

2004 APR 27 PM 2 03

**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
	)
Case No. 39576	) FINDINGS OF FACT AND
	) CONCLUSIONS OF LAW
	)
	) For Water Rights: 61-10953, 61-10949,
	) 61-11010, 61-11012, 61-11312, 61-11425,
	) 61-11479, 61-11533.

I.

Procedure and Findings of Fact

Dual-based Claim

A. The above-captioned water rights were claimed as dual-based stockwater rights meaning the rights were claimed as federal reserved water rights pursuant to Public Water Reserve (PWR) 107 and alternatively as state-law based rights. The Idaho Department of Water Resource reported the state-basis for the claims with an 1879 priority date and also with the statement that the right had been claimed pursuant to PWR 107.

B. Objections were filed by the State of Idaho to both the state and federal basis for the claims, raising issues common to all federal stockwater claims based on state-law and PWR 107. For purposes of resolution, numerous subcases were consolidated and the issues pertaining to the state-basis and PWR 107 proceeded on different tracks.

State-Law Basis

C. The issues pertaining to the state-law basis for the claims mainly dealt with whether the United States could perfect state-law based stockwater rights prior to

June 28, 1934, (the date of enactment of the Taylor Grazing Act), and if so, under what conditions. The above-captioned rights were consolidated for purposes of summary judgment under lead subcase 72-11767, which was consolidated with consolidated subcases 51-04031, 55-04072 and 61-04057. See *Order Consolidating and Designating Lead Subcases and Resetting Oral Argument on Summary Judgment, Consolidated Subcases 51-04031, 55-04072, 61-04057 and 72-11767 (May 15, 1998)*.

D. Special Master Hammerle, then assigned to the cases recommended that as a matter of law and fact that the priority date for the state-basis for the water rights was June 28, 1934. See *Order Granting Summary Judgment and Denying Cross-Motion for Summary Judgment, Consolidated Subcases 51-04031, 55-04072, 61-04057 and 72-11767*. Judge Hurlbutt, then presiding, adopted the report and recommendation and for purposes of appeal, consolidated the cases further with subcases 57-04028B, 57-10587B, 57-10588B, 57-10770B and 72-15929C. The consolidated subcase was designated under lead subcase number 72-15929C. See *Order Adopting Special Master's Report and Recommendation and Consolidating Subcases, Consolidated Subcase Nos. 72-11767, 51-04031, 55-04072 and 61-04057*. However, because of the pendency of the issues pertaining to the federal reserved basis for the claims, *Partial Decrees* could not be issued.

E. The State of Idaho move for 54(b) certification of the order for purposes of perfecting an appeal. On December 3, 1998, Judge Hurlbutt issued a *54(b) Certification for the Order*. The State of Idaho and the United States, pending settlement negotiations, jointly moved to vacate the *54(b) Certification*. An *Order Vacating the 54(b) Certification* was issued by Judge Wood, then presiding, on January 1, 2000. On January 10, 2000, the consolidation was removed.

F. On June 11, 1999, and on July 1, 1999, the United States and the State of Idaho filed stipulations resolving objections raised with respect to the state-basis for the claims not covered under consolidated subcases 72-11767, 51-04031, 55-04072 and 61-04057. See *Stipulation to Resolve Objections, Consolidated Subcase Nos. 23-10859, 24-10221, 25-13659, 27-11604 (June 11, 1999)* (resolving state-bases for dual-based claims); *Stipulation to Resolve Objections (July 1, 1999)* (resolving claims made solely pursuant to state law).

G. As a result, the priority dates for the state-law basis for those subcases subject to the *Special Master's Order Granting Summary Judgment on Consolidated Subcases 51-04031, 55-04072, 61-04057 and 72-11767* is June 28, 1934.

Federal Reserved Basis

H. As concerns the federal reserved basis for the claims, in *U.S. v. Idaho, 131 Idaho 468, 959 P.2d 449 (1998)*, the Idaho Supreme Court held that PWR 107 created a valid basis for federal reserved water rights. In *Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights Consolidated Subcase Nos. 23-10872 et. al. (December 28, 2001))*, Judge Burdick, then presiding, resolved certain issues pertaining to the elements of a PWR 107 federal reserved water right.

I. Pursuant to I.C. 42-1411(A) a hearing was held on the federal reserved basis for water rights 61-10949, 61-11010, 61-11012, 61-11312, 61-11425, 61-11479, 61-11533 on December 11, 2003. A hearing was also held on the federal reserved basis for water right 61-10953 on February 24, 2004. Prior to the hearings the *Affidavits of Robert R. Mallis* were filed by the United States in support of the elements of the water right claims.

J. According to the *Mallis* affidavits, at the time PWR 107 was executed, there were pending homestead applications for each of the lands to which the above water rights are appurtenant. This Special Master previously ruled in Subcases 25-13635, 25-13637, 25-13653, 65-19960, and 65-19962 that a pending homestead application defeated a reservation under PWR 107.

II.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

For the above-stated reasons, this Special Master concludes that as a matter of law the above-captioned water right claims do not fit the criteria for establishing federal reserved water rights pursuant to PWR 107.

THEREFORE, IT IS RECOMMENDED that the federal reserved basis for the above-captioned rights be disallowed and that the rights be decreed pursuant to state law as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)*.

DATED April 27, 2004.



THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

DISTRICT COURT-SRBA
TWIN FALLS CO, IDAHO
FILED

2004 APR 27 PM 2 04

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

CERTIFICATE OF MAILING

Water Right(s) : 61-10949

61-10953 61-11010 61-11012
61-11312 61-11425 61-11479
61-11533

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 April 27, 2004, with sufficient first-class postage prepaid to the following:

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

STATE OF IDAHO

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

USDI BLM

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

CERTIFICATE OF MAILING


DEBBIE LASH
Deputy Clerk

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2004 APR 27 PM 2 04

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

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      Water Right(s) : 61-10949
61-10953      61-11010      61-11012
61-11312      61-11425      61-11479
61-11533

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On April 27, 2004, Special Master THOMAS R CUSHMAN 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 April 27, 2004.


DEBBIE LASH
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

2004 APR 27 PM 2 04

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
) Water Right 61-10953

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

SOURCE: SPRING TRIBUTARY: CROOKED CREEK

QUANTITY: 0.02 CFS

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

PRIORITY DATE: 06/28/1934

POINT OF DIVERSION: T01S R07E S29 NWNESW Within Elmore 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 Elmore County
T01S R07E S29 NESW

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.

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

RECOMMENDATION

APR 27 2004

SPECIAL MASTER