2003 AUG 26 PM 3:02
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	**SPECIAL MASTER'S REPORT AND RECOMMENDATION; FINDINGS OF FACT AND CONCLUSIONS OF LAW**
	)	
Case No. 39576	)	
	)	**WATER RIGHT NOS.: EXHIBIT A (37PWR107 FILE #173)**

I. PROCEDURAL BACKGROUND

Claims were filed by the United States Bureau of Land Management for the above listed water rights. The United States originally claimed these rights under both state law and as a federal reservation. The state-based portion of each right was investigated by the Idaho Department of Water Resources ("IDWR") and reported in a *Director's Report*. IDWR did not investigate the federal reservation theory because those are based on federal law. I.C. § 42-1411A.

Objections were filed by Pickett Ranch & Sheep Co., Joe Tugaw, Jared Bedke, Bruce Bedke, Scott Bedke, Karl Bedke, Joyce Livestock Company, Jerry Hoagland, Michael Poulton, Gary Poulton, Western Stockgrowers Association and the State of Idaho. Those *Objections* were withdrawn on August 29, 2002. *Notice of Withdrawal of Objection* (August 29, 2002); *Stipulation to Resolve Objections* (March 11, 2003); *Revised Exhibits A and B Part 1 for Stipulation to Resolve Objections filed on March 11, 2003*. (April 11, 2003) An evidentiary hearing was held on April 23, 2003. At the hearing, the United States Bureau of Land Management withdrew the state basis for these claims and opted to pursue these rights solely under a federal reservation pursuant to Public Water Reserve 107 ("PWR 107"). Therefore, these claims are now uncontested claims based on federal law and may proceed under I.C. § 42-1411A.

The United States BLM submitted an *Affidavit of Floyd P. Dewitt in Support of Basin 37 BLM PWR 107 Water Rights Claims*, an *Amended Affidavit of Floyd P. Dewitt in Support of Basin 37 BLM PWR 107 Water Right Claims,* an *Affidavit of Lisa A. Jaro* and an *Amended Affidavit of Lisa A. Jaro.*

II. STANDARD OF REVIEW

A. Federal Reserve Water Rights

A state has plenary control of water located within its territory. *Kansas v. Colorado,* 206 U.S. 46 (1907). A claim to a federal reserve water right is an exception to a state's plenary control of water. *United States v. Rio Grande Dam and Irrigation Co.,* 174 U.S. 690 (1899). Reserved water rights may be express or implied. *United States v. New Mexico,* 438 U.S. 696 (1978). An express reservation of water is created by the explicit language in the act creating the reservation. *Id.* An implied reserved water right must be based on a reservation of land. *Arizona v. California,* 373 U.S. 546 (1963), and may be granted if the following three criteria are satisfied:

(1) An implied reservation of water exists only if necessary to fulfill the primary, not the secondary, purpose for which the reservation of land was created, *United States v. New Mexico,* 438 U.S. at 702

(2) Without water, the purposes of the reservation must be entirely defeated, *Id.*; and

(3) The water claimed must be the minimum amount necessary to achieve the purposes of the reservation, *Id.* at 700.

B. Federal Reserved Rights Under Public Water Reserve 107

The United States Bureau of Land Management filed these claims for stockwatering based on alternative legal theories of beneficial use (pursuant to state law) and on the executive order Public Water Reserve 107 (April 17, 1926) (pursuant to federal law). All the claims at issue are for stockwater claims not to exceed 13,000 gallons per day.

The issue of whether PWR 107 created a valid basis for a federal reserved water right was previously designated in the SRBA as Basin-Wide Issue 9. **Order Designating Basin Wide Issue No. 9** (March 8, 1996). Judge Daniel C. Hurlbutt, Jr. held that PWR 107 did not create an express or implied reservation of water by the United States. ***Memorandum Decision and Order Re: Basin Wide Issue,*** (Subcase No. 91-00009, December 9, 1996) That decision was appealed to the Idaho Supreme Court. The Supreme Court reversed, holding that PWR 107 did create a valid basis for a federal reserved stock water right. *U.S. v. Idaho,* 131 Idaho 468, 959 P.2d 449 (1998) Although the opinion states that "PWR 107 evidences an *express* intention by Congress that reserves a water right in the United States." *Id.* at 471, 959 P.2d at 452 (emphasis added) the parties and the SRBA District Court understand the holding as determining that PWR 107 creates an implied federal reserved water right. ***Memorandum Decision and Order on Challenge***, at 3,

fn.1 (Dec. 28, 2001).

After the Supreme Court held that PWR 107 did create a valid basis for a federal reserve stockwater right, the SRBA District Court took up the scope of water rights pursuant to PWR 107. The issue was whether PWR 107 creates a federal reserved water right if the spring or waterhole is tributary to a perennial stream or river and whether PWR 107 creates a federal reserved water right if the spring or waterhole is tributary to an intermittent stream or river or flows for any distance in a defined stream channel. The SRBA District Court held that "nothing in the language of PWR 107 . . .suggest[s] that such withdrawals were . . .limited to non-tributary springs and water holes." ***Memorandum Decision and Order on Challenge*** at 19 (December 28, 2001).

The ***Memorandum Decision and Order on Challenge*** also held that PWR 107 does not create a basis for rights based on stream segments which are not "springs" or "water holes." *Id.* at 22. The place of use for the water right is within the boundaries of the 40-acre section withdrawn. Water flowing from the spring or water hole outside the boundaries of the withdrawn land does not create another land withdrawal or accompanying reserved water right.

C. Uncontested Claims Based on Federal Law

Idaho Code Title 42 sets forth the SRBA procedures for both state-based and federal-based water right claims in the Snake River Basin Adjudication. Claims which are brought pursuant to Idaho state law are investigated by the Idaho Department of Water Resources (IDWR) which recommends the elements in a *Director's Report*. Claims which are brought pursuant to federal law are not investigated by IDWR, and IDWR does not make any recommendation for federal-based claims. Instead, IDWR merely reformats the claimed elements in a document that is reported along with the *Director's Report*.

The statutory provisions for federal-law claims are found in I.C. § 42-1411A. The statute takes into account the absence of an independent investigation into federal-law claims and requires a hearing for uncontested claims. I.C. § 42-1411A(14). Since no independent review is conducted of federal-law claims, the claimant bears the burden of going forward and the burden of persuasion.

> Each claimant of a water right established under federal law has the ultimate burden of persuasion for each element of a water right. Since no independent review of the notice of claim has occurred as provided for water rights acquired under state law in a director's report, 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 for the water right established under federal law. All such proceedings shall be

governed by the Idaho Rules of Civil Procedure and Idaho Rules of Evidence.

I.C. § 42-1411A(12).

D. Hearing Requirement and Affidavits

The hearings on these claims relied on sworn affidavits rather than on live testimony. This court has previously held that introduction of sworn affidavits complies with the hearing requirement. ***Order Accepting in Part, and Denying in Part, Special Master's Report and Recommendation*** (Subcase 36-15452, Oct. 10, 1997) (hereafter "Smith Springs") *overruled on other grounds, In Re SRBA Case No. 39576* (Minidoka Wildlife Refuge), 134 Idaho 106, 996 P.2d 806 (2000). The SRBA District Court has approved many ***Special Master's Reports and Recommendations*** for federal-based claims based on sworn affidavits rather than live testimony. The affidavits submitted by the United States meet the hearing requirement in I.C. § 42-1411A(14).

E. Quantum of Proof is "Substantial Evidence"

In ***Smith Springs***, the Court concluded that in default-type proceedings, "substantial evidence" must support each element of the claim. The analogy to default proceedings is appropriate for uncontested federal reserve rights. A claimant has the burden of proof and burden of persuasion for each element and must provide "substantial evidence" of each element.

III. FINDINGS OF FACT ON ELEMENTS

A. Ownership of the Water Right

The claims assert that the owner of these water rights is the U.S. B.L.M. The record contains the following evidence regarding ownership:

> The Master Title Plats are official records of the United States that identify United States' property and its status. I have reviewed these records and determined that the federal public domain containing the water sources asserted in the above listed BLM SRBA claims are located on unreserved federal public domain and this is under Department of Interior, BLM, administration.

Affidavit of Floyd P. Dewitt at 7, ¶ 4; *Amended Affidavit of Floyd P. Dewitt* at 6, ¶ 4.

The United States asserts that these claims "are located on unreserved federal public domain as of April 17, 1926." *Affidavit of Lisa A. Jaro,* at 3, ¶ 4. There are no remaining objections to the claim of ownership by the U.S. Bureau of Land Management. There is "substantial evidence" that the United States is the owner of these rights.

B. Priority Date

No objections were filed to priority date for these rights. These water rights were claimed based on PWR 107 with a claimed priority date of April 17, 1926. That is the day an executive order known as Public Water Reserve 107 was signed by the President of the United States. There is "substantial evidence" that the priority date is April 17, 1926.

C. Source

The claims assert various sources for these water rights. No objections were filed to the source element. The record contains the following information regarding source:

> The claimed water sources were confirmed by field investigation. Based upon the field verification and my review of the field investigation documents, the source of water for these water right claim's (sic) is either a playa lake or a free-flowing spring located at the claimed point of diversion and place of use.

Affidavit of Floyd P. Dewitt at 7, ¶ 5 and 6. In addition, IDWR investigated the source element for each right under the state basis and submitted a *Director's Report* with specific sources determined for each water right. There is "substancial evidence" of the individual sources for each right.

D. Quantity

The quantity claimed for these water rights is 13,000 gallons or less per day. The *Affidavit of Floyd P. Dewitt in Support of Basin 37 BLM PWR 107 Water Right Claims* states, "Based upon the field verification and my review of the field investigation documents, there is sufficient water at this site for consumptive use by livestock." *Affidavit of Floyd P. Dewitt in Support of Basin 37 BLM PWR 107 Water Right Claims*, p.7, ¶ 7.; *Amended Affidavit of Floyd P. Dewitt in Support of Basin 37 BLM PWR 107 Water Right Claims*, p.7, ¶ 7.; *Affidavit of Lisa A. Jaro,* p.7,¶ 7. In addition, IDWR investigated the quantity element for each right and submitted a *Director's Report* with specific quantities determined for each water right. Bolstered by the *Director's Report*, there is "substantial evidence" of the quantity for each right.

E. Point of Diversion

Each claim asserted a point of diversion that was expressed with a legal description. In addition, IDWR investigated the point of diversion element for each right under the state basis and submitted a *Director's Report*. The *Director's Report* for these rights contained determinations of the claimed points of diversion. There is "substantial evidence" of the points of diversion for each right.

F. Purpose of Use

The claimed purpose of use for each of these rights is "stockwater." The United States asserted that "Based upon the field verification and my review of the field investigation documents, there is sufficient water at this site for consumptive use by livestock." *Affidavit of Floyd P. Dewitt in Support of Basin 37 BLM PWR 107 Water Right Claims*, p.7, ¶ 7.; *Amended Affidavit of Floyd P. Dewitt in Support of Basin 37 BLM PWR 107 Water Right Claims*, p.7, ¶ 7.; *Affidavit of Lisa A. Jaro,* p.7,¶ 07. There is "substantial evidence" that the purpose of use is "stockwater."

G. Period of Use

The claimed period of use for each of these stockwater rights is January first to December 31st of each year. The United States did not assert that these claims had been <u>used</u> for stockwatering, merely that "there is sufficient water at this site for consumptive use by livestock." However, these claims are not now based on beneficial use, but are based on a federal reservation under PWR 107. The purpose of PWR 107 was to reserve land to avoid monopolization of the springs or water holes.

IDWR also investigated the period of use element and submitted a *Director's Report* with a determination that period of use was year round. There is substantial evidence of the period of use for each water right.

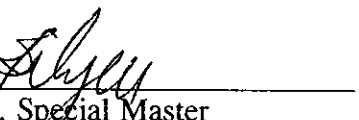
H. Place of Use

Each claim asserted a place of use that was described by a legal description. In addition, IDWR did investigate these rights under the state basis. The *Director's Report* for these rights concluded that the claimed places of use were correct. There is "substantial evidence" of the claimed places of use.

IV. CONCLUSION

Therefore, based on the files for these subcases and the record contained therein, IT IS RECOMMENDED that these water rights be **decreed** with the elements set forth in the attached ***Special Master's Recommendations for Partial Decree.***

DATED: August 26, 2003



BRIGETTE BILYEU, Special Master
Snake River Basin Adjudication

EXHIBIT A (37PWR107#2 FILE #173)

Subcase Nos:

37-18349	37-20063	37-20203
37-18435	37-20064	37-20204
37-18498	37-20066	37-20205
37-18519	37-20072	37-20206
37-18648	37-20073	37-20208
37-18650	37-20074	37-20209
37-18845	37-20076	37-20218
37-18905	37-20078	37-20220
37-18907	37-20079	37-20221
37-19242	37-20081	37-20222
37-19246	37-20085	37-20223
37-19252	37-20086	37-20224
37-19256	37-20087	37-20227
37-19313	37-20088	37-20228
37-19314	37-20090	37-20230
37-19407	37-20097	37-20236
37-19409	37-20098	37-20237
37-19580	37-20100	37-20241
37-19582	37-20101	37-20242
37-19584	37-20104	37-20243
37-19590	37-20105	37-20247
37-19595	37-20110	
37-19605	37-20111	
37-19612	37-20112	
37-19617	37-20113	
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37-20032	37-20120	
37-20033	37-20122	
37-20034	37-20123	
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37-20039	37-20173	
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37-20046	37-20178	
37-20047	37-20179	
37-20048	37-20182	
37-20049	37-20183	
37-20050	37-20188	
37-20051	37-20189	
37-20052	37-20191	
37-20053	37-20193	
37-20055	37-20195	
37-20058	37-20196	
37-20059	37-20197	
37-20061	37-20198	

(Subcase list: PWR107F173)
8/25/03

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	NOTICE OF ISSUANCE OF SPECIAL MASTER'S RECOMMENDATION
Case No. 39576	)	
	)	Water Right(s): 37-18349 (SEE ATTACHED EXHIBIT A)

On August 26, 2003, Special Master BRIGETTE BILYEU issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED August 26, 2003.

Janet Connell
JANET CONNELL
Deputy Clerk

Exhibit A

Subcase Nos:

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37-20061	37-20198	

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	CERTIFICATE OF MAILING
	)	
Case No. 39576	)	
	)	Water Right(s): 37-18349 (SEE ATTACHED EXHIBIT A)

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on August 26, 2003, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

FLYING TRIANGLE INC
GARY POULTON
JOE TUGAW
KARL U (BUD) BEDKE
MICHAEL POULTON
PICKETT RANCH & SHEEP CO
SCOTT BEDKE
WESTERN STOCKGROWERS ASSN
Represented by:
NORMAN M. SEMANKO
ATTORNEY AT LAW
205 N 10TH ST, STE 530
BOISE, ID 83702
Phone: 208-344-6690

USDI BLM
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

Janet Connell
JANET CONNELL
Deputy Clerk

Exhibit A

Subcase Nos:

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37-20059	37-20197	
37-20061	37-20198	

2003 AUG 26 PM 02:00
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

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	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 37-20031

NAME AND ADDRESS: USDI BLM
IDAHO STATE OFFICE
1387 S VINNELL WAY
BOISE, ID 83709-1657

SOURCE: SPRING TRIBUTARY: SHEEP CREEK

QUANTITY: 0.02 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.

PRIORITY DATE: 04/17/1926

****
* *
* THIS WATER RIGHT IS ISSUED BASED ON FEDERAL LAW WITH AN *
* APRIL 17, 1926, DATE OF PRIORITY PURSUANT TO AN EXECUTIVE *
* ORDER SIGNED THE SAME DATE AND KNOWN AS PUBLIC WATER RESERVE *
* 107. *
* *
****

POINT OF DIVERSION: T02N R20E S05 NESWSE Within Blaine County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Stockwater	01-01 TO 12-31	0.02 CFS

PLACE OF USE: Stockwater Within Blaine County
T02N R20E S05 SWSE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

RECOMMENDATION
AUG 26 2003
SPECIAL MASTER

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication