

2004 OCT 20 PM 3 03

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	)	SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION; FINDINGS OF
Case No. 39576	)	FACT AND CONCLUSIONS OF LAW
	)	
	)	WATER RIGHT NO.: 75-13749
	)	(Basin 75 PWR 107 Uncontested Federal)

I. PROCEDURAL BACKGROUND

A claim was filed by the United States Bureau of Land Management for water right 75-13749. 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 the Idaho Department of Water Resources ("IDWR") and reported in a *Director's Report*. IDWR did not investigate the federal reservation theory because those are based on federal law. I.C. § 42-1411A.

An *Objection* was filed by the State of Idaho. A *Stipulation to Resolve Objections* was filed on July 6, 2004. An evidentiary hearing was held on October 13, 2004. At the hearing, the United States Bureau of Land Management withdrew the state basis for this claim and opted to pursue this right solely under a federal reservation pursuant to Public Water Reserve 107 ("PWR 107").

Therefore, this claim is now an uncontested claim based on federal law and may proceed under I.C. § 42-1411A. The United States BLM submitted an *Affidavit of Alan R. Bittner*, (75-11708 *et. al.*)(August 29, 2003) (hereafter *Bittner I*). The United States BLM also submitted a *Supplemental Affidavit of Alan R. Bittner* (75-13749) (September 7, 2004)(hereafter *Bittner II*).

II. STANDARD OF REVIEW

A. Federal Reserve Water Rights

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

v. California, 373 U.S. 546 (1963), and may be granted if the following three criteria are satisfied:

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

B. Federal Reserved Rights Under Public Water Reserve 107

The United States Bureau of Land Management filed this claim for stockwatering based on alternative legal theories of beneficial use (pursuant to state law) and on the executive order Public Water Reserve 107 (April 17, 1926) (pursuant to federal law). This claim is for stockwater not to exceed 13,000 gallons per day.

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.

C. Uncontested Claims Based on Federal Law

Idaho Code Title 42 sets forth the SRBA procedures for both state-based and federal-based water right claims in the Snake River Basin Adjudication. Claims which are brought pursuant to Idaho state law are investigated by IDWR which recommends the elements in a *Director’s Report*. Claims which are brought pursuant to federal law are not investigated by IDWR, and IDWR does not make any recommendation for federal-based claims. Instead, notice of the filing of federal-based claims is placed on the docket sheet and reported along with the *Director’s Report*.

The statutory provisions for federal-law claims are found in I.C. § 42-1411A. The statute takes into account the absence of an independent investigation into federal-law claims and requires a hearing for uncontested claims. I.C. § 42-1411A(14). Since no independent review is conducted of federal-law claims, the claimant bears the burden of going forward and the burden of persuasion.

Each claimant of a water right established under federal law has the ultimate burden of persuasion for each element of a water right. Since no independent review of the notice of claim has occurred as provided for water rights acquired under state law in a director’s report, a claimant of a water right established under federal law has the burden of going forward with the evidence to establish a *prima facie* case for the water right established under federal law. All such proceedings shall be governed by the Idaho Rules of Civil Procedure and Idaho Rules of Evidence.

I.C. § 42-1411A(12).

III. FINDINGS OF FACT ON ELEMENTS

A. Ownership of the Water Right

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

The Master Title Plats are official business records of the United States that
SPECIAL MASTER’S REPORT AND RECOMMENDATION
G:/75MRR/13749.PWR107.UNCONTESTED.FEDERAL
10/20/04

identify United States' property and its status. The MTP is the United States' official Record of Title. It is a graphic display of township survey data, and are (sic) drafted from information abstracted, compiled, and composed from the latest approved U.S. Government Survey Plats, survey field notes, and protraction diagrams. It describes the locations of United States property, aliquot parcels, and government surveyed "lots." I have reviewed these records and determined that the federal public domain containing the water sources asserted in the above captioned SRBA claims are located on unreserved federal public domain as of April 17, 1926; and this land currently remains under Department of Interior administration.

Bittner I at 2-3, ¶ 4.

There are no remaining objections to the claim of ownership by the U.S. Bureau of Land Management. There is "substantial evidence" that the United States is the owner of this right.

B. Priority Date

This water right was claimed based on PWR 107 with a priority date of April 17, 1926. That is the day an executive order known as Public Water Reserve 107 was signed by the President of the United States. The federal public domain contained the claimed water source and this was located on unreserved federal public domain on April 17, 1926. There is "substantial evidence" that the priority date is April 17, 1926.

C. Source

The claim asserted a source for this water right. The *Affidavit of Alan R. Bittner I* states that the source for this right is a spring or water hole located at the claimed point of diversion. The source was verified by field investigation. *Bittner I* at 3, ¶¶ 5, 6 and 7.

In addition, IDWR investigated the source element for this right under the state basis and submitted a *Director's Report* with a specific source determined for this water right. There is "substantial evidence" of the source for this right.

D. Quantity

The quantity claimed for this water right is 13,000 gallons or less per day. The *Affidavit of Alan R. Bittner I* states that there is sufficient surface water for consumptive use by livestock. *Bittner I* at 3, ¶6. In addition, IDWR investigated the quantity element for this right and submitted a *Director's Report* with a specific quantity determined for this water right. There is "substantial evidence" of the quantity for this right.

E. Point of Diversion

The *Affidavit of Alan R. Bittner I* states that the source of water for this claim is a spring

located at the claimed point of diversion. This claim asserts a point of diversion that was expressed with a legal description. In addition, IDWR investigated the point of diversion element for this right under the state basis and submitted a *Director's Report*. The *Director's Report* for this right contained a determination of the claimed point of diversion. There is "substantial evidence" of the point of diversion for this right.

F. Purpose of Use

The claimed purpose of use for this right is "stockwater." The United States asserted that a field investigation conducted by the U.S. confirmed that sufficient surface water exists for consumptive use by livestock. *Bittner I* at 3, ¶6. There is "substantial evidence" that the purpose of use is "stockwater."

G. Period of Use

The claimed period of use for this stockwater right is January 1st to December 31st of each year. The United States asserted that a field investigation conducted by the United States confirmed that sufficient surface water exists for consumptive use by livestock. *Bittner I* at 3, ¶6. There is "substantial evidence" of the period of use for this water right.

H. Place of Use

This claim asserted a place of use that was described by a legal description. The *Affidavit of Alan R. Bittner I* states that the place of use was verified by a field investigation. The *Supplemental Affidavit of Alan R. Bittner* (75-13749) corrected a typographical error in the legal description for the place of use for this claim. *Bittner II* at 2, ¶9. In addition, IDWR did investigate this right under the state basis. The *Director's Report* for this right concluded that the claimed place of use was correct. There is "substantial evidence" of the claimed place of use.

IV. CONCLUSION

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

DATED: October 20, 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
FILED

In Re SRBA)
PARTIAL DECREE PURSUANT TO
Case No. 39576) I.R.C.P. 54(b) FOR
Water Right 75-13749

2004 OCT 20 PM 3 03

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

SOURCE: SPRING TRIBUTARY: SALMON RIVER

QUANTITY: 0.02 CFS

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

PRIORITY DATE: 04/17/1926

*
* THIS WATER RIGHT IS ISSUED BASED ON FEDERAL LAW WITH *
* AN APRIL 17, 1926, DATE OF PRIORITY PURSUANT TO AN *
* EXECUTIVE ORDER SIGNED THE SAME DATE AND KNOWN AS *
* PUBLIC WATER RESERVE 107. *
*

POINT OF DIVERSION: T22N R23E S18 NWNESW Within Lemhi County

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

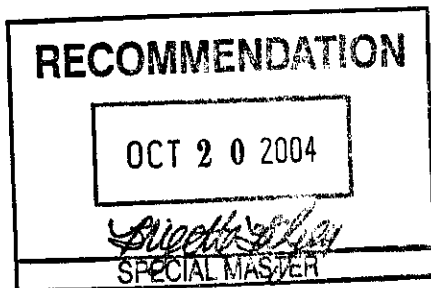
PLACE OF USE: Stockwater Within Lemhi County
T22N R23E S18 NESW

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
TWIN FALLS CO., IDAHO
FILED _____

2004 OCT 20 PM 3 03

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): 75-13749

On October 20, 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 October 20, 2004.



JANET CONNELL
Deputy Clerk

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

2004 OCT 20 PM 3 03

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): 75-13749

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 October 20, 2004, with sufficient first-class postage prepaid to the following:

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

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

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

CERTIFICATE OF MAILING

 PAGE 1
JANET CONNELL 10/20/04
Deputy Clerk