

**IN THE DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT
WASHAKIE COUNTY, STATE OF WYOMING**



IN RE: THE GENERAL ADJUDICATION)
OF ALL RIGHTS TO USE WATER)
IN THE BIG HORN RIVER SYSTEM)
AND ALL OTHER SOURCES, STATE)
OF WYOMING)
Civil No. 86-0012-3906

**JOINT MOTION TO ADJUDICATE PERMIT NO. 6902R IN PART AND REMAND
THE REMAINDER TO THE STATE ENGINEER**

The United States of America (“United States”), and the Objector Owl Creek Irrigation District (the “Owl Creek”) by and through their respective undersigned attorneys, hereby move the Court to enter an Order adjudicating, in part, and remanding to the State Engineer, in part, Permit No. 6902R, and as grounds therefore, movants state as follows.

1. This action was brought pursuant to Wyoming Statutes, Section 1-37-106, which states, in pertinent part:

The court conducting such a general adjudication shall:

* * * * *

Determine the status of all uncanceled permits to acquire the right to use the water of the State of Wyoming and adjudicate all perfected rights thereunder not theretofore adjudicated...

WYO. STAT. § 1-37-106(A)(I)(A)(III) (LEXISNEXIS 2003).

2. Section II.E.1 of the *1997 Big Horn Adjudication Amended Phase III Procedures* (Procedures) provides as follows:

All permits applied for, that are received by the State Engineer, prior to midnight December 31, 1984, shall be adjudicated in this action, with the following exception: if a permit applied for before this date is extended such that the deadline for application of water to beneficial use or completion of the reservoir extends beyond December 31, 1988, the permit may be excluded by order of the Special Master.

As demonstrated herein, the completion of the reservoir to hold the full amount of water permitted and for which the dam was constructed has yet to be fully accomplished.

3. Under Phase III of the adjudication, the State can only recommend and the Court can only adjudicate water that has been historically stored under unadjudicated reservoir permits.

4. This matter comes before the Court pursuant to the objection of Owl Creek in the above referenced matter. Owl Creek objected to the elimination of 8,152 acre-feet of constructed storage capacity in Anchor Dam and Reservoir. Reclamation signed an "Elimination of Unadjudicated Reservoir Capacity" document on November 30, 2005; and a "Proof of Construction of Reservoir" on December 1, 2005, which proof contained a request for elimination. Owl Creek Irrigation District, the ultimate beneficiary of the stored water, was not consulted and objected. The United States and Owl Creek agree that the Elimination of Unadjudicated Reservoir Capacity should be and is hereby withdrawn.

5. The original permit for Anchor Dam was filed for by the Owl Creek Irrigation District on December 18, 1933, for 22,011 acre-feet of storage for irrigation use. The Permit was later assigned to the United States, Bureau of Reclamation on October 19, 1946. The United States Department of the Interior, Bureau of Reclamation ("Reclamation"), is the current holder of Permit No. 6902R. The Owl Creek Irrigation District, through a contract with Reclamation, is the user of the irrigation water stored under Permit No. 6902R. The original project was permitted for irrigation, but the federal funding was allotted for both irrigation and flood control.

6. Pursuant to Permit No. 6902R, Reclamation, constructed Anchor Dam with due diligence at a cost of approximately \$ 5.3 million. Anchor Dam was constructed with a capacity to store 17,412 acre-feet to benefit the lands within the Owl Creek Irrigation District for purposes of irrigation and to provide flood control benefiting all lands susceptible of flooding.

7. Due to circumstances beyond the control of the Bureau of Reclamation or Owl Creek, the reservoir behind Anchor Dam is not currently able to store 17,412 acre-feet and release that amount for beneficial use for irrigation. Upon initial filling of the reservoir, a series of sinkholes and leaks developed in the reservoir basin area. These geological problems were not detectable prior to the reservoir construction and filling. From 1961, when the reservoir first stored water, through at least 1980 sink holes and other depression in the floor of reservoir continued to develop. The sinkholes caused a portion of the water legally diverted under the Permit to be unavailable for release to the intended irrigation beneficiaries. The presence of the sinkholes made the water physically unavailable for storage and use above the level of 9,252 acre-feet.

8. The United States has diligently undertaken steps to reduce the excessive reservoir seepage loss, and improve the impoundment capability of Anchor Dam and reservoir. These efforts have included filling sinkholes, diking off the large sinkholes from the main reservoir area and blanketing smaller leaks at a total cost of about \$1.5 million. As a result, the United States has been able to store at least 9,252 acre-feet of water in one water year. In 1967 the reservoir reached a maximum water surface elevation of 6418.55 feet on July 5 and again on July 6. Based on the acre-capacity table in use in 1967, 9,252 acre-feet of water was stored in Anchor Reservoir at elevation 6418.55 feet.

9. Each time these sink holes and other depressions appeared significant effort was made by Reclamation to fill these areas using material from within the reservoir high water line. In addition, it appears that some sinkholes have been sealed with silt and no longer present a leakage problem. As a result of the reoccurring sinkholes and work in within the reservoir high water line to repair these areas, the capacity of the reservoir may have increased such that the maximum water stored in the reservoir in 1967 at reservoir elevation 6418.55 feet may have been greater than the 9,252 acre-feet shown by the reservoir's acre-capacity table. It is believed that a reoccurrence of a large runoff event similar to that in 1967 would most likely result in a higher storage level in the reservoir then occurred in 1967. Determination of the actual water stored in the reservoir in 1967, or storable in a high-flow year, will require additional evaluation or survey of the reservoir site area. However, water has not been physically available to allow such a storage event for a number of years. Therefore, additional time is needed to determine the effectiveness of the past Anchor Reservoir repair work, and determine the actual amount that can be stored and placed to beneficial use under the current reservoir conditions.

10. On November 22, 1967, Reclamation submitted to the Wyoming State Engineer a revised application map and a Notice of Completion of Construction for Anchor Dam and Reservoir showing an as constructed reservoir capacity of 17,412 acre-feet. The Parties agree that the Anchor Dam, as constructed, is capable of impounding the 17,412 acre-feet of water allowed by the Permit. The State Engineer in a letter dated September 11, 1968, acknowledged receipt of the Notice of Completion of Construction and stated: "all notices have been filed that are required by law." The State Engineer further stated that the only step remaining to secure an adjudicated water right was receipt of the final proof of construction from the Water Division Superintendent for Water Division No. 3. Because of the sinkholes which caused a substantial portion of the water captured by the dam to disappear unused, the Division Superintendent, has not completed the proof of construction.

11. Owl Creek is currently engaged in efforts to seek funding from the Wyoming Water Development Commission to construct the means to store and place to beneficial use the full 17,412 acre-foot constructed capacity of Anchor Dam.

12. It is undisputed by either the State or Owl Creek that 9,252 acre-feet of water have been stored and placed to beneficial use pursuant to Permit No. 6902R, and that this portion of the water storage right should be adjudicated, as no further proof is needed. However, additional time is needed to allow for proof of construction for the remaining 8,160 acre-feet permitted capacity of Anchor Dam, and the 8,160 acre-feet capacity under Permit No. 6902R should be remanded to the State Engineer to allow the United States and Owl Creek to request an extension of time to put the water to beneficial use, with sufficient time provided to the State Engineer's Office to address the issues of the remanded Permit. See generally, WYO. STAT. § 41-4-506 WYO. STAT. § 41-3-401.

13. The unique circumstances related to Anchor Dam justify the remand of Permit No. 6902R to the State Engineer. Anchor Dam has been constructed at substantial cost to the taxpayers, and the Owl Creek Irrigation District has a continuing need for the water intended to be stored. A summary of the distinguishing facts and circumstances justifying the remand to the State Engineer and potential continuation of the Permit includes:

a. Anchor Dam was constructed with due diligence at a cost of \$5.3 million, with the clear intent to appropriate a water right for 17,412 acre-feet of water.

b. Anchor Dam was built in accordance with the terms of the permit, and the design plans, and is capable of impounding 17,412 acre-feet.

c. Geologic structures which were unanticipated and unknown at the time of design and construction have interfered with the ability of the dam to store water to its constructed capacity. The United States has continued to exercise due diligence regarding Permit No. 6902R. Significant engineering and construction activities have been undertaken since the dam was completed at an additional cost of approximately \$1.5 million. This work included but was not limited to locating and attempting to determine the subsurface size of sink holes; building dikes and taking other steps to plug sinkholes and reduce excessive reservoir seepage loss; and attempting to determine where the water travels after entering the sink holes. The location and elevation of the spillway have not been moved; and the capacity of the dam to impound the full 17,412 acre-feet has not been decreased. This work is believed to have expanded the ability to store water and place it to beneficial use, but hydrologic conditions have not allowed greater storage in a number of years.

d. There are ongoing efforts to obtain state funding to enable the water users to place to beneficial use the remaining 8,160 acre-feet of storage under the Permit. Current due diligence activity includes an ongoing Owl Creek Irrigation District Storage, Level II Study being performed by Short Elliott Hendrickson, Inc. of Ft. Collins, CO, which attempts, inter alia, to quantify the losses and to pinpoint their location, and also involves locating other sites for storage. This study, funded by the Wyoming Water Development Commission, has been completed, but as of this date a report has not been received.

e. The permit for Anchor Dam is uniquely trapped in this General Adjudication, with arbitrary deadlines having nothing to do with the permit itself. All reservoir permits have unique attributes which, with due diligence, are routinely granted extensions for completion. If Anchor Dam were not located in Division III, there would be no arbitrary deadline assigned.

f. The factual uniqueness of this situation will not set any precedent for any other permit in this, or any other, Adjudication. The sinkhole problems of Anchor Dam and

