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AUG 02 2004

**DEPARTMENT OF
WATER RESOURCES**

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

21 In Re SRBA

22 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

23 **LU RANCHING CO.'S OPENING**
24 **CHALLENGE**

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27 **I. INTRODUCTION**

28 LU Ranching Co. ("LU Ranching"), by and through its counsel of record, hereby submits its
Opening Brief in Support of LU Ranching's Notice of Challenge. At issue herein is the Special
Master's Report and Recommendation, Findings of Fact and Conclusions of Law, and the
subsequent Order on Motion to Alter or Amend and Amended Special Master's Report and
Recommendation and recommended Partial Decrees, filed in the above captioned matter. LU
Ranching's Challenge is strictly limited to what have been termed "technical issues" or corrections
to certain legal descriptions contained in the Recommended Partial Decrees. In all other respects,
LU Ranching agrees with the Special Master's substantive decision as outlined in the Special
Master's Report and Recommendation, Findings of Fact, and Conclusions of Law, and specifically

1 agrees with the Special Master's recommended priority dates contained therein.

2 II. STATEMENT OF ISSUES ON CHALLENGE

3 As indicated, above, there are two distinct technical issues raised by LU Ranching in its
4 Challenge. The first is whether the Special Master erred in failing to recommend T5S R6W S23
5 NWNE as a place of use consistent with the evidence produced at trial and the recommended points
6 of diversion for subcase 55-10296. The second issue is whether the Special Master erred in failing
7 to recommend T5S R6W S13 SWSW as a place of use consistent with the evidence produced at
8 trial and the recommended points of diversion for subcase 55-10297B.

9 III. STANDARD OF REVIEW

10 In the SRBA, the District Court is to accept the Special Master's findings of fact unless
11 "clearly erroneous." *See* Administrative Order 1 ("AO1"), 13(f); *see also* I.R.C.P. 53(e)(2);
12 *Rodriguez v. Oakley Valley Stone, Inc.*, 816 P.2d 326, 333-334 (Idaho 1991) (the court shall accept
13 the master's findings of fact unless clearly erroneous). To the extent that corrections are required,
14 however, such corrections can be made by the court. *Id.* at p. 334; *see also* AO1, 13(f) ["The court
15 may, in whole or in part, adopt, modify, reject, receive further evidence or remand (the Special
16 Master's findings) with instructions"]. This is consistent with other applicable rules which provide
17 for the correction of clerical errors arising from oversight or omission. Specifically, I.R.C.P. 60(a)
18 provides as follows:

19 Clerical mistakes in judgments, orders or other parts of the record and
20 errors therein arising from oversight or omission may be corrected by
21 the court at any time of its own initiative or on the motion of any party
22 and after such notice, if any, as the court orders. During the pendency
of an appeal, such mistakes may be so corrected before the appeal is
docketed in the Supreme Court or the district court, as the case may
be, and thereafter while the appeal is pending may be so corrected.

23 I.R.C.P. 60(a).^{1/} In sum, provision has been made both in AO1 and in the Idaho Rules of Civil
24 Procedure to correct any errors which may exist.

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28 ^{1/} The Idaho Rules of Civil Procedure are among the rules governing the
litigation of the SRBA. *See* AO1, 1.

IV. ARGUMENT

A. The Special Master Erred in Failing to Recommend T5S R6W S23 NWNE as a Place of Use for Water Right 55-10296.

In the Special Master's Amended Report and Recommendation, and accompanying recommended Partial Decree for water right 55-10296, the Special Master failed to include the quarter quarter section defined as T5S R6W S23 NWNE as a place of use. This stream segment is in the middle of a longer stream, the rest of which was decreed as a place of use for this stockwater right. The evidence at trial, including the Director's Reports and the map exhibit prepared by the United States support the inclusion of this quarter quarter section as a place of use for this water right.

The beginning and ending points of diversion for this water right, as defined in the Director's Report and Special Master's recommended Partial Decree, support the inclusion of this quarter quarter section as a place of use. As illustrated on the United States' Exhibit 22 (Objector's Exhibit 22) admitted at trial, the instream beginning point of diversion is at T5S R6W S12 NWSWSW, and the instream ending point is at T5S R6W S23 SESWNW. In between, the stream flows through several quarter quarter sections without interruption, including through T5S R6W S23 NWNE at issue herein, and each of those quarter quarter sections are identified as places of use except for T5S R6 S23 NWNE. The beginning and end points for this stockwater right and the place of use lying between all exist inside a grazing allotment for which LU Ranching has the preferred grazing right and the omitted place of use is not fenced off from the other recommended places of use along the stream. No other parties to the SRBA have filed claims on these water rights. Failing to decree the omitted place of use would result in an anomaly whereby LU Ranching will own all water rights along the stream segment, except for the omitted one, and that section will be owned by no one. Based on the instream beginning and ending points of diversion as identified in the Director's Report, Recommended Partial Decree, and the United States' Exhibit 22, it was clearly the intent of all to include all points on the stream between the beginning and ending points of diversion as places of use for this water right. The Special Master correctly found that LU Ranching and its predecessors have put the subject water to benefic use continuously for

1 stockwatering purposes, and therefore, are entitled to a priority date of 1876. See Special Master's
2 Report and Recommendations, p. 7, 10-11. The error in failing to claim and recommend this
3 quarter quarter section was merely an administrative oversight which now should be corrected
4 consistent with the evidence presented at trial.^{2/}

5 B. The Special Master Erred in Failing to Recommend T5S R6W S13 SWSW as a Place
6 of Use Consistent with the Evidence Produced at Trial for Water Right 55-10297B.

7 As above, a quarter quarter section which should have been claimed and recommended as a
8 place of use in conjunction with subcase number 55-10297B, namely T5S R6W S13 SWSW, was
9 mistakenly omitted. This quarter quarter section has a segment of the subject stream running
10 through it, and this quarter quarter section was recommended as a point of diversion by the IDWR
11 and by the Special Master in the Recommended Partial Decree for this Water Right. Again, this
12 place of use is on LU Ranching's grazing allotment; the water right is used for stockwatering; and,
13 there are no competing claims for this water. No evidence was submitted at trial to rebut the
14 Director's Report or, specifically, the accuracy of the IDWR's finding that this quarter quarter
15 section is the instream beginning diversion point for this water right. In fact, even the United States
16 in its Exhibit 22 identified this quarter quarter section as an instream beginning diversion point on
17 the face of the exhibit. It simply does not make sense to identify this quarter quarter section as the
18 beginning point of diversion for this water right without also designating it as a place of use.

19 While this quarter quarter section was properly identified and recommended without
20 objection at trial as an instream beginning point, through an oversight it was not identified as a place
21 of use. Accordingly, LU Ranching requests that the recommended Partial Decree be amended to
22 identify this quarter quarter section as a place of use, consistent with the identification of the quarter
23 quarter section as an instream beginning diversion point on the recommended Partial Decree, and
24 consistent with the evidence presented at trial.

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27 ^{2/} If LU Ranching's requested amendments to include the quarter quarter
28 sections at issue in this Notice of Challenge are denied for any reason, LU Ranching in the
alternative reserves the right to file a Motion to File a Late Claim and corresponding Claim
to identify the places of use at issue herein.

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V. CONCLUSION

Given the evidence at trial and the record before the Court, the Special Master's failure to include T5S R6W S23 NWNE as a place of use for water right 55-10296, and failure to include T5S R6W S13 SWSW as a place of use for water right 55-10297B, were clearly erroneous. Accordingly, LU Ranching respectfully requests that this Court include the above quarter quarter sections as places of use in 55-10296 and 55-10297B consistent with the evidence presented at trial.

Dated this 30 day of July, 2004.

Respectfully submitted,

McQUAID BEDFORD & VAN ZANDT, LLP

By: 

MICHAEL J. VAN ZANDT

Dated this ____ day of July, 2004.

LING & ROBINSON

By: _____

BRIAN J. COFFEY

Idaho State Bar No. 6566

Attorneys for LU Ranching Co.

JUL 30. 2004 2:48PM

MCQUAID BEDFORD VAN ZANDT LLP

NO. 802 P. 6

1 **V. CONCLUSION**

2 Given the evidence at trial and the record before the Court, the Special Master's failure to
3 include T5S R6W S23 NWNW as a place of use for water right 55-10296, and failure to include T5S
4 R6W S13 SWSW as a place of use for water right 55-10297B, were clearly erroneous.
5 Accordingly, LU Ranching respectfully requests that this Court include the above quarter quarter
6 sections as places of use in 55-10296 and 55-10297B consistent with the evidence presented at trial.

7
8 Dated this ____ day of July, 2004.

9 Respectfully submitted,

10 McQUAID BEDFORD & VAN ZANDT, LLP

11
12 By: _____

13 MICHAEL J. VAN ZANDT

14
15 Dated this 30th day of July, 2004.

16 LING & ROBINSON

17
18 By: _____

19 BRIAN J. COFFEY
Idaho State Bar No. 6566

20 Attorneys for LU Ranching Co.

1 **CERTIFICATE OF SERVICE**

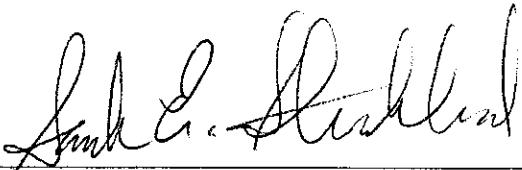
2 I certify that on July 30, 2004, I served a true and correct copy of foregoing **LU**
3 **RANCHING CO.S' OPENING CHALLENGE** upon the following individuals by placing the
4 document in the United States Mail, postage paid, and addressed as follows:

5 U.S. Department of Justice
6 General Litigation Section
7 Environment and Natural Resources Division
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10 Larry Brown
11 Attorney, U.S. Dept. of Justice
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