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: 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B, and 72-15929C**
	)	
Case No. 39576	)	**ORDER DENYING CHALLENGES AND ADOPTING SPECIAL MASTER'S REPORTS AND RECOMMENDATIONS**
	)	
	)	

I. PROCEDURAL BACKGROUND

The matters before the court involve various challenges relating to stock water ownership on the public domain. Joyce Livestock Company (Joyce) filed a *Notice of Challenge* to the ***Special Master's Reports and Recommendations*** in subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, and 57-10770B. The issue raised in those challenges is:

> **Whether the Special Master erred in determining that the United States has a water right in the stock water available on federal land in spite of the fact that the United States does not own stock and does not water livestock in connection with any water right located on the public domain.**

In the same subcases, the United States also filed a *Notice of Challenge*. In those subcases, the issues presented are:

> **Whether the Special Master erred in granting Joyce a water right because Joyce did not have exclusive use of the water at issue; and**
>
> **Whether the Special Master erred in granting a second water right for the same beneficial use as an existing water right.**

In a separate dispute for subcase 72-15929C, the United States filed a *Notice of Challenge* to the ***Special Master's Report and Recommendation*** and ***Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment)*** (Subcase 72-15929C, April 15, 1998). In that subcase, the issues presented are:

Whether the Special Master erred in ruling that the United States is not entitled to a priority date earlier than June 28, 1934; and

Whether the Special Master erred in striking the affidavit and report of James Muhn.

II. STANDARD OF REVIEW

A Special Master's finding of fact must be accepted unless the findings are clearly erroneous. *Seccombe v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989); ***SRBA Administrative Order 1 (A.O.1)***, Section 13(f); I.R.C.P. 53(e)(2). The district court exercises free review over a Special Master's conclusions of law; however, the Special Master's conclusions of law are intended to be persuasive. *Rodriquez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 816 P.2d 326 (1991).

III. DECISION ON JOYCE'S CHALLENGE IN SUBCASES 57-04028B, 57-10587B, 57-10588B, 57-10598B, AND 57-10770B

In order to perfect a challenge, the party must have filed a motion to alter or amend in front of the Special Master. "**Failure 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."** ***A.O.1***, Section 13(a) (emphasis in original). In this case, Joyce failed to file a motion to alter or amend in the subcases where a *Notice of Challenge* was filed. Therefore, Joyce's challenges in subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, and 57-10770B are **DISMISSED**.

IV. DECISION ON UNITED STATES' CHALLENGE IN SUBCASES 57-04028B, 57-10587B, 57-10588B, 57-10598B, AND 57-10770B

A. THE SPECIAL MASTER DID NOT ERR IN GRANTING JOYCE A WATER RIGHT

The United States argues that a private party operating on the public domain must have exclusive "dominion and control" of a water source to perfect a water right at that source. The United States further argues that only it has exclusive dominion and control of the public domain and, therefore, only it can perfect water rights on the public domain.

> The United States is the only land manger of these lands, and thus has the required exclusivity with respect to its claims. The United States is the "appropriator" and

> "beneficial user" of these water rights by virtue of the fact that it consents to allow the grazing to occur and by virtue of the fact that it has managed the public land for grazing.

United States' Memorandum in Support of Challenges to Special Master's Recommendations (Subcase 57-04028B) at 14, fn. 7. Under this argument, as mentioned by the Special Master, the United States creates a quasi-riparian legal theory whereby it is the only party that may own stock water rights on the public domain. There are a number of problems with this theory.

First, "[a]ll the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state . . . ." I.C. § 42-101. No river, lake, or spring[1] is under any exclusive dominion and control, yet the legitimacy of appropriations made from these sources cannot be denied because access to the source is not exclusive. Absent a claim for a reserved right, all water within the boundaries of this state is subject to appropriation. If there are a number of appropriations made from a single source, those appropriations are administered "first in time, first in right." IDAHO CONST., art. XV, § 3. *See, e.g., Village of Peck v. Denison*, 92 Idaho 747, 749-50, 450 P.2d 310 (1969) (Water from a spring is subject to multiple appropriations by different users so long there is water in the spring available for appropriation).

[1] Absent a claim for a reserved right, the only water that is not subject to state control is private water. *See* I.C. § 42-212. No argument was advanced that water located on the public domain constitutes private water.

Second, the theory would nullify several Congressional enactments specifically recognizing a private party's ability to perfect water rights located on the public domain. *See* the Mining Act of 1866, Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C.A. § 51 (1986)), partially repealed Pub. L. 90-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793 (FLPMA);[2] 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);[3] 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));[4] and 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)).[5]

Third, the United States' theory would override well-established legal precedent whereby water located on the public domain is separated from land ownership and the water located on the public domain, absent reserved rights, is open for appropriation by private individuals.

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

---

2 The Mining Act of 1866, in pertinent part, reads: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." 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).

3 The Act of 1870, in pertinent part, reads: "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." 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).

4 The Desert Land Act of 1877, in pertinent part, reads: "All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377 (codified at 43 U.S.C.A. § 321 (1986)).

5 The Taylor Grazing Act of 1934, in pertinent part, reads, "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 U.S.C.A. § 315 (1986)).

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935). "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." *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996), *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).

Finally, the United States' argument would foreclose any ownership of stock water rights located on the public domain. The United States does not own or operate stock and, therefore, must rely on private appropriators for its claim to stock water rights. Most of the United States' claims to stock water rights predate the Taylor Grazing Act of 1934. Prior to the Taylor Grazing Act, private parties roamed at will on the public domain under "implied" licensing authority. *Buford v. Houtz*, 133 U.S. 320 (1890). It is these nonexclusive appropriations made by private parties that serve as the basis for many of the United States' claims to stock water rights.

> The United States has numerous state-based claims in the SRBA. At least for the United States claims at issue, the United States was not the party that actually appropriated or perfected the water right. Rather, the basis to the United States' state-based stock water claims is that private parties moved West, watered their livestock from sources located on the public domain, and because the land is public domain, the United States owns the water right by virtue of the efforts of private parties. (February 19, 1997, Tr., p. 34, L. 4 - p. 36, L. 4.)

Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions (Subcase 57-04028B, Mar. 25, 1997) at 16. As the Special Master noted, if a private party is unable to perfect a right, then the United States can never own a stock water right as those rights would always be based on the nonexclusive appropriations made by private parties. The result is that no stock water rights would ever be perfected on the public domain.

Therefore, the court finds that the Special Master did not err in granting Joyce a water right even though it did not have exclusive use to the water source at issue.

B. THE SPECIAL MASTER DID NOT ERR IN GRANTING A SECOND WATER RIGHT FOR THE SAME BENEFICIAL USE AS AN EXISTING WATER RIGHT

The United States alleges that only one water right may exist on the public domain and that all private rights are "entirely subsumed within the United States' claims." *United States'*

Memorandum in Support of Challenges to Special Master's Recommendation (Subcase 57-04028B) at 15. This argument assumes facts not in the record.[6] None of the claims in which challenges were filed involved competing claims for the same place of use.

[6] An allegation that private rights are subsumed by federal rights raises the question of a taking. IDAHO CONST. art. XV, § 3.

One of the undisputed facts was as follows:

> 6. Where the United States and Joyce filed competing claims to the same stock water right, the Director of the Idaho Department of Water Resources (IDWR) recommended ownership to the United States and not to Joyce. *See*, Director's Report for Joyce's rights.

Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions (Subcase 57-04028B,[7] Mar. 25, 1997) at 5.

This finding was not challenged by the United States. What this finding means is that where a right was recommended in favor of Joyce, the United States did not file a competing claim. In other words, for the place of use recommended, Joyce claimed the only right. Because of this undisputed fact, the Special Master ruled as follows:

> One of the undisputed facts is that the United States was the first party to put the water to a beneficial use. As to competing claims, this fact would be relevant. However, one of the undisputed facts is that where the United States and Joyce filed competing claims to the same stock water right, the Director of IDWR recommended that title to the water right be decreed to the United States and not to Joyce. See, Director's Report for Joyce rights. Since claim numbers 57-04028, 57-10486, 57-10487, 57-10587, 57-10588, 57-10598, and 57-10770 were reported to Joyce, the court concludes that these rights, as reported, do not compete with any rights claimed by United States.

Id. at 23.

Since none of the rights before the court involve competing claims, any ruling on whether private claims are "subsumed" by claims filed by the United States would necessitate an advisory ruling by the court. The court has no authority to issue advisory opinions involving non-justiciable issues based "upon a hypothetical state of facts." *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988 (1984), *citing*, *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937). Therefore, the court will decline ruling on this issue until the issue is properly before it.

[7] This ***Order*** was originally filed in subcase 57-11124 *et al*. Subcase 57-11124 is not on challenge. However, 57-04028B was included in the subcase list that designated 57-11124 as the lead subcase. Therefore, the ***Order*** will, for the purposes of this Challenge, be referenced to subcase 57-04028B.

V. DECISION ON UNITED STATES' CHALLENGE IN SUBCASE 72-15929C

A. THE SPECIAL MASTER DID NOT ERR IN RULING THAT THE UNITED STATES IS NOT ENTITLED TO A PRIORITY DATE EARLIER THAN JUNE 28, 1934

Having reviewed the ***Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment)*** (Subcase 72-15929C, April 15, 1998), the court finds that the Special Master did not err in concluding that the United States is not entitled to a stock water right prior to June 28, 1934, the date of the Taylor Grazing Act.

Although the State does not challenge the ability of the United States to own stock water rights after passage of the Taylor Grazing Act, it should be noted, as cited by the Special Master, that there is no language in the Taylor Grazing Act which fundamentally altered the relationship between the federal government and states with respect to water rights located on the public domain. After passage of the Taylor Grazing Act, Congress continued to recognize the ability of private parties to perfect real 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 be 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 U.S.C.A. § 315b (1986)) (emphasis added); ***Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment)*** (Subcase 72-15929C, April 15, 1998) at 14, n. 9.

B. THE SPECIAL MASTER DID NOT ERR IN STRIKING THE AFFIDAVIT AND REPORT OF JAMES MUHN

The United States claims the Special Master erred in striking the *Affidavit of James Muhn*. The decision of whether to allow affidavits which were not filed in a timely manner is subject to an abuse of discretion standard. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979). After a careful review of the record, including the ***Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment)*** (Subcase 72-15929C, April 15, 1998), the court finds that the Special Master did not abuse his discretion in striking the *Affidavit of James Muhn*.

The reasons for disallowing the affidavit require further elaboration. The United States did not offer the affidavit during the summary judgment proceeding. It was only after the Special Master denied the United States' summary judgment motion and during the motion to alter or amend that the affidavit was offered. The SRBA is a lawsuit governed by the Idaho Rules of Evidence and the Idaho Rules of Civil Procedure. I.C. § 42-1411A(12); **A.O.1**, Section 1(a). This court is unaware of any procedure which allows a losing party on summary judgment to offer facts after it has lost. Such a procedure would allow the losing party to discover why it lost, only to supplement its case after losing to cure the defects.

VI. CONCLUSION

In reviewing stock water ownership on the public domain, the court has several important observations. In litigating these subcases, the United States has advanced several legal theories addressing stock water ownership.[8] Many of these theories are not necessarily consistent, but all the theories lead to the same erroneous conclusion: The United States is the only party which may own water rights located on the public domain.[9] None of the theories can be reconciled with existing federal or state law.

Under federal law, as previously mentioned, Congressional acts such as the Mining Act of 1866, the Act of 1870, the Desert Land Act of 1877, and the Taylor Grazing Act of 1934, all recognize a private party's ability to perfect water rights and other real property rights on the public domain. The result of these acts is that water located on federal land belongs to the state

---

8 Following is a chronology of these theories. (1) Private parties may not appropriate water located on the public domain when that public domain is "not open to entry, settlement and acquisition of private title." ***Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions*** (Mar. 25, 1997) at 6; *United States Brief in Support of Motion to Alter or Amend* p. 7. (2) Since water is appurtenant to federal land, unity of title requires the owner of land to own water rights perfected on that land. ***Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions*** (Mar. 25, 1997) at 11. (3) Exclusive access to the water source is required to perfect a water right located on the public domain. The United States relied on federal law in support of this proposition before the Special Master. On challenge, the United States relied on state law for this proposition. (4) The United States is the owner of water right located on the public domain because it gives permission to the private party to operate on the public domain. ***Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment)*** (April 15, 1998) at 7.

9 The theories advanced by the United States, all of which result in the United States owning all water rights perfected on the public domain, are consistent with the directive given by Solicitor Krulitz. 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, Jan. 1980, p. 1.

and that water, absent reserved rights, is to be allocated under state law. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935).

In the context of these important principles, the United States Supreme Court held that absent any reserved rights, stock water rights located within the national forests belong to the stockmen who perfected the rights.

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

United States v. New Mexico, 438 U.S. 696, 715-17 (1978) (emphasis added).

Consistent with these federal principles, state law also recognizes that ownership of the land is separated from ownership of water located on the land. The Special Master noted the relevant Idaho law as follows:

> In Idaho, water rights are appurtenant to the land upon which the water is used. I.C. §§ 42-220 and 42-220; *see also, Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). However, the fact that water is appurtenant to the land does not answer the question of who owns the water right. The rule in Idaho has long been that "[w]ater may be appropriated for beneficial use on land not owned by the appropriator, and such water rights become appropriator's property." *First Security Bank v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930). The exception to this rule is that a trespasser cannot perfect a water right on private property. "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, 185 P. 1072 (1919); *First Security Bank v. State*, 49 Idaho 740, [291 P. 1064] (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).

Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions (Subcase 57-04028B, Mar. 25, 1997) at 11-12. If the party claiming ownership of the water right is not the same party that actually appropriated the water, the only way the nonappropriating party can legitimately claim the right is through an agency theory orby a showing that the right was conveyed from the party that actually appropriated 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 v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930) (emphasis added). Water rights are real property rights that may be conveyed. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 244 P.2d 151 (1951).

Therefore, after careful review of the record before the court, the challenges filed by the United States in subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B, and 72-15929C are **DENIED**. The challenges filed by Joyce in subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B are **DISMISSED** as the challenges are not properly before the court. The court adopts and incorporates by reference the following decisions of the Special Master:

1. The ***Special Master's Reports and Recommendations*** for subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B.

2. The ***Special Master's Report and Recommendation*** and the ***Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment)*** (April 15, 1998) for subcase 72-15929C.

IT IS ORDERED.

DATED September _____, 1998.

_____
DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication