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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho
SEP 21 2012
By _____ Clerk
Deputy Clerk

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

In Re SRBA) Subcase No. 65-23481
)
Case No. 39576) SPECIAL MASTER'S REPORT AND
) RECOMMENDATION ON MOTION TO
) FILE LATE NOTICE OF CLAIM
)
_____)

I. BACKGROUND

On March 26, 2012, Allen Ranch LLP ("Claimant"), through its attorney Bruce M. Smith, filed a *Standard Form 4, Motion to File a Late Notice of Claim* in the above-captioned subcase. The *Motion* was heard by Judge Wildman on June 19, 2012. On June 21, 2012, Judge Wildman issued an *Order of Reference* appointing Theodore R. Booth as special master for the purpose of making findings under the standard for late notices of claim pursuant to I.R.C.P. 55(c).

Two parties to the SRBA have appeared in opposition to the *Motion*: Jim Bunce (*pro se*); and Sandra M. Chess (*pro se*). A hearing on the *Motion* was held in Boise, Idaho on September 4, 2012.

II. LEGAL STANDARD ON A MOTION
TO FILE A LATE NOTICE OF CLAIM

A motion to file a late notice of claim in the SRBA is evaluated under the criteria of Idaho Rule of Civil Procedure 55(c), which provides the standard for setting aside the

entry of a default. See *AOI* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) (leave to amend a notice of claim shall be freely given when justice so requires). In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho courts apply a “good cause” for untimeliness standard. I.R.C.P. 55(c). The “good cause” standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d at 279 (Ct. App. 1993). The I.R.C.P. 55(c) standard takes into account the following: (1) whether the default was willful; (2) whether setting aside the judgment would prejudice the opponent; and (3) whether a meritorious position has been presented.

III. PROCEDURAL HISTORY OF RELATED WATER RIGHT CLAIMS 65-3111X and 65-3112

According to statements made by counsel for Allen Ranch, LLP at the September 4, 2012 hearing, the purposes of proposed late claim 65-23481 are: (1) to recognize the use of water for livestock; and (2) to recognize the use of water earlier and later in the irrigation season than was decreed under water right number 65-3111X. For the reason that the subject late claim is related to water right 65-3111X (which in turn is related to disallowed claim 65-3112), a brief procedural history of 65-3111X and 65-3112 are provided as follows:

A. 65-3111X

1. On May 19, 1971, Everett and Mary Allen filed a *Notice of Claim to a Water Right* for 65-3111X¹ in the Payette Adjudication (*In the Matter of the General Determination of the Right to the Use of the Surface and Ground Waters of the Payette River Drainage Basin*, Gem County Case No. 3667). The claimed elements were:

¹ Exhibit 1 to the *Affidavit of J.R. Allen in Support of Motion to File Late Claim* is described therein as “a copy of the Payette Claim from the Idaho Department of Water Resources.” In researching the issues involved in this matter, this Special Master pulled the original *Notice of Claim* from the Payette Adjudication from the file boxes located at the SRBA Courthouse in Twin Falls, a copy of which is attached hereto. The document in Exhibit 1 is not the notice of claim, rather it appears to be a form used by IDWR for purposes of claim review and data entry.

Priority Date	June 1, 1894
Source	Rock Creek
Purpose and Period of Use	Irrigation May 1 to October 1 Stockwater January 1 to December 31 Domestic January 1 to December 31
Quantity	3.2 cubic feet per second
Point of Diversion	T13N R3E S3 (no quarter-quarter provided)
Number of Irrigated Acres	200
Basis of Claim	Allen v. Withers

2. Page number 314 of the *Proposed Findings of Water Rights for the Payette River Drainage Basin* (dated March 2, 1979 and filed by the Idaho Department of Water Resources on April 26, 1979) recommends 65-3111X with the following elements:

Priority Date	June 1, 1894
Source	Rock Creek
Purpose and Period of Use	Irrigation April 15 to October 15
Quantity	2.7 cubic feet per second
Point of Diversion	T13N R3E S3 NESE
Number of Irrigated Acres	83
Basis of Claim	Decree
Remarks	This right when combined with right 65-3112 shall provide no more than .02 CFS/Acre.

3. On January 21, 1986, Judge Doolittle entered a ***Partial Decree Pursuant to Rule 54(b) I.R.C.P.***, which decreed the uncontested portions of the *Proposed Findings*.

4. On or about July 16, 1999, E K Allen Ranches, Inc., filed an amended *Notice of Claim to a Water Right* in the Snake River Basin Adjudication for water right 65-3111X,² which claims the following elements:

² The amended Notice of Claim has a "Date Received" date of 11/17/ 1988, which is the same as the original notice of claim. However, the signature of Everett Allen is dated 7/16/1999.

Priority Date	June 1, 1894
Source	Rock Creek (Richard Creek)
Purpose and Period of Use	Irrigation April 15 to October 15
Quantity	2.7 cubic feet per second
Point of Diversion	T13N R3E S3 NESE
Number of Irrigated Acres	83
Basis of Claim	State of Idaho v. A & C Corp., et al.

5. On December 8, 1999, IDWR filed its *Director's Report* for water right 65-3111X. The Director recommended the right as claimed, with the exceptions of: (1) The source was described as “unnamed stream” rather than “Rock Creek”; and (2) the POD was described as being in the NWSE rather than the NESE.

6. No objections were filed to the *Director's Report* for water right 65-3111X, and on October 31, 2000, the SRBA District Court issued a ***Partial Decree*** for the right.

B. 65-3112

1. On May 19, 1971, Everett and Mary Allen filed a *Notice of Claim to a Water Right* for 65-3112 in the Payette Adjudication. The claimed elements were:

Priority Date	July 4, 1917
Source	Rock Creek and Little Rock Creek
Purpose and Period of Use	Irrigation May 1 to October 1 Stockwater January 1 to December 31 Domestic January 1 to December 31
Quantity	2.0 cubic feet per second
Point of Diversion	unspecified
Number of Irrigated Acres	149
Basis of Claim	Allen v. Withers

2. Page number 238 of the *Proposed Findings of Water Rights for the Payette River Drainage Basin* (dated March 2, 1979 and filed by the Idaho Department of Water

Resources on April 26, 1979), which is the number index for disallowed claims, lists water right claim 65-3112 as disallowed. In addition, page 183 of the *Proposed Findings*, which lists water rights “Recommended to be Disallowed” states that water right claim 65-3112 is “Recommended as Right 65-3111X.”

3. On January 21, 1986, Judge Doolittle entered a *Partial Decree Pursuant to Rule 54(b) I.R.C.P.*, which decreed the uncontested portions of the *Proposed Findings*.

4. There has been no further procedure relative to water right claim 65-3112 either in the Payette Adjudication or in the Snake River Basin Adjudication.

IV. ANALYSIS

A. Late Claim for Stockwater.

Based upon the record in this subcase, and upon the comments made at the September 4, 2012 hearing on the matter, this Special Master finds that the Claimant’s untimeliness in filing its claim was not willful, and further that other parties to the SRBA, including the objectors, will not be prejudiced by allowing the claim to proceed. Furthermore, with respect to the Claimant’s motion to file a late claim for a stockwater purpose of use, this Special Master finds that the Claimant has demonstrated a meritorious position, and therefore should be allowed to prosecute its claim for stockwater in the SRBA.

The legal history and framework for the use of water for livestock in association with an irrigation water right which was decreed in the Payette Adjudication can best be described by categorizing such use into two components: (1) stock water use during the irrigation season, i.e. “incidental stockwater”; and (2) non-irrigation season stockwater. With respect to the first category (incidental stockwater), the analysis starts with the *Proposed Findings* in the Payette Decree. Therein, Finding of Fact No. 12 states: “Water for stock is commonly an incidental use on irrigated ground.” The next noteworthy development in the law concerning “incidental stockwater” is found in the holding of the Idaho Supreme Court in the case of *A & B Irrigation Dist. v. Idaho*

Conservation League, 131 Idaho 411, 415-416, 958 P.2d 568 (1997), wherein the Court held that the right to use water for livestock, as an incident to an irrigation use, was included in the irrigation right, and therefore a general provision specifically allowing said stockwater use is not necessary. In accordance with this holding, irrigation water right 63-3111X already authorizes the claimant to use a reasonable amount of water for stockwater purposes, from the same source and point of diversion, and upon the same place of use. That being said, this Special Master is unaware of any provision of Idaho law that would prevent the claimant from seeking to have such use memorialized in a partial decree in the SRBA.

With respect to the use of water for livestock during the non-irrigation season, again the starting point is the *Proposed Findings* entered in the Payette Adjudication, wherein Conclusion of Law No. 7 states: “When stockwater is not a specifically mentioned use for a right that includes irrigation, a reasonable flow is implied and included for the watering of livestock during the non-irrigation season.” In the SRBA, this provision was never carried forward, and it was not recommended as a general provision in the *Director’s Reports* for Basin 65.

In a letter dated May 4, 2001, from David R. Tuthill (who at the time was the IDWR Adjudication Bureau Chief), and addressed to “Basin 65 Water Users,” the Department explained that the non-irrigation season provision was not being recommended for inclusion in the SRBA, and further informed the water users that they may be eligible to file a new non-irrigation season stockwater claim. *Allen Aff.*, Ex. 5. The record in this subcase does not reflect whether the Allen Ranch LLP or its predecessors-in-interest ever received this letter. In any event, there is nothing in the record to suggest that the delay on the part of the Allen Ranch, LLP was willful.

For the reason that water right 65-3111X, as decreed in the Payette Adjudication, included the right to divert a reasonable amount of water during the non-irrigation season³, and also for the reason that such a right has not been extinguished by the proceedings in the SRBA, the Claimant has demonstrated a meritorious position for its

³ The letter from Mr. Tuthill states that a prerequisite for a non-irrigation season stockwater claim is that the claimant “must have actually and historically watered livestock during the non-irrigation season . . .”

late claim for non-irrigation season stockwater. Furthermore, because the irrigation-season (incidental) stockwater can be (but need not be) claimed in the SRBA, the Claimant should be allowed to file a claim for both, i.e. year ‘round stockwater.

B. Late Claim for Early and Late Period of Use.

Unlike the Claimant’s stockwater claim, this Special Master finds that the Claimant has not shown a meritorious position for its claim for a water right for early and late season irrigation. It occurs to this Special Master that there are two potential legal theories available to the Claimant for its claim to early and late season irrigation. The first is that the claim is derivative of the general provisions decreed in the Payette Adjudication (similar to the stockwater claim discussed above); and the second is simply a “stand-alone” claim for a water right based upon diversion and application to beneficial use.

The Claimant’s water right 65-3111X, as it was previously decreed in the Payette Adjudication, was apparently subject to (and benefitted from) a general provision that allowed the use of water both before and after the normal irrigation season.⁴ Specifically, the *Proposed Findings* of the Payette Adjudication state: “The practice of diverting water during the pre-irrigation and post-irrigation season . . . in addition to the quantified rights described in the recommended decree of water rights . . . [is] allowed provided: a. the waters so diverted are applied to a beneficial use; [and] b. The existing quantified rights . . . are first satisfied.” In the SRBA, the *Director’s Reports* for Basin 65 recommended a general provision which carried forward this recognition of pre-season and post-season irrigation use. However, on October 15, 2008, the SRBA District Court entered a ***Partial Decree*** disallowing this recommended general provision. ***Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 65***, Subcase 00-91065 (October 15, 2008). Therefore, with the general provision regarding early and late

The record does not reflect whether the Allen Ranch LLP or its predecessors-in-interest meet this prerequisite.

⁴ The irrigation season in the Payette Adjudication was specified in Finding of Fact No. 10, and illustrated in Figure 2 of the *Proposed Findings*. In Figure 2, the irrigation season for the entirety of Township 13 N. Range 3 E. (which is where the place of use for 65-3111X is located) is April 15 to October 15 (which is the decreed period of use for 65-3111X).

season irrigation having been decreed disallowed in the SRBA, such general provision cannot be relied upon to form the basis of an individual water right in the SRBA.⁵

With respect to the second legal theory of the late claim being based upon a water right created by diversion and application to beneficial use prior to July 1, 1971 (the effective date of the statutory enactments requiring water rights to henceforth be established through the application and permit procedures), this legal theory is foreclosed based upon principles of *res judicata*. At the September 4, 2012, hearing, counsel for the claimant acknowledged that the doctrine of *res judicata* may dictate that the water right could not have a priority date earlier than the date of the decree in *Allen v. Withers* (1930?). SRBA case law cited by counsel for the claimant in this regard are ***Order Granting Motion for Reconsideration as to Alternative Relief (Post Decree Priority)***, Subcases 72-16779 et al., May 6, 2010 (“*Baker Decision*”); and ***Order Conditionally Granting Motion to File Late Notice of Claim; Order Requiring Filing of Amended Claim; Order Requesting Amended Director’s Report if Amended Claim is Filed***, Subcases 74-15015 and 74-15861, January 12, 2009 (“*Riggan Decision*”).

However, for purposes of evaluating the effects of *res judicata* of the prior decrees in the pedigree of the subject late claim, it is not the *Allen v. Withers* Decree that is relevant here; rather it is the decree entered in the Payette Adjudication that determines the outcome in this matter. In a previous decision of the SRBA Court regarding a motion to file a late notice of claim for a water right that was subject to, but not claimed in, the Payette River General Stream Adjudication, the Court held the claim to be barred, stating: “[U]nder principles of *res judicata*, law-of-the-case, and the holding in *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), any water user or successor-in-interest whose claim was decreed or who failed to file a claim is bound by the [January 21, 1986] ***Partial Decree***.” ***Order Denying Late Notice of Claim***, Subcase 65-02794 (December 1, 2010).

⁵ Even if the subject general provision had not been decreed as disallowed in the SRBA, it is doubtful that such general provision could form the basis of an individual water right in the SRBA. In a decision that dealt with an almost identical general provision from the *Lemhi Decree*, (Lemhi County Civil Case No. 4948 (December 30, 1982)), the SRBA District Court held that the “high flow” or “excess water” portion of the general provision could be recognized in the SRBA in the form of a general provision, but it could not form the basis of individual water right claims to the so-called excess water. ***Memorandum Decision and Order on Challenge***, Subcase Nos. 74-15051 et al., (January 3, 2012).

In addition to the above-quoted subcase from the SRBA, the *Partial Decree* entered in the Payette Adjudication itself explicitly states that unclaimed water rights are lost upon the entry of the decree. The *Proposed Findings of Water Rights in the Payette River Drainage Basin* (April 26, 1979), as adopted by the *Partial Decree Pursuant to Rule 54(b) I.R.C.P.* (January 21, 1986), states:

This recommended decree includes all of the rights established before October 19, 1977 to the waters of the Payette River and its tributaries including groundwater, and upon its adoption supercedes all prior judgments of the Court. Any water user who heretofore diverted surface water or groundwater from within the boundaries as described in Exhibit 1, or who owns lands to which previously established rights were appurtenant and who, upon being joined to this action, failed to claim such water rights has forfeited such rights as provided in Section 42-1411, Idaho Code.⁶

Proposed Findings of Water Rights in the Payette River Drainage Basin (April 26, 1979), as adopted by the *Partial Decree Pursuant to Rule 54(b) I.R.C.P.* (January 21, 1986), Conclusion of Law No. 1, p. 173. A copy of the relevant portions of the *Proposed Findings* is attached hereto as Exhibit "B." Therefore, based upon law-of-the-case in the SRBA, upon principles of *res judicata*, and upon the explicit language of the decree entered in the Payette Adjudication, any water right that may have been created by the Claimant or its predecessors-in-interest, prior to July 1, 1971, pursuant to the beneficial use of the water in the early and late season, and not claimed in the Payette Adjudication, has been lost, and hence cannot be claimed in the SRBA.

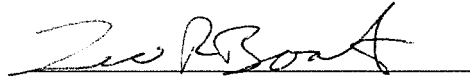
⁶In 1979, Idaho Code § 42-1411 read as follows:

42-1411. DECREE – FORFEITURE OF RIGHT. – The decree shall be conclusive as to the rights of all existing claimants upon the water system which shall lawfully embrace any determination. When a decree has been entered, any water user who has been joined and who failed to appear and submit proof of his claim as provided in the act shall be barred and estopped from subsequently asserting any right theretofore acquired upon the waters included within the proceedings, and shall be held to have forfeited all rights to any water theretofore claimed.

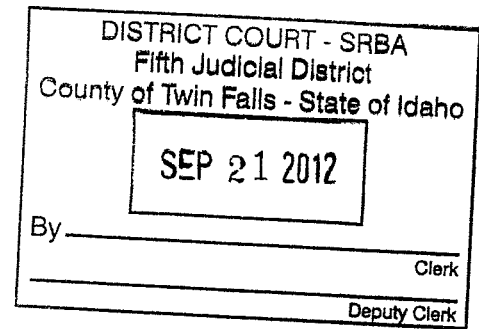
V. RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the *Motion to File Late Notice of Claim* for water right be **conditionally granted**, with the condition being that the claimant file a notice of claim consistent with this *Special Master's Report and Recommendation*.

Dated Sept. 21, 2012



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication



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

In Re SRBA)
Case No. 39576)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

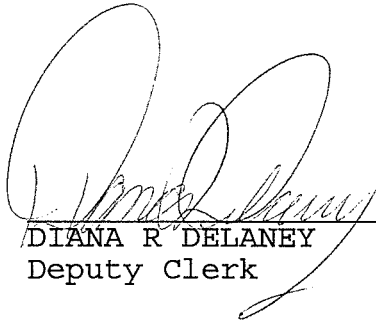
Water Right(s): 65-23481

On September 21, 2012, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

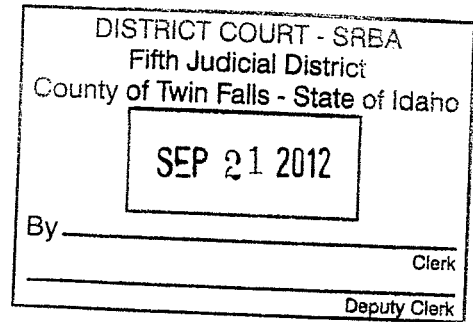
Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

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 September 21, 2012.



DIANA R. DELANEY
Deputy Clerk



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

In Re SRBA)
)
Case No. 39576)
_____)

CERTIFICATE OF MAILING

Water Right(s): 65-23481

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 September 21, 2012, with sufficient first-class postage prepaid to the following:

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

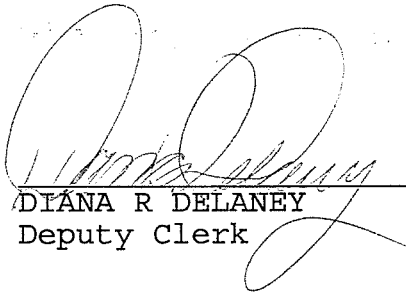
ALLEN RANCH LLP
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Phone: 208-331-1800

JIM BUNCE
PO BOX 890
CASCASE, ID 83611-0890
Phone: 208-315-1628

CERTIFICATE OF MAILING

PAGE 1
09/21/12

SANDRA M CHESSE
1200 LIZASO AVE
BOISE, ID 83709
Phone: 208-863-8769



DIANA R DELANEY
Deputy Clerk

IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHT TO THE USE OF THE SURFACE AND GROUND WATERS OF THE PAYETTE RIVER DRAINAGE BASIN

MAP NO.

65 3111X

(Mailing Address)

The extent and nature of said claim is as follows:

- [illegible]

Individual

(Signature of Claimant)

Organization

(Signature of Spouse)

State of California

Organization
Seal

(Signature of Authorized Agent)

County of Held

On this 19 day of MAY, in the year 1971, before me,

a notary public, personally appeared ✓ Eusebio R. Balon
known to me to be the person(s) whose name(s) are subscribed to the above instrument, and acknowledged to me that (he, she, they,
~~corporation, partnership or~~) executed the same. Dina L. Balon

Notary Public residing at

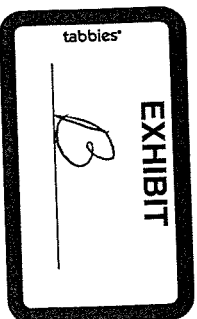
My commission expires.

EXHIBIT

Appendix:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF GEM

IN THE MATTER OF THE GENERAL)
DETERMINATION OF THE RIGHTS)
TO THE USE OF THE SURFACE AND)
GROUNDWATERS OF THE PAYETTE)
RIVER DRAINAGE BASIN)
)

CIVIL NO. 3667
PROPOSED FINDING OF WATER
RIGHTS

The above-entitled cause was initiated under the provisions of Section 42-1406, Idaho Code, by submission of a petition from five (5) organized water associations in the Payette River Drainage Basin, requesting that the Department of Water Resources (formerly the State Department of Reclamation and Department of Water Administration, and hereinafter called Department) obtain authority from the Court to prepare a proposed finding of water rights in the Payette River Drainage Basin.

Pursuant to Section 42-1407, Idaho Code, R. Keith Higginson, former Director of the Department, petitioned the Court on August 11, 1969, for an order of authorization for the commencement of an adjudication of water rights in the Payette River Drainage Basin.

An order was signed on November 12, 1969, by District Judge Gilbert C. Norris, authorizing the Department to commence an investigation and determination of the various rights to the use of the water of the Payette River and its surface tributaries including groundwater, which may be either tributary to the Payette River or its surface tributaries within the Payette River Drainage Basin; such waters lying or being used within Boise, Canyon, Gem, Payette, Valley, and Washington counties.

Orders of joinder signed on February 13, 1970, April 21, 1970, July 22, 1970, August 31, 1970, July 21, 1971, December 21, 1971, December 10, 1975, August 23, 1976, and April 25, 1977, made approximately 11,087 land owners and possible water users party to the adjudication. About 10,500 claims to water rights were submitted to the Department.

Based upon the claims submitted, the files and records of the Department and the Court, and the examination of the ditches, diversions, lands irrigated and other uses of water within the Payette River Drainage Basin, the Department recommends these findings of fact, conclusions of law and decree of water rights, in which the following definitions apply:

- a. "Department" means the Idaho Department of Water Resources (formerly the State Department of Reclamation and Department of Water Administration).

- b. "Right Number" is the number assigned to each water right for purposes of cataloging. The first two (2) numerals of this number indicate the basin number as reflected in Department files. For example, "65" indicates the Payette River Drainage Basin.
- c. "Name and Address" indicates the owner of the right at the time the "Notice of Claim to a Water Right" was submitted to the Department, or the updated owner as based on amended claims, correspondence, or records of the county assessors.
- d. "Priority Date" indicates the date when the water was first applied to a beneficial use, or generally the date of filing in the case of a permit or license.
- e. "Use" indicates the beneficial use to which the water is applied.
- f. "Use Period From . . . To" indicates the time when a particular right may be used each year.
- g. "Max Amount" indicates the volume in AFA (acre-feet per annum) that may be diverted each year under a particular right.
- h. "Acre-foot" is a volume of water sufficient to cover one acre of land one foot deep with water and is equal to 43,560 cubic feet or 325,851 gallons.
- i. "Max Rate" indicates the maximum rate of diversion from a source in CFS (cubic feet per second).
- j. "One miner's inch" in Idaho is the quantity of water which will flow through an orifice one inch square under a four inch head, or approximately nine (9) gallons per minute. This is not a legal measure in Idaho but is used often in old references to water.
- k. "One cubic foot per second" is the unit of measure for the rate of flow of water and is equivalent to fifty miner's inches in Idaho, or 449 gallons per minute.
- l. "Place of Use and Acreage" indicates the legal description of the place of use and number of irrigated acres within each government lot or one-sixteenth (1/16) section.
- m. "Under the general heading "Basis of Right":
 - "Beneficial Use" indicates the right is based on a Constitutional right or "use right".
 - "Permit" indicates the right has been initiated under the statutes of the State of Idaho but has not yet been perfected by submission of proof of beneficial use, with subsequent field examination by the Department. Rights based on permit must be completed according to statutory procedures, and are not recommended to be decreed in this Proposed Finding.

- "License" indicates the right has been initiated through the Department with appropriate statutory proof of beneficial use submitted in the past with subsequent examination by the Department. The license is "prima facie" evidence of the water right.
- "Decree" indicates that the right has been adjudicated in a court of law prior to this general determination of water rights.
- "Reserved" indicates the right was established incidental to the withdrawal of national forest lands by the federal government.
- n. "Domestic Purposes" is defined as water for household use or livestock, and water used for all other purposes including irrigation of up to one-half ($\frac{1}{2}$) acre of land in connection with said household where total use is not in excess of 13,000 gallons per day. Idaho Code, Section 42-230(d).
- o. "H. E. S." means Homestead Entry Survey and may describe a place of use of a water right. The number following the H. E. S. designation refers to the particular homestead entry in question.
- p. "Consumptive Use" is the amount of water transpired in the process of plant growth plus the water evaporated from soil and foliage in the area occupied by the growing plant.

FINDINGS OF FACT

- 1) The Payette River lies within Boise, Gem, Payette, and Valley counties, State of Idaho. As shown in Figure 1, its confluence with the Snake River is near Payette, Idaho, and its source is comprised of tributaries rising in the surrounding mountains and hills. There are periods during each year when the amount of water flowing in the Payette River and its tributaries is insufficient to satisfy the various demands by claimants of appropriate rights.
- 2) Interbasin diversion and unpredictable groundwater flow patterns necessitate exact definitions of the area in which water rights are determined herein. This proposed decree includes all water rights developed prior to October 19, 1977, with point of diversion within the boundaries defined in Exhibit 1.
- 3) The water rights of the United States are subject to adjudication in this proceeding under the provisions of 43 USC 666. The United States has submitted claims to consumptive use water rights based upon the doctrine of "reserved rights". The United States Supreme Court ruled July 3, 1978, in United States v. New Mexico that reserved water rights in national forests exist only where necessary to preserve the timber in the forest or to secure favorable water flows for private and public uses under state law. The consumptive use claims of the United States must be evaluated in accordance with this ruling.

As a result of the decision in United States v. New Mexico, the United States did not submit claims to nonconsumptive water rights in the Payette River Drainage Basin. No nonconsumptive rights are found to be necessary to accomplish the purposes of timber and watershed protection in the Payette and Boise National forests.

4) There exist numerous separate decrees on the tributaries of the Payette River which adjudicate the various priorities to the use of the water on those tributaries. Diversion and beneficial use of water on these decreed tributary streams has in the past been without regard for uses or rights claimed on the Payette River proper, and users on the Payette River proper have made no demand on these tributary streams for water to fill prior rights on the main stem.

5) The present use of water under previously decreed rights in the Payette River Drainage Basin was found, in many cases, to be different from the use as described in the original decrees. Changes in place of use or point of diversion, apparent errors in the original decrees, abandonment or forfeiture of use, and the updating and improvement of irrigation systems through the years are some of the reasons for recommendations of decreed rights different from the original decrees.

6) Beneficial use rights from surface water sources are those rights which were commenced by diversion and application of the water to a beneficial use prior to May 20, 1971. Beneficial use rights from groundwater sources are those which were commenced by diversion and application of the water to a beneficial use prior to March 25, 1963. All other rights to the use of water must have been initiated by an application filed with the Department, or a prior decree. The only exceptions are groundwater uses for domestic purposes, and federal reserved rights necessary to preserve timber or to secure favorable water flows. Permits and licenses herein are updated as of December 1, 1978.

7) Some water rights recommended herein were initiated by application and permit from the Department. These permit rights are not decreed herein, but are subject to the requirement that proof of beneficial use of the water must be submitted to the Department and each right will be limited to and confirmed by such license as may subsequently be issued by the Department.

8) The consumptive use of water for irrigation purposes was found to be dependent upon location within the basin, and varies from 2.0 AFA to 3.0 AFA per acre as shown in Figure 2. [Reference: Sutter, R.J. and G.L. Corey, 1970, *Consumptive Irrigation Requirements for Crops in Idaho*, University of Idaho Agricultural Experiment Station Bull. 516.]

9) The existing water rights in the Payette River Drainage Basin were found to be in most cases based on .02 CFS (one miner's inch) per acre in addition to a rate to compensate for delivery losses.

10) The irrigation season is found to be dependent upon location within the basin. As shown in Figure 2, the three seasons consist of: 184 days (April 15 through October 15), 215 days (April 1 through November 1), and 246 days (March 15 through November 15). [Reference: Stevingson, David J., and Dale O. Everson, *Spring and Fall Freezing Temperatures in Idaho*, University of Idaho Agricultural Experiment Station Bull. 494.]

11) The amount of water required for stock watering purposes is found to be 12 gallons of water per day per head for range cattle and horses, 35 gallons per day for dairy cattle, and 2 gallons per day per head for sheep. For domestic or household use, the average requirement is 1,000 gallons of water per day per household. [Reference: U.S. Environmental Protection Agency, 1974, *Manual of Individual Water Supply Systems*.]

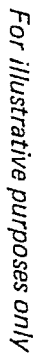
The seal of the State of Idaho is a shield-shaped emblem. It features a mountain range in the background, with a river flowing through a valley in the foreground. A large, stylized letter 'I' is superimposed over the scene. The words 'STATE OF IDAHO' are inscribed across the bottom of the shield.

Figure 1.

CONSUMPTIVE REQUIREMENTS and IRRIGATION SEASONS in the PAYETTE RIVER DRAINAGE BASIN

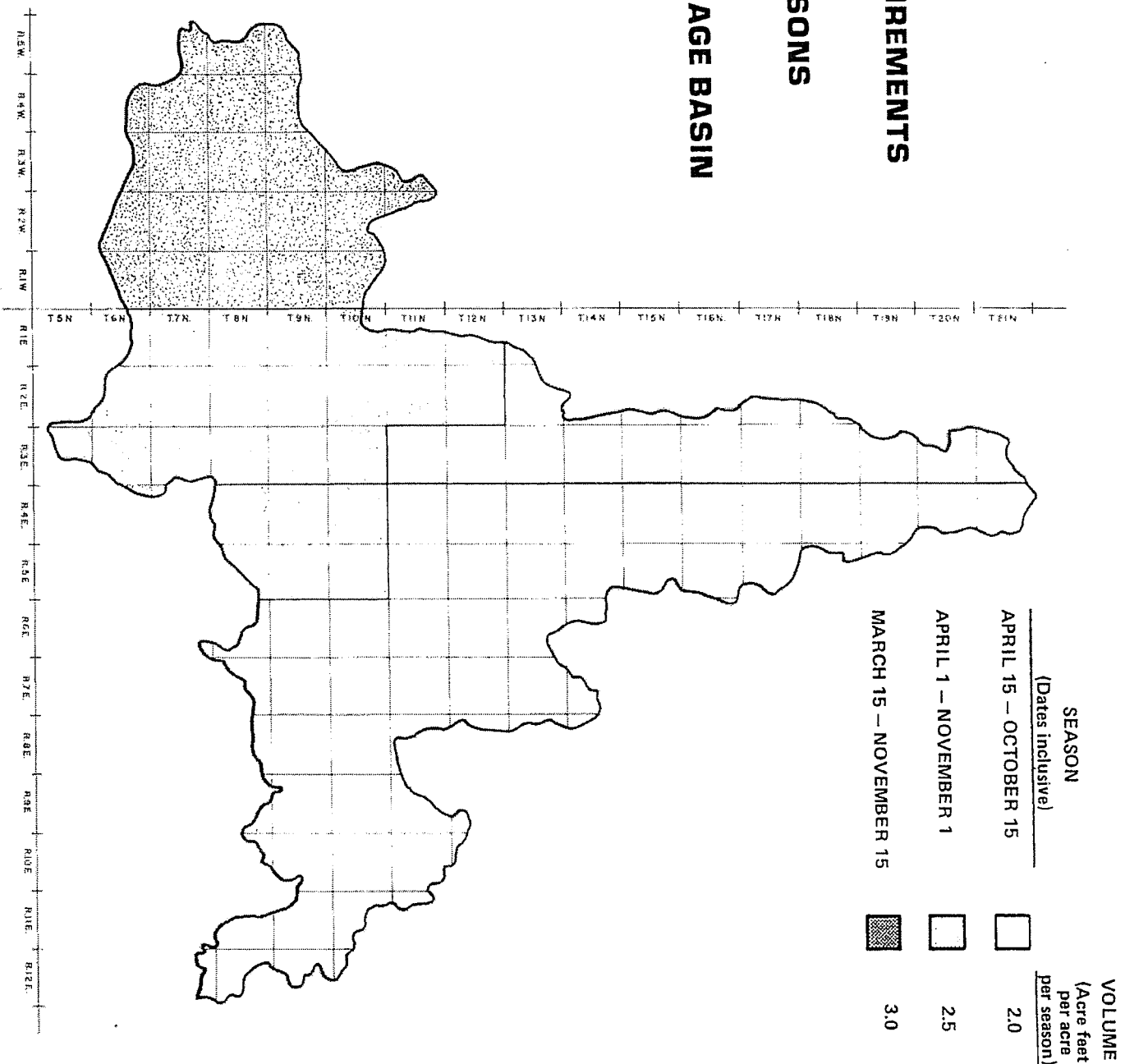


Figure 2.

- 12) Water for stock is commonly an incidental use on irrigated ground.
- 13) Regulation of the diversion and use of water from the Payette River and its tributaries requires that each user who diverts must install and maintain a suitable headgate and measuring device for use by the watermaster.
- 14) Regulation of artesian sources of supply requires that all flowing wells be capped or equipped in a manner that will allow the flow of water to be completely stopped when not being used beneficially.
- 15) "Fire Protection" is an alternate use to which any right could be beneficially applied.
- 16) The practice of sprinkling dirt roads to improve visibility has been identified in some claims to water rights. The amount of water used for this purpose is negligible and the point of diversion and place of use is difficult to identify; however, this use has been found to be beneficial.
- 17) The practice of holding stored water in a reservoir has normally been year around.
- 18) A branch of the Payette River called Sevenmile Slough has traditionally served as a main channel for Payette River water during periods of low flow. This usage has caused water diversions from the channel to be delivered as if they were from the Payette River.
- 19) Water has been diverted and applied to a beneficial use as described in the recommended decree of water rights. In addition, the water users in the Payette River Drainage Basin have historically diverted the so called "high water" or "flood water" generally during the months of May and June.

CONCLUSIONS OF LAW

1) This recommended decree includes all of the rights established before October 19, 1977 to the waters of the Payette River and its tributaries including groundwater, and upon its adoption supercedes all prior judgments of the Court. Any water user who heretofore diverted surface water or groundwater from within the boundaries as described in Exhibit 1, or who owns lands to which previously established rights were apurtenant and who, upon being joined to this action, failed to claim such water rights has forfeited such rights as provided in Section 42-1411, Idaho Code.

2) The United States holds rights to the use of water on national forest lands within the Payette River Drainage Basin. The priorities for the reserved rights of the United States (where necessary to preserve timber or to secure favorable water flows for private and public uses) are based upon the dates when the various forest lands were reserved. The priorities for nonreserved beneficial use rights of the United States are based upon the dates such waters were diverted and applied to a

beneficial use prior to May 20, 1971, for surface waters and prior to March 25, 1963, for groundwater sources. Nonreserved water rights acquired after these dates must be based upon statutory compliance. All existing water rights of the United States within the Payette River Drainage Basin, whether consumptive or nonconsumptive, are recommended herein.

3) An adjudication of water rights should recognize the past history of water use in the area. Since there exist numerous and separate decrees on tributaries to the Payette River, and since users on these stream systems have distributed their waters under direction of a watermaster independently and without regard for prior uses on the Payette River proper, the water users on those tributaries or water sources have advised or prescribed any prior right to demand water from the tributary streams to fill rights on the Payette River proper. For the purposes of water distribution in the Payette River Drainage Basin, water rights from the following sources, to the extent recommended herein, are not considered junior to water rights from the Payette River:

1. Big Willow Creek, tributary to Payette River, and tributaries,
2. Boulder Creek, tributary to Cascade Reservoir, and tributaries,
3. Campbell Creek, tributary to Cascade Reservoir, and tributaries,
4. Lake Fork Creek, tributary to Cascade Reservoir, and tributaries,
5. Little Willow Creek, tributary to Payette River, and tributaries,
6. Porter Creek, tributary to Payette River, and tributaries,
7. Richards Creek, tributary to South Fork Payette River, and tributaries,
8. Rock Creek (Richards Creek), tributary to Cascade Reservoir, and tributaries,
9. Scriver Creek, tributary to Middle Fork Payette River, and tributaries,
10. Squaw Creek, tributary to Payette River, and tributaries,
11. Warm Springs Creek, tributary to Middle Fork Payette River, and tributaries,
12. Willow Creek, tributary to Cascade Reservoir, and tributaries.

Appropriations of water after October 18, 1977, on the above streams or any other water source or stream in the Payette River Drainage Basin, however, are considered to be tributary to the Payette River proper for the purposes of distribution.

Water sources or creeks not included in the listing above are tributary to the Payette River for the purposes of distribution if in fact water from the water source or creek would eventually reach the Payette River.

4) The consumptive use of water for irrigation purposes in the Payette River Drainage Basin has been determined to be dependent upon location of use as shown in Figure 2. The Director of the Department of Water Resources will be guided by this determination in authorizing changes requested pursuant to Section 42-222 Idaho Code or pertinent case law. Regulation of diversion for irrigation purposes by the Department of Water Resources will be on the basis of the rates of diversion herein specified rather than by the acre-feet allotment.

5) The rates of diversion recommended are generally based on .02 CFS (one miner's inch) per acre with consideration given for reasonable losses incurred dependent on the nature of the conveyance system.

6) The normal irrigation season depends upon the location of the water use, and is identified in Figure 2. The practice of diverting water during the pre-irrigation and post-irrigation season as well as diverting the so-called "high water" or "flood water" in addition to the quantified rights described in the recommended decree of water rights (and future rights that may be established pursuant to statutory procedures) are allowed provided:

- a. The waters so diverted are applied to a beneficial use.
 - b. The existing quantified rights (including future appropriations of water) are first satisfied.
- 7) When stockwater is not a specifically mentioned use for a right that includes irrigation, a reasonable flow is implied and included for the watering of livestock during the non-irrigation season.

8) Water users whose rights are described herein are required to install and maintain headgates and measuring devices at their points of diversion for use by a watermaster.

9) Water users whose rights are described herein and whose sources of supply include flowing wells are required to cap or equip these wells in a manner that will allow the flow of water to be completely stopped when not being used beneficially.

10) "Fire Protection" is an implied use for each right, to the extent of the maximum rate of diversion for the right.

11) "Road-watering" is recognized as a beneficial use for which no water right need be recorded.

12) The right to hold water in a reservoir is year around unless otherwise defined.

13) The Sevenmile Slough is identified and treated for water delivery purposes as part of the main stem of the Payette River.

14) With the exception of water rights with a basis of "Permit" (which are not recommended to be decreed herein but are included for informational purposes only), water has been diverted and applied to a beneficial use as described in Volumes II and III of this recommended decree of water rights.

HOW TO FIND A WATER RIGHT IN THE PROPOSED FINDING

RECOMMENDED RIGHTS:

- 1) If the number is known, locate the water right in the "Recommended Rights: Number Index".

Numbers greater than 65-9999 are arranged in the index as if they were divided by 10. For example: 65-11252 is arranged as 65-1125.2, and is found between 65-1125 and 65-1126.

- 2) If the number is not known, locate the water right in the "Recommended Rights: Name Index".

A water right that has multiple names will be indexed under only one name in the group. For example, right 65-6828 has four owners: Lester E. McClintick, Virginia E. McClintick, Frank L. Harrold and Edith E. Harrold. The right is indexed under Lester E. McClintick only.

For water delivered by an irrigation company or a multiple domestic system, the water right number is shown in the index under the name of the irrigation company or water users association.

- 3) Obtain from the index (1) the source, (2) the stream to which the source is tributary (if applicable), and (3) the date of priority of the water right.
- 4) If the source is other than groundwater, go to Volume II, Table for Contents for further instructions.
- 5) If the source is groundwater, go to Volume III, Table of Contents for further instructions.

DISALLOWED CLAIMS:

- 1) If the name is known, locate the reason for disallowal in the section entitled "Claims Submitted, Recommended to be Disallowed".
- 2) If only the number is known, use the section entitled "Claims Submitted: Recommended to be Disallowed: Number Index" to find the name. Then proceed as in 1) above.

UNCLAIMED RIGHTS:

- 1) The water rights listed numerically in "Statutory and Decreed Rights not Claimed" were those found to have no current use.