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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' MEMORANDUM
	) IN REPLY TO LU RANCHING'S
Case No. 39576	) OPPOSITION TO UNITED STATES'
	) MOTION FOR SUMMARY
_____	) JUDGMENT

I. INTRODUCTION

On June 24, 2005, LU Ranching Co. ("LU") filed LU Ranching's Opposition to United States' Motion for Summary Judgment, In Re SRBA, Case 39576, Subcases 55-02414, et al.

(hereinafter “LU’s Memo). This Memorandum replies to LU’s arguments in opposition to the United States’ Motion for Summary Judgment.

II. ARGUMENT

A. Standard of Review

LU argues that the United States failed to meet its burden of showing the absence of genuine issues of material fact for trial, therefore, summary judgment is not appropriate. LU’s Memo at 1-2. Summary judgment is appropriate where, as here, “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Idaho R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Yoakum v. Hartford Fire Insurance Co., 923 P.2d 416, 420 (Idaho 1996). Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate an issue of fact to be tried. Yoakum, 923 P.2d at 420. The nonmoving party is then required to go beyond the pleadings and by their own affidavits or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Sanders v. Kuna Joint School District, 876 P.2d 154, 156 (Idaho Ct. App. 1994) (burden shifts to non-moving party to establish genuine issue for trial); Idaho R. Civ. P. 56(e) (“an adverse party may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”).

The United States has moved for summary judgment and pointed out the fact that each of the above-captioned claims is based upon a license. LU, through its objections, attacked the

elements of the licenses, which were determined by the Idaho Department of Water Resources long ago.^{1/} Thus, the burden is on LU to show that there is a genuine issue for trial. Sanders, 125 Idaho at 874, 876 P.2d at 156; Idaho R. Civ. P. 56(e). This Court need not weigh the evidence and determine the truth of the matter, but need only determine whether there is a genuine issue for trial. Altman v. Arndt, 706 P.2d 107, 110 (Idaho Ct. App. 1985) (court is not permitted to weigh evidence). The non-moving party's case must be more than speculation, and a scintilla of evidence is insufficient to create a genuine issue. Edwards v. Conchemco, Incorporated, 727 P.2d 1279, 1281 (Idaho Ct. App. 1986).

LU has failed to meet its burden of showing a genuine issue for trial because each director's report states that the six BLM water right claims at issue here are based upon licenses and LU did not show that BLM's claims were not based upon licenses. Therefore, there are no genuine issues of material fact. Based upon the law of the case established in the 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, Order On Motion To Set Aside Partial Decrees And File Late

¹ Apparently, LU did not file a timely protest to the application for licenses and is now barred from challenging the validity of such licenses in the SRBA. See Affidavit of Tim Lowry at 2 ("Had I received such notice, I would have protested the applications."); see Idaho Code 42-203A (4) ("Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest . . .").

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, and Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue, In Re SRBA, Case No. 39576, Subcases 36-02708, *et al.* (Dec. 29, 1999) (hereinafter “Facility Volume”), the United States is entitled to judgment as a matter of law dismissing LU’s objections with prejudice because LU cannot collaterally attack BLM’s licenses in the Snake River Basin Adjudication.

B. Notice of Prior License Proceedings

LU argues that because LU did not receive notice of the license proceedings they may now challenge the licenses in the SRBA. LU’s Memo at 4; Affidavit of Tim Lowry at 2. However, personal service of notice of such license proceedings is not required by Idaho statutes. See Idaho Code §§ 42-222(4)(a) and 42-203A (2) and (3). Neither LU’s argument nor the Affidavit of Tim Lowry are sufficient to overcome the presumption of administrative regularity that presumes LU received all of the notice required by Idaho law. See Hayden Lake Fire Protection District v. Alcorn, 111 P.3d 73, 88 (Idaho 2005) (“[t]here is in Idaho, as in most states, a presumption of regularity in the performance of official duties by public officers.”); see also The Lands Council v. Packard, 2005 WL 1353899 (D.Idaho) at 3 (“The agency action is provided a presumption of administrative regularity. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).”). If LU provided any competent evidence at all, which they did not, it was only a scintilla of evidence that is wholly insufficient to create a genuine issue for trial. Conchemco, Incorporated, 727 P.2d at 1281. Because LU failed to file a timely protest to

the BLM's applications for license, LU cannot now challenge the Idaho Department of Water Resources' ("IDWR") decision to award such licenses to the BLM.

C. Forfeiture and Abandonment

LU argues that the BLM forfeited or abandoned the above-captioned water rights for lack of beneficial use of stockwater because the BLM does not own the livestock that actually consume the claimed stockwater, and the water rights are therefore properly challenged in the SRBA through LU's objections. LU's Memo at 6-9. Idaho Code § 42-501 specifically recognizes the BLM as being a valid appropriator of stockwater, even though the BLM does not own the livestock authorized to use public lands for grazing. The Idaho Legislature expressly did not limit the methods by which the BLM was authorized to appropriate stockwater. Idaho Code § 42-503; see also Idaho Code § 42-242 (the term "person" means, among others, "the United States of America when claiming water rights established under the laws of the state of Idaho."); cf. Idaho Code § 42-113(4) ("No change in use of any water right used for watering of livestock, whether proposed under this section of section 42-222, Idaho Code, shall be made or allowed without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock."). LU's argument, i.e., that the BLM's licenses for use of stockwater, awarded in accordance with state law, are forfeited or abandoned for lack of beneficial use because the BLM does not own the livestock authorized under the Taylor Grazing Act of 1934 to graze the public lands would effectively render the above-referenced Idaho statutes meaningless.

“The courts have a duty not to deprive any statutory provisions of their meaning.” A & B Irrigation District v. Idaho Conservation League, 958 P.2d 568, 581 (Idaho 1998). Applying applicable Idaho statutes as written, the BLM validly appropriated stockwater on federal public lands pursuant to licenses awarded by the state, and such stockwater rights were not forfeited or abandoned simply because the BLM does not own the livestock that actually drink the water. See Special Master Report and Recommendation, In Re SRBA, Case No. 39576, Subcase No. 55-10135 *et al.* at 24 (“The fact that the BLM does not own the livestock which actually consumes the water is irrelevant. State water law specifically authorizes the BLM ‘to appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain’”); see also Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.). Therefore, the United States is entitled to judgment as a matter of law dismissing LU’s objections filed in the above-referenced subcases.

D. BLM’s Licenses Are Not Void Ab Initio

LU argues that BLM’s stockwater claims based upon licenses are void ab initio because the United States could not have put the claimed water to a beneficial use,² and because the claimed water was already appropriated by LU’s predecessors. LU’s Memo at 9-11. This argument must be rejected. First, IDWR awarded licenses to the BLM in accordance with statutory provisions which require a demonstration of beneficial use. See Idaho Code § 42-217. Second, LU waived its opportunity to litigate the issue of whether the stockwater at issue here was prior appropriated by LU and/or its predecessors when it failed to file a protest within the

² This is based upon LU’s assertion that the BLM does not own the livestock that actually consume the stockwater.

time frames set forth in Idaho Code § 42-203A(4) (notice of protest must be filed “within the time allowed in the notice of application . . .”). Last, the Special Master has already ruled, “[t]he fact that the BLM does not own the livestock which actually consumes the water is irrelevant.” See Special Master Report and Recommendation, In Re SRBA, Case No. 39576, Subcase No. 55-10135 *et al.* at 24; see also Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.).

The BLM meticulously followed Idaho statutes in applying for stockwater rights that designate public lands as places of use. IDWR likewise meticulously complied with Idaho statutes in awarding the BLM licenses for stockwater use. LU, on the other hand, failed to heed notice of BLM’s applications and therefore waived its opportunity to protest BLM’s license applications and then seek judicial review of IDWR’s decisions. Idaho’s Administrative Procedure Act did not contemplate allowing adverse parties to bypass the provisions of Idaho Code §§ 42-203A(4) and (6) by seeking a different avenue of judicial review with a different level of judicial scrutiny. See Bone v. City of Lewiston, 693 P.2d 1046, 1050 (Idaho 1984). Thus, the District Court has steadfastly held:

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. Therefore, the BLM’s licenses are not void ab initio, and the United States is entitled to judgment, as a matter of law, dismissing LU’s objections in the above-captioned subcases with prejudice.

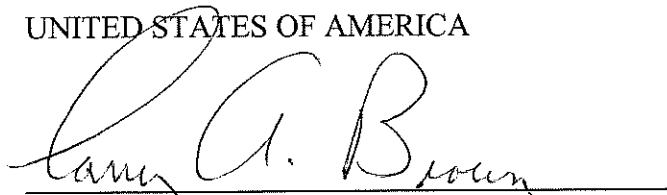
III. CONCLUSION

For all of the above-stated reasons, and for the reasons stated in the United States' Motion for Summary Judgment, Including Memorandum of Points and Authorities, In Re SRBA, Case 39576, Subcase Numbers 55-02414 et al. (May 10, 2005), the United States' is entitled to judgment as a matter of law dismissing LU's objections, with prejudice.

DATED this 11th day of June 2005.

Respectfully submitted,

UNITED STATES OF AMERICA

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

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on June 11, 2005, I served a true and correct copy of the foregoing **UNITED STATES' MEMORANDUM IN REPLY TO LU RANCHING'S OPPOSITION TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT; 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 Boise, Idaho, postage paid, and addressed as follows:

Original to:

Clerk of the Court (filed by FAX, original then mailed to the 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

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

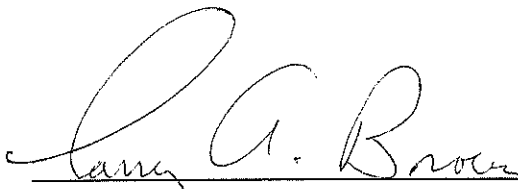
Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098

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

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

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

Michael E. Stanford
Cliffs Stage
Jordan Valley, OR 97910



Signature of person or attorney serving document