

2004 SEP 3 PM 4 40

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

RECEIVED
SEP 08 2004
DEPARTMENT OF
WATER RESOURCES

In Re SRBA) SUBCASE NO.: 63-29070
Case No. 39576) SPECIAL MASTER'S REPORT AND
RECOMMENDATION

I. PROCEDURAL BACKGROUND

Water right 63-29070 was claimed in the SRBA by the United States Bureau of Land Management (hereafter "United States"). The United States originally claimed this right under both state law and as a federal reservation. The State-based portion of this right was investigated by IDWR and reported in a *Director's Report*. IDWR did not investigate the federal reservation theory because these are based on federal law. I.C. § 42-1411A. An *Objection* was filed by the State of Idaho. The United States proceeded with the federal basis of the claim. The land on which this water right is 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, a homestead entry application was pending on the land parcel on which this claim is located. The homestead entry application eventually failed, and the land did not leave federal ownership.

The United States filed a *Motion for Summary Judgment* on December 19, 2003 asserting that the United States was entitled to a federal-reserve water right based on PWR 107. The *Motion for Summary Judgment* was granted for 63-29070 but denied for 63-29142 because genuine issues of material fact remained. *Order on Summary Judgment* (May 11, 2004)

The *Motion for Summary Judgment* was supported by two affidavits. *Affidavit of Fredric W. Price* (hereafter "Price") (subcase no. 63-29070 et. al.) (Dec. 19, 2003); *Affidavit of Robert R. Mallis* (hereafter "Mallis") (subcase no. 51-10499 et. al.) (July 31, 2003).

II. STANDARD OF REVIEW

A. Federal Reserve Water Rights

A state has plenary control of water located within its territory. *Kansas v. Colorado*, 206 U.S. 46 (1907). A claim to a federal reserve water right is an exception to a state's plenary control of water. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899). Reserved water rights may be express or implied. *United States v. New Mexico*, 438 U.S. 696 (1978). An express reservation of water is created by the explicit language in the act creating the reservation. *Id.* An implied reserved water right must be based on a reservation of land, *Arizona v. California*, 373 U.S. 546 (1963), and may be granted if the following three criteria are satisfied:

- (1) An implied reservation of water exists only if necessary to fulfill the primary, not the secondary, purpose for which the reservation of land was created, *United States v. New Mexico*, 438 U.S. at 702;
- (2) Without water, the purposes of the reservation must be entirely defeated, *Id.*; and
- (3) The water claimed must be the minimum amount necessary to achieve the purposes of the reservation. *Id.* At 700.

B. Federal Reserved Rights Under Public Water Reserve 107

The United States Bureau of Land Management filed this claim for stockwatering based on alternative legal theories of beneficial use (pursuant to state law) and on the executive order Public Water Reserve 107 (April 17, 1926) (pursuant to federal law).

At the time the President of the United States signed Public Water Reserve 107, the land on which this water right was claimed was subject to a homestead entry application. The legal issue of whether the pendency of a homestead entry defeats a PWR 107 withdrawal has been answered in this litigation. *Order on Summary Judgment* (May 11, 2004) This Special Master holds that PWR 107 created an ongoing withdrawal. A pending homestead entry is not a permanent legal blockade to a PWR 107 withdrawal. Thus, the PWR 107 withdrawal continued to be effective and remained in effect at the time this homestead application failed. Once a homestead application fails, the withdrawal under PWR 107 is effective unless the withdrawal is otherwise defective. *See, Order on Summary Judgment* at 7. In this case, it was undisputed that a spring or water hole existed for this right at the time of the federal withdrawal.

III. FINDING OF FACTS

A. Ownership of the Water Right

The claims assert that the owner of this water right is the U.S. B.L.M. The record contains the following evidence regarding ownership:

At the request of counsel for the United States, I have reviewed the official business records of the BLM for the claims described in Attachment 1, and verified that: a. The subcases shown in Attachment 1 were located on unreserved federal public domain lands as of April 17, 1926, and that these lands currently remain under Department of the Interior Administration.

Mallis at 3, ¶ 5. It is undisputed that the United States is the owner of this right.

B. Priority Date

This water right was claimed based on PWR 107. Public Water Reserve 107 was signed by the President of the United States is April 17, 1926. However, the withdrawal was not effective until the pending homestead application failed. In this case, a pre-emption Homestead Entry was filed by Fal B. Jenkins on June 15, 1920. The homestead entry was cancelled on January 10, 1928. The ongoing withdrawal was effective when the homestead application failed. Therefore, the date of the PWR 107 withdrawal is January 10, 1928. *Price* at 6, ¶ 7.

C. Source

The claim asserts a source for this water right. The *Affidavit of Robert R. Mallis* states that the source for this right is a spring or water hole located at the claimed point of diversion. The source was verified by field investigation. *Mallis* at 3, ¶ 5. The identification of the source for this right is undisputed.

D. Quantity

The quantity claimed for this water right is 13,000 gallons or less per day. The *Affidavit of Robert R. Mallis* states there is sufficient surface water for this right for consumptive use by livestock. *Mallis* at 3, ¶ 5. In addition, IDWR investigated the quantity element for each right and submitted a *Director's Report* recommending 13,000 gallons or less. Therefore, the quantity for this right is 13,000 gallons or less.

E. Point of Diversion

The claim asserted a point of diversion expressed with a legal description. The point of diversion was confirmed by a field investigation. *Mallis* at 3, ¶ 5. The *Director's Report* for

this right is consistent with the claimed point of diversion. The point of diversion for this right was undisputed.

F. Purpose of Use

The claimed purpose of use for this right is "stockwater." The *Affidavit of Robert R. Mallis* states that a field investigation conducted by the U.S. confirmed that sufficient surface water exists for consumptive use by livestock. *Mallis* at 3, ¶ 5. The purpose of use is "stockwater."

G. Period of Use

The claimed period of use for this stockwater right is January 1st to December 31st of each year. The United States did not assert that these claims had been used for stockwatering, merely that "there is sufficient water at this site for consumptive use by livestock." This claim is now based on a federal reservation under PWR 107. The purpose of PWR 107 was to reserve land to avoid monopolization of the springs or water holes.

IDWR also investigated the period of use element and submitted a *Director's Report* with a determination that period of use was year round. It is undisputed that the period of use for this water right is January 1st to December 31st.

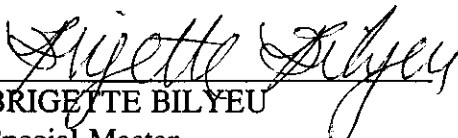
H. Place of Use

This claim asserted a place of use that was expressed by a legal description. A field investigation was conducted by the United States that confirmed the location of the place of use. *Mallis* at 3, ¶ 5. In addition, IDWR investigated this right under the state basis. Therefore, the place of use is as claimed.

IV. CONCLUSION

Therefore, based on the file for this subcase and the record contained therein, IT IS RECOMMENDED that this water right be decreed with the elements set forth in the attached *Special Master's Recommendation for Partial Decree*.

DATED: September 3, 2004


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

DISTRICT COURT - SRBA
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS
FILED

In Re SRBA)
Case No. 39576)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 63-29070

2004 SEP 3 PM 4 40

RECEIVED

SEP 08 2004

DEPARTMENT OF
WATER RESOURCES

NAME AND ADDRESS: USDI BLM
IDAHO STATE OFFICE
1397 S VINNELL WAY
BOISE, ID 83709-1657

SOURCE: SPRING TRIBUTARY: SHEEP CREEK

QUANTITY: 0.02 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000
GALLONS PER DAY.

PRIORITY DATE: 01/10/1928

* 01/10/1928 CLAIMED UNDER FEDERAL RESERVED WATER RIGHT PWR 107 *
*
* THIS WATER RIGHT IS CLAIMED BASED ON FEDERAL LAW WITH A *
* JANUARY 10, 1928 PRIORITY. THAT IS THE DATE A HOMESTEAD *
* ENTRY PENDING ON APRIL 17, 1926, FAILED. *
*

POINT OF DIVERSION: T03N R03E S24 SENWSW Within Ada County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Stockwater	01-01 TO 12-31	0.02 CFS

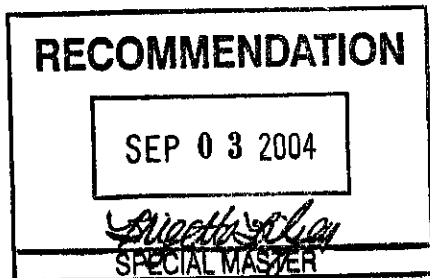
PLACE OF USE: Stockwater Within Ada County
T03N R03E S24 NWSW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A
DETERMINATION OF HISTORICAL BENEFICIAL USE.
THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

RECEIVED

SEP 08 2004

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2004 SEP 3 PM 4 40

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): 63-29070

On September 03, 2004, Special Master BRIGETTE BILYEU 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 September 03, 2004.



JANET CONNELL
Deputy Clerk

RECEIVED

SEP 08 2004

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2004 SEP 3 PM 4 40

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)
_____)

CERTIFICATE OF MAILING

Water Right(s): 63-29070

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 September 03, 2004, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

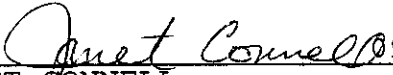
STATE OF IDAHO

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

USDI BLM

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

CERTIFICATE OF MAILING

 PAGE 1
JANET CONNELL 09/03/04
Deputy Clerk