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	**Subcases: 65-20033, 65-19750, 65-19851, 65-19738, 24-10339, 65-19748, 24-10263, 24-10373, 24-10331, 51-10873, 23-10894, 65-19994, and 72-12607** **ORDER ON THE MOTION OF THE UNITED STATES TO ALTER OR AMEND THE SPECIAL MASTER'S RECOMMENDATION**

I.
APPEARANCES

R. LEE LEININGER, Esq., General Litigation Section, Environment & Natural Resources Division, U. S. Department of Justice, for the United States of America.

LARRY BROWN, Esq., Special Assistant United States Attorney, U. S. Department of Interior, BLM, for the United States of America.

PETER J. AMPE, Esq., Deputy Attorney General, Natural Resources Division, Office of the Attorney General of the State of Idaho, for the State of Idaho

II.
PROCEDURAL BACKGROUND

This matter came before the Special Master on March 20, 2000 to hear the *Motion to Alter or Amend the* ***Second Order on Joint Submission*** filed the United States, on December

27, 1999. The ***Second Order on Joint Submission*** was issued in response to a *Joint Submission of Public Water Reserve No. 107 Subcase Examples* (*Joint Submission*) filed jointly by the United States, on behalf of the Bureau of Land Management (BLM), and the State of Idaho (State). The *Joint Submission* was filed in response to this Special Master's predecessor's ***Order Granting State's Motion for Summary Judgment*** (***Order***) (Mar. 5, 1999, Subcases 23-10872, 24-10233, 25-13625, 27-11578, and 65-19736). In that ***Order***, the Special Master held that as follows:

> For these reasons, the court finds that PWR 107 does not apply to springs or water holes which are tributary to perennial rivers or streams. If a spring or water hole is tributary and has a surface connection to a perennial river or stream, then the spring or water hole should be considered a part of the river or stream and, therefore, would not be covered by PWR 107.

In the *Joint Submission*, the State and United States presented to the Special Master twelve different subcases each of which involved different types of springs. Because the holding in the ***Order*** was fairly narrow, the Special Master only addressed springs or water holes having surface water connections to perennial streams or rivers in his ***Order on Joint Submission*** of June 25, 1999. The first ***Order*** did not address springs or water holes which were tributary to intermittent rivers or streams. That ***Order*** also did not address springs which flowed for any distance in a defined stream channel. Those types of springs or water holes were the subject of the ***Second Order on Joint Submission***.

The State of Idaho objected to the motion of the United States to *Alter or Amend*. Following argument on March 20, 2000, the matter was deemed fully submitted the following day.

III.
STANDARD OF REVIEW

Motions to alter or amend, are provided for in Paragraph 13, ***AO1***. While not identical, a motion to alter or amend in AO1, is similar to a motion under Rule 59 (e), I.R.C.P. The case history on Rule 59(e) I.R.C.P. sets the appropriate standard and rationale for Paragraph 13, ***AO1***. A Rule 59(e) motion to alter or amend a judgement [special master's recommendation] is

addressed to the discretion of the court [special master]. *Lowe v. Lym,* 103 Idaho 259, 263, 646 P.2d 1030 (1982).(brackets added.)

> Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered its decision upon which the judgment is based.

Id. at 263 (citations omitted).

IV.
DECISION

Both parties concede, and the Idaho Supreme Court has ruled, that PWR 107 withdrew from entry certain tracts of public land which surround springs or water holes in order to keep individual homesteaders from controlling or monopolization such water. *Basin-Wide Issue #9 (PWR 107), United States v. Idaho,* 131 Idaho 468, 952 P.2d 449 (1998). PWR 107 is an executive order signed by President Coolidge on April 17, 1926 and codified as 43 CFR. § 292.1 (1938)(recodified at 29 CFR 4302, Mar. 31, 1964 § 292.1 as § 2321.1(a).

The United States, however, claims that this resulted in a broad withdrawal in which the Department of the Interior has essentially come to control all of the unappropriated water on Bureau of Land Management (BLM) land. This assertion is inconsistent with the intent of Congress, as expressed at every opportunity since at least 1866,[1] virtually every decision of the United States Supreme Court concerning western water,[2] and the clear, limited and plain

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[1] e.g., *See*, the Mining Act of 1866, Act of July 26, 1866, ch. 262, ' 9, 14 Stat. 251, 253, (codified at 30 U.S.C.A. ' 51 (1986)), partially repealed Pub. L. 90-579, Title VII, ' 706(a), Oct. 21, 1976, 90 Stat. 2793 (FLPMA); the Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, ' 1, 48 Stat. 1269 (codified at 43 U.S.C.A. ' 315 (1986)); the Act of 1870, Act of July 9, 1870, ch. 235, ' 17, 16 Stat. 217, 218 (codified at 30 U.S.C.A. ' 52 (1986)), partially repealed Pub. L. 90-579, Title VII, ' 706(a), Oct. 21, 1976, 90 Stat. 2793 (FLPMA); and the Desert Land Act of 1877, Act of March 3, 1877, ch. 107, ' 1, 19 Stat. 377 (codified at 43 U.S.C.A. ' 321 (1986)): , *see California v. United States*, 438 U.S. 645, 656 (1978); *United States v. Rio Grande Dam & Irrigation, Co.*, 174 U.S. 690, 702-703 (1899); *Kansas v. Colorado*, 206 U.S. 46, 92-95 (1907). *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935).

[2] For example, *California v. United States*, 438 U.S. 645, 656 (1978); *United States v. Rio Grande Dam & Irrigation, Co.*, 174 U.S. 690, 702-703 (1899); *Kansas v. Colorado*, 206 U.S. 46, 92-95 (1907). *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935),holding that, all unappropriated waters of non-navigable sources remained open to appropriation according to state law, that the Desert Land Act applied to all public domain lands and that the water and land were severed. In *United States v. New Mexico, 438 U.S. 696,* 98 S.Ct. 3012(1978), the court stated clearly that the several states continued to have plenary power over water, and that implied rights derivative of a federal reservation were limited and were the exception to the general rule of state control.

language of President Coolidge. The Special Master has considered the words of PWR 107 in context with this history and the intent of both Congress and President Coolidge. The BLM believes that all of the water unappropriated before 1926 became the federal government's with the signing of PWR 107. This position urged by BLM is not persuasive because it attempts to re-define the language of PWR 107 in a historical vacuum. The current argument of the United States ignores the contemporaneous opinion of Interior's solicitor in 1927 concerning the definitional limitations of PWR 107. That letter dated March 8, 1927, was from F.O. Patterson, Solicitor, Department of Interior and addressed to the Secretary of Interior. Mr. Patterson had been asked to give his opinion on the scope of PWR 107 because a question had been raised as to the need for PWR 108 if PWR 107 covered streams.[3] In the letter, he stated his opinion that PWR 107 did not cover streams and rivers but only water holes. Therefore, PWR 108 would be necessary to protect the two enumerated sites in Wyoming, which were the subject of PWR 108. One only has to compare the limiting language of PWR 107 with that used by President Coolidge in PWR 108[4] to see that President Coolidge knew how to be inclusive when he wished to be; and he could do so quite succinctly. Indeed, as Solicitor Patterson opined, there would have been no need at all for PWR 108[5] if the language of PWR 107 was as broad or broadly interpreted as the United States now asserts.[6] Rather, the change now asserted would have resulted in a riparian theory of water on all BLM land in the effected states. There is no record nor indication that President Coolidge intended in PWR 107 a reversal of what was by then 60 years of Congressional intent to leave the plenary power over water in the west with the states.[7] Nor is it likely that the United States Supreme Court would have continuously missed such a water shed change in federal water policy in its decisions

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[3] i.e. water which flowed off of the 40 acre reservations in PWR 107.

[4] PWR 108 was issued in 1927 to set aside two tracts of land on the Henry's Fork River in Wyoming. A copy of PWR 108 is attached as Appendix A. If streams or springs attached to perennial streams had been included in PWR 107, PWR 108 would have been redundant.

[5] Nor PWR's 1 through 106.

[6] This "born-again" position of the U. S. seems to have its genesis in the President Carter administration with Solicitor Krulitz in 1979. See 86 Interior Dec. 553 (1979).

[7] Nor that Congress and the powerful Senators from the west would have allowed this to occur without comment or action.

during the ensuing 70 odd years, commencing with *California Oregon Power*,cited in notes 1 and 2.

CONCLUSION

It is undisputed that the intent of PWR 107 was to prevent monopolization of the subject springs and water holes by individual ranchers. It does not follow that to do so President Coolidge created a federal monopoly over all of the unappropriated water on unreserved federal land in the west[8]. This Special Master continues to adhere to the prior decisions which he and his predecessor have made concerning the scope of PWR 107. The United State's *Motion to Alter or Amend* is denied.

DATED April 27, 2000.

THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

[8] There is, in fact, some indication that not only was the scope of PWR 107 intended to be limited; but its life, as well. In the letter of transmittal to President Coolidge, the Secretary of Interior referred to PWR 107 as a **"temporary** general order of withdrawal." Reading the entire letter, it is fair to infer PWR 107 was intended to be in effect **only until** the then pending grazing legislation was passed. [Presumably the Taylor Grazing, passed in 1934, which, in fact adequately protects monopolization by its grazing permit system.] See letter of April 17, 1926 from Herbert Work, Sec'ty of Interior to Pres. Coolidge, concerning the transmittal of PWR 107.

CERTIFICATE OF MAILING

I certify that a true and correct copy of ORDER was mailed on May 2, 2000, with sufficient first-class postage prepaid to the following:

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