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Department of Water Resources

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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. See attached list
	)	
CASE NO. 39576	)	Statement of Undisputed
	)	Facts in Support Of
	)	United States Motion For
	)	Summary Judgment

DESCRIPTIVE SUMMARY

This is a statement of undisputed facts in support of United States Motion for
Summary Judgment.

STATEMENT OF UNDISPUTED FACTS

In accordance with Idaho R. Civ. P. 56, the United States submits the following statement of undisputed fact:¹

1. In 1919, the *Utah Construction Company* ("Company") filed a complaint in federal district court seeking to determine the water rights to the use of surface water from the Big Lost River and its tributaries. Plaintiff's Appendix (hereinafter "P.App.") p. 1-154.
2. The complaint was filed in federal district court based on diversity jurisdiction since *Utah Construction* was a foreign corporation. The case was instituted as *Utah Construction v. B.B. Harger, et . al.*, subsequently recaptioned as *Utah Construction v. A. Aiken, et.al.*, and finally *Utah Construction v. John F. Abbott, et.al.*. All of these cases proceeded in the United States District Court for Idaho under equity case number 222.
3. The Company based its claim on the right to store water in its Mackay reservoir and use stored water for irrigation of lands under the Carey Act. P. App. 2.
4. Defendants were settlers above and below the Mackay reservoir who claimed water rights prior in time to the Company. P. App. 2. The United States was not named as defendant. P. App. 2.

¹ This Statement is supported by the Affidavits of Joan L. Brownell, Plaintiff's Appendix (P.App.) pp 1-154; William Tydeman, P.App. 162-394 and Timothy Jones, P.App. 155-161 and exhibits thereto which are being submitted concurrently with this motion as Plaintiff's Appendix to the Memorandum In Support of the United States Motion For Summary Judgement.

5. Subpoenas were served on the defendants and proofs of service filed with the District Court. P. App. 163. The United States was not on the service list and was not served with a subpoena. *Id.*, P. App. 163 .
6. An amended complaint was filed on May 26, 1920. P. App. 3, 27-79. The United States was not named as defendant, was not on the service list and was not served with a subpoena. P. App. 163.
7. On March 1, 1920, a hearing on the decree was held in the District Court. P. App. 163. During the course of the hearing there was no mention of the United States or any water rights associated with the Federal government. P. App. 163.
8. On March 15, 1923, a final decree was entered. P. App. 3. The decree allowed for storage and diversion of the Big Lost River when it did not interfere with any prior rights for irrigation and specified beneficial uses as domestic and culinary purposes and watering of livestock. P. App. 3.
9. The decree identified all parties whom were bound by the decree including all persons upon whom subpoenas had been served. P. App. 3, 163, 393-394 . The United States was not identified as a party served with process or bound by the decree. P. App. 3.
10. On August 26, 1924, the Lemhi Forest supervisor requested several state water commission “blanks” to make application for water at several ranger stations from the same water commissioner in Boise. P. App 159. Approximately two years after entry of the final decree, on July 2, 1925, the Forest Supervisor for the Lemhi Forest made application for water rights for irrigation uses at two guard stations including the

Wildhorse Guard Station. P. App. 160-161. There was no reference in this request to the *Utah Construction* decree.

11. The omission of rights of the United States Forest Service and others to waters of the Big Lost River were observed by Lynn Crandall, who was appointed Water Commissioner of the Big Lost River to administer the 1923 Decree. P. App. 147-148. Crandall presented the information to the attorney for the plaintiff "...with the suggestion that steps be taken to obtain the correction of said decree in those respects" . . P. App. 147-148.
12. On September 30, 1925, the attorney for the Utah Construction Company filed a motion requesting that several water rights including the two Forest Service water rights be included in the 1923 final decree. P. App. 3-4, 149.
13. These rights were requested to be included under a provision of the final decree that allowed for corrections for clerical errors, inadvertence and omissions. P. App. 4, 149-154.
14. The March 1923 *Utah Construction* Decree included a clause (Part III No. 7) that the Court retain jurisdiction of this cause (a) to make corrections for clerical errors, inadvertence and omissions in the rights decreed, the reservation of jurisdiction for this purpose to extend to January 1, 1926. P. App. 391.
15. On October 12, 1925, the Water Commissioner confirmed that these water rights were correct. P. App. 147-148.
16. On October 21, 1925, the district court entered an Order Correcting Errors and Omissions in the *Utah Construction* Decree. P. App. 4, 124-146.

17. In March of 1993, the United States on behalf of the United States Department of Agriculture, Forest Service (hereinafter "United States") filed claims in each of the above referenced subcases. Each of these claims are state law based consumptive use claims for stockwater use in de minimus amounts.
18. The priority dates recommended in the Director's Reports for all of the referenced claims were prior to 1923.
19. Objections to these claims were filed by Young Harvey Walker (subcase nos. 34-11645, 34-11659, 34-11661, 34-11662, 34-11946, 34-11947, 34-11948, 34-11949, 34-11950 and 34-11951), Vernon Roche (subcase nos. 34-11447 and 34-11509) and Gordon Fulton (subcase nos. 34-11576 and 34-11580).
20. Standard Form 5's were submitted to the Court on July 18, 1995, which resolved the objections to the above referenced cases including all objections to priority dates. The priority dates recommended in the SF5's are 1876 (subcase nos. 34-11645, 34-11659, 34-11661, 34-11662, 34-11946, 34-11947, 34-11948, 34-11949, 34-11950, 34-11951, 34-11576 and 34-11580), 1898 (subcase no. 34-11509) and 1906 (subcase no 34-11447).
21. In each of these subcases IDWR was the only entity objecting to these settlements. In each subcase, IDWR filed a report explaining the basis for its objections:

rights to the use of surface water from the Big Lost River and tributaries were adjudicated in *Utah Construction Co., v. Abbott*, Equity No. 222 (D.E.Id. 1923). The source of water for this right is tributary to the Big Lost River, and the United States was a party to that case. The United States is therefore precluded by the doctrine of res judicata from asserting a beneficial use priority date the same as or earlier than the date of the decree, March 15, 1923.

22. IDWR has filed similar statements regarding all United States' claims in the SRBA in the geographic area adjudicated in the *Utah Construction* Decree, including numerous claims filed on behalf of the BLM.

Respectfully submitted

DATED this 26 day of June, 1996

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List Of Affected Subcases

United States' Motion for Summary Judgment Concerning The *Res Judicata*

Effect Of The *Utah Construction* Decree On The United States

34-11447

34-11509

34-11576

34-11580

34-11645

34-11659

34-11661

34-11662

34-11946

34-11947

34-11948

34-11949

34-11950

34-11951

CERTIFICATE OF MAILING

I certify that on the 26th day of June, 1996, I served a true and correct copy of this **Statement of Undisputed Facts in Support Of United States' Motion for Summary Judgment** by the following methods:

Original by Federal Express to:

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

Copies by United States First Class Mail postage prepaid to:

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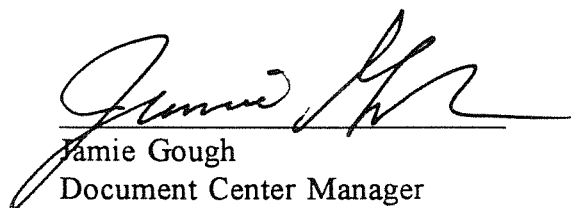
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