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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

) Subcase Numbers 55-10135, 55-11061,
) 55-11385 and 55-12452
)
) **JOYCE LIVESTOCK'S REPLY**
) **TO UNITED STATES'**
) **MEMORANDUM IN OPPOSITION TO**
) **JOYCE LIVESTOCK COMPANY'S**
) **MOTION TO ALTER OR AMEND**
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I. INTRODUCTION

As previously briefed at length, a primary issue in the pending Motion to Alter or Amend is whether the existence of multiple users of the same stockwater source defeats a valid appropriative stockwater right and whether, once acquired, Joyce Livestock's predecessors in interest intended to transfer and did in fact transfer these water rights. Contrary to the arguments of the United States, the fact that there were multiple users of Jordan Creek does not defeat Joyce Livestock's stockwater rights, particularly when Joyce Livestock as it exists today is a product of the consolidation of the ranching operations that have used water from Jordan Creek for stockwatering dating back to 1898.

Also at issue is whether the United States is entitled to a constitutional based or common law appropriative stockwater right when it has never beneficially used the water at issue. In support of its common law claim, the United States has turned to authority regarding statutory based water rights. *See* United States' Memorandum in Opposition to Joyce Livestock Company's Motion to Alter or Amend ("United States' Memorandum"), p. 18. However, this ignores the fact that statutory water rights are separate and distinct from constitutional water rights. There are three separate and distinct categories of water rights that the United States could have claimed in this case: a constitutional or common law water right, a statutory water right, or a reserved water right. The United States did not claim or seek a statutory water right, the United States did not claim or assert a reserved water right, and the United States did not appropriate water and place it to beneficial use for purposes of establishing a constitutional based water right. Under such circumstances, the United States' claims should be denied in their

entirety.¹

II. ARGUMENT

A. Whether There Is a Valid Appropriative Stockwater Right Is Not Dependent Upon

Whether There Was Exclusive Use of the Stockwater Source.

The United States takes issue with Joyce Livestock's statement that the Special Master erred in concluding that there can be no appropriation if there is more than one appropriator. *See* United States' Brief, p. 5. The Special Master concluded that "use of water in common with others does not constitute an appropriation." *See* Report and Recommendation, p. 20, fn. 28. Despite the United States' contention, these conclusions in the Report and Recommendation remain at issue, and, furthermore, they continue to be the mainstay of the United States' argument in this case. *See* Special Master's Report and Recommendation ("Report and Recommendation"), p. 20. Citing to the Report and Recommendation, the United States argues that because there were multiple parties using water from Jordan Creek, or, in the United States' words, Joyce "failed to show any intent to appropriate water for an exclusive use," Joyce's predecessors could not acquire valid appropriative water rights. *See* United States Brief, p. 11 *citing* Special Master's Report and Recommendation, p.22.²

¹ The majority of the issues raised by the United States have been extensively briefed in Joyce Livestock's Opening Brief in Support of Motion to Alter or Amend. For that reason, Joyce Livestock hereby incorporates its Opening Brief by reference, and limits the arguments contained in the within Reply Brief to additional errors and misstatements contained in the United States' Memorandum in Opposition to Joyce Livestock Company's Motion to Alter or Amend.

² The United States repeats its argument regarding the alleged "exclusive use" requirement throughout its brief. *See e.g.* United States' Brief, p. 4, *quoting* the Special Master's Report and Recommendation ("a fundamental principal of water law is that mere use of water in

However, the United States' argument that Joyce and its predecessors did not acquire water rights because they did not have exclusive use of the stockwater must fail as a matter of law and fact. First, the United States' argument is contrary to law within the state of Idaho and the law of the case in the SRBA. Second, federal statutory law prohibits acts which would constitute a defense of exclusive use of water on the public domain. Finally, none of the cases cited by the United States hold that exclusive use of a water source is an essential element of an appropriative stockwater right.

The issue of exclusive use of the water was litigated by the United States in this case before the SRBA District Court. The issue before the SRBA District Court was "whether the Special Master erred in granting Joyce a water right because Joyce did not have exclusive use of the water at issue." *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Report and Recommendations, p. 1 (September 30, 1998) ("District Court's Order). The District Court specifically held that exclusive use of a stockwater is *not* necessary for a party to acquire a stockwater right and wrote:

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." Idaho Const., art. XV, § 3. *See e.g., Village of Peck v. Denison*, 92 Idaho 747, 749-50, 450 P.2d 310 (1969) (*Water from a spring is subject to multiple appropriations by different users so long as there is water in the spring available for appropriation.*)

common with others does not constitute an appropriation"); *see also* United States' Brief, p. 9 ("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"); United States' Brief, p. 14 ("none of (Joyce's predecessors) defended their exclusive use of the grazing land or the stockwater at any particular place of water use").

District Court's Order, p. 3. In fact, the United States historically has based its water right claims on the validity of these so-called nonexclusive appropriative water rights acquired by private parties. As described by the District Court:

It is these nonexclusive appropriations made by private parties that serve as the basis for many of the United States' claims to stock water rights. 'The United States has numerous state-based claims in the SRBA. *At least for the United States claims at issue, the United States was not the party that actually appropriated the water or perfected the water right.* Rather, the basis to the United States' state-based stockwater claims is that private parties moved West, watered their livestock from sources located on the public domain, and because the land is public domain, the United States owns the water right by virtue of the efforts of private parties' ... As the Special Master noted, if a private party is unable to perfect a right, then the United States can never own a stock water right as *those rights would always be based on the nonexclusive appropriations made by private parties.*

District Court Order, p. 5 (*emphasis added*). Based on this analysis, the United States could not own a water right because it is based on the acts of other "nonexclusive" users watering their livestock from the water source. Fundamental to the District Court's holding was the recognition that nonexclusive use or nonexclusive appropriations of water does not affect the validity of the appropriative water right. District Court Order, p. 1, 3, and 5. The District Court's holding on this issue is definitive; it is on point; and it is binding precedent requiring a reversal of the Special Master's Report and Recommendation. Under the law of the case, there can be multiple users of a stockwater source, and there is no requirement that those water users or appropriators individually "defend" exclusive use of the source in order to acquire a valid appropriative water right. The only issue is the priority of the right.

In addition to the above, it is unclear what evidence of a "defense" of exclusive use of the

stockwater the United States is looking for in this case. Presumably, the United States is looking for evidence that Joyce Livestock and its predecessors took steps to exclude other potential users of the stockwater source. When what is at issue is stockwatering, what comes to mind is the exclusion of other cattle from the water source so that Joyce and its predecessors could maintain "exclusive use" of the stockwater. This could be accomplished by erecting physical barriers such as fences around the water source, and perhaps this is the evidence of "defense" of "exclusive use" that the United States is looking for in this case. However, as the United States is well aware, Joyce Livestock and its predecessors in interest were precluded by federal law from taking such measures to "defend" exclusive use of the water sources where there were multiple users. As previously briefed, federal law beginning in 1885 with the Unlawful Inclosure Act prohibited ranchers from enclosing a water source for the purpose of maintaining exclusive use of the source unless they claimed the entire source. *See* 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). Given the status of federal law prohibiting parties from erecting barriers which would bar the use of water by other parties, coupled with the concomitant recognition that private parties can obtain valid appropriative water rights on the public domain, the only logical conclusion is that exclusive use of a stockwater source simply is not a requirement for an appropriative water right.

The United States' argument also ignores the fact that Joyce Livestock and its predecessors in interest did defend their rights to the water in Jordan Creek by filing grazing applications which evidenced their historic and continuous use of the water rights and range rights. *See e.g.* United States Trial Exhibit 87 (Shea Grazing Application); *see also* United States Trial Exhibit 85 (Joyce Brothers Livestock Company Grazing Application). These rights were essential to the economic viability and sustainability of the ranching operation as a whole. *See* Testimony of Paul Nettleton, p. 673-686; *see also* Testimony of Gene Lewis, p. 321; *see also* Testimony of Dr. Chad Gibson, p. 610. It was by continuous and uninterrupted use of the water that Joyce Livestock and its predecessors maintained rights to use the water, without which the cattle operation would have been worthless.³

Notwithstanding the above, the United States cites to *Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163, 295 P. 772 (Nev. 1931) and *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967) in support of its contention that use of water in common with others precludes a party from acquiring an appropriative water right. *See* United States' Brief, p. 9 (regarding the facts of *Steptoe*); *see also* United States' Brief p. 10-11 (discussion of *Hunter*) However, as discussed at length, below, neither *Steptoe* nor *Hunter* hold that exclusive use of a water source is a prerequisite to obtaining a water right, nor do those cases hold that grazing or watering in

³ Although the United States argues that the fact that one of Joyce Livestock's many predecessors in interest, John T. Shea, leased his ranch for a period of time somehow affects the validity of rights transferred, at no time were Mr. Shea's rights to the waters in Jordan Creek ever adjudicated to be either forfeited or abandoned. Moreover, the direct testimony from trial was that the Shea ranch and cattle were purchased by the Nettleton family and that the cattle continued to use water from Jordan Creek consistent with the Shea's historic practice. *See* Testimony of Mr. Lewis, Trial Transcript p. 325-327; Testimony of Paul Nettleton, Trial Transcript p. 659-661, 681-682

common defeat a water right.

The United States also cites to *Robinson v. Schoenfeld*, 218 P. 1041 (1923), for the proposition that Joyce Livestock's water right should be denied for failure to show an intent to appropriate water for an "exclusive use." While that may be the holding of a 1923 case in the state of Utah, such a holding conflicts with the law in the state of Idaho and, specifically, with direct rulings from the SRBA District Court on this issue. *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Report and Recommendations, p. 1 (September 30, 1998). Further, the *Robinson* case is distinguishable on its facts. In that case, the issue involved conflicting claims to the right to water in certain springs. The Plaintiff in the action claimed ownership based on use of the waters for stockwatering by Plaintiff and his predecessor for over 20 years. The Defendant based his claim on his application to the state engineer to appropriate the waters of the springs. In sum, the case involved a dispute between two parties regarding their respective rights to use the waters in the springs. In contrast, in the present case, there is no dispute between the actual appropriators regarding ownership of the waters at issue; all of the entities that actually appropriated the water at issue herein have been acquired by Joyce Livestock and are now part of the Joyce Ranch. *See* Testimony of Paul Nettleton, p. 659-683. Given the clear law of the case in the SRBA, that fact that *Robinson* is a 1923 case based upon the state law of Utah, and the factual differences between *Robinson* and the present case, the United States' citation to the *Robinson* case does nothing to bolster the United States' position.

As previously briefed at length, Joyce Livestock and its predecessors in interest obtained

and transferred valid, appropriative water rights. *See* Joyce Livestock's Opening Brief in Support of Motion to Alter or Amend, p. 7-23. Despite the arguments of the United States, the fact that Joyce Livestock's predecessors in interest used the stockwater source in common does not defeat an otherwise valid stockwater water. Joyce Livestock's predecessors had valid appropriative stockwater rights, which they intended to transfer and did in fact transfer as appurtenances to the base ranch property. *See* Joyce Livestock's Opening Brief in Support of Motion to Alter or Amend, p. 7-23.

B. Judicial Precedent, Both Within the SRBA and Other Courts, Support Joyce's Water Right Claims.

The United States disputes the applicability, and attempts to distinguish, much of the authority cited by Joyce Livestock in its Opening Brief. However, each of the cases cited by Joyce Livestock is relevant to the matters at issue herein and supports Joyce Livestock's position. In addition, while the United States advises that the *Hage* case is still pending, what the United States has not advised the Court is that through the United States' dismissal of a related appeal in that suit in particular, the United States has effectively conceded some of the issues being litigated today in the SRBA. In the *Hage* litigation and in other cases throughout the west the United States has acknowledged the validity of private water rights on federally administered lands that exist today as a result of the consolidation of ranch holdings and concomitant transfer of private water rights sited on federally administered lands. That is inconsistent with the position taken by the United States in the present litigation.

1. The Cases Cited by Joyce Livestock Support its Claimed Stockwater Rights.

The United States takes issue with a number of the cases cited by Joyce Livestock in support of its claims. Despite attempts to distinguish those cases, each of them is relevant to the issues presented and supports Joyce Livestock's claims.

The United States first contends that *Hage v. United States*, 51 Fed.Cl. 570 (2002) is not relevant to this litigation. However, the *Hage* case is relevant to prove two important points. First, the Court in *Hage* recognized private water rights on federally administered lands and consolidation of many rights into one ranch. See *Hage v. United States*, 51 Fed.Cl. 570, 578-580 (2002) (finding appropriated and maintained vested water rights located within federally administered allotments based on numerous appropriations initiated by Hage's various predecessors in interest). Second, the Court in *Hage* recognized that the stockwater rights on federally administered land are tied to the base ranch properties. See *Hage v. United States*, 51 Fed.Cl. 570, 586 (2002). As in *Hage*, at issue in the present case is whether a legitimate basis for Joyce Livestock's stockwater rights can be found in acts of its predecessors putting the water to beneficial use through stockwatering, and whether those rights, initiated by the predecessors in interest, are part of the base ranch operation. With respect to these issues, the *Hage* case validates Joyce Livestock's argument that private parties can acquire stockwater rights, through the acts of a private party and its predecessors in interest watering cattle using stockwater sited on federally administered land. Also relevant to the issue of whether these rights are appurtenant to the base ranch property and whether they are transferred as appurtenances is the following observation by the Court in *Hage*:

While the BLM might commission a genetically engineered cow that will drink only where preprogrammed, until then it is highly

unlikely that you will be able to make a cow differentiate between water they can drink because it is base property and water that is attached to public land. For centuries, no one has been able to lead the cow without it drinking at will. In a sense, the point of use for the water is the cow's head, which is an extension of the base ranch.

Id. at p. 586. In sum, the *Hage* case is relevant to this action because it confirms that 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, and because the case recognizes that private water rights on federally administered lands can and do exist today as a result of the consolidation of ranch holdings and concomitant transfer of private water rights sited on federally administered lands. 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); see also *Hage v. United States*, 42 Fed.Cl. 249 (1998) (adopting Monitor Valley Decision); *Hage v. United States*, 51 Fed.Cl. 570, 586 (2002). Consistent with the above, as well as with testimony at the trial in this case, Joyce Livestock’s predecessors in interest acquired valid appropriative water rights on what is now a federally administered allotment, those water rights are appurtenant to the base ranch property, and were transferred as appurtenances to the base ranch property. Through the consolidation of all of the ranch holdings, Joyce Livestock is entitled to its water rights as claimed.

The United States next takes issue with *Steptoe Live Stock Co. v. Gulley*, 53 Nev. 163, 295 P. 772 (Nev. 1931). Contrary to the United States' position, this case is relevant and addresses more than just the "diversion element of stockwater rights." See United States Brief, p. 8. First, the *Steptoe* court specifically recognized a beneficial use stockwater right created through the acts of the current ranchers and their predecessors in interest using the water at issue for stockwatering purposes. *Steptoe Live Stock Co. v. Gulley*, 295 P. 772-773 (Nev. 1931). The *Steptoe* case also addresses the fundamental requirements of an appropriative, common law stockwater right which, contrary to the United States' argument, does not include a requirement that there be exclusive use of the water. The Court wrote as follows:

[I]n this case the court below found that a well-established, well-recognized custom, of over forty years' duration, of appropriating waters in the manner shown for the watering of live stock, existed in the state of Nevada. We think that our conclusion is not only justified by such well-established custom, but that it is fortified by the act of Congress referring to streams upon the public domain, which provides that rights based on priority of possession, which have vested and accrued and are recognized and acknowledged by local custom, shall be maintained and protected... 43 U.S.C. § 661.

Id. at p. 775. If exclusivity of use was a determinative factor in deciding whether a valid appropriative stockwater right had been acquired, there simply would be no reason for the doctrine of prior appropriation to exist or apply. By definition, there is no need to apply the doctrine of prior appropriation if there is only one appropriator, or one person putting the water to beneficial use.

The United States raises similar arguments with respect to an "exclusive use" requirement in the context of its discussion of *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967). As in

Steptoe, Hunter does not hold that exclusive use is a prerequisite to an appropriative stockwater right. The only requirements of a valid appropriation are the “intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use.” *Hunter*, 388 F.2d at 153. In the case of stockwatering, this outward manifestation of intent to take is evidenced by watering livestock directly from the source. *Id.* Additional language in *Hunter* that the water at issue was in an isolated enclave does not support the United States’ position that there is an additional exclusivity requirement associated with appropriative stockwater rights. Reference to the isolated locale of the water at issue was made by the court only to further support its position that there were no other senior water right holders. The Court wrote:

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.

Id. (*emphasis added*) (internal citations omitted). Language regarding the isolated nature of this source was used to support the Hunters’ priority of possession, not to say that the appropriation itself was dependent on exclusive use.

The *Hunter* case remains on point, and it is factually almost identical to the present case.

See Hunter, 388 F.2d at 151-153 (recognizing right to water right based on prior appropriation for stockwatering purposes on public domain based on evidence that the owner of livestock and his predecessors in interest, members of his family, had since prior to 1880 persistently grazed and watered livestock on the public domain); *see also* Joyce Livestock's Opening Brief in Support of Motion to Alter or Amend, p. 4-6 (all of the entities that grazed and watered livestock in the Jordan reek area have been acquired by Joyce Livestock and are now part of the Joyce Ranch, and 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). As with the other cases cited by Joyce Livestock, *Hunter* supports Joyce Livestock's stockwater rights claimed in this litigation.

2. The United States' Position in this Case Is Inconsistent with Historic Recognition of Private Appropriative Rights on the Federal Land, and Is Inconsistent with the United States' Position Asserted in Other Litigation Today.

From the enactment of the Mining Act of 1866, through the present, there has been consistent recognition of the rights of private parties to appropriate water on the public domain, and recognition that preexisting water rights and water rights initiated by predecessors in interest are entitled to protection. Such support is found not only in statutes dating back to 1866, but in the positions taken by the United States today in other litigation. Against this backdrop, the United States' attempts to extinguish the water rights perfected by Joyce Livestock's predecessors and held by Joyce Livestock today do not make sense.

Through the settlement of the west in particular, private rights on the then public domain

were obtained through appropriation and application to beneficial use. These water rights on the public domain were specifically recognized 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 not only confirmed, but also given specific protection. *See also California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935) (the effect of these statutes is to approve and confirm the policy of appropriation for a beneficial use as the test and measure of private rights in and to the non-navigable waters on the public domain). Despite the specific protection afforded to private water rights acquired on the public domain, in the instant litigation the United States attempts to erase these rights by arguing that because there was nonexclusive use of the water on the public domain, there was no appropriation of water and, further, that Joyce Livestock did not and could not acquire the water rights first appropriated by its predecessors in interest. As previously addressed in detail, these arguments are contrary to statute, contrary to the applicable case law, and, additionally, they also are contrary to the positions taken by the United States in other litigation.

In various contexts, the United States has recognized the right of private parties to appropriate and hold water rights sited on what is now federally administered land even when the water rights are based not just on the acts of the present day water right holder, but reach back to the actions taken by predecessors in interest to appropriate or acquire the water rights. In *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*, In the Fifth Judicial District Court of the State of

Nevada in and for the County of Nye, Findings of Fact, Conclusions of Law, Judgment and Decree ("Hage Decree") was entered on June 25, 2003. *See* Attached Exhibit "A".⁴ The United States appealed the findings of fact and conclusions of law, which included determinations by the Court awarding stockwater rights to private persons on federal lands rather than to the United States. *See* Decree; *see also* Attached Exhibit "B": United States' Notice of Appeal; Attached Exhibit "C": United States' Case Appeal Statement. The United States' appeal of this case was subsequently withdrawn by stipulation of the parties. *See* Attached Exhibit "D": Stipulation for Voluntary Dismissal of Appeals.

In another case, *Colvin Cattle Co. v. United States*, In the United States Court of Federal Claims, No. 03-1942L ("*Colvin*"), the Plaintiff alleged, in part, that it acquired all water rights on the base property as well as on the appurtenant federally administered grazing allotment, and that these water rights were lawfully acquired by plaintiff's predecessors in interest or by plaintiff. *See* Attached Exhibit E: *Colvin* Complaint, pp. 3-4, ¶¶ 9-11. In the United States' Answer, the United States admits that "Plaintiff or its predecessors in interest acquired some water rights located in the Montezuma Allotment as part of its acquisition of the 40 Bar Ranch." *See* Attached Exhibit F: Answer by the United States in the *Colvin* action, p. 3, ¶ 4.

While the United States will, undoubtably, attempt to distinguish and discount the importance of the above cited cases, they are, nonetheless, highly instructive. In these cases, the United States acknowledged and recognized private water rights on federally administered land even when those water rights were acquired by separate predecessors in interest and then later

⁴ The Hage Decree, and other judicial documents, are attached hereto for the Court's reference and convenience.

consolidated into what is now a present day ranching operation. Such admissions in other litigation are inconsistent with the position taken by the United States in this case.

C. There Is No Factual or Legal Support for the United States' Claim of a Common Law Appropriative Water Right.

There are fundamental differences between common law appropriative water rights, statutory water rights, and reserved water rights. In this case, the United States did not claim a statutory water right, and it did not claim a reserved water right. The only right claimed by the United States was a constitutional based water right and the evidence simply does not support such a common law appropriative water right for the United States.

The Idaho Supreme Court specifically differentiated between the various types of water rights recognized in the State of Idaho. *See R.T. Nahas v. Hulet*, 114 Idaho 23, 26-27 (1988). Because the United States did not file an application with the Department of Water Resources for a permit, and has only claimed a constitutional water right, then it cannot rely on Idaho statutory water law as a basis for this water right. Instead, just like any other water user claiming a beneficial use water right, to prove its claim the United States must present evidence that it either (1) actually appropriated and beneficially used the water, (2) is a successor in interest to an actual appropriator, or (3) has 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. The only thing that the United States has claimed is that it put the water to beneficial use by way of its management of the rangeland. However, when what is at issue is a stockwater use, beneficial use has been defined only as the act of placing stock the claimant owns or operates near a water source and the drinking of water by the stock. *See In Re SRBA* Case No. 39576, Special Master's Order Denying Motion to Alter or Amend, p. 7; *see also In Re SRBA Subcase No. 39576, Minidoka National Wildlife Refuge v. United States*, 996 P.2d 806, 811-812 (2000).

The United States' current stockwater claim also is inconsistent with the United States Supreme Court decision *United States v. New Mexico*, 438 U.S. 696 (1978). In that case, the United States argued that Congress intended to reserve water from the Rio Mimbres in the Gila National Forest for stockwatering purposes. In support, the United States offered the fact that it issued permits to private cattle owners to graze their livestock within the national forest and that Congress must have foreseen stockwatering within national forests. *Id.*, at p. 715-716. The Supreme Court rejected the United States' position stating, "The New Mexico courts disagreed (with the United States' position) and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree." *Id.* Individual appropriators, individual stockwaterers, are the ones who acquire and hold stockwater rights, not the United States. Accordingly, any holding that awards the United States an appropriative stockwater right based simply on the fact that it issues permits and administers the land is inconsistent with the United States Supreme Court decision in *United States v. New Mexico*.

Whether the United States can meet the test for a statutory based water right is legally irrelevant to this action because the United States has not claimed a statutory based water right. The fact that the United States issues permits or regulates the rangeland is similarly irrelevant. Just like any other claimant in the SRBA, in order to substantiate a constitutional based water right, the United States must demonstrate that it actually appropriated the water and placed that water to beneficial use. There is no evidence in the record that the United States actually took or appropriated the water and put it to actual beneficial use. Under such circumstances, having failed to claim any alternative statutory or reserved rights basis for its claimed water rights, the United States' water rights claims should be denied in their entirety.⁵

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⁵ It should be noted that even if the United States had claimed a reserved water right, given the existence of pre-existing appropriative water rights held by Joyce Livestock and its predecessors in interest coupled with judicial precedent on the scope of reserved rights, the United States would not, in any event, be entitled to a reserved stockwater right in this case. *See e.g. United States v. New Mexico*, 438 US 696 (1978).

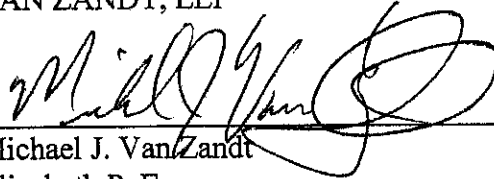
III. CONCLUSION

Joyce Livestock's claims are supported by both the law and the evidence in this case. At the same time, there is no legal or factual basis for the United States' asserted constitutional based stockwater rights. Given that, Joyce Livestock respectfully requests that the Special Master grant its Motion to Alter or Amend in its entirety, recommending Joyce Livestock's claimed water rights in full, and denying the United States' claims in their entirety.

DATED this 3rd day of March, 2004.

Respectfully submitted,

McQUAID BEDFORD &
VAN ZANDT, LLP



Michael J. VanZandt
Elizabeth P. Ewens

LING, ROBINSON & WALKER

Roger D. Ling

Attorneys for Joyce Livestock

III. CONCLUSION

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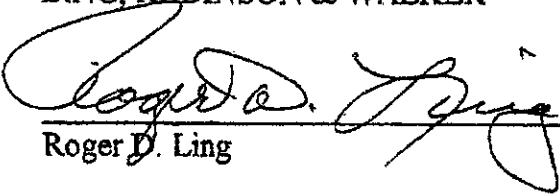
DATED this day of ^{March}~~January~~, 2004.

Respectfully submitted,

McQUAID BEDFORD &
VAN ZANDT, LLP

Michael J. Van Zandt
Elizabeth P. Ewens

LING, ROBINSON & WALKER



Roger D. Ling

Attorneys for Joyce Livestock

CERTIFICATE OF SERVICE

I certify that on March 8, 2004, I served a true and correct copy of foregoing **JOYCE LIVESTOCK'S REPLY TO UNITED STATES' MEMORANDUM IN OPPOSITION TO JOYCE LIVESTOCK COMPANY'S MOTION TO ALTER OR AMEND** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Larry Brown
Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098



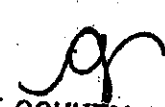
Sarah E. Strickland

FILED

**IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE**

IN THE MATTER OF THE DETERMINATION OF)
THE RELATIVE RIGHTS IN AND TO WATERS)
OF MONITOR VALLEY - SOUTHERN PART)
(140-B), NYE COUNTY, NEVADA)

2003 JUN 25 P 1: 57


NYE COUNTY CLERK
BY DEPUTY

**FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGEMENT AND
DECREE**

FINDINGS OF FACT

(A) On October 15, 1981, a petition was filed in the office of the State Engineer by E. Wayne Hage requesting a determination of the relative rights of the claimants to the waters of Meadow Creek, Corcoran Creek, Andrew's Creek, Pine Creek, Pasco Creek, Mosquito Creek, Barley Creek, and their tributaries, as well as all other waters flowing into or arising in Monitor Valley south of Township 13 North, Nye County, Nevada.

(B) On February 26, 1982, the State Engineer sent a notice by certified mail to persons identified as owning land within the subject area stating that a petition had been filed requesting an adjudication of the streams in Monitor Valley by persons claiming rights to use the water. The notice set forth that a field investigation would be held to determine if the petition for adjudication was justified.

(C) As a result of a field investigation by the State Engineer on March 19, 1982, it was found that the facts and conditions justified such a determination and on June 15, 1982, the State Engineer issued Order No. 789 granting the petition and thereafter proceeded with the determination of the relative rights of the water users in accordance with NRS 533.090.

(D) On June 15, 1982, the State Engineer issued an Order initiating the proceedings for the determination of the relative rights in and to all the waters in Monitor Valley - Southern Part, Nye County, Nevada.

(E) The State Engineer prepared notice of Order No. 788, setting forth the requirement that all those making claims to the rights and to the waters of Monitor Valley, Nye County, Nevada, were required to make proof of their claims.

RECEIVED

JUL - 9 2003

Attorney General CC
Civil - CNR

(F) The notice was published in the Tonopah Times – Bonanza & Goldfield News on June 24, July 1, 8, 15, and 22, 1982, a newspaper of general circulation within the boundaries of the hydrographic basin.

(G) On September 20, 1982, the State Engineer issued Order No. 791, establishing September 20, 1982, as the date the State Engineer would commence taking proofs of claims of the various rights in and to the waters of Monitor Valley – Southern Part, and established September 23, 1983, as the final date for taking proofs in the office of the State Engineer. The notice was published on August 12, 19, 26, and September 2, and 9, 1982, in the Tonopah Times – Bonanza & Goldfield News, a newspaper of general circulation within the boundaries of the hydrographic basin.

(H) On August 5, 1982, the State Engineer sent by certified mail to each potential claimant that could be reasonably ascertained, a notice equivalent to the published notice setting forth the date the State Engineer would commence taking proofs of claims as to the rights in and to the waters of Monitor Valley – Southern Part and set forth the final date for filing proofs in the office of the State Engineer.

(I) On September 23, 1983, the State Engineer sent by certified mail to each potential claimant that could be reasonably ascertained a notice extending the final date for filing proofs in the office of the State Engineer to September 25, 1984. On February 9, 1990, the State Engineer issued Order No. 1020, based on a request by the United States Department of Agriculture – Forest Service, Toiyabe National Forest¹, re-opening the period for filing proofs of claims as to the rights in and to the waters of Monitor Valley. On the same date the State Engineer sent by certified mail a copy of the order re-opening the period for the filing of all documents in the subject adjudication in the office of the State Engineer through February 28, 1991. On February 12, 1991, the State Engineer granted a further extension of time until February 28, 1992, for the filing of all documents in the subject adjudication. On February 9, 1993, the State Engineer granted an additional extension of time for the filing of all document in the subject adjudication until February 28, 1994. The State Engineer received and filed in the records of the Division of Water Resources, maps,

¹ In 1989, Public Law 101-195 created the Alta Toquima and the Table Mountain Wilderness areas and said law directed the U.S. to participate and assert any wilderness claims to water in adjudication of water rights.

statements of claims and supporting documents as to the claims of use of water from said stream systems required under provisions of NRS 533.

(J) Field investigations of the hydrographic system, ditches diverting water, and lands irrigated there from were conducted on November 30, and December 1 through 2, 1993, September 13 through 15, 1994, June 12 through 16, 1995, and November 6 through 8, 1995. The field investigator's observations and measurements were reduced to reports of field investigations. Surveys and their corresponding maps were caused to be executed and submitted for filing by the claimant in the Office of the State Engineer.

(K) The Preliminary Order of Determination and the Abstract of Claims and the notice of Order fixing and setting the time and place of inspection of said documents, as required by NRS § 533.140, were prepared and sent by certified mailed to all interested parties on February 15, 1996. On February 22, 1996, an amended Preliminary Order of Determination was issued and sent by certified mail to all claimants on March 4, 1996.

(L) The minimum 20 day inspection period required by NRS § 533.140 was held April 1, 1996 through April 30, 1996, at the office of the State Engineer in Carson City, Nevada.

(M) Objections to the Preliminary Order of Determination were filed by various parties in a timely manner.

(N) Pre-hearing briefing took place during June and July 1996, and a Pre-hearing Conference was held on August 13, 1996.

(O) After all parties of interest were properly noticed, a public administrative hearing on the objections to the Preliminary Order of Determination was held before the State Engineer on January 7 through 9, 1997, and March 17 through 21, 1997.

(P) After consideration of all the evidence and testimony received at the hearing on the objections to the Preliminary Order of Determination, the State Engineer issued his Order of Determination on September 15, 1998.

(Q) On September 18, 1998, a certified copy of the State Engineer's Order of Determination was filed with this Court in the above titled matter, along with the original evidence and testimony taken before the State Engineer during the

administrative phase of this proceeding. Also, on September 18, 1998, the Court issued its Order Setting Time for Hearing and further ordered that all parties aggrieved or dissatisfied with said Order of Determination of the State Engineer shall file with the Clerk of the Court, notice of exceptions to the State Engineer's Order of Determination on or before April 19, 1999. The hearing was set to commence on May 3, 1999.

(R) Pursuant to NRS 533.170, the following parties filed exceptions to the State Engineer's Order of Determination:

(1) Claimants HRH Nevada Resources, Ltd. (HRH) filed a notice of exception on March 24, 1999, for the correction of the owner of record to Proofs of Appropriation V-04463 and V-05738. The objection to Proofs of Appropriation V-04463 and V-05738 claimed the State Engineer's interpretation of ownership was a "potentially misleading oversimplification" by stating that E. Wayne Hage and Jean N. Hage owned Proof of Appropriation V-04463 jointly with HRH. HRH felt that this interpretation would imply that they were party to the Hage's lawsuit against the Federal government in which Hage alleged the United States violated the U.S. Constitution by taking his property rights. HRH also objected to the State Engineer's inclusion of M.C. and Grace Winfield as owning a portion of Proof of Appropriation V-05738. HRH claim that the Winfield's have not owned any portion of V-05738 for over 50 years, and that the Hages had provided that information to the State Engineer.

(2) Claimants and objectors E. Wayne Hage and the Estate of Jean N. Hage filed with the Court a notice of exception to the Order of Determination on April 15, 1999. The Hages took exception to the following findings of the State Engineer:

(a) The award of domestic and stockwater rights to the United States Forest Service for its Meadow Canyon Creek administrative site as claimed under Proofs of Appropriation R-04176, R-04177, R-04178 and R-04179. The basis of this Hage exception was that there is allegedly no statutory authority, which entitles the United State Forest Service to obtain reserved water rights for administrative sites.

(b) The award of reserved water rights pursuant to Proofs of Appropriation R-04175, R-04180 and R-04181 for the Barley Creek and Scuffe's administrative sites. The basis of this Hage exception was that there is allegedly no statutory authority, which entitles the United State Forest Service to obtain reserved water rights for administrative sites.

(c) The award of reserved water rights to the United State Forest Service Proofs of Appropriation R-07220 and R-07221 for the Alta Toquima and Table Mountain Wilderness areas, on the grounds that there was allegedly no inappropriate water when the Nevada Wilderness Protection Act was enacted in 1989.

(d) The award of the stockwater rights associated with Proof of Appropriation V-05738 to HRH Nevada Resource, Ltd. associated with the 40 acre Warm Springs parcel.

(3) The United States filed a notice of exception to the Order of Determination on April 16, 1999. The United States took exception to the following findings and conclusions of the State Engineer.

(a) The rejection of implied reserved water rights for instream flows under the Organic Administration Act of 1897.

(b) The rejection of public water reserve claims allegedly created pursuant to Executive Order No. 107, dated April 17, 1926.

(c) The award of private rights on public lands. On this issue, the United States alleged the State Engineer erred in the awarding of stockwater rights to a private person on federal lands rather than to the United States. The United States alleged the State Engineer erred in finding a private claimant provided sufficient evidence of use and title to be award stockwater rights. The United State alleged the State Engineer erred by excluding from evidence an exhibit prepared for the United States and by the limiting of testimony by a witness for the United States. The United States alleged the State Engineer erred in awarding irrigation rights to a private person for the irrigation of federal lands, and that the State Engineer erred in the quantifying the historic irrigated acreage on federal lands. The United States alleged the

State Engineer erred in the awarding private water rights for sheep grazing because, according to the United States, there was no basis for the granting of such a right since sheep grazing had not occurred for many decades and thus could not be claimed as a beneficial use. Finally, the United States alleged the State Engineer erred in his determination of the number of animals and period of use for stockwatering grazing because, according to the United States, the State Engineer should have limited the claim to the terms of the current grazing permit, not the historic practices.

(d) The award of water rights under Proofs of Appropriation V01091, V-01183, V-01184, V-01185, V-01186, V-02355, V-02357, V-02359, V-04174, V-04463, V-04465, V-04466, V-05532, V-05694, V-05695, V-05696, V-05697, V-05698, V-05738, V-05739, V-05740, V-05741, V-05742, V05743, V-05744, V-05745, V-05746, V-07044 and Permits/Certificates 767/360, 2213/414, 2244/436, 3361/2606, 3362/2556, 3406/742, 4784/1212, 4785/1213, 26756/10862 and 26757/10863, based on the exceptions set forth above.

(e) The rejection of the United State's claim to vested water rights for stockwatering purposes.

(f) The rejection of the United States' Proofs of Appropriation and claims to Reserved water rights V-03255, V-03256, V-03257, V-03258, V-03259, V-03312, V-03313, V-03745, V-03746, V-03747, V03748, V-03749, V-03750, V-03751, V-03752, V-03753, V-03754, V-03755, V-03756, V-03757, V-03758, V-03772, V-03774, V03775, V-03777, V-03778, V-03779, V-03780, V-03781, V-03782, V-03783, V-03784, V-03786, V-03787, V-03789, V-03790, V-03792, V03793, V-03794, V-03795, V-03796, V-03797, V-03799, V-03800, V-03801, V-03802, V-03804, V-03805, V-03807, V-03808, V-03809, V-03810, V-03811, V-03812, V-03813, V-03815, V-03816, V-03820, V-03821, V-03822, V-03824, V-03825, V-03826, V-03827, V-03828, V-03829, V-03830, V-03831, V-03833, V-03834, V-03835, V03836, V-03841, V-03842, V-03843, V-03844, V-03846, V-03848, V-03854, V-03855, V-03856, V-03857, V-03858, V-03860, V-03861, V-03862, V-03865,

V-03867, V-03868, V03869, V-03870, V-03871, V-03872, V-03875, V-03876, V-03880, V-03881, V-03886, V-03887, V-03888, V-03889, V-03890, V-03891, V-03892, V-03893, V-03894, V-3895, V-03896, V-03897, V-03898, V-03899, V-03900, V-03901, V-03903, V-03904, V-03905, V-03906, V-03907, V-03908, V-03909, V-03910, V-03911, V-03912, V-03913, V-03914, V-03915, V-03916, V-03917, V-03918, V-03919, V-03922, V-03923, V-03924, V-03925, V-03926, V-03929, V-3930, V-03931, V-03932, V-03933, V-03934, V-03938, V-03939, V-03940, V-03942, V-03943, V-03944, V-03945, V-03946, V-03947, V-04024, V-04029, V-04047, V-04048, V-04049, V-04050, V-04051, V-04052, V-04053, V-04054, V-04055, V-04056, V-04057, V-04058, V-04059, V-04093, V-04099, V-04100, V-04101, V-04108, V-04109, V-04110, V-04111, V-04112,, V-04113, V-04114, V-04115, V-04116, V-04126, R-04182, R-04183, R-04185, R-04186, R-04187, R-04188, R-04189, R-04190, R-04191, R-04525, R-04526, R-04527, R-07325, and R-07326.

(4) Claimant James R. Wolfe, representing Barley Creek Ranch, a partnership, filed a claim of adverse possession and a senior right to the waters of Barley Creek on April 19, 1999. Wolfe contended that he and his predecessors in interest had used the water from Barley Creek for the past 100 years in continuous, open, notorious, adverse and exclusive possession against all-the world.

(S) The aforementioned exceptions were heard before this Court on May 3, 1999. At the May 3, 1999, hearing the Court established a briefing schedule to be followed by the parties to these proceedings concerning the historic or vested water rights by private persons on lands owned by the United States (Phase I), the awarding of reserved water rights to the federal government for administrative sites and wilderness areas (Phase II) and the claim of a senior water right based on adverse possession by James R. Wolfe for the water of Barley Creek (Phase III).

(T) The United States filed an Opening Memorandum of Law on June 15, 1999, which addressed the following Phase I issues:

(1) Whether the State Engineer properly ruled that vested stockwater rights on national forests should be granted to private citizens and whether the State Engineer properly rejected all claims filed by the United States for vested stockwater rights.

(2) Whether the State Engineer properly ruled that the private claimant for stockwater rights to be used on public lands presented sufficient evidence to support those claims.

(3) Whether the State Engineer properly excluded certain evidence proffered by the United States at the administrative hearing.

(4) Whether the State Engineer properly awarded private claimants vested irrigation water rights for irrigation on federal lands, and whether the State Engineer's determination of the extent of historical irrigation giving rise to vested rights was accurate.

(5) Whether the State Engineer properly awarded vested water rights to private individuals for watering sheep on public lands.

(6) Whether additional language should be added to the Order of Determination that recognizes that the amount and period of use for watering livestock may be limited by grazing permits issued by the appropriate federal agency.

(U) On October 8, 1999, the Court issued an order that rejected all but one of the United States exceptions that were considered as part of Phase I of this judicial proceeding. (See Exhibit 1 attached hereto). The Court agreed with the United States that the State Engineer erred in not considering the testimony of the United States' historical experts. The Court directed the State Engineer, pursuant to NRS § 533.180, to conduct a further evidentiary investigation by analyzing the evidence and testimony presented by the United States.

(V) As directed by the Court, the State Engineer held a hearing on February 29, 2000, to take further evidence on the historical development and water use within Monitor Valley. The evidence and testimony of the United States concentrated on Proofs of Appropriation V-01091, V-01185, V-01186, V-04465 and V-04466. The

United States contended that the State Engineer awarded more acreage under the aforementioned proofs than was historically justified.

(W) On April 28, 2000, the Court issued an order that rejected the United States exceptions that were considered in Phase II of this judicial proceeding. (See Exhibit 2 attached hereto). The Court affirmed the State Engineer's Order of Determination that awarded reserved water rights to the United States for the Barley Creek, Meadow Canyon and Scuffe's administrative sites and rejected reserved water right claims for the Toquima and Table Mountain Wilderness areas.

(X) On July 12, 2001, the State Engineer issued an Order of Determination on Remand regarding the State Engineer's consideration of evidence that this Court, in its October 8, 1999 Order, directed him to admit and consider. The State Engineer examined each subject proof separately and determined that the United States did not provide substantial evidence to justify reducing the acreage awarded in the Final Order of Determination.

(Y) On November 1, 2001, the Court orally ruled against the claim of adverse possession and claim of senior right filed by James R. Wolfe. The Court also orally affirmed the State Engineer's Order of Determination on Remand. An order was issued on October 28, 2002 that confirmed the Court's oral ruling. (See Exhibit 3 attached hereto).

(Z) There are two existing civil decrees, Decrees 588 and 5038, issued in 1879 and 1942, respectively, within the area of this adjudication. Decree 588 addresses the waters in the Meadow Canyon Creek drainage, including MacAfee (aka Q Spring), Peterson Spring, Box Spring and House Spring. Decree 5038 addresses the waters of Barley Creek, Mosquito Creek, Pine Creek, Pasco Creek, Corcoran Creek and Andrew's Creek drainages, including Scuffe Spring, Upper Scuffe Spring and Unnamed Spring. The State Engineer properly recognized that these existing civil decrees are controlling and any determination made herein was intended to be consistent with those civil decrees.

(AA) In all other respects, the Court hereby affirms each and every finding of fact by State Engineer in the Final Order of Determination in the matter of the

determination of the relative rights in and to the waters of Monitor Valley - Southern Part (140-B), Nye County.

CONCLUSIONS OF LAW

From the records on file in this proceeding, from the arguments heard by the Court and from the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

(A) The State Engineer had the right, authority, and jurisdiction under chapter 533 of the Nevada Revised Statutes to make the investigations made by him, receive the proofs and maps, enter and file in his office the Order of Determination, file a certified copy of the Order of Determination in this Court, determine the relative rights of the claimants in and to the waters of Monitor Valley - Southern Part, Hydrographic Basin 140-B, Nye County, Nevada, and that the State Engineer duly made all orders necessary and proper in connection therewith and entered the same in his office as required by chapter 533 of the Nevada Revised Statutes.

(B) The sovereign immunity of the United States has been waived by 43 U.S.C. § 666.

(C) Each and every notice required by law to be given herein to the claimants and appropriators was duly served by the State Engineer in the manner and within the time required by law and that the notices contained all the information required by law and that the claimants and appropriators of the waters of Monitor Valley - Southern Part, Hydrographic Basin 140-B, Nye County, Nevada, duly received the information and notices as required by law.

(D) The Fifth Judicial District Court of the State of Nevada in and for the County of Nye has jurisdiction to hear this matter and has the jurisdiction to make and enter the foregoing Findings of Fact and these Conclusions of Law and further enters its Decree as set forth herein. The Fifth Judicial District Court of the State of Nevada also retains exclusive jurisdiction over the enforcement of this Decree and all matters that arise under this adjudication.

(E) The priorities for the proofs in this proceeding are fixed by the years and where the years are the same, the priorities are equal.

(F) All waters allotted under this decree shall be appurtenant to the place of use designated herein. Any water user desiring to change the point of diversion, place of use or manner of use of the waters herein must make application to the State Engineer for permission to make the change pursuant to Nevada water law.

(G) The period of use for all irrigation water rights awarded under this proceeding is from April 1 through October 31, unless otherwise noted. The period of use for irrigation in Decree 588 is from May 1 through October 31. The period of use for irrigation in Decree 5038 is from April 1 through October 31. The period of use for stockwatering, domestic and all other manners of use shall be from January 1 through December 31 of each year, unless otherwise noted.

(H) The State Engineer reserves the right to require the installation of measuring devices. If required, the measurements of diverted water are to be made at a location approved by the State Engineer and the parties will be required to install and maintain, at their own expense, substantial and easily operated regulating diversion structures and measuring devices.

(I) This Decree does not extend to any claimant, or their successors in interest, the right of ingress or egress on public, private or corporate lands.

(J) Because livestock are opportunistic and will consume water at various sources and in varying quantities depending on available feed and season of use, the number of animals specifies the limit and extent of the rights claimed for watering of livestock and not the quantity of water. Therefore, claims for livestock watering are determined for priority date, maximum number of animals, location and ownership.

(K) Any conveyance of title of a water right must be filed with the State Engineer in accordance with NRS § 533.382 - 386. Successors in interest to any of the water rights awarded under this proceeding are subject to the terms and conditions of this Decree.

(L) Pursuant to NRS § 533.270, the State Engineer shall appoint a Water Commissioner, subject to the confirmation of the Court, to carry out and enforce the provisions of this Decree and the instructions and orders of the Court. If any proper order, rules or direction of such Water Commissioner, made in accordance with and for the enforcement of this Decree, are disobeyed or disregarded he is hereby

empowered and authorized to suspend delivery of water users so disobeying or disregarding such proper orders, rules or direction. The Water Commissioner shall promptly report to the Court his said action in such case and the circumstances connected therewith and leading thereto. A water distribution account will be established by the State Engineer to pay the expenses and salary of the Water Commissioner.

(M) The State Engineer or a duly appointed Water Commissioner has the right to enter any premise where a water source adjudicated by this Decree is located, or where water awarded by this Decree is used, at any reasonable hour of the day for the purpose of investigating and carrying out the duties required for the administration of this Decree.

(N) The duty of water is as specified in the attached tabulation of the relative rights involved in this proceeding. To the extent water rights that were awarded through Nevada's statutory permit system are listed in that tabulation, they are not decreed water rights. They are included for informational purposes and to reflect their relationship to the water rights determined as a result of this proceeding.

(O) In all other respects, and subject to this Court's Orders that are attached hereto, the Court hereby affirms each and every conclusion of law made by the State Engineer in his Final Order of Determination in the matter of the determination of the relative rights in and to the waters of Monitor Valley - Southern Part (140-B), Nye County.

(P) Rights of Appropriation. The attached tabulation lists the final determination of the relative rights of the claimants in and to the waters of Monitor Valley - Southern Part, Hydrographic Basin 140-B, Nye County.

EXHIBIT B

1 Case No. CV 14906

2 Dept. No.

3
4 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

5
6 IN AND FOR THE COUNTY OF NYE

7
8 IN THE MATTER OF THE DETERMINATION)
9 OF THE RELATIVE RIGHTS IN AND TO THE)
10 WATERS OF MONITOR VALLEY - SOUTHERN)
11 PART (140-B), NYE COUNTY, NEVADA)

UNITED STATES'
NOTICE OF APPEAL

12 Notice is hereby given that the United States of America hereby appeals to the Supreme
13 Court of Nevada from the Findings of Fact, Conclusions of Law, Judgement and Decree entered in
14

15 “

16 “

17 “

18 “

19 “

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1
2 this matter on the 25th day of June, 2003.
3

4
5 Respectfully submitted this 5th day of August, 2003.
6

7 THOMAS L. SANSONETTI
8 Assistant Attorney General
9 Environment & Natural Resources Division

10 
11 STEPHEN G. BARTELL, Attorney, CO #21760
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22 Washington, DC 20004
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EXHIBIT C

1 Case No. CV 14906

2 Dept. No.

3
4 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
5
6 IN AND FOR THE COUNTY OF NYE

7
8 IN THE MATTER OF THE DETERMINATION)
9 OF THE RELATIVE RIGHTS IN AND TO THE)
10 WATERS OF MONITOR VALLEY - SOUTHERN)
11 PART (140-B), NYE COUNTY, NEVADA)

UNITED STATES'
CASE APPEAL STATEMENT

- 12 1. The United States of America hereby appeals to the Supreme Court of Nevada from
13 the Findings of Fact, Conclusions of Law, Judgement and Decree entered in this
14 matter on June 25, 2003, Notice of Entry of which was served on July 11, 2003.
15 2. The Findings of Fact, Conclusions of Law, Judgement and Decree being appealed
16 was entered by the Court, with District Judge John P. Davis presiding.
17 3. The parties/claimants involved in this action before the district court are the United
18 States of America, on behalf of the U.S. Forest Service and Bureau of Land
19 Management, E. Wayne Hage and James Wolfe.
20 4. The United States of America is the only appellant in this appeal.
21 5. The counsel for the United States involved in this appeal are:

22
23 STEPHEN G. BARTELL
24 Natural Resource Section
25 Environment and Natural Resources Div.
26 United States Department of Justice
27 P.O. Box 663
28 Washington, D.C. 20044-0663
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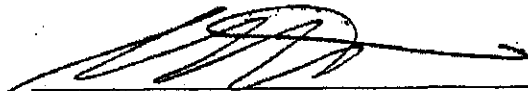
DAVID SHILTON
Appellate Section

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2 United States Department of Justice
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4 L'Enfant Plaza Station
5 Washington, D.C. 20026-3795
6 (202) 514-5580

- 7 6. The United States of America was represented by counsel for the United States in the
8 District Court.
9 7. The United States of America is also represented by counsel for the United States in
10 this appeal to the Supreme Court of Nevada.
11 8. The United States of America did not seek and was not granted leave to proceed in
12 forma pauperis.
13 9. The State Engineer's Order of Determination was filed in the District Court on
14 September 18, 1998.

15 Respectfully submitted this 5th day of August, 2003.

16 THOMAS L. SANSONETTI
17 Assistant Attorney General
18 Environment & Natural Resources Division

19 

20 STEPHEN G. BARTELL, Attorney, CO #21760
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1
2
3 CERTIFICATE OF SERVICE
4

5 I hereby declare under penalty of perjury, that on August 5th, 2003, I served a true and
6 correct copy of the United States' Notice of Appeal and Case Appeal Statement to the Court's
7 Findings of Fact, Conclusions of Law, Judgement and Decree in the Monitor Valley
8 Adjudication, by U.S. Mail, postage prepaid, to the places and addresses below stated:
9

10 Michael L. Wolz, Esq.
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12 Office of the Attorney General
13 100 North Carson Street
14 Carson City, NV 89701-4717

15 James R. Wolfe
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18 Michael J. Van Zandt
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28

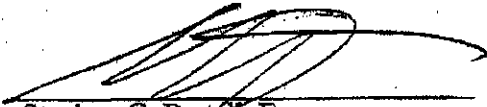

Stephen G. Bartell, Esq.

EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

UNITED STATES OF AMERICA, Appellant

vs.

JAMES WOLFE, and HUGH RICCI, P.E.,
NEVADA STATE ENGINEER, and
E. WAYNE HAGE, Respondents

No. 41886

E. WAYNE HAGE, Appellant,

vs.

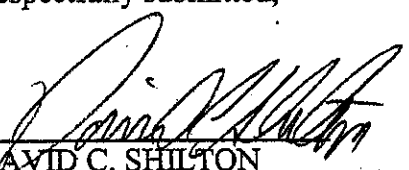
UNITED STATES OF AMERICA AND HUGH RICCI,
P.E., NEVADA STATE ENGINEER, Respondents.

STIPULATION FOR VOLUNTARY DISMISSAL OF APPEALS

Pursuant to Rule 42(b) of the Rules of this Court, the undersigned parties to this appeal, by their counsel, hereby stipulate that the appeal filed by the United States of America and the cross-appeal filed by E. Wayne Hage shall be voluntarily dismissed, each side to bear its own costs.

Respectfully submitted,

MICHAEL VAN ZANDT
Lyman Bedford
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221 Main Street, 16th Floor
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Attorney for United States

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

UNITED STATES OF AMERICA, Appellant

vs.

No. 41886

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NEVADA STATE ENGINEER, and
E. WAYNE HAGE, Respondents

E. WAYNE HAGE, Appellant,

vs.

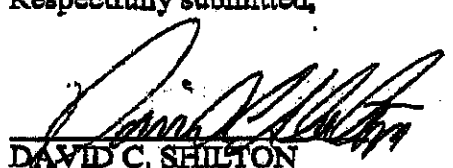
UNITED STATES OF AMERICA AND HUGH RICCI,
P.E., NEVADA STATE ENGINEER, Respondents.

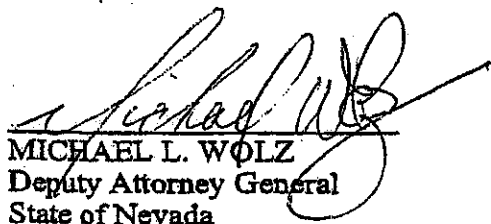
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Respectfully submitted,


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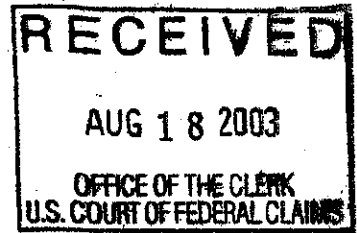

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MICHAEL L. WOLZ
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100 North Carson Street
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Attorney for Nevada State Engineer

EXHIBIT E



IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COLVIN CATTLE CO., INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

) Case No.

03 - 1942L

) COMPLAINT FOR:

-) 1. Just Compensation
) 2. Damages

) (28 U.S.C. §1491)
)

COLVIN COMPLAINT

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COLVIN CATTLE CO., INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

) Case No.
)
)
)
)

) **COMPLAINT FOR:**
)

) 1. Just Compensation
)

) 2. Damages
)

) (28 U.S.C. §1491)
)
)

Colvin Cattle Co., Inc., plaintiff in the above captioned action, hereby alleges as follows:

JURISDICTION

1. 28 U.S.C. § 1491 provides that this Court shall have jurisdiction over any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, *inter alia*. Jurisdiction over this matter is conferred by Section 1491 in that:

A Defendant is the United States and agent of the United States acting for and on behalf of the United States;

COLVIN COMPLAINT

B. The acts of defendant alleged below constitute a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States for which compensation is due and owing. The First Cause of Action, alleging said taking are founded, therefore upon the Constitution of the United States. The provisions of the just compensation clause of the Fifth Amendment are self-executing, and the remedy established is the payment of compensation.

2. The claims herein stated involve a grazing lease ("the Lease") issued pursuant to regulations of the Executive Department authorized by, or purported by defendant to be authorized by, the following Acts of Congress: 31 U.S.C. § 9701; 43 U.S.C. § 1751, *et seq.*; and 43 U.S.C. § 1901, *et seq.* The Lease was issued to the plaintiff by the Bureau of Land Management of the Department of the Interior ("BLM").

3 The Lease constitutes an express contract between the United States and plaintiff. The claims set forth in the Third Cause of Action, relating to violations of said contract entitling plaintiff to monetary damages, are founded upon the contract represented by the Lease; and

4. 43 U.S.C. § 1752, subsection (g) mandates payment as alleged in the Second Cause of Action below.

PARTIES

5. Plaintiff Colvin Cattle Co., Inc. ("Colvin") is a corporation, duly incorporated under the laws of the State of Nevada and is owner of the 40 Bar Ranch in Central Nevada, of the water rights, forage rights, access rights, and range improvements described below, and is the holder of the Lease.

6. Defendant United States administers the federal lands referred to herein through the BLM.

STATUTES AND REGULATIONS AT ISSUE

7. The United States Congress has established a policy for the use of federal lands through a system of statutes designed to ensure multiple use of federal lands. A major and principal purpose of said statutes is to protect the rights of persons grazing cattle on federal lands, to protect the rights of persons who have acquired water rights and other property rights on federal lands under applicable laws and customs, and to provide stability to the livestock industry. This policy is embodied in a number of statutes.

8. Among the federal statutes directly at issue or directly related to the issues herein alleged, or which reflect the federal policies with regard to respect to the protection the rights of persons who have acquired water and other rights on federal lands under applicable laws and customs contained in the statutes directly at issue, are, *inter alia*:

A. 43 U.S.C. § 315, *et seq.*, 383, 661, 1181a, *et seq.*, 1701, *et seq.*, 1751-1753, 1901-1908; 43 U.S.C. § 1751, *et seq.*; 43 U.S.C. § 1752, subsection (g); and 43 U.S.C. § 1901, *et seq.*

B. Regulations issued by the Bureau of Land Management are relevant to the issues raised herein.

GENERAL ALLEGATIONS

9. In 1968, plaintiff's predecessor, L.C. Colvin, purchased the 40 Bar Ranch, ("the Ranch") from Andrew H.L. Anderson. In 1969, plaintiff, Colvin Cattle Co., Inc., acquired all right, title and interest to the 40 Bar Ranch, including water rights, range rights, forage rights, access rights, and range improvements on the base property, as well as on the appurtenant federally administered grazing allotment, known as the Montezuma Allotment.

10. The Ranch, located in central Nevada, consists of approximately 520 deeded acres owned by plaintiff in fee simple. It is the base property for approximately 560,000 acres in grazing allotments on lands administered by the Bureau of Land Management (the "BLM"). Because of the shortage of water in the areas in which the Ranch is located, large grazing allotments are necessary to economically raise cattle.

11. At the time at which plaintiff acquired 40 Bar Ranch, it also acquired rights to water in central Nevada, which rights are appurtenant to said ranch. Among the water rights acquired by plaintiff are rights to waters originating in or found in the Montezuma Allotment. The water rights were lawfully acquired by plaintiff's predecessors-in-interest or by plaintiff. Plaintiff have all rights to said water for all purposes. Defendant has no legal or equitable right or interest in said water.

12. Meaningful access to the water owned by plaintiff is essential to the economic viability of the Ranch.

13. The Ranch is family owned and operated. The Colvin family consists of Ben Colvin, Juanita Colvin and William Colvin and five children, all of whom participate or have participated in one manner or another in the operation of the Ranch. Plaintiff also employed one person on a full-time basis to operate the Ranch.

14. The full time employee participated in the day-to-day operation of the Ranch. His duties include, but are not limited to, fence building and repair; stock water maintenance; livestock feeding and care; ranch care and maintenance; and the distribution, gathering and classification of livestock.

15. The Colvin family members work on a seasonal basis, with those seasons lasting from May to December. Their duties include, but are not limited to, livestock handling, fence repair and water maintenance.

16. The Colvin family and employees at the Ranch are highly experienced and knowledgeable in their respective areas.

17. To maintain economic viability of the Ranch, as is true for all ranching operations, plaintiff must be able to plan for the number of permanent and seasonal employees they must hire, the times at which such employees will be needed, capital expenditures, consumables expenditures, needs for leasing additional pasturage, acquisitions of stock, and other expenses with a reasonable degree of certainty. Any contracts, licenses, permits, or other agreements entered into between plaintiff and defendant or between plaintiff and any other parties which contemplate movement of cattle on to and off the allotment, other cattle control measures, and repair, maintenance, or installation of facilities and improvements, must, therefore, be sufficiently definite to permit such planning in accordance with normal industry practices and professional standards. Congress specifically intended to and did take its legislative actions with respect to use of the federal lands in order to provide such definiteness and certainty.

18. Defendant is aware of the needs of plaintiff for reasonable certainty and predictability in permitting decisions. Actions by defendant which are intended to or otherwise do interfere with or otherwise make it difficult or impossible to carry out such normal planning and implementation defeat the purpose of said agreements, contracts, permits or other commitments.

19. The 40 Bar Ranch has been in operation since at least 1914. After the passage of the Taylor Grazing Act in 1934, a valid grazing lease was issued to the then owners of the Ranch. This lease was issued in recognition of the prior regular use of the rangelands adjacent to the 40 Bar Ranch base properties. Prior regular use of the range was the result of the 40 Bar Ranch's ownership of the water rights on that portion of the range. Ownership of the stock water rights had been established by the prior appropriation doctrine embodied in local law and rules of the court. At the time at which plaintiff acquired the Ranch, its then owners, Andrew H.L. Anderson, had a grazing right for approximately 825 head of cattle.

20. At or about the same time that plaintiff acquired 40 Bar Ranch, it also lawfully acquired the Lease, and the preferences and water rights upon which they were based, in accordance with the applicable statutes and BLM procedures. The 40 Bar Ranch is the base property for the Lease and grazing authorizations within the meaning of the Taylor Grazing Act.

21. The Lease and grazing authorizations were issued by the BLM pursuant to the statutes and regulations cited in paragraph 1(c), *supra*, which paragraph is incorporated herein by reference as though fully set forth herein. Said statutes are part of a comprehensive and integrated scheme establishing a consistent federal land use and grazing policy for the United States. Said scheme includes, but is not limited to the Taylor Grazing Act (43 U.S.C. § 315, *et seq.*), the Federal Land Policy and Management Act (43 U.S.C. § 1701, *et seq.*), and the Public Rangelands Improvement Act (43 U.S.C. § 1901, *et seq.*). The policies embodied therein pervade the federal land use scheme developed by Congress and do not change with administering agency.

22. The Lease and authorizations recognize the right of plaintiff to graze cattle on the Montezuma Allotment administered by the BLM.

23. An allotment is a designated area of land available for livestock grazing.

24. The right to graze cattle acknowledged in said Lease is limited only by the terms of the Lease, the legislation under which the Lease was issued as it existed at the time at which the Lease was issued, the valid regulations existing at the time at which the Lease was issued, and such other applicable laws existing at the time at which the Lease was issued, including the statutory and common law governing contracts, and the Constitution of the United States.

25. Similarly, the right of the BLM to alter, amend, or otherwise adversely affect the Lease is limited by the same statutes, regulations, statutory and common laws and the Constitution. The right of Congress to alter, amend, or otherwise legislate with respect to or adversely affect the Lease and such property as plaintiff may own is similarly limited by the provisions of the Constitution. Said statutes, regulations, laws, and Constitution, combined with the expenditures made and actions taken by plaintiff in reliance thereon give rise to reasonable, investment-backed expectations.

26. Defendant has engaged in a pattern and practice of conduct in interpreting and administering the applicable statutes, regulations, and the Lease, which conduct is and was intended to do the following and/or which has the effect of doing the following without respect to defendant's intent:

A. Acquiring the water located on or originating on lands administered by defendant, including lands administered by the BLM, to which plaintiff had sole rights;

B. Transferring plaintiff's rights in their water and in their forage to the BLM and rights in the Lease to third parties;

C. Acquiring and destroying the value of 40 Bar Ranch;

D. Interfering with the ability of plaintiff to economically operate, and preventing plaintiff from economically operating, the Ranch;

E. Interfering with plaintiff's ability to comply with the terms of the Lease and preventing plaintiff from doing so;

F. Interpreting, applying, and enforcing the terms of the Lease and grazing authorization in a manner which is intended to or does defeat the intended purpose of the Lease and authorization and their underlying statutory scheme;

G. Unilaterally modifying the Lease and authorization;

H. Acquiring and destroying the value of the Lease;

I. Destroying plaintiff's reasonable, investment-backed expectations;

J. Penalizing plaintiff for asserting its rights under the Lease and applicable laws and constitutional provisions and for plaintiff's public criticisms of defendant;

K. Acquiring the plaintiff's cattle;

L. Breaching the contract represented by the Lease; and

M. Preventing plaintiff from making economically viable use of their Taylor Grazing Act Lease on federal land administered by the Bureau of Land Management.

27. The conduct constituting the pattern and practice alleged herein includes, but is not limited to, the following conduct:

A. Defendant permitted over 1300 head of wild horses on plaintiff's allotment over the objections of plaintiff.

(1) The existence of wild horses in plaintiff's allotment without honoring plaintiff's legally mandated grazing rights constitutes a grant of a grazing permit to the U.S.

Department of Interior on allotments for which plaintiff holds a grazing right. Said grazing right was granted for each year in which said wild horses are permitted to graze in violation of plaintiff's statutory, constitutional and contractual rights.

(2) In addition, the wild horses did use, do use, and will continue to use the Montezuma Allotment, reducing the forage available for plaintiff to which plaintiff's were and are entitled, forcing plaintiff to remove their cattle from said allotment much earlier than they would otherwise have been required to do.

(3) Further, the wild horses did use, do use, and will continue to use the water owned by plaintiff in that range, and have, do, and will continue to, destroy plaintiff's lawfully constructed improvements, which improvements plaintiff's must repair on pain of the BLM claiming that said damages violate plaintiff's Lease.

B. Plaintiff objected to the existence of the wild horses, the use by the wild horses of the allotment and water thereon, and the damages caused by said wild horses, but defendant ignored plaintiff's objections and persist in their conduct;

C. Defendant has used, presently use, and will continue to use plaintiff's water for defendant's own purposes, including the watering of wild horses, the watering of BLM animals, and other BLM purposes, and providing that water to third parties, despite objections to such uses by plaintiff;

D. Defendant rendered multiple adverse decisions against plaintiff, alleging numerous instances of misconduct, knowing that said allegations were incorrect or with reckless disregard for the correctness of said allegations, requiring plaintiff to expend resources to defend against said allegations, at the same time reducing the number of cattle which could be grazed

under the Lease and reducing or eliminating plaintiff's ability to comply with the terms of the Lease;

E. Defendant imposed conditions on plaintiff's Lease unwarranted by range conditions and/or plaintiff's conduct;

F. Defendant actively and physically intervened in plaintiff's attempts to remove cattle from the allotments, which attempts were made in an effort to comply with directives of the BLM;

I. Defendant established deadlines for moving cattle onto and off allotments which were and are inherently impossible to meet;

G. Defendant established conditions which made and make it is physically and fiscally impossible to prevent cattle from drifting onto specified areas, and then have penalized plaintiff when cattle do drift into those areas;

H. Defendant has adopted, does use, and will continue to use methods of determining forage usage and standards for forage usage which defeat the purposes of the Lease, including those of the statutes underlying the Lease, and which are incorporated therein as a matter of law, including, but not limited to, preventing plaintiff from using the allotment for three months out of the year, when other forage and water were not reasonably available to plaintiff. The effect of said reduction is to remove the area from grazing, preventing use of the entire allotment and devoting said allotment to public use;

I. Defendant has trespassed, are, and will continue to trespass on plaintiff's property;

J. Defendant has confiscated plaintiff's cattle without compliance with the terms of the Lease and its own regulations and when not justified by or permitted under the terms of the

Lease and have, in the process of doing so, have threatened plaintiff's agents or members of the Colvin family to prevent plaintiff from using its water rights and range rights;

K. Defendant has failed to give adequate notice to remove cattle before confiscating cattle;

L. Defendant has failed to properly confer with plaintiff before creating or imposing Annual Management Plans or otherwise amending or modifying the Lease;

M. Defendant has failed to properly confer with plaintiff before taking action against plaintiff or their cattle as required by said Lease;

N. Defendant's actions have imposed reductions in cattle unrelated to any actual damages resulting from plaintiff's management of cattle under the Lease;

O. Defendant has penalized plaintiff for non-use of allotment areas where defendant's own actions have made grazing on said allotment infeasible;

P. Defendant has required plaintiff to make repairs to range improvements unwarranted by their actual condition and in a manner making said maintenance economically infeasible, in a manner inconsistent with the intent and purpose of the Lease;

Q. Defendant has prevented plaintiff from acquiring and using certain additional water sources and from making lawful improvements necessary to transport water from a lawful point of diversion to a lawful point of use; and

R. The BLM is permitting another rancher, Bud Johns, to graze his cattle on the Montezuma Allotment. These cattle are consuming the forage and possibly water owned by plaintiff. Plaintiff has never given permission to Mr. Johns to graze any cattle on the Montezuma Allotment.

28. Defendant has obstructed and interfered with plaintiff's livestock business by demanding that plaintiff remove cattle from its own fee lands, and filing trespass charges against plaintiff.

29. Defendant has likewise engaged in a pattern and practice of physically taking plaintiff's private property for a public purpose without just compensation, which conduct was intended to do the following or which has the effect of doing the following without regard to defendant's intent:

- A. Acquiring plaintiff's water located on or originating on lands administered by defendant, including lands administered by defendant, the BLM, to which plaintiff has sole rights;
- B. Transferring plaintiff's rights in their water to the BLM and rights in their Lease to third parties;
- C. Acquiring and destroying the value of 40 Bar Ranch;
- D. Penalizing plaintiff for asserting their rights under the permits and applicable laws and constitutional provisions, and for the plaintiff's public criticisms of defendants;
- E. Acquiring plaintiff's cattle;
- F. Breaching the contract represented by the Lease; and
- G. Preventing plaintiff from making economically viable use of their Taylor Grazing Act Lease on land administered by the BLM.

30. The conduct constituting the pattern and practice with physical taking alleged herein includes, but is not limited to, the following conduct:

A. Physically taking plaintiff's water and forage for defendant's own use, including the watering of wild horses, and other BLM purposes, and providing forage and possibly water to third parties, despite objections to such use by plaintiff.

B. Defendant has trespassed, is, and will continue to trespass on plaintiff's property;

C. Defendant has confiscated plaintiff's cattle without compliance with the terms of the Lease and its own regulations and when not justified by or permitted under the terms of the Lease and have, in the process of doing so, threatened plaintiff's agents or members of the Colvin family to prevent plaintiff from enforcing the terms of the Lease;

D. The BLM is permitting another rancher, Bud Johns, to graze his cattle on the Montezuma Allotment. These cattle are consuming the forage and possibly water owned by plaintiff. Plaintiff has never given permission to Mr. Johns to graze any cattle on the Montezuma Allotment.

31. In 2001, 2002 and 2003, the BLM gave permission to Bud Johns to graze his livestock on the Montezuma Allotment. Plaintiff has never consented to said use of said allotment, and said livestock are, and will, consume the water and forage thereon owned by plaintiff.

32. Plaintiff has voluntarily engaged in efforts to improve the condition of the range. Plaintiff has also spent considerable resources to hire range consultants to improve its understanding and management of rangeland resources, to minimize the impact of its authorized grazing activities on the rangelands and to ensure that its activities comply with the terms and conditions of the Lease. For example, since 1969, plaintiff has spent approximately \$50,000 in

private range consultation fees and range betterment activities in addition to their normal range improvement and management expenditures.

33. Plaintiff has made every reasonable effort to comply with the terms and conditions of the Lease and with defendant's directives, even where doing so detrimentally affected normal and accepted operation of the Ranch. At the same time, plaintiff has reserved its rights to challenge defendant's actions while engaging in such administrative courses of action available to plaintiff and requesting evidentiary hearings before said agency, which requests are still pending. Plaintiff has exhausted their administrative remedies.

34. Even had plaintiff not exhausted its administrative remedies, further administrative appeals would be futile in that defendant's actions have rendered any remedy other than damages and compensation inadequate. No administrative remedy would restore the economic viability of plaintiff's enterprise.

FIRST CAUSE OF ACTION

Taking of Property Without Just Compensation

35. Paragraphs 1-34 are incorporated herein by reference as though fully set forth herein.

36. Assuming the actions alleged in paragraphs 25-28 to be lawfully taken, defendant's actions constitute either a temporary or permanent taking of plaintiff's property for which compensation is due within the meaning of the Fifth Amendment to the United States Constitution.

37. Defendant has taken plaintiff's rights in water found or originating on federal lands in that:

A. Plaintiff's rights to water found on or originating on the allotment administered by the BLM are property rights within the meaning of the Just Compensation clause of the Fifth Amendment, which water rights carry with them all of the incidents normally accompanying such rights;

B. Defendant's actions alleged herein, each and severally, have prevented plaintiff from having access to said water necessary to enable plaintiff to make beneficial use of said water;

C. Defendant's actions alleged herein, each and severally, have physically appropriated waters and forage belonging to plaintiff for defendant's own use and the use of third parties;

D. Defendant has imposed conditions on access to plaintiff's water and have interfered with the acquisition and maintenance of improvements necessary to obtaining and using plaintiff's water. Each and all of said conditions are not related to the reasons for which defendant could deny such permission to acquire water rights, build improvements or conduct such maintenance, fail to substantially advance said purposes, deny plaintiff all economically viable use of said water, and deprive plaintiff of its reasonable, investment-backed expectations;

E. Defendant's actions alleged herein, each and severally, have physically appropriated grazing lands, forage, and water belonging to plaintiff for defendant's own use and the use of third parties.

38. Defendant has taken plaintiff's Ranch in that:

A. Plaintiff owns the ranch, the access to grazing lands, the forage, and the water. Its rights in each are property rights within the meaning of the Just Compensation clause of the Fifth Amendment;

B. The water, forage and grazing lands above described are appurtenant to the Ranch and meaningful access to and use of the water owned is necessary for the Ranch to be economically viable;

C. A taking of said water, forage and grazing land rights deprives the ranch of all economically viable use;

D. Defendant's actions have, each and severally, for the reasons herein alleged, taken said water, forage and grazing lands within the meaning of the Fifth Amendment to the Constitution of the United States; and

E. The taking of the water, forage and land has deprived plaintiff of all economically viable use of the Ranch and has deprived plaintiff of its reasonable, investment-backed expectations.

39. Defendant has taken the plaintiff's Lease in that:

A. The Lease was issued in recognition of rights which existed prior to the passage of the Taylor Grazing Act. Further, said Lease is a contract and is itself property within the meaning of the Fifth Amendment to the Constitution of the United States;

B. To the extent that said Lease is not property, said Lease and the statutes, laws, and regulations applicable thereto and the plaintiff's actions in reliance thereon have created reasonable, investment-backed expectations; and

C. Defendant's actions have each and severally deprived plaintiff of all economically viable use of said permits and of their reasonable, investment-backed expectations.

SECOND CAUSE OF ACTION

Compensation Pursuant to 43 U.S.C. § 1752, Subsection (g)

40. Paragraphs 1-39 are incorporated herein by reference as though fully set forth⁹ herein.

41. 43 U.S.C. § 1752, subsection (g), provides that the owners of leases issued pursuant to the Federal Lands Policy and Management Act shall be compensated for the value of their interests in authorized permanent improvements placed or constructed by said permittees on their allotments when said permits are cancelled in whole or in part in order to devote said allotments to another public purpose. Except in cases of emergency, such cancellation may not occur without two years prior notification.

42. The actions of defendant amount to a *de facto* cancellation of plaintiff's Lease to dedicate the land subject to plaintiff's Lease to a different public use including, but not limited to, propagation of wild horses and grazing by third parties.

43. The actions of defendant in issuing permits to third parties, allowing such third parties to use plaintiff's grazing allotments and to graze cattle on the Montezuma Allotment, amount to a taking of plaintiff's Lease and property rights to dedicate plaintiff's grazing allotment to another public purpose, including, but not limited to use as a public grazing area under the Taylor Grazing Act and for the grazing of wild horses to the exclusion of grazing.

THIRD CAUSE OF ACTION

Breach of Contract

44. Paragraphs 1-43 are incorporated herein by reference as though fully set forth herein.

45. The Lease is a contract within the meaning of 28 U.S.C. § 1491. The terms of the contract are those contained in the Lease itself, to the extent that said terms are consistent with and authorized by the statutes and valid regulations governing said leases, the provisions of the legislation under which the Lease was issued as they existed at the time at which the Lease was issued, the provisions of the valid regulations existing at the time at which the Lease was issued, and such other applicable laws existing at the time at which the Lease were issued, and such terms as have been lawfully and validly added to or modified after the issuance of said Lease. Defendant, by their actions alleged herein, has breached said contract in the following respects:

- A. Defendant has consistently willfully and/or negligently interfered with the efforts of plaintiff to comply with the terms of the contract;
- B. Defendant has consistently wilfully and/or negligently interpreted the terms of the contract in a manner intended to and/or having the effect of depriving plaintiff of its reasonable investment-backed expectations and/or making performance by plaintiff impossible;
- C. Defendant has unilaterally, and without the consent of or consultation with plaintiff, altered the terms of the Lease, and have also altered terms of the Lease at times and in manners not allowed under the terms of the Lease. Such changes include, but are not limited to reducing the allowable use of the allotment from twelve months to nine months, thus preventing access to water rights and forage rights owned by plaintiff;

D. Defendant has consistently wilfully and/or negligently created situations which cause plaintiff to be in breach; and

E. Defendant has violated 43 U.S.C. § 1752, subsection (g), which provides that the owners of leases issued pursuant to the Federal Lands Policy and Management Act may not be cancelled in whole or in part to dedicate the land subject to said permits to other uses without giving at least two years prior notice, except in cases of emergency. Said limitation on cancellations constitutes a term of the Lease as a matter of law. The actions of defendant amount to a taking of plaintiff's Lease to dedicate the land subject to plaintiff's Lease to a different public use including, but not limited to, propagation of wild horses without giving the two years notice required by said Section.

DAMAGES

46. Paragraphs 1-45 are incorporated herein by reference as though fully set forth herein.

47. As a result of said actions, plaintiff has sustained damages and is entitled to compensation in at least the following amounts:

- A. For temporary takings to date of \$6,000,000;
- B. For the taking of the 40 Bar Ranch, \$2,000,000;
- C. For the taking of plaintiff's cattle, \$2,000,000;
- D. For the taking of plaintiff's water rights, \$6,000,000;
- E. For the taking of plaintiff's forage and grazing allotment, \$4,000,000;
- F. In costs and damages sustained as a proximate result of defendant's interference with the contract and normal ranching operations, including but not limited to, fees for leasing

other lands, feed costs, lost opportunity costs, lost profits, loss of good will, acquisitions of livestock, and other capital and non-capital expenses, \$10,000,000; and

G. Interest on the compensation from the dates of the takings as determined by the Court and interest on the damages from the date of judgment.

H. Attorneys fees and costs, according to proof.

WHEREFORE plaintiff respectfully pray as follows:

That the Court award compensation to plaintiff for a taking of property in the amount of at least \$20,000,000, or in such amounts as proved at trial;

That the Court award damages to plaintiff for breach of contract in the amount of \$10,000,000, or in such amounts as proved at trial;

That the Court award attorneys fees and costs to plaintiff; and

That the Court grant such other relief as it deems proper.

DATED: August 16, 2003

By



Michael J. Van Zandt
Attorney of Record for
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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COLVIN CATTLE CO., Inc.,)
)
)
Plaintiff,)
)
v.)
)
UNITED STATES,)
)
Defendant.)
_____)

No. 03-1942 L

Honorable John P. Wiese

ANSWER

Defendant, in answer to Plaintiff's complaint, hereby admits, denies and avers as follows:

FIRST DEFENSE

Defendant responds to the numbered paragraphs of Plaintiff's complaint as follows:

1. The allegations of the first paragraph and its subparagraphs are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied. In further response to the first paragraph, Defendant admits that the Tucker Act, 28 U.S.C. § 1491, is the principal statute conferring jurisdiction on this Court.

2. The allegations of the first sentence of paragraph 2 are a characterization of Plaintiff's complaint to which no response is required. In response to the allegations of the second sentence, Defendant admits that it previously issued a grazing lease to Plaintiff, which lease has now been cancelled.

3. The allegations of paragraph 3 are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

4. The allegations of paragraph 4 are conclusions of law to which no response is

required; to the extent matters of fact are alleged, they are denied.

5. In response to the allegations of paragraph 5, Defendant admits that Plaintiff Colvin Cattle Co., Inc. is a Nevada corporation and is the current owner of what is commonly referred to as the 40 Bar Ranch. In further response to the allegations of paragraph 5, Defendant denies that Plaintiff currently holds a BLM grazing lease. The allegations that Plaintiff is the owner of "water rights," "forage rights" and "access rights" are conclusions of law to which no response is required. Defendant admits that Plaintiff owns or has owned range improvements, some of which are or were located on federal land and some of which are, or were, located on the 40 Bar Ranch.

6. In response to the allegations of paragraph 6, Defendant admits that it is the United States and that, through the Bureau of Land Management (BLM) of the Department of the Interior (DOI), it administers the federal lands which are referred to in Plaintiff's complaint.

7. The allegations of paragraph 7 are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

8. The allegations of paragraph 8 and its subparagraphs are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

9. In response to the allegations of the first sentence of paragraph 9, Defendant avers that L.C. Colvin, founder of Colvin Cattle Co., acquired the property known as the 40 Bar Ranch from Andrew H.L. Anderson in 1968. The allegations in the second sentence that the acquisition included "water, rights, range rights, forage rights, access rights, and range improvements on the base property" as well as "the Montezuma Allotment" are conclusions of law to which no response is required; to the extent matters of fact are alleged, Defendant denies that "range rights," "access rights" or "forage rights" were mentioned in the deed by which Plaintiff acquired

the 40 Bar Ranch.

10. In response to the allegations of the first sentence of paragraph 10, Defendant admits that the 40 Bar Ranch consists of approximately 520 deeded acres located in central Nevada. In response to the allegations of the second sentence, Defendant admits that the 40 Bar Ranch was accepted by BLM as "base property" for purposes of the issuance of the grazing lease previously held by Plaintiff (see 43 C.F.R. § 4110). In response to the allegations of the third sentence, Defendant avers that there are many factors which impact the economic viability of a cattle ranch, and that the size of a federal grazing allotment is only one.

11. In response to the allegations of paragraph 11, Defendant admits that Plaintiff or its predecessors in interest acquired some water rights located on the Montezuma Allotment as part of its acquisition of the 40 Bar Ranch. The remaining allegations are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

12. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 12.

13. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 13.

14. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 14.

15. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 15.

16. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 16.

17. Defendant lacks sufficient knowledge or information to form a belief as to the truth

or falsity of the allegations of the first two sentences of paragraph 17. The allegations of the third sentence are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

18. The allegations of paragraph 18 are denied.

19. The allegations of the first sentence of paragraph 19 are denied. In response to the allegations of the second sentence, Defendant admits that in March, 1968 a grazing lease was issued to H. L. Anderson, then-owner of the 40 Bar Ranch, and avers that this lease terminated by operation of law when H.L. Anderson conveyed the 40 Bar Ranch to L.C. Colvin. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the third sentence; and Defendant avers that in any case, the 1968 permit which is the subject of the allegations of this sentence terminated by operation of law when H.L. Anderson ceased to own the 40 Bar Ranch. The allegations of the fourth sentence are denied. The allegations of the fifth sentence are conclusions of law to which no response is required. In response to the allegations of the sixth sentence, Defendant avers that prior to the acquisition by L.C. Colvin of the 40 Bar Ranch, the previous owner, H. L. Anderson, held a grazing lease for approximately 825 head of cattle.

20. The allegations of the first sentence of paragraph 20 are conclusions of law to which no response is required. Defendant avers that the grazing Lease was, and is, not a legal property right which was conveyed, or can be conveyed, with the acquisition of the 40 Bar Ranch by L.C. Colvin in 1968. After L.C. Colvin incorporated the Colvin Cattle Co. in 1969, the Colvin Cattle Co. applied for a new grazing lease in its own name. Defendant admits that Plaintiff or its predecessors in interest acquired some water rights as part of the acquisition of the 40 Bar Ranch; and that the 40 Bar Ranch was accepted by BLM as "base property" for the issuance of the

grazing Lease. The remaining allegations are conclusions of law to which no response is required.

21. In response to the allegations of paragraph 21, Defendant avers that the Complaint does not contain the paragraph 1(c) referred to in the first sentence, which therefore makes it impossible for Defendant to formulate an answer to paragraph 21. Further, the allegations of paragraph 21 are conclusions of law to which no response is required.

22. The allegations of paragraph 22 are denied.

23. The allegations of paragraph 23 are admitted.

24. The allegations of paragraph 24 are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

25. The allegations of paragraph 25 are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

26. The allegations of paragraph 26 and its subparagraphs are denied, and Defendant further avers that allegations of a "pattern and practice of conduct" sound in tort and are outside the jurisdiction of this Court.

27. The allegations of paragraph 27 are a characterization of Plaintiff's complaint to which no response is required.

27(A). The allegations of paragraph 27(A) are denied.

27(A)(1). The allegations of paragraph 27(A)(1) are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

27(A)(2). In response to the allegations of paragraph 27(A)(2), Defendant admits that wild horses can be found on the Montezuma Allotment, which is federally-owned land and is unfenced; Defendant lacks sufficient knowledge or information to form a belief as to the truth of

falsity of the remaining allegations.

27(A)(3). In response to the allegations of paragraph 27(A)(3), Defendant admits that it requested that Plaintiff repair improvements constructed on the federal lands known as the Montezuma Allotment and that keeping constructed improvements properly repaired was one of the conditions of Plaintiff's range improvement permit. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations.

27(B). In response to the allegations of sub-paragraph 27(B), Defendant admits that Plaintiff has expressed objections to Defendant concerning the presence of wild horses on the federal lands known as the Montezuma Allotment; Defendant denies that those expressions have been ignored. Defendant avers that in 1996, BLM removed 876 wild horses and burros from the federal lands known as the Montezuma Allotment.

27(C). The allegations of sub-paragraph 27(C) are denied.

27(D). In response to the allegations of sub-paragraph 27(D), Defendant admits that it has issued several administrative decisions involving Plaintiff but denies that those decisions were "incorrect" or made "with reckless disregard for the correctness" of the allegations; and further avers that a cause of action based on tort is outside the jurisdiction of this Court. Defendant admits that in 1994 the number of cattle which Plaintiff was allowed to graze on the federal lands known as the Montezuma Allotment was reduced; in all other respects, the allegations of this sub-paragraph are denied.

27(E). In response to the allegations of sub-paragraph 27(E), Defendant admits that the grazing lease previously held by Plaintiff contained conditions to its validity. In all other respects, the allegations of this sub-paragraph are denied.

27(F). The allegations of sub-paragraph 27(F) are denied.

27(F)(1). The allegations of sub-paragraph 27(F)(1) are denied.

27(G). The allegations of sub-paragraph 27(G) are denied.

27(H). In response to the allegations of sub-paragraph 27(H), Defendant admits that it proposed modifications to Plaintiff's grazing lease, including a provision for a three month rest period in order to permit plant vigor on the federal lands to be maintained. In all other respects, the allegations of this sub-paragraph are denied.

27(I). The allegations of sub-paragraph 27(I) are denied.

27(J). In response to the allegations of sub-paragraph 27(J), Defendant avers that it authorized the impoundment of Plaintiff's cattle after repeated acts of trespass on federal lands had occurred and after adequate and reasonable warnings to Plaintiff. In all other respects, the allegations of this sub-paragraph are denied.

27(K). The allegations of sub-paragraph 27(K) are denied, and Defendant further avers that this Court lacks jurisdiction over a monetary claim for damages based on a violation of due process.

27(L). The allegations of sub-paragraph 27(L) are denied.

27(M). The allegations of sub-paragraph 27(M) are denied.

27(N). In response to the allegations of sub-paragraph 27(N), Defendant admits that in 1994, the number of cattle that Plaintiff was allowed to graze on the federal lands known as the Montezuma Allotment was reduced. In all other respects, the allegations are denied.

27(O). The allegations of sub-paragraph 27(O) are denied.

27(P). In response to the allegations of sub-paragraph 27(P), Defendant admits that it requested that Plaintiff make repairs to its range improvements. In all other respects, the allegations of this sub-paragraph are denied.

27(Q). The allegations of sub-paragraph 27(Q) are denied.

27(R). In response to the allegations of sub-paragraph 27(R), Defendant admits that it authorized cattle owned by Bud Johns to graze on a portion of the federal lands known as the Montezuma Allotment. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegation that Plaintiff has never given permission to Bud Johns to graze cattle on the federal lands known as the Montezuma Allotment. In all other respects, the allegations of this sub-paragraph are denied.

28. The allegations of paragraph 28 are denied.

29. The allegations of paragraph 29 and its sub-paragraphs are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied. Defendant specifically denies that it has taken Plaintiff's private property for a public purpose without just compensation.

30. The allegations of paragraph 30 are a characterization of Plaintiff's complaint to which no response is required.

30(A). In response to the allegations of paragraph 30(A), Defendant admits that wild horses can be found on the Montezuma Allotment, which is federally-owned land and is unfenced. The remaining allegations are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

30(B). The allegations of paragraph 30(B) are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

30(C). In response to the allegations of paragraph 30(C), Defendant avers that it authorized the impoundment of Plaintiff's cattle after repeated acts of trespass on federal lands had occurred and after adequate and reasonable warning to Plaintiff. In all other respects, the

allegations of this sub-paragraph are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

30(D). In response to the allegations of sub-paragraph 30(D), Defendant admits that it authorized cattle owned by Bud Johns to graze on a portion of the federal lands known as the Montezuma Allotment. In all other respects, the allegations of this sub-paragraph are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

31. In response to the allegations of sub-paragraph 31, Defendant admits that it authorized cattle owned by Bud Johns to graze on a portion of the federal lands known as the Montezuma Allotment. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegation of Plaintiff that it has never consented to the use of the Montezuma Allotment by Bud Johns. In all other respects, the allegations of this sub-paragraph are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

32. In response to the allegations of paragraph 32, Defendant admits that Plaintiff obtained range improvement permits and constructed range improvements on federal lands. In all other respects, Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations of paragraph 32.

33. The allegations of the first sentence of paragraph 33 are denied. The allegations of the second sentence are vague, and as such, Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations. The allegations of the third sentence are conclusions of law to which no response is required.

34. The allegations of paragraph 34 are conclusions of law to which no response is

required; to the extent matters of fact are alleged, they are denied.

(FIRST CAUSE OF ACTION)

35. Defendant repeats and incorporates herein its responses to paragraphs 1-34, above.

36. The allegations of paragraph 36 are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

37. The allegations of paragraph 37 and its sub-paragraphs are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied. Defendant specifically denies that it has taken Plaintiff's property without just compensation.

38. The allegations of paragraph 38 and its sub-paragraphs are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

39. The allegations of paragraph 39 and its subparagraphs are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied. Defendant specifically denies that it has taken Plaintiff's property without just compensation.

(SECOND CAUSE OF ACTION)

40. Defendant repeats and incorporates herein its responses to paragraphs 1-39, above.

41. The allegations of paragraph 41 are admitted to the extent they are consistent with the provisions of the statute cited therein, and the Court is respectfully referred to that statute, which is the best evidence of its contents.

42. The allegations of paragraph 42 are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

43. The allegations of paragraph 43 are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied. Defendant specifically denies that it has taken Plaintiff's property without just compensation.

(THIRD CAUSE OF ACTION)

44. Defendant repeats and incorporates herein its responses to paragraphs 1-43, above.

45. The allegations of paragraph 45 and its subparagraphs are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

46. Defendant repeats and incorporates herein its responses to paragraphs 1-45, above.

47. The allegations of paragraph 47 and its subparagraphs are conclusions of law to which no response is required; to the extent matters of fact are alleged, they are denied.

All allegations of the complaint which have not been specifically admitted or otherwise answered are hereby denied.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

That portions of the allegations of Plaintiff's complaint are barred by the statute of limitations.

FOURTH DEFENSE

Those allegations of Plaintiff's complaint which sound in tort are beyond the jurisdiction of this Court.

FIFTH DEFENSE

Those allegations of Plaintiff's complaint which claim a violation of substantive due process are outside the jurisdiction of this Court.

WHEREFORE, defendant respectfully requests that this court enter an order:

1. Dismissing the complaint with prejudice;

2. Assessing the costs of this litigation against Plaintiff; and
3. Granting such other relief as the court may deem just and proper.

Dated: November 14, 2003.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division



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255201.1

CERTIFICATE OF SERVICE

I certify that a copy of the attached

ANSWER

has been served upon counsel by placing the same in the United States mail, postage prepaid,
properly addressed, this 14th day of November, 2003, to:

Michael J. Van Zandt
McQuaid, Bedford & Van Zandt
221 Main Street, 16th Fl.
San Francisco, CA 94105

Felecia Lelesne
FELECIA LESESNE

