

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

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

MAY 28 2010

IN RE SRBA)
CASE NO. 39576)
_____)

By _____ 75-14092 Clerk
75-14093 75-14100 75-14302 Deputy Clerk
75-14512 75-14513

MOTION TO ALTER OR AMEND
SPECIAL MASTER'S RECOMMENDATION
SRBA SUBCASE NO. 39576

BACKGROUND:

1. On April 27, 2010, Special Master Terrence A. Dolan issued a Special Master's Recommendation for the above SRBA Subcase (No. 39576), pursuant to SRBA Administrative Order 1, Section 13a.

2. The SRBA Subcase pertains to Water Rights 75-14090, 75-14092, 75-14093, 75-14100, 75-14302, 75-14512, and 75-14513. These water rights permit the diversion of water from the upper reaches of Wallace Creek. The Point-Of-Diversion ("POD") is located on public lands managed by the Salmon-Challis National Forest ("SCNF") and is conveyed in an earthen ditch known as the Sanderson Ditch across public lands also managed by the SCNF.

3. Wallace Creek is occupied designated critical habitat for threatened Snake River spring/summer Chinook salmon under the Federal Endangered Species Act ("ESA") and Essential Fish Habitat ("EFH") under the Federal Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). It is also occupied habitat for Snake River Basin steelhead, Columbia Basin bull trout, Westslope cutthroat trout, and near its mouth, Snake River sockeye salmon.

4. Idaho Department of Fish and Game ("IDFG") manages a conservation easement, which includes Wallace Creek, downstream of the Lemhi County public road and culvert and upstream of the confluence of Wallace Creek and the mainstem Salmon River, in the lower reaches of Wallace Creek. The conservation easement was received and is managed for the benefit of Wallace Creek and its native fishes including: threatened Snake River spring/summer Chinook salmon, threatened Snake River Basin steelhead, endangered Snake River sockeye salmon, threatened Columbia Basin bull trout, and protected fluvial Westslope cutthroat trout.

5. Wallace Creek flows through the Diamond-Moose Allotment, a public domestic livestock grazing allotment that is managed by the SCNF for permitted grazing by cattle and their calves.

6. Western Watersheds Project ("WWP") has been monitoring the Diamond-Moose Allotment for at least a decade as well as habitat and fish conditions in Wallace Creek on behalf of its members, supporters, and staff.

7. WWP has participated in Protests of some IDWR Water Rights Claims (including Basin 75), Water Rights Transfers (including Basin 75), and in the SRBA with flood rights as well as expansive water claims submitted to the SRBA as Supplemental Late Claims. WWP also participates in the management of water rights associated with its headquarters along the East Fork Salmon River in Clayton, Idaho at the GreenFire Preserve, with Valley Sun LLC the current registered water users.

8. WWP is in a Settlement Agreement for a Federal legal action brought against the Salmon-Challis National Forest concerning water diversions and the operation and maintenance of their conveyance systems across Forest Service-managed Public Lands. Wallace Creek, including the site

of the POD and a substantial portion of the Sanderson Ditch. The operation, installation, and maintenance of the POD, new fish screen, and the Sanderson Ditch appears to violate WWP's Settlement Agreement with the Forest Service.

9. The Special Master's Recommendation and previous IDWR recommendations if made into a final decree for the above referenced water rights fulfilled with waters diverted from upper Wallace Creek will adjudicate numerous violations of the WWP-FS Settlement Agreement, will violate Idaho Water Law, and further damages to public natural resources as well as to private property, contrary to local public interests.

MOTION TO ALTER OR AMEND:

WWP motions to alter or amend the Special Master's Recommendation in the above referenced water rights based on the following:

1. The IDWR has erred by not applying the correct priority dates for the listed water rights. By assigning all the listed rights with an April 17, 1923 priority date, even though some of the uses have been made since 2006 or more recently, the water rights for Wallace Creek are clouded and incorrect, and the prior appropriation doctrine of Western water rights as applied in Idaho cannot be properly applied. Without such corrections, future development in the Wallace Creek watershed may result in additional water claims and further harm to valuable public natural resources (e.g., public lands managed by the FS, Wallace Creek, and the fish and wildlife it supports) as well as to downstream water users and the IDFG, a holder of a valid conservation easement.

2. By allowing new water users to apply the water where they see fit, including historically non-irrigated sagebrush habitat used by sage-grouse, a species recently determined to deserve protection by the U.S. Fish and Wildlife Service under the Endangered Species Act, the IDWR and SRBA Court are abandoning a very tenet of Idaho Water Law, which defines a water right not only by its priority date, POD, volume, time of use, and beneficial uses, but also by its place of use.

3. From examining the records submitted by water users Jeff Waite and Arden Arrington of Wallace Creek as well as viewing the POD, Wallace Creek, and the Sanderson Ditch, current water use from the above referenced water rights greatly exceeds historic diversions and the safe capacity of the Sanderson Ditch as it crosses SCNF-managed Public Lands. In fact, numerous blow-outs from diversion flows and volumes exceeding the ditch's safe capacity have resulted in significant natural resource damage to SCNF-managed Public Lands that will not heal without significant expenditure of public funds. Future blow-outs are likely unless historic diversion flows and volumes are adhered to by water users and mandated by the SRBA Court and IDWR.

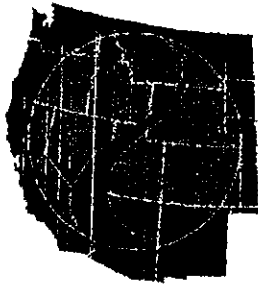
4. With the expansive use of water since at least 2000, more and more water has been diverted into the Sanderson Ditch illegally at the Public's expense of dewatering Wallace Creek, harming and degrading FS-managed lands and waters, dependent ESA-protected salmonids and their protected habitats, downstream riparian property owners, and the IDFG's conservation easement and the purpose for it. This also harms irreparably WWP and its members who enjoy wildlife viewing, hiking, camping, outdoor photography, and angling in and around Wallace Creek on the Diamond-Moose Allotment.

5. Against the tenets and regulations of Idaho Water Law, some of the water users in the above referenced water rights are wasting water with much of it resulting in land slumping in several areas, water dumping into ravines rather than being put to beneficial use such as supporting wildlife and fish production, and in the case of Mr. Waite's property, threatening his house foundation and flooding his private property against his wishes. WWP much rather see the water remain in Wallace Creek to the public benefit and interest of supporting instream flows, fish production, wildlife benefits, and maintaining the SCNF-managed lands with proper ecological functioning.

6. Wallace Creek, particularly in the summer, provides thermal refugia to coldwater dependent salmonids including endangered Snake River sockeye salmon from the warming waters of the mainstem Salmon River. Allowing its waste and expansive uses harms the fish, their recovery, and their protected habitats, as well as WWP and its members.

RECOMMENDED ALTERATIONS AND AMENDMENTS:

1. The Special Master's Recommendations for Upper Wallace Creek water rights under SRBA should be corrected and amended to reflect the true priority dates, included the recent expansive and wasteful applications of water to areas that were not historically irrigated.
2. The Special Master's Recommendations should only allow the historic water use to be diverted from the POD on the SCNF into the Sanderson Ditch.
3. The Special Master's Recommendations should only allow water to be placed in beneficial use and not allow waste of water and destruction of private and public properties.
4. The Special Master's Recommendations should only allow water to be applied to areas with historic irrigation. Any other uses should be advertised with Public Notices, including to WWP, as new water rights, subject to the conditions of the SRBA including the Nez Perce Settlement as well as the Wild and Scenic Rivers requirements and subjugation.
5. The Special Master's Recommendations should reflect the water rights and uses of the downstream reaches of Wallace Creek including IDFG's Conservation Easement below the Lemhi County Road and Culvert.



**Western
Watersheds
Project**

Central Idaho Director
Post Office Box 1322
Salmon, Idaho 83467
Email: Larry@WesternWatersheds.org
Web site: www.WesternWatersheds.org

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

MAY 28 2010

Working to protect and restore Western Watersheds

By _____ Clerk

Deputy Clerk

May 27, 2010

Special Master Terrence A. Dolan
District Court - Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, Idaho 83303

RE: SRBA Case No. 39576, Upper Wallace Creek, Lemhi County

Dear Special Master Dolan:

Please find attached Western Watershed Project's ("WWP's") Motion to Alter or Amend the Special Master's Recommendation for the SRBA Subcase No. 39576, pertaining to Idaho Water Rights 75-14090, 75-14092, 75-14093, 75-14100, 75-14302, 75-14512, and 75-14513 for water diverted from the upper reaches of Wallace Creek, a tributary of the Salmon River in Lemhi County, Idaho.

Pursuant to SRBA Administrative Order 1, Section 13a, WWP, a party to the adjudication, is filing the attached Motion to Alter or Amend the Special Master's Recommendation, because some of the water usage and water rights, as recommended by IDWR and the Special Master, are not in the local public interest, because it is greatly expansive from the historic use, and because some of the diverted water is not being put to beneficial use as required by Idaho Water Law, but rather being removed from Wallace Creek and then wasted in several ravines, creating multiple mass movements of soil, severe erosion, and other natural resource damage on Forest Service managed public lands and private lands, and property damage to private property owned by Jeff Waite as well as to a conservation easement held by Idaho Department of Fish and Game on lower Wallace Creek for the benefit of the stream, its dependent wildlife and plants, as well as protected salmonids, including threatened bull trout, threatened Snake River Basin steelhead, threatened Snake River spring/summer Chinook salmon, endangered Snake River sockeye salmon, and Regionally Sensitive Westslope cutthroat trout and their designated critical habitats and Essential Fish Habitats.

Thank you for providing this opportunity to comment and file a Motion to Alter or Amend pertaining to SRBA Subcase No. 39576. Please feel free to contact us if you have any questions or require additional information.

Yours truly,

Larry Zuckerman, Central Idaho Director
Western Watersheds Project
PO Box 1322
Salmon, Idaho 83467

XC: Jon Marvel, Executive Director-WWP-Hailey Laird Lucas-Advocates For The West-Boise