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DEPARTMENT OF
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

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

**BRIEF IN SUPPORT OF AMENDMENT
OF PERIOD OF USE**

I. INTRODUCTION

LU Ranching Company ("LU Ranching"), by and through its counsel of record hereby submits its Brief in Support of Amendment of Period of Use pursuant to the Court's instruction during the March 18, 2008 Status Conference and Order dated April 2, 2008. As the Court is aware, LU Ranching and the United States have agreed to a priority date, points of diversion, purpose of use, place of use and remarks for subcase numbers 55-10295, 55-10296, 55-10297B,

55-10298, 55-10299B and 55-10300. This agreement is being submitted to the Court by way of a Stipulation signed by each of the parties or their counsel. Despite best efforts, however, the parties have been unable to agree on the proper period of use for these subcases. Accordingly, the parties are submitting simultaneous briefing on this issue to the Court. In sum, it is LU Ranching's position that the period of use designated on the partial decrees should reflect the actual historic season of use which begins in April of each year, rather than on June 15 as erroneously indicated on the IDWR's Recommended Water Rights for the above referenced subcases. Amendments to conform to the evidence of use presented at trial is authorized by Idaho law. This change does not prejudice the United States, particularly as the United States, through its grazing permitting system, already has recognized the right of LU Ranching to access these waters, by way of the lands surrounding these water sources, beginning in April of each year.

II. ARGUMENT

A. The Idaho Rules of Civil Procedure Allow for the Amendment of Pleadings to Conform to the Evidence of Trial.

Idaho courts and the Idaho Rules of Civil Procedure unequivocally recognize the authority of a court to permit changes to pleadings, at any time, to conform to the proof at trial. I.R.C.P. 15(b); *Cameron Sales, Inc. v. Klemish*, 93 Idaho 451, 545 (1970). These rules are equally applicable in the Snake River Basin Adjudication where notices of claims, which include descriptions of the period of use, serve as pleadings and where the Idaho Rules of Civil Procedure are recognized and applied in the conduct of that litigation. Administrative Order No. 1 ("AO1"), § 1 ("The litigation of the SRBA will be governed by the Idaho Rules of Civil

Procedure”); AO1, § 2.r. (“Pleadings” defined to include notices of claims).

Idaho Rule of Civil Procedure 15(b) authorize amendments to conform to the evidence presented at trial at any time. The rule provides:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment*; but failure to amend does not affect the result of the trial of these issues.

I.R.C.B. 15(b) (*emphasis added*). As noted by the Idaho Supreme Court, the trial court has wide discretion to permit such amendments to conform to proof at trial. *Cameron Sales, Inc. v. Klemish*, 93 Idaho 451, 454 (1970) (“The rule is well established that a trial court has wide discretion in permitting amendments of pleadings at any stage of the proceedings to conform to the proof. Even prior to adoption of Idaho Rules of Civil Procedure, Idaho recognized liberality in this regard.”)

Amendments are liberally permitted where the court has jurisdiction over the matters tried, even if the amendment effectively adds or changes the nature of the cause of action, so long as the opposing party is not prejudiced. The court in *Cameron Sales*, quoting Moore’s Federal Practice, wrote:

Rule 15(b) has rejected any concept that such amendments are barred if they result in a change of the plaintiff’s “cause of action.” Rule 15 (b) does not even limit the amendment to the transaction or occurrence set forth in the pleadings; *the only apparent limitation is that the court have jurisdiction over the matter tried*, although as a matter of practice issues tried by implied or express consent ordinarily do arise from the same general set of facts set forth in the complaint ... The fact that this involves a change in the nature of the cause of action, or the legal theory of the action, is immaterial so long as the opposing party has not been prejudiced in presenting his case.

Cameron, 93 Idaho at p. 455, *quoting* 3 Moore’s Federal Practice, 15.13(2), pp. 984-985 (2d ed.

1968) (*emphasis added*). Where the evidence at issue was received at trial without objection of the opposing party, it may be acted on by a court even though it was not originally pleaded. *Obray v. Mitchell*, 98 Idaho 533, 537 (1977). In the present case, evidence of the season of use for the water sources at issue was introduced by way of both testimony and documentary evidence without objection by the United States. Further, because the United States has acknowledged use of these water sources beginning in April of each year, as a practical matter the United States has no basis in fact to object to the requested change.

B. The Claims Filed by LU Ranching Should Be Amended, and Eventual Partial Decrees Drafted. So As To Reflect the Correct Period of Use Consistent with the Unrebutted Evidence at Trial.

The unrebutted evidence at trial is that the period of use for water sources within the Cow Creek Allotment begins in April of each year. Evidence of the season of use was admitted without objection by the United States.

At trial, Mr. William Lowry testified as to the seasonal use of the water sources as follows:

Q. Would you explain to the court, generally speaking, the grazing patterns that you follow on your ranch and the adjoining BLM allotments?

A. Yes, sir. May I tell you that in my own terms to make it a clear picture.

Q. Just explain it the way that you do it and have done it all the time.

A. Okay. April the 1st we go off of the deeded land onto spring range, which is 0562.¹

The 15th of June we take what we're authorized to the South Mountain area. Those cattle stay there from the 16th of June until the 1st of October. Then we gather those cattle, and we come back to our base property, go through the winter with them, and then start the cycle over again the following spring.

¹ The notation 0562 refers to areas within the Cow Creek Allotment.

- Q. And do the cattle, following that cycle, do they graze on the land?
A. Yes, sir.
Q. And do they drink the water on the land?
A. Yes, sir.

Trial Transcript ("T. Tr."), p. 293 (Testimony of Mr. William Lowry). Similarly, with reference to specific areas within the Cow Creek Allotment, Mr. Tim Lowry also testified as to the season of use which begins, in the Cow Creek Allotment, in April of each year:

- Q. ... can you explain to the court what is your normal movement of cattle for grazing for stockwatering purposes given a 12-month period beginning in January and through the year?
A. ... I guess, first, I'd say that we maintain two cow herds and keep each herd in the same, running in the same location that they historically have been. And one of those herds is based here where dad lives on Trout Creek. And if we take it from January, they'll be on the private land in January through – being fed hay until April. And April they go out into here in this pasture for spring ...
Q. When you say "these pastures," the record is not going to reflect. So you're going to have to identify either by allotment or the pasture that you're talking about, Mr. Lowry.
A. Okay. In the spring they go into pasture that's labeled 05622, from April until the middle of June with the mountain cows. The mountain cow portion of those then go to South Mountain, 05611, from the middle of June until the end of September.
Without having the license with me, I can't give you the exact numbers. But then we will have some cattle in 05623 and 05624. It would be kind of go in there usually a little bit later in the spring, early part of the summer and also into 05625. After we get the cows to South Mountain, the remainder of the cows that have been in 05622 will go into 05625 ...
A. The Trout Creek operation would have ran (sic) the same. It has continued to run the same pattern.
Q. Do you know whether or not the Mendieta ran basically the same pattern before you did?
A. Yes.

T. Tr. p. 336-337, 339 (Testimony of Mr. Tim Lowry). The areas referenced by Mr. Lowry, in which the herd grazes and waters each year beginning in April, encompass the location of the stockwater rights for 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B and 55-10300.

Trial Exhibit 21 (Map depicting places of use for 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B and 55-10300 and allotment boundaries for Cow Creek Allotment).

Use of the stockwater sources beginning in April of each year also is reflected in grazing adjudication records admitted at trial. Areas once known as the Trout Creek Allotment had a recognized season of use beginning on April 1 of each year, and areas encompassed by what was originally designated as the Cow Creek Allotment had a season of use beginning on April 15 of each year.² Trial Exhibit C, bsn 1080 (Short Form Application for Grazing License or Permit claiming April 1 beginning date for Trout Creek Allotment and April 15 beginning date for Cow Creek Allotment); Trial Exhibit C, bsn 1137 (Notice of Initial Advisory Board Recommendations, Cow Creek Unit opening date of April 15); Trial Exhibit C, bsn 1158 (advisory board recommendation for April 1 beginning date for Trout Creek Allotment); Exhibit R, bsn 122 (BLM memorandum to Galo Mendieta File reflecting beginning period of use for Cow Creek Unit of April 15 of each year, and beginning date of use of the Trout Creek Allotment of April 1 of each year). These grazing rights were transferred through the chain of title to LU Ranching and are used today with the same period of use. Trial Exhibit Q, bsn 96, 99 (Contract of Sale between Galo Mendieta and William and Nita Lowry); T. Tr. p. 336-337, 339 (Testimony of Mr. Tim Lowry). Importantly, the original grazing applications reflect use of the areas covered by the applications in the years prior to the enactment of the Taylor Grazing Act. Trial Exhibit 10 (Grazing Application filed by Galo Mendieta on May 4, 1935); Exhibit Y (O'Keefe Application for Grazing Permit). In addition, class one grazing preferences were

² Previously a distinction was drawn between the "Trout Creek Allotment" and the "Cow Creek Allotment." Those areas all now are designated generally as the Cow Creek Allotment. Tr. T. p. 380 (Testimony of Dr. Gibson).

assigned to LU Ranching's predecessors in interest. Trial Exhibit W (Dependent Property and Adjudication Summary evidencing class one grazing preference qualifications for the Cow Creek and Trout Creek allotments). As held by the Idaho Supreme Court, class one grazing preferences could only been awarded if there had been use of the lands prior to the enactment of the Taylor Grazing Act. *Joyce Livestock v. United States*. 144 Idaho 1, 156 P.3d 502, 516-517 (2007). In sum, the consistent evidence at trial is that the water sources within the Cow Creek and Trout Creek Allotments have been used each year beginning in April, and that this practice has been in effect prior to the enactment of the Taylor Grazing Act through today. Accordingly, the partial decrees entered for these rights should conform to the evidence at trial, with the beginning of the period of use of April 1 of each year for subcase numbers 55-10295, 55-10296, 55-10297 and 55-10298, and the beginning period of use of April 15 of each year for subcase numbers 55-10299 and 55-10300. As the United States has historically recognized this as the beginning period of use in conjunction with its administration of the corresponding grazing permits, making these amendments results in no prejudice to the United States.

III. CONCLUSION

Both Idaho courts and the Idaho Rules of Civil Procedure recognize the right of the trial court, at any time, to amend pleadings to conform to the evidence at trial. In this case, the unrebutted evidence at trial demonstrates use of the water rights corresponding to subcase numbers 55-10295, 55-10296, 55-10297B and 55-10298 beginning April 1 of each year, and use of the water rights corresponding to subcase numbers 55-10299B and 55-10300 beginning April 15 of each year. Accordingly, LU Ranching respectfully requests that its claims for these rights

be amended to reflect these beginning periods of use, and that the partial decrees issued in these subcases reflect this change together with all of the other elements as agreed to by the parties in the accompanying Stipulation.

Respectfully submitted,

Dated: May 16, 2008

McQUAID BEDFORD & VAN ZANDT LLP

By: _____


Michael J. Van Zandt

Dated: May____, 2008

By: _____

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Idaho State Bar No. 1018

Attorneys for LU Ranching Co.

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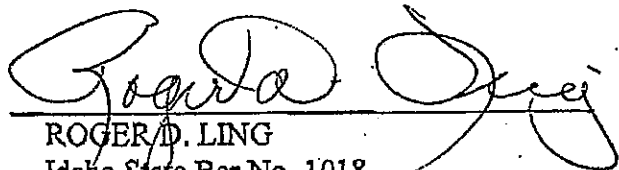
Respectfully submitted,

Dated: May____, 2008

McQUAID BEDFORD & VAN ZANDT LLP

By: _____
Michael J. Van Zandt

Dated: May____, 2008

By: 

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CERTIFICATE OF MAILING

I certify that I on May 16, 2008, I served a true and correct copy of the foregoing **BRIEF IN SUPPORT OF AMENDMENT OF PERIOD OF USE** upon the following persons by mailing the original and/or copies, postage paid and addressed as follows:

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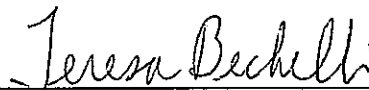
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