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Department of Water Resources

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
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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) Subcases 63-29070 and 63-29142
)
Case No. 39576) ORDER ON SUMMARY JUDGMENT
)
_____)

I. PROCEDURAL BACKGROUND

Water rights 63-29070 and 63-29142 were claimed in the SRBA by the United States Bureau of Land Management (hereafter "United States"). The land on which these water rights are claimed remained in federal ownership on April 17, 1926, the date Public Water Reserve 107 (PWR 107) was signed by the President of the United States. At the time PWR 107 was signed, homestead entry applications were pending on the land parcels on which these claims are located. Both homestead entry applications eventually failed, and the land never left federal ownership.

The United States filed a *Motion for Summary Judgment* on December 19, 2003. The United States argues that no genuine issues of material fact remain to be decided and asserts that the United States is entitled to federal-reserve water rights based on PWR 107.

II. FACTS

In subcases 63-29070 and 63-29142, the United States filed affidavits stating that each claim is to springs located on the federal public domain. *Affidavit of Fredric W. Price* (hereafter "Price") (subcase no. 63-29070) (Dec. 19, 2003); *Affidavit of Robert R. Mallis* (hereafter "Mallis") (subcase no. 51-10499) (July 31, 2003). The affidavits also state that the land on which the claims were made was unreserved prior to April 17, 1926. *Price* at 5, ¶ 6. The claimed springs contain sufficient water for the purpose of stock watering. *Mallis* at ¶ 5.

Applications for homestead entries were pending on the land relating to both claims at the time of the PWR 107 reservation. *Price* at 6, ¶ 7. Both homestead applications failed. *Id.*

III. STANDARD OF REVIEW

I.R.C.P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to “the pleadings, depositions, and admissions on file, together with the affidavits, if any . . .” to determine whether the moving party is entitled to judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). If the moving party properly supports the motion for summary judgment, the nonmoving party must then present opposing evidence.

The opposing party’s case must consist of more than speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho at 517. The burden of proving the absence of material facts rests upon the moving party. If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* Credibility determinations, weighing of evidence, and drawing of legitimate inferences from the facts are functions to be performed at trial.

IV. ANALYSIS

A. Individual Subcases

1. **Subcase 63-29142:** At the time PWR 107 was signed, the land on which 63-29142 is located was subject to a homestead entry application filed by George Pringle on December 11, 1922, under the Stock Raising Homestead Act.

a. **Homestead Application Fails.** Mr. Pringle filed his homestead entry application on December 11, 1922. In August 1927, Mr. Pringle submitted “Final Proof” of the validity of his homestead claim. *Price* attach. 2 at 36-38. However, in December 1927, the General Land Office concluded that Mr. Pringle had not placed permanent improvements on the land as required by law. *Id.* attach. 2 at 23-25. The inspector who conducted the field investigation for the General Land Office found no water holes located on the land. After the General Land

Office filed its report, Mr. Pringle relinquished his claim. The homestead application was cancelled on January 1, 1928 for failure to submit proof. *Price* at 6, ¶ 7.

b. Genuine Issues of Material Fact. Although the homestead entry application relating to this claim failed, “genuine issues of material fact” remain as to whether a PWR 107 withdrawal applied to subcase 63-29142. One of the critical prerequisites for a PWR 107 withdrawal is an existing spring or water hole. In the report of the General Land Office, the inspector who conducted the field investigation concluded that “I found no water holes” on the property. *Price* attach. 2 at 23. Therefore, “genuine issues of material fact” remain as to whether there was a spring or water hole at the time of the PWR 107 withdrawal. **Summary judgment is denied for subcase 63-29142.**

2. Subcase 63- 29070: At the time PWR 107 was signed, the tract of land on which this spring is claimed was subject to a homestead application filed by Fal B. Jenkins on June 15, 1920. *Price*, attach. 1 at 16. This application was a Pre-emption Homestead Entry. *Price* at 7. The General Land Office cancelled Mr. Jenkins’ homestead application on January 10, 1928, for failure to submit proof within the statutory period. *Id* attach. 1 at 6, ¶ 7, at 11. Therefore, the homestead entry application pending on April 17, 1926 failed. The question remaining for this subcase is whether a pending homestead application on the date PWR 107 was signed is a legal barrier to a federal withdrawal under Public Water Reserve 107.

B. PWR 107

Public Water Reserve 107 withdraws from settlement public land that is vacant, unappropriated, unreserved, and contains a spring or waterhole.

[E]very smallest legal subdivision or the public land surveys which is **vacant, unappropriated, unreserved, public land** and contains a spring or waterhole, and all land within one quarter of a mile of every spring or waterhole located on unsurveyed public lands, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916, (39 Stat. 865; 43 U.S.C. § 300) and in aid of pending legislation.

PWR 107, 43 C.F.R. § 2321.1-1 (1967) At the time President Coolidge signed Public Water Reserve 107, the land on which these water rights were claimed (63-29070 and 63-29142) was subject to homestead entry applications. The legal issue is **whether the pendency of a homestead entry defeats a PWR 107 withdrawal.**

C. Land Segregation

A homestead entry pending at the time a general withdrawal of public land is made by the President of the United States temporarily changes the character of the property. Two rules of law are clear. 1) A federal withdrawal is not effective while a homestead application is pending. 2) A federal withdrawal is not effective for a homestead application that is perfected. Both the United States and the State of Idaho concede these points of law. The question in dispute is whether a federal withdrawal made while a homestead application is pending becomes effective once the homestead application fails? The U.S. asserts that the federal withdrawal takes effect once the application fails. The State of Idaho argues that the federal withdrawal does not take effect.

A homestead application segregates the land while the application is pending. The State of Idaho argues that this segregation of land during the pendency of the application creates a legal blockade to a general withdrawal. The State of Idaho asserts that a pending homestead application creates an ongoing segregation of the land. If land was 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 its restoration to the public domain is noted upon the records of the local land office.” *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 Interior Dec. 55, 1917 WL 1344 (D.O.I.). The State of Idaho argues that a later congressional act or Presidential Proclamation could withdraw land after a homestead application fails, but asserts that a general withdrawal under PWR 107 does not become effective again once the application fails.

D. The Notation Rule

The State of Idaho bolsters its argument by referring to a rule promulgated by the United States Department of Interior known as the “notation rule.” A homestead entry segregates land until restored to the public domain. This segregation is accomplished by a notation on the records of the local land office. *State of Idaho’s Memorandum* at 5. The rationale for the rule is:

The notation rule . . . strives to give all the public an opportunity to file [and] presupposes that the item noted on the records, i.e. a homestead entry, oil or gas lease, patent, segregates the land from further conflicting appropriations. It assumes that the entry noted is valid and protects a later would-be applicant who does not go behind it. . . .The record itself constitutes a bar to any other filing whatever the situation may be on the land itself.

B.J. Toohey, C.D. Toohey, & C.W. Toohey, 92 Interior Dec. 317, 1985 WL 264287 (D.O.I.).

The State of Idaho argues that United States' land subject to a homestead entry is appropriated land. Therefore, this land was not vacant, unappropriated, unreserved public lands when PWR 107 was entered. Thus, the State of Idaho argues the United States may not claim it under a federal reservation.

E. Unperfected Homestead Entry Applications

The United States counters that a pending homestead application merely segregates federal land temporarily and does not create a permanent blockade to the effectiveness of a federal withdrawal. The rationale behind the United States' argument is based on the nature of homestead applications. The United States asserts that the filing of a homestead application protects the applicant against claims by other entries, but does not divest the United States of ownership of the land. A homestead application gives the applicant only an inchoate interest as to the United States prior to the issuance of a land patent. *Guerra v. Packard*, 236 Cal. App. 2d 272, 291-292 (Cal. App. 1965) The inchoate interest of an applicant becomes a vested interest only upon the "proving up" of the application. The homestead application vests only when the applicant shows that he or she has complied with the homesteading laws including making permanent improvements to the entered lands. *Motion for Summary Judgment and Memorandum in Support* at 6. Failure to "prove up" the application results in cancellation of the entry. The United States argues that since both homestead entries failed, the mere homestead applications did not bar the PWR 107 reservation.

F. PWR 107 Blanket Withdrawal

The State of Idaho argues that a PWR 107 reservation should be analyzed differently than other federal reservations. The State of Idaho argues that reservations of land by the United States for National Forests are distinct because those reservations specifically describe the location of the land withdrawn. PWR 107 did not specifically describe where the water holes or springs it withdrew were located. Instead, PWR 107 was a general withdrawal of a type of land that comes within the Presidential Proclamation. This type of withdrawal is a "blanket withdrawal" rather than a specific withdrawal. Because PWR 107 was a "blanket withdrawal," the State of Idaho argues that it must be construed narrowly. The State of Idaho asserts that the President of the United States had the power to withdraw land from the public domain in a way that would defeat pending homestead applications; but if the language of PWR 107 is construed

narrowly, it is clear that he did not exercise that power. The State of Idaho argues that land with pending applications on the date of PWR 107 **could not be withdrawn by the U.S. as a matter of law** if a homestead application was pending. The State of Idaho argues that the U.S. could have later withdrawn the water holes or springs after the applications failed, or in the alternative could obtain a state-based water right.

G. PWR 107 in Context

The historical and legislative background in which PWR 107 emerged provides insight into whether it withdrew federal land at a single point in time, or whether the withdrawal was intended to be ongoing, at least as applied to a pending homestead application. This Special Master concludes that the PWR 107 withdrawal was intended to be ongoing. Therefore, a pending homestead entry is not a permanent legal blockade to a PWR 107 withdrawal.

The SRBA District Court has noted that the United States Congress enacted a number of statutes during the 19th Century aimed at promoting settlement of the western public domain. In conjunction with promoting settlement, Congress and the President adopted policies to thwart monopolization of crucial water sources. PWR 107 was signed during the height of these dual policies. *See, Memorandum Decision and Order on Challenge*, (“Scope of PWR 107 Reserved Rights” Consolidated Subcase Nos. 23-10872 et. seq.) (December 28, 2001)

1. Pickett Act

During this time period, stockmen were permitted to graze livestock on the remaining unappropriated lands. As unappropriated public land became scarcer and the competition for land became fiercer, it was clear that those who controlled access to water sources controlled grazing lands. Congress and the Department of Interior soon viewed federal land withdrawals as a means of preventing the monopolization of public lands and water sources. *Id.* The Pickett Act of 1910 authorized the President of the United States to make temporary withdrawals of land for public purposes. The Pickett Act provided that:

The President may, at any time in his discretion, temporarily withdraw lands from settlement, location, sale or entry of any of the public lands of the United States, including Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in orders of withdrawals, **and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.**

Pickett Act of 1910 (Act of June 25, 1910, ch. 421, 36 Stat. 487, codified at 43 U.S.C. § 141 (1976)) (Emphasis added)

Later in 1916 Congress sanctioned the public water reserve policy through the passage of the Stock Raising Homestead Act. (“SRHA”) (Act of December 29, 1916, 39 stat. 865, codified at 43 U.S.C. § 141 (1976)) This act encouraged the development of small ranching operations on the public domain, and specifically excluded from entry lands surrounding sources of water considered important for public watering purposes. Congress required those lands to be withdrawn pursuant to the Pickett Act. In the application for an entry under the SRHA, an applicant had to sign an affidavit stating that there was no spring, water hole, stream or surface supply of water of any kind needed or used by the public for watering livestock. See, Exhibit 7 to United States *Supplement Memorandum Regarding Public Water Reserve 107* (Case No. 39576) Consequently, homestead applications under SRHA for lands which contained water sources like those contemplated under PWR 107 were expressly exempt from withdrawal.

Public Water Reserve 107 followed these acts of the President and Congress by several years. PWR 107 was signed by the President in 1926. Although PWR 107 shifted the withdrawal from a case-by-case approach to a blanket or global withdrawal, the timing of the reservation is critical. This withdrawal was done after the Pickett Act. The Pickett Act clearly expresses Congressional intent that a Presidential withdrawal of land be ongoing. The language “such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress” seems to suggest that this withdrawal was not effective merely at the time of the signing of PWR 107. The withdrawal was effective until revoked.

Therefore, this Special Master answers the legal question of **whether the pendency of a homestead entry defeats a PWR 107 withdrawal** in the negative. The PWR 107 withdrawal continued to be effective, and remained in effect at the time these homestead applications failed. Once the homestead application failed, the withdrawal under PWR 107 was effective.

V. CONCLUSION

The Special Master has considered the pleadings and affidavits on file for these two subcases and finds that the United States has not met its burden of proving the absence of genuine issues of material fact for subcase 63-29142. There is a genuine issue of Material fact as to whether a spring or waterhole existed. The *Motion for Summary Judgment* is **DENIED** for subcase 63-29142. This Special Master finds that the United States has met its burden of

proving the absence of genuine issues of material fact for subcase 63-29070 because a pending homestead entry does not create a permanent bar to a federal withdrawal under Public Water Reserve 107. Therefore, the court **GRANTS** the *Motion for Summary Judgment* for subcase 63-29070.

DATED May 11, 2004.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

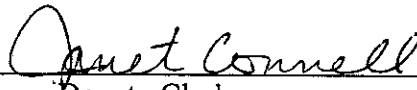
CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON SUMMARY JUDGMENT was mailed on May 11, 2004, with sufficient first-class postage to the following:

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