

RECEIVED

MAY 11 2005

Department of Water Resources

KELLY A. JOHNSON
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

DAVID L. NEGRI
United States Department of Justice
Environment and Natural Resources Division
General Litigation Section
550 W. Fort St. MSC033
Boise, ID 83724
(208) 331-5943; facsimile (208) 387-0842
ISB # 6697

Counsel for the United States of America

**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. 81-02181, 81-10309, 81-10326,
	)	81-10365, 81-10438, 81-11820, and 81-11923
	)	
	)	United States' Memorandum in Support of
CASE NO. 39576	)	Federal Reserved Water Right Claims
	)	

This is the United States' Memorandum in Support of Federal Reserved Water Right Claims 81-02181, 81-10309, 81-10326, 81-10365, 81-10438, 81-11820, and 81-11923 ("Claims"). The Claims were made on behalf of the USDA Forest Service pursuant to the Organic Administration Act, Act of June 4, 1897, 30 Stat. 34 (codified at 16 U.S.C. § 475 *et. seq.* (1994)) ("Organic Act").

INTRODUCTION

The United States, on behalf of the United States Department of Agriculture, Forest Service ("Forest Service"), submits this memorandum in support of seven separate Claims for the use of water at federal administrative sites. The United States is entitled to federal reserved water rights for the Claims because 1) the Claims are located on federal lands reserved from the public domain, and 2) the use of water is necessary to administer the reserved lands and to fulfill primary purposes of the reservations. Accordingly, the United States hereby requests that it be granted federal reserved water rights for the Claims.

STATEMENT OF FACTS

The United States filed the Claims for consumptive uses at seven administrative sites situated in the Bitterroot, Nez Perce and Clearwater National Forests ("National Forests"). In each of the subcases for the Claims, the United States has filed Affidavits in support of the Claims (collectively, "Supporting Affidavits").

As demonstrated by the Supporting Affidavits, the purpose of the Claims is to supply the administrative sites with sufficient water necessary to administer National Forest System lands and to effectuate the purposes of the Organic Act. The Supporting Affidavits provide evidentiary support for each element of the Claims.

The Claims are for Forest Service administrative sites representing a variety of essential administrative uses and needs at the administrative sites.

The Claims describe water used for essential administrative activities. These activities include activities, such as fire suppression and watershed protection, directly related to primary

Organic Act purposes.¹

ARGUMENT

The statutory procedures for prosecuting federal reserved water right claims in the Snake River Basin Adjudication are set forth in Idaho Code § 42-1411A. That section provides, in relevant part, that "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." I.C. § 42-1411A(12). In order to meet the statutory burden of establishing a prima facie case under I.C. § 42-1411A, the United States has filed the Supporting Affidavits, which set forth the factual basis for each element of the Claims.

The reserved rights doctrine provides that when the federal government reserves land, the federal government by implication reserves water sufficient to accomplish the purpose of the reservation. *Cappaert v. United States*, 426 U.S. 128 (1976); *Avondale Irrig. Dist. v. North Idaho Prop. Inc.*, 99 Idaho 30, 34, 577 P.2d. 9, 13 (1978). In ascertaining whether a federal reserved right exists, the Court must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation. *See United States v. Idaho*, 131 Idaho 468, 959 P.2d 449, 451 (1998), *cert. denied*, 119 S.Ct. 1158 (1999); *United States v. City and County of Denver*, 656 P.2d 1, 20 (Colo. 1982); .

It is well settled that the national government has the authority to "reserve water for the use and benefit of federally reserved lands." *United States v. District Court for Eagle County*,

¹ The primary purposes of National Forest reservations are to provide a continuous supply of timber and to assure favorable conditions of water flow. *United States v. New Mexico*, 438 U.S. 696 (1978); *see p. 5, infra*.

401 U.S. 520, 522 (1971) (*quoting Arizona v. California*, 373 U.S. 546, 597 (1963)). The reserved right doctrine was fully articulated in *Cappaert v. United States*, 426 U.S. 128 (1976):

[W]hen the federal government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert, 426 U.S. at 138 (citations omitted). *See also United States v. New Mexico*, 438 U.S. 696, 699-700 (1978). Idaho law is in accord with this authority. *See United States v. Idaho*, 959 P.2d at 450-51 (*quoting* the above passage from *Cappaert*); *Avondale Irrig. Dist.*, 99 Idaho 30 at 34, 577 P.2d. at 13 ("When the federal government reserves land from the public domain it also, by implication, reserves rights to the appurtenant and then unappropriated water necessary to accomplish the purpose of the reservation.").

To establish a reserved water right, the United States must show 1) a reservation of land, 2) that water is necessary to effectuate the purposes of the reservation, and 3) the minimum amount of water necessary to effectuate those purposes. *Cappaert*, 426 U.S. at 138-141; *Avondale Irrig. Dist.*, 99 Idaho at 41, 577 P.2d. at 20.

As demonstrated by the Supporting Affidavits, all of the Claim sites are located on reserved land. The land underlying the Claims was reserved from the public domain on February 22, 1897. This land was reserved pursuant to the Creative Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103, as amended (codified at 16 U.S.C. § 471) (repealed 1976) ("Creative Act"). The

Organic Act provides that all land subject to reservations made under the Creative Act shall be administered pursuant to the Organic Act. *See* 16 U.S.C. § 475.²

The Supporting Affidavits demonstrate that water at the administrative sites is necessary to administer National Forest System lands. That water is necessary for use in association with government property cannot be seriously doubted. *See Arizona v. California*, 373 U.S. 546, 598 (1963) ("We have no doubt about the power of the United States under the [commerce and property] clauses to reserve water rights for its reservations and property."). As a land management agency, the Forest Service is charged with the administration and management of National Forest System lands, which include the National Forests in question. *See* 33 Stat. 628, 16 U.S.C. § 472; *see also*, *United States v. Grimaud*, 220 U.S. 506; *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917). The SRBA Court previously has held that it is reasonable to assume that Congress intended, in reserving National Forest System lands, to reserve sufficient water to serve administrative sites for such lands. *See Order of Partial Decree on Uncontested Federal Water Right*, Subcase No. 63-30981 (July 31, 2000).

The water encompassing the Claims also fulfills the purposes of the Organic Act. In determining the extent of the reserved right in question, the Court must look to the primary purposes for which the reservation was created. *United States v. New Mexico*, 438 U.S. 696 (1978). The primary purposes of National Forest reservations are to provide a continuous supply of timber and to assure favorable conditions of water flow. *Id.* As set forth in the Supporting

² "[A]ll public land that may hereafter be set aside and reserved as national forests under [the Creative Act], shall be as far as practicable controlled and administered in accordance with the following provisions." 16 U.S.C. § 475.

Affidavits, water at the various Forest Service administrative sites is necessary to accomplish the Organic Act's primary purposes.

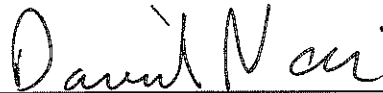
Accordingly, the United States has claimed water necessary to administer the National Forests and to fulfill primary purposes of the underlying reservations. Therefore, the United States should be granted reserved water rights for the Claims.

CONCLUSION

For the foregoing reasons, the United States requests that it be granted federal reserved water rights as described by the Claims.

DATED this 10th day of May, 2005.

Respectfully submitted,

A handwritten signature in cursive script, reading "David Negri", is written over a horizontal line.

DAVID L. NEGRI
United States Department of Justice
Counsel for the United States

CERTIFICATE OF MAILING

I certify that on May 10, 2005, I mailed a true and correct copy of the foregoing Memorandum in Support of Federal Reserved Water Right Claims upon the following by First Class United States Mail, prepaid:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

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

A handwritten signature in black ink, appearing to read "David Negri", is written over a horizontal line.

David L. Negri