

ALAN G. LANCE
Attorney General
State of Idaho

RICHARD B. BURLEIGH
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 327-7900
FAX: (208) 327-7866

Attorney for IDWR

3-14

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. 57-11480
	)	
	)	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
3. [] Quantity
4. [] Priority Date

5. [] Point of Diversion

6. [X] Purpose of Use

The Standard Form 5 seeks to change the description of the purpose of use in two ways.

First, the Standard Form 5 seeks to change the purpose of use from "STOCKWATER" to "STOCKWATER" and "WILDLIFE." The United States did not claim wildlife as a purpose of use in its Notice of Claim. Even if it had, 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, 4964 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.

Second, the Standard Form 5 omits the further description of non-irrigation use stated above. 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.

With regard to the number of cattle, the BLM originally claimed 2975 head of range cattle and this is the number which the director recommended. The BLM objection asserts that the correct number of head is 4964 range cattle. IDWR does not object to this number since it is consistent with the number of head recommended in related claims.

The further description of non-irrigation uses for water rights acquired under state law by the United States for stockwater purposes is currently the subject of further proceedings before the Special Master.

7. ☒ Period of Use

There is a typographical error in the description of the period of use in the SF5. The SF5 states the final date as "13/31"; the correct date is 12/31.

8. ☐ Place of Use

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