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NOV 21 1997

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

Department of Water Resources

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: **29-12487**

Date received _____

Receipt No: _____

RESERVED UNDER FEDERAL LAW

1. Name of Claimant: UNITED STATES OF AMERICA on behalf of the U.S.D.A. Forest Service

Address: 550 W. Fort Street MSC033

Boise

ID 83724

2. Date of Priority: 05/01/1902

3. Source of water: CCC PASTURE SPRING

From: Spring

4. Location

Description of Diversion Works:

Headbox

Location of Point of Use

Meridian BOISE

T: 08 S R: 35 E S: 18 SENW

Location of Point of Diversion

T: 08 S R: 35 E S: 18 SENW

5. Quantity claimed:

Period	Quantity	For
6 / 01 -- 10 / 31	0.02 CFS	Stockwater

6. Total Consumptive Use Claimed for Present and Future Use is:

0.02 CFS

7. Present and future uses to which the water is or will be used:

Stockwater

8. Attach the legal description of the reservation, and maps showing for each consumptive use the existing and proposed place of use and existing points of diversion.

Bound separately

9. Remarks:

State Basin: 29

National Forest: Caribou

Forest Service Record ID: 04 05 17040208 20 0007

10. Describe any other water rights used at the same place and for the same purposes as described above:

None

11. Counties within the reservation: Not available

Notice is hereby given that the United States Department of Justice will represent the Department of Agriculture, Forest Service, in all matters pertaining to the Snake River Basin Adjudication. All notices required by law to be mailed by the Director to the claimant should be mailed to the individuals at the address below:

Bruce Bernard
U.S. Department of Justice
Environment and Natural Resources Division
550 W. Fort Street MSC033
Boise, ID 83724

This form is an attachment to a letter forwarding the claims of the U.S. Department of Agriculture, Forest Service. The signature and affirmation on such letter constitutes the signature of the authorized agent representing the United States of America required for each such claim.

[illegible]

APR 14 1998

Department of Water Resources
Adjudication Bureau

In Re SRBA

Case No. 39576

A. Subcase 29-12487
(Insert water right number)

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: State of Idaho
Address: 700 W. Jefferson
Boise, Idaho 83702
Phone: Work: 334-2400

Home:

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APR 2 8 1998

Department of Water Resources
Eastern Region

Name and Address of Attorney, if any:

Attorney Name: ALAN G. LANCE
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
PETER J. AMPE
Deputy Attorney General

Attorney Address: Office of the Attorney General
700 W. Jefferson, Room 210
P.O. Box 44449
Boise, ID 83711-4449

Attorney Phone No. (208) 334-2400

COPY

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: United States of America on behalf of the
U.S.D.A. Forest Service
Address: 550 W. Fort Street MSC 033
Boise, Idaho 83724

D. I object to the following elements as recommended in the Director's Report (Please check the appropriate box(es))

1. ☒ **Name and Address**
Should be: Decreed as disallowed.
2. ☒ **Source**
Should be: Decreed as disallowed.
3. ☒ **Quantity**
Should be: Decreed as disallowed.
4. ☒ **Priority Date**
Should be: Decreed as disallowed.
5. ☒ **Points of Diversion**
Should be: Decreed as disallowed.
6. ☒ **Instream Flow Description**
Should be: Decreed as disallowed.
7. ☒ **Purpose(s) of Use**
Should be: Decreed as disallowed.
8. ☒ **Period of Year**
Should be: Decreed as disallowed.
9. ☒ **Place of Use**
Should be: Decreed as disallowed.

11. I object because:

- ☒ This water right should not exist.
- ☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTION(S): This claim is made pursuant to federal law as a reserved right with a stockwater as the purpose of use. The abstract of claim does not state what act of Congress is purported as the basis for this right. However, stockwatering is not recognized under federal law as a purpose for which water was reserved by Congress for the United States Forest Service. See, United States v. New Mexico, 438 U.S. 696, 700, 98 S. Ct. 3012, 3014, 57 L. Ed. 2d 1052 (1978). Therefore this claim must be dismissed.

F. VERIFICATION (Must be Completed)

State of Idaho)
) ss.
County of Ada)

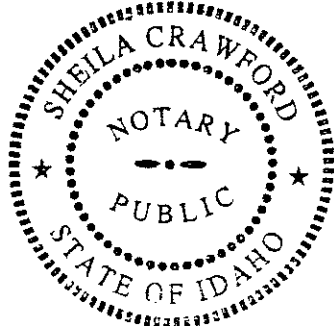
Peter J. Ampe, Deputy Attorney General, being first duly sworn, upon oath, deposes and says:

That the State of Idaho, in both its sovereign and proprietary capacity, pursuant to I.C. § 42-1211A(16), is filing this objection and that I am a Deputy Attorney General authorized to represent the State of Idaho, which is a party/claimant in this proceeding as defined by I.C. § 42-1401A(1) and (7), and I have read this objection, know its contents and that the statements are true to the best of my knowledge and belief.

ALAN G. LANCE
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
PETER J. AMPE
Deputy Attorney General


By Attorney signing in representative capacity

Subscribed and sworn to before me on: APR 08 1998
(Insert Date)



Sheila Crawford
Notary Public for ID/AHO
Residing at: BOISE, ID
My commission expires: May 9, 2002

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the Court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on April 8, 1998, I mailed the original and copies of this objection, including all attachments, to the following persons:

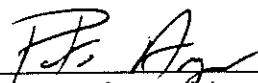
1. Original to:
Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707
2. One copy to the owner of the water right at the following address:

Name: Bruce Bernard
U.S. Department of Justice
Environment and Natural Resources Division
550 W. Fort Street MSC 033
Boise, ID 83724
3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief of Natural Resource Division (not applicable)
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, Idaho 83724



Signature of party claimant or attorney



SRBA13831



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
ALAN G. LANCE

April 8, 1998

Ms. Diana Delaney
Chief Deputy Clerk
SRBA District Court
Post Office Box 2707
Twin Falls, ID 83303-2707

Re: In Re SRBA Case No. 39576

Dear Diana:

Enclosed please find the following documents:

1. Subcase No. 29-12487 – *Domestic and Stock Water Right Objection* (original and one copy); and
2. Subcase No. 29-12489 – *Domestic and Stock Water Right Objection* (original and one copy).

Please file the originals with the Court, and conform the copies and return in the self-addressed, stamped envelope provided herein.

If you have any questions, please do not hesitate to call me. Thanks again for your assistance with this matter.

Very truly yours,


Sheila Crawford
Legal Secretary
Natural Resources Division

/sc
Enclosures

AJ5809NP
No. R29-12487

IDAHO DEPARTMENT OF WATER RESOURCES
ADJUDICATION CLAIM PROFILE REPORT

DATE: 01/24/98
PAGE: 54

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	UNITED STATES OF AMERICA ACTING THROUGH	05/01/1902	STOCKWATER	06-01 10-31	0.02 CFS	

TOTAL DIVERSION: 0.02 CFS

Water Source: CCC PASTURE SPRING

Tributary to: MINK CREEK

Stage: RESERVED

Point(s) of Diversion: T08S R35E S18 SENW

BANNOCK County

Place of use Legal Description for: STOCKWATER

NE				NW				SW				SE																			
NENE		NWNE		SWNE		SENE		NENW		NWNW		SWNW		SENW		NESW		NWSW		SWSW		SESW		NESE		NWSE		SWSE		SESE	
T	R	S	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	
08S	35E	18	:		:				:						:					:					:					:	

POU County: BANNOCK

Conditions of Approval:

- N11 - THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.
- N13 - THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.

Remarks: EXP FOREST SERVICE RECORD ID = 0405 17040208 20 0007
2138 Cattle

Dates: Exam Made Date: Verified Date: Objection Filed Date:

Misc: Water District Number: Field Inspection Flag:
Presumption Flag:

NOT IN DIRECTOR'S REPORT

~~OK~~ MOLD
MT
1-27-98

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Department of Water Resources

Not found

Ronde
Pla

cc: Ernie
Doug, Jan

NOV 22 PM 3:20

DISTRICT COURT-SEBA
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 29-12487 and 29-12489

Case No. 39576

ORDER ON THE MOTION OF THE
UNITED STATES TO ALTER OR
AMEND THE SPECIAL MASTER'S
RECOMMENDATION

I.
APPEARANCES

David W. Gehlert, Esq., General Litigation Section, Environment & Natural Resources
Division, U. S. Department of Justice, for the United States of America.

Randall J. Bramer, Esq., Special Assistant United States Attorney, U. S. Department of
Justice, for the United States of America.

Peter J. Ampe, Esq., Deputy Attorney General, Natural Resources Division, Office of the
Attorney General of the State of Idaho, for the State of Idaho.

II.
PROCEDURAL BACKGROUND

This matter is before the Special Master on a *Motion to Alter or Amend the Special Master's Recommendation*. The claims before the Special Master are for stockwater rights claimed by the United States Forest Service, Department of Agriculture (USFS), under the Organic Administration Act, Act of June 4, 1897, 30 Stat. 34, (codified at 16 U.S.C. § 473 *et seq.* (1994) (Organic Act). The State of Idaho moved for summary judgment on July 26, 1999, without any supporting affidavit and contemporaneously lodged a *Brief* in support of its position. The State's motion was premised on the theory that the primary purposes of the Organic Act do not include stockwater, either explicitly or impliedly. It is undisputed that managing the forest for timber production is a primary purpose for the reservation under the Organic Act. On August 11, 1999,

the United States lodged a *Memorandum in Opposition to the State's Motion* and contemporaneously filed an *Affidavit of Jerald Tower*. The affidavit states that the stockwater was needed for USFS's own horses, which are used to inventory and mark trees for sale, etc. The State then lodged a response brief on August 18, 1999, without any affidavits.

On August 27, 1999, then Special Master Haemmerle issued an *Order Granting the State's Motion for Summary Judgment*, without issuing findings or a *Special Master's Report*. On September 1, 1999, this Special Master succeeded Mr. Haemmerle and was referred these subcases on September 13, 1999, by the court. Based upon the August 27, 1999, *Order* and a file review, this Special Master filed *Findings of Fact and Conclusions of Law* on September 14, 1999. On October 28, 1999, the United States filed a *Motion to Alter or Amend* pursuant to Rule 13(a) of *AOI*. The United States asserted that the *Order Granting Summary Judgment* was incorrectly entered. This assertion was based upon law and fact, to wit: that horses are necessary to administer the Organic Act and therefore, there is an implied federally reserved right to stockwater for such horses.

III. STANDARD OF REVIEW

A motion to alter or amend, is provided for in Paragraph 13, *AOI*. The Special Master is unaware of any ruling concerning the use for Paragraph 13 of *AOI*. There is some case history on Rule 59(e) I.R.C.P. and the Special Master believes that it sets the appropriate standard and rationale for Paragraph 13, *AOI*. A Rule 59(e) motion to alter or amend a summary judgement decision is addressed to the discretion of the court. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030 (1982).

Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered its decision upon which the judgment is based.

Id. at 263 (citations omitted). A motion for summary judgement can not be granted if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is a genuine issue as to any material fact. I.R.C.P. 56(c); *Olsen v. J.A. Freeman, Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the

nonmoving party. *Tush Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986).

For claims based on federal law, the Director of the Idaho Department of Water Resources abstracts the claim. The abstract does not constitute *prima facie* evidence of the claim. The claimant of a water right based on federal law has the ultimate burden of persuasion on each element of the claim. I. C. § 42-1411A (12).

IV. FEDERAL RESERVED RIGHTS

It is long established law that the United States has an implied federally reserved right to water which is necessary to accomplish the primary purpose of a reservation. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 462 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978). However, the Court in *New Mexico* made it clear that "purpose" meant only the primary purpose and that "necessary" meant "that without the water the purposes of the reservation would be entirely defeated." *New Mexico, Id.* at 700. The court went on to say:

Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

Id. at 702 (citations omitted). The Supreme Court held that the only two primary purposes of the Organic Act were ". . . to conserve the water flows, and to furnish a continuous supply of timber for the people." *Id.* at 707.

V.
DECISION

The State of Idaho contends that stockwatering is not a primary purpose of the Organic Act and, therefore, there can be no federal reserved water right for watering horses. It cites the decision in *New Mexico* as *ipso jure* deciding this subcase. In *New Mexico*, the court rejected the United States' claim that it had a reserved federal right to water for stockwater. However, it is clear that the stockwater claimed (and rejected by the Court) was for grazing cattle by permittee ranchers on USFS land, and that was a secondary purpose under the Organic Act.

In these subcases the United States asserted that the stockwater was needed for its own horses which it claims are used to further the timber purpose of the Organic Act. On summary judgment the only factual record before Special Master Haemmerle and now this Special Master is the lone affidavit filed by the United States. In that affidavit, it claims that horses are needed to fulfill the USFS's responsibilities regarding tree inventorying, tree marking and the like. The affidavit presents a factual issue which is material to the outcome of these subcases.

On a motion for summary judgment the Special Master is constrained to the four corners of the record. That record is uncontroverted at this point in these subcases. In the affidavit, Mr. Tower, the District Ranger, stated that the horses were being used as "an integral and continuing part of the administrative process. . . ." *Affidavit of Jerold D. Tower* ¶ 4. The affidavit also said that horses were an *integral* part of the administration of the timber sale and water shed purposes of the Organic Act. *Id.* ¶ 5 (emphasis added).

The United States relied on the language of the Idaho Supreme Court in *Avondale II*, for the proposition that the standard for an implied right is to show the activity is an integral part of the purpose for the reservation. *Avondale Irr. Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 577 P.2d 9 (1978) [*Avondale II*]. The United States argued that there was no difference between the *integral part* test of *Avondale II* and the *necessary* test found in *New Mexico*. This Special Master disagrees. As "necessary" is defined by the court in *New Mexico*, integral and necessary are not semantically identical. The necessary test in *New Mexico* means, "without the water the purposes of the reservation would be entirely defeated." *New Mexico* at 700. "Integral," as used by the court in *Avondale II*, lacks this *but for* concept. Furthermore, it should be noted that the Idaho Supreme Court wrote *Avondale II* without the benefit of the U.S. Supreme Court's analysis

in *New Mexico*. In any event, the stricter standard of the U.S. Supreme Court is the one that is applied to the federal doctrine of implied water rights.

The current record factually supports the position that the horses have been an integral part of the administration of the Caribou National Forest, regarding timber and water shed. What is not clear is whether lack of stockwater for these horses would entirely defeat the purposes of the reservation. Further, it is not clear whether lack of these horses would entirely defeat the purpose of the reservation. These are factual matters yet to be determined and which are material to the ultimate determination of these subcases.

For the reasons set forth above, the Special Master vacates the *Order Granting State's Motion for Summary Judgment* entered on August 31, 1999. A status conference for the purpose of scheduling these subcases for trial will follow.

DATED November 20, 1999.



THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of ORDER ON MOTION TO ALTER OR AMEND was mailed on November 22, 1999, with sufficient first-class postage prepaid to the following:

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

U.S. Dept 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, ID 83711-4449


Deputy Clerk