



U.S. Department of Justice

Environment and Natural Resources Division

LL:SLM

90-6-2-63C

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May 8, 2001

RECEIVED

MAY 13 2002

Department of Water Resources

via Federal Express

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
Consolidated Subcase Nos. 23-10872, 24-10233, 25-13625, 27-11578, and
65-19736
Joint Submission Subcase Nos. 23-10894, 24-10331, 24-10339, 24-10263,
24-10373, 51-10873, 65-19738, 65-19748, 65-19750, 65-19851, 65-19994,
65-20033, and 72-12607

Dear Ms. Delaney:

Enclosed for filing are the following original documents in the above mentioned subcases:

1. **MOTION FOR CLARIFICATION AND STAY, AND FOR EXPEDITED CONSIDERATION THEREOF**
2. **[PROPOSED] ORDER STAYING ALL PROCEEDINGS BEFORE THE SPECIAL MASTER**

Thank you for your time and attention in this matter.

Sincerely,

Susan L. Middagh
Paralegal

Enclosure

MOTION

Introduction

The United States respectfully moves for clarification of the Court's December 28, 2001, *Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman* (consolidated subcase numbers 23-10872, *et al.*)(*Order*) and for a stay of all proceedings in the subcases listed on the attached Exhibit A pending clarification of the *Order*. The United States requests expedited consideration of this motion because the State of Idaho -- in a number of subcase proceedings -- is attempting to reopen objections that have already been decided by this Court .

In the *Order*, this Court rejected the State of Idaho's objections to the United States' stockwatering claims based upon PWR 107 declaring that "this decision constitutes a final disposition of the objections raised in this matter and the significant number of subcases dependent on this ruling. . . ." *Id.* at 36 (emphasis added). The Court certified this ruling pursuant to Rule 54(b), Idaho R. Civ. P., permitting appeal of the Court's judgment. *Id.* The State did not appeal the Court's decision.

The *Order* also remanded the subcases to the Special Master for disposition consistent with the ruling and the requirements of Idaho Code § 42-1411(a)(12). *Id.* At the March 21, 2002 hearing on remand, the State of Idaho contended that its objections were not finally resolved. *See* [Partial] Transcript of Taped Proceedings, March 21, 2002, p. 17, l. 15-25 to p. 26, l. 3, (hereinafter the "Transcript"), attached as Exhibit B. Despite its admission that it had "actually briefed [the issue in contention] twice," the State maintains that its objections to PWR 107 water right claims are not fully resolved and that a full evidentiary trial may be an appropriate mechanism to resolve its objections. *Id.*, *see also* Transcript at p. 27, ll. 3-13. On April 25,

2002, the State served the United States with a discovery request that asks for, *inter alia*, any photographs, maps, surveys, or written information in support of BLM's public water reserve claims filed in the SRBA. See First Set of Interrogatories, Requests for Admission, and Request for Production in subcases 21-12003, *et al.* (totaling 108 subcases), attached as C (exhibits to discovery omitted). This request is enormously broad, burdensome and, because the State's objections have been disposed of, completely unnecessary.

Accordingly, the United States respectfully requests that the Court clarify the application of its ruling in light of the State's continued efforts to object to the PWR 107 rights, clarify the scope of the issues on remand, and clarify the procedures necessary to comply with I.C. § 42-1411(a)(12). The United States also requests that the Court stay all proceedings in the 108 subcases in which the State has propounded its discovery pending clarification of the *Order*.

Background

The State of Idaho has litigated against the United States' *de minimis* claims to stockwater pursuant to PWR 107 for almost seven years. It was a party opponent in the adjudication of Basin Wide Issue No. 9, where the issue presented was whether Public Water Reserve No. 107 is a valid basis for a federal reserved water right. See *State of Idaho's Response to Motion to Designate Basin-Wide Issue No. 9*, dated December 18, 1995; *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998). Even after the Idaho Supreme Court ruled against the State and declared that "PWR 107 evidences an express intention by Congress that reserves a water right in the United States," *id.* at 452, the State proceeded to object to thousands of PWR 107 claims. The State alleged in its objections that

the United States has failed to establish any legal and/or factual basis for any priority date for stockwater purposes with a date prior to the enactment of the Taylor Grazing Act, June 28, 1934.

Even if PWR 107 created a federal reserved water right, the United States, or any subdivision thereof, has not complied with the requirements of PWR 107 and/or the United States' and/or its subdivisions' own rules and regulations in regards to this claim. Therefore, no water right can be granted based on PWR 107.

The State further objects to this claim as to any part based on federal law as the claimed source is declared tributary to a flowing stream and so cannot be based upon the executive order known as Public Water Reserve 107 (April 17, 1926).

See e.g., [State's] Objection, subcase 23-10859, filed September 11, 1998. The State, through its various responses and pleadings in the course of litigation, narrowed the issue to be decided to the legal issue of tributary water source to a PWR 107 spring or waterhole.^{1/} Accordingly, the presiding Special Master described the issue the State elected to pursue as the "issue of 'tributary' water source for claims for federal reserved water right pursuant to PWR 107." See Order Setting Deadlines, consolidated subcases 23-10859, *et al.*, dated December 31, 1998.

Having narrowed the scope of its objections to springs with surface connections to tributary water sources (i.e., streams or rivers), the State withdrew objections to -- and settled -- hundreds of contested cases where the PWR 107 spring source was described as "tributary to sinks." See Stipulation to Resolve Objections, Consolidated Subcase Numbers 23-10859, *et al.*, filed August 10, 1999. Since the settlement and the withdrawal of the State's objections to springs that sink, the Court has entered approximately 1,461 partial decrees for United States' claims based on PWR 107.

Litigation proceeded on the State's remaining objections to springs and waterholes that were claimed by the United States as tributary to a named or unnamed stream or river. On March

^{1/} The notice of claim, the objection, and responses to the objection "shall identify the issues to be litigated." I.C. § 42-1411A(9).

5, 1999, Special Master Haemmerle granted the State's motion for summary judgment and denied the United States' cross-motion. *Order Granting State's Motion for Summary Judgment*, consolidated subcases 23-10872, *et al.*. The parties then stipulated to the submission of eleven examples of PWR 107 claims representative of varying hydrological characteristics for the claimed springs and waterholes. *See Joint Submission of Public Water Reserve 107 Subcase Examples*, subcases 23-10872, *et al.*, dated June 11, 1999. The State and the United States argued for and against the federal reservation's application to these examples. In the *Order on Joint Submission*, subcases 65-20033, *et al.*, dated June 25, 1999, Special Master Haemmerle ruled that only one of the eleven claim examples was a proper PWR 107 reservation. Following additional briefing and argument, Special Master Cushman (having been assigned these subcases after Special Master Haemmerle's departure), issued a *Second Order on Joint Submission*, dated October 29, 1999, and ruled against the United States' PWR 107 claims on grounds other than those that formed the basis of Special Master Haemmerle's determination.

The United States subsequently filed a Notice of Challenge appealing both of the Special Masters' recommendations. *See Notice of Challenge*, dated May 11, 2000. On December 28, 2001, Presiding Judge Burdick issued the *Order* disposing of the State's objections and remanding the subcases to Special Master Cushman with instructions to proceed with a *prima facie* hearing pursuant to I.C. § 42-1411(A). *Id.* at 35.

On remand, at a March 21, 2002 scheduling conference, the State of Idaho contended that its objections have not been resolved and finally disposed of by the judge's ruling. The State alleges that a claim it raised in both the Basin Wide Issue No. 9 proceeding and in its supplemental briefing in the recent challenge to the Special Masters' decisions was not disposed

of in either of these contested matters. *See* Transcript at pp. 17-18. The State claims that because the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743 (FLPMA) repealed the Acts on which PWR 107 reservations are based, only specific PWR 107 water sources that were formally identified and listed by the BLM (or its predecessor the General Land Office) before the enactment of FLPMA and were then reviewed by the BLM within a short period after the enactment of FLPMA are valid. *See* Transcript at pp. 18-20. Following the hearing, the Special Master set a trial schedule for the subcases which includes a period of discovery. *See e.g.*, Trial Scheduling Order, subcase 21-12003, dated March 27, 2002.

On April 25, 2002, the State served upon the United States a First Set of Interrogatories, Requests for Admission, and Request for Production in subcases 21-12003, *et al.* (totaling 108 subcases). Its discovery asks, *inter alia*, that the United States "identify any photographs, videos, motion pictures, computer generated graphics, maps, drawings, diagrams, measurements, surveys, or other graphic descriptions that were created or developed in support of BLM's PWR water right claims filed in the SRBA," and that the United States "identify any technical reports or other written information in support of these PWR claims." *Id.* at Interrogatory Nos. 12 and 13.²

² More recently, a trial schedule for PWR 107 subcases in which the State is a party was the subject of an April 30, 2002 hearing before Special Master Bilyeu in subcases 37-14592, *et al.*. When a trial scheduling order is received, the United States will ask that the Court also stay these subcases pending the outcome of the clarification motion.

Argument

1. The State's objections have been disposed of by the Idaho Courts.

As the State admits, it has twice before brought before this Court the claim that the BLM failed to comply with FLPMA. In the Basin-Wide Issue No. 9 litigation the State argued that "the issue becomes whether the BLM can essentially designate or add PWR 107 reserves after the statutes upon which PWR 107 is based have been repealed [by FLPMA], and whether it can do so without complying with its own procedures." *State of Idaho's Response Brief Opposing The Validity of Public Water Reserve No. 107 As a Basis For a Federal Reserved Water Right*, dated April 26, 1996, at 15. The District Court agreed with the State's argument. However, the Idaho Supreme Court unanimously reversed the District Court's ruling:

The United States argues also that the SRBA District Court incorrectly concluded that the purpose of PWR 107 was abrogated by the passage of FLPMA in 1976. The United States contends that, instead, this Court should follow the decision of the Colorado court in United States v. City and County of Denver, *supra*, holding that the enactment of FLPMA had no effect on the reserved water rights created by PWR 107. 656 P.2d at 31, n. 47. We agree.

In 1976, with the enactment of FLPMA, Congress limited the authority for future withdrawals of land from the public domain by the Executive Branch. However, FLPMA provided a savings provision that stipulates: "All withdrawals, reservations, classifications, designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law." 43 U.S.C. historical note § 1701.

In short, the FLPMA itself stipulated that withdrawals and reservations existing at the time of its enactment shall remain in effect. Therefore, PWR 107 reserving water rights in withdrawn land fifty years prior to the enactment of FLPMA, remains in full force and effect.

United States v. State, 959 P.2d at 453. The Supreme Court's decision is clear; the PWR 107 withdrawal of unappropriated springs and waterholes was in effect as of the date of FLPMA and these reserved water sources are therefore unaffected by the Act.

Despite the Supreme Court's ruling, the State returned to this argument five years later in the *State of Idaho's Response Brief to Supplemental Memorandum of United States*, dated September 5, 2001. In an almost identical phrasing of its earlier claim, the State alleged that "[t]he United States has never provided any evidence of compliance with Section 204 of FLPMA regarding the modification of PWR 107 to include lands that had not been designated as of the time of enactment of the FLPMA in 1976." *Id.* at 10.³

In the December *Order*, the State's attempt to limit the reservation was once again rejected. The *Order* notes that "PWR 107 represented a shift from the case-by-case examination and withdrawal of lands surrounding water sources needed by the public to a 'global' or 'blanket' withdrawal." *Id.* at 18. After stating that the plain language of the PWR 107 reservation should be examined to determine whether there need be "any further administrative procedures to 'perfect' the reservation," *id.* at 25, the Court ruled that "the only issue in applying the provisions of PWR 107 is determining what was intended by the use of the terms 'spring' and 'water hole' Once these terms are defined it's a matter of applying the express terms of PWR 107 to identify the land withdrawn and ultimately the related water right reserved with the withdrawal." *Id.* at 26. Furthermore, the comprehensiveness of the Court's *Order* is unambiguous. The "decision constitutes a final disposition of the objections raised in this matter." *Id.* at 36.

Therefore, the State's argument that neither the Supreme Court nor the SRBA Court have addressed its objection appears utterly unfounded. *See* Transcript p. 17, l. 22 to p. 18, l. 3 (where State's attorney states "if I understand what the court did in the decision at the end of December

³ The Court should also take note of the fact that the State revived this argument for the first time in its September 2001 supplemental response brief -- the final briefing filed before the Court -- after approximately three years of litigation over the State's objections.

of last year, it essentially considered [the FLPMA issue] to be a new argument, that wasn't proper and just basically did not address it, so I would simply like the court to address those issues. As I say, I've actually briefed it twice now."'). The State's arguments that PWR 107 reservations were only perfected by post-reservation administrative procedures was addressed by the Courts and was rejected.

2. The State is barred from relitigating this issue.

Fundamental principals of law prevent the State from raising this claim for a third time. *Res judicata* or "claim preclusion" bars relitigation of decided matters and meets the judicial objectives of repose and finality when there is identity in the cause of action between two suits. *D.A.R., Inc. v. Sheffer*, 134 Idaho 141, 144, 997 P.2d 602, 605 (2000); *Yoakum v. Hartford Fire Ins.*, 129 Idaho 171, 177, 923 P.2d 416, 422 (1996); *see also Arizona v. California*, 460 U.S. 605, 619 (1983)("a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.") The State has raised this same claim in the SRBA twice before; therefore, it should be barred from doing so on remand to the Special Master.

Even if it could be argued that the State's claim on remand is not identical to the matters determined by the Idaho courts, claim preclusion also prohibits litigation of matters "which might and should have been litigated in the first suit." *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 148-51, 804 P.2d 319, 321-24 (1990) (citing *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 208 P. 241 (1922)). The State did not resurrect this claim when its objections were litigated before Special Masters Haemmerle and Cushman over the past four years. In fact, the State settled approximately 1,461 of its objections even though the alleged failure to comply with FLPMA would have applied equally to the settled cases as well as the cases that proceeded to

summary judgment. Accordingly, the State is now precluded from arguing that the Court has failed to address its claim on the application of FLPMA when 1) the State waited until the supplemental and final briefing it filed last September to again raise the claim of failure to comply with FLPMA, and 2) the State resolved objections without regard to any FLPMA provision.⁴

3. The scope of the remand for a *prima facie* showing pursuant to I.C. § 42-1411A(12) is clear from the *Order* and the Court's well-established procedures.

The *Order* remands the subcases to the Special Master for a *prima facie* showing pursuant to I.C. § 42-1411A(12). *Id.* at 35. This section of the Idaho Code requires the federal claimant to go forward with evidence establishing a *prima facie* case for each water right established under federal law. The establishment of the PWR 107 water right under federal law has been clearly defined by the Supreme Court and District Court opinions. First, the United States "reserves appurtenant water then unappropriated [at the time of the reservation]. . . ." United States v. State, 959 P.2d at 451. Second, PWR 107 "reserve[s] water for public use and appropriation as a [stockwatering] source for permittees under the Taylor Grazing Act." *Id.* at 452. In addition, a spring or waterhole unappropriated in 1926 is withdrawn and reserved if

⁴The State's argument is, alternatively, barred by the doctrine of collateral estoppel, or "issue preclusion." As the Idaho Supreme Court recognized in *Rodriguez v. Dep't of Corrections*, 29 P.3d 401, 403-404 (Idaho 2001):

Although the literal definition of the term "res judicata" is expansive enough to cover both preclusion of relitigation of the same cause of action and relitigation of the same issue, the modern tendency is to refer to the aspect of the doctrine that precludes relitigation of the same issue in a separate cause of action as "collateral estoppel," and to refer to that aspect preventing relitigation of the same cause of action as "res judicata." See 46 Am.Jur.2d Judgments § 516 (1994). Collateral estoppel thus applies to protect litigants from the burden of litigating an identical issue with the same party or its privy.

The State's objection, whether characterized as the same claim or the same issue, is barred.

“[t]he place of use for the water right is within the boundaries of the 40-acre section withdrawn.”

Order at 35. This is true, “irrespective of whether or not the water flowing from the spring of water hole is tributary to a perennial running stream.” *Id.* Finally, “quantity is not at issue as the parties have stipulated to a quantity of .02 cfs, limited to 13,000 gallons per day.” *Id.*

The elements that must be established for a federal reservation under PWR 107 do not include a case-by-case determination whether certain post-reservation procedures allegedly created by FLPMA in 1976 have been followed. The State’s FLPMA argument has been rejected, twice, and is not a part of the *prima facie* showing for a PWR 107 water right.

This court established the evidentiary requirements for a § 42-1411A(12) *prima facie* showing many years ago. In an Order dated November 13, 1998, Special Master Haemmerle stated:

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 13, 1998 (emphasis added)(internal citation to U.S. Memorandum omitted).⁵

Following an evidentiary hearing, where the United States’ testimony consisted of the submission of an affidavit from the BLM Field Office Water Rights Coordinator attesting to the Court-recognized elements of a PWR 107 water right, the Special Master recommended these

⁵ The Special Master initially denied the United States’ motion for entry of a default judgment because the BLM’s claim was to the entire yield of the spring source, a position that was subsequently changed to a claim for only a *de minimis* 0.02 cfs or 13,000 gallons of water a day.

rights for partial decree. They were then partially decreed by Order of the Court dated June 28, 1999.

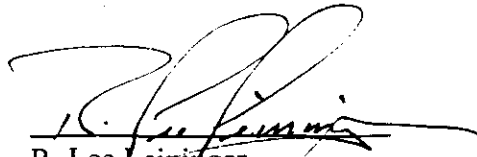
Nothing in the Court's December *Order* alters or amends these *prima facie* elements for a PWR 107 reservation. On the contrary, the Court's detailed analysis of the history and the judicial and administrative interpretation of PWR 107 only lend support to the evidentiary requirements established in 1998.

Conclusion

The State has participated in or actively pursued claims against the United States' PWR 107 *de minimis* stock water claims for almost seven years. Hundreds of pages of argument by the State and response by the United States on legal issues relating to PWR 107 have been submitted culminating in a decision by the Idaho Supreme Court (and the denial of certiorari by the United States Supreme Court) and the recent decision by the District Court that the State did not appeal. The United States respectfully asks that the Court now bring closure to the State's objections. We believe that the most expedient and efficient means to do so is by an Order clarifying the December 28, 2001, *Memorandum Decision and Order on Challenge* (consolidated subcase numbers 23-10872, et. al.) and the scope of remand, together with procedures for the Special Masters to follow in conducting a *prima facie* hearing pursuant to I.C. § 42-1411A(12). Pending clarification, the United States respectfully requests that the Court stay all PWR 107 subcase proceedings in the attached exhibit A (a list of subcases where the State has propounded discovery).⁹ A proposed Order staying all such matters is attached for the Court's consideration.

⁹ Concurrent with the filing of this motion for clarification, the United States is also filing a Motion for Protective Order and for Expedited Consideration in subcases 21-12003, *et al.* requesting that the State's discovery not be had pending the outcome of this motion.

Fully submitted this 8th day of May, 2002.



R. Lee Leininger

Larry Brown

Attorneys, U.S. Department of Justice

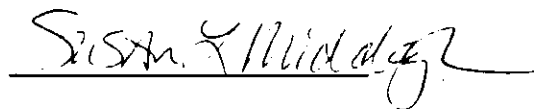
CERTIFICATE OF MAILING

I certify that on May 8, 2002, I mailed a true and correct copy of the United States' **MOTION FOR CLARIFICATION AND STAY, AND FOR EXPEDITED CONSIDERATION THEREOF** to the following persons, postage prepaid and addressed as follows:

Document Depository
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

US Department of Justice
Environment & Natl' Resources Division
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David Barber, Esq.
Natural Resources Division
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P.O. Box 4449
Boise, Idaho 83711-4449



**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.: See Attached Exhibit A
	)	
	)	[PROPOSED]
	)	ORDER STAYING ALL
Case No. 39576	)	PROCEEDINGS BEFORE THE
	)	SPECIAL MASTER
_____	)	

This matter having come before the Court on the United States' MOTION FOR CLARIFICATION AND STAY, AND FOR EXPEDITED CONSIDERATION THEREOF (Motion for Clarification), and the Court being otherwise fully advised in the premises:

IT IS HEREBY ORDERED, that the United States' motion is partially GRANTED. All proceedings before the Special Master in the above captioned subcases are stayed pending final resolution of the Motion for Clarification or until further notice.

IT IS SO ORDERED this _____ day of _____, 2002.

Roger S. Burdick
Administrative District Judge and
Presiding Judge of the Snake River Basin
Adjudication

EXHIBIT A

EXHIBIT A

21-12003	21-12079	25-13684
21-12005	21-12081	25-13686
21-12007	21-12083	25-13688
21-12009	21-12085	25-13942
21-12011	21-12087	31-10981
21-12013	21-12089	31-10983
21-12015	21-12091	31-11000
21-12017	21-12093	31-11022
21-12019	21-12095	31-11026
21-12021	21-12099	31-11028
21-12023	21-12105	31-11030
21-12027	21-12107	31-11088
21-12029	21-12109	31-11090
21-12031	21-12113	31-11110
21-12033	21-12115	31-11112
21-12035	21-12117	31-11114
21-12037	21-12119	31-11116
21-12039	21-12121	31-11118
21-12041	21-12123	31-11120
21-12045	21-12125	31-11122
21-12047	21-12127	31-11126
21-12049	21-12129	31-11128
21-12051	21-12131	31-11130
21-12053	21-12133	31-11144
21-12055	21-12135	31-11158
21-12057	25-13639	31-11160
21-12059	25-13641	31-11162
21-12061	25-13643	31-11172
21-12063	25-13645	31-11180
21-12065	25-13647	31-11184
21-12067	25-13649	31-11287
21-12069	25-13651	31-11288
21-12071	25-13655	51-12038
21-12073	25-13657	51-12157
21-12075	25-13674	51-12158
21-12077	25-13682	51-12418

US Motion for Clarification and
Stay and Expedited Consideration

EXHIBIT A

EXHIBIT B

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Case No. 39576

EXHIBIT B

1 (Reconvene)

2 SPECIAL MASTER CUSHMAN: This is the
3 Snake River Basin Adjudication, sitting in Emmett
4 today. For the record, Mr. Barber is here for the
5 State of Idaho, Mr. Brown for the United States.

6 We have a series of subcases on BLM
7 ground, and I know there have been some
8 discussions and there are some SF5s that will be
9 coming; and my question that I discussed with
10 counsel just before we went on the record was,
11 after the dust settles with the SF5s, how many of
12 these will we have left and what issues will we
13 have left.

14 Mr. Barber, you wanted to address that?

15 MR. BARBER: Yes, Your Honor. I do not
16 have a precise count, but with respect to the
17 issue, at least from my perspective, it's a
18 relatively straight-forward issue, it was one that
19 was brought up in the Basin-Wide 9 matter, it was
20 not disposed of then, it was one that when there
21 was a filing due last September of 2001, I brought
22 it up then; and if I understand what the court did
23 in the decision at the end of December of last
24 year, it essentially considered that to be new
25 argument, that wasn't proper and just basically

1 did not address it, so I would simply like the
2 court to address those issues. As I say, I've
3 actually briefed it twice now.

4 SPECIAL MASTER CUSHMAN: Can you just
5 summarize for the record today what issue?

6 MR. BARBER: Well, yes, very simple.
7 When the PWR 107 was entered in April of 1926,
8 shortly thereafter, there was an order entered by
9 E.C. Finney with respect to a procedure about
10 recording what you do with blanket withdrawals.

11 First off, and the court needs to
12 understand, blanket withdrawals are relatively
13 unusual. Normally, there is a precise legal
14 description associated with the withdrawal in a
15 reservation of land. There wasn't here. So they
16 needed to keep track of that information, when
17 they found a PWR 107 spring, they put it on the
18 track books, and make, essentially indicate that
19 that wasn't available. So they came up with this
20 procedure of entering orders of interpretation. I
21 have supplied all the orders of interpretation
22 that I'm aware of for the state of, the entire
23 State of Idaho within the Snake River Basin
24 Adjudication, there are not that many.

25 At some point in time -- and I don't

1 have the precise date, in -- but about 1940 or so,
2 they decided they didn't like that procedure, so
3 they quit using orders of interpretation. What
4 they did was simply have a memo to the file. At
5 that time it was by the General Land Office. This
6 was before the BLM was created. I mean the --
7 the, yeah, it was before the BLM was created.
8 There are a couple of those. And then after the
9 BLM was created, at the end of the '40s, then
10 there were also memos to the file as well.

11 I, as I said, submitted all of those to
12 the court. That essentially gives you a listing
13 of all PWR 107s that were of record with the BLM
14 as of the time of entry of the (unintelligible on
15 tape) in the mid 1970s. The (unintelligible on
16 tape) did a couple of things, as I think the court
17 is probably well aware of. Number one, it
18 essentially repealed the acts on which PWR 107 was
19 based. It also had a savings provision that
20 essentially said that valid orders that are of
21 record now will continue in effect, and it said we
22 need to have a little better handle on this, and
23 so we're going to go out and require the BLM to do
24 a study as to whether those should be continued.
25 And there was a procedure, and they came up with

1 withdrawal review reports to see whether existing
2 withdrawals should be continued or not. I've
3 submitted some examples of those to the court.
4 And I also have submitted a computer database
5 printout from the BLM's computers, actually from
6 Denver, with respect to the valid PWR 107s, and
7 our point is simply this: After enactment of
8 (unintelligible on tape), you simply can't make,
9 modify or, you know, change existing withdrawals
10 unless you go through the Section 204 process; and
11 we believe there's only a very small number of
12 valid PWR 107s out there, because they haven't
13 gone through the 204 process. They're essentially
14 saying you can go ahead and find a new PWR 107
15 spring and ignore the 204 process; and we're
16 saying that is a very simple, straight-forward
17 legal issue, the court can decide that, you have a
18 list, and if you take that list of valid PWR 107s,
19 and it's not on the list, it gets dumped, if it's
20 on the list, well, then, it's allowed to continue.
21 So that's essentially this thumbnail sketch of the
22 argument.

23 SPECIAL MASTER CUSHMAN: Now, I assume
24 that that's going to take, to do the legal
25 argument, you still have to ask a factual basis as

1 to whether or not the United States has jumped
2 through the hoops that you suggest they have to
3 jump through.

4 MR. BARBER: Yes. And all those
5 documents were initially submitted of record, and
6 let me give you a little explanation of that, of
7 record, with the PWR 107 Basin-Wide 9 proceedings.
8 At the conclusion of those proceedings, I filed a
9 request of the court and asked that the original
10 of the documents be returned to me, and the court
11 said that's fine as long as you make a copy for
12 us, and so you have that copy there.

13 When the matter came up, and the brief
14 was required last September, what I did was
15 essentially relabeled and gave you back the
16 originals that have been submitted.

17 SPECIAL MASTER CUSHMAN: When you say
18 me, you're talking about the proceedings in front
19 of Judge Burdick?

20 MR. BARBER: That's correct. And so I
21 don't have those originals any more. Those are in
22 those proceedings. I do have copies, of course.
23 And so, what I would propose to do is simply, with
24 the case numbers that we have, resubmit the
25 briefing and make reference to those documents.

1 If you want me to resubmit my copy of it, that's
2 fine, I simply don't have the original certified
3 copy that I had with the original that I submitted
4 last September. But I mean, you've got the
5 substance of it.

6 SPECIAL MASTER CUSHMAN: All right. But
7 Mr. Brown, just on that, procedurally, is that
8 going to be a problem or are you satisfied with
9 that?

10 MR. BROWN: I am not satisfied with
11 that, Your Honor. What I recommend to the court
12 is that, one, the special master is bound by the
13 court's decision in PWR 107.

14 SPECIAL MASTER CUSHMAN: All right. So
15 if I -- so you both are operating out of the same
16 rule book, I look at the court's decision as
17 simply being a global on the basic issue of 107
18 and what 107 is; but we still have to then get
19 down, and what we're doing now is deciding what
20 subcases fit within that global description. So I
21 think -- I do think his argument, Mr. Barber's
22 argument, is appropriate at this point, because
23 all the court did was say that, yes, as the
24 Supreme Court in its 107 decision Basin-Wide 9,
25 said, yeah, 107 is the, you know, proper

1 reservation. Then we had to determine what, in
2 generic terms, what that was, and that's what
3 Judge Burdick's decision is about. But what we
4 still now have to do is to fit every subcase
5 either into or outside that decision. And I
6 anticipated, before Mr. Barber made his comments,
7 that we were only going to be dealing with, you
8 know, factually, was there a reservation for this
9 specific spot, and I guess that's sort of what
10 your argument is.

11 MR. BROWN: It is essentially.

12 SPECIAL MASTER CUSHMAN: And so I do
13 think that that is before us. You know, I'm not
14 saying that he's going to win in any subcase or
15 not, but I think that issue is before us, of
16 whether or not a specific subcase in the SRBA
17 that's before me is in fact a 107 reservation, and
18 I guess he's making a legal argument as to what
19 the United States had to do to do that.

20 MR. BROWN: He is, Your Honor.

21 SPECIAL MASTER CUSHMAN: Which, in fact,
22 is true, because it's going to take some records
23 of the United States to support his position or
24 not support his position.

25 MR. BROWN: It would be, Your Honor,

1 except he has argued this in front of the judge;
2 and he submitted a brief, and then the judge came
3 out with a decision, and on page 36 the judge
4 specifically states that this decision constitutes
5 a final disposition of the objections raised in
6 this matter, and a significant number of subcases
7 depended on this ruling.

8 Now, to me, what we're here for is to
9 set an evidentiary hearing for each and every
10 subcase that would be of issue.

11 SPECIAL MASTER CUSHMAN: I understand
12 that. What I'm suggesting is, is that, while that
13 decision, the judge settled the legal issue, we
14 still in every case, there's a factual issue of
15 whether a claimed matter under PWR 107 is
16 factually a 107 claim; and my understanding of
17 Mr. Barber's argument, to factually be a 107
18 claim, on each of these you have to show that you
19 went through the proper hoops under 107 between
20 1926 and whenever.

21 MR. BROWN: I believe that that was
22 disposed of by the District Court, Your Honor.

23 SPECIAL MASTER CUSHMAN: All right.
24 Well, I think that there's a factual issue for
25 each subcase which is not disposed of, that all

1 that the court was doing was affirming -- the
2 Supreme Court in Basin-Wide 9 said, yes, 107 is
3 proper, and wait for the federal government to
4 make a claim under federal law. What the judge
5 was saying was legally this is what a 107 claim
6 is. What I and the other two masters now have to
7 do is decide, do these subcases fit within those
8 two rules, and that's a factual, essentially a
9 fact-driven issue, have you dotted all your I's
10 and crossed all your T's, to make these factually
11 fit into 107.

12 And so I think the issue before me is a
13 factual issue of whether the United States has
14 properly claimed these as 107s or they're not
15 107s.

16 In other words, simply because 107
17 exists, doesn't mean that you can file 200,000
18 claims and say we're claiming these under 107.
19 You have to have some factual history even if they
20 are 107s. Do you follow me?

21 MR. BROWN: Sort of, Your Honor. You
22 know, Mr. Leininger will be handling these
23 matters; and of course, he isn't here today, and
24 if there's any other factual determinations that
25 need to be made or any other arguments that need

1 to be made regarding the United States' process on
2 this, whether it needed to be done now or it could
3 be done by the United States at the time the
4 adjudication was done, it really is a United
5 States' process, so those arguments would have to
6 be made by Mr. Leininger. And there's also
7 another scheduling conference coming up in front
8 of Special Master Bilieu to deal with this very
9 issue on whether a scheduling conference is indeed
10 necessary for it, because if the process is indeed
11 the United States' (unintelligible on tape) once
12 we get partial decrees, that would be the argument
13 that I would expect from the United States, at
14 least part of it. So if you could set a schedule
15 that is out there far enough so that Mr. Leininger
16 could handle these, as well as the (unintelligible
17 on tape) adjudication and other things he has
18 going, I would certainly appreciate it.

19 SPECIAL MASTER CUSHMAN: Sure. We can
20 do that.

21 Now, one of the things that I am going
22 to do with these is we'll probably split these,
23 based on basin, in the different courthouses, at
24 least that's my inclination; but if either of you
25 think that all issues remain consolidated for

1 trial, we can do that, too, because we are dealing
2 more with fact than with law per se.

3 MR. BARBER: My only comment about that,
4 Your Honor, is that it's really concerning a lot
5 of facts involved as evidenced by these various
6 documents; but I'm not aware of anything you need
7 to do outside, at least from our perspective,
8 outside the documents that we've already
9 submitted, and I think it is something that is
10 resolvable, essentially on a motion for summary
11 judgment, and if there is some other fact that I
12 need that precludes that, that's fine, but I'm not
13 aware of --

14 SPECIAL MASTER CUSHMAN: Well, one of
15 the facts that you're going to have to demonstrate
16 is factually whether the United States has jumped
17 through the legal hoops that you believe they have
18 to jump through, and I don't think that's
19 established through the record. That's a finding
20 of fact that I'm going to have to make, that
21 legally they have to do X, Y, and Z and in this
22 subcase, they've done X, Y, and Z, or in this
23 subcase they've missed Z, and that is a factual
24 finding. So I'm not sure that summary judgment
25 fits, unless the United States would be willing to

1 stipulate to what they've done or not done.

2 MR. BARBER: Well, I, of course, don't
3 know what their position is, Your Honor. I, at
4 least, from my perspective, I think it is
5 resolvable that way and, of course, that's for
6 them to make their own argument as to whether it
7 is or it is not, and that's for you to make that
8 decision.

9 SPECIAL MASTER CUSHMAN: And if we keep
10 them together, the next question is where do we
11 try these things. My inclination is, on these,
12 since they are in multiple basins, is to go to the
13 closest basin to Boise, which I think is Murphy,
14 in 51.

15 MR. BARBER: That's fine.

16 SPECIAL MASTER CUSHMAN: Is that fine
17 with both of you?

18 MR. BROWN: Yes.

19 SPECIAL MASTER CUSHMAN: I assume --

20 MR. BROWN: Mr. Leininger will be happy
21 to go down to Murphy, Your Honor.

22 SPECIAL MASTER CUSHMAN: Well, I think
23 he'd rather go down to Murphy than go down to Twin
24 or down to Pocatello or somewhere else, because
25 all of these basins basically are in southern

1 Idaho.

2 MR. BROWN: Murphy would be fine, Your
3 Honor.

4 SPECIAL MASTER CUSHMAN: All right.
5 Because Murphy is the closest one to Boise that we
6 actually have something in, and I'm trying to keep
7 venue at least loosely connected to some of these.

8 MR. BROWN: Very well.

9 THE COURT: All right. We'll try this
10 group of cases in Murphy, then, I guess.

11 Now, do we have any problems with
12 additional parties or amending pleadings?

13 MR. BROWN: I see no reason to amend the
14 pleadings, Your Honor, or add additional parties.

15 SPECIAL MASTER CUSHMAN: Mr. Barber?

16 MR. BARBER: I don't think so.

17 SPECIAL MASTER CUSHMAN: All right. Cut
18 that off today then. Discovery.

19 MR. BARBER: There probably is some
20 limited discovery I would like to conduct. And we
21 actually did a great deal in the Basin-Wide 9
22 proceedings, and probably the only thing I want to
23 do is probably update some of that, to make sure
24 there hasn't been something that's happened that
25 I'm not aware of, but I don't think I would need a

1 great deal of time for that. And I don't know --
2 I think I've already provided the U.S. everything
3 that I ever came up with on PWR 107 already, so in
4 the Basin-Wide 9 proceedings.

5 SPECIAL MASTER CUSHMAN: Well, most of
6 what you came up with was out of their own
7 records, wasn't it, anyway? Wasn't it?

8 MR. BARBER: Yes, it was --

9 SPECIAL MASTER CUSHMAN: So discovery is
10 not necessary per se other than identifying
11 exhibits.

12 MR. BROWN: If you could give us a maybe
13 a couple of months for Mr. Leininger to look at it
14 and see if there's anything more that he needs. I
15 don't see any reason to --

16 SPECIAL MASTER CUSHMAN: I guess my
17 point is that it's not discovery in the
18 traditional sense, since the documents that the
19 state is talking about using in evidence are
20 actually your documents.

21 MR. BROWN: I understand, Your Honor;
22 but I just want to make sure that Mr. Leininger
23 can have a look at it to see if there's anything
24 he wants to conduct with the state.

25 SPECIAL MASTER CUSHMAN: Sure. I'll

1 give you two months, which is the end of May. And
2 what is the last working day in May? It is the
3 31st? So the 31st of May at 5:00 p.m. local time.

4 MR. BROWN: Okay.

5 SPECIAL MASTER CUSHMAN: Are we going to
6 have any need for motions to consolidate any
7 further on this then?

8 MR. BROWN: I can't see any need, but
9 Mr. Barber may, but I don't.

10 MR. BARBER: No.

11 SPECIAL MASTER CUSHMAN: All right.
12 I'll hold you to that. All right. Summary
13 judgment, then, how much time after discovery?

14 MR. BROWN: Well, Mr. Barber is probably
15 ready to file his motion right now, but
16 Mr. Leininger has asked me to get as much time as
17 possible, so I would think --

18 SPECIAL MASTER CUSHMAN: The end of June
19 sometime?

20 MR. BROWN: The end of June, end of
21 July. He's doing the (unintelligible on tape)
22 adjudication. I know he has things going. If we
23 can make it the end of June and then if he can
24 throw himself on the court's and Mr. Barber's
25 mercy, and try to get an extra six weeks or so, if

1 he deems that necessary, I'd appreciate that.

2 SPECIAL MASTER CUSHMAN: All right.

3 Let's go with the 28th of June for filing of
4 summary judgment or any other dispositive motions.

5 And then we're talking about hearing it.
6 Now, I already have a hearing set in Emmett on the
7 19th of July in the morning in another matter. Is
8 that a date that works for you?

9 MR. BROWN: Whether that works for
10 Mr. Leininger or not, Your Honor, I don't know,
11 but go ahead and set it.

12 SPECIAL MASTER CUSHMAN: Okay. What I'm
13 inclined to do is set this for right after lunch,
14 and then I'll just take the whole afternoon.

15 MR. BROWN: That's great.

16 SPECIAL MASTER CUSHMAN: Because I don't
17 know how long the morning is going to take. I
18 mean, we could be done at 9:30, but then again, we
19 might not be. So let's just set this at 1:15 on
20 the 19th of July here in Emmett for summary
21 judgment, since I'm going to be there anyway. And
22 you have all afternoon if you need it.

23 MR. BROWN: Very well, Your Honor.

24 SPECIAL MASTER CUSHMAN: There's also a
25 possibility that I may have to move that date

1 myself. My grandchild is going to get born
2 sometime in that period, and like I say, I'll
3 leave you here and go down there and see the
4 child.

5 All right. Then we're looking at trial
6 maybe in late August or early September. So --

7 MR. BARBER: Well, the only concern I
8 have about that is, I have a trial in Federal
9 Court that is scheduled for two weeks that begins
10 the end of September, and it's a quiet title
11 action concerning (unintelligible on tape) out
12 there, and my sincere hope is that we're going to
13 settle that here in a week or two; but if that
14 doesn't happen, I will certainly be in trial
15 preparation. So that's a major trial for me.

16 Let's go ahead and set it, as you
17 suggest, in August, but in the event, I just want
18 to advise the court that if all of a sudden I
19 might get in a real crunch, and it will be very
20 difficult to proceed with this.

21 SPECIAL MASTER CUSHMAN: All right.

22 MR. BARBER: But I would still prefer to
23 set the date in August and see if we can get it
24 done then in the event summary judgment --

25 SPECIAL MASTER CUSHMAN: How many days

1 do you think this is going to take?

2 MR. BARBER: Well, you know, basically,
3 the United States is the proponent of the water
4 right. I don't know how much time it's going to
5 take with respect to presentation on those of the
6 affirmative claims.

7 In terms of response, the response that
8 we have is essentially going to, to the whole
9 thing, is going to be done in a summary judgment.
10 If that's not sufficient, I guess it's --

11 SPECIAL MASTER CUSHMAN: Assuming that
12 we have to go to trial, and Mr. Brown, how long is
13 it going to take you to prove your claim, keeping
14 in mind that these are not claims that have a
15 director's report, so there's no presumption to
16 lean on.

17 MR. BROWN: Well, if in fact they do
18 have a director's report, Your Honor, that the
19 director's report would have prima facie effect
20 for the state-based portion of it, they were filed
21 as dual-based claims.

22 SPECIAL MASTER CUSHMAN: But I'm talking
23 about the 107 portion of these claims.

24 MR. BROWN: If we needed to prove
25 anything, it would be, in my opinion, outside what

1 the director's report has in it, that would be the
2 normal affidavits that the United States puts on
3 that, yeah, we've been there and, yeah, there's
4 water, and those sorts of things, because I
5 believe we are entitled to the presumption of the
6 report and the director's report, in the
7 state-based portion of it.

8 SPECIAL MASTER CUSHMAN: For the
9 state-based portion, I would concur with you.

10 MR. BROWN: That's right.

11 SPECIAL MASTER CUSHMAN: I'm talking
12 about the 107 portion of the (unintelligible on
13 tape).

14 MR. BROWN: If we submitted our
15 affidavits, we would just do that in one day, Your
16 Honor, and then Mr. Barber could, of course,
17 question whoever on whatever basis he had left at
18 that time to question the claimant on.

19 SPECIAL MASTER CUSHMAN: Well, at this
20 time I'll ask Mr. Barber, is submitting affidavits
21 going to be satisfactory to you?

22 MR. BARBER: Well, normally in a trial,
23 I expect to have a live witness.

24 MR. BROWN: Well, we'll have a live
25 witness there.

1 THE COURT: All right.

2 MR. BARBER: And if you simply are
3 suggesting that we have prepared testimony and we
4 simply cross-examine --

5 SPECIAL MASTER CUSHMAN: Well, again,
6 I've indicated to Mr. Brown my distaste for that
7 procedure, given the appellate decisions in Idaho
8 indicating that that's not really a trial at all
9 and that they have free review of the facts.

10 MR. BROWN: I'm not suggesting that, at
11 all, Your Honor. What I'm suggesting is, is that
12 we submit the affidavits, the person can get on
13 the stand, testify to what he has in the
14 affidavit, and he can cross-examine, and they
15 could -- we could put the affidavits to the court
16 and call it a day. But I don't know how many
17 claims we'd have at this point.

18 SPECIAL MASTER CUSHMAN: All right.

19 MR. BROWN: How long would it take for
20 one witness to sit up there and say, yes, I went
21 out there and, yes, this is what I saw.

22 SPECIAL MASTER CUSHMAN: Well, let's
23 assume for the worst case scenario, that you have
24 to do this with every claim.

25 MR. BROWN: Let's say 20 minutes per

1 claim.

2 SPECIAL MASTER CUSHMAN: Times -- what
3 do we have in the shoot?

4 MR. BROWN: Times 5,000 claims. How
5 long are you willing to listen to that, Judge?

6 SPECIAL MASTER CUSHMAN: (Unintelligible
7 on tape).

8 MR. BROWN: I would suggest a
9 streamlined way of doing this, and I would hope
10 that we can do this all on summary judgment to
11 find out if we have to go through the hoops, that
12 Mr. Barber is suggesting --

13 SPECIAL MASTER CUSHMAN: Well, it seems
14 to me that the testimony, even though we're
15 dealing with 1,700 cases, that, you know, your,
16 the testimony could be streamlined in the sense
17 that this applies to the following list of cases
18 by testimony.

19 MR. BROWN: We might be able to do it
20 that way, Your Honor.

21 SPECIAL MASTER CUSHMAN: Is that
22 satisfactory, Mr. Barber?

23 MR. BARBER: Yeah.

24 SPECIAL MASTER CUSHMAN: So we can
25 streamline it substantially that way by having

1 some sort of an exhibit with case numbers on it
2 and the testimony will apply to this set of cases
3 or that set of cases, whatever.

4 MR. BROWN: It becomes difficult when it
5 would be for cross examination. I think it would
6 be unreasonable for anyone to say on this
7 particular claim, "Do you actually remember going
8 out there and doing," when the person actually has
9 -- he may have just reviewed the record and
10 refreshed his memory -- it could become rather
11 difficult. But it depends upon what we can
12 stipulate to and what we can't, to begin with, I
13 suppose.

14 SPECIAL MASTER CUSHMAN: And I'm
15 optimistic that some of this can be stipulated to,
16 or SF5, before we get there. All right.

17 Mr. Barber, even based on your argument,
18 it's my understanding that you acknowledge that in
19 some of these that the United States has jumped
20 through all the hoops on?

21 MR. BARBER: Yeah.

22 SPECIAL MASTER CUSHMAN: We're only --
23 we're not talking about the entire universe of
24 their claims, just some portion of them.

25 MR. BARBER: That's right. Now, my, way

1 back in the Basin-Wide 9 proceedings, I attempted
2 to do an analysis of just how many have they
3 jumped through the hoops on, et cetera, and it was
4 a relatively small number; but a lot of things
5 have happened since then. They may have simply
6 corrected some legal descriptions, and if they did
7 that, it would change my analysis, so I don't have
8 a good handle on that at this point in time.

9 SPECIAL MASTER CUSHMAN: All right.
10 Well, I'm going to be optimistic. How long is
11 your part of the trial going to take?

12 MR. BARBER: If it isn't resolved on
13 summary judgment, it's basically going to
14 essentially be my cross examination at this point
15 in time of their witnesses.

16 SPECIAL MASTER CUSHMAN: All right. So
17 optimistically, if we set two days, we might
18 actually get done in one, if things are
19 streamlined?

20 MR. BARBER: Yeah.

21 SPECIAL MASTER CUSHMAN: Let's do that.
22 Then we'll set it for the 14th of August. Well,
23 let's make it the 21st. I need just a little bit
24 more time on the summary judgment, for three days,
25 in Murphy, subject to the courtroom being

1 available.

2 MR. BROWN: And Mr. Leininger's
3 availability, Your Honor.

4 SPECIAL MASTER CUSHMAN: That's a
5 separate issue. All right. Let's go off the
6 record.

7 (Recess)

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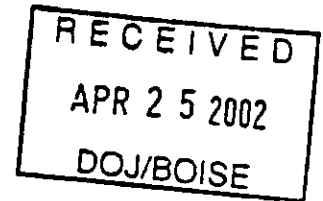
EXHIBIT C

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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	)	SUBCASE Nos.: (See Attached Exhibits A and B)
	)	
Case No. 39576	)	STATE OF IDAHO'S FIRST SET OF INTERROGATORIES,
	)	REQUESTS FOR ADMISSION, AND REQUESTS
	)	FOR PRODUCTION TO THE UNITED STATES
_____	)	

INTRODUCTION

This document contains the interrogatories, requests for admission, and requests for production being submitted to the United States regarding subcases described in the attached Exhibits A and B. These interrogatories, requests for admission, and requests for production are made pursuant to and are governed by the orders of the SRBA District Court and Rules 26, 33, and 34 of the Idaho Rules of Civil Procedure.

US Motion for Clarification and
Stay and Expedited Consideration

EXHIBIT C

GENERAL INSTRUCTIONS

1. Unless otherwise indicated, these interrogatories, requests for admissions and requests for production refer to all claims for stock water purposes made by the United States under the federal reserved water rights doctrine based on Public Water Reserve 107 in Basins 21, 25, 31, and 51.

2. These interrogatories, requests for admissions, and requests for production are deemed continuing in nature, and your responses are to be supplemented as additional information and, knowledge becomes available or, known to you, as provided in Rule 26(e) of the Idaho Rules of Civil Procedure.

3. In answering these interrogatories, requests for admissions, and requests for production, furnish all information which is known or available to you, including, but not limited to, information known of your personal knowledge, information obtainable by the diligent search of sources of information available to you, and all information in the possession of, or available to, any person or persons acting on your behalf, or under your control, or under the control of any of your attorneys, agents, employees, experts, insurers, independent contractors, investigators, representatives, or others with whom you have a relationship and from whom you are capable of deriving information, documents or material.

4. Any reference herein to an individual, partnership, corporation, or other entity, shall include the present and past agents, employees, representatives, and assigns of that individual or entity.

5. If you withhold any information, in whole or in part, which is called for in an interrogatory, request for admission, or request for production on the ground that it is subject to attorney-client privilege, or other privilege, please do all of the following: (1) identify the

information or document; (2) state the basis for each claim of privilege or other objection; and (3) identify each person or entity having knowledge of the basis for each claim of privilege or other objection.

6. If, for reasons other than alleged privilege, you do not provide a complete response to any interrogatory, request for admission, or request for production, please state with respect to such interrogatory, request for admission, or request for production that a complete response is not provided and state the reason for the incomplete response.

7. Please serve the original written responses to these interrogatories, requests for admission, and requests for production with a copy of the notice of serving on the State of Idaho.

INSTRUCTIONS FOR INTERROGATORIES

1. You must respond to the interrogatories within fifteen (15) days of service by fully setting forth each interrogatory followed by an answer or objection to each interrogatory under oath.

INSTRUCTIONS FOR REQUESTS FOR ADMISSION

1. You will be deemed to have admitted the truth of the matters set forth in these requests for admissions unless, within fifteen (15) days of service of the request, you serve an answer or objection addressed to the matters set forth, signed under oath by you or your attorney.

2. If an objection is made to a requested admission, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why you cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify your answer or deny only a part of the matter of which an admission is requested, you shall so specify so much of it as is true and qualify or deny the remainder. You may not give lack of information or knowledge as a

reason for failure to admit or deny unless you state that you have made a reasonable inquiry and that the information known or readily obtainable by is insufficient to enable you to admit or deny. You may not object to a request only on the ground that the matter of which an admission has been requested presents a genuine issue for trial.

INSTRUCTIONS FOR REQUESTS FOR PRODUCTION

1. Please produce the documents and things for inspection and copying on the 10th day of May, 2002, at 9:00 a.m. at the State of Idaho, Office of the Attorney General, 700 W. Jefferson Street, Rm. 210, Boise, Idaho 83720-0010, or such other time and place as may be mutually agreed by the parties. Inspection and copying will be conducted by the undersigned attorneys or their agents and will continue from time to time and from day to day until completed.

2. If you will make the originals of the requested documents available at a subsequent time requested by the State of Idaho, upon reasonable notice, then the requests for production of documents may be satisfied by mailing true, correct, and legible copies of each and every requested document to David J. Barber, Deputy Attorney General, Office of the Attorney General, 700 W. Jefferson Street, Rm. 210, P.O. Box 83720, Boise, Idaho 83720-0010 within the prescribed time.

3. Each document requested to be produced shall be provided in a manner which preserves its sequential relationship with other documents being produced and shall include the file folder and folder tabs associated with its file location. If the file location is not apparent on the folder and tabs, the document shall be accompanied by information indicating from where the file was taken and such additional information as is necessary to enable the State of Idaho to determine the document's original pre-production location.

4. You are requested to provide a response within fifteen (15) days of service of this request stating whether you will produce the requested documents at the specified place and time and reasons for any objection. If you refuse to produce any document, you must identify it as provided in these instructions and state the legal grounds for non-production.

Definitions:

In answering these interrogatories, all terms used retain their normal meaning. The following terms, in addition to their commonly understood definitions, shall have the following meanings:

- A. The acronym “BLM” refers to the Bureau of Land Management, an agency within the U. S. Department of the Interior, and includes all agency personnel and attorneys and other representatives of the agency.
- B. The term “custodian” means the person who has possession or control of documents and a request for the identity of a custodian constitutes a request for his name, last known address, and telephone number.
- C. The term “data,” as used in this document, refers to measurements, estimates, and observations made for the purposes of establishing and quantifying the stock water claims of the United States made under PWR 107 and under state law for beneficial use. The term “data” includes all files prepared in conjunction with these studies. For purposes of illustration, and not of limitation, the following list is an example of documents that should be produced in response to requests for production related to quantification of the stock water claims of the United States made under PWR 107 and under state law for beneficial use. Data for other types of consumptive claims may vary from the examples given below:

- field data books and all raw data
- photographs of the study sites
- daily logs of field activities and chain of custody documentation for all data.

D. The term “**document**” shall be defined in the broadest possible manner and shall, at a minimum, mean any original or copy of words or information, whether produced in original or copy form by printing, typing, recording, retrieval from electronic storage, manual reproduction, or other process and regardless of the form. The term “document” includes, but is not limited to, writings, agreements, communication, correspondence, electronic mail messages, reports, telegrams, memoranda, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, diaries, records, maps, charts, plans, drawings, sketches, photographs, graphs, notes, summaries or records of meetings or conferences, summaries or reports of investigations or negotiations, opinions, or reports of consultants, drafts of any document, phonorecords, printouts from electronic storage or other data compilations from which information can be obtained or translated, if necessary, by the respondent through detection devices into reasonably usable form, marginal comments appearing on any document and all other writing.

E. The acronym “**FLPMA**” refers to the Federal Land Policy Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743.

F. The term “**identify**” means:

- (1) as to documents, give the date of each such document, the addressor’s name, position, and address, the addressee’s name, position and address, any file, index or other identification number, title and general character of the document, and

specify the name, address and position of the person or persons having custody and control thereof. Alternatively, the document may be appended to your answer.

- (2) as to a person, or entity, give the full name, business address and telephone number; last known home address and telephone number; the person's current employment, position and duties, the person's relationship to the United States; the person's educational background, and if the person is an employee of the United States, the date of the employee's original employment by the United States.
- (3) as to conversations, including telephone communications, or meetings, give:
 - a. the date, place and time such communication occurred;
 - b. the identity of each and every person between whom the communication was transmitted, who was present or who participated in the conversation, and any other person(s) who have knowledge of such communication;
 - c. the place at which such communication occurred, or in the case of telephone conversations, the location of each party; and
 - d. a detailed statement of the substance of what was discussed or what actions were taken.
- (4) as to administrative or judicial proceedings:
 - a. the caption of the proceeding;
 - b. the administrative or judicial tribunal, including the business address and phone number; and
 - c. the date(s) a witness provided testimony.

(5) as to independent contractors:

- a. the duties assigned to and performed by the contractor;
- b. the date of the contractor's original employment;
- c. the date the contractor completed the duties assigned to and performed by the contractor; and
- d. the nature of the final work product submitted by that contractor to the United States and the title or other identification of that final work product.

(6) as to any person who the United States claims is an expert witness within the meaning of I.R.C.P. 26:

- a. the name, address and telephone number of that expert witness;
- b. the occupation or profession of the expert;
- c. any title of the expert witness;
- d. the educational background of the expert witness;
- e. the subject matter on which the expert is expected to testify;
- f. the substance of the facts and opinions to which the expert is expected to testify; and
- g. a summary of the grounds for each opinion.

G. A request for the "**location**" of documents constitutes a request to state the present address at which such documents are kept, if known, and if not known, the last address known and information as to their disposition.

H. The definition of "**person**" in Idaho Code § 42-1401A(8) (Supp. 1995) is incorporated herein by reference.

- I. The acronym “PWR” refers to public water reserve.
- J. The term “relied” or “rely” when used in a request for all documents relied upon in the preparation of claims, refers not only to documents containing information supporting the stock water claims made by the United States, but also all documents reviewed, obtained, or prepared by the United States or its employees, agents or contractors in the course of preparing the claims, whether or not the information in those documents ultimately supports the claims submitted by the United States.
- K. The acronym “SRBA” refers to the Snake River Basin Adjudication.
- L. References to the “United States” includes its departments, agencies, employees, agents, or representatives, and as used in these discovery requests encompasses all information related to the water right claims of the BLM filed in the SRBA.

**INTERROGATORIES, REQUESTS FOR ADMISSION, AND REQUESTS FOR
PRODUCTION**

Discovery Requests Relating to Claims Made

by the United States Bureau of Land Management Under PWR 107

Request for Admission No. 1.

Admit that the documents contained in Exhibit C and described herein are true and correct copies of documents on file with the BLM. The documents are described as follows:

Interpretation No. 38 February 9, 1927	Interpretation No. 51 January 17, 1928	Interpretation No. 83 February 16, 1929
Interpretation No. 106 August 29, 1929	Interpretation No. 120 February 10, 1930	Interpretation No. 123 March 13, 1930
Interpretation No. 125 March 15, 1930	Interpretation No. 131 June 5, 1930	Interpretation No. 142 January 17, 1931
Interpretation No. 145 April 15, 1931	Interpretation No. 156 February 3, 1932	Interpretation No. 160 April 8, 1932

Interpretation No. 169 August 4, 1932	Interpretation No. 171 September 27, 1932	Interpretation No. 175 January 23, 1933
Interpretation No. 177 February 15, 1933	Interpretation No. 186 June 6, 1933	Interpretation No. 189 October 17, 1933
Interpretation No. 205 August 30, 1934	Interpretation No. 209 September 27, 1934	Interpretation No. 214 March 28, 1935
Interpretation No. 220 September 11, 1935	Interpretation No. 221 November 7, 1935	Interpretation No. 228 February 26, 1937
Interpretation No. 251 March 8, 1939	Interpretation No. 261 April 10, 1940	Interpretation No. 264 April 10, 1940
General Land Office Order March 20 1942	General Land Office Order March 24, 1942	BLM Memorandum May 26, 1955
BLM Memorandum July 8, 1959	BLM Memorandum April 6, 1960	BLM Memorandum August 1, 1967
BLM Memorandum January 9, 1968	BLM Memorandum January 26, 1968	BLM Memorandum September 23, 1968
BLM Memorandum October 15, 1970	BLM Memorandum September 11, 1974	

Request for Production No. 1.

If you deny Request for Admission No. 1, produce a true and correct copy of each Order of Interpretation, General Land Office Order, or BLM Memorandum that you identified as not being a true and correct copy.

Request for Production No. 2.

Produce a "Case Management Audit Report" from the database maintained by the Bureau of Land Management of the land status of Public Water Reserves in Idaho using the following selection criteria:

ADMINISTRATIVE STATE = ID

PRINT REMARKS

CASE TYPE = 231104

ACTION CODES = 124 387 501 801

Request for Production No. 3.

Produce a list of all case types entered into the database maintained by the Bureau of Land Management of the land status of lands in Idaho.

Request for Production No. 4.

Produce a list of all action codes entered into the database maintained by the Bureau of Land Management of the land status of lands in Idaho.

Interrogatory No. 1.

Identify those water right claims of the United States in Basin 21, 25, 31, and 51 that are based on any Order of Interpretation of Public Water Reserve 107 listed in Request for Admission No. 1.

Interrogatory No. 2.

Identify all persons who had any responsibility in investigating, preparing or submitting the notice of claims of the United States based on Public Water Reserve 107.

Interrogatory No. 3.

In addition to those persons listed in response to Interrogatory No. 3, identify all other persons employed or previously employed by the BLM who have knowledge or any relevant fact concerning the BLM's PWR claims filed in the SRBA.

Interrogatory No. 4.

Identify all persons who are or were independent contractors hired by the United States to assist in any way in the investigation, preparation, and submission of the BLM's PWR claims in the SRBA.

Interrogatory No. 5.

Identify all persons who you propose to call as expert witnesses to substantiate BLM's PWR claims in the SRBA.

Interrogatory No. 6.

Please indicate for each expert identified in response to Interrogatory No. 5 if that expert has given you a written opinion.

Interrogatory No. 7.

For each expert identified in response to Interrogatory No. 5 state:

- a. the expert's name;
- b. the date of the opinion;
- c. the subject matter of the opinion; and
- d. whether the United States intends to call the expert as a witness during trial of this

matter.

Interrogatory No. 8.

Did the BLM or someone working on behalf of the BLM make a field inspection of each PWR water right claimed listed in Exhibits A and B?

Interrogatory No. 9.

For each field inspection, state the following:

- a. the nature or type of inspection, and the date of each;

- b. identify the person who conducted or assisted in the inspection;
- c. state whether field notes were made during the inspection;
- d. describe the written report made of each inspection;
- e. state whether any summary reports cumulating the information gathered in the field inspection reports written;
- f. identify the persons who have possession or custody of each report described in subdivisions (d) & (e).

Interrogatory No. 10.

Did the BLM rely on any agency standards, procedures or other methodology in conducting the field investigations described in response to Interrogatory No. 9?

Interrogatory No. 11.

If the answer to Interrogatory No. 10 is in the affirmative, state:

- a. its identity, including its title, publication, volume, issue, date, page, etc.;
- b. the name and address of its publisher, or other information explaining where a copy may be found; and
- c. a description of the nature and extent of BLM's reliance on this agency standard, procedure, or other methodology.

Interrogatory No. 12.

Identify any photographs, videos, motion pictures, computer generated graphics, maps, drawings, diagrams, measurements, surveys, or other graphic descriptions that were created or developed in support of BLM's PWR water right claims filed in the SRBA.

Interrogatory No. 13.

Identify any technical reports or other written information in support of these PWR claims.

Interrogatory No. 14.

Identify all other persons who you propose to call as witnesses to substantiate BLM's PWR claims in the SRBA other than those identified in response to Interrogatory No. 5.

Request for Admission No. 2.

Admit that the BLM created a serialized case file for its public water reserves.

Interrogatory No. 15.

Describe the purpose for creation of the serialized case file for BLM's public water reserves.

Interrogatory No. 16.

Identify the serialized case file numbers for BLM's public water reserves within the Snake River Basin.

Request for Production No. 5.

Produce the serialized case files for all public water reserves within the Snake River Basin.

Interrogatory No. 17.

Identify all documents not contained in BLM's serialized case files for its public water reserves within the Snake River Basin that contain information or which pertain in any way to those public water reserves.

Interrogatory No. 18.

Identify all persons having knowledge of any of the documents listed in Interrogatory No. 17.

Interrogatory No. 19.

Identify all persons who assisted in the preparation of the reports entitled "Withdrawal Review Report" or "Land Report" as required by Section 204(1) of FLPMA for public water reserves within the Snake River Basin.

Request for Production No. 6.

Produce all exhibits the United States proposes to use in your direct and/or rebuttal cases.

Request for Admission No. 3.

Admit that Exhibit D is a true and correct copy of page 167 from the book entitled "OPPORTUNITY AND CHALLENGE The Story of BLM" by James Muhn and Hanson R. Stuart.

Request for Admission No. 4.

Admit that page 167 attached as Exhibit D accurately describes the events stated therein.

Request for Production No. 7.

Produce a true and correct copy of the July 8th critique described in Exhibit D.

Request for Production No. 8.

Produce a true and correct copy of the 250-page detailed analysis described in Exhibit D.

Interrogatory No. 20.

Identify the custodian of the BLM's land status records in Idaho.

Interrogatory No. 21.

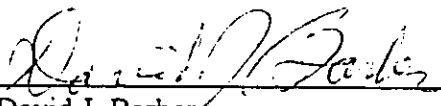
Identify all documents not previously identified in the answers to any interrogatory hereinabove, which relate to or pertain to any facts given in answer to the foregoing interrogatories.

Interrogatory No. 22.

Identify all persons who assisted in the preparation of the United States' Responses to these Interrogatories, Requests for Admissions, and Requests for Production.

DATED this 25th day of April, 2002.

ALAN G. LANCE
Attorney General



David J. Barber
Deputy Attorney General
Natural Resources Division

P2114NBA