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: 25-13635, 25-13637, 25-13653,**
	)	**65-19960 and 65-19962**
Case No. 39576	)	
	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON CHALLENGE**
	)	
	)	**ORDER OF PARTIAL DECREES**
	)	

Summary of Ruling: Reversing decision of Special Master. Holding that when read in its entirety, PWR 107 provided that withdrawal was suspended until entry failed. When entry failed, withdrawal attached without subsequent order. "Notation" policy did not apply as against United States.

I. PROCEDURAL BACKGROUND

A. The above-captioned subcases involve "dual-based" stockwater right claims made by the United States Department of Interior, Bureau of Land Management ("United States"), based on alternative theories of law. The rights were claimed as federal reserved water rights pursuant to Public Water Reserve (PWR) 107 and alternatively based on beneficial use in accordance with state law. The claims were before Special Master Cushman for purposes of conducting a *prima facie* hearing on the federal basis for the claim pursuant to I.C. § 42-1411A(12). Following the hearing, Special Master Cushman issued a *Special Master's Report and Recommendation* recommending the federal basis for the claim be disallowed and recommending the claims based on state law. Special Master Cushman raised the issue *sua sponte* and ruled that because there was a pending homestead entry at the time of the PWR 107 withdrawal, the lands sought to be withdrawn were not "vacant, unappropriated unreserved public lands" containing a

spring or waterhole as required by PWR 107, and therefore the withdrawal failed. In all of these subcases the pending homestead entry eventually failed or was withdrawn but never patented.

B. The United States filed a *Motion to Alter or Amend* the *Special Master's Recommendation* seeking to have the ruling reconsidered. In the *Order Denying Amended Motion to Alter or Amend*, Special Master Cushman held further that a pending homestead entry "segregated" the land from the public domain and therefore was not subject to "settlement or any other form of appropriation" until the entry was relinquished or terminated and the land restored to the public domain by the appropriate notation being made in the records of the local land office. Special Master Cushman concluded:

> The notation rule suggests that restoration to the public lands is required prior to a valid federal withdrawal. The notation rule, therefore, suggests that land must be restored and a subsequent, separate withdrawal must occur.

Since issuance of the *Special Master's Recommendation*, Special Master Cushman required in conjunction with I.C. § 42-1411A hearing, that the United States search archive records and demonstrate that a homestead entry was not pending at the time of the withdrawal as part of the *prima facie* case for each PWR 107 claim. Including the instant claims, pending homestead entries were shown in approximately 83 subcases before Special Master Cushman.

C. The same issue was subsequently raised in subcases involving federal stockwater claims before the other two special masters. Both Special Masters Dolan and Bilyeu ruled to the contrary based on the legislation that authorized PWR 107. Both held that PWR 107 withdrawals were on-going as to pending homestead entries. Once a pending entry failed, the previously encumbered land was subject to the PWR 107 withdrawal without the issuance of a subsequent executive order withdrawing the land. *See Order on Summary Judgment*, subcase nos. 63-29070, 63-29142 (May 11, 2004)(Special Master Bilyeu); *Special Master Report*, subcase 35-12996 et.al (Oct. 28, 2003) (Special Master Dolan).

D. On June 21, 2004, the United States filed a *Notice of Challenge*. A memorandum in support was filed July 19, 2004. Oral argument was heard September 7, 2004. The State of Idaho originally participated in the I.C. 42-1411A hearings but withdrew participation in the Challenge.

II. MATTER DEEMED FULLY SUBMITTED

Oral argument occurred in this matter on September 7, 2004. The United States did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or September 8, 2004.

III. ISSUE ON CHALLENGE

The United States raises the following issue on Challenge:

> Did the Special Master err in ruling that the United States is not entitled to a federal reserved water right pursuant to Public Water Reserve No. 107 if there was a homestead entry application pending at the time of the reservation on the land containing a spring or waterhole?

IV. STANDARD OF REVIEW

In the case of claims filed pursuant to federal law, the Director of IDWR does not file a *Director's Report*. Instead, an "abstract" of the claim is filed. Since the abstract does not carry the same presumptive weight as the *Director's Report*, the claiming party must establish a *prima facie* case independently of the abstract. I.C. § 42-1411A(2).

The issues on Challenge only pertain to the Special Master's conclusions of law. Although the conclusions of law of a special master are expected to be persuasive, they are not binding upon the district court. This permits the district court to adopt the special master's conclusions of law only to the extent they correctly state the law. *Rodriguez v. Oakley Valley Stone, Inc*., 120 Idaho 370, 378, 816 P.2d 326, 334 (1991); *Higley v.Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Accordingly, the

district court's standard of review of the trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534.

V. DISCUSSION

A. Relevant historical context of PWR 107 and its related enabling legislation.

Public Water Reserve (107) was a "blanket withdrawal" of public lands surrounding "springs" or "waterholes". *United States v. State of Idaho*, 131 Idaho 468, 472, 959 P.2d 449, 453 (1998). The withdrawal was considered a "blanket withdrawal" in that the withdrawal did not identify with particularity the specific tracts of land withdrawn. The "purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering" in anticipation of the Taylor Grazing Act. *Id*. at 471, 959 P.2d at 452. PWR 107 provides in relevant part:

> **Under and pursuant to the provisions of the [Pickett Act]**, it is hereby ordered that every smallest legal subdivision of the public land survey which is **vacant unappropriated unreserved public land** and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of [**the Stock Homestead Raising Act**], and in aid of pending legislation.

(emphasis added).

The enabling legislation which authorized the President to make public land withdrawals was the Pickett Act of 1910 (Act of June 25, 1910, ch. 421, 36 Stat. 487, codified at 43 U.S.C. § 141 (1976)) and the Stock Raising Homestead Act ("SRHA")(Act of December 29, 1916, 39 Stat. 865, codified at 43 U.S.C. § 141 (1976)).

Enacted in 1910, the Pickett Act authorized the President to make temporary withdrawals of land for public purposes, providing in relevant part:

> The President may, at any time in his discretion, temporarily withdraw lands from settlement, location, sale or entry of any of the public lands of the United States, including Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, **or other public purposes to be specified in the orders of withdrawals, and such withdrawals or**

> **reservations shall remain in force until revoked by him or by an Act of Congress.**

(emphasis added).

The Pickett Act also specifically addressed the effect of pending homestead applications on such withdrawals:

> **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 the entry or settlement was made.**

Id. (emphasis added). Judge Burdick, in his ***Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights)*** Consolidated Subcase Nos.: 23-10872 *et. al.* (Dec 28, 2001), which addressed the scope of PWR 107, discussed at length the history giving rise to the enactment of the Pickett Act and ultimately the issuance of PWR 107. Some of that history is relevant to the issues in this matter. Judge Burdick's opinion provides:

> Throughout the 19th Century, Congress enacted a number of statutes aimed at promoting settlement of the western public domain through the disposition of public lands including the establishment of small family homesteading operations. In general terms, these statutes authorized the entry, settlement, and eventual ownership of tracts of land within the public domain. During this same era, stockmen were permitted to graze livestock on the remaining unappropriated lands. As a result, the western livestock industry rapidly came into prominence. However, prior to the enactment and implementation of the Taylor Grazing Act in 1934, grazing on public lands was largely unregulated and open to the public in general.
>
> As the availability of unappropriated public lands diminished, competition for public grazing lands became fierce. Because of the importance and scarcity of water in the arid west it also became readily apparent to the livestock industry that those who controlled access to water sources could control vast amounts of surrounding grazing lands. As a result, those involved in the livestock industry developed a number of schemes for either controlling or acquiring ownership of lands immediately surrounding key water sources. A number of these schemes were

> unlawful and fraudulent. Illegal fencing was used to deny others access to grazing land and water. Stockmen used "strawmen" for the purpose of making entries under the Homestead Act or other applicable land laws on lands immediately surrounding water sources and then "legitimately" purchased back those same lands. Land entries were also made in narrow marginal strips immediately surrounding both sides of streams. It became apparent to the Department of Interior and members of Congress that the monopolization of stock water sources would eventually defeat the policy of promoting the establishment of small family homesteading operations. In order to prevent the monopolization of land via control of such water sources, the initial response was to attempt to keep entries compact and deny pretextual land entries. Congress also enacted several statutes aimed at curtailing illegal attempts to gain control of water sources as well as repealed some of the land laws being abused. These initial attempts however, did not entirely correct the problem, as stock raising interests were able to take advantage of other available land laws to control water sources.
>
> Land withdrawals were eventually viewed by the Department of Interior as a means of preventing the monopolization of the public lands and water sources. The [Pickett Act] authorized the President to make temporary withdrawals of land for public purposes.

Id. at 12-14.

The historical background in which the Pickett Act and PWR 107 arose is integral to the issues in this case because it puts into context the reason for the Pickett Act, specifically addressing the effect of pending entries on withdrawals but also taking into account unlawful or cancelled entries.

In 1916, Congress passed the Stock Raising Homestead Act ("SRHA")(Act of December 29, 1916, 39 Stat. 865, codified at 43 U.S.C. § 141 (1976)). The purpose of the SHRA was to encourage the development of small ranching operations on the public domain. However, the SRHA specifically excluded from entry lands surrounding sources of water considered important for public watering purposes by requiring that those lands be withdrawn pursuant to the Pickett Act. The SRHA provided in relevant part:

> The lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but shall be reserved under the provisions of the [Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the

> public use for such purposes under such general rules and regulations as the Secretary of Interior may prescribe.

The purpose of the SRHA, as expressed in the House Report accompanying the Act, was stated as follows:

> This is a new section and authorizes the Secretary of Interior to withdraw from entry and open for the general use of the public, important waterholes, springs, and other bodies of water that are necessary for large surrounding tracts of country; so that a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.

H.R. Rep. No. 35. 64th Cong., 1st Sess. 18 (1916). Persons entering lands under the SHRA had to sign an affidavit stating that no such springs or waterholes existed on the lands being entered. ***Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights)*** at 16.

The scope and application of the SHRA is also integral to the issues in this case. Applications for entries made pursuant to the SHRA on land containing "springs or waterholes" of the type contemplated by PWR 107 were invalid from the outset because such lands were expressly excluded from the SHRA. It would have made little sense to allow an entry that was invalid from the outset to defeat a withdrawal.

B. The express provisions of the Pickett Act, which are incorporated by reference into PWR 107, specifically addressed the treatment of pending homestead entries on lands subject to withdrawal.

The Special Master concluded as a matter of law that lands with pending homestead entries were not "vacant unappropriated unreserved public land" and therefore excluded from a PWR 107 withdrawal. While it could be argued as a general matter that public land subject to a homestead entry did not constitute "vacant unappropriated unreserved land" for purposes of PWR 107 withdrawals, the argument disregards PWR107's specific treatment of pending entries. This treatment did not automatically exclude lands subject to entries. Therefore, the only reasonable reading of PWR 107 is

that the phrase "vacant unappropriated unreserved public land" was not intended to pertain to pending entries.

PWR 107 expressly incorporated the provisions of the Pickett Act. Under the express terms of the Pickett Act, lands subject to withdrawal, which were also encumbered by a lawful pending homestead or desert land entry on the date of withdrawal, were conditionally excluded from the withdrawal. In order for the exclusion to apply, the entryman had to continue to comply with the law in perfecting the patent. 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 Pickett Act the exception no longer continued to apply. Finally, the Pickett Act expressly provided that withdrawals remained in place until revoked. Therefore the withdrawal, although excluded or suspended pending the outcome of the entry, nonetheless applied to those lands. Once the entry failed the withdrawal attached and no subsequent withdrawal was required.

This Court's plain reading of PWR 107 is also consistent with general rules of construction for statutes.[1] As a general rule, a statute should be construed so that effect is given to all its provisions so that no part will be inoperative superfluous void or insignificant. *See generally* 73 Am Jur 2d *Statutes* § 165. To conclude as a matter of law lands with pending homestead entries were permanently excluded from a PWR 107 withdrawal disregards the express provision regarding the special treatment of pending entries. Where a statute contains both general and specific provisions which can be read to address the same subject matter then the specific provision is controlling. *See generally* 73 Am Jur 2d *Statutes* § 170. In this case, the Pickett Act specifically addresses the treatment of pending homestead or desert land entries. The phrase "vacant unappropriated unreserved public land" is general in nature and describes a wide range of circumstances encumbering land. Therefore, under the aforementioned rule of construction, the provisions addressing the treatment of pending entries are controlling.

[1] As a general rule, a court need not engage in statutory construction if the statutory language is clear and unambiguous *State v. Hagerman Water Right Owners, Inc*., 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). Although this Court holds that the executive order can be read given its plain ordinary meaning without engaging in construction, to the extent its argued that it can be read two different ways and statutory construction is necessary, the Court's plain reading is nonetheless consistent with applicable rules of construction.

This Court's reading is also consistent with the way pending entries were treated with respect to other withdrawals sanctioned under the Pickett Act. In *Svan Hogland*, 43 Pub.Lands Dec. 540 (1915), a homestead entry was filed in 1902. In 1904, the same land was also included in a temporary withdrawal for a proposed national forest reservation. *Id.* at 543. The proclamation for the withdrawal included similar language excluding lands embraced in a valid settlement but also provided that the exclusion would not continue to apply unless the entryman continued to comply with the law under which the entry was made. *Id.* In 1907 the entryman submitted final proof of compliance. In 1908, a hearing on the entry was held as a result of allegations that the entryman failed to comply with the law by not maintaining and establishing residency on the entered land. *Id.* At the hearing it was determined that the entryman initially complied up until 1905, at which the entry defaulted for failure to comply with the law, but that he resumed compliance in 1906. *Id.* The Secretary ruled that as a matter of law the resumption of compliance was ineffective against the default because once the entry defaulted the withdrawal automatically attached. *Id.* at 543. In the instant case, under the express terms of the Pickett Act, once the entry failed, the exclusion no longer applied and the PWR 107 withdrawal attached.

Finally, this Court's reading is consistent with the historical context in which PWR 107 arose. The Special Master's interpretation if carried to its logical conclusion treats illegal or pretextual entries the same as withdrawn entries on the basis that the lands were not "vacant unappropriated unreserved public lands." This would have undermined the purpose of PWR 107 by allowing an illegal entry to defeat a withdrawal. An entry under the SHRA exemplifies this point. Lands containing springs or waterholes of the type contemplated by PWR 107 were expressly excluded from entry under the SHRA. Therefore, to the extent that an entry was made under the SHRA and it was later determined that the lands entered did in fact include springs or water holes of the type excluded from the SHRA, the entry was invalid on its face. Concluding that this type of illegal entry permanently defeated a withdrawal is inconsistent with the express operation of the Pickett Act and PWR 107 as well as the historical context in which both arose.

C. Public lands with pending entries could have remained "vacant unappropriated unreserved public land" based on the plain meaning of those terms.

Alternatively, even disregarding the express treatment of pending entries provided in the Pickett Act, an initiated or pending homestead entry would not necessarily change the status of land from "vacant unappropriated unreserved public land" within the plain meaning of those terms. The filing of a homestead entry application presented a unique set of circumstances. The acceptance of a homestead entry application by the United States constituted a contract between the entryman and the government to the effect when the entryman complied with all legal requirements and made acceptable proof of compliance the government would issue a patent evidencing ownership of land. *See generally* 73A C.J.S. *Public Lands* § 46. A pending homestead entry only conferred an inchoate interest in the entryman but did not confer equitable or legal title or a vested right against the United States. *Id.*

An entry by an individual did not constitute a "reservation" of public land. In the context of public land and water law the term "reservation" has specific meaning. The term "reservation" typically refers to a legislative or executive designation of a withdrawn tract of land as primarily or exclusively suitable for a specified federal purpose. *See e.g. United States v. State*, 131 Idaho 468, 469-70, 959 P.2d 449, 450-51 (1997)(explaining federal reserved water right doctrine). The public domain generally was open to settlement under various laws sanctioning entry. One purpose of a "reservation," among other things, was to set the land aside preventing further entry. It would be a stretch to conclude that a homestead entry by a private individual constituted a "reservation" within the common applied usage of that term.

An entry did not constitute an "appropriation" of public land. While the term "appropriation" has broader connotations and could apply generally to a wide range of circumstances, a "pending entry" could really consist of nothing more than the filing of an application. Because an entry conferred only an inchoate right, and such rights did not vest until the entryman complied with all of the requirements of the law under which the land was entered, an entry could not be described as an "appropriation" of land.

At best, land where an entry was initiated may have not been "vacant" as a result of the entry. However, a pending entry could also consist of nothing more than the acceptance of an application without the land being occupied. Pretextual entries may have never been occupied. *See e.g. Hogland*. Therefore, whether land was "vacant" actually vacant at the time of the withdrawal would have to be decided on a case by case basis which would be entirely inconsistent with the purpose and goal of a blanket withdrawal. Presumably, this is the reason PWR 107, through the Pickett Act, expressly provided special treatment for pending entries.

D. The rules of segregation and notation are inapplicable to issues in this case.

The Special Master also ruled PWR 107 did not withdraw lands subject to a pending entry because the pending entry "segregated" the land from the public domain. Further the Special Master ruled that lands segregated from the public domain were not restored to the public domain until properly noted on the records of the local land office. Therefore, the Special Master concluded any lands "segregated" from the public domain on April 17, 1926, the date PWR 107 was issued, were not withdrawn. This Court reverses for the reasons previously discussed, namely that the withdrawal was suspended only until such time as an entry failed. As such, this ruling is not inconsistent with the land being "segregated" during the pendency of an entry.

The Special Master also ruled that the land was not restored to the public domain until properly noted in the land office records based on a Department of Interior policy referred to as the "notation rule." The Special Master quoted the following which describes the notation rule:

> The notation rule, which insofar as the public is concerned, strives to give all the public an opportunity to file presupposes that the item noted on the records, i.e. a homestead entry, oil or gas lease, patent, segregates the land from further conflicting appropriations. It assumes that the entry noted is valid and protects a later would be applicant who does not go behind. . . .The record itself constitutes a bar to any other filing whatever the situation may be on the land itself.

Order Denying Amended Motion to Alter or Amend at 3 (quoting *Toohey*, *et al*., 92 Interior Dec. 317, 324 (1985). However, the following excerpt, which clearly sets forth the purpose of the rule, was omitted from the above quote:

> The notation rule has been described as an equal protection doctrine, grounded in fairness to the public at large. . . .[The notation rule] assumes that an entry noted is valid and protects a later would-be applicant who does not go behind it. That is, a notation of a patent on the records segregates the land it describes from a later application, even though the patent is invalid. A later applicant, knowing of the invalidity can gain no right to the land until the patent is cancelled and the cancellation noted on the records. Anyone else interested in the land, whether he knows of the defect or not, can also rely on the fact that no other person can establish a prior right so long as the entry remains of record.

Toohey at 324. The purpose of the rule is clear. The notation rule was essentially a recording policy implemented to assure reliance on the status of the public land records to avoid giving an unfair advantage to a later applicant possessing information not reflected in the records. A withdrawal of land is not inconsistent with the underlying purpose of the rule. Finally, even if it were determined that the notation rule prevented a withdrawal until properly noted, no findings were made by the Special Master regarding whether or not proper notation was made at the time the subject entries failed. Therefore it is not clear whether the notation rule even presents an issue in this case.

VI. CONCLUSION AND ORDER OF PARTIAL DECREES

For the above-stated reasons, the Special Master's ruling is reversed. THEREFORE, IT IS ORDERED that water rights **25-13635, 25-13637, 25-13653, 65-19960 and 65-19962** are hereby decreed as federal reserved water rights as set forth in the attached ***Partial Decree[s] Pursuant to I.R.C.P. 54(b***).

Dated October 5, 2004

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JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication