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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

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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	) Subcases 47-16433, <i>et al.</i>
	) (see list of 26 subcases attached)
Case No. 39576	) (USDA/FS)
	)
	) ORDER DENYING MOTION
	) TO ALTER OR AMEND

BACKGROUND

Order Denying Motions to File Late Objections

On July 3, 2003, the Special Master entered an *Order Vacating Stays and Order Denying Motions to File Late Objections* in the above 26 stockwater claims located on federal grazing lands. The United States of America, Department of Agriculture, Forest Service (USDA/FS) is the claimant. The *Order* denied motions to file late objections filed by Bruce B. Bedke and Jared K. Bedke for two reasons. First, according to the Idaho Supreme Court's reasoning in *LU Ranching Co. v. United States*, 138 Idaho 606, 67 P.3d 85 (2003), the Bedkes did not act as would a reasonably prudent person under the circumstances and they failed to show excusable neglect or mistake in failing to file timely objections:

[T]here is no doubt that LU Ranching was aware of the commencement of the SRBA and aware that action concerning its claimed rights and the rights of others in the region would be adjudicated. It received notice of the Director's report, the nature of that report, its location, and the way to access the report, as well as the offer of technical assistance if necessary. . . . The method of notice given was reasonably calculated to give LU Ranching and all other claimants the information to pursue and protect their rights. In fact, LU Ranching found the information when it examined the Director's report. Requiring personal service of all potentially adverse claims could well involve a flood of paper that would do no more than what is done by existing procedures.

LU Ranching, 138 Idaho, at 610, 67 P.3d, at 89.

Second, the Bedkes failed to plead a meritorious defense and thereby cannot show “good cause” to file late objections. The United States offered to stipulate that the Bedkes and certain other private parties with conflicting stockwater claims on federal grazing allotments would receive senior priority stockwater rights so long as the water rights do not “alter the rights of a permittee under a valid grazing permit nor impede the authority of the United States to manage federal lands.”¹ The Bedkes refused to sign the stipulation because of the quoted provision. The Special Master thus concluded:

It is apparent that Bruce and Jared Bedke are concerned less about stockwater rights than they are about conditions imposed on their grazing privileges and more broadly, the authority of the United States to manage federal lands. Both of those issues bear only a tenuous relationship, at best, to water rights and the role of the SRBA Court in adjudicating such rights. Viewed another way, the issues the Bedkes want to pursue with their late objections are beyond the jurisdiction of the SRBA Court. For that reason, the Bedkes failed to plead a meritorious defense and failed to show good cause to file late objections.

Order Vacating Stays and Order Denying Motions to File Late Objections, at 6.

Order Denying Motion to Reconsider

On January 7, 2004, the Special Master entered an ***Order Denying the Bedke’s [sp.] Motion to Reconsider*** because their basic argument was untenable – that IDWR’s bifurcated process of reporting *de minimis* and *de maximus* stockwater claims excused any requirement to file timely objections. Former-Presiding Judge Roger S. Burdick fully reviewed that issue in his ***Order on Motion for Reconsideration***, dated July 27, 2001, subcases 65-07267, *et al.*, involving A. L. Cattle. Judge Burdick’s reasoning applies equally in the present subcases:

With respect to the claims at issue, the United States followed established SRBA procedures for filing its claims. The United States’ claims were also reported in accordance with established procedure. Any deviation from standard procedures and erroneous assumptions therefrom came as a result of the manner in which some grazing allottees have filed their claims, not as a result of an infirmity in the SRBA notice procedure, IDWR’s reporting procedure or some bad-faith conduct on behalf of the United States. **At a minimum if there was uncertainty over the reporting of the claims in light of the novel manner in which they were**

¹ The *Stipulation*, dated August 29, 2002, and signed by the United States and all the other private parties, stated: The overlapping or competing claims of the Private Parties shall have a priority date that is one-day senior to the United States’ priority date, unless the Private Parties can provide a patent or deed for their “base property,” . . . that precedes this date, in which case the Private Parties shall receive a priority date that is this more senior date.

Stipulation, at 4.

claimed, the onus should have been on the allottee to resolve any uncertainties as to how the claims would be reported [footnote omitted, emphasis added].

Judge Burdick's *Order on Motion for Reconsideration*, at 12.

The Special Master specifically found that:

The Bedkes have not shown why *LU Ranching* is not dispositive of their motions to file late objections. As in that case, the Bedkes were aware of the commencement of the SRBA, they knew their claims and the claims of others would be adjudicated and they received notice of the filing of the *Director's Report for Domestic and Stockwater, Reporting Area 12 (IDWR Basin 47)*. . . . [F]ive of Bruce Bedke's stockwater claims on federal land (47-14923A, B, C, D and E) were, in fact, included in the same *Director's Report* that reported the 26 Forest Service claims at issue here [footnote omitted].

Order Denying the Bedke's Motion to Reconsider, at 3.

Special Master Report

On January 12, 2004, the Special Master entered a *Special Master Report* recommending that the United States is entitled to partial decrees for its 26 stockwater claims as recommended by IDWR.

Motion to Alter or Amend

On February 27, 2004, the Bedkes filed a *Motion to Alter or Amend Special Master Report*. In their *Brief in Support*, the Bedkes argued that they showed good cause to file late objections because of "their confusion as to the process of whether or not objections had to be filed in what they perceived to be conflicting claims" and their late awareness of "the strict definition the Idaho Department of Water Resources (IDWR) used in determining conflicting claims." The Bedkes also argued that: 1) Jared Bedke received no notice of the *Director's Report* for Basin 47²; 2) they sought relief immediately after becoming aware of the need to object to the United States' claims; 3) they plead a meritorious defense ("the original use of the water in the subcases at issue was made by their [the Bedkes'] predecessors in interest prior to establishment of the Forest Reserves and Bureau of Land Management, and that the United States has never put the water to any beneficial use, as the only way stockwater could be put to use is by livestock"); 4) there is no undue prejudice to the United States; and 5) the holdings in

² Jared Bedke was not listed as a claimant of any water rights in the *Director's Report for Domestic and Stockwater, Reporting Area 12 (IDWR Basin 47)*. His father, Bruce Bedke is such a claimant.

A. L. Cattle and *LU Ranching* do not apply here because the present subcases have not gone to partial decree – hence, the lower burden to set aside entry of default under I.R.C.P. 55(c) applies.

US Memorandum in Opposition

On March 15, 2004, the United States lodged its *Memorandum in Opposition to Bruce and Jared Bedke's Motion to Alter or Amend Special Master's Report*. It argued that: 1) the Bedkes raised the same arguments that have already been rejected by the Special Master; 2) the facts in *LU Ranching* are remarkably similar to the present subcases ("the parties were aware of the commencement of the SRBA, were aware that their rights and the rights of others would be adjudicated, and received notice of the Director's report, the nature of that report, its location, and the way to access the report"); and 3) the *A. L. Cattle* subcases included both partially decreed rights and claims which had not yet been partially decreed.

The Bedkes' Asseverations³

On April 6, 2004, two days before the hearing on their *Motion to Alter or Amend*, the Bedkes lodged their *Asseverations in Support of Motion to Alter or Amend Special Masters [sic] Report*. The *Asseverations* consisted of certain statements⁴ by the Bedkes along with their signatures followed by the phrase: "By the mouth of two or three witnesses every word shall be established' 2 Cor. 13:1."⁵ Bruce Bedke's *Asseveration* was witnessed by his son, Jared, and Bruce Bedke's wife, Martha J. Bedke. Jared Bedke's *Asseveration* was witnessed by his father and his mother. Neither *Asseveration* was sworn to or notarized.

³ Asseveration is defined as:

An affirmation; a positive assertion; a solemn declaration. This word is seldom, if ever, used for a declaration made under oath, but denotes a declaration accompanied with solemnity or an appeal to conscience, whereas by an oath one appeals to God as a witness of the truth of what one says.

Black's Law Dictionary 108 (5th ed. 1979).

⁴ The Bedkes' *Asservations* generally addressed IDWR's bifurcated process of early reporting of small (*de minimis*) stockwater claims and later reporting of large (*de maximus*) stockwater claims – specifically, IDWR's claim procedures, its alleged advise to the Bedkes and its "strict definition" of conflicting claims. The Bedkes have yet to identify IDWR personnel with whom they spoke about those issues or submit affidavits from any IDWR representative.

⁵ The complete passage from *The Bible* reads:

This will be the third time I am coming to you. "By the mouth of two or three witnesses every word shall be established [italics in the original]."

II *Corinthians* 13:1. That passage then references the following:

One witness shall not rise against a man concerning any iniquity or any sin that he commits; by the mouth of two or three witnesses the matter shall be established.

Deuteronomy 19:15.

Hearing on Motion to Alter or Amend

A hearing on the Bedkes' *Motion to Alter or Amend Special Masters Report* was held on April 8, 2004, at the SRBA Courthouse in Twin Falls, Idaho. David L. Negri appeared for the United States, along with Jamie Gough; Bruce Bedke appeared *pro se*, along with Martha and Jared Bedke; and Roxanne Brown monitored the hearing for IDWR by telephone.

During the hearing, the United States objected to the Bedkes' *Asseverations*. After the hearing, on April 13, 2004, the United States filed its *Objection to and Motion to Strike Bruce and Jared Bedke's Asseverations*. It argued that: "Because the Special Master cannot consider new evidence on a motion to alter or amend, and because the *Asseverations* were neither timely filed nor in proper form, the *Asseverations* should not be considered by the Special Master and should be stricken from the record."

The Bedkes lodged their *Response to United States' Objection and Motion to Strike Asseverations* on April 27, 2004, arguing: "Because the *Asseverations* contain only facts that are already a part of the trial record and seek to enter no new evidence, they should be considered by the Special Master and should not be stricken from the record."

DISCUSSION

The United States was correct when it pointed out that the Bedkes raised the same arguments in their *Motion to Alter or Amend* that have already been rejected twice by the Special Master. Whatever uncertainty may have arisen as a result of IDWR's bifurcated reporting process did not excuse the Bedkes from filing timely objections to the United States' conflicting stockwater claims. *LU Ranching* is sufficiently analogous to the present subcases to conclude that the Bedkes did not act as would a reasonably prudent person under the circumstances and they failed to show excusable neglect or mistake in failing to file timely objections.

Judge Burdick's holding in *A. L. Cattle* is likewise dispositive of the Bedkes' *Motion to Alter or Amend*:

Any deviation from standard procedures and erroneous assumptions therefrom came as a result of the manner in which some grazing allottees have filed their [*de maximus*] claims, not as a result of an infirmity in the SRBA notice procedure, IDWR's reporting procedure or some bad-faith conduct on behalf of the United States. At a minimum if there was uncertainty over the reporting of the claims in light of the novel manner in which they were claimed, the onus should have been

on the allottee to resolve any uncertainties as to how the claims would be reported.”
Judge Burdick’s *Order on Motion for Reconsideration*, at 12.

The Bedkes’ argument that they plead a meritorious defense is disingenuous, at best. In their late objections, they sought to argue that: 1) their predecessors-in-interest were the first to put the water to beneficial use, and 2) the United States never beneficially used the water because only the grazers’ livestock can establish beneficial use of stockwater (“the cow is the point of use and it is an extension of the base ranch”⁶). Such argument only reinforces the Special Master’s earlier conclusion that the Bedkes “are concerned less about stockwater rights than they are about conditions imposed on their grazing privileges and more broadly, the authority of the United States to manage federal lands.” *Order Vacating Stays and Order Denying Motions to File Late Objections*, at 6.

As noted before, the Bedkes were among that group of private parties with conflicting stockwater claims on federal grazing allotments who were offered a deal by the United States guaranteeing them “a priority date that is one-day senior to the United States’ priority date.” The Bedkes refused to sign because part of the agreement was that the senior priority stockwater rights would not “alter the rights of a permittee under a valid grazing permit nor impede the authority of the United States to manage federal lands.”

The fact that the Bedkes were so concerned about another’s stockwater rights, despite the offer of a senior priority date, can only lead to the conclusion that the Bedkes’ concerns extend beyond the jurisdiction of the SRBA Court.⁷ If the Bedkes wish to contest their rights as a permittee under a valid grazing permit or the authority of the United States to manage federal lands, their venue lies elsewhere – not with the SRBA Court.

⁶ The Bedkes’ *Brief in Support of Motion to Alter or Amend*, at 5.

⁷ No one would genuinely disagree with the axiom that “[p]riority is the essential feature of the doctrine of prior appropriation.” David H. Getches, *Water Law*, at 101 (2d ed., West 1990).

It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water. As between appropriators, the first in time is the first in right. Each junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made. The same rule applies whether appropriator is above or below other appropriators. When water has once been decreed and becomes a fixed right, the water must be distributed as in the decree provided [citations omitted].

Beecher v. Cassia Creek Irr. Co., 66 Idaho 1, 9-10, 154 P.2d 507, 510 (1944).

“The senior appropriator is entitled to exercise his right without any interference by the junior appropriator that materially affects such action.” Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 49-50 (1968) [citing *Noh v. Stoner*, 53 Idaho 651, 655-657, 26 P.2d 1112, 1113-1114 (1933)].

CONCLUSIONS OF LAW

The Bedkes' *Motion to Alter or Amend* fails to state sufficient legal or factual grounds to alter or amend the January 12, 2004 *Special Master Report* recommending that the United States is entitled to partial decrees for its 26 stockwater claims in subcases 47-16433, *et al.* Further, in light of the following *Order* denying the Bedkes' *Motion*, the United States' *Objection to and Motion to Strike Bruce and Jared Bedke's Asseverations* is deemed moot.

ORDER

THEREFORE, IT IS ORDERED that the Bedkes' *Motion to Alter or Amend* in subcases 47-16433, *et al.*, is **denied**.

DATED October 6, 2004.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

47-16433
47-16434
47-16435
47-16437
47-16438
47-16440
47-16441
47-16442
47-16443
47-16444
47-16445
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47-16474

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO ALTER OR AMEND was mailed on October 06, 2004, with sufficient first-class postage to the following:

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