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

12 In Re SRBA

13 Case No. 39576
14

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, 55-13451,
55-13846 and 55-13844^{1/}

15 **LU RANCHING CO.'S MOTION FOR**
16 **RECONSIDERATION AND/OR MOTION**
17 **TO AMEND**

18 **I. INTRODUCTION**

19 LU Ranching Co. ("LU Ranching"), by and through its counsel of record, hereby submits
20 this Motion for Reconsideration or Motion to Amend Judgment pursuant to I.R.C.P. 11(a)(2)(B) and
21 I.R.C.P 59(e) following the entry of this Court's Memorandum Decision and Order on Challenge
22 and Order of Partial Decrees ("Order"). It is important to note at the outset that LU Ranching agrees
23 with the majority of this Court's Order. However, LU Ranching respectfully requests that this Court
24 reconsider and amend its findings as they relate to the priority dates assigned to LU Ranching's
25 claims and requests that the Court amend the Partial Decrees as outlined herein. LU Ranching

26
27 ^{1/} In the Memorandum Decision and Order on Challenge and Order of Partial
28 Decrees, the Court split water right 55-10292B and thereby added water right 55-13846, and
split water right 55-10290B and thereby added water right 55-13844. The new subcases
numbers are added to the case caption, above.

1 additionally requests pursuant to I.R.C.P. 60(a) that this Court amend the Partial Decree issued for
2 water right 55-10296 to correct a clerical error concerning place of use descriptions with respect to
3 that right.

4 **II. STATEMENT OF ISSUES**

5 LU Ranching requests that the Court reconsider and amend its Order as it relates to the
6 following issues:

7 1. Whether, as a matter of law and fact, LU Ranching is entitled to priority dates that
8 pre-date the Taylor Grazing Act by virtue of the grazing preferences and grazing permits issued to
9 LU Ranching's predecessors in interest.

10 2. Whether the priority dates in the Partial Decrees are contrary to the unrebutted
11 evidence at trial.

12 3. Whether the evidentiary standard applied by this Court on the issue of priority date
13 constitutes an unrealistic and insurmountable evidentiary hurdle.

14 4. Whether collateral estoppel bars the relitigation of the issue of the priority date to be
15 assigned to LU Ranching's claims when LU Ranching's related "A" claims already have been
16 decreed, without objection by the United States, with a priority date of 1872.

17 **III. STANDARD OF REVIEW**

18 The function of a motion for reconsideration or motion to amend judgment is to give the
19 court an opportunity to correct any errors that may exist and, in that way, obviate the need for an
20 appeal. Authority for such review is found first in I.R.C.P. 11(a)(2)(B) which states the following:

21 A motion for reconsideration of any interlocutory orders of the trial court may be
22 made at any time before the entry of final judgment but not later than fourteen (14)
23 days after the entry of the final judgment. A motion for reconsideration of any order
24 of the trial court made after entry of final judgment may be filed within fourteen (14)
25 days from the entry of such order; provided, there shall be no motion for
26 reconsideration of an order of the trial court entered on any motion filed under Rules
27 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

28 I.R.C.P. 11(a)(2)(B). Similarly, I.R.C.P. 59(e) provides that a party may file a motion to alter or
29 amend judgment and serve the same not later than fourteen days after the entry of judgment.

30 A motion to amend a judgment is addressed to the sound discretion of the court. *See Lowe*
31 *v. Lym*, 103 Idaho 259, 263 (1982). Such a motion affords the court an opportunity to correct errors

1 both of fact or law that may have occurred, and, as stated above, provides a mechanism for
2 corrective action short of appeal. *Id.*

3 IV. ARGUMENT

4 A. As a matter of law, LU Ranching is entitled to priority dates that pre-date the
5 enactment of the Taylor Grazing Act.

6 LU Ranching respectfully requests that the Court reconsider its ruling as it relates to the
7 proof necessary to substantiate a priority date and, related to this, the legal effect to be given to the
8 grazing preference applications and subsequently issued grazing permits. In sum, the Court gives
9 too much effect to the absence of a reference in the grazing applications to water rights sited on
10 federal public land, and not enough effect to the grazing preferences themselves. The grazing
11 preferences are in and of themselves evidence that LU Ranching's predecessors in interest made use
12 of the rangeland at issue, and the water thereon, prior to 1934. The earliest regulations and
13 adjudications made clear that grazing applications would be granted on the basis of priority of use,
14 and the highest preferences were awarded to those, like LU Ranching's predecessors in interest, who
15 were able to demonstrate commensurate base property used in connection with the public range
16 during the five year period prior to the enactment of the Taylor Grazing Act.

17 This Court's analysis regarding the proof necessary to establish the existence and scope of
18 water rights, and priority date in particular, is summarized in the following portion of the Court's
19 opinion:

20 General averments that grazing existed historically by the public at large in a general
21 area are insufficient to establish the existence and transfer of water rights. In proving
22 any beneficial use right by a predecessor-in-interest, a claimant must still establish the
23 existence and scope of the right and then connect the chain of title and appurtenant
24 water rights from the original appropriator to the claimant. *Id.* 13 For example a
25 claimant can trace his or her chain of title back to the patent and demonstrate that the
26 original homesteader was engaged in the livestock business. This can be
27 demonstrated from subsequent grazing permit applications wherein the applicant was
28 required to set forth the prior historic use of the adjacent public domain in
conjunction with the homesteaded property. Any subsequent preference and permit
issued would certainly be probative of the historic use, for two reasons: First,
because the preference and resulting permit was issued based on the representations
by the applicant; and secondly, because the preference would be "attached" to the
land (or water right) by operation. Subsequent conveyances of the base property
together with attached grazing privileges and the continued use of the grazing
privileges are probative that any water rights transferred as appurtenances to the base
property.

1 Order, p. 27. Thereafter, the Court engages in a detailed analysis of the claims at issue, culminating
2 in each with the conclusion that LU Ranching is entitled to its claimed water rights, but with a
3 priority date that corresponds to the dates that LU Ranching's respective predecessors in interest
4 grazed and watered its cattle on the various allotments pursuant to permit. However, this analysis
5 recognizes only one side of the story – the continued use of this rangeland by LU Ranching's
6 predecessors in interest pursuant to permit. What the analysis fails to recognize is the first half of the
7 story – that these permits would not have been issued to LU Ranching's predecessors in interest
8 unless the applicants were able to demonstrate prior use of the same rangeland dating back to a time
9 period pre-dating the Taylor Grazing Act. If LU Ranching's predecessors in interest were using the
10 rangeland prior to 1934, then, by definition, they were also appropriating the water thereon for
11 stockwatering purposes and these water rights should be assigned priority dates predating enactment
12 of the Taylor Grazing Act in 1934.^{2/} Subsequent conveyances of the base property together with all
13 appurtenances and the transfer of attached grazing privileges and the continued use of the grazing
14 privileges then would be probative of the transfer of the water rights with a priority date relating
15 back to the first appropriations prior to 1934.

16 Interestingly, this Court recognized the prior use requirement in its Order. The Order
17 contains the following language:

18 The United States obviously recognized the need for the adjacent public land to
19 sustain a viable ranching operation when it embraced the historical practice by
20 awarding grazing preferences *based on the prior use of the public land*. See e.g.
21 *supra*, *Public Lands Council v. Babbitt*, at p. 1295. Doctor Gibson also testified that
22 in awarding grazing preferences: "The two primary things were *prior use* and
commensurate base property. The prior-use rule that was finally adopted was that *you*
had to have grazed there two consecutive years, or three years not consecutively out
of the previous years prior to 1934." Tr. p. 391.

23 Order, p. 19-20 (*emphasis added*). The only way for applicants, like LU Ranching's predecessors in
24 interest, to obtain a preference grazing right was to demonstrate to the satisfaction of the United
25 States when their grazing applications were being reviewed that they owned commensurate base

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27 ^{2/} As discussed herein, LU Ranching believes that the evidence at trial supports
28 the claimed 1876 priority dates. In the alternative, however, the partial decrees issued
should include a priority date that minimally predates June 28, 1934, the date that the Taylor
Grazing Act was signed into law.

1 property and used that base property in connection with the public range prior to the passage of the
2 Taylor Grazing Act. If the applicants met this showing, class 1 permits were issued to enable them
3 to continue to use the same range.

4 In addition to the unrebutted testimony of Dr. Chad Gibson at trial describing the prior use
5 rules, details of the prior use requirement are found in the body of the Taylor Grazing Act, in a
6 United States Supreme Court case analyzing that Act, in a decision by the Department of the Interior
7 regarding the adjudication of grazing preferences in the 1930s, and the Advisory Board Minutes
8 detailing the development of the prior use rule. Each source confirms what this Court recognized but
9 failed to apply: the fact that LU Ranching's predecessors in interest received preference grazing
10 rights is dispositive evidence of the fact that they were on the public range and were making use of
11 the grass and water thereon to support their livestock operation prior to 1934.

12 The basis for grazing preferences is set forth in the Taylor Grazing Act, 43 U.S.C. § 315b.
13 The statute recognizes that preference shall be given to those within or near a grazing district and
14 who are landowners engaged in the livestock business. *Id.* Following the enactment of the Taylor
15 Grazing Act the focus shift to determining how to apply that language and how best to administer
16 that Act. That process, and the prior use rule that developed, was described by the United States
17 Supreme Court as follows:

18 By 1937 the (Interior) Department had set the basic rules for allocation of grazing
19 privileges. Those rules recognized that many ranchers had long maintained herds on
20 their own private lands during part of the year, while allowing their herds to graze
21 farther afield on public land at other times. The rules consequently gave a first
22 preference to owners of stock who also owned "base property," i.e. private land (or
water rights) sufficient to support their herds, *and* who had grazed the public range
during the five years just prior to the Taylor Act's enactment. See 2 App. 818-819
(Rules for Administration of Grazing Districts (June 14, 1937)).

23 *Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000) (*emphasis in original*). A detailed record
24 of the process through which these rules were developed is found in the Minutes of the District
25 Advisors Convention, January 13-14, 1936. See Trial Exhibit BBB-2, beginning at p. 21-22
26 (discussing decision to award Class I grazing rights to those who could demonstrate that they owned
27 dependent base property and prior use of the range). Application of the prior use rule also is found in
28 decisions of the Department of the Interior considering the criteria to be applied to earliest

1 applications for grazing preferences under the Taylor Grazing Act. Faced with task of determining
2 who was entitled to the highest preferences, the Department of Interior turned to and relied upon the
3 prior use rule. In a decision issued on January 21, 1937, it was held:

4 If one of the purposes of the Taylor Grazing Act is "to stabilize the livestock industry
5 dependent upon the public range," it is obvious that this purpose is well served by
6 granting grazing privileges to applicants who are and have been operating going
7 concerns in connection with the range ... Clearly, if the standard of selection is to be
8 one of prior use of the public lands in connection with the private property held by the
9 applicants, some definition of the nature and extent of such prior use becomes
10 necessary. I am informed by the Director of Grazing that the 5-year period
11 immediately preceding the enactment of the act has been selected as a period within
12 which an applicant may qualify for grazing privileges by having used the public range
13 for one full grazing season because of its definite relation to the existing economic
14 and climatic conditions.

15 Opinion of the Department of the Interior, by T.A. Walters, First Assistant Secretary, dated January
16 21, 1937, p. 66-67.^{3/}

17 Based on the above criteria, the earliest applicants under the Taylor Grazing Act would be
18 concerned about two things: demonstrating that they had commensurate base property and that they
19 had used the public range in conjunction with that base property and their ongoing livestock
20 operation during the five years preceding the enactment of the Taylor Grazing Act. The fact that
21 grazing preferences were awarded is proof that the applicants satisfied both requirements. The fact
22 that the Applicants, in addition to identifying their patented or base properties, were given the option
23 of also identifying water rights but chose to leave that question blank does not mean that those rights
24 did not exist. Because identification of water rights was not a prerequisite to receiving a grazing
25 preference, applicants would not necessarily complete that portion of the application, nor could they
26 have known that almost seventy years later such omission would be construed as a practical
27 abandonment of those pre-existing water rights. Accordingly, the absence of language regarding
28 private water rights on the public domain on the grazing application is not dispositive of the issue of
whether they had valid appropriative water rights on the public domain prior to 1934.

As this Court recognized, the highest and first grazing priority was assigned to those
applicants who demonstrated that they had dependent commensurate property with prior use of the

^{3/} Although part of the public record, for the Court's convenience, a copy of the
Department of the Interior Decision is attached hereto as Exhibit "A".

1 public grazing land. *See* Order, p. 24, ft.n. 12. Evidence that such grazing preferences were granted
2 is evidence that the range, and the water thereon, was used and appropriated prior to 1934 as part of
3 an ongoing livestock operation. Accordingly, it was in error to assign a priority date relating to the
4 date the grazing permits were first exercised. Instead, the priority date must be prior to 1934 in
5 recognition of the fact that the permit would not have been issued in the first instance had there not
6 been use of the range, and the water and grass, thereon prior to 1934.

7 B. The un rebutted evidence at trial supports a priority date relating back to the date the
8 original patent holders in LU Ranching's chain of title first acquired the patents or, minimally, to a
9 date preceding the enactment of the Taylor Grazing Act.

10 **1. The un rebutted evidence at trial supports a priority date relating back to the date**
11 **LU Ranching's predecessors in interest, the original patent holders first settled**
their land.

12 At trial, LU Ranching presented an uninterrupted chain of title dating back to 1876 when the
13 earliest patent holder in LU Ranching's chain of title, Mr. Ezra Mills, first settled the land. *See*
14 Exhibit "X": Chain of Title. Importantly, none of those deeds reserved water rights in the grantor, but
15 instead, almost without exception, transferred not only base properties but also all appurtenances
16 thereto. While the Court discounted the effect to be given to surrounding evidence putting these
17 transfers and the livestock operations of these early predecessors into historic context,^{4/} the evidence
18 cannot be ignored. Together, evidence of historic use in the region, coupled with specific and direct
19 evidence of the livestock operations and grazing practices of LU Ranching's predecessors in interest,
20 support a priority dates dating back to the dates the original patent holders first settled on the land.^{5/}
21 The three original predecessors in interest are Mr. Mills, Mr. Ewing and Mr. Duncan. Mr. Mills'
22 application supports a priority date of 1876. *See* Exhibit CC: Ezra Mills Patent File. Mr. Ewing filed

24 ^{4/} *See* Order, p. 26 ("Where a deed is otherwise silent, a generalized showing
25 that a particular region was historically used by the pubic for grazing is insufficient to
26 establish that a particular predecessor-in-interest grazed cattle for purposes of establishing a
27 water right.")

28 ^{5/} Although LU Ranching claimed, and Special Master Cushman, recommended
a priority date for all water rights of 1876, correlating with the date that the earliest
predecessor in interest, Mr. Ezra Mills, first settled the land, as this Court recognized, a more
accurate analysis would correlate the water rights to the specific original patent holders from
which the rights derive.

1 a homestead entry application in 1909 and received a patent in 1910. *See* Exhibit K: George Ewing
2 Patent File. Mr. Duncan filed two homestead applications in 1910 and 1911 and received his patent
3 on December 9, 1914. *See* Exhibit BB: Warren Duncan Patent File. Under this analysis, water rights
4 55-10295, 55-10296, 55-10297, 55-10298, 55-10299, 55-10300 and 55-10301 would relate back to
5 Mr. Ezra Mills, with a priority date of 1876. *See* Exhibit CC: Ezra Mills Patent File; *see also* Exhibit
6 X: Chain of Title. Water rights 55-10303 and 55-13451 would relate back to Mr. George Ewings,
7 with a priority date of, at the latest, July 26, 1910, the date that Mr. Ewings received his patent. *See*
8 Exhibit K: George Ewings Patent File; *see also* Exhibit X: Chain of Title. Finally, water rights 55-
9 10288, 55-10289, 55-10290, 55-10292 and 55-10293 would relate back to Mr. Duncan, with a
10 priority date not later than December 9, 1914, the date that Mr. Duncan received his patent from the
11 United States government. *See* Exhibit BB: Warren Duncan Patent File; *see also* Exhibit X: Chain of
12 Title.^{6/}

13 Both general and specific evidence was presented at trial that LU Ranching's predecessors in
14 interest were engaged in the livestock industry and used not only the patented lands, but the
15 associated public lands and waters thereon, to support their ongoing livestock operations.^{7/} This
16 evidence includes evidence that the livestock industry was the predominant industry in the vicinity.
17 *See* Exhibit UU: Article from the Enterprise Times; Exhibit TT: Excerpts from the Owyhee County
18 Blue Book; Testimony of Dr. Chad Gibson, p. 391-392. Specific evidence that LU Ranching's
19 predecessors in interest were engaged in the livestock industry, and used the public range and water
20 thereon that are at issue in this case, prior to 1934 also was presented at trial. This unrebutted
21 evidence includes evidence of the grazing applications, evidence of the grazing preferences and
22 grazing permits awarded to LU Ranching's predecessors in interest, and direct testimony from Mr.

24 ^{6/} It should be noted that while the respective patent dates are 1887, 1910, and
25 1914, in order to receive those patents on those dates, the original patent holders must have
been working those homesteads prior to those dates.

26 ^{7/} As recognized by this Court, Mr. Mills as well as the other original patent
27 holders used both their patented lands and surrounding public lands and water thereon to
28 support their homesteads and their cattle operations. *See* Testimony of Dr. Chad Gibson,
Trial Transcript, p. 386-387. Without such use of surrounding public land, the small
homesteads would be insufficient to support the operations of the original settlers. *See*
Testimony of Dr. Chad Gibson, Trial Transcript, p. 387, 389.

1 Thomas Skinner who witnessed, first hand, the livestock operations of LU Ranching's predecessors in
2 interest.

3 **2. The grazing preferences awarded to LU Ranching's predecessors in interest,**
4 **together with direct testimony offered at trial, provide conclusive and un rebutted**
5 **evidence that the claimed water rights were first appropriated prior to 1934.**

6 There is a legal doctrine familiar to every first year law student, *res ipsa loquitur*, "the thing
7 speaks for itself." Although typically used in the context of tort, its principle is equally applicable
8 here. It recognizes that in the absence of "X", "Y" would not have occurred. In our case, in the
9 absence of LU Ranching's predecessors' use of the range and concomitant appropriation of the water
10 thereon prior to 1934, LU Ranching's predecessors in interest would not have received their grazing
11 preferences. Put another way, we know because of the permits and grazing preferences awarded to
12 LU Ranching's predecessors in interest, that those predecessors in interest used the public lands
13 identified in those permits and the water thereon prior to 1934. *See* Exhibits A, C, D, E, F, G, H, I,
14 M, P, S, V (demonstrating BLM recommendations for preferences on federal allotments, grazing
15 permits, and transfers of grazing permits involving LU Ranching and its predecessors in interest).
16 The evidence of prior use of the water at issue in this case prior to 1934 is in the record. It is found
17 not only in the evidence of historic use and through the demonstration of LU Ranching's chain of title
18 it also is found directly in the grazing permits and the documents awarding grazing preferences to LU
19 Ranching's predecessors in interest and in the direct and un rebutted testimony of Mr. Thomas
20 Skinner who witnessed first-hand the livestock operations of LU Ranching's predecessors in interest
21 on federal public land.

22 a. South Mountain – Water Rights 55-10290B and 55-10292B

23 Water rights 55-10290B and 55-10292B are sited within the South Mountain allotment and, as
24 the Court recognized, derive from that portion of LU Ranching's chain of title deriving from the
25 Duncan homestead. *See* Order, p. 30-31. In 1935, one of the successors to Mr. Duncan, and one of
26 LU Ranching's predecessors in interest, Mr. Patrick O'Keefe, applied for a grazing permit. *See*
27 Exhibit Y: Patrick O'Keefe Grazing Records. Mr. O'Keefe represented in that application that his
28 base lands and the water had been used in connection with the public domain for thirty years prior to

1 the application, which would place the priority date to 30 years prior the signing of this grazing
2 application, or 1905. *See* Exhibit Y: Patrick O'Keefe Grazing Records. Subsequent to the
3 application, Mr. O'Keefe was issued a permit for the use of South Mountain Allotment. As briefed
4 extensively herein, Mr. O'Keefe would not have received such a preference grazing right but for the
5 fact that he had been using that public range prior to the enactment of the Taylor Grazing Act. As
6 further proof that Mr. O'Keefe was engaged in the livestock industry and using the public range in
7 conjunction with his ongoing livestock operation, first hand testimonial evidence was offered by Mr.
8 Thomas Skinner at trial. Based on his personal knowledge, Mr. Skinner testified regarding cattle
9 grazing and watering prior to 1934 on what would become the South Mountain Allotment, and
10 additionally testified from his personal knowledge and experience that Mr. O'Keefe was engaged in
11 the livestock industry and grazed and watered cattle on what became BLM administered land.
12 *See* Testimony of Mr. Skinner, p. 491-494, 498-499. In short, there is direct and un rebutted evidence
13 in the trial record that LU Ranching's predecessors in interest were using the subject lands and water
14 thereon prior to 1934. While LU Ranching believes that a priority date relating back to the earliest
15 patent holder for these rights, 1914, is supported by the evidence, in the alternative, a priority date of
16 July 14, 1928 should be assigned to these rights. That date represents the date that Mr. O'Keefe
17 acquired the base ranch associated with these rights together with all appurtenances. *See* Exhibits 2
18 and X.

19 Additional grazing applications associated the South Mountain Allotment were filed by Mr.
20 Mendieta. *See* Exhibits C and G: Mendieta Grazing Records. As with the grazing preferences
21 awarded to Mr. O'Keefe, the fact that Mr. Mendieta sought and obtained a preference grazing right
22 from the United States is evidence that Mr. Mendieta was able to prove, to the United States'
23 satisfaction, that he and/or his predecessors in interest used the public range and the resources thereon
24 in conjunction with the base ranch property and an ongoing livestock operation for at least five years
25 predating the Taylor Grazing Act.

26 b. Cow Creek Allotment – Water Rights 55-10295, 55-10296, 55-10297B, 55-
27 10298, 55-10299B and 55-10300

28 Again, the Court details in its opinion the history of the above water rights. *See* Order, p. 33-

1 38. However, the Court fails to give proper legal effect to the direct evidence presented regarding the
2 use of the waters prior to the enactment of the Taylor Grazing Act. The grazing applications filed and
3 granted were filed by Mr. O'Keefe in 1937, and by Mr. Mendieta in 1949. As outlined above, the
4 preference grazing rights associated with this allotment would not have been granted but for the fact
5 that Mr. O'Keefe and/or his predecessors in interest had used this public range and the natural
6 resources thereon in conjunction with the base ranch property for at least five years prior to the
7 enactment of the Taylor Grazing Act. Moreover, there is in the record direct evidence from Mr.
8 Skinner of the fact that LU Ranching's predecessors in interest associated with this right were
9 engaged in the livestock operations and were using the federal public range in conjunction therewith.
10 *See* Testimony of Mr. Skinner, p. 502-505 (Shea), p. 498-499 (O'Keefe), and p. 502-504 (Mendieta).
11 Because of the legal effect that must be given to the preference grazing rights awarded, while it is LU
12 Ranching's position that a priority date should be assigned relating back to the original patent holder
13 for these rights, in the alternative, at the latest, a priority date must be assigned that predates the
14 enactment of the Taylor Grazing Act in recognition of the fact that in order to obtain the preference
15 grazing rights, LU Ranching's predecessors in interest must have used this public range and water and
16 grass thereon as part of their livestock operation during the five years prior to 1934.

17 c. Cliff's Allotment – Water Rights 55-10303B and 55-13451

18 The history of these water rights relate back to Mr. George Ewings. In 1937, Clyde C. Foster,
19 one of LU Ranching's predecessors in interest, filed a grazing permit application. On that
20 application, there is evidence of prior use of the public range land at issue by virtue of Mr. Foster's
21 representations that he had used the public lands for the previous 25 years. *See* Exhibit 5: Grazing
22 Records. The application was granted, and by virtue of that fact there is, therefore, evidence in the
23 record that Mr. Foster was able to prove to the United States' satisfaction at that time that he and/or
24 his predecessors in interest had used that public land and the resources thereon to support his base
25 ranch and livestock operations at least for a period of five years predating the enactment of the Taylor
26 Grazing Act. *See* Exhibits 5, L, and M: Grazing Records Relating the Cliffs Allotment.

27 **3. The un rebutted evidence at trial supports the conclusion that LU**
28 **Ranching's predecessors in interest appropriated the claimed water rights**
dating back to the date that the original patent holders first settled the

1 **land.**

2 The evidence outlined, above, relates to just some of the grazing applications filed by LU
3 Ranching's predecessors in interest. However, the un rebutted evidence at trial is that grazing
4 preferences were awarded for the use of allotments which cover all of the claimed places of use for
5 the water rights at issue herein, and were transferred through the subsequent chain of title.
6 See Exhibit 2, 5-18, A, C, D, E, F, G, H, I, M, P, S, V and X. The un rebutted evidence also supports
7 historic use of these lands and the transfer of both the base ranch properties, together with all
8 appurtenances and grazing preferences, through the chain of title to today's LU Ranching Company.
9 See Testimony of Mr. Skinner, p. 461-521 (regarding the grazing operations of LU Ranching's
10 predecessors in interest, including O'Keefe, McKay, Shea, Mendieta, Mills, Stanford, Staples, and
11 Lowry); see also X: LU Ranching's Chain of Title. No evidence was offered by the United States to
12 rebut the evidence that LU Ranching's predecessors in interest were using the lands and the water at
13 issue herein dating back to the time of the original patent holders. Similarly, no evidence was offered
14 by the United States to rebut the evidence that grazing preferences were awarded to LU Ranching's
15 predecessors in interest and that the existence of those grazing preferences evidence prior use of the
16 lands and water at issue herein during the five year period predating the Taylor Grazing Act. While
17 LU Ranching believes that the evidence at trial supports priority dates corresponding to the date the
18 original patent holders first settled on the land, to the extent that this Court is inclined to amend the
19 partial decrees and to correlate the priority dates instead with the five year or more period pre-dating
20 the Taylor Grazing Act, representing the dates that the grazing applicants used the public range prior
21 to the enactment of the Taylor Grazing Act, LU Ranching respectfully requests the opportunity to file
22 a supplemental brief on that issue, given the number and complexity of the grazing applications and
23 corresponding transfers in LU Ranching's chain of title.

24 D. Failure to issue partial decrees with dates relating to the dates that LU Ranching's
25 earliest predecessors in interest first acquired their patents will result in inconsistent
26 rulings in the SRBA and conflict with Partial Decrees issued in the companion "A"
27 subcases involving LU Ranching's water rights.

28 The subcases at issue herein were once part of a greater set of water right claims comprised

1 not only of water right claims sited on what are now federally administered grazing allotments, but
2 also those located on private land and land owned by the state of Idaho. All of the water right
3 claims, whether on federal, state or private land, were supported by the application of the water to
4 beneficial use by each of LU Ranching's predecessors in interest and the subsequent transfer of those
5 water rights through the chain of title from the original patent holders to today's LU Ranching.
6 These claims were later separated during the course of this adjudication, and given either "A"
7 designations, representing water rights located on private or state owned land, or "B" designations, at
8 issue herein, involving water rights located on federal land. Importantly, the United States was a
9 party to both the litigation involving the "A" claims in addition to the "B" claims at issue herein.

10 The "A" claims have now been decreed, and were awarded a priority date of May 20, 1872,
11 representing the first date LU Ranching's predecessors in interest put the water to beneficial use,
12 based on the same chain of title and the same evidence regarding LU Ranching's predecessors in
13 interest that has been offered to support the "B" claims in the present action. As a party to the
14 litigation of the "A" claims, the United States had a full and fair opportunity to object to LU
15 Ranching's position that the priority date for these water rights relates back to the date the water was
16 first appropriated by the original patent holders. Having failed to make that objection, and given the
17 fact that both the "A" and "B" sets of rights were acquired through the same predecessors in interest
18 and were based on the same acts of appropriation, the United States should have been estopped from
19 raising any objection to the 1876 priority date claimed by LU Ranching in the "B" claim litigation.
20 *See e.g. D.A.R., Inc. v. Rudzik*, 997 P.2d 602 (Idaho 2000); *Eastern Idaho Agricultural Credit Assn.*
21 *v. Neibaur*, 987 P.2d 314 (Idaho 1999) (collateral estoppel bars relitigation of an issue determined in
22 a prior proceeding).

23 The effect of the partial decrees in the "A" claims on the present "B" claims stems not only
24 from the fact that the United States failed to object to the early priority dates assigned to those
25 claims, but also stems from the practical realities stemming from the evidence supporting the 1872
26 priority date for the "A" claims. The SRBA Court has already made a judicial determination that LU
27 Ranching's earliest predecessors in interest were engaged in the livestock business dating back to
28 1872, were appropriating the waters claimed in the "A" claims as early as 1872, and that, therefore,

1 LU Ranching is entitled to a priority date relating back to 1872 by virtue of the transfer of those
2 water rights as appurtenances to the base ranch property. As a practical matter, the same cattle that
3 were using the water on the private stream segments (the "A" claim waters) were concurrently and
4 historically using the waters represented by the "B" claims. Simply, cows do not read maps and do
5 not recognize phantom boundaries separating private land from state land, and state land from
6 federal land. Accordingly, because there was a prior judicial finding of historic use of related
7 streams in the same geographic area by LU Ranching's predecessors in interest dating back to 1872,
8 and that judicial determination was not challenged by the United States, the partial decrees issued in
9 the "A" claims are probative of the validity of LU Ranching's beneficial use "B" claims with a
10 priority date of 1876. Failure to recognize such an early priority date will result in conflicting rulings
11 within the SRBA involving the same set of rights.

12 E. Pursuant to I.R.C.P. 60(a), LU Ranching requests that the Court correct the Partial
13 Decree issues in 55-10296 such that the point of diversion and places of use correlating with T5S
14 R6W Section 14, NENE and SENE are addressed within the same Partial Decree.

15 Idaho rules provide for the correction of clerical mistakes in orders arising from oversight or
16 omission. *See* I.R.C.P. 60(a). Such mistakes can be corrected either by the Court of its own
17 initiative or on the motion of any party. *Id.* In the present case, this Court identified an error in the
18 point of diversion and place of use legal descriptions correlating with T5S R6W Section 14, NENE
19 and SENE. *See* Order, p. 46. It appears that these quarter quarter sections were claimed as places of
20 use for water right 55-10296, and were claimed as points of diversion but for water right 55-10297B.
21 While it was clearly the intent to include these quarter quarter sections as both points of diversion
22 and place of use, an error was made in failing to include each within the same water right claim. To
23 correct this unintended clerical oversight, LU Ranching requests that the Court amend the Partial
24 Decree for water right 55-10296 so that it reflects T5S R6W Section 14, NENE and SENE as both
25 points of diversion and places of use for this water right.

26 V. CONCLUSION

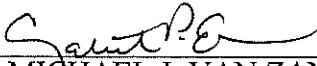
27 The evidence at trial supports priority dates for LU Ranching's water rights relating back to
28 the dates that LU Ranching's three earliest predecessors in interest first occupied the patented lands

1 and began using the same in conjunction with the surrounding public range. In the alternative, at the
2 latest, LU Ranching is entitled to a priority date that predates the enactment of the Taylor Grazing
3 Act by at least five years. LU Ranching respectfully requests that this Court amend its Order and
4 Order of Partial Decrees accordingly.

5
6 Dated this 17 day of January, 2005.

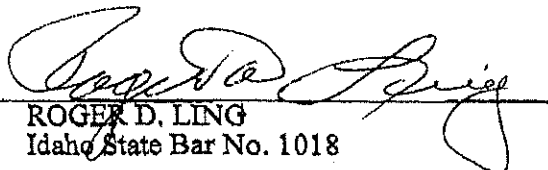
7 Respectfully submitted,

8 McQUAID BEDFORD & VAN ZANDT, LLP

9
10 By: 
11 MICHAEL J. VAN ZANDT
12 ELIZABETH EWENS
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1 Dated this ____ day of January, 2005.

2 LING, ROBINSON & WALKER

3
4 By: 

5 ROGER D. LING

6 Idaho State Bar No. 1018

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10 Attorneys for LU Ranching Co.

1 **CERTIFICATE OF SERVICE**

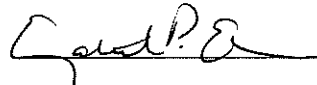
2 I certify that on January 17, 2005, I served a true and correct copy of foregoing LU
3 **RANCHING CO.S' MOTION FOR RECONSIDERATION AND/OR MOTION TO AMEND**
4 upon the following individuals by placing the document in the United States Mail, postage paid, and
5 addressed as follows:

6 U.S. Department of Justice
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Elizabeth Ewens

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