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FILED
TWIN FALLS CO., IDAHO

**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**

) **FINDINGS OF FACT AND**
) **CONCLUSIONS OF LAW**

Case No. 39576

) **FOR WATER RIGHTS: 78-10996, 78-**
) **11080, 78-12022, 78-10968, 78- 10972 and**
) **78-12024.**

I. PROCEDURAL HISTORY

A notice of claim was filed for the above water rights by the United States, through the Department of Interior, Bureau of Land Management (United States) pursuant to I.C. § 42-1409. The Director of the State of Idaho Department of Water Resources examined the water system for this reporting area. The *Director's Report* contained a recommendation or abstract for the elements of these water rights.

On September 17, 1999, objections were filed to the above water right by the State of Idaho, Pickett Ranch & Sheep Co, Western Stockgrowers Assoc., Joe Tugaw, Michael Poulton, Gary Poulton, Karl Bedke, Jared Bedke, Scott Bedke, Bruce Bedke, Jerry Hoagland and Joyce Livestock Company. On August 29, 2002, the parties filed a *Stipulation and Joint Motion for Order Approving Stipulation, Notice of Withdrawal of Objections and Responses* filed by Norman Semanko for Bruce Bedke et al, *Notice of Withdrawal of Objections and Responses* filed by Norman Semanko for Western Stockgrowers et al. On September 18, 2002, an *Order Dismissing Objections and Responses with Prejudice; and Order Dismissing Parties* was issued. On March 11, 2003, the State of Idaho filed a *Stipulation to Resolve Objections*. On May 15, 2003, the United States filed a *Notice Regarding Priority Date*. The *Notice* states the claims are federal reserve water rights based on

Public Water Reserve 107. *An Order Dismissing Objections and Dismissing the State of Idaho as a Party* was issued on June 30, 2003.

On April 23, 2004, a trial was held on these and other claims pursuant to Idaho Code 42-1411A(12), which requires the United States to demonstrate a *prima facie* showing of the existence of the claimed federal reserve water right. In conjunction with that trial, the United States filed affidavits, which were admitted into evidence, for each of the claimed rights to meet its burden. At the hearing, Semanko withdrew all of his clients' objections and responses from the above subcases.

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 Resources reported the state-basis for the claims and 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 moved 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.

H. A priority date earlier than the June 28, 1934, date is allowed pursuant to the *Stipulation to Resolve Objections* if the United States provides evidence that the claimed water right was acquired from a third party, with a priority date earlier than June 28, 1934, through purchase, exchange, gift or other means and that the water right was acquired and maintained in accordance with all applicable state laws.

Federal Reserved Basis

I. 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.

J. Pursuant to I.C. 42-1411(A) a hearing was held on the federal reserved basis for the above-captioned rights on April 23, 2004. Prior to the hearing the *Affidavit of Craig A. Johnson* was filed by the United States in support of the elements of the water right claim.

K. According to the *Johnson* affidavit, at the time PWR 107 was executed, in water rights 78-10996, 78-11080, 78-12022, 78-10968 and 78-10972 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.

L. According to the *Johnson* affidavit, on December 15, 1993, the United States reacquired the land upon which water right 78-12024 is appurtenant. The priority date for 78-12024 is December 29, 1904.

II. CONCLUSIONS OF LAW

Therefore based on the file and record herein and pursuant to the 1411A(12) hearing, IT IS RECOMMENDED that the above water rights be decreed with the elements as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)*.

DATED May 24, 2004.



THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

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TWIN FALLS CO., IDAHO
FILED

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

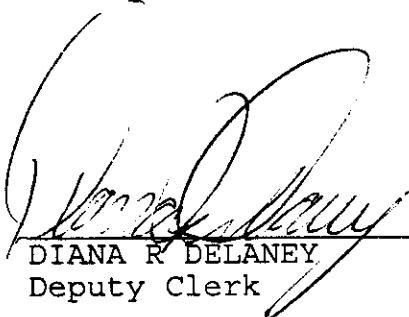
Water Right(s): 78-10968
78-10972 78-10996 78-11080
78-12022 78-12024

On May 24, 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 May 24, 2004.



DIANA R DELANEY
Deputy Clerk

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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): 78-10968

78-10972 78-10996 78-11080
78-12022 78-12024

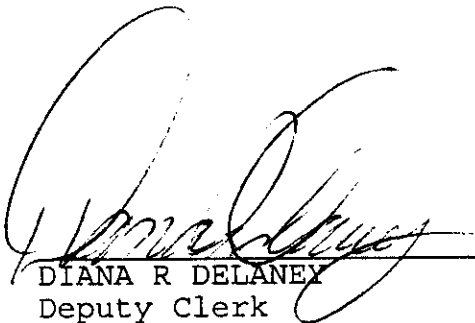
CERTIFICATE OF MAILING

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 May 24, 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


DIANA R DELANEY
Deputy Clerk

CERTIFICATE OF MAILING

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