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	)	**Subcases 55-2414, 55-7319,**
	)	**55-7383, 55-7410, 55-7413**
Case No. 39576	)	**and 55-7420**
	)	**(USDI/BLM)**
	)	
	)	**ORDER GRANTING UNITED**
	)	**STATES**
	)	**MOTION FOR SUMMARY**
	)	**JUDGMENT**
	)	**and SPECIAL MASTER REPORT**

FINDINGS OF FACT

United States Late Claims

The United States of America, Department of Interior, Bureau of Land Management, Idaho State Office, 1387 S. Vinnell Way, Boise, Idaho, 83709-1657 ("U.S." or "BLM"), filed *Motions to File Late Notices of Claims* in the above six subcases on August 31, 2001. It claimed the following water rights, all based on licenses and all for use in the BLM Cliffs Allotment in Owyhee County:

55-2414 – 1.5 cfs / 1.5 af from an unnamed stream for year-'round stockwater storage and stockwater from storage uses with a priority date of June 6, 1966.

55-7319 – 1.4 af from an unnamed stream for year-'round stockwater and wildlife storage and stockwater and wildlife from storage uses (Cherry Creek Reservoir) with a priority date of May 27, 1983.

55-7383 – .02 cfs / 3.1 af from a spring for year-'round stockwater and wildlife uses (Apache Springs #8480) with a priority date of October 27, 1988.

55-7410 – .14 cfs / 8.9 af from Dougherty Creek for year-'round stockwater and wildlife storage and stockwater and wildlife uses (Dougherty Reservoir #8531) with a priority date of April 13, 1990.

55-7413 – .14 cfs / 8.9 af from an unnamed stream for year-'round stockwater and wildlife storage and stockwater and wildlife uses (One-Berry Reservoir #8530) with a priority date of April 13, 1990.

55-7420 – .16 cfs / 7.5 af from a spring for stockwater use from April 1 to December 31 and for year-'round wildlife use (Two Fly Spring #8529) with a priority date of December 17, 1990.

Orders Granting Motions to File Late Claims

On December 26, 2001, former SRBA Presiding Judge Roger S. Burdick entered an ***Order Granting Motion to File Late Notice of Claim*** in five of the six subcases (55-2414, 55-7319, 55-7383, 55-7413 and 55-7420).[1] Judge Burdick entered a second ***Order Granting Motion to File Late Notice of Claim*** in the remaining license-based claim, 55-7410, on May 16, 2002.

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report for Late Claims, Domestic and Stockwater and Irrigation and Other Water Rights, Reporting Areas 2 & 6, IDWR Basins 55 & 57* on October 31, 2002. The Director recommended the above six United States claims as filed, but in four of the claims (55-7383, 55-7410, 55-7413 and 55-7420), he added the following remark: "This right, when considered with all other rights common to the same grazing allotment, shall be limited to the quantity of water beneficially used by the number of stock within the allotment."

LU Ranching Objections

On January 3, 2003, LU Ranching Co., Inc., filed an identical *Objection* in each of the above six subcases objecting to name and address ("Should be: LU Ranching Co., Inc., Box 415,

[1] Judge Burdick's ***Order*** also included 55-11890, a beneficial use late claim filed by the U.S., but not part of the *Motion for Summary Judgment* now before the Special Master.

Jordan Valley, OR 97910.") and priority date ("Should be: 1905."). An attachment to each of the *Objections* stated in part:

> LU Ranching Co., Inc., is a co-claimant of an identical water right (under SRBA subcase 55-13450) to that claimed by the United States in the present subcase. . . . Any license held by the United States related to the claimed water source or right inures only to the benefit of LU Ranching Co., Inc., its co-claimants under subcase 55-13450, and/or its predecessors in interest, as the actual user(s) of the water right claimed herein, and any such license, for the above stated reasons, is inadequate to support the decree of any water right to the United States or any of its Agencies, Departments, Bureaus, or Services.[2]

There were no other objections.

Consolidation

On March 3, 2003, the Special Master entered an ***Order Granting Joint Motion to Consolidate Subcases*** consolidating the above six United States claims, plus 55-11890, with claim 55-13450 filed by LU Ranching, Jeff Anderson Estate and Michael E. Stanford.

United States Motion for Summary Judgment

On May 10, 2005, the United States filed its *Motion for Summary Judgment* in the above six subcases seeking dismissal of LU Ranching's objections. The United States wrote that there are no genuine issues of material fact and the United States is entitled to summary judgment dismissing LU Ranching's objections as a matter of law. The United States's principal argument was that because the six claims are based upon licenses issued to the BLM by the State, "LU's objections constitute impermissible collateral attacks on previously issued licenses."

LU Ranching Opposition

LU Ranching filed its *Opposition to United States' Motion for Summary Judgment* on June 24, 2005. It argued:

[2] On August 11, 2005, LU Ranching Co., Inc., Jeff Anderson Estate, Inc., and Michael E. Stanford were granted leave to file amended notice of claim 55-13450 for .1 cfs / 8.8 afy from groundwater for stockwater and stockwater storage uses in the BLM Cliffs Allotment in Owyhee County from April 1 to September 30 with a priority date of October 15, 1901, based on beneficial use. For purposes of brevity in this ***Order*** and ***Report***, the terms "LU" and "LU Ranching" include all three entities who claimed water rights under 55-13450 and who objected to the six United States license-based claims.

> In the present case, there is both legal and factual support for LU Ranching's challenge of the United States' licensed based claims. Under such circumstances, where triable issues of material fact exist as to the matters at issue, the United States' Motion must be denied.

Along with its *Opposition*, LU Ranching filed an *Affidavit of Tim Lowry* and *Supplemental Affidavit of Tim Lowry*. Mr. Lowery is the vice-president of LU Ranching, a family corporation holding a grazing preference and grazing permits for the Cliffs Allotment. He wrote:

> The claimed places of use for subcase 55-13450 and the United States' claimed places of use for Subcases 55-02414, 55-07319, 55-07383, 55-07410, 55-07413, and 55-07420 overlap. All the places of use claimed by the United States are reservoir and spring locations within the Cliffs Allotment that have been historically used by L.U. Ranching and the two other preference holders, the Jeff Anderson Estate, Inc., and Michael Stanford, and their respective predecessors in interest. . . . . My understanding is that the United States is basing its claims on licenses issued to it. At no time prior to this adjudication was I personally aware that the United States had applied for or had been issued licenses for the water sources that are now claimed by the United States in these subcases. I received no notice of the United States' applications for licenses or of applications for the appropriation of these waters. Had I received such notice, I would have protested the applications.

United States Reply

The United States lodged its *Memorandum in Reply to LU Ranching's Opposition to United States' Motion for Summary Judgment* on July 11, 2005. It argued:

> LU has failed to meet its burden of showing a genuine issue for trial because each director's report states that the six BLM water right claims at issue here are based upon licenses and LU did not show that the BLM's claims were not based upon licenses. Therefore, there are no genuine issues of material fact.

The United States further argued that LU Ranching failed to file a timely protest to the BLM's applications for license; the BLM validly appropriated stockwater rights on federal public lands pursuant to I.C. § 42-503; and such rights are not forfeited or abandoned simply because the BLM does not own the livestock authorized under the Taylor Grazing Act of 1934 to graze the federal public lands.

Summary Judgment Hearing[3]

A hearing on the United States' *Motion for Summary Judgment* was held by telephone on July 14, 2005. Larry A. Brown appeared for the United States; Elizabeth P. Ewens and Roger D. Ling appeared for LU Ranching, Jeff Anderson Estate and Michael E. Stanford; and Chris M. Bromley appeared for IDWR.

CONCLUSIONS OF LAW

Standards of Review

The criteria governing motions for summary judgment spelled out in I.R.C.P. 56(c) fill multiple pages of case law and are seldom disputed but often quoted:

> It is well established that "[A] motion for summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Upon a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party. Likewise, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact [citations omitted].

G&M Farms v. Funk Irr. Co., 119 Idaho 514, 516-517, 808 P.2d 851, 853-854 (1991).

In the unique circumstance where a party pleads an affirmative defense, the general guidelines change somewhat:

> Although this question [of entitlement to summary judgment based on affirmative defense] has not been previously presented to this court, numerous federal decisions have held that if a party moves for summary judgment on the basis of an affirmative defense which entitles him to judgment as a matter of law, and if there is no genuine dispute of material fact as to that defense, even though a dispute of fact may exist as to the merits of the plaintiff's claim, summary judgment should be granted [citations omitted].

Collord v. Cooley, 92 Idaho 789, 792, 451 P.2d 535, 538 (1969). Also see *Stewart v. Hood Corporation*, 95 Idaho 198, 200, 506 P.2d 95, 97 (1973) and *Sierra Life Ins. v. Magic Valley Newspapers*, 101 Idaho 795, 801, 623 P.2d 103, 108 (1981).

[3] The hearing was also scheduled to consider LU Ranching's unopposed *Motion to File Amended Notice of Claim* in subcase 55-13450 – LU Ranching's competing claim to the above six United States claims on the Cliffs Allotment – and the United States' *Unopposed Motion to Vacate Trial Date and Stay Trial*. The Special Master entered an ***Order Granting LU Ranching's Motion to File Amended Notice of Claim 55-13450 and Order Vacating Trial Schedule Order*** on August 11, 2005.

United States' Affirmative Defense

The United States pled an affirmative defense to LU Ranching's objections. The United States pointed out that all six of its contested claims are based on licenses issued by the State to the BLM and LU Ranching's objections squarely challenge those licenses. Because the licenses were not appealed when issued and any attempt to "appeal" those licenses in a subsequent judicial proceeding such as the SRBA constitutes an impermissible collateral attack on the licenses, LU Ranching's objections are barred. Therefore, the United States is entitled to summary judgment dismissing LU Ranching's objections as a matter of law.

The Special Master agrees with the United States' reasoning. LU Ranching's arguments that it is a co-claimant (along with the Jeff Anderson Estate and Michael E. Stanford) of an identical water right and is the actual user of the water rights claimed by the United States does not alter is core arguments – that the licenses inure to the benefit of the objectors and are inadequate to support the decree of any water right. In simpler terms, LU Ranching has argued that the licenses are invalid and that is an impermissible collateral attack on the licenses.

LU Ranching failed to present any genuine issue of material fact as to the United States' affirmative defense. Mr. Lowry's *Affidavits* merely acknowledges the existence of licenses issued to the United States but fails to allege that the licenses are invalid. His statements that he was unaware that the United States applied for and had been issued the licenses prior to the adjudication and that he received no notice of the applications falls short of alleging a genuine issue of material fact. He presented no evidence that his lack of knowledge somehow rendered the licenses invalid. In sum, his objections and *Affidavits* are nothing more than a late substitute for an appeal of IDWR's administrative decision concerning the merits of water rights created by the licenses. There are no triable issues of material fact.

Law of the Case

Earlier in the SRBA, former Presiding Judge Barry Wood adopted certain conclusions of law made by former Special Master Fritz Haemmerle concerning collateral attacks on licenses issued by IDWR:

> If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higinson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the

> license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license [footnote 5: The court expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a license in the SRBA. That issue is not before the court.] *See e.g.*, *Mossman [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 Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue, subcases 36-2708, *et al.*, December 29, 1999, at 16. Also see former Presiding Judge Roger S. Burdick's ***Order on Motion to Set Aside Partial Decrees and File Late Objections***, subcases 65-7267, *et al.*, January 31, 2001, at 13.

However, less than three months later, Judge Wood entered another order concerning collateral attacks on licenses issued by IDWR. This time, Judge Wood held that parties to the licensing process **and** non-parties are barred from collaterally attacking a license in SRBA proceedings:

> 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 [Nez Perce] 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 [*Mosman* and *Bone*, *supra*].

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, consolidated subcase 03-10022, March 23, 2000, at 33.

Binding Effect of Law of the Case

Former Presiding Judge Roger S. Burdick unequivocally reminded the special masters of their role in the SRBA process and their duty to follow legal rulings of the district court:

> Special masters do not possess authority independent from the jurisdiction of the district court. Special masters are appointed for a limited purpose pursuant to an order of reference issued by the district court. The primary function of a special master is one of fact finding. A special master's conclusions of law are expected to be persuasive but are not binding upon the district court. Ultimately, the district court is charged with the specific duty of reviewing a special master's conclusions of law. Therefore, it is not within the purview of the authority conferred upon a special master to "reconsider" the prior legal rulings of the

> district court. Further, much of the benefit realized through the use of special masters is undermined if the district court has to repeatedly set aside a special master's conclusions of law for failing to follow a legal principle already set forth by the district court.
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> . . .
>
> [U]ntil such time as a decision is appealed and precedent established, rulings by the district court are considered to be law of the case in the SRBA and the special masters are expected to follow such rulings[citations omitted].

Memorandum Decision and Order on Challenge, subcase 65-5663B, May 9, 2002, at 9-10.

ORDER

THEREFORE, IT IS ORDERED that the United States' *Motion for Summary Judgment* in subcases 55-2414, 55-7319, 55-7383, 55-7410, 55-7413 and 55-7420 is **granted**. LU Ranching's objections to the United States' claims are dismissed as a matter of law because they constitute impermissible collateral attacks on licenses issued by the State. The pleadings and affidavits on file show that there is no genuine issue as to any material fact and the United States is entitled to judgment as a matter of law.[4]

RECOMMENDATION

THEREFORE, IT IS RECOMMENDED that the United States be awarded partial decrees adjudicating water rights for claims 55-2414, 55-7319, 55-7383, 55-7410, 55-7413 and 55-7420 as recommended by IDWR and as described in the attached ***Special Master Recommendations for Partial Decrees for Water Rights 55-2414, 55-7319, 55-7383, 55-7410, 55-7413 and 55-7420***.

DATED October 5, 2005.

/s/ Terrence A. Dolan
TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

[4] The United States' related beneficial use claim (55-11890) and LU Ranching's overlapping claim (55-13450) will be set for trial in the near future.