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UNITED STATES OF AMERICA

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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,
	)	55-10295, 55-10296, 55-10297B,
	)	55-10298, 55-10299B, and 55-10300
Case No. 39576	)	
	)	UNITED STATES' MEMORANDUM
	)	ON PERIOD OF USE

INTRODUCTION

The United States Department of the Interior, Bureau of Land Management ("BLM") filed objections to LU Ranching Co.'s ("LU") water right claims at issue in the above-captioned subcases on December 5, 1997. After over ten years of litigation, LU now takes issue with the period of use that was claimed, reported by the Idaho Department of Water Resources ("IDWR"),

recommended twice by Special Masters, and partially decreed by the District Court. LU's claimed and reported period of use has never been an issue in this litigation. LU long ago waived their right to challenge the recommended period of use and should not now be allowed to expand their water right claims to include additional months of stockwater use.

FACTUAL BACKGROUND

On March 26 and April 3, 1992, LU filed numerous claims for stockwater rights and claimed June 15 to December 31 as the period of use. On July 31, 1997 the Director of IDWR filed a Director's Report recommending the stockwater claims at issue in the above-captioned subcases. The period of use recommended by IDWR was June 15 to December 31. The BLM filed and served timely objections to the recommendations on December 5, 1997. The BLM did not object to the period of use. LU did not file any objections to the recommendations.

The parties filed cross-motions for summary judgment on October 15, 1998. Special Master Haemmerle granted the United States' Motion for Summary Judgment and, on April 23, 1999, issued Reports and Recommendations. The period of use reported and recommended by the Special Master was June 15 to December 31.^{1/} LU filed a Motion to Alter or Amend the Special Master's Recommendation on May 24, 1999. LU did not move for alteration or amendment of the period of use. LU did not argue that the period of use should be altered or amended. The Special Master denied LU's Motion to Alter or Amend on July 27, 1999.

On August 10, 1999, LU filed its Notice of Challenge. LU did not identify period of use as an issue on challenge and LU did not argue that the period of use should be anything other

^{1/} The period of use for 55-10451, LU's domestic water right claim that designates public land as the place of use, was claimed, recommended, and decreed as January 1 to December 31.

than the period of use recommended by the Special Master. On April 25, 2000, the District Court recommitted LU's challenge regarding priority dates to Special Master Cushman for further proceedings.

On August 22, 2000, LU filed Motions to File Amended Notice of Claim in Subcases 55-10297, 55-10298, and 55-10303. LU claimed June 15 to December 31 as the period of use. IDWR filed supplemental director's reports on December 5, 2003 recommending the period of use as claimed. LU did not file objections to the supplemental director's reports.

On April 30, 2001, the District Judge entered partial decrees for 55-10288A, 55-10289A, 55-10290A, 55-10292A, 55-10293A, 55-10297A, 55-10299A, and 55-10303A.^{2/} The decreed period of use was June 15 to December 31.

On February 21-23 and March 14, 2001, the above-captioned subcases were tried on the merits. LU did not identify period of use as an issue for trial in its trial brief, did not argue that the period of use should be different from what IDWR recommended, and did not timely move to conform the period of use element in the Director's Reports to the evidence presented at trial. On February 27, 2003, the Special Master filed his Reports and Recommendations recommending June 15 to December 31 as the period of use. On March 28, 2003, LU filed a timely Motion to Alter or Amend. LU did not request alteration or amendment of the period of use recommended by the Special Master nor did LU argue that the period of use should be altered or amended. On April 15, 2004, the Special Master filed an Order on Motion to Alter or Amend and simultaneously filed Amended Special Master's Reports and Recommendations, again recommending June 15 to December 31 as the period of use. On May 28, 2004, LU filed a notice

^{2/}These partial decrees designate private land as the place of use.

of challenge but did not identify period of use as an issue on challenge. LU's sole issues on challenge were the Special Master's failure to recommend one place of use for 55-10296 and one place of use for 55-10297B. *LU Ranching Company's Notice of Challenge* (May 27, 2004) at 2.

On January 4, 2005, the District Court filed its *Memorandum Decision and Order on Challenge and Order of Partial Decrees*. The decreed period of use was June 15 to December 31. LU filed its motion for reconsideration or to amend on January 18, 2006. LU did not argue that the period of use should be amended. The District Court denied the motion on May 2, 2005.

On June 9, 2005, LU filed a Notice of Appeal. LU did not list period of use as an issue on appeal. Furthermore, LU did not, at any time during the appeal process, argue that the decreed period of use was in error. On February 9, 2007, the Idaho Supreme Court filed an opinion stating that the judgment was affirmed in part, vacated in part, and remanding the case for redetermination of priority dates. The Supreme Court did not remand the case for redetermination of the period of use. The "Opinion of the Court announced February 9, 2007" is final. *Remittitur, LU Ranching Co. V. United States of America*, No. 31994 (April 2, 2007).

ARGUMENT

1. Period Of Use Was Not Raised As An Issue Or Tried by Consent

Idaho's water adjudication statutes state, "The notice of claim, objections, and responses to objections, shall identify the issues to be heard for water rights acquired under state law." I.C. § 42-1412(3). LU did not file any objection to period of use. Indeed, LU specifically stated, "All elements of the water rights as claimed by LU Ranching are undisputed with the exception of the priority dates claimed by LU Ranching." *LU Ranching's Findings of Fact and Conclusions of Law* (May 17, 2001) at 2. Period of use was never raised as an issue or tried by consent and

should not be considered by the District Court now. See Idaho R. Civ. P. 15(b); see *Furness v. Park*, 570 P.2d 854, 860 (Idaho 1977).

2. Period Of Use Was Not Raised As An Issue On Motion To Alter Or Amend

The Snake River Basin Adjudication (“SRBA”) Court’s rules of procedure state, “**Failure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend the Special Master’s Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge.** This waiver shall also apply to further proceedings in the subcase if remanded back to the Special Master.” Administrative Order 1 (“AO1”), 13.a. LU filed its first motion to alter or amend on May 24, 1999 and its second motion to alter or amend in March 28, 2003. LU completely failed to identify period of use as an element of the Special Masters’ water right recommendations in need of alteration or amendment. Thus, LU long ago waived its right to challenge the Special Masters’ recommended period of use.

3. Period Of Use Was Not Raised As An Issue On Challenge

The SRBA Court’s rules of procedure also state, “The *Notice of Challenge* shall include a detailed statement of the issue(s) Once raised and detailed, the issue(s) on challenge **may not** be amended to include additional issue(s) not specifically identified in the *Notice of Challenge* except on motion and leave of court.” AO1, 13.c. LU has filed two notices of challenge during this litigation. LU did not raise period of use as an issue in its notices of challenge. Even if LU had not waived its right to challenge by failing to move to alter or amend the Special Masters’ period of use recommendations, LU waived its right by failing to identify period of use as an issue in its notices of challenge.

4. Period Of Use Was Not Raised As An Issue On Appeal

LU also failed to raise period of use as an issue in its appeal of the partial decrees filed by the District Court on January 4, 2005. The Idaho Supreme Court would not have reviewed any actions of the District Court not specifically assigned as error or argued in the briefs. See State v. Hoisington, 657 P.2D 17, 23 (Idaho 1983). The SRBA District Court's Partial Decrees were final as of January 4, 2005. LU should not be allowed to raise a new issue now.

LU may be attempting to reopen this Court's final judgment over three years after it was entered. LU must file a timely motion under Idaho R. Civ. P. 60(b) to obtain relief from a final judgment. However, such motion must be filed "not more than six (6) months after the judgment . . . was entered or taken." Id. Therefore, LU cannot obtain relief from the final judgment because the time limit has expired. See Gordon v. Gordon, 800 P.2d 1018, 1020 (Idaho 1990); see Estate Of Bagley, 793 P.2d 1263, 1265-66 (Idaho App. 1990) (Rule 60(b) not a substitute for timely motion to amend a judgment and a timely appeal).

In the alternative, LU may be attempting a late challenge or a collateral attack on the Partial Decrees. In similar circumstances, the District Court has already held:

an ***Order of Partial Decree*** disallowing water rights 57-10487A and 57-10487B was signed by Judge Hurlbutt and issued by this Court on December 31, 1998. Furthermore, a Rule 54(b) Certificate is printed on the face of the *Partial Decree*, directing that "the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules." Again, no party took an appeal from this *Partial Decree*, the time for appeal has long since expired, and the *Partial Decree* is final. Because a *Partial Decree* has already been issued in these subcases, this challenge by Joyce must be considered either an appeal of the *Partial Decree* or a collateral attack on the *Partial Decree*. In either case, this Court is prevented from deciding the substantive issues presented in this challenge. If Joyce's challenge constitutes an appeal, this Court is without subject matter jurisdiction to decide it. Administrative Order 1 (15)(a) (Oct. 16, 1997) ("procedure for appealing partial decrees"); I.R.C.P. 54(b); Idaho Const. Art. 5, § 9; I.C. §§ 1-204, 705 (defining respective jurisdictions of district and supreme court); *First Security Bank v. Neibar*, 98 Idaho 598, 604, 570 P.2d 276, 282 (1977) (once appeal is filed, district

court loses subject matter jurisdiction until case is remanded; 9.A.R. 21 (failure to comply with time limits is jurisdictional). If Joyce's challenge constitutes a collateral attack on the *Partial Decree*, the rules of *res judicata* apply and this Court is without authority to address the substantive issues raised in Joyce's challenge. *See Gilbert v. Nampa School District. No. 131, 104 Idaho 137, 657 P.2d 1 (1983)* (*res judicata* applies when existing final judgment has been rendered on merits of the case).

Memorandum Decision and Order on Challenge, In Re SRBA, Case No. 39576, Subcases 57-10486, 57-10487, 57-10487A, 57-10487B, and 57-10922 (Oct. 6, 1999) at 5-6 (footnote omitted). Here, the partial decrees, except for priority date, are also final. As above, this Court is likewise "prevented from deciding the substantive issues" presented by LU's late challenge or collateral attack on the decreed period of use. *Id.*

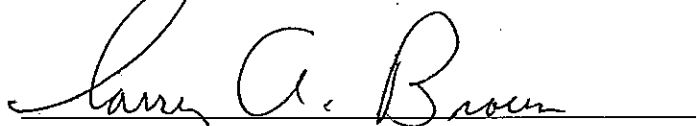
CONCLUSION

LU's attempted modification of its claimed period of use is clearly inappropriate. Not only did LU waive the issue by 1) failing to file a timely objection, 2) failing to file a timely motion to alter or amend a Special Master's recommendation, 3) failing to designate the issue for challenge, and (4) failing to designate the decreed period of use as error on appeal, but LU cannot now obtain relief from this Court's final judgment because the time for filing a motion under Rule 60(b) has long since expired. Therefore, this Court should deny LU's current attempt, in whatever form, to amend its claimed period of use.

DATED this 19th day of May 2008.

Respectfully submitted,

UNITED STATES OF AMERICA



Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on May 19, 2008, that I served a true and correct copy of foregoing **UNITED STATES' MEMORANDUM ON PERIOD OF USE; SUBCASES 55-10288B ET AL.** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

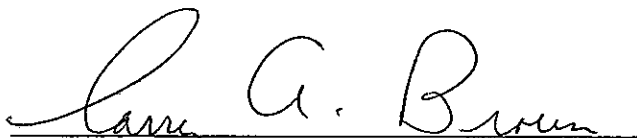
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