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	))))))	**Subcase: 72-15929C** **ORDER DENYING MOTION TO ALTER OR AMEND (AMENDED ORDER ON STATE'S MOTION FOR SUMMARY JUDGMENT)**

I. PROCEDURAL AND FACTUAL BACKGROUND

This matter involves a stock water claim filed by the Bureau of Land Management (BLM) on behalf of the United States Department of Interior. The State of Idaho (State) filed a timely objection to the priority date. Originally, the matter came before the court on a *Motion for Summary Judgment* and *Cross-Motion for Summary Judgment*. The State filed a *Motion for Summary Judgment* arguing that since the United States does not actually own stock, the United States can own a stock water right only provided the United States entered into an agency relationship with the party that actually appropriated the water. As a matter of law, the State argues that the federal government lacked any authority to enter into an agency relationship prior to passage of the Taylor Grazing Act, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986)). The United States argues that its ownership to stock water rights does not depend on an agency relationship with the actual appropriator and that its ownership and resulting priority date arise out of its authority to manage the federal land.

Pursuant to both motions, the court entered an ***Order on Motion and Cross-Motion for Summary Judgment*** (February 6, 1998) granting the State's *Motion for Summary Judgment* and denying the United States' *Cross-Motion for Summary Judgment*. A ***Special Master's Report and Recommendation*** was issued on February 25, 1998. The United States filed a *Motion to Alter or Amend*. In that motion, the United States raised issues relating only to the State's *Motion for*

Summary Judgment. In support of its *Motion to Alter or Amend*, the United States filed the *Affidavit of James Muhn*. Since the affidavit was not filed or considered during summary judgment, the State filed a *Motion to Strike* the affidavit. On April 8, 1998, a hearing was held on the *Motion to Alter or Amend* and on the *Motion to Strike*.

II. STANDARD AND SCOPE OF REVIEW

A motion to alter or amend is treated as a motion for reconsideration pursuant to I.R.C.P. 11(a)(2). On a motion to alter or amend a summary judgment decision, the parties participating in the subcase may allege errors of law or present newly discovered facts which were not previously presented. The court will not consider facts which could have, but were not, presented by parties participating in summary judgment.

As to the scope of review, the "**[f]ailure 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**." ***SRBA Administrative Order 1***, section 13a (emphasis in original). In this case, there were two summary judgment motions before the court. The United States filed its *Motion to Alter or Amend* only as to the State's *Motion for Summary Judgment*. Because the United States did not file a *Motion to Alter or Amend* as to the *Cross-Motion for Summary Judgment*, any issues raised in that motion are waived.

III. MOTION TO STRIKE

This matter was originally decided on summary judgment. Prior to hearing the matter, the parties agreed that the objection could be decided as a matter of law. The State prevailed on both its *Motion for Summary Judgment* and on the United States' *Cross-Motion for Summary Judgment*. In support of its *Motion to Alter or Amend*, the United States filed a 34-page *Affidavit of James Muhn* (*Affidavit*). The State alleges that the *Affidavit* could have been presented during the summary judgment stage of this litigation. Since the *Affidavit* was not presented at that time, the State alleges the court should strike the *Affidavit*.

Matters before the Special Masters proceed under the Idaho Rules of Civil Procedure. I.C. § 42-1411(5). In summary judgment proceedings, all affidavits must be filed prior to hearing. I.R.C.P. Rule 56(c). Any party not filing affidavits does so at the risk of losing on

summary judgment. In this case, there is no showing as to why the *Affidavit* could not have been filed during summary judgment. According to the United States, the *Affidavit* was either being prepared during summary judgment or it was commissioned after summary judgment was entered against the United States. If the *Affidavit* was unavailable for summary judgment, the United States had a duty to request a continuance to obtain the *Affidavit*. I.R.C.P. Rule 56(f). Here, there was no request by the United States to continue the matter pending completion of the *Affidavit*.

If the *Affidavit* was commissioned after summary judgment was entered against the United States, then the court can only conclude that the United States wants a second "bite of the apple." Parties cannot wait for a court to enter summary judgment to determine which facts it should have presented on summary judgment. If a party has facts it believes are relevant to a matter on summary judgment, it has a duty to present them during summary judgment or risk losing. *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981). In this case, the United States asks this court to consider the *Affidavit* because the matters contained in the *Affidavit* may be relevant and important for this court to consider. Again, if the *Affidavit* is relevant, it should have been presented during summary judgment.[1]

For these reasons, the State's *Motion to Strike* is **GRANTED**.

IV. DECISION ON MOTION TO ALTER OR AMEND

A. INCORPORATION OF JOYCE ORDER

The State's *Motion for Summary Judgment* is intricately related to this court's prior decision involving Joyce Livestock Company and the United States. To the degree that the issues are interrelated and the parties cited to the Joyce decision, the court adopts by reference sections IV(A) and (B) of the ***Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions*** (March 23, 1997) (***Order***). In sections IV(A) and (B) of the ***Order*** the court held that: (1) federal law does not prevent the appropriation of stock water rights on the public domain by private parties; (2) under state law, water rights appurtenant to land

[1] The United States also alleges that the court should consider the *Affidavit* because the facts contained in the Affidavit are undisputed. Since the Affidavit was not presented to the State in a timely matter and was not subject to discovery, there is no way for this court to conclude that the *Affidavit* contains undisputed facts.

may be owned by a party other than the landowner; (3) exclusive access to the water source is not required to perfect a water right; and (4) for rights claimed by beneficial use, I.C. §§ 42-114 and 42-501 are not relevant or dispositive as to ownership.

B. I.C. § 42-501

The United States alleges that it should be considered the appropriator of water under I.C. § 42-501. There are several problems with this argument. First, the water right at issue is based on beneficial use, not a permit or license issued under I.C. § 42-501. Second, the section merely states that the United States "may appropriate for purpose of watering livestock any water not otherwise appropriated." Nothing in the section states that the United States "is" the appropriator of water rights on the public domain. Third, nothing in the section addresses the manner of appropriation. Finally, if I.C. § 42-501 is dispositive as to stock water ownership and the United States is the appropriator of water on the public domain, then I.C. § 42-114 would be rendered a nullity. The court notes that the legislative intent of I.C. § 42-114 is to place ownership of stock water rights on the association or persons owning or operating cattle and not with the land management agency. "This bill will place the beneficial use clearly with the consumption and the ownership of the cattle and not with the land management agencies." *Minutes of House Resources and Conservation Committee* (Idaho, Feb. 17, 1986), cited in OAG 88-6. *See*, ***Order*** § IV(B)(3).

To clarify, I.C. § 42-501 states that the United States "may" be the appropriator of water of stock water rights. This decision also states that the United States "may" be the appropriator of stock water rights and addresses the manner by which the United States Bureau of Land Management may perfect stock water rights located on the public domain.

C. AGENCY

Under the State's *Motion for Summary Judgment* and the assumption that the United States does not actually own stock and is not in the stock water business, the State asserts that the United States may own a water right only through the efforts of an agent that actually perfected the water right. Under this theory, the State alleges that the earliest the United States may claim ownership to stock water rights is the date coinciding with passage of the Taylor Grazing Act, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986)). The United States alleges that its ownership of stock water rights does not depend on an agency relationship

and that it may own stock water rights by virtue of the United States' ownership and management of the land where the stock water rights were perfected.

In addressing the agency issue, it is helpful to understand the United States' status with respect to its role as a proprietor of land. When the United States is not claiming any reserved water rights, it exercises the right of any other ordinary proprietor under state law. "Where water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *United States v. New Mexico*, 438 U.S. 696, 702 (1978). "[T]he [federal] government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property." *Camfield v. United States*, 167 U.S. 518, 524 (1897). Since the United States acts as any other landowner with regard to possession of property, the United States may perfect a water right the same way as any other public or private landowner. *See e.g., In Re Water of Hallet Creek Stream System*, 749 P.2d 324, 329 (Cal. 1988).[2] As any other landowner in a prior appropriation jurisdiction, possession of the land does not include possession of the water perfected on that land. *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939).

There are several ways for the landowner to possess a water right. First, the landowner may perfect the right by actually appropriating the water. I.C. § 42-103; *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). Second, the landowner may purchase the water right, or the right may otherwise be conveyed from the party that actually perfected the right to the landowner. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951). Third, a water right may be adversely possessed. *Bachman v. Reynolds Irr. Dist.*, 56 Idaho 507, 55 P.2d 1314 (1936). Finally, the right could be perfected on behalf of the landowner by a party acting as the landowner's agent. *First Sec. Bank of Blackfoot v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930)

[2] In *In Re Water of Hallet Creek Stream System*, the United States claimed that it was entitled to assert a claim for a water right under state law like any other "ordinary proprietor." 749 P.2d at 328.

("If the water right was initiated by the lessee, the right is the lessee's property unless the lessee was acting as [an] agent of the owner.")[3]

The United States argues that its status is no different than municipalities, canal companies, irrigation districts, or feedlot operators who "routinely hold valuable water rights in Idaho and throughout the west, and yet they do not turn the tap at the faucet, spread the water upon cultivated acres, or own the stock that consumes the water." *U.S. Cross-Motion for Summary Judgment and Response to State's Motion* at 20. In support of this argument, the United States cites *Farmers' Co-op Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 P. 761 (1908). The United States cites this case for the following proposition:

> Fundamental in the decree of a water right to an organizational entity is the recognition that the use could not be made were it not for the larger organization, and as a matter of law and policy it is the larger organization that should be considered the "appropriator" of the water right.

United States' Cross-Motion for Summary Judgment and Response to State's Motion for Summary Judgment at 20.

This argument lacks merit. The Idaho Constitution specifically recognizes that an entity who appropriates water may not be the same party that actually applies the water to a beneficial use. In this type of case, the user who actually applies the water to a beneficial use operates under a "sale, rental, or distribution" agreement. IDAHO CONST., art. XV, § 1. The user of water under a sale, rental, or distribution agreement does not own the water right; the user exercises the right through the entity that actually appropriated the water. IDAHO CONST., art XV, §§ 3, 4 and 5; *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 100 A.L.R. 557 (1935). It is the appropriator, not the user, that owns the water right. *Id*. at 19.

Explaining the relationship between the actual appropriator and the user under a sale, rental, or distribution agreement, the Idaho Supreme Court in *Farmers' Co-op Ditch Co*. stated:

> Whatever the differences may be in the facts with reference to the use and application of the water, the ditch owners in every instance are necessarily the appropriators of the water within the meaning of the constitution and statute. In *Wilterding v. Green*, 4 Ida. 780, 45 Pac. 134, this court stated: "A company or individual may appropriate and take out the water of a stream for sale, rental or

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[3] Any attempt by the United States to claim ownership to a right perfected by another appropriator, where the United States' claim to ownership is not based on one of the previously mentioned methods of acquiring a water right, would involve a taking without just compensation. IDAHO CONST., art XV, § 3; art. 1, § 14.

> distribution or for any beneficial purpose. When so taken out it becomes a public use and the sale or rental of it for pay is a franchise." It is true, as intimated by this court in *Hard v. Boise City Irr. Co.*, 9 Ida. 602, 76 Pac. 331, 65 L.R.A. 407, that the appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without water consumers. In other words, it takes the water user, applying the water to a beneficial purpose, to enable a ditch company that has appropriated waters for sale, rental or distribution, to continue the diversion of the water.

Farmer's Co-op Ditch Co. at 457-458.

Farmers' Co-op Ditch Co. does not support the United States' theory that it owns water rights perfected on the public domain merely under the notion that the United States is the "larger organizational entity." *Farmers' Co-op Ditch Co*. simply states the well-established constitutional principle that it is the actual appropriator who owns the water right. For an instream stock water right like the water right at issue, the party claiming a stock water right will point to the act of placing stock it owns or operates near a water source and the drinking of water by the stock as the act constituting an appropriation of water. I.C. § 42-113; *R.H. Nahas v. Hulet*, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988). The United States does not own or operate cattle so it cannot rely on this type of act to appropriate its own stock water right.

The United States' theory as to why it should be considered the appropriator of stock water rights located on the public domain is convoluted. It claims that the act constituting an appropriation of water is the fact that the United States gives permission to private parties to operate on the public domain and the fact that Congress passed various acts insuring that water sources on the public domain are not monopolized.[4] The difficulty with this theory, particularly for this water right with a claimed priority date of 1879, is that Congress did not pass any of the acts relied upon by the United States until after 1884. Furthermore, the United States did not formally manage the public domain until passage of the Taylor Grazing Act of 1934. At the time this water right was claimed, parties operated on the public domain under "implied licenses." During settlement of the west, "there thus grew up a sort of implied license that these lands [the public domain], thus left open, might be used so long as the government did not cancel its tacit consent." *Buford v. Houtz*, 133 U.S. 320 (1890). At least for this water right, the United States'

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[4] The acts relied upon by the United States include the Unlawful Enclosures Act, Act of February 25, 1885, ch. 149, 23 Stat. 321; the Stock Water Reservoir Act of 1897, Act of January 13, 1897, ch. 11, 29 Stat. 484; and the Stock Raising Homestead Act of 1916, Act of December 29, 1916, ch. 9, 39 Stat. 862 (repealed 1976).

theory of appropriation is based on acts of Congress which had not yet been passed and on the implied licensing status of those operating on the public domain who actually perfected the stock water right.

The United States' theory of ownership must be reviewed in light of *United States v. New Mexico*, 438 U.S. 696 (1978). That case involved a claim by the United States to reserved stock water rights in a national forest. In denying any federal reserved water rights for stock water purposes, the United States Supreme Court held that stock water rights must be allocated to stock water permittees under state law.

> What we have said also answers the Government's contention that Congress intended to reserve water from the Rio Mimbres for stock watering purposes. The United States issues permits to private cattle owners to graze their stock on the Gila National Forest and provides for stock watering at various locations along the Rio Mimbres. The United States contends that, since Congress clearly foresaw stock watering on national forests, reserved rights must be recognized for this purpose. **The New Mexico courts disagreed and held that any stock watering rights must be allocated under state law to individual stock waterers. We agree. . . . But Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators under state law.**

Id. at 716-717 (emphasis added).

The United States persists that *United States v. New Mexico* is not relevant because it does address stock water ownership. In evaluating this claim, it is important to understand the lower court proceedings and what the United States Supreme Court meant when it stated "[w]e agree." At the state level, *United States v. New Mexico* was entitled *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615 (N.M. 1977). The holding the United States Supreme Court "agreed" with was as follows:

> An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. **It necessarily follows that the water rights must be perfected and held by the permittee in accordance with state law**.

Id. at 619 (emphasis added).

Given the United States' ownership theory, the holdings in *United States v. New Mexico* and *Mimbres Valley Irrigation Co. v. Salopek* are important for two reasons. First, the fact that

the United States issues permits to operate on public lands does not make the United States the appropriator of water rights perfected by permittees. Second, the fact that federal land is regulated by Congress in no way evidences an intent by Congress to make the United States the appropriator of all water rights located on the public domain. At every given point in time during development of the west, Congress has always deferred to state water law and recognized private parties' abilities to perfect water rights on the public domain. "Where Congress has expressly addressed the question of whether entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico,* 438 U.S. at 701; ***Order*** § IV(A).

Furthermore, the fact that the United States gives "permission" to stockmen has no relevance to a claim that the United States is the appropriator under state law. As previously stated, the United States is treated like any other landowner as it relates to a claim for a state-based water right. As such, the rule in Idaho is that unless there is an agreement between the landowner and the party actually appropriating water on the landowner's property, the water right belongs to the party perfecting the right. "If the water right was initiated by the lessee, the right is the lessee's property unless the lessee was acting as [an] agent of the owner." *First Sec. Bank of Blackfoot v. State* at 746.

Finally, if the United States' theory were accepted, then the only party that can claim an water right on the public domain is the United States. The result of such a theory would be to create either a quasi-riparian or quasi-reserved theory of water right ownership where only the United States may own a water right located on the public domain.[5] Such a result is contrary to Idaho law. "The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid." *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168 (1974); *see also, Mahoney v. Neiswanger*, 6 Idaho 750, 59 P. 561 (1899); *Sarret v. Hunter*, 32 Idaho 536,

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[5] In assessing claims by the United States under state law in the wake of *United States v. New Mexico*, the court needs to carefully scrutinize theories of appropriation asserted by the United States. Immediately after *United States v. New Mexico*, the Solicitor stated that "(t)he plenary power that Congress has under the Property Clause by virtue of federal ownership of (public lands) includes the power to control the disposition and use of water on, under, flowing through or appurtenant to such lands" and "that to the extent Congress has not clearly granted authority to the states over waters which are in, on, under or appurtenant to federal lands, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of state law." Solicitor Krulitz's Opinion of June 25, 1979, note 5. *See generally*, Richard A. Simms, NATIONAL WATER POLICY IN THE WAKE OF UNITED STATES V. NEW MEXICO, UNIVERSITY OF NEW MEXICO, NATURAL RESOURCES JOURNAL, Vol. 20, No. 1, January 1980, p. 1.

185 P. 1072 (1919); *First Security Bank v. State*, 49 Idaho 740 (1930). Spring water situated wholly on public land is subject to appropriation. *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922); *see also, Keiler v. McDonald*, 37 Idaho 573, 218 P. 365 (1923).[6]

This theory also runs contrary to a long history of Congressional recognition of private parties' rights to develop property rights on the public domain. For example, the ability of private parties to possess rights on the public domain was recently recognized in *Hage v. United States*, 35 Fed. Cl. 147 (1996). In that case, ranch owners alleged that cancellation of their grazing permit constituted a taking of certain property rights including water rights allegedly perfected by the ranch owners on the public domain. Acknowledging the ability of private parties to perfect water rights on the public domain, the court stated: "The [Mining Act] of 1866 clearly acknowledges vested water rights on the public lands . . . . [a]lso, the Supreme Court, has acknowledged that private parties may acquire water rights on federal lands." *Id*. at 172, *citing Broder v. Natoma Water and Mining Co.*, 101 U.S. 274, 276 (1879); *see also, Store Safe Redlands Associates v. United States*, 35 Fed. Cl. 726 (1996); *Duval Ranching Co. v. Glickman*, 965 F. Supp. 1427 (D. Nev. 1997).

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), is not the only act which recognizes private property rights on the public domain. 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)) all recognize the ability of private parties to perfect water property rights on the public domain.

> The effects of these acts [Mining Act of 1866 and the Act of 1870] is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the

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[6] The holdings in both *Short v. Praisewater* and *Keiler v. McDonald* that private parties may perfect water rights out of springs located on the public domain will be affected by the recent holding in *In Re SRBA, Case No. 39576* (PWR 107), 1998 WL 154457 (Idaho), whereby it was determined that PWR 107 constitutes a basis to reserve springs or water holes located on the public domain. However, the holdings in both cases should still apply to claims with a priority date preceding April 17, 1926, the date PWR 107 was signed.

> test and measure of private rights in and to the nonnavigable waters on the public domain.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935); *See* ***Order*** § IV(A).

For these reasons, the court finds that the United States is not the appropriator of water based solely on the fact that it issues permits and that Congress regulates access to water sources. Again, if the United States is not the actual appropriator of water, it must perfect a water right through an appropriator under an agency theory, *First Sec. Bank of Blackfoot v. State*, or the right must be conveyed to the United States from a party who actually perfected the right.[7]

Since the United States admits, as a matter of fact and law, that it is not claiming this right under an agency theory (Tr., p. 35, ll. 6-9), the court is not required to address whether, as a matter of law, the United States had the legal authority to enter into an agency relationship with the actual appropriator of water prior to passage of the Taylor Grazing Act. However, the court notes that if the United States does claim a water right through the efforts of an agent, the agent acting on behalf of the United States must have had express authority to enter into such an agency relationship.

> The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power.

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947), *appeal from*, 67 Idaho 196, 174 P.2d 834 (1946) (citations omitted).[8]

Taking these principles into consideration, both parties made dispositive judicial admissions. A "judicial admission" is defined as "a formal admission made by an attorney at trial

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[7] The record does not reflect and the United States did not argue a claim to this right under an adverse possession theory.

[8] There are three types of agency authority: express authority, implied authority, and apparent authority. Express and implied authority are forms of actual authority. Apparent authority arises when actual authority is absent. *Landvik v. Herbert*, 130 Idaho 54, 936 P.2d 697 (Ct. App. 1997). Under *Federal Crop Ins. Corp. v. Merrill* at 384, it is doubtful whether a federal agent can bind the United States under any authority other than express authority.

[which] is binding on his client as a solemn judicial admission." *McLean v. City of Spirt Lake*, 91 Idaho 779, 783, 430 P.2d 670 (1967). "Judicial admissions may occur at any point during the litigation process." *See, e.g., Kohne v. Yost*, 818 P.2d 360, 362 (Mont. 1991). "For a judicial admission to be binding, it must be an unequivocal statement." *Id*. Here, the United States admits that it is not the party that actually appropriated the water with its own stock (Tr., p. 35, ll. 10-15) and, as previously indicated, is not claiming that the water right was perfected by an agent. The State, however, is not contesting, as a matter of law or fact, the United States' claim to this water right after June 28, 1934, the date coinciding with passage of the Taylor Grazing Act. (Tr., p. 11, ll. 21-25; p. 12, ll. 1-3.)

For these reasons, there is no material issue of fact or law that the priority date for this right is **June 28, 1934**.

D. APPLICATION OF PWR 107 RESERVE

Recently, the Idaho Supreme Court held that Public Water Reserve (PWR) 107 constituted a basis to reserve springs and water holes located on the public domain. *In Re SRBA, Case No. 39576* (PWR 107), 1998 WL 154457 (Idaho). Since the right currently before the court is for an instream use, the question is weather PWR 107 applies to instream uses. If it does, then no party can claim a priority date for a state-based water right after April 17, 1926. Prior to the hearing on the *Motion to Alter or Amend*, both parties were advised to present to the court legal authority on this issue.

The United States, through the Department of Justice, did not present any authority to the court. The State presented to the court *Hyrup v. Kleppe*, 406 F. Supp. 214 (D. Colo. 1976), a case litigated by the Department of Justice. The case involved an administrative appeal from a decision of the Department of Interior Board of Land Appeals denying an application for a right-of-way for a pipeline to tap water from a spring on public land. The Board denied the application because of its opinion that the spring had been reserved under PWR 107. The district court reversed finding that the decision of the Board was arbitrary and capricious. In reversing the Board, the court stated:

> It has been held, consistently, by administrative interpretation, that the effect of this executive order [PWR 107] was to withdraw for public use every spring or water hole on public land which was not tributary to a running stream. At the argument of the present case, **it was conceded [by Department of Interior and Department of Justice] that if this spring is actually tributary to the Flying**

Pan River, it would not be subject to the executive order of withdrawal and the statutory authority under which the order was issued.

Id. at 216 (emphasis added).

On its face, PWR 107 applies to the "unreserved public land [which] contains a spring or water hole." *See* 43 C.F.R. § 292.1 (1938) (recodified at 29 F.R. 4302, Mar. 31, 1964. Section 292.1 was recodified as 2321.1-1(a)). Consequently, springs and water holes not being the same thing as streams or rivers, PWR 107 does not apply to instream claims. Evidently, this has been the position of the Department of Interior and Department of Justice even though, for reasons unknown to this court, that point was not conceded to by the Department of Justice in this case.

Because PWR 107 does not apply to streams or rivers, this court finds that the priority date of this water right of June 26, 1934 is not affected by the reservation.

VI. CONCLUSION

The United States has advanced an ownership theory of water law whereby it considers itself an "appropriator" of stock water rights because the United States gives permission to all those who operate on the public domain and because Congress passes laws regulating water sources. This theory is rejected because, if true, then all water rights on the public domain would belong to the United States irrespective of the relationship between the United States and the party that actually appropriated the water. For stock water rights claimed under state law, the United States is no different than any landowner and, as such, must perfect a water right through an agent or the water rights must be conveyed from the party that actually appropriated the water to the United States. In this case, as a matter of fact and law, the State has elected not to contest the basis of the United States' right to stock water claims after passage of the Taylor Grazing Act of 1934. Therefore, the court finds that the United States has a priority date for this right dated **June 26, 1934**.[9]

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[9] The court notes, however, that nothing in the Taylor Grazing Act of 1934 fundamentally altered the method by which the United States may claim ownership to state-based water rights. The Act does not automatically create the agency relationship necessary for the United States to claim ownership of any stock water right. If anything, the Taylor Grazing Act of 1934 maintained the status quo legal relationship between stockmen and the United States whereby private parties could continue to perfect private property rights on the public domain. "That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining agriculture, manufacturing, or other purpose which has heretofore vested or accrued under existing law validly affecting the public lands or which may hereafter initiated or acquired and maintained in accordance with such law." Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269, codified at 43

This decision supersedes this court's prior order as to the State's *Motion for Summary Judgment*.

DATED April 15, 1998.

/s/ Fritz X. Haemmerle
FRITZ X. HAEMMERLE, Special Master
Snake River Basin Adjudication

U.S.C.A. § 315 (1986).

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER DENYING MOTION TO ALTER OR AMEND** was mailed on April 15, 1998, with sufficient first-class postage prepaid to the following:

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