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DEPARTMENT OF
WATER RESOURCES

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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

15 **LU RANCHING CO.'S RESPONSIVE**
16 **BRIEF TO UNITED STATES'**
17 **MEMORANDUM IN OPPOSITION TO**
18 **LU RANCHING CO.'S MOTION FOR**
19 **RECONSIDERATION**
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I. INTRODUCTION

The United States' opposition to LU Ranching's Motion for Reconsideration is telling not so much for what it does say, but for what it doesn't. The United States argues that the award of grazing preferences does not evidence prior use, but then fails to dispute the law then in effect that grazing preferences were awarded only to those who could show use of the range prior to 1934. The United States argues that the evidence in the record does not support the award of a pre-1934 priority date, but then only analyzes a small portion of the evidence relating to the Cliffs Allotment and completely ignores evidence of prior use admitted at trial by way of direct testimony and grazing applications. Finally, the United States argues that the partial decrees issued in the related "A" claims are not relevant to the issues herein because the partial decrees for the "A" portion of the root rights were uncontested and "obtained by default" when, in fact, the United States objected to all of these claims at the initiation of this litigation. The evidence at trial and the applicable law fully support LU Ranching's claimed priority dates, and the United States' opposition to the pending Motion for Reconsideration does nothing to rebut LU Ranching's position on this issue.

II. ARGUMENT

A. **The United States Does Not Dispute the Fact that the Grazing Regulations Required a Demonstration of Use Prior to 1934 as a Prerequisite to Obtaining a Grazing Preference.**

It is notable that the United States does not rebut or dispute that grazing preferences were given only to those within or near a grazing district who were landowners engaged in the livestock business, and who had grazed the relevant public range during the five years just prior to the enactment of the Taylor Grazing Act. *See* Taylor Grazing Act, 43 U.S.C. § 315b; *see also Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000); Opinion of the Department of the Interior, by T.A. Walters, First Assistant Secretary, dated January 21, 1937, p. 66-67 (submitted as Exhibit "A" to LU Ranching's Motion for Reconsideration). The highest grazing priorities were assigned to those applicants who demonstrated that they had dependant commensurate property and had used

1 the same in conjunction with the public land as part of an ongoing livestock operation.
2 Accordingly, evidence of the grazing preferences and grazing permits awarded to LU Ranching's
3 predecessors are evidence in and of themselves that the allotments at issue and the water thereon
4 were used by LU Ranching's predecessors prior to 1934. Continuous use of the water on the
5 allotments for the five years prior to 1934 is evidence of an intent to appropriate the water within the
6 allotment. The act of applying for and obtaining a preference grazing right under the Taylor
7 Grazing Act was done to confirm the rights already obtained under state law and the Mining Act of
8 1866 with regard to the water used for livestock. In addition, as detailed below, LU Ranching's
9 predecessors specifically certified that the allotments, even before they were designated as BLM
10 administered allotments, were used in the years prior to the Taylor Grazing Act as part of their
11 ongoing livestock operations.

12 **B. The Evidence at Trial Supports an Amendment of the Partial Decrees to Reflect**
13 **Pre-1934 Priority Dates.**

14 The history of use of these water sources has been described and summarized for the Court
15 at length before, and for the sake of brevity, the Court is referred to the previously submitted briefs.^{1/}
16 However, in addition to references to the uninterrupted chain of title, grazing records, and direct
17 testimonial evidence at trial, it is apparently necessary to provide further specific citations to the
18 record regarding evidence of prior use given the United States' argument in its brief that "LU has
19 not pointed out any specific errors in the District Court's Findings." *See* United States'
20 Memorandum, p. 4. The record is replete with evidence of use of the range and water sources at
21 issue herein prior to 1934 and dating back to 1876. It is LU Ranching's position that the Court's
22 failure to acknowledge this evidence and apply it to its determination of priority date was in error.

23 At trial, LU Ranching presented an uninterrupted chain of title dating back to 1876 when the
24 earliest patent holder in LU Ranching's chain of title, Mr. Ezra Mills, first settled the land. *See*
25 Exhibit "X": Chain of Title. Importantly, none of those deeds reserved water rights in the grantor,

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27 ^{1/} *See* LU Ranching's Memorandum in Opposition to United States' Challenge;
see also LU Ranching's Motion for Reconsideration and/or Motion to Amend.

1 but instead, almost without exception, transferred not only base properties but also all appurtenances
2 thereto. The three original predecessors in interest are Mr. Mills, Mr. Ewing and Mr. Duncan. Mr.
3 Mills' application supports a priority date of 1876. *See* Exhibit CC: Ezra Mills Patent File. Mr.
4 Ewing filed a homestead entry application in 1909 and received a patent in 1910. *See* Exhibit K:
5 George Ewing Patent File. Mr. Duncan filed two homestead applications in 1910 and 1911 and
6 received his patent on December 9, 1914. *See* Exhibit BB: Warran Duncan Patent File. While the
7 respective patent dates are 1887, 1910, and 1914, in order to receive those patents on those dates,
8 the original patent holders must have been working those homesteads prior to those dates. Mr.
9 Mills first settled on the land in 1876. *See* Exhibit CC, p. 4048-4049. The evidence at trial
10 demonstrates that Mr. Duncan was on the land dating back to at least August 30, 1890. *See* Exhibit
11 BB, p. 4075 (Duncan Homestead Application). Mr. Ewing's first settled the land nineteen years
12 prior to his Homestead Application, which also takes him back to 1890. *See* Exhibit K, p. 4208.

13 From the time of the original patent holders forward, the livestock industry was the
14 predominant industry in the vicinity. *See* Exhibit UU: Article from the Enterprise Times; Exhibit
15 TT: Excerpts from the Owyhee County Blue Book; Testimony of Dr. Chad Gibson, p. 391-392.
16 Specific evidence that LU Ranching's predecessors in interest were engaged in the livestock
17 industry, and used the public range and water thereon that are at issue in this case, prior to 1934 also
18 was presented at trial. This un rebutted evidence includes evidence of the grazing applications,
19 evidence of the grazing preferences and grazing permits awarded to LU Ranching's predecessors in
20 interest, and direct testimony from Mr. Thomas Skinner and Mr. William Lowry who witnessed,
21 first hand, the livestock operations of LU Ranching's predecessors in interest. *See* Testimony of
22 Mr. Skinner, p. 461-521 (regarding the grazing operations of LU Ranching's predecessors in
23 interest, including O'Keefe, McKay, Shea, Mendieta, Mills, Stanford, Staples, and Lowry); *see also*
24 Testimony of Mr. William Lowry; Exhibit X: LU Ranching's Chain of Title. No evidence was
25 offered by the United States to rebut the evidence that LU Ranching's predecessors in interest were
26 using the lands and the water at issue herein dating back to the time of the original patent holders.
27 Similarly, no evidence was offered by the United States to rebut the evidence that grazing

1 preferences were awarded to LU Ranching's predecessors in interest and that the existence of those
2 grazing preferences evidence prior use of the lands and water at issue herein during the five year or
3 prior period predating the Taylor Grazing Act.

4 In its Memorandum Decision, this Court detailed the ways in which parties could
5 demonstrate historic beneficial use of water rights that are sited on what are now federally
6 administered grazing allotments. In the Memorandum Decision and Order on Challenge, the Court
7 held:

8 In the case of instream stock water rights on the public domain, *a claimant must*
9 *show that the predecessor grazed livestock on the public domain and where on the*
10 *public domain the predecessor grazed the livestock ...* Homestead applications and
11 proofs, applications for grazing permits, grazing permits and other historic
12 documents typically memorialized historic uses. Lastly, a claimant must show that
the rights were conveyed as an appurtenance to the patented or base ranch property,
based on the intent of the grantor. *Intent can be inferred by showing the property*
and adjacent public land on which the rights are located was used consistent with
the use of the original appropriator.

13 See LU Ranching Memorandum Decision and Order on Challenge ("Memorandum Decision"), p.
14 26 (*emphasis added*). In this case, the grazing applications provide specific evidence of prior use on
15 the allotments at issue. They show "that the predecessor(s) grazed livestock on the public domain"
16 and specifically "where on the public domain the predecessor grazed the livestock." See
17 Memorandum Decision, p. 26. The grazing applications certified not only that the applicants had
18 been historically engaged in ranching and had sufficient commensurate base properties to support
19 their applications, but in response to a direct question asking whether they had used the specific
20 "public lands" covered by the grazing applications, the applicants, LU Ranching's predecessors in
21 interest, answered "yes."^{2/} Prior to 1934, LU Ranching's predecessors in interest used the exact
22 same lands that later were designated as the South Mountain, Cow Creek and Cliffs Allotments, and
23 this use would have included not only the consumption of forage but by necessity the use of water
24 thereon for stockwatering purposes.

25
26 ^{2/} The grazing applicants were signed and certified by the grazing applicants,
27 LU Ranching's predecessors. See e.g. Exhibit Y, p. 2010 ("I certify that all the foregoing
answers and statements are true and correct to the best of my knowledge and belief.")

1 1. Water Sources on the South Mountain Allotment Associated with Water Right
2 Claims 55-10288b, 55-10289B, 55-10290B, 55-10292B, 55-10293B 55-13846, and
3 55-13844.

4 In his June 24, 1935 Application for Grazing Permit, Mr. O'Keefe was asked, "Have you
5 *previously used the lands covered by this application* for grazing permit?" and responded "Yes."
6 *See Exhibit Y, p. 2005 (emphasis added).* In a subsequent related application dated April 7, 1937,
7 Mr. O'Keefe was asked whether base lands and water had been previously used in livestock
8 operations "in connection *with the public domain involved in this application*" to which Mr.
9 O'Keefe responded "Yes" for "30 years." *See Exhibit Y, p. 2009 (emphasis added).* Based on the
10 representations contained in the O'Keefe Grazing Application, permits were awarded for the South
11 Mountain Allotment. As the Court found, such use pursuant to permit supports LU Ranching's
12 claims with a priority date of at least July 1, 1938 when O'Keefe used the South Mountain
13 Allotment pursuant to permit. *See Memorandum Decision, p. 32.* But what the Court fails to
14 recognize is that the grazing application upon which the permit was based states that the exact same
15 lands covered by the application for grazing permits were used for at least thirty years prior to the
16 date of the grazing application, or April 7, 1907. The continuous use of the South Mountain
17 Allotment for 30 years prior to 1937 is evidence that O'Keefe intended to appropriate water for
18 livestock and placed it to beneficial use. Accordingly, it was in error to award a priority date of
19 1938 when on the face of the application, an earlier date of at least 1907 is clearly supported.^{3/}

20 Another application relating to the South Mountain Allotment was filed by Frank and Amy
21 Maher of Cliffs, Idaho. *See Exhibit 10.* The application was filed on March 8, 1937 and, similar to
22 the other applications at issue herein, asked the Mahers whether they had used the lands that were
23 the subject of the application in conjunction with their base ranch and livestock operation. The
24 Mahers certified that they had used the base lands in livestock operations in connection with the

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26 ^{3/} Other evidence in the record supports a priority date relating back to the dates
27 that the original patent holders first settled the land but, at a minimum and based solely on
 the O'Keefe grazing applications, at a minimum a 1907 priority date is supported by the
 evidence.

1 public domain involved in the grazing application for seven years. *See* Exhibit 10, p. 3507. That
2 takes the use back, at least, to the year 1930.

3 **2. Water Sources on the Cow Creek Allotment Associated with Water Right**
4 **Claims 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, and 55-10300.**

5 On April 7, 1937, LU Ranching's predecessor, Patrick O'Keefe, filed a grazing application
6 which covered areas in both the South Mountain and Cow Creek grazing allotments. As outlined
7 above, in that grazing application, Mr. O'Keefe certified that the base lands had been used in
8 connection with the lands covered by the grazing application (in what was to become the Cow
9 Creek and South Mountain allotments) for thirty years. *See* Exhibit Y, p. 2007-2010 ("Have the
10 base lands and water described in this application been previously used in livestock operations in
11 connection with the public domain involved in this application? Yes. How many years? 30 yrs").
12 The certified grazing application evidences use of the range that was to become the Cow Creek and
13 South Mountain Allotments, and the beneficial use of the water thereon for stockwatering at least
14 back to April 7, 1907. Based on the plain language of the application, then, it was in error to assign
15 a priority date to these rights that was later than 1907.

16 Some of the rights belonging to Mr. O'Keefe were later acquired by another of LU
17 Ranching's predecessors, Galo Mendieta. However, looking at some of the original grazing
18 applications filed by Mr. Mendieta, there also is independent evidence of prior use of the areas that
19 became the allotments prior to 1934. *See* Exhibit 10, p. 1366-1368 (May 4, 1935 Application for
20 Grazing permit). In that application, Mr. Mendieta stated that he had been using the lands covered
21 by the application for approximately 18 years, which takes Mr. Mendieta's use back to 1917. *See*
22 Exhibit 10, p. 1368 ("Have you previously used the lands covered by this application for grazing
23 permit? Yes. If so, how many years and what is the usual period of use each year? about 18
24 years.")^{4/}

25
26 ^{4/} As previously briefed, and acknowledged by the Court, there is also
27 corroborating historic use of Mr. Mendieta's use of the entire South Mountain and Cow
(continued...)

1 The Shea and Staples families also appear in LU Ranching's chain of title and have interests
2 relating to areas covered in both the Cow Creek and South Mountain Allotments. Similar to the
3 other grazing applications cited to herein, the Sheas and Staples certified in their applications as to
4 their prior historic use of the grazing allotments when the allotments still were public lands.
5 See Exhibit 12 (December 7, 1937 Shea Application) ("Have the base lands and water described in
6 this application been previously used in livestock operations in connection with the public domain
7 involved in this application? yes. How many years 25."); see also Exhibit 13 (July 6, 1940 Shea
8 Grazing Application) ("Have the base lands and water described in this application been previously
9 used in livestock operations in connection with the public domain involved in this application? yes
10 How many years? 20 years."); Exhibit 14 (March 20, 1937 Shea Grazing Application) (certifying as
11 to use of the public domain involved in the application for 20 years); Exhibit 15 (May 11, 1935
12 Shea Grazing Application) (certifying as to the use of the public domain involved in the application
13 for 21 years).

14 3. **Water Sources on the Cliff's Allotment Associated with Water Right Claims 55-**
15 **10303B and 55-13451**

16 The earliest relevant grazing application for the Cliffs Allotment was filed by Mr. Clyde C.
17 Foster. On January 12, 1937, Mr. Foster filed a grazing permit application for the Cliffs Allotment.
18 Mr. Foster certified that he had used the lands covered by this application for twenty-five (25) years,
19 taking Mr. Foster's stated use of the applicable range and the water thereon to 1912. See Exhibit 5,
20 p. 3. Subsequent support is also found in grazing applications relating to Mr. Foster's successors,
21 Frank and Louise Maher and Mr. Don McKay. In addition to acquiring interests from Mr. Foster,
22 there is independent evidence of their own historic use of the range and water. See Exhibit 4
23 (March 8, 1937 Grazing Application, certifying prior use for a period of 7 years). Additional
24 support of the historic use of the range and water in the Cliffs Allotment is found in the Cliffs
25

26 ^{4/} (...continued)
27 Creek Allotments. See Testimony of Mr. William Lowry, Trial Transcript p. 272-733, 276-
77, 281-282; see also Testimony of Mr. Skinner, p. 502-504.

1 Grazing Memoranda and supporting statements evidencing use of the Cliffs Allotment by, among
2 others, Frank Maher. It includes the certification of use of the federal public range dating back to
3 1929. *See* Exhibit L, p. 2660, 3461 (statement of Bill Shea re: use between 1932 to 1934), p. 3464
4 (statement by Clyde C. Foster regarding use between 1929 to 1934).

5 As stated before, for each of the claimed water rights, evidence of prior use is provided by
6 the fact that LU Ranching's predecessors in interest were awarded grazing preferences for the areas
7 on which the water sources are sited, and such grazing preferences would not have been granted but
8 for the fact that LU Ranching's predecessors were using that range and watering their cattle thereon
9 prior to 1934. In addition, if you look to the applicable grazing files and the original grazing
10 applications summarized above, there is specific evidence of use of public range prior to 1934.
11 Moreover, the applicants did not just certify that they used *any* public range, rather, the original
12 applicants, LU Ranching's predecessors in interest, certified that they used *the particular lands*
13 *covered by the application for grazing permit*. By definition, if the cattle were grazing the lands
14 covered by the application for a grazing permit prior to 1934, then they also were drinking the water
15 thereon prior to 1934, thus providing evidence of pre-1934 beneficial use of the water at issue
16 herein by LU Ranching's predecessors in interest.

17 The United States' argues that LU Ranching has pointed to no evidence that designates a
18 water right that has a place of use on "public lands" or what are now federally administered
19 allotments. *See* United States' Memorandum, p. 4. Similarly, the Court in its Memorandum
20 Decision states that the original grazing applicants, LU Ranching's predecessors in interest, failed to
21 identify any water rights located on the public domain. *See e.g.* Memorandum Decision, p. 35.
22 Neither of these statements are accurate. First, as detailed above, all of the grazing applicants
23 certified that they used the public lands, and therefore both the grass and the water thereon, up to
24 thirty years prior to the date of the grazing applications. Second, in the same grazing applications,
25 references to named water sources on the public domain were specifically identified as water rights
26 used in their livestock operations on the public domain. In addition to unnamed sources, specific
27 water sources were mentioned as follows: Juniper Creek (*see* Exhibit 5, Grazing Application of

1 Clyde Foster; *see also* Exhibit 15, Shea Grazing Application), Jordan Creek (*see* Exhibit 11, Meyer
2 Grazing Application), Spring Creek (*see* Exhibit 15, Shea Grazing Application), Trout Creek
3 (*see* Exhibits H, 17 and 18, O'Keefe Grazing Applications), and Cabin Creek (*see* Exhibit H and 18,
4 O'Keefe Grazing Applications). These water sources, mentioned in both the grazing applications
5 and LU Ranching's water right claims are found within each of the three allotments at issue, and in
6 addition to the remaining portions of the grazing applications discussed herein, and the
7 corroborating direct testimony of Mr. Skinner and Mr. Lowry, identify the places of use and
8 evidence historic use of these water rights dating back to before the Taylor Grazing Act was
9 enacted. *See* Trial Transcript, Testimony of Mr. Skinner, p. 498-499 (O'Keefe cattle operation), p.
10 500-502 (McKay cattle operation), p. 502, 504-505 (Shea cattle operation), p. 502-504 (Medieta
11 cattle operation), p. 505-508 (Mills and Stanford cattle operations), p. 508-509 (Staples and Lowry
12 cattle operations); *see also* Trial Transcript, Testimony of Mr. William Lowry, p. 282, 287, 296-
13 304; Trial Transcript, Testimony of Mr. Timothy Lowry, p. 425-443. The sum total of all of the
14 evidence at trial support the water rights already decreed to LU Ranching, but with a priority date
15 pre-dating the enactment of the Taylor Grazing Act.

16 C. **The Partial Decrees for Related Water Rights on Private Land Are Relevant to**
17 **these Proceedings and Probative of the Priority Date that Should be Awarded in**
18 **this Case.**

19 The United States argues that the partial decrees entered in the related "A" claims with an
20 1872 priority date were acquired "by default." *See* United States' Memorandum, p. 6-7. This is
21 incorrect. The United States filed objections to LU Ranching's claims as a whole. As a party to the
22 subcases before they were separated into "A" and "B" claims, and as a party to the "A" claims even
23 after the claims were split, the United States had a full and fair opportunity to object to the 1872
24 priority date or to contest LU Ranching's position that the evidence of historic beneficial use
25 coupled with an intent to transfer the water rights supported its beneficial use claims with an 1872
26 priority date. In failing to so object, the United States should be estopped from disputing the
27 sufficiency of the same evidence now.

1 The "A" claims, and the 1872 priority date, were supported by the same evidence that is
2 before the Court now. The SRBA District Court has already held that the evidence is sufficient to
3 support an 1872 priority date for these water rights. As previously argued to this Court, the same
4 predecessors in interest were watering the same cattle along the same streams at issue in the "A"
5 claims as in the "B" claims. The only differences are the boundaries, invisible to the cattle at the
6 time, separating the streams on private or state land from the portions of the same streams flowing
7 on the public land. In sum, there already has been a judicial determination of historic beneficial use
8 of these waters by LU Ranching's predecessors in interest, coupled with an intent to transfer the
9 water rights through the chain of title, and that the sum total of the evidence supports an award of an
10 1872 priority date. To depart from this holding with respect to the "B" claims at issue herein, would
11 result in inconsistent rulings within the SRBA involving rights along the same water sources.

12 III. CONCLUSION

13 The evidence at trial supports priority dates for LU Ranching's water rights relating back to
14 the dates that LU Ranching's three earliest predecessors in interest first occupied the patented lands
15 and began using the same in conjunction with the surrounding public range. In particular, the
16 undisputed evidence at trial supports pre-1934 priority dates consistent with the certification of LU
17 Ranching's predecessors of their prior use of the lands and water thereon prior to 1934.
18 Accordingly, LU Ranching respectfully requests that this Court amend its Order and Order of Partial
19 Decrees on the issue of priority date and assign priority dates to reflect the use of the water at issue
20 herein prior to 1934.

21 Dated this 12 day of March, 2005.

22 Respectfully submitted,

23 McQUAID BEDFORD & VAN ZANDT, LLP

24
25 By: 
26 MICHAEL J. VAN ZANDT
27 ELIZABETH EWENS

1 Dated this 11th day of March, 2005.

2 LING, ROBINSON & WALKER

3
4 By: *Michael P. Tribe*

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CERTIFICATE OF SERVICE

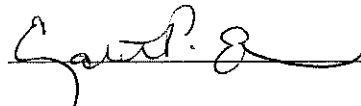
I certify that on March 2, 2005, I served a true and correct copy of foregoing **LU RANCHING CO.S' RESPONSIVE BRIEF TO UNITED STATES' MEMORANDUM IN OPPOSITION TO LU RANCHING CO.'S MOTION FOR RECONSIDERATION** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

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