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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	)	Subcase Nos.: 25-13637, 65-19960, and 65-19962
	)	
	)	
Case No. 39576	)	STATE OF IDAHO'S RESPONSE TO AMENDED
	)	MOTION TO ALTER OR AMEND
	)	
_____	)	

INTRODUCTION

This memorandum of the State of Idaho responds to the Amended Motion to Alter or Amend filed in this matter by the United States. In summary, the State argues that the Special Master correctly applied past rulings in the Snake River Basin Adjudication in requiring that the real property claimed to be the point of diversion and place of use of a Public Water Reserve No. 107, (hereinafter "PWR 107") spring be vacant, unappropriated and unreserved public domain on the date of entry of PWR 107 on April 17, 1926, and that the legal arguments made by the United States do not respond to this dispositive issue.

COPY

STATEMENT OF THE CASE

i. The Nature of the Proceeding

The present subcases present the legal issue of whether a federal reserved water right or a state beneficial use water should be determined to be appurtenant to springs located on the public domain when the real properties where the water rights are claimed were subject to entry by claimants under the various public land laws on the date of April 17, 1926—the date of entry of PWR 107.

ii. The Course of the Proceedings

The course of the proceedings relevant to the limited issue before the court may be briefly summarized as follows for each of the three subcases:

Subcase No. 25-13637: The Court scheduled the evidentiary hearing under Idaho Code § 42-1411A for December 4, 2002, vacated that hearing date, and reset the matter for hearing on December 9, 2002. The United States filed the Affidavit of Deena M. Teel dated October 25, 2002, in support thereof. The hearing was held on December 9, 2002, and the Special Master entered his Report and Recommendation of Master on December 17, 2002.

The United States filed its Motion to Alter or Amend on January 27, 2003. The State of Idaho filed its NOTICE OF INTENT TO PARTICIPATE on February 14, 2003. The Court set a hearing date of April 17, 2003, for consideration of the State of Idaho's NOTICE OF INTENT TO PARTICIPATE and set further dates in an ORDER SETTING HEARING AND DEADLINES on April 17, 2003. The United States filed its AMENDED MOTION TO ALTER OR AMEND on May 2, 2003.

Subcase Nos.: 65-19960 and 65-19962: The Court scheduled the evidentiary hearing under Idaho Code § 42-1411A for December 4, 2002, vacated that hearing date, and reset the

matter for hearing on December 9, 2002. The United States filed the AFFIDAVIT OF FREDERIC W. PRICE dated December 9, 2002, in support thereof. The hearing was held on December 9, 2002, and the Special Master entered his Report and Recommendation of Master on December 18, 2002. The remainder of the course of the proceedings is identical to the course of proceeding for subcase no. 25-13637.

iii. Statement of Facts

Subcase No. 25-13637: On December 12, 1925, Sophia Nielsen initiated a homestead entry under the Stock Raising and Homestead Act of December 29, 1916, ch. 9, 39 Stat. 862 for the real property that includes the place of use and point of diversion for subcase no. 25-13637. The United States assigned serial number (BL040273) to this application. A partial relinquishment of the application occurred on November 13, 1928. The application was subsequently relinquished in its entirety on September 27, 1930. AFFIDAVIT OF DEENA M. TEEL dated October 25, 2002, at 4.

Subcase Nos. 65-19960 and 65-19962: On September 7, 1923, John Schultz initiated a homestead entry under the Stock Raising and Homestead Act of December 29, 1916, ch. 9, 39 Stat. 862. for the real property that includes the place of use and point of diversion for subcase nos. 65-19960 and 65-19962. The United States assigned serial number (B-026962) to this application. The application was subsequently relinquished on April 1, 1927. AFFIDAVIT OF FREDERIC W. PRICE dated December 9, 2002, at 7-9.

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ARGUMENT

I. PWR 107 DOES NOT APPLY TO REAL PROPERTY THAT WAS SUBJECT TO AN ENTRY UNDER THE HOMESTEAD LAWS ON APRIL 17, 1926.

PWR 107 states:

[E]very smallest legal subdivision or the public land surveys which is **vacant, unappropriated, unreserved, public land** and contains a spring or waterhole, and all land within one quarter of a mile of every spring or waterhole located on unsurveyed public lands, be and the same is hereby withdraw from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916, 39 Stat. 865; 43 U.S.C. § 300) and in aid of pending legislation.

43 C.F.R. § 2321.1-1 (1967) (emphasis added). Here, it is uncontroverted that the subcases before the court were subject to an entry under the homestead laws on April 17, 1926. The legal issue is whether the pendency of an entry under the public land laws takes this real property outside the scope of PWR 107. The general rule is that “[l]and segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.” *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 Public Lands Dec. 55, 1917 WL 1344 (D.O.I.). A copy is attached as Attachment I. Thus, such real property is not “vacant, unappropriated, unreserved, public land” within the scope of PWR 107. Since the subject real property was not “vacant, unappropriated, unreserved” lands when PWR 107 was issued, the United States is not entitled to claim a federal reserved water right.

II. THE UNITED STATES’ ARGUMENTS DO NOT RESPOND TO THE FUNDAMENTAL LEGAL ISSUE HERE.

The United States offers three reasons for the Court to reverse its rulings in these matters:

(1) “Fundamentally, a homestead entry application does not demonstrate that the water on the entry sites was privately appropriated – or even that entry persons actually homesteaded the land.” (2) 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.”

(3) 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’

Amended Motion to Alter or Amend, Re 25-13625, et al., at 3. None of these reasons respond to whether the specific real property in question fits within the four corners of PWR 107. Whether a private party had appropriated the water from the source within the described parcels does not address whether the real property met the requirements of being **vacant, unappropriated, unreserved** at the time of entry of PWR 107 in 1926.

The Idaho Supreme Court held in *United States v. Idaho*, 131 Idaho 468, 959 P.2d 449 (1997) that PWR 107 was a valid federal reserved water right. The following statement appears in the opinion:

The United States persuasively argues that such 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. . . .

We agree with the United States and the observation by the Colorado Supreme Court that the purpose of PWR 107 includes a federal reserved water right.

131 Idaho at 471, 959 P.2d at 452 (emphasis added). Thus, the quoted language in the United States’ brief is only a statement of the United States’ argument before the Idaho Supreme Court. The only agreement appears to be one of result that a federal reserved water right for PWR 107 exists. Even if the word, “persuasive,” from the court opinion is taken as an endorsement by the Idaho Supreme Court of the United States’ argument, this statement cannot be taken as a license to validate any claim of the United States to a PWR 107 spring. Rather, the United States still must demonstrate that the spring otherwise fits within the limits of the reservation.

III. PAST DECISIONS OF THE DISTRICT COURT DO NOT REQUIRE A DIFFERENT RESULT.

Special Master Haemmerle issued an earlier decision on the *prima facie* elements of a PWR 107 spring on November 16, 1998. ORDER DENYING MOTION FOR DEFAULT JUDGMENT (PWR 107). This decision stated, in part, as follows:

PWR 107 provides:

It is hereby ordered that every smallest legal subdivision of public land surveys which is **vacant, unappropriated, unreserved public land . . .**

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.

This court agrees with these *prima facie* elements.

Id. at 2-3 (citations omitted; emphasis added). The decision contains no analysis that justifies or explains the deletion of the words, vacant and unappropriated, from the *prima facie* elements. If the United States is suggesting that the Special Master had the authority to rewrite PWR 107 by deleting these words, the United States has offered no basis for this legal conclusion. The most that can be said is that the use of the word, “unreserved,” in the statement of the *prima facie* elements is simply a shorthand method of referring to the longer phrase contained in PWR 107. This past decision provides no basis for ignoring the express language of PWR 107.

CONCLUSION

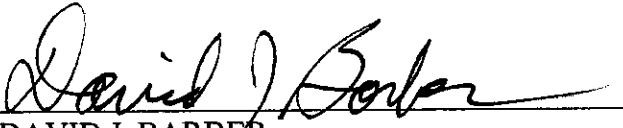
The United States has not responded to the fundamental legal issue before the Special Master whether the real property that is subject to an application for entry under the public land laws qualifies as “vacant, unappropriated, unreserved public domain” under PWR 107. The State of Idaho submits that such real property does not qualify as a PWR 107 spring and that the

Special Master correctly ruled that such real property must take the state law water right.

RESPECTFULLY Submitted this 16th day of May 2003.

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STATE OF IDAHO



DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 16th day of May 2003, I caused to be served the original and true and correct copies of the **STATE OF IDAHO'S RESPONSE TO AMENDED MOTION TO ALTER OR AMEND** on the following parties by the methods indicated below:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 27007
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. One Copy to the claimant of the water right:

R. Lee Leininger
Trial Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources
Div.
550 West Fort Street, MSC 033
Boise, ID 83724

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (303) 312-7379
- ☐ Statehouse Mail

3. Copies to

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

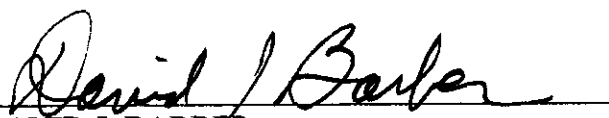
STATEHOUSE MAIL

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

(not applicable)

United States Department of Justice
Environment and Natural Resource Division
550 W. Fort Street, MSC 033
Boise, ID 83724

U.S. MAIL



DAVID J. BARBER
Deputy Attorney General

Citation
46 Pub. Lands Dec. 55

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Department of the Interior (D.O.I.)

****1 CALIFORNIA AND OREGON LAND CO.**

v.

HULEN AND HUNNICUTT

Decided March 17, 1917

***55 Vacation of Patent--Notation of Restoration--When Lands Subject to Appropriation.**

Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

***56 Prior Decision Overruled in Part.**

So much of the decision in the case of Sarah V. White (40 L. D., 630), as holds that land restored to the public domain as the result of vacation of patent thereby becomes subject to settlement, if unappropriated, is overruled.

The California and Oregon Land Company has appealed from the decision of the Commissioner of the General Land Office, dated May 12, 1916, rejecting its forest lieu selection under the act of June 4, 1897 (30 Stat., 36), for Lots 1, 2, 7, 8, 9, 10, 15 and 16 of Sec. 28, T. 21 S., R. 2 W., W. M., Roseburg, Oregon, land district.

The lands described were formerly embraced in two patented entries, which were canceled by decrees of court. The local officers were, by letter of December 9, 1915, advised by the Commissioner of the General Land Office that the decrees had been recorded, and they were directed to post in their office, and to give to the press as a matter of news, a notice to the effect that on a date thirty days hence they would note the restoration of the lands upon the records of their office, and that thereupon they would be subject to all forms of appropriation permitted by the public land laws appropriate thereto.

The local officers issued notice as directed, setting January 18, 1916, at 2 o'clock p. m., as the hour of opening said lands to entry.

Within twenty days prior to January 18, 1916, as provided in the regulations of May 22, 1914 (43 L. D., 254), William Hulen presented his application to make homestead entry for Lots 1, 2, 7, and 8 of said Sec. 28; Ulysses I. Hunnicutt presented a like application for Lots 9, 10, 15, and 16 of said section, and the California and Oregon Land Company, by Robert E. Smith, its attorney in fact, presented its forest lieu selection for all of the lands.

Hulen and Hunnicutt having alleged prior settlement, the local officers allowed their applications, and rejected the forest lieu selection for conflict therewith. The Commissioner held that, the local officers having followed the regulations of May 22, 1914, supra, the applications had been properly disposed

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ATTACHMENT I

46 Pub. Lands Dec. 55

(Cite as: 46 Pub. Lands Dec. 55, *56, 1917 WL 1344, **1 (D.O.I.))

of.

The Commissioner's decision is based on the assumption that the lands became subject to settlement when the prior patents were canceled by the court decrees. In this he erred. The correct rule is that when a decree canceling a land patent becomes finally effective, the patented lands are thereby restored to the public domain, but they are not thereby restored to appropriation until the local officers are instructed by the Commissioner that the lands are restored to entry and have in accordance with instructions made notation of restoration upon the records of the local office. See cases of Hiram M. Hamilton (38 L. D., 597) and Sarah V. White (40 L. D., 630). In the latter case it was held:

****2 *57** By a final decree of cancellation of patent, land once patented becomes part of the public domain, subject to settlement, . . . if unappropriated, but does not become subject to entry until opened to entry by the General Land Office.

The quoted holding was not necessary to the disposition of the case, and the orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office. So much of the White decision as holds to the contrary is overruled.

It follows that, instead of recognizing any claim of prior settlement, a drawing should have been had, as directed by paragraph 4 of the regulations of May 22, 1914, supra. However, Hulen's entry was canceled on relinquishment filed October 17, 1916, and Hunnicutt's entry was likewise canceled on January 29, 1917. The selection of the California and Oregon Land Company will therefore be allowed, if no other objection exists.

The decision is reversed.

Vogelsang

First Assistant Secretary

46 Pub. Lands Dec. 55, 1917 WL 1344 (D.O.I.)

END OF DOCUMENT