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Department of Water Resources

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In RE:

SRBA
Case No. 39576

) Subcase ##: 55-10288B, 55-10289B,
) 55-10290B, 55-10292B, 55-10293B,
) 55-10295B, 55-10296B, 55-10297B
) 55-10298B, 55-10299B, 55-10300,
) 55-10301B, 55-10303B, and 55-13451
)
) MEMORANDUM IN OPPOSITION TO
) UNITED STATES' MOTION TO ALTER
) OR AMEND THE SPECIAL MASTER'S
) REPORT AND RECOMMENDATION,
) FINDINGS OF FACT AND CONCLUSIONS
) OF LAW

I. INTRODUCTION

LU Ranching Company ("LU Ranching"), by and through its attorneys, respectfully
submits this Memorandum in Opposition to United States' Motion to Alter or Amend the Special

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Master's Report and Recommendation, Findings of Fact and Conclusions of Law. LU Ranching previously filed a Memorandum in Support of LU Ranching's Motion to Alter or Amend, addressing what have been termed "technical" issues involving the legal descriptions contained in the Special Master's Report and Recommendation. In an attempt to simplify the process of review, LU Ranching incorporated therein its response to those portions of the United States' Memorandum in Support of United States' Motion to Alter or Amend dealing with the United States' recommended amendments to the water right legal descriptions contained in the Court's recommended Partial Decrees. That discussion will not be repeated now other than to reference the Court to LU Ranching's prior Memorandum addressing LU Ranching's opposition to many of the technical changes proposed by the United States in its Memorandum in Support of United States' Motion to Alter or Amend.

The present Memorandum addresses what has been termed the substantive matter at issue, namely, LU Ranching's entitlement to a priority date of June 10, 1876 for all of the water rights at issues. Because the United States' request that the Court amend the recommended priority date is without basis in law or in fact it should be denied.

II. ARGUMENT¹

- A. The Court's recommended June 10, 1876 priority date is supported by both the evidence and the law.

¹ Most of the theories raised by the United States in support of its Motion have been fully argued and briefed by the parties before. Accordingly, LU Ranching hereby incorporates by reference its arguments and briefs including but not limited to LU Ranching's Trial Brief, LU Ranching's Post Trial Brief, and LU Ranching's Findings of Fact and Conclusions of Law.

The State of Idaho is a prior appropriation state whereby water rights are acquired and given priority based on the date the water is diverted and put to beneficial use. *See Idaho Constitution, art. XV, § 3; see also In Re SRBA Case 39576 (Minidoka National Wildlife Refuge v. United States*, 996 P.2d 806, 811 (Idaho 2000). A water right so acquired may be transferred, and will carry with it all elements of the water right including the early priority date representing the first date the water was put to beneficial use. *See Water Rights Law in the Nineteen Western States*, Wells A. Hutchins, J.D., Volume I, p. 485. Put another way, the priority date of the transferred water right relates back to the first act of beneficial use; this is referred to as the “relation back” doctrine. Further, the full water right, with the early priority date, will transfer even absent specific mention of the water right in the instrument of conveyance. *See In Re SRBA 39576 (Subcases 55-10288B et al.) Memorandum Decision and Order on Challenge*, Judge Wood, April 25, 2000, p. 18, *citing Crow v. Carlson*, 107 Idaho 461 (1984).

In the present case, the Court’s recommended 1876 priority date for the water rights at issue is fully supported by the evidence. LU Ranching presented into evidence an uninterrupted chain of title dating back to the first patent obtained by Ezra Mills in 1876. *See Exhibit “X”*: Chain of Title to LU Ranching Base Property located in Idaho, including chart of properties, index of deeds, and 28 deeds and patents. These documents cannot be viewed in isolation to demonstrate the time and place of appropriation as suggested by the United States, but must be viewed in context. We know, for example, that the original settlers, including Ezra Mills, were engaged in the livestock business as of the date their properties were patented to them by the United States and that they used both their patented lands and surrounding unoccupied public

lands to support the cattle. *See* Testimony of Dr. Chad Gibson. Historic use of the water and lands at issue, pre-dating the Taylor Grazing Act, is further supported by the fact that after the enactment of the Taylor Grazing Act, LU Ranching's predecessors in interest obtained grazing permits and in order to acquire those permits they had to present evidence of historic and continuous use of these lands in addition to ownership of commensurate base property prior to 1934. *See* LU Ranching Exhibits C, D, E, F, H, L, M, N, P, R, Y; *see also* United States Exhibits 5. Testimony offered at trial adds further support for the conclusion that LU Ranching's predecessors, including the fact that Mr. Mills appropriated water for stockwater purposes in the areas at issue, put it to beneficial use, and the successor continues to do so to the present day. *See* Testimony of Dr. Chad Gibson, Trial Transcript p. 384-392; *see also* Testimony of William A. Lowry, Trial Transcript p. 282, 287, 296-304; Testimony of Timothy Lowry, Trial Transcript p. 425-443; Testimony of Thomas George Skinner, Trial Transcript p. 461-512. Finally, substantial evidence was offered supporting the conclusion that it was the intent of LU Ranching's predecessors in interest to convey the water rights as appurtenances to the base ranch property.² Given all of the evidence taken together and put in historic context, this Court was

² It was the testimony of one of LU Ranching's predecessors in interest that it was his intent to convey the water rights as appurtenances to the base ranch property. *See* Testimony of William A. Lowry, p. 284-296. None of LU Ranching's predecessors in interest reserved water rights in the deeds transferring the base ranch properties. *See* Exhibit X: Chain of Title to LU Ranching Base Property, including chart of properties, index of deeds and 28 deeds and patents. After the enactment of the Taylor Grazing Act, applications to transfer grazing preferences were filed concurrently with the transfer of the base ranch property. *See* Exhibit X: Chain of Title and related documents; *see also* Exhibit V, p. 000094-000103 (incorporating written conveyance with specific mention of grazing rights at page 000099, relating to deed 8 in Exhibit X, into written conveyance from Lowry to LU, relating to deed 7 in Exhibit X); Exhibit M (reflecting transfers of grazing privileges to successive owners of base property for Cliffs

correct to recommend an 1876 priority date for all of the water rights at issue.

All of the arguments raised by the United States to rebut the above are without merit. First, the United States argues that Ezra Mills' homestead is connected to LU Ranching's grazing preference in the Cow Creek Allotment only and, therefore, cannot be used as a basis for water rights located within other allotments. Again, the United States fails to recognize or acknowledge historic grazing practices, including the fact that in the late nineteenth and early twentieth centuries ranchers grazed in common throughout a vast geographic area. Moreover, although it is convenient today to compartmentalize matters through reference to specified grazing allotments, that analysis cannot be applied to ranching operations in 1876 when numerous ranchers grazed in common, there were no grazing allotments and there were no grazing permits limiting grazing to precisely defined geographic areas or allotments. As this Court properly recognized, "LU Ranching has ... been able to show that their predecessors in interest were using open federal land and the water thereon from the dates that the original patent holders occupied and commenced working on their homesteads. This resulted in different dates for the base property as it was pieced together. However, this special master believes that these

allotment, reflected in Exhibit X, deeds 1-6); Testimony of Dr. Chad Gibson, p. 370-385. The water rights at issue benefit and add value to the base ranch properties owned by LU Ranching's predecessors in interest and now by LU Ranching, and, because they were necessary to the beneficial use and enjoyment of the base ranch properties and necessary to sustain the economic viability of the base ranch property, the water rights were appurtenances to the base ranch properties and transferred as such. *See* Testimony of Dr. Chad Gibson, Trial Transcript p. 384-389; *see also* Testimony of William A. Lowry, p. 273-277, 281-284, 291-295; Testimony of Timothy C. Lowry, Trial Transcript p. 332-341; Testimony of Thomas George Skinner, Trial Transcript p. 495-512 (essential consideration of grantees in purchasing base ranch property included the availability of appurtenant water rights located on public land or, later, on the federal allotments).

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amount to distinguishments without a difference ... They claimed only one right for each location, which their earliest predecessors used in common with each other and with others. They are entitled to the earliest of those dates proven which is June 10, 1876.” Special Master’s Report and Recommendation, p. 10-11.

Second, in addition to the above, the United States argues that a water right claimant must have a possessory interest in the land in order to acquire a water right. *See* United States’ Memorandum, p. 13-14. This riparian theory has been asserted before by the United States, and has been rejected the Courts. *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master’s Reports and Recommendations, Presiding Judge Hurlbutt, Jr. (September 30, 1998); *see also In Re SRBA Case No. 39576*, Memorandum Decision and Order on Challenge, Judge Wood (April 25, 2000). In sum, a private rancher can acquire stockwater rights on public land. These rights are appurtenant to the base ranch property, and, as appurtenances, can be transferred as such.

Finally, the United States challenges the adequacy of the conveyances of the water rights as appurtenances. The United States challenges the absence of language in the deeds transferring the water rights at issue. However, the Court has already ruled that a water right can be conveyed without expressly mentioning the water right in the same instrument that conveys the real property to which the water right is appurtenant. *See In Re SRBA 39576 (Subcases 55-10288B et al.) Memorandum Decision and Order on Challenge*, Judge Wood, April 25, 2000, p. 18, *citing Crow v. Carlson*, 107 Idaho 461 (1984). The relevant inquiry is whether the grantor intended to transfer the water rights as appurtenances as part of the conveyance of the base ranch

property. As discussed, above, and previously briefed at length, ample evidence has been presented supporting the Special Master's ruling that LU Ranching's predecessors in interest were using open federal land and the water thereon from the dates that the original patent holders occupied and commenced working their homesteads. The uninterrupted chain of title presented as evidence at trial, taken together with evidence of later grazing applications and transfers of grazing permits, testimony of historic grazing practices, evidence that the base ranch property would have little or no economic value without the water rights at issue, and, importantly, direct testimony that it was the intent of one of LU Ranching's predecessors in interest to transfer the water rights with the base ranch property, join together to provide clear and convincing evidence that it must have been the intent of each of LU Ranching's predecessors to transfer the water rights with the base ranch property. Common sense also supports this conclusion. As previously recognized by the Court, "where the use of the grazing allotments and water rights are necessarily connected with the use and enjoyment of the base ranch property, it is reasonable that a grant of the ranch would include both the grazing preference and the water rights used thereon." *See In Re SRBA 39576 (Subcases 55-10288B et al.) Memorandum Decision and Order on Challenge*, Judge Wood, April 25, 2000, p. 19-20.

To prove intent to transfer the water rights as appurtenances, the United States apparently wants LU Ranching to perform the impossible: to produce direct testimony from LU Ranching's predecessors in interest that they appropriated the water for domestic or stockwatering purposes and intended to transfer the water rights as appurtenances to the base ranch property. LU Ranching cannot wake the dead in order to satisfy the impossible requirements of the United

States. What LU Ranching could do, and did do, was to produce testimony from one predecessor in interest still among us, Mr. William Lowry, that it was indeed his intent to transfer the water rights as appurtenances. In addition, LU Ranching produced overwhelming documentary and historical evidence that it was the intent of LU Ranching's predecessors in interest to transfer the ranching operation in its entirety which included both the base ranch property and the water rights on public land necessary for the continued operation and viability of the ranch. This evidence coupled with the law of the case are more than sufficient to support the 1876 priority date recommended by this Court.

- B. The United States should be estopped from challenging the 1876 priority date in the "B" claims now at issue given the fact that the United States did not object to the early priority dates previously decreed in the "A" claims.

The subcases at issue herein, were once part of a greater set of water right claims. In 1992, LU Ranching filed several claims for stockwater rights, some located on federally administered grazing allotments and others located on private land or land owned by the state of Idaho. These claims were later separated and given either "A" designations, representing water rights located on private or state owned land, or "B" designations, at issue herein, involving water rights located on federal land. The United States was a party to both the suit involving the "A" claims as well as the "B" claims. The "A" claims have now been decreed, and were awarded an early priority date, dating to the first date LU Ranching's predecessors in interest put the water to beneficial use, based on the same chain of title as presented herein in support of the "B" claims. As a party to the litigation of the "A" claims, the United States had a full and fair opportunity to object to LU Ranching's position that the priority date relates back to the date the

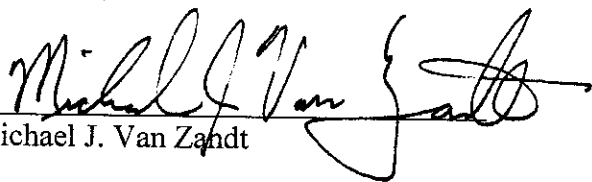
water was first put to beneficial use by LU Ranching's predecessors in interest and that the water rights, complete with the early priority date, were intended to be transferred, and were in fact transferred, by each in the line of LU Ranching's predecessors in interest all the way to the present day. Having failed to make that objection, and given the fact that both the "A" and "B" sets of rights were acquired through the same predecessors in interest and were based on the same acts of appropriation, the United States should be estopped from raising any objection to the 1876 priority date now. See *D.A.R., Inc. v. Rudzik*, 997 P.2d 602 (Idaho 2000); *Eastern Idaho Agricultural Credit Assn. v. Neibaur*, 987 P.2d 314 (Idaho 1999) (collateral estoppel bars relitigation of an issue determined in a prior proceeding).

III. CONCLUSION

Having waived any objection to an early priority date by way of litigation and final resolution of the "A" claims, the United States should be estopped now from relitigating the issue of the relation back of the priority date to the first date of appropriation by LU Ranching's predecessors in interest. However, even if the United States is allowed to continue its appeal of this issue, its appeal should fail. Substantial evidence was offered at trial to support the Special Master's recommended 1876 priority date for each of the water rights at issue. Accordingly, the United States Motion to Alter or Amend should be denied.

Dated this 12 day of May, 2003.

Respectfully submitted,
McQUAID BEDFORD &
VAN ZANDT, LLP

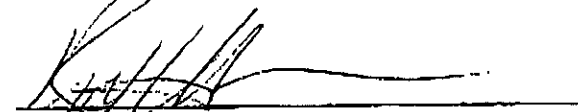
By: 
Michael J. Van Zandt

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By: SEE PAGE 11
Richard L. Harris

As local counsel, having reviewed the foregoing Memorandum in Opposition to United States' Motion to Alter or Amend the Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law, I hereby execute the same this 12th day of May, 2003.

LAW OFFICES OF RICHARD HARRIS



Richard L. Harris

Attorney for LU Ranching Co.

CERTIFICATE OF MAILING

I certify that on May 12, 2003, I mailed the original and copies of the foregoing ***Memorandum in Opposition to United States' Motion to Alter or Amend the Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law*** to the following persons via facsimile or U.S. Mail, the original and/or copies, postage paid and addressed as follows:

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