

MAY 13 2005

Department of Water Resources

Names of Parties Serving Document:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

KELLY A. JOHNSON
Acting Assistant Attorney General
Environment and Natural Resources Division

LARRY A. BROWN
Attorney, U.S. Dept. of Justice
Natural Resources Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724
Ph.: (202) 305-0435 FAX: (202) 305-0274

**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: 55-02414, 55-07319,
	)	55-07383, 55-07410, 55-07413, and
	)	55-07420
	)	
	)	UNITED STATES' MOTION FOR
	)	SUMMARY JUDGMENT, INCLUDING
Case No. 39576	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT
	)	

MOTION

Pursuant to Idaho R. Civ. P. 56(b), the United States respectfully moves the Special Master for summary judgment dismissing LU Ranching Co.'s (hereinafter "LU") objections filed in Subcase Numbers 55-02414, 55-07383, 55-07413, 55-07319, 55-07410, and 55-07420

because LU has failed to state claims upon which relief can be granted. Based upon the pleadings on file, there are no genuine issues of material fact and the United States is entitled to summary judgment dismissing LU's objections as a matter of law.

MEMORANDUM OF POINTS AND AUTHORITIES

The United States Department of the Interior, Bureau of Land Management ("BLM"), filed six stockwater claims based upon licenses previously issued to the BLM by the State of Idaho under relevant permitting statutes. LU objected to each claim urging that, for various reasons, the BLM's stockwater licenses should be owned by LU. LU's objections constitute impermissible collateral attacks on previously issued licenses, and as such, the United States is entitled to summary judgment dismissing LU's objections, with prejudice. See Response to United States' Motion for Status Conference and Order on Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments And Orders On Instream Flow Claims Entered In Consolidated Subcase 03-10022 By Judge R. Barry Wood, And Motion To Disqualify Judge Wood, In Re SRBA, Case No. 39576, Consolidated Subcase No. 03-10022 (Mar. 23, 2000) (hereinafter "Order on Tribe's Motion") at 33.

The relevant Director's Reports state that the BLM's stockwater claims at issue here are based upon licenses. LU objected to each claim stating that the name and address should be "LU Ranching Co., Inc., Box 415, Jordan Valley, OR 97910" and the priority date should be "1905." Standard Form 1 Objection, Subcases 55-02414, 55-07319, 55-07383, 55-07410, 55-07413, and 55-07420 at 2. Each objection also states:

LU Ranching Co., Inc., is a co-claimant of an identical water right (under SRBA subcase 55-13450) to that claimed by the United States in the present

subcase. LU Ranching's claim in subcase 55-13450 was recommended for approval by the Idaho Department of Water Resources. The United States owns no livestock and does not put the water source claimed herein to any beneficial use. LU Ranching Co., Inc., its co-claimants under subcase 55-13450, and their predecessors in interest have put the claimed water source to beneficial use as stockwater continuously since 1905, and the water right for use of the claimed source is appurtenant to real property owned exclusively by LU Ranching Co., Inc., and its co-claimants under subcase 55-13450. Further, LU Ranching Co., Inc., is informed and believes that (a) the expansion of the water diversion and storage means, occurring on or about the date claimed by the United States as the priority date reported herein, was accomplished with funds paid as part of grazing fees by LU Ranching Co., Inc., its co-claimants under subcase 55-13450, and/or their predecessors in interest, and that (b) said expansion was carried out exclusively for the benefit of LU Ranching Co., Inc., its co-claimants under subcase 55-13450, and/or their predecessors in interest. Any license held by the United States related to the claimed water source or right inures only to the benefit of LU Ranching Co., Inc., its co-claimants under subcase 55-13450, and/or its predecessors in interest, as the actual beneficial user(s) of the water right claimed herein, and any such license, for above stated reasons, is inadequate to support the decree of any water right to the United States or any of its Agencies, Departments, Bureaus, or Services.

Standard Form 1 Objection, In Re SRBA, Case No. 39576, Subcases 55-02414, 55-07319, 55-07383, 55-07410, 55-07413, and 55-07420, Attachment A. LU's objections attack specific elements of BLM's stockwater claims, and hence, also attack specific elements of BLM's licenses. Thus, LU's objections are collateral attacks upon BLM's licenses in the Snake River Basin Adjudication (hereinafter "SRBA").

In considering whether there would be a direct conflict between his own water right claims and the Nez Perce Tribe's water right claims, then presiding SRBA District Court Judge R. Barry Wood held:

In regards to Judge Wood's split-irrigation claim, this claim will not be reported until sometime in the year 2003. Judge Wood owns a fraction of a much larger claim. *See Disclosure*. This claim is based upon a license issued by the State of Idaho with a priority date of 1973. As such, the likelihood of any good

faith objection to the claim appears to be remote and speculative. If Judge Wood's split-irrigation claim is ultimately contested, the only factual issues which can be brought before the Court will have to be those concerning events occurring subsequent to the issuance of the license such as abandonment or forfeiture. The license *per se*, and the right it created, is not subject to collateral attack within the SRBA proceedings. Unlike a federal reserved right, a constitutionally based claim under state law, or perhaps a claim based upon a private decree, the Tribe cannot attack the elements of an underlying licensed right in the SRBA at this late date. There will be no fact finding concerning the elements determined during licensing. An objection to a licensed right cannot be a late substitute for an appeal of IDWR's administrative decision concerning the merits of the right created by the license. If a license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, *e.g.*, the SRBA, would constitute an impermissible collateral attack on the license. *See, e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

Order on the Tribe's Motion at 32-33. In 2001, then presiding SRBA District Court Judge Roger S. Burdick similarly held:

The partial decrees contained in section III, paragraph 2, are based on previously licensed rights. In a previous decision, the SRBA Court held that if a license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding like the SRBA would constitute an impermissible collateral attack on the license. *See Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcase 36092708, *et al.* (Dec. 29, 1999). A.L. Cattle has not acknowledged the existence of these licenses nor alleged a defense for collaterally attacking the licenses.

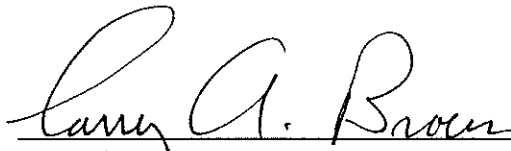
Order On Motion To Set Aside Partial Decrees And File Late Objections; Order of Reference to Special Master Cushman, In Re SRBA, Case No. 39576, Subcase No. 65-07267 *et al.* (Jan. 31, 2001) (hereinafter "A.L. Cattle Order") at 13. These prior rulings by the SRBA District Court are law of the case that the Special Master must apply here. Memorandum Decision And Order On Challenge; And, Order of Partial Decree, In Re SRBA, Case No. 39576, Subcase 65-95663B (May 9, 2002) at 8-13.

As demonstrated above, LU's objections in the above-captioned subcases are undoubtedly impermissible collateral attacks on BLM's previously issued stockwater licenses. Pursuant to the law of the case established in the Order on the Tribe's Motion at 32-33 and the A.L. Cattle Order at 13, LU's objections in the above-captioned subcases must be dismissed. Therefore, the United States is entitled to summary judgment dismissing LU's objections, with prejudice.

DATED this 10th day of May 2005.

Respectfully submitted,

UNITED STATES OF AMERICA

A handwritten signature in cursive script, reading "Larry A. Brown", is written over a horizontal line.

Larry A. Brown

Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on May10, 2005, I served a true and correct copy of the foregoing **UNITED STATES' MOTION FOR SUMMARY JUDGMENT, INCLUDING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; SUBCASE NUMBERS 55-02414, 55-07319, 55-07383, 55-07410, 55-07413, AND 55-07420** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

Original to:

Clerk of the Court
Snake River Basin Adjudication
253 3rd Avenue North
Twin Falls, ID 83301
(208) 736-3011

Copies to:

U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

Michael E. Stanford
Cliffs Stage
Jordan Valley, OR 97910

Michael J. VanZandt
Elizabeth P. Ewens
McQuaid, Bedford & VanZandt
221 Main Street, 16th Floor
San Francisco, CA 94105

Roger D. Ling
Ling, Robinson & Walker
P.O. Box 396
Rupert, ID 83350

Jeff Anderson Estate, Inc.
c/o Jim Anderson
Cliffs Stage
Jordan Valley, OR 97910



Signature of person or attorney serving document