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Department of Water Resources

**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 55-10135, 55-11061,
) 55-11385 and 55-12452
)
) **JOYCE LIVESTOCK'S OPENING**
) **BRIEF IN SUPPORT OF MOTION TO**
) **ALTER OR AMEND THE SPECIAL**
) **MASTER'S REPORT AND**
) **RECOMMENDATION, FINDINGS OF**
) **FACT AND CONCLUSIONS OF LAW**
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JOYCE LIVESTOCK'S OPENING BRIEF
IN SUPPORT OF MOTION TO
ALTER OR AMEND

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I. INTRODUCTION

The purpose of a Motion to Alter or Amend is to give the Court the opportunity, prior to further appeal, to correct errors of law or fact contained in the Special Master's Report and Recommendation. In the present case, amendment of the Court's ruling is particularly appropriate because the Court's ruling contains significant legal and factual errors, the practical effects of which would preclude private ownership of water rights on federally administered land, contravene well established precedent that water rights, as property rights, can be held in common, contravene precedent regarding transfers of rights as appurtenances, contravene Idaho law that a beneficial use water right requires actual beneficial use of the water, and, for the first time, subscribe to a riparian theory of water right ownership. The ruling conflicts not only with statutory law, case law, and common law principles at large, but also conflicts directly with other opinions issued by the SRBA court that are law of the case. Accordingly, for the reasons outlined herein and in briefs previously filed with this Court,¹ Joyce Livestock requests that the Court amend its prior determinations and recommend Joyce Livestock's claims with a priority date of 1898 and deny the United States' claims in their entirety.

II. SUMMARY OF ARGUMENT

Basic to the understanding of what is at issue in this case is the fact that water rights are

¹ Joyce Livestock hereby incorporates by reference briefs previously submitted to the Court including Motion for Summary Judgment by Joyce Livestock Co. for an Order Decreeing a Stockwater Right as Reported in Subcase 55-10135 and an Order Disallowing the Claimed Stockwater Rights in Subcases 55-11061, 55-11385, and 55-12452; Reply Brief to Memorandum in Opposition to Joyce Livestock Co.'s Motion for Summary Judgment; Joyce Livestock Company's Motion to Supplement Briefs in Support of Motion for Summary Judgement; and Closing Argument by Joyce Livestock Co.

property rights. *See Nevada v. United States*, 463 U.S. 110, 124 (1983) (in the western states, “it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right.”) Like a property right, a water right can be held in common by different parties. This basic principle of property law has been recognized in the context of tenants holding property in common, *Watts v. Krebs*, 967 (Idaho 1998), the right of multiple property owners to hold an easement in common, *Wood v. Brown Inc.*, 702 P.2d 777 (Idaho 1985), and it certainly has been recognized in the context of multiple parties holding water rights in a common water source, *In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master’s Reports and Recommendations, Presiding Judge Daniel C. Hurlbutt, Jr. (September 30, 1998) and *In Re SRBA Case No. 39576, Clear Springs Foods, Inc. v. Clear Lakes Trout Company*, 136 Idaho 761 (2002). In fact, the District Court specifically held in a case of stockwater rights on the public domain that the legitimacy of appropriative water rights cannot be denied even if there is non-exclusive use. *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master’s Reports and Recommendations, Presiding Judge Daniel C. Hurlbutt, Jr., p. 3 (September 30, 1998).

Additionally, like other property rights, a water right can be transferred. Specific to the facts at issue in this case, stockwater rights on the public domain can be held by private parties, are appurtenant to the base ranch property, and can be transferred as appurtenances with the base ranch property that benefits from their use. *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master’s Reports and Recommendations, Presiding Judge

Daniel C. Hurlbutt, Jr., p. 3 (September 30, 1998); *see also In the Matter of the Determination of the Relative Rights in and to the Waters of Monitor valley – Southern Part (140-B)*, Nye County Nevada, Fifth Judicial District Court of the State of Nevada in and for the County of Nye, Case No. CV 14906, Findings of Fact and Conclusions of Law (October 8, 1999) (“Monitor Valley Decision”) (private parties can acquire stockwater rights on federal land and those stockwater rights are appurtenant to the base ranches rather than to the federal land where the livestock drink); *Hage v. United States*, 42 Fed.Cl. 249 (1998) (adopting Monitor Valley Decision); *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967).

In contravention of above basic principles of property law, the Report and Recommendation rejects Joyce Livestock’s water right claims because there were multiple appropriations of stockwater from the same source and because of a perceived “lack of intent” to transfer these rights. As discussed above, and in greater detail herein, these conclusions are unjustifiable given the applicable law of the case and the evidence presented of Joyce Livestock and its predecessors’ historic and continuous appropriation of the water rights in Jordan Creek coupled with direct evidence of intent to transfer the water rights as appurtenances to the base ranch.

The Court’s conclusion that the United States can own a beneficial use water right also goes against established law of the case in the SRBA. The United States did not claim a statutory based water right and, therefore, the Idaho statutes relied upon by the Court and the United States have no application to the United States’ claims. The United States did not claim a federal reserved water right and, therefore, the United State’s rational in support of its “appropriative”

water rights, that the water is necessary to accomplish the purpose and mandates of the Taylor Grazing Act, is also irrelevant. The asserted basis for the United States' claims is beneficial use, and pursuant to the law of the case, the only way the United States can prove up its beneficial use water right claims is if the United States actually appropriated water and placed it to beneficial use through its own stockwatering operation, if it had an agency relationship with the actual appropriators (Joyce Livestock and its predecessors in interest), or if it acquired the water rights from the actual appropriators. *See In Re SRBA Case No. 39576*, Special Master's Order Denying Motion to Alter or Amend, p. 5-6 (April 15, 1998), *affirmed and adopted and incorporated by reference in In Re SRBA Subcase No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998). The United States presented no evidence of actual appropriation, no evidence that it acquired a water rights from Joyce Livestock and its predecessors, and no evidence of an agency relationship with Joyce Livestock or its predecessors. In the absence of any evidence whatsoever to support the claimed beneficial use right, the United States' claims must be denied in their entirety.

III. STATEMENT OF FACTS

The Court is well familiar with the facts of this case which have been detailed, at length, for the Court in Joyce Livestock's Motion for Summary Judgment and Closing Argument, and, certainly, at trial. Accordingly, Joyce Livestock refers the Court to the facts previously briefed for the Court, and incorporates the same herein by reference. A brief summary of the evidence pertinent to the matters at issue herein, however, is appropriate.

Joyce Livestock's claims for instream stockwater rights include places of use along

Jordan Creek. *See* Exhibit 8. All of the entities that grazed and watered livestock in the Jordan Creek area have been acquired by Joyce Livestock and are now part of the Joyce Ranch, and property that was the subject matter of the original patents in 1898 is part of the current base ranch. *See* Testimony of Paul Nettleton, Trial Transcript p. 681. Moreover, the ranching operation which is now Joyce Livestock Company is now, and, in its various forms, has been since 1898 a family ranching operation beginning with the earliest patent holders, Mary and Anna Joyce. *See* Special Master Report and Recommendation, p. 8; *see also* Testimony of Paul Nettleton, Trial Transcript p. 659-661, 674-683; Exhibit 1 (Chain of Title). Throughout the history of this ranching operation, Joyce Livestock and its predecessors in interest continually grazed and watered their livestock along Jordan Creek. *See* Testimony of Paul Nettleton, Trial Transcript p. 680-683.

Not only the ability to graze on the allotment surrounding Jordan Creek, but the ability to water cattle at Jordan Creek, is now and always has been essential to the economic viability of the base ranch operation and the survival of the cattle. *See* Testimony of Paul Nettleton, Trial Transcript p. 683-686; Testimony of Gene Lewis, Trial Transcript p. 321. In fact, the water from Jordan Creek is an essential part of the ranch unit. *See* Testimony of Dr. Chad Gibson, p. 610. For this reason, when the base ranch properties were transferred with all appurtenances, the appurtenance clause was intended to, and did in fact, transfer everything essential to the economic viability of the base property and cattle operation. *See* Testimony of Paul Nettleton, Trial Transcript p. 673-684; *see also* Testimony of Dr. Chad Gibson, Trial Transcript p. 590. This includes rights to the water in Jordan Creek. *In Re: SRBA Case No. 39576*, Memorandum

Decision and Order on Challenge, p. 18-21 (April 25, 2000) (water rights can transfer as appurtenances to the base ranch property even if the deed transferring the base property is silent on the issue of water rights); *citing Crow v. Carlson*, 690 P.2d 916 (Idaho 1984).

While Joyce Livestock's claims are based on actual beneficial use of the water in Jordan Creek since 1898, the United States' claims are based not on its ownership of cattle or its own stock operation, but rather on so-called acts of managing the rangeland since the enactment of the Taylor Grazing Act in 1934. The United States has not claimed an agency relationship with Joyce Livestock or its predecessors, nor could it, and has not acquired water rights on behalf of or from Joyce Livestock or its predecessors. The United States also has not claimed that the rights at issue are federal reserved water rights, nor has the United States applied for or obtained a permit for water rights pursuant to state law. *See* Testimony of Gary Madenford, p. 427-428. In fact, the United States claims are based on the constitutional or beneficial use method of appropriation only, and by definition the claims of the United States fail to meet the specified requirements of such beneficial use method of appropriation.

IV. STANDARD OF REVIEW

A Motion to Alter or Amend is authorized by SRBA Administrative Order 1, paragraph 13 and is similar to a motion to alter or amend a judgment under I.R.C.P. 59(e). A rule 59(e) motion to alter or amend a judgment, or in this case a Special Master's recommendation, provides the trial court the opportunity to correct errors both of fact or law and provides a mechanism for corrective action short of appeal. *See In Re SRBA Case No. 39576*, Subcases 65-20033 et al., Order on the Motion of the United States to Alter or Amend the Special Master's

Recommendation (May 2, 2000), *citing* I.R.C.P. 59(e) and *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030 (1982); *see also* *First Sec. Bank of Idaho, N.A. v. Webster*, 119 Idaho 262, 266, 805 P.2d 468 (1991). Such a motion is addressed to the discretion of the trial court. *Id.*

V. ARGUMENT

A. Joyce Livestock Met Its Burden to Prove Its Water Right Claim.

As recognized by the Court in its Summary Judgment Order, to prove a water right claim, the issues are as follows: whether predecessors in interest acquired and transferred a valid water right which establishes the existence of the water right and its priority date, and the quantity, place of use, and period of use of the water right. Neither the United States in its Closing Argument nor the Court in its Report and Recommendation disputed issues of quantity, period of use, or place of use.² Instead, the focus of the United States' Closing Argument and the Court's Report and Recommendation, and the ultimate basis for the denial of Joyce's claim, was the Court's conclusion that Joyce's predecessors in interest did not, and could not, acquire water rights on federal public land and, even if they had, the predecessors lacked the requisite intent to transfer those water rights. With respect to this analysis, the Report and Recommendation contains significant errors as to fact and law.

1. The Special Master Erred in Holding There Was No Intent to Appropriate Water.

Joyce Livestock filed a claim for a beneficial use water right, based on the constitutional

² As to place of use, Joyce Livestock made a motion to amend legal descriptions on its claims to conform to the proof at trial based upon the testimony by Mr. Price. *See* Trial Transcript p. 749-752; *see also* Motion to Amend Legal Descriptions of Points of Diversion of Stockwater Rights by Joyce Livestock Co., Claim No. 55-10135 (Silver City Area) According to Proof.

method of appropriation. The Report and Recommendation rejects Joyce Livestock's claim, however, based on the Court's legal conclusion that "use of water in common with others does not constitute an appropriation." See Report and Recommendation, p. 20, fn. 28. The Court describes the "fatal flaw" in Joyce Livestock's claim in further detail as follows:

Joyce Livestock offered the very evidence that rebuts its claim. It proved that multiple ranchers grazed livestock along Jordan Creek for decades in direct competition with Mary and Anna Joyce and their successors. Admittedly, nearly all of the ranches were ultimately consolidated into the Joyce Ranch, but from 1898 until 1934, and even later, there were no fences, the cattle followed the green grass and different brands watered along Jordan Creek. With that in mind, it is difficult to argue that an 1898 instream stockwater right along Jordan Creek ever existed because no one recognized or defended such a right. The logical conclusion is that no one in Joyce Livestock's chain of title acquired such a right – *the water right was shared by all grazers with access to the land – because the concern of all grazers from 1898 through the present was access to graze on federal public land, not water rights on the federal public land.*

Report and Recommendation, p. 22 (*emphasis added*). The Court's first fundamental error in the above analysis is its conclusion that there can be no appropriation if there is more than one appropriator. This conclusion goes against established law in the state of Idaho that water rights can be held in common. See *In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations, Presiding Judge Daniel C. Hurlbutt, Jr. (September 30, 1998); see also *In Re SRBA Case No. 39576, Clear Springs Foods, Inc. v. Clear Lakes Trout Company*, 136 Idaho 761, 763 (2002). Second, the Court erred in concluding that stock owners from 1898 forward were only concerned with the right to graze on public land, not water rights. The history of livestock operations, the evidence presented in this case, and common sense dictate a contrary conclusion. Both access to grazing lands and water rights are

absolutely essential to the survival of the cattle and the viability of the ranching operation as a whole. Third, the Court's emphasis on the fact that the water rights at issue are founded on what is now federally administered land does not negate the existence of Joyce's water rights. Private parties could acquire water rights on the public domain and those rights are specifically recognized and are afforded special protection under the Taylor Grazing Act. Finally, the fact that some of Joyce's predecessors in interest failed to identify the water rights on their grazing applications does not qualify as a forfeiture of those rights, particularly when the evidence established that Joyce's predecessors continued to use those water rights. In sum, both established law and the evidence presented at trial support the conclusion that Joyce's predecessors in interest appropriated water and placed it to beneficial use, thereby acquiring valid water rights along Jordan Creek.

The right to divert and use unappropriated water of any natural stream is guaranteed by the Idaho State Constitution. *See* Const. Art. 15 § 3. "Constitutional" or "beneficial use" appropriations are based on this Constitutional guarantee. Although never formally adjudicated, a person still could acquire a constitutional right to water based upon actual diversion and beneficial use, which right was entitled to full legal protection. *See R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 25-26 (1988). In the context of running a ranching or livestock operation, an appropriation for the watering of stock results in a beneficial use water right entitled to full protection under Idaho law. *See Stevenson v. Steele*, 93 Idaho 4, 11 (1969), *citing Cottonwood Water and Light Co. v. St. Michael's Monastery*, 29 Idaho 761 (1916); *and see Town of Genow v.*

Westfall, 141 Colo. 533 (1960); *Steptoe Livestock Co. v. Gulley*, 53 Nev. 163 (1931).³

The fact that multiple parties appropriated and beneficially used water from the same source does not cancel out these rights nor does it prevent these rights from coming into existence. To the contrary, the laws of the case in the SRBA, Idaho law in general, and indeed law throughout most of the western states, recognizes that there often will be multiple appropriators using water from the same source. In the SRBA, the Presiding Judge explicitly recognized that non-exclusive use of a source does not defeat a water right claim. Presiding Judge Hurlbutt, Jr. wrote as follows:

[A]ll the waters of the state, when flowing in their normal channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state ..." I.C. § 42-101. No river, lake, or spring is under any exclusive dominion and control, *yet the legitimacy of appropriations made from these sources cannot be denied because access to the source is not exclusive*. Absent a claim for a reserved right, all water within the boundaries of this state is subject to appropriation. If there are a number of appropriations made from a single source, those appropriations are administered "first in time, first in right."

In Re SRBA Case No. 39576, Order Denying Challenges and Adopting Special Master's Report and Recommendations, p. 3 (September 30, 1998) (*emphasis added*), citing Idaho Const. art. XV, § 3; *Village of Peck v. Denison*, 92 Idaho 747, 749-750 (Idaho 1969). In Idaho, the doctrine of

³ The Court also disputes whether there was an intent to appropriate the water and place it to beneficial use. However, for purposes of stockwatering, intent to appropriate water is evidenced by diversion of water from its natural source or by watering livestock directly from the source. See *Hage v. United States*, 51 Fed. Cl. 570 (2002), citing *Hunter v. United States*, 388 F.2d 148, 153 (S.D. Cal. 1967). As described in *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967), "The Hunters' intent to use the water is made plain by the evidence. Year after year for nearly a century they have pastured their livestock in this isolated enclave, surrounded by miles of impassable desert; except for the water provided by these springs and the stream, there has been none other available to keep their animals alive."

first in time is first in right is recognized by statute and in case law. *Id.*; *see also* I.C. 42-106 (“As between appropriators, first in time is first in right”); *see also* *Crow v. Carlson*, 690 P.2d 916 (1984) (water rights in Idaho are administered “first in time, first in right”); *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26 (1988), *citing* *Nielson v. Parker*, 19 Idaho 727 (1911). Accordingly, this Court’s conclusion that “use of water in common with others does not constitute an appropriation” contradicts not only the clear law of the case, but also unravels the first in time principle because anytime multiple parties used the same water in common with each other, there could be no protection or protectable water right and, as to the senior appropriator, as soon as someone else used that water (even if there was plenty to appropriate), then the first in time would lose his right. Such a proposition is inimical to the doctrine of prior appropriation and is unsupported by law.

A fundamental purpose of the SRBA is to determine proper ownership of water rights and priority of water rights when there are multiple claimants to the same water source. The SRBA Court not only has recognized that use of water in common constitutes valid appropriations, it has decreed water rights to parties who have, historically, appropriated water rights in common with each other from the same source. *See, e.g. In Re SRBA Case No. 39576, Clear Springs Foods, Inc. v. Clear Lakes Trout Company*, 136 Idaho 761 (2002). In *Clear Springs*, the parties separately owned and operated adjacent fish hatcheries near Buhl Idaho and, in conjunction therewith, appropriated water from streams. Any historical dividing point between the stream no longer exists, and the source of all four of the water rights claimed by the two parties was the common water channel. *Id.* at p. 763, 765. The Idaho Supreme Court upheld the SRBA District

Court's ruling that the parties' water rights derive from the same source. *Id.* at p. 767.

In the present case, when the cattle were drinking the water from Jordan Creek, they were separately appropriating water from that source. *See Hage v. United States*, 51 Fed. Cl. 570, 577 (2002), *citing Hunter v. United States*, 388 F.2d 148, 153 (S.D. Cal. 1967) (for purposes of stockwatering, appropriation is evidenced by watering livestock directly from the source); *see also Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967). As addressed, above, the fact that there was non-exclusive use of the source is legally irrelevant. Moreover, appropriation of water rights in spite of non-exclusive use was expected particularly with regard to the appropriation of stockwater on public land. Ranchers watering cattle on the range ordinarily would not have exclusive use of a water source, and ranchers were prevented, by law, from inclosing the source so that it would be exclusive. *See e.g.* Unlawful Inclosure Act, Act of February 25, 1885, ch. 149, 23 Stat. 321, codified at 43 U.S.C.A. § 1061 (1986); Stockwater Reservoir Act, Act of January 13, 1897, ch. 11, 29 Stat. 484, codified at 43 U.S.C. § 952 (1986), repealed Pub. L. 90-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793 (FLPMA); Stock Raising Homestead Act, Act of December 29, 1916, ch. 9, 39 Stat. 862, repealed Pub.L. 90-579, Title VII, § 706(a), October 21, 1976, 90 Stat. 2793 (FLPMA). Knowing, based on laws preventing ranchers from inclosing water sources on the public range, that there would not be exclusive use of the stockwatering sources, if non-exclusive use was sufficient in and of itself to prevent private parties from acquiring stockwater rights on the public domain then there would be no reason to have a savings clause in the Taylor Grazing Act protecting water rights acquired on the public domain because none would exist. *See* Taylor Grazing Act, 43 U.S.C. § 315b.

Water rights historically were acquired by each and every person who appropriated that water and placed it to beneficial use, regardless of the number of other parties also appropriating water from the same source. As a matter of law, such non-exclusive use does not prevent the appropriators from acquiring valid water rights. *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations, Presiding Judge Daniel C. Hurlbutt, Jr., p. 3 (September 30, 1998); *see also In Re SRBA Case No. 39576, Clear Springs Foods, Inc. v. Clear Lakes Trout Company*, 136 Idaho 761, 763 (2002). This is so whether what is at issue are stock owners watering cattle from the same creek, multiple individuals mining along the same stream bed within feet of each other, farmers taking water from the same source via the same ditch for the purpose of irrigating their individual farmlands, or adjacent fisheries making use of water from the same source. Under the constitutional method of appropriation, in each instance a water right is created by virtue of the parties' appropriation of the water and putting it to beneficial use. The water rights so acquired are legally protectable property rights thereafter administered under the laws of prior appropriation of this state.

The conclusion in the Report and Recommendation that "no one in Joyce Livestock's chain of title acquired such a (water) right ... because the concern of all grazers from 1898 through the present was access to graze on federal public land, not waters rights on the federal public land"⁴ goes against the evidence in this case as well as the historic and practical reality that both grazing and water rights were essential to the ranching operations. In fact, grazing and watering on public land came about because the water and pasture on the base ranches could not

⁴ Special Master's Report and Recommendation, p. 22.

sustain the cattle. Simply, the lives of the cattle and the continued viability of the ranching operations depended on the ability both to graze and water the cattle on the public range. As testified to by Mr. Gene Lewis, who began working in the ranching industry in the Silver City area beginning in approximately 1933, cattle belonging to Joyce Livestock's predecessors in interest grazed around and watered from Jordan Creek, and the water in Jordan Creek was essential to the cattle operation. *See* Testimony of Mr. Gene Lewis, Trial Transcript p. 314-316 (recounting the owners of cattle, Joyce Livestock's predecessors in interest, who watered cattle from Jordan Creek). Mr. Lewis testified in part as follows:

- Q: ... Now, I assume that when the cattle were in the Silver City area, not only did they eat (sic) the green grass, but did they drink the water out of Jordan Creek?
- i. They have to drink water.
- Q: That was – was the main source for them in the summertime?
- A: *Yes. That was the only source*, well, Jordan Creek and its tributaries, but they all, the only choice they have in this Silver City basin.
- Q: Was Jordan Creek?
- A: Is Jordan Creek or one of its little tributaries

Testimony of Gene Lewis, Trial Transcript p. 321 (*emphasis added*). Cattle need water to survive, not just grass, and the water the cattle historically used was from Jordan Creek.

Accordingly, any conclusion that the ranchers historically were only concerned with the right to graze ignores the fact that water rights were absolutely essential to the survival of the cattle and the viability of the base ranch. As Mr. Lewis reminded those in the courtroom at the time of trial: “[j]ust keep in mind that the cattle follow the green grass, and they’ve got to have water when they get there.” Testimony of Mr. Lewis, Trial Transcript p. 330.

The fact that the water rights are located on federally administered land does not change

or defeat these private water rights. Historically, parties could acquire water rights on the public domain and those rights were given specific protection pursuant to the terms of the Taylor Grazing Act and Courts who subsequently considered the issue. Private rights on the then public domain were confirmed and preserved by Congress in the passage of the Mining Act of 1866, 43 U.S.C. §661, the Desert Land Entry Act of 1877, 43 U.S.C. §§ 321-323, and the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316. In each of these statutes, the right to appropriate water from the public domain was confirmed and recognized, and given specific protection. Of particular relevance to the present action is the protective language contained in the Taylor Grazing Act which states:

That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

43 U.S.C. § 315b; *see also California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935). As the United States Supreme Court stated in *California Oregon Power Co.*,

The effects of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain.

Id. at 155.

Other courts, including the SRBA District Court, also have recognized private water rights on federally administered land and, as discussed in more detail below, the transfer of these

stockwater rights from one predecessor in interest to another to the present day owner. *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Report and Recommendation, Presiding Judge Hurlbutt, Jr. (September 30, 1990); *In Re SRBA Case No. 39576*, Memorandum Decision and Order on Challenge, Judge Wood (April 25, 2000) (a private rancher can obtain stockwater rights on public land and that once acquired, these water rights are transferrable); *see also Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967) (recognizing right to water right based on prior appropriation for stockwatering purposes on public domain based on evidence by owner of livestock and members of his family had since prior to 1880 persistently grazed and watered livestock on the public domain); *Hage v. United States*, 51 Fed.Cl. 570, 592 (2002).

The fact that some of Joyce Livestock's predecessors in interest failed to identify their stockwater rights along Jordan Creek on their grazing applications does not mean that their rights were forfeited or never existed. First, the primary concern of the applicants would be to establish their grazing preference. Under the Taylor Grazing Act, the highest preference would be given to those who could demonstrate their ownership of a base ranch property. The Taylor Grazing Act provides: "Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business." 43 U.S.C. 315b. The basis for the commensurate base property priority for the preference grazing right was to preclude itinerant sheepherders from claiming vast areas of the west for grazing of sheep when they did not own deeded land in the vicinity of the range in which they were grazing and for which they had no motivation to prevent overgrazing. *See e.g. Omaechevarria v. State of Idaho*, 246 U.S. 343, 344-

345 (1918) (describing laws to protect the interests of cattle ranchers from interference by sheep herders). One of the main purposes of the Taylor Grazing Act was to prevent this overgrazing by sheepherders who might otherwise claim a water right based on prior appropriation. *See e.g.* Taylor Grazing Act 43 U.S.C. § 315b (giving preference to landowners engaged in the livestock business as opposed to itinerant shepherders). Accordingly, the focus of the applications would be first and foremost the ownership of the commensurate base property ranch, because that afforded the highest priority for the grazing preference right.

Second, the mere fact that a person designates the manner of the highest claim to the grazing preference does not mean that they do not also have an appurtenant water right. Given the purposes behind the Taylor Grazing Act, the applicants would want to establish their highest qualification for the grazing preference. If an applicant did not (and some did) also check that they had a water right, that fact does not undermine the evidence that these predecessors of Joyce Livestock, as established at trial, did in fact appropriate water from Jordan Creek and its tributaries and did place that water to beneficial use for stockwatering purposes. There is no requirement under Idaho law that an entity prove its water right by complying with the requirements of the Taylor Grazing Act, an act designed not to establish water rights but to establish grazing rights. The issue of water rights is a separate one for state law.

Third, as noted by Special Master Cushman, “these documents (grazing applications) are ambiguous and legally insufficient to transfer or waive preexisting water rights obtained under the Idaho Constitution ... they are insufficient to result in an abandonment or forfeiture of a water right.” *In Re SRBA Case No. 39576*, Special Master’s Report and Recommendation, Findings of

Fact and Conclusions of Law for Water Rights 55-10288B et al. (February 27, 2003). Special Master Cushman's conclusions in this regard are supported by Idaho law. Specifically, forfeitures are not favored in the law. Additionally, a party alleging abandonment must prove by clear and convincing evidence that the owner of the water right intended to abandon that right. *See Crow v. Carlson*, 107 Idaho 461 (1984). In the present case, there is no evidence to support a conclusion that by signing the grazing application any of Joyce Livestock's predecessors in interest intended to abandon their water rights.

As acknowledged by this Court, Paul Nettleton's family history *is* the non-Indian history of Owyhee County. *See* Special Master Report and Recommendation, p. 13. All of the entities that grazed and watered livestock in the Jordan Creek area have been acquired by Joyce Livestock and are now part of the Joyce Ranch. Further, the list of Joyce Livestock's predecessors in interest is akin to a family tree, beginning with the earliest patent holders Mary and Anna Joyce. *See* Special Master Report and Recommendation, p. 8; *see also* Testimony of Paul Nettleton, Trial Transcript p. 659-661, 674-683; Exhibit 1 (Chain of Title). Even the BLM admits that Joyce Livestock's predecessors in interest were using the waters of Jordan Creek for stockwater purposes prior to the enactment of Taylor Grazing Act. *See* Testimony of Gary Madenford, p. 392-393. The consistent beneficial use of the water in Jordan Creek for stockwatering by Joyce Livestock's predecessors, which has taken place for more than a century, is more than sufficient evidence of a legally protectable water right based on the constitutional method of appropriation. In failing to recognize this right, the Report and Recommendation is in error.

2. It Was in Error to Hold That There Was No Intent to Transfer Water Rights as Appurtenances to the Base Ranch Property

As previously briefed at length, private ranchers can acquire and transfer stockwater rights located on public land as appurtenances to the base ranch property. The legality of such transfers as appurtenances, even absent specific mention of water rights in a deed, has been recognized by the SRBA Court including the District court in several cases. *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations, Presiding Judge Hurlbutt, Jr. (Sept. 30, 1998), *see also In Re SRBA Case No. 39576*, Memorandum Decision and Order on Challenge, Judge Wood (April 25, 2000); *In Re SRBA Case No. 39576*, Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law for Water Rights 55-10288b et al., Special Master Cushman (February 27, 2003). These holdings are consistent with the holdings of other courts that stockwater rights on the public domain are appurtenant to the base ranch properties in connection with which they are used. *See In the Matter of the Determination of the Relative Rights in and to the Waters of Monitor Valley – Southern Part (140-B)*, Nye County Nevada, Fifth Judicial District Court of the State of Nevada in and for the County of Nye, Case No. CV 14906, Findings of Fact and Conclusions of Law (October 8, 1999) ("Monitor Valley Decision") (private parties can acquire stockwater rights on federal land and those stockwater rights are appurtenant to the base ranches rather than to the federal land where the livestock drink); *Hage v. United States*, 42 Fed.Cl. 249 (1998) (adopting Monitor Valley Decision); *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967). Finally, the transferability of these appurtenant water rights is recognized by noted legal

scholars. See *Water Rights Laws in the Nineteen Western States*, Wells A. Hutchins, J.D., Volume I, p. 453; see also *Kinney on Irrigation and Water Rights*, Volume 2, sections 997, 1000, 1005, 1009 (1912) (a water right necessary to the beneficial enjoyment of the land, the title to which is also in the owner of the land, becomes appurtenant to such land; using the word “appurtenance, ” unless there is a specific reservation of the water right, the water right will pass with the transfer of the land the same as though it had been specifically mentioned in the deed.”) Importantly, it is specifically the law of the case in the SRBA that a stockwater right can pass as an appurtenance to the base ranch property if that was the intent of the grantor. See Memorandum Decision and Order on Challenge, Judge Wood (April 25, 2000). This is consistent with the opinions of other courts as well as legal scholars as noted, above.

The fact that stockwater rights acquired on the public domain are transferable and retain the original priority date representing the date of the first historic appropriation was recognized by Special Master Cushman in his recent opinion *In Re SRBA Case No. 39576*, Special Master’s Report and Recommendation, Findings of Fact and Conclusions of Law for Water Rights 55-10288b et al., Special Master Cushman (February 27, 2003) (LU Ranching). Applying the District Court’s April 25, 2000 Memorandum Decision and Order on Challenge, Special Master Cushman held that the legal effect of characterizing a water right as an appurtenance to a parcel of land is to create a legal relationship whereby the water right automatically passes with the conveyance of land unless otherwise specifically excluded. Further, absent evidence to contradict direct evidence presented by the last grantor in the chain of title that it was his intent to transfer not only the base ranch but also all water rights relating to the grazing on federal land,

LU Ranching, as the current owner, was entitled to a stockwater right with a priority date representing the earliest date that the water was used by its predecessors in interest. In the LU Ranching case, that priority date was 1876. *See In Re SRBA Case No. 39576*, Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law for Water Rights 55-10288b et al., Special Master Cushman, p. 7-11 (February 27, 2003).

As in the LU Ranching case, in the present case direct evidence was presented by the most recent grantor in Joyce Livestock's chain of title that it was his intent to transfer the stockwater rights at issue herein as appurtenances to the base ranch property. *See Trial Transcript*, p. 654-737; *see also* Exhibit 1 (Chain of Title). When Mr. Nettleton refers to his ranch, and specifically when he transferred the ranch, it was his intent to transfer the entire ranch and everything that was necessary to operate it, including not only the base ranch but also the grazing rights and the water rights located in Jordan Creek. *See Trial Transcript*, p. 673, 684. No evidence by the United States was presented to rebut Mr. Nettleton's testimony.

Due to the unstoppable passage of time, direct testimony of additional grantors in Joyce Livestock's chain of title is not possible. For example, Paul Nettleton's father, born in 1897, passed away in 1985, but could have testified regarding his intent as well as the history and transfers of the water rights at issue. However, this does not defeat the claim. The totality of the evidence, including the direct testimony of Joyce Livestock's predecessor in interest, Mr. Paul Nettleton, the expert testimony of Dr. Chad Gibson, and the historic testimony offered by Mr. Gene Lewis support the conclusion that the water in Jordan Creek was appropriated by Joyce Livestock's predecessors in interest, was essential to the beneficial use and enjoyment of the base

ranch property, that the ranching operation would be worthless without those water rights, and that the water rights were intended to be transferred as appurtenances to the base ranch property. Paul Nettleton who is intimately familiar with the historic ranching operation testified that he knows of no situation where the ranch was transferred without also transferring the water rights at issue herein. *See* Testimony of Paul Nettleton, Trial Transcript p. 718-719. Further, as required by Idaho statute, rights to the use of stockwater associated with grazing on federally administered land, established under constitutional method of appropriation, are to be given a priority date based upon the date when the water was first used for livestock associated with grazing on the land. *See* I.C. 42-113(2). The evidence in this case is clear that Joyce Livestock's predecessors in interest were putting the water in Jordan Creek to beneficial use, that the water rights were used by each successor owner of the base properties, that the water rights so beneficially used were transferred by deed with the base properties, and the United States provided no evidence to rebut this evidence, as was its burden. In sum, the applicable law and totality of the evidence support the conclusion that it was the intent of Joyce Livestock's predecessors in interest to transfer not only the base ranch property but also the stockwater rights at issue in this case. *See In Re SRBA Case No. 39576*, Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law for Water Rights 55-10288b et al., Special Master Cushman, p. 7-11 (February 27, 2003).

In addition to the LU Ranching case cited above, in another very similar case where a rancher's predecessors in interest, primarily members of his family, had since before 1880 persistently grazed and watered livestock in the public domain, the court held that the predecessors in interest held water rights on the public domain and that those water rights were

entitled to protection with the 1880 priority date. *See Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967). It is the circumstantial evidence of continued use of the range and the water rights appurtenant to the base property that compels the conclusion that there was an intent to transfer these rights. Otherwise, the value of the base property as an ongoing livestock business would be undermined and there would be little or no value to the transaction. Similar to the history at issue in *Hunter*, Joyce Livestock has produced evidence of continuous use of the waters in Jordan Creek by its predecessors in interest, principally made up of members of the Joyce family, since 1898. Accordingly, as in *LU Ranching* and *Hunter*, Joyce Livestock is entitled to an early priority date of 1898.

B. Making Public Land Available for Livestock Grazing and Management of Land Does Not Entitle United States to a Stockwater Right under Idaho Law.

As addressed briefly, above, there are two types of state water rights recognized in the state of Idaho--constitutional or beneficial use water rights and statutory water rights. The United States did not claim a statutory water right nor did the United States ever file an application for a permit for the water rights at issue herein. Accordingly, it was in error to rely on Idaho statutory provisions to support the United States' asserted rights. The United States also did not claim a federal reserved water right, thus making its argument that the water is essential to the carry out the purpose of the Taylor Grazing Act irrelevant to the present action. The only remaining basis for the United States' right, and the only basis claimed, is beneficial use. However, the law of the case and this own Court's prior ruling is that the BLM's management of the rangeland does not equate to an appropriation of a water right and cannot be used as a basis for a beneficial use

water right.

The two types of state based water rights, constitutional and statutory water rights, have been described as follows:

The right to divert and use the unappropriated water of any natural stream is guaranteed by the Idaho Constitution in article 15, § 3. Until the law changed in 1971 ... a person desiring to appropriate the water of a stream could do so either by actually diverting the water and applying it to a beneficial use or by pursuing the statutory method, which entailed an application to the Department of Water Resources for a permit and then fulfilling the requirements of the permit ... Since 1971 the exclusive way to acquire a water right has been by the permit method. Nevertheless, those rights acquired by the so-called constitutional method prior to that time are still valid ... Thus, an appropriator, whose right is based upon a valid, although unadjudicated, constitutional method of appropriations, retains a senior claim in relation to a person holding a later issued permit.

R.T. Nahas v. Hulet, 114 Idaho 23, 26-27 (1988) (internal citations omitted). In the present case however, the United States did not claim a statutory based water right, and, indeed, has never filed an application for a permit for a water right pursuant to statute. See Testimony of Roxanne Brown, Trial Transcript p. 21; Testimony of Gary Madenford, Trial Transcript p. 427-428.

Under such circumstances, citation to statutes authorizing a statutory based stockwater right for the Bureau of Land Management are wholly irrelevant to the present action.

Each of the statutory provisions cited in the Report and Recommendation as authority for an award of a water right to the United States, as well as the Attorney General opinion, are applicable only when the United States files an application for the issuance of a permit, and in this case, no such application has ever been filed by the United States. Idaho Code § 42-501 states as follows:

The bureau of land management of the department of interior of the United States

may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain. The department of water resources shall, *upon application* in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation ...*such permit, license and certificate of water right* shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefor on the public domain.

I.C. 42-501 (*emphasis added*).⁵ Similarly, I.C. 42-114, relied upon by the Court and the United States, also is restricted to statutory based water rights which entail an application to the Department of Water Resources for a permit. That statute states:

Any *permit* issued for the watering of domestic livestock shall be issued to the person or association of persons *making application therefor* and the watering of domestic livestock by the person or association of persons *to whom the permit was issued* shall be deemed a beneficial use of water.

I.C. 42-113 (*emphasis added*). Reference to a beneficial use of water in this statute does not change the nature of the right from a statutory based water right to a beneficial use water right. It merely confirms that in this state water is a precious resource and cannot be used for wasteful purposes but, rather, must be placed to a beneficial use. Finally, as acknowledged by the Court, the Attorney General's opinion deals strictly with statutory based water rights when an application for a water right as been made and a permit has been issued. *See* Report and Recommendation, p. 25. The above statutes together with the Attorney General's opinion provide a mechanism for the United States to apply for and obtain a statutory based water right for water not otherwise appropriated. They do not, however, justify or support a beneficial use

⁵ Importantly, this statute also states that a permit will not be issued to the United States if the water has already been appropriated. As discussed at length herein, the water at issue has already been appropriated by Joyce Livestock and its predecessors in interest.

water right based on the constitutional method of appropriation.

In the State of Idaho, there are only three ways to get a beneficial use water right: (1) actually appropriate and beneficially use the water, (2) be a successor in interest to an actual appropriator, or (3) have an agency relationship with the actual appropriator. *See In Re SRBA Case No. 39576*, Special Master's Order Denying Motion to Alter or Amend, p. 5-6 (April 15, 1998), *affirmed and adopted and incorporated by reference in In Re SRBA Subcase No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998). In this case, the United States has made no claim that it is either the successor in interest to Joyce Livestock's predecessors who appropriated the water, nor has the United States claimed an agency relationship with either Joyce Livestock or its predecessors. What is left, then, is the United States' argument that it has appropriated the water in Jordan Creek and put it to beneficial use by virtue only of its management of the rangeland. Under applicable law and the law of the case, the United States cannot acquire a beneficial use water right on the basis of its operation and management of the rangeland.

Under the law of the case doctrine applicable to the SRBA litigation, a special master does not have the authority to reconsider the prior rulings of the District court. Further, as noted by the District Court, "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." *See In Re SRBA Case No. 39576 (Wood v. Trout)*, Memorandum Decision and Order on Challenge and Order of Partial Decree (May 13, 2002). In the present case, the legal principle has already been

established and recognized that the United States cannot obtain an appropriative water right by virtue of its operation and management of public land.

To prove a beneficial use water right, Idaho law requires an actual physical diversion and use of water to support a water right claim. *See In Re SRBA Case No. 39576*, Special Master's Order Denying Motion to Alter or Amend, p. 7 (April 15, 1998) (for an instream stockwater right, the party claiming a stockwater right will point to the act of placing stock it owns or operates near a water source and the drinking of water by the stock as the act constituting an appropriation of water); *see also In Re SRBA Subcase No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998); *In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge v. United States*, 996 P.2d 806, 811 (2000); *R.T. Nahas Co. v. Hulet*, 674 P.2d 1036 (1983). It is the law of this state, and the law of the case in the SRBA, that managing rangeland operations and issuing grazing permits do not qualify as acts of putting water to beneficial use and do not support a constitutional or beneficial use water right.

The argument that the United States can obtain an appropriative water right by virtue of its management of public land has already been rejected by the District Court, and under the law of the case doctrine, this holding must be respected and followed. In the April 15, 1998 Order Denying Motions to Alter or Amend, specifically adopted and incorporated by reference by the SRBA District Court, the Court held the following:

[T]he court finds that the United States is not the appropriator of water based solely on the fact that it issues permits and that Congress regulates access to water sources. Again, if the United States is not the actual appropriator of water, it must

perfect a water right through an appropriator under an agency theory ... or the right must be conveyed to the United States from a party who actually perfected the right.

In Re SRBA Case No. 39576, Special Master's Order Denying Motion to Alter or Amend, p. 11 (April 15, 1998); *In Re SRBA Subcase No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998).

In a December 1, 1999 Order, this very Court recognized that the law of the case, as established by the Presiding Judge in subcase 72-15929C (quoted and cited, above), is that the United States cannot own a water right simply because it manages the public domain. This Court's December 1, 1999 states, in pertinent part, as follows:

The Presiding Judge (in the Order Denying Challenges and Adopting Special Master's Reports and Recommendations) then adopted and incorporated by reference Special Master Haemmerle's Report and Recommendation in subcase 72-15929C. Special Master Haemmerle held that the United States does not own a water right simply because it manages the public domain: [T]he court [Special Master Haemmerle] finds that the United States is not the appropriator of water based solely on the fact that it issues permits and that Congress regulates access to water sources ...

In Re SRBA Case No. 39576, Subcase 35-12939 et al., Amended Special Master's Report, Special Master Dolan (December 1, 1998). It is, therefore, the recognized law of the case that the United States is not an appropriator of water based solely on the fact that it issues permits and regulates access to water on the rangeland.⁶

⁶ The fact that a 1934 priority date was awarded to the United States in that action does not negate the holding that the United States does not and cannot appropriate water or obtain a beneficial use water right by virtue of its rangeland management practices. The 1934 right was given to the United States only as a result of a stipulation reached between the United States and State of Idaho; the 1934 date simply was not contested. No such stipulation has been reached in the subcases at issue herein, and the United States' ability to obtain a beneficial use

If, as the United States now claims, ownership of the water rights on the federally administered lands is essential to its ability to fulfill its duties under the Taylor Grazing Act, the United States should have reserved the water with the lands. The United States did not do this and no such federally reserved right has been asserted in these subcases for the water rights at issue. In keeping with historic practice, in enacting the Taylor Grazing Act, the United States did not reserve the water, but rather separated the water from the land. Further, Congress specifically recognized water rights acquired pursuant to state law on the public domain initiated either before or after the enactment of the Taylor Grazing Act. The Taylor Grazing Act states, in pertinent part:

Nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purpose which has heretofore vested or accrued under existing law validly affecting the public lands *or which may be hereafter initiated or acquired* and maintained in accordance with such law.

Taylor Grazing Act, 43 U.S.C. § 315 (*emphasis added*). There simply would be no reason for the above language if it was the intent of Congress to reserve these water rights.

In addressing this issue under similar circumstances, the United States Supreme Court held that the United States did not reserve stockwater rights on lands comprising the Gila National Forest. The Supreme Court wrote:

The United States contends that, since Congress clearly foresaw stockwatering on

water right is clearly contested. Additionally, the holding that the United States does not appropriate water based on its acts of managing the rangeland only makes sense in the context of claimed rights with a 1934 or later priority date because it was only after the passage of the Taylor Grazing Act in 1934 that the United States began to manage and regulate the federal rangeland.

national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree ... Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators under state law.

United States v. New Mexico, 438 U.S. 696, 715-717 (1978). Similar to the facts at issue in *New Mexico*, Congress in passing the Taylor Grazing Act clearly understood that stockwatering by private parties would continue to take place on what was to become federally administered rangelands. Knowing this, Congress elected to preserve and protect those private water rights acquired on the public domain.

As stated above, the United States has not asserted a reserved rights claim in this litigation, however its argument substantially mirrors that which would be raised in support of an implied federal reserved right claim. Specifically, the United States argues that ownership and control of the water on the allotments are necessary to accomplish the objectives of the Taylor Grazing Act. *See* United States' Closing Argument, p. 16-18; *see also* Testimony of Gary Madenford, Trial Transcript p. 354. At trial, Dr. Madenford testified that if the permittees own the water rights, it greatly inhibits the BLM's ability to manage the land according to the direction that it has been given from Congress. *See* Testimony of Dr. Madenford, Trial Transcript p. 354. This is almost identical to an argument justifying a federal reserved water right. *See United States v. New Mexico*, 438 U.S. 696, 699-700 (1978) (Congress, on giving the President the power to reserve portions of the federal domain for specific federal purposes, impliedly authorized him to reserve appurtenant water to the extent necessary to accomplish the purpose of the reservation). However, in this case no federal reserved water right has been

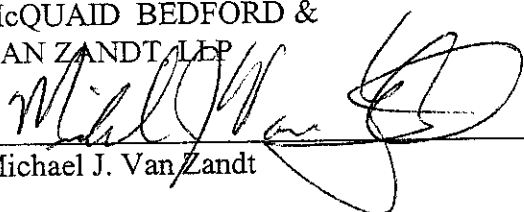
claimed and none exists. Therefore, evidence relating to the perceived necessity of water rights to BLM operations is irrelevant and provides no support for the United States' claims.

VI. CONCLUSION

If the Report and Recommendation at issue herein is allowed to stand, the practical effect will be that no one other than the United States can own a water right on the public domain, thus ignoring the fact that the state of Idaho is a prior appropriation state and instead applying riparian principles. Such a result runs afoul not only of the state law of Idaho, but against the stated intent of Congress in the Taylor Grazing Act that water rights acquired under state law are to be protected. Accordingly, Joyce Livestock Co. respectfully requests that this Court reconsider and reverse its prior recommendations, and instead recommend that Joyce Livestock be award a water right in and to the waters of Jordan Creek with a priority date of 1898, and that the United States' claim for a beneficial use water right be denied in its entirety.

DATED this 8th day of January, 2004.

Respectfully submitted,
McQUAID BEDFORD &
VAN ZANDT LLP



Michael J. Van Zandt

DATED this _____ day of January, 2004.

Respectfully submitted,
LING ROBINSON & WALKER



Roger Ling
Idaho State Bar No. 1018

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VI. CONCLUSION

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DATED this ____ day of January, 2004.

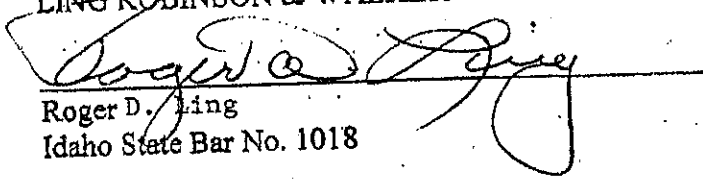
Respectfully submitted,

McQUAID BEDFORD &
VAN ZANDT, LLP

Michael J. Van Zandt

DATED this 8th day of January, 2004.

Respectfully submitted,
LING ROBINSON & WALKER


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CERTIFICATE OF SERVICE

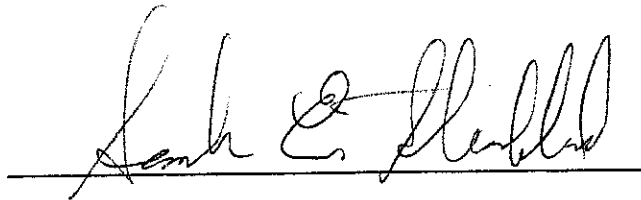
I certify that on January 8, 2003, I served a true and correct copy of foregoing **JOYCE LIVESTOCK'S OPENING BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND THE SPECIAL MASTER'S REPORT AND RECOMMENDATION, FINDINGS OF FACT AND CONCLUSIONS OF LAW** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

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A handwritten signature in dark ink, appearing to read "Sarah E. Hendricks", is written over a horizontal line.

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