

RECEIVED

MAY - 7 2003

Department of Water Resources

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2003 MAY 2 PM 3 25

Name of Party Filing Document:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

THOMAS L. SANSONETTI
United States Department of Justice
Assistant Attorney General
Environment and Natural Resources Division

DAVID L. NEGRI
United States Department of Justice
Environment and Natural Resources Division
General Litigation Section
550 W. Fort St. MSC033
Boise, ID 83724
(208) 331-5943; facsimile (208) 387-0842
ISB # 6697

Counsel for the United States of America

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. 21-11704 <i>et al.</i>
	)	<i>See Attachment A</i>
	)	
	)	Memorandum in Support of Federal
CASE NO. 39576	)	Reserved Water Right Claims
	)	

DESCRIPTIVE SUMMARY

This is the United States' Memorandum in Support of Federal Reserved Water Right Claims 21-11704 *et al.* ("Claims"). Most of the Claims were made on behalf of the USDA

Forest Service pursuant to the Organic Administration Act, Act of June 4, 1897, 30 Stat. 34 (codified at 16 U.S.C. § 475 *et. seq.* (1994)) ("Organic Act"). Three of the Claims, subcase nos. 31-11200, 31-11201, and 31-11202, were made on behalf of the USDA Agricultural Research Service pursuant to Executive Orders 2268 and 2491.

INTRODUCTION

The United States, on behalf of the United States Department of Agriculture, Forest Service ("Forest Service") and the United States Department of Agriculture, Agricultural Research Service ("Agricultural Research Service" or "ARS") submits this memorandum in support of 105 separate Claims for the use of water at federal administrative sites. 102 of the Claims are for the use of water at administrative sites located on National Forests in Idaho (collectively, "Forest Service Claims" or "FS Claims").¹ Three of the Claims are for the use of water on lands reserved for the Agricultural Research Service (collectively "ARS Claims").² The United States is entitled to federal reserved water rights for the Claims because 1) the Claims are located on federal lands reserved from the public domain, and 2) the use of water is necessary to administer the reserved lands and to fulfill primary purposes of the reservations. Accordingly, the United States hereby requests that it be granted federal reserved water rights for the Claims.

STATEMENT OF FACTS

1. Forest Service claims.

The United States filed the Forest Service Claims for consumptive uses at administrative

¹ The Forest Service Claims are all of the Claims except subcase numbers 31-11200, 31-11201, and 31-11202.

² The ARS Claims are subcase numbers 31-11200, 31-11201, and 31-11202.

sites situated in the Bitterroot, Boise, Caribou–Targhee, Clearwater, Nez Perce, Payette, Salmon–Challis, and Sawtooth National Forests. In each of the subcases for the FS Claims, the United States has filed Affidavits in support of the Claims (collectively, “FS Supporting Affidavits”).

As demonstrated by the FS Supporting Affidavits, the purpose of the FS Claims is to supply the administrative sites with sufficient water necessary to administer National Forest System lands and to effectuate the purposes of the Organic Act. The FS Supporting Affidavits provide evidentiary support for each element of the FS Claims.

The FS Claims are for Forest Service administrative sites representing a variety of essential administrative uses and needs. There are claims for very remote facilities such as Claim No. 77-10796 for the Bernard Guard Station and Claim No. 81-10296 for the Salmon Mountain Lookout. Access to these locations is primarily by horseback. The Bernard Guard Station is approximately 28 trail miles from the nearest road. There also are claims such as Claim No. 84-10853 (the Mussleshell Work Center) for larger, more expansive, and more accessible sites where numerous people are housed and work.

All of the FS Claims describe water used for essential administrative activities. These activities include activities, such as fire suppression and watershed protection, directly related to primary Organic Act purposes.³

2. ARS Claims.

The United States filed the ARS Claims for consumptive uses at the U.S. Sheep

³ The primary purposes of National Forest reservations are to provide a continuous supply of timber and to assure favorable conditions of water flow. *United States v. New Mexico*, 438 U.S. 696 (1978); see p. 7, *infra*.

Experiment Station near Dubois, Idaho ("Experiment Station"). In each of the subcases for the ARS Claims, the United States has filed Affidavits in support of the Claims (collectively, "ARS Supporting Affidavits").

As demonstrated by the ARS Supporting Affidavits, the purpose of the ARS Claims is to supply water necessary to administer the Experiment Station and to effectuate the purposes of the Executive Orders reserving land for the Experiment Station. The ARS Supporting Affidavits provide evidentiary support for each element of the ARS Claims.

ARGUMENT

The statutory procedures for prosecuting federal reserved water right claims in the Snake River Basin Adjudication are set forth in Idaho Code § 42-1411A. That section provides, in relevant part, that "a claimant of a water right established under federal law has the burden of going forward with the evidence to establish a prima facie case." I.C. § 42-1411A(12). In order to meet the statutory burden of establishing a prima facie case under I.C. § 42-1411A, the United States has filed the FS Supporting Affidavits and the ARS Supporting Affidavits, which set forth the factual basis for each element of the Claims.

The reserved rights doctrine provides that when the federal government reserves land, the federal government by implication reserves water sufficient to accomplish the purpose of the reservation. *Cappaert v. United States*, 426 U.S. 128 (1976); *Avondale Irrig. Dist. v. North Idaho Prop. Inc.*, 99 Idaho 30, 34, 577 P.2d. 9, 13 (1978). In ascertaining whether a federal reserved right exists, the Court must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation. See *United States v. Idaho*, 131 Idaho 468, 959 P.2d 449, 451 (1998), *cert. denied*, 119 S.Ct. 1158 (1999); *United States v.*

City and County of Denver, 656 P.2d 1, 20 (Colo. 1982); .

It is well settled that the national government has the authority to "reserve water for the use and benefit of federally reserved lands." *United States v. District Court for Eagle County*, 401 U.S. 520, 522 (1971) (*quoting Arizona v. California*, 373 U.S. 546, 597 (1963)). The reserved right doctrine was fully articulated in *Cappaert v. United States*, 426 U.S. 128 (1976):

[W]hen the federal government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert, 426 U.S. at 138 (citations omitted). *See also United States v. New Mexico*, 438 U.S. 696, 699-700 (1978). Idaho law is in accord with this authority. *See United States v. Idaho*, 959 P.2d at 450-51 (*quoting* the above passage from *Cappaert*); *Avondale Irrig. Dist.*, 99 Idaho 30 at 34, 577 P.2d. at 13 ("When the federal government reserves land from the public domain it also, by implication, reserves rights to the appurtenant and then unappropriated water necessary to accomplish the purpose of the reservation.").

To establish a reserved water right, the United States must show 1) a reservation of land, 2) that water is necessary to effectuate the purposes of the reservation, and 3) the minimum amount of water necessary to effectuate those purposes. *Cappaert*, 426 U.S. at 138-141; *Avondale Irrig. Dist.*, 99 Idaho at 41, 577 P.2d. at 20.

1. Forest Service claims.

As demonstrated by the FS Supporting Affidavits, all of the FS Claim sites are located on

reserved land. The lands underlying the FS Claims were reserved from the public domain on various dates ranging from February 22, 1897, for the Bitterroot Forest Reserve⁴ to June 30, 1932, for an addition to what was then called the Idaho National Forest⁵. Much of this land was reserved pursuant to the Organic Act. Other land was reserved pursuant to the Creative Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103, as amended (codified at 16 U.S.C. § 471) (repealed 1976) ("Creative Act"). The Organic Act provides that all land subject to reservations made under the Creative Act shall be administered pursuant to the Organic Act. See 16 U.S.C. § 475.⁶

⁴ This priority applies to 31 claims presently located on the Bitterroot, Clearwater, Nez Perce, and Salmon-Challis National Forests. Such subcases are noted with an asterisk (*) on Attachment A.

⁵ See subcase no. 77-10797.

⁶ The Organic Act clearly applies to all reservations made under the Organic Act itself. For reservations made after enactment of the Organic Act (June 4, 1897) but pursuant to the provisions of the Creative Act, 16 U.S.C. § 475 explicitly provides that such lands shall be administered pursuant to the Organic Act.

A subset of Forest Service Claims – those described in note 4, *infra* – are on lands which were reserved pursuant to the Creative Act several months prior to passage of the Organic Act. The Creative Act provided in its entirety: "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."

The Creative Act did not state the purpose for which the President may reserve public lands. Nevertheless, its legislative history makes clear that Congress was concerned with the preservation of timber stands and the protection of watersheds in mountainous areas. See *Avondale Irrigation District*, 577 P.2d at 14-15; Harold K. Steen, THE BEGINNINGS OF THE NATIONAL FOREST SYSTEM, 27-29 (1991); David Gillian, *Will There Be Water For the Forests?*, 69 Colo. L. Rev. 533, 535-36 (Spring 1998); see also United States Memorandum in Support of its Motion For Partial Summary Judgment, Appendix A, Legislative History Index 1-20, In Re SRBA Case No. 39576, Consolidated Subcase No. 63-25243 (Organic Act), filed on or about August 28, 1998. The concerns noted in the legislative history of the Creative Act are almost identical to the purposes of the Organic Act. In addition, as noted above, the Organic Act provides that lands reserved pursuant to the Creative Act shall be administered pursuant to the

(continued...)

The water encompassing the FS Claims is the minimum amount necessary to fulfill the purposes of the Organic Act. In determining the extent of the reserved right in question, the Court must look to the primary purposes for which the reservation was created. *United States v. New Mexico*, 438 U.S. 696 (1978). The primary purposes of National Forest reservations are to provide a continuous supply of timber and to assure favorable conditions of water flow. *Id.* As a land management agency, the Forest Service is charged with the administration and management of National Forest System lands, which include the National Forests in question. *See* 33 Stat. 628, 16 U.S.C. § 472; *see also*, *United States v. Grimaud*, 220 U.S. 506; *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917). That water is necessary for use in association with government property cannot be seriously doubted. *State of Nevada v. United States*, 165 F. Supp. 600 (D.Nev. 1958); *see Arizona v. California*, 373 U.S. 546, 598 (1963) ("We have no doubt about the power of the United States under the [commerce and property] clauses to reserve water rights for its reservations and property."), *State of Nevada v. United States*, 165 F. Supp. 600 (D.Nev. 1958). As set forth in the FS Supporting Affidavits, water at the various Forest Service administrative sites is necessary to accomplish the Organic Act's primary purposes.

Finally, the FS Supporting Affidavits demonstrate that water at the administrative sites is necessary, in general, to administer National Forest System lands. The SRBA Court previously has held that it is reasonable to assume that Congress intended, in reserving National Forest System lands, to reserve sufficient water to serve administrative sites for such lands. *See Order*

⁶(...continued)

Organic Act. Accordingly, the purposes of the Organic Act, *i.e.*, to provide a continuous supply of timber and to assure favorable conditions of water flow, are the operative purposes with respect to all of the Forest Service Claims, including those reserved several months prior to passage of the Organic Act.

of *Partial Decree on Uncontested Federal Water Right*, Subcase No. 63-30981 (July 31, 2000).

Accordingly, the United States has claimed water necessary to fulfill primary purposes of the underlying reservations and necessary to administer the National Forests. Therefore, the United States should be granted reserved water rights for the FS Claims.

2. ARS Claims.

As demonstrated by the ARS Supporting Affidavits, the ARS Claims are located on reserved land. The lands underlying the ARS Claims were reserved from the public domain pursuant to Executive Order 2268, dated October 30, 1915, and Executive Order 2491, dated November 21, 1916. The Executive Orders provide that the purposes of the reservations are “for use by the Department of Agriculture of the United States as a sheep-breeding and grazing experimental station.”⁷

The ARS Supporting Affidavits demonstrate that all water described by the ARS Claims is used for “sheep production, herding, grazing, management and research.” See ¶ 7, ARS

⁷ Executive Orders 2268 and 2491 were made pursuant to 36 Stat. 847 and 37 Stat. 497. 36 Stat. 847, commonly known as the Pickett Act or General Withdrawal Act, provided: “The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.” The Pickett Act therefore provides that the primary purpose of the ARS withdrawals are those specified in the Executive Orders: “for use . . . as a sheep-breeding and grazing experimental station.”

The Pickett Act was codified at 43 U.S.C. § 141, and was repealed by the Federal Land Policy Management Act, FLPMA § 704(a), 90 Stat. 2792 (1976). The Idaho Supreme Court, in recognizing the Pickett Act as the legislative authority for Public Water Reserve 107 reservations, noted that FLPMA provides that all withdrawals in force at the time of enactment of FLPMA remained in force until specifically modified. *See United States v. Idaho*, 131 Idaho 468, 959 P.2d 449, 451-52 (1998), *cert. denied*, 119 S.Ct. 1158 (1999).

Executive Orders 2268 and 2491 also reference 37 Stat. 497 as amending the Pickett Act. 37 Stat. 497 amends a section of the Pickett Act not at issue in these subcases.

Supporting Affidavits. Accordingly, such water is necessary to accomplish the primary purposes of the reservations. In addition, the ARS Supporting Affidavits demonstrate that such water is necessary, in general, to administer the Experimental Station. The United States, therefore, should be granted reserved water rights for the ARS Claims.

CONCLUSION

For the foregoing reasons, the United States requests that it be granted federal reserved water rights as described by the Claims.

DATED this 2nd day of May, 2003.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David Negri", is written over a horizontal line.

DAVID L. NEGRI
United States Department of Justice
Counsel for the United States

CERTIFICATE OF MAILING

I certify that on May 2, 2003, I mailed a true and correct copy of the foregoing Memorandum in Support of Federal Reserved Water Right Claims upon the following by First Class United States Mail, prepaid:

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

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720



David L. Negri

Attachment A

* denotes February 22, 1897 priority dates

21-11704	77-10727	81-10298*
21-11763	77-10741	81-10300*
23-10768	77-10765	81-10330*
23-10769	77-10796	81-10353*
23-11169	77-10797	81-10358*
23-11170	77-10833	81-10364*
24-10393	77-10835	81-10366*
27-11644	77-10854	81-10383*
31-11200	77-10881*	81-10389*
31-11201	77-10887*	81-10391*
31-11202	77-10904*	81-10426*
37-13748	77-10906*	81-10437*
37-13766	77-10927	81-10444*
37-19880	77-11518	81-10446*
37-19888	77-11535	81-10450*
47-15210	77-11540	81-11883*
65-02331	77-11551	83-10137*
65-09920	77-11635	83-10175
65-11336	77-11650	83-10177
65-19406	77-11658	83-10193
65-19506	77-11665	83-10220*
65-22203	77-11666	83-10221
65-22206	77-13913	83-10222
67-12138	77-13926*	83-11925
67-12143	77-14131	84-10853*
69-10279	77-14132	84-10854*
69-11491	77-14133	84-10855*
72-10969	77-14134	
72-10970	78-10558	
75-11095	78-10567	
75-11193*	78-10575	
75-11194	78-10647	
75-11198*	79-13956	
75-11199	79-13958	
75-11200	79-13959	
75-13801	79-13961	
77-10692	81-10290*	
77-10702	81-10293*	
77-10716	81-10296*	

AMENDED CERTIFICATE OF MAILING

I certify that on May 6, 2003, I mailed a true and correct copy of the
Memorandum in Support of Federal Reserved Water Right Claims -SRBA Subcase no. 21-11704
et al. upon the following

By First Class United States Mail, prepaid:

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

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720

This Amended Certificate of Mailing by Facsimile to:

Clerk of the District Court
Snake River Basin Adjudication
253 3rd Ave. North
Twin Falls, Idaho 83301



David L. Negri