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Names of Parties Filing Document:

UNITED STATES OF AMERICA

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	)	Subcase No. 35-07173
	)	
Case No. 39576	)	**MOTION TO GRANT THE UNITED**
	)	**STATES' OBJECTION FOR FAILURE**
	)	**TO PROSECUTE**

Pursuant to Idaho R. Civ. P. 41(b), the United States of America, by and through the undersigned counsel, respectfully moves the Special Master to grant the United States' objection to Water Right Number 35-07173 for failure of the claimants to prosecute. A Memorandum of Points and Authorities, the Affidavit of Larry A. Brown in support of this motion, and Attachment 1 to the Affidavit of Larry A. Brown are filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

Idaho R. Civ. P. 41(b) allows a defendant to move for dismissal of an action for failure of the plaintiff to prosecute. A Snake River Basin Adjudication (hereinafter "SRBA") claimant has an affirmative duty to seek prompt adjudication of a water right claim. *See* Nagal v. Wagers 111 Idaho 822, 727 P.2d 1250 (Ct. App. 1986). In applying Idaho R. Civ. P. 41(b), the Special Master should consider the length of the delay caused by the claimant's failure to prosecute, the justification for the delay, and the resulting prejudice to the moving party. Grant v. City of Twin Falls, 113 Idaho 604, 746 P.2d 1063 (Ct. App. 1987). Moreover, the Special Master has the inherent power to dismiss a case for failure to prosecute with due diligence, independent of any statute or rule of the court. Bartlett v. Peak, 107 Idaho 284, 688 P.2d 1189 (1984).

Claimant failed to appear at the Initial Hearing held on October 27, 1999 in Blackfoot, Idaho in accordance with the Notice Setting Subcase for Initial Hearing, Subcase 35-07173 dated August 19, 1999. Affidavit of Larry A. Brown in Support of the United States' Motion to Grant the United States' Objection for Failure to Prosecute (hereinafter "Brown Aff."), p. 2. Claimant failed to appear at the telephonic status conference held on April 12, 2002 in accordance with the Notice Setting Status Conference, Subcase 35-07173 dated February 25, 2002. Brown Aff., p. 2. Claimant has taken no action to defend or prosecute the water right claim for over two years. Claimant's delay in prosecution is without justification. Thus, the claimant breached a duty to the Court to seek prompt adjudication of a water right claim.

The United States is unduly prejudiced by the delay in court proceedings. The United States has expended considerable resources in attending the Initial Hearing, initiating phone calls attempting to contact the claimants, drafting pleadings, drafting settlement documents, and drafting this Motion. Brown Aff., pp. 2-3. Unless the instant water right claim is adjudicated, the United States must continue to appear in court proceedings ordered by the Special Master to preserve an objection to the water right claim. Given the facts in the record, the Special Master should grant the United States' objection for failure of the claimant to prosecute, either pursuant to Idaho R. Civ. P. 41(b), or pursuant to the Special Master's inherent authority.

Attachment 1 to the Brown Aff. (hereinafter "Attachment 1") is a form entitled Idaho Department of Water Resources Recommended Water Rights Acquired Under State Law. Attachment 1 was created by the United States Department of the Interior, Bureau of Land Management to represent a description of Water Right Number 35-07173 that would resolve the United States objection to Water Right Number 35-07173. Brown Aff., pp. 2-3. Subject to concurrence by the Idaho Department of Water Resources, the Special Master should issue a Special Master's Report and Recommendation for Water Right Number 35-07173 in conformance with Attachment 1.

DATED this 16th day of April, 2002.

Respectfully submitted,

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on April 16, 2002, I served a true and correct copy of the foregoing **MOTION TO GRANT THE UNITED STATES' OBJECTION FOR FAILURE TO PROSECUTE; SUBCASE 35-07173, the AFFIDAVIT OF LARRY A. BROWN IN SUPPORT OF MOTION TO GRANT THE UNITED STATES' OBJECTION FOR FAILURE TO PROSECUTE; SUBCASE 35-07173, and ATTACHMENT 1, AFFIDAVIT OF LARRY A. BROWN IN SUPPORT OF MOTION TO GRANT THE UNITED STATES' OBJECTION FOR FAILURE TO PROSECUTE; SUBCASE 35-07173** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

Original to:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Copies to:

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

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098

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

S & H Farms
c/o Rulon Spears
2057 East 358 South
Declo, ID 83323

S & H Farms
c/o Dave Hinckley
3500 North 220 West
Salt Lake City, UT 84116

Larry A. Brown

Signature of attorney mailing document

Name of Party Filing Document:

UNITED STATES OF AMERICA

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
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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 No. 35-07173
	)	
Case No. 39576	)	**AFFIDAVIT OF LARRY A. BROWN IN**
	)	**SUPPORT OF MOTION TO GRANT**
	)	**THE UNITED STATES' OBJECTION**
	)	**FOR FAILURE TO PROSECUTE**

State of Maryland)
) ss.
County of Anne Arundel)

I, Larry A. Brown, being first duly sworn, do depose and state:

1. My name is Larry A. Brown. I am attorney of record for the United States of America in the above-captioned subcase.

2. I have personal knowledge of the following facts:

a. In June, 1999, the United States Department of the Interior, Bureau of Land Management (BLM), Idaho State Office filed an objection to Water Right Claim Number 35-07173 because a place of use was described on BLM property.

b. In August, 1999, the Special Master ordered an Initial Hearing to be held in Blackfoot, Idaho. In September and October, 1999, through diligent research, I discovered that the original claimants had conveyed the real property described as private land places of use in Water Right Number 35-07173 to S & H Farms, co-owned by Dave Hinckley and Rulon Spears. I obtained addresses and phone numbers for the new owners, and the new owners were called prior to the Initial Hearing to discuss the need to file a change of ownership with the Idaho Department of Water Resources and to discuss settlement. I traveled from Boise, Idaho to Blackfoot, Idaho to attend the Initial Hearing held on October 27, 1999. The new claimants did not appear, however, I informed the Special Master of my research regarding ownership.

c. In February, 2002, the Special Master ordered a status conference. On April 12, 2002, I attended the telephonic status conference ordered by the Special Master. The new claimants did not appear.

d. Attachment 1 to this Affidavit is a description of Water Right Number 35-07173 that I caused to be drafted by water rights specialists employed by the BLM. The BLM water rights

specialists have assured me that Attachment 1 would resolve BLM's objection to Water Right Number 35-07173 and should conform to Idaho Department of Water Resources standards.

DATED this 16th day of April, 2002.

Larry A. Brown

Subscribed and sworn to before me this 16th day of April, 2002.

Notary Public for the State of Maryland
My Commission Expires: SEPT 21, 2002

DAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 35-07173

Name and Address: ~~CLARENCE R SCHROEDER~~
~~2308 S MOSER RD~~
~~AMERICAN FALLS, ID 83211~~

~~WILLIAM R SCHROEDER~~
~~2308 S MOSER RD~~
~~AMERICAN FALLS, ID 83211~~

S & H FARMS
RULON SPEARS
2057 EAST 358 SOUTH
DECLO, IDAHO 83323

DAVE HINCKLEY
3500 NORTH 220 WEST
SALT LAKE CITY, UTAH 84116

Source: GROUNDWATER

Quantity: 7.20 CFS
~~1789.20~~ 1785.60 AFY

Priority Date: 04-16-1971

Diversion Point: T07S R29E S31 NWNWSE Within Power County

Purpose and Period of Use:

Purpose of Use	Period of Use	Quantity
Irrigation	04-01 TO 10-30	7.20 CFS ~~1789.20~~ 1785.60 AFY

Place of Use: Irrigation Within Power County

T07S R29E	S30	SESE 3.4	~~SWSE 0.9~~
	S31	NENE 39	NWNE 27
		SWNE 39	SENE 39
		NESE 39	NWSE 40
		SWSE 40	NESW 40
	LOT 3	(NWSW) 30	LOT 4 (SWSW) 30
		SESW 40	SESE 40

~~447.3~~ 446.4 Acres Total

Other Provisions Necessary for Definition / Administration of this Water Right:

Explanatory Material: Basis of Claim - License

RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.

ATTACHMENT 1
AFF. OF LARRY A. BROWN