

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED
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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: 25-13635, 25-13637, 25-13653,
	)	65-19960, and 65-19962
	)	
Case No. 39576	)	ORDER DENYING AMENDED
	)	MOTION TO ALTER OR AMEND
	)	
_____	)	

I. PROCEDURAL BACKGROUND

Water rights 25-13635, 25-13637, 25-13653, 65-19960, and 65-19962 were claimed in the SRBA by the United States Bureau of Land Management (hereafter "United States"). These water rights were claimed under a "dual-basis" with both a federal-law reservation theory and a state-law theory based on prior appropriation. The land on which these water rights are claimed was subject to homestead entry applications pending on April 17, 1926. That is the date Public Water Reserve 107 was signed by the President of the United States. The homestead entry applications relating to each of these water rights ultimately failed.

This Special Master issued separate *Master's Reports and Recommendations* for these water rights (December 17 and 18, 2002.) The *Master's Reports and Recommendations* recommended these rights based on the conclusion that the federal reservation under PWR 107 should be denied. Accordingly, these water rights were recommended under the alternative state-based theory.

On May 2, 2003, the United States filed an *Amended Motion to Alter or Amend* the *Special Master's Report and Recommendation*. The hearing on the motion was held June 5, 2003.

II. FINDINGS

At the hearing for these claims pursuant to I.C. § 42-1411A(14), the United States presented affidavits regarding these water rights. No opposing affidavits were presented. It was undisputed that each water claim had an existing spring or springs located on federal lands with water sufficient for use by livestock. It was also undisputed that a homestead entry application was pending on the land containing the spring sites at the time of the enactment of PWR 107.

III. ANALYSIS

A. PWR 107

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

“[E]very smallest legal subdivision or the public land surveys which vacant, unappropriated, unreserved, public land and contains a spring or waterhole, and all land within one quarter of a mile of every spring or water hole 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 lands on which the springs claimed for these rights are located, were subject to homestead entry application. Because there was a pending homestead entry at the time of the PWR 107 withdrawal, these lands were not “vacant, unappropriated, unreserved” lands containing a water hole. The pending homestead applications defeated a PWR 107 withdrawal.

B. Land Segregation

The lands on which these claims occur were subject to homestead entries. The pending homestead entry applications **segregated** these lands from the public domain. Indeed, the United States concedes that PWR 107 could not have reserved these lands while the homestead applications were pending. PWR 107 could not reserve land that had a pending homestead entry because that land was segregated or separated from unreserved, unappropriated Federal lands. “Land 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.) PWR 107 was a one-time withdrawal, occurring on April 17, 1926. Lands with a pending homestead application could not have been withdrawn on that day. Thus, PWR 107 did not withdraw those lands. Once a homestead application failed however, the land could be restored to the public domain as recognized by the Notation Rule.

C. The Notation Rule

The United States argues that PWR 107 subsequently withdrew these waterholes once the homestead applications failed. However, the internal rules of the Interior Department suggest otherwise. The United States Department of Interior applies a rule that an entry such as a homestead application segregates land until restored to the public domain by a notation on the records of the local land office. The rule is known as the "notation rule."

"The notation rule, which insofar as the public is concerned, strives to give all the public an opportunity to file 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. . . . 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 notation rule suggests that restoration to the public records is required prior to a valid federal withdrawal. The notation rule, therefore, suggests that land must be restored and a subsequent, separate withdrawal must occur.

D. Unperfected Homestead Entry Applications

The United States argues that a pending homestead entry is not a permanent bar from withdrawal under PWR 107. The United States asserts that the PWR 107 withdrawal is effective immediately once the homestead application fails. This Special Master disagrees in part. It is accurate that failure to "prove up" a homestead application results in the cancellation or relinquishment of the entry. However, that does not result in an automatic withdrawal under PWR 107. The PWR 107 withdrawal was effective only when signed. The United States was not barred from making a later federal withdrawal where homestead applications were pending. Once the homestead application failed, the land could have been restored to the public domain by a notation on the records, and a subsequent withdrawal would then be effective. Although, the

priority date would have been from the date of the subsequent reservation, not April 17, 1926. The United States' however, failed to make a subsequent withdrawal and has yet to do so. Therefore these rights can be recommended only under the state basis.

V. CONCLUSION

The court has considered the pleadings and affidavits on file for these subcases and **denies** the United States *Amended Motion to Alter or Amend*. This decision in no way diminishes the state-based rights recommended to the United States for these subcases.

Dated May 24, 2004.



THOMAS R CUSHMAN
Special Master
Snake River Basin Adjudication

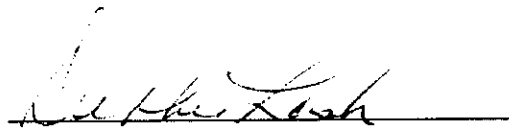
CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING AMENDED MOTION TO ALTER OR AMEND was mailed May 24, 2004, with sufficient first-class postage to the following:

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Deputy Clerk