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: 61-11783, 61-11784 and 61-11785**
Case No. 39576	)	**ORDER DISALLOWING UNCONTESTED FEDERAL RESERVED WATER RIGHT CLAIMS (Mountain Home Air Force Base)**

James J. DuBois, United States Department of Justice, appearing for the United States.

Peter J. Ampe, Deputy Attorney General, appearing *Amicus Curiae* for the State of Idaho.

Jayne T. Davis, appearing *Amicus Curiae* for J.R. Simplot Company and J.R. Simplot Self Declaration of Revocable Trust.

I.
SUMMARY

The matter before the Court involves federal reserved water right claims for the Mountain Home Air Force Base. The claims were uncontested and therefore, the matter comes before the Court, following a hearing, pursuant to Idaho Code § 42-1411A(14). For the reasons discussed below, the Court holds that the United States failed to establish federal reserved water rights for Mountain Home Air Force Base.

II.
PROCEDURAL BACKGROUND

A. The above-captioned claims were filed by the United States under federal law for uses associated with the Mountain Home Air Force Base. The Idaho Department of Water Resources ("IDWR") reported the claims in an *Abstract*, which restated the elements of the water right for each claim. The *Abstract* for each of the three claims appeared in the

Director's Report for Basin 61, Federal Reserved Right Claims which was filed with the Court on February 16, 1999. The *Notice of Filing Director's Report* appeared on the March 1999 Docket Sheet.[1] No objections were filed to the claims, and the time for filing objections expired on June 15, 1999.

B. Pursuant to Idaho Code §§ 42-1411A(11) and (12), the matter was initially set for a hearing. Because of the uncontested nature of the claims, the Honorable Barry Wood, then Presiding Judge of the SRBA, permitted the United States to present evidence in support of its *prima facie* case in the form of sworn affidavits provided that the affidavits were filed with the Court in advance of the hearing.

C. The United States initially filed an affidavit and exhibits in support of the claims, together with a memorandum in support on February 18, 2000. By order of the Court, revised affidavits were filed by the United States on May 12, 2000. On October 31, 2000, the United States again filed revised affidavits. The matter was set to be heard on November 21, 2000.

D. On October 31, 2000, the J.R. Simplot Company, *et al.* ("Simplot"), through counsel, filed a Motion to Participate in the hearing on the uncontested claims. At the November 21, 2000 hearing, following review of the pre-filed affidavits, Judge Wood raised various issues regarding the uncontested claims. Judge Wood denied Simplot's Motion to Participate but allowed Simplot and the State of Idaho to file *Amicus Curiae* briefs.

E. On December 15, 2000, the Honorable Roger S. Burdick replaced the Honorable Barry Wood as Presiding Judge of the SRBA.

F. On January 5, 2001, the United States filed its brief in response to the issues raised by the Court at the November 21, 2000 hearing, together with a substitution of Exhibit 25. The State of Idaho and Simplot filed respective *Amicus Curiae* briefs on that same date.

III.
MATTER DEEMED FULLY SUBMITTED

The last filings occurred in the above-captioned matter on January 5, 2001. On February 23, 2001, the Court requested a copy of Schedule A to Exhibit 4 of the *Affidavit of*

[1] Originally, the United States filed seven claims for uses related to the Mountain Home Air Force Base. The United States withdrew three of the claims (61-11787, 61-11788 & 61-11789) on April 4, 2000. The United States also elected to pursue one claim under state law (61-11786).

James DuBois, which was omitted from the Exhibit. A copy of Schedule A was filed with the Court on that same date. The Court considered the missing schedule to be integral to the decision. No party has requested additional briefing and the Court required none. The matter is deemed fully submitted for decision the next business day or February 24, 2001.

IV.
AMICUS CURIAE PARTICIPATION

The above-captioned claims were uncontested in the SRBA. On October 31, 2000, Simplot filed a Motion to Participate pursuant to ***Administrative Order 1*** (***AO1***), section 10(k) and Rule 24 of the Idaho Rules of Civil Procedure. The United States opposed the Motion. Following a hearing on the matter, the Court denied Simplot's Motion but allowed Simplot and the State of Idaho to file *Amicus Curiae* briefs addressing the issues raised by the Court at the hearing. *See In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge, SRBA Subcase No. 36-15452,* 134 Idaho 106, 111, 996 P.2d 806, 811 (2000) (upholding special master's decision to limit participation to *Amicus Curiae*). Both Simplot and the State of Idaho filed briefs.

V.
STANDARD OF REVIEW

A. UNCONTESTED CLAIMS BASED ON FEDERAL LAW

Idaho Code Title 42 sets forth the SRBA procedures for both state-based and federal-based water right claims. Claims brought pursuant to state law are investigated by IDWR and the elements ultimately recommended in a *Director's Report.* Claims brought pursuant to federal law are not investigated by IDWR, rather, IDWR merely restates the elements as claimed in an *Abstract*.

The statutory provisions for claims made pursuant to federal law are contained in I.C. § 42-1411A. The statute takes into account the absence of an independent investigation by IDWR and requires a hearing for uncontested claims. I.C. § 42-1411A(14). Since no independent review of the claims is conducted, the claimant bears the burden of going forward and of persuasion. I.C. § 42-1411A(12) provides:

> Each claimant of a water right established under federal law has the ultimate burden of persuasion for each element of a water right. Since no independent review of the notice of claim has occurred as provided for water rights acquired under state law in a director's report, a claimant of a water right established under federal law has the burden of going forward with the evidence to establish a prima facie case for the water right established under federal law. All such proceedings shall be governed by the Idaho rules of civil procedure and Idaho rules of evidence.

I.C. § 42-1411A(12).

B. HEARING REQUIREMENTS, AFFIDAVITS AND THE ROLE OF THE COURT

I.C. § 42-1411A(14) provides:

> 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. If the claimant fails to present a prima facie case of the existence of the water right established under federal law, then the district court shall enter an order determining that the claimed water right does not exist.

I.C. § 42-1411A(14).

Although a hearing was conducted on the matter on November 21, 2000, the presentation by the United States relied on sworn affidavits as opposed to live testimony. The SRBA Court has previously determined that the introduction of sworn affidavits in lieu of live testimony complies with the hearing requirement. *See e.g.*, ***Order Accepting in Part, and Denying, in Part, Special Master's Report and Recommendation*** (Subcase 36-15452, Oct. 10, 1997) ("***Smith Springs***"), *overruled on other grounds*, *In re SRBA Case No. 39576, Minidoka Wildlife Refuge, SRBA Subcase No. 36-15452*, 134 Idaho 106, 996 P.2d 806 (2000); ***Order of Partial Decree on Uncontested Federal Water Right*** (Subcase 63-30981, July 31, 2000) (uncontested federal reserved water right for administrative site).

In ***Smith Springs***, the SRBA Court approved the presentation of affidavits in single-party subcases. The ***Smith Springs*** decision also anticipated that in the event the affidavits were submitted in uncontested SRBA hearings, the Court could require more evidence if the initial affidavits were insufficient. The SRBA Court compared single-party cases to default proceedings under I.R.C.P. 55.

> The Idaho Rules of Civil Procedure address the resolution of cases where only one party appears. Under I.R.C.P. 55, parties may obtain default based on averments in a sworn complaint. *Olson v. Kirkham*, 111 Idaho 34, 720 P.2d 217 (Ct. App. 1986). In the SRBA, the court does not have sworn complaints. However, sworn affidavits establishing the factual basis for a water right in a one-party case may suffice. As in default proceedings, if the court is not satisfied with the affidavits, it can require more evidence.

Smith Springs at 6.

The Idaho Supreme Court has also made the same comparison in single-party subcases.

> As this Court observed in an early case involving the adjudication of water rights, "the plaintiff, after taking default, must apply to the Court for the relief demanded in the complaint; in other words, must establish by proof the material allegations of his complaint."

In re SRBA Case No. 39576, State v. United States (Basin-Wide Issues 2 and 3) 128 Idaho 246, 258, 912 P.614 (1995) (hereafter *1994 Statutory Amendments)* (quoting *Joyce v. Rubin*, 23 Idaho 296, 130 P. 793, 796 (1913)).

The procedure to be followed by the district court where no objection has been raised is established by the rules for entering a default judgment in civil actions, set out in I.R.C.P. 55. In addition to providing for the entry of judgment by default, I.R.C.P. 55 retains in the district court the inherent power to apply law to facts and render a decision.

Although I.C. § 42-1411A(14) specifically requires that the claimant of an uncontested federal claim demonstrate a *prima facie* case for the water right claimed, the court still retains its inherent power in applying the law to the facts and rendering a decision. The Idaho Supreme Court has emphasized the role of a court after a *prima facie* case is offered. In *1994 Statutory Amendments,* the Supreme Court discussed the effect of the *prima facie* weight accorded the *Director's Report*:

> To the extent that the 1994 statutes attempt to remove from the district court the power to exercise its discretion in determining what provisions of the Director's report shall be decreed, those provisions are in conflict with I.R.C.P. 55.
> . . .

> Stripping the district court of the ability to review the contents of the Director's report and apply the law to the facts as established in that report is an unconstitutional intrusion into the province of the judicial department of the government.

1994 Statutory Amendments at 258-59.

This same reasoning applies equally to the review of the *prima facie* case made in support of an uncontested federal water right claim pursuant to I.C. § 42-1411A(14). The court must apply the law to the facts and render a decision. Finally, whether or not a particular statute or act establishes a federal reserved water right is purely a question of law. *In re SRBA Case No. 39576, Re: Sawtooth National Recreation Area Claims*, 134 Idaho 940, 12 P.3d 1284 (2000).

C. THE ELEMENTS OF AN IMPLIED FEDERAL RESERVED WATER RIGHT

A state generally has plenary control of the water located within its territory. *Kansas v. Colorado*. 206 U.S. 46 (1907). A claim to a federal reserved water right creates an exception to a state's plenary control of the water. *United States v. Rio Grande Dam and Irr. Co.*, 174 U.S. 690 (1899). Federal reserved water rights can be either express or implied. *United States v. New Mexico*, 438 U.S. 696 (1978). An express federal reservation of water is created by the explicit language contained in the act creating the reservation. *Id*. An implied reserved water right is based on the withdrawal of land from the public domain.[2] *Arizona v. California*, 373 U.S. 546 (1963). In *United States v. State of Idaho (PWR 107)*, 131 Idaho 468, 959 P. 2d 449 (1998), the Idaho Supreme Court explained the underlying legal basis for the federal implied reserved right as follows:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of

[2] Lands owned by the federal government are generally classified as either "public domain" or "reserved lands." In *United States v. City and County of Denver, et al*., 656 P. 2d 1 (1982), the Colorado Supreme Court explained the difference between the two classifications as follows:

> The public domain includes lands open to settlement, public sale, or other disposition under federal public land laws, and which are not exclusively dedicated to any specific governmental or public purpose. . . . Reserved lands are those that have been expressly withdrawn from the public domain by statute, executive order, or treaty and are dedicated to a specific federal purpose. . . . Congress has frequently acted to reserve or withdraw lands from the public domain or to empower the President or his delegate to do so.

Id. at 5 (citations omitted).

> reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by Commerce Clause, Art. I § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Id. at 469-470 (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).

The Idaho Supreme Court then explained the limitations and conditions imposed on an implied federal reserved water right.

> The reserved right is not without limitation, however. The Court in *Cappaert* also advised that "[t]he implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Furthermore, if "water is only valuable for 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." The necessity of water must be so great that without the water the reservation would be "entirely defeated." Therefore, where a reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water, the courts must consider the relevant acts, enabling legislation and history surrounding the particular reservation under review to determine if a federal reserved water right exists.

Id. at 470 (citations omitted).

Based on the foregoing, the elements of an implied reserved water right can be summarized as follows:

1. An implied reserved water right must be based on the withdrawal of land from the public domain;

2. An implied reserved water right exists only if necessary to fulfill the primary not the secondary purpose for which the land was reserved;

3. Without the federal reserved water right, the primary purpose for which the land was reserved must be entirely defeated; and

4. The quantity of the reserved water right must be the minimum amount necessary to achieve the purpose of the land reservation.

D. FEDERAL RESERVED WATER RIGHTS CAN EXTEND TO GROUNDWATER

The claims at issue are for groundwater asserted pursuant to federal law. The United States Supreme Court has not explicitly addressed the issue of the application of the federal

reserved water right doctrine to groundwater. In *Cappaert v. United States*, 426 U.S. 128 (1976), the United States Supreme Court upheld the finding of a federal reserved water right in a surface pool and the related injunction which enjoined the pumping of hydrologically connected underground water within a defined radius of the surface which was determined to lower the level of the pool.

> Thus, since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversions, whether the diversion is of surface or groundwater.

Id. at 143 (footnote omitted). The Supreme Court acknowledged the potential hydraulic interrelationship between ground and surface water.[3] Recently, the Arizona Supreme Court, in an *en banc* decision, recognized federal reserved rights to groundwater. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) ("*Gila River*"). The Arizona Supreme Court's analysis traced federal reserved water rights from *Winters v. United States*, 207 U.S. 564 (1908) to *Cappaert*. The Arizona Supreme Court concluded that federal reserved water rights extend to groundwater.

> In summary, the cases we have cited lead us to conclude that if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Gila River, 989 P.2d at 747.

This Court agrees with the reasoning of the Arizona Supreme Court. Additionally, the SRBA Court has also previously recognized a reserved right to groundwater in the limited context of a *de minimis* domestic claim for a federal administrative site. *See* ***Order of Partial Decree on Uncontested Federal Water Right*** (63-30981, July 31, 2000).

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[3] Although the United States Supreme Court ultimately concluded that the subject reservation was of surface water not groundwater, the court below concluded that a federal reserved water right extended to groundwater in *United States. v. Cappaert*, 508 F.2d 313 (9th Cir. 1974). The Ninth Circuit relied on two earlier federal cases which approved the application of the doctrine of implied reservations of groundwater when water was needed to accomplish the primary purpose of the reservation. *Id.* (citing *Nevada ex rel. Shamberger v. United States*, 165 F.Supp. 600 (D. Nev. 1958)), aff'd. on other grounds, 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.*, 286 F.Supp. 383 (D. Mont. 1968).

E. IMPLIED FEDERAL RESERVED WATER RIGHT CONCEPT CAN ALSO EXTEND TO AN AIR FORCE BASE IF THE ELEMENTS OF SUCH A RIGHT ARE ESTABLISHED

The implied reservation of water doctrine originated in *Winters v. United States*, 207 U.S. 564 (1908), in the context of an Indian reservation. In *Arizona v. California*, 373 U.S. 564, 601 (1963), the Supreme Court extended the *Winters* Doctrine to include waters reserved for federal lands which had been set aside for recreation, wildlife or forests. In *United States v. Dist. Court for Eagle County*, 401 U.S. 520, 522-23 (1971), the Supreme Court held that the federal government's authority to reserve waters for the use and benefit of federally reserved lands extended to any federal enclave. Recently, the Idaho Supreme Court acknowledged the extension of the *Winters* Doctrine: "Since the *Winter's* decision, the doctrine has been extended 'to include public lands reserved for a particular governmental purpose, such as the creation of parks, wildlife refuges, and national forests.'" *In re SRBA, Case No. 39576, Re: Sawtooth National Recreation Area Claims*, 134 Idaho 940, 942, 12 P.3d 1284, 1287 (2000). This Court holds that an implied federal reserved water right can be extended to a federal air force base provided the elements of such a right are met.

VI.
FACTUAL BACKGROUND

A. MOUNTAIN HOME AIR FORCE BASE

1. Mountain Home Air Force Base is situated in southwestern Elmore County approximately 49 miles southeast of Boise, Idaho. The lands initially comprising Mountain Home AFB were acquired through a combination of lands withdrawn from the public domain and the condemnation of privately held land. A total of 3,680 acres were withdrawn from the public domain pursuant to *Public Land Order 109*. The remaining 2,080 acres were obtained through condemnation proceedings against privately held land, creating a total of 5,760 acres. Additional lands have been subsequently acquired bringing the total acreage to 6,721 of which 740 are improved. *Affidavit of James DuBois*, Exhibit 12 -- *Historical Water Use Requirements at Mountain Home Air Force Base* at 2.

2. As of October 27, 2000, there were a total of twelve wells on the Mountain Home AFB, with another (the new well 4) under construction. *Affidavit of James DuBois*, Exhibit 15. The original well 1 was drilled in 1942 during the initial site

preparation. Wells 2 and 3 were constructed in the 1940s. Wells 4 and 5 were drilled in the 1950's, while well 6 was added prior to 1967. The original wells 1 and 3 have been abandoned. In the 1970s, well 1 was redrilled. Wells 7, 8, and 9 were added before 1989. Well 10 was added sometime between 1989 and 1993 and is located off-site at C.J. Strike Reservoir. In 1993, well 7 was removed from service and wells 11 and 12 were added. *Affidavit of James DuBois*, Exhibit 12 -- *Historical Water Use Requirements at Mountain Home Air Force Base, Idaho.*

3. On November 30, 1942, construction began on the runways and necessary support facilities. "Initially, only necessary support facilities, such as *administrative offices, classroom buildings, barracks,* a *hospital, warehouses,* and installation utilities were constructed." *Affidavit of James DuBois*, Exhibit 12 at 41. A theater, mess hall, fuel storage facilities, enlisted men's and officers' clubs, and a base exchange were added by 1944. No family housing was present on the base during the World War II period. During this time, the airbase served as a training facility for bomber groups; the base population remained above 5,500 military personnel and approximately 400 civilians during the World War II period. *Id.*

4. Immediately following World War II, the base experienced a decrease in activity. However, the base has been in continuous operation since 1948. During the 1950's, construction began on the family housing units which was not completed until 1962. Other community service facilities were added, as well as the construction of permanent barracks and officers' quarters. *Affidavit of James DuBois*, Exhibit 12 at 44-47. During the 1960's, family housing, schools, hospital, exchange, and community services all expanded. Two athletic fields were added. It was during this period that well 6 was constructed. The distribution system at this time was a duel system: a base distribution system and a housing-side distribution system, mostly serviced by well 6. *Id.* at 48.

Between the mid-1960s and 1977, substantial additional family housing, barracks, and community buildings were constructed. The airbase also added two additional athletic facilities and a family campground. Well 1 was redrilled to increase water production capacity for the airbase. *Id.* at 52. Between 1977 and 1989, the on-base golf course was expanded from nine to 18 holes. During this period, wells 7, 8, and 9 were drilled. Well 7 was drilled to address needs for family housing; well 8 to supply water to the

golf course on the base, and; well 9 to supply water for sanitation for the control tower. *Id.* at 55-58.

5. The improvements on the base are situated on 740 acres. The improvements were situated without regard to whether the land was reserved or condemned. *Compare* ***Attachment 1*** (showing reserved and condemned land sections and approximate locations of wells), *with Affidavit of James DuBois,* Exhibit 14 (map showing production well locations on Mountain Home AFB as well as improvements with superimposed section grid). It is apparent that the improvements are intermingled on both the public reserved and condemned land. As the United States asserts, "Mountain Home Air Force Base is a checkerboard of public and acquired land" and that "[b]ecause of the jigsaw fit of the pieces, and the nature of the base as an Air Force facility requiring long runways and geographically expansive operation, the water needs for the acquired and reserved public land cannot be divided. They are functionally an integrated whole." *United States of America's Memorandum in Support of Reserved Water Rights Claims for Mountain Home Air Force Base* at 7.

6. The Government obtained its first water license for Mountain Home AFB from the State of Idaho in 1969. License G-33490, was for six wells with a maximum rate of diversion of 12.96 cubic feet per second ("cfs") and a priority date of February 6, 1967. *Affidavit of James DuBois,* Exhibit 9. The Air Force has obtained two additional water licenses: License 61-07224, issued September 13, 1976, with a priority date of April 22, 1976, for a diversion of 4.23 cfs; and License 61-07579, issued November 1, 1993, with a priority date of September 2, 1986, for a diversion of 0.02 cfs with a maximum volume of 0.6 acre feet (AF) per year. *Affidavit of James DuBois,* Exhibits 10 and 11.

7. The United States' expert has estimated total water requirements for Mountain Home AFB of 832.22 million gallons (mgal) per year in 1999 and 845.19 mgal per year in 2006, although this could increase to as much as 1.59 billion gallons-per-year under certain scenarios. *Affidavit of James DuBois,* Exhibit 13 -- *Future Water Requirements at Mountain Home Air Force Base, Idaho* at 16. The United States is seeking "approximately 6,162.9 acre feet of water to fulfill it [sic] present and future mission for national defense purposes." *United States of America's Memorandum in Support of Reserved Water Rights Claims for Mountain Home Air Force Base* at 7. As of October 27, 2000, there were 12 wells on Mountain Home AFB. *Affidavit of James DuBois,* Exhibit 15.

B. HISTORICAL CONTEXT OF RESERVATION AND CONDEMNATION

1. On April 24, 1942, President Franklin D. Roosevelt issued *Executive Order No. 9146*, authorizing the U.S. Secretary of the Interior to withdraw and reserve lands under the Secretary's own signature. *Affidavit of James DuBois*, Exhibit 1.

2. On April 12, 1943, pursuant to *Executive Order No. 9146*, Abe Fortas, then Acting Secretary of the Interior, issued *Public Land Order 109 ("PLO 109")*, which withdrew land underlying a portion of the current Mountain Home Air Force Base ("Mountain Home AFB"). *PLO 109* states *inter alia*:

> Subject to valid existing rights, **the public lands** in the following-described areas are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws and **reserved for the use of the War Department as an airport**:
>
> Boise Meridian
>
> T. 4 S., R. 5E
>
> Secs. 20 to 22 inclusive,
> Secs. 27 to 29 inclusive, and
> Secs. 32 to 34 inclusive.
>
> The areas described, including both public and non-public lands, aggregate 5,760 acres.

Affidavit of James DuBois, Exhibit 2 (emphasis added).[4] *PLO 109* then concludes: "**It is intended that the public lands described herein shall be returned to the administration of the Department of the Interior, when they are no longer needed for the purpose for which they are reserved**." *Id.* (emphasis added). The express language of *PLO 109* did not apply to the non-public lands contained within the described boundary. Attachment 1 to this ***Order*** depicts the lands within the described sections that were withdrawn and those that were acquired through condemnation.

3. The tracts of land referred to in *PLO 109* as "non-public" were later obtained through condemnation proceedings. The government obtained fee-simple title on July 17, 1943, by a court order filed November 27, 1944. *Affidavit of James DuBois*, Exhibit 8, *Final Order of Condemnation. See also, Affidavit of James DuBois*, Exhibits 5-7 -- *Declaration of Taking Nos. 1-3; See* Attachment 1.

[4] The effect of the reservation was to withdraw only the public lands contained in the enumerated sections, which comprised 3,680 acres.

4. President Roosevelt, by *Executive Order No. 9526* dated February 28, 1945, amended *PLO 109. Executive Order No. 9526* was a "blanket" order which amended numerous executive orders and public land orders including *PLO 109*. The language contained in *Executive Order 9526* is unambiguous as to the purpose and intent of the various reservations. In particular, the purpose of the reservation was temporary and for purposes incidental to "the national emergency" (World War II), and after the emergency the lands would be restored to the jurisdiction of the agency that had jurisdiction prior to the reservation.[5] The Executive Order amended the previously issued orders, including *PLO 109*, to incorporate the following language:

> The jurisdiction granted by this order shall cease at the expiration of the six months' period following the termination of the unlimited national emergency declared by Proclamation No. 2437 of May 27, 1941 (55 Stat. 1847). Thereupon, jurisdiction over the lands hereby reserved shall be vested in the Department of Interior, and any other department or agency of the Federal Government according to their respective interests then of record. The lands, however, shall remain withdrawn from appropriation as herein provided until otherwise ordered.

Affidavit of James DuBois, Exhibit 3 -- *Executive Order No. 9526* (footnote omitted).

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[5] WHEREAS by certain Executive and public land orders more than 13,000 acres of public lands have been withdrawn and reserved for the use of the military and other branches of the Federal Government for purposes incident to the various phases of the national emergency and the prosecution of the war; and

WHEREAS immediately prior to the issuance of such orders various Executive departments and independent agencies of the Federal Government had primary jurisdiction over, interests in, needs and uses for, or administration of, certain portions of public lands; and

WHEREAS because of the findings of necessity for the emergency use of such lands, the jurisdiction over, interests in, needs and uses for, and administration of those lands by such departments and agencies were subordinated to such use; and

WHEREAS it is and has been the intention, as expressed in most of the orders, that after the termination of the emergency, the public lands should be returned to the jurisdiction, uses, and administration which existed prior to the withdrawal and reservation of such lands for purposes incident to the national emergency and the prosecution of war; and

WHEREAS it is appropriate that, in the future determinations of the public purposes for which such lands should be used, reserved or administered after the emergency, those departments and agencies of the Federal Government which had prior jurisdiction over, interests in, or administration of such lands should have restored to them such jurisdiction over, interests in, or administration of the lands as existed prior to the withdrawal and reservations of the lands for purposes incident to the national emergency and the prosecution of war.

5. On July 30, 1954, the United States Department of the Interior issued *Public Land Order 987 ("PLO 987")* which expressly withdrew those public lands[6] covered by *PLO 109* and simultaneously reserved the same lands.[7] Following the legal description of the affected lands, *PLO 987* concludes: "Public land Order No. 109 of April 12, 1943, as amended by Executive Order No. 9526 of February 28, 1945, withdrawing public lands **for the use of the War Department as an airport** is hereby revoked as far as it affects the above-described lands." Exhibit 4 to *Affidavit of James DuBois* (emphasis added).

VII.
ANALYSIS

A. THE UNITED STATES CANNOT ESTABLISH IMPLIED FEDERAL RESERVED WATER RIGHTS FOR PRIVATE LANDS ACQUIRED THROUGH CONDEMNATION PROCEEDINGS

The United States claims implied federal reserved water rights with priority dates of April 12, 1943. The first element for establishing a federal reserved water right is whether there has been a reservation of land from the public domain. The United States first asserts that *PLO 109* reserved both the public domain and privately condemned land and created a reserved right for the entire 5,760 acres that originally comprised the Mountain Home AFB. The United States then asserts that for purposes of establishing an implied federal reserved water right there is no distinction between lands reserved from the public domain and privately held land acquired through condemnation. This Court disagrees with both assertions.

Mountain Home AFB consists of a "checker board" pattern including lands originally withdrawn from the public domain and lands acquired through condemnation proceedings. *See* Attachment 1 (diagram) to this ***Order***. Approximately 2,080 acres of the 5,760 acres that

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[6] The land description contained in *PLO 987* excludes those lands obtained by condemnation.

[7] *PLO 987* states:

> Subject to valid existing rights, and to the provisions of existing withdrawals, the public lands in the following-described areas are hereby withdrawn from all forms of appropriations under the public-land laws, including the mining and mineral-leasing laws, and reserved for the use of the Department of the Air Force in connection with the Mountain Home Air Force Base.

PLO 987.

originally comprised Mountain Home AFB were privately owned and subsequently acquired by the United States through condemnation proceedings.[8]

This Court finds that the United States did not establish implied federal reserved water rights on the private lands acquired through condemnation. The Court reaches this conclusion for several reasons.

1. Establishment of an Implied Federal Reserved Water Right Requires the Withdrawal of Federal Public Land from the Public Domain

The elements of an implied federal reserved water right have long been established by the United States Supreme Court as well as analyzed and applied by the Idaho Supreme Court. This Court is limited to the application of an implied federal reserved water right as expressly defined by the United States Supreme Court. In *United States v. State of Idaho (PWR 107)*, 131 Idaho 468, 469-70, 959 P.2d 449, 450-51 (1998), the Idaho Supreme Court, quoting the U.S. Supreme Court, stated the elements of an implied federal reserved water right as follows:

> [W]hen the **Federal Government withdraws its lands from the public domain** and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.

Id. (emphasis added) (quoting *Cappaert v. United States,* 426 U.S. 128 (1976)).

In *Cappaert,* the U.S. Supreme Court stated: "[i]n determining whether there is a federal reserved water right **implicit in a federal reservation of public land**, the issue is whether the Government intended to reserve unappropriated and thus available water." *Cappaert,* 426 U.S. at 139 (emphasis added).

In *United States v. New Mexico,* 438 U.S. 699 (1978), the U.S. Supreme Court discussed the respective authority of federal and state governments over waters in the western states.

> The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, however, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands **withdrawn from the public domain for specific federal purposes.** *Winters v. United States,* 207 U.S. 564, 577, 28 S.Ct. 207 211, 52 L.Ed. 340 (1908);

[8] The Mountain Home AFB has subsequently expanded beyond the 5,760 acres, however, the United States is not seeking federal water right claims for the lands outside of the original 5,760 acres.

> *Arizona v. California,* 373 U.S. 546, 597-98, 83 S.Ct. 1468, 1496-1497, 10 L.Ed.2d 542 (1963); *Cappaert v. United States,* 426 U.S. 128, 143-146, 96 S.Ct. 2062, 2071-2073, 48 L.Ed.2d 523 (1976).
> . . .
> The Court has previously concluded that Congress in giving the President the power to reserve portions of the **federal domain for specific federal purposes,** *impliedly* authorized him to reserve "appurtenant water than [sic] unappropriated to accomplish the purpose of the reservation." *Cappaert, supra,* at 138, 96 S.Ct. at 2069 (emphasis added). See *Arizona v. California, supra,* 373 U.S. at 595-601, 83 S.Ct. at 1496-1498; *United States v. District Court for Eagle County,* 401 U.S. 520, 522-523, 91 S.Ct. 998, 1000-1001, 28 L.Ed.2d 278 (1971); *River Water Cons. Dist. v. United States*, 424 U.S. 800, 806, 96 S.Ct. 1236, 1240, 47 L.Ed.2d 483 (1976).

United States v. New Mexico at 698-99 (emphasis added).

The United States concedes the U.S. Supreme Court's reserved water rights cases all involve lands that were reserved from the public domain. The United States asserts, however, that nothing in the cases indicates that the reserved right could not extend to all federally owned land whether reserved or acquired. The United States cites no authority, nor was this Court able to find authority, supporting the proposition that the United States could establish a federal reserved water right for private lands acquired through condemnation, purchase, or a means other than a withdrawal from the public domain. The limited case law that exists on the subject holds to the contrary. The case of *United States v. Fallbrook*, 165 F.Supp. 806 (S. D. Cal. 1958), specifically addressed the similar issue of whether the federal government established federal reserved water rights for lands contained in a military reservation that had been purchased from private landowners. The *Fallbrook* Court analyzed the history and rationales underlying the implied federal reserved water rights doctrine and ultimately concluded that the government could have a water right on the acquired land but only to the extent vested water right holders were not affected. The case is not entirely on point because California applies a hybrid of riparian and prior appropriation doctrines. *Id.* at 833. The inference is that the Court allowed a water right based on riparian doctrine but disallowed a federal reserved water right based on prior appropriation.

The Chief of the Air Force's Water Right Adjudication Team, who initially filed affidavits in support of the federal reserved claims at issue, also previously recognized this limitation and co-authored a law review article acknowledging that: "[t]he Federal Reserved Rights Doctrine has not been extended to apply to acquired lands. It applies only to water sources located on the 'public domain' lands (i.e. those federal lands usually

managed by the Bureau of Land Management and 'reserved' or put aside for a particular purpose, pursuant to federal legislation or Executive Order.)" Lt. Col. Michael Cianci, Jr., *et al., The New National Defense Water Right – An Alternative to Federal Reserved Water Rights for Military Installations*, 48 A.F.L. REV. 159, 169 (2000).[9]

In support of its argument that private land acquired by the federal government can establish a federal reserved water right, the United States cites *United States v. Anderson*, 736 F.2d 1358 (1984). *Anderson* addressed the issue of the respective priority dates for water rights on allotted lands conveyed to non-Tribal members and subsequently reacquired by the Tribe, and unallotted or "surplus" lands which the Tribe also reacquired. The *Anderson* Court held that the priority date for the allotted lands related back to the date of the creation of the Indian reservation. *Id*. at 1361-62. The decision was based on the reasoning set forth in *Colville Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), which held that *Winters* rights on allotted land sold to non-Indians do not cease to exist because the land passed out of Indian ownership. The underlying reasoning is predicated on the interpretation of the General Allotment Act of 1887 and the congressional intent that Indian allottees receive the full benefit and value of the allotment. The value of the allotment would be diminished if allottees could not sell their allotments to a non-Indian successor with the early priority date. *Id*. In regards to the unallotted lands, the *Anderson* Court held that to the extent state-based rights existed on the land, the Tribe succeeded to those same rights. *Id.* at 1363. If no water rights were previously perfected on the land, then the Tribe acquired reserved rights as of the date of the reacquisition. The unallotted lands were originally part of a prior federal (Indian) reservation and upon acquisition reverted back to "tribal status." *Id.* In essence the federal reserved water right arose out of the nexus or legal relationship between the original Indian Reservation and the unallotted lands. The extent of this legal relationship has yet to be fully determined but relies on Congressional intent in dealing with the Indian Tribes. The same reasoning is not applicable to the facts of this case. This case does not involve an Indian Reservation. Furthermore, this case is distinguishable in that it does not involve lands that were previously part of a prior federal reservation. The condemned lands at issue in this

[9] The law review article discusses the issues associated with applying the federal reserved rights doctrine to the Nellis Air Force base in Nevada and the alternative agreement that the state of Nevada ultimately made with the United States as to water rights.

case transferred from the public domain directly to private ownership and then to government ownership through condemnation. This procedure carries none of the nexus or legal relationship which is special to unallotted Indian reservation lands. In this Court's view the reasoning in *Anderson, Walton* and related case law, is limited to the context of Indian reservations and inapplicable to the facts of this case.

This Court holds that the land acquired through condemnation proceedings does not meet the first element of an implied federal reserved water rights as stated by the U.S. Supreme Court.

2. The Rationale and History that Underlie a Federal Reserved Water Right Do Not Apply to Private Land that is Acquired through Condemnation

Contrary to the United States' assertion, the underlying reasoning giving rise to an implied federal reserved water right does not apply to private lands acquired through condemnation proceedings. The reasoning behind the federal reserved water rights doctrine begins with the acquisition of and settlement of the West. Treaties with other countries and the Indian tribes gave the federal government ownership of nearly all western lands, as well as the power to control the allocation of the lands and water. The overriding policy of the nineteenth century was settlement and disposition of the lands under a variety of special grants and homestead laws. The federal government was otherwise silent on the issue of water rights. Settlers and miners took the water they needed, and state courts began applying the prior appropriation doctrine among these trespassers. The federal government initially acknowledged these rights by a "silent acquiescence" and later through legislation.[10] In 1877, Congress enacted the Desert Land Act, which made 640 acres of land available for sale to homesteaders if they irrigated the land within three years of entry. Act of March 3, 1877,

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[10] The Mining Act of 1866 gave federal sanction to water rights acquired by "priority of possession . . . for mining, agricultural, manufacturing, or other purposes . . . [where] recognized by local customs, laws and decisions of the courts. 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). In *Bosy v. Gallagher*, 87 U.S. 670 (1875), the U.S. Supreme Court ruled that the 1866 law, in addition to confirming pre-existing rights, also authorized future appropriation rights on the public domain. In 1870, the Act was amended to apply to all federal patents, homestead rights, and rights of preemption. Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218, codified at 30 U.S.C.A. § 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).

ch. 107, § 1, 19 Stat. 377, codified at 43 U.S.C.A. 321 (1986).[11] In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), the U.S. Supreme Court held that the Desert Land Act "effected a severance of all waters on the public domain, not theretofore appropriated from the land itself" giving sanction to the rule of prior appropriation. *Id.* at 158. As a result, federal land patents did not convey water rights to homesteaders and other grantees. Allocation of water was essentially left to the states.

Previously in 1899, in *United States v. Rio Grande Dam & Irrigation*, 174 U.S. 690 (1899), the Supreme Court held that the federal government did not completely relinquish its control of water to the states. The Court noted that the navigation power was one of two exceptions to the federal government's acquiescence to state water law. The other exception was that a state cannot by its legislation destroy the right of the United States, as owner of the lands bordering a stream, to the continued flow of its waters; so for at least as may be necessary for the beneficial use of the government property. *Id.* at 703. Then in *Winters v. United States*, 207 U.S. 564 (1908), based on the second exception enunciated in *Rio Grande Dam*, the Supreme Court ruled that when the federal government reserves a part of the public domain for a particular purpose, it impliedly also reserves sufficient unappropriated water to effectuate the purpose. Since *Winters*, a number of Supreme Court decisions have defined the scope of the federal reserved water rights concept. In *United States v. New Mexico*, 438 U.S. 696 (1978), the Supreme Court stated:

> The Court has previously concluded that Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes, *impliedly* authorized him to reserve "appurtenant water than [sic] unappropriated *to the extent needed to accomplish the purpose of the reservation." Cappaert, supra,* at 138, 96 S.Ct., at 2069 (emphasis added). See *Arizona v. California, supra,* 373 U.S., at 595-601, 83 S.Ct., at 1496-1498; *United States v. District Court for Eagle County*, 401 U.S. 520, 522-523, 91 S.Ct. 998, 1000-1001, 28 L.Ed.2d 278 (1971); *River Water Cons. Dist. v. United States*, 424 U.S. 800, 806, 96 S.Ct. 1236, 1240, 47 L.Ed.2d 483 (1976).

Id. at 700.

The federal government possesses control over the public domain lands sought to be reserved. Under the delineated exception to the federal government's deference

[11] The Desert Land Act also provided that the use of the water "shall depend upon bona fide prior appropriations" and that the surplus waters "shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing subject to existing rights." 43 U.S.C.A. § 321.

to state control over water, the federal government also has limited "control" – for purposes of establishing a federal reserved right – over unappropriated appurtenant water. However, once the public domain land passes into private ownership, the legal relationship changes and the reasoning which gives rise to the federal reserved water right no longer applies. The land is no longer in the public domain. The federal government did not patent or grant appurtenant water rights with the land patent. When land passed from public to private ownership, any appurtenant water rights had to be appropriated or acquired by the private landowner pursuant to state law. *See*, Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377, codified at 43 U.S.C.A. 321 (1986) (Desert Land Act). Thus, any appurtenant water rights would be private property rights and subject to the control and jurisdiction of the state, not the federal government.[12] IDAHO CONST. art. XV, § 1; I.C. § 42-101 (waters within state declared to be property of state); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 67 (1960)(state's interest is not in proprietary capacity but rather in sovereign capacity as representative of people).

As a result, when the federal government condemns land of a private individual, the federal government's interest in the land and appurtenant water, if any, is derivative of the interest held by the owner of the condemned land. Where the federal government condemns land with appurtenant water rights, it acquires only "state-based" rights not federal reserved water rights. In the event there was no appurtenant "state-based" water, or the government elected not to condemn appurtenant state-based rights, the federal government would still not establish a federal reserved water right because unappropriated "appurtenant" water over which the federal government exercises control (under the second exception to the state's control over water) does not exist with respect to private property. Once the land passes to private ownership, any appurtenancy relationship that may have existed with respect to the public domain lands is severed. A private property owner must perfect a water right pursuant to state law. The federal government obtains this same interest when it condemns the land.

In sum, the rationale supporting the federal reserved water right is predicated on the relationship between the government's power to regulate federal lands and the government's limited control over the unappropriated water of a state. *Cappaert*, 126 U.S.

[12] The same reasoning would not apply as to navigable waters. In this case we are dealing with non-navigable groundwater rights. Navigation is one exception; the *Winters* Doctrine being the other.

138. However, where the government does not possess the same regulatory control over the private land being condemned as it possesses over public domain lands being reserved, and where the government takes by condemnation an interest co-extensive with that of the landowner, the court cannot find that the same underlying rationale which has historically been used to support an implied federal reserved water right applies.

3. The Requisite Intent to Reserve a Water Right Cannot be Inferred from Land Acquired through Condemnation Proceedings

Even if the reasoning underlying the federal reserved right could be reconciled so that the concept could be extended to condemned land, the Court still would not be able to infer the requisite "intent" to establish a reserved right in this case. The determination of an implied federal reserved water right is essentially an issue of statutory interpretation. In *United States v. New Mexico,* the Supreme Court stated "what quantity of water, if any, the United States reserved . . . is a question of implied intent not power." 438 U.S. at 698. Intent is inferred if the water is necessary for the primary purpose of the reservation and without the water the purpose of the reservation would entirely be defeated. *Id*. at 700. The primary purpose of the reservation is a question of statutory interpretation and the Court looks to the legislative enactment or executive order reserving the land. *See e.g., In Re SRBA, Case No. 39576, Re: Sawtooth National Recreation Area Claims*, 134 Idaho 940, 943, 12 P.3d 1284, 1287 (2000). In context of a condemnation proceeding, the role of the court is not interpreting a statute or executive order reserving land but rather the scope of a judicial condemnation proceeding. The government's interest is defined by the scope of the property interest condemned. Accordingly, given the means by which the government acquired the land, the "primary purpose" for which the land is being condemned cannot fail without water. To the extent the government "intended" appurtenant water for the purpose of the condemned land, the water should have been included in the scope of the condemnation proceedings. This is not a situation where a statute or executive order would otherwise be rendered meaningless without inferring that the government intended to reserve water. The government's silence as to water in a statute or act reserving land has been interpreted to reserve unappropriated water if the primary purpose of the reservation would be entirely defeated. In the context of condemnation proceedings, where the government does not possess the same interest and control over the affected land and

there exists no appurtenant unappropriated water to the private land, the government's silence as to water in the scope of a judicial condemnation proceeding is at best ambiguous.

For the foregoing reasons, this Court holds that the United States cannot establish a federal reserved water right for lands that have been acquired through condemnation proceedings. The element of a federal reserved water right expressly requires that the federal government reserve land from the public domain. The United States has not met its burden with respect to this element for those private lands acquired through condemnation proceedings. I.C. § 42-1411A(12).

B. THE CONDEMNED LANDS CONTAINED IN MOUNTAIN HOME AFB WERE NOT SUBJECT TO THE PUBLIC LAND ORDERS

The United States asserts that whether or not a reserved right can be established through condemnation proceedings is not at issue. The argument is that following the condemnation proceedings, the private land reverted back into the ownership of the United States and then was reserved by the operation of *PLO 109*. This Court disagrees.

PLO 109, which initially reserved the 3,689 acres of public land, and *PLO 987*, which revoked *PLO 109* and reserved the same land, both expressly applied only to the public lands contained within the nine sections. *See supra*, Part IV.B.2-5. On April 12, 1943, when *PLO 109* was issued, 2,080 acres within the nine sections were privately owned. *PLO 109* acknowledged that sections described contained non-public lands but only reserved "public lands." *PLO 987*, which contained a particularized legal description of lands reserved, specifically did not include any of the condemned lands.[13] *Id*. As such, there was no "reservation" of the condemned lands pursuant to either *PLO 109* or *987*.

Furthermore, *PLO 109* was issued on April 12, 1943. The final order of condemnation was issued November 27, 1944, and stated that the United States obtained fee simple title on July 17, 1943. At the time *PLO 109* was issued, the condemned lands were yet to be acquired by the United States. Therefore, *PLO 109* could not have applied to the non-public lands. *PLO 109* specifically acknowledged that the described sections contained both public and non-public lands and yet only expressly reserved the "public lands." *PLO*

[13] The fact that *PLO 987* did not apply to the acquired land is highly probative of the United States' intent and belief regarding the acquired land. *PLO 109* described the nine sections and reserved only the "public lands" contained therein. One plausible interpretation is that the United States had yet to determine the specific legal descriptions for the respective public and non-public lands. However, once the condemnation proceedings for the non-public land had commenced, the respective legal descriptions had been determined. Yet, in 1954, PLO 987 only expressly applied to the public lands.

109 does not contain any language regarding application to future acquired lands once the United States obtained ownership.

The private lands also did revert back into the "public domain" following the condemnation. The lands were condemned for a specific governmental purpose. Public domain lands are those lands not exclusively dedicated to any specific governmental or public purpose. *City and County of Denver*, 656 P.2d 1, 5 (Colo. 1982). Thus, *PLO 109* could not have applied to the private lands following condemnation because there had not been a reservation from the "public domain" for purposes of establishing a federal reserved water right.

Finally, for the reasons previously discussed, the Court is not convinced that once lands are patented to private individuals and transferred out of control of the federal government and into the jurisdiction of the state, that the United States can establish a federal reserved water right through the re-acquisition of those same lands. There is no water over which the federal government exercises control that is appurtenant to the land from which to infer a water right. The Court holds that neither *PLO 109* nor *PLO 987* reserved any of the private lands acquired by the condemnation proceedings.

C. THE EARLIEST POSSIBLE PRIORITY DATE IS 1954 UNDER A FEDERAL RESERVATION

Because some of the land creating Mountain Home AFB was reserved from the public domain, the next issue is whether water is necessary to fulfill the primary purpose of the reservation and that without water the primary purpose would be entirely defeated. In deciding whether an implied federal reserved water right existed pursuant to the legislation establishing the Sawtooth National Recreation Area, the Idaho Supreme Court stated:

> In deciding whether an implied reservation exists, we must determine whether Congress "intended to reserve" unappropriated waters. Intent to reserve unappropriated water is inferred if the water is necessary to accomplish the primary, rather than the secondary, purposes of the reservation. Additionally, the need for water must be so great that, without the water, the purposes of the reservation will be entirely defeated. Thus, our inquiry begins with a determination of the primary purpose of the reservation, and then turns to whether the previously unappropriated water is necessary to achieve that purpose because, without the water, the purpose of the reservation would be entirely defeated.
>
> …
>
> A determination of the primary purpose of the Sawtooth NRA Act is a question of statutory interpretation. Interpretation of a statute must begin with

> the plain meaning of its language. If the statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in statutory interpretation. However, if it is necessary for the Court to interpret a statute, then it will attempt to ascertain legislative intent by examining the language used, the reasonableness of proposed interpretations, and the policy behind the statute.

In re SRBA, Case No. 39576, Re: Sawtooth National Recreation Area Claims, 134 Idaho 940, 12 P.3d 1284, 1288 (2000) (citations omitted).

PLO 109 and *Executive Order 9526,* which amended *PLO 109,* clearly state the intended purpose of the reservation. *PLO 109* was intended as a temporary reservation of land for use by the War Department as an airport during the pendency of World War II. *PLO 109* unequivocally states that the public lands reserved would be returned to the administration of the Department of the Interior when no longer needed for the purpose for which the lands were reserved. Thus, it is clear from the plain meaning of *PLO 109* the purpose of the reservation was not intended to establish a permanent base.

Executive Order 9526, which subsequently amended *PLO 109* in 1945, as well as numerous other similar land withdrawal orders for purposes of the war, elaborated on the intended purpose of *PLO 109* and further makes it clear that the land reservations were not intended to be permanent. The *Executive Order* states:

> [I]t is and has been the intention . . . that after the termination of the emergency [World War II] the public lands should be returned to the jurisdiction, uses, and administration which existed prior to the withdrawal and reservation of such lands as existed for purposes incident to the national emergency and the prosecution of war.

Executive Order 9526; see supra Part VI.B.4. The language amending *PLO 109* makes the jurisdiction granted by *PLO 109* to the War Department expire six months after the expiration of the "national emergency" (World War II) and restored to the Department of the Interior, albeit the lands were intended to remain "withdrawn from appropriation as herein provided until otherwise ordered."

The Assistant Secretary of the Department of the Interior issued *PLO 987* in 1954. From this, the implication is that jurisdiction was restored to the Department of the Interior in accordance with *Executive Order 9526* and, therefore, the primary purpose for which the

land was originally reserved expired six months after World War II.[14] *PLO 987* then reserved the lands previously reserved by *PLO 109* for "use of the Department of the Air Force in connection with the Mountain Home Air Force Base." *PLO 987* then revoked *PLO 109* which "[withdrew] public lands for the use of the War Department as an airport." The primary purpose for the reservation of lands changed and the prior purpose for which the lands had been reserved was revoked. Based on the plain language of *PLO 109*, its subsequent amendment, and the historical context in which the order was issued, the Court finds that the intent of *PLO 109* in 1943 was not for a permanent air force base facility as is in existence today.

Further, although the original stated primary purpose for the reservation, the use of the lands for an "airport," and the subsequently stated purpose, the establishment of an “air force base” are similar, in the Court's view the two are quite different. The use as an airport during war times contemplated a temporary wartime facility. *PLO 109* was one of many such temporary reservations for the war effort. The argument that *PLO 109* was intended to be anything other than temporary for the war effort belies its stated purpose. The United States’ claims rely on the conclusion that in 1943 the intent of the reservation was for a permanent military facility akin to what is in existence today. Presently, Mountain Home AFB resembles a municipality with its own independent infrastructure, including family housing developments, recreational facilities, and an 18-hole golf course. It is inconceivable that in 1943, during a wartime emergency, the primary purpose of the reservation included such amenities.

This Court holds that lands temporarily reserved for use as an airport during wartime and the purpose for an air force base as in existence today are very different. The primary purpose for which the lands were withdrawn and reserved in 1943 extinguished six months after the end of World War II when the land reverted back to the jurisdiction of the Department of Interior and in any event no later than 1954 when ultimately revoked pursuant to *PLO 987*. Those same lands were then reserved in 1954 for the Mountain Home AFB. Therefore, even assuming that a federal reserved water right exists, the earliest conceivable priority date would be 1954, not the 1943 priority date claimed by the United States.

[14] The record is not clear as to the date when the lands were transferred back to the jurisdiction of the Department of the Interior.

D. THE PRIMARY PURPOSE OF THE RESERVATION WOULD NOT BE ENTIRELY DEFEATED WITHOUT A WATER RIGHT

Although the earliest priority date for the reserved lands would be 1954, this Court is not convinced that the United States has established a *prima facie* case for any federal reserved water rights on Mountain Home AFB. In *New Mexico*, the U.S. Supreme Court stated:

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water, the entire purposes of the reservation would be entirely defeated.

New Mexico at 700 (emphasis added); *In re SRBA, Case No. 39576, Re: Sawtooth National Recreation Area Claims*, 134 Idaho 940, 12 P.3d 1284 (2000). As previously discussed, Mountain Home AFB was originally comprised of nine sections totaling 5,760 acres. A total of 3,680 acres were withdrawn from the public domain. The remaining 2,080 acres were acquired through condemnation. The condemned land comprises approximately 36% of the original total area of the base. The condemned and withdrawn lands are intermingled in a "checker board" pattern throughout the original 5,760 acres. *See* Attachment 1. Improvements and water delivery systems are also intermingled throughout the condemned and withdrawn lands and straddle the condemned and withdrawn lands. *See* Attachment 2. The improvements apparently were located without regard to whether they were situated on improved or withdrawn land. For example, building complexes etc., extend onto both reserved and condemned land. *Id*. The diversion wells that supply water to the base are also situated on both the withdrawn and condemned lands. *See* Attachment 1.

In the United States' brief, counsel argues:

> For purposes of a functioning Mountain Home Air Force Base, there is no distinction between acquired land, and reserved public land. The acquired land and the reserved public lands are intermingled and both underlie the runways and structures necessary to the military base . . . . Because of the jigsaw puzzle fit of the pieces, and the nature of the air force base requiring long runways and geographically expansive operation, the water needs for the acquired and reserved land CANNOT be divided.

United States' Memorandum in Support of Reserved Water Right Claims for Mountain Home AFB at 7. It is for this very reasoning that this Court concludes that *PLO 109* and its successor *PLO 987* did not create federal reserved water rights. Simply put, because of the

intermingling of the withdrawn and condemned land, the primary purpose of the reservation cannot fail without a federal reserved water right. The United States had to acknowledge that at least some of the water supply for the facility would be state-based.

The plain language of *PLO 109* and its successor *PLO 987* are clear and unambiguous in that neither applied to the non-public lands that were condemned. *See supra* Part IV.B.2-5. Thus, whether the primary purpose of the reserved land under *PLO 109* was to establish a temporary airport facility during the pendency of World War II or to establish a more comprehensive base as contemplated by *PLO 987*, implicit in the primary purpose of either interpretation is that the reserved lands would comprise only a portion of the overall Mountain Home AFB facility.

A federal reserved water right originates with a reservation of land. If established, the related reserved water right becomes appurtenant to that land. It follows that federal reserved waters cannot be applied to or used in conjunction with non-reserved (non-appurtenant) lands. The use of reserved water on non-reserved land would in effect be creating a separate water right. Because federal reserved water cannot be applied to non-reserved land, implicit in establishment of the Mountain Home facility was the acknowledgment that the water supply needs would have to include state-based water rights. The United States' conduct in constructing improvements on the acquired land where reserved water cannot be applied is testament to that acknowledgment. The United States has not attempted to demonstrate where and to what extent a federal reserved water right can be used and to what extent federal reserved rights would have to be supplemented with state-based water. The United States instead takes the position that "[t]he acquired land and the reserved lands are so intermingled . . . the water needs for the acquired and reserved land cannot be divided." It further concludes that as a result the United States is entitled to a federal reserved water right for the entire base. *United States' Memorandum in Support* at 7.

This Court views the affect of the intermingled withdrawn and acquired land differently. This Court holds that the primary purpose of the reservation under either *PLO 109* or *PLO 987* would not be entirely defeated without a federal reserved water right. Under either *PLO 109* or *PLO 987* the primary purpose of the reserved lands was to <u>create a portion of the overall base</u>. The only plausible interpretation is that Mountain Home AFB was created with the intention that some, if not all, of the water supply comes from state-based water rights for the following reasons: 1) over one-third of the total area of the base consists

of condemned land; 2) the condemned land and withdrawn land are intermingled; and 3) federal reserved water cannot be used on non-reserved land. Because the water needs for the acquired land and the condemned land "cannot be divided," it would appear that the essential purpose of the reservation would not be entirely defeated. Properly developed state-based water rights can be (an historically have been) applied to both the reserved and acquired land. Mountain Home AFB was established with the intent that it would be supplied with state-based water rights.

Probative of this conclusion is that the United States deferred to state law by following Idaho's application, permit and licensing statutory procedures for establishing water rights for Mountain Home AFB. The first license was issued for Mountain Home AFB in 1969. The licensing procedure has been in existence since 1903 but did not become mandatory for groundwater until 1963, although pre-existing beneficial use rights were excluded from the mandatory requirements. *See* I.C. § 42-229; 1963 Idaho Sess. Laws 624. The Court acknowledges that the United States can pursue water rights under a "dual-basis" (meaning pursuant to both federal and state-based legal theories), although the United States must ultimately select one basis for the right. ***Memorandum Decision and Order Re: Basin-Wide Issue 12*** (April 25, 1997). Nonetheless, the application, permit and license procedures continue to be state administrative proceedings. The United States consented to the jurisdiction of the State of Idaho, absent a McCarran Amendment adjudication, for the purposes of claiming water rights based on state law. If the position now asserted had been the United States' position in 1969, there would not have been any reason to apply for state licenses. This conduct is probative of the government's historical position and belief as to its entitlement of water for Mountain Home AFB.

Alternatively, assuming for the sake of argument, that had the reserved portions of the lands within the boundaries of the Mountain Home AFB were reserved water (for use on those same lands), the claims would still fail. The United States has taken an "all or nothing approach" to the existence of the reserved rights. As such, the United States has not attempted to identify the scope or quantify the rights for less than would be required for the entire base. The position taken by the United States is that the water demands between the acquired land and the withdrawn land cannot be segregated. Therefore, even if the Court concluded that water was necessary for the primary purpose of the reservation, based on the United States' position that the water demands for the base cannot be segregated, the United

States would not be able to define the scope of or otherwise quantify the rights. The United States would not be able to establish a *prima facie* case for its claims.

VIII.
CONCLUSION

For the above-stated reasons, this Court holds that the United States has failed to make a *prima facie* case for the above-captioned federal reserved water right claims in accordance with I.C. § 42-1411A(14).

This decision is limited to federal reserved water right claims. Nothing in this decision shall be construed as deciding any claims brought pursuant to state law, previously or in the future, for Mountain Home AFB.

THEREFORE IT IS ORDERED AND ADJUDGED that water right claims 61-11783, 61-11784, and 61-11785 are hereby **disallowed with prejudice** and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: April 6, 2001.

_____
Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ***Order on Disallowal of Uncontested Federal Reserved Water Right Claims*** was mailed on April 6, 2001, with sufficient first-class postage prepaid as follows:

Director of IDWR
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_____
Deputy Clerk