



U.S. Department of Justice

Environment and Natural Resources Division

LL:DAJ

90-6-2-63C

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July 3, 2002

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Department of Water Resources

via facsimile transmission

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
Subcases listed on Attachment 1

Dear Ms. Delaney:

Enclosed for filing is the following original document in the above mentioned subcases:

- 1 **UNITED STATES' REPLY TO STATE OF IDAHO'S BRIEF OPPOSING
THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT AND
RESPONSE TO STATE OF IDAHO'S CROSS-MOTION FOR SUMMARY
JUDGMENT**

Thank you for your time and attention in this matter.

Sincerely,

David A. Jarvis
Paralegal

Enclosure

Name of Party Filing Document:
UNITED STATES OF AMERICA

Attorneys' Names and Addresses:
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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 Exhibit 1
	)	
	)	UNITED STATES' REPLY TO STATE
	)	OF IDAHO'S BRIEF OPPOSING THE
	)	UNITED STATES' MOTION FOR
Case No. 39576	)	SUMMARY JUDGMENT AND
	)	RESPONSE TO STATE OF IDAHO'S
_____	)	CROSS-MOTION FOR SUMMARY
	)	JUDGMENT

The State of Idaho admits that the numerous objections it filed to United States' claims to stockwater based upon Public Water Reserve No 107 center on one claim, that "[these] water right[s] should not exist." *State of Idaho's Brief Opposing the United States' Motion for summary Judgment and in Support of Idaho's Cross-Motion for Summary Judgment* (hereinafter the "*State's Brief*"), at 6. The SRBA Court reviewed the State's objections and determined that

they are unfounded. These water rights should exist. Moreover, the Court ruled that “this decision constitutes a final disposition of the objections raised in this matter and the significant number of subcases dependent on this ruling. . . .” *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*), at 36. Therefore, there is no basis for the State’s contention in its cross-motion and in its opposing brief to the United States’ motion that these water rights should not exist, or its bold assertion that “[h]ere, the District Court has not entered any final judgment.” *State’s Brief* at 13. There remains but one task in the decree of these water rights and that is determining whether the United States has demonstrated the *prima facie* elements of the water right, e.g., a factual showing of the springs’ location on the public domain, the minimal amount of water reserved, and the use or potential use of stockwatering.

Nevertheless, the State continues to insist that all legal bases for its objection have not been addressed, in particular its claim that the United States failed to comply with Federal Land Policy and Management Act of 1976, Pub L 94-579, 90 Stat. 2743 (FLPMA). While the United States (as shown below) disputes the merits of this allegation, the fact remains that the State had the full and fair opportunity to argue this point as a basis for its objection that “[these] water right[s] should not exist” and chose not to

The State improperly depicts the past four years of litigation on its objections as being limited by order of the Court. *See State’s Brief* at 15 (the “December 31, 1998 [Order] described the issue as the tributary water issue. Thus, the Memorandum Decision and Order on Challenge could not and did not dispose of the [FLPMA] issue.”). However, it was the State, not the Court, that delineated the issue to be litigated in the context of its objection that these water rights

should not exist. While it is true that the Order dated December 31, 1998, identified the issue as tributary water, the Court was merely continuing down the path that had been established by the State. In its *Motion for Summary Judgment* in subcases 23-10872, dated December 18, 1998 (nearly two weeks prior to the issuance of the Stipulation Order), the State argued that the tributary water issue should be the basis for disallowing a federal reserved water right. The FLPMA issue was not even raised in the motion.

It is not clear at what point in the more than four years of litigating these objections that the State feels its FLPMA issue was properly raised before the District Court. The State does maintain, however, that the issue was raised prior to the Court's December 28, 2001 *Order*. See *State's Brief* at 9 ("the District Court's decision on December 28, 2001 did not address the issue raised regarding the designation of additional reserved under PWR 107 without compliance with section 204 of the FLPMA")(emphasis added). The United States' review of the record shows that the State first raised the FLPMA issue in the course of litigating these objections in *State of Idaho's Response Brief to Supplemental Memorandum of United States*, dated September 5, 2001. See *id.* at 10 ("[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").^{1/} Regardless of the remarkably belated timing of this argument, the State admits that the issue was raised prior to the Court determining that its "decision constitutes a final disposition of the objections raised in this matter and the significant number of subcases dependent on this ruling. . . ." *Order* at 36.

^{1/} The United States still contends, however, that the issue of FLPMA compliance was raised by the State and decided by the Idaho Supreme Court in *United States v. State*, 131 Idaho 468, 959 P.2d 449, 453 (1998)("PWR 107 reserving water rights in withdrawn land fifty years prior to the enactment of FLPMA, remains in full force and effect.").

Despite the comprehensiveness of this ruling, the State attempts to avoid the *res judicata* and law of the case bar to its claim by asserting that the issue was not addressed in the decision. That is an improper interpretation of the Court's *Order*. The Court's 36 page Memorandum Decision establishes the scope, breadth and application of the PWR 107 reservation in these proceedings. While the decision does not mention FLPMA *per se*, it does effectively address the merits of the State's argument.

The State alleges that the United States has "added springs as PWR 107 springs after the enactment of [and in violation of] FLPMA." *State's Brief* at 13. Yet, the District Court clearly determined that "PWR 107 represented a shift from a case-by-case examination and withdrawal of lands surrounding water sources needed by the public to a "global" or "blanket" withdrawal." *Order* at 18. The blanket withdrawal was in effect prior to the enactment of FLPMA and therefore is unaffected by the statute *United States v. State*, 131 Idaho 468, 959 P.2d 449, 453 (1998). Accordingly, there is no merit to the State's claim that the United States "added" PWR 107 withdrawals after 1976.

The State's confusion apparently stems from the language of Section 204 of FLPMA that authorizes the Secretary of the Interior to "make withdrawals" after the effective date of the Act but only under certain provisions and limitations. The State then postulates that any PWR 107 claims that were not identified on a Bureau of Land Management list or plat prior to the enactment of FLPMA must have been "made" after the date of the Act. *State's Brief* at 9-13. Such an argument finds no support in the Idaho Courts' rulings. The PWR 107 withdrawals and reservations were "made" on April 17, 1926 when the blanket withdrawal was signed.

In focusing on the language of section 204 of FLPMA, the State ignores the Court's reasoning why PWR 107 is a blanket withdrawal. PWR 107 is a global or blanket withdrawal because its primary purpose was to retain for public use scarce water resources and "prevent[] monopolization and control of the arid western land." *Order* at 20 (*quoting United States v. City and County of Denver*, 656 P.2d 1, 33 (Colo. 1982)). The Court noted that it would be paradoxical to infer the existence of a tributary distinction that results in defeating the primary purpose of the executive order. *Id.* Similarly, here it would be paradoxical to infer that the few dozen PWR 107 spring sites that were posted on BLM maps or investigated in the course of an application for homestead entry are the only PWR 107 withdrawals and reservations.² Such a limitation would clearly defeat the purpose of the reservation.

Finally, the State argues that the United States breached the *Stipulation to Resolve Objections*, Consolidated Subcase Numbers 23-10859, *et al.*, filed August 10, 1999. *State's brief* at 16. The State wrongly construes the purpose of the United States' discussion of the settlement agreement. The agreement was cited merely to show that the State has settled objections to PWR 107 claims in the past without regard to any purported FLPMA limitations. This fact is well known to the Court because it has entered partial decrees for hundreds of PWR 107 subcases where the State and United States have submitted Standard Forms No. 5. The stipulation was not raised for the purpose of demonstrating that the State waived the FLPMA argument. The point is the FLPMA argument was never raised in the course of litigating these objections until the final

²The fact that after 1976 the BLM undertook the difficult and expensive task of identifying the thousands of PWR 107 stockwatering springs located on the federal public lands in Idaho and filing rights to the water sources in this adjudication does not diminish the scope of the reservation. On the contrary, the BLM's efforts help to fulfill the very purpose the Snake River Basin Adjudication in determining the use of and rights to water within the State.

supplemental briefing in September of 2001. In any case, should the State feel that this point goes against the spirit and intent of the agreement, the United States will withdrawal previous argument related to the settlement stipulation.

Respectfully submitted this 3rd day of July, 2002.



R. Lee Leininger
Larry Brown
Attorneys, U.S. Department of Justice

Exhibit 1

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
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21-12019	21-12095	31-11026
21-12021	21-12099	31-11028
21-12023	21-12105	31-11030
21-12027	21-12107	31-11088
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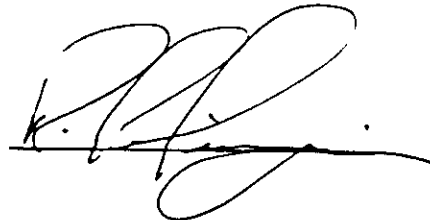
CERTIFICATE OF MAILING

I certify that on July 3, 2002, I mailed a true and correct copy of the **UNITED STATES' REPLY TO STATE OF IDAHO'S BRIEF OPPOSING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO STATE OF IDAHO'S CROSS-MOTION FOR SUMMARY JUDGMENT** to the following persons, postage prepaid and addressed as follows:

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A handwritten signature in black ink, appearing to be "D. Barber", written over a horizontal line.