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June 23, 2005

Via Overnight UPS

Clerk of the Court
Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, Idaho 83301

Re: **SRBA Case No. 39576** -Subcase Numbers 55-02414, 55-07319, 55-07383, 55-07410, 55-07413 and 55-07420

Dear Sir/Madam:

Enclosed are original and 7 copies of **LU RANCHING CO.'S OPPOSITION TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT** and accompanying **AFFIDAVIT OF TIM LOWRY IN SUPPORT OF LU RANCHING'S OPPOSITION TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT** which we wish be filed with your court on 6/24/05. Please return a file endorsed copy to our office in the enclosed self-addressed stamped envelope.

Please call the undersigned at 530-792-1631 if you have any questions regarding the above filing.

Thank you for your assistance.

Sincerely yours,

Elizabeth P. Ewens

Enclosures

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16 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT**
17 **OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

18 IN RE SRBA

19 Case no. 39576

Subcase Numbers 55-02414, 55-07319, 55-07383, 55-07410, 55-07413 and 55-07420^{1/}

**LU RANCHING'S OPPOSITION TO
UNITED STATES' MOTION FOR
SUMMARY JUDGMENT**

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27 ^{1/} The subcases consolidated in this litigation also include the United
28 States' claim number 55-11890 and 55-13450 (LU Ranching, Jeff Anderson Estate, Inc. and Stanford). The United States' Motion for Summary Judgment does not address these subcase numbers.

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I. INTRODUCTION

The United States' Motion for Summary Judgment ("Motion") fails to include any documentary evidence in support of the Motion and relies on legal authority that is inapplicable to the facts of this case. The United States fails to meet its burden to prove that no disputed facts or issues exist, and instead focuses myopically on the issue of whether licenses can be challenged in the SRBA. Such an approach ignores the totality of the issues before this Court. As addressed below, legal and factual issues exist as to the validity of the United States' claims and whether they are legally or factually justified. Under such circumstances, where there remain genuine issues of material fact that bear directly on the issue of whether the United States' claims are valid, the United States' Motion should be denied in its entirety.

II. STANDARD OF REVIEW

Summary judgment is only appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Olson v. Freeman*, 117 Idaho 706, 791 P.2d 1285 (1990). In a motion for summary judgment, this Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. *Northwest Bec-Corp v. Home Living Service*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002).

The moving party always bears the burden of proving the absence of a genuine issue of material fact. *Id.*; see also *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). To meet this burden, the moving party must challenge in its motion and establish through evidence that no issue of material facts exists on each and every element of the nonmoving party's case. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997). All doubts are to be resolved against the moving party. See *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

Summary judgment must be cautiously invoked to the end that parties may always be

1 afforded a trial when there is a bona fide dispute of facts. *See Associated Press v. United States*,
2 326 U.S. 1, 6 (1945). For this reason, the law requires that as the moving party, the United
3 States must bear the heavy burden of proving that there are no disputed facts. *See Northwest*
4 *Bec-Corp*, 136 Idaho at 839. As discussed at greater length herein, this is a burden the United
5 States completely fails to meet, and, accordingly, L.U. Ranching should be afforded its day in
6 court to present evidence in opposition to the United States' claims.

7 **III. ARGUMENT**

8 **A. Licensed Based Claims Can Be Challenged in the Snake River Basin Adjudication**

9
10 Contrary to the position asserted by the United States in its Motion, licensed based claims
11 are not immune from challenge in SRBA proceedings. While the United States has cited authority
12 that purports to stand for the proposition that any attempt to challenge a license in a subsequent
13 judicial proceeding would constitute an impermissible collateral attack on the license, the analysis
14 offered by the United States is incomplete and the cases cited are distinguishable on their face.
15 Specifically, the United States fails to acknowledge other legal authority which supports a
16 contrary conclusion that the mere fact that a party was once issued a license does not mean that
17 the license is forever immune from challenge.

18 The United States relies on two primary cases in support of its argument. The first is
19 Judge Wood's Order on Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments and
20 Orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022 by Judge R. Barry
21 Wood, and Motion to Disqualify Judge Wood (April 3, 2000) ("Nez Perce Order"). Importantly,
22 a challenge to a license based claim was not at issue in that case. Instead, the issue in the Nez
23 Perce case was whether Judge Wood should be disqualified as a judge in that matter. Only in that
24 context did the Court opine that "the likelihood of any good faith objection to the claim appears to
25 be remote and speculative." *See Nez Perce Order*, p. 32-33. Because a challenge to a licensed
26 based claim was not at issue in that case, any statements by the Court regarding the ability of a
27 party to challenge a license in an SRBA proceeding was mere *dicta* and does not have precedential
28 effect. *See Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715- 716 (9th Cir.

1 1990) (“law of the case doctrine gives no preclusive effect to dicta”).

2 The Nez Perce Order cites to two cases in support of the statement that a license cannot be
3 challenged in a subsequent judicial proceeding, including proceedings in the SRBA. Neither of
4 the cases cited in the Nez Perce Order deal with water right licenses. The case *Mosman v.*
5 *Mathison* involves claims regarding public access to a road and a determination by the State Board
6 of Highway Directors regarding the status of that road. See *Mosman v. Mathison*, 90 Idaho 76,
7 408 P.2d 450 (1965). The second case cited in the Nez Perce Order is *Bone v. City of Lewiston*.
8 Here again, the issues had nothing to do with water or water licenses. Instead, the sole issue
9 before the *Bone* Court was review of a city council decision to deny a landowner’s application to
10 have his land rezoned. See *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).
11 What one is left with, then, is mere *dicta* on the issue of the legal weight to be given a water right
12 license contained in one paragraph of a forty-nine page Nez Perce Order ruling on a Motion to
13 Disqualify the judge, supported by citation to two cases that have nothing to do with water rights
14 or water right adjudications in the state of Idaho. See Nez Perce Order, p. 32-33, citing *Mosman*
15 *v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965) and *Bone v. City of Lewiston*, 107 Idaho 844,
16 693 P.2d 1046 (1984).

17 Even if the Court’s language in the Nez Perce Order were to be given effect, that Court
18 did not foreclose the possibility that legitimate objections to a licensed based claim can be raised
19 in the SRBA. Indeed, it specifically recognized that licensed based claims *can* be contested in the
20 SRBA particularly when issues of abandonment and forfeiture are raised. See Nez Perce Order,
21 p. 33 (“If Judge Wood’s split-irrigation claim is ultimately contested, the only factual issues
22 which can be brought before the Court will have to be those concerning events occurring
23 subsequent to the issuance of the license such as abandonment or forfeiture.”)

24 The United States also cites to *In Re SRBA Case No. 39576*, Order On Motion to Set
25 Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman,
26 Subcase No. 65-07267 *et al.*(Jan. 31, 2001) (“A.L. Cattle Order”) in support of its argument that
27 a party cannot “collaterally attack” a previously issued license in the SRBA. A.L. Cattle is
28 distinguishable on its face. Similar to the Nez Perce Order, the merits of a challenge to licensed

1 based claims were not at issue in the A.L. Cattle Order. Instead, at issue was whether A.L.
2 Cattle had raised a meritorious defense sufficient to support its Motion to Set Aside Partial
3 Decrees and File Late Objections. On this point, the Court noted that "A.L. Cattle has not
4 acknowledged the existence of these licenses nor alleged a defense for collaterally attacking the
5 licenses." See A.L. Cattle Order, p. 13. In contrast, as discussed at greater length herein, in this
6 case LU Ranching has filed specific and valid objections to the United States' claims and has
7 alleged defenses which, if proved, will preclude the United States' claims.

8 It also is worthy to note that the sole decision relied upon by the A.L. Cattle Court also
9 does not address the issue of whether someone who was not a party to the original license
10 proceedings can later attack the licenses in SRBA proceedings. The A.L. Cattle Order solely
11 relies on the *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and*
12 *"Additional Evidence Issue"*, Subcase 36-02708 *et al.* (December 29, 1999) ("Facility Volume
13 Order") in support of the statement that licenses cannot be collaterally attacked in the SRBA.
14 However, the portion of the Facility Volume Order quoted by the A.L. Cattle Court is
15 incomplete. A full reading clarifies that the Facility Volume Court did not foreclose the
16 possibility that litigants who were not parties to the license proceedings could challenge licenses
17 in subsequent proceedings. The Facility Volume Order specifically states as follows: "The Court
18 expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a
19 license in the SRBA. That issue is not before the court."^{2/}

20 As indicated above, contrary to the United States' arguments, the issue of whether licenses
21 can be challenged in SRBA proceedings by individuals who were not parties to the underlying
22 license proceedings has not been resolved by the courts. Further, to adopt the United States'
23 position that there can be no challenges to license based claims would be contrary to law as well
24 as public policy. The applicable Idaho statutes specifically recognize that the mere issuance of a
25

26 ^{2/} To preclude such a challenge in subsequent SRBA proceedings would
27 be inequitable and contrary to the interests of justice, particularly where, as here, the
28 objectors were given no notice of the prior license proceedings. See Affidavit of Tim
Lowry, ¶ 7-8.

1 license does make the licensed water rights immune from attack. Specifically, on the issue of
2 effect of a license, the applicable state statute says as follows:

3 Such license shall be binding upon the state as to the right of such licensee to use
4 the amount of water mentioned therein, an shall be *prima facie evidence* as to such
5 right ... The right to continue the beneficial use of such waters shall never be
6 denied nor prevented for any cause other than the failure, on the part of the user or
7 holder of such right, to pay the ordinary charges or assessments which may be
8 made or levied to cover the expenses for the delivery or distribution of such water,
9 or for other reasons set forth in this title ...

10 I.C. § 42-220 (*emphasis added*). The license is only binding on the state, and not a private
11 litigant, but even then a license is *only* prima facie evidence as to the existence and elements of
12 the license based right. By definition, the effect to be given to prima facie evidence is limited and
13 can be rebutted. *See State v. Trimming*, 89 Idaho 447, 451, 406 P.2d 118, 125 (1965), *citing*
14 *Sellers v. State*, 149 P. 1071 (Okla. 1915) (prima facie evidence referred to in statutory
15 enactments is such evidence as in the judgment of the law is sufficient to establish a fact, and if
16 credited by the finder of the facts, is sufficient for that purpose *unless* rebutted or the contrary
17 proved).

18 The conclusion that failing to protest a license at the time it was issued does *not* preclude a
19 subsequent challenge is also supported by the law in other western states. The Ninth Circuit
20 Court of Appeals specifically found that:

21 [T]here is no statute, called to our attention or found in independent search, that
22 requires a protest at the peril of losing pre-existing rights by failing to protest. Nor
23 has any case been brought to our attention, either in Nevada or from any of the arid
24 Western States, which holds that a failure to protest a permit application will render
25 the determinations made in the application final and conclusive to the extent that they
26 may impair or obliterate pre-existing rights. Our review of the Nevada permit
27 procedures convinces us that an issued permit creates only a public record of a
28 claimed right for water use administration. It does not create a right as against prior
29 "existing rights on the source."

30 *Salmon River Canal Co., Ltd. V. Bell Brand Ranches, Inc.*, 564 F.2d 1244, 1248 (9th Cir. 1977).

31 Similarly, in Idaho, failure to protest a license or permit application at the time they are filed does
32 not preclude a subsequent challenge particularly where, as in this case, it will have the effect of
33 impairing prior existing private water rights or confirming water rights to the United States when
34 the United States has never placed the water to beneficial use.

1 The legal effect of a license is limited and, as explicitly recognized by statute, can be
2 rebutted or challenged. In particular, any rights secured by a license can be lost as a result of
3 nonuse. The applicable Idaho statute states as follows:

4 All rights to the use of water acquired under this chapter or otherwise shall be lost
5 and forfeited by a failure for the term of five (5) years to apply it to the beneficial use
6 for which it was appropriated and when any right to the use of water shall be lost
through nonuse or forfeiture such rights to such water shall revert to the state and be
again subject to appropriation ...

7 I.C. § 42-222(2). Accordingly, even if a party obtains a license, such license still can be challenged
8 in subsequent proceedings if the party fails to put the water to beneficial use. Indeed, to hold that a
9 license is immune from collateral attack even in the face of nonuse would go against Idaho law and
10 public policy. The Idaho Supreme Court analyzed the same, and concluded:

11 [Appellant argues] that these water rights evidenced by a license also occupy a
12 preferred status in that the license itself is prima facie evidence of water right, the
13 presumption being that such license is valid and duly and regularly issued ... He
14 further contends that where a water right has once been decreed for a tract of land by
15 a final decree, such decree is presumed to remain in effect ... However, it is well
16 settled that such rights may be abandoned. Section 41-216, I.C.A., as amended,
17 provides in part as follows: "All rights to the use of water acquired under this chapter
or otherwise shall be lost and abandoned by failure for the term of five years to apply
it to the beneficial use for which it was appropriated ..." *To hold otherwise would
defeat a well-settled rule of public policy that the right to the use of public water of
the state can only be claimed where it is applied to a beneficial use in the manner
required by law.*

18 *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475, 479 (Idaho 1944) (*emphasis added*). As a matter of
19 law and public policy, the United States' licenses are not immune from challenge in the SRBA. In
20 fact, such a challenge is particularly appropriate where, as here, the United States has never actually
21 applied the water to beneficial use.

22 **B. Material Issues of Fact Exist on the Issues of Whether the United States Ever**
23 **Perfected Its Claimed License Based Water Rights or, Even if Perfected,**
24 **Whether Those Rights Were Subsequently Forfeited or Abandoned.**

25 The United States has submitted no evidence that it has ever placed the waters at issue to
26 beneficial use. Glaringly, the United States Motion fails to cite to or include for the Court copies of
27 the United States' applications for permits, proof of the United States' application of the water to
28 beneficial use, or even the licenses upon which the United States so heavily relies. On the other

1 hand, before this Court is evidence that the United States never perfected the water rights claimed
2 or, even if the rights were perfected, evidence that the United States has since forfeited those rights
3 due to its failure to place the water to beneficial use for a period of time well exceeding five years.
4 *See* Affidavit of Tim Lowry.

5 A precondition to the issuance of licenses is that the applicant demonstrate that it has placed
6 the waters to beneficial use. The applicable code section requires that “[o]n or before the date set
7 for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder
8 shall submit a statement that he has used such water for the beneficial purpose allowed by the
9 permit.” *See* I.C. § 42-217. In the present case, there is no evidence that the United States has
10 actually used the claimed water for a beneficial use, stockwatering, or otherwise perfected that water
11 right. In fact, evidence before this Court supports a contrary conclusion: at no time has the United
12 States or the Bureau of Land Management (“BLM”) put any of the claimed waters to beneficial use
13 or used the claimed waters for the watering of livestock. *See* Affidavit of Tim Lowry, ¶ 5; *see*
14 *also In Re SRBA Case No. 39576*, Subcases 55-02414, 55-07319, 55-07383, 55-07410, 55-07413,
15 and 55-07420, LU Ranching’s Standard Form 1 Objection and Attachment “A” thereto. Indeed, the
16 United States has never owned livestock that would enable the United States to place the waters to
17 beneficial use. *See* Affidavit of Tim Lowry, ¶ 6; *see also In Re SRBA Case No. 39576*,
18 Subcases 55-02414, 55-07319, 55-07383, 55-07410, 55-07413, and 55-07420, LU Ranching’s
19 Standard Form 1 Objection and Attachment “A” thereto.^{3/}

20 Even if, for argument’s sake, one assumes that the United States’ obtained licenses after
21 submitting proof that it had applied the water to beneficial use, those licensed rights are subject to
22 forfeiture. Idaho law provides that water rights are forfeited if not used for a period of five years or
23 more. *See* I.C. § 42-222(2). In this case, the evidence before this Court is that the United States
24

25 ^{3/} While the pleadings on file with this Court coupled with the Affidavit
26 of Tim Lowry submitted herewith demonstrate the existence of material issues of fact
27 precluding summary judgment, it additionally should be noted that discovery is ongoing in
28 the present case. It is believed that additional evidence of nonuse will be obtained through
additional written discovery and through deposing witnesses including witnesses identified
by the United States. Under such circumstances, where discovery is ongoing, the Court may
refuse an application for summary judgment. *See* I.R.C.P. 56(f).

1 has never used the water sources at issue. *See* Affidavit of Tim Lowry. In particular, Mr. Lowry
2 attests based on his direct knowledge regarding the use of the claimed places of use that at no time
3 during the past twenty years has the United States or BLM used the stockwater sources at issue. *See*
4 Affidavit of Tim Lowry, ¶¶ 1, 5 and 6. Indeed, the individuals who were applying the water to a
5 beneficial use were at all times private parties, including LU Ranching, the Jeff Anderson Estate,
6 Inc. and Michael Stanford and their respective predecessors in interest. *See* Affidavit of Tim Lowry,
7 ¶ 1-4. The use of the water sources by these private parties for stockwatering occurred both before
8 and after the development of the places of use, and all developments and expansions of these water
9 sources were accomplished for the benefit and use of these private individuals and not the United
10 States. *See* Affidavit of Tim Lowry, ¶¶ 1-5, 9; *see also In Re SRBA Case No. 39576*, Subcases 55-
11 02414, 55-07319, 55-07383, 55-07410, 55-07413, and 55-07420, LU Ranching's Standard Form 1
12 Objection and Attachment "A" thereto.

13 Despite the above evidence that the United States has never actually applied the claimed
14 water to beneficial use, in other litigation the United States has argued that its management of the
15 rangeland constitutes a beneficial use of water. This theory has been rejected by the SRBA Court.
16 In 1998, the SRBA Presiding Judge held as follows:

17 [T]he fact that the United States issues permits to operate on public lands does not
18 make the United States the appropriator of water rights perfected by permittees.
19 Second, the fact that federal land is regulated by Congress in no way evidences an
20 intent by Congress to make the United States the appropriator of all water rights
located on the public domain ... Furthermore, the fact that the United States gives
"permission" to stockmen has no relevance to a claim that the United States is the
appropriator under state law.

21 *In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Reports
22 and Recommendations (September 30, 1998). The management of the rangeland does not equate to
23 an appropriation of water under Idaho law. Under such circumstances, where the evidence
24 demonstrates that the United States has taken no other action to actually apply the claimed water to
25 beneficial use, the United States has failed to meet even the most basic requirement of perfecting its
26 claimed water rights or, in the alternative, the United States has since abandoned or forfeited the
27 licensed based water rights due to subsequent nonuse.

28 Material issues of fact exist on the issue of whether the United States perfected its claimed

1 water rights in the first instance, or subsequently abandoned or forfeited those rights due to its
2 failure to place those waters to beneficial use. Under such circumstances where there is conflicting
3 evidence on point, the Motion for Summary Judgment must be denied and this matter must be
4 permitted to proceed to trial. This is especially so given judicial preference for cases to be fully
5 heard and developed at trial, and the legal standard to be applied to motions for summary judgment
6 that requires the Court to liberally construe all facts in favor of the nonmoving party and draw all
7 reasonable inferences from the facts in favor of the nonmoving party. *See Northwest Bec-Corp v.*
8 *Home Living Service*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002).

9 **C. Issues Exist Regarding Whether the United States' Claimed Licenses Are Legal**
10 **or Were Void *Ab Initio*.**

11 Presumably, the licenses upon which the United States relies to support its claims were
12 issued pursuant to an Idaho statute permitting the BLM to appropriate for the purpose of watering
13 livestock any water not otherwise appropriated on the public domain. *See* I.C. § 42-501.^{4/} In the
14 present case, issues of fact exist regarding the validity of the United States' licensed based claims
15 and on the issue of whether L.U. Ranching's prior appropriation of the claimed waters trump the
16 United States' claims. If the waters claimed by way of the United States' license applications were
17 already appropriated, then the issuance of those licenses was contrary to law rendering the licenses
18 void *ab initio*.

19 As discussed at length, above, the United States relies heavily on dicta contained in the Nez
20 Perce Order regarding the right to attack licensed based claims in the SRBA. *See In Re SRBA Case*
21 *No. 39576*, Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments and Orders on
22 Instream Flow Claims Entered in Consolidated Subcase 03-10022 (April 3, 2000). The Nez
23 Perce Order, in turn, cites to *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (Idaho 1965).

24
25 ^{4/} Section 42-501 reads, in pertinent part, as follows: "The bureau of land
26 management of the department of interior of the United States may appropriate for the
27 purpose of watering livestock *any water not otherwise appropriated*, on the public domain.
28 The department of water resources shall, upon application in such form and of such content
as it shall by rule prescribe issue permit and license and certificate of water right within a
reasonable time in such form as it shall prescribe for such appropriation." I.C. § 42-501
(*emphasis added*).

1 The *Mosman* Court makes clear the fact that administrative decisions *can* be attacked in cases
2 where the determination is void on its face. See *Mosman v. Mathison*, 90 Idaho 76, 85, 408 P.2d
3 450, 455 (1965) (“The determination of an administrative board, such as this one, is not subject
4 to collateral attack in cases *where the determination is not void on its face*, not tainted with fraud,
5 and is within the power of such board.”) In the present case, the decision to issues licenses to the
6 United States is void on its face. Additionally, because the water was previously appropriated by
7 private parties and the United States has never placed the claimed water to beneficial use, the
8 Department of Water Resources was without power or legal authority to issue the licenses.
9 Accordingly, under prevailing law the licenses are subject to challenge in these SRBA
10 proceedings.

11 Because the United States has never beneficially used the water at issue, the United States
12 must have sought its licensed based claims based on a statute permitting the United States to
13 appropriate stockwater that has not otherwise appropriated. In this case, there is evidence that the
14 stockwater at issue was appropriated prior to the date of the United States’ applications and, indeed,
15 prior to the enactment of the Taylor Grazing Act in 1934. See Affidavit of Tim Lowry, ¶¶ 2-4, 9;
16 see also *In Re SRBA Case No. 39576*, Subcases 55-02414, 55-07319, 55-07383, 55-07410, 55-
17 07413, and 55-07420, LU Ranching’s Standard Form 1 Objection and Attachment “A” thereto. All
18 of the places of use at issue herein are reservoir and spring locations within the Cliffs Alltoment that
19 have been historically used by LU Ranching and the two other preference holders, the Jeff Anderson
20 Estate, Inc. and Michael Stanford, and their respective predecessors in interest. See Affidavit of
21 Tim Lowry, ¶ 3. The appropriation of these waters dates back to the time that these waters first
22 were used for grazing in the area, and for these preference holders and their predecessors, their prior
23 appropriation of these waters specifically dates back to 1905. See Affidavit of Tim Lowry, ¶¶ 2-4,
24 9; see also *In Re SRBA Case No. 39576*, Subcases 55-02414, 55-07319, 55-07383, 55-07410, 55-
25 07413, and 55-07420, LU Ranching’s Standard Form 1 Objection and Attachment “A” thereto; see
26 also Claims and Amended Claims filed in *In Re SRBA Case No. 39576*, Subcase 55-13450.

27 Because the water at issue was already appropriated when the United States applied for licenses, the
28 state lacked the statutory authority to issue the licenses to the United States. Simply, the United

1 States could not legally obtain water right licenses for water that had already been appropriated.
2 See I.C. § 42-501. Accordingly, the water right licenses relied upon by the United States were void
3 at the outset.

4 There exists in this case a bona fide dispute about whether the water rights claimed by the
5 United States were already appropriated by LU Ranching and its predecessors in interest and
6 whether the United States was ever entitled to the claimed licenses when it had never put the water
7 to beneficial use. Those facts, if ultimately proved at trial, will render the licenses void and
8 otherwise defeat the United States' claims. Because disputed facts remain at issue, it would be in
9 error to grant the United States' Motion for Summary Judgment.

10 IV. CONCLUSION

11 Disposition of cases at the summary judgment stage is not favored and summary judgment
12 motions must be denied if conflicting inferences can be drawn from the evidence or if reasonable
13 people might reach different conclusions regarding the same. In considering this standard, all
14 doubts are to resolved against the moving party.

15 In the present case, there is both legal and factual support for LU Ranching's challenge of
16 the United States' licensed based claims. Under such circumstances, where triable issues of
17 material fact exist as to the matters at issue, the United States' Motion must be denied.
18 Accordingly, LU Ranching respectfully requests that this Court deny the United States' Motion
19 for Summary Judgment in its entirety and permit this matter to proceed to trial.

20
21 Dated this 23 day of June, 2005.

Respectfully submitted,

McQuaid, Bedford & Van Zandt LLP

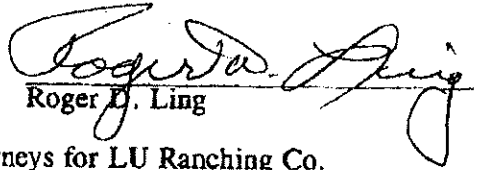
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25 By:


Michael J. Van Zandt
Elizabeth P. Ewens

1 Dated this 23rd day of June, 2005.
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LING, ROBINSON & WALKER

By:


Roger D. Ling

Attorneys for LU Ranching Co.

1 **CERTIFICATE OF SERVICE**

2 I certify that on June 23, 2005 I served a true and correct copy of foregoing LU
3 **Ranching's Opposition to United States' Motion for Summary Judgment** and accompanying
4 **Affidavit of Tim Lowry** upon the following individuals by placing the document in the United
5 States Mail, postage paid, and addressed as follows:

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General Litigation Section
8 Environment and Natural Resources Division
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