DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN 30 2004
By _____ Clerk
_____ Deputy Clerk

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 ((42) Basin 63 PWR107 Uncontested Federal)**

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 the State of Idaho. Those *Objections* were withdrawn on September 26, 2003. *Report on Status of State of Idaho's Objections in Basin 63 and 73.* An evidentiary hearing was held on November 12, 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 Alan R. Bittner*, an *Affidavit of Robert R. Mallis,* and an *Amended Affidavit of Frederic W. Price.*

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 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, notice of the filing of federal-based claims is placed on the docket sheet and 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 business records of the United States that identify United States' property and its status. The MTP is the United States' official Record of Title. It is a graphic display of township survey data, and are (sic) drafted from information abstracted, compiled, and composed from the latest approved U.S. Government Survey Plats, survey field notes, and protraction diagrams. It describes the locations of United States property, aliquot parcels, and government surveyed "lots." I have reviewed these records and determined that the federal public domain containing the water sources asserted in the above captioned SRBA claims are located on unreserved federal public domain as of April 17, 1926; and this land currently remains under Department of Interior administration.

Affidavit of Alan R. Bittner at 3, ¶ 4; *See also, Affidavit of Robert R. Mallis* at 2, ¶ 2, at 3 ¶ 5a.

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

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. The *Affidavit of Alan R. Bittner* states that the sources for these rights are springs or water holes located at the claimed point of diversion. The sources were verified by field investigation. *Affidavit of Alan R. Bittner* at 3, ¶¶ 5, 5a, and 6; *Affidavit of Robert R. Mallis* at 3, ¶ 5.

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 "substantial 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 Alan R. Bittner* states that for each water right there is sufficient surface water for consumptive use by livestock. *Affidavit of Alan R. Bittner* at 3, ¶ 7; *See*, *Affidavit of Robert R. Mallis* at 3, ¶ 5b. In addition, IDWR investigated the quantity element for each right and submitted a *Director's Report* with specific quantities determined for each water right. 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 a field investigation conducted by the U.S. confirmed that sufficient surface water exists for consumptive use by livestock. *Affidavit of Alan R. Bittner* at 3, ¶ 7; *Affidavit of Robert R. Mallis* at 3, ¶ 5b. 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 1st to December 31st of each year. The United States did not assert that these claims had been used 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: January 30, 2004

BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

EXHIBIT A (42)BASIN 63 PWR107

Subcase Nos:

63-29062
63-29132
63-29134
63-29136
63-29182
63-29258
63-29259
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63-30498
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63-30532

(Subcase list: 42B63PWR)
1/27/04

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN 30 2004
By _____ Clerk
Deputy Clerk

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	NOTICE OF ISSUANCE OF SPECIAL MASTER'S RECOMMENDATION Water Right(s): 63-29062 (SEE ATTACHED EXHIBIT A)

On January 30, 2004, 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 January 30, 2004.

Janet Connell
JANET CONNELL
Deputy Clerk

Exhibit A

Subcase Nos.:

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DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JAN 3 0 2004

By _____ Clerk
_____ Deputy Clerk

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): 63-29062
	(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 January 30, 2004, with sufficient first-class postage prepaid to the following:

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

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

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DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JAN 3 0 2004

By _____ Clerk

_____ Deputy Clerk

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 63-30522

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

SOURCE: SPRING TRIBUTARY: LIME CREEK, SOUTH FORK

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 R12E S34 NWNESE Within Camas 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 Camas County
T02N R12E S34 NESE

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

JAN 3 0 2004

SPECIAL MASTER

_____
John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication