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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

Case No. 39576

) Sub-case No. 34-04138
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**UNITED STATES' BRIEF ON
INCLUSION OF REMARKS IN
STOCKWATERING CLAIMS AND
CHANGES TO UNOBJECTED-TO
RIGHTS.**

**U.S. BRIEF ON REMARKS TO
STOCKWATERING CLAIMS**

DESCRIPTIVE SUMMARY

This is the United States' brief on the remarks attached to de minimis stockwatering claims made by the United States by and through the Bureau of Land Management and procedures to effect changes in remarks or elements to unobjected-to claims.

INTRODUCTION

At a status conference hearing held for this subcase on July 25, 1995, the Special Master for Basin 34 requested that the parties and the Idaho Department of Water Resources address the Court's concerns regarding three matters. First, whether the remark IDWR included in its recommendation for this stockwatering right and other similar stockwatering rights should be amended. Second, whether the remark should be moved and included under some other element of the water right. Third, whether and/or how the Special Master should acquire jurisdiction over unobjected-to claims referenced directly or indirectly in the remark.

The United States believes that IDWR's remark is not necessary for the definition or administration of stockwatering rights. The most efficient means to resolve the Court's concerns would be to simply eliminate the remark from stockwatering claims to de minimis amounts of water. Should the Special Master determine that the remark is necessary, the United States requests that the claims be decreed as reported. Changing the remark to include a list of all water rights in an allotment is unnecessary and burdensome and will result in inaccurate decrees.

DISCUSSION

I. Inclusion Of The Remark For De Minimis Stockwatering Claims

The United States, by and through the Bureau of Land Management, has approximately six hundred water sources claimed on the public lands for stockwatering purposes in Basin 34. These claims are for consumptive uses by cattle and wildlife in de minimis quantities of water. The Director of the Idaho Department of Water Resources recommended that these water rights be decreed in the Director's Report. In addition to recommending these claims, the IDWR added a remark to the majority of the BLM stockwatering claims¹ that states:

This right and other rights common to the same grazing allotment shall be limited to the quantity of water beneficially used by the number of stock within the allotment.

The United States did not object to the inclusion of this remark. It was understood that the inclusion of IDWR's remark did not affect the form or substance of the United States' claim and therefore no objection was necessary. At the July 25, 1995, hearing the Special Master indicated a concern that IDWR's remark may be legally or factually insufficient. The Special Master inquired whether the phrase in IDWR's remark, "other water rights common to the same grazing allotment," should be identified with specificity and include, by number, all the other water rights in the allotment. In addition, the Master noted a concern that the water rights not be "cumulative". Finally, the question arose whether

¹ The U.S. Forest Service has filed for consumptive use claims to stockwatering rights in basin 34. The Director has also added this remark to the Forest Service claims.

IDWR's remark is, in fact, necessary to describe the quantity element of the water right and should, accordingly, be moved under that section of the claim.

1. The Remark Is Not Necessary For The Description Or The Administration Of The Water Right.

The United States did not object to IDWR's remark because the remark, as currently written, does not affect the BLM's stockwatering claim. IDWR's remark is merely an innocuous reiteration of the law of the State of Idaho. The remark states that the right is limited to the amount of water beneficially used. This principle is well established in the Idaho Constitution and Idaho statutes. See e.g., Idaho Constitution, Article XV, § 3 (1994); I.C. §§ 42-101, 42-104.

IDWR's remark also includes language recognizing that this claim to beneficial use is for stockwatering purposes ("water beneficially used by the number of stock"). Again, this is already stated in the claim under purpose of use and its inclusion in the remark is redundant.

Finally, IDWR's remark indicates that the water at this source and other sources will be used by the cattle within the allotment. While this is true, it is not necessary or helpful for the administration or the definition of the water right. The IDWR does not actively administer small domestic and stockwatering claims. See, IDWR's Second Brief Re: Elements of Small Domestic and Stockwater Rights, April 21, 1995, at 5 ("The more summary view of such claims is reasonable because D&S uses are small and numerous, and seldom either contested or administered").

Nor is IDWR's remark necessary for the definition of the water right or the determination of the quantity of water used. The parties may simply stipulate that the amount of water consumptively used is de minimis. As stated in the Court's Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, January 17, 1989, "[d]omestic and stock water uses collectively divert annually less than one per cent of the 36 million acre feet which leaves the state each year." Id. at 1. Because the cattle consume such small quantities of water, "de minimis" appropriately describes the quantity of water used. Therefore, it is immaterial whether the water consumed by the cattle at this source will be used by the cattle "within the allotment", as long as the rate and the amount of water consumed for stockwatering purposes does not exceed de minimis amounts.²

2. The Claims To Stockwatering Rights Are Not "Cumulative" Because The Claims Do Not Exceed De Minimis Quantities Of Water.

The Special Master expressed concern at the July 25, 1995 hearing that the BLM claims to stockwatering sources not be "cumulative". The Court's concern appears to be that the accumulation of all BLM claims to de minimis stockwatering sources in a particular allotment may exceed actual consumption and therefore beneficial use. This

² The term "de minimis" has been used to describe the annual consumptive volume, but is also appropriate in describing consumptive rates. As Judge Hurlbutt has indicated, de minimis stockwatering uses are defined statutorily in 42-1401(12). See, Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, January 17, 1989, at 3. As the statute makes clear, the use for a stockwatering purpose is the use of water solely for livestock or wildlife where the total is not in excess of 13,000 gallons per day. This is the equivalent of 0.02 cfs. It is also the equivalent to 0.24 cfs, if 13,000 gallons were diverted for only a two-hour period per day. See, United States Brief on the Elements of a De Minimis Water Right, March 10, 1995.

concern, and presumptive need for IDWR's remark, is unfounded and any remark on combined or cumulative rights is unnecessary.

The stockwatering rights are accurately described without IDWR's remark because of the manner in which stockwater is utilized on the open range. Cattle within an allotment generally are not restricted in their choice of water sources. Cattle may and do beneficially use any available water. However, excessive or cumulative use is impossible because of the nature of the right. The cattle and wildlife are limited in their beneficial use of these in-stream and non-diverted spring claims to the de minimis quantity of water they actually consume.³

The Master's concern that the water rights not be cumulative appears to be more a concern that the water rights not be additive. In other words, certain parties to the SRBA have voiced concerns that the BLM will attempt to add all the stockwatering rights in a particular basin and use that water for non-stockwatering purposes. These concerns are not justified and a remark to that effect is not necessary.

These rights are claimed and used for stockwatering purposes. As a stockwatering use, the amount of water cannot exceed the amount of water beneficially consumed by the stock or wildlife that frequent the source. As noted, supra, this is a de minimis amount of water.

³ Depending upon cattle grazing patterns, the water consumed at one source on a daily basis may involve a large percentage of the cows within the allotment or none. However, proof of beneficial use does not require that a water source be constantly utilized. See e.g., Jenkins v. State, Dep't of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).

Basically, the concern that the water rights not be additive and that excessive amounts of water not be decreed is an outgrowth of the State's reporting process for stockwatering claims. The Director has allowed claimants of stockwatering rights to claim up to 0.23 cfs of water for 1000 cattle. For allotments with a large number of springs and stream reaches, and thus water right claims, adding all stockwatering rights in the allotment would appear to result in a large quantity of water claimed in excess of de minimis amounts. The IDWR has admitted that the recommended diversion rates for stockwater are based upon a two hour diversion. See, IDWR's Brief Re: Elements of Small Domestic and Stockwater Rights, March 13, 1995. While this methodology may be appropriate for claims to developed stockwatering sources utilizing large conveyances and stock tanks that may be filled in a two hour period, it is not routinely accurate for spring and in-stream stock water uses. The United States has previously stated that stockwatering claims based on a two-hour diversion should be so stated in the water right to avoid the appearance of excess diversion. See, United States Brief on the Elements of a De Minimis Water Right, March 10, 1995. This solution would alleviate the Court's concern that the water rights not be additive and not result in an appearance of an excessive amount of water decreed.

3. Inclusion Of All Water Right Numbers In An Allotment In IDWR's Remark Would Be Burdensome And Inaccurate.

The amendment of BLM stockwatering claims to include, by number, all stockwater rights common to the same grazing allotment in IDWR's remark would be burdensome to the BLM and the IDWR. In many allotments, BLM has made stockwatering claims to dozens of stockwatering sources. Some allotments contain over one hundred claims to stockwatering sources. Identification and listing of all these claims common to the same

allotment will be burdensome to the BLM District's resources and, because the claims would need to be entered into IDWR's data base, burdensome to the Director.

Furthermore, the identification of water rights common to the allotment will result in rapidly outmoded, perpetually unsettled decrees. Allotment boundaries change due to management decisions and grazing requirements. Administrative flexibility in these boundaries is vital in managing the public lands for stock grazing purposes. Such changes in the allotment borders will alter the number of water rights appurtenant to that allotment and adjacent allotments and necessitate change in decreed remarks.

Listing of all stockwatering rights in an allotment is also inappropriate because allotments may cross the boundaries of the SRBA subbasins. San Felipe allotment, for example, is partially in Basin 34 and partially in Basin 72. Listing of all water rights common to the allotment may require inclusion of water rights outside the test basins and outside the Special Master's jurisdiction.

A final problem with the listing of all water rights is that grazing allotments are not limited to federal lands. An allotment may include water rights owned or claimed by the State or private claimants. These parties would likely object to their water right being included with the federal water right.

II. IDWR's Remark is Not Necessary and Therefore Inclusion of the Remark In An Element Is Not Warranted.

The Idaho Supreme Court has ruled that general provisions are permissible in a final decree, if they are necessary to define or efficiently administer the water right.

Idaho v. United States, 1995 WL 371258 (Idaho). Remarks, similarly, should be examined

to determine whether or not the water right is adequately defined or can be properly administered in the absence of the proposed remark.

Because inclusion of the IDWR's remark is not necessary to the definition of the right or the efficient administration of the right, it should not be included in the decree. However, the United States did not strenuously object to the inclusion of IDWR's remark in its claims to stockwatering rights. Due to the remark's benign nature, should the Special Master determine that IDWR's remark should be retained, the United States could accede to repositioning the remark under another element of the water right. Altering the remark to include all stockwatering claims in an allotment should be avoided, however, as an unnecessary and wasteful burden on the claimant and the IDWR.

III. The Special Master's Jurisdiction Over Unobjected-To Claims Is Not Necessary.

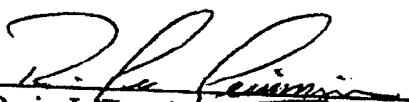
A third question posed by the Special Master at the July 25 hearing was whether an Amended Order of Reference should be sought for the unobjected-to water rights common to the same grazing allotment. This question may be simply answered, no.

Jurisdiction by the Special Master is not necessary because the remark may simply be eliminated from all BLM stockwatering claims by the Court. Notice for this change may be accomplished by docket sheet procedures. More substantial procedures are unnecessary because the Court may determine that IDWR's remark had no force or effect, either in the definition or administration of the stockwatering right. Notice for a change that will not materially affect the water right should be accomplished by simple docketing. Moreover, parties to the SRBA will have the opportunity to challenge the Special Master's report after it is submitted to Judge Hurlbutt.

CONCLUSION

WHEREFORE, the United States respectfully submits this brief for the issues raised in the July 25 hearing for this subcase. The United States requests that the Special Master order that IDWR's remark for de minimis stockwatering claims be stricken. Alternatively, should the Special Master determine that the remark is necessary, the United States requests that the claims be decreed as reported. Changing the remark to include a list of all water rights in an allotment will be burdensome and lead to inaccurate decrees.

Respectfully submitted this 2nd day of September, 1995.


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CERTIFICATE OF SERVICE

I certify that on the 2nd day of September, 1995, I served a true and correct copy of the UNITED STATES' BRIEF ON INCLUSION OF REMARKS IN STOCKWATERING CLAIMS AND CHANGES TO UNOBJECTED-TO RIGHTS for subcase 34-04138 upon the following individuals:

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U.S. BRIEF ON REMARKS TO
STOCKWATERING CLAIMS

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DEPARTMENT OF JUSTICE

ENVIRONMENT AND NATURAL
RESOURCES DIVISION
GENERAL LITIGATION SECTION



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