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Names of Parties Filing Document:

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Attorneys' Names and Addresses:

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division

LARRY A. BROWN
Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724
Ph.: (202) 305-0435 FAX: (202) 305-0274

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

I. INTRODUCTION

On May 13, 2003, LU Ranching Company (hereinafter "LU") filed a Memorandum in Opposition to United States' Motion to Alter or Amend the Special Master's Reports and Recommendation, Findings of Fact and Conclusions of Law (hereinafter "LU's Memo") in the above-captioned subcases. For the reasons stated below, the United States' Motion to Alter or Amend should be granted.

II. ARGUMENT

A. The recommended priority date is not supported by the evidence or the law

The subcases at issue were remanded to the Special Master when the District Court reversed the Special Master's granting of the United States' Motion for Summary Judgment because there were "genuine issues of material fact." Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief, Order of Recommitment to Special Master Cushman, In Re SRBA, Case No. 39576, Subcases 55-10288 A & B, et al. (hereinafter "District Court's Order"), p. 28. The District Court stated that "the question of whether any water rights, perfected by LU's predecessors-in-interest, have become appurtenant to any particular property interest which has been conveyed to LU, is an issue of fact to be ascertained from the instruments of conveyance and the circumstances surrounding each conveyance." District Court's Order, pp. 13-14 (footnote omitted). The Special Master must now decide whether a stockgrower who grazes his livestock on land owned by another can perfect a stockwatering right on that land, based upon prior use by other stockgrowers who

allowed livestock to roam at large on unenclosed land, by tacking back to the first water user even where there is no evidence of any conveyance of a preexisting water right.

LU argues that they proved the water rights at issue here were preexisting vested water rights owned by Ezra Mills. LU's Memo, pp. 3-8. There is no testimony in the transcript and there is no document in the Exhibits that proves, by a preponderance of the evidence, that Ezra Mills was in the livestock business, or that Ezra Mills in any way depended upon grazing use of public land.^{1/} In fact, there is no evidence in the record that anyone in LU's chain of title^{2/} to privately owned ranch land satisfied the test of a valid appropriation of water from each of the water sources claimed by LU.^{3/} Therefore, the evidence is insufficient to show that Ezra Mills owned stockwatering rights that designated public land as places of use.

LU cites the District Court's Order to support their contention that water rights can be conveyed without a writing. LU's Memo, p. 3. While it is true that the District Court remanded these subcases for trial so that LU would have yet another opportunity to prove conveyance of the

^{1/} See Memorandum in Support of United States' Motion to Alter or Amend the Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law, In Re SRBA, Case No. 39576, Subcase No. 55-10288B, *et al.* dated April 10, 2003 (hereinafter "United States' Memo"), pp. 7-15.

^{2/} Except the self serving inconsistent testimony of William Lowry. See United States' Memo, pp. 16-20.

^{3/} "The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. . . ." Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 677, 679-680, 619 P.2d 1130, 1132-1133 (Idaho 1980). Furthermore, LU did not even try to meet its burden of proving that anyone in their chain of title had the required possessory interest in the land designated as places of use. Lemmon v. Hardy, 519 P.2d 1168, 1171 (Idaho 1974).

water rights to LU under a number of theories, LU's evidence was insufficient to prove such conveyances. United States' Memo, pp. 15-20; United States' Post Trial Memorandum, In Re SRBA, Case No. 39576, Subcase No. 55-10288B et al. dated May 18, 2001, pp. 11-17.

In its remand order, the District Court required LU "to support its theory that each conveyance in its chain of title back to 1872 (or whatever priority date LU can prove) carried with it a grant of the subject water rights." District Court's Order, p. 26. LU argues that they presented sufficient evidence to meet this burden through the testimony of William Lowry, Timothy Lowry, Chad Gibson, and Thomas George Skinner showing the intent of the grantors in LU's chain of title to its privately owned ranch land to transfer water rights located on public land to successors in interest. LU's Memo, pp. 3-8. LU did not present any evidence of acts by predecessors in interest that could possibly make the water rights at issue appurtenant to LU's privately owned ranch land. Mr. William Lowry, the only witness with personal knowledge, did testify that he intended to transfer some of the water rights at issue to LU.⁴ See Trial Transcript, p. 296. However, Mr. Lowry's testimony is self-serving and inconsistent with a warranty deed that did not even mention water rights.⁵ Thus, the evidence does not show that "each conveyance" in LU's chain of title "carried with it a grant of the subject water rights." District Court's Order, p. 26 (emphasis added).

⁴ Mr. William Lowry was the only "grantor" to testify. He had personal knowledge, as the grantor, of only one real property conveyance in LU's entire chain of title. Timothy Lowry, Chad Gibson and Thomas Skinner were not grantors in any property conveyance in Exhibit 2. Chad Gibson and Thomas Skinner had no personal knowledge of any of the conveyances in LU's chain of title.

⁵ See United States' Memo, pp. 16-20.

LU states that water rights designating land not owned by the claimant as places of use are appurtenant to the water right claimant's privately owned ranch land. LU's Memo, p. 6. LU then cites the District Court's Order to support their contention "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." LU's Memo, p. 6. In sum, LU's sole theory is that the water rights at issue were preexisting water rights appurtenant to LU's privately owned ranch land, and the water rights were conveyed by the general appurtenance clauses in deeds through a chain of title to LU.

A water right is an appurtenance to the land on which it has been used. I.C. § 42-101; I.C. § 42-220; I.C. § 42-1402; Russell v. Irish, 118 P. 501, 502 (Idaho 1911); Paddock v. Clark, 126 P. 1053, 1054 (Idaho 1912); Anderson v. Cummings, 340 P.2d 1111 (Idaho 1959); Crow v. Carlson, 690 P.2d 916 (Idaho 1984). Assuming, arguendo, that there were preexisting water rights, the water at issue here has always been used on federal public land, not on LU's privately owned ranch land. LU did not prove any act by any predecessor in interest that made the water rights appurtenant to LU's privately owned ranch land. See District Court's Order, pp. 16-17. Thus, these water rights are probably independent water rights that are not appurtenant to any other real estate. See District Court's Order, pp. 24-25. Because there is no written conveyance of independent water rights, LU's priority dates are still September 23, 1976 for water rights in

the Cow Creek Allotment and the South Mountain Allotment, and June 28, 1984 for water rights in the Cliffs Allotment. McGinness v. Stanfield, 6 Idaho 372, 55 P. 1020, 1021-1022 (Idaho 1898).⁹

A water right is “a real property interest, and is legally protected as such.” Crow, 690 P.2d at 920; Idaho Const., Art. XV, §3; I.C. § 55-101 (water rights are real property). The conveyance of a water right, as well as all other real property, can only occur if the conveyance is in writing. Olson v. Idaho Department of Water Resources, 666 P.2d 188, 190-191 (Idaho 1983)(citing I.C. §§ 9-503 and 9-505). Because “a water right is real estate, and any interest therein is an interest in real estate, if [LU’s predecessors] secured a water right . . . [they] could not transfer it to another except by a written conveyance, such as would convey the title to real estate.” Gard v. Thompson, 123 P. 497, 502 (Idaho 1912). Without any evidence whatsoever that a preexisting water right was conveyed to LU in writing, LU cannot now improve its priority date over all other users of the sources claimed by “tacking” its use of water sources back to the date of earlier water users. 2 C. KINNEY, IRRIGATION AND WATER RIGHTS § 999; *see* § 787; McGinness v. Stanfield, 6 Idaho 372, 55 P. at 1021-1022. Accordingly, LU must be satisfied with a priority date that relates back only to the day LU first used water on the federal public land they designated as places of use.

⁹ “[A]ny attempt to transfer an independent water right by a mere parol or verbal contract is void as against the rights of appropriators subsequent to the inception of the right attempted to be transferred and prior to the date of the attempted transfer, although such a sale, accompanied by the actual possession and use of the right, may be good as between the parties to the agreement.” 2 C. KINNEY, IRRIGATION AND WATER RIGHTS § 997.

III. CONCLUSION

For the above stated reasons and the reasons stated in the United States' Memorandum in Support of Motion to Alter or Amend the Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law; Subcase Numbers 55-10288B, et al., the United States Motion to Alter or Amend should be granted.

DATED this 30th day of May, 2003.

Respectfully submitted,

UNITED STATES OF AMERICA

A handwritten signature in cursive script, reading "Larry A. Brown", is written over a horizontal line.

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on May 30, 2003, I served a true and correct copy of foregoing **MEMORANDUM IN REPLY TO LU'S OPPOSITION THE UNITED STATES' MOTION TO ALTER OR AMEND THE SPECIAL MASTER'S REPORT AND RECOMMENDATION, FINDINGS OF FACT AND CONCLUSIONS OF LAW; SUBCASES 55-10288B et al.** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

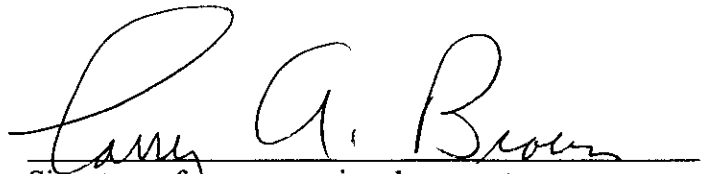
U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Mr. Richard L. Harris
Attorney at Law
1023 Arthur Street
Caldwell, ID 83605

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

Mr. Michael J. Van Zandt
Craig A. Pridgen
Ms. Elizabeth Ewens
Attorneys at Law
McQuaid, Bedford & Van Zandt, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105


Signature of person serving document