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Department of Water Resources

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**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	) Subcase Numbers 55-10288B, 55-10289B,
	) 55-10290B, 55-10292B, 55-10293B,
	) 55-10295, 55-10296, 55-10297B,
	) 55-10298, 55-10299B, 55-10300,
Case No. 39576	) 55-10301B, 55-10303B, and 55-13451
	)
	) REPLY MEMORANDUM IN
	) SUPPORT OF LU RANCHING'S
	) MOTION TO ALTER OR AMEND
	) THE SPECIAL MASTER'S REPORT
	) AND RECOMMENDATION,
	) FINDINGS OF FACT AND
	) CONCLUSIONS OF LAW

LU Ranching, by and through its attorneys, hereby submits this Reply Memorandum in Support of LU Ranching's Motion to Alter or Amend the Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law ("LU Ranching's Motion to Alter or Amend"). Specifically, this Reply Memorandum responds to points raised in the United States'

Memorandum dated May 12, 2003. Because both the United States, in its Motion to Alter or Amend, and LU Ranching, through LU Ranching's Motion to Alter or Amend, both requested sometimes identical changes to the place of use and point of diversion descriptions contained in the Special Master's Report and Recommendation, LU Ranching consolidated its briefing of these "technical" issues in its Memorandum in Support of LU Ranching's Motion to Alter or Amend the Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law. Similarly, the United States' Memorandum in Opposition to LU Ranching's Motion to Alter or Amend addresses changes proposed by LU Ranching in its Motion to Alter or Amend as well as technical changes suggested by the United States in its Motion to Alter or Amend. For the sake of expediency and simplicity, LU Ranching addresses herein the technical issues raised by each of the parties, and incorporates its prior Memorandum in Support of LU Ranching's Motion to Alter or Amend by reference.

I. STANDARD OF REVIEW

It is good to remember that the purpose of a motion to alter or amend is to give the parties, and the Court, an opportunity to correct errors that may have occurred. A motion to Alter or Amend pursuant to AO1 Rule 13 is treated as a motion under I.R.C.P. 59(e). The purpose of such a motion is to "correct errors both of fact and law that occurred in its proceedings." *See In Re SRBA Case No. 39576, Order on the Motion of the United States to Alter or Amend the Special Master's Recommendation, Subcases 65-20033 et al.*, p. 2-3 (May 2, 2000), *citing* *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030 (1982). In sum, it provides a "mechanism for corrective action short of an appeal." *Id.*

II. ARGUMENT

In its Motion to Alter or Amend, LU Ranching requested certain changes to the recommended partial decrees to ensure that the recommended partial decrees conform to the maps and other evidence presented at trial. For the reasons outlined below, LU Ranching's Motion to Alter or Amend should be granted in its entirety.

A. 55-10288B

Both the Director's Report and the Special Master's Recommended Partial Decree recommend T.07S, R.06W, Section 35, SENE as a point of diversion and place of use. The Special Master is correct that this is a valid point of diversion and place of use and should be decreed as such. The United States, however, believes that this quarter quarter section should be deleted because "Trial Exhibit 20 shows that the boundary of the South Mountain Grazing Allotment is the property line between the State of Idaho in T.07S, R.06W, Section 36 and the public land in T.07S, R.06W, Section 35." *See* United States Memorandum in Opposition of LU Ranching's Motion to Alter or Amend, p. 2. As previously briefed, however, the testimony admitted at trial supports the conclusion that while the boundary is close, there is a portion of this particular quarter quarter section that is located within the South Mountain Allotment. *See* Trial Transcript p. 270-271 (testimony that the fence surrounding the South Mountain allotment does not follow the section lines). Accordingly, it should not be deleted as either a point of diversion or place of use. Because this quarter quarter section includes areas both within and without the South Mountain Allotment, however, LU Ranching submits that a general provision for the definition or administration of this right would be appropriate. To that end, in its prior Memorandum LU Ranching proposed that the following language be added: "The use of water

within the SENE, Section 35, T.07S, R.06W is limited to the South Mountain Allotment.” This is supported by evidence that LU Ranching has authorization for livestock grazing within the South Mountain Allotment and that LU Ranching and its predecessors in interest have used the area within the fenced in allotment boundary for grazing and watering. *See e.g.* Trial Transcript, p. 271-274.

B. 55-10289B

Both the Director’s Report and the Special Master’s Recommended Partial Decrees include unnamed streams tributary to Juniper Creek as sources. This recommendation is correct. There are little draws and short reaches or streams that come into Juniper Creek. Accordingly, the inclusion of unnamed streams tributary to Juniper Creek as sources is correct notwithstanding the fact that the draws are small enough that they do not appear on the map presented by the United States. The evidence supports the historic watering of cattle throughout this area, and the source descriptions should remain undisturbed so that they properly reflect all of the water historically used for stockwatering in the area. The United States will not be prejudiced by this result.

C. 55-10296

As briefed in LU Ranching’s Memorandum in Support of LU Ranching’s Motion to Alter or Amend, T.05S, R.06W, Section 23, NWNE should be added as a place of use. The purpose of a Motion to Alter or Amend is to provide parties and the Court with a procedural mechanism to correct factual errors and to conform the ruling to the evidence presented at trial. *See In Re SRBA Case No. 39576, Order on the Motion of the United States to Alter or Amend the Special Master’s Recommendation, Subcases 65-20033 et al.*, p. 2-3 (May 2, 2000), *citing Lowe v. Lym*,

103 Idaho 259, 263, 646 P.2d 1030 (1982). In this case, the evidence at trial, including but not limited to United States' Exhibit 22, shows the subject stream running through the northwest corner of this quarter quarter section. Further, the map prepared by the United States does not identify beginning or ending points on the stream as it enters or leaves this quarter quarter section. To the contrary, the beginning and ending points of diversion for this water right as defined in the Director's Report, the Court's recommended Partial Decrees, and on Exhibit 22 prepared by the United States begin at T.05S, R.06W, Section 12 NWSWSW, and then have the stream flowing through several quarter quarter sections including the one at issue herein without interruption, and finally ending at T.05S, R.06W, Section 23 SESWNW. Having judicially admitted that the stream used as the basis for this water right runs without interruption, and was used without interruption, throughout this entire area including the quarter quarter section at issue, the United States' objection to the designation of this quarter quarter section as a place should be denied. *See Strouse v. K-Tek, Inc.*, 930 P.2d 1361, 1363-1364 (Idaho 1997) (judicial admissions remove the admitted facts from the field of controversy, and statements made within the evidence of a party, or evidentiary admissions, may serve as prima facie proof of the facts stated) (*internal citations omitted*). The uncontroverted evidence is that LU Ranching and its predecessors in interest grazed and watered their cattle throughout this area, including along the entire stream segment. There is no prejudice now to the United States if the Special Master's Recommended Partial Decree is corrected to accurately reflect the actual, historic use of this entire stream including that portion running through the quarter quarter section at issue.

D. 55-10297B

Similar to the unnamed streams tributary to Juniper Creek at issue in subcase 55-10289B,

the unnamed streams tributary to Jordan Creek at issue herein are made up of draws or reaches flowing into Jordan Creek and, thus, consistent with the Director's Reports, the unnamed streams should not be deleted as sources from the Special Master's Report and Recommendation. There is simply no error in including unnamed streams tributary to Jordan Creek as sources for this water right.

Also at issue is T.05S, R.06W, Section 13, SWSW. The Director's Report, United States' Exhibit 22, and the Special Master's Recommended Partial Decrees all identify this quarter quarter section as a beginning point of diversion for this water right. The evidence, including evidence presented by the United States by way of its admission of Exhibit 22 at trial, support this as a recommended point of diversion. Having judicially admitted that this is the beginning point of diversion, the United States' request that it be deleted as a point of diversion should be denied.

Consistent with the above, while this quarter quarter section was not identified in the Director's Report or the Special Master's Recommended Partial Decrees (which mirror the Director's Report) as a place of use, LU Ranching has requested by way of its Motion to Alter or Amend that it be added as a place of use. Clearly, neither LU Ranching, the United States, nor the IDWR would designate this as a point of diversion if it was not also the intent to designate it as a place of use. Having judicially admitted that this quarter quarter section contains the beginning point of diversion, the United States should be judicially estopped from opposing the correction of the Recommended Partial Decrees to include it as a place of use. *See Strouse v. K-Tek, Inc., supra.*

Next, the United States continues to claim that T.05S, R.06W, Section 14, NESE and

T.05S, R.06W, Section 23 SWNE should be deleted because the United States' maps do not depict water sources within these quarter quarter sections. However, springs which sometimes flow into the relevant streams, though not depicted on the maps, exist and are used within these quarter quarter sections. In further support of the continued inclusion of these quarter quarter sections as places of use, the IDWR, following investigation, recommended that they be included as places of use. Accordingly, the Court did not error in recommending these sections as places of use, and the United States' request to delete them from the recommended partial decrees should be denied.

Finally, there has been significant discussion about whether T.05, R.06W, Section 24, NESW and SWSE should be designated as places of use on LU Ranching's Partial Decree for water right number 55-10297A or whether these water rights should be given "B" designations. As the United States correctly pointed out, portions of the places of use within these quarter quarter sections are within the Lowry Federal Fenced Range Allotment, therefore supporting the "A" designation of this water right. However, portions of each of these quarter quarter sections also include areas within the Cow Creek Allotment which would support a "B" designation. In keeping with the ultimate goal of ensuring that the water rights are accurately decreed, with sufficient specificity to avoid future conflict, it would be appropriate if the water rights on these quarter quarter sections were decreed without "A" or "B" designations in order to clearly reflect LU Ranching's water right throughout these quarter quarter sections, whether the water is within the Lowry Federal Fenced Range Allotment or within the Cow Creek Allotment. As the evidence presented coupled with the Partial Decree already issued in the 55-10297A, support this water right, such a change should not prejudice the United States.

E. 55-10303B

The source “unnamed streams tributary to Corral Creek” should not be amended. Both the IDWR and the Court correctly recommended that unnamed streams, plural, should be included as sources for this water right. Numerous draws and reaches extend into Corral Creek, and are properly included in the current source description.

As previously briefed, LU Ranching does not agree to the deletion of T.09S, R.05W, Section 33 NWNW as a place of use. It was properly recommended as a place of use by the IDWR and the Court, and although the claimed stream as depicted on the maps admitted at trial only appears to touch upon this quarter quarter section, this quarter quarter section still must be included in partial decree to ensure the complete accuracy of the described water right. Similarly, LU Ranching has requested that the quarter quarter section described as T.09S, R.05W, Section 28 NWSW be included as a place of use. Again, the stream at issue appears from the maps to touch upon this quarter quarter section. Accordingly, to ensure that the described water right is complete, and to conform the Partial Decrees to the evidence presented at trial, the Recommended Partial Decree should be amended to reflect this quarter quarter section as a place of use.

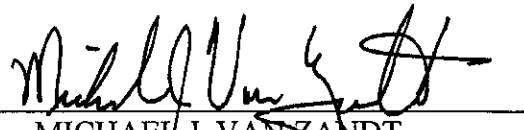
III. CONCLUSION

The entire purpose of a Motion to Alter or Amend is to ensure that the Court’s ruling is accurate and conforms to the evidence presented at trial. LU Ranching’s recommended changes to the Recommended Partial Decrees would do just that. Accordingly, LU Ranching requests that its Motion to Alter or Amend be granted in its entirety, and that the United States’ Motion to Alter or Amend be denied its entirety with the exception of the technical changes agreed upon by

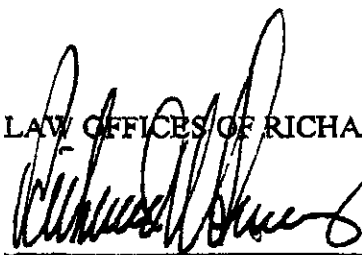
the parties as outlined with specificity in LU Ranching's Memorandum in Support of LU Ranching's Motion to Alter or Amend.

DATED: May 29, 2003

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CERTIFICATE OF MAILING

I certify that on May 29, 2003, I mailed the original and copies of the foregoing ***Reply Memorandum in Support of LU Ranching's 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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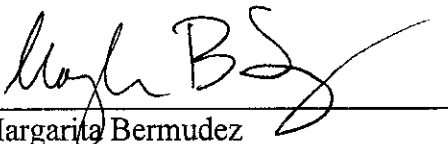
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