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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO 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)
	)	
	)	REBUTTAL BRIEF TO U.S. RESPONSE TO
	)	NOTICE OF CHALLENGE OF
	)	SPECIAL MASTERS REPORT and
	)	RECOMMENDATION
	)	

This is the REBUTTAL BRIEF TO U.S. RESPONSE TO NOTICE OF
CHALLENGE OF SPECIAL MASTERS RECOMMENDATION of Bruce Byron Bedke
and Jared K. Bedke (challengers), pro se litigants, in the above named subcases.

I. INTRODUCTION

On January 11, 2005, the United States filed a RESPONSE BRIEF IN
OPPOSITION TO CHALLENGE TO SPECIAL MASTER'S DECISION ON MOTION
TO ALTER OR AMEND (Response) making procedural and factual arguments. We will
address each in turn.

REBUTTAL BRIEF TO U.S. RESPONSE TO NOTICE OF CHALLENGE OF SPECIAL MASTERS REPORT and
RECOMMENDATION

II. STANDARD OF REVIEW

In the Response, the United States argues that the district court is required to adopt a special master's findings of fact unless clearly erroneous, and cites the *Memorandum Decision and Order on Challenge*, subcase no. 65-05663B (May 9, 2002) ("Wood v. Troutt"). In that case, the special master had conducted a trial and then issued his findings of fact and conclusions of law in that matter. That decision was then challenged, and the district court affirmed the ruling because there was no evidence presented at trial to make the special master's ruling clearly erroneous.

The procedural differences between subcase 65-05663B and the cases at issue here raise an interesting question for the court. What standard of review is to be applied when a trial has not been conducted for a particular subcase? Logically, if there has been no trial conducted, then there has been no chance for the introduction of evidence to contradict the presumption created by the director's report. Therefore a limitation imposed upon the district court to review only the evidence introduced at trial to determine whether or not clear error occurred, would be folly in cases that have had no trial. To further clarify this issue, this court distinguished uncontested claims from claims that have been contested and the discretion to be applied to them (see OPENING BRIEF IN SUPPORT OF NOTICE OF CHALLENGE OF SPECIAL MASTERS REPORT AND RECOMMENDATION [Opening Brief], at 15). Clearly, there is no such restriction on the court in the subcases at issue.

III. SPECIAL MASTER'S REPORT IS CLEARLY ERRONEOUS

In the subcases at issue, the United States is acting strictly in its proprietary capacity and has to meet all the requirements of any other claimant (Opening Brief, at 8,

16). Given the United States' judicial admission in Basin 72 that it is not the party that appropriated the water with its own stock, and the subsequent findings of the court in that matter, the United States has not met the criteria set forth by the State to acquire a state based water right. Without use by its own stock, the U.S. cannot demonstrate: 1.) An intent to use/divert the water; 2.) A diversion of water took place; 3.) That the actual use of water occurred. Any conclusion reached by the special master contrary to these facts is clearly erroneous.

IV. ISSUES ON CHALLENGE

The United States argues that only issues raised at the alter or amend stage can be brought up on a challenge, and subsequently that all other issues are barred.

A.O.1 sets forth a criteria that defines who may bring forth a challenge to the special masters report and recommendation as a proper party, A.O.1 13(a), but it does not address which issues can be raised on a challenge. The answer can be arrived at through logic and simple reason.

First of all, we know that the only way a special master can have a trial to determine the merits of a particular water right, is for there to be claim and an objection to that claim. This creates a justiciable controversy of fact that the special master can resolve through witnesses, evidence, and testimony.

In the subcases at issue, the special master denied the Bedke's motions to file objections. Because of this ruling, procedurally, no issues of fact could be raised in front of the special master. The original motion to file objections had to be granted in order to reach a trial to determine the merits of the subcases at issue. Consequently, the only issue that could be appealed before the special master was the ruling on the motions to file

objections.

The district court, however, retains discretion over uncontested water rights (Opening Brief, at 15). Since it retains this discretion, it has the authority to hear new issues on challenge when the procedures set forth for dealing with a special master offer no remedy. Furthermore, A.O.1 13(f) directs that the court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand the special masters report with instructions. Clearly, there are no limitations on the district court as to the issues that can be placed before it or the remedies it may apply.

V. DIRECTORS REPORT CLEARLY ERRONEOUS

The United States also argues that the director's report must be accepted unless contrary evidence is present or the Director's Report is clearly erroneous.

As pointed out earlier, evidence can only be admitted at trial by a judge or the special master. Therefore, there has been no opportunity to place evidence before this court once the challengers' Motions to file objections were denied. Challengers have provided this court with an offer of proof as to the correctness of their position (Opening Brief, Exhibit 7).

The subcases at issue were reported on August 7, 1998 by the IDWR in the Director's Report. The recommendations for these subcases in this report are inconsistent with the rulings made by this court in its order of 2/6/98 (see Opening brief, pg 16 et. seq.), given the judicial admission made by the United States that they were not the party that appropriated the water.

VI. UNITED STATES' ARGUMENT

The United States makes several allegations and misstatements regarding the facts

in this case within section “V. ARGUMENT” in their Response (pg 6 – 17). We shall address several of those in turn.

C. HEARINGS AND TRANSCRIPTS

On page 9 of the Response it is alleged that challengers specifically attended an initial hearing in Basin 45 to request that their names be added to Scott Bedke’s objections. The record of that hearing clearly shows no such request was made by challengers (see Response exhibit F, pp. 75-83).

Further, the United States alleges and infers that challengers were present with a group of people that represented to this Court that their names had been inadvertently omitted from Scott Bedke’s objections. While challengers were present at that hearing, the record clearly shows no such representation was ever made by challengers (see Response exhibit F, pp. 75-83).

Also on page 9, it quotes Jared Bedke from a hearing on June 7, 1999, and argues that it demonstrates the absolute latest date challengers became aware of the need to file objections. A reading of the transcript (see U.S. Response, exhibit G, pp 80 – 86) demonstrates that the challengers were quite confused by the advice they were given, and set out as soon as they were aware of the necessity of it to make Motions to file objections in the subcases at issue.

The United States also sets out a timeline on page 9 of their Response, inferring a lack of urgency with respect to their Motions to file objections in the subcases at issue, specifically stating “two months after their appearances in the SRBA Court...”. It should be pointed out that the appearance in the SRBA Court on April 7, 1999 was for subcases that were within Basin 45. The first hearing in the subcases at issue occurred on June 7,

1999 three days after the challengers' Motions to file objections were lodged (see U.S. Response, Exhibit G).

B. SRBA STANDARD FOR LATE OBJECTIONS

The United States makes an argument that deadlines provided by A.O.1 must be strictly construed, and cites a Idaho Supreme Court ruling denying a request to file late responses (Response, at 10).

The United States then makes another argument, contradicting its previous one, that Motions to file late objections are permissible if the "good cause" standard of IRCP 55 is met (Response, at 11).

1. The default was not willful

The United States asserts that challengers argue "that their failure to file timely objection was caused by their 'confusion,' allegedly brought about by IDWR's bifurcation of domestic and stockwater claims...". This is wholly inaccurate. Challengers' confusion came from the advice they received subsequent to the bifurcation process on whether objections had to be filed to conflicting claims (see Opening Brief, at 5-7).

The United States then argues that the Idaho Supreme Court's ruling in the L.U. Ranching case is applicable here. The United States admits that the L.U. case was determined on whether or not improper notice excused its failure to properly contest federal stockwater claims (Response, at 11-12). Challengers are not arguing improper notice was given, nor the constitutionality of the notice provisions. Secondly, the subcases at issue in L.U. had already proceeded to partial decree and as such were subject to the higher 60(b) standard of review (Opening Brief, at 12). Similarly, the ruling in

A.L. Cattle is off point and does not apply.

The United States also argues that a delay from the Basin 45 hearing on April 7, 1999 to June 4, 1999 constitutes an inexcusable delay, which demonstrates a willful disregard of the deadlines established. At the hearing on June 7, 1999, Jared Bedke told of the process that he and his father went through after the hearing on April 7, 1999. The transcript shows that challengers began an investigation after the April 7, 1999 hearing to determine which federal claims they needed to object to. Challengers finished their investigation and proceeded to file their motions before the hearing on June 7, 1999 (Response, Exhibit G, pp 82 – 83). Clearly, as the record plainly demonstrates, there has been no willful default in this matter.

2. Heresay

The United States argues that any factual assertions made by the Bedke's should not be considered because they were never properly sworn, and therefore everything said is heresay and should not be considered by the court (Response, at 14). A logical discussion of this argument seems appropriate.

As discussed above, the only way to introduce evidence is at a trial, everything else is merely part of the trial record. How does one get to trial? In the SRBA court, there needs to be a claim and an objection in order to proceed to trial. In these instant cases, we have claims, so how do we get objections? Since the deadline for filing objections has passed, the only way to get objections is to file a motion to file objections. Now in order for such a motion to be granted, good cause must be established pursuant to Rule 55. Hearings are held, and briefs are filed to see if good cause exists. However, according to the United States' logic, nothing that isn't properly sworn to can be used in

determining good cause. Hearings, status conferences, and briefs are not sworn, therefore, following the United States' argument, there can't be anything in the trial record that the court can consider when determining whether good cause exists, as the court can only rely on evidence. By this logic, the court must make its decision in a vacuum, and actually can't consider any argument either party makes in this matter. Logically, the heresay argument fails.

3. United States would be prejudiced

The United States makes argument and relies upon a ruling made by Special Master Cushman dated March 13, 2002 denying Motions to file late objections in several subcases (Response, at 16). This ruling is off point and misapplied.¹

The United States also references the *Global Stockwater Settlement*, specifically, language contained within paragraph 9 of that settlement. Challengers are not parties to the *Settlement* and are therefore not bound by its terms and conditions. Any language in the *Settlement*, such as paragraph 9, is at best bad planning on the part of the drafters of the *Settlement*, and at worst a deliberate attempt by the United States and third parties to deny challengers their rights to due process in the SRBA. Challengers are hopeful that it is simply bad planning.

¹ In that case, the State of Idaho had objected to several of the United States' stockwater claims. Bracketts, the party making the motion to file late objections, were aware that the State had objected to the U.S. claims and didn't object at that time. The State and U.S. resolved the objections and Special Master Cushman issued a report and recommendation accordingly. Bracketts then filed their Motions to file late objections to the subcases that had been the subject of the report and recommendation, admitting that they were aware of the U.S. claims and that they intentionally didn't file timely objections in the hopes that someone else would litigate the case and they wouldn't have to (see Order at 11). The court therefore denied the motions to file late objections due to the fact that the U.S. claims had already "been subject to lengthy proceedings" and it would therefore be prejudicial.

4. Meritorious defense

The United States argues that the arguments made A.L. Cattle subcases are identical to challengers' arguments. This too is wholly inaccurate, off point, and misapplied² (see also Opening Brief, at 8, 16).

The United States further argues that "the allegations made by the Bedkes are not enough to rebut" the presumption of the Director's Report (Response, at 17). This is one of many examples of the United States attempting to divert the issue and to hold the challengers to a higher standard than IRCP Rule 55 requires. The standard set by Rule 55(c) is good cause shown. Along with good cause a meritorious defense must also be presented. The Court has ruled that challengers only have to *plead* facts, which *if* established, *would* constitute a defense to the action (Opening Brief, at 3). The United States continues to argue that standards should be met as if a trial had already occurred. Clearly, the United States argument is without merit.

C. BEDKES ARE BARRED FROM ARGUMENT

The United States argues that only issues raised at the alter or amend stage can be brought up on a challenge, and subsequently that all other issues are barred.

A.O.1 sets forth a criteria that defines who may bring forth a challenge to the special masters report and recommendation as a proper party, A.O.1 13(a), but it does not address which issues can be raised on a challenge. That answer can be arrived at through

²In the A.L. Cattle Reconsideration Order, the question before the District Court was whether or not IRCP Rule 60(b)(4) applied to certain licensed water rights based on an argument of forfeiture. The Court pointed out that A.L. Cattle made no specific argument as to forfeiture and pointed out the fact the United States didn't own cattle doesn't necessarily preclude them from obtaining a water right through an agency relationship with a grazing allottee. The subcases at issue here claim no such agency relationship as their basis.

logic and simple reason.

First of all, we know that the only way a special master can have a trial to determine the merits of a particular water right, is for there to be claim and an objection to that claim. This creates a justicable controversy of fact that the special master can resolve through witnesses, evidence, and testimony.

In the subcases at issue, the special master denied the Bedke's motions to file objections. Because of this ruling, procedurally, no issues of fact could be raised in front of the special master. The original motion to file objections had to be granted in order to reach a trial to determine the merits of the subcases at issue. Consequently, the only issue that could be appealed before the special master was the ruling on the motions to file objections.

The district court, however, retains discretion over uncontested water rights (Opening Brief, at 15). Since it retains this discretion, it has the authority to hear new issues on challenge when the procedures set forth for dealing with a special master offer no remedy. Furthermore, A.O.1 13(f) directs that the court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand the special masters report with instructions. Clearly, there are no limitations on the district court as to the issues that can be placed before it or the remedies it may apply.

1. Director's report clearly erroneous

The United States also argues that the director's report must be accepted unless contrary evidence is present or the Director's Report is clearly erroneous.

As pointed out earlier, evidence can only be admitted at trial by a judge or the special master. Therefore, there has been no opportunity to place evidence before this

court once the challengers' Motions to file objections were denied. Challengers have provided this court with an offer of proof as to the correctness of their position (Opening Brief, Exhibit 7).

The subcases at issue were reported on August 7, 1998 by the IDWR in the Director's Report. The recommendations for these subcases in this report are inconsistent with the rulings made by this court in its order of 2/6/98 (see Opening brief, pg 16 et. seq.), given the judicial admission made by the United States that they were not the party that appropriated the water.

As for the argument that the U.S. has received numerous partial decrees already and its demonstration of the correctness of the Director's Report, the facts behind the issuance of those claims is wide and varied. The vast majority were obtained through the legal loophole created by the scenario of uncontested claims in the SRBA and by settlement. Few, if any, of the claims that the United States has received by either of these two methods have been decided based on the underlying merits of the claims.

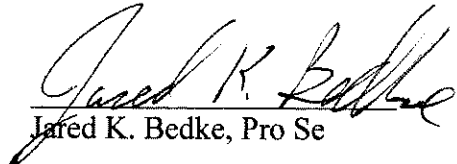
CONCLUSION

For the reasons stated above, as well as all of the Challengers previous pleadings, this court should grant relief to the Challengers by:

- 1.) Granting the Challengers Motions to File Late Objections in the above named subcases because they have fully met the conditions imposed by IRCP Rule 55(c) in this matter;
- 2.) Granting the Challengers Motions to File Late Objections in the above named subcases because the Special Master misapplied the law to the facts;

- 3.) Granting the Challengers Motions to File Late Objections in the above named subcases because the Special Master made key conclusions based on facts not of record;
- 4.) Or in the alternative, exercising the discretion that the Court has with respect to uncontested water rights in the SRBA, and overturn the Special Masters Report and Recommendation for the subcases at issue as they are contrary to State Law and well established case law.

Dated this 26th day of January, 2005.


Jared K. Bedke, Pro Se


Bruce Byron Bedke, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2005 I served a true and correct copy of the foregoing OPENING BRIEF IN SUPPORT OF NOTICE OF CHALLENGE OF SPECIAL MASTERS REPORT and RECOMMENDATION upon the following individuals by placing the document in the United States Mail, postage prepaid, addressed as follows:

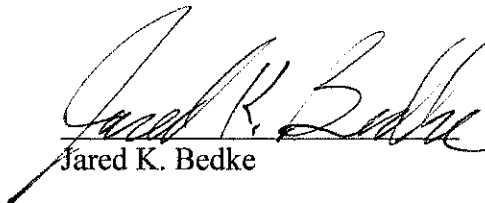
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Jared K. Bedke

ATTACHMENT 1

Subcase Nos:

47-16433
47-16434
47-16435
47-16437
47-16438
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