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*Attorneys for Defendants the State of Idaho, the Idaho Department of Water Resources, and Gary Spackman, in his official capacity as Director of the Idaho Department of Water Resources*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

The STATE OF IDAHO; the IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho; and GARY SPACKMAN, in his official capacity as the Director of the Idaho Department of Water Resources,

Defendants,

v.

IDAHO HOUSE OF REPRESENTATIVES; MIKE MOYLE, in his official capacity as Majority Leader of the House; IDAHO

Case No. 1:22-cv-00236-DCN

**DECLARATION OF  
SHELLEY W. KEEN**

SENATE; and CHUCK WINDER, in his official capacity as President Pro Tempore of the Senate,

Intervenor-Defendants.

1. My name is Shelley W. Keen. I am over eighteen years of age and the following statements are based upon my personal knowledge.

2. I have been employed continuously by the Idaho Department of Water Resources ("IDWR") since December 1990. I am currently the Water Allocation Bureau Chief at IDWR, and have been since 2018. As Bureau Chief, I manage and direct the operations of two of IDWR's operational sections, the Water Rights Section and the Adjudication Section.

3. The Water Rights Section implements and administers provisions of Chapter 2, Title 42, Idaho Code, by processing all manner of statutorily required water right applications and filings, including applications for new water rights, applications to change existing water rights, proofs of beneficial use, and ownership change notices. The Adjudication Section implements provisions of Chapter 14, Title 42, Idaho Code, by serving as the technical advisor to the Snake River Basin Adjudication ("SRBA") District Court in general stream adjudications. This work includes taking and investigating water right claims, filing recommendations with the court regarding whether and how claims should be decreed pursuant to Idaho law, providing information and analysis when requested by the Special Masters or the Presiding Judge, and generally assisting the court with case management.

4. In addition to managing and directing these operations, I sometimes serve as an administrative hearing officer. In this role I conduct and preside over contested cases involving questions of Idaho water law and water rights, including new appropriations and changes to existing water rights and permits. These types of proceedings are governed by the Idaho Administrative Procedure Act and IDWR's Rules of Procedure, and often require me to resolve disputed questions of how Idaho water law applies in specific factual scenarios. I also occasionally speak publicly on Idaho water right topics. For example, I have recently spoken at four forums regarding the opportunity afforded by Idaho Code §§ 42-227 and 42-113 to establish a water right for domestic or stockwater purposes without filing an application and obtaining a permit.

5. From 2007 to 2018, I was the Water Rights Section Manager at IDWR. In that role, I oversaw the day-to-day processing of water right applications and notices, the issuance of water right licenses, the processing of Water Supply Bank lease and rental applications, and the maintenance of statewide water right records. I evaluated hundreds if not thousands of water right applications and beneficial use field examinations for compliance with Idaho water appropriation law. I signed hundreds of water right permits, licenses, and transfers. When necessary, I also drafted and issued orders rejecting, denying, or voiding various water right filings to comply with Idaho water law. As Water Rights Section Manager, I also served as a hearing officer for contested water right cases, spoke publicly about water rights

program matters, and drafted program-related legislation and rule changes proposed by IDWR.

6. From 1994 to 2007 I was the Water Rights Supervisor in the Water Rights Section at IDWR. During that time, I coordinated the drafting of thousands of water right permits and licenses to comply with Idaho water appropriation law. I also explained Idaho water right requirements to hundreds of walk-in and telephone customers.

7. From 1990 to 1994 I worked in IDWR's Adjudication Section as a Water Resource Agent and Senior Water Resource Agent. I evaluated hundreds of claims filed in the SRBA for compliance with filing requirements. I also conducted investigations, including field examinations, and prepared recommendations for hundreds of SRBA claims from many areas of the state, including the Potlatch River drainage, the Little Lost River Drainage, and the Eastern Snake River Plain Aquifer.

8. IDWR's duties and responsibilities are defined by Idaho statutes, primarily those in Title 42 of the Idaho Code. My work at IDWR has required me to become familiar with many of these statutes, especially those dealing with the appropriation of water under Idaho law. Understanding and implementing or administering statutes in Title 42 has been central to every position I have held at IDWR.

9. I have a bachelor's degree in Geography from Central Washington University. I completed 29 graduate credits in Geography and Public Administration

at the University of Idaho and nine credits in Computer Information Systems at Boise State University. In 2007 I completed the Idaho Certified Public Manager program.

10. In 2021 the Director of IDWR received petitions from the following entities alleging forfeiture of stockwater rights on federal grazing allotments:

<u>Petitioner</u>	<u>Grazing Allotment</u>
Soulen Livestock Company and Soulen Grazing Association, LLC	Paddock Valley Allotment
Soulen Ranches and Soulen Grazing Association, LLC	Crane Creek Allotment
Gill Family Ranches, LLC	Cow Creek Allotment
Gill Family Ranches, LLC	Butcher Bar Allotment and China Creek Allotment

11. In 2022 the Director of IDWR received a petition from Jacob J. Smith and Cheyenne A. Smith alleging forfeiture of stockwater rights on the Fourth of July Creek Allotment.

12. I was assigned to evaluate each of the five petitions for the purposes of advising the Director whether they present prima facie evidence that the stockwater rights have been lost through forfeiture. To accomplish this task, I delegated review work to IDWR employees Glen Gardiner and Craig Saxton, I monitored the work done by Glen and Craig, and I advised Glen and Craig on various aspects of their review efforts. For the four petitions received in 2021, Glen and Craig wrote me memorandums detailing their reviews and findings regarding the stockwater rights alleged to have been forfeited. I forwarded those memorandums to the Director. For the petition received in 2022, Craig and I wrote

the Director a memorandum detailing our review and findings regarding the stockwater rights alleged to have been forfeited.

13. Idaho water rights and water law are based on “the prior appropriation doctrine,” which requires that water be put to a “beneficial use” and protects seniority of right. Idaho’s prior appropriation doctrine is often summarized by the familiar sayings that “first in time is first in right,” and that “beneficial use is the basis, measure, and limit” of an Idaho water right.

14. Idaho law generally prohibits the diversion and use of water from a public water source without first obtaining a permit from IDWR. There are exceptions to the permit requirement, however. Pursuant to Idaho Code § 42-113, livestock can be watered directly from a surface water source (in-stream watering of livestock) without first obtaining a permit. Idaho Code § 42-113 also allows instream stockwater rights to be perfected through “beneficial use” alone. Idaho Code § 42-227 exempts wells for “domestic purposes” from the permit requirement. Idaho Code § 42-111 defines “domestic purposes” as including water for livestock, as long as the use is limited to 13,000 gallons per day.

15. Idaho water rights are rights to beneficially use a portion of the public water resource, a resource which is the property of the State of Idaho and allocated for beneficial uses by the State of Idaho. Idaho water right holders do not own any portion of the public water resource or the source from which they divert, but only hold a right to use those waters in accordance with the elements and conditions of their water rights and Idaho water law.

16. Idaho water rights are defined by specific elements stated in a permit, license, or decree: owner, source, quantity, priority date, point of diversion, purpose and period of use, and place of use. Sometimes the permit, license, or decree also includes conditions that limit use of the water right or are needed to define or administer the water right. The elements and conditions define the nature and extent of the water right. The water appropriated by the water right generally may not be diverted from any other source or at any other location, used for other purpose or at any other time, or used in any other place, than those stated in the elements of the permit, license, or decree.

17. Idaho water rights do not include a right to exclude any other water users or water right holders from access to, or use of, the public waters of the state. The only exception to this rule is that a water right holder is allowed to seek curtailment of other uses of water from the same source when the other uses are interfering with the water right holder's use of water, and are either taking place under "junior" water rights (water rights having priority dates that are later in time than the "calling" right) or are not authorized by any valid water right. Further, any water that is not actually being used under a water right is considered to be available for use under other water rights, according to their priorities.

18. Idaho water rights do not include the right to access lands that are not owned by the holder of the water right, and do not authorize trespass. Access to the water source must be granted by the owner of the land (or otherwise acquired pursuant to provisions of Chapter 11 of Title 42 of the Idaho Code), even when the

licensed or decreed source, point of diversion, or place of use for a water right is located on those lands.

19. Idaho water rights must be maintained by making beneficial use of the water, and they can be lost for non-use pursuant to statutory forfeiture, in whole or part, if the water rights are not used. This is true for all Idaho water rights, even if they have been licensed or decreed.

20. It is uncommon, but not unheard of, for licensed or decreed water rights to be lost for non-use pursuant to the forfeiture provisions of Idaho Code § 42-222(2). This is partly because forfeiture is generally disfavored, and partly because there are a number of defenses against forfeiture, such as those listed in Idaho Code § 42-223. Forfeiting an unused water right is consistent with Idaho's need to maximize beneficial use of its often-limited water resources, because it frees water up for appropriation by those who will beneficially use it.

21. IDWR historically has not viewed itself as having authority to make legally effective determinations of whether decreed water rights have been forfeited, but rather has viewed this as being a question for the courts.

22. While some statutes enacted or amended during the period from 2017 to 2022 apparently authorized IDWR to make legally effective determinations that stockwater rights had been forfeited, these statutes have been repealed or amended. I am aware of no Idaho statute, administrative rule, or judicial decision that authorizes IDWR to make a legally effective determination that a decreed stockwater right has been forfeited.



23. As I understand Idaho Code § 42-224, it does not mandate forfeiture of any stockwater right. Rather, I understand Idaho Code § 42-224 as defining a procedure for determining whether state law-based stockwater rights have been forfeited under the standards of Idaho Code § 42-222(2), and as providing opportunities for stockwater right holders to defend their stockwater rights from alleged forfeiture.

24. IDWR's records show that the Idaho Department of Lands ("IDL") holds many stockwater rights used on state endowment lands. As I understand Idaho Code § 42-224, it could potentially be applied to IDL's stockwater rights.

25. I have reviewed IDWR's records for permit no. 31-12339. This permit is held by the United States Forest Service and is considered "active." IDWR has not taken any action with respect to this permit since sending the Forest Service a notice dated July 30, 2021, stating that the deadline for providing proof of beneficial use was October 1, 2021.

26. Under Idaho Code § 42-113, livestock owners can water their livestock at surface water sources such as springs, creeks, streams, and rivers (in-stream watering of livestock) even if there are no permitted, licensed, or decreed water rights for those uses. This is true throughout Idaho, including on federal lands within Idaho. Federal grazing permittees can lawfully water their livestock at public water sources on federal lands even if there are no permitted, licensed, or decreed stockwater rights for those sources.

27. When federal grazing permittees water their livestock directly from a public surface water source for which the United States holds a state law-based stockwater right, that stockwatering does not necessarily constitute a use or exercise of the United States' stockwater right. Federal grazing permittees with lawful access to public water sources on federal lands do not need a permit, license, or decree to water their livestock at those sources, and can establish and exercise their own stockwater rights in those sources pursuant to Idaho Code § 42-113. In addition, the fact that the United States may already hold a stockwater right for the same source, point of diversion, or place of use does not give the United States ownership of the water or an exclusive right to control its use, and does not preclude grazing permittees from establishing or exercising their own stockwater rights at those same locations.

28. Idaho water law provides multiple ways for federal grazing permittees to water their livestock on federal lands even when there are no permitted, licensed, or decreed stockwater rights for those lands. One way is instream stockwatering pursuant to Idaho Code § 42-113. Another way is by drilling a "domestic" well and using the water for "livestock" purposes, as authorized by Idaho Code §§ 42-227 and 42-111. The federal agency managing the land presumably would need to grant permission for constructing the well, and IDWR would have to issue a well construction permit, but if this permission was given Idaho water law would allow federal grazing permittees to use these "domestic" wells for "livestock" purposes on federal lands, provided the use did not exceed 13,000 gallons per day. Finally, the

federal grazing permittee could apply for a new water right pursuant to the permitting and licensing provisions of Chapter 2 of Title 42 of the Idaho Code.

29. Idaho water rights and water law do not regulate or control grazing on federal lands. They govern the separate question of how water is allocated and used under Idaho law. While Idaho law allows federal grazing permittees to establish their own stockwater rights in water sources on federal lands, those water rights do not authorize the holders to prohibit other grazing permittees from watering their livestock at the same sources or locations, or to otherwise control or monopolize any portion of the public water resource located on federal lands.

30. I have reviewed the declarations of Fredric W. Price and Kathryn J. Conant that were filed in this case, and the exhibits attached to these declarations. Some of the assertions in paragraphs 29-36 of Mr. Price's declaration and in paragraphs 8 and 19 of Ms. Conant's declaration appear to assume that Idaho law prohibits the use of water for stockwatering unless there is a permit, licensed water right, or decreed water right authorizing that use. Some of the assertions in these paragraphs also appear to assume that a stockwater right gives the holder exclusive use of the public water source from which the water is diverted or used, and entitles the holder to control access to and use of that public water source. These assumptions are incorrect for reasons discussed above.

31. Some of the assertions in paragraphs 34 and 36 of Mr. Price's declaration and paragraphs 8 and 19(d) of Ms. Conant's declaration appear to assume or infer that the holder of an Idaho water right may move the water to any place of

use that the holder chooses. This is incorrect. One of the elements of an Idaho water right is the “place of use” element, which provides a legal description of the only location(s) where the water may be used. Under Idaho law the water may not be used in any other location unless IDWR has approved a change to the authorized place of use. This is true even if the stockwater right is “appurtenant” to land other than the place of use, or if there is a need to move the water to a different location on federal lands.

32. Existing water rights, limited water supplies, and permitting moratoriums often make it difficult to acquire new water rights in many areas in Idaho. This is because “first in time is first in right” in Idaho. Much of Idaho is arid, the demand for water often exceeds the available supply, and the prior appropriation doctrine allocates water on the basis of priority of right. The fact that it may be difficult to acquire new water rights in many areas is not a defect in Idaho’s application of the prior appropriation doctrine. It is a natural and sometimes necessary consequence of the need to protect existing water rights and the public interest. This is the reason the permit application cited in paragraph 32 of Mr. Price’s declaration was denied. Under Idaho Code § 42-203C, senior priority hydropower water rights on the Snake River will be subordinated to new applications, such as the one Mr. Price filed, only when the use is deemed to be in the “public interest.” Denying the permit application was deemed necessary to protect the public interest in the use of the water for power generation purposes pursuant to senior priority water rights.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATE: March 14, 2023

  
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SHELLEY W. KEEN