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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

) Subcase Nos.: 63-29070 and 63-29142
)
)
)
)
)

**MOTION TO ALTER OR
AMEND**

Descriptive Summary

This is the United States' motion to alter or amend the Special Master's recommendations for the above referenced subcases.

Motion

This motion respectfully asks that the Special Master partially alter or amend her recommendations contained in the separate *Special Master's Report and Recommendation[s]* (SMRR), issued for these subcases on September 3, 2004. The Special Master found that the United States is entitled to these water rights based upon the federal reservation Public Water Reserve No.

107. The Special Master recommended, however, that the priority date for 63-29070 and 63-29142 be January 10, 1928 and March 26, 1928, respectively. The Special Master states that “[s]ince a homestead application was pending on April 17, 1926, the date Public Water Reserve 107 (PWR 107) was signed by the President of the United States, we look to the date the homestead application failed as the date of the withdrawal.” *SMRR*, re: 63-29142 at 4. Similarly, the Special Master states that “the withdrawal was not effective until the pending homestead application failed.” *SMRR*, re: 63-29070 at 3.

The United States submits that the date of the PWR 107 reservation, April 17, 1926, should be the priority date for these and any other PWR 107 claims where a homestead entry pending on the date of the reservation subsequently failed. Judge Melanson recently ruled on the effect of pending homestead entries at the time of the pending PWR 107 withdrawal. *Memorandum Decision and Order on Challenge; Order on Partial Decrees*, subcases 25-13635, 25-13637, 25-13653, 65-19960, and 65-19962, dated October 4, 2004. After analyzing the history of PWR 107 and its enabling legislation, the Court determined that

PWR 107 was *suspended* until entry failed.

[T]he withdrawal, although excluded or suspended pending the outcome of the entry, nonetheless applied to those lands. *Once the entry failed the withdrawal attached* and no subsequent withdrawal was required.

[T]he withdrawal was *suspended* only until such time as an entry failed.

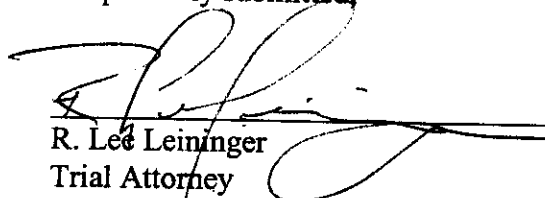
Id. at 1, 8 and 11 (emphasis added). The Court reversed the Special Master’s ruling and determined

that these were valid PWR 107 claims and that they should be decreed "as set forth in the attached Partial Decree[s] Pursuant to I.R.C.P. 54(b)." *Id.* at 12. Consistent with the Court's ruling that PWR 107 was merely suspended until such time as a pending homestead entry was cancelled or relinquished, the Court decreed these rights with a priority of the date of the President's signing PWR 107, April 17, 1926.

The subcases in the instant case, 63-29070 and 63-29142, should be treated no differently. These are valid PWR 107 withdrawals that were suspended until after the homestead applications failed. At that time, the PWR 107 withdrawal attached with the date of the withdrawal intact. Therefore, the United States respectfully request that the Special Master's Report and Recommendation[s] be changed to reflect the date of withdrawal and reservation, April 17, 1926, as the priority date.

DATED this 28th day of October, 2004.

Respectfully submitted,


R. Lee Leininger
Trial Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on this 28th day of October, I served a true and correct copy of foregoing Motion to Alter or Amend upon the following individuals by serving as indicated, postage pre-paid, addressed as follows:

via Facsimile:

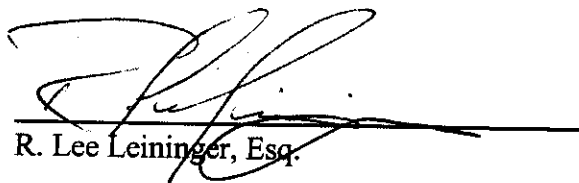
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