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Department of Water Resources
Adjudication Bureau

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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	)	Subcase Nos. 34-10717
	)	and 34-10807
	)	
Case No. 39576	)	UNITED STATES' BRIEF ON
	)	ELEMENTS OF A DE MINIMIS
	)	WATER RIGHT
	)	

Descriptive Summary

This is the United States brief on the elements required to define a de minimis water right. This brief is submitted pursuant to the Order Setting Hearing and Briefing

Schedule for Subcase Nos. 34-10807 and 34-10717.

I. DISCUSSION

- A. The Rate of Diversion and Annual Consumptive Volume For De Minimis Use of Water for Stockwatering and Domestic Purposes Should Not Exceed the Equivalent of 13,000 Gallons Of Water Per Day.

Although the Idaho Code does not define a de minimis use of water, it does define "stock watering" and "domestic use." The Code defines "stock watering" use as an amount of water used solely for livestock or wildlife where the total use is not in excess of 13,000 gallons per day. I.C. § 42-1401A(12) (1990). In addition, "domestic use" is defined in I.C. § 42-1401A(5) and § 42-111(A) as a total use not in excess of 13,000 gallons per day.

The SRBA Court, in ruling on procedures for small domestic and stockwatering claims in the SRBA, referred to parties who claimed water pursuant to these statutes as "de minimus claimants." See, Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Rights, January 17, 1989, at 3.

While continuing to recognize claims for water up to 13,000 gallons of water per day for stock water and domestic purposes as de minimis, it is also possible to define a quantity of water used in cubic feet per second, as required in the Director's Report under I.C. § 42-1411(2)(c). The quantity of water used in cubic feet per second is easily calculated from the de minimis rate of 13,000 gallons per day. 13,000 gallons per

day is equivalent to 0.0201 cfs. Therefore, any amount recommended for domestic or stockwatering purposes that is equal to or less than 0.02 cfs is a de minimis amount of water.

Idaho law also 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 possible to calculate a maximum annual consumptive volume for a de minimis use. Assuming that cattle consume water every day of the year, using 13,000 gallons per day multiplied by 365 days, the maximum annual consumptive use for a de minimis right would be 14.56 acre-feet per year. Clearly, such a large volume is not appropriate to be decreed for a de minimis amount in all instances. This number is excessive if less than the full amount of 13,000 gallons a day was consumed due to either a season of use less than a full year or a small number of cattle actually using the source.

B. IDWR's Recommendation of De Minimis Water Rights Based Upon a Two-Hour Period of Diversion Is Not Realistic.

IDWR stated in an earlier telephonic hearing on this water right subcase that the amount of water recommended to be diverted for de minimis stockwater and domestic uses is based on a two hour diversion. No explanation has been provided by IDWR why a two hour diversion is appropriate and the figure appears to be completely arbitrary.

Not only is the two hour diversion arbitrary, it also results in excessive, non-de minimis amounts of water being

recommended in the Director's Report. For example, based on the two hour limit, the Director may recommend 0.24 cfs as de minimis. This is based on the fact that a diversion rate of 0.24 cfs over a two-hour period equals approximately 13,000 gallons of water per day. However, the Director's Report does not expressly state that there is a limit to the diversion of water to a 2-hour period. A claimant decreed water at a rate of 0.24 cfs would divert over the course of an entire day approximately 155,115 gallons. He or she would clearly exceed the Court's definition of de minimis and violate the statutory definition in I.C. § 42-1401A(12) defining stock water use as not in excess of 13,000 gallons per day.

The only means to assure compliance with the statute establishing 13,000 gallons per day as the amount of water for stock water use is to restrict the quantity used in cubic feet per second to 0.02 cfs. Any amount greater than 0.02 cfs for a stockwater or domestic use should not be recommended as de minimis.¹

- C. IDWR's Use of the Number of Head of Cattle In a Recommendation of a De Minimis Stockwater Water Right Is Reasonable Provided No More Than One Thousand Head Are Recommended.

¹The United States, in making its claims to de minimis stockwater in the adjudication, used and relied upon the figure of 0.02 cfs as the amount of water claimed for de minimis purposes. 0.02 cfs is the quantity of water used in cubic feet per second that under Idaho Code § 42-1401A(12) should be decreed as de minimis.

IDWR also stated in the earlier telephonic hearing on this water right subcase that the number of cattle is a necessary element in the decree of a de minimis water right for stockwater purposes. This is because it is possible to determine the approximate amount of water each cow drinks. This is then used to determine the maximum number of cows it is possible to range without exceeding the 13,000 gallons per day limit on de minimis.

As IDWR has previously said, the 13,000 gallons per day limit allows for watering of approximately 1000 head of cattle. This could be determined as follows. The Idaho Department of Water Resources has defined the amount of water necessary for stockwatering in Idaho as 12 gallons of water per range cattle per day. See, Idaho Water Rights Adjudication Handbook, § 5-7 (Appendix 4), in Idaho Water Law Handbook (May 29, 1992 ed.). This is a reasonable determination of the quantity of water necessary for the beneficial use of stockwatering.

Using the amount of 12 gallons of water per range cattle per day, the quantity of water necessary to water any number of cattle may be calculated. In terms of a rate the quantity of water used per head is 1.85×10^{-5} cfs. The quantity of water per head for annual consumptive volume would be 0.0134 acre-feet per year.² Using these figures a thousand head of cattle would require a diversion rate of approximately 0.0185 cfs

² These figures are appropriate for in-stream stockwatering use where the amount beneficially used is entirely consumptive. For stockwatering requiring diversions a reasonable amount of water for conveyance loss is appropriate.

diverted over an entire day and an annual consumptive volume of 13.4 acre-feet per year. These amounts approximate the previously calculated quantities pursuant to I.C. § 42-1401A(12) of a diversion rate of 0.02 and consumptive volume of 14.5 a-f/year for one thousand head of cattle for a de minimis water right, supra, Section I.A.³

Recommendations for stock water for greater than 1000 head of cattle would, therefore, exceed de minimis amounts of water. Because a stock water recommendation that includes more than 1000 head of cattle is not de minimis, it must be consistent with the beneficial use doctrine. A fundamental requirement for water rights under Idaho law is that the water be used for a beneficial purpose. Idaho Code § 42-104. Furthermore, an appropriator under Idaho law is entitled to only that amount of water that is beneficially used. Idaho Code §§ 42-104 and 42-1402.

Recommendations of water for greater than 1000 head of cattle should be calculated using a reasonable beneficial use estimate per cattle. The quantity of water used and the annual consumptive volume for stock water could easily be determined using reasonable estimates of water used per cow, such as 12 or 13 gallons per cow per day.

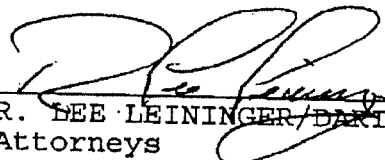
³ The amounts do not exactly coincide because the amount of water for stock water needs pursuant to statute is 13,000 gallons per day. Dividing this figure by 1000 head of cattle yields a consumptive figure of 13 gallons per cow per day. The difference between the 12 gallons per cow per day and the 13 gallons per cow per day is minimal and either figure appears reasonable.

II. CONCLUSION

A de minimis water right should not exceed a quantity of water used of 0.02 cfs, nor an annual consumptive volume of more than 14.56 acre-ft per year. This is also the approximate amount of water necessary for stockwatering of 1000 head of cattle. Any amount of water greater than 0.02 cfs, 14.56 acre-ft per year, or recommended for use by greater than 1000 head of cattle is not, and should not be recommended as, de minimis. Recommendations for quantity of water used and annual volume of consumptive use for greater than 1000 cattle should be calculated using a reasonable beneficial use estimate per cow.

Respectfully submitted,

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