

RECEIVED

MAY 11 1995

Department of Water Resources
Adjudication Bureau

Movant's Name:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division

PETER C. MONSON
Attorney, Department of Justice
Indian Resources Section
Environment and Natural Resources Division

DARIA J. ZANE
R. LEE LEININGER
Attorneys, Department of Justice
General Litigation Section
Environment and Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663
(202) 272-8351, (202) 272-4692

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 Nos. 34-10807, 34-
	)	10717, 34-12429
	)	
Case No. 39576	)	RESPONSE TO IDWR'S
	)	SECOND BRIEF RE: ELEMENTS OF
	)	SMALL DOMESTIC AND STOCKWATER
	)	RIGHTS

Descriptive Summary

This is the United States' response to the second brief filed by IDWR on the elements of small domestic and stockwater rights.

Background

The United States submits this response to IDWR's brief on small domestic and stockwatering rights pursuant to the Special Master of Basin 34 orders establishing a briefing schedule for the above referenced subcases.

The Special Master issued two orders on April 11, 1995, permitting IDWR to brief "how the quantity element should be decreed," Order Establishing Deadlines for Submitting Briefs, Subcase No. 34-12429, and "standard language for quantity and annual volume of consumptive use elements, and information proposing a cap stated in acre-feet per year for annual volume of consumptive use for de minimis domestic and stockwater rights." Order Establishing Deadlines for Submitting Briefs, Subcase Nos. 34-10717 and 34-10807. Response briefs were due no later than April 21, 1995 and the deadline was extended to May 5, 1995 by stipulation of the parties.

IDWR filed a twenty-three page brief on this matter on April 21, 1995. IDWR's brief addresses the quantity elements of de minimis stockwatering claims, describes storage rights, and discusses the sufficiency of the Standard Form No. 5 and the United States' "objection" to quantification of de minimis rights.

Discussion

As a preliminary matter, the United States is compelled to respond to IDWR's charge that it acted in bad faith in

responding to the court's initial request for briefing. IDWR has characterized the United States brief on the elements of stockwatering claims as an "objection" coming after the United States had stipulated to the elements of the water right on a Standard From No. 5.

This allegation is spurious, at best. The United States submitted its initial brief on the elements of a stock water claim at the request of the court. The court requested in its Order Setting Hearing and Briefing Schedule, dated February 27, 1995, that the parties discuss water right elements to assist the court in making its report and recommendation. The United States' initial brief addressed the ten questions presented by the court and did so pursuant to applicable law and fact. The United States statements in response to the court's request for briefing can in no manner be characterized as bad faith.

More important than IDWR's accusation is the basis for the United States' arguments in its initial brief and its continued concern with the manner in which de minimis stockwater rights are reported and decreed.

1. The quantity of water decreed in cubic feet per second must be explained to avoid inconsistent decrees.

The United States is the largest claimant of de minimis stockwater rights in the SRBA. Over twenty thousand claims, most of which are de minimis, were filed by the United States on behalf of the Bureau of Land Management in the SRBA. Therefore, the United States has a particularly keen interest in how

stockwatering rights are decreed and how such decrees are interpreted.

The United States' primary concern is with the element of the quantity of water used in cubic feet per second, as required in I.C. § 42-1411(2)(c) and in Standard Form No. Five as element number three. As stated in the earlier U.S. brief on de minimis stockwatering claims, the BLM in the Salmon District of basin 34 relied on a plain meaning interpretation of the Idaho Code provision defining stockwater use in the adjudication of water rights. Stockwatering use is water used "solely for livestock and wildlife where the total use is not in excess of thirteen thousand (13,000) gallons per day." I.C. § 42-1401A(12) (emphasis added). The BLM reasonably relied on the statute in computing a quantity of water used in cubic feet per second for range cattle based on a twenty-four (24) hour diversion rate. As previously stated 13,000 gallons per day is equivalent to .02 CFS diverted over a 24 hour period or per day.

The IDWR, as noted in its briefs, based its recommendations for maximum diversions of de minimis stockwater on a two-hour diversion rate. As IDWR pointed out, the two-hour calculation may be appropriate for diversions into stockwatering tanks or other situations depending on the delivery system. The United States accepts that contention and joins IDWR's position that a two-hour rate may be appropriate under certain circumstances. It would be a waste of the court's time and

resources if the parties were forced to litigate issues such as the consumptive habits of range cattle or to present proof of when a cow drinks.

Therefore, both the two-hour and the twenty-four hour period of determining the rate at which water is used in cubic feet per second is reasonable. However, to avoid inconsistent results and to provide for the differences in quantity of water used in decrees for stockwatering use an explanation of the diversion rate is necessary. This may be succinctly stated in the required statement under element three of the Standard Form No. 5 or in the remarks section of a water right recommendation. For example, a water right for stockwatering use with an amount greater than 0.02 CFS can be further defined as based on a two-hour period of diversion.

2. The annual volume of consumptive use is an element that is accurately defined as de minimis.

Much attention has been placed by this court on the necessity of including an annual volume of consumptive use in a recommendation for a small domestic or stockwater use. The focus of this discourse has been on a diversion cap of annual consumptive use in acre-feet per year. However, a designation in acre-feet per year for each and every small stockwater claim is not warranted under the law or the facts and would be extremely burdensome to the parties and IDWR.

There is no doubt that Idaho law requires the Director to include in the recommendation of a water right the annual volume of consumptive use. I.C. § 42-1411(2)(i). It is important to note, however, that unlike the provision in § 42-1411(2)(c) requiring that the quantity of water used be recommended in cubic feet per second, annual consumptive use does not direct that the amount be stated in acre-feet per year. A designation of the annual consumptive use of small stockwater claims as de minimis, therefore is reasonable and conforms to the requirements of the law.¹

The plain meaning of § 42-1401A(12) defining stock water use is also useful in resolving the question of whether an acre-feet volumetric determination is necessary. The statute defines stockwater use as a rate, 13,000 gallons per day, not as a volume. An examination of the statutory definition, therefore, suggests that a specific volume determination is not necessary to define a stockwater right.

Equally important is the reason why the parties to the SRBA sought to have small stockwatering claims designated as de minimis. As the SRBA Court noted in its Findings of Fact, Conclusions of Law, and Order Establishing Procedures for

¹ That de minimis may be used in the definition of a water right is clear from the Court's decision in Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Rights, January 17, 1989, at 3. Therein the court recognizes de minimis as domestic and stock water uses "as defined in Idaho Code § 42-1401A(5) and (12)...."

Adjudication of Domestic and Stock Water Rights, January 17, 1989, at 1, the domestic and stock water uses collectively divert annually less than one per cent of the 36 million acre feet which leaves the state each year. Yet, claims for these uses represent more than half of the total estimated number of claims in the SRBA. Id. This, apparently, was the basis for the Court's determination that de minimis claims, claims up to 13,000 gallons per day, or 0.02 CFS, could be deferred. Thus, it was realized at the outset that trying to calculate any consumptive volume less than the threshold "de minimis" amount would be too burdensome and pointless given the small total amount of use. Indeed, this goes to the essence of the de minimis doctrine. De minimis non curat lex provides that "the law does not care for, or take notice of, very small or trifling matters." Black's Law Dictionary 431 (6th ed. 1990).

As the United States explained in its initial brief, an acre-feet per year amount may be calculated. As also stated previously that amount will inevitably be excessive. An accurate estimate would need to consider season of use, number of head of cattle at the source throughout the season of use, temperature variations affecting consumptive habits, and as IDWR has noted, delivery system and conveyance losses. Such

determination would be time consuming and exceptionally burdensome to the parties and IDWR.²

The Special Master need look no further than the SRBA Court's previous determination of what constitutes a de minimis stockwater use. The annual consumptive volume element of a small stockwater use right should incorporate de minimis as the description of that element of the right.

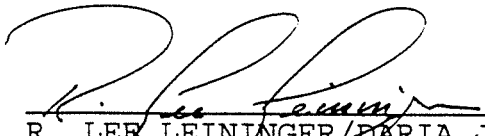
CONCLUSION

The elements of a water right for stockwater use should be as defined in I.C. § 42-1401A(12). This statute defines the quantity of water used as a rate and not a volume. The rate is described in gallons per day which must be interpreted as an amount in cubic feet per second pursuant to I.C. § 42-1411(2)(j). The amount in CFS can be designated as a diversion for a two-hour or twenty-four hour period. To avoid inconsistent decrees of stockwater based on different and inconsistent diversion periods a remark or required statement describing the method is necessary. The annual consumptive use should be defined as de minimis. This is the amount of water the Court has recognized for stockwater claims pursuant to I.C. § 42-1401A(12).

² The Idaho legislature has recognized the futility and hardship that would be encountered in attempting to quantify water use for stockwatering purposes. In a recent revision to I.C. § 42-701, stockwatering uses are expressly exempt from the installation of measuring devices. I.C. § 42-701(7) (Supp. 1995)

Respectfully submitted,

Dated: 5/5/95


by: R. LEE LEININGER/DARIA J. ZANE
Attorneys
Env. and Natural Resources Division

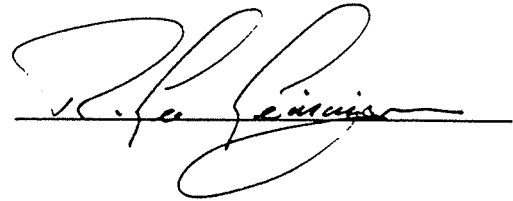
CERTIFICATE OF SERVICE

I certify that on the 5th day of May, 1995, I served a true and correct copy of the United States' Response Brief on Elements of a De Minimis Water Right upon the following individuals:

A. Lynne Krogh
Deputy Attorney General
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, Idaho 83702

M.B. "Buck" Hiller
Hiller, Benjamin & Associates
Suite 2A, 525 Park Avenue
Idaho Falls, ID 83405

Bret and Jolene Zollinger
Star Route
Mackay, ID 83251

A handwritten signature in cursive script, appearing to read "R. H. Jensen", is written over a horizontal line.