

2004 APR 15 AM 11 47

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	)	ORDER ON MOTION TO ALTER OR
	)	AMEND
	)	
Case No. 39576	)	AMENDED SPECIAL MASTER'S
	)	REPORT AND RECOMMENDATION
	)	
	)	FOR WATER RIGHTS (SEE
	)	ATTACHED EXHIBIT A)

I.
PROCEDURAL BACKGROUND

On February 27, 2003, this Special Master issued a *Special Master's Report and Recommendation* in the above listed subcases.

On March 28, 2003, the United States of America, Bureau of Land Management filed a *Motion to Alter or Amend*. LU Ranching also filed a *Motion to Alter or Amend* on that same date. In its *Motion*, the United States raised a sufficiency of the evidence argument with respect to the 1876 priority date recommended for each of the subject water rights. The United States also raised issues with respect to specific elements recommended for the individual water rights, mainly involving legal descriptions for certain place of use and point of diversion elements.

In support, the United States also filed *Proposed Amended Special Master Recommendations* indicating how the elements should be amended. LU Ranching in its *Motion* only raised issues with respect to recommended elements for certain water rights. The parties referred to the correction of non-priority date elements as "technical issues."

A hearing was held on the *Motions* on July 31, 2003.

Following a briefing schedule, this Special Master requested a Supplemental Director's

Report from IDWR addressing the technical issues raised with respect to individual water rights. The *Supplemental Director's Report* was filed December 5, 2003. The parties were then given the opportunity to file written responses. Both parties were in agreement as to some of the proposed amendments. Other changes were opposed and remain in dispute.

A Status Conference was held on March 19, 2004, wherein the parties agreed the matter was fully submitted for decision.

II

DECISION AND RULING

Regarding the "1876" Priority Date:

The United States raises an argument with respect to the evidence supporting the 1876 priority date recommended for each of the subject water rights. LU Ranching does not oppose the recommended priority date.

In the *Findings of Fact and Conclusions of Law* this Special Master based, the 1876 priority date recommendation on the earliest date it was demonstrated that LU Ranches predecessors-in-interest (for private lands) grazed cattle on adjacent public lands (predating grazing allotments) in conjunction with their respective ranching operations. LU Ranching subsequently acquired these private ranch properties which now comprise LU Ranches' "base property." The public lands previously grazed in conjunction with private property now comprise the grazing allotments on which the subject water rights are being claimed.

For the reasons previously discussed in the *Findings of Fact and Conclusions of Law* this Special Master defers to the earlier ruling and denies the United States' *Motion to Alter or Amend* on the issue of priority date.

Regarding the "Technical Issues" on individual water rights:

A. Background: LU Ranches' original stockwater claims did not distinguish between water right elements located on public and private lands. The United States objected to the *Director's Recommendation* for the priority date only with regard to the portion of the claim with elements located on United States (BLM) lands. The United States filed a *Motion for Summary Judgment* asserting that LU Ranches failed to introduce deeds or other instruments evidencing the mesne transfers of the subject water right necessary to support the 1872 priority date claimed for the portion of the water rights located on public lands.

In order to segregate the contested water rights, or the portion of the water rights being contested, Special Master Haemmerle ordered the water rights split to distinguish between water rights with elements on public and private lands. IDWR split the rights into "A" and "B" water rights. The "A" water rights represented water rights located on private land. There was no motion to alter or amend filed on the "A" water rights. Subsequently *Partial Decrees* were issued disallowing the parent or root water rights and recommending the "A" water rights on April 30, 2001. The "B" portions of the split water rights reflect those water rights with elements on public lands. Water rights 55-10295, 55-10296, 55-10298, 55-10300 and 55-13451 were not split, are located solely on public land, and are at issue. Special Master Haemmerle then granted the *United States' Motion for Summary Judgment* and issued *Special Master's Reports and Recommendations* for the split water rights.

LU Ranching filed a *Motion to Alter or Amend*, and ultimately a *Challenge*, contesting the recommended priority date. The other elements recommended pursuant to the splits were not contested by either party.

On *Challenge* Judge Wood, then presiding, ruled that there existed genuine issues of material fact and recommitted the matter to this Special Master for a trial on the merits. Following a trial, wherein only the issue of priority date was litigated, this Special Master issued the *Amended Special Masters Report and Recommendations and Findings of Fact and Conclusions of Law*, which are the subject of this *Motion to Alter or Amend*. With the exception of the priority date this Special Master recommended the descriptive elements the same as previously recommended by Special Master Haemmerle following the split. Pursuant to the respective *Motions to Alter or Amend* the parties now raise these "technical issues," concerning recommended elements.

Therefore, to the extent the parties are in agreement as to certain proposed changes and taking into account IDWR concurs with these amendments, this Special Master will treat the agreements as a *Stipulation* and recommend the proposed amendments. However, to the extent there is still disagreement and the disagreement cannot be reconciled with the evidence presented or the arguments made there is no basis from which this Special Master make findings and the proposed amendments will not be recommended.

B. Water Right 55-10288B:

LU Ranching opposes the deletion of T07S, R06W, S35 SENE as a point of diversion and place of use contending that a portion of the quarter quarter section is located in the South Mountain allotment. LU Ranching does not oppose limiting language stating that the use of the water right is limited to within the boundaries of the South Mountain Allotment. IDWR recommended that if the quarter quarter is to be included that an additional instream beginning and ending point be added. LU Ranching does not oppose IDWR's recommendation. LU Ranching does not oppose any of the other amendments proposed by the United States.

Based on the foregoing, THE FOLLOWING ARE RECOMMENDED for water right 55-10288B: The water right will be recommended as proposed by the United States subject to T07S, R06W, S35 SENE will not be deleted from the point of diversion or place of use; the additional instream beginning point and ending point will be recommended as proposed by IDWR (T07S, R06W, S35 SENE (instream beginning point)) (T07S, R06W, S35 SENE (instream ending point)); the proposed references to different instream beginning and ending points (B₁ E₂ etc...) will not be recommended as IDWR does not find this necessary for describing the water rights and the SRBA Court system (IWATRS) will not include them in the partial decrees.

Finally, IT IS ALSO RECOMMENDED that the limiting language "the use of water within the T07S, R06W, S35, SENE is limited to the south mountain allotment" be included in the "other provisions necessary for definition or administration of water rights" portion of the partial decree. This language is recommended on the basis that the United States recommended a similar solution for water right 55-10298 involving a similar issue with respect to the Cow Creek Allotment.

C. Water Right 55-10289B:

LU Ranching opposes the United States' proposal to delete "unnamed streams tributary to Juniper Creek," but agrees with the other proposed amendments. Therefore, IT IS RECOMMENDED that water right 55-10289B be amended as proposed by the United States subject to "unnamed streams tributary to Juniper Creek" remain as previously recommended by this Special Master.

D. Water Right 55-10290B, 55-10293B, 55-10295, 55-10299B and 55-10300:

LU Ranching does not oppose any of the amendments proposed by the United States.

Therefore, IT IS RECOMMENDED that these water rights be amended as proposed by the United States.

E. Water Right 55-10292B:

The United States proposed additional instream beginning and ending points for this water right. IDWR determined that the addition of proposed beginning points TT08S, R05W, S35 NESW and T08S, R05W, S35, Lot 2, SWSE would not be helpful in clarifying the water right because the stream reach "may or may not flow through an adjacent 40 acre tract at this location, its simply too close to call." The United States opposes IDWR's proposal only with respect to omitting the additional beginning points. LU Ranching does not oppose the United States' proposal.

Therefore, this Special Master will recommend the amendments as proposed by IDWR with one exception. Because IDWR is uncertain as to whether the addition of the two beginning points will clarify the water right and because the United States and LU Ranching are both in agreement that both should be included, this Special Master will recommend that the additional beginning points be included.

F. Water Right 55-10298:

LU Ranching does not oppose any of the amendments proposed by the United States. LU Ranching filed a *Motion to Amend Claim* on August 21, 2000. Presumably, the United States' proposed amendments resolve any discrepancies. Therefore the *Motion to Amend the Claim* is denied. IT IS RECOMMENDED that water right 55-10298 be amended as proposed, subject to the language referring to the Cow Creek Allotment being moved to the "other provisions necessary" section on the recommendation.

G. Water Right 55-10296:

LU Ranching opposes the additional points of diversion as proposed by the United States. This is the only proposed amendment to the previous recommendation. Therefore, this Special Master **declines** to amend the prior recommendation for this water right.

H. Water Right 55-10297B:

LU Ranching opposes all of the amendments proposed by the United States. Therefore this Special Master **declines** to amend the prior recommendation for this water right.

I. Water Right 55-10301B:

The United States argues that this right should be recommended disallowed because Mr. Tim

C. Lowry admitted at trial that LU Ranching did not intend to claim stockwater on public land with respect to 55-10301B, because a fence excludes cattle from entering the public land where the source is located. LU Ranching does not respond to this assertion in any of its post trial briefing. In the *Supplemental Director's Report* IDWR states that neither party disputes the previous recommendation. LU Ranching states in its response to the *Supplemental Director's Report* that it is in agreement with the *Supplemental Report*. Therefore, this Special Master will find that the parties are not in disagreement and recommends 55-10301B disallowed.

J. Water Right 55-10303B:

LU Ranching opposes the United States proposal to change "unnamed streams Corral Creek" plural to "unnamed stream Corral Creek" singular. LU Ranching does not oppose the deletion of T09S, R04W, S18, Lot 3(NWSW) from the place of use but opposes the deletion of T09S, R05W, S33 NWNW. LU Ranching does not oppose the amendments. Therefore, IT IS RECOMMENDED that this water right be amended to reflect the deletion of T09S, R04N, S18 Lot 3 (NWSW) from the place of use.

K. Water Right 55-13451:

Neither LU Ranches nor the United States oppose the Special Master's Report and Recommendation for this water right although this water right was listed on the both *Motions to Alter or Amend*. Therefore, the *Motion to Alter or Amend* filed by the United States and the *Motion to Alter or Amend* filed by LU Ranches in subcase 55-13451 is denied.

III.

CONCLUSION AND RECOMMENDATION

Therefore, based on the file and record herein, IT IS RECOMMENDED that the above mentioned water rights be decreed with the elements as set forth in the attached *Amended Special Master's Recommendations for Partial Decrees pursuant to I.C.R.P. 54(b)*.

DATE April 15, 2004.



THOMAS R CUSHMAN
Special Master
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

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
55-13451

DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
FILED

2004 APR 15 AM 11 48

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: Exhibit A
)
)

Case No. 39576
_____)

) CERTIFICATE OF MAILING
)
)

I certify that a true and correct copy of the ORDER ON MOTION TO ALTER OR AMEND;
AMENDED SPECIAL MASTER'S REPORT AND RECOMMENDATION FOR PARTIAL
DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND
RECOMMENDATION were mailed April 15, 2004, with sufficient first-class postage prepaid to the
following:

Director of IDWR
P O Box 83720
Boise, Idaho 83720-0098

Richard L Harris
P O Box 1438
Caldwell, Idaho 83606

Roger D Ling
P O Box 396
Rupert, Idaho 83350

Elizabeth P Ewens
221 Main Street, 16th Floor
San Francisco, California 94105

LU Ranching
Cliffs Stage
Jordan Valley, OR 97910

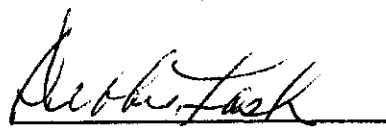

Deputy Clerk

Exhibit A

Subcase Nos:

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
55-13451

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

2004 APR 15 AM 11 48

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)
)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

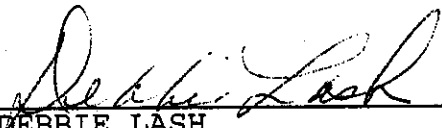
Water Right(s): 55-10288B
(SEE ATTACHED EXHIBIT A)

On April 15, 2004, Special Master THOMAS R CUSHMAN
issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s)
pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party
to the adjudication including parties to the subcase, may file a Motion
to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate
in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION
shall constitute a waiver of the right to challenge it before the
Presiding Judge.

DATED April 15, 2004.



DEBBIE LASH
Deputy Clerk

DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
FILED

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 55-10292B

2004 APR 15 AM 11 47

PAGE 1
Apr-15-2004

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.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

