

ALAN G. LANCE
Attorney General
State of Idaho

CLIVE J. STRONG
Chief, Natural Resources Division

BRENT KING
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

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. 36-04219
	)	
Case No. 39576	)	IDWR REPORT RE: REVIEW
	)	OF PRELIMINARY SPECIAL
	)	MASTER'S REPORT
	)	

DESCRIPTIVE SUMMARY

IDWR submits this report to inform the Court and the parties that IDWR has reviewed the Preliminary Special Master's report submitted in this subcase and has these comments.

DISCUSSION

1. The comments of IDWR in regards to specific elements of the water right in the Preliminary Special Master's report are:

1 - IDWR REPORT RE: REVIEW OF PRELIMINARY SPECIAL MASTER'S REPORT.

[X] Quantity

The total quantity for this right is stated in the Preliminary Special Master's report as 4.0 AFY. Where a water right has multiple purposes of use, the quantity for each purpose should be described. In this subcase, the quantity should be stated as follows:

STOCKWATER STORAGE	4 AFY
STOCKWATER FROM STORAGE	4 AFY
WILDLIFE STORAGE	4 AFY
WILDLIFE FROM STORAGE	<u>4 AFY</u>
(TOTAL QUANTITY)	4 AFY

Description of the quantity for each purpose of use is necessary to define and/or administer the water right, because it establishes that the total quantity is used for each purpose, and leaves no ambiguity as to whether or how the total should be allocated among multiple purposes of use.

[X] Purpose of Use

The purpose of use in the Preliminary Special Master's report is described as, "Stockwater storage, Stockwater from storage, Wildlife storage, Wildlife from storage".

The Preliminary Special Master's report describes both "STOCKWATER" and "WILDLIFE" uses. 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, 1100 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. This issue is pending before the court in Basin Wide Issue No. 12.

The Preliminary Special Master's report also 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 that IDWR 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 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 injure other water rights. This is particularly true for instream stockwater rights because a reasonable rate of flow (cfs) for

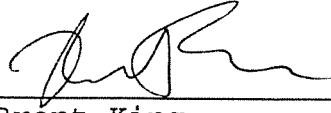
such rights is capable of producing an annual diversion volume that is significantly in excess of the volume of water reasonably required for drinking by the stock for which the water was appropriated.

The further description of non-irrigation uses for water rights acquired under state law by the United States for stockwater purposes is currently pending before the court in Basin Wide Issue No. 12.

[X] Other Matters Necessary to Define or Administer the Right

The Preliminary Special Master's report 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. This matter is pending before the court in Basin Wide Issue No. 12.



Brent King
Deputy Attorney General
Idaho Department of Water Resources

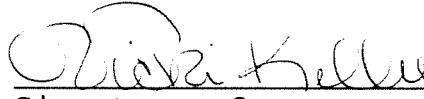
CERTIFICATE OF MAILING

I certify that on June 13, 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:



Signature of person or attorney
mailing the form