



U.S. Department of Justice

Environment and Natural Resources Division

LL:DAJ

90-6-2-63

David A. Jarvis

Labat-Anderson, Inc.

999 Eighteenth Street

Suite 945, North Platte

Denver, Colorado 80202

RECEIVED
JUL 19 2004
Department of Water Resources

Telephone (303) 312-7370

Facsimile (303) 312-7379

July 16, 2004

via FedEx Mail

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

Re: SRBA Case No. 39576
Subcase Nos. 25-13635, 25-13637, 25-13653, 65-19960, and 65-19962

Dear Ms. Delaney:

Enclosed for filing are the original and four copies of the following document in the above mentioned subcases:

1. **OPENING MEMORANDUM CHALLENGING THE SPECIAL MASTER'S REPORT AND RECOMMENDATION**

Thank you for your time and attention in this matter.

Sincerely,

David A. Jarvis
Paralegal

Enclosures

Names of Parties Filing Document:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division

R. LEE LEININGER
Attorney, Department of Justice
General Litigation Section
Environment and Natural Resources Division
999 18th St., Ste. 945NT
Denver, CO 80202
(303) 312-7322

**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	)	Subcase Nos.: 25-13635, 25-13637, 25-13653,
	)	65-19960, and 65-19962
	)	
Case No. 39576	)	OPENING MEMORANDUM CHALLENGING
	)	THE SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION
	)	

I. Introduction

The above referenced water rights were claimed by the United States on behalf of the United States Department of the Interior, Bureau of Land Management ("BLM") based upon alternative theories of law. These water right claims were filed under a state law based beneficial use theory and a federal law based reservation theory. At issue in this challenge are the Special

Master's reports and recommendation disallowing federal reservation of water sources based on the executive order titled Public Water Reserve No. 107 (hereinafter "PWR 107").

PWR 107 is a blanket reservation of all "vacant, unappropriated, unreserved, public land [containing] a spring or waterhole." 43 C.F.R. § 2321.1-1 (1967).¹ The claims subject to this challenge involve federal public lands containing springs or waterholes where homestead entries were pending at the time of the PWR 107 federal reservation on April 17, 1926. The homestead entries failed and the land containing the springs or waterholes remained federal public land. Nevertheless, the Special Master concluded that "[b]ecause 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." *Order Denying Amended Motion to Alter or Amend*, subcases 25-13635, *et al.*, dated May 24, 2004, at 2.

Accordingly, the Special Master issued a report for each water right recommending that the federal reservation of water be disallowed and that the rights be decreed under the alternative state law basis. The United States filed an Amended Motion to Alter or Amend the Special Master's reports and recommendations on May 2, 2003 requesting the master reconsider his rulings. This motion was denied.

¹ PWR 107 provides in relevant part as follows:

Under and pursuant to the provisions of the [Pickett Act], it is hereby ordered that every smallest legal subdivision of the public land survey which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of [the Stock Homestead Raising Act], and in aid of pending legislation.

Pursuant to SRBA Administrative Order No. 1 (Amended 10/16/97), ¶ 13, the United States gave notice of its intent to raise the following issue for review by the Presiding Judge:

Did the Special Master err in ruling that the United States is not entitled to a federal reserved water right pursuant to Public Water Reserve No. 107 if there was a homestead entry application pending at the time of the reservation on the land containing the spring or waterhole?

Notice of Challenge, Re: Subcases 25-13635, *et al.*, dated June 21, 2004, at 2.

II. Background

PWR 107 litigation has a long history in the Snake River Basin Adjudication (SRBA). Beginning in Spring 1996, the State of Idaho and others challenged the validity of the PWR 107 federal reservation in Basin-Wide Issue No. 9. *See Order Designating Basin Wide Issue No. 9*, subcase 91-00009, dated March 8, 1996. In that contest, the presiding SRBA Judge ruled that PWR 107 only reserved to the United States small parcels of land and not the water from springs and water holes located on the land. *Memorandum Decision and Order, Re: Basin Wide Issue 9*, subcase 91-00009, dated December 9, 1996. The Idaho Supreme Court unanimously reversed, holding that “PWR 107 evidences an express intention by Congress that reserves a water right in the United States.” *United States v. State*, 959 P.2d 449, 452 (Idaho 1998). The Idaho Supreme Court stated that “[w]ithout the reserved water right for such springs and waterholes the purpose of PWR 107 would be entirely defeated because Taylor Grazing permittees would not have water needed for stockwatering purposes.” *Id.* at 453.

The State of Idaho then filed hundreds of individual objections asserting that PWR 107 water rights should not be decreed where the claimed springs and water holes are tributary to a river or stream. Two presiding Special Masters agreed with the State’s objections and ruled that

springs on the federal public domain with water that leaves the reservation while on the surface are not reserved by PWR 107. *Order Granting State's Motion for Summary Judgment*, subcase 23-10872, *et al.*, dated March 5, 1999; *Second Order on Joint Submission*, subcase 65-20033 *et al.*, dated October 29, 1999.

On challenge, the Presiding Judge unequivocally rejected the Special Masters' recommendations and held that PWR 107 "created an appurtenant implied federal reserved water right in the spring or water hole giving rise to the land irrespective of whether or not water flowing from the spring or water hole is tributary to a perennial running stream." *Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman*, Consolidated Subcases 23-10872, *et al.*, Joint Submission Subcases 23-10894, *et al.* (hereinafter "*Memorandum Decision on Scope of PWR 107*") (dated December 28, 2001), at 35. The Presiding Judge clearly stated that his decision constituted "a final disposition of the objections raised in this matter and the significant number of subcases dependant on this ruling" and certified the decision as final for purposes of appeal. *Id.* at 36. The State did not appeal the district court's ruling.

The Presiding Judge recommitted the subcases to the Special Master for an evidentiary hearing pursuant to Idaho Code § 42-1411A(12). *Id.* at 35. At these evidentiary hearings, the United States presents affidavit testimony to establish the *prima facie* elements of a water right under PWR 107. The requisite *prima facie* elements were defined nearly six years ago when a Special Master stated that

[u]nder the express provisions of PWR 107, the United States alleges that the *prima facie* elements for a PWR 107 reserve are as follows:

a. Identification of a spring or waterhole;

- b. Located on land that was unreserved federal public lands in 1926; and
- c. Containing sufficient water for purposes of stock watering.

This court agrees with these *prima facie* elements.

Order Denying Motion for Default Judgment (PWR 107)), subcases 57-02493, *et al.*, dated November 16, 1998 (emphasis added).²

Last year, another Special Master also ruled on the required elements for establishing a PWR 107 water right. The Special Master stated that “to establish a *prima facie* case in support of its PWR 107 claims, the BLM must: a) identify a spring or waterhole, b) located on land that was reserved federal public land on April 17, 1926,³ and c) which contains sufficient water for purposes of stock watering.” *Special Master Report*, re: subcases 35-12996, *et al.*, dated 28, 2003, at 9. In accord with these rulings, the United States has filed affidavits for approximately 3000 subcases attesting to these elements of a PWR 107 water right.

Here, the Special Master has added an additional element to the *prima facie* case necessary to establish a PWR 107 water right. Raising this issue *sua sponte* for the first time in December 2002, the Special Master required the United States to gather and submit information regarding the status of homestead entries on the lands containing springs claimed under PWR

² The claims for subcases 57-02493, *et al.* were initially denied based upon the Special Master’s determination that the quantity of water claimed was in error. This matter was subsequently settled when the BLM agreed to accept 0.02 cfs or 13,000 gallons per day as the decreed water amount.

³ While the Order in subcases 57-02493 *et al.* refers to the *prima facie* requirement of unreserved federal public lands in 1926, the Report in subcases 35-12996, *et al.* refers to the land as reserved federal public land on April 17, 1926. We believe both Special Masters are correct. The status of the land changed from unreserved to reserved as of the date of the signing of the executive order, April 17, 1926. Because PWR 107 refers to “unreserved public land”, however, the United States will continue to state in the affidavits from the BLM that the water right claims are located on unreserved federal public domain as of April 17, 1926.

107.⁴ The Special Master subsequently disallowed all PWR 107 claims located on land where there was a pending application for homestead entry at the time of the withdrawal.

The United States challenges the Special Master's erroneous conclusions of law and seeks a ruling that Public Water Reserve No. 107 reserves water at springs and waterholes on the public domain regardless of applications for homestead entry that may have been pending on the date of the reservation.

III. Special Master's Ruling

In his *Order Denying Amended Motion to Alter or Amend*, dated May 24, 2004 at 2, the Special Master observed that “pending homestead entry applications segregated [the claimed public] lands from the public domain.” The Special Master recognized the well-settled principle that land segregated from the public domain by the filing of an application for homestead entry is not subject to “settlement or any other form of appropriation” until the entry is relinquished or cancelled and the termination is noted in the records of the local federal land office. *Id.* at 2-3. This “notation rule * * * constitutes a bar to any other filing” on land validly entered by a bona fide homesteader. *Id.* at 3, *quoting B.J. Toohey, C.D. Toohey, & C.W. Toohey*, 92 Interior Dec. 317, 318, 1985 WL 264287.

The Special Master, without further citation to competent authority, then leaps to the unwarranted conclusion that

⁴ Another Special Master referred to this additional element of a *prima facie* case as “frankly, a waste of time.” *Special Master Report*, re: subcases 35-12996, *et al.*, dated 28, 2003, at 7.

[t]he notation rule suggests that restoration to the public lands 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.

Order Denying Amended Motion to Alter or Amend, at 3 (emphasis in original). Also without citation to competent authority, the Special Master declares that “PWR 107 was a one-time withdrawal, occurring on April 17, 1926” and “was effective only when signed.” *Id.* As a result, the Special Master concludes that the restoration of the entry lands after the date of enactment of PWR 107 does not entitle the United States to a PWR 107 water right. *Id.*

IV. Related Cases

In the *Special Master Report*, re: subcases 35-12996, *et al.*, dated 28, 2003, at 9, Special Master Dolan ruled on the identical issue presented here and concluded “[f]or its PWR 107 federal reserved claims, the BLM is not required to submit evidence of the land entry status of the area surrounding the spring or waterhole source at the time of the reservation.” Emphasis in original.

In the *Order on Summary Judgment*, subcases 63-29070 and 63-29142, dated May 11, 2004, at 8, Special Master Bilyeu held that a “homestead entry [pending at the time of the reservation] does not create a permanent bar to a federal withdrawal under Public Water Reserve 107.”

V. Argument

1. The Congressional authority for PWR 107 demonstrates that where homesteaders failed to comply with the homestead laws their entries do not defeat a withdrawal and reservation.

At the beginning of the twentieth century, Congress favored settlement and disposal of public lands to homesteaders and opposed the livestock industry's efforts to control or acquire large swaths of public lands for cattle and sheep operations. *See Memorandum Decision on Scope of PWR 107*, at 13-14. Stock growers frequently engaged in illicit and fraudulent schemes aimed at gaining control of public lands. *Id.* These efforts alarmed Congress and the federal agency overseeing the public lands. "It became apparent to the Department of Interior and members of Congress that the monopolization of stock water sources would eventually defeat the policy of promoting the establishment of small family homesteading operations." *Id.* at 13-14.

It was well known that land in the west could be monopolized by controlling the scarce water resources. *Id.* In order to prevent the monopolization of land by control of the water sources, Congress gave the executive branch authority to withdraw and reserve public lands containing water bodies. These withdrawals, termed "Public Water Reserves," began with the reservation of specific streams and waterholes and culminated in the 107th water reserve, a blanket reservation of all unappropriated springs and waterholes. PWR 107 was signed by President Coolidge in 1926 and served to prevent monopolization of the public lands and to preserve water sources for use by the general public. *United States v. Idaho*, 959 P.2d at 451-52

The enabling legislation granting the President the power to withdraw and reserve public lands, including the lands described in PWR 107, was the *Pickett Act of 1910* (Act of June 25, 1910, ch. 421, 36 Stat. 487, codified at 43 U.S.C. §141 (1976)) ("*Pickett Act*") (repealed by Federal

Land Policy and Management Act, Pub. L. 94-579, § 704(a), 90 Stat. 2743 (1976)), *See generally United States v. Idaho*, 959 P.2d at 451-52. The *Pickett Act* embodies Congress's desire that legitimate homesteading continue. The Act excepted from the executive's withdrawal authority "any lawful homestead" existing on the date of such withdraw, provided the entryman or settler "continue[s] to comply with the law under which the entry or settlement was made." *Id.* at 43 U.S.C. § 142. This proviso is important. As one hundred years of administrative decisions and court rulings have shown, the homesteader had to comply with homesteading laws to prevent federal reservation of public lands.

In *Stockley v. United States*, 260 U.S. 532, 543-44 (1923), the Supreme Court examined the effect of a homestead exclusion provision in a 1908 executive order that withdrew certain oil lands "subject to existing valid [homestead] claims." The purpose of the homestead exception, the Court concluded, was to exempt from the withdrawal order "claims which had been lawfully initiated and which, upon full compliance with the land laws, would ripen into a title." *Id.* at 544.

The Secretary of the Interior examined the effect of homestead entries that do not ripen into title and determined that "[t]he reservation of the lands by the Government is effective as against those who have not complied with the conditions of the homestead law." *Svan Hoglund*, 43 Pub. Lands Dec. 540, 542, 1915 WL 1132, 2 (D.O.I.). In *Hoglund*, the homesteader argued that his commuting to his entry parcel maintained his homestead entry even after the land was withdrawn and reserved as a National Forest. Rejecting this claim, Secretary Lane noted that "[i]t is the Government's policy to withdraw all lands which at the time of withdrawal are properly subject to attack for failure to comply with the law." *Id.* The Secretary then concluded

that because the homesteader failed to comply with the homesteading laws his “entry . . . [was] not a valid appropriation of the land at and prior to the [order withdrawing and reserving the land].” *Id.* at 544. As a result, the entry had no force or effect on the federal withdrawal.

In the subcases at issue here -- and all other PWR 107 claims -- the prospective homesteaders did not continue to comply with the law under which the entry or settlement was made. The homestead entries were relinquished, cancelled, or otherwise terminated prior to patent. Accordingly, the *Pickett Act*’s homestead exemption to subsequent withdrawals and reservations made under its authority, including PWR 107, does not apply. Therefore, the Special Master’s conclusions of law are unpersuasive and erroneous and should be set aside.

2. The segregation of land from the public domain upon the filing of a homestead entry merely gave the homesteader exclusive rights of possession as against all other homesteaders, but did not grant a right as against the United States.

The Special Master held that “PWR 107 could not reserve land that had a pending homestead entry because that land was segregated or separated from unreserved, unappropriated Federal lands.” *Order Denying Amended Motion to Alter or Amend*, at 2. The Special Master misconstrues the meaning of segregation of public land and its effect on the authority of the United States to withdraw and reserve federal lands pursuant to Congressional and Presidential directives. The courts and the Department of the Interior (DOI) have consistently found that the mere filing of an application for homestead entry does nothing more than give the prospective homesteader a possessory right against all other potential homesteaders, but conveys no right as against the United States. *See Sturr v. Beck*, 133 U.S. 541, 550 (1890) (“as to mere settlement, with the intention of obtaining title under the pre-emption laws, . . . no vested right in the land as against the United States is acquired until all the prerequisites for the acquisition of title have

been complied with . . . ”); *United States v. Buchanan*, 232 U.S. 72, 76-77 (1914) (“The legal title remained in the government until [the homesteading] patent issued”); *Rice v. Simmons*, 43 Pub. Lands Dec. 343, 345, 1914 WL 1521, 2 (D.O.I.) (“Her settlement and entry gave her possessory property in said lands as against all except the Government”); cf. *Stockley*, 260 U.S. at 540 (where the Supreme Court concluded that rights of a homesteader were perfected because he had done “everything which the law required on his part ”and was therefore “entitled to a patent”).

The filing of an application for homestead entry grants only an inchoate interest as against the United States. *Guerra v. Packard*, 236 Cal.App.2d 272, 291-292 (Cal.App.1965)(“a patentee’s title is inchoate against the United States prior to the issuance of the patent . . . ”). An inchoate interest is “an interest in real estate which is not a present interest, but which may ripen into a vested estate if not . . . extinguished.” *BLACK’S LAW DICTIONARY* 762 (6th ed. 1990). The inchoate interest of a homesteader becomes a real interest upon “proving up,” *i.e.*, showing that he or she complied with the homestead laws, including occupancy for a term of years, payment to the United States, and/or permanent improvements to the entered lands.⁵

⁵ Homesteading in the United States began with the Homestead Act of 1862, ch. 75, 12 Stat. 392 (not codified), which granted the homesteader title to 160 acres of the public domain by either submitting payment of \$1.25 per acre or by occupying the land for five years and paying a registration fee of 30 dollars. Occupancy meant the construction of a house and cultivation of a minimum percentage of acreage. *Id.* Under the Enlarged Homestead Act of 1910, ch. 298, 36 Stat. 531, *repealed by* Federal Land Policy and Management Act, Pub. L. 94-579, § 702, 90 Stat. 2787 (1976), the size of the land parcel a homesteader could claim was raised to 320 acres for dryland farming in arid western states. *Id.* The Stock-Raising Homestead Act of 1916, ch. 9, 39 Stat. 862, *repealed by* Federal Land Policy and Management Act, Pub. L. 94-579, § 702, 90 Stat. 2787 (1976), further raised the maximum size of a land entry parcel to 640 acres for dryland grazing and, instead of cultivation, the homesteader had to make improvements to the land valued at not less than \$1.25 per acre. *Id.*

None of the subcases at issue here, and to the best of counsel's knowledge, none of the PWR 107 water rights claimed in the SRBA, involves lands where a homesteader successfully proved up an entry and was entitled to a patent. In the above-captioned subcases, all of the homestead entries failed. Thus, the homestead entries were ineffective and had no effect upon Congress's or the President's authority to withdraw and reserve federal land. Because the Special Master's contrary conclusions of law are clearly erroneous, they should be set-aside.

3. The notation practice is not a bar to a Presidential withdrawal and reservation.

The Special Master relied on the "notation rule" as a bar to federal withdrawal of public lands under PWR 107. This so-called rule was actually an Interior Department practice of segregating a parcel of land from subsequent appropriations once an application to enter was recorded or "noted" in the local land office. *B.J. Toohey, C.D. Toohey, & C.W. Toohey*, 92 Interior Dec. 317, 318, 1985 WL 264287, 1 (D.O.I.). In *E. A. Vaughey*, 63 Interior Dec. 85, 87, 1956 WL 8725, 2 (D.O.I.), the Interior Department identified the practice as follows:

The Department has held for over 50 years that an outstanding entry on public land is an absolute bar to the filing of other applications for the same lands until such time as the outstanding entry is canceled or relinquished and that fact is noted on the records of the local office.

See also Margaret L. Klatt, Allan D. Klatt, 23 IBLA 59, 64 (1975) ("no other person can establish a prior right so long as the entry remains of record").

The Special Master states that the Interior Departments notation practice "suggests" that land that has been filed upon and duly noted in the local land offices must be restored "to the public records . . . prior to a valid federal withdrawal." *Order Denying Amended Motion to Alter or Amend* at 3 (emphasis omitted). None of the cases discussing the notation practice holds, or

even suggests, that a federal withdrawal is valid only if it is established after the cancellation or relinquishment of an entry on the public lands. In fact, *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 Public Lands Dec. 55, 1917 WL 1344 (D.O.I.), a case cited by the Special Master in support of his flawed conclusions of law, simply restates the principle that an entry removes the public land from other private attempts at settlement, and nothing more.

The Special Master quoted, in relevant part, *California and Oregon Land Co.*, as follows: “Land segregated from the public domain . . . by entry . . . 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.” *See Order Denying Amended Motion to Alter or Amend* at 2. This quote merely confirms that homestead entries are a bar against other would-be settlers, and does not hold that homesteaders establish a right as against the United States that prevents withdraw and reservation. Indeed, the actual holding in *California and Oregon Land Co.* is that formerly patented lands are restored to appropriation and entry only after the patent cancellations are recorded in the local land office. 46 Public Lands Dec. at 55-56. Clearly, this is not what happened to the applications for homestead entry at issue here. The applications never went to patent because the entries were abandoned or cancelled a few years after they were filed.

The notation practice merely insures that homesteaders have a preference right against other would-be applicants. The Interior Department’s practice does not and cannot overrule Supreme Court and DOI cases that expressly hold that a homesteader has no right to the public lands as against the United States. Thus, the Special Master erred when he held that PWR 107 was barred by the notation rule.

4. The PWR 107 executive order was a present and prospective withdrawal and reservation.

The Special Master concluded, without citation to authority, that “the PWR 107 withdrawal was effective only when signed.” *Order Denying Amended Motion to Alter or Amend* at 3. This unsupported conclusion of law is not correct. PWR 107 was created under Congressional authority, contained in the Pickett Act of 1910, to temporarily withdraw land from the public domain for public purposes. *See discussion, supra* at 8-9; *Memorandum Decision on Scope of PWR 107*, at 14-16; *United States v. State*, 959 P.2d at 449. The Pickett Act provided:

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 the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

43 U.S.C. § 141 (1976) (emphasis added). Using his broad discretion to withdraw lands “at any time,” the President stated in PWR 107 that unappropriated springs and waterholes “be, and the same is” withdrawn. 43 C.F.R. § 2321.1-1 (1967). The use of the present and future tense in the executive order is a clear indication that the withdraw was effective when signed and prospectively. *See e.g., State Compensation Ins. Fund v. McConnell, et al.*, 294 P.2d 440, 446 (Cal. 1956)(“It is a general rule of statutory construction that a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter”).

Further, even if an entry application pending at the enactment of PWR 107 were to suspend the reservation, it has long been established that the reservation takes effect after the

entry is relinquished or cancelled. The Special Master completely ignored well settled law that holds “an executive order creating a reservation for a public purpose, and embracing land created [the decision uses the word 'covered'] by a prima facie valid entry, will take effect thereon if the entry is subsequently canceled.” *Emma H. Pike*, 32 Pub. Lands Dec. 395, 397, 1904 WL 886, 2 (D.O.I.)(citations omitted); *see also James F. Rapp*, 60 Interior Dec. 217, 218, 1948 WL 5092, 1 (D.O.I.)(“[w]here lands subject to an existing homestead entry are withdrawn under the Reclamation Act, the withdrawal becomes effective as to such land without any further order as soon as the existing entry is canceled”); *State of Alaska v. Phyllis Westcoat*, 83 IBLA 191 (“the Executive order applies to lands which, at the date of its issuance, were covered by outstanding entries or other appropriations under the public-land laws or by withdrawals or reservations, and takes effect as to such lands whenever they become a part of the public lands of the United States by reason of the termination of the outstanding appropriation, withdrawal, or reservation”).

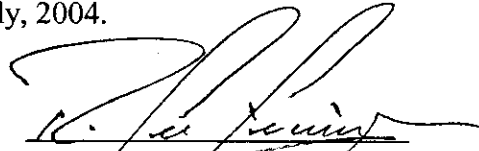
Therefore, even assuming, *arguendo*, that the parcels of land containing the springs and waterholes claimed in these subcases were validly entered and a right good against the United States was created prior to the PWR 107 reservation, upon extinguishing such private interest through cancellation or relinquishment, the reservation was fully enforceable.

VI. Conclusion

The Special Master’s conclusions of law are unpersuasive and erroneous. Therefore, the United States respectfully requests the Presiding Judge set-aside the Special Master’s Reports and Recommendations and issue partial decrees for the PWR 107 claims at issue in the above-captioned subcases. The United States further requests that the Court rule that evidence of the

status of any homestead entry pending at the signing of executive order PWR 107 is not necessary to establish the United States' entitlement to the reserved water right at a hearing pursuant to I.C. § 42-1411(A).

Respectfully submitted this 16th day of July, 2004.



R. Lee Leininger
Attorney
U.S. Department of Justice

CERTIFICATE OF MAILING

I certify that on July 16, 2004, a true and correct copy of the United States' Opening Memorandum Challenging the Special Master's Report and Recommendation, Re: Subcases 25-13635, 25-13637, 25-13653, 65-19960, and 65-19962 was served via first class U.S. mail to the following persons:

U.S. Department of Justice
General Litigation Section
Environment and Natural Resources
Division
550 West Fort Street, MSC 033
Boise, ID 83724
(208) 387-0842

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098
(208) 334-2690

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098
(208) 327-7866

