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 35-12996, 43-10957, 43-10997,**
	)	**43-11005, 43-11052, 43-11054, 43-11056,**
Case No. 39576	)	**43-11058, 43-11069, 43-11071, 43-11158,**
	)	**43-11160, 43-11166, 43-11172, 43-11268**
	)	**and 43-11272**
	)	
_____	)	**SPECIAL MASTER REPORT**

SUMMARY

1. For its PWR 107 federal reserved claims, the BLM is not required to submit evidence of the land entry status of the area surrounding the spring or waterhole source at the time of the reservation; and

2. To establish a *prima facie* case in support of its PWR 107 claims, the BLM must: a) identify a spring or waterhole, b) located on land that was reserved federal public land on April 17, 1926, and c) which contains sufficient water for purposes of stock watering.

FINDINGS OF FACT

Director's Reports

35-12996

The Director of the Idaho Department of Water Resources filed his *Director's Report for Domestic and Stockwater, Reporting Area 5 (IDWR Basin 35)* on May 29, 1997. He recommended 35-12996 to the United States of America, Department of Interior, Bureau of Land Management, 1387 S. Vinnell Way, Boise, Idaho, 83709-1657 ("BLM"), for 2 afy from an unnamed stream for year-'round stockwater storage and stockwater from storage in Power County with a priority date of January 1, 1880, based on beneficial use. The Director also noted: "This water right is also claimed 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 ["PWR 107"]."

43-10957, 43-10997, 43-11005, 43-11052, 43-11054, 43-11056, 43-11058, 43-11069, 43-11071, 43-11158, 43-11160, 43-11166 and 43-11172

The Director filed his *Director's Report, Domestic & Stock, Reporting Area 7 (IDWR Basin 43)* on March 2, 1998. The Director recommended 43-10957 through 43-11172 (13 claims) to the BLM for .02 cfs from various springs for year-'round stockwater use in Cassia County, all with the same priority date of January 1, 1873, based on beneficial use. The Director noted that the claims were also based on PWR 107.

43-11268 and 43-11272

The Director filed his *Director's Reports for Irrigation and Other, Reporting Area 7, IDWR Basin 43*, on September 28, 2001. The Director recommended both 43-11268 and 43-11272 to the BLM for .02 cfs from two springs for year-'round stockwater use in Cassia County with the same priority date of January 1, 1873, based on beneficial use. The Director noted that the claims were also based on PWR 107.

Earlier Proceedings in Similar Basin 35 Claims

Subcase 35-12996 was one of 21 subcases in Basin 35 included in an ***Order on Motions for Summary Judgment*** entered by the Special Master on August 10, 1998. In that ***Order***, the BLM's motion for summary judgment was granted on the issue of whether it was entitled to a priority date earlier than June 28, 1934 (Taylor Grazing Act), for its *state law*-based claims.

On August 26, 1998, the BLM, with IDWR's concurrence, filed a *Standard Form 5* in 35-12996 with a priority date of January 1, 1880. The same date, the Special Master entered a ***Report and Recommendations*** in all 21 subcases in accordance with the *SF-5*, but then the State of Idaho filed a *Motion to Alter or Amend* on September 23, 1998. In light of Presiding Judge Daniel C. Hurlbutt, Jr.'s September 30, 1998 ***Order Denying Challenges and Adopting Special Master's Reports and Recommendations*** (subcase 72-15929C), the Special Master entered an ***Order Granting, in Part, State's Motion to Alter or Amend*** on December 1, 1998, holding that the Presiding Judge had decided the issue – the BLM cannot own a *state law*-based water right simply because it managed the public domain. Hence, the priority date for the 21 claims was recommended to be June 28, 1934.

An ***Amended Report and Recommendations*** was entered on December 1, 1998, recommending a June 28, 1934 priority date. The BLM filed its *Motion to Alter or Amend Amended Special Master's Report* on January 28, 1999. On September 23, 1999, the Special Master entered an ***Order Granting, in Part, United States Motion to Alter or Amend and State of Idaho Motions to Amend Objections***. The ***Order*** allowed the BLM to change the basis of its "dual-based" claims from state law to federal law and change the claimed priority date to April 17, 1926 (PWR 107). The ***Order*** also allowed the State to amend its objections to include objections to the *federal law*-basis because of the April 6, 1998 Idaho Supreme Court decision reversing Judge Hurlbutt: "PWR 107 evidences an express intention by Congress that reserves a water right in the United States." *U.S. v. State*, 131 Idaho 468, 471, 959 P.2d 449, 452 (1998).

Evidentiary Hearing

On May 12, 2003, the BLM and the State of Idaho filed a *Joint Motion to Vacate Hearing on Dispositive Motions and to Proceed with Hearing under I.C. § 42-1411(A)* in 172 subcases in Basins 35, 43 and 47, including the present 16 subcases. An I.C. § 42-1411A hearing was held by telephone on May 15, 2003, based on affidavits by Deena M. Teel and Steven R. Davis to support the BLM's *prima facie* claims for water rights established under federal law (PWR 107).

In her affidavit, lodged December 10, 2002, Ms. Teel (a BLM ecologist) said that for claim 35-12996, the claimed water source 1) was confirmed by field investigation as a natural playa, 2) its location on unreserved federal public domain as of April 17, 1926, was verified and 3) there was sufficient surface water at the site for consumptive use by livestock. In the 15 subcases in Basin 43, Mr. Davis (a BLM hydrologist) said in his affidavit, lodged March 14, 2003, that the claimed sources 1) were confirmed by field investigation, 2) are located on unreserved federal public domain as of April 17, 1926, and 3) there is sufficient surface water at the sites for consumptive use by livestock.

During the hearing, the State learned that the BLM had not investigated whether there were pending homestead entries where the PWR 107 claims are located on April 17, 1926, and withdrew its joinder in the *Joint Motion*. Because the identical issue was raised *sua sponte* by

Special Master Thomas R. Cushman and was pending before him, the matter was set off for three months or until Special Master Cushman could issue his decision.[1]

A status conference was held on August 22, 2003, and the parties noted that the issue of land entry status for water rights reserved under PWR 107 had yet to be resolved by Special Master Cushman. So, a ***Scheduling Order*** was entered on August 25, 2003, setting deadlines for the BLM to file a motion for summary judgment and for the State to respond.

BLM's Motion for Summary Judgment

The BLM filed its *Motion for Summary Judgment and Memorandum in Support* on September 19, 2003. The same date, it lodged the *Affidavit of Frederic W. Price*. The BLM argued that in these claims for federal reserved water rights under PWR 107, it should not be required to submit evidence on the land entry status of the area surrounding the spring or waterhole at the time of the reservation because the land never left federal ownership. When a homestead entry application is filed, the entryperson has only an inchoate interest prior to issuance of a land patent:

> The entryperson had no real interest in the land upon filing an application to homestead and, because all such applications were extinguished prior to vesting, the entryperson never acquired a real interest. Therefore, the land was never appropriated or legally occupied and was available for reservation under PWR 107 on April 17, 1926.[2]

BLM *Motion for Summary Judgment*, at 14.

The BLM also argued that to demonstrate a *prima* facie case for the existence of a federally reserved water right under PWR 107, I.C. § 42-1411A(14) merely requires that the BLM establish the following elements:

a. Identification of a spring or waterhole;
b. Located on land that was reserved federal public lands in 1926; and

[1] On December 18, 2002, Special Master Cushman entered his ***Report and Recommendation*** in subcases 65-19960 and 65-19962. He found: "At [the I.C. § 42-1411A] hearing testimony was given that the place of use for water rights 65-19960 and 65-19962 were homesteaded at the time that President Coolidge signed the enactment of Public Water Reserve 107." For that reason, he recommended the two BLM claims be decreed with a June 28, 1934 priority date instead of the claimed April 17, 1926 (PWR 107) priority date. On December 17, 2002, Special Master Cushman entered a ***Report and Recommendation*** in subcase 25-13637. On December 18, 2002, he entered a ***Report and Recommendation*** in subcases 25-13635 and 25-13653. In the latter three subcases, Special Master Cushman simply recommended a priority date of June 28, 1934, without further explanation. He described all five BLM claims as "state based rights." On January 27, 2003, the BLM filed a *Motion to Alter or Amend* in the five subcases. A hearing on that *Motion* was held on June 5, 2003, and a ruling by Special Master Cushman is pending.

[2] Homesteading began with the Homestead Act of 1862, ch. 75, 12 Stat. 392.

c. Containing sufficient water for purposes of stock watering.

BLM *Motion for Summary Judgment*, at 3.

State's Motion to Withdraw

On September 25, 2003, the State filed its *Motion to Withdraw its Objections* because Mr. Price's affidavit established that "only two of the sixteen subcases were ever subject to entry under the public land disposal statutes. Thus, the State of Idaho has no basis for continuation of its objections for those fourteen subcases."

In subcase 43-11160, the State alleged that an application for entry under the Stock Raising Homestead Act[3] was relinquished on May 12, 1921: "Thus, this application was not pending on the date of April 17, 1926, and the State of Idaho has no basis for continuing its objection for subcase no. 43-11160."

In subcase 43-11268, a 1921 application for entry under the Enlarged Homestead Act[4] was contested because the applicant never established residence, never lived on the land and never built a house nor made any improvements, except enclosing the land with a fence. The entry was cancelled on September 22, 1926. For these reasons, the State agreed there was no bona fide settlement: "Thus, the land was unappropriated on April 17, 1926, and the State of Idaho has no basis for continuing its objection for subcase no. 43-11268."

BLM's Response

On October 2, 2003, the BLM lodged its *Corrected Response to the State of Idaho's Motion to Withdraw its Objections*. The BLM pointed out that summary judgment proceedings were scheduled on the legal issue of whether a homestead entry application pending at the establishment of PWR 107 defeats the federal reservation. It then argued: "While the State is certainly entitled to end its participation in the briefing, the 'withdrawal' of the State's objections should not prevent the Special Master from ruling upon this important legal matter."

[3] The Stock Raising Homestead Act of 1916, ch. 9, 39 Stat. 862, *repealed* by the Federal Land Policy and Management Act, Pub. L. 94-579, § 702, 90 Stat. 2787 (1976) ("FLPMA").

[4] The Enlarged Homestead Act of 1910, ch. 298, 36 Stat. 531, *repealed* FLPMA.

CONCLUSIONS OF LAW

BLM's Motion for Summary Judgment

These subcases present an anomalous situation because the State objected to the BLM claims, an I.C. § 42-1411A hearing was held[5] and afterwards the BLM filed its *Motion for Summary Judgment*. Then, the State withdrew its objections leaving no party to respond to the *Motion*. These circumstances bring to mind the Idaho Supreme Court's ruling in *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), that held that summary judgment proceedings are not appropriate in one-party subcases because there is no adverse party or non-moving party as provided for in I.R.C.P. 56.

While it is true in these subcases there was an adverse party (the State) who filed objections and an evidentiary hearing has been held (unlike the Hagerman subcases), the Special Master does not intend to rule on the BLM's *Motion for Summary Judgment* – solely to avoid a potential error. Instead, the following conclusions of law will address the issue of whether the BLM should be required to submit evidence on the land entry status of the area surrounding the spring or waterhole at the time of the reservation for all its PWR 107 claims. The Special Master agrees with the BLM that it should not be so required.

Prima Facie Case

Idaho Code § 42-1411A(14), states in relevant part:

> If no objections are filed to a notice of claim for a water right established under federal law, the claimant shall appear at a hearing scheduled by the district court and shall demonstrate a prima facie case of the existence of the water right established under federal law prior to entry of a decree for such claimed water right established under federal law [emphasis added].

A "prima facie case" is: "Such as will prevail until contradicted and overcome by other evidence." Black's Law Dictionary 1071 (5th ed. 1979). "'Prima facie proof' connotes a situation where a party has come forward with sufficient proof to prevail on an issue absent competent evidence to the contrary." D. Craig Lewis, *Idaho Trial Handbook* (1995), at 126.

[5] Read literally, I.C. § 43-1411A only requires an evidentiary hearing when no objections are filed to a federal law claim. Here, the State objected to both the BLM's state law based claims and its PWR 107 claims. Nevertheless, the BLM and the State requested the hearing to move forward a large number of such claims bogged down in similar proceedings.

In the present 16 subcases, the BLM has established a *prima facie* case in support of its PWR 107 claims. In each subcase, the affiants 1) identified the spring or waterhole, 2) located on land that was reserved federal public lands in 1926, 3) which contains sufficient water for purposes of stock watering. Hence, the BLM proved up the necessary elements of the claims.

It is not necessary for the BLM to submit evidence on the land entry status of the area surrounding the spring or waterhole at the time of the reservation. If the claimed sources are located on unreserved federal public domain as of April 17, 1926, further inquiry into the land entry status would be unduly burdensome and frankly, a waste of time – all to prove a negative "fact." The applicable evidentiary standard is a "preponderance of evidence." As such, the BLM need not account for every potential contingency in making a *prima facie* showing.

Robert A. Hall's Homestead Entry (43-11268)

Subcase 43-11268 is a prime example of why inquiry into the land entry status is superfluous and why the State withdrew its objection to this BLM claim. First of all, on April 17, 1926, the land was unreserved federal public domain. But five years earlier, on July 22, 1921, Robert A. Hall filed a "Homestead Entry, Application and Affidavit" for 320 acres designated under the "enlarged homestead law," which included land surrounding BLM's claim 43-11268.

On November 15, 1922, Walter H. Dean filed an "Application to Contest" stating Mr. Hall's homestead entry was invalid: "Robert A. Hall has never established residence on the said lands and has never performed any acts of settlement only to brake [sic] 4 or 5 acres of land and has abandoned the said lands and is living remote from the same having never built any house or made any other improvements, thus not complying with the homestead laws." But because no proof of personal service was filed or other action was taken, the case was "abated and closed." *Affidavit of Frederic W. Price*, Attachment 2.

On March 13, 1926, Joe R. Fitzsimmons filed another "Application to Contest" Mr. Hall's homestead entry: "That said entry man has never established residence, never lived on this land, never having built a house, or made any other improvements, excepting inclosing [sic] said lands with a fence. And has never cleared, broke or cultivated any of the said land." *Affidavit of Frederic W. Price*, Attachment 2.

Finally, on September 22, 1926, Mr. Hall's homestead entry was cancelled – five months *after* Public Water Reserve 107 was signed into law. That means that on April 17, 1926, when President Coolidge signed the Executive Order, Mr. Hall's homestead entry was "active" even though Mr. Hall failed to comply with the homestead laws and the land never left federal ownership. The BLM correctly argued that:

> The entryperson [Mr. Hall] had no real interest in the land upon filing an application to homestead and, because all such applications were extinguished prior to vesting, the entryperson never acquired a real interest. Therefore, the land was never appropriated or legally occupied and was available for reservation under PWR 107 on April 17, 1926.

BLM's *Motion for Summary Judgment*, at 14.

Pickett Act

The 1910 Pickett Act was the earliest enabling legislation for PWR 107 and its language demonstrates that homestead entries that were not perfected and patented would not defeat a withdrawal and reservation.[6] The Act, which granted the President the power to withdraw and reserve public lands, stated in relevant part:

> *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made [emphasis added].

The Pickett Act of 1910, ch. 421, 36 Stat. 847, *repealed* by FLPMA.

> The *Pickett Act* excepted from the executive's withdrawal authority "any lawful homestead" existing on the date of such withdrawal, provided the entryman or settler "continues to comply with the law under which the entry or settlement was made." In subcases 43-11160 and 43-11268 – and all other claims made pursuant to PWR 107 – the entryperson or settler did not continue to comply with the law under which the entry or settlement was made. The homestead entries were relinquished or cancelled prior to patent. As a result, the Pickett Act's homestead exemption to subsequent withdraw[al]s made under its authority, including PWR 107, does not apply.

BLM's *Motion for Summary Judgment*, at 7.

[6] For a complete discussion of the Pickett Act and the historical context and purpose of PWR 107 (issue of tributariness), see Presiding Judge Roger S. Burdick's ***Memorandum Decision and Order on Challenge***, consolidated subcases 23-10872, *et al.*, dated December 28, 2001.

Summary of Conclusions of Law

1. For its PWR 107 federal reserved claims, the BLM is not required to submit evidence of the land entry status of the area surrounding the spring or waterhole source at the time of the reservation;

2. To establish a *prima facie* case in support of its PWR 107 claims, the BLM must: a) identify a spring or waterhole, b) located on land that was reserved federal public land on April 17, 1926, and c) which contains sufficient water for purposes of stock watering;

3. The BLM has established a *prima facie* case in each of the present 16 subcases; and

4. The BLM is entitled to partial decrees adjudicating water rights as described in the attached ***Special Master Recommendations for Partial Decrees for Water Rights 35-12996, 43-10957, 43-10997, 43-11005, 43-11052, 43-11054, 43-11056, 43-11058, 43-11069, 43-11071, 43-11158, 43-11160, 43-11166, 43-11172, 43-11268 and 43-11272***.

DATED October 28, 2003.

_____
TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication