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WATER RESOURCES

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**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 55-10288B, 55-10289B,
	)	55-10290B, 55-10292B, 55-10293B,
	)	55-10300, 55- 55-10303B, and 55-13451
	)	
Case No. 39576	)	UNITED STATES' RESPONSE TO LU
	)	RANCHING CO.'S STATEMENT ON
_____	)	PRIORITY DATE

INTRODUCTION

On remand from the Idaho Supreme Court, the District Court instructed LU Ranching Co. ("LU") to "briefly trace the chain of title back to the earliest date the water right can be established and specify the evidence in the record that is being relied on to establish the scope of

the water use.” Scheduling Order on Remand and Notice of Status Conference on Settlement on Cow Creek Allotment Claims, In Re SRBA, Case No. 39576, Subcases 55-10288B et al. (October 4, 2007) at 2. On November 1, 2007, LU filed LU Ranching Co.’s Statement on Priority Date, In Re SRBA, Case No. 39576, Subcases 55-10288B et al. (October 4, 2007). Furthermore, the District Court asked, “[i]f the earliest use relies on the legal significance of the issuance of a particular type of grazing permit issued, then explain why.” Id. The United States respectfully disagrees with LU’s statement and submits the following in response to LU’s statement on priority dates.

UNITED STATES’ STATEMENT ON PRIORITY DATES

South Mountain Allotment - Duncan Homestead

LU has always emphatically asserted that its chain of title to Water Right Claim Numbers 55-10288, 55-10289, 55-10290, 55-10292, and 55-10293 that designate public land within the South Mountain Grazing Allotment as the place of use traces back to a homestead patent issued to Warren C. Duncan on December 9, 1914. Affidavit of Tim Lowry, In Re SRBA, Case No. 39576, Subcase Numbers 55-10288, et al. (October 29, 1998) (hereinafter “Lowry Aff.”) p. 3, filed simultaneously with LU Ranching Co.’s Motion for Summary Judgment, In Re SRBA, Case No. 39576, Subcase Numbers 55-10288 et al. (October 29, 1998). In 1910, Warren C. Duncan filed a homestead entry application on 160 acres of land in Owyhee County, Idaho described as the SENW, NESW, SWSW, and SESW, Section 11, T.9S., R.5W., B.M. Exhibit BB, Bates Stamp Number (hereinafter “BSN”) 4075-4076. For various reasons, on September 7, 1911, Duncan reapplied for the same homestead. Exhibit BB, BSN 4098. On December 9, 1914, Duncan received a patent to the above-described homestead entry. Exhibit 2, p. 13. In 1928,

Owyhee County took possession of the land under a Tax Deed, and the land was conveyed to Patrick O'Keefe on July 14, 1928. Exhibit 2, pp. 115, 117 - 120 and 323. There is no evidence in the trial record showing that Duncan or anyone in the chain of title up to O'Keefe was in the livestock business or that livestock owned them used forage and water on public lands.

On June 24, 1935, Patrick O'Keefe filed an application for grazing permit with the BLM. Exhibit Y, BSN 2003. O'Keefe said he owned the SENW, NESW, SESW, and SWSW, Section 11, T.9S., R.5W., B.M. (the Duncan homestead), and said he had grazed livestock in "Deary Dist #8" and in portions of Section 24, T.5S., R.6W., B.M. Exhibit Y, BSN 2003-2004. In 1938, the BLM issued O'Keefe a Class 1 license to graze 40 cattle and four horses in the Individual South Mountain Allotment. See Exhibit Y, BSN 2077. The Individual South Mountain Allotment is in the NW 1/4, W 1/2 SW 1/4, SESW, Section 35, T.8S., R.5W., B.M.; and in Lots 3 and 4, Section 2, E 1/2 E1/2, SWNE, W1/2 SE 1/4, Section 11, T.9S., R.5W., B.M. See Exhibit C, BSN 1179 and 1180; see Exhibit 23. The Individual South Mountain Allotment contains only three POUs described in 55-10292B and one POU described in 55-10290B. See Exhibit Y, BSN 2077, 2076, 2074, 2072; compare legal descriptions to Exhibit 23. The three POUs in 55-10292B are T08S, R05W, Section 33, NWNW, SENW, and NNESW. The POU in 55-10190B is T08S, R05W, Section 33, SWSW. More likely than not, O'Keefe's beneficial use of stockwater was solely within these three POUs and started on July 14, 1928, the date he acquired the Duncan homestead. See Exhibit 2, p. 323. The United States relies on the above-referenced documentary evidence to show that the priority date for the places of use within T08S,

R05W, Section 33, NWNW, SENW, and NNESEW described in 55-10292B and the place of use within T08S, R05W, Section 33, SWSW described in 55-10190B is July 14, 1928.

The BLM rejected O'Keefe's 1939 grazing permit application because he had leased the Duncan homestead (also known as the "Cabin Creek Property") to another. See Exhibit Y, BSN 2068. On October 14, 1941, O'Keefe conveyed the Duncan homestead to Galo Mendieta. See Exhibit 2, p. 309. On February 28, 1942, Mendieta informed the BLM of the land conveyance. See Exhibit Y, BSN 2037. The BLM informed Mendieta that the full extent of grazing use on public lands would be the "individual allotment [Individual South Mountain Allotment] attached to the 800 acres" Exhibit Y, BSN 2037. In June, 1942, Mendieta applied for a grazing permit and said he owned only four horses. Exhibit C, BSN 1183. In 1942, Mendieta received "nonuse" in the Individual South Mountain Allotment. See Exhibit C, BSN 1181. On January 22, 1943, Mendieta applied for a grazing permit for 25 cattle and four horses in the Individual South Mountain Allotment. See Exhibit C, BSN 1178 - 1179. The BLM authorized Mendieta to graze 25 cattle and 4 horses in the Individual South Mountain Allotment from July 1 to September 30. Exhibit C, BSN 1180. Over time, the BLM increased authorized livestock use to 40 cattle and 4 horses, but the increase was never based upon Mendieta's acquisition of additional base property. See Exhibit C, BSN 1163-1174, 1155. Mendieta's 1943 through 1953 ten-year grazing permit authorized 61 cattle and 4 horses to use the Individual South Mountain Allotment. See Exhibit G, BSN 1085. Mendieta last applied to use these grazing privileges on November 12, 1965. See Exhibit C, BSN 1080. There is no evidence in the trial record that shows domestic livestock owned by Galo Mendieta were ever authorized to graze in any pasture of the South Mountain Allotment other than the South Mountain Individual Allotment.

On December 22, 1965, the BLM's Advisory Board recommended a new boundary for the South Mountain Unit. See Exhibit P, BSN 1100. The BLM's Advisory Board recommended Galo Mendieta's "qualified demand for Federal range privileges in the South Mountain Unit be" 172 AUMs. See Exhibit P, BSN 1100. Mr. William Lowry testified that his domestic livestock used the South Mountain Unit for forage and water. T.Tr. Pp. 291-293. The BLM relies upon this evidence to show that the priority date for 55-10288B, 55-10289B, 55-10293B, the NENW and NESE of Section 34 T08S R05W described in 55-10290B, NWSE of Section 23 T08S R05W described in 55-10292B, Lot 1, Lot 2, and NESE of Section 35 T08S R05W described in 55-10292B, and Lot 2, SWNE, and SENE of Section 2 T09S R05W could not be earlier than December 22, 1965. However, the grazing season in the South Mountain Allotment begins on July 1 of each year. See Exhibit G, BSN 1085 ("Individual Allotment 7-1 to 9-30 65%"). The BLM relies on this documentary evidence to show that the priority date for 55-10288B, 55-10289B, 55-10293B, the NENW and NESE of Section 34 T08S R05W described in 55-10290B, NWSE of Section 23 T08S R05W described in 55-10292B, Lot 1, Lot 2, and NESE of Section 35 T08S R05W described in 55-10292B, and Lot 2, SWNE, and SENE of Section 2 T09S R05W described in 55-10292B should be July 1, 1966.

On December 13, 1965, Mendieta conveyed the land comprising the Duncan homestead to William and Nita Lowry. See Exhibit 2, p. 17; see also Exhibit Q (Contract of Sale). On January 13, 1966, the BLM authorized a transfer of grazing privileges from Mendieta to Lowry. See Exhibit S, BSN 125 ("William A. Lowry furnished a contract of sale on January 13, 1966 whereby he has purchased all of the Galo Mendieta base property and attached Federal range privileges.").

On October 1, 1976, William A. and Nita Lowry conveyed the land comprising the Duncan homestead to LU. See Exhibit 2, p. 15.

Cliffs Allotment - Ewings Homestead

LU has always emphatically asserted that its chain of title to Water Right Claim Numbers 55-10303 and 55-13451 that designate public land within the Cliffs Grazing Allotment as the place of use traces back to the homestead patent issued to George Ewings on July 26, 1910. Lowry Aff. at 3. In 1909, George Ewings, Jr. filed a homestead entry application for 160 acres of public land in Owyhee County, Idaho described as the W ½ NE 1/4, SENW, and NESW, Section 9, T.9S., R.5W., B.M. See Exhibit K, BSN 4211. On July 26, 1910, Ewings received a patent to the above-described homestead entry. See Exhibit 2, p. 331. There is no evidence that shows Ewings was in the livestock business or that livestock owned by Ewings used forage and water on public lands.

On July 16, 1912, Ewings conveyed the land to Clyde C. Foster. See Exhibit 2, p. 329. On January 12, 1937, Clyde C. Foster filed a grazing permit for non-use with the BLM. See Exhibit 5, pp. 1- 5. The Ewings homestead was part of the ranch land that Foster said was used in his livestock operations. See Exhibit 5, pp. 2 and 5. Foster's application said he intended to graze 200 cattle on public lands customarily used by him in the Pole Creek Unit where his livestock would use forage and water in common with others. See Exhibit 5, p. 1-4. The land designated as POUs in 55-10303 and the land designated as POUs in 55-10491 is all located in T.9S., R.5W. and in approximately the W ½ of T.9S., R.4W., B.M. See Exhibit 23 (Cliffs Pastures #05012 and #05013). The closest boundary of the Pole Creek Unit is in approximately the E ½ W ½ of T.9S., R.3W., a straight-line distance of nearly five miles. See Exhibit 6, p. 10.

Thus, Foster's livestock could not have customarily used forage and water on public lands within the Cliffs Allotment. The United States specifically relies upon these documents to show that Foster's beneficial use of stockwater and domestic water within the Cliff's Grazing Allotment could not have been earlier than January 12, 1937.

From April 27, 1937 to April 29 1937, Foster and others held meetings with the BLM's Advisory Board. See Exhibit VV. On July 15, 16, and 17, 1937, the BLM's Advisory Board "[r]esolved that tentative cattle allotment known as the cliffs cattle allotment be approved." Exhibit VV. The BLM specifically relies on this document to show the priority date for Water Right Claim Numbers 55-10303B and 55-10491 could not be earlier than July 15, 1937.

On April 22, 1946, the land was conveyed to Frank and Louise Maher. See Exhibit 2, p. 308. Maher acquired a grazing privilege for an unknown number of cattle to use the Cliff's Cattle Allotment, and by board action in 1953, Maher's "privilege was established as" 94 animal units with 375 animal unit months in the Cliffs Cattle Allotment. Exhibit M, BSN 3851. The grazing season in the Cliffs Cattle Allotment begins on June 16 of each year. See Exhibit N, BSN 3426.

On January 24, 1955, Maher conveyed the Ewings homestead to Donald J. and Elizabeth McKay. See Exhibit 2, p. 7. McKay obtained the grazing preference that was attached to the Foster base lands, for adjudication purposes, of 117 animal units with 480 animal unit months. See Exhibit M, BSN 3852. By adjudication, the preference for use of the Cliffs Allotment was adjusted to 664 animal unit months. See Exhibit M, BSN 3855-3856.

On June 28, 1984, the McKays conveyed the Ewings homestead, and other ranch land, to LU. See Exhibit 2, p. 26. The grazing preference for the Cliffs Allotment attached to McKay's

base property was also transferred to LU. See Exhibit M, BSN 3853. Tim Lowry testified that LU's livestock used public lands in the Cliffs Allotment for forage and water pursuant to BLM grazing permits. T. Tr., pp. 338-339, 349-356.

Significance of Class 1 Grazing Permits

The first Range Regulations defined Class 1 Base Property as "Forage land dependent by both location and use, and full-time water." 43 C.F.R. § 501.4 (1938). The regulations defined "land dependent by use" as "[f]orage land which was used in livestock operations in connection with the same part of the public domain, which part is now Federal range, for any 3 years or for any 2 consecutive years in the 5-year period immediately preceding June 28, 1934^{1/}, and which is offered as base property in an application for a grazing license or a permit filed before June 28, 1938." 43 C.F.R. § 501.3 (1938). Recognition of a grazing privilege for a specific grazing allotment attached to Class 1 base property does not necessarily imply that the original applicant grazed livestock within that specific grazing allotment during the priority years. Indeed, the trial record specifically shows that the BLM attached Class 1 grazing privileges for public lands not grazed by the applicant during the priority years to the applicant's base property. For example, O'Keefe, then owner of the Duncan homestead, used only the area encompassed by the Individual South Mountain Allotment during the priority years, yet the BLM attached a Class 1 grazing privilege for use of all of the South Mountain Allotment to the Duncan homestead after that base property was obtained by William and Nita Lowry. Moreover, the trial record shows that Foster exclusively used the Pole Creek Unit during the priority years, yet a Class 1 grazing

^{1/} Also known as the "priority years."

privilege for use of an Individual Allotment and the Cliffs Allotment was attached to Foster's base property, and neither allotment was part of the Pole Creek Unit.

Grazers used public lands where the forage and water was adequate to sustain livestock. *See Public Lands Council v. Babbitt*, 529 U.S. 728, 731-733 (2000) ("Ranchers once freely grazed on the publicly owned range as their herds moved from place to place, searching for grass and water."). Public land was open for grazing by all who wished to use it for that purpose. *See Anthony Wilkinson LiveStock Co. v. McIlquham*, 83 P. 364, 369 (Wyo. 1905) ("This privilege or right of pasturage upon the public lands of the government, which are left open and unenclosed, and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it. It is not a special privilege conferred upon one person or a few persons. No individual has any greater right than another to herd his live stock upon such lands, or to allow them to roam at large thereon."). The public land near the Ewings homestead, for example, could have been fully stocked by other grazers, and Foster could well have been forced to use public land in the Pole Creek Unit because the forage near the Ewings homestead was depleted. Therefore, the fact that LU now has grazing privileges for use of all of the South Mountain Grazing Allotment and for use of all of the Cliffs Allotment attached to Class 1 based property does not mean that LU's predecessors grazed livestock within those specific allotments prior to enactment of the Taylor Grazing Act.

CONCLUSION

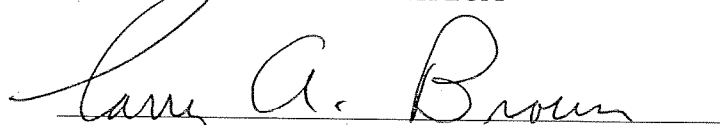
The documents in the trial record prove that LU's predecessors actually beneficially used stockwater at only three places of use in 55-10292B and only one place of use in 55-10290B prior to enactment of the Taylor Grazing Act. The documents show that LU's predecessors could

not have beneficially used stockwater at any of the other places of use claimed within the South Mountain Allotment prior to July 1, 1966. The documents also show that LU's predecessors could not have beneficially used stockwater at any places of use claimed within the Cliffs Allotment prior to July of 1937. As demonstrated above, LU is entitled to partial decrees for Water Right Claim Numbers 55-10303 and 55-10491 with a July 15, 1937 priority date. Furthermore, LU is entitled to partial decrees for Water Right Claim Numbers 55-10288B, 55-10289B, 55-10293B, for the places of use within the NENW and NESE of Section 34 T08S R05W described in 55-10290B, for the place of use within the NWSE of Section 23 T08S R05W described in 55-10292B, for the places of use within Lot 1, Lot 2, and NESE of Section 35 T08S R05W described in 55-10292B, and for the places of use within Lot 2, SWNE, and SENE of Section 2 T09S R05W described in 55-10292B with a July 1, 1966 priority date. LU is also entitled to partial decrees for the places of use within T08S, R05W, Section 33, NWNW, SENW, and NNESW described in 55-10292B and the place of use within T08S, R05W, Section 33, SWSW described in 55-10190B with a July 14, 1928 priority date.

DATED this 30th day of November, 2007.

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 November 30, 2007, that I served a true and correct copy of foregoing **UNITED STATES' RESPONSE TO LU RANCHING CO.'S STATEMENT ON PRIORITY DATE** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

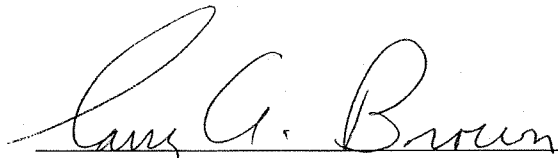
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