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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 No. 34-04179
)
Case No. 39576) MOTION FOR SUMMARY JUDGMENT
)

This document is the United States' Motion, through and on behalf of the Bureau of Land Management, for Summary Judgment in subcase no. 34-04179.

Claimant, the United States of America (hereinafter "United States"), by and through its attorneys, pursuant to Rule 56(c) of the Idaho Rules of Civil Procedure, moves for entry of a summary judgment. As grounds therefor, Claimant states:

BACKGROUND

The United States claims water right 34-04179 for de minimis amounts of water for a stockwatering purpose pursuant to the description of this right in the Amended Standard Form No. 5 (Amended SF5), filed with the Court on November 11, 1995. The Amended SF5 contains a description of elements of water right 34-04179 that differ from the elements of the right as claimed and recommended by IDWR in the Director's Report. These differences involve legal matters of proper form and content of the stockwater decree.¹ As such, the resolution of these differences are appropriate for summary judgment.

Pursuant to I.R.Civ.P. 56, summary judgment is appropriate where there are no genuine issues of material fact, and the case can be decided as a matter of law. Ambrose v. Buhl Joint School District, 126 Idaho 581, 887 P.2d 1088 (Ct. App. 1995); Myers v. A.O. Smith Harvestore Prod., Inc., 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988).

In the instant case, there are no genuine issues of any material fact which are necessary to the determination of the

¹ The United States' objection to this right listed priority date as the reason for the objection. As noted on the Amended SF5, the United States stipulates to the priority date as recommended in the Director's Report. However, the issues presented for summary judgment involve the legal necessity of remarks and statements included in a stockwater right. These issues were originally raised by the Court in subcases 34-10807, 34-10717, 34-12425 and 34-12429. Because the same issues exist for subcase no. 34-04179 this case is ripe for summary judgment disposition.

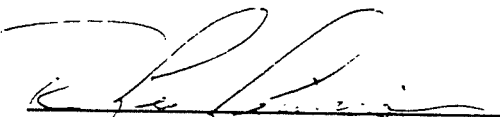
questions of law. The legal issues presented are therefore ripe for determination under Rule 56.

The legal matters of form and content at issue in 34-04179 are also the subject of the pending Basin-Wide Issue No. 12. This basin-wide issue will determine form and content questions applicable to this and other de minimis stockwatering rights. For this reason, the United States incorporates by way of reference and submits in support of this motion the attached opening brief for basin-wide issue no. 12.

CONCLUSION

For the reasons set forth herein and on the attached opening brief in Basin-Wide Issue No. 12, the United States respectfully requests this Court enter an Order pursuant to I.R.Civ.P 56(c) concluding that the United States of America is entitled as a matter of law to the decree of a water right as stipulated to in the Amended Standard Form No. 5 for subcase 34-04179.

Respectfully submitted this 32nd day of April, 1996.

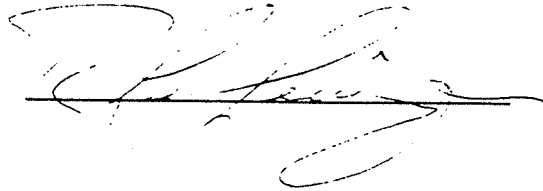

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CERTIFICATE OF SERVICE

I certify that on the 27th day of April, 1996, I served a true and correct copy of the foregoing Motion for Summary Judgment for subcase no. 34-04179 via first-class U.S. mail upon the following individuals:

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A handwritten signature in black ink, appearing to be "J. L. Howard", written over a horizontal line.

Movant's Name:

UNITED STATES OF AMERICA

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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	)	Basin-Wide Issue No. 12
	)	
Case No. 39576	)	UNITED STATES' OPENING BRIEF
_____	)	

DESCRIPTIVE SUMMARY

This is the United States' opening brief in response to the order designating Basin-Wide Issue no. 12.

INTRODUCTION

Basin-Wide Issue no. 12 states:

What should be the form and content of decrees for state-law based claims to de minimis amounts of stockwater?

Essentially, this question, and the sub-issues raised in the designation order, ask whether the Director's recommendations for small stockwater rights accurately define the rights and allow for efficient administration of the rights. As set forth below,

the Director's current, and proposed revised, recommendations for stockwater rights violate clear legislative intent, fail to adequately describe the right, and include extraneous remarks that are unnecessary for definition or administration.

The United States proposes that decrees for stockwater be streamlined to reflect legislative intent, reasonable statutory interpretation, and use of the water by stock on the open range. This may be accomplished by decreeing de minimis stockwater rights with a quantity of use amount of 13,000 gallons per day, or its cfs equivalent, and without extraneous remarks on the number of head of cattle or combined use with other rights.

DISCUSSION

Since the initiation of the adjudication, claims to small amounts of water for stockwatering purposes have been afforded unique recognition and special procedures by the legislature and the SRBA Court. The distinct statutory and procedural treatment of these rights has been oriented toward a goal of simplified reporting, adjudication and decreeing of stockwater claims. Basin-Wide Issue number 12 should be determined in accord with the legislative intent and prior Court decisions that dictate straightforward decrees absent superfluous remarks.

A. SUB-ISSUE NO. 1: What constitutes a de minimis stockwater right and may the annual consumptive volume for such rights be described as "de minimis?"

1. De minimis stockwater rights are defined by statute.

At the commencement of the Snake River Basin Adjudication, the Idaho legislature singled out small stock water uses and specifically defined them in Idaho Code § 42-1401A(12). In the statute, the legislature established what a stockwater right may be used for and set a de minimis threshold for the quantity of water used for these purposes.

The legislative determination of many of the elements in stockwater rights recognizes a fundamental fact - the costs of detailed adjudication and precise determination of every element of these de minimis rights far outweigh the benefits to the owner, the Department, or the state of Idaho.¹

Therefore, to answer how small stockwater rights should be defined, the Court need look no further than the chapter in the adjudication statutes entitled "[d]efinitions". A stockwatering use;

means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

¹ De minimis is an abbreviation of the Latin maxim, de minimis non curat lex, meaning "the law does not care for, or take notice of, very small or trifling matters." Black's Law Dictionary 431 (6th ed. 1990). In the SRBA, the concept of de minimis does not suggest that small uses of water for livestock are unimportant. Stockwater rights are vital to grazing programs and ranching interests. Rather, the term is appropriate when considering why the legislature chose to specifically define small stockwatering rights.

I.C. § 42-1401A(12) ("Definitions").²

This definition supplies the answer to most of the sub-issues raised in basin-wide issue no. 12. For purpose of use, the legislature has determined that wildlife is included in a claim to a stockwatering right. For the element of quantity, the legislature has determined that stockwatering diversions are for amounts up to 13,000 gallons per day. Nowhere in the definition of stockwater is there a description of the right with the number of head of cattle. Also absent from the definition is any requirement that separate, non-commingled water sources be noted in a remark as "combined."

There is no need for extraneous remarks on number of head or combined-use where a statute is clear on its face. When a statute is clear and unambiguous, the plain meaning of the statute must be given effect. In the Matter of Application for Permit No. 36-7200 in the Name of the Idaho Department of Parks and Recreation, 121 Idaho 819, 822, 828 P.2d 848, 851 (1992) ("It is a basic rule of statutory construction that, unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute"); see also, Kootenai Electric Cooperative, Inc. v. Washington Water Power Co., 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995).

Pursuant to the plain meaning of the legislature's directive, a decree for stockwater should list the purpose of use

² This definition was not changed in the over-haul of the adjudication statutes in 1994, nor in the recent statutory changes to specific elements signed into law on March 12, 1996.

as "stockwater, wildlife." The element of quantity used should list 13,000 gallons per day, converted to cubic feet per second as required by I.C. § 42-1411(2)(c). As set forth, infra, a reasonable conversion of this amount is 0.02 cfs.

Remarks on the number of head of cattle or remarks on the combination of non-commingled water rights are not included in the legislative definition of stockwater. These remarks attempt to add to or redefine elements of a stockwater right that the legislature has already expressly defined. Neither IDWR nor the court may add language to a statute. See, In the Matter of the Adoption of Chaney, 126 Idaho 554, 558, 887 P.2d 1061, 1065 (1995) ("[We] have held that we cannot insert into statutes terms or provisions which are obviously not there." Citations omitted). The extraneous remarks must be excluded from stockwater decrees.

2. The legislature's definition of a de minimis stockwater right is appropriate because of the characteristics of the stockwater use on the public lands.

The legislature set forth the elements describing stockwater use in § 42-1401(A). This legislative determination for de minimis rights is appropriate not just because these rights are "very small or trifling."³ It is also appropriate

³ Stockwatering and domestic water rights comprise more than 50% percent of all the claims filed in the SRBA and yet account for less than one percent of the water that flows through the Snake River Basin. See Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, January 17, 1989, at 1 ("[d]omestic and stock water uses collectively divert annually less than one percent of the 36 million acre feet which leaves the state each year").

(continued...)

because of the manner in which stock use the water resources on the public lands, which account for the majority of claims to stockwater in the SRBA.

One important function of the public lands owned by the United States is livestock grazing. Permits are issued to livestock owners to utilize the public lands for grazing and watering of their stock. Claims by the United States for stockwater in the SRBA were made to ensure that the water resources located on the public lands are available for the public to use.

Grazing privileges are granted for parcels of public land termed "allotments". An allotment is generally open or subdivided into pastures. Stock within the allotment or pasture are usually unfenced and allowed to forage across the allotment. Because the stock are generally free to graze throughout the allotment or pasture, stock numbers at any given water source will change depending on grazing patterns. As a result, water consumption at any particular water source is highly variable and

³(...continued)

Although the January 17 order was vacated due to procedural changes for deferring domestic and stockwater rights, see SRBA Administrative Order No. 10 dated March 22, 1995 superseding the January 17, 1989 Order, the Court's statement at p.3 remains valid - stockwater rights pursuant to § 42-1401(A)(12) constitute a de minimis use. Id. at 3.

almost impossible to accurately quantify.⁴ See, Affidavit of Robert C. Mitchell at ¶¶ 7, 8, and 9, attached as Exhibit B.

In addition, a permittee or the agency in charge of administering the public lands may alter the number of stock around water sites on a seasonal and annual basis. The flexibility to change consumption patterns at water sites, while still staying within de minimis amounts, is critical for stock grazing purposes and protection of resources.

The Idaho legislature, in defining a specific threshold for the amount of water claimed for a stockwatering right under I.C. 42-1401(A)(12), implicitly recognized the futile task of accurately determining the quantity that stock drink from small individual sources.

3. Water adjudications in other western states set de minimis thresholds for stockwatering.

The fact that accurate quantification of de minimis stockwater sources on the open range is both infeasible and unnecessary has also been expressly acknowledged in other water rights adjudications in western states. In Arizona, in a water rights adjudication that is often referenced by Idaho state attorneys as a model for the SRBA, see e.g., Transcript of July 12, 1995, at 18, the state engineer reported on stockwatering and

⁴ Most stockwater claims filed by the United States in the adjudication are to undeveloped spring sources on the public lands or non-diverted stream reaches in open allotments. See, Affidavit of Gary Madenford at ¶ 4, attached as Exhibit C. Thus, the "quantity-used" at these sources is equal to the amount of water the stock consume.

the futility of specific quantification for water sites on the open range:

[Other states'] approaches are also reflective of typical livestock range conditions: the number of livestock that use a particular facility is constantly changing; the water supply that is available to a particular facility is constantly changing; and the condition of these normally rudimentary facilities and their ability to store, divert, or develop a water supply is constantly changing. Therefore, in simplifying the standards used to adjudicate these rights, many previous jurisdictions have apparently found it unrealistic to gather the facts necessary to establish accurate attributes for each individual right or unrealistic to expect most stockwatering and stockpond rights to be maintained, exercised, or administered according to detailed decreed specifications.

Technical Report on De Minimis Adjudication of Stockpond and Stockwatering Uses in the Silver Creek Watershed, Arizona

Department of Water Resources, September 1, 1993, at 23, submitted in In Re: The General Adjudication of All Rights to Use Water in the Little Colorado River System and Source, Civ. No. 6417-03-9005, April 20, 1994. The Arizona DWR concluded that "[s]tockwatering impacts on the hydrology of the stream system are so small that artificial and arbitrary limits **such as a per head quantification limit are not necessary.**" Id. at 36 (emphasis added).

The Special Master for the Arizona adjudication agreed with the DWR report. After noting DWR's estimates of exactly how much water is consumed on average by a cow-calf pair (0.011 acre-feet per year), a deer, an antelope and an elk (between 0.0005 and 0.0034 acre-feet per year) the master concluded

While it might be possible to determine a uniform figure that could be used to specify and adjudicate the quantity for stock and wildlife, there is not reason to do so since it would be highly impractical to measure such uses and difficult to enforce. Thus, the Master will adopt one of DWR's recommendations and quantify stockwatering and wildlife uses as "reasonable use."

Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases Involving Stockponds, Stockwatering, and Wildlife Uses, in In Re: The General Adjudication of All Rights to Use Water in the Little Colorado River System and Source, at 30.

Similarly, the Idaho stockwatering statute, § 42-1401(A)(12), recognizes that livestock and wildlife on the public lands consume very little water. Rather than instruct that the quantity decreed in a stockwater right be "reasonable use," however, the legislature choose to set a threshold to define the quantity. Therefore, the form and content for stockwater rights on the open range should, as the legislature instructed, set the amount of water claimed for a de minimis stockwatering right at 13,000 gallons per day, or the cfs equivalent.

4. The legislature's recent exemption of annual consumptive volume in the decree for non-irrigation uses is a further indication that stockwater decrees should be simple and uniform.

The Idaho legislature recently amended the adjudication statutes to exempt from the decree of stockwater rights the element of annual volume of consumptive use. I.C. § 42-1401A(2), as amended, March 12, 1996. This amended language effectively determines the sub-issue of how the annual consumptive use volume should be described for stockwater rights. The Director may report stockwater rights without this element.

The legislature acted appropriately when it again applied special statutory treatment to de minimis stockwater rights. Excluding the annual volume of consumptive use for stockwatering rights is appropriate because the volume consumed by stock and wildlife is so small. Determination of the annual consumptive volume would be costly both to claimants and the Department and a waste of time and resources.

The same reasoning applies to other elements defining small stockwater rights. The quantity of water used by stock and wildlife is inconsequential and a description of the right beyond the uniform standard of 13,000 gallons per day, as determined by the legislature, is unnecessary. The combined usage of all the stock in an allotment is also negligible. Any remark attempting to further define use or quantity by combined use is also unnecessary.

B. SUB-ISSUE 2: Is a statement of combined usage necessary for the definition or administration of a de minimis water right and, if so, where should it appear in the decree?

1. A remark in a stockwater right must be necessary to further define or administer the right.

In its recommendations for stockwatering rights, IDWR has included extraneous remarks relating to "non-irrigation uses" and combined usage. These remarks are not necessary and should not appear in the decree.

A preliminary question that must be addressed when considering whether a decree for a stockwater right should contain these remarks, is what standard to apply to the Director's recommendation that the remarks be included? The

Director of IDWR is required to issue reports incorporating his recommendations for water rights acquired under state law. See generally, I.C. § 42-1411. In his recommendations, the Director is afforded some discretion in determining which elements are "appropriate and proper" to define or administer the right. § 42-1411(2). Once the Director has determined which elements to include, however, he may only include additional remarks if they are necessary to clarify any element or further define or administer the right. § 42-1411(2)(k).

The remarks on non-irrigation uses and combined uses must therefore be examined to determine whether they are necessary to define/clarify/administer the element of purpose of use.⁵ As discussed below, the Director's remarks on stockwater rights are not necessary.

2. IDWR's remark on "combined use" is not necessary because it is superfluous, inaccurate and will result in perpetually unsettled decrees.

IDWR's "combined use" statement appears in remarks to the Director's recommendations for state-law based stockwater claims on the public lands. The remark 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.

See, e.g., subcase number 34-13147, attached as Exhibit A.

This remark is unnecessary and inappropriate for a

⁵ "Non-irrigation uses" is not an element for the description of a water right under § 42-1411(2)(a - j). Therefore, the only statutory grounds for inclusion of the remark is under § 42-1411(2), subsection (k).

decree of stockwater rights for a number of reasons. First, the statement is merely a recitation of Idaho water law and the doctrine of beneficial use. 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. As such, it is not necessary for inclusion in the decree of a stockwater right.

Second, the United States is not claiming water for an allotment. The United States through the BLM and the Forest Service is claiming water at individual sources for the purpose of watering livestock. As discussed more thoroughly in the following section, the number of head of cattle that utilize a claimed water source is not equal to and should not be defined by the number of cattle within the allotment.

Third, a water right tied to "other rights common to the allotment" results in a rapidly outmoded, perpetually unsettled decree. Grazing allotments and their borders change due to management decisions and grazing requirements. Mitchell Affidavit at ¶¶ 5,6. The water rights common to an allotment at the time of reporting of stockwater claims may not be common to that allotment when the Court enters a final decree.

Further, any attempt to identify for each stockwater right all rights common to the same grazing allotment would be extremely burdensome to the United States and the IDWR. In many allotments, BLM has made stockwatering claims to dozens of

stockwatering sources. Some large allotments contain over one hundred stockwatering sources. Listing of all these claims common to the same allotment would be a hardship to the United States' agencies and, because the claims would need to be entered into IDWR's data base, burdensome to the Director.

A remark referencing all stockwatering rights in an allotment is also inappropriate because allotments may cross the boundaries of the SRBA subbasins. San Felipe Ranches' allotment, for example, is partially in Basin 34 and partially in Basin 72. As a result, water rights common to the allotment may include water rights outside the test basins and outside the Special Master's jurisdiction.

A final problem with the remark referencing water rights common to a grazing allotment is that 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 rightfully object to their water right being included with the federal water right.

The combined usage remark is not necessary for the definition or administration of the water right. More importantly, its inclusion will result in stockwater rights that are perpetually unsettled. Such remarks are not suitable for a decree.

C. SUB-ISSUE 3: Is it necessary to include the number of head of cattle allowed to describe or administer a de minimis water right and, if so, where should it appear in the decree?

1. The number of head of cattle remark is not necessary for the definition of a stockwater decree because it does not accurately define the purpose of use or the quantity-used at a claimed water source.

The United States filed claims in the adjudication and included, at IDWR's direction, a statement on "non-irrigation uses" that reference a number of head of cattle. The United States supplied these numbers to the Director as evidence of beneficial use of water by livestock at springs and stream sites within allotments on the public lands. Madenford Affidavit at ¶ 7. However, this remark is not necessary for the definition of the purpose of use of the right.

The Director has already succinctly identified in his Reports the purpose of use of water consumed by livestock. This use is recommended by the Director as "stockwater". See e.g., Director's Report for subcase no. 34-13147, Exhibit A. An additional statement referencing the number of cattle to describe the purpose of use is therefore not necessary.

While the remark concerning the number of head of cattle is not necessary to describe the purpose of use, it is readily apparent from the Amended Director's Reports for Reporting Areas 1, 2, and 3 that IDWR no longer wishes to include the remark as a clarification of the purpose of use, but as a further description of quantity used. See, Amended Director's

Reports for Reporting Areas 2 (Basin 57), November 27, 1996,
Attachment 3.

Assuming arguendo, that IDWR's placement of the head of cattle remark was mistaken and that the remark should have been placed under the element of quantity-used, the remark nonetheless fails the test of "necessity" to define/clarify/administer the quantity element. The remark is unnecessary because the number of head do not accurately depict, and should not be the basis of, the amount of water consumed at any particular de minimis stockwatering site in a grazing allotment.

As stated, supra, the consumption by stock and wildlife of water at individually claimed springs and water reaches on the public lands varies greatly, daily and annually. However, as required for de minimis claims to stockwater, the water consumed at the undeveloped sources on the public lands almost certainly does not exceed 13,000 gallons per day. Moreover, the quantity of water consumed at almost every developed stockwater source on the public lands does not exceed 13,000 g.p.d. Mitchell Affidavit at ¶¶ 10, 11, and 12. This is because, for resource management purposes, de minimis water sources on the public lands will not accommodate the number of cattle necessary to exceed consumption rates of 13,000 gallons per day.

Pursuant to IDWR's estimate of stockwater consumption, cattle consume 12 gallons per day per head. IDWR's Report Re: Elements of Small Stockwater Rights, subcase 57-02362, et. al., February 16, 1996, at 12. Thus, it takes over 1000 head of

cattle to exceed the statutory threshold of 13,000 gallons per day. It is a virtual certainty that the number will not exceed 1000 head of cattle at stockwater sources on the public lands.⁶

The reason is best summed up in the report by the Arizona DWR:

[S]ome parties might argue that streamlined de minimis adjudication is a license to increase de minimis use up to the maximum quantity (i.e., a one surface acre stockpond would be increased to two surface acres). DWR believes that this would not occur for stockwatering and stockpond uses. Field experience shows that the construction of stockponds and the practices of stockwatering are controlled by topographic opportunities, carrying capacities of the range, water supply development opportunities, the need to retain a water supply during the dry seasons of the year, public land management policies, and economic considerations, not by arbitrary limits specified in law.

Technical Report on De Minimis Adjudication of Stockpond and Stockwatering Uses in the Silver Creek Watershed, supra, at 37.

The United States concurs with this conclusion. Public land management policies, the carrying capacities of the range and

⁶ Not only is IDWR's attempts to quantify water used by the number of head of cattle wrong, it leads to violations of the law. Applying IDWR's methodology, any stockwater right that exceeded 1000 head of cattle would exceed the statutory threshold on use of a stockwater right. For example, on the Director's recommendation for the stockwater right claim attached as Exhibit A, the number of head of range cattle is 1810. Multiplying this number by 12 gpd per cow, results in a daily consumption of approximately 21,720 gpd. Clearly this exceeds the statutory limit for a stockwater right of 13,000 gpd. The owner is in technical violation of the law.

Of course, this is not an accurate estimate of water use at this water source. The large number of head reflect the size and carrying capacity of the allotment and not the amount consumed at this source. In fact, cattle on large allotments utilize the water sources just as cattle on smaller allotments, in de minimis quantities.

economic conditions prevent the expansion of use of small stockwatering sources of water on the public range.

2. The number of head of cattle remark is not necessary for the administration of a stockwater right because it may result in inequitable and unjust application.

Although IDWR does not, in fact, actively administer de minimis water sources, it has indicated that it may do so in the future. See generally, IDWR's Report Re: Elements of Small Stockwater Rights, supra. In administering the right as presently reported, IDWR has indicated that cattle numbers on the allotment will be used to police the right. In other words, permittees with allotments that exceed the number of decreed cattle may be forced to remove cattle from the area. Just as troubling, even an allegation that an allotment has exceeded the number of decreed cattle may result in a permittee having to round-up and provide a head count of the cattle on that allotment. Because cattle numbers in an allotment do not accurately reflect water use at individual stockwater sources, it is unjust, unfair and unlawful to use such numbers to administer water rights.

- D. **SUB-ISSUE 4: Should the quantity used in cubic feet per second for a de minimis water right be based on a 24-hour rate, a 2 hour rate or a set constant based on a 13,000 gallons-per-day rate?**

The quantity used for a de minimis stockwater right should obviously be based on 13,000 gallons per day. This is what the statute requires. § 42-1401A(12). However, the units of gallons per day are inconsistent with the statute instructing

that the element of quantity used be reported as cubic feet per second. See, § 42-1411(2)(c).

The question thus becomes, how to convert the statutory stockwater amount of 13,000 gallons per day amounts into c.f.s.? The most accurate means would be to determine how many cubic feet per second would equal 13,000 gallons in a one day period. A simple calculation yields 0.02 cfs. IDWR, on the other hand, has recommended diversion rates for stockwater based upon a two hour diversion. See e.g., IDWR's Brief Re: Elements of Small Domestic and Stockwater Rights, in subcases 34-10807, 34-10717, 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. Cattle on the open range may consume water at all hours of the day.

Moreover, IDWR's recommendations based on a two-hour diversion may result in excessive, non-de minimis amounts of water being decreed for de minimis stockwater rights. For example, based on IDWR's two-hour limit, the Director may recommend up to 0.24 cfs for a de minimis stockwater right. 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 with a quantity of 0.24 cfs may divert over the course of an entire day approximately 155,115 gallons.

The water user would clearly exceed the statutory limit of 13,000 gallons for a de minimis right.

Thus, if the Court allows the use of a 0.24 cfs diversion rate, a remark is needed to identify the right as one based on a two-hour diversion and should be so identified in the right. The remark that the quantity used is based on a two-hour rate of diversion will sufficiently define the right and prevent expanded diversions in excess of de minimis quantities.

E. SUB-ISSUE 5: Does a water right with a stockwatering purpose of use include use for wildlife?

This question may also be answered by a simple review of the statute defining stockwater use, § 42-1401(A)(12). The statute expressly and unambiguously permits wildlife to be included in the claim to stockwater. Stockwatering

means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

I.C. § 42-1401A(12) (emphasis added).

Accordingly, for purposes of the decree, the description of the right claimed under § 42-1401(A)(12) should state as the purpose of use, "stockwater, wildlife." This clearly indicates to future examiners of the right, either water owners, ditch-riders or judges, that the stockwater right includes the incidental use of the water source by wildlife.

F. SUB-ISSUE 6: Whether a single water right can be decreed with both a state and federal basis?

In appropriate circumstances, a single stock watering right can be decreed with both a state and federal basis. For

example, in the adjudication thus far, the United States has made a single claim for spring sites which are entitled to water rights under both state-law principles and the reserved rights doctrine (in particular, the reservation commonly cited as Public Water Reserve 107).⁷ In this situation, a single decree is appropriate because all of the required elements claimed are the same with the exception of priority date and the basis of the claim.⁸ Thus, the decree may merely be issued as a state-law based stock water right with a remark referencing that it is also reserved under Public Water Reserve 107 with the date of reservation being April 17, 1926. It is practical and efficient that only one right referencing both bases be decreed.

CONCLUSION

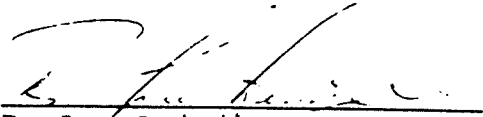
The form and content of stockwater decrees in the current and proposed Director's Reports include extraneous remarks that are unnecessary for definition or administration of the rights and fail to adequately describe the rights. These remarks and other elements do not reflect how stockwater is utilized on the open range. A streamlined decree, pursuant to

⁷ Although it has not done so to date, in future basins the United States could, with Court permission, potentially file two different claims at the same spring site. This would occur if the United States determines that the quantity reserved under PWR-107 properly differs from the quantity claimed under state law at a given site. Under that theoretical circumstance, a single decreed right probably would not be appropriate.

⁸ Of course, reserved water rights and state appropriative rights have a number of different attributes. For example, a state appropriative right is based on placing water to beneficial use, while a reserved right is not. These differences are not, however, necessary or appropriate to put into a decree.

the legislature's definition for these rights, will more accurately define these rights and allow for more efficient and just administration.

Respectfully submitted this 14th day of April, 1996.



R. Lee Leininger
Attorney
General Litigation Sec.
U.S. Dept. of Justice

CERTIFICATE OF SERVICE

I certify that on the 14th day of April, 1996, I served a true and correct copy of the foregoing Basin-Wide Issue No. 12 Opening Brief via first-class U.S. mail upon the following individuals:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711

Court Certificate of Mailing for Expedited Hearings

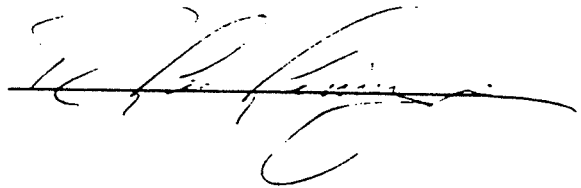


EXHIBIT A

AJ58564P

DATE: NOV-17-1992
PAGE: A-389

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER	NAME & ADDRESS	PRIORITY DATE	PURPOSE OF USE	PERIOD OF USE FROM TO	MAXIMUM QUANTITY	BASIS OF CLAIM
	SOURCE: SPRING					
34-13147	US DEPT OF INTERIOR BUREAU OF LAND MANAGEMENT IDAHO STATE OFFICE 3380 AMERICANA TERRACE BOISE ID 83706	01/01/1884	STOCKWATER	01-01 12-31	.01	CFS BENEFICIAL USE

TRIBUTARY: BRADSHAW CREEK

TOTAL QUANTITY: .01 CFS

NON-IRRIGATION-USES:
STOCKWATER, 1,810 RANGE CATTLE
POINT OF DIVERSION:
T09N R20E S15 SESWSE
PLACE OF USE: STOCKWATER

T09N R20E S15 SWSE

REMARKS: 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.
BLM RECORD ID = 3404583544

Movant's Name:
UNITED STATES OF AMERICA

Attorneys: Names and Addresses:

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

R. LEE LEININGER
DARIA J. ZANE
PAUL F. HOLLEMAN
WILLIAM M. FERRY
Attorneys, Department of Justice
General Litigation Section
Environment and Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663
(202) 305-0242

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)
_____) BASIN-WIDE ISSUE NO. 12
 AFFIDAVIT OF ROBERT C. MITCHELL

ROBERT C. MITCHELL, being duly sworn, deposes and says:

1. I am the Range Management Program Leader for BLM administered lands in Idaho.
2. I am a graduate of: B.S. Forestry with Range/Wildlife Option in 1962 from the University of Idaho. I have 34+ years of experience with BLM in the capacities of Range Conservationist, Wildlife Biologist, and Area Manager.
3. As the Idaho BLM Program Leader for grazing my responsibilities include interpreting and or developing state-wide guidance and policy in range management and administrative matters.
4. An allotment is an area of land designated and managed for

the grazing of livestock. Allotments may be a single open unit, or can be subdivided into pastures. Allotments and pastures may be used by one or more livestock permittees.

5. Grazing allotment boundary lines were established through Range Line Agreements, Allotment Management Plans (AMP) and Resource Management Plans (RMP) that reflect management objectives for grazing. These documents allow for modification of grazing allotment boundary lines.

6. Grazing allotment boundaries can change and have changed in the past. Allotment boundaries may change due to a variety of reasons, including; changes in management objectives, major changes in forage due to fire rehabilitation and reseeding, and sale or purchase of base (private) property and redistribution of grazing use areas.

7. The number of livestock permitted in an allotment is a function of the condition and availability of vegetative forage and the needs of other resources or multiple uses.

8. Livestock (cattle, sheep and horses) are authorized on public land through the issuance of a term permit. Among other items, the permit displays the units of vegetation or forage authorized to be removed through consumption by livestock animals. There is no measure of water consumed by livestock animals in the grazing permit.

9. Livestock generally utilize the pastures within an allotment in a rest/rotation scheme defined in an Allotment Management Plan. It is also customary within the BLM to conduct utilization and trend studies of the vegetation available to livestock to

determine whether the management practices in place are progressing toward or digressing away from the defined land management objectives. If adjustments are needed in the management of livestock to assure progress toward objectives, livestock timing, use patterns and stock numbers may change considerably.

10. Individual water sources that are available within the pastures and allotments are used by the livestock in a manner that is variable according to the management prescription. However, it is extremely unlikely that the amount of water consumed at any individual, undeveloped water source would exceed 13,000 gallons per day.

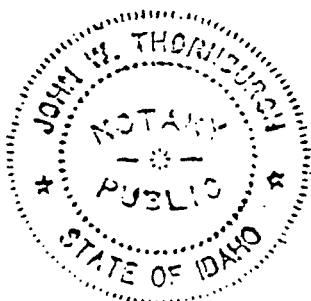
11. The number of stock that may reasonably consume greater than 13,000 gpd of water (greater than approximately one thousand head) are generally prevented from congregating at one water site due to resource management and resource availability conditions.

12. There are a few water developments that are extensive and provide water over a wide area. Typically, these involve pipelines supplying water to troughs at several points along the system, which when taken in total could exceed 13,000 gallons per day.

Dated: April 18, 1996

Robert C. Mitchell

Subscribed and sworn to me this 18th day of April, 1996.



John W. Thornburg
NOTARY PUBLIC

My commission expires: 5-16-97

Movant's Name:
UNITED STATES OF AMERICA

Attorneys: Names and Addresses:

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

R. LEE LEININGER
DARIA J. ZANE
PAUL F. HOLLEMAN
WILLIAM M. FERRY
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P.O. Box 663
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(202) 305-0242

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) BASIN-WIDE ISSUE NO. 12
)
)
 Case No. 39576) AFFIDAVIT OF GARY MADENFORD
)

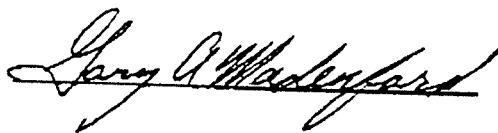
GARY MADENFORD, being duly sworn, deposes and says:

1. I am the Natural Resource Specialist, Bureau of Land Management, Idaho State Office.
2. I am a graduate of:
 - AS - Chemistry - Chaffey College
 - BS - Soil Science - California State Polytechnic University
 - MS - Soil Genesis and Morphology - Iowa State University
 - PhD - Agronomy - Iowa State University
 - Major - Soil Genesis and Morphology
 - Minors - Geology and Forestry
3. As the Natural Resource Specialists, my responsibilities include serving as Team Leader for BLM's efforts in the Snake River Basin Adjudication.

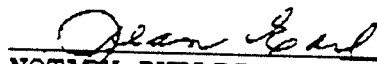
4. The majority of claims to stockwater filed by the United States through the Bureau of Land Management (BLM) in the adjudication are to undeveloped spring sources or non-diverted stream reaches on the public lands.
5. The Bureau of Land Management (BLM), in filing its stockwater claims in the Snake River Basin Adjudication, followed the procedures established by the Idaho Department of Water Resources (IDWR) requiring claimants to supply information concerning non-irrigation uses. The BLM complied with that requirement in the prescribed manner.
6. A typical response to the request for non-irrigation uses detailed a number of range cattle, range sheep, horses or variable amounts of wildlife.
7. The BLM supplied the information of stock numbers to support its claim to a stockwater purpose of use.
8. The BLM did not include in its claims to undeveloped sources for stockwater a remark that this right combined with other rights common to the allotment is limited to the number of head of cattle in the allotment.

Dated: April 17, 1996

State of Idaho
County of Ada



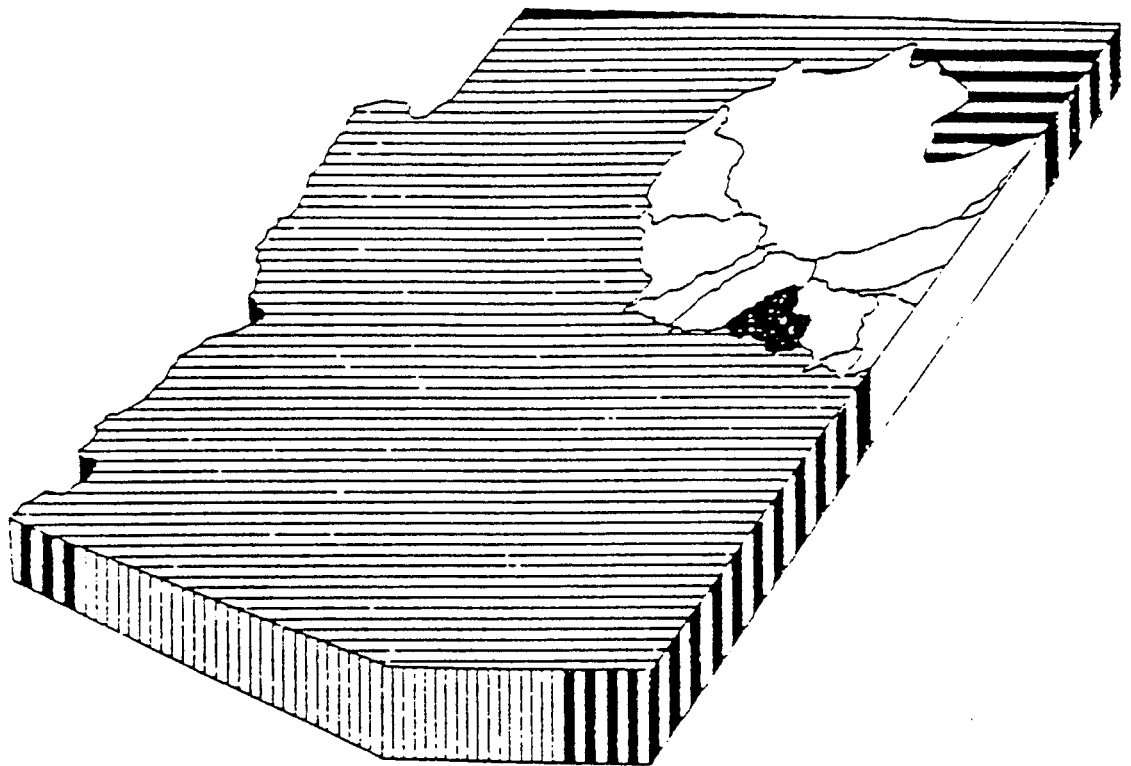
Subscribed and sworn to me this 17 day of April, 1996.


NOTARY PUBLIC

My commission expires: August 1, 1996

TECHNICAL REPORT ON DE MINIMIS ADJUDICATION
OF STOCKPOND AND STOCKWATERING USES
IN THE SILVER CREEK WATERSHED

*In Re: The General Adjudication Of The
Little Colorado River System And Source*



Arizona Department of Water Resources

September 1, 1993

3.3 ALTERNATIVE METHODS

As the previous section indicates, other states and jurisdictions have employed wide ranging approaches and standards in addressing stockwatering and stockpond water rights. Although some general stream adjudications have established stockpond rights on the basis of claimed but usually unverified capacities and priorities, most past adjudications have either excluded them from the case or use a uniform approach to their quantification and sometimes prioritization. DWR believes that these approaches are reflective of the physical realities associated with these water uses. First, as shown in Chapter 2, the effect of stockpond water use in the Silver Creek watershed on the average annual discharge of Silver Creek at the watershed outlet is minimal, and is expected to be of the same order of magnitude in the other watersheds of the Little Colorado River system.

Second, these approaches are also reflective of typical livestock range conditions: the number of livestock that use a particular facility is constantly changing; the water supply that is available to a particular facility is constantly changing; and the condition of these normally rudimentary facilities and their ability to store, divert, or develop a water supply is constantly changing. Therefore, in simplifying the standards used to adjudicate these rights, many previous jurisdictions have apparently found it unrealistic to gather the facts necessary to establish accurate attributes for each individual right or unrealistic to expect most stockwatering and stockpond rights to be maintained, exercised, or administered according to detailed decreed specifications.

If it is determined that a comprehensive adjudication of the Silver Creek watershed also does not require detailed, verified elements to be established for all stockwatering and stockpond rights, then what alternatives might be considered in quantifying, prioritizing, and specifying other attributes of these rights? First, can a uniform approach to quantification be adopted and if so what standard should be used? Second, can stockwatering and stockpond uses that have a small effect on the total water supply and consequently on any senior downstream appropriators be classified and prioritized as a *de minimis* user, and if so at what size threshold? Third, if a uniform quantification is adopted for certain stockwatering and stockpond uses, and certain stockwatering and stockpond are prioritized according to a *de minimis* standard, then which remaining attributes need to be specified for these rights in the decree?

From a technical perspective, several alternatives that might be employed in answering these questions are described below.

STOCKWATERING USES

Alternative 1. Stockwatering rights could be quantified and prioritized according to claimed information. No *de minimis* category would be established.

Advantages: A stockwatering right would have a unique extent and priority specified.

Disadvantages: Since the claimed information could be erroneous or inaccurate, the decreed attributes could also be inaccurate. It would also be infeasible to actively administer or enforce the extent or priority of these rights (how are you are to keep livestock from drinking out of a particular stream or watering facility).

Alternative 2. Stockwatering rights would not be individually prioritized and they would be quantified according to a uniform reasonable use standard. All stockwatering rights would be included in a *de minimis* classification.

Advantages: This alternative would be very simple to apply. Erroneous or inaccurate attributes would be avoided. The rights would be feasible to administer.

Disadvantages: This alternative would not quantify the extent nor the priority of stockwatering rights.

Alternative 3. Stockwatering rights could be quantified according to the number of livestock that can be supplied under each right, or in gallons per head per day, or be entitled to a certain maximum annual volume such as 0.25 acre-feet per year. The priority date could be assigned from claimed information. All such rights or none of these rights could be classified as *de minimis*, but individual priority assignment would be meaningless under this alternative if the rights were classified as *de minimis*.

Advantages: This alternative would be simple to apply and would avoid having erroneous or inaccurate individual quantification attributes decreed.

Disadvantages: Even these uniform quantification limits would be essentially

meaningless for stockwatering rights since they could not be feasibly administered. The claimed priority dates may be erroneous and would also not be feasible to administer if not they are not included in a *de minimis* category.

STOCKPONDS

Alternative 1. Stockpond rights could be quantified and prioritized according to claimed information. There would be no *de minimis* classification.

Advantages: Every stockpond would have an extent and a priority date assigned to it.

Disadvantages: Individual extent and priority would be frequently in error unless these attributes were verified in all instances by DWR or they are litigated. Currently, DWR verifies only a small minority of stockpond capacities and probably would not find it fiscally feasible or an appropriate use of resources to expand its verification to all stockponds.

Alternative 2. Stockpond rights could be quantified and prioritized by DWR verified information above a certain area or capacity threshold. Below the threshold, stockpond rights would be uniformly quantified and prioritized as a *de minimis* classification. Some possible capacity thresholds could be 15 acre-feet maximum controlled capacity (possible statutory basis) or lower capacities such as 3, 5, or 10 acre-feet. Some possible surface area limits might be 1 acre or 2 acres at maximum capacity.

Advantages: Currently, the HSR contains DWR verified information upon which to base an extent and priority based upon a 1 or 2 surface acre area standard, or based upon a 15 acre-feet capacity standard. There is a possible statutory basis and precedence in other states for a capacity threshold. A surface area threshold, on the other hand, provides a more modern parameter that can be feasibly enforced for exceedence through remote sensing or aerial photography. Classifying stockponds below the threshold as *de minimis* enhances the feasibility of actively administering the remaining stockponds above the threshold.

Disadvantages: In this alternative, a unique extent and priority date for each stockpond right below the threshold would not be specified. A threshold based upon capacity

CHAPTER 4: SUMMARY AND CONCLUSIONS

This report posed three fundamental questions concerning the use of a streamlined adjudication procedure for a *de minimis* category of stockwatering and stockpond rights: 1) should a uniform approach to quantification be adopted and, if so, what standard should be used; 2) what maximum levels should be created for the quantification and prioritization of stockpond and stockwater rights under a *de minimis* classification; and 3) what effect, if any, will there be on the hydrology of the river system if these rights are summarily adjudicated by the courts. The answers to these questions, supported by the analysis in Chapters 2 and 3, are summarized here.

The quantification of each individual stockpond and stockwatering right by verifiable measurement is an enormous task. DWR has not attempted to measure each of these constantly changing rights in preparation of the hydrographic survey reports (HSRs). Furthermore, DWR cannot conduct such a survey at current staffing levels and does not recommend that public monies be expended for such a task. Likewise, DWR believes that litigation over each right to establish an individual quantity is a waste of resources. In litigation, at least two parties will attempt to quantify each individual right, then present their differing findings to the Special Master who must decide the quantity without benefit of an independent viewpoint. While such an approach may produce a fairly accurate survey for a particular moment in time, it amounts to the trial of 762 stockponds in the Silver Creek watershed alone. More importantly, decreed quantities would be systematically unenforceable unless state funding were provided for a field survey team to constantly measure the uses to prevent unlawful expansions. Enforcement would be left to competing right holders, resulting in potentially endless legal disputes.

To expeditiously reach an enforceable decree, DWR recommends a uniform quantification method for all rights within the *de minimis* category. The assigned quantity would be the threshold limit itself, regardless of whether the actual magnitude of the use is less than the limit. For stockponds, one possible uniform standard to base the *de minimis* classification on is a maximum capacity, such as the 15 acre-foot limit found in the Stockpond Registration Act (A.R.S. § 45-271 *et seq.*) However, the HSR

investigations have found that 15 acre-feet is a much larger than typical capacity for stockponds. Stockponds of that size have a much greater than typical potential to impact downstream senior rights. Out of a total of 762 stockponds identified in the Silver Creek watershed, only 10 were found to exceed 15 acre-feet in capacity.

Another uniform standard that can be used is to base the *de minimis* threshold on a maximum controlled surface area of the stockpond. DWR believes that a surface area standard provides a more feasible method for administering compliance with the *de minimis* threshold than does stockpond capacity because it allows the use of modern technology with satellite remote sensing to periodically monitor stockpond sizes. With a feasible method of administration, DWR can provide greater assurance that it will be able to actively administer and enforce exceedence of whatever *de minimis* thresholds may be adopted by the Court, as well as to administer the decreed quantities assigned to stockponds that are larger than the *de minimis* amounts. Therefore, as the future administrator of the decree, DWR urges the adoption of a maximum surface area standard to establish *de minimis* stockpond rights.

If a surface area standard is adopted by the Court, then DWR recommends a *de minimis* threshold of two surface acres at the maximum controlled capacity of the stockpond. DWR has found from its surveys of stockponds in the Silver Creek watershed that there are no stockponds at or below this threshold that exceed 15 acre-feet in capacity--the limit specified in the Stockpond Registration Act. While the legal significance of the Act's 15 acre-feet limit may be arguable, DWR suggests that a *de minimis* classification should probably not be extended to stockponds that exceed 15 acre-feet. A two surface acre threshold provides the means to ensure that 15 acre-foot and greater capacity stockponds would not be classified as *de minimis* rights. In fact, the average two surface acre stockpond in the Silver Creek watershed has a statistically predicted capacity of 6.6 acre-feet. This capacity is smaller than the 10 acre-feet capacity *de minimis* stockpond classifications provided in California and New Mexico, less than the 15 acre-feet limit in Kansas and Nebraska, substantially less than the 200 acre-feet limit in Texas, and less than the unlimited *de minimis* classification of all stockponds in Wyoming. Of the 762 stockponds identified in the Silver Creek watershed, 10 have surface areas that exceed 2 acres and capacities that exceed 15 acre-feet, and another 26 have surface areas greater than two acres, but capacities of

less than 15 acre-feet. That then leaves only these 36 stockponds in the Silver Creek watershed that would exceed the recommended *de minimis* threshold of two surface acres, and two of these are located in closed drainages. For these 36 stockponds, DWR recommends that individual extent and priorities be established and actively administered along with other non *de minimis* rights following entry of the adjudication decree (except for perhaps the two stockponds located closed drainages, depending upon the Court's disposition of surface water uses from these sources).

For stockwatering, DWR recommends the uniform standard of reasonable use. This effectively places all stockwatering uses within the *de minimis* category. Balancing the initial quantification of the individual rights and the enforcement difficulty of such a decree against the amount of water gained or lost to the watershed under slight variations in ranching practices, stockwatering rights do not justify individual quantification. Stockwatering impacts on the hydrology of the stream system are so small that artificial and arbitrary limits such as a per head quantification limit are not necessary. DWR's recommendation for the necessary attributes and standards to adjudicate *de minimis* stockpond and stockwatering uses is illustrated by example shown under Alternative 2, Table 3-3 in the previous chapter.

Assuming that these simple, yet practical methods of quantification are employed, the important question becomes what impact, if any, will be suffered by the senior downstream users? Chapter 2 of this report shows that the total volume of water prevented from contributing to the surface water supply of Silver Creek at the watershed outlet by all existing stock uses is an unmeasurably small amount. The total volume of surface water reduction due to all stockponds is estimated to average 380 acre-feet per year or 2.8% of the total existing surface water supply, and only 2.2% for stockponds of less than two surface acres in size. DWR suggests that these impacts meet the definition of *de minimis* use within the context of the adjudication proceedings.

Nevertheless, there is concern that simplistic quantification and prioritization standards will permit stock uses to be expanded to the increasing injury of the senior users. While perhaps a realistic concern, DWR urges that several points be considered before drawing any conclusions. By streamlining administration requirements for the large number of small uses, the *de minimis* concept in general adjudications provides

the means to actively administer the larger rights. Without such thresholds it becomes a question for the decree's administrator to either not actively administer any rights, or to create administrative thresholds which essentially mimic the *de minimis* concept itself. As all parties are aware, state governments throughout the nation are faced with increasing demands on their financial reserves. In the near term, it is unlikely that large new funding will be appropriated for an adjudication enforcement effort capable of measuring, and policing, the thousands of small uses within this state. In fact, the trend may be exactly in the opposite direction.³ Without uniform quantification and *de minimis* thresholds, small uses, even if ranked precisely by quantity and priority, would go largely unmonitored simply by virtue of their numbers. The burden would fall on individual parties to enforce the decree against their neighboring users or against numerous junior users, probably by resort to the courts.

Secondly, some parties might argue that streamlined *de minimis* adjudication is a license to increase *de minimis* use up to the maximum quantity (i.e., a one surface acre stockpond would be increased to two surface acres). DWR believes that this would not occur for stockwatering and stockpond uses. Field experience shows that the construction of stockponds and the practices of stockwatering are controlled by topographic opportunities, carrying capacities of the range, water supply development opportunities, the need to retain a water supply during the dry seasons of the year, public land management policies, and economic considerations, not by arbitrary limits specified in law. For example, the great bulk of stockponds in the Silver Creek watershed are less than two surface acres, but as of today, there is no legal reason why they must be this small. DWR's conclusion is that their size is directly dependent on stockwatering needs and costs, rather than artificial limits. In fact, one could argue that the incentive may be greater to reduce a larger pond to the two acre maximum, rather than increase a working pond's size just to take advantage of the legal limit when there is no clear need.

It is much more practical to enforce the limits of a class of rights than to enforce each individual right against each other. *De minimis* standards such as those suggested

³It is anticipated that a bill will be introduced this year in the Arizona Legislature to amend the Groundwater Code and cease regulation of all grandfathered irrigation rights of 10 acres or less, as opposed to the two acre irrigation threshold currently in effect.

in this report could be administered by DWR through remote sensing techniques. Proliferation of new rights and expansion of existing rights could be administered according to the decree's provisions without private litigation, ensuring that the *de minimis* category of existing small uses remains *de minimis* throughout the life of the decree.

Finally, DWR believes that employing the *de minimis* concept in Arizona's general stream adjudication provides a benefit beyond reduced litigation costs to all claimants both large and small. In DWR's view, a *de minimis* assignment for water uses does not mean that those uses are dismissed from the adjudication or are ignored in terms of any administration. Rather DWR believes that these rights need to be located, individually decreed, and administered appropriately to ensure that the threshold limits are not violated. This provides the opportunity to enforce a finding by the Adjudication Court that certain watersheds are fully appropriated and that no additional rights should be granted. Large senior users would then be protected from further degradation of their water supply from unconstrained increases in the numbers of *de minimis* category surface water users. Small users would be granted a valuable right in a watershed with a then fixed number of water rights. There are, of course, a number of different scenarios that could occur through litigation or stipulation that will affect the way in which rights will eventually be decreed in the Little Colorado River Adjudication. But as the Court's technical assistant and administrator of the state's water resources, DWR strongly believes that a general adjudication decree which encompasses a *de minimis* category for stockwatering and stockpond uses will be in the interest of the claimants and in the general interest of the state as a whole.

In summary, DWR answers the three fundamental questions posed at the outset of this report as follows:

1. A uniform standard of quantification for small water uses is an appropriate method of quantification in a general stream adjudication. For stockponds, DWR recommends that the use be measured by the maximum controlled surface area

of the pond; for stockwatering, DWR recommends that the use be measured by a reasonable use standard.

2. From a technical perspective, DWR recommends that all stockwatering uses and all stockponds with less than two acres of maximum controlled surface area be prioritized as a *de minimis* category of rights.
3. All existing stockwatering and stockpond uses in the Silver Creek watershed that would be classified as *de minimis* according to the standards set forth above have a cumulative impact on reducing the surface water discharge from the Silver Creek watershed by 2.2%. DWR considers this relative magnitude to coincide with the definition of *de minimis* uses. Further, considering the large number of individual uses involved in effecting that reduction in discharge, DWR believes that enforcing relative priorities against these uses (even if that could be accomplished considering the nature of the facilities involved) would constitute a futile call.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

IN CHAMBERS

(X)

IN OPEN COURT

()

SPECIAL MASTER JOHN E. THORSON

Presiding

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
LITTLE COLORADO RIVER SYSTEM
AND SOURCE

DATE: April 20, 1994

CIVIL NO. 6417-033-9005
(Consolidated)

MEMORANDUM DECISION,
FINDINGS OF FACT, AND
CONCLUSIONS OF LAW FOR
GROUP 1 CASES INVOLVING
STOCKPONDS, STOCK-
WATERING, AND WILDLIFE
USES

CONTESTED CASE NAME: *In re Reporting of Diversion Information and
Other Objections*

DESCRIPTIVE SUMMARY: The Special Master issues his memorandum decision, findings of fact, and conclusions of law on all matters submitted by stipulation, evidentiary hearing, and legal argument concerning stockponds, stockwatering uses, and wildlife uses (Group 1). Abstracts of water right for all the proposed water rights involved in the first group are also set forth in the appendix.

NUMBER OF PAGES - 119.

DATE OF FILING: Original mailed to the Clerk of the Court April 20, 1994.

I. Place of Use

1. Discussion

The purpose of the place of use characteristic is to provide a legal description adequate for the court, Department of Water Resources, and water users to monitor whether a certain water use has actually been adjudicated in this proceeding. In the context of stockwatering, stockpond, and wildlife uses, the place of use description will be a composite of the traditional point of diversion and place of use. For most stock and wildlife uses, the actual watering takes place at the same location as any diversion.

2. Conclusions of Law

Conclusion of Law No. 39. For wildlife and stockwatering uses, the place of use will be described to the quarter-quarter (1/4 1/4) section in which the use occurs. In cases of two or more stockwatering uses or two or more wildlife uses within the same quarter-quarter section, the rights will be adjudicated to the nearest quarter-quarter-quarter (1/4 1/4 1/4) section. Unless the litigants otherwise agree, the information set forth in the watershed file report under the "uses" section will be utilized for determining this characteristic.

Conclusion of Law No. 40. For stockponds, the quarter-quarter (1/4 1/4) sections in which the surface area of the stockpond extends will be utilized for the legal description of the place of use. In the case of two stockponds in the same quarter-quarter section, each stockpond will be located to the nearest quarter-quarter-quarter (1/4 1/4 1/4) section. Unless the litigants otherwise agree, the information set forth in the "reservoir" section of the watershed file report will be utilized to provide the legal description of the place of use for stockponds.

Conclusion of Law No. 41. If an objection has been filed concerning the place of use and no agreement has been reached, the department will reexamine the basis for its description of the place of use and report the results to the Master for inclusion in the abstract of proposed water right. No hearing will be held on the objection.

J. Quantity

1. Stockwatering and Wildlife Uses

As previously discussed, the consumptive use of stock and wildlife who drink water from undiverted surface water is negligible—whether considered individually or cumulatively throughout the watershed. DWR has reported that the consumptive use by one animal unit of a calf and cow is

only 0.011 acre-feet per year. Deer, antelope, and elk consume between 0.0005 and 0.0034 acre-feet per year. TECHNICAL REPORT at 16.

While it might be possible to determine a uniform figure that could be used to specify and adjudicate the quantity for stock and wildlife, there is no reason to do so since it would be highly impractical to measure such uses and difficult to enforce. Thus, the Master will adopt one of DWR's recommendations and quantify stockwatering and wildlife uses as "reasonable use." *Id.* at 24.

2 De Minimis Stockponds (SPs $\leq$ 4 Acre-Feet)

The determination of the quantity for stockpond uses that are entitled to summary administration is a more difficult problem. While it is technically possible to survey and thereby determine the quantity for each of the stockponds, the methodology is time-consuming and expensive and defeats the whole purpose of a summary determination of these small uses.

The court could rely upon the quantity asserted in statements of claimant for stockponds; but the Master's own experience has demonstrated wide variability in the volume claimed in these statements--apparently due to the inability of many lay people to calculate the volume of small ponds and reservoirs.⁶ The Department of Water Resources has approached this problem by recommending that stockponds be quantified on the basis of surface acreage ("maximum controlled capacity") rather than volume. Remote sensing would be used to determine the original acreage of these ponds and to monitor any enlargements. TECHNICAL REPORT at 34-35.

DWR has statistically demonstrated that stockponds of 2 surface acres or less in the Silver Creek watershed all have less than 15 acre-feet of volume, which is also less than the 15 acre-foot threshold recognized in the Stockpond Registration Act, ARIZ. REV. STAT. ANN. §§ 45-271 to -276.

Some of the litigants have opposed a uniform quantification scheme in general because they believe it would result in an exaggerated amount of water being awarded to appropriators, which amount might be unrelated to actual beneficial use. See ARIZ. REV. STAT. ANN. § 45-141(B) ("Beneficial use shall be the basis, measure and limit to the use of water"). Other litigants oppose DWR's specific recommendation because they fear appropriators will enlarge their stockponds in order to capture more water for their own use or to sell or transfer to others.

⁶The State Land Department's statements of claimant, which are based on actual field surveys, usually provide reliable information about volume.