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AUG 14 2009

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

AUG 13 2009

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.: 37-20513

I. PROCEDURAL BACKGROUND

A claim was filed by the United States Bureau of Land Management for the above listed water right. 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 that is based on federal law. I.C. § 42-1411A.

An *Objection* was filed by the United States Bureau of Land Management on November 13, 2007. A *Standard Form 5 Amended Claim* was filed April 15, 2008.

The United States BLM submitted the *Affidavit of Frederic W. Price*, and an evidentiary hearing under I.C. § 42-1411A was held on July 8, 2009.

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). The claim at issue is for a stockwater claim 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 the Idaho Department of Water Resources (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, the claimed elements are 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).

D. Hearing Requirement and Affidavits

The hearings on these claims relied on sworn affidavits rather than on live testimony. This court has previously held that introduction of sworn affidavits complies with the hearing requirement. *Order Accepting in Part, and Denying in Part, Special Master's Report and Recommendation* (Subcase 36-15452, Oct. 10, 1997) (hereafter "Smith Springs") *overruled on other grounds, In Re SRBA Case No. 39576* (Minidoka Wildlife Refuge), 134 Idaho 106, 996 P.2d 806 (2000).

III. FINDINGS OF FACT ON ELEMENTS

A. Ownership of the Water Right

The claim asserts that the owner of this water right is the United States Bureau of Land Management. *Affidavit of Frederic W. Price* at 5, ¶ 7. 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. *Affidavit of Frederic W. Price* at 5, ¶ 6. Although the United States and the *Director's Report* also provided evidence of a later state law priority, the United States requested the earlier federal priority. There is “substantial evidence” that the priority date is April 17, 1926.

C. Source

The claim asserts a source for this water right. The United States provided evidence that the source of water is a spring or waterhole which was verified by a field investigation. *Affidavit of Frederic W. Price* at 6, ¶ 10. There is “substantial evidence” of the source.

D. Quantity

The quantity claimed for this water right is 13,000 gallons or less per day. The United States asserts that there is sufficient water at these sights for consumptive use by livestock. *Affidavit of Frederic W. Price*, at 5, ¶ 9. There is “substantial evidence” of the quantity for this right.

E. Point of Diversion

This claim asserts a point of diversion that was expressed with a legal description. The *Affidavit of Frederic W. Price* explains that the point of diversion is based on field verifications and Mr. Price's review. There is “substantial evidence” of the point of diversion for this right.

F. Purpose of Use

The claimed purposes of use for this right are stockwater and stockwater storage. The United States asserts that the purpose of use was verified by a field examination and by examination of the claim file. *Affidavit of Frederic W. Price*. There is “substantial evidence” that the purposes of use are stockwater and stockwater storage.

G. Period of Use

The claimed period of use for this right is January first to December 31st of each year. The purpose of PWR 107 was to reserve land to avoid monopolization of the springs or water holes. IDWR's investigation resulted in a *Director's Report* with a determination that period of use was year round. There is “substantial evidence” of the period of use for this water right.

H. Place of Use

This claim asserts a place of use that is described in a legal description. The *Affidavit of*

Frederic W. Price explains that the place of use was verified by field examination and review of the claim. 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: Aug 13, 2009



BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

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DEPARTMENT OF
WATER RESOURCES

In Re SRBA)

Case No. 39576)

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

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 37-20513

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

AUG 13 2009

By _____

Clerk

Deputy Clerk

NAME AND ADDRESS:

UNITED STATES OF AMERICA
USDI BUREAU OF LAND MANAGEMENT
IDAHO STATE OFFICE
1387 S VINNELL WAY
BOISE, ID 83709-1657

SOURCE:

UNNAMED STREAM TRIBUTARY: SINKS

QUANTITY:

1.90 AFY

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:

T02S R23E S31 LOT 8 (NWSW) Within Blaine County

PURPOSE AND

PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Stockwater Storage	01-01 TO 12-31	1.90 AFY
Stockwater from Storage	01-01 TO 12-31	1.90 AFY

PLACE OF USE:

Stockwater Storage	Within Blaine County
T02S R23E S31 LOT 5 (NWSW)	LOT 8 (SWSW)
Stockwater from Storage	Within Blaine County
T02S R23E S31 LOT 5 (NWSW)	LOT 8 (SWSW)

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).

RECOMMENDATION

AUG 13 2009

Bridgette Lilley
SPECIAL MASTER

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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
AUG 13 2009	
By _____	Clerk Deputy Clerk

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

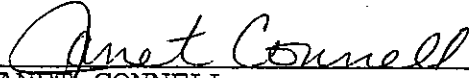
Water Right(s): 37-20513

On August 13, 2009, 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 August 13, 2009.


JANET CONNELL
Deputy Clerk

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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

AUG 13 2009

By _____

Clerk

Deputy Clerk

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): 37-20513

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 August 13, 2009, with sufficient first-class postage prepaid to the following:

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

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

UNITED STATES OF AMERICA
USDI BUREAU OF LAND MANAGEMENT
IDAHO STATE OFFICE
1387 S VINNELL WAY
BOISE, ID 83709-1657
Phone: 208-373-4000

CERTIFICATE OF MAILING

 PAGE 1
JANET CONNELL 08/13/09
Deputy Clerk