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: 72-15929C**
	)	
Case No. 39576	)	**ORDER ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT**
	)	
	)	

I. PROCEDURAL AND FACTUAL BACKGROUND

This matter involves a stockwater claim filed by the Bureau of Land Management (BLM) on behalf of the United States Department of Interior. The State of Idaho (State) filed a timely objection to the priority date. The State filed a *Motion for Summary Judgment* arguing that since the United States does not actually own stock, the United States can own a stockwater right only provided the United States entered into an agency relationship with the party that actually appropriated the water. As a matter of law, the State argues that the federal government lacked any authority to enter into an agency relationship prior to passage of the Taylor Grazing Act, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986)). The United States argues that its ownership to stockwater rights does not depend on an agency relationship with the actual appropriator. The United States argues that its ownership and resulting priority date arise out of its authority to manage the federal land.

As to the *Cross-Motion for Summary Judgment*, the United States argues that the State lacks standing to object to this subcase. If the State does have standing, the United States argues that the State should be estopped or that laches should be applied to prevent the State from pursuing its objection because of the State's failure to raise the issue of agency in the test basins. The basis of these theories is that the Idaho Department of Water Resources (IDWR) reported numerous stockwater rights in favor of the United States with priority dates earlier than 1934. Since the State

did not object to recommendations in the test basins and since the State's interests were litigated through IDWR prior to 1994, the United States alleges that the State should be bound by this policy.

II. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J.A. Freeman Co.,* 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the nonmoving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R..G. Nelson A.I.A. v. M. L. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of nonmoving parties. *Barlow's, Inc. v. Bannock Cleaning Corp*., 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

The Director's Report constitutes *prima facie* evidence of the water right. I.C. § 42-1411(4). When a party relies on the Director's Report, that party is relieved from offering any facts in support of the summary judgment motion. Giving evidence *prima facie* status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *In Re: SRBA, Case 39576*, ___ Idaho ___, 947 P.2d 409 (1997). On summary judgment, the party opposing any element in the Director's Report has the burden of raising an issue of material fact in order to defeat summary judgment. I.C. § 42-1411(5). Presumptions may support either the moving or nonmoving party on summary judgment. *See e.g., Olsen v. J.A. Freeman Co*., 117 Idaho 706, 791 P.2d 1285 (1990); *In the Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (1994).

III. STATE'S MOTION FOR SUMMARY JUDGMENT

A. Incorporation of Joyce Order

The State's *Motion for Summary Judgment* is intricately related to this court's prior decision involving Joyce Livestock Company and the United States. To the degree that the issues are interrelated and the parties cited to the Joyce decisions, the court adopts by reference sections IV(A) and (B) of the ***Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions*** (March 23, 1997) (***Order***), attached as Exhibit A. In a nutshell, in sections IV(A) and (B) of the ***Order*** the court held that: (1) federal law does not prevent the appropriation of stockwater rights on the public domain by private parties; (2) under state law, water rights appurtenant to land may be owned by a party other than the landowner; (3) exclusive access to the water source is not required to perfect a water right; and (4) for rights claimed by beneficial use, I.C. §§ 42-114 and 42-501 are not relevant or dispositive as to ownership.[1]

B. Agency

Under the State's *Motion for Summary Judgment* and under the assumption that the United States does not actually own stock and is not in the stock water business, the State asserts that the United States may own a water right only through the efforts of an agent that actually perfected the water right. Under this theory, the State alleges that the earliest the United States may claim ownership to stock water rights is the date coinciding with passage of the Taylor Grazing Act, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986)). The United States alleges that its ownership of stock water rights does not depend on an agency relationship and that it may own stock water rights by virtue of the United States' ownership and management of the land where the stock water rights were perfected.

In addressing the agency issue, it is helpful to understand the United States' status with respect to its role as a proprietor of land. When the United States is not claiming any reserved water rights, it exercises the right of any other ordinary proprietor under state law. "Where water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *United States v. New Mexico*, 438 U.S. 696, 702 (1978). "[T]he [federal] government has, with respect to its own lands, the rights of an

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[1] Water right 72-15929C is based on beneficial use, not a permit or license issued under I.C. § 42-501.

ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property." *Camfield v. United States,* 167 U.S. 518, 524 (1897); *In Re Water of Hallet Creek Stream System*, 749 P.2d 324, 329 (Cal. 1988).[2] Since the United States acts as any other landowner with regard to possession of property, the United States may perfect a water right the same way as any other public or private landowner. As any other landowner in a prior appropriation jurisdiction, possession of the land does not include possession of the water perfected on that land. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939).

There are several ways for the landowner to possess a water right. First, the landowner may perfect the right by actually appropriating the water. I.C. § 42-103; *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). Second, the landowner may purchase the water right, or the right may otherwise be conveyed from the party that actually perfected the right to the landowner. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1952). Third, a water right may be adversely possessed. *Bachman v. Reynolds Irr. Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936). Finally, the right could be perfected on behalf of the landowner by a party acting as the landowner's agent. *First Sec. Bank of Blackfoot v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930) ("If 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.")[3]

The United States argues that its status is no different than municipalities, canal companies, irrigation districts, or feedlot operators who "routinely hold valuable water rights in Idaho and throughout the west, and yet they do not turn the tap at the faucet, spread the water upon cultivated acres, or own the stock that consumes the water." *U.S. Cross-Motion for Summary Judgment and Response to State's Motion* at 20. In support of this argument, the United States cites *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist*, 14 Idaho 450, 94 P. 761 (1908). The United States cites this case for the following proposition:

> Fundamental in the decree of a water right to an organizational entity is the recognition that the use could not be made were it not for the larger organization, and

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[2] *In Re Water of Hallet Creek Stream* System, the United States claimed that it was entitled to assert a claim for a water right under state law like any other "ordinary proprietor."

[3] Any attempt by the United States to claim ownership to a right perfected by another appropriator, where the United States' claim to ownership is not based on one of the previously mentioned methods of acquiring a water right, would involve a taking without just compensation. IDAHO CONST., art XV, § 3; art. 1, § 14.

> as a matter of law and policy it is the larger organization that should be considered the "appropriator" of the water right.

United States Brief at 20.

This argument lacks merit. The Idaho Constitution specifically recognizes that an entity who appropriates water may not be the same party that actually applies the water to a beneficial use. In this type of case, the user who actually applies the water to a beneficial use operates under a "sale, rental, or distribution" agreement. IDAHO CONST., art. XV, § 1. The user of water under a sale, rental, or distribution agreement does not own the water right; the user exercises the right through the entity that actually appropriated the water. IDAHO CONST., art XV, §§ 3, 4 and 5; *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935). It is the appropriator, not the user, that owns the water right. *Id.* at 19.

Explaining the relationship between the actual appropriator and the user under a sale, rental, or distribution agreement, the Idaho Supreme Court in *Farmers' Co-op. Ditch Co.* stated:

> Whatever the differences may be in the fact with reference to the use and application of the water, the ditch owners in every instance are necessarily the appropriators of the water within the meaning of the constitution and statute. In *Wilterding v. Green*, 4 Ida. 780, 45 Pac. 134, this court stated: "A company or individual may appropriate and take out the water of a stream for sale, rental or distribution or for any beneficial use. When so taken out it becomes a public use and the sale or rental of it for pay is a franchise." It is true, as intimated by this court in *Hard v. Boise City Irr. Co.*, 9 Ida. 602, 76 Pac. 331, 65 L.R.A. 407, that the appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without water consumers. In other words, it takes the water user, applying the water to a beneficial purpose, to enable a ditch company that has appropriated waters for sale, rental or distribution, to continue the diversion of the water.

Id. at 457-458.

Farmers' Co-op. Ditch Co. does not support the United States' theory that it owns water rights perfected on the public domain merely under the notion that the United States is the "larger organizational entity." *Farmers' Co-op. Ditch Co.* simply states the well-established constitutional principle that it is the actual appropriator who owns the water right. If the United States is not the actual appropriator of water, then it must perfect a water right through an appropriator under an

agency theory or the right must be conveyed to the United States from a party who actually perfected the right.[4]

The United States' theory that it owns water rights because it is the "larger organizational entity" is nothing more than a thinly disguised quasi-riparian theory. The United States does not argue that it owns all water rights located on the public domain. However, the United States does argue that if a water right is perfected on the public domain, it owns the right even though the United States may not be the party that actually appropriated the water. The United States asserts this is also true even though there may be no formal agreement or consideration to transfer the right from the party that actually perfected the right. The United States' theory is contrary to both federal and state law which recognizes the ability of private appropriators to perfect water rights on the public domain. *First Sec. Bank of Blackfoot v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930); *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168 (1974); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922); *United States v. New Mexico*, 438 U.S. 696, 716-717 (1978); *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967); *See* ***Order*** §§ IV(A) and (B).

Since the United States admits, as a matter of fact and law, that it is not claiming this right under an agency theory (Tr., p. 35, ll. 6-9), the court is not required to address whether, as a matter of law, the United States had the legal authority to enter into an agency relationship with the actual appropriator of water prior to passage of the Taylor Grazing Act. However, the court notes that if the United States does claim a water right through the efforts of an agent, the agent acting on behalf of the United States must have had express authority to enter into such an agency relationship.

> The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power.

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947), *appeal from*, 67 Idaho 196, 174 P.2d 834 (1946) (citations omitted).[5]

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[4] The record does not reflect and the United States did not argue a claim to this right under an adverse possession theory.

[5] There are three types of agency: express authority, implied authority, and apparent authority. Express and implied authority are forms of actual authority. Apparent authority arises when actual authority is absent. *Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997). Under *Federal Crop Ins. Corp. v. Merrill* at 384, it is doubtful whether a federal agent can bind the United States under any authority other than express authority.

Taking these principles into consideration, both parties made dispositive judicial admissions. A "judicial admission" is defined as "a formal admission made by an attorney at trial is binding on his client as a solemn judicial admission." *McLean v. City of Spirt Lake*, 91 Idaho 779, 783, 430 P.2d 670 (1967). "Judicial admissions may occur at any point during the litigation process." *See, e.g., Kohne v. Yost*, 818 P.2d 360, 362 (Mont. 1991). "For a judicial admission to be binding, it must be an unequivocal statement." *Id*. Here, the United States admits that it is not the party that actually appropriated the water with its own stock (Tr., p. 35, ll. 10-15) and, as previously indicated, is not claiming that the water right was perfected by an agent. The State, however, is not contesting, as a matter of law or fact, the United States' claim to this water right after June 28, 1934, the date coinciding with passage of the Taylor Grazing Act. (Tr., p. 11, ll. 21-25; p. 12, ll. 1-3).[6]

For these reasons, there is no material issue of fact or law that the priority date for this right is **June 28, 1934**.

IV. UNITED STATES' MOTION FOR SUMMARY JUDGMENT

A. Standing

The United States alleges that the State lacks standing, both in its sovereign and proprietary capacities, to appear in this subcase. The United States' allegation can be resolved by determining whether the State has standing in its proprietary capacity. Because the State, through its representative agencies, owns water rights within the Snake River Basin, it is a claimant in the SRBA. I.C. § 42-1401A(1). As a claimant, the State may file objections to any water right recommended in a director's report. I.C. § 42-1412(1). There is no statutory requirement that any claimant show injury to object to a water right. Regardless, the United States argues that the State must show concrete injury to have actual standing in a particular subcase.

The basic principles of standing were outlined by the Idaho Supreme Court in *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989). "Thus, to satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.* at 641, *citing, Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 (1978). Relying on this general principle, the United States cites *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992),

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6 The court notes that nothing in the Taylor Grazing Act, as a matter of law, created the required agency relationship necessary for the United States to automatically possess all water rights that were perfected on the public domain prior to passage of the Act. If anything, the Taylor Grazing Act continued the well-established principle that all water rights on the public domain "which has hereto vested or accrued" or those rights "which may hereafter initiated" would continue to be owned by the private party perfecting the right.

for the proposition that despite Idaho's statutory scheme granting claimants the right to object to claims recommended in a Director's Report, concrete injury must still be established in order to file objections.

The United States' reliance on *Lujan* is misplaced. *Lujan* dealt with the narrow issue of standing, in federal courts, for parties filing citizen-suits filed against the government. In those classes of cases and despite statutes providing for citizen-suits, the Supreme Court held that "it is clear that in suits against the government, at least, the concrete injury requirement must remain." *Id*. at 578. To the extent that *Lujan* has any validity as to standing in Idaho courts, the narrow holding did not alter the general rule perpetuated in *Lujan* as follows:

> Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to a class of persons entitled to bring suit.

Id. at 580.

As to general water adjudications, Congress has defined the injury and the class of persons "entitled to bring suit" in a general stream adjudication. In consideration of waiving its sovereign immunity in state court adjudications for general stream adjudications, Congress recognized that all parties within the scope of the adjudication have an interest in the outcome of the adjudication. "[B]y reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in particularly every case, are interested and necessary parties to any court proceedings." S. Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951).

The argument advanced by the United States that a party must show a concrete injury to file an objection to a water right would reduce the SRBA to a series of private adjudications. The SRBA is a general adjudication where all users within the scope of the adjudication are presumed to have an interest in the outcome of all other rights. Citing the purposes of the McCarren Amendment, 43 U.S.C. 666(a), the Ninth Circuit Court of Appeals in *State of California v. Rank*, 293 F.2d 340, 347 (9th Cir. 1961), *reversed on other grounds, Dugan v. Rank*, 372 U.S. 609 (1963), stated:

> There can be little doubt as to the type of suit congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceedings which in the law of western waters is known as a "general adjudication" of a stream system: one

in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated.

The purpose and nature of a general adjudication cited by Congress and federal courts were also recognized by the Idaho Legislature and Idaho Supreme Court. I.C. § 42-1406A; *In re Snake River Basin Water System*, 115 Idaho 1, 6-7, 764 P.2d 78 (1988). "As Congress realized, under the law of prior appropriation, all water users are interrelated. The amount of water one user consumes affects the amount of water available for other water users." *Idaho Dept. of Water Resources v. U.S.*, 122 Idaho 116, 832 P.2d 289 (1992), *overruled on fees issue*, *U.S. v. Idaho*, 508 U.S. 1 (1993).

For purposes of standing, the presumed interconnection of all water users in a stream system, and the presumed interest each shares in the outcome of every other water right, is important in a case like the SRBA where there are nearly 180,000 claims. If, as the United States alleges, concrete injury and interest is required to file an objection, the court would have to litigate injury and interest in every subcase prior to addressing substantive issues relating to the objection. Under that scenario, it is possible that the objecting party would have to retain a hydrologist to prove interconnection in order to establish an interest and potential concrete injury. To avoid this expensive and impossible scenario, general stream adjudications must presume that all water rights are interconnected and that each claimant in the stream system has an interest in the outcome of the litigation.[7]

The court finds that the State has standing in its proprietary capacity to appear in this subcase. Therefore, it is unnecessary for the court to address the State's assertion that it has standing in its sovereign capacity or under the doctrine of *parens patriae*.[8]

B. Judicial Estoppel

The United States alleges that the State should be estopped from objecting to stock water rights claimed by the United States. The United States argues that between 1987 and 1992, the State litigated its interests through IDWR and, that at that time, "the State affirmatively took the position in this adjudication that the USBLM's priority date for its de minimis water rights was true and

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7 Parties seeking to participate in a subcase under I.R.C.P. 24(a) have to show some specific interest. "In order to give I.C. § 42-1412 [objections and responses] meaning, parties must show a specific interest in order to intervene as a matter of right under I.R.C.P. 24(a)." *In re SRBA Case No. 39576,* ***Order Accepting, in Part, and Denying, in Part, Special Master's Report and Recommendation.*** (Subcase 36-15452, Oct. 10, 1997).

8 "Parens patriae" means "parent of the country" and is invoked to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc. BLACKS LAW DICTIONARY 1003 (5th ed. 1990).

correct." *United States Brief in Support of Cross-Motion for Summary Judgment* at 4-5. The State asserts that it should not be estopped from raising the agency issue at this stage of the SRBA.

The elements of judicial estoppel are as follows:

> It is quite generally held that where a litigant, by means of such sworn statements, obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject matter.

Loomis v. Church, 76 Idaho 87, 93-94, 277 P.2d 561 (1954), *cited in McKay v. Ownes*, 130 Idaho 148, 937 P.2d 1222 (1997).

The first inquiry is to identify the "sworn statement" at issue. Here, the United States points to previous stock water recommendations made by IDWR in the test basins for stock water rights made to the United States with priority dates earlier than 1934. Having identified the sworn statement, the next inquiry is whether the litigant, in this case the representative state agencies, obtained "a judgment, advantage or consideration" as a result of the statement. Here, the party obtaining a judgment, advantage, or consideration as a result of the sworn statement was the United States. It was the United States that obtained the partial decrees based on IDWR's recommendations. Regardless of what IDWR's recommendations were for the test basins, the State did not obtain any judgment, advantage, or consideration as a result of the United States obtaining partial decrees in the test basins for stock water rights with priority dates earlier than 1934.

For this reason, the court finds that the State is not bound by judicial estoppel from contesting the priority date for this water right.

C. Laches

The United States asserts that under the doctrine of laches the State should not be able to contest the priority date for this water right. The elements of laches are as follows:

> The defense of laches is a creation of equity and is a specie of equitable estoppel. The necessary elements of laches are: (1) defendant's invasion of plaintiff's rights, (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit, (3) lack of knowledge by defendant that plaintiff would assert his rights, and (4) injury or prejudice to defendant in event relief is accorded to plaintiff or the suit is not held to be barred.

Huppert v. Wolford, 91 Idaho 249, 257, 420 P.2d 11 (1966). Whether or not laches applies is primarily a question of fact. *Quintana v. Quintana*, 119 Idaho 1, 802 P.2d 488 (1990).

The inquiry is whether the State impermissibly delayed in raising its objection to priority date. There is no factual dispute that the State filed a timely objection to the right. As a matter of law, the State did not have standing to object to the water right until the Director's Report for Basin 72 was filed. I.C. § 42-1411(6)(f). The United States asserts that "[t]he delay in this instance is the four and a half years it took for the State to object to the United States' beneficial use priority date." *United States' Reply Brief in Support of Cross-Motion for Summary Judgment* at 5. This is not the type of delay that can support a claim of laches. Under this theory, any party in the adjudication who could have, but did not, object to recommendations for the United States' stock water claims in the test basins would be forever foreclosed from objecting to similar stock water recommendations made in subsequent basins.

Delay alone cannot support a claim of laches unless the party asserting laches can also establish an injury or disadvantage as a result of the delay. *Huppert v. Wolford* at 257. The United States cites as its injury or prejudice costs incurred as a result of the United States' investigation of its stock water claims. *Affidavit of Gary Madenford*.[9] Since parties have a duty to investigate claims prior to those claims being filed, *see* I.R.C.P. Rule 11(a)(1), the court presumes that these costs would have been incurred prior to the time the recommendations or objections for these stock water rights were ever filed.

For these reasons, laches is inapplicable to defeat the States' objection.

VI. CONCLUSION

1. The State's *Motion for Summary Judgment* is **GRANTED**. If the United States does not claim a reserved right, appropriate its own water right, purchase or otherwise negotiate for a water right, adversely possess a water right, or obtain a right through the efforts of an agent who actually appropriated the water on behalf of the United States, the United States does not own a water right. Absent one of these ownership theories, the United States does not own a water right simply because it manages the public domain. As a matter of law and fact, the State does not contest the United States' claim to this water right after June 28, 1934. Therefore, the priority date for this water right shall be June 28, 1934.

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[9] The Affidavits of Gary Madenford and David Tuthill, Jr. were not filed with the court as required under I.R.C.P. 5(d)(1). For future reference, any "papers" other than briefs which are required to be served on opposing parties must be filed. Affidavits attached to briefs are not properly considered unless they are filed. Nevertheless, the court will consider these Affidavits.

2. The United States' *Cross-Motion for Summary Judgment* is **DENIED**. The State has standing in its proprietary capacity. Neither estoppel or laches prevents the State from pursuing its objection to this water right.

DATED April 8, 1998.

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FRITZ X. HAEMMERLE
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT** was mailed on April 8, 1998, with sufficient first-class postage prepaid to the following:

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