

2004 JUN 18 AM 10 42

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	)	SECOND AMENDED SPECIAL
	)	MASTER'S REPORT
Case No. 39576	)	
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	
	)	FOR WATER RIGHTS 67-12382, 67-
	)	12431, 67-12433, 67-12435, 67-12492, 67-
	)	12738, 67-12874, 67-12876, 67-12892.
	)	

PROCEDURAL HISTORY

Special Master's Report and Recommendations were issued on June 2, 2004 in the above subcases.

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 rights were claimed as dual based rights, with both a federal and state-law basis. 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 June 2, 1999, an objection was filed by the State of Idaho. On September 17, 1999, objections were filed to the above water right by 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 and the United States filed a *Stipulation to Resolve*

Objections. On April 23, 2003, a *Special Master's Report and Recommendation* was issued. On April 23, 2003, an *Order Withdrawing Master's Report and Recommendation* was issued, along with an *Order Requesting Standard Form 5's*. 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 July 31, 2003, 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.

State-Law Basis

A. 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).

B. 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.

C. 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

D. 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.

E. Pursuant to I.C. 42-1411(A) a hearing was held on the federal reserved basis for the above-captioned rights on July 31, 2003. Prior to the hearing the *Affidavit of Robert R. Mallis* and the *Affidavit of Fredric Price* were filed by the United States in support of the elements of the water right claim.

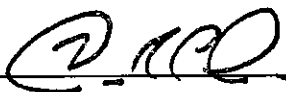
F. According to the *Mallis* affidavit, at the time PWR 107 was executed, in the above water rights there were pending homestead applications for each of the lands to which the above water rights are appurtenant. This Special Master previously ruled in Subcases 25-13635, 25-13637, 25-13653, 65-19960, and 65-19962 that a pending homestead application defeated a reservation under PWR 107. Therefore, the water rights are state-based with a June 28, 1934 priority date.

II. CONCLUSIONS OF LAW

Therefore based on the file and record herein and pursuant to the 1411A(12) hearing, IT IS RECOMMENDED the June 2, 2004 *Special Master's Report and Recommendation* be Withdrawn as it pertains to the above water rights.

IT IS FURTHER 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 June 18, 2004.


THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

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I certify that a true and correct copy of the AMENDED SPECIAL MASTER'S REPORT AND AMENDED RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF AMENDED SPECIAL MASTER'S REPORT AND RECOMMENDATION was mailed with sufficient first-class postage to the following:

Director of IDWR
P O Box 83720
Boise, Idaho 83720-0098

United States of America
Department of Justice
550 West Fort Street, MSC 033
Boise, Idaho 83724

Office of the Attorney General
State of Idaho
P O Box 44449
Boise, Idaho 83711-4449

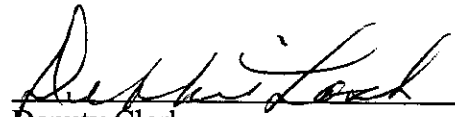

Deputy Clerk

NOTICE OF ISSUANCE

On June 11, 2004, Special Master Thomas R Cushman issued a Second Amended Special Master's Report and Recommendation to the above listed subcases 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.


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