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. 67-15263, *et al.* (Hood)**
	See Ex. A
Case No. 39576	
	ORDER AMENDING SPECIAL MASTER'S REPORT
	AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. APPEARANCES

Norman M. Semanko and Garrett M. Kitamura, Parsons Behle & Latimer, for claimants Keith and Karen Hood.

Mark J. Widerschein, Katherine Laubach, and Michelle Ramus, Natural Resources Section, Environment and Natural Resources Division, U.S. Department of Justice, for objector United States of America, Department of Interior, Bureau of Land Management.

II. PROCEDURAL BACKGROUND

Trial in these subcases was held on October 2-3, 2024. On January 8, 2025, this Special Master issued a ***Special Master's Report and Recommendation, Order Denying United States' Post-Trial Request to Adjudicate Quantity, Order Denying United States' post-Trial Request to Adjudicate Forfeiture, Findings of Fact and Conclusions of Law*** (R&R). Therein, it was the recommendation of this Special Master that the above-captioned water right claims be decreed with a of priority date of April 1, 1911.

On February 2, 2025, The United States filed the *United States' Motion to Alter or Amend Special Master's Report and Recommendation, Findings of Fact, and*

Conclusions of Law ("*Motion to Alter or Amend*"). The United States reiterates the three primary issues that were presented by the United States in its post-trial briefing: 1) the relationship between the size of a cattle herd and the priority date of any water rights created via the use of water by such herd[1]; 2) whether the periods of non-use (regarding Category 4 and 5 claims) resulted in extinguishment of water rights that came into existence before the passage of the Taylor Grazing Act, and; 3) the dates upon which these water rights came into existence – i.e. the priority dates. *Motion to Alter or Amend*, p. 2.

III. APPLICABLE LEGAL STANDARD

As noted by the United States, *SRBA Administrative Order 1* does not provide a standard of review to be applied when considering a motion to alter or amend. The *Motion to Alter or Amend* filed by the United States cites to I.R.C.P. 59(e) as a basis for its *Motion*, but in its *Reply in Support of Its Motion to Alter or Amend* (March 28, 2025), the United States clarifies that I.R.C.P. 11.2(b) is more applicable in this instance.

In its ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*** (December 2, 1999) ("***Facility Volume***"), the SRBA District Court stated that while Rule 59(e) is instructive, Rule 52(b) is more appropriately applied to a motion to alter or amend under AO1 13. Therein, the SRBA District Court went on to say that "the applicable standard for amending the findings of fact, whether prior to, or post-judgement, is effectively the same. Rule 52(b) allows a court to correct or augment its findings so that an appellate court may have a clear understanding of how the trial court arrived at its decision." ***Facility Volume***, p. 20.

The SRBA District Court went on to state that Rule 52(b) "is not intended to allow parties to advance new legal theories or relitigate the merits of a case." ***Facility Volume***, p. 20 (citing ***Memorandum Decision and Order on Challenge***, Subcases 36-00061 *et al.* (September 27, 1999)). The SRBA District Court went on to discuss the four grounds whereunder a motion to alter or amend can be properly granted pursuant to

[1] The United States styles this issue as "when quantities of cattle related to the claims began using water." *Motion to Alter or Amend*, p. 2.

I.R.C.P. 52(b), only two[2] of which possibly have application in these subcases: correction of manifest error, and supplementation or amplification of findings.

IV. ISSUE OF WHETHER AN INCREASE IN THE NUMBER OF LIVESTOCK UTILIZING A STOCKWATER RIGHT RESULTS IN AN ADVANCEMENT OF THE PRIORITY DATE OF THE RIGHT

In the R&R this Special Master labeled this issue as "issue of quantity." This label does not accurately describe the issue in that the United States is not seeking to have the Hoods' stockwater rights decreed with a quantity less than the 0.02 cubic feet per second as recommended in the *Director's Reports*; rather the United States is asserting that the priority date for any of the Hoods' water right claims with a pre-TGA priority date should coincide with the time at which the size of the cattle herd turned-out onto the federal public range by the Hoods' predecessors-in-interest was at its maximum.

The United States bases this assertion on IDWR's *Adjudication Memorandum #12*, which is IDWR's interpretation of Idaho Administrative Procedures Act (IDAPA) 37.03.01.060.02.c.ii, which states:

> Only one (1) source shall be listed unless the claim is for a single water delivery system that has more than one (1) source, or the claim is for a single licensed or decreed right that covers more than one (1) water delivery system. If more than one (1) source is listed and the claim is not for a single water delivery system that has more than one (1) source, and the claim is not for a single licensed or decreed water right that covers more than one (1) water delivery system, the claim will be rejected and returned along with any fees paid, and must be refiled as multiple claims.

IDAPA 37.03.01.060.02.c.ii. IDWR's guidance document, entitled *Adjudication Memorandum #12 (Subject: Multiple Sources on a Single Claim)* (January 22, 2009) states, in part:

> Where there are two water rights with different priorities, the claimant may in some instances claim both as a single water right if the claimant wants to claim both with the later priority date. For example, the claimant has a parcel with a spring and the claimant started using the spring to water stock in 1935. The claimant then acquired a contiguous parcel with a spring and

[2] The other two grounds, which do not apply here, are "newly discovered evidence" and "change in law."

started using the spring to water stock in 1940. The claimant could submit one notice of claim for both springs if a 1940 priority date is claimed. (Or, the claimant started using a spring to water 100 head of stock in 1935, and added an additional 100 head in 1940. The claimant could submit one notice of claim for watering 200 head with a 1940 priority date.)

Adjudication Memorandum #12.

The water right claims filed by the Hoods all specify a single source of water, not multiple sources. The above-quoted Adjudication Rule and IDWR Guidance Document pertain to situations involving more than one source and are therefore not applicable to the Hoods' water right claims. Accordingly, the *Motion to Alter or Amend* is **denied** as to this issue.

V. ISSUE OF FORFEITURE a.k.a. ISSUE OF WATER RIGHT MAINTENANCE

In its ***Memorandum Decision and Order on Challenge***, Subcases 55-10288B *et al.*, (January 4, 2005) (*LU I*), the SRBA District Court stated: "The use of water rights alleged to have existed prior to the Taylor Grazing Act, but located outside of the boundaries of a subsequently issued permit would not have been able to be maintained." *LU I* at p. 27, fn. 13. In the R&R, this Special Master interpreted the words "not maintained" to be based upon statutory forfeiture pursuant to Idaho Code § 42-222. In its *Motion to Alter or Amend*, the United States asserts that this interpretation is incorrect. Rather than asserting statutory forfeiture, the United States asserts that "the Special Master need[s] to apply the *LU I* opinion, which states that water rights established before the passage of the TGA could not have been maintained in trespass."[3] *Motion to Alter or Amend* at p. 11.

The United States is not asserting statutory forfeiture pursuant to Idaho Code § 42-222 for the claims labelled "Category 4 and Category 5" based upon more than five-

[3] The subject footnote 13 from *LU I* does not use the phrase "maintained in trespass" – it only states that such water rights "would not have been able to be maintained." Although this Special Master generally agrees that use of a water right in trespass would not count as use for purposes of statutory forfeiture, this is not an issue in these subcases. There is nothing in the record to indicate that the Hoods' predecessors-in-interest engaged in any unauthorized use of public land, and the Hoods are not asserting any such use as a defense to forfeiture.

years of non-use occurring between 1936 and 1975.[4] Rather, the United States is asserting that the "non-maintenance" language found in footnote 13 in the *LU I* decision is an independent legal means by which the Hoods' Category 4 and 5 claims were extinguished sometime during the years between 1936 and 1974.[5] This Special Master disagrees with the United States' interpretation of footnote 13 in the *LU I* decision and concludes that the legal basis of the "non-maintenance" concept found in footnote 13 is statutory forfeiture pursuant to Idaho Code § 42-222.

The statutory forfeiture issue was fully analyzed in the R&R. The concept of "non-maintenance" found in footnote 13 does not have a basis that is independent of statutory forfeiture. Therefore, the United States' *Motion to Alter or Amend* is **denied** as to this issue.

VI. AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The United State asks that this Special Master reconsider all the evidence presented by the parties. *Reply* at p. 3. Having reviewed the evidence presented at trial, including the transcript thereof, and having considered the briefing of the parties, and with a view towards finding and correcting manifest error and/or supplementing and amplifying the findings and conclusions in accordance with the standards supplied by I.R.C.P. 52(b), this Special Master submits the following additional and/or corrected findings of fact and conclusions of law:

The following new Finding of Fact No. 47.5 is inserted into page 16 of the R&R.

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[4] *See* U.S. Table 1 at *U.S. Pre-Trial Brief* at 4 and *U.S. Post-Trial Brief* at 4 for a list of claims that are either wholly or partially classified by the United States under Categories 4 and 5.

[5] The United States' legal theory regarding the extinguishment of a stockwater right on federal public land due to non-maintenance involves the following hypothetical series of events: 1) livestock owner A, who owned deeded private land and who grazed his/her livestock on nearby federal public land prior to the TGA, established a beneficial use instream stockwater right with a place of use on the federal public land; 2) the instream stockwater right becomes an appurtenance to livestock owner A's deeded land; 3) after passage of the TGA, livestock owner A is not permitted to use a portion of the previously used federal public land; 4) during the time when livestock owner A is not authorized to use the federal public land associated with the place of use for the instream stockwater right, livestock owner A transfers the deeded property to livestock owner B; 5) the instream stockwater right that is appurtenant to the deeded property that is being transferred from livestock owner A to livestock owner B does not pass in the transaction for the reason that the water right was not being maintained.

47.5. In his *Testimony of Claimant*, David Edwards did not list ownership of any livestock. The standard *Testimony of Claimant* form filled out by David Edwards does not ask the attestant to list livestock. Furthermore, the standard form only has one question regarding personal property, which asks: "Have you any personal property of any kind elsewhere than on this claim?" To which David Edwards answered "No, Sir." U.S. Ex. 16 at BLM_260. No inferences can be drawn from David Edwards not providing information regarding livestock ownership that he was not asked to provide.

The following new Finding of Fact No. 49.5 is inserted into page 16 of the R&R.

49.5. In an "Application and Affidavit" dated March 21, 1916, regarding an application for an Isolated Tract, the applicant David Edwards was asked: "Question 2. To what use do you intend to put the isolated tract above described should you purchase same?" To which David Edwards answered: "grazing of my own stock." U.S. Ex. 17 at BLM_421-422.

The following new Finding of Fact No. 57.5 is inserted into page 17 of the R&R.

57.5. In his *Homestead Entry Final Proof* (Testimony of Claimant), Charles Edwards did not list ownership of any livestock. The standard *Testimony of Claimant* form filled out by Charles Edwards does not ask the attestant to list livestock. Furthermore, the standard form only has one question regarding personal property, which asks: "Have you any personal property of any kind elsewhere than on this claim?" To which Charles Edwards answered "No." U.S. Ex. 21 at BLM_189. No inferences can be drawn from Charles Edwards not providing information regarding livestock ownership that he was not asked to provide.

Finding of Fact No. 61 is replaced with the following:

61. The north end of the Horse Flat Allotment is located less than one-half mile from the modern-day Payette National Forest. U.S. Ex. 33; Joint Ex. 319 at BLM_1387. The Payette National Forest includes land formerly designated as the Weiser National Forest. The Weiser National Forest was created on May 25, 1905. *See* Richard C. Davis,

National Forests of the United States, THE FOREST HISTORY SOCIETY (September 29, 2005).

Finding of Fact No. 62 is replaced with the following:

62. In a 1919 U.S. Forest Service application for grazing permit, Charles Edwards averred that he owns 28 head of cattle and 5 horses and that he sought a permit to graze 20 head of cattle in the U.S. National Forest lands. Joint Ex No. 325 at BLM_2302-2303.

The following new Finding of Fact No. 65.5 is inserted into page 18 of the R&R.

65.5. In the Report on Qualifications of New Applicants, there are two questions, the answers to which appear on their face to be inconsistent with each other. The first is: "Is applicant dependent upon Forest range, or is range elsewhere available for his stock?" Answer: "dependent on Forest Range." The second is: "Has applicant previously held permit on National Forest? If so, when and what disposition was made of it?" Answer: "never had one." It is unclear how the applicant, Charles Edwards, could have become dependent on Forest range without ever previously having a permit for use of National Forest land. Because of this inconsistency, this Special Master places no weight on the statement in the Report on Qualifications of New Applicants that the applicant was "dependent on Forest range" or any inferences that can be made as to whether there was "range elsewhere available for his stock."[6] Joint Ex. 325 at BLM_2305.

The following new Finding of Fact No. 84 is inserted into page 21 of the R&R:

84. Water right nos. 67-15263, 67-15264, 67-15265, 67-12566, 67-15268, 67-15271, 67-15272, 67-15273, 67-15274, 67-15278, 67-15279, 67-15280, 67-15281, 67-15282, 67-15283, 67-15285, and 67-15286, (a.k.a. Category 4 and 5 claims) were not used by the Hoods' predecessors-in-interest on any land for which grazing authorization was not given during the grazing seasons from 1936 through 1974. The Hoods' predecessors-in-interest were not authorized by the United States to graze cattle on the

[6] This Special Master notes that although the question appears to solicit an "either / or" answer, it is entirely possible, and even likely, that a livestock operation would be dependent on forage from land managed or owned by more than one entity, i.e. Forest Service, BLM, state, and private etc.

land associated with the stream-reaches (in whole or in part) located thereon during that time period.

The following new Conclusion of Law No. 4.5 is inserted into page 22 of the R&R:

4.5. Water right nos. 67-15263, 67-15264, 67-15265, 67-12566, 67-15268, 67-15271, 67-15272, 67-15273, 67-15274, 67-15278, 67-15279, 67-15280, 67-15281, 67-15282, 67-15283, 67-15285, and 67-15286, (a.k.a. Category 4 and 5 claims) were neither extinguished due to non-maintenance nor forfeited pursuant to I.C. § 42-222 during the period of non-use from 1936 to 1974.

The following new Conclusion of Law No. 9.5 is inserted into page 23 of the R&R:

9.5. Once a *de minimis* instream stockwater right comes into existence, the water right can be subsequently used to water more livestock than it was used for at the time of creation, so long as the quantity element and any associated gallon-per-day limitation are not exceeded, and no injury results to other hydraulically connected water rights.

VII. ORDER

In accordance with the foregoing, the ***Special Master's Report*** is altered and amended as set forth herein. However, the ***Special Master's Recommendation*** regarding the elements of the above-captioned water rights, including the recommendation that the water rights be decreed with a priority date of April 1, 1911, remains unchanged.

Dated April 24, 2025

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

67-15263
67-15264
67-15265
67-15266
67-15267
67-15268
67-15269
67-15270
67-15271
67-15272
67-15273
67-15274
67-15275
67-15276
67-15277
67-15278
67-15279
67-15280
67-15281
67-15282
67-15283
67-15284
67-15285
67-15286
67-15287
67-15288
67-15289

(Subcase list: HOOD)
4/23/25

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO ALTER OR AMEND was mailed on April 24, 2025, with sufficient first-class postage to the following:

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