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Attorney for IDWR

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. 57-11150
	)	
	)	IDWR REPORT RE: REVIEW
Case No. 39576	)	OF STANDARD FORM 5
	)	
	)	

DESCRIPTIVE SUMMARY

IDWR submits this report to inform the Court and the parties that IDWR has reviewed the Standard Form 5 submitted by the parties in this subcase and that the Director has chosen not to sign the Standard Form 5.

DISCUSSION

The Director did not sign the Standard Form 5 for the reasons set forth below:

A. The description of the elements of the water right in the Standard Form 5 are not correct as stated below:

1. [] Name and Address

2. ☒ Source

The Standard Form 5 does not list the stream to which West Rabbit Creek is tributary. The stream, Rabbit Creek, should be shown to more accurately describe the source of the water used.

3. ☒ Quantity

The quantity of water should be 0.07 cfs for stockwater purposes only. IDWR erred in its original recommendation; see response to 6. below for further information.

4. ☐ Priority Date

5. ☐ Point of Diversion

6. ☒ Purpose of Use

The United States did not file an objection to the description of the purpose of use of this water right as recommended in the director's report. Its Standard Form 5, however, alters that recommendation.

The Standard Form 5 omits the further description of non-irrigation use that states "STOCKWATER, 294 RANGE CATTLE; WILDLIFE, VARIABLE AMOUNT". Further description of stockwater uses by the type and number of head is provided pursuant to Idaho Code §42-1411(2)(f), which provides for IDWR to determine the purpose(s) of use of a water right to the extent the director deems appropriate to define and administer the water right, and 42-1411(2)(j), which further provides for IDWR to include such other matters as the director deems appropriate to define and administer the water right. The further description of non-irrigation uses defines the water right by describing the purpose of use with sufficient specificity to prevent future expansions in use that would enlarge

the water right and cause injury to other water rights. This is particularly true for instream stockwater rights because a reasonable rate of flow (cfs) for such rights is capable of producing an annual diversion volume that is significantly in excess of the volume of water reasonably required for drinking by the stock for which the water was appropriated.

The omission of the further description of non-irrigation uses from Standard Form 5s for water rights acquired under state law by the United States for stockwater purposes is currently the subject of further proceedings in subcase no. 34-04179.

Moreover, IDWR's recommendation included an error. The purpose of use as recommended by IDWR should be corrected from "STOCKWATER" and "WILDLIFE" to "STOCKWATER" only. Wildlife use cannot be included as a purpose of use for an instream stockwater water appropriation. Physical diversion is required for an appropriation unless an exception is established by statute. Idaho Code §§42-113 and 42-114 establish an exception to the diversion requirement for watering of domestic livestock, but no exception is provided for appropriations by the United States for wildlife purposes. However, IDWR recognizes that wildlife preservation is an appropriate use of public lands, and to the extent the United States has a right to water for instream stockwatering purposes, wildlife might also drink from the source. On this basis, IDWR is willing to include in its recommendation a further description of non-irrigation uses that states: "STOCKWATER, 294 RANGE CATTLE; WILDLIFE, VARIABLE AMOUNT." This language recognizes wildlife use as incidental to stockwater use but does not recognize wildlife as

a purpose of use of the water right independent from stockwater use.

7. ☐ Period of Use

8. ☒ Place of Use

The place of use should be decreed as it appears in the director's report. IDWR did not recommend a change in place of use as suggested by the Standard Form 5. IDWR believes that the U.S. misread the topographic map in checking the place of use, which led to the U.S. position that the place of use should differ from that recommended in the director's report.

9. ☐ Consumptive Use

10. ☒ Other Matters Necessary to Define or Administer
the Right

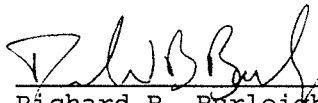
The Standard Form 5 omits the following statement, "THIS RIGHT AND OTHER RIGHTS COMMON TO THE SAME GRAZING ALLOTMENT SHALL BE LIMITED TO THE QUANTITY OF WATER BENEFICIALLY USED BY THE NUMBER OF STOCK WITHIN THE ALLOTMENT." This statement is necessary to limit the use of this water right in combination with other rights claimed and recommended for the same use. In the case of BLM stockwater rights, combined use occurs where the BLM claims a separate right to each of a number of water sources, each for use by the full number of cattle on the allotment. Each right is quantified based on the total use for the allotment, to allow the grazing permittee to take the full amount of water needed from any combination of the sources within the allotment. Since each right is quantified based on the total use within the allotment, the

combined use must also be limited to that same total, thereby avoiding the misconception that the rights are additive.

B. The Standard Form 5 was not signed by the Director for other reasons as stated below:

☐ Federal Reserved Water Right

☐ Other



Richard B. Burleigh
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF MAILING

I certify that on February 96, 1996, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

2. Copies to:

U.S. Department of Justice
Environment and Natural Resources Division
550 West Fort St., MSC 033
Boise, ID 83724



Signature of person or attorney
mailing the form