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**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

Case No. 39576

) Subcase Nos.: 25-13635, 25-13637, 25-13653,
) 65-19960, and 65-19962
)
) **AMENDED MOTION TO ALTER OR**
) **AMEND**
)

Descriptive Summary

This is the United States' amended motion to alter or amend the Special Master's recommendation for the above referenced subcases.^{1/2}

^{1/} This motion challenges the ruling applicable to water right claims 25-13635, 25-13637, 25-13653, 65-19960, and 65-19962 subject to separate Reports and Recommendations issued by the Court on December 17 and 18, 2002.

^{2/} The United States was granted the right to amend its initial pleading by order of the Court. The amendments included in this document are; a new paragraph subsection 1A., and footnotes 3, 7 and 8, and; Exhibit A, Stock-Raising Homestead Entry - Original Application and Affidavit of Sophia Nielsen, dated December 12, 1925.

Introduction

These water right claims are “dual-based”, i.e., they are claimed under a federal law reservation theory and a state law prior appropriation theory. The Special Master recommends that the federal law claim based upon the executive order Public Water Reserve No. 107 (PWR 107) be denied and the state law claim be decreed. The United States respectfully asks that the Special Master alter or amend his ruling and recommend that these claims, and similarly situated claims that may arise in the future, be decreed pursuant to the PWR 107 reservation.

At the hearing for these claims held pursuant to Idaho Code 42-1411A(14), the United States presented affidavits signed by BLM water rights personnel attesting to the fact that these springs are located on federal lands and that the springs contain sufficient water for use by livestock.³ The affidavits also stated that homestead entry applications existed on the land containing the spring sites at the time of the enactment of PWR 107. Based on this evidence, the Special Master concluded that

³ The United States notes that a previous order of this Court by Special Master Haemmerle is directly on point regarding the sufficiency of BLM affidavits filed in support of a claim under PWR 107. The Court’s *Order Denying Motion for Default Judgment (PWR 107)*, subcases 57-02493 *et al.*, dated November 16, 1998 states:

Under the express provisions of PWR 107, the United States alleges that the *prima facie* elements for a PWR 107 reserve are as follows:

- a. Identification of a spring or waterhole;
- b. Located on land that was unreserved federal public lands in 1926; and
- c. Containing sufficient water for purposes of stock watering.

See Memorandum in Support of Motion for Entry of Default Judgment and Amended Motion to Vacate Trial at 4. This court agrees with these *prima facie* elements.

Emphasis added. While the claims under subcases 57-02493 *et al.* were initially denied based upon the Special Master’s determination that the quantity of water claimed was in error (an issue subsequently rectified when the BLM agreed to accept 0.02 cfs or 13,000 gallons per day as the decreed water amount), the Special Master nonetheless agreed with the United States as to the elements necessary to establish a PWR 107 water right. These elements do not include the land entry application status.

the entry applications demonstrate that the lands “were homesteaded” at the time that President Coolidge signed PWR 107 and that the water on the lands was appropriated. *Special Master’s Report and Recommendation, subcase 65-19812, et al.* Accordingly, the Special Master ruled that the places of use containing the water were not reserved.⁴

The United States respectfully maintains that whether a homestead application was filed on the lands containing these water sources is immaterial to and does not defeat a federal reserved water right based upon PWR 107. Fundamentally, a homestead entry application does not demonstrate that the water on the entry sites was privately appropriated - or even that entrypersons actually homesteaded the land. The fact that the land entries expired and title to the lands never left federal hands supports a conclusion that the springs were never privately appropriated. Furthermore, no private party has claimed a water right at these spring sites in this adjudication, evidencing that no private appropriation, past or present, occurred at these sites. Finally, denying the BLM a federal reserved water right at these sources is contrary to the Idaho Supreme Court’s decision that PWR 107 springs should be decreed to the federal government to “ensure the perpetual use of the water for stockwatering purposes” *United States v. State*, 131 Idaho 468, 959 P.2d 449, 452 (1998).

The task of investigating the historical use of federal lands that contain PWR 107 spring sites is time consuming. The BLM must examine Master Title Plats, Historical Indices, and Serial Registry

⁴ The reports and recommendations do not detail the grounds for the Special Master’s ruling. Based upon statements made at the hearing, the United States believes it has accurately stated the rational for the Special Master’s denial of the federal reserved water right.

pages to determine where, when and what type of entry was attempted.⁵ This burdensome requirement is unnecessary because the requirements for establishing a PWR 107 water right are satisfied regardless of whether a homestead entry application existed at the time of the enactment of the executive order.

1. A prior appropriation water right cannot be inferred from the filing of a homestead entry.

The Special Master's recommendations assume that the existence of a homestead entry application at the time of the reservation is proof of private appropriation of water on the entry lands. This assumption is misplaced. These homestead entries were not patented (i.e., fee simple title was not granted to the entryperson) and title has and remains with the federal government. It is improper, therefore, to deny the United States' claim to a PWR 107 water right when the historical evidences strongly suggests that no prior appropriation was ever made.

As the United States has previously argued -- and this Court has previously recognized -- "settlement" on public lands containing water sources was subject to gross speculation and fraudulent behavior:

[T]hose involved in the livestock industry developed a number of schemes for either controlling or acquiring ownership of lands immediately surrounding key water sources. A number of these schemes were unlawful and fraudulent. . . . Stockmen used "strawmen" for the purpose of making entries under the Homestead Act of other applicable land laws on lands immediately surrounding water sources and then "legitimately" purchased back those same lands.

Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of

⁵In addition, research in the National Archives would be necessary to try to determine why an entry was relinquished or canceled.

Recommitment to Special Master Cushman Consolidated Subcases 23-10872 et al., Joint Submission Subcases 23-10894 et al. (hereinafter “Memorandum Decision on Scope of PWR 107”) (Issued December 28, 2001).

Concern that a few individuals were illegitimately controlling scarce water sources on the public lands led Congress to enact strict land acquisition measures. For instance, entrypersons for small ranching operations on the public domain had to sign an affidavit stating:

That there is no spring, water hole, stream or surface supply of water of any kind upon said land needed or used by the public for watering livestock; that there is no known surface supply of water on any of the subdivisions of said land so applied for; that it and the whole thereof is unwatered dry land suitable for grazing purposes only and that save during the snowy season and rainy periods water for livestock grazed thereon will have to be obtained from a well or wells to be sunk or a reservoir or reservoirs to be constructed thereon.

Stock Raising Homestead Act, Act of December 29, 1916, 39 Stat.865, codified at 43 U.S.C. § 141 (1976): *See also Memorandum Decision on Scope of PWR 107*, at n. 13. Restrictions persisted through the enactment of PWR 107 on April 17, 1926. The General Land Office (GLO) issued a regulation approximately one month after PWR 107, titled Circular 1066, requiring homesteaders to demonstrate that no important springs existed on the land to be homesteaded. The Circular states that “all General Land Office circulars and regulations pertaining to the selection, filing, or entry of public lands under any of the public land laws . . . are hereby amended so that in every instance it must be shown by a duly corroborated affidavit . . . that no spring or water hole exists. . . .”⁹

⁹Circular 1066 directs that PWR 107 not be construed as applying to or reserving from homestead or other entry lands having small springs or water holes with only enough water for the use of one family and its domestic livestock. As the United States previously argued, the “one family” exemption ceases to have legal significance (or application to the BLM claims filed in the SRBA) after the disposal of

Due to the requirement that entrypersons aver that no springs or water holes exist on entry lands that could be useful to the general public, and the prevalence of fraud and speculation that existed on the public domain in the early twentieth century, the presumption should not be that the springs at issue in this motion were appropriated in 1926. Rather, the presumption should be that these entries -- abandoned or extinguished long ago -- were never legitimate and, therefore, an appropriation of water never occurred.

- 1A. The Stock-Raising Homestead Entry application and affidavit expressly required that entrypersons attest to the lack of available water sources for public use on the entry lands.

As stated above, the Stock Raising Homestead Act (“Act”) required all entry applicants to aver and swear “[t]hat there is no spring, water hole, stream or surface supply of water of any kind upon said land needed or used by the public for watering livestock.” Act of December 29, 1916, *supra*. An example of an Application and Affidavit that was required to be submitted by the entryperson for any Stock-Raising Homestead Entry is found in Attachment 1 to the Affidavit of Fredric W. Price, filed contemporaneously with this motion. Consistent with the congressional directive in the Act, the Application and Affidavit includes an averment that the land “does not contain any water hole or other body of water needed or used by the public for watering purposes” *Id.* at 2.⁷

As a legal matter, then, an entry under the Stock Raising Homestead Act can not substantiate an appropriation of water on the land entry parcel. In fact, such an entry confirms just the opposite; the

federal lands through homesteading came to an end in 1976. Any exclusions from the blanket PWR 107 withdrawal had to have been identified by entrypersons, confirmed by Interior investigation, subsequently patented into private ownership decades ago.

⁷ The attached entry application is for the land parcel encompassing two of the water rights claimed under this motion, subcases 25–13635 and 25-13637.

alleged “appropriator” has declared that no water source exists.

2. Idaho’s water appropriation law requires that the water user provide evidence of applying water to actual beneficial use.

The burden placed on the United States to definitively prove that no private party had appropriated the water at these spring sites approximately 75 years ago is counter to Idaho’s appropriation doctrine. In Idaho, the “constitutional method” of appropriation (without a state permit) requires the water user to show that water was diverted and put to a beneficial use. *See State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000). Even the statutory method of appropriation placed the burden on the water user to affirmatively demonstrate that after posting notice he “commenced work on his proposed diverting works, and continued the prosecution of such work with reasonable diligence” and applied the water to beneficial use. *Sand Point Water and Light Co. v. Panhandle Dev. Co.*, 11 Idaho 405, 413, 83 P. 347, 349 (1905).

The law in Idaho, therefore, is that some showing of actual use of water and application of the water to a beneficial use is necessary to establish a state-law based water right. The state law requirement that the water user demonstrate beneficial use is not satisfied by the existence of an entry application. The mere filing of a homestead application does not prove that the entryperson actually occupied the land and beneficially used the water at spring sites on the land. As discussed above, the filing may have been speculative and fraudulent.[§] Thus, it is unreasonable to conclude that a prior

[§] Speculation has never been grounds for legal appropriation of water in the west. The state of Colorado has perhaps developed the most comprehensive anti-speculation law for water appropriation. In Colorado, to establish a conditional water right an “applicant must show in general that a ‘first step’ toward the appropriation of a certain amount of water has been taken, that the applicant's intent to

appropriation occurred.

3. The PWR 107 reservation ensures the perpetual use of water for stockwatering purposes.

It is undisputed that the entry applications on the lands containing these springs failed. Notably, there is no recorded water claim. Thus, it cannot be shown that an actual appropriation of water ever occurred by an entryperson. Under this scenario, the PWR 107 reservation order should be granted. As the Idaho Supreme Court has stated, “a reservation of stock water is needed in order to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit for the lands containing the relevant springs and waterholes.” *United States v. Idaho*, 131 Idaho 468, 959 P.2d 449, 452 (1998); *see also id.* at 453 (“ These springs and waterholes, which are located on public lands, should be regulated, supervised and administered by the Department of Interior.”).

A state-law based water right awarded to the United States for these springs does not accomplish this goal. State-law based rights may be forfeited, abandoned or otherwise lost. I.C. section 42-222(2); *see also McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2201). In contrast, federal reserved rights, as creations of federal law, cannot be lost. *Sierra Club v. Yeutter*, 911 F.2d 1405, 1419 (10th Cir. 1990) (federal water rights are protected from extinguishment under state law by the Supremacy Clause); *Arizona v. California*, 373 U.S. 546, 600-01 (1963) (federal reserved rights vest in perpetuity, are never lost by non-use, and satisfy both future and present federal needs).

appropriate is not based upon the speculative sale or transfer of the appropriative rights, and that there is a substantial probability that the applicant can and will complete the appropriation with diligence.” *Mount Emmons Min. Co. v. Town of Crested Butte*, 40 P.3d 1255, 1258 (Colo. 2002)(emphasis in original)(internal citation omitted).

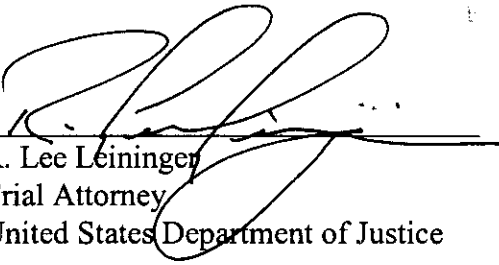
The United States' reserved water rights under PWR 107 and its 1926 priorities, therefore, ensure that the United States receives such water, up to the limit of its right. In this manner, and only in this manner, can the United States "ensure the perpetual use of the water for stockwatering purposes" on public lands.

Summary

For the foregoing reasons, the United States respectfully asks that the Special Master alter or amend his decision and recommend that these subcases be decreed based upon the federal reservation PWR 107 and rule that the United States is no longer required to submit evidence on the land entry status of the area surrounding the spring sources at the time of the reservation.

DATED this 2ND day of May, 2003.

Respectfully submitted,



R. Lee Leininger
Trial Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on this 2nd day of May, 2003, I served a true and correct copy of fore-going Motion to Alter or Amend upon the following individuals by serving as indicated, postage pre-paid, addressed as follows:

via Facsimile & Federal Express mail:

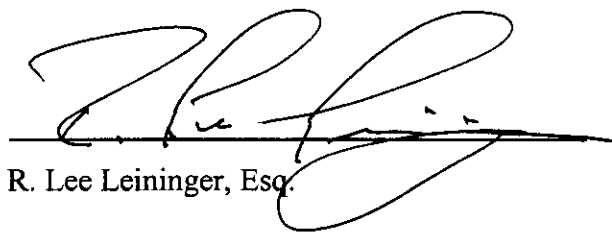
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