

RECEIVED
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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
MAY 15 2012	
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	)	SUBCASES: 63-29070 and 63-29142
	)	
Case No. 39576	)	ORDER GRANTING MOTION TO ALTER OR
_____	)	AMEND / AMENDED RECOMMENDATION

I. PROCEDURAL BACKGROUND

Water rights 63-29070 and 63-29142 were claimed in the SRBA by the U.S. Bureau of Land Management (hereafter "United States"). These rights were originally claimed by the United States under both state law and as a federal reservation. The United States proceeded with the federal basis of the claim. The land on which these water rights were claimed remained in federal ownership on April 17, 1926, the date Public Water Reserve 107 (PWR 107) was signed by the President of the United States. At the time PWR 107 was signed, however, a homestead entry application was pending on the land on which these claims are located. If the homestead entry applications had been successful, the land would have transferred from federal ownership to private ownership, and there would not have been a valid PWR 107 withdrawal. The homestead entry applications eventually failed, however, and the land did not leave federal ownership.

Master's Reports and Recommendations issued, which determined that these two rights should have the date on which the homestead applications failed as the priority dates. (The homestead applications failed on January 10, 1928 and March 26, 1928.) The U.S. filed a *Motion to Alter or Amend*. The *Motion* argued that the priority date should be the date PWR 107 was enacted, April 17, 1926.

II. ISSUES

The only issue raised is: **Where a homestead application was pending on the date PWR 107 was enacted, but the homestead application eventually failed, is the priority date the date of enactment or the date the homestead application failed?**

The United States provided a well-reasoned argument, and after further consideration, the *Motion to Alter or Amend* is **granted**.

III. ANALYSIS

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 filed these claims for stockwatering based on both beneficial use pursuant to state law and based on PWR 107 pursuant to federal law.

When the President of the United States signed Public Water Reserve 107 on April 17, 1926, the land on which these water rights were claimed was subject to homestead entry applications. The legal issue of whether a pending homestead entry defeats a PWR 107 withdrawal has previously been answered in this litigation in the *Order on Summary Judgment*. A pending homestead entry does not defeat a PWR 107 withdrawal. Therefore, a pending homestead entry is not a permanent blockade to a PWR 107 withdrawal. In both of these subcases, it was undisputed that a spring or water hole existed at the time of the federal

withdrawal. Consequently, the PWR 107 withdrawal was in effect and remained in effect at the time this homestead application failed. The PWR 107 withdrawal is effective once the homestead application fails unless it is otherwise defective.

C. Elements of the Water Rights

The *Master's Reports and Recommendations* made findings on the elements of these water rights. The *Masters Reports* determined that the United States was the owner of the water rights, that the source was a spring or water hole located at the claimed points of diversion, that the quantity was 13,000 gallons or less per day, that the purpose of use was stockwater, with a year round period of use. The only element that was disputed was the priority date.

The *Master's Reports and Recommendations* determined that the priority date was the date that the homestead applications failed (January 10, 1928 and March 26, 1928) instead of the earlier date that PWR 107 was enacted on April 17, 1926. The *Master's Reports and Recommendations* found that “since a homestead application was pending on April 17, 1926 . . . we look to the date the homestead application failed as the date of the withdrawal.” Thus the *Master's Reports and Recommendations* gave a priority date for 63-29070 of January 10, 1928, and the priority date for 63-29142 was March 26, 1928.

D. Priority Date

The United States filed a *Motion to Alter or Amend* arguing that the priority date for these rights should not be the date the homestead applications failed, but should instead revert back to the date Public Water Reserve 107 was signed by the President of the United States. The United States relied on the *Memorandum Decision and Order on Challenge; Order on Partial Decrees* (Subcases 25-13635 et. al.) (Oct. 4, 2004). That decision reversed a decision by Special Master Cushman that land subject to a pending homestead entry did not meet the requirements of a PWR 107 withdrawal. In reversing the lower decision, Judge Melanson held that “In the event the entryman failed to continue to comply or the entry was later determined to be unlawful, under the express terms of the Picket Act the exception no longer continued to apply.” The decision held that the PWR 107 withdrawal, “although excluded or suspended pending the outcome of the entry, nonetheless applied to those lands.” Furthermore, Judge Melanson held that when the entry failed, “the withdrawal attached and no subsequent

withdrawal was required.” The decision held that the PWR 107 withdrawal was only suspended while the homestead application was pending. “This Court reverses for the reasons previously discussed, namely that the withdrawal was suspended only until such time as an entry failed.” It should also be noted that Judge Melanson attached the *Partial Decrees* for the related water rights to his *Memorandum Decision and Order*. In all subcases, he established the priority date as April 17, 1926.

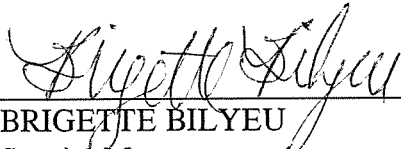
IV. CONCLUSION

After considering the pleadings, evidence, and legal arguments, the *Motion to Alter or Amend* is **granted**. PWR 107 operates to suspend pending homestead applications which were active on the date of withdrawal, April 17, 1926. Although the withdrawal was suspended during the pendency of the homestead application, it did not defeat a PWR 107 water right. Furthermore, it is the law of the case in the SRBA that a homestead application which subsequently fails merely suspended the PWR 107 withdrawal. As a consequence, the priority date relates back to the date of enactment.

Therefore, considering the pleadings, evidence and argument on the *Motion to Alter or Amend*, the *Motion* is **granted**. The recommended *Partial Decrees* shall have the priority date of enactment of PWR 107 which is April 17, 1926.

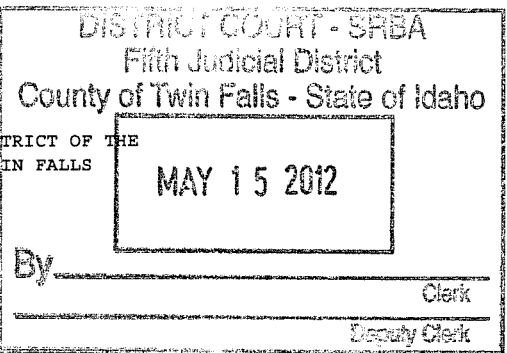
Therefore, IT IS RECOMMENDED that these subcases be **decreed** with the elements set forth in the attached *Amended Recommendations for Partial Decree*.

Dated: May 15, 2012.


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

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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)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 63-29142

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

SOURCE: SPRING TRIBUTARY: MORES CREEK

QUANTITY: 0.02 CFS

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

PRIORITY DATE: 04/17/1926

* 4/17/1926 DECREED UNDER FEDERAL RESERVED WATER RIGHT *
* *
* THIS WATER RIGHT IS DECREED 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: T03N R04E S18 NWNESE Within Ada County

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

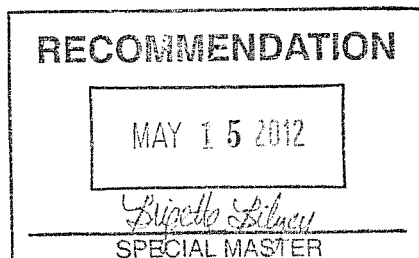
PLACE OF USE: Stockwater Within Ada County
T03N R04E S18 NESE

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.



Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO ALTER OR AMEND/ AMENDED RECOMMENDATION was mailed on May 15, 2012, with sufficient first-class postage to the following:

STATE OF IDAHO

Represented by:

NATURAL RESOURCES DIV CHIEF

STATE OF IDAHO

ATTORNEY GENERAL'S OFFICE

PO BOX 44449

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USDI BLM

Represented by:

US DEPARTMENT OF JUSTICE

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