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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: 55-10135, 55-11061,
	)	55-11385, and 55-12452
	)	
Case No. 39576	)	UNITED STATES' MEMORANDUM
	)	IN OPPOSITION TO JOYCE
	)	LIVESTOCK COMPANY'S MOTION
_____	)	TO ALTER OR AMEND

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I. INTRODUCTION

Joyce Livestock Co. Ltd. [hereinafter "Joyce"] filed a Motion to Alter or Amend [hereinafter "Joyce's Motion"] the Special Master Report and Recommendation [hereinafter "SMRR"] that recommended partial decrees be awarded to the United States Department of the Interior, Bureau of Land Management [hereinafter "BLM"] for three State-law based beneficial

use claims for instream stockwatering located entirely upon public land.¹ Joyce's Motion also seeks to alter or amend the SMRR's denial of Joyce's instream stockwatering claim that describes a water source identical to BLM's claims and provides water for livestock using the same public land for grazing. The United States, through the undersigned counsel, files this Memorandum in opposition to Joyce's Motion and 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 [hereinafter "Joyce's Memo"].²

II. ARGUMENT

A. The Special Master Correctly Denied Joyce's Stockwatering Claim

1. Joyce Failed to Prove that its Predecessors in Interest Satisfied the Test of a Valid Appropriation

The trial evidence revealed that Joyce's predecessors, as well as other itinerant livestock herdsman, used public land for livestock grazing before the Taylor Grazing Act, but did not offer water rights as dependent base property. *See* Exhibits 80, 82, 83, 84, 85, 86. There is no evidence that any stockman depended upon water rights in Jordan Creek to support a livestock operation. Exhibit 22; *see generally* Testimony of Michael Boltz, Trial Transcript, pp. 437-533.

¹The term "public land" means "any land and interest in land owned by the United States . . . and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership . . ." 43 U.S.C. § 1702(e).

² The United States' position on the issues was earlier presented to the Special Master in the United States' Post-Trial Memorandum, the United States' Memorandum in Opposition to Joyce Livestock Co.'s Motion in Limine, and the United States' Memorandum in Opposition to Joyce Livestock Co.'s Motion for Summary Judgment, which are incorporated herein by this reference. Many of the arguments and assertions in Joyce's Memo are addressed in these previously filed Memoranda and will not be reargued here.

None of the competitors for grazing preferences in the grazing unit containing Jordan Creek said they owned any water rights in Jordan Creek in their initial applications for grazing permits or subsequent applications for grazing leases. Exhibits 82, 83, 84, 85, 86. Out of all the competitors for grazing preferences in the subject grazing unit, only the grazing permit applications of Jump Creek Sheep Co. and John T. Shea stated a specific grazing use on public land in the Jordan Creek drainage during the priority years, and only Shea conveyed any real property to Joyce. Trial Transcript, pp. 455-463, pp. 466-471, and pp. 473-478; Exhibits 8 (Bates Stamp Number (BSN) 4774), 22, 65 (BSN 660), 72, 87, 95, and 96. The evidence shows that Shea sold his livestock operation in 1938, leased his ranch land to Salove who did not use Jordan Creek as a livestock watering source for a period of 13 years, and did not sell or otherwise convey a water right in Jordan Creek to anyone. Trial Transcript pp. 327-328, pp. 462-463, and pp. 464-467; Exhibits 65 (BSN 660) and 94. Shea conveyed his ranch land to Joyce and Nettleton in 1951, and the deed does not mention water rights on public land. Exhibit 1 (BSN 100224-100225) and 75. The Special Master correctly applied this evidence to the law:

The fatal flaw in Joyce Livestock's claim to an instream stockwater right on federal public land can be illustrated in the following scenario. Joyce Livestock filed one claim with an 1898 priority date that corresponds to the earliest patents in the Joyce Ranch chain of title - Mary and Anna Joyce (June 1, 1898). Assuming, *arguendo*, that Mary and Anna Joyce perfected a valid appropriation in 1898, and assuming that such right became appurtenant to their land and ultimately to the current Joyce Ranch, that would necessarily mean that Joyce Livestock based its claim on that single water right. However, 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 water³ 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 federal public land.

SMRR, p. 22 (footnote added).

The Special Master concluded:

A fundamental principle of water law is that mere use of water in common with others does not constitute an appropriation. Intent to appropriate, along with diversion for a beneficial use, is an important element of a valid appropriation: "the three elements were designed to prevent fraud and to provide some order in an otherwise unstructured system." David H. Getches, *Water Law in a Nutshell* (2d Ed., 1990), at 88.

SMRR, p. 20 n.28. This conclusion of law is in complete accord with judicial precedent:

"The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use." Sarret v. Hunter, 32 Idaho 536, 541, 185 P. 1072, 1074 ((1919). "It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use, existing at the time or contemplated in the future, followed by diversion from the natural channel by means of a

³ Joyce quotes this same passage, but mistakenly added the word "right" after the word "water." Joyce's Memo, p. 8. This apparently unintended error changes the meaning of the Special Master's conclusion of law. The Special Master specifically concluded that "[t]he preponderance of the evidence is that none of Joyce Livestock's grantors intended to appropriate the water of Jordan Creek for instream stockwatering." SMRR, p. 20. Thus, there is no evidence of a preexisting stockwater right. The water in Jordan Creek was shared equally by all those using the Jordan Creek drainage for livestock grazing. Since there is no evidence that anyone established and defended a water right in Jordan Creek, the water was still in the public and anyone using public lands for grazing was free to water livestock from Jordan Creek. See Adams v. Portage Irrigation, Reservoir & Power Co., 95 Utah 1, 72 P.2d 648, 652-653 (Utah 1937) ("while water is still in the public, everyone may drink or dip therefrom or water his animals therein . . ."); cf. Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 83 P. 364, 369 (Wyo. 1905) ("This privilege or right of pasturage upon the public lands of the government, which are left open and uninclosed, and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it. It is not a special privilege conferred upon one person or a few persons. No individual has any greater right than another to herd his live stock upon such lands, or to allow them to roam at large thereon.").

ditch, canal, or other structure and also an active application of the water, within a reasonable time, to a beneficial use.” 78 Am.Jr.2d Waters § 321 (1975) (footnotes omitted).

Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 677, 679-680, 619 P.2d 1130, 1132-1133 (Idaho 1980); *see* Lemmon v. Hardy, 95 Idaho 778, 781, 519 P.2d 1168, 1171 (Idaho 1974) (claimant must have a possessory interest⁴ in the land designated as a place of use); *see* United States v. Schmutz, 56 F.2d 269, 270 (D. Utah 1932); *see* Robinson v. Schoenfield, 62 Utah 233, 218 P. 1041, 1042-1043 (Utah 1923); *cf.* Tattersfield v. Putnam, 45 Ariz. 156, 171-172, 41 P.2d 228, 234-235 (Ariz. 1935); *cf.* 2 R. BECK, WATERS AND WATER RIGHTS § 12.02(c)(1) n.52 (2000).

2. Joyce’s Memo Misconstrues the Special Master’s Conclusion

Joyce’s Memo states that the Special Master erred in the “conclusion that there can be no appropriation if there is more than one appropriator.” Joyce’s Memo, p. 8. There is no such conclusion in the SMRR.

Instead, the Special Master found that Joyce presented no evidence that “Joyce Livestock’s grantors intended to appropriate the water of Jordan Creek for instream stockwatering. Hence, there was no water right to convey and there is no evidence that they intended to convey such a right.” SMRR, p. 20. The Special Master found that “[i]f any one rancher appropriated the water of Jordan Creek as early as 1898, as Joyce Livestock argued, then that ‘water right’ has been ignored for over 100 years - only grazing preferences under the Taylor

⁴ A “possessory interest” is a right to exert control over certain land to the exclusion of others, coupled with an intent to exercise that right. RESTATEMENT OF THE LAW OF PROPERTY (VOLUME 1) § 7 (1936). *Cf.* Sunol, et al. v. Hepburn, et al., 1 Cal. 254, 262 (Cal. 1850).

Grazing Act were sought and recognized.” SMRR, p. 20 n.28. The Special Master observed that Dr. Chad C. Gibson, Joyce’s own witness, stated:

that in his experience, “ranches were bought and sold and traded as a unit, which included all of the, the [sic] necessary resources to operate that ranch.” TTr, at 586-588. “[A]nd the ranch unit would have been essentially worthless if it didn’t have a right to, to [sic] use water that went with whatever range land that was associated with that ranch unit.” TTr, at 590. But Dr. Gibson acknowledged that he based much of his understanding on the records of the 1936 Salt Lake City District Advisor’s Conferences. Those records reveal that the advisors’ concerns were about access to grazing on federal public land, not water rights. The conclusion, then, is that when ranches were bought, sold and traded around 1936, the real value of the “ranch unit” was its appurtenant grazing preferences or privileges (access to grazing on federal public land) - not water rights on the federal public land.

SMRR, p. 21; see SMRR, pp. 10-12. The Special Master found that “[n]one of Joyce Livestock’s grantors claimed water rights on federal public land as part of their base property.”

SMRR, p. 21; see SMRR, pp. 9, 13-15. These findings of fact led the Special Master to conclude that “no one recognized or defended such” a stockwatering right in Jordan Creek, and “no one in Joyce Livestock’s chain of title acquired such a right” SMRR, p. 22.

There is no error in the findings of fact because they are supported by the Trial Transcript and Exhibits. Memorandum Decision and Order on Challenge; and, Order of Partial Decree (Wood v. Troutt), In Re SRBA, Case No. 39576, Subcase 65-05663B [hereinafter “Wood v. Troutt”], pp. 5-7. The Special Master’s conclusions of law correctly apply the “legal principles to the facts found” Wood v. Troutt, p. 8. Because the Special Master did not conclude “that there can be no appropriation if there is more than one appropriator[,]” as stated in Joyce’s Memo, p. 8, Joyce’s arguments to the contrary are of no avail and should be ignored. See Joyce’s Memo, pp. 3, 8, 10-13.

3. Judicial Precedent Relied Upon By Joyce Does
Not Support the Motion to Alter or Amend

a. Hage v. United States

Joyce cites Hage v. United States, 51 Fed.Cl. 570 (2002) in support of their Motion. Joyce's Memo, pp. 3, 10, 12, 16, and 19. Hage is a takings case being litigated in the Federal Court of Claims and, as such, relates to whether there has been a taking of a property interest, and if so, what just compensation must be paid by the United States for that taking. Hage does not deal directly with the issue in this case, namely whether the claimant's predecessors in interest intended to appropriate a water right. In the Southern Monitor Valley Adjudication litigation referenced in Hage as the "'State Engineer's report on the Southern Monitor Valley.'" Hage, 51 Fed.Cl. at 578 (quoting Hage v. United States, 42 Fed.Cl. 249, 250 (1998) (rescinded 52 Fed.Cl. at 573 ("except as explicitly reaffirmed herein.")), the Nevada State Engineer determined that Hage had water rights. The State Engineer determined that Hage, as a grantee to the base ranch, had acquired water rights as an appurtenance.

In this case, unlike Hage, the Special Master decided that Joyce had not acquired a stockwatering right from predecessors in interest because "no one recognized or defended such" a stockwatering right in the first instance. SMRR, p. 22. Here, "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" SMRR, p. 22. In Idaho, that evidence alone is sufficient to prove that "no one recognized or defended such" a stockwatering right in Jordan Creek, and "no one in Joyce Livestock's chain of title acquired such a right" SMRR, p. 22.

Thus, Joyce's facts are easily distinguished from the facts considered by the Court in Southern Monitor Valley and the Hage case is irrelevant here.⁵

b. Steptoe Live Stock Co. v. Gulley

Joyce cites Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 295 P. 772 (Nev. 1931) in support of their arguments. Joyce's Memo, p. 10. Steptoe Live Stock Co. held that a physical diversion device was not required in order for a claimant to appropriate a stockwater right. This case is not on point because the holding addresses the diversion element of stockwater rights. However, even if it were on point, the Nevada Supreme Court's opinion in Steptoe Live Stock Co. would support the Special Master's conclusions here.

The facts, as found by the court, were:

[F]or more than forty years last past the plaintiff and its predecessors in interest have had and now have a subsisting right to water in excess of 500 head of live stock at and upon the water courses in question, and have watered their live stock in sufficient numbers to utilize substantially all that portion of the public range available to live stock watering at such places; . . . that the use of said waters and range by such live stock of the plaintiff and its predecessors during said period was exclusive, except as to other live stock that would drift or stray in, and that said right on the part of the plaintiff to water their said live stock in sufficient numbers to utilize substantially all that portion of the public range readily available to live stock watering at said places was recognized by other owners of live stock whose stock drifted or strayed to such places.

Steptoe Live Stock Co., 53 Nev. 163, 295 P. at 773 (emphasis added). The Nevada Supreme Court declined to follow the Utah Supreme Court decision in Robinson, 62 Utah 233, 218 P. at 1042-1043 (holding that the claimant was not entitled to a water right because the claimant

⁵ The Hage case is still being contested in the Court of Federal Claims. See 51 Fed.Cl. at 592 ("next and final stage" is a trial "to finally resolve this case."). Thus, Hage is not yet settled law, much less controlling or even persuasive in the Snake River Basin Adjudication.

merely allowed livestock to roam at large on unenclosed public land using grass and water in common with other stockgrowers' livestock). The Nevada Supreme Court observed that the facts in Robinson "failed to show an exclusive right in plaintiff to the use of the waters in question and the public range thereabouts. Such are not the facts in this case." Steptoe Live Stock Co., 53 Nev. 163, 295 P. at 775. The Nevada Supreme Court suggested in dicta that they would follow the holding in Robinson where, as here, the "proof failed to show an exclusive right" to use the water and the public range adjacent to the water source. Steptoe Live Stock Co., 53 Nev. 163, 295 P. at 775.

As the Special Master in this case correctly found, Joyce's predecessors used water and public range in common with multiple ranchers that "grazed livestock along Jordan Creek for decades in direct competition with Mary and Anna Joyce and their successors." SMRR, p. 22. The Special Master logically concluded that no one in Joyce's chain of title acquired a stockwatering right in Jordan Creek because the water was equally shared by "all grazers with access to the land" SMRR, p. 22. The Special Master's conclusions are in accord with Robinson, 62 Utah 233, 218 P. at 1042-1043 and in accord with the Nevada Supreme Court's dicta because the evidence here also fails to show "an exclusive right in plaintiff to the use of the waters in question and the public range thereabouts." Steptoe Live Stock Co., 53 Nev. 163, 295 P. at 775.

c. Hunter v. United States

Joyce cites Hunter v. United States, 388 F.2d 148 (9th Cir. 1967) in support of their Motion. Joyce's Memo, pp. 3, 10 n.3, 12, 16, 17, and 23. Even though Joyce relies upon Hunter more than any other judicial precedent, Hunter does not support Joyce's Motion.

The pertinent conclusions of law and findings of fact, as stated by the Hunter Court, are as follows:

To constitute an appropriation, therefore, there must co-exist 'the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use.' . . . The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use; . . . but it can also be evidenced in other ways, for example, as in this case, by watering livestock directly from the source (Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 295 P. 772 (Nev. 1931)) or as in other cases by placing water wheels into a stream in order to use the flowage as power to operate a mill located on the bank. . . .

In this case there is no lack of proof of the asserted appropriation; to the contrary, a clearer showing could hardly be imagined. 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.

Their intended (and actual) use has been for a beneficial purpose, as the trial court specifically found. Indeed a contrary finding could hardly have been justified, particularly since cattle watering has been judicially recognized in California as 'a reasonable beneficial use.' . . .

And their use has been prior in point of time to that of any other person; indeed it appears that few people have ever ventured into this desolate area and there have never been any users other than the Hunters.

We believe that a legal basis for the acquisition of an appropriation to water by virtue of local decisions has been established. On the basis of the facts found by the district court, we conclude that Hunter's predecessors must be deemed to have appropriated these waters; that the right is equivalent of a grant of the use of the waters from the federal government; and that it is entitled to protection.

Hunter, 388 F.2d at 153 (citations, except for Steptoe Live Stock Co., omitted).

The Special Master's conclusions of law are in accord with the Hunter Court's conclusions of law. The Hunter Court's findings of fact are similar to the findings of fact in the Steptoe Live Stock Co. case, but are contrary to the evidence in Joyce's case.

Hunter's intent to appropriate water was manifested through proof of nearly a century of pasturing livestock in an isolated enclave, surrounded by miles of impassable desert, with virtually no use of the public range and available water by anyone else. In contrast, the evidence in this case shows that livestock owned or operated by Joyce's predecessors used the public land adjacent to Jordan Creek for forage and water in common with many other ranchers and herdsmen who used the same public land for the same purpose.

The findings of fact in Joyce are most similar to the findings of fact in Robinson, 62 Utah 233, 218 P. at 1042-1043. There, as here, the plaintiff's livestock used the public range and water sources on the public range in common with livestock owned by other ranchers and herdsmen, and the plaintiff had never defended an exclusive right to the public range or the water sources. The Utah Supreme Court held that the plaintiff's proof "did not show such appropriation or use of the waters of the springs as would authorize the trial court to decree to plaintiffs the use of the waters against defendant." Id. at 1043. As in Robinson, Joyce's proof also failed to show any intent to appropriate water for an exclusive use. Therefore, the Special Master correctly denied Joyce's water right claim. SMRR, p. 22.

d. District Court's Order Denying Challenges and Adopting Special Master's Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B and 72-15929C

Joyce argues that the District Court's Order Denying Challenges and Adopting Special Master's Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B and 72-15929C [hereinafter "Court's Order"], dated September 30, 1998, pp. 2-5, is law of the case that holds private ranchers are entitled to a water right on public land simply because predecessors used public land for

livestock pasturage. Joyce's Memo, pp. 2, 8,10, and 13. Joyce's argument is not supported by the Court's Order.

The Court's Order does not address the specific issue decided by the Special Master in this case, i.e. Joyce's predecessors did not acquire a stockwater right because there was no evidence that any of Joyce's predecessors intended to appropriate the water or Jordan Creek for instream stockwatering.⁶ Therefore, the Court's Order is not law of the case that should be applied here. Sun Valley Ranches, Inc. v. Prairie Power Co-op, Inc., 124 Idaho 125, 856 P.2d 1292 (Idaho Ct.App. 1993) (Order is not applicable to subcases where the issues are different than those decided by the District Court and Order is not applicable to subcases where the facts are substantially different); see Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995), cert. denied, 516 U.S. 1029 (1995).

⁶ The Court's Order criticized two theories not advanced by the United States here: (1) "that a private party operating on the public domain must have exclusive 'dominion and control' of a water source to perfect a water right at that source[.]" and (2) that only the United States "has exclusive dominion and control of the public domain and, therefore, only it can perfect water rights on the public domain." Court's Order, pp. 2-3. The Court's Order criticizes these theories because they would "create[] a quasi-riparian legal theory whereby it is the only party that may own stock water rights on the public domain . . . , nullify several Congressional enactments specifically recognizing a private party's ability to perfect water rights located on the public domain . . . , override established legal precedent . . . , [and] foreclose any ownership of stock water rights located on the public domain." Court's Order, pp. 3-4.

Hunter, supra. and Steptoe Live Stock Co., supra. state that ranchers using public land for pasturage prior to enactment of the Taylor Grazing Act of 1934 could perfect stockwatering rights located on public land. The United States does not dispute, and, in the SRBA never has disputed, that ranchers can perfect stockwatering rights on public land, provided the evidence of intent meets or exceeds the standards set forth in Hunter and Steptoe Live Stock Co. that require a rancher to show intent through evidence of use of the public land to the exclusion of livestock owned by others.

In this case, “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” SMRR, p. 22. Joyce’s evidence of intent to appropriate a stockwatering right “failed to show an exclusive right in plaintiff to the use of the waters in question and of the public range thereabouts.” Steptoe Live Stock Co., 53 Nev. 163, 295 P. at 775. Thus, the Special Master correctly concluded “that no one in Joyce Livestock’s chain of title acquired such a right - the water was shared by all grazers with access to the land” SMRR, p. 22. The Special Master’s findings of fact and conclusions of law do not run afoul of the Court’s Order. Therefore, the Court’s Order is not law of the case that should be applied here.

e. Clear Springs Foods, Inc. v. Clear Lakes Trout Company

Joyce cites Clear Springs Foods, Inc. v. Clear Lakes Trout Company, 136 Idaho 761, 40 P.3d 119 (Idaho 2002) in support of its Motion. Joyce’s Memo, pp. 2, 8, 11, and 13. In Clear Springs Foods, the Idaho Supreme Court agreed with the SRBA District Court’s findings of fact that each party was essentially diverting water from the same source, not separate sources. There is no such issue in this case. Even so, Joyce cites Clear Springs Foods to bolster its argument that the Special Master erred in holding that multiple parties could not hold water rights in a common water source. See Joyce’s Memo, p. 2. The Special Master in the Joyce case did not hold that there could not be multiple appropriations from the same source. In fact, there can be multiple appropriations from the same water source, and the “[p]riority of appropriations shall give the better right as between those using the water’ . . . as between appropriators, first in time is first in right.” Crow v. Carlson, 107 Idaho at 465, 690 P.2d at 920. Here, the Special Master held, “no one recognized or defended such” a stockwatering right in Jordan Creek, and “no one

in Joyce Livestock's chain of title acquired such a right" SMRR, p. 22. Clear Springs Foods has nothing at all to do with whether or not a water claimant manifested an intent to appropriate stockwater.

Furthermore, the Clear Springs Foods case is distinguishable because each party used water in separate fish hatchery facilities where each apparently retained a possessory interest in their own place of use. See Lemmon, supra. In contrast, Joyce's predecessors were using public land and water located on public land in common with many other ranchers and herdsmen, none of whom defended their exclusive use of the grazing land or the stockwater at any particular place of water use. The Special Master found these facts to be dispositive in denying Joyce's water right for lack of evidence of intent to appropriate stockwater. SMRR, p. 22. Clear Springs Foods has no relation to the facts found or the conclusions of law in the Joyce case and provides no useful precedent for consideration by the Special Master here.

f. Special Master's Report and Recommendation, In Re SRBA,
Case No. 39576, Subcases 55-10288B et al.

Joyce cites Special Master Cushman's Report and Recommendation, Findings of Fact and Conclusions of Law, In Re SRBA, Case No. 39576, Subcases 55-10288B *et al.*, dated February 27, 2003, as authority for the contention that certain United States' Trial Exhibits are entitled to no weight or consideration. Joyce's Memo, pp. 17-18. Special Master Cushman's Report and Recommendation is under advisement on the United States' Motion to Alter or Amend. Thus, it is not final, is certainly not law of the case, and is of no precedential value whatsoever.

Furthermore, Joyce is contending that Joyce's predecessors had a water right located entirely on public land, and the United States' Trial Exhibits "'are insufficient to result in an abandonment

or forfeiture of a water right.” Joyce’s Memo, p. 17. However, the Special Master here held that there was no evidence that Joyce’s predecessors “acquired such a right” SMRR, p. 22. There is no issue of forfeiture or abandonment. Therefore, Special Master Cushman’s Report and Recommendation is not precedent that should be followed.

4. Joyce’s Predecessors Could Not Convey a Water Right That Did Not Exist

Joyce argues that it was error for the Special Master to hold that there was no intent to transfer water rights as an appurtenance to base property. Joyce’s Memo, pp. 19-23. There is no such holding in the SMRR. Joyce is rearguing its novel contention that a water right entirely located on property owned by someone else somehow, without notice to anyone, becomes appurtenant to ranch land far removed from the actual place of use. *See* Closing Argument by Joyce Livestock Co., pp. 31-38; *see* Motion for Summary Judgment by Joyce Livestock Co., pp. 12-22. The Special Master found no evidence that “Joyce Livestock’s grantors intended to appropriate the water of Jordan Creek for instream stockwatering. Hence, there was no water right to convey and there is no evidence that they intended to convey such a right.” SMRR, p. 20. It follows that there was no water right that could become appurtenant to Joyce’s privately owned ranch property. Therefore, none of the arguments in Joyce’s Memo, pp. 19-23, have any bearing on the SMRR.

In the LU Ranching Subcases, the District Court reversed the Special Master’s granting of the United States’ Motion for Summary Judgment because there were “genuine issues of material fact.” Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief, Order of Recommitment to Special Master Cushman, In Re SRBA, Case No. 39576, Subcases 55-10288 A & B, et al. [hereinafter “District Court’s Order”], p. 28. Joyce cites

the District Court's Order and even goes so far as to say "it is specifically 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." Joyce's Memo, p. 20. However, the District Court stated that "the question of whether any water rights, perfected by LU's predecessors-in-interest, have become appurtenant to any particular property interest which has been conveyed to LU, is an issue of fact to be ascertained from the instruments of conveyance and the circumstances surrounding each conveyance." District Court's Order, pp. 13-14 (footnote omitted). Therefore it is not law of the case that stockwater rights located on property not owned by the claimant are necessarily appurtenant to the claimant's privately owned ranch property. It is only an issue of fact to be determined by the Special Master.

In its remand order, the District Court required LU Ranching "to support its theory that each conveyance in its chain of title back to 1872 (or whatever priority date LU can prove) carried with it a grant of the subject water rights." District Court's Order, p. 26. Here, Joyce argues that they presented sufficient evidence to meet this burden through the testimony of Paul Nettleton, Chad Gibson, and Gene Lewis showing the intent of the grantors in Joyce's chain of title to its privately owned ranch land to transfer water rights located on public land to successors in interest. Joyce's Memo, pp. 20-22. Joyce did not present any evidence of acts by predecessors in interest that could possibly make the water right at issue appurtenant to Joyce's privately owned ranch land. Mr. Paul Nettleton, the only witness with personal knowledge, did testify that he intended to transfer the water right at issue to Joyce Livestock Co., Ltd. as an appurtenance to

ranch base property.⁷ See Trial Transcript, p. 672-683. However, Mr. Nettleton's testimony is self-serving and inconsistent with warranty deeds that do not even mention water rights. See District of Columbia v. Murphy, 314 U.S. 441, 456 (1941) (testimony regarding intention can be considered, but is subject to the "infirmity of any self-serving declaration," and may not be persuasive or can be contradicted by other declarations and inconsistent acts); cf. Malcom v. Hammer, 64 Idaho 66, 127 P.2d 331, 337 (Idaho 1942) (acts or declarations that are self-serving, or in the interest of the parties making them, are generally not admissible). Thus, the preponderance of the evidence does not show that "each conveyance" in Joyce's chain of title "carried with it a grant of the subject water rights." District Court's Order, p. 26 (emphasis added).

5. Conclusion

For all of the above-stated reasons, Joyce's Motion should be denied.

B. The Special Master Correctly Recommended That BLM Should Be Awarded Partial Decrees

The public land contained within the Silver City Grazing Allotment boundary is managed by the BLM for the purpose of providing sustenance to domestic livestock owned by qualified applicants for grazing permits issued under the provisions of the Taylor Grazing Act. See United States' Post-Trial Memorandum, p. 9 Therefore, the United States, by and through the BLM, in its proprietary capacity as a landowner, validly appropriated livestock water in compliance with

⁷ Mr. Paul Nettleton was the only "grantor" to testify. He had personal knowledge, as the grantor, of very few real property conveyances in Joyce's entire chain of title. Chad Gibson and Gene Lewis were not grantors in any property conveyance. Chad Gibson and Gene Lewis had no personal knowledge of any of the conveyances in Joyce's chain of title.

Idaho law because all of the elements of a valid appropriation are satisfied. SMRR, p. 24; *see Hidden Springs Trout Ranch, Inc.*, 101 Idaho at 679-680, 619 P.2d at 1132-1133 (intent, diversion and beneficial use); *see Lemmon*, 95 Idaho at 781, 519 P.2d at 1171 (possessory interest in the land designated as a place of use).

Joyce argues that the Special Master based his holding on statutes that authorize stockwater appropriation by permit or license. Joyce's Memo, pp. 23-26. Then, Joyce argues that the statutory method of appropriation is so fundamentally different from the constitutional method of appropriation that the Special Master erred in recommending partial decrees for BLM's water right claims. Joyce's Memo, p. 25. However, the elements of appropriation of water under the constitutional method are the same as the elements of appropriation under the statutory method. Under the law of appropriation, the beneficial use that must be proved is exactly the same no matter what the bases for the water right. Trial Transcript, p. 37; Trial Transcript, pp. 14-18. Thus, Joyce's argument that there is a distinct difference between the elements of a water right based upon the statutory method of appropriation and the elements of a water right based upon the constitutional method of appropriation has no basis in fact or law. Neither method of appropriation requires livestock ownership as a condition precedent to a landowner being entitled to a stockwatering right.

Even though the Special Master has twice held that the District Court's "observations" in the Court's Order, pp. 8-10,⁸ are "mere dicta," Joyce continues to argue that the Court's Order

⁸ *See supra*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B and 72-15929C dated September 30, 1998.

precludes the BLM's water right claims. Joyce's Memo, pp. 26-28. Joyce continues to rely on the District Court's observations, and Special Master Haemmerle's remarks in his Order Denying Motion to Alter or Amend,⁹ as putative law of the case. Joyce's Motion, pp. 2-5.

The Special Master has twice specifically decided:

the issue of whether the United States (including the BLM in the instant subcases) is entitled to a 1934 priority date or later for an instream stockwater right on federal public land, even though it does not actually own stock, has not been addressed by the SRBA Court, except by default. Logic suggests that those portions of Special Master Haemmerle's and Presiding Judge Hurlbutt's decisions concerning permits and regulation of stock grazing on federal public land are mere dicta for *1934 or later* priority date claims because such range management began *after* June 28, 1934 - the priority date awarded the United States' claims.

Order Denying Joyce Livestock Motions for Summary Judgment and Order Setting Scheduling Conference, In Re SRBA, Case No. 39576, Subcases 55-10135, et al., p. 14 n. 20, dated July 23, 2002; SMRR, pp. 23-24 n.30. The conclusions stated by the Special Master are dispositive. Accordingly, the Special Master was not precluded by the law of the case from holding that the BLM can appropriate stockwater on public land under the constitutional method with a June 28, 1934 priority date. *See* Court's Order, p. 7.

The United States presented thorough arguments regarding the preclusive effect of the Court's Order in its Memorandum in Opposition to Joyce Livestock Co.'s Motion in Limine, pp. 5-14 and incorporates those arguments here by reference. In summary of those arguments, the Special Master correctly determined that the observations in the Court's Order are mere dicta and

⁹ *See* Special Master Haemmerle's Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment), In Re SRBA, Case No. 39576, Subcase 72-15929C dated April 10, 1998.

dicta is not, and cannot be, law of the case. Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 715- 716 (9th Cir. 1990) (“law of the case doctrine gives no preclusive effect to dicta”); Ducey v. United States, 830 F.2d 1071, 1072 (9th Cir.1987). Contrary to Joyce’s contentions in Joyce’s Memo, pp. 26-28, the Court’s Order does not have preclusive effect in this case.

Joyce then suggests that the United States should have filed for federal reserve stockwater rights under the Taylor Grazing Act. Joyce’s Memo, p. 29. Joyce recognizes that the BLM did not file a federal reserve claim for instream stockwater, but then argues that the United States’ arguments in support of BLM’s stockwatering claims are “almost identical to an argument justifying a federal reserved water right. *See United States v. New Mexico*, 438 U.S. 696, 699-700 (1978).” Joyce’s Memo, p. 30. Since Joyce admits that the BLM claims at issue here are not federal reserve claims, this argument is nothing more than a red herring.

Moreover, the Supreme Court’s language relied upon in Joyce’s Memo, pp. 29-30 is also mere dicta and should not have preclusive effect here. *See Memorandum in Opposition to Joyce Livestock Co.’s Motion in Limine*, pp. 12-14. Indeed, the Supreme Court specifically noted:

Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

Congress indeed has appropriated funds for acquisition under state law of water to be used on federal reservations. . . . The agencies responsible for administering the federal reservations have also recognized Congress’ intent to acquire under state law any water not essential to the specific purposes of the reservation.

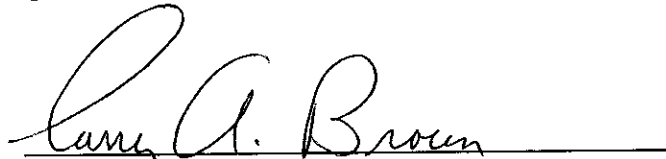
New Mexico, 438 U.S. at 702-703 (emphasis added). Here, the United States is acquiring water rights in the same manner as any other proprietor who makes land available to others for livestock pasturage. Therefore, the United States' acquisition of stockwater rights on public land managed for livestock grazing under the Taylor Grazing Act is not foreclosed by the New Mexico case. Accordingly, Joyce's arguments to the contrary are without merit.

III. CONCLUSION

For the reasons stated above, Joyce's Motion should be denied. The United States is entitled to partial decrees for Water Right Numbers 55-11061, 55-11385, and 55-12452. Joyce's Water Right Claim 55-10135 was correctly denied.

DATED this 12th day of February 2004.

UNITED STATES OF AMERICA

A handwritten signature in cursive script, reading "Larry A. Brown", is written over a horizontal line.

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on Feb. 12, 2004, I served a true and correct copy of the foregoing **UNITED STATES' MEMORANDUM IN OPPOSITION TO JOYCE LIVESTOCK COMPANY'S MOTION TO ALTER OR AMEND; SUBCASE NUMBERS 55-10135, 55-11061, 55-11385, and 55-12452** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

Original to (By Federal Express):

Clerk of the Court
Snake River Basin Adjudication
253 3rd Avenue North
Twin Falls, ID 83301

Copies to (By U.S. Mail):

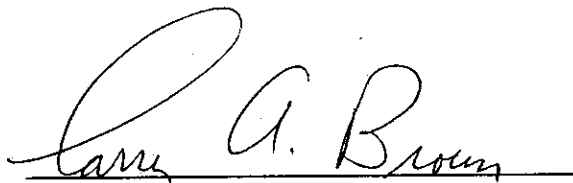
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