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Names of Parties Filing Document:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

SUE ELLEN WOOLDRIDGE
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 Number: 45-02810A
	)
	) UNITED STATES' MOTION FOR
Case No. 39576	) SUMMARY JUDGMENT, INCLUDING
	) 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 Jared Bedke's Response filed in Subcase Number 45-02810A because he has failed to a state claim 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 Mr. Bedke's Response as a matter of law.

MEMORANDUM OF POINTS AND AUTHORITIES

The United States Department of the Interior, Bureau of Land Management ("BLM"), filed water right claim number 45-02810A, and the claim is based upon a license previously issued to the BLM by the State of Idaho under the relevant permitting statute enacted by the Idaho Legislature. See IDAHO CODE § 42-501. Mr Bedke filed an objection to the claim urging that, for various reasons, the BLM's stock watering license should not exist. See Standard Form 1 Objection, In Re SRBA, Case No. 39576, Subcase Number 45-02810A (January 7, 2005) at 2.^{1/} Mr. Bedke's Response constitutes an impermissible collateral attack on a previously issued license, and as such, the United States is entitled to summary judgment dismissing Mr. Bedke's Response, 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 Notice of Completed Administrative Proceeding states that the BLM's stock water claim at issue here is based upon a license. See Notice of Completed Administrative Proceeding, In Re SRBA, Case No. 39576, Subcase Numbers 45-2810, 45-2810A, 45-2810B

^{1/} "Jared Bedke's Objection was deemed to be a timely response to the BLM's November 26, 2004 Objection." *Orders Re: Bedke Objection*, In Re SRBA, Case No. 39576, Subcase Number 45-2810A (November 1, 2005). Therefore, the Standard Form 1 Objection, In Re SRBA, Case No. 39576, Subcase Number 45-02810A (January 7, 2005) will hereinafter be referred to as the "Response."

(October 7, 2004), Attachment 1 (“This Notice of Completed Administrative Proceeding (NCAP) splits the ownership of former licensed water right number 45-2810 between the Bureau of Land Management and the State of Idaho Department of Lands pursuant to a change of ownership filed with IDWR on or about September 13, 1993.”). Mr. Bedke’s Response states:

This water right should not exist. This water right is filed on the basis of IC 42-501 which provides that the BLM may appropriate for the purposes of water livestock and water not otherwise appropriated on the public domain. The diversion is capturing a live stream that is fully appropriated water. Furthermore this location of the water claim does not lie within the public domain (*Bardon v. Northern Pacific Railroad Company* 145 U.S. 535 holding that land to which any claims or rights of others have attached does not fall with the designation of public land).

Response at 2. Mr. Bedke’s response attacks specific elements of BLM’s stock water claim, and hence, also attacks specific elements of BLM’s license. Thus, Mr. Bedke’s Response is a collateral attack upon BLM’s license 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, Mr. Bedke's Response filed in the above-captioned subcase is undoubtedly an impermissible collateral attack on BLM's previously issued stock water license. 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, Mr. Bedke's Response filed in the above-captioned subcase must be

dismissed. Therefore, the United States is entitled to summary judgment dismissing Mr. Bedke's Response, with prejudice.

DATED this 4th day of January 2006.

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 Jan. 4, 2006, I served a true and correct copy of foregoing **UNITED STATES' MOTION FOR SUMMARY JUDGMENT, INCLUDING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; SUBCASE NUMBER 45-02810A** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

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

Bruce Byron Bedke
42 East Basin Road
Oakley, ID 83346

Jared K. Bedke
42 East Basin Road
Oakley, ID 83346

Travis L. Thompson
Attorney at Law
Barker, Rosholt, & Simpson, LLP
113 Main Avenue West, Suite 303
Twin Falls, ID 83301



Signature of attorney serving document