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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.: 63-29070, 63-29142
	)	
Case No. 39576	)	REPLY TO STATE OF IDAHO'S
	)	MEMORANDUM IN OPPOSITION TO
	)	THE UNITED STATES' MOTION FOR
	)	SUMMARY JUDGMENT
	)	

The State, in its response to the United States' Motion for Summary Judgment, argues that entry under the various public land disposal statutes segregated the entered federal land and that such land was, therefore, not "unappropriated" during the period of segregation. *State of Idaho's Memorandum in Opposition to the United States' Motion for Summary Judgment* (hereinafter the "*State's Response*") at 4-6. The State further argues that while the land was so segregated and appropriated the United States could not reserve the land under Public Water Reserve 107. *Id.* This argument fails for the simple reason that the state misconstrues the concept of segregation and the effect of an unperfected entry as against the United States and the President's power to withdrawal and reserve public land.

The courts and the United States Department of Interior (DOI) have consistently held for well over one hundred years that the mere filing of an entry application does nothing more than give the entryperson a possessory right against all other potential entrypersons, but conveys no right as against the United States. *See Sturr v. Beck*, 133 U.S. 541, 550 (1890) (“as to mere settlement, with the intention of obtaining title under the pre-emption laws, . . . no vested right in the land as against the United States is acquired until all the prerequisites for the acquisition of title have been complied with . . .”); *United States v. Buchanan*, 232 U.S. 72, 76-77 (1914) (“The legal title remained in the government until [the homesteading] patent issued; but, as against all except the United States, [the entryperson] was the lawful possessor, clothed with an inceptive title.”); *Rice v. Simmons*, 43 Pub. Lands Dec. 343, 345, 1914 WL 1521, 2 (D.O.I.) (“Her settlement and entry gave her possessory property in said lands as against all except the Government.”).

The DOI decision cited by the State, *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 Public Lands Dec. 55, 1917 WL 1344 (D.O.I.), does not hold differently. The case merely restates the longstanding rule that an entry removes the public land from other private attempts at settlement. Further, *California and Oregon Land Co.* is inapposite to the State’s positions that “an entry under the public land laws takes this real property outside the scope of PWR 107.” *State’s Response* at 5. *California and Oregon Land Co.* 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 to the entry applications on the lands claimed under subcases 63-29070 and 63-29142. These applications never went to patent as the entries were abandoned or cancelled long ago.

The “notation rule” discussed by the State also establishes that entrypersons have a preference right against other would-be applicants, and nothing more. *Margaret L. Klatt, Allan D. Klatt*,²³ IBLA 59, 64 (1976) (“no other person can establish a prior right so long as the entry remains of record.”); *E. A. Vaughey*, 63 Interior Dec. 85, 87, 1956 WL 8725, 2 (“The Department has held for over 50 years that an outstanding entry on public land is an absolute bar to the filing of other applications for the same lands until such time as the outstanding entry is canceled or relinquished and that fact is noted on the records of the local office.”). The notation rule does not and cannot, however, usurp Supreme Court and DOI holdings that an entryperson gains no right to the public lands as against the United States.

The State further argues that the word “entry” should be equated to an “appropriation of public lands.” *State’s Response* at 6. For this proposition the State cites the remark in *Loyd Wilson*, 48 Interior Dec. 380 1921 WL 1660 (D.O.I.), which states that the word “entry” should be taken in a “generic sense and treated as ‘signifying an appropriation of public lands’”. Here again, the State overreaches. The phrase “signifying an appropriation of public lands” derives from the case of *North and South Alabama Railroad Company*, 2 L.D. 681. This phrase, according to the public land decision, 2 L.D. at 682, further finds its origin in the Supreme Court decision of *Chotard v. Pope*, 12 Wheat. 586 (6 L. Ed. 737). In *Chotard v. Pope*, the Court defined the term “entry” as meaning:

That act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the epithet of an entrytaker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States.'

Id. at 588. The Court further explained that the term “entry . . . will be found to be distinctly

confined to the appropriation of lands under the laws of the United States, at private sale.”

Therefore, entry, as defined by the Supreme Court, means an appropriation of public lands “first surveyed, then advertised at public auction, and then, whatever remains unsold at public auction, is offered at private sale to the first applicant, at stipulated prices.” *Id.*

In other words, the “inceptive right” created by filing an entry is not perfected (and therefore is not an “appropriation” of the land) until the entryperson complies with all applicable laws. This was the holding in *Stockley v. United States*, 260 U.S. 532, 544 (1923) (cited in the United States’ opening memorandum at p. 8), where the Supreme Court discussed *Chotard v. Pope* and concluded that Stockley’s rights as an entryperson were perfected because he was in “full compliance with the law, and having paid all the fees and commissions lawfully due” and had done “everything which the law required on his part” and was therefore “entitled to a patent.” *Id.* (emphasis added): *see also Gilbert v. Spearing*, 4 Pub. Lands Dec. 463, 465-466, 1886 WL 3322, 3 (D.O.I.) (where the Department answered the question, “[w]hat then does the word entry mean as used in the land laws of the United States[?]”, by stating that “[i]t has been repeatedly held by the Department and by the Supreme Court of the United States, that when an applicant to enter public land has done all that the law requires of him, his rights [of entry] will not be lost by the failure or neglect of the district land officers to do their duty.”) (emphasis added). In the subcases at bar, 63-29070, 63-29142, the entrypersons did not comply fully with the law and they did not do everything required on their part. As a result, their entries never matured into anything that could be described as an “appropriation.”

Furthermore, the State fails to address the fundamental fact in these subcases; because the entrypersons did not comply with the law, the entries were never perfected and they failed. The

Secretary of the Interior long ago found that “[t]he reservation of the lands by the Government is effective as against those who have not complied with the conditions of the homestead law.”

Svan Hoglund 43 Pub. Lands Dec. 540, 542, 1915 WL 1132, 2 (D.O.I.). In *Hoglund*, an entryperson argued that his commuting to his entry parcel maintained his homestead entry even after the land was withdrawn and reserved as a National Forest. In rejecting this claim, the DOI noted that “[i]t is the Government's policy to withdraw all lands which at the time of withdrawal are properly subject to attack for failure to comply with the law.” The DOI then concluded that because the entryperson failed to comply with the homesteading laws his “entry . . . [was] not a valid appropriation of the land at and prior to the [order withdrawing and reserving the land].” *Id.* at 544.

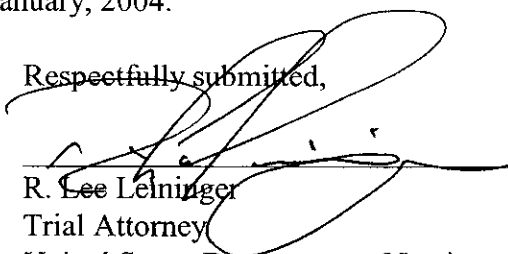
Finally, even if an entry application pending at the enactment of PWR 107 were to suspend the reservation, it is well established that the reservation takes effect after the entry is relinquished or cancelled. *Emma H. Pike*, 32 Pub. Lands Dec. 395, 397 (1902) (“[i]t is well settled that an executive order creating a reservation for a public purpose, and embracing land created [the decision uses the word 'covered'] by a prima facie valid entry, will take effect thereon if the entry is subsequently cancelled.”)(citations omitted); *James F. Rapp*, 60 Interior Dec. 217, 218 (1948) (“[w]here lands subject to an existing homestead entry are withdrawn under the Reclamation Act, the withdrawal becomes effective as to such land without any further order as soon as the existing entry is cancelled.”); *State of Alaska v. Phyllis Westcoat*, 83 IBLA 237, 250 (1984) (“the Executive order applies to lands which, at the date of its issuance, were covered by outstanding entries or other appropriations under the public-land laws or by withdrawals or reservations, and takes effect as to such lands whenever they become a part of the public lands of

the United States by reason of the termination of the outstanding appropriation, withdrawal, or reservation.”) Therefore, even assuming, *arguendo*, that the land parcels claimed under subcases 63-29070 and 63-29142 were validly entered and a right good against the United States was created prior to the PWR 107 reservation, upon the extinguishing of such private interest through cancellation or relinquishment the reservation was fully enforceable.

Accordingly, the United States respectfully asks that the Special Master grant the United States’ Motion for Summary Judgment and declare that a homestead entry application pending at the enactment of PWR 107 reservation, and which is subsequently relinquished or abandoned and never perfected, does not defeat the federal reservation. The United States further requests that the Special Master rule that evidence of the status of any homestead entry pending at the signing of executive order PWR 107 is not necessary to establish the United States’ entitlement to the reserved water right at a hearing pursuant to I.C. § 42-1411(A).

DATED this 28th day of January, 2004.

Respectfully submitted,



R. Lee Leininger
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United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on this 28 th day of January 2004, I served a true and correct copy of foregoing **REPLY TO STATE OF IDAHO'S MEMORANDUM IN OPPOSITION TO THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT** upon the following individuals by serving as indicated, postage pre-paid, addressed as follows:

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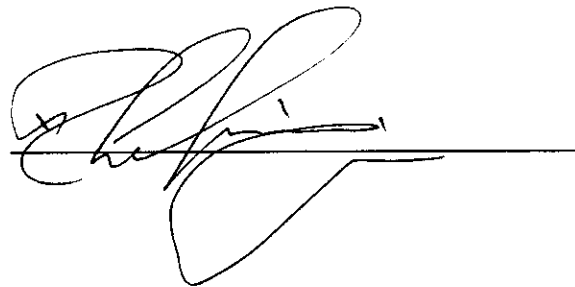
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A handwritten signature in black ink, appearing to be "R. Lee Leininger", written over a horizontal line.