

ADJUDICATION MEMORANDUM #58

TO: Adjudication Staff

FROM: Carter Fritschle, Adjudication Section Manager *CF*

SUBJECT: Diversion Rates for *de minimis* Stockwater Rights

REVISED: November 6, 2011

The purpose of this memorandum is to serve as a guide for recommending *de minimis* stockwater rights. This memorandum also specifically provides guidance for the implementation of Snake River Basin Adjudication (SRBA) District Court's decision in Basin Wide Issue 12.

This memorandum does not apply to non-*de minimis* stockwater uses claimed on the Irrigation & Other claim form where the appropriate filing fees are paid.

De minimis stockwater rights in general

All *de minimis* stockwater rights require a condition limiting the diversion volume to 13,000 gallons per day.

For *de minimis* stockwater rights in which the water is diverted continuously 24 hours per day, the recommendation should be for no more than 0.020 cfs and include a condition limiting the diversion volume to 13,000 gallons per day.

If the water is diverted less than 24 hours per day, the diversion rate can exceed 0.020 cfs provided the daily diversion volume does not exceed 13,000 gallons per day. For guidance on stockwater diversion rates based on water being diverted for two hours per day, see Appendix 1.

Since much of the time stockwater diversion is through an irrigation ditch, condition N15 is often added to compensate for the ditch loss that allows the 0.02 cfs to reach the place of use, which states, "The appropriator is entitled to the quantity of water described for stockwater purposes at a point of measurement where the delivery ditch enters the place of use described."¹

If the annual diversion volume of stockwater use was not previously determined by a court or IDWR, the recommendation should include a condition such as N11, which states, "The quantity of water decreed for this water right is not a determination of historical beneficial use."

¹ Historical note: Condition N01 "The appropriator is entitled to the quantity of water described for stockwater purposes at a point of measurement where the delivery ditch enters the place of use described, so long as the quantity diverted at the point of diversion does not constitute unreasonable waste," was used initially in the SRBA Test Basins (primarily in Basin 34). However, the SRBA District Court generally did strike the following portion of the condition: "so long as the quantity diverted at the point of diversion does not constitute unreasonable waste." Therefore, condition N15 was created to replace condition N01 in order update IDWR's database to match the Court's partial decrees.

De minimis instream stockwater rights (Basin Wide Issue 12)

In Basin Wide 12, the Court determined *de minimis* instream stockwater rights cannot exceed 13,000 gallons per day. A copy of Basin Wide 12 is attached as Appendix 2.

For *de minimis* instream stockwater rights, the maximum diversion rate cannot exceed 0.02 cfs. A condition limiting the right to 13,000 gallons per day must be included in the recommendations for all *de minimis* rights (at this time, this condition is N13). This is because a diversion rate greater than 0.020 cfs results in a 24-hour diversion volume that exceeds 13,000 gallons. NOTE: IDWR's policy is to round the diversion rate to the nearest hundredth of a cfs. If the claim is based on a license where more than 13,000 gallons per day was authorized, the recommended diversion volume should mirror the license.

If an instream stockwater right is claimed in excess of 13,000 gallons per day, the claimant must file on the appropriate form (the Irrigation & Other claim form), pay the appropriate fees, and provide all the required supporting evidence, including evidence of the priority date.

Appendix 1. Suggested Stockwater Diversion Rates Based on Water Being Diverted for Two Hours per Day

RECOMMENDED DIVERSION RATES FOR STOCKWATER

No. of head	Dairy cows	In cubic feet per second (cfs) Other cattle, horses & mules	Hogs	Sheep & goats
0 - 25	0.02	0.02	0.02	0.02
26 - 50	0.04	0.02	0.02	0.02
51 - 100	0.07	0.03	0.02	0.02
101 - 200	0.13	0.05	0.02	0.02
201 - 300	0.20	0.07	0.02	0.02
301 - 400	0.26	0.09	0.03	0.02
401 - 500	0.33	0.12	0.04	0.02
501 - 600	0.39	0.14	0.05	0.03
601 - 700	0.46	0.16	0.05	0.03
701 - 800	0.52	0.19	0.06	0.03
801 - 900	0.58	0.20	0.07	0.04
901 - 1000	0.65	0.23	0.08	0.04

For chickens, round to the next highest 100 and multiply this number by 0.0000018.

For turkeys, round to the next highest 100 and multiply this number by 0.0000033.

If you have more than 1000 head of stock (other than poultry), round the number of head to the next highest 100, and multiply this number by one of the following factors:

For dairy cows, multiply by 0.00065

For other cattle, horses, or mules, multiply by 0.00022

For hogs, multiply by 0.000074

For sheep or goats, multiply by 0.000037

Round the amount you calculate to the nearest 0.01 cfs and enter this amount in the appropriate space on your claim. You may claim 0.01 cfs even if your calculated amount is less than 0.01 cfs.

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TWIN FALLS, IDAHO
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Appendix 2

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

91-00012

Case No. 39576

MEMORANDUM DECISION AND
ORDER RE: BASIN-WIDE ISSUE 12

Lee Leininger, United States Department of Justice, for the United States
David Barber, Idaho Attorney General's Office, for the State of Idaho
Shawn Del Ysursa, for the J.R. Simplot Company

I. PROCEDURAL HISTORY

Basin-Wide Issue 12 was designated by the court and referred to Special Master Fritz X. Haemmerle as follows:

- 1) What constitutes a *de minimis* stock water right and may the annual consumptive use volume for such rights be described as "*de minimis*"?
- 2) Is a statement of combined usage necessary for the definition or administration of a *de minimis* water right and, if so, where should it appear in the decree?
- 3) Is it necessary to include the number of head of cattle allowed to describe or administer a *de minimis* water right and, if so, where should it appear in the decree?
- 4) Should the quantity used in cubic feet per second for a *de minimis* water right be based on a 24-hour rate, a 2-hour rate or a set constant based on a 13,000-gallons-per-day rate?

- 5) Does a water right with a stock watering purpose of use include use for wildlife?
- 6) Whether a single water right can be decreed with both a state and federal basis?

II. DECISION

The only challenge before the court is to issue no. 5 (Section IV, Subsection E) of the Special Master's *Second Amended Recommendation Re: Basin-Wide Issue 12* (August 12, 1996). Initially, the court adopts as its own Section I, Scope of Review; Section II, Procedural Background; and Section III, Standard of Review, of the Special Master's *Second Amended Recommendation Re: Basin-Wide Issue 12*.

To clarify the record, the recommendations contained in Section IV, subsections A - F are adopted by this court as follows:

A. Annual Volume of Consumptive Use for *De Minimis* Water Rights is Not Required to be Decreed.

The recommendation in Section IV.A. is adopted in its entirety.

B. A Statement of Combined Usage for the Definition or Administration of a *De Minimis* Water Right is Not Necessary.

The recommendation in Section IV.B. is adopted in its entirety.

C. It is Not Necessary to Include the Number of Cattle in *De Minimis* Claims.

The recommendation in Section IV.C. is adopted in its entirety.

D. The Quantity Used in Cubic Feet Per Second for a *De Minimis* Claim Under L.C. § 42-1407A(12) Involving a Diversion May be Based on Any Hourly Rate so Long as the Amount is Capped to a Quantity Not to Exceed 13,000 Gallons Per Day.

The recommendation in Section IV.D. is adopted in its entirety.

E. Under a State-Based Appropriation, a Water Right Which Includes Wildlife as a Purpose of Use Can Be Perfected Only Where There is a Diversion Accompanied with an Intent to Use the Water for Wildlife Purposes.

This recommendation is adopted, in part, and stricken, in part.

The issue addressed by the Special Master in this subsection is set forth in the order of referral as:

- 5) Does a water right with a stock watering purpose of use include use for wildlife?

Order Designating Basin-Wide Issue 12, Referring Matter to Special Master Haemmerle and Setting Hearing (April 5, 1996).

Through briefing and hearing, the question was presented by the parties to the Special Master as 1) whether a wildlife use can exist without a diversion and 2) whether a wildlife purpose of use exists as an incidental use to any stock water claim. In response to the parties' question, the Special Master ruled that 1) a wildlife use can only exist where there has been a diversion and 2) a wildlife use does not exist as an incidental use to a stock water claim under I.C. § 42-1401A(12).

Because the requirement of a diversion to perfect a wildlife use was neither referred to the Special Master nor is its resolution necessary to answer the matter referred, that portion of the recommendation dealing with diversion (page 9, Section E, second paragraph, "the first inquiry . . .," through the second full paragraph on page 10) is stricken as beyond the scope of the referral.¹

This court adopts the Special Master's recommendation in Part E resolving the "second inquiry" (page 10, last paragraph, through page 11).

The United States alleges that the language of I.C. § 42-1401A(12) grants it a wildlife purpose of use as an incident or part of any stock water right. It relies on the statutory language that "[s]tock watering use" means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day." I.C. § 42-1401A(12). Reading the statute in the conjunctive, the United States claims entitlement to a wildlife use as part of each stock watering right. Primary principles of statutory construction require the court to reject the United States' interpretation.²

Using the plain and ordinary meaning of the words in the statute, the word "or" requires reading the act in the disjunctive. Had the legislature meant the statute to be read in the conjunctive, it would have used the word "and." It is unreasonable to read the statute otherwise.

¹ Basin-Wide Issue 12 does not raise the issue of a diversion requirement for instream wildlife uses. This decision neither addresses nor resolves the issue. It has been raised directly in a subcase before a Special Master and is on challenge to this court. It will be resolved in that subcase only.

² The standard used by this court for statutory interpretation is set forth in *Rim View Trout Farms v. Higginson*, 121 Idaho 819, 822 (1992).

Giving effect to all the words used in I.C. § 42-1401A(12) further supports the Special Master's recommendation. This definition of a *de minimis* stock watering and wildlife uses is limited to "the use of water solely for livestock or wildlife" I.C. § 42-1401A(12) (emphasis added). The correct parsing of the sentence reveals that "solely" modifies both "uses" (livestock and wildlife). Therefore, the correct interpretation of the sentence is that the term "stock watering use" includes uses solely for livestock or solely for wildlife. Solely means only or exclusively. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1387 (College ed. 1962). It does not mean together, part of, or incidental to as suggested by the United States. The plain and ordinary meaning of the terms used does not render wildlife use incidental to or as a part of a stock watering use.

The Special Master insightfully found, and this court has adopted, the correct interplay between the two statutes reviewed as part of this basin-wide issue: I.C. § 42-1401A(12) and I.C. § 42-113. The former defines the term "stock watering use" in the Snake River Basin Adjudication (SRBA) as that class of claims where the diverted use is solely for stock watering or solely for wildlife and where the diversion is 13,000 gallons per day or less. The definition of this class of claims does not eliminate accepted statutory stock watering instream uses which do not require a diversion. I.C. § 42-113. For purposes of the SRBA, the legislature did not include instream stock watering uses in the defined class set by I.C. § 42-1401A(12). Just as with instream stock watering uses, I.C. § 42-1401A(12) is not a legislative pronouncement on instream wildlife claims. I.C. § 42-1401A(12) simply defines a particular class of diverted uses for stock watering or wildlife which falls under 13,000 gallons per day. The statute, by its terms, does not address instream uses.

I.C. § 42-1401A(12) defines a class of *de minimis* water rights for treatment in the SRBA. The class includes small rights (13,000 gallons per day or less) diverted solely for stock water or solely for wildlife. The definition does not include lawful instream uses. Similarly, it does not address those single water rights which allow multiple uses.

To clarify, instream stock water rights will be treated the same as diverted stock water rights; that is, as "*de minimis*" (13,000 gallons per day or less) unless the claimant proves a greater quantity and pays the required filing fee for an amount of water in excess of 13,000 gallons per day.

Additionally, claimants may be decreed a water right for more than one use where there is proof of intent as to each of the claimed uses. No right can be decreed for multiple uses where one use is claimed as mere incident of another use.

The recommendation of the Special Master that I.C. § 42-1401A(12) does not allow a wildlife use incidental to a diverted stock water use is adopted. The recommendation that I.C. § 42-113 does not allow a wildlife use incidental to an instream stock watering use is also adopted. A wildlife use requires the intent to put water to that beneficial use and cannot be incidental to a stock watering use. Neither I.C. § 42-1401A(12) nor I.C. § 43-113 dispenses with the intent requirement when perfecting a water right.

The Special Master's recommendation that instream wildlife claims require a diversion is not adopted and is stricken as beyond the call of the question referred.³

F. A Single Water Right Cannot Be Decreed with Both a State and Federal Basis.

This recommendation is adopted in its entirety.

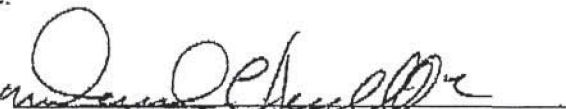
Section V, Summary, is adopted with the exception of Part 5 as discussed above.

III. CONCLUSION

This *Memorandum Decision and Order* constitutes the court's Findings of Fact and Conclusions of Law on Basin-Wide Issue 12.

IT IS SO ORDERED.

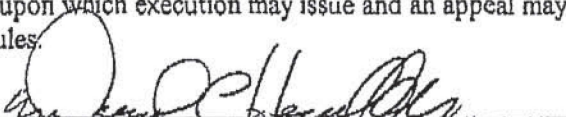
DATED April 25, 1997.


DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

RULE 54(B) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby certified, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED April 25, 1997.


DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

³

This court again reiterates that this decision leaves open the question of whether a wildlife use requires a diversion or may be instream which will be decided in the challenge in subcase 36-15452.