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Department of Water Resources

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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 51-10199
	)	(Lahtinen)
Case No. 39576	)	
_____	)	SPECIAL MASTER REPORT

FINDINGS OF FACT¹

Procedural History

Lahtinen Claim

David and Barbara Lahtinen, HC Box 167A, Bruneau, Idaho 83604, filed an amended *Notice of Claim to a Water Right* in subcase 51-10199 on January 11, 1989, claiming .07 cfs from unnamed streams and springs in Owyhee County "trib. to sinks" for year-'round stockwater use with a priority date of March 31, 1882, based on beneficial use. The diversion works were described as "earthen dams, catchment ponds, tanks" and the use was for "s / 205 range cattle." On the claim form, the Lahtinens said they do not own the property listed as the places of use. Under remarks, they stated: "BLM lessee." Finally, under the paragraph "other water rights used," the Lahtinens wrote: "in-stream stockwater."

Director's Report

On July 31, 1997, the Director of the Idaho Department of Water Resources (IDWR) filed his *Director's Report for Domestic and Stockwater, Reporting Area 6, Volume One (IDWR Basin 51)*. He recommended the claim as filed and listed the sources as 11 unnamed streams and

¹ Most of the Findings of Fact are taken from the Special Master's *Order Vacating Partial Summary Judgment*, dated June 23, 2000, and *Order Denying Second Motion for Summary Judgment*, dated February 7, 2001.

springs tributary to various creeks, sinks and "O X Prong." Most relevant here, the sources included unnamed streams and springs tributary to Little Jacks Creek.

Objections

United States

Two *Objections* to the claim were filed on December 5, 1997. The United States of America, Department of Interior, Bureau of Land Management, objected to the priority date, points of diversion and place of use. The United States *Objection* was settled on August 17, 1998, when it and the Lahtinens filed a *Stipulation to Resolve Subcase*. The parties agreed that the Lahtinens would dismiss those portions of their claim located on federal land. In exchange, the United States agreed that stockwater rights decreed for its competing claims "shall not be changed so long as a valid BLM-issued grazing permit exists for the land on which a particular water right is located."

Urquidi

John B. Urquidi (J&J Ranches) also filed an *Objection* on December 5, 1997, objecting to all recommended elements except the claimed purpose of use. He alleged, "this water right should not exist." Urquidi wrote:

Most, if not all, of the specified or actual points of diversion [and places of use] exist on property owned by either the objecting party, other private parties, or government bodies, none of whom have authorized development of water rights for or on behalf of claimant.

Urquidi First Motion for Summary Judgment

Urquidi filed a *Motion for Summary Judgment* on September 23, 1998, seeking dismissal of the Lahtinens' claim for any water right "which is within private property owned solely by the Urquidis." The *Motion* was argued before former-Special Master Fritz X. Haemmerle on November 20, 1998. On December 15, 1998, Special Master Haemmerle entered his *Order Denying, in Part, and Granting, in Part, Summary Judgment*. By then, the claimed sources were narrowed to a single spring -- Buckaroo Spring, tributary to Little Jacks Creek -- and the issues were 1) whether the water right was perfected by trespass and 2) whether the source is a spring constituting "private water."

Special Master Haemmerle found the following facts to be undisputed:

1. The source for this water is a spring. The spring is located on property owned by Urquidi.
2. Some portion of the Urquidi property is fenced. However, the portion of the Urquidi property where the spring is located is not fenced.
3. Lahtinen has watered cattle out of the spring since 1963.
4. Urquidi has not conveyed any water rights to Lahtinen, and neither has Urquidi given Lahtinen express permission to use the spring for the watering of livestock.
5. As to the area where the spring is located, Urquidi has an agreement with the Bureau of Land Management (BLM) whereby the BLM manages the land. In connection with that agreement, Urquidi acknowledges that the spring may be used by stockmen who may operate stock where the spring is located.

Special Master Haemmerle's *Order Denying, in Part, and Granting, in Part, Summary Judgment*, at 1-2.

Special Master Haemmerle then concluded that because 1) the land where Buckaroo Spring is located is managed by the BLM and 2) the spring is left open for use by stockmen, "Urquidi has acquiesced in the use of this spring by other stockmen, including Lahtinen." Therefore, Special Master Haemmerle held that, as a matter of law, the water right was not initiated by trespass. However, he also held that, because there was a material issue of fact as to whether the spring constitutes private water, a trial on that issue was necessary.

J.R. Simplot Motion to Participate

J.R. Simplot Company filed a *Motion to Participate* on April 14, 1999, alleging that some points of diversion and places of use included in the Lahtinens' claim are located on Simplot property. However, on April 19, 1999, the Lahtinens and Simplot filed a *Stipulation and Joint Motion for Order Approving Stipulation and Deleting Points of Diversion and Places of Use in Claim No. 51-10199*. In the *Stipulation*, the Lahtinens agreed to delete from their claim those points of diversion and places of use on Simplot's land.

Amended Order of Reference

On July 30, 1999, former-Presiding Judge Barry Wood entered an *Amended Order of Reference Appointing Terrence A. Dolan Special Master* in subcase 51-10199.

Dismissals

On November 12, 1999, the parties filed a *Stipulation of Dismissal* agreeing that the United States and Simplot be dismissed from the subcase. On December 7, 1999, this Special Master entered an *Order Dismissing J.R. Simplot Company and United States as Parties*.

Trial on Private Water Issue

On the issue of whether Buckaroo Spring is private water, the only trial in this subcase was held on March 24, 2000, in Murphy, Idaho, before Special Master Dolan. Jay R. Friedly appeared for claimants David and Barbara Lahtinen and Paul A. Turcke and Joseph D. Mallett appeared for objector John B. Urquidi (J&J Ranches).

Based on testimony and evidence produced during the trial and a review of case law, this Special Master vacated Special Master Haemmerle's summary judgment order on the trespass issue:

There seems to be no argument that 1) Buckaroo Spring is a spring, 2) it is located on private land, and 3) the Urquidis have not given the Lahtinens express (written) permission to use the spring to water livestock. Those being the facts, and assuming the water from the spring is private water ('located or situated wholly or entirely upon the lands of a person or corporation'), the factual question remains whether the Lahtinens can avoid the requirement of I.C. § 42-212 that they have the Urquidis' written permission to divert or appropriate the water of Buckaroo Spring. In any event, Special Master Haemmerle's *Order Denying, in Part, and Granting, in Part, Summary Judgment* must be vacated. It was erroneous to conclude as a matter of law that the Lahtinens did not initiate a water right in trespass because 'Urquidi has acquiesced in the use of this spring by other stockmen, including Lahtinen.'

Order Vacating Partial Summary Judgment, dated June 23, 2000.

With the summary judgment set aside, trial was set on the issue of trespass. No decision was made on the private water issue because the two issues seemed inseparable and unsolvable apart from one another.

Urquidi Second Motion for Summary Judgment

On November 16, 2000, Urquidi filed his *Second Motion for Summary Judgment*, again seeking dismissal of the Lahtinens' claim to a water right on "private property owned by the Urquidis since 1966." Urquidi argued that because 1) Buckaroo Spring is on private land, 2) the

spring is private water and 3) the Lahtinens did not have written permission to perfect or maintain a right to that water, there are no material issues of fact -- the claimed water right was initiated in trespass and, hence, is invalid.

The Lahtinens agreed that Buckaroo Spring is located on Urquidi's private property, but argued it is public water subject to appropriation because it flows off Urquidi's property. The Lahtinens also argued the water right was not initiated in trespass because Urquidi "consented to or acquiesced in the use of Buckaroo Springs by Lahtinens and others for many years" and because of the "Urquidis' agreement with the BLM to allow other livestock owners access to the springs in exchange for the Urquidis' use of BLM property." Finally, the Lahtinens argued that even if Buckaroo Spring is now private water, the Lahtinens established a stockwater right prior to the spring becoming private water because the "Urquidis' predecessors obtained their patent subject to Lahtinens' prior stockwater right." This last argument raised a new issue not presented in trial on the private water issue.

This Special Master found the Lahtinens presented some credible evidence which **might** prove the Lahtinens are entitled to a water right with a priority date at least as early as 1900 -- a full 22 years before Urquidi's predecessors-in-interest acquired title to the land where Buckaroo Spring is located. That would render the issues of private water and trespass moot. More importantly, though, circumstances surrounding the appurtenance of stockwater rights and the mesne conveyances of the Lahtinens' base ranch property raise genuine issues of material fact precluding summary judgment.² Hence, Urquidi's *Second Motion for Summary Judgment* was denied. *Order Denying Second Motion for Summary Judgment*, dated February 7, 2001.

Stipulation and Trial

On August 20, 2001, the parties filed a *Stipulation Addressing Trial Setting and Presentation of Subcase* agreeing to "waive any right to present further witness testimony or evidence in this matter, and stipulate and agree to present this matter to the Court on the materials and evidence presently contained in the record." Briefs were then lodged and oral arguments made on August 31, 2001, in Mountain Home, Idaho. On October 11, 2001, the

² See Judge Wood's *Memorandum Decision and Order on Challenge* in subcases 55-10288A & B, *et al*, dated April 25, 2000, discussed more fully hereinafter on page 17.

parties filed a *Joint Statement of Counsel Regarding Extra-Record Submission* confirming the parties' agreement to waive presentation of additional evidence.

History of Lahtinen Base Ranch Property and Buckaroo Spring

Appurtenancy

The Lahtinens claimed a stockwater right at Buckaroo Spring located on land now owned by Urquidi. However, the Lahtinens' claim relates back to an appropriation allegedly made in 1882 -- well before the land was patented to Urquidi's predecessor-in-interest in 1922. Essentially, the Lahtinens argued a stockwater right perfected at Buckaroo Spring by David Lahtinen's great-grandfather "long before" the land was patented to Urquidi's predecessors-in-interest was appurtenant to the Lahtinen base ranch property³ approximately 25 miles north/northeast of the spring. By their argument, as the Lahtinen base ranch property was conveyed to each new owner and eventually to the Lahtinens, the "appurtenant" stockwater right at Buckaroo Spring was transferred as well.

In support of their claim and in opposition to Urquidi's *Second Motion for Summary Judgment*, the Lahtinens lodged the *Affidavit of David Lahtinen* on December 15, 2000. In his *Affidavit*, Lahtinen said:

My predecessors in interest and my ancestors, some of whom are the same, have been running cattle in the Jack's Creek Basin area and using Buckaroo Springs and other springs in the area since long before the United States patent was issued to Urquidi's predecessors in 1922. . . . To the best of my knowledge, information and belief, this has continued uninterrupted since the issuance of the patent to the land.

The Lahtinens attached several documents to the *Affidavit*:

- *Homestead Certificate No 1596*, a patent deed, dated July 21, 1900, from the United States conveying 160 acres (T 7S, R 4E, § 13, E½ NE¼ and E½ SE¼) to Richard M. Stone (David Lahtinen's great-grandfather). According to David Lahtinen's *Affidavit*, this parcel (the Lahtinens' base ranch property) is a portion of his base property for his BLM grazing permits.

³ The term "base ranch property", similar to the phrase "base property" required for BLM grazing permits, is used for convenience only and implies no legal significance.

- A *Warranty Deed*, dated June 2, 1900, from Richard and Elen Stone conveying the base ranch property to Thomas B. Frost.⁴
- An Owyhee County real and personal property *Tax Receipt*, dated December 8, 1900, issued to J.F. Black for 8 horses, 42 cattle and 1 vehicle.
- A hand-written *Warranty Deed*, dated March 19, 1903, from Thomas and Laura Frost conveying the base ranch property to James F. Black (David Lahtinen's grandfather).
- An Owyhee County *Tax Collector's Receipt*, dated June 20, 1925, issued to J.F. Black for, among other items, 339 cattle and 4 horses (personal property) and "Imp. Jack Creek Pot Holes" (real property).⁵
- A *Warranty Deed*, dated February 23, 1932, from J.F. and Sylvia Black conveying the base ranch property to Lauri and Fay Lahtinen (David Lahtinen's parents).
- A *Warranty Deed*, dated June 20, 1962, from Lauri and Faye Lahtinen conveying the base ranch property to their son, David L. Lahtinen.

Witness Testimony -- March 24, 2000 Trial

During trial on the private water issue in Murphy, Idaho, on March 24, 2000, a representative of IDWR presented the basis for the Director's recommendations and both parties offered witnesses and exhibits. The following are abstracts of relevant facts based on each witness' testimony, in the order of their presentation:

- **Roxanne Brown** -- senior water rights analyst for IDWR:

Brown said the Lahtinens filed the only claim to Buckaroo Spring. Because it is a *de minimis* claim, a contractor (Ken Dunn, former IDWR Director) performed a cursory review of the claim in 1992, and confirmed that Lahtinen was a BLM lessee and had the right to graze cattle in Pasture 10.⁶ No determination was made whether the claim was on private land. The accuracy of the claimed source and hydrologic connection (tributariness) was reviewed using USGS topo maps. When IDWR reported two of the claimed sources (including Buckaroo Spring) as being tributary to Little Jacks Creek, that meant water **possibly** flows from the sources into Little Jacks Creek during certain times of the year. The USGS maps showed Buckaroo

⁴ Apparently, it was not unusual for homesteaders to convey their land to others before the patent deed was actually issued, as appears to have been done here.

⁵ Lahtinen's *Affidavit* offered no explanation for the meaning of "Imp. Jack Creek Pot Holes".

⁶ To aid the reader, attached to this *Report* is a map similar to the 34" x 36" map admitted as Court Exhibit 3-- both prepared by IDWR based on USGS quad maps. The attached map is for illustrative purposes only, but is more legible because some witness markings have been eliminated and the symbols and labeling have been enhanced.

Spring flows into an unnamed intermittent stream and then into Little Jacks Creek, all on Urquidi deeded property. Essentially, the Lahtinen claim was recommended as filed.

Brown visited Buckaroo Spring once, on June 22, 1992. The natural spring site had been obliterated by cattle, but water flowed from a 2-inch pipe under a fence and into a depression 20 feet in diameter and 1 foot deep. A nearby trough was shot full of holes. Water then continued flowing northeast from the depression into an unnamed stream and finally into Little Jacks Creek. There were also man-made impoundments or berms holding water between the spring and Little Jacks Creek. The unnamed stream below the spring was mainly fed by snow run-off, so water is probably not there year-'round. Brown was not aware of any other claims to Buckaroo Spring and knew of no claims for storage water along the unnamed stream below the spring.

- **John C. Urquidi** -- rancher and objector:

Urquidi bought the land around Buckaroo Spring in 1966. In 1977, a drought year, he leased the land to Frank Davis. Davis hired Ace Black to improve the flow at the spring and install a powder river stock tank. The Soil Conservation Service paid half the cost of the improvements as part of an agreement to allow others to graze cattle on Urquidi's land. To his knowledge, no water from the spring flowed off his property, either before or after the spring was improved in 1977.

- **Asa "Ace" Black** -- rancher:

Black is a life-long Bruneau Valley rancher. Buckaroo Spring is a good spring that usually flows all the time and seldom dries up. Snowmelt increases the flow. Frank Davis leased the Urquidi property and in 1977, hired Black to improve it. There was not enough flow to get away from the mud and grass-covered marsh or bog below the spring. The marsh was about 25 yards wide. It was not hard to find the spring because there were already some old improvements -- a wooden box, some pipe and rocks -- but the area was trampled. Black was not sure whether there was a trough or whether water was coming out of the old pipe because it was under water.

Black followed the vein of water 8 to 10 feet up-slope from the original site with his backhoe to release pressure from the trampling. He then installed a 2-inch black pipe from the new spring site to a powder river stock tank and a steel overflow tailpipe from there. When he

was done, there was a full pipe of water, maybe 3 to 10 gallons per minute.⁷

- **John B. Urquidi** -- rancher and John C. Urquidi's son:

Urquidi started working on the family-owned ranch in 1986. The Urquidis originally grazed cattle in both Pastures 10 and 16, but since 1984 or 1986, the Urquidis and their lessees have grazed only in Pasture 16. The Lahtinens never had permission to graze in Pasture 16 where Buckaroo Spring is located. The elevation at the spring is 5,800 feet.

Urquidi first saw Buckaroo Spring in 1991 or 1992, after Frank Davis' and then Chet Sellman's leases of the Urquidi property expired. Then, there was a powder river stock tank about 14 to 16 feet long below the spring. Water flowed from the spring into the stock tank and out an overflow pipe, under the fence and into a bog. He never saw water from the spring flow off the Urquidi property.

The fence on the Urquidi property allowed cattle access to Buckaroo Spring from both Pastures 10 and 16. In 1992, Urquidi built two small dams or berms in the unnamed stream below Buckaroo Spring to capture Buckaroo Spring water plus water from a weaker spring uphill and rain and snow runoff. That way, his cattle in Pasture 16 would get more water. In the 1990s, he had trouble keeping cattle out of the water near the spring. So, in 1993, 1994 or 1995, Urquidi removed the stock tank and plumbed the spring pipe directly to the overflow pipe bypassing the stock tank. The result was that all water from Buckaroo Spring flowed only to the Pasture 16 side of the fence. That way, there would be no more problems with cattle grazing in Pasture 10.

- **Chester "Chet" Sellman** -- rancher:

Sellman has run cattle in the Little Jacks Creek Basin since 1965. During the grazing season (now, June through September), he is usually in the area of Buckaroo Spring a couple times per month. In 1965, Buckaroo Spring was open with some logs, a galvanized pipe and sheep troughs. Sellman never saw Buckaroo Spring dry. He saw water on the road crossing the unnamed stream below Buckaroo Spring when his vehicle and others were stuck in the mud. He has personally seen its water reach Little Jacks Creek. In the last 35 years, he saw Buckaroo Spring water run off Urquidi's property many times, particularly in better years, though he could not say for sure it was during the grazing season.

In 1999, Urquidi removed the stock tank Ace Black installed (in 1977) and let the water

⁷ A flow rate of 3 to 10 gallons per minute equals .006 to .022 cfs.

run back into a puddle. So, Sellman and Lahtinen replaced the stock tank. Later that summer (1999), Urquidi removed the stock tank again and installed a drain line from the spring pipe into his field on the other side of the fence. Cattle in Pasture 10 could no longer reach Buckaroo Spring water. When Sellman returned to remove his cattle in 1999, 10 of his cows and a couple of Lahtinen's cows were in bad shape ("stressed") from lack of water.

- **Robert Tindall** -- rancher:

Tindall has been a rancher on his own since 1945. In 1985 and 1986, he sub-leased the Urquidi property from Frank Davis and ran 50 head of cattle. He visited Buckaroo Spring once a week in June, July and August during those two years. Buckaroo Spring water was piped to a trough and from there out a pipe, through the fence and onto private property. Tindall was pretty sure water from Buckaroo Spring would leave Urquidi's deeded property early in the year but not in the later part. He never actually saw the water reach Little Jacks Creek, but the road that crossed the unnamed stream below the spring was so muddy early in the year he would not cross it.

- **Raymond Colyer** -- rancher, buckaroo:

Colyer arrived in the Bruneau area in 1949, when he earned \$40 a month as a buckaroo. There were no fences back then, just homesteads. He was around Buckaroo Spring all summer from 1950 until 1990. Early on, there were only wooden troughs until a round trough was installed in the 1960s. In dry years, troughs were needed; other times, they were not, so the water ran into the fields. In some years, water would flow down the draw below Buckaroo Spring and off Urquidi's deeded property, especially early in the year. Colyer could not say if the flow was all Buckaroo Spring water.

- **David Lahtinen** -- rancher and co-claimant with Barbara Lahtinen:

Lahtinen has been a rancher in the Bruneau Valley since 1963. His great-grandfather was the first White settler in the Bruneau Valley. Lahtinen has leased his outfit the last two years, but he still owns 200 mother cows and 130 yearlings. He has grazed cattle in Jacks Creek Basin (part of the Battle Creek Allotment) since 1962 or 1963. Until 1984, the grazing season was April to September. Now, the grazing season is June 1 through September 30, although he claimed a year-'round period of use for stockwater from Buckaroo Spring.

Lahtinen first saw Buckaroo Spring 57 years ago when his father ran cattle with the Owenses and the Nobles. The spring was already developed with water piped into three metal

sheep tanks bolted together. He did not know who developed the spring, but everyone ran their cattle together. Lahtinen said the spring is actually in Pasture 10, not Pasture 16, because the fence is not on the pasture line.

In 1963, Lahtinen hand-dug and installed eight feet of pipe plus an oblong tank at Buckaroo Spring. After that, he repaired bullet holes in the tank and twice replaced the tank after someone removed it in 1993. Until Urquidi blocked off access to Buckaroo Spring water in 1999, 50 of the Lahtinens' cattle watered from Buckaroo Spring.

Currently, water flows from the spring, under the fence, down a natural channel (wash) about 50 yards, under the fence again, by a road, along the fence and then into Little Jacks Creek. Only run-off water comes down the wash above Buckaroo Spring. There is no other spring between Buckaroo Spring and Little Jacks Creek. Left unimpeded, water from the spring will flow into Little Jacks Creek. Lahtinen has never seen Buckaroo Spring run dry. Maybe snowmelt from the bench above the spring adds to the flow. He has seen water flow into Little Jacks Creek as late as July, mostly June, though. In 1998, 6 years after Urquidi built dams below the spring, Lahtinen saw water from Buckaroo Spring flowing into Little Jacks Creek.

Buckaroo Spring was never fenced before and has been a public water hole where everybody watered their cattle "since time began." All he is asking for is to hold the water for everyone. He does not object to anyone using the water. Urquidi has the right to fence his own deeded ground, but subject to Lahtinen's right of access to Lahtinen's stockwater.

MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prima Facie Weight of Director's Report

Idaho Code § 42-1411 (4) states the *Director's Report* "shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law." In this subcase, however, it is fair to say there is no evidence to support any of the elements recommended by the Director, except the names and address of the claimants (Lahtinens) and the purpose of use (stockwater).

The Lahtinens claimed .07 cfs from multiple unnamed streams and springs for year-round stockwater use with a priority date of March 31, 1882, and the Director recommended the claim as filed. As the subcase proceeded, though, the claim narrowed to a *de minimis* amount of

stockwater from a single natural flow spring (Buckaroo Spring) for use from June 1 to September 30 with a priority date of April 1, 1963.⁸

With scant *prima facie* evidence as to the nature and extent of the Lahtinens' claim, this Special Master was left with the testimony and documents admitted at trial on the private water issue plus documents submitted in response to Urquidi's *Second Motion for Summary Judgment*. That constitutes "the materials and evidence presently contained in the record" as agreed to by the parties. *Stipulation Addressing Trial Setting and Presentation of Subcase*, filed August 20, 2001.

Nature of Spring Water and Streams

The issue tried before this Special Master on March 24, 2000, in Murphy, Idaho, was whether water naturally flowing from Buckaroo Spring is non-appropriable private water or public water subject to appropriation. Before proceeding further, and for some perspective, it might be useful to again consider the nature of the water source claimed by the Lahtinens and the general law of the West concerning springs:

Spring waters are waters that break out upon the surface of the earth through natural openings in the ground. They necessarily originate from the ground-water supply. The essential difference between a spring and a well is that the former is a natural outlet for ground water, and the latter is an artificial excavation. Natural springs, however, are sometimes 'developed' by artificial means in order to increase the flow. Springs often constitute important sources of supply of surface stream systems. In other cases they may form marshes or bogs, with no natural outlet. The ground water that supplies the spring has come from some higher elevation. The discharge from the spring may sink into the ground again, or it may evaporate, or it may create a seepage area and become diffused surface water, or it may flow away in a definite surface channel that constitutes a watercourse.

Whether a landowner has the exclusive right to use a spring on his land depends, in various jurisdictions, upon whether the flow from the spring remains on his land. If the spring waters have been dedicated to the public, prior to the acquisition of a private right of use, the only way in which the landowner can acquire an exclusive right of use ordinarily is by appropriating the water, regardless of whether it remains on his land. And if the spring water flows away from his land in a defined stream which constitutes a watercourse, the law of

⁸ In the Lahtinens' *Post Trial Memorandum* lodged after the March 24, 2000 trial in Murphy, the Lahtinens effectively amended their claim under 51-10199. Instead of claiming year-round stockwater use from unnamed streams and springs, the claim was amended to an unspecified amount of water from Buckaroo Spring for 205 head of cattle from June 1 through September 30 (current BLM grazing season on the Battle Creek allotment) with a priority date of April 1, 1963. Evidence in support of the claimed priority date of March 31, 1882, was first offered in response to Urquidi's *Second Motion for Summary Judgment*, heard on January 5, 2001. Lahtinens' counsel agreed to either the 1882 claimed priority date or 1963 because no one else claimed a stockwater right from Buckaroo Spring.

watercourses generally applies, which means that he has no exclusive right to use the spring solely by virtue of land ownership.

The uniform holding in most high-court Western cases in which the question has been litigated is that a spring that constitutes the source of a watercourse is subject to the law of watercourses [emphasis added].

Wells A. Hutchins, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES*, Vol. II, at 592-593.

In the American West, and Owyhee County in particular, whether a stream is part of a watercourse must take into account Idaho's unique geography and climate:

It has been held that to be a 'watercourse' a stream must do more than conduct seasonal runoffs of precipitation. Yet some indisputable 'watercourses' flow only intermittently and are made up solely of snowmelt and rainwater. This is especially true in the high mountains of the West where streams dry up in summer months after snows have melted.

Presumably, the more arid the area, the more important a small flow will be and the greater the likelihood it will be found to be a watercourse in a close case.

David H. Getches, *WATER LAW IN A NUTSHELL*, 3rd Edition, at 108-109

Idaho Statutes and Case Law

In general, all water located in the State of Idaho is public water subject to appropriation:

All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed [emphasis added].

I.C. § 42-101.

The exception is private water which, by statute since 1911, is **not** subject to appropriation:

Diversion of private waters. -- The department of water resources is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at highwater mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation, except to the person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate [emphasis added].

I.C. § 42-212. Also see Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 12 (1968).

The Idaho Supreme Court has gone so far as to hold that spring water rising on private land not flowing off the premises and not forming any watercourse is the private property of the landowner. *Hall v. Taylor*, 57 Idaho 662, 67 P.2d 901 (1937).

In 1939, the Idaho Supreme Court summarized the distinction between private water (not appropriable) and public water (subject to appropriation):

While the rule prevails that lakes of a surface area of less than five acres and pools and springs, located *wholly* upon and within the lands of a person or corporation, are appurtenant to and part of the lands and belong exclusively to the owners of the land . . . it is also well settled that the waters of natural springs, which form a natural stream or streams flowing off the premises on which they arise, are public waters subject to acquirement by appropriation, diversion and application to a beneficial use [emphasis added].

Jones v. McIntire, 60 Idaho 338, 352, 91 P.2d 373, 379 (1939).

In *Jones*, the Court recognized that a water right cannot be initiated in trespass upon private lands. But in that case, because water from natural springs located on private land flowed in a natural channel upon the land of another, the water was subject to appropriation by the lower landowner for use on his own land, as against the owner of the land on which the spring rose. However, at trial, the lower landowners conceded they had no right to enter the private land without the landowner's consent to clean out the springs or ditches, the right being "limited to such waters as naturally flow from the springs to and upon [the lower landowners'] lands." *Jones*, 60 Idaho at 353, 91 P.2d at 380.

In *Maher v. Gentry*, 67 Idaho 559, 186 P.2d 870 (1947), the Idaho Supreme Court held that water from a spring which sank into the soil and did not flow off the premises upon which the spring rose constituted private waters. Therefore, the adjoining landowner had no right to the use of that water in the absence of strict compliance with the provisions of the statute prohibiting state officials from issuing permits to divert such waters except to the person or corporation owning the land or with his written permission. Also, see Hutchins, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES*, Vol. II, at 608.

In *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922), the Idaho Supreme Court held that when water from a spring does not flow sufficiently to create a natural stream that runs beyond the lines of private property, that water is not appropriable without the landowner's consent. But in the *Short* case, a neighbor paid \$100 for the exclusive right to use the water, plus

an easement for a pipeline from the spring to his land. Hence, there was a valid appropriation as against all others.

The general rule in Idaho, then, is that spring water flowing off privately-owned land on which it arises and which constitutes the source of a natural channel, natural stream or watercourse is public water subject to appropriation, diversion and application to a beneficial use. But what is a natural channel, natural stream or watercourse?

In 1942, the Idaho Supreme Court cited jury instructions it approved to define a watercourse:

The jury is instructed that a watercourse is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

While it has been said that no definition of a natural watercourse can be given that will apply to all cases, in general a natural watercourse is one made by the natural flow of the water caused by general superficies [surfaces] of the surrounding land from which the water is collected into one channel. Surface water becomes a natural watercourse at the point where it begins to form a reasonably well defined channel, with bed and banks or sides and current, although the stream itself may be very small, and the water may not flow continuously.

In determining whether a stream is a natural watercourse its size is not a material element in respect of the volume of water carried, and while the element of permanence is necessary, great age is not an essential attribute of a watercourse.

The particular source is immaterial. Thus the supply of a natural watercourse may come from springs, swamp, surface water, artificially controlled water over which the creator has lost control, artesian wells, lake, or a pond formed by surface water, the overflow of a lake because of rainfall, or from a glacier.

Scott v. Watkins, 63 Idaho 506, 517-518, 122 P.2d 220, 224 (1942).

Buckaroo Spring is Public Water

The USGS maps used by IDWR to locate the spring and determine its hydrologic connection (tributariness) show Buckaroo Spring water flows into an unnamed stream, then into Little Jacks Creek and finally off the Urquidi property. Each of those stream reaches is marked by dashed blue lines indicating they are intermittent or possibly not flowing year-'round.

Ace Black described Buckaroo Spring as a good spring that usually flows all the time and

seldom dries out. Lahtinen never saw the spring go dry since about 1945, although its flow in dry years was diminished enough to require improvements like pipes and troughs. Urquidi never saw Buckaroo Spring water run off his property since he bought it in 1966, but one of his lessees, Chet Sellman, saw Buckaroo Spring water run off Urquidi's property many times in the last 35 years. Robert Tindall, who subleased the same Urquidi property in 1985 and 1986, was pretty sure Buckaroo Spring water flows off Urquidi's property, at least early in the year. Even after Urquidi built impoundments or berms below the spring in 1992, Lahtinen saw Buckaroo Spring water flow into Little Jacks Creek. The fact that Urquidi constructed berms in the intermittent stream reaches below the spring suggests there is a watercourse and Buckaroo Spring is a source.

The evidence shows that at certain times of the year, water from Buckaroo Spring (plus snowmelt early in the year) flows into a natural watercourse and forms a reasonably well-defined, permanent channel with bed and banks or sides and current. Therefore, the evidence is convincing that Buckaroo Spring constitutes the source of a watercourse and, hence, is public water subject to appropriation.

Priority Date and No Trespass upon Private Lands

Given the conclusion that Buckaroo Spring is public water subject to appropriation, a beneficial user of that water did not have to obtain written consent from the owner of the surrounding private land to appropriate the water. The general rule in Idaho is that water may be appropriated for beneficial use on land not owned by the appropriator and the water right becomes the property of the appropriator.⁹ *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930); also see *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072 (1919).

However, no water right can be initiated in trespass upon private lands in Idaho. *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974). The question, then, is whether the Lahtinens initiated a stockwater right from Buckaroo Spring in trespass upon private land. Closely related to that issue is the Lahtinens' claimed priority date.

Priority Date

The Lahtinens originally claimed an 1882 priority date because David Lahtinen's great-grandfather, Richard Stone, ran cattle in the Jacks Creek Basin and watered his stock from

⁹ "The fact that a party holds a water right does not mean that he has, because of that fact, the right to enter the lands of others for the purpose of constructing ditches across them. That easement and right away must be obtained either by purchase or condemnation or by adverse user." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 18 (1968); also see I.C. § 42-1103.

Buckaroo Spring. They submitted documents showing: 1) Stone acquired a 160-acre homestead near Bruneau, Idaho, in 1900, which was eventually acquired by the Lahtinens; 2) Lahtinen's grandfather, James Black, paid Owyhee County taxes for 42 cattle in 1900; and 3) in 1925, Black paid more Owyhee County taxes for 339 cattle. By the Lahtinens' argument, then: 1) Stone appropriated a stockwater right from Buckaroo Spring (before the surrounding land was patented in 1922); 2) the water right was appurtenant to Stone's homestead; and 3) title to the water right passed with ownership of the homestead.

Last year, former-Presiding Judge Barry Wood addressed claims filed by the LU Ranching Company for instream stockwater rights on federal public land (i.e., grazing allotments) with a priority date of 1872 established by LU's predecessors-in-interest. The issue was whether those water rights were transferred from LU's predecessors-in-interest to LU by mesne conveyances of LU's privately owned base ranch property to which the grazing preference was attached. On April 25, 2000, Judge Wood held: "[T]he question of whether any water rights, perfected by LU's predecessors-in-interest, have become appurtenant to any particular property interest which has been conveyed to LU, is an issues of fact to be ascertained from the instruments of conveyance and the circumstances surrounding each conveyance." *Memorandum Decision and Order on Challenge*, subcases 55-10288A & B, *et al.*, at 13-14.

The evidence in this record does not support the Lahtinens' claimed priority date of 1882. The earliest date even mentioned in any document is 1900, when David Lahtinen's great-grandfather received a homestead patent for the Lahtinens' base ranch property. However, there were no additional documents or testimony offered to prove that a stockwater right in Buckaroo Spring was appurtenant to the homestead conveyed to the Lahtinens. On the contrary, Lahtinen recalled when his father ran cattle 57 years ago in the Jacks Creek Basin, Buckaroo Spring was already developed (a pipe and sheep tanks), but he did not know who did the work. Buckaroo Spring was never fenced, everyone ran their cattle together and everyone watered their cattle from the spring. Lahtinen even described Buckaroo Spring as a public water hole. All things considered, there is no convincing evidence that the Lahtinens' predecessors-in-interest appropriated water from Buckaroo Spring for stockwater use or intended such water right to become appurtenant to the Lahtinens' base ranch property.

The circumstances changed in 1963, three years before Urquidi bought the land

surrounding Buckaroo Spring¹⁰ In 1963, Lahtinen removed an old pipe and three metal sheep troughs from the spring and hand-dug and installed eight feet of pipe and an oblong metal tank. These were the improvements Chet Sellman and Raymond Colyer saw in the 1960s, and Ace Black replaced in 1977. Black installed a stock tank in 1977, but John B. Urquidi removed the tank in approximately 1994, and again in 1999. Lahtinen and Sellman replaced the tank several times over the years and repaired bullet holes. Lahtinen watered his cattle from Buckaroo Spring from 1963 until 1999 when John B. Urquidi finally removed the stock tank and piped all the water under the fence and into their field. Since then, Lahtinens' cattle in Pasture 10 have not been able to reach Buckaroo Spring water.

The evidence supports the Lahtinens' claim that they appropriated a *de minimis* amount of water from Buckaroo Spring for stockwater use on April 1, 1963, when the grazing season in Jacks Creek Basin / Battle Creek Allotment was April 1 to September 30 (pre-1984). The Lahtinens demonstrated the three fundamental elements of a valid constitutional appropriation of water: they "diverted [the water of Buckaroo Spring] with an *intent* to appropriate it for a *beneficial use*." David H. Getches, *WATER LAW IN A NUTSHELL*, 3rd Edition, at 88.

No Trespass upon Private Lands

In his *Order Denying, in Part, and Granting, in Part, Summary Judgment*, dated December 15, 1998, former-Special Master Haemmerle found certain facts to be undisputed. Buckaroo Spring is located on Urquidi's property, but the portion of the property where the spring is located is not fenced. Urquidi has an agreement with BLM whereby BLM manages that land and Buckaroo Spring is used by other stockmen, including Lahtinen, to water their cattle.

Those facts were confirmed in Urquidi's *Reply Memorandum in Support of Motion for Summary Judgment*, lodged November 13, 1998. In response to the Lahtinens' claim of a prescriptive easement, Urquidi argued:

In order to reach the Urquidis' property, the Lahtinens' cattle must cross both federal land and the Urquidi property. Lahtinens cattle graze on the federal land under a grazing preference administered by BLM. . . . Similarly, any access to the spring in question on Urquidi's property occurs as a result of the grazing system and fences administered as part of this BLM management of the allotment. . . . Lahtinens grazing use has occurred under the terms of a government license, in conjunction with other grazers.

¹⁰ Neither party offered evidence concerning ownership of the private land surrounding Buckaroo Spring before 1966 (when Urquidi bought the property), except for the patent deed issued to Urquidi's predecessor-in-interest in 1922.

Reply Memorandum, at 3-4.

Chester Sellman substantiated the undisputed facts concerning the Lahtinens' use of Buckaroo Spring for stockwater:

I have been running cattle of my own in this area [Jacks Creek Basin] continuously since 1965. While I have no deeded land in the area, I have federal grazing privileges in the area, specifically in the Battle Creek Allotment. There is a spring located on the Urquidi Property that my cattle have used for watering purposes each and every year since 1965. . . . To the best of my knowledge there has never been a fence that has kept my cattle or the cattle of others from going from the open range to the Urquidi Property to drink.¹¹ To this day [November 5, 1998], the spring located on the Urquidi Property is not fenced and my cattle grazing on the public domain have access to the spring.

Affidavit of Chester W. Sellman in Opposition to Motion for Summary Judgment, lodged November 10, 1998, at 2.

As noted earlier, there is no evidence concerning ownership of Urquidi's property in 1963, when the Lahtinens appropriated water from Buckaroo Spring. Also, there is no evidence of the date of the agreement with BLM to administer Urquidi's property as part of the Battle Creek Allotment. Nevertheless, the weight of the evidence is that the Lahtinens, like Sellman, had federal grazing privileges in the Battle Creek Allotment, including Urquidi's property, in 1963. Therefore, when the Lahtinens appropriated a *de minimis* amount of water from Buckaroo Spring for stockwater, the water right was not initiated in trespass on private land.

FINAL CONCLUSIONS OF LAW

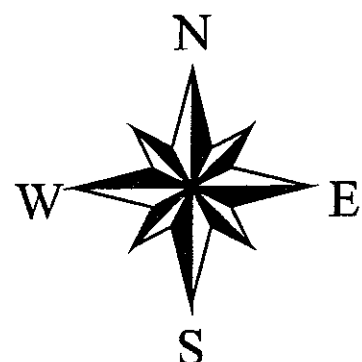
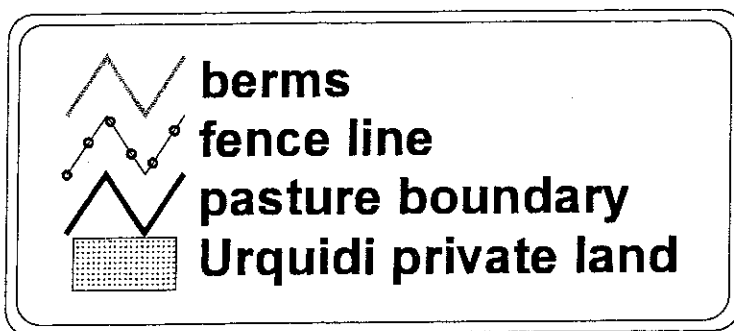
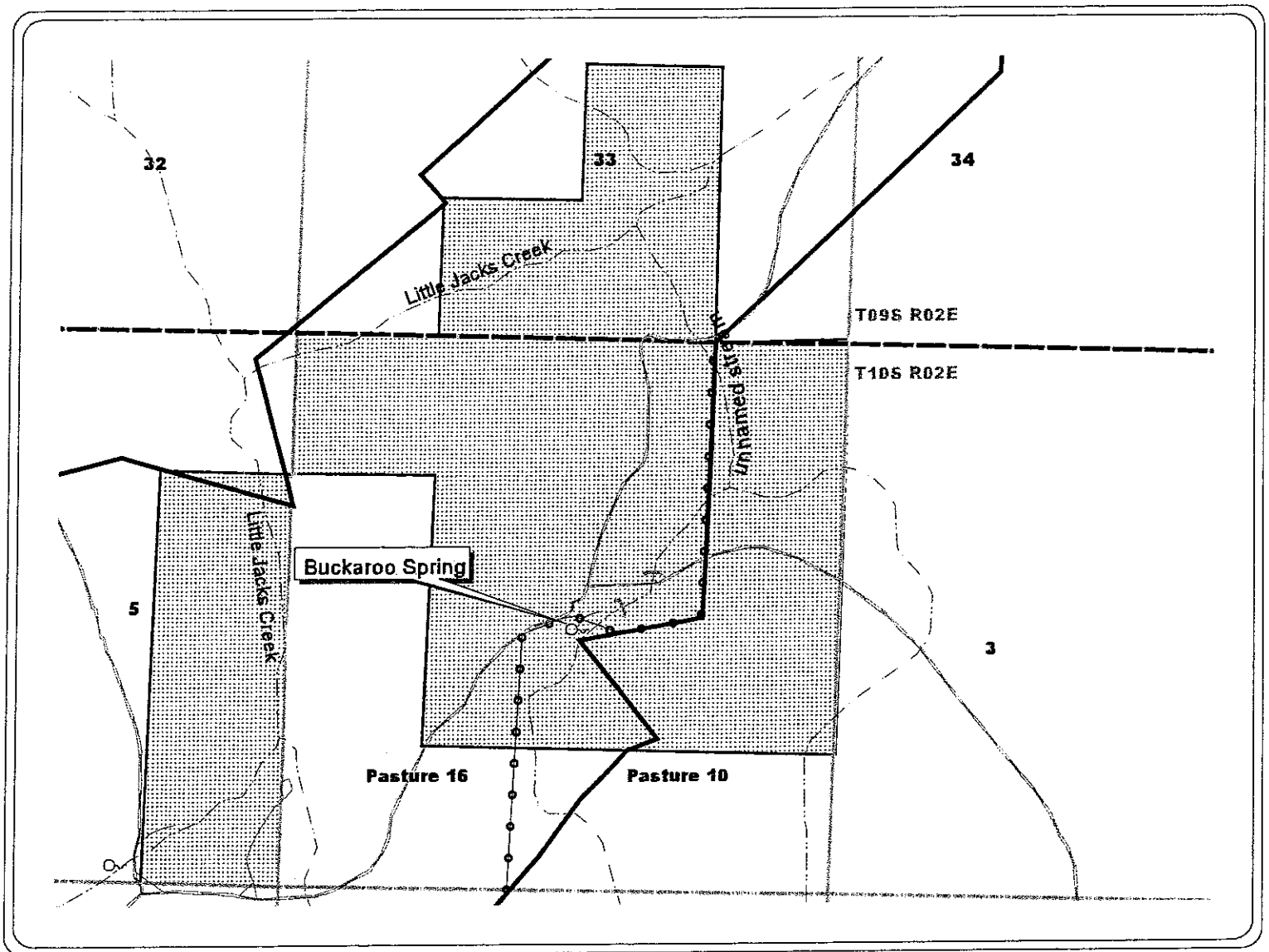
David and Barbara Lahtinen are entitled to a partial decree adjudicating a water right under claim 51-10199 as described in the attached *Special Master Recommendation for Partial Decree for Water Right 51-10199*.

DATED November 19, 2001.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

¹¹ There is no clear evidence in the record of when the fence near Buckaroo Spring was built, who built it or what its purpose was. Several witnesses suggested it was built by homesteaders.



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

2001 NOV 19 11 9:33

In Re SRBA)
Case No 39576)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 51-10199

FILED *OM*

NAME AND ADDRESS: BARBARA LAHIINEN
DAVID LAHIINEN
HC 85 BOX 167A
BRUNEAU, ID 83604

SOURCE: BUCKAROO SPRING TRIBUTARY: LITTLE JACKS CREEK

QUANTITY: 0.02 CFS

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

PRIORITY DATE: 04/01/1963

POINT OF DIVERSION: 110S R02E S04 NWSE Within Owyhee County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Stockwater	06-01 TO 09-30	0.02 CFS

PLACE OF USE: Stockwater Within Owyhee County
110S R02E S04 NWSE

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

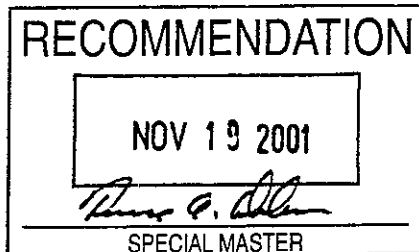
THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A
DETERMINATION OF HISTORICAL BENEFICIAL USE.

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.

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication



NOV 19 2001 9:47

OM

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): 51-10199

On November 19, 2001, Special Master TERRENCE A. DOLAN 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 November 19, 2001.

Lettie Messick
LETTIE MESSICK
Deputy Clerk

2001 NOV 19 AM 9:47

DM

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)

CERTIFICATE OF MAILING

Case No. 39576)
_____)

Water Right(s): 51-10199

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 November 19, 2001, with sufficient first-class postage prepaid to the following:

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CERTIFICATE OF MAILING

Lettie Messick PAGE 1
LETTIE MESSICK 11/19/01
Deputy Clerk