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UNITED STATES OF AMERICA

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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 Numbers 55-10288B, 55-10289B,
	) 55-10290B, 55-10292B, 55-10293B,
	) 55-10295, 55-10296, 55-10297B,
	) 55-10298, 55-10299B, 55-10300,
	) 55-10303B, 55-13451, 55-13844, and
	) 55-13846
Case No. 39576	)
	) UNITED STATES' MEMORANDUM
	) IN OPPOSITION TO LU RANCHING
	) CO.'S MOTION FOR
	) RECONSIDERATION

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I. INTRODUCTION

On January 18, 2005, LU Ranching Co. ("LU") filed LU's Motion for Reconsideration and/or Motion to Amend (hereinafter "LU's Motion") arguing that the District Court should reconsider the District Court's Memorandum Decision and Order on Challenge, Order of Partial Decrees which was filed in the above-captioned subcases on January 4, 2005 (hereinafter "Court's Order"). The purpose of this Memorandum is to oppose LU's Motion.

II. ARGUMENT.

A. The Trial Record Militates Against Amending The Court's Order

LU urges the District Court to reconsider those portions of the Court's Order that hold the evidence was insufficient to prove that LU's predecessors had satisfied Idaho's test of a valid appropriation of stockwater on the public lands designated as places of use ("POUs") before the enactment of the Taylor Grazing Act of 1934. LU's Motion at 3-12. LU argues that because the United States Department of the Interior, Bureau of Land Management (the "BLM") assigned grazing preferences to ranchers in LU's chain of title to ranch property, those ranchers must have established the claimed water rights prior to the date the Taylor Grazing Act of 1934 was enacted. LU's Motion at 3-7. In addition, LU argues that the trial record supports pre-1934 priority dates, LU's Motion at 7-9, the grazing preferences coupled with the trial testimony prove that LU is entitled to pre-1934 priority dates, LU's Motion at 9-11, and the historic grazing use of the public lands, LU's predecessors' grazing preferences, and the conveyance of ranch property through a chain of title support priority dates that relate back to the time homesteaders received land patents from the United States, LU's Motion at 11-12. The fallacy of LU's arguments and representations is amply illustrated by the trial evidence which shows that the fact

that the BLM caused grazing preferences to be attached to ranch land, and then issued permits to qualified ranchers that authorize grazing use of specific public lands, does not prove that the grazing permittee's livestock used stockwater on the claimed POUs before 1934.

There is no need to restate the facts already stated in the United States' Memorandum in Support of the United States' Challenge of the Special Master's Order on Motion to Alter or Amend at 6-27 or the findings in the Court's Order at 30-40. However, a summary of the facts that led to a grazing preference for use of the Cliffs Allotment being attached to the George Ewings homestead adequately disposes of LU's unsubstantiated assertions.

LU claims there is proof in the trial record that predecessors grazed livestock in the Cliffs Allotment before enactment of the Taylor Grazing Act. LU's Motion at 11. In fact, there is no such evidence. There is no evidence that the original homesteader, George Ewings, was in the livestock business.^{1/} Court's Order at 38. Before 1934, Clyde Foster, Ewings' successor to the Ewings homestead, used public lands in the Pole Creek Allotment for livestock grazing, and not public lands in the Cliffs Allotment. Exhibit 5 at 1-4. There is no evidence that Ewings or Foster ever used the Cliffs Allotment for livestock grazing. Indeed, there was no use of the Cliffs Allotment by anyone in LU's chain of title to the Ewings homestead until Frank Maher, Foster's successor to the Ewings homestead, purchased the Ewings homestead. Exhibit M^{2/} at 2 ("Prior to

^{1/} As the District Court found, the same is true for Warren C. Duncan (Court's Order at 30-33) and Ezra Mills (Court's Order at 33-38).

^{2/} Exhibit M is the Don McKay Analysis completed by a BLM Range Conservationist after Don McKay had purchased ranch land from Frank Maher. The year 1961 appears at the top of the first page. At that time, Don McKay had no proof of control "of the fore-mentioned state lease . . ." Exhibit M at 3. Therefore, McKay's Class I demand was reduced to 117 animal units. See Exhibit M at 3.

1942, Maher had base lands that by priority qualified for 23 C . . . This privilege was attached to state lease land . . . [l]ater he lost this base . . . [i]n 1953, Jeff Anderson assigned it back to Frank Maher.”). In 1946, the grazing advisory board recommended that Maher receive a use in the Cliffs Cattle Allotment for 180 cattle. Exhibit N at 1. “In 1953, by board action, the Maher privilege was established as . . . 94 AU with 376 AUM’s [sic] CliffsCattle Allot. [sic].” Exhibit M at 2. McKay, Maher’s successor to the Ewings homestead, received Maher’s grazing preference through a BLM approved transfer of grazing preference. Without any proof of prior use in the Cliffs Allotment tied to the Ewings homestead, the grazing advisory board awarded Maher and McKay a preference for grazing use of the Cliffs Allotment, as approved by the BLM. The grazing preference in the Cliffs Allotment was established through grazing advisory board action approved by the BLM, and was not established because the Ewings homestead was a base ranch for livestock operations on the Cliffs Allotment. LU’s arguments collapse when faced with direct citations to the trial record. LU has not pointed out any specific errors in the District Court’s findings. Therefore, there is no basis for this Court to reconsider its factual findings.

Furthermore, the trial record does not support pre-1934 priority dates. At the outset of grazing preference adjudications, not one of LU’s predecessors ever acknowledged that they owned water rights that describe public lands as POUs, even when each applicant for a grazing preference was specifically asked if they owned or controlled any water rights needed or used for a livestock operation that depended on public lands. See e.g., Exhibit 5 at 3 (Foster), Exhibit 17 at 3 (O’Keefe), Exhibit 18 at 2 (O’Keefe), Exhibit 4 at 3 (Maher - none of Maher’s descriptions of water rights describe any land located in Idaho (Trial Transcript at 126-128)). In 1984, not even LU acknowledged that there were any water rights that designate public lands as POUs that

might be eligible as base property for a grazing preference. Exhibit 3 at 1. No one in LU's chain of title acknowledged or defended a water right that designates public lands as POUs. Because there is no evidence that any of LU's predecessors have ever established a water right that designates public lands as POUs by priority of possession, by local custom, by law, or by decisions of Idaho courts before 1934,^{3/} LU is not entitled to priority dates that pre-date enactment of the Taylor Grazing Act of 1934. LU's arguments to the contrary are without merit. Because LU has not stated any basis for this Court to reconsider the factual findings in the Court's Order, LU's Motion for Reconsideration should be denied.

LU is trying to shift the burden of proof by suggesting that the United States must disprove a pre-1934 appropriation of stockwatering rights. LU has always had the burden of persuading the finder of fact that water rights were established pursuant to state law. Idaho Code § 42-1411(5). Therefore, it is LU's burden to prove by a preponderance of the evidence that predecessors to LU's ranch land intended to divert water on the public lands designated as POUs for a beneficial purpose on the date claimed as a priority date. See Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 619 P.2d 1130, 1132-1133 (Idaho 1980). LU failed to carry the burden of proof at trial. Nearly four years after trial, they still cannot establish a concrete basis for the claimed priority date. Because there is no rational basis to reconsider the Court's Order, the District Court should deny LU's Motion for Reconsideration.

^{3/} See Court's Order at 13 (quoting the Mining Act of 1866).

**B. Uncontested Partial Decrees For Water Rights On Private Land
Do Not Overcome Direct Evidence That Water On Nearby Public
Land Was Not Appropriated On The Claimed Priority Date**

LU argues that because the District Court filed partial decrees for the private land portion of the water rights originally claimed by LU, those partial decrees are evidence that water on nearby public lands was appropriated at the same time. LU's Motion at 12-14. LU even suggested that the partial decrees for the private land POUs, awarded by default, should result in the United States being collaterally estopped from arguing that LU is not entitled to pre-1934 priority dates for water rights that designate public lands as POUs. LU's Motion at 13.

This controversy over LU's claimed priority date did not end with the District Court's disallowance of certain "root" rights, then issuing partial decrees for Special Master's Reports and Recommendations that were intended to describe only private lands. Notice of Hearing Re: Court's Intent to Issue Order of Disallowance; Notice of Hearing Re: Court's Intent to Issue Partial Decrees, In Re SRBA, Case No. 39576, Subcases 55-10288 et al. (October 2, 2000) at 1-3. In January of 1999, the Special Master held that LU was entitled to a 1976 priority date for water rights that designate public lands as POUs. Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief, Order of Recommitment to Special Master Cushman, In Re SRBA, Case No. 39576, Subcases 55-10288 A & B, et al. (hereinafter "Memorandum Decision") (April 25, 2000) at 10. The District Court intended to remand all of the water rights that designate public lands as POUs to the Special Master so that LU could try to prove its priority date at trial on the merits. Id. at 14-25. There is no indication in the entire record that the District Court ever intended for LU to have its claimed priority date

for public lands designated as POUs, and the United States should then be estopped from litigating its objections to the priority date for water rights that designate public lands as POUs.

The record is consistent and clear. After the Special Master held that LU was entitled to a 1976 priority date for water rights that designate public lands as POUs and filed Special Master's Reports and Recommendations, the District Court remanded the water rights that designate public lands as POUs to the Special Master. The District Court intended to disallow what it termed the "root" rights. Id. at 2. The District Court intended the "A" portion of the root rights to describe only private land and the "B" portion of the root rights to describe only public lands. Id. The "A" portion of the root rights was uncontested. The "B" portion of the root rights was contested and remanded to the Special Master for trial on the merits. The evidence at trial proved that LU was not entitled to their claimed priority date. The partial decrees for the "A" portion of the root rights obtained by default do not overcome direct evidence in the trial record. Therefore, the partial decrees for the "A" portion of the root rights do not provide a rational basis to reconsider the Court's Order and LU's Motion for Reconsideration should be denied.

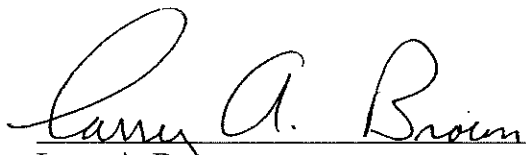
III. CONCLUSION

For the above-stated reasons, LU's Motion for Reconsideration should be denied.

DATED this 15th day of February, 2005.

Respectfully submitted,

UNITED STATES OF AMERICA



Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on February 15, 2005, that I served a true and correct copy of foregoing **UNITED STATES' MEMORANDUM IN OPPOSITION TO LU RANCHING CO.'S MOTION FOR RECONSIDERATION; SUBCASES 55-10288B ET AL.** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

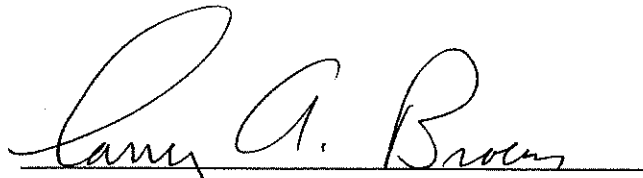
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