107 claims because further field investigation revealed that the withdrawn claims were not properly based upon PWR 107. Price Aff., p. 7.

Approximately 53,900 livestock watering claims were filed in the SRBA. Price Aff., p. 7. Thus, only 12% of the total livestock watering claims filed in the SRBA are based upon PWR 107. Price Aff., p. 8. These claims were invited by the State of Idaho when the Snake River Basin Adjudication was commenced.

The State of Idaho asserts that Water Right Claim Number 34-13705 is improperly based upon PWR 107. States’ Brief, p. 2, n 2. BLM claim 34-13705 is a claim based on state and federal law (PWR 107) to livestock water from a playa lake located on public domain. Price Aff, p. 5. The Idaho Department of Water Resources (hereinafter “IDWR”) has standards for describing the source element of a water right. Price Aff., p. 6. BLM follows those standards. Price Aff., pp. 6-7.

IDWR’s administrative rules require that the source of water for a water hole (or water body) is not the water hole itself, but the water that fills it. Price Aff., p. 6. A “water hole” is a natural or artificial depression in which water collects. Price Aff., p. 6 and Exhibit 2. Water holes, such as playas, ponds, and lakes, are filled by precipitation runoff, named and unnamed creeks, and sometimes ditches and canals. Price Aff., p. 6. The water hole (playa lake) claimed under 34-13705 receives most of its water from a named creek. Price Aff., p. 6. IDWR administrative rules require that the claimant

should use water feature names that are found on the U.S.G.S., 7 1/2 minute, topographic maps. Price Aff., p. 6 and Exhibit 3. The named creek that contributes to the water hole claimed under 34-13705 is listed on the appropriate topographic map as Big Lost River. Price Aff., p. 6. The listing of the source as a “stream,” doesn't change the fact that BLM is making a claim to a water hole (playa lake). Price Aff., p. 7. Thus, the State of Idaho’s representation that BLM’s Water Right Number 34-13705 is “egregious” and “can hardly be characterized as a spring or water hole,” is factually unfounded. See States’ Brief, p. 2, n 2.

**B. THE STATE OF IDAHO’S MOTION SHOULD BE DENIED
BECAUSE ADMINISTRATIVE ORDER 10 ALLOWS SRBA PARTIES
TO FILE LATE CLAIMS.**

A Motion to File Late Notice of Claim is reviewed by the Court “under the criteria of I.R.C.P. 55(c).” Administrative Order 1, 4.d.(2)(d). The Court should grant a Motion to File Late Notice of Claim if the moving party shows good cause. Idaho R. Civ. P. 55(c). “Based on the *Deferral Order*, *de minimis* domestic and stockwater claims are not considered ‘late,’ although *Standard Form 4 - Motion to File Late Notice of Claim* must be filed for each claim.” Memorandum Decision and Order on Motion to Set Aside Partial Decrees, In Re SRBA, Case No. 39576, Subcases 55-02373 *et al.* (LU Ranching Co.), pp. 31-32.

In Idaho, BLM manages about 11,323,215 acres of public land for, among other things, livestock grazing under the provisions of the Taylor Grazing Act. *See* Affidavit of Fredric W. Price in Support of the United States’ Motion for Summary Judgement, In Re SRBA, Subcase Numbers 55-10135, 55-11061, 55-11385, and 55-12452, p. 6. Availability of water for livestock using public

lands for grazing purposes is a necessary and integral part of BLM's grazing program, and the fulfillment of the national goals embodied in the Taylor Grazing Act. *See* Affidavit of Ronald W. Kay in Support of the United States' Motion for Summary Judgement, In Re SRBA, Subcase Numbers 55-10135, 55-11061, 55-11385, and 55-12452, p. 7. Without water available for use by livestock, there would not be livestock grazing on public lands. *See* Affidavit of Ronald W. Kay in Support of the United States' Motion for Summary Judgement, In Re SRBA, Subcase Numbers 55-10135, 55-11061, 55-11385, and 55-12452, p. 7. In Fiscal Year 2000, the BLM issued about 1,962 grazing permits that allow privately owned livestock to use public land designated by the BLM as grazing allotments. *See* Affidavit of Fredric W. Price in Support of the United States' Motion for Summary Judgement, In Re SRBA, Subcase Numbers 55-10135, 55-11061, 55-11385, and 55-12452, p. 6. Each grazing allotment was investigated for the presence of water sources. BLM eventually filed about 28,773 water right claims in the SRBA in order to have sufficient water to sustain its livestock grazing program. Price Aff., p. 7.

BLM's filing of the late claims at issue here is certainly understandable. Initial investigations were thorough, but not perfect. Price Aff., p. 7. BLM withdrew all but 16,670 water right claims when further investigation revealed errors. Price Aff., p. 7. Further investigation also revealed water sources that should have been claimed earlier. Price Aff., p. 5. Given the immense area to be investigated, it should be understandable, if not to the State of Idaho, then at least to this Court, that BLM will occasionally need to file late livestock watering claims for previously unclaimed water sources.

Because the Court understood the daunting nature of the Snake River Basin Adjudication, and the hardships on the parties, it issued Administrative Order No. 10. The District Court allows adjudication of “[b]oth domestic and stock water uses for which no Notice of Claim was filed . . . using SRBA *Standard Form 4 Motion to File a Late Notice of Claim*.” Administrative Order 10, p. 2 (emphasis by the Court). The Court readily accepts late claims of this type from all SRBA parties. Thus, if a livestock watering claim was deferred, or if the claim was not filed when a Basin was reported, the District Court provided an avenue for adjudication for all SRBA parties. Because Basin 34 was not closed to the filing of new claims, BLM followed Administrative Order 10 and filed the late claims at issue here. Price Aff., p. 5.

The BLM filed 29 motions to file late claims in Basin 34. This insignificant number of late claims in Basin 34 is not an iceberg that will sink the SRBA. The enormity of BLM’s claim investigation task provides the good cause necessary for this Court to grant the United States’ Motion for Leave to File Late Claims. Price Aff., p. 5. Each claim was verified by field inspection, and each claim is based

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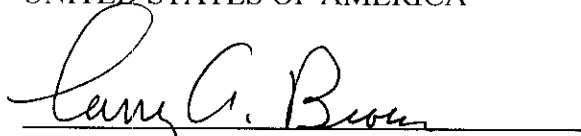
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upon state law, federal reserve, or is a dual based claim. Price Aff., p. 5. The claims are all in conformance with Idaho law. Therefore, this Court should grant the United States' Motions for Leave to File Late Claims.

DATED this 7~~4~~ day of June, 2002.

Respectfully submitted,

UNITED STATES OF AMERICA

A handwritten signature in cursive script, reading "Larry A. Brown", is written over a horizontal line.

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on June 7, 2002, I served a true and correct copy of the foregoing **UNITED STATES' MEMORANDUM IN OPPOSITION TO THE STATE OF IDAHO'S MOTION FOR AN ORDER DENYING LEAVE TO FILE LATE NOTICES OF CLAIM IN BASIN 34 AND REQUIRING A STATUS REPORT** by placing the documents in the United States Mail in Washington D.C., postage paid, and addressed as follows:

Original to:

Clerk of the Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, ID 83303-2707

Copies to:

U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
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Mr. David J. Barber
Deputy Attorney General
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State of Idaho
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Boise, ID 83720-0098

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

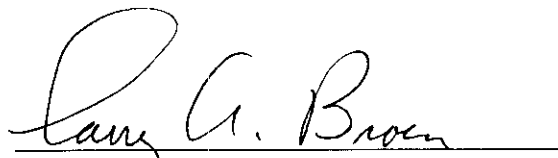

Signature of Attorney Serving Documents

EXHIBIT A

Subcase Numbers:

34-13676
34-13677
34-13678
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EXHIBIT A

Subcase Numbers:

34-13676
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