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DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
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DEPARTMENT OF
WATER RESOURCES

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 No.: 63-29142
)
Case No. 39576) SPECIAL MASTER'S REPORT AND
) RECOMMENDATION

I. PROCEDURAL BACKGROUND

Water right 63-29142 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 parcels 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 denied because genuine issues of material fact remained as to whether a spring or water hole existed at the time of the PWR 107 withdrawal. *Order on Summary Judgment* (May 11, 2004) A trial was held on August 10, 2004.

At trial, the United States offered the testimony of Fredric W. Price, and 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). The State of Idaho cross examined Mr. Price.

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 these claims 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).

The issue of whether PWR 107 created a valid basis for a federal reserved water right was previously designated in the SRBA as Basin-Wide Issue 9. *Order Designating Basin Wide Issue No. 9* (March 8, 1996). Judge Daniel C. Hurlbutt, Jr., held that PWR 107 did not create an express or implied reservation of water by the United States. *Memorandum Decision and Order Re: Basin Wide Issue*, (Subcase No. 91-00009, December 9, 1996) That decision was appealed to the Idaho Supreme Court. The Supreme Court reversed, holding that PWR 107 did create a valid basis for a federal reserved stock water right. *U.S. v. Idaho*, 131 Idaho 468, 959 P.2d 449 (1998) Although the opinion states that "PWR 107 evidences an *express* intention by Congress that reserves a water right in the United States" *Id.* At 471, 959 P.2d at 452 (emphasis added), the parties and the SRBA District Court understand the holding as determining that PWR 107 creates

an implied federal reserved water right. *Memorandum Decision and Order on Challenge*, at 3, fn. 1 (Dec. 28, 2001).

After the Supreme Court held that PWR 107 did create a valid basis for a federal reserve stockwater right, the SRBA District Court took up the scope of water rights pursuant to PWR 107. The issue was whether PWR 107 creates a federal reserved water right if the spring or waterhole is tributary to a perennial stream or river and whether PWR 107 creates a federal reserved water right if the spring or waterhole is tributary to an intermittent stream or river or flows for any distance in a defined stream channel. The SRBA District Court held that “nothing in the language of PWR 107. . . suggest[s] that such withdrawals were. . . limited to non-tributary springs and water holes.” *Memorandum Decision and Order on Challenge* at 19 (December 28, 2001).

The *Memorandum Decision and Order on Challenge* also held that PWR 107 does not create a basis for rights based on stream segments which are not “springs” or “water holes.” *Id.* At 22. The place of use for the water right is within the boundaries of the 40-acre section withdrawn. Water flowing from the spring or water hole outside the boundaries of the withdrawn land does not create another land withdrawal or accompanying reserved water right.

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

[E]very smallest legal subdivision or the public land surveys which is **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)

C. Pending Homestead Application Does Not Defeat Withdrawal

At the time President Coolidge 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. A PWR 107 withdrawal continues to be effective and remains in effect at the time a homestead application fails. Once the 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, the critical question was whether a spring or water hole existed at the time of the federal withdrawal.

III. FINDING OF FACTS

A. The PWR 107 Withdrawal

The contested issue at trial was whether a spring or water hole existed at the time of the PWR 107 withdrawal. Since a homestead application was pending on April 17, 1926, the date Public Water Reserve 107 (PWR 107) was signed by the President of the United States, we look to the date the homestead application failed as the date of the withdrawal. The homestead application failed on March 26, 1928 when the Stock-Raising Homestead Entry was cancelled. *Price* at 6, ¶7b.

B. Existence of a Spring or Water Hole

The record contains conflicting evidence as to whether a spring or water hole existed at the time of the withdrawal in 1928. A modern-day field investigation of the point of diversion showed that a spring or water hole currently exists with sufficient water for the purpose of stock watering. *Mallis* at 3, ¶5b.

However, the evidence is conflicting as to whether a spring or water hole existed at the time of the PWR 107 withdrawal in 1928. W.H. Burnett, an inspector for the General Land Office¹ filed an “Adverse Report” on December 12, 1927. Burnett “found no water holes or evidence of mineral.” *Price* attach. 2 at 23. (emphasis added)

However, there is evidence that a spring did exist in 1928. The homestead petitioner George A. Pringle referred to existing springs on multiple occasions. In the April 3, 1919 “Petition for Designation/Stock-Raising Homestead Law”, Mr. Pringle was asked whether there were streams, springs, or bodies of water, or irrigation ditches, on or adjacent to said Lands. Mr. Pringle wrote, “Except small seepage springs on land in my present application . . .”

¹ The General Land Office of the United States Department of Interior.

Price attach. 2 at 63. Mr. Pringle was also asked where he proposed to obtain water for watering stock. Mr. Pringle wrote, "the seepage springs by digging them out and improving them." *Price* attach. 2 at 63.

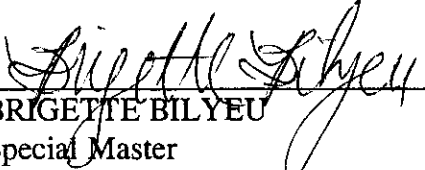
Later in the homesteading process, Mr. Pringle referred to an existing spring when he protested an overlapping homestead application filed by George A. Percy. In a July 1922 affidavit, Mr. Pringle stated, "the part over filed on by George A. Percy has a spring on it and this is very essential to make that which I have applied for suitable for pasture." *Id.* attach. 2 at 55.

Although the General Land Office inspector did not locate a spring during an on-site examination of Mr. Pringle's application, that does not mean that no spring existed. The primary purpose of W.H. Burnett's examination was to determine whether the required improvements had been made on the homestead, not to determine whether a spring existed. The location of the current spring is not within the enumerated legal description of his examination. This Special Master concludes that Mr. Burnett did not observe the spring existing in 1928. This Special Master is convinced by the location of the modern spring, together with the repeated references to springs by Mr. Pringle, that a spring existed in 1928.

V. CONCLUSION

Considering the record herein and the evidence presented at trial, this Special Master finds that a valid PWR 107 water right exists for 63-29142. 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

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

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 63-29142

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NAME AND ADDRESS: USDI BLM
IDAHO STATE OFFICE
1387 S VINNELL WAY
BOISE, ID 83709-1657

SOURCE: SPRING TRIBUTARY: MORES CREEK

QUANTITY: 0.02 CFS

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

PRIORITY DATE: 03/26/1928

* 3/26/1928 CLAIMED UNDER FEDERAL RESERVED WATER RIGHT PWR 107. *
*
* THIS WATER RIGHT IS CLAIMED BASED ON FEDERAL LAW WITH *
* A MARCH 26, 1928 PRIORITY. THAT IS THE DATE A HOMESTEAD ENTRY *
* PENDING ON APRIL 17, 1926, FAILED. *
*

POINT OF DIVERSION: T03N R04E S18 NWNESE Within Ada County

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

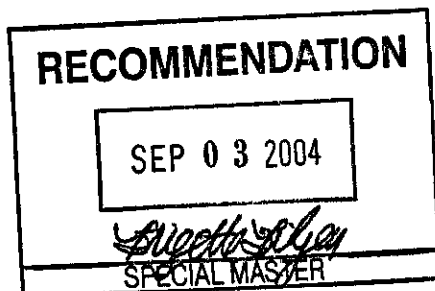
PLACE OF USE: Stockwater Within Ada County
T03N R04E S18 NESE

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

DISTRICT COURT-SRBA
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WATER RESOURCES

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

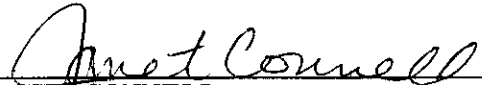
Water Right(s): 63-29142

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

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WATER RESOURCES

DISTRICT COURT-SRBA
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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

Case No. 39576

CERTIFICATE OF MAILING

Water Right(s): 63-29142

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

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09/03/04

JANET CONNELL
Deputy Clerk