



## I.

### APPEARANCES

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

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

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

ROGER S. BURDICK, Administrative District Judge and Presiding Judge of the SRBA, Presiding.

## II.

### PROCEDURAL BACKGROUND AND FACTS

1. The United States, acting through the Bureau of Land Management (“United States” or “USBLM”), filed numerous “dual based” water right claims for stock watering, based on alternative legal theories of “beneficial use” pursuant to state law and federal law based on the executive order Public Water Reserve 107 (April 17, 1926) (“PWR 107”). The issue on challenge only concerns the federal basis for these claims. All such claims at issue are small stock water claims for .02 cfs not to exceed 13,000 gallons per day.

2. Previously, the issue of whether PWR 107 created a valid basis for a federal reserved water right was designated in the SRBA as Basin-Wide Issue 9. *See Order Designating Basin Wide Issue No. 9*, (March 8, 1996). On December 9, 1996, Judge Hurlbutt, then Presiding Judge of the SRBA, ruled that PWR 107 did not create either an express or implied reservation of water by the United States. *Memorandum Decision and Order Re: Basin Wide Issue 9*, subcase 91-00009 (Dec. 9, 1996). Judge Hurlbutt’s decision was appealed to the Idaho Supreme Court and was ultimately reversed by the Court. In *U.S. v. Idaho*, 131 Idaho 468, 959 P.2d 449 (1998), the Idaho Supreme Court

ruled that PWR 107 created a valid basis for a federal reserved stock water right.<sup>1</sup>  
Remittitur to this Court was issued July 29, 1998.

3. Following remand, the State of Idaho filed Objections to those PWR 107 claims filed by the United States where the claimed spring or water hole was described as being tributary to a perennial stream or river. Such Objections were filed in numerous subcases. The State's Objections that were filed to springs or water holes that were claimed as being tributary to "sinks" have been resolved by stipulation. *See Stipulation to Resolve Objections to Certain Claims Based Upon Public Water Reserve 107* (Aug. 10, 1999). These PWR 107 claims are either pending before respective Special Masters or have proceeded to partial decree.

4. Special Master Haemmerle, then presiding, pursuant to a stipulation of the parties, consolidated certain of the United States PWR 107 claims for purposes of deciding an anticipated motion to be filed by the State of Idaho. *See Order Consolidating Subcases* (Dec. 31, 1998). On December 19, 1998, the State of Idaho filed a *Motion for Summary Judgment*, consolidated subcase 23-10872 *et al.*, seeking a legal ruling on whether or not PWR 107 applied to springs or water holes tributary to perennial rivers or streams. Special Master Haemmerle granted the State's *Motion* and ruled that PWR 107 does not apply to the springs or water holes tributary to perennial rivers or streams. *See Order Granting State's Motion for Summary Judgment*, subcase 23-10872 *et al.* (March 5, 1999).

5. Following the ruling on summary judgment, the State and the United States filed a *Joint Submission of Public Water Reserve No. 107 Subcase Examples*, subcase 65-20033 *et al.*, attached hereto as "Exhibit A" (*Joint Submission*). In the *Joint Submission* the parties presented the Special Master with thirteen subcases purportedly representing

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<sup>1</sup> The holding is a little confusing as to whether the reserved right is express or implied. The opinion sets forth the elements of an implied federal reserved water right but then concluded that: "PWR 107 evidences an *express* intention by Congress that reserves a water right in the United States." *Id.* at 471, 959 P.2d at 452 (emphasis added). The parties and this Court are in general agreement that the holding was based on an implied federal reserved water right and have proceeded accordingly.

typical factual scenarios of the various types of spring flows and/or water holes claimed pursuant to PWR 107. Special Master Haemmerle then issued an ***Order on Joint Submission***, subcases 65-20033 *et al.* (June 25, 1999). The *Order* addressed most, but not all of the different factual scenarios. . Additional briefing from the parties was requested on the remaining types of factual scenarios. Shortly thereafter the subcases were assigned to Special Master Cushman, who succeeded Special Master Haemmerle.

6. Following additional briefing on the factual scenarios yet to be ruled on, Special Master Cushman issued a ***Second Order on Joint Submission***, subcase 65-20033 *et al.* (Oct. 29, 1999). Special Master Cushman issued special master's reports and recommendations, recommending to the District Court that three of the subcases be decreed pursuant to PWR 107, and the remainder be decreed pursuant to the state-law basis of the claim.<sup>2</sup> The United States filed a *Motion to Alter or Amend* the recommendations in eleven of the thirteen subcases.<sup>3</sup> Special Master Cushman denied the *Motion to Alter or Amend*.

7. On May 11, 2000, the United States filed a *Notice of Challenge*, Joint Submission subcase 23-10894 *et al.* In accordance with the Court's briefing schedule, on July 13, 2000, the United States lodged *United States of America's Opening Brief on Challenge to the Special Master's Recommendations on Public Water Reserve Number 107*, together with the affidavits of Karl A. Gebhardt and Gary A. Madenford. On August 3, 2000, the State of Idaho lodged *State of Idaho's Response Brief on Challenge* and filed a *Motion to Strike* the affidavits filed by the United States. On August 17, 2000, the United States lodged a *Reply to State of Idaho's Response Brief on Challenge*.

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<sup>2</sup> It is unclear why the United States filed its *Motion to Alter or Amend* in the three subcases in which Special Master Cushman recommended the water rights pursuant to PWR 107.

<sup>3</sup> For purposes of clarification, the *Motion to Alter or Amend* was filed in eleven of the thirteen individual subcases designated under the *Joint Submission* as opposed to the lead subcase numbers consolidated for summary judgment. (The *Motion to Alter or Amend* could not be filed in the consolidated subcases because special master's reports and recommendations have not been filed yet.) This needs to be clarified for the Court's register of actions because the issues raised pursuant to the *Motion to Alter or Amend* and subsequent *Challenge* go to the merits of the summary judgment ruling and are not merely limited to the rulings on the *Joint Submission*. Therefore this order will also be docketed in consolidated subcases 23-10872, 24-10233, 25-13625, 27-11578, 65-19736

8. Effective December 15, 2000, Roger S. Burdick was appointed Presiding Judge of the SRBA. Oral argument on the matter was held on January 24, 2001. At the conclusion of the hearing the parties were granted additional time to file post-hearing briefing and address in writing questions raised by the Court at oral argument. On May 8, 2001, the United States lodged a *Supplemental Memorandum Regarding Public Water Reserve 107*. On September 5, 2001, the State of Idaho lodged *State of Idaho's Response Brief to Supplemental Memorandum of United States*. On October 10, 2001, the United States lodged a *Reply to State of Idaho's Response to the Supplemental Memorandum Regarding PWR 107*.

### III.

#### **MATTER DEEMED FULLY SUBMITTED FOR DECISION**

In accordance with the post-hearing briefing schedule set forth by the Court as modified by the extensions granted to the parties, the last filing and/or lodging occurred in this matter on October 10, 2001. Therefore, this matter is deemed fully submitted for decision on the next business day, or October 11, 2001.

### IV.

#### **ISSUES PRESENTED ON CHALLENGE**

The United States frames the issues raised on challenge as follows:

- A. Did the Special Master err in ruling that the United States is not entitled to a federal reserved water right pursuant to Public Water Reserve no. 107 if the spring or waterhole is tributary to a perennial stream or river?

Special Master Haemmerle concluded that “PWR 107 does not apply to springs or water holes which are tributary to perennial rivers or streams.” Order on Joint Submission (June 25, 1999) at p. 8 (emphasis in original). The United States respectfully challenges the Special Master’s recommendation and will seek a ruling that Public Water Reserve no. 107 reserves water at springs and waterholes regardless of the hydrological connection between the spring or waterhole source and a perennial river or stream.

- B. Did the Special Master err in ruling that the United States is not entitled to a federal reserved water right pursuant to Public Water Reserve no. 107 if the water from the claimed spring or waterhole is tributary to an intermittent stream or river, or the water flows for any distance in a defined stream channel.

Special Master Cushman concluded in the Second Order on Joint Submission, dated October 29, 1999, that springs on the federal public domain with “water [that] leaves the reservation while on the surface...is not contained within the protected area and can not be, as a matter of definition, the type of water protected by the PWR 107 implied water reservation.” Id. At 12.

The United States respectfully challenges the Special Master’s recommendation and will seek a ruling that Public Water Reserve no. 107 reserves water at springs and waterholes regardless of whether surface water from the spring or waterhole is wholly contained within the reservation or flows outside the reservation boundaries.

*Notice of Challenge*, subcase no. 23-10894 *et al.* (May 11, 2000), pp.2-3.

## V.

### STANDARD OF REVIEW OF A SPECIAL MASTER’S CONCLUSIONS OF LAW

The Special Master’s ruling ultimately being challenged was pursuant to a *Motion for Summary Judgment*. In *United States v. State of Idaho*, \_\_\_Idaho\_\_\_, 23 P.3d 117 (2001)(Deer Flat National Wildlife Refuge), the Idaho Supreme Court stated the standard of review of an order granting summary judgment in the context of a federal reserved water right.

Summary judgment is appropriate where there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. *First Security Bank v. Murphy*, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). The determination is to be based on the pleadings, depositions, and admissions on file, together with the affidavits, if any. *Id.*, see I.R.C.P. 56(c). However, the Court will liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence. *Mitchell*, 130 Idaho at 422, 942 P.2d at 546. Because there are no genuine issues of material fact, the issue of whether the reservations in this case established a federal reserved water right is a

question of law. *See, e.g., United States v. City of Challis*, 133 Idaho 525, 529, 988 P.2d 1199, 1203 (1999).

*Id.* at 122.

The Challenge in the instant case does not put at issue any genuine issue of material fact. The Challenge only goes to the conclusions of law. Although the conclusions of law of a special master are expected to be persuasive, they are not binding upon the district court. This permits the district court to adopt the special master's conclusions of law only to the extent they correctly state the law. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Accordingly, the district court's standard of review of the trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534.

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

## VI.

### ORDER ON STATE OF IDAHO'S MOTION TO STRIKE AFFIDAVITS

Attached to the United States' *Opening Brief on Challenge to the Special Master's Recommendations on Public Water Reserve Number 107* was an *Affidavit of Karl A. Gebhardt* and an *Affidavit of Gary A. Madenford*. On August 3, 2000, the State of Idaho filed a *Motion to Strike Affidavits*, asserting that these two affidavits are untimely and irrelevant. The information contained in the affidavits is intended to show factually that under the legal interpretations recommended by the Special Masters, the identification of land withdrawn by PWR 107 would be extremely time consuming and expensive task.

This Court concurs with the State that the affidavits are irrelevant and untimely. With respect to untimeliness, this Court has previously ruled that the motion to alter or amend stage of the proceedings is not the proper time for developing the factual record and litigating the merits of a claim. ***Order on Challenge (Consolidated Issues) of***

**“Facility Volume” Issue and “Additional Evidence” Issue, Subcase Nos. 36-02708 et al. (December 29, 1999).** In the instant case, the subject affidavits were submitted in conjunction with a challenge rather than proceedings before a special master. The United States argues that the additional evidence it seeks to provide to the Court is not untimely because Rule 53(e)(2) of the Idaho Rules of Civil Procedure allows a court to receive further evidence with respect to a special master’s report. Although Rule 53(e)(2) allows a court to supplement the record to make up for any deficiencies in the record developed before the special master, the Rule does not give a party *carte blanche* to introduce additional evidence on challenge.

This Court also agrees with the State with respect to the relevancy of the information contained in the affidavits. The costs of investigation required to acquire the facts necessary to support a claim for a water right are not an element of a water right and are not relevant to the resolution of the legal issues now before the Court. For purposes of a summary judgment proceeding, facts contained in supporting affidavits must be otherwise admissible in evidence. I.R.C.P. 56(e). The Court finds that the facts contained in the affidavits would be inadmissible based on relevancy. I.R.E. 401 and 402. However, even if the affidavits were not stricken, the information contained in the affidavits would have no bearing on the Court’s analysis as such information is not germane to the resolution of the issues in this case.

In accordance with the foregoing, the *State of Idaho’s Motion to Strike Affidavits* is **granted**.

## VII.

### ANALYSIS AND DISCUSSION

#### A. INTRODUCTION AND OVERVIEW.

The language of PWR 107 as well as its related enabling legislation does not **expressly** limit the scope of PWR 107 to “springs” or “water holes” that are non-tributary to perennial streams or rivers. As explained further in this opinion, the issue regarding such a distinction in the application of PWR 107 is the result of subsequent administrative agency and judicial interpretations. Unfortunately, some of these interpretations have reached conflicting results. *See infra* section VII.E.

In *United States v. State of Idaho*, 131 Idaho 468, 472, 959 P.2d 449, 453 (1998), the Idaho Supreme Court held that the “purpose of PWR 107 was to prevent the monopolization by private individuals of springs and waterholes on public lands needed for stockwatering.” *Id.* at 471, 959 P.2d at 452. Although, the Idaho Supreme Court was not asked to address whether the executive order applied to springs and water holes tributary to perennial streams, the Supreme Court’s interpretation of the primary purpose of PWR107 is nonetheless significant to the resolution of the issue now before this Court.

The State of Idaho argues, and the Special Master held, that PWR 107 was intended to exclude springs and water holes that are tributary to perennial rivers or streams. The United States argues that PWR 107 was not limited to non-tributary springs and water holes. However, the United States appeared to argue before the Special Master that any water source located on the unreserved public domain could give rise to a federal reserved water right under PWR 107.<sup>4</sup> Specifically, that any discrete stream segment running across unreserved public domain gave rise to a federal reserved water right. It is not entirely clear from the record whether or not the United States actually filed any claims relying on a segment of a stream situated on unreserved public domain as a basis for a water right under PWR 107.<sup>5</sup>

It is the opinion of this Court that neither interpretation of PWR 107 is entirely correct. As set forth below, the hyper-technical distinction between tributary and non-tributary springs is not only inconsistent with the application of the express language of

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<sup>4</sup> In the *Order Granting State’s Motion for Summary Judgment* issued by Special Master Haemmerle states:

Nevertheless, the United States argues that it could have claimed river or stream segments under that portion of the executive order which allows the United States to reserve ‘all land within a quarter of a mile of a spring or waterhole.’ It is this exact argument which precludes PWR 107 from including springs or waterholes tributary to rivers or streams. If the United States, in fact had the authority to include river or stream segments within one quarter of a mile of any spring or water hole, it would be reserving water sources (i.e. rivers or streams) which were not included under the express provisions of PWR 107.

*Order* at 3.

<sup>5</sup> Footnote 2 to Special Master Haemmerle’s Order states that “the United States informed the Court that only particular springs or water holes were claimed in the SRBA under PWR 107. However, the United States asserted, in its argument, that it could have claimed river or stream segments along with the springs or water holes.”

PWR 107, including the common definition of a spring, but also with the historical background and purpose of PWR 107. As to “water holes” as the term is used in PWR 107, it is this Court’s opinion that water holes and perennial running streams are mutually exclusive concepts. Concomitantly, the argument that any stream or river segment situated on unreserved public domain is a valid basis for a reserved right pursuant to PWR 107 is equally inconsistent with the express language of PWR 107. The Court interprets PWR 107 as having a more limited application.

**B. THE ISSUE OF WHETHER PWR 107 APPLIES TO SPRINGS OR WATER HOLES THAT ARE TRIBUTARY TO PERENNIAL STREAMS OR RIVERS INVOLVES A QUESTION OF INTERPRETATION.**

The issue of whether PWR 107 was intended to apply to springs or water holes tributary to perennial streams requires a reexamination of the primary purpose of PWR 107 and a determination as to whether such application of the executive order is consistent with that primary purpose. The Idaho Supreme Court, in applying federal law,<sup>6</sup> has repeatedly held that the primary purpose of a statute or executive order for purposes of determining the existence of an implied federal reserved water right is a question of statutory interpretation. *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000) (interpreting Wild and Scenic Rivers Act); *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260 (2000) (interpreting Wilderness Act and Hells Canyon National Recreation Area Act); *State v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) (interpreting Sawtooth National Recreation Area Act).

In *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997), the Idaho Supreme Court summarized principles of statutory construction which the Court later applied in construing federal legislation in conjunction with determining the existence or absence of implied federal reserved water rights. *See*

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<sup>6</sup> In *United States v. State of Idaho*, \_\_\_ Idaho \_\_\_, 23 P.3d 117 (2001) (Deer Flat National Wildlife Refuge), the Idaho Supreme Court reiterated that “[t]he existence or absence of a federal reserved water right is a matter of federal law. In its prior decisions this Court has relied solely upon United States Supreme Court cases and relevant federal executive and legislative history. Reliance upon its prior decisions is intended simply to incorporate reasoning based upon federal law, not imply that there is applicable state law.” *Id.* at 122. In this same regard, in citing to relevant Idaho Supreme Court case law, this Court acknowledges that the Idaho Supreme Court relied on federal law.

*e.g.*, *State v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) (Sawtooth National Recreation Area Act) (citing *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho at 732, 947 P.2d at 405). In other words, these principles are not unique to state jurisprudence. These same principles apply in the resolution of the issue regarding the executive order now before this Court. In *Hagerman Water Right Owners*, the Idaho Supreme Court stated that “[i]f statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction.” *Id.* at 732, 947 P.2d at 405 (citations omitted). “Statutory interpretation begins with the words of the statute, giving the language its plain, obvious, and rational meanings.” *Id.* (citations omitted). However, “[i]f it is necessary for the Court to construe a statute [or executive order], then it will attempt to ascertain the legislative [or executive] intent. In construing a statute, this Court may examine the language used, the reasonableness of the proposed interpretation, and the policy behind the statute.” *Id.* at 733, 947 P.2d at 406 (citations omitted).

In regards to the role of administrative agency interpretations and historical applications with respect to interpreting a statute or executive order, the Idaho Supreme Court stated “[a] basic rule of statutory construction is that the application of a statute is an aid to construction where the public relies on that application over a long period of time.” *Id.* (citing SUTHERLAND STAT. CONST. (5<sup>th</sup> ed.1992). Further,

[s]tatutes are documents having practical effects. It is therefore improper to construe them in the abstract, without taking into consideration the historical framework in which they exist. . . . Correlatively, such information is also relevant when deciding what the statute means to others because it is important to know how people affected by an act understand it.

*Id.* (quoting SUTHERLAND at § 49.01).

Where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as very important in arriving at the proper construction of a statute. [O]ne of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that the public has relied on the interpretation.

*Id.* (quoting SUTHERLAND at § 49.07). The Supreme Court summarized the four-part test for establishing when agency construction should be accorded deference as follows:

This four prong test states that an agency's construction will be given great weight if: (1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present.

*Id.* (citing *Garner v. Horkley Oil*, 123 Idaho 831, 833, 853 P.2d 576, 578 (1993)(citing *J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho at 862, 820 P.2d at 1219.)).

As indicated, the first step in a question of interpretation begins with the express language of the act and then the Court may go behind the language only if necessary to ascertain legislative or executive intent. However, in an effort to provide a comprehensive analysis of the issue and avoid deciding the issues before the Court on the narrowest grounds possible, the Court's analysis also takes into account not only the express language of PWR 107 but also the historic purpose, applications and interpretations of PWR 107.

### **C. THE HISTORICAL CONTEXT AND PURPOSE OF PWR 107.**

#### **1. The historical context and purpose of PWR 107 does not support the position that PWR 107 was intended to be limited to springs and water holes that are non-tributary to perennial rivers or streams.**

The historical context in which PWR 107 emerged provides some insight into the intended scope of the executive order. While this history makes clear the general intended purpose behind the executive order, it is equally apparent that there has always existed uncertainty and disagreement over the intended scope and application of PWR 107 within various sectors of the federal government responsible for its administration. In other words, from a historical perspective the intended scope of PWR 107 is not as "mechanical" as either the State of Idaho or the United States would argue. In this Court's view, the historical circumstances culminating in the issuance of PWR 107 would not support the position that the executive order was intended to be strictly limited to non-tributary springs and water holes or that PWR 107 was intended to reserve lands surrounding all stream segments on the public domain.

Throughout the 19<sup>th</sup> Century, Congress enacted a number of statutes aimed at promoting settlement of the western public domain through the disposition of public

lands including the establishment of small family homesteading operations.<sup>7</sup> In general terms, these statutes authorized the entry, settlement, and eventual ownership of tracts of land within the public domain. During this same era, stockmen were permitted to graze livestock on the remaining unappropriated lands. *See e.g., Buford v. Houtz*, 133 U.S. 320, 326-328 (1890)(discussing government’s historical policy towards grazing on public lands). As a result, the western livestock industry rapidly came into prominence. However, prior to the enactment and implementation of the Taylor Grazing Act in 1934, grazing on public lands was largely unregulated and open to the public in general. *See generally* Paul W. Gates, *History of Public Land Law Development*, pp.607-34 (1968).

As the availability of unappropriated public lands diminished, competition for public grazing lands became fierce. Because of the importance and scarcity of water in the arid west it also became readily apparent to the livestock industry that those who controlled access to water sources could control vast amounts of surrounding grazing lands.<sup>8</sup> As a result, those involved in the livestock industry developed a number of schemes for either controlling or acquiring ownership of lands immediately surrounding key water sources. A number of these schemes were unlawful and fraudulent. Illegal fencing was used to deny others access to grazing land and water. Stockmen used “strawmen” for the purpose of making entries under the Homestead Act or other applicable land laws on lands immediately surrounding water sources and then “legitimately” purchased back those same lands. Land entries were also made in narrow marginal strips immediately surrounding both sides of streams. It became apparent to the

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<sup>7</sup> For example, the Preemption Acts, The Homestead Act, The Mining Acts of 1866 and 1870, and The Desert Land Act of 1877 all provided a means for a settler to acquire fee title to public land.

<sup>8</sup> The way in which water enabled an individual to control land is exemplified in the testimony of a cattleman given to the Public Land Commission in 1879 and paraphrased in a recent law review article written on the subject.

‘The water,’ he stated, ‘controls the land. Where ever there is any water there is a ranch.’ His ranch had two miles of running water. In one direction, the next water source was 23 miles away. ‘No man,’ he explained, ‘can have a ranch between these two places. I have control of the grass the same as though I owned it.’ That was the way it was all over the West-**he who controlled the water, controlled the adjacent range.**

James Muhn, Public Water Reserves: *The Metamorphosis of a Public Land Policy*, 21 J. LAND RESOURCES & ENVTL. L., 67, 73 (2001)(quoting *Report of the Public Land Commission Created by Act of March 3, 1879, Relating to Public Lands in the Western Portion of the United States and to the Operation of Existing Land Laws*, 46 H.R. Exec. Doc. 46, 297 (Feb. 25, 1880))(emphasis added).

Department of Interior and members of Congress that the monopolization of stock water sources would eventually defeat the policy of promoting the establishment of small family homesteading operations. In order to prevent the monopolization of land via control of such water sources, the initial response was to attempt to keep entries compact and deny pretextual land entries. Congress also enacted several statutes aimed at curtailing illegal attempts to gain control of water sources as well as repealed some of the land laws being abused.<sup>9</sup> These initial attempts however, did not entirely correct the problem, as stock raising interests were able to take advantage of other available land laws to control water sources.<sup>10</sup>

Land withdrawals were eventually viewed by the Department of Interior as a means of preventing the monopolization of the public lands and water sources. The Pickett Act of 1910 (Act of June 25, 1910, ch. 421, 36 Stat. 487, codified at 43 U.S.C. § 141 (1976)), authorized the President to make temporary withdrawals of land for public purposes.<sup>11</sup> The Pickett Act provided:

The President may, at any time in his discretion, temporarily withdraw lands from settlement, location, sale or entry of any of the public lands of the United States, including Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, *or other public purposes to be specified in the orders of withdrawals*, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

(emphasis added).

In 1911, then Secretary of Interior Walter Fisher acknowledged that the public range could not be administered under the existing laws and advocated a comprehensive leasing system under the administrative authority of the Department of Interior. James

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<sup>9</sup> For example, the Unlawful Enclosures Act of 1885 regulated the erection of fencing. The Stockwater Reservoir Act of 1897 permitted the development of watering sources subject to regulations, which among other things, kept such watering sites open to the public.

<sup>10</sup>For example, stockmen took advantage of various governmental programs involving land scrip.

<sup>11</sup>The Pickett Act came about as a result of President Taft seeking Congressional clarification of the scope of the executive branch's authority to withdraw public lands. *See United States v. Midwest Oil Company*, 236 U.S. 459 (1915). Previously, the executive authority to withdraw lands had been infrequently used. Theodore Roosevelt, Taft's predecessor, liberally used the authority for withdrawing other important public land resources and in some circumstances even without prior Congressional authorization. Apparently Taft was not as confident regarding the scope of the executive authority.

Muhn, *Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. LAND RESOURCES & ENVTL. L., 67, 82 (2001)(quoting *Annual Report Of the Department of Interior*, HR Rep 62 120 at 9-10 (Dec. 1, 1911)), *United States' Supplemental Memorandum Regarding Public Water Reserve No. 107*, Exhibit 20. Ultimately, the withdrawal from entry of lands containing stock watering sources in arid regions was viewed as a solution and legitimate exercise of the executive authority conferred by the Pickett Act. The initial public water reserve withdrawals were recommended and issued on an as needed case-by-case basis beginning with President Taft. These initial public water reserve withdrawals were not without significant controversy. The Pickett Act was not viewed as an express Congressional sanction of the public water reserve policy. Rather, the public water reserves were a result of the Interior Department's interpretation of the "or other public purposes" language contained in the Pickett Act. *Id.* (quoting letter from George Otis Smith, Dir. USGS, to Walter Fisher, Secretary of Interior (Mar. 26, 1912)).

Some in Congress felt that the idea of the federal government retaining public lands was inconsistent with the policy of transferring the public domain into private ownership. In a response to this concern, Secretary of Interior Fisher indicated that it was not the intent of the Interior Department to have withdrawn every tract of land bordering a creek or that has a spring, rather that withdrawals would be used only where the withdrawal was absolutely essential to the use of adjacent lands and if private control of the water source would result in control of several square miles of territory. *Id.* at 86 (quoting *Improvement and Regulation of Grazing on the Public Lands of the United States hearings Before the Committee on Public Lands, House of Representatives on H.R. 19857 HR Doc 62 N at 94-96 (1919)*). In response to another concern regarding the frequency of public reserve withdrawals, Director Smith of the USGS indicated withdrawals were unnecessary "where water supply of the area is so abundant that public control of watering places is unnecessary to the free use of the range." *Id.* at 87 (quoting letter from George Otis Smith, Dir. USGS, to Walter Fisher, Secretary of Interior (July 25, 1912)).

In Utah, the concern was raised over the legality of the public water reserves and specifically that the reserves encroached on the state laws enacted for the appropriation

and beneficial use of the State's waters. *Id.* at 92 (quoting letter from Sec. of Utah Board of Land Commrs. to Sen. George Sutherland (Mar. 3, 1913)). Secretary of Interior Franklin Lane, successor to Fisher under the Wilson administration responded to Utah's concern by explaining that the reserves did nothing more than withdraw the land surrounding watering places and did not "interfere with the appropriation or utilization of waters which originate upon or flow across the reserves." Secretary Lane stated further: "It is difficult, therefore to see how the reserves can interfere with the State laws for the appropriation and utilization of water." *Id.* at 93 (quoting letter from Franklin K. Lane, Secretary of Interior to Sen. George Sutherland (April 12, 1913)).

The above colloquium demonstrates the uncertainty that existed within the Interior Department over the scope and legal effect of the public water reserves. For example, Secretary Lane's statement that the public water reserves only withdrew land and did not interfere with the appropriation of water pursuant to state law ultimately turned out to be inaccurate as the public water reserves (and in particular PWR 107) were subsequently construed to create federal reserved water rights.

In 1916, Congress sanctioned the public water reserve policy through the passage of the Stock Raising Homestead Act ("SRHA") (Act of December 29, 1916, 39 Stat. 865, codified at 43 U.S.C. § 141 (1976)). The purpose of the SHRA was to encourage the development of small ranching operations on the public domain<sup>12</sup> and specifically excluded from entry lands surrounding sources of water considered important for public watering purposes and required that those lands be withdrawn pursuant to the Pickett Act.<sup>13</sup> The SRHA provided in relevant part:

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<sup>12</sup> The SRHA provided for the entry of 640 acres. Lands that were suitable for purposes other than grazing such as timber or agriculture were excluded from the application of the SHRA.

<sup>13</sup> In the application for an entry under the SRHA, applicants had to sign an affidavit stating:

That there is no spring, water hole, stream or surface supply of water of any kind upon said land needed or used by the public for watering livestock; that there is no known surface supply of water on any of the subdivisions of said land so applied for; that it and the whole thereof is unwatered dry land suitable for grazing purposes only and that save during the snowy season and rainy periods water for livestock grazed thereon will have to be obtained from a well or wells to be sunk or a reservoir or reservoirs to be constructed thereon.

*See* Exhibit 7 to United States' *Supplemental Memorandum Regarding Public Water Reserve 107.*

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

Consistent with the purpose and prior application of the public water reserves, the purpose of the SRHA, as expressed in the House Report accompanying the Act, was stated as follows:

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

H.R. Rep. No. 35. 64<sup>th</sup> Cong., 1<sup>st</sup> Sess. 18 (1916).

The SHRA did not appear to alter or impose additional limitations on the criteria previously used by the Interior Department for selecting public water reserve withdrawals.<sup>14</sup> Following the enactment of the SHRA, the Interior Department continued with its public water reserve policy. Public water reserves were also made for purposes other than stock watering if viewed as necessary for a public purpose. Eventually however, as a result of continued land law abuses as well as overgrazing practices it became apparent to the Interior Department that something more than the public water reserve policy would be required to preserve the public rangelands. As a result, the policy of the Interior Department shifted towards comprehensive legislation that would allow

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<sup>14</sup> Secretary of Interior Lane issued instructions to the Director of the Geological Survey for the continuation of public water reserve withdrawals following the SHRA which stated that:

You are further instructed to continue the work heretofore undertaken in connection with the creation of public water reserves. In continuation of that work you will receive and consider any applications or petitions for the withdrawal of water holes or other bodies of water needed or used by the public for water places will make such field investigations as may be necessary to determine their suitability for use by the public for such purpose, and in the event that lands are found to contain watering places of this character, you will submit recommendations of withdrawal prepared for the signature of the President.

*Stock-Raising Homesteads, Instructions*, 46 Land Dec. 252, 255 (Aug. 4, 1917). These instructions under the SHRA appear entirely consistent with criteria used for the previous public water reserves.

for the withdrawal and lease of such grazing lands. In 1926, in anticipation of such legislation, PWR 107 was recommended to and issued by President Coolidge on April 17, 1926.

PWR 107 provides in relevant part as follows:

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

PWR 107 represented a shift from a case-by-case examination and withdrawal of lands surrounding water sources needed by the public to a “global” or “blanket” withdrawal. This is consistent with the Interior Department’s advocacy of comprehensive legislation to control grazing on public lands.

Although not expressly stated in PWR 107, contemporaneous interpretations of the executive order indicate that it was not intended to withdraw lands surrounding all springs and water holes. At the time of the issuance of PWR 107, homesteading was still in effect. The withdrawal of all springs and water holes would have effectively ended further homesteading. The instructions (*Circular 1066*) issued on May 25, 1926, (or a little over a month after the issuance of PWR 107), by the General Land Office for identifying the withdrawals made under PWR 107, expressly excluded small springs and water holes providing only enough water for the use of a single family.

[PWR 107] was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small spring or waterholes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for water purposes.

....

In every instance it must be shown by a duly corroborated affidavit in connection with every selection, filing or entry made upon or subsequent to the date of [PWR 107], or theretofore filed but not allowed, that no spring or water hole exists, if it be a fact, upon any legal subdivision of the

land sought to be appropriated, if surveyed, and if unsurveyed , within one quarter of a mile from the exterior boundaries of said land. If there be any spring or water hole the affidavit should state the exact location and size thereof, together with an estimate of the quantity of water in gallons, which it is capable of producing daily, and any other information necessary to determine whether or not it is valuable or necessary as a public water reserve.

*Selections, Filings, or Entries of Lands Containing Springs or Waterholes—All Prior Instructions Amended, [Instructions Circular 1066], 51 Land Dec. 457-58 (May 25, 1926), United States’ Supplemental Memorandum Regarding Public Water Reserve No. 107, Exhibit 1.* As with previous withdrawals, nothing in the language of PWR 107 or the instructions for identifying withdrawals under PWR 107 would suggest that such withdrawals were strictly limited to non-tributary springs and water holes.

Throughout the history leading up to the issuance of PWR 107, the unequivocal intent of the public water reserve policy was to attempt to prevent monopolization of the public rangelands through the control of the limited water sources. Although, admittedly there was disagreement regarding the application and scope of the withdrawals, nothing in the historical background suggests that whether a particular water source was tributary to another source was a dispositive factor in whether to recommend a particular withdrawal. Rather it appears that the overriding criterion was the abundance of water sources relative to the surrounding lands. At best, whether a particular spring or water hole was tributary to a perennial stream would be a factor considered in evaluating the abundance and importance of water sources in a particular geographic region.

Furthermore, from a practical standpoint, limiting the prior withdrawals or the application of PWR 107 strictly to lands surrounding non-tributary water sources would not have necessarily resolved the general concern of the monopolization of grazing lands. There are no facts in the record to support the position that a spring, water hole or any other body of water tributary to a perennial stream if under private ownership would not result in the ability to control the surrounding territory. This is more appropriately a factual determination dependent on the abundance of watering places relative to the geographic surroundings. In *United States v. State of Idaho*, 131 Idaho 468 (1998), the Idaho Supreme Court made clear that “[t]he purpose of PWR 107 was to prevent the

monopolization by private individuals of springs and waterholes on public land needed for stockwatering.” *Id.* at 472. As stated previously, because the purpose could not necessarily be accomplished by imposing such a limitation (i.e. tributary springs could also be monopolized), it would also be inconsistent with the purpose already stated by the Idaho Supreme Court to conclude that the springs and water holes that were tributary to perennial streams were *per se* excluded from the application of PWR 107. Simply put, the imposition of a bright-line rule in many instances would defeat the intended purpose of PWR 107 already enunciated by the Idaho Supreme Court. The parties, as well as this Court, are bound by that prior ruling.

Although this Court reached this conclusion independently of the reasoning of the Colorado Supreme Court in addressing the same issue, the underlying reasoning is consistent. In *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982), in addressing the issue of whether PWR 107 excluded tributary water holes and springs, the Colorado Supreme Court reasoned:

[T]he reservation documents [for PWR 107] fail to distinguish between tributary and non-tributary spring waters. The focus of Public Water Reserve No. 107 was on the surface manifestation of spring water, not on the fine hydrological distinctions of tributariness. There is also nothing in the statute or the legislative history which would support the water court’s exclusion of tributary water. ***Such a conclusion is likely to frustrate the legislative purpose of preventing monopolization and control of arid western land.*** Monopolization of public waterhole or spring waters is prevented when no one appropriator has complete control of the resource.

*Id.* at 32-33 (footnotes omitted)(emphasis added). Accordingly, to the extent a legally imputed tributary distinction ultimately results in defeating the primary purpose of PWR 107 then it would be paradoxical to infer the existence of such a distinction.<sup>15</sup> It is therefore the opinion of this Court that the historical background of PWR 107 does not support the position that the executive order was intended to apply only to non-tributary springs and water holes. In this Court’s view the issues giving rise to the distinction between tributary and non-tributary springs and water holes are the result of subsequent interpretations and applications of PWR 107.

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<sup>15</sup> It is the very determination that without water the primary purpose of a statute or executive order withdrawing land would be entirely defeated which creates the implied reserved water right in the first

What is not as apparent from the historical background is whether PWR 107, as apparently argued before Special Master Haemmerle by the United States, was intended to apply to springs and water holes as well as stream segments and other bodies of water located on the remaining unreserved public domain. The Court raises this issue because public water reserves made prior to the SHRA as well as those made pursuant to the SHRA were not limited to “springs” and “water holes.” Yet, the express language of PWR 107 limits its application to “springs” and “water holes.”

One of the bases for Special Master Haemmerle’s finding a tributary-non-tributary distinction in the application of PWR 107 was the determination that if PWR 107 applied to all bodies of water on the public domain then the United States could conceivably reserve and control all water on the public domain pursuant to PWR 107. *See supra* fn 4. Specifically, the Special Master concluded that such a determination would be inconsistent with the myriad of prior federal law aimed at developing land and water in the western states through deference to state water law. In essence, the federal law would be meaningless if the United States appropriated all of the remaining water through PWR 107.

By way of background, in 1899, in *United States v. Rio Grande Dam & Irr.*, 174 U.S. 690 (1899), the Supreme Court held that the federal government acquiesced to state water law subject to two exceptions. The first being the navigation power and the other exception being that a state by its legislation cannot destroy the right of the United States as owner of land bordering a stream to the continued flow of its waters for at least as may be necessary for the beneficial use of the government property. *Id* at 703. In 1908, in *Winters v. United States*, 207 U.S. 564 (1908), based on the second exception enunciated in *Rio Grand Dam*, the Supreme Court ruled that when the federal government reserves a part of the public domain for a particular purpose, it reserves sufficient unappropriated water to effectuate that purpose. Later in 1935, in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), the Supreme Court explained 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 state law of prior appropriation.

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place. *United States v. State of Idaho*, 131 Idaho at 472, 959 P.2d at 453 (purpose of PWR 107 would be defeated without reserved water right).

Accordingly, this Court agrees that it would be completely inconsistent with these holdings to conclude that PWR 107 in one fell swoop impliedly reserved from the states all of the water on the public domain.

In this Court's view, the subsequent issuance of PWR 108, the definitions given to the terms "spring" and "water holes" by the Interior Department and the express language of PWR 107 are all dispositive of that issue. As set forth below, the Court finds that PWR 107 does not give rise to a land withdrawal based on stream segments or other bodies of water, which are not "springs" or "water holes."

**2. The subsequent issuance of PWR 108 does not support the position that PWR 107 was limited to springs and water holes non-tributary to perennial streams and rivers.**

The subsequent issuance of PWR 108 on March 27, 1927, raised further issues regarding the intended scope of PWR 107. Both Special Masters, in their respective opinions relied in large part on the issuance of PWR 108 as the basis for concluding that PWR 107 was not intended to apply to springs or water holes tributary to perennial rivers or streams. *See Order on the Motion of the United States to Alter or Amend the Special Master's Recommendation*, subcase 65-20033 *et al.* (April 27, 2000) at 4; *Order Granting State's Motion for Summary Judgment*, consolidated subcase 23-10872 *et al.* (Mar. 5, 1999) at 4. Based on this Court's review, interpretations surrounding the issuance of PWR 108 are the genesis of the issue regarding tributariness. Furthermore, the correspondence leading to the issuance of PWR 108 is illustrative of that fact that there was uncertainty within the federal governmental agencies over the scope of PWR 107 not long after its issuance.

On February 19, 1927, George Smith, Director of the USGS, issued a memorandum to the Secretary of Interior recommending that certain grazing lands crossed by a perennial stream be withdrawn, the implication being that the lands were not previously withdrawn under the "blanket" provisions of PWR 107. The memorandum states in relevant part:

In this report [by an inspector of the Department] it is shown that these are the only remaining public lands crossed by Henry's Fork River, a perennial stream which controls the grazing operations on thousands of

acres of open range, especially to the north. It is necessary, therefore, that these subdivisions remain open in order that stock using these adjoining ranges may have access to the water thereon.

*Memorandum for the Secretary* (dated Feb. 19, 1927), Exhibit A to the *Affidavit of Peter J. Ampe*, p.4. William Spry, Commissioner of the General Land Office, responded in a March 3, 1927, memorandum that: “With reference to the proposed public water reserve, your attention is called to the fact that the approval of this withdrawal will be equivalent to a holding that lands crossed by a stream of water were not reserved under the withdrawal order of April 17, 1926.” *Memorandum for the Secretary* (dated Mar. 3, 1927), Exhibit A to the *Affidavit of Peter J. Ampe*, p.5. On March 5, 1927, a memorandum was sent to E.O. Patterson, Solicitor for the Interior Department, requesting an interpretation of the scope of PWR 107.

It appears that this Order [PWR 108] is in proper form, if the withdrawal Order of April 17, 1926, did not include running streams but if running streams were included, the present suggested withdrawal should be changed. An interpretation of [PWR 107], is, therefore, necessary and will be appreciated.

*Memorandum for the Solicitor* (dated Mar. 5, 1927), Exhibit A to the *Affidavit of Peter J. Ampe*, p.6. Solicitor Patterson issued an opinion stating in relevant part:

The question has arisen in connection with the recommendation . . . that two legal subdivisions in Wyoming crossed by Henry’s Fork River be withdrawn for the benefit of stock using adjoining ranges.

[PWR 107] withdrew from settlement, location, sale, or entry- -

every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unreserved public land.

It must be assumed that “water hole” was used in the order quoted in the sense it is used generally and as defined in Webster’s International Dictionary: “A natural hole or hollow containing water.”

A hole in the dry bed of an intermittent river could be described as a water hole but in my opinion the lands bordering on running streams are not affected by [PWR 107].

*Letter from Solicitor Patterson to the Secretary of Interior* (dated Mar. 8, 1927), Exhibit A to the *Affidavit of Peter J. Ampe*, pp.7-8. As a result of Solicitor Patterson's opinion, PWR 108 was issued thereafter. The issuance of PWR 108 has also been the subsequent basis from which it has been concluded that PWR 107 did not reserve springs or water holes tributary to running streams. *See infra* discussion on *Hyrup v. Kleppe*, 406 F. Supp. 214 (Dist.Colo. (1976)) section VII.E.1.

This Court does not interpret PWR 108 and the related correspondence as broadly. Solicitor Patterson's opinion must be read in the context of the specific factual circumstances that the opinion addressed. The issue was whether the river or segments of the river crossing the surveyed land would be a valid basis for a withdrawal under PWR 107. Solicitor Patterson simply applied the plain meaning of the express language of PWR 107. PWR 107 only expressly withdrew surveyed tracts surrounding springs and water holes. The existence of a spring with respect to PWR 108 was not even at issue. Patterson's opinion focused on the common definition of a "water hole" and simply distinguished that under the common meaning of the word a perennial flowing stream does not constitute a "water hole," but that a seasonally intermittently flowing stream could result in a water hole under the same definition. Specifically, that during the times of the year when a stream is not continuously flowing "water holes" could exist within or near the streambed. However, Patterson's opinion that the dry bed of a an intermittent river could contain a "water hole" was more or less offered gratuitously because a water hole in an otherwise dry river bed was not at issue with respect to PWR 108.

In this Court's view, even a liberal reading of the Patterson opinion does not support the proposition that the intent behind PWR 107 was to *per se* exclude springs or water holes tributary to perennial streams. This Court's interpretation of the significance of PWR 108 is also consistent with a 1979 Interior Department Solicitor's opinion by Solicitor Krulitz, which addressed the 1927 Patterson opinion.

[The Solicitor's] opinion did not even address that issue; rather it merely stated that the withdrawal could not be used as authority to reserve two tracts bordering on the Henry's Fork River in Wyoming for purposes of stockwatering. The Henry's Fork is a perennial stream tributary to the Green River. *The Solicitor concluded that the 1926 Order did not effect withdrawals of lands bordering perennial rivers since they clearly did not*

*fit the definition of “spring” or “water hole.”* The opinion went on to conclude, however, that the withdrawal did apply to a water hole in the bed of an intermittent stream.

*Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management*, 86 I.D. 553, 584 fn.47 (1979)(emphasis added).

Patterson’s opinion and the issuance of PWR 108, do however, lend significant weight to the position that not just any source of water, and in particular a segment of a stream running across unreserved public land, forms a valid basis for a PWR 107 withdrawal. Both also support the conclusion that PWR 107 was not intended to apply to all remaining water sources. Patterson’s opinion and the issuance of PWR 108 are entirely consistent with the plain meaning of the express language of PWR 107 and in this Court’s view the plain meaning of the express language of PWR 107 is dispositive of the issues in this case.

**D. THE PLAIN MEANING OF THE EXPRESS LANGUAGE OF PWR 107 DOES NOT SUPPORT A DISTINCTION BETWEEN TRIBUTARY AND NON-TRIBUTARY SPRINGS AND WATER HOLES.**

The plain meaning of the express terms of PWR 107 does not support the argument that PWR 107 was intended to exclude springs and water holes that are tributary to perennial rivers and streams.<sup>16</sup> In *Hagerman Water Right Owners*, the Idaho Supreme Court stated that “[i]f statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction.” *Id.* at 732, 947 P.2d at 405 (citations omitted). “Statutory interpretation begins with the words of the statute, giving the language its plain, obvious, and rational meanings.” *Id.* (citations omitted). In this case the Court does not find PWR 107 to be ambiguous when applying the plain, common and established meanings of its express terms.

On its face PWR 107 expressly withdrew land as opposed to expressly reserving water. The federal reserved water right is implied as a result of the land withdrawal

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<sup>16</sup> The one caveat is that a “water hole” that is tributary to a perennial stream may not fit under the definition of waterhole.

pursuant to operation of law. However, the lands withdrawn are described in terms of the proximity to the water source. Specifically, if the public land was unreserved and surveyed, then the smallest subdivision (1/4 1/4 section or 40 acre tract)<sup>17</sup> “containing” a “spring” or “water hole” was expressly withdrawn. If the unreserved public land was not surveyed, then all land within a quarter of a mile of the “spring” or “water hole” was withdrawn. PWR 107 does not contain any language regarding the tributariness of a “spring” or “water hole.” Therefore, the only issue in applying the provisions of PWR 107 is determining what was intended by the use of the terms “spring” and “water hole.” PWR 107, or its prior enabling legislation, does not define these terms. There is also an issue regarding the use of the term “contains.” See *Second Order on Joint Submission* (Oct 29, 1999). Once these terms are defined it’s a matter of applying the express terms of PWR 107 to identify the land withdrawn and ultimately the related water right reserved with the withdrawal.

Although PWR 107 does not expressly define “spring” or “water hole” both are common terms with well-established definitions. The Interior Department has also historically applied these same common definitions in the context of PWR 107. The common use of the term “spring” describes “a place where water issues naturally from the surface of the earth.” See e.g. *Branson v. Miracle*, 107 Idaho 221, 225, 687 P.2d 1348, 1352 (1984)(citing *Beisell v. Wood*, 185 P.2d 570 (Ore. 1947), and *Holman v. Christensen*, 274 P. 460 (Utah 1929) for same definition of spring applied in Utah and Oregon); 1Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 313 (2d ed. 1912) (“springs may be defined as those places where water issues naturally from the surface of the earth and the principal sources of natural water courses”).<sup>18</sup> The fact that the water issuing from a spring may be tributary to a water course does not alter the character or definition of a spring. In fact, it is common knowledge that springs typically feed surface streams. In the 1979 Interior Department opinion by the Solicitor Krulitz, which addressed certain issues pertaining to the scope of PWR 107, Solicitor Krulitz applied the

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<sup>17</sup> The parties are in agreement that the phrase “smallest subdivision” refers to a ¼ ¼ section.

<sup>18</sup> The Court acknowledges that the United States is not bound by a state law definition in regards to a federal reserved water right. These cases, however, are illustrative of the fact that the term “spring” has a common well-established definition.

same common definition of spring. “For purposes of [PWR 107] the term ‘spring’ means a discrete natural flow of water emerging from the earth at a reasonable distinct location whether or not such flow constitutes a source of or is tributary to a water course, pond or other body of surface water.” *Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management*, 86 I.D. 553, 587 (1979). Although Solicitor Krulitz’s opinion was later modified as to other issues it was not modified as to the definitions employed. *See Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107*, 90 I.D. 81, 82 (1983).

In regards to the term “water hole,” Solicitor Patterson’s 1927 opinion regarding the issuance of PWR 108 concluded “it must be assumed that ‘water hole’ was used in the order quoted in the sense it is used generally and as defined in Webster’s International Dictionary: ‘A natural hole or hollow containing water.’” *Letter from Solicitor Patterson to the Secretary of Interior* (dated Mar. 8, 1927), Exhibit A to the *Affidavit of Peter J. Ampe*, p.8. Solicitor Krulitz in his 1979 opinion also applied the common definition. “The term ‘water hole’ means a dip or hole in the earths surface where surface or groundwater collects and which may serve as a watering place.” 86 I.D. 553, 587 (1979). Therefore, although “spring” and “water hole” are not defined terms, the terms are not ambiguous. Further, the Interior Department has also historically applied the common meaning of these terms.

The argument was also made that the use of the word “contains” is probative that PWR 107 was not intended to apply to “springs” or “water holes” tributary to perennial streams. Specifically, that if the flow from a spring or water hole leaves the 40-acre tract (or all land within one quarter of a mile if not surveyed) sought to be withdrawn and is tributary to a perennial stream then the spring or water hole is not “contained” within the meaning of the term. *Second Order on Joint Submission*, subcase 65-20033 *et al.* at 4. This Court disagrees. In its strict literal sense the term “contains” means “1. to have in it, hold, enclose, or include [the can contains tea, the list contains 50 items] 2. to have the capacity for holding. . . 4. to hold back or within fixed limits. . . .” *Id.* (quoting WEBSTER’S NEW WORLD DICTIONARY, Third College Ed. (3d.ed. 1991, 1998). If the

term “contains” was intended to be used in its strict literal sense, the land withdrawn would still “contain” the spring or water hole even though the water may flow off the land. Although water is an essential component of a “spring” or “water hole,” those terms refer to specific geographical features, i.e. “spring” connotes the location where water emanates from the earth, and “water hole” connotes the location of a depression in the earth where water collects. The word “contains,” as it relates to the terms “spring” or “water hole” applies to the geographical feature, not the actual water flow emanating therefrom. Accordingly, the land withdrawn can “contain” the spring or water hole irrespective of whether the water flowing from the spring or water hole flows off the parcel.

However, the term “contains” is equally susceptible to another connotation given the context in which the term is being used in PWR 107. The term is equally susceptible to mean “located on.” Although such an interpretation varies from the strict literal meaning of the term, the term nonetheless should not be read in a vacuum without regard to the context in which the term appears. *See e.g., Larson Co. v. United Capital Ins. Co.*, 64 F.3d 1010, 1014 (1995)(holding must read word in context in which it appears including words preceding and following it). In any event, under either interpretation of the use of the word, (whether the term was intended to be used in its strict literal sense or more loosely as a synonym for “located on” ), the end result is the same.

The argument was raised, and the Special Master concurred, that if PWR 107 did not exclude from withdrawals the springs and water holes tributary to running streams (i.e. waters not “contained” within the parcel) that the United States would essentially have an implied water right for all the water on the public domain under PWR 107. Further, that such a conclusion would be inconsistent with various historical federal acts directed at the development of water in the arid west and the United States’ deference to state control over water. This argument, however, assumes that an interpretation of PWR 107, which includes springs and water holes with water flowing off the reserved tract and into running streams, would result in giving the United States water rights in the entire supply of water on the public domain. This assumption is erroneous.

The source of the implied reserved water right is the spring or water hole giving rise to the land withdrawal with a place of use for the water right within the withdrawn

parcel. Segments of the flow running outside of the withdrawn parcel do not give rise to an independent water right. The Court agrees that because springs are typically the source for running streams that a water right in the entire yield of a spring providing the source of water for a running stream could *de facto* result in complete control of the running stream. Although, the issue of quantity is not before the Court, the United States only filed or has stipulated to claims for *de minimus* (.02cfs/13,000 gal/day) amounts. Therefore, it does not appear that the United States is attempting to claim the entire yield.

Furthermore, interpretations of PWR 107 would not support such a claim. The Interior Department also does not take the position that PWR 107 reserved the entire flow of a spring or water hole. “The entire flow or quantity of water of these reserved sources was accordingly not reserved unless necessary for the primary purposes—a fact that must be determined on a case-by-case basis.” *Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107*, 90 I.D. 81, 82 (1983). The Colorado Supreme Court has also addressed the subject: “Monopolization of public water hole or spring waters is prevented when no one appropriator has complete control of the resource. Any amount in excess of the amount needed to prevent monopolization is not reserved water.” *United States v. City and County of Denver*, 656 P.2d 1, 32 (1982). Therefore, the arguments regarding the use of the word “contains” are without merit.

In applying the express language of PWR 107, the location of a “spring” or “water hole” identifies the particular tract of land withdrawn. A federal reserved water right is implied to fulfill the primary purpose of the reservation. In *U.S. v. State of Idaho*, 131 Idaho at 472, the Idaho Supreme Court has already ruled that the primary purpose of PWR 107 was to prevent the monopolization of springs and water holes. Accordingly, a federal reserved water right is created in the spring or water hole giving rise to the land withdrawal in the minimum quantity necessary to fulfill the primary purpose. In this case, quantity is not at issue as the parties have stipulated to a quantity of .02 cfs, less than 13,000 gallons per day.<sup>19</sup> The express language of PWR 107 does not support the position that springs or water holes that are tributary to perennial streams are outside the scope of PWR 107. The express language of PWR 107 also does not support the position

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<sup>19</sup> See *Transcript of Hearing*, January 24, 2001, pp. 35-36.

that water sources other than springs or water holes are within the scope of PWR 107, nor does it support a continuation of the water right off the withdrawn land.<sup>20</sup>

**E. SUBSEQUENT AGENCY AND JUDICIAL INTERPRETATIONS OF THE SCOPE OF PWR 107 ARE OF LIMITED GUIDANCE TO THE RESOLUTION OF THE ISSUES IN THIS CASE.**

There are two judicial interpretations regarding the issue of tributariness, which reach opposite results. However, for the reasons discussed below, the Court declines to follow one decision and is reluctant to rely on the other as persuasive authority absent this Court's independent analysis.

**1. The *Hyrup* Decision.**

The decision of the federal district court for the District of Colorado is cited as the predominate authority for the proposition that PWR 107 was not intended to apply to tributary springs and water holes. In *Hyrup v. Kleppe*, 406 F.Supp. 214 (Dist.Colo. 1976), the Court addressed, *inter alia*, the issue of whether PWR 107 applied to springs or water holes tributary to running streams. The District Court stated:

It has been held, consistently, by administrative interpretation, that the effect of this executive order was to withdraw for public use every spring or water hole on public land which was not tributary to a running stream. At the argument of the present case, it was conceded that if this spring is actually tributary to the Frying Pan River, it would not be subject to the executive order of withdrawal and the statutory authority under which it was issued.

*Id.* at 216. However, in this Court's view, reliance on the *Hyrup* opinion to support the proposition is misplaced. Although the *Hyrup* opinion concludes that it has been "consistently" held by administrative interpretations that PWR 107 only withdrew springs and water holes that are not tributary to running streams, the opinion cites to no such administrative authority. This Court's independent research of administrative

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<sup>20</sup> According to statements made by the United States at the January 24, 2001, hearing, the claimed place of use for all the PWR 107 claims is the surveyed 40-acre tract in which the spring or water hole is located. *See Transcript of Hearing*, January 24, 2001, pp. 34-35. Although the United States is not claiming a continuation of the reserved water right beyond the boundaries of the withdrawn land, the Court included

interpretations did not yield the same conclusion, as the Court was unable to locate any such administrative authority. In an effort to ascertain the administrative interpretations referred to in the *Hyrup* opinion and ultimately follow the Court's analysis; this Court reviewed the record from the *Hyrup* proceedings, including memoranda filed and the reporter's transcript from the hearing on the matter.

A review of the record indicated that although the issue of tributariness was discussed the issue was only tangentially related to the issue before the *Hyrup* Court. Therefore, there was no legal analysis on the issue. *Hyrup* was a review of an administrative ruling. For purposes of the proceeding the United States orally agreed on the record that PWR 107 would not apply to springs or water holes tributary to running streams. In effect for purposes of the proceeding there was a stipulation of the parties as to the scope of PWR 107. The matter was not argued as a legal issue because the United States took the position that the administrative agency below made a factual determination that the water source at issue was not tributary to another watercourse. The United States also took the position that irrespective of whether the subject water source was within the scope of PWR 107, the claimant still required a right-of-way to use the water and that the issue before the Court turned on the claimant's ability to perfect such a right-of way. Therefore, although the issue of tributariness was addressed, the issue was not squarely before the Court, making the statements in the opinion regarding tributariness more or less dicta.

In regards to the administrative interpretations collectively referenced in the *Hyrup* opinion, the only administrative interpretation authority argued at the hearing and in the briefing to support the tributary-non-tributary distinction was the 1927 interpretation by Solicitor Patterson regarding the issuance of PWR 108. This Court has already concluded that the Solicitor's opinion deals with describing the geological features defined by the use of the term "water hole" as opposed to creating a bright-line tributary-non-tributary distinction in the application of PWR 107. For these reasons it is the opinion of this Court that reliance on the *Hyrup* opinion is not dispositive of the issues in this case.

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this matter in its analysis because it is integrally related to the central issue of whether there is a "tributary" factor concerning PWR 107 land withdrawals.

Solicitor Krulitz in his 1979 opinion regarding the scope of PWR 107 also rejected the holding in *Hyrup* on the issue of tributariness on essentially two bases. First, that the definition of what constitutes tributariness between water sources varies significantly between states. In Colorado where the *Hyrup* case originated, all water within the state was presumed to be tributary. Because the *Hyrup* Court did not define “tributary” as applied to PWR 107, Solicitor Krulitz opined that the application of PWR 107 could not be subject to state law regarding a definition of “tributary.” Secondly, Solicitor Krulitz, also concluded, as does this Court, that the 1927 opinion by Solicitor Patterson did not conclude that PWR 107 only applied to springs and water holes that are not tributary to a stream. *See supra* section VII.C.2. Although the Solicitor’s opinion was subsequently modified, the opinion was not modified as to this issue. *Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107*, 90 I.D. 81, 82 (1983).

## **2. *United States v. City and County of Denver.***

In 1982, in *United States v. City and County of Denver*, 656 P.2d 1 (1982), the Colorado Supreme Court specifically rejected the holding in *Hyrup* that PWR 107 was limited to non-tributary water holes and springs. “We are convinced nothing in the presidential proclamation supports that conclusion of *Hyrup*.” *Id.* at 32, fn. 51. As indicated above (*supra* section VII.C.1), the basis for the Colorado Supreme Court’s conclusion was that the executive order or the related enabling legislation did not distinguish between tributary and non-tributary water and that to impute such a distinction would frustrate the primary purpose of the executive order. While this Court agrees with the reasoning and conclusion in *City and County of Denver*, the opinion lacked sufficient analysis on the issue for this Court to rely entirely on the opinion as persuasive authority absent a comprehensive independent analysis. However, in *United States v. State of Idaho*, the Idaho Supreme Court relied on *City and County of Denver* as persuasive authority on the issue of whether PWR 107 created an implied federal reserved water right. 131 Idaho at 471, 472, 959 P.2d at 470, 471 (citing *City and County of Denver*). Consistent with the opinion of the Colorado Court, to the extent a tributary–non-tributary distinction results in defeating the primary purpose of PWR 107 (as already

determined by the Idaho Supreme Court), it would be error for this Court to imply the existence of such a limitation. In this regard, the Colorado decision represents persuasive authority on the issue.

The Department of Interior also concurred with the interpretation of the Colorado Supreme Court. In 1983, the Office of the Solicitor for the Department of the Interior (Solicitor Coldiron) issued an opinion modifying the prior decision issued by Solicitor Krulitz as to different issues but agreed with determination that for purposes of PWR 107 it made no difference whether or not the spring or water hole was tributary to another water source. Solicitor Coldiron goes on to state in the opinion: “After close scrutiny, it is my opinion that the Colorado Supreme Court correctly interpreted the Executive Order of 1926.” *Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107*, 90 I.D. 81, 82 (1983).

### **3. Agency Applications and Interpretations.**

Homesteading did not end with the issuance of PWR 107. Following the issuance of PWR 107, when an application for entry was made, the General Land Office conducted an investigation to determine whether the land in question was withdrawn pursuant to PWR 107 or was available for entry (i.e. whether the land contained a spring or water hole of the type contemplated by PWR 107). In this regard, the Department of Interior issued regulations establishing criteria for field agents to apply in making the investigation. The regulations, among other things, primarily focus on whether the spring or water hole supplies enough water to benefit more than a one-family domestic and stock use and the scarcity of water in the particular region.

Although the language of PWR 107 does not expressly exclude small water sources the Department of Interior has applied such an interpretation since its issuance. *Circular 1066*, which was issued approximately a month after PWR 107, provided that PWR 107 was to be construed withdrawing springs and water holes capable of providing enough water for the general use by the public and not to be construed as applying to small springs or water holes affording only enough water for one family and its domestic animals. *Selections, Filings, or Entries of Lands Containing Springs or Waterholes—All Prior Instructions Amended, [Instructions Circular 1066]*, 51 Land Dec. 457-58 (May

25, 1926), United States' *Supplemental Memorandum Regarding Public Water Reserve No. 107*, Exhibit 1.

Subsequently issued Code of Federal Regulations for administering PWR 107 include essentially the same criteria. The Court has reviewed such administrative regulations and none delineate between tributary and non-tributary springs and water holes nor do the parties cite to any regulations that make such a distinction. *See e.g., Regulations of the Department of Interior*, 43 C.F.R. 292.1 *et seq.* (1938)(citing *Circular 1066*); *Regulations of the Department of Interior*, 43 C.F.R. 2311.0-3 *et seq.* (1970)(citing *Circular 1066*).

Following an investigation, if it was determined that the land was withdrawn pursuant to PWR 107 and the application for entry was denied, applicants had the opportunity to contest the withdrawal determination in an administrative forum. Accordingly, there exist a number of Interior Department opinions regarding the scope of PWR 107. However, other than Solicitor's Patterson's opinion regarding PWR 108, none of the Interior Department decisions provided by the parties, or the Court's independent research of Interior Department decisions, specifically describe the geological features of the spring or water hole or address the issue of tributariness. These decisions all turn on other issues regarding the scope of PWR 107 such as quantity, developed water sources and purposes other than stockwatering etc., which are not at issue in this case.

Finally, after the issuance of PWR 107, additional public water reserves were issued if it was determined that PWR 107 did not withdraw the land in question, as was the situation with PWR 108. The Court has reviewed the public water reserve recommendations issued after PWR107 and none expressly indicate that the spring or water hole involved is tributary to a running or perennial stream. Rather, these recommendations rely on a running or perennial stream as the basis for the withdrawal which is not only outside the scope of PWR 107 but also consistent with Solicitor Patterson's decision regarding PWR 108. *See e.g., Order of withdrawal for Public Water Reserve 112 and accompanying memoranda, Affidavit of David J. Barber regarding State's Exhibit V.*

A basic tenet of statutory construction is that administrative agency interpretations and historical applications of a statute are used as an aid to interpreting the statute "where

the public relies on that rule over a long period of time.” *Hagerman Water Right Owners*, at 733, 947 P.2d at 406 (citing SUTHERLAND STAT. CONST. (5<sup>th</sup> ed. 1992)). Because the historical interpretations, regulations and decisions of the Interior Department do not support a tributary non-tributary distinction in applying PWR 107, this Court finds that reliance on this tenet of construction to support such a distinction is misplaced. Historical interpretations and applications do however support the conclusion that PWR 107 was not intended to apply to a running stream reach as a basis for a withdrawal or that PWR 107 did not apply to water source only capable of supplying water enough for a single family.

## VIII. CONCLUSION

For the above stated reasons, this Court holds that PWR 107 withdrew lands surrounding springs or water holes providing water sufficient for more than just a single-family use. PWR 107 then created an appurtenant implied federal reserved water right in the spring or water hole giving rise to the land withdrawal irrespective of whether or not the water flowing from the spring or water hole is tributary to a perennial running stream. The place of use for the water right is within the boundaries of the 40-acre section withdrawn (or land within one quarter mile if land was unsurveyed as of April 17, 1926). Water flowing from the spring or water hole outside of the boundaries of the withdrawn land does not create another land withdrawal or accompanying reserved water right. Pursuant to stipulation of the parties the quantity for each reserved right is *de minimus* (.02cfs/13,000 gal/day). Stream segments and other bodies of water that do not constitute a spring or water hole within the common meaning of the terms are outside the scope of PWR 107.

## IX. ORDER OF RECOMMITMENT FOR FURTHER PROCEEDINGS

The above-captioned consolidated and joint submission subcases are hereby recommitted to Special Master Cushman for further proceedings consistent with this *Order* and for a *prima facie* showing pursuant to Idaho Code § 42-1411A(12) in the event

this opinion is not appealed. However, because this decision constitutes a final disposition of the objections raised in this matter and the significant number of subcases dependant on this ruling the Court is certifying the matter as final pursuant to I.R.C.P. 54(b) to avoid any further delay and to allow for immediate appeal.

IT IS SO ORDERED

DATED: December 28, 2001

SIGNED: \_\_\_\_\_  
Roger S. Burdick  
Administrative District Judge and  
Presiding Judge of the Snake River  
Basin Adjudication

**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: December 28, 2001

SIGNED: \_\_\_\_\_  
Roger S. Burdick  
Administrative District Judge and  
Presiding Judge of the Snake River  
Basin Adjudication