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DEPARTMENT OF
WATER RESOURCES

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9

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

12 In Re SRBA
13
14 Case No. 39576

Subcase Numbers 55-10288B, 55-10289B, 55-
10290B, 55-10292B, 55-10293B, 55-10295,
55-10296, 55-10297B, 55-10298, 55-10299B,
55-10300, 55-10301B, 55-10303B, 55-13451,
55-13846 and 55-13844

15 **LU RANCHING CO.'S STATEMENT ON**
16 **PRIORITY DATE**

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I. INTRODUCTION

LU Ranching Co. ("LU Ranching"), by and through its attorneys of record hereby submits its Statement On Priority Date pursuant to the Court's October 4, 2007 Scheduling Order on Remand and Notice of Status Conference on Settlement of Cow Creek Allotment Claims for claimed water rights with places of use located within the South Mountain Allotment and the Cliffs Allotment. As addressed with the Court during the October 16, 2007 Status Conference, the parties have reached an agreement to settle the water right claims located within the Cow Creek Allotment with a priority date of November 8, 1913. This settlement concerns resolution of water right claim numbers 55-10297B, 55-10295, 55-10298, 55-10299B, 55-10296, and 55-10300. Although LU Ranching fully anticipates being able to finalize this settlement with the United States, if for some reason final settlement is not reached, as addressed with the Court during the Status Conference, LU Ranching reserves its right to supplement this Statement on Priority Date to address those water rights located within the Cow Creek Allotment.

The remaining claims at issue include water rights arising out of the historic use of water located on once public land that was later designated as federal grazing allotments. The first set of such claims are located within the South Mountain Allotment, covered by water right claim numbers 55-10288B, 55-10289B, 55-10290B, 55-10292B and 55-10293B. The second set of claims, numbers 55-10303B and 55-13451, have places of use located within an area known as the Cliffs Allotment. The trier of fact in this case, the Special Master, held with respect to each of the water rights at issue that LU Ranching's "predecessors in interest were using open federal land and the water thereon from the dates that the original patent holders occupied and commenced working their homesteads." Special Master's Report and Recommendation, p. 10. This fundamental conclusion, based on completely un rebutted evidence of continuous historic use of these waters by LU Ranching and its predecessors in interest, is correct. The error in the Special Master's analysis, if there was one, was in failing to trace each of the water rights at issue individually to one of the three

1 corresponding original patent holders^{1/}. Tracing back to the original patent holders, the water right
2 claims within the South Mountain allotment arise out of original appropriations made by Mr.
3 Warren C. Duncan who filed a homestead application on September 7, 1911, and Mr Ezra Mills,
4 who obtained a patent in 1886 and represented in his Affidavit of Proof that he had lived and
5 worked on the homestead since June 10, 1876. Tr. Exh. 2, p. 13; Tr. Exh. BB; Tr. Exh. CC. These
6 are the priority dates, that should be assigned to water rights within the South Mountain Allotment
7 that trace their origins to the Mills and Duncan homesteads. Similarly, the water rights within the
8 Cliffs Allotment that arise out of the Ewings homestead should be assigned a priority date of July
9 26, 1910, the date that the Ewings patent was awarded. Tr. Exh. K.

10 In the alternative, at a minimum, pre-Taylor Grazing Act, or pre-1934 priority dates, must be
11 awarded to each of the claimed water rights under the prior use rule articulated by the Idaho
12 Supreme Court in *Joyce Livestock v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) and *LU*
13 *Ranching v. United States*, 144 Idaho 89, 156 P.3d 590, 594 (2007) and the United States Supreme
14 Court in *Public Lands Council*, 529 U.S. 728, 734 (2000). All of the claimed places of use in this
15 case are covered by preference grazing rights, or Class I grazing preferences, acquired by LU
16 Ranching's predecessors in interest and later transferred, thought the chain of title, to today's LU
17 Ranching. Under the prior use rule, the existence of these preference grazing rights conclusively
18 establishes pre-1934 use of the range at issue, and by definition the stockwater thereon, as part of
19 historic livestock operations conducted by LU Ranching's predecessors in interest. A pre-1934
20 priority date, reflecting the appropriation of these stockwater rights as part of historic livestock
21 operations, must be recognized under the applicable law and the un rebutted facts in this case.

22 II. ARGUMENT

23 A. The Unrebutted Evidence at Trial and Findings of the Special Master Support a 24 Priority Date Relating Back to the Date that Patents Were First Issued to LU 25 Ranching's Earliest Predecessors in Interest.

26 ^{1/} Rather than tracing the rights to one of the three individual patent holders, the
27 Special Master concluded that "these amount to distinguishments without a difference ...
28 They are entitled to the earliest of those dates proven which is June 10, 1876." Special
Master Report and Recommendations, p. 10-11.

1 As this Court has previously recognized, the law in Idaho requires a district court to adopt a
2 special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v.*
3 *Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). The fact that on the same
4 evidence the appellate court, in this case the SRBA court sitting in its appellate capacity, might have
5 reached a different result on the same evidence does not justify setting aside the factual findings of
6 the special master. *In Re SRBA Case No. 39576, LU Ranching v. United States*, Subcase No. 55-
7 10288 *et seq.*, Memorandum Decision and Order on Challenge ("Memorandum Decision"), p. 7,
8 *citing Amadeo v. Zant*, 486 U.S. 214, 223 (1988). Such deference to the special master's factual
9 findings is appropriate, particularly because it was the special master who had the opportunity to
10 review, first hand, both the documentary and testimonial evidence presented at trial and to evaluate
11 the credibility of the witnesses. I.R.C.P. 52(a).

12 In this case, after reviewing all of the documentary evidence and observing the testimonial
13 evidence and credibility of the witnesses at trial, the Special Master concluded that there was
14 evidence to support the conclusion that LU Ranching's predecessors in interest were using the water
15 at issue dating back to the year 1876. Special Master's Report and Recommendation, p. 10-11. If,
16 as determined by the Special Master, the evidence "establish(ed) the use of federal land and the
17 water located thereon from the time the original patent holder began living upon the land" and found
18 that the evidence supported a priority date of 1876, then *a fortiori* the same evidence supports a
19 priority date of September 7, 1911 for water rights arising from historic use in conjunction with the
20 Duncan Homestead, a priority date of June 10, 1876 for those water rights originally arising out of
21 the patent obtained by Mr. Ezra Mills, and a priority date of July 26, 1910 for water rights
22 historically used in conjunction with the Ewing homestead. Special Master's Report and
23 Recommendation, p. 6-7, 10-11.

24 The conclusion reached by the Special Master that LU Ranching's earliest predecessors in
25 interest, Mills, Duncan and Ewings, engaged in the livestock business and that they depended upon
26 public lands to provide forage and water can be properly inferred from the evidence presented at
27 trial. Historic accounts of the growth of the livestock industry in this area is well documented and
28

1 recognized. *See* Exhibit TT: Excerpts from Owyhee County Blue Book; *see also* Exhibit UU:
2 Article from Enterprise Times; Tr. Trans, Testimony of Dr. Chad Gibson, p. 391-392 (from the
3 1860s forward in Owyhee County, the numbers of livestock increased rapidly, from a cattle
4 population of about 30,000 head in the early 1880s, expanding to upwards of 100,000 head of cattle
5 and 150,000 sheep at the end of the 1880s). It was for this intended business purpose, to engage in
6 this livestock business, that the original homesteads were first acquired. Because the original 160
7 acre homestead sites were sufficient only to support one cow and one calf for a period of one year,
8 out of absolute necessity, the original homesteaders would have turned to the public lands for
9 forage and water for their livestock. . *See* Trial Transcript, Testimony of Dr. Chad Gibson, p. 389.
10 In addition, as further proof that these original homesteaders were engaged in the livestock business
11 and using the public range in conjunction with the same, despite the considerable passage of time,
12 we also have the benefit of the testimony of an individual who had personal knowledge of the Mills
13 livestock operation. Tr. Trans. p. 505-507 (Testimony of Mr. Skinner).

14 LU Ranching entered into evidence an uninterrupted chain of title dating to the first patent
15 obtained by Ezra Mills. *See* Exh. X (Chain of Title to LU Ranching Base Property, including chart
16 of properties, index of deeds, and 28 deeds and patents)¹; Exh. 2 (LU Ranching chain of title). Mr.
17 Mills, as well as the other original patent holders, used both their patented lands and surrounding
18 unoccupied public lands and water thereon to support their homesteads and their cattle. *See*
19 Testimony of Dr. Chad Gibson, p. 386-387. As acknowledge by the United States, the original
20 patents, near areas which are now known as the South Mountain Allotment, Cow Creek Allotment,
21 and Cliffs Allotment, but were at the time wide open range, provided for a homestead entry on 160
22 acres of land only. These small homesteads were insufficient in and of themselves to support the
23 operations of the original settlers. Dr. Chad Gibson testified at trial as follows:

24 Q ... When you go back to homestead days when they had 160 acres,
25 they obviously had to use the land around them ... And so most of the ranches
have been developed as a combination of base property and outside property

26
27 ¹ Exhibit "X" was admitted into evidence by the Special Master, and pages 1 through 9
28 thereof for illustrative purposes only. *See* Trial Transcript, p. 398.

1 ...
2 A: So that your understanding would be that a homesteader with 160
3 acres 100 years ago would still only be able to graze one cow or a cow and a
4 calf on that 160 acres in a year, correct?
5 A. That would be correct, yes.

6 Tr. Trans. p. 387, 389 (Testimony of Dr. Chad Gibson). As a practical matter, to sustain the
7 homestead, and certainly to sustain a cattle operation, use of the surrounding public range, and the
8 forage and water thereon, by LU Ranching's predecessors was an absolute necessity.

9 Evidence of the cattle operations belonging to LU Ranching's predecessors in interest is
10 corroborated by the testimony of Mr. Thomas Skinner, who personally witnessed cattle operations
11 and, specifically, the use of forage and water by livestock belonging to some of LU Ranching's
12 predecessors in interest, including the Mills livestock operation.² From about 1926 to the time he
13 went to college, and in later life when he returned to the area, Mr. Skinner witnessed and obtained
14 personal knowledge regarding the ranching operations of LU Ranching's predecessors in interest in
15 the areas that are now at issue in this case. *See generally* Trial Transcript, Testimony of Mr.
16 Skinner, p. 461-512; *see also* Tr. Trans. p. 498-499, Testimony of Mr. Skinner (O'Keefe cattle
17 operation), p. 500-502 (McKay cattle operation), p. 502, 504-505 (Shea cattle operation), p. 502-
18 504 (Mendieta cattle operation), p. 505-508 (Mills and Stanford cattle operations), p. 508-509
19 (Staples and Lowry cattle operations).

20 All of the above evidence of the appropriation of water rights, initiated prior to the
21 enactment of the Taylor Grazing Act and dating back to the time when the three original patent
22 holders acquired their homesteads, is further supported by evidence surrounding preference grazing
23 rights, and Class 1 permits, awarded to LU Ranching's predecessors in interest. These preference
24 grazing rights, and their effect on the priority date analysis, is discussed below.

25 **B. In the Alternative, at a Minimum, the Evidence Viewed in Light of the Idaho Supreme
26 Court's Decision Mandates a Priority Date Pre-Dating the Enactment of the Taylor
27 Grazing Act.**

28 ² Mr. Skinner was born on August 16, 1917. *See* Tr. Trans.p. 459 (Testimony of Mr. Thomas
Skinner).

1 In *Joyce Livestock v. United States*, the Idaho Supreme Court held that the issuance of a
2 class one grazing preference evidences the use of the public range during the five years prior to the
3 enactment of the Taylor Grazing Act in 1934. *Joyce Livestock v. United States*, 144 Idaho 1, 156
4 P.3d 502 (2007); *LU Ranching v. United States*, 144 Idaho 89, 156 P.3d 590, 594 (2007) (adopting
5 the holding and rationale of the *Joyce* decision). The Idaho Supreme Court wrote:

6 [T]he district court failed to give consideration to the fact that at least Shea was
7 issued Class 1 grazing rights. The significance of Class 1 grazing rights was
8 explained by the United States Supreme Court in *Public Lands Council v. Babbitt*,
9 529 U.S. 728, 734 (2000) (emphasis theirs). "The rules [for allocating grazing
10 privileges under the Taylor Grazing Act] consequently gave a first preference to
11 owners of stock who also owned 'base property,' i.e., private land (or water rights)
12 sufficient to support their herds, and who had grazed the public range during the five
13 years just prior to the Taylor Act's enactment." A Class 1 permit could have been
14 issued to Shea only if he had been grazing the public range for at least five years
15 prior to the enactment of the Taylor Grazing Act in 1934.

16 *Joyce Livestock v. United States*, 156 P.3d at 516-517. In the case of both the South Mountain
17 Allotment and the Cliffs Allotment, the undisputed evidence is that LU Ranching's predecessors
18 obtained Class 1 or preference grazing rights in both the South Mountain and Cliffs Allotments. By
19 definition, as held by both the United States Supreme Court and the Idaho Supreme Court, this
20 means that LU Ranching's predecessors in interest were grazing their cattle on the public range
21 covered by these allotments, and appropriating the water located thereon, as part of the ongoing
22 livestock operations, prior to the enactment of the Taylor Grazing Act in 1934.

23 1. The South Mountain Allotment Water Right Claim Numbers 55-10290B and 55-
24 10292B Arising Out of the Duncan Homestead.

25 The record is consistent, and the United States has never denied, that Class I grazing
26 preferences were obtained by LU Ranching's predecessors in interest and transferred through the
27 chain of title including preference grazing rights relating to the South Mountain Allotment. Tr. Exh.
28 W: Lowry Dependent Property Record (Reflecting Class I Grazing preferences in South Mountain
Allotment); Tr. Exh. Y: O'Keefe Grazing Records, bsn 2073-2077 (Class I Grazing Preferences).
This is corroborated by testimonial evidence presented at trial confirming that LU Ranching's
predecessors were given preference grazing rights within the South Mountain Allotment and that
those rights evidenced the pre-Taylor Grazing Act use of the areas, land, and water that today fall

1 within the defined South Mountain Allotment. Tr. Trans. p. 372- 392 (Testimony of Dr. Chad
2 Gibson testifying regarding the Class I or preference grazing rights and the transfer of those rights to
3 LU Ranching). Further evidence of pre-1934 use is found, explicitly, in the April 7, 1937 O'Keefe
4 Grazing Application in which O'Keefe certified that the public domain covered by the application
5 had been used in connection with livestock operations for 30 years. Tr. Exh. Y, bsn 2009.

6 The sum total of this undisputed evidence of prior use demonstrates that the land and water
7 in areas now designated as the South Mountain Allotment were used by LU Ranching's
8 predecessors in interest prior to the enactment of the Taylor Grazing Act dating back to a time 30
9 years prior to O'Keefe's grazing application, or April 7, 1907. This is consistent not only with the
10 evidence trial, but with applicable case law which holds that Class I preferences were only awarded
11 to those, who like O'Keefe, had used the range and the water thereon in the years prior to the
12 enactment of the Taylor Grazing Act. *Joyce Livestock v. United States*, 144 Idaho 1, 156 P.3d 502
13 (2007); *LU Ranching v. United States*, 144 Idaho 89, 156 P.3d 590, 594 (2007); *Public Lands*
14 *Council*, 529 U.S. 728, 734 (2000).

15 2. The South Mountain Allotment Water Right Claim Numbers 55-10288B, 55-
16 10289B, 55-10293B and Remaining Portions of 55-10290B and 55-10292B Arising
17 Out of the Mills Homestead.

18 As a preliminary matter, while the Court has made a distinction between rights located
19 within the South Mountain Allotment arising from use and transfers the Duncan homestead as
20 compared to the Mills homestead, the practical reality is that prior to the enactment of the Taylor
21 Grazing Act there were no permits, no paper, no fences that would either artificially or physically
22 prevent the cattle owned by LU Ranching's predecessors in interest from using the whole of the area
23 that is today defined as the South Mountain allotment. Accordingly, the same evidence of historic
24 use of the water sources relating to O'Keefe, discussed above, also relate to and support a similar
25 finding as to a pre-Taylor Grazing Act priority date discussed herein.

26 As summarized by the Idaho Supreme Court, water rights located in other areas of the South
27 Mountain Allotment arise out of purchase of a portion of the Mills homestead by Mr. Galo
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1 Mendieta . *LU Ranching v. United States*, 156 P.3d 590, 593. The Supreme Court, however, held
2 that the District Court in its analysis “failed to recognize the significance of predecessors being
3 granted Class I permits.” *Id.* at p. 594. This error extends to water rights located on remaining
4 portions of the South Mountain Allotment, including those covered by permits obtained and later
5 transferred by Mendieta.

6 The Dependent Property and Adjudication Record for William Lowry indicates that he held
7 Class I grazing preferences on the South Mountain Allotment separate and apart from Class I
8 grazing preferences obtained through a the O’Keefe Purchase and state leases held within the South
9 Mountain area. Tr. Exh. W, bsn 1074. That the remaining portions of the South Mountain
10 Allotment were covered by Class I grazing preferences was confirmed by expert testimony provided
11 at trial by Dr. Chad Gibson. After analyzing the Mendieta adjudication records it was Dr. Gibson’s
12 conclusion based on the grazing preferences awarded to Mendieta that, under the prior use rule, Mr.
13 Mendieta or his predecessors made use of this range (and thereby also the stockwater thereon) prior
14 to the enactment of the Taylor Grazing Act. Tr. Trans. p. 389-391; Tr. Exh.C (Galo Mendieta
15 Grazing Records). Importantly, no contrary evidence was provided at trial by the United States to
16 dispute the fact that Mendieta, and his successors, have preference grazing rights or Class I grazing
17 rights within the South Mountain allotment. Pursuant to the *Joyce Livestock* decision and *Public*
18 *Lands Council*, this evidences historic use of these sources prior to the enactment of the Taylor
19 Grazing Act. Accordingly, at a minimum, a June 28, 1929 priority date, reflecting the use of the
20 water on this range in the five years prior to the enactment of the Taylor Grazing Act, must be
21 assigned.

22 3. The Cliffs Allotment Water Right Claim Numbers 55-10303B and 55-13451 Arising
23 Out of the Ewings Homestead.

24 The original grazing preferences for areas encompassed by the Cliffs Allotment were
25 originally held by LU Ranching’s predecessors Foster and Maher. Each of these individual, in their
26 applications for grazing privileges, certified that they had been using the public lands that were the
27 subject of the applications prior to the enactment of the Taylor Grazing Act. In his January 12, 1937
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1 application, Foster certified that he had using the public domain involved in the application for a
2 period of 25 years. Tr. Exh. 5, p. 3. In the Maher application, he certified that they had used the
3 public lands associated with the 1937 application for seven years. Tr. Exh. 4, bsn 3507. Mr.
4 McKay, successor in interest to both Maher and Foster, acquired by way of those transfers Class I
5 grazing preferences within the Cliffs Allotment. Tr. Exh. M (BLM Memoranda Analyzing
6 Transfers of Cliffs Grazing Preferences). Having reviewed these and other related documents, it
7 was the conclusion of Dr. Chad Gibson at trial that in order for Mr. McKay to have obtained these
8 Class I grazing preferences, his predecessors must have “established a priority by grazing that area
9 prior to 1934.” Tr. Trans. P. 374, 373-379. Based on the representations made in the Foster
10 application, and the existence of preference grazing rights awarded in conjunction with the Cliffs
11 Allotment, at a minimum the evidence supports use of this land and the water thereon to support the
12 livestock operation beginning on January 12, 1912. Tr. Exh. 5. Accordingly, while LU Ranching
13 believes, and the Special Master agreed, that the evidence supported historic use of these water
14 rights back to the date of the original patent holders, in this case Ewings with an original patent date
15 of July 26, 1910, in the alternative, and at a minimum, the evidence supports a priority date of
16 January 12, 1912 based on the representations made in the Foster grazing application and the
17 preference grazing rights awarded on the Cliffs Allotment. *Joyce Livestock v. United States*, 156
18 P.3d at 516-517; *Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000).

19 **C. The Water Rights Acquired By LU Ranching’s Predecessors in Interest**
20 **Transferred As Appurtenances to the Base Ranch Properties to Today’s LU**
21 **Ranching.**

22 While the Court did not request briefing on the issue of appurtenances, it should be noted
23 that the issue of whether the elements of these water rights, including the early priority dates
24 assigned to these rights, is an issue that has been settled by the Idaho Supreme Court. The Idaho
25 Supreme Court has held that:

26 Unless (water rights) are expressly reserved in the deed or it is clearly shown that the
27 parties intended that th grantor would reserve them, appurtenance water rights pass
28 with the land even though they are not mentioned in the deed and the deed does not
mention “appurtenances” ... Thus, the inquiry is not whether there is evidence

1 indicating that the grantor intended to convey the water rights with the land. Rather,
2 the inquiry is whether the water rights were expressly reserved in the deed conveying
the land or whether there is clear evidence that the parties intended that the grantor
would reserve them.

3 *Joyce Livestock*, 156 P. 3d 502, 515. Just as in *Joyce Livestock* “there is nothing in the record
4 indicating that any of Joyce Livestock’s predecessors in interest intended to reserve their water
5 rights on public land when they conveyed their ranches, [t]herefore, the conveyances of the land
6 included the appurtenant water rights,” so too in this case there is nothing in the deeds or in the
7 record to indicate that any of LU Ranching’s predecessors intended to reserve water rights. Tr. Exh.
8 X (Chain of Title). All of the water rights at issue transferred as appurtenances and, carried with
9 them all elements of the water rights including the priority date.

10 III. CONCLUSION

11 As held by the Special Master, all evidence presented in this case supports the conclusion
12 that the water rights at issue were first appropriated by LU Ranching’s earliest predecessors in
13 interest. No contrary evidence of non-use has been presented by the United States. Accordingly,
14 those rights arising from the original Mills homestead should be assigned a priority date of June 10,
15 1876, those arising from historic use in conjunction with the Duncan Homestead a priority date of
16 September 7, 1911, and a priority date of July 26, 1910 for water rights historically used in
17 conjunction with the Ewings homestead. Special Master’s Report and Recommendation, p. 6-7, 10-
18 11.

19 In the alternative, the water right claims at issue must be assigned priority dates pre-dating
20 the enactment of the Taylor Grazing Act given the undisputed evidence that these water sources and
21 the surrounding rangeland were used by LU Ranching’s predecessors in interest prior to 1934 and
22 the holdings by the Idaho Supreme Court and United States Supreme Court that the existence of
23 preference grazing rights, or Class I grazing preferences, is conclusive proof that the same public
24 range (and the water thereon) was used by these stockgrowers as part of their livestock operation in
25 the years prior to the enactment of the Taylor Grazing Act. *Joyce Livestock v. United States*, 156
26 P.3d at 516-517; *Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000).

1 Dated this 1st day of November, 2007.

2 Respectfully submitted,

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4 McQUAID BEDFORD & VAN ZANDT, LLP

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9 By: _____
10 ELIZABETH EWENS
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1 Dated this 1st day of November, 2007.
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5 ROGER D. LING
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7 Idaho State Bar No. 1018

8 Attorneys for LU Ranching Co.
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CERTIFICATE OF SERVICE

I certify that on November 1, 2007, I served a true and correct copy of foregoing:

LU RANCHING CO.S' STATEMENT ON PRIORITY DATE

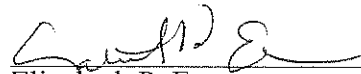
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