

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

R. LEE LEININGER
 Trial Attorney
 United States Department of Justice
 Environment & Natural Resources Division
 General Litigation Section
 999 18th St. Suite 945
 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	)	MOTION TO ALTER OR
	)	AMEND
	)	

Descriptive Summary

This is the United States' motion to alter or amend the Special Master's recommendation for the above referenced subcases.^{1/}

Introduction

These water right claims are "dual-based", i.e., they are claimed under a federal law reservation theory and a state law prior appropriation theory. The Special Master recommends that the federal law

^{1/} This motion challenges the ruling applicable to water right claims 25-13635, 25-13637, 25-13653, 65-19960, and 65-19962 subject to separate Reports and Recommendations issued by the Court on December 17 and 18, 2002.

claim based upon the executive order Public Water Reserve No. 107 (PWR 107) be denied and the state law claim be decreed. The United States respectfully asks that the Special Master alter or amend his ruling and recommend that these claims, and similarly situated claims that may arise in the future, be decreed pursuant to the PWR 107 reservation.

At the hearing for these claims held pursuant to Idaho Code 42-1411A(14), the United States presented affidavits signed by BLM water rights personnel attesting to the fact that these springs are located on federal lands and that the springs contain sufficient water for use by livestock. The affidavits also stated that homestead entry applications existed on the land containing the spring sites at the time of the enactment of PWR 107. Based on this evidence, the Special Master concluded that the entry applications demonstrate that the lands "were homesteaded" at the time that President Coolidge signed PWR 107 and that the water on the lands was appropriated. *Special Master's Report and Recommendation, subcase 65-19812, et al.* Accordingly, the Special Master ruled that the places of use containing the water were not reserved.²

The United States respectfully maintains that whether a homestead application was filed on the lands containing these water sources is immaterial to and does not defeat a federal reserved water right based upon PWR 107. Fundamentally, a homestead entry application does not demonstrate that the water on the entry sites was privately appropriated - or even that entrypersons actually homesteaded the land. The fact that the land entries expired and title to the lands never left federal hands supports a conclusion that the springs were never privately appropriated. Furthermore, no private party has

² The reports and recommendations do not detail the grounds for the Special Master's ruling. Based upon statements made at the hearing, the United States believes it has accurately stated the rational for the Special Master's denial of the federal reserved water right.

claimed a water right at these spring sites in this adjudication, evidencing that no private appropriation, past or present, occurred at these sites. Finally, denying the BLM a federal reserved water right at these sources is contrary to the Idaho Supreme Court's decision that PWR 107 springs should be decreed to the federal government to "ensure the perpetual use of the water for stockwatering purposes" *United States v. State*, 131 Idaho 468, 959 P.2d 449, 452 (1998).

The task of investigating the historical use of federal lands that contain PWR 107 spring sites is time consuming. The BLM must examine Master Title Plats, Historical Indices, and Serial Registry pages to determine where, when and what type of entry was attempted.³ This burdensome requirement is unnecessary because the requirements for establishing a PWR 107 water right are satisfied regardless of whether a homestead entry application existed at the time of the enactment of the executive order.

1. A prior appropriation water right cannot be inferred from the filing of a homestead entry.

The Special Master's recommendations assume that the existence of a homestead entry application at the time of the reservation is proof of private appropriation of water on the entry lands. This assumption is misplaced. These homestead entries were not patented (i.e., fee simple title was not granted to the entryperson) and title has and remains with the federal government. It is improper, therefore, to deny the United States' claim to a PWR 107 water right when the historical evidences strongly suggests that no prior appropriation was ever made.

³In addition, research in the National Archives would be necessary to try to determine why an entry was relinquished or canceled.

As the United States has previously argued -- and this Court has previously recognized -- "settlement" on public lands containing water sources was subject to gross speculation and fraudulent behavior:

[T]hose involved in the livestock industry developed a number of schemes for either controlling or acquiring ownership of lands immediately surrounding key water sources. A number of these schemes were unlawful and fraudulent. . . . Stockmen used "strawmen" for the purpose of making entries under the Homestead Act of other applicable land laws on lands immediately surrounding water sources and then "legitimately" purchased back those same lands.

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") (Issued December 28, 2001).

Concern that a few individuals were illegitimately controlling scarce water sources on the public lands led Congress to enact strict land acquisition measures. For instance, entrypersons for small ranching operations on the public domain had to sign an affidavit stating:

That there is no spring, water hole, stream or surface supply of water of any kind upon said land needed or used by the public for watering livestock; that there is no known surface supply of water on any of the subdivisions of said land so applied for; that it and the whole thereof is unwatered dry land suitable for grazing purposes only and that save during the snowy season and rainy periods water for livestock grazed thereon will have to be obtained from a well or wells to be sunk or a reservoir or reservoirs to be constructed thereon.

Stock Raising Homestead Act, Act of December 29, 1916, 39 Stat.865, codified at 43 U.S.C. § 141 (1976): *See also Memorandum Decision on Scope of PWR 107*, at n. 13. Restrictions persisted through the enactment of PWR 107 on April 17, 1926. The General Land Office (GLO) issued a regulation

approximately one month after PWR 107, titled Circular 1066, requiring homesteaders to demonstrate that no important springs existed on the land to be homesteaded. The Circular states that "all General Land Office circulars and regulations pertaining to the selection, filing, or entry of public lands under any of the public land laws . . . are hereby amended so that in every instance it must be shown by a duly corroborated affidavit . . . that no spring or water hole exists. . . ."⁴

Due to the requirement that entrypersons aver that no springs or water holes exist on entry lands that could be useful to the general public, and the prevalence of fraud and speculation that existed on the public domain in the early twentieth century, the presumption should not be that the springs at issue in this motion were appropriated in 1926. Rather, the presumption should be that these entries -- abandoned or extinguished long ago -- were never legitimate and, therefore, an appropriation of water never occurred.

2. Idaho's water appropriation law requires that the water user provide evidence of applying water to actual beneficial use.

The burden placed on the United States to definitively prove that no private party had appropriated the water at these spring sites approximately 75 years ago is counter to Idaho's appropriation doctrine. In Idaho, the "constitutional method" of appropriation (without a state permit) requires the water user to show that water was diverted and put to a beneficial use. *See State v. United*

⁴Circular 1066 directs that PWR 107 not be construed as applying to or reserving from homestead or other entry lands having small springs or water holes with only enough water for the use of one family and its domestic livestock. As the United States previously argued, the "one family" exemption ceases to have legal significance (or application to the BLM claims filed in the SRBA) after the disposal of federal lands through homesteading came to an end in 1976. Any exclusions from the blanket PWR 107 withdrawal had to have been identified by entrypersons, confirmed by Interior investigation, subsequently patented into private ownership decades ago.

States, 134 Idaho 106, 996 P.2d 806 (2000). Even the statutory method of appropriation placed the burden on the water user to affirmatively demonstrate that after posting notice he "commenced work on his proposed diverting works, and continued the prosecution of such work with reasonable diligence" and applied the water to beneficial use. *Sand Point Water and Light Co. v. Panhandle Dev. Co.*, 11 Idaho 405, 413, 83 P. 347, 349 (1905).

The law in Idaho, therefore, is that some showing of actual use of water and application of the water to a beneficial use is necessary to establish a state-law based water right. The state law requirement that the water user demonstrate beneficial use is not satisfied by the existence of an entry application. The mere filing of a homestead application does not prove that the entryperson actually occupied the land and beneficially used the water at spring sites on the land. As discussed above, the filing may have been speculative and fraudulent.⁹ Thus, it is unreasonable to conclude that a prior appropriation occurred.

3. The PWR 107 reservation ensures the perpetual use of water for stockwatering purposes.

It is undisputed that the entry applications on the lands containing these springs failed.

Notably, there is no recorded water claim. Thus, it cannot be shown that an actual appropriation of

⁹ Speculation has never been grounds for legal appropriation of water in the west. The state of Colorado has perhaps developed the most comprehensive anti-speculation law for water appropriation. In Colorado, to establish a conditional water right an "applicant must show in general that a 'first step' toward the appropriation of a certain amount of water has been taken, that the applicant's intent to appropriate is not based upon the speculative sale or transfer of the appropriative rights, and that there is a substantial probability that the applicant can and will complete the appropriation with diligence." *Mount Emmons Min. Co. v. Town of Crested Butte*, 40 P.3d 1255, 1258 (Colo. 2002)(emphasis in original)(internal citation omitted).

water ever occurred by an entryperson. Under this scenario, the PWR 107 reservation order should be granted. As the Idaho Supreme Court has stated, "a reservation of stock water is needed in order to ensure the perpetual use of the water for stockwatering purposes by whichever member of the public happens at any time to have the grazing permit for the lands containing the relevant springs and waterholes." *United States v. Idaho*, 131 Idaho 468, 959 P.2d 449, 452 (1998); see also *id.* at 453 ("These springs and waterholes, which are located on public lands, should be regulated, supervised and administered by the Department of Interior.").

A state-law based water right awarded to the United States for these springs does not accomplish this goal. State-law based rights may be forfeited, abandoned or otherwise lost. I.C. section 42-222(2); see also *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2201). In contrast, federal reserved rights, as creations of federal law, cannot be lost. *Sierra Club v. Yeutter*, 911 F.2d 1405, 1419 (10th Cir. 1990) (federal water rights are protected from extinguishment under state law by the Supremacy Clause); *Arizona v. California*, 373 U.S. 546, 600-01 (1963) (federal reserved rights vest in perpetuity, are never lost by non-use, and satisfy both future and present federal needs).

The United States' reserved water rights under PWR 107 and its 1926 priorities, therefore, ensure that the United States receives such water, up to the limit of its right. In this manner, and only in this manner, can the United States "ensure the perpetual use of the water for stockwatering purposes" on public lands.

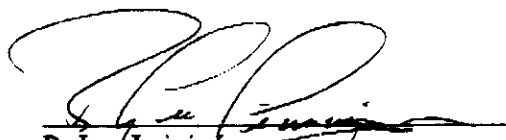
Summary

For the foregoing reasons, the United States respectfully asks that the Special Master alter or amend his decision and recommend that these subcases be decreed based upon the federal reservation

PWR 107 and rule that the United States is no longer required to submit evidence on the land entry status of the area surrounding the spring sources at the time of the reservation.

DATED this 27th day of January, 2003.

Respectfully submitted,



R. Lee Leininger
Trial Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on this 27th day of January, 2003, I served a true and correct copy of fore-going Motion to Alter or Amend upon the following individuals by serving as indicated, postage pre-paid, addressed as follows:

via Facsimile & Federal Express mail:

Diana R. Delaney, Chief Deputy Clerk (Original)
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, ID 83301

via Facsimile & First-Class Mail:

U.S. Department of Justice
Environment and Natural Resources
550 W. Fort Street, MSC 033
Boise, ID 83724

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

David Barber, Esq.
Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 4449
Boise, ID 83711-4449



R. Lee Leiminger, Esq.



IMPORTANT: This facsimile is intended only for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected from disclosure under applicable law. If the reader of this transmission is not the intended recipient or the employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, copying or use of this transmission or its contents is strictly prohibited. If you have received this transmission in error, please notify us by telephoning and return the original transmission to us at the address given below.

FROM: / Department of Justice
ENRD/GLS/DFO
999 18th Street, #N945
Denver, Colorado 80202
Fax No. 303-312-7379
Voice No. 303-312-7307

January 27, 2003

SENT BY: Helena Engelhart, LSA
ON BEHALF OF: R. Lee Leiningner, Esq.

TO:	Diana Delaney	FAX No.	208/736-2121
CC:	David Barber, Esq.		208/334-2690
	IDWR		208/327-5400
	USDOJ - Boise		208/843-7377

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 11

RE: Attached for filing is the United States Motion to Alter or Amend, the original will be sent via FEDED today, for delivery tomorrow.