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Department of Water Resources
Adjudication Bureau

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. 57-11124 et.al.
	)	
	)	United States' Reply
	)	to Memorandum in Opposition to
	)	United States' Motion for
Case No. 39576	)	Summary Judgment
	)	

Descriptive Summary .

This is the United States' Reply to the Memorandum in Opposition to United States' Motion for Summary Judgment filed by Harry Richard Bass, Henry Brandau, Ted K. Blackstock, Chipmunk Grazing Association, and Joyce Livestock Company (the "Private Claimants").

Introduction

As an initial matter, the Special Master should note that the Private Claimants' answering brief was not filed within the time period prescribed by I.R.C.P. 56(c). The rule requires such briefs to be served "at least 14 days prior to the date of the hearing." The Private Claimants brief was filed August 5th, only eight days before the August 13th hearing.

The Private Claimants' suggestion that their answering brief was late because the United States' opening brief was not filed in a timely fashion (See Memorandum in Opposition at 4) is misleading and flat wrong. Copies of the front pages of the United States' Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment bearing the SRBA Court Clerk's date and time stamp of Monday, July 15, 4:41 p.m. are attachments 1 and 2 to this Reply. The late filing of the answer brief left the United States with one week before the hearing to prepare and file this Reply. There is prejudice to the United States in that counsel has had less time to prepare for the oral argument scheduled for August 13th, and in that the Special Master will not have had time to review this Reply in detail before the hearing. This latest delay is another example in a pattern of tactics prejudicial to the United States and evincing disrespect for the Idaho Rules of Civil Procedure and the Court.

REPLY

Because the Private Claimants did not respond in a timely fashion to requests for admission, the facts listed below are conclusively established in the litigation of these consolidated subcases.¹ See United States Memorandum in Support of Motion for Summary Judgment (US Brief), Appendix A "Unanswered Discovery."

¹The Special Master so ruled at an August 9, 1996 hearing in these consolidated cases.

1. With respect to each of the water rights claimed by the Private Claimants in these consolidated cases, the United States owns the land claimed for both the point of diversion and the place of use.
2. The Private Claimants' use of the water rights they are claiming in these cases has not been exclusive because other stock owners have used the water they are claiming to water stock.
3. The United States was the first party to put the water it has claimed in these consolidated cases to a beneficial use.²
4. The only rights that the Private Claimants have to graze stock on land managed by the BLM is pursuant to the terms of BLM issued grazing permits.

The United States summary judgment motion is resolved by two very simple points. First, the law of prior appropriation requires a would be appropriator to demonstrate exclusive use of the water claimed. Secondly, it is an undisputed fact that the Private Claimants have not had exclusive use of the water they are claiming in these cases. Accordingly, their claims to water

²The United States did not present argument on this issue in its opening brief because the Private Claimants, by their failure to respond to discovery, had admitted it was a true statement. US brief at 2. In their response to the United States' opening brief, the Private Claimants argued that this is a mixed question of fact and law and have presented argument that they should be considered the first beneficial user of the water rights under Idaho law. Memorandum at 2, 11-12. As demonstrated in the United States' opening brief and this Reply, the Private Claimants' claims to water rights, and objections to the United States' claims to water rights, should be dismissed on the ground that any use they can show has not been exclusive to other stockraisers. The exclusivity issue resolves both the Private Claimants' claims and objections. To the extent that the Special Master agrees, however, with the Private Claimants that the issue of who was the beneficial user remains an issue in this case, the United States has supplied the Special Master with the controlling law on that issue in section III of this Reply brief.

rights in these consolidated cases should be dismissed as a matter of law. Furthermore, all of their objections to the United States water rights in these consolidated cases are based on their claim to own the water and should also be dismissed.

I. Exclusivity

The Private Claimants have failed to address the very simple argument made in the United States' opening brief that a water rights claimant must demonstrate that he or she has had exclusive use of the water claimed. See United State Memorandum in Support of Motion for Summary Judgment ("US Brief") at 6-7. Because they cannot refute this basic point of the law of prior appropriation, the Private Claimants have elected to address other "exclusivity" issues, none of which were raised by the United States or have a bearing on the outcome of this summary judgment motion. Nonetheless, these arguments are addressed below.

1. The United States does not argue that a water rights claimant must demonstrate exclusive use of an entire water source.

The Private Claimants misunderstand or misconstrue the United States "exclusivity" argument to be that a claimant must demonstrate "exclusivity as to control of the source of the water." Memorandum at 4, 5-11. This is not the United States' argument.

The United States readily agrees that more than one party, indeed "multiple" parties in the words of the Private

Claimants (Memorandum at 4, 10, 11), may have separate and distinct rights to divert water from a particular river, stream or other water source.

2. The United States does not argue that a water right may only be initiated on land owned by the appropriator.

The Private Claimants further misunderstand or misconstrue the United States' "exclusivity" argument to be that water rights may only be appropriated by the "owner of the land on which the water source exists." Memorandum at 4, 5-7. Again, this is not the United States argument.

The United States readily acknowledges that private water rights may be appropriated on federal lands for some purposes and some places of use. The United States also recognizes Idaho law explained in First Sec. Bank of Blackfoot v. State, 49 Idaho 740, 291 P. 1064 (1930), that a lessee may appropriate water for use on land that he or she has leased from another. With respect to state, federal and private land, however, such appropriations are valid only where they otherwise satisfy the requirements of state law. The single, fundamental point of the United States initial motion for summary judgment is that the Private Claimants cannot satisfy the "exclusivity" requirement of the state law prior appropriation doctrine.

The holding and the facts of First Security Bank help illustrate the United States' "exclusivity" argument. The question before the court in First Security Bank was "whether a water right may be perfected by a lessee of state land for use in connection with that land." at 1066. The Court held that "[i]f

the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as an agent of the owner." at 1066. The distinction between a bona fide lease, which was the subject of the First Security Bank case, and a mere license, such as the grazing permits at issue in this case, goes to the heart of the exclusivity issue at bar.

Ranchers holding grazing permits on federal lands are not lessees, but licensees, grazing by permission of the United States.³ United States v. Fuller, 409 U.S. 488 (1973); Swim v. Bergland, 696 F.2d 712 (9th Cir 1983).

A license "is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein." 25 Am. Jur. 2d Easements & Licenses § 123 (1966).

The distinction between a license and a lease:

is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license.

Kaiser Co. v. Reid, 184 P.2d 879, 884 (Cal. 1947) emphasis added (quoting Goerlitz v. Turner, 150 P.2d 278, 280 (Cal. Ct. App. 1944); See also Branson v. Miracle, 111 Idaho 933, 936, 729 P.2d 408, 411 (Idaho 1986) ("While acting pursuant to permission the claimant's rights are in the form of a license. Unless the

³This is true both before and after passage of the 1934 Taylor Grazing Act. See e.g. Buford v. Houtz, 133 U.S. 320, 326, 10 S. Ct. 305, 307 (1890); Omaechevarria v. Idaho, 246 U.S. at 352.

licensor is estopped, a license is revocable at will No interest in property vests in the licensee."). In contrast to the lease that was the subject of First Security Bank, where the claimant was able to demonstrate "continuous possession of the lands on which the water in question has been used . . . since the original appropriation of water" (at 1065), the licensees in these consolidated cases could not and did not have exclusive use of the public range land or the water rights they are claiming.

3. The United States argument, and Idaho law, is that an appropriator must demonstrate exclusive use of the water claimed.

The Private Claimants admit there is an exclusivity requirement in Idaho water law. Memorandum at 8. They argue, however, that what is required is not exclusive control over the water being put to beneficial use, but "exclusive control over the beneficial use to which they put the water appropriated, i.e., their livestock." Memorandum at 8. This argument might be appropriate if the Private Claimants were trying to acquire livestock, but as a test of the exclusivity necessary to secure a property interest in water, it is not a persuasive interpretation.

Exclusivity, like all attributes of a valid appropriation, intent, diversion, beneficial use, etc..., goes to the water, not to the people, animals, machines, mines or crops for which the water is used. What an appropriator is required to show is that he or she had the exclusive use of the water claimed.

Private Claimants' cursory attempt to deflect the impact of Jones v. Hanson, 320 P.2d 1007 (Mont. 1958) and Brasher v. Gibson, 406 P.2d 441 (Ariz. App. 1965); vacated, 419 P.2d 505 (1966), are not persuasive. See Memorandum at 9. In both decisions, it is beyond dispute that the respective courts applied the "exclusivity" requirement to use of the water claimed.

In Jones, the court held:

There is no showing by plaintiff that his use of the water was to the exclusion of others and since the springs were not subject to the complete domain and control of the plaintiff, it necessarily follows that the boxing of the springs did not constitute a valid appropriation of water for any purpose.

at 1012 (emphasis added). Similarly, in Brasher the evidence showed that the water at issue had been used by the general public for the same fishing and recreation purposes for which a private right was asserted. Because use of the water had not been exclusive, the court stated there could be no valid appropriation. Brasher at 449.

The Private Claimants completely failed to address the Robinson decision which, as the United States noted in its opening brief (at 7, fn 7), is the most closely analogous case to the situation at bar. In Robinson v. Schoenfeld, 218 P. 1041, as in this case, it was "undisputed that the range cattle of other stockraisers frequented these springs and drank therefrom." at 1042. The Utah Supreme Court held that where "other stock owners having cattle on this range had enjoyed the same rights and privileges with respect to the waters of the springs here in

question as did plaintiffs" no water right could result.

Robinson at 1043.

Even if the Private Claimants' interpretation were correct, however, and all one needed to do was demonstrate exclusive control over the entity or object using the water claimed, their claims to own the water rights at issue would fail. The simple and controlling undisputed fact is that the Private Claimants have not owned all of the livestock that have used and relied on the water sources they are claiming. Even under their unusual interpretation of the exclusivity doctrine, their claims to water fail.

In support of their position, the Private Claimants cite Lake Shore Duck Club v. Lake View Duck Club, 166 P. 309 (Utah 1917). This case involved an action to quiet title to water rights. The claimed beneficial use of water was to grow "grasses, tules, rushes, and other vegetation suitable for feeding wild water fowl" at 309.

At page 9 of their Memorandum, the Private Claimants quote the following language from Lake Shore Duck Club:

It is almost a matter of common knowledge, even among laymen that water may be appropriated and used on the public domain, and such a right acquired thereby as will be recognized and sustained, even though the appropriator never acquires title to the land.

The Private Claimants fail to mention that the Court in Lake Shore Duck Club went on to explain that such rights could only be acquired by those with "some sort of possessory right, good as against everybody but the government." at 311 (emphasis added).

Nor did the Private Claimants explain that the key point to the Court's conclusion that the plaintiff Duck Club did not have a water right, was "that the plaintiff has no possessory right whatever to the lands upon which the water is to be applied. It is therefore impossible for it to acquire the exclusive enjoyment of the use to which the water is applied." at 311.

The exclusivity requirement is closely related or identical to the diversion⁴ and "adversity" requirements which are traditional cornerstones of Idaho water law.⁵ See e.g. Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 677, 619 P.2d 1130 (1980) (and cases cited therein regarding the diversion requirement); See also Keiler v. McDonald, 37 Idaho 573, 578, 218 P. 365, 370 (1923) (and cases

⁴The heart of the diversion requirement is that the amount of water claimed must have been reduced to actual, exclusive possession before a property interest could be established. Until actually possessed, water remained "unappropriated," and under the Idaho Constitution, subject to appropriation by others. Article 15, Sec. 3.

⁵The same "exclusivity" requirement is present in other situations where, as in the creation of water rights, the law allows a party to create a property interest merely by possession. The most obvious examples are adverse possession (See e.g. Farrell v. Brown, 111 Idaho 1027, 1034, 729 P.2d 1090, 1097 (1986) (no adverse possession where evidence showed use had not been exclusive) and the rule of capture. The same concept is present in the law that governed entry and settlement on the public domain. An early case from the Idaho Territory illustrates what it meant in that era to acquire a private property interest by mere possession. Quoting the Supreme Court of California, the Idaho Court said "there must be an actual, bona fide occupation, a possessio pedis, a subjection to the will and control, as contradistinguished from the mere assertion of title, and the exercise of actual acts of ownership such as recording deeds, paying taxes, &c [sic]." Feirbaugh v. Masterson, 1 Idaho 153 (1867).

cited therein for the proposition that a valid appropriation requires beneficial use be made "openly, notoriously, and adversely" to other users.).

Exceptions to the diversion requirement have been carved out, of course, and with good reason. The important concept of exclusivity, however, remains. In R.T. Nahas Co. v. Hulet, 106 Idaho 37, 674 P.2d 1036 (Id. App. 1983), the court held that "for the purpose of establishing the existence of a stock watering right by the constitutional method of appropriation, a diversion device is not required." Nahas at 1044. In Nahas, the instream stockwater use was on private land controlled by the owner of the livestock. Indeed, key to the Nahas court's decision was its conclusion that it was impractical for a rancher to divert water from a stream "running through his property for livestock." Nahas at 1043. The landowner in this case had the legal ability to exclude others from watering livestock on the private land at issue, and, it appears from the facts recited, in fact enjoyed exclusive use of the instream rights at issue.

II. "Exclusivity" is an argument based on state law.

In their brief, the Private Claimants spend a great deal of time explaining why state law should apply to this controversy. Memorandum at 12-19. They cite the "equal footing doctrine",⁶ the 1866 Mining Act, the 1870 Amendment to that Act,

⁶ The Private Claimants begin and end their brief by discussing the equal footing doctrine. While the United States
(continued...)

numerous Supreme Court opinions, the Taylor Grazing Act and FLPMA, all for the proposition that Congress has "recognized water rights created by prior appropriation." They seem to have missed the very basic point that the United States' "exclusivity" argument is premised on the state law prior appropriation doctrine.

III. The United States is the beneficial user of the water rights it has claimed in these cases.

Because the Private Claimants failed to answer requests to admit in a timely fashion, it is a conclusively established fact that the United States is the first beneficial user of the water rights it is claiming in these consolidated cases. See US Brief at 2. Even if this issue were not already conclusively established, however, the same result would obtain because the Idaho legislature has recognized the BLM as the beneficial user of stockwater rights on federal public land.

Idaho Code Section §42-501, authorizing the BLM to own water rights for stockwatering purposes, provides in pertinent part:

The bureau of land management of the department of interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain.

⁶(...continued)
disagrees with their interpretation of that doctrine, that issue is irrelevant to the United States' summary judgment motion which has been filed under state law.

See also I.C. §42-503("Nothing herein shall be construed to deprive . . . the United States from filing application for waters nor from obtaining permit, license and certificate of water right under the general laws of the state having to do with the appropriation of water of the state.").

The Private Claimants ignore the clear consequences of §42-501, and argue instead that I.C. §42-114 is a legislative determination that "the owner of the livestock is the personal making the beneficial use of the water" on the federal public land. Memorandum at 11.⁷ Contrary to their conclusion, §42-114 does not say that a grazing permittee is the beneficial user of water on federal public land. It directs:

Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water.

This section says nothing about stockwater on the federal public land. The general rule in Idaho is that a statute will not be interpreted to apply against the government unless that intent is clearly expressed in the text of the statute. Local Union 283, Intern. Broth. of Elec. Workers v. Robison, 91 Idaho 445, 447, 423 P.2d 999, 1002 (1967)("[T]his court will not interpret broad

⁷The Special Master should note that the Private Claimants' interpretation of I.C. §42-114 is directly contradicted by a published opinion of the Idaho Attorney General that §42-114 "does not prohibit the Idaho Department of Water Resources from issuing a water right permit" to the BLM or a private landowner for stock watering purposes even though another party may own the livestock grazing the land and drinking the water. 1988 Idaho Op. Atty. Gen. 41 (No. 88-6).

language in a statute 'to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.'"(citations omitted)).

Where the question is whether the United States or a private claimant should be considered the beneficial user of water rights on the federal public land, the more specific and controlling legislative statement is §42-501, the only statute which specifically addresses the "public domain," and which can only be construed to be a determination by the Idaho legislature that the United States is the beneficial user of stockwater on those specifically mentioned lands.

The conclusion in §42-501 is well supported by the law and policy underlying BLM's management of the federal public land. BLM's mission is to see that the federal public land under its control is used for the benefit of the public. Among the many endeavors the BLM undertakes in accomplishing that mission is that it manages its land and water for use by private livestock. As the proprietor and manager of these lands, the United States should be considered the beneficial user of the stock water sources under state law. State v. Morros, 766 P.2d 263 (Nevada 1988).

The Morros case is instructive. There, the Supreme Court of Nevada held:

"In managing federal grazing lands, the United States acts in a proprietary capacity. . . . The new water sources covered by the applications at issue will permit better use of areas of the public range where grazing is limited by the lack of watering places, a problem recognized by this court . . . Congress has

mandated development of water sources for livestock and wildlife as a component of the federal land management program Thus, the United States acts in its proprietary capacity as a landowner when federal agencies seek to appropriate water under state law for livestock and wildlife watering. Although the United States does not own the livestock and wildlife, it owns the land on which the water is to be put to beneficial use. In addition, the United States benefits as a landowner from the development of new water sources on federal land." Morros at 268 (citations omitted).

The beneficial use made of these stockwater rights by the United States is analogous to other types of water uses where the water right is owned by an umbrella entity, but actually used by numerous smaller users. For example, water rights in Idaho may be owned by an irrigation district or municipality, but it is, respectively, the irrigators on the ditch, and the people in their homes and business who actually put the water to use.

Decreeing these stockwater rights to the BLM is consistent with these other examples where, under Idaho law, the right is decreed to the larger, more permanent entity that can provide comprehensive management and a stable framework in which the resource can be put to a beneficial use.

1. Stability of the Grazing Program on Idaho Public Lands.

As recognized by the Supreme Court of Montana, in the arid regions of the American West, "the control of the water means the control of the land itself." Department of State Lands v. Pettibone, 216 Mont. 361, 373, 702 P.2d 948, 955 (1985). In Pettibone, the Montana Supreme Court held that title to water rights appurtenant to school trust lands administered by the State must vest in the state. Although as the court noted,

"school trust lands are subject to a different set of rules than other public lands," that "different set of rules" does not prevent the application of Pettibone's rationale to this case. The underlying premises and policy considerations construed in Pettibone are identical to those raised here:

(1) Taylor Grazing Act permittees use federal lands only with the consent of the United States, just as the lessee in Pettibone was on the school lands "only through state action." 702 P.2d at 952.

(2) Like the Pettibone lessees, the permittees are entitled to the non-exclusive use of water appurtenant to public land.

(3) Like the state, the United States is prohibited from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefor. U.S. Const. art IV, §3 cl.2; U.S. v. State of California, 332 U.S. 19, 27 (1947).

The Court in Pettibone concluded that public lands cannot be effectively administered if private entities hold the water rights. The case stands for the proposition that a private party using public lands by consent of the government should not be allowed to control the administration of a public resource via a private stockwater right.

A quick look at the range management problems caused by private ownership of the stockwater sources on the federal public land demonstrates that the best public policy for the State of Idaho, and for the livestock industry in Idaho, is for the stockwater rights at issue to be decreed to the United States.

If private parties hold the stockwater rights on the federal public land, the following issues have the potential to

permanently and detrimentally affect the viability of the livestock industry. See generally Pettibone at 955.

1. Succession: When a grazing allotment changes hands, the allotment will be useless to both the managing federal agency and the new grazing permittee unless the private owner of the water consents to sell or lease the stockwater right to the new permittee. In many circumstances, the stockwater rights owned by the former permittee will be the only rights available to serve the allotment, giving the private owner of the stockwater right a monopoly. Thus, even if the old permittee is willing to sell, there is the potential that the asking price will be unreasonable. If the old permittee is unwilling to sell, the parcel will have to be shut down as a grazing allotment.
2. Sever and transfer proceedings: If a private party owns the stockwater, the right could be severed from the land and transferred to a different place of use. Drying up an allotment in this fashion would render it useless for both future grazers, wildlife and the BLM. The parcel would have to be shut down as a grazing allotment.
3. Multiple allottees: Where there are multiple grazing permit holders on a single grazing allotment, as is often the case in Idaho and other Western States, only one of whom owns the water source, the other permittees will be at the mercy of the owner of the water. If the owner of the water right refuses to let the others use the water, or charges them an unreasonable sum, the allotment will have to be closed to everyone but the owner of the water.
4. Ability to manage forage patterns: If a private party controls the stockwater rights on a grazing allotment, the private party, by controlling access to the water, will be able to control forage patterns and thereby dictate range conditions.
5. Land exchanges: The ability of the BLM to execute land exchanges beneficial to the general public and the ranching community would be severely hindered.

IV. Only the United States may have exclusive use of these stockwater sources.

Finally, the United States must be considered the beneficial user of the water because only the United States is in a position to show the requisite exclusivity necessary to secure a water right under Idaho law. As demonstrated here and in the United States' opening brief, these Private Claimants cannot, as a matter of fact or as a matter of law, show that they had exclusive use of the water claimed. The United States on the other hand, as the proprietor of these lands, has as a matter of fact allowed and managed their use by generations of revolving livestock owners and others, and is the only party that could legally exclude others from using these lands.

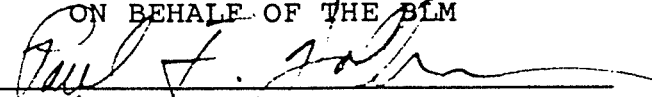
Conclusion

The Private Claimants have admitted the controlling material fact in these consolidated cases: use of the water they are claiming has not been exclusive. Accordingly, the United States, as the objector to the water rights claimed by these private parties, is entitled to judgment as a matter of Idaho law with respect to each of the subcases involving a claim to stockwater made by one of the Private Claimants. These claims, listed on Appendix C to the United States' opening brief, should be denied as a matter of law. For this same reason, all of the Private Claimants' objections to the claims made by the United States (Appendix B to US Brief) which were based on alleged private ownership of the waters at issue, should be dismissed.

The Private Claimants have also admitted the United States was the first beneficial user of the water rights it is seeking in these consolidated cases. Their objections to the water rights claimed by the United States should be dismissed on this alternative ground as well.

Respectfully submitted this 12th day of August, 1996.

UNITED STATES OF AMERICA
ON BEHALF OF THE BLM



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In Re SRBA	)	Subcase Nos. 57-11124 et.al.
	)	United States' Motion for
Case No. 39756	)	Summary Judgment

Descriptive Summary

The United States moves for summary judgment under I.R.C.P. 56 with respect to all SRBA subcases consolidated in the above captioned proceeding.

Motion

Pursuant to I.R.C.P. 56, the United States requests summary judgment be entered in its favor with respect to each of the claims for stockwater rights made by the private claimants in these subcases. The United States further requests judgment as a matter of law with respect to its claims for stockwater in these consolidated subcases. The grounds for this motion are explained in the accompanying memorandum.

Respectfully submitted this 15th day of July, 1996.

UNITED STATES OF AMERICA
ON BEHALF OF THE U.S.

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ATTACHMENT 1

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Descriptive Summary

This is the United States' memorandum in support of its motion for summary judgment.¹

Introduction

Under well established principles of state law, a water right claimant must demonstrate that he or she has had exclusive use and control over the water claimed. The purpose of this memorandum is to demonstrate that a private claim to stockwater for use on the federal public land cannot satisfy this basic prerequisite.

¹ The United States' motion for summary judgment and this accompanying memorandum are submitted pursuant to the Special Master's May 10, 1996 trial scheduling order which set an initial summary judgment deadline for July 13, 1996.

ATTACHMENT 2

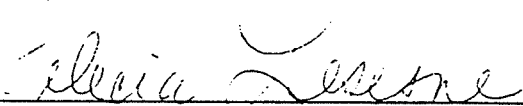
CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 1996, I caused a true and correct copy of the United States' Reply to Memorandum in Opposition to United States' Motion for Summary Judgment to be served by FACSIMILE and United States mail, postage prepaid, on the following persons:

Special Master Fritz X Hammerle
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Chief, Natural Resources Division
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