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Department of Water Resources

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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 45-12475, et al.
	)	(see list of 64 subcases attached)
Case No. 39576	)	
	)	OBJECTOR'S REBUTTAL BRIEF
	)	
_____	)	

This is the OBJECTOR'S REBUTTAL BRIEF of Bruce Byron Bedke and Jared K. Bedke, pro se litigants (Bedkes), pursuant to the ORDER GRANTING PERMISSIVE REVIEW OF SPECIAL MASTER'S ORDER DENYING MOTION TO FILE LATE OBJECTION of January 19, 2005 in the above named subcases.

DISCUSSION

In the UNITED STATES' RESPONSIVE BRIEF (Response) of April 6, 2005, the United States spent a great deal of time discussing land ownership, land management, and its alleged effect upon associated property rights secured in water. While most of these issues are collateral to the questions before the court, they do create some confusion

as to the nature of the property secured and its relationship to the meritorious position advanced by the Bedkes. In order to clarify the issues and resolve this confusion, we shall address them now.

PROPERTY IN GENERAL

At the heart of any confusion regarding property of any kind is a misunderstanding of exactly what property is. Property is not a thing or some tangible object of ownership, rather, property is a set of legal relations or relationships among persons with respect to things. [*Fallini v. Hodel* 725 F.Supp. 1113, 1123 (1989) citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979), see also *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)] “These rights include, among others, the right to possess, use, and dispose of property, and to exclude others from using property. *Id.*” (*Fallini v. Hodel, supra*) The thing or tangible object is correctly referred to as the “subject of property”

Perhaps the clearest example of the true nature of property is an easement to cross another’s land. An easement in its simplest form, is the right to cross another’s land for a specified purpose. There is no doubt that an easement is property, but it does not give the easement holder title to another’s land. It merely confirms that he has established a legal relationship with another person’s land for a specified purpose.

When viewed on the whole, state property law is merely a codification of how one established relationships with the various subjects of property. Once these relationships were established, the relationships became known as vested property rights. These property rights, once vested and secured, became the private property of the one who established the original relationship and became his to dispose of through sale,

inheritance, or any other lawful conveyance (“A ‘vested right’ is one which is absolute, complete, and unconditional to exercise of which no obstacle exists and which is immediate and perfect in itself and not dependent upon a contingency.” *Hutton v Autoridad Sobre Hogares De La Capital, D.C. Puerto Rico*, 78 F.Supp 988, 994, 999).

PROPERTY IN WATER

During the settlement of the West, the prevailing riparian water doctrine of the Eastern United States was abandoned out of the necessity created by the arid character of the Western States, and the Prior Appropriation Doctrine of securing water rights became the established and recognized method of securing property in water throughout the Western United States. The Prior Appropriation Doctrine, or first in time, first in right as it became known, established the method people must use in order to establish a legal relationship with water. For the first time, merely establishing a relationship with land as the subject of property, did not establish a relationship with water. Conversely, establishing a relationship with water as the subject of property, did not establish a relationship with soil. Both relationships had to be secured separately by use (“The Desert Land Act of 1877 severed soil and water rights on ‘public lands’ and provided that a transfer of federal land out of the public domain after the date of the Act would not pass title to any *unappropriated* appurtenant water; water rights would be acquired in the manner provided by the law of the state of location. *United States v. Cappaert*, 508 F.2d. at 320.” *Fallini v Hodel*, supra, at 1119, emphasis unchanged; “A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to a

beneficial use. To this extent, therefore, the common law doctrine of riparian rights is in conflict with the constitution and statutes of this state and has been abrogated thereby.”

Hutchinson v. Watson Slough Ditch Co. (1909) 16 I. 484, 491, 101 P. 1059, 133 A. S. R. 125).

In order to establish property in water, or a “water right”, one must first put it to a beneficial use and create a relationship with it. In the case of stockwater rights, the original predecessor in interest must have established a relationship with the stream or other source of water by accessing the same with his livestock, thereby creating the relationship. The priority date established is not an arbitrary date, rather it is the date from which his relationship with the water began. The points of diversion/points of use are the actual locations that the relationship took place. The volume, or rate of diversion, is the quantity of water used in the relationship.

Once this relationship has been established and secured, it becomes a vested right, vesting in the one who established the relationship and becomes private property. The Idaho Supreme Court has held, “The state engineer has no right, power, or authority to interfere with vested rights, or to grant a permit for the appropriation and diversion of the water of a stream, where the same has already been diverted and applied to a beneficial use.” “Under the laws of this state, a water right is ‘real property,’ and one who has actually diverted the water of a stream and applied the same to a beneficial use is in the actual possession of such real property, and this possession constitutes actual notice to any subsequent appropriator of the water of the same stream, or to any person who subsequently applies to the state engineer for a permit to appropriate and divert the water of the same stream.” *Nielson v. Parker* (1911) 115 P. 488, see also *Youngs v. Regan*

(1911) 118 P. 499, *Furey v. Taylor* (1912) 22 I. 605, 127 P. 676.

PUBLIC LAND

The lawful definition of public lands are: “The general public domain; unappropriated lands; lands belonging to the United States and which are subject to sale or other disposal under general laws, and not reserved or held back for any special governmental or public purpose. *Newhall v. Sanger*, 92 U.S. 761, 763, 23 L.Ed. 769 (1875)” Blacks Law Dictionary 5th edition.

A review of other United States Supreme Court opinions where the issue involved lands of the public domain demonstrates that the term “public land” has a definite and fixed meaning. In *Bardon v. Northern Pacific Railroad Co.* 12 S Ct 856, 145 US 535, 538, 36 L Ed 806, the Court stated: “It is well settled that all land to which any claims or rights of others have attached does not fall within the designation of public land.” And again in *Northern Pacific Railroad Company v Wismer*, C.C.A. Wash., 230 F. 591, 593, the Court held that “public lands are lands open to sale or other disposition under the general laws, lands to which no claims or rights of others have attached”.

In its Response, the United States defines public lands as “‘The term ‘public lands’ means any land and interest in land owned by the United States... and administered by the Secretary of the Interior through the Bureau of Land management, without regard to how the United States acquired ownership...’ 43 U.S.C. Sec 1702(e)” (Response, footnote 1). This definition was first set out by the Federal Land Policy and Management Act (FLPMA) of 1976. Under the broad political definition of public land created by FLPMA, if the United States owns merely an interest in land, that is public land. For example, if the U.S. purchased an easement across a section of private land,

this easement would be an interest in land owned by the United States. As such, under the political definition, it would be considered public land, even though the only property owned by the United States is the easement and not the underlying section of private land. Furthermore, if the United States issues a patent for a parcel of ground, yet retains the mineral estate, the surface estate becomes private property, yet the mineral estate would still be an interest in the land owned by the United States, so the parcel would be considered public land.

The discord in western land jurisprudence, and resulting confusion, arises from the use of the term “public land” by the federal land management agencies, and here by the United States, in its broad political sense to characterize a rancher’s grazing allotment. They then attempt to invoke regulatory authority which only applies to public lands when defined in the lawful sense. The agencies then demand that a rancher have agency permission to utilize his own water rights and grazing lands.

The question now becomes, which definition of public land is correct in the subcases at hand? To resolve this question, the courts have directed, “The words ‘public lands’ are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to find such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results.” *United States v Blendaur*, 128 F. 910, 913, 63 C.C.A. 636

Clearly, the legal definition and binding precedent set forth the definition of public lands that should be used in the SRBA or any court of law. Furthermore, as the lands where the water claims at issue are located are not available for sale or disposal under the general laws, have not been reserved or held back for any special governmental

or public purpose, and do have claims or rights of others attached to them, they do not fall within the lawful definition of public lands and therefore should be placed in their proper context.

REBUTTAL

1. Jared Bedke did not comply with his own standards.

The United States in their Response allege in Footnote 3 that Jared Bedke did not comply with his own standards because he did not provide proof to IDWR that he owned the livestock that actually consume the water from the source he claimed. Any precursory investigation by the IDWR would have revealed that along with his sworn statement on the claim form, Jared Bedke does indeed have a lawful brand recorded with the state brand inspector for use on livestock. Further investigation would show that Jared Bedke indeed owns the stock that actually consume the water from the source he claimed.

The United States has no brand recorded with the state brand inspector, and do not own the stock that actually consume the water from the sources they claimed. (See Objector's Opening Brief, at 17).

2. The Bedkes Have Not Established Good Cause

In its Response, the United States makes an argument nearly identical to the one set forth in similar subcases (47-16433 et al) recently the subject of a decision by this court. In its MEMORANDUM DECISION AND ORDER ON CHALLENGE, ORDER OF RECOMMITMENT (March 22nd Decision) the court found that the Bedke's confusion was not clearly willful, and that the special master erroneously applied an I.R.C.P. 60(b)(default judgment) standard. As the same circumstances surrounding the

confusion caused by the advice the Bedkes received from the IDWR regarding conflicting claims in Basin 47 applies in these subcases, as well as the erroneously applied standard by the special master, the United States argument lacks merit.

3. Bedke's Failed to Allege a Meritorious Position

A. PWR 107

The United States also argues that "The BLM's claims based upon PWR 107 are undoubtedly valid, therefore, the Bedkes could not allege a meritorious position..." and provides a list of 40 claims that it alleges are dual based claims (Response pg 13).

Unless the United States is withdrawing any state basis for these claims, and relying solely upon the PWR basis for these claims, then the Bedke's meritorious position is valid against the claims listed, as it was against the United States' claims in Basin 47 (March 22nd Decision, pg 14).

Any discussion of the merits of any Federal Reserved Water Right should be taken up at an I.C. Sec 1411A hearing dealing with the validity of such claims, and is therefore off point in the subcases at issue.

B. BLM's Prior Appropriation and Beneficial Use Stockwater Claims

The United States alleges that the BLM's prior appropriation and beneficial use stockwater claims are valid, therefore the Bedkes could not allege a meritorious position, and also argues that the allegations in the Bedke's objection forms state bare conclusions that fail to meet the requirement of alleging detailed facts. A review of the Bedke's objections forms however shows that the Bedke's objections were not only to the priority date (subsequently amended by the United States to June 28, 1934), but to the purpose of use, and also to the fact that the water right should not exist. Clearly the issue raised by

the Bedkes in the objection forms and subsequent hearings and pleadings is the validity of the United States' stockwater claims. This has already been accepted by this court as a meritorious position (March 22nd Decision, at 14).

The United States argues that the District Court's 1998 Basin 57 Order is the law of the case and holds that the BLM can appropriate livestock water on the public lands with a priority date of June 28, 1934. The issue of public lands notwithstanding, the Bedke's have never alleged that the United States *cannot* earn a stockwater right under state law, but rather that the United States *has not* earned a stockwater right under state law by developing a relationship with water through the use of livestock (see Objector's Opening Brief, 9-11).

The United States also argues that "Literally hundreds of private landowners in Idaho who make their land available to others for the pasturage of livestock are similarly situated and have likewise established valid livestock watering rights in streams running through their own property." As explained earlier, these livestock watering rights must have been secured independently by use prior to their becoming vested in the current owners predecessors in interest, or by other lawful methods cited by this court (Objector's Opening Brief, at 8, 10). The fact that some water claims have been partially decreed in the past, does not mean that the United States' claims at issue are valid.

CONCLUSION

The United States' Response tells a tale of the United States recognizing the "critical need to provide water for the care and management of livestock using public lands for grazing" and the resultant impetus for the BLM to file claims to all of the stockwater rights at issue. They tell of a "common interest between the ranching

community and the BLM in ensuring the availability of water for all permittees”. As pointed out earlier, none of the lands where the claims at issue are located fall within the legal definition of public lands. Furthermore, the only issue generally before the SRBA court is that of property, specifically property in water, and did the claimant or his predecessors in interest establish a legal relationship with water.

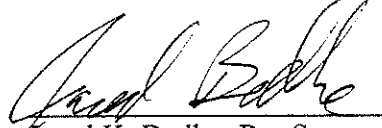
The United States has failed to establish that the Bedkes default was willful. The United States has failed to establish that the Bedkes did not show good cause before the special master. The United States has failed to establish that the Bedkes have not alleged a meritorious position. The United States has failed to establish that the special master did not err as a matter of law when he applied the IRCP 60(b)(default judgment) standard to the Bedke’s motions to file objections. The United States has failed to establish that the special master did not err when he considered the Stipulation in finding prejudice to other parties.

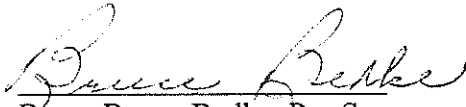
For the reasons stated above, as well as all of the Objector’s previous pleadings, this court should grant relief to the Objectors by:

- 1.) Granting the Objector’s 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 Objector’s Motions to File Late Objections in the above named subcases because the Special Master misapplied the law to the facts;
- 3.) Granting the Objector’s 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 Director's recommendations for the subcases at issue as they are contrary to State Law and well established case law.

Dated this 19th day of April, 2005.


Jared K. Bedke, Pro Se


Bruce Byron Bedke, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2005 I served a true and correct copy of the foregoing OBJECTOR'S REBUTTAL BRIEF upon the following individuals by placing the document in the United States Mail, postage prepaid, addressed as follows:

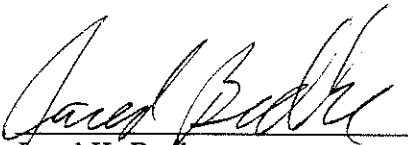
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ATTACHMENT 1

Subcase Nos:

45-12475	45-12795
45-12493	45-12796
45-12495	45-12797
45-12499	45-12801
45-12515	45-12802
45-12571	45-12803
45-12522	45-12804
45-12523	45-12807
45-12524	45-12808
45-12525	45-12809
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