

THOMAS L. SANSONETTI
 Assistant Attorney General
 Environment and Natural Resources Division

R. LEE LEININGER
 Trial Attorney
 United States Department of Justice
 Environment & Natural Resources Division
 General Litigation Section
 999 18th St. Suite 945
 Denver, CO 80202
 (303) 312-7322

**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.: 25-13635, 25-13637, 25-
	)	13653, 65-19960, and 65-19962
	)	
Case No. 39576	)	REPLY TO STATE OF IDAHO'S
	)	RESPONSE TO AMENDED MOTION
	)	TO ALTER OR AMEND
	)	

The State, in its response to the United States' Amended Motion to Alter or Amend, argues that the United States did not respond to the fundamental legal issue in this matter. The State asserts that the language in PWR 107 reserving vacant, unappropriated, unreserved public lands precludes a reservation where there was a pending application for entry at the time PWR 107 was signed - despite the fact that none of the entry applications at issue was patented and none of the lands left federal ownership. State of Idaho's Response to Amended Motion to Alter or Amend, subcases 25-13637, 65-19960, and 65-19962, dated May 16, 2003 (hereinafter "*State's Response*") at 4-5. But it is the State who misses the real dispositive issue. PWR 107 reserved lands containing a spring or waterhole. As discussed in the United States opening

memorandum, an entryperson under the Stock Raising Homestead Act (SRHA) was required to aver that the land "does not contain any water hole or other body of water needed or used by the public for watering purposes" The SRHA application, therefore, does not support the denial of the PWR 107 reservation. On the contrary, the entrypersons' avowal that there is no water to appropriate on the public lands indicates that these lands were not validly entered because we know from field examination that these lands do contain stockwatering springs.¹⁷ Consequently, the entry applications could not defeat a PWR 107 reservation. The State's response did not address this point at all.

The State cites *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 Public Lands Dec. 55, 1917 WL 1344 (D.O.I.) in support of its argument that the pendency of an entry removes the public land from the scope of PWR 107. *State's Response* at 4. The "general rule" the State declares from this case, however, is inapposite. In *California*, the Interior Department stated the 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 the restoration to the public domain is noted upon the records of the local land office." *Id.* at 57. This, however, does not support a finding as alleged by the State that the public land was not "vacant, unappropriated [and] unreserved" and thus not within the scope of PWR 107. *State's Response* at 4, *quoting* from PWR 107. Rather, the case holds that formerly patented lands are restored to appropriation and entry only after the patent cancellations are recorded in the local land office. Clearly, this is not what happened in the SRHA applications relevant here. The

¹⁷ See Affidavit of Deena M. Teel (Subcase No. 25-13637), dated 11/01/02; Affidavit of Deena M. Teel (Subcase Nos. 25-13625, 25-13627, 25-13629, 25-13631, 25-13635, and 25-13653), dated 12/09/02; Affidavit of Robert R. Mallis (Subcase Nos. 65-19812, *et al.*), dated 11/27/02.

applications under the SRHA never went to patent as the entries were abandoned long ago.

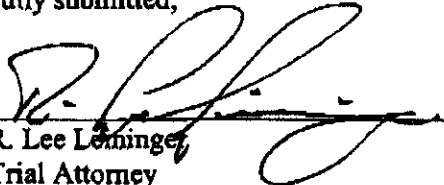
Moreover, even if an entryperson under the SRHA had a vested right good against all other entries upon filing of an application, his or her title was inchoate against the United States prior to the issuance of the patent. *Guerra v. Packard*, 236 Cal.App.2d 272, 291-292 (Cal.App.1965). An inchoate interest is "an interest in real estate which is not a present interest, but which may ripen into a vested estate if not . . . extinguished." *Black's Law Dictionary* 762 (6th ed. 1990). Since these entries were extinguished and did not vest against the United States, the entryperson had no interest and therefore no effect upon the federal reservation.

Further, it cannot be assumed that an entry application demonstrates that the land was no longer vacant. "Vacant lands are such as are absolutely free, unclaimed, and unoccupied." *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 112 Fed. 13 (9th Cir. 1901)(emphasis added). There is no evidence that the public land in question was occupied. As the United States argued in its opening memorandum, the pervasive fraud in settlement entries together with the fact that the entry applications were incorrect and the entries were eventually relinquished, supports a conclusion that the lands were not occupied.

Accordingly, the United States respectfully asks that the Special Master alter or amend his ruling and recommend that these subcases be decreed as reserved rights pursuant to the executive order PWR 107.

DATED this 29th day of May, 2003.

Respectfully submitted,


R. Lee Leininger
Trial Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on this 29th day of May, 2003, I served a true and correct copy of foregoing **REPLY TO STATE OF IDAHO'S RESPONSE TO AMENDED MOTION TO ALTER OR AMEND IN THE MOTION TO ALTER OR AMEND** upon the following individuals by serving as indicated, postage pre-paid, addressed as follows:

via Facsimile:

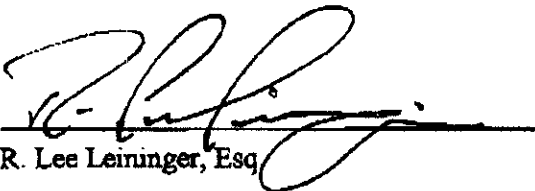
Diana R. Delaney, Chief Deputy Clerk (Original)
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, ID 83301

via Facsimile & First-Class Mail:

U.S. Department of Justice
Environment and Natural Resources
550 W. Fort Street, MSC 033
Boise, ID 83724

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

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


R. Lee Leininger, Esq