

RECEIVED

AUG 03 2004

DEPARTMENT OF
WATER RESOURCES

RECEIVED

AUG 03 2004

DEPARTMENT OF
WATER RESOURCES

Names of Parties Filing Document:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

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

LARRY A. BROWN
Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724
Ph.: (202) 305-0435 FAX: (202) 305-0274

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

In Re SRBA

) Subcase Numbers 55-10288B, 55-10289B,
) 55-10290B, 55-10292B, 55-10293B,
) 55-10295, 55-10296, 55-10297B,
) 55-10298, 55-10299B, 55-10300,
) 55-10303B, and 55-13451
)

Case No. 39576

) **MEMORANDUM IN SUPPORT OF**
) **THE UNITED STATES' CHALLENGE**
) **OF THE SPECIAL MASTER'S ORDER**
) **ON MOTION TO ALTER OR AMEND**

--

--

--

--

TABLE OF CONTENTS

TABLE OF CONTENTS	i-iv
TABLE OF AUTHORITIES	v-ix
I. OPINION BELOW	1-2
II. STATEMENT OF THE CASE	2-29
A. Applicable Law	3-6
B. Factual Background	6-27
1. Livestock Grazing on Public Lands	6-10
2. LU's chain of title to the water rights at issue	11-27
3. South Mountain Allotment - Duncan Homestead	12-14
4. Cow Creek Allotment - Mills Homestead	14-18
a. 80 Acres of the Mills Homestead in Section 25	16-17
b. 80 Acres of the Mills Homestead in Section 26	18
5. Mendieta's Acquisition of the Duncan and Mills homesteads	18-22
6. William and Nita Lowry's Acquisition of the Duncan and Mills homesteads	22
7. Cliffs Allotment - Ewings Homestead	23-25
8. LU's Acquisition of the Duncan, Mills, and Ewings Homesteads	8-27
C. Proceedings Below	27-29
III. STANDARD OF REVIEW	29
IV. ARGUMENT	29-52
A. Introduction	29-30

B. LU failed to prove that Duncan, Mills, or Ewings appropriated water on public lands	30-31
C. Successors to Duncan, Mills, and Ewings did not perfect water rights on public lands	31-43
1. Introduction	31-34
2. O'Keefe	35-36
3. Sheas	36
4. Staples	36-37
5. Kellogg	37
6. Flora	38
7. Fretwells	38
8. Foster	38-39
9. Mendieta	39-40
10. Maher	41
11. McKay	41-42
12. Lowry	42
13. Conclusion	42-43
D. If water rights were perfected by LU's predecessors, there is no evidence that the water rights were conveyed to LU	43-49
1. Introduction	43
2. Water rights were not conveyed as appurtenances to grazing preferences	44
3. If water rights were perfected, they are independent water rights not appurtenant to land	44-46

4. The evidence does not support the finding that grantors intended to convey the water rights at issue	36-49
E. Certain water right descriptions should be amended	49-52
1. 55-10288B	49-50
2. 55-10289B	50
3. 55-10296	50
4. 55-10297B	50-51
5. 55-10303B	51-52
V. CONCLUSION	52-53
VI. RELATED CASES	53

TABLE OF AUTHORITIES

I. CASES

A. Federal

<u>Buford v. Houtz</u> , 133 U.S. 320 (1890)	7
<u>Camfield v. United States</u> , 167 U.S. 518 (1897)	32-33
<u>District of Columbia v. Murphy</u> , 314 U.S. 441 (1941)	46
<u>Hunter v. United States</u> , 388 F.2d 148 (9th Cir. 1967)	33
<u>Light v. United States</u> , 220 U.S. 523 (1911)	7-8
<u>McKelvey v. United States</u> , 260 U.S. 353 (1922)	7
<u>Omaechevarria v. Idaho</u> , 246 U.S. 343 (1918)	7
<u>Public Lands Council v. Babbitt</u> , 529 U.S. 728 (2000)	7-8, 10
<u>United States v. Oregon & C. R. Co.</u> , 164 U.S. 526 (1896)	32
<u>United States v. Schmutz</u> , 56 F.2d 269 (D. Utah 1932)	4, 32-34

B. State

<u>Adams v. Portage Irrigation, Reservoir & Power Co.</u> , 72 P.2d 648, 653 (Utah 1937)	3, 34
<u>Anthony Wilkinson Live Stock Co. v. McIlquam</u> , 83 P. 364 (Wyo. 1905)	7, 33
<u>City of Kellogg v. Mission Mtn. Interests Ltd., Co.</u> , 16 P.3d 915 (Idaho 2000)	48
<u>Crow v. Carlson</u> , 690 P.2d 916 (Idaho 1984)	5
<u>Daugharty v. Post Falls Highway Dist.</u> , 9 P.3d 534, 538 (Idaho 2000)	48
<u>First Security Bank of Blackfoot v. State</u> , 291 P. 1064 (Idaho 1930)	5, 45
<u>Gard v. Thompson</u> , 123 P. 497 (Idaho 1912)	6, 47-48

<u>Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.,</u> 619 P.2d 1130 (Idaho 1980)	3, 30, 32
<u>Lake Shore Duck Club v. Lake View Duck Club,</u> 166 P. 309 (Utah 1917)	4
<u>Lemmon v. Hardy,</u> 519 P.2d 1168 (Idaho 1974)	4, 33-34, 36, 40, 41-42
<u>Malcom v. Hanmer,</u> 127 P.2d 331 (Idaho 1942)	46
<u>McGinness v. Stanfield,</u> 55 P. 1020 (Idaho 1898)	6, 48-49
<u>Olson v. Idaho Department of Water Resources,</u> 666 P.2d 188 (Idaho 1983)	6
<u>Pyramid Land and Stock Co. v. Pierce,</u> 95 P. 210 (1908)	7
<u>R.T. Nahas Company v. Hulet,</u> 674 P.2d 1036 (Idaho App. 1983)	3, 33
<u>Robinson v. Schoenfeld,</u> 218 P. 1041 (Utah 1923)	3-4, 33
<u>Russell v. Irish,</u> 118 P. 501 (Idaho 1911)	4
<u>Sarret v. Hunter,</u> 185 P. 1072 (1919)	3
<u>Steptoe Live Stock Co. v. Gulley,</u> 295 P. 772 (Nev. 1931)	33
<u>Sunol v. Hepburn,</u> 1 Cal. 254 (Cal. 1850)	4, 33
<u>Sweet v. Ballentine,</u> 69 P. 995 (1902)	7
<u>Tattersfield v. Putnam,</u> 41 P.2d 228 (Ariz. 1935)	4, 34

C. SRBA District Court and Special Master Cases

Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief, Order of Recommitment to Special Master Cushman, <u>In Re SRBA</u> , Case No. 39576, Subcases 55-10288 A & B, et al (Judge Wood, Presiding). . . .	4-5, 28, 30, 44-46
Memorandum Decision and Order on Challenge; and, Order of Partial Decree (Wood v. Troutt), <u>In Re SRBA</u> , Case No. 39576, Subcase 65-05663B (Judge Burdick, Presiding)	29-30

Order on Motion to Alter or Amend, Amended Special Master's Report and Recommendation, <u>In Re SRBA</u> , Case No. 39576, Subcase No. 55-10288B et al.	2, 28-29
Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law, <u>In Re SRBA</u> , Case No. 39576, Subcase No. 55-10288B et al.	2, 12, 31-32, 35, 43
Special Master Report and Recommendation, <u>In Re SRBA</u> , Case No. 39576, Subcase Numbers, 55-10135, 55-11061, 55-11385, and 55-12452	53

II. STATUTES

A. Federal

43 U.S.C. § 315	8
43 U.S.C. §§ 315a	8
43 U.S.C. §§ 315b	8, 10, 32, 36, 40-42, 44
43 U.S.C. §§ 316	8
43 U.S.C. §§ 1061-1066	33
43 U.S.C. § 1702(e)	2
9 Stat. 869	6
48 Stat. 1269	8

B. State

IDAHO CODE § 9-503	6
IDAHO CODE § 9-505	6
IDAHO CODE § 42-113(1)	43
IDAHO CODE § 42-113(2)	27, 28-29
IDAHO CODE § 42-220	4
IDAHO CODE § 42-222	27

IDAHO CODE § 42-1402	4, 53
IDAHO CODE § 55-101	5

III. FEDERAL REGULATIONS

43 C.F.R. § 501.1 (1938)	9
43 C.F.R. § 501.2 (1938)	9, 10, 19
43 C.F.R. § 501.4 (1938)	10
43 C.F.R. § 501.6 (1938)	10
43 C.F.R. § 501.9 (1938)	47
43 C.F.R. § 501.21	10
43 C.F.R. § 4100.0-5	9, 11, 19
43 C.F.R. §§ 4110.2	44, 47
43 C.F.R. § 4140.1	10

IV. CONSTITUTIONS

U.S. CONST. art. IV, § 3, cl. 2	6-7
IDAHO CONST., art. XV, §3	5
IDAHO CONST., art. XI, §12	29

V. TREATISES

78 Am.Jur.2d Waters § 321 (1975)	3
2 C. KINNEY, KINNEY ON IRRIGATION AND WATER RIGHTS (2 nd Ed. 1912)	
§ 787	48
§ 997	6, 48-49

§ 999	48
§ 1011	5, 45
3 D. GETCHES, WATER LAW IN A NUTSHELL (3 rd ed., 1997)	33-34
2 R. BECK, WATERS AND WATER RIGHTS § 12.02(c)(1) n.52 (2000)	4, 34

VI. RESTATEMENTS OF THE LAW

RESTATEMENT OF PROPERTY (FIRST) § 7 (1936)	4
--	---

RECEIVED
AUG 03 2004
DEPARTMENT OF
WATER RESOURCES

Names of Parties Filing Document:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

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

LARRY A. BROWN
Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724
Ph.: (202) 305-0435 FAX: (202) 305-0274

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

In Re SRBA	) Subcase Numbers 55-10288B, 55-10289B,
	) 55-10290B, 55-10292B, 55-10293B,
	) 55-10295, 55-10296, 55-10297B,
	) 55-10298, 55-10299B, 55-10300,
	) 55-10303B, and 55-13451
	)
Case No. 39576	) MEMORANDUM IN SUPPORT OF
	) THE UNITED STATES' CHALLENGE
	) OF THE SPECIAL MASTER'S ORDER
	) ON MOTION TO ALTER OR AMEND

I. OPINION BELOW

On April 15, 2004, the Special Master filed an order denying, in part, the United States' Motion to Alter or Amend the Special Master's Findings of Fact and Conclusions of Law, In Re

SRBA, Case No. 39576, Subcase Numbers 55-10288B et al. dated February 27, 2003. Order on Motion to Alter or Amend, Amended Special Master's Report and Recommendation, In Re SRBA, Case No. 39576, Subcase No. 55-10288B et al. The Special Master relied on the Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law, In Re SRBA, Case No. 39576, Subcase No. 55-10288B et al. (hereinafter "SMRR") in holding that LU Ranching Company (hereinafter "LU"), the Claimant of the Water Right Claims at issue in the above-captioned subcases, was entitled to a priority date of June 10, 1876.

II. STATEMENT OF THE CASE

The United States challenges the Special Master's recommendation that LU is entitled to priority dates that pre-date the time when LU first used public lands^{1/} for livestock grazing because LU failed to prove that its predecessors in interest to the water rights at issue, as designated by LU, satisfied Idaho's test of a valid appropriation of water, and hence, there were no valid water rights to convey to successors. Even if there were valid water rights, LU failed to prove that predecessors conveyed such rights, or intended to convey such rights, to successors. When the legal principles are correctly applied to competent and substantial evidence found in the trial record, the conclusion should have been that if LU is entitled to the water rights at issue, the priority dates should be not earlier than September 23, 1976 in Subcases 55-10288B, 55-10289B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, and, 55-10299B, and June 28, 1984 in Subcases 55-10303B and 55-13451. The United States also challenges

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

certain points of diversion (hereinafter “PODs”), places of use (hereinafter “POUs”), and/or sources described in the Recommendations of 55-10288B, 55-10289B, 55-10296, 55-10297B, and 55-10303B. The applicable law and relevant facts are as follows.

A. Applicable Law

“‘The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use.’ Sarret v. Hunter, 32 Idaho 536, 541, 185 P. 1072, 1074 (1919).

‘It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use, existing at the time or contemplated in the future, followed by diversion from the natural channel by means of a ditch, canal, or other structure and also an active application of the water, within a reasonable time, to a beneficial use.’ 78

Am.Jur.2d Waters § 321 (1975) (footnotes omitted).” Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 619 P.2d 1130, 1132-1133 (Idaho 1980). An actual diversion device is not required to satisfy the diversion requirement of an in-stream livestock watering right. R.T. Nahas Company v. Hulet, 674 P.2d 1036, 1044 (Idaho App. 1983).

“[W]hile water is still in the public, everyone may drink or dip therefrom or water his animals therein” Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648, 653 (Utah 1937). Mere use of livestock water in common with others on the open unenclosed public grazing commons does not satisfy the test of a valid appropriation. Robinson v. Schoenfeld, 218

P. 1041, 1043 (Utah 1923); cf. Lake Shore Duck Club v. Lake View Duck Club, 166 P. 309, 310-311 (Utah 1917); Tattersfield v. Putnam, 41 P.2d 228, 234-235 (Ariz. 1935).^{2/}

A water right claimant must have a possessory interest^{3/} in the land designated as a place of use. Lemmon v. Hardy, 519 P.2d 1168, 1171 (Idaho 1974). This requirement goes to the right of a claimant to be on the land designated as POUs, to the exclusion of others, and to the permanency of the beneficial use because, “[i]f a water user could be dispossessed at any time, the beneficial use would be illusory.” 2 R. BECK, WATERS AND WATER RIGHTS § 12.02(c)(1) n.52 (2000); cf. United States v. Schmutz, 56 F.2d 269, 270 (D. Utah 1932).

A water right may be an appurtenance to the land on which it has been used. IDAHO CODE § 42-101 (“such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied”); IDAHO CODE § 42-220; IDAHO CODE § 42-1402; Russell v. Irish, 118 P. 501, 502 (Idaho 1911). However, in order for a water right to be appurtenant to a tract of land, there must be unity of title between the land designated as POUs and the water right:

“A water right used in connection with a certain tract of land for the irrigation thereof, where necessary to the beneficial enjoyment of the land, together with the ditch, canal or other works necessary to conduct the water to the places of use,

^{2/} “It would be contrary to the spirit, as well as the letter of our law, to hold that it is possible for a temporary occupant of lands, who has no intention or ability of acquiring a permanent title thereto, to make a valid appropriation of a water right which must be necessarily appurtenant to that land.” Tattersfield, 41 P.2d at 234-235.

^{3/} A “possessory interest” is a right to exert control over certain land to the exclusion of others, coupled with an intent to exercise that right. RESTATEMENT OF PROPERTY (FIRST) § 7 (1936); cf. Sunol v. Hepburn, 1 Cal. 254, 261-262 (Cal. 1850) (cattle & horses roaming over and grazing upon unenclosed land does not constitute a possessory interest in the land).

become appurtenances to the land, provided that they are all owned by the same parties. But they must be the property of the owner of the land to which it is claimed they are appurtenant, and not the property of another." Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1011 (2nd Ed. 1912).

Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief, Order of Recommitment to Special Master Cushman, In Re SRBA, Case No. 39576, Subcases 55-10288 A & B, et al. (hereinafter "Memorandum Decision"), p. 15 (emphasis added). Thus, a valid appropriation of water with POUs designated on land not owned by the appropriator of water, results in an independent water right not appurtenant to land because there is no unity of title between the water right and the land designated as POUs. See First Security Bank of Blackfoot v. State, 291 P. 1064, 1066 (Idaho 1930);⁴ Memorandum Decision, p. 16 ("[a]rguably, non-unity of title effectuates a severance of any alleged appurtenancy relationship.").

A water right is "a real property interest, and is legally protected as such." Crow v. Carlson, 690 P.2d 916, 920 (Idaho 1984); IDAHO CONST., art. XV, §3; IDAHO CODE § 55-101 (water rights are real property). IDAHO CODE § 55-101 states:

Real property or real estate consists of:

1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer.
2. That which is affixed to land.

⁴"Water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator. . . . [A] water right is not necessarily appurtenant to the land on which it is used and may be separated from it, and this is the general rule." First Security Bank of Blackfoot, 291 P. at 1066.

3. That which is appurtenant to land.

The conveyance of a water right can only occur if the conveyance is in writing. Olson v. Idaho Department of Water Resources, 666 P.2d 188, 190-191 (Idaho 1983) (citing IDAHO CODE §§ 9-503 and 9-505). “A water right is defined . . . in terms of the priority, amount, season of use, purpose of use, point of diversion, and place of use.” Olson, 666 P.2d at 191. Because “a water right is real estate, and any interest therein is an interest in real estate, if [LU’s predecessors] secured a water right . . . [they] could not transfer it to another, except by a written conveyance, such as would convey the title to real estate.” Gard v. Thompson, 123 P. 497, 502 (Idaho 1912). “[A]ny attempt to transfer an independent water right by a mere parol or verbal contract is void as against the rights of appropriators” 2 C. KINNEY, KINNEY ON IRRIGATION AND WATER RIGHTS § 997 (emphasis added); McGinness v. Stanfield, 55 P. 1020, 1021-1022 (Idaho 1898).

B. Factual Background

1. Livestock Grazing on Public Lands

On June 15, 1846, all lands now comprising the State of Idaho were ceded to the United States by the United Kingdom of Great Britain and Ireland in a treaty commonly known as the “Oregon Compromise.” Treaty with Great Britain, June 15, 1846, U.S.-U.K., 9 Stat. 869. Since that time, the United States has exercised its sovereign and proprietary rights over the public lands in Idaho under the Property Clause of the United States Constitution, which provides, that “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, §

3, cl. 2. The United States holds the public lands in trust for the people of the whole country. Light v. United States, 220 U.S. 523, 537 (1911).

Congress managed the public lands in Idaho as an open grazing commons available to all citizens, and the use of the public lands in Idaho for rearing livestock was customary under an implied license. Buford v. Houtz, 133 U.S. 320, 326-327 (1890); see Public Lands Council v. Babbitt, 529 U.S. 728, 731 (2000) (“Ranchers once freely grazed livestock on the publicly owned range as their herds moved from place to place, searching for grass and water.”); see Anthony Wilkinson Live Stock Co. v. McIlquam, 83 P. 364, 369 (Wyo. 1905).^{5/} The United States retained the power to recall the implied license to freely use public lands for livestock grazing. Light, 220 U.S. at 535.

Competition for grazing resources on public lands was intense. Public Lands Council, 529 U.S. at 732; Omaechevarria v. Idaho, 246 U.S. 343, 344 fn. 1 (1918) *citing* Pyramid Land and Stock Co. v. Pierce, 95 P. 210 (1908) and Sweet v. Ballentine, 69 P. 995 (1902); McKelvey v. United States, 260 U.S. 353 (1922). Calls for grazing regulation on public lands began as early as 1878. Public Lands Council, 529 U.S. at 732-733. Opposition to regulation eventually diminished, and the erosion-caused dust storms of the 1930's finally impressed upon Congress the critical need to regulate grazing on public land. Id. at 733. On “June 28, 1934, President Franklin Roosevelt signed the Taylor Grazing Act into law.” Id.; see The Taylor Grazing Act of

^{5/} “This privilege or right of pasturage upon the public lands of the government, which are left open and unenclosed, and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it. It is not a special privilege conferred upon one person or a few persons. No individual has any greater right than another to herd his live stock upon such lands, or to allow them to roam at large thereon.” Wilkinson Live Stock Co., 83 P. at 369.

1934 (hereinafter "Taylor Grazing Act") (codified at 43 U.S.C. §§ 315-316).⁹ Congress enacted the Taylor Grazing Act "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; to stabilize the livestock industry dependent upon the public range; and for other purposes." 48 Stat. 1269.

For nearly 70 years, the United States Department of the Interior, Bureau of Land Management (hereinafter "BLM")⁷ has administered and controlled every aspect of domestic livestock grazing on the public lands.⁸ Initially, the BLM verified the extent of dependent

⁹ The Taylor Grazing Act granted the "Secretary of the Interior authority to divide the public range lands into grazing districts, to specify the amount of grazing permitted in each district, to issue leases or permits 'to graze livestock,' and to charge 'reasonable fees' for use of the land. 43 U.S.C. §§ 315, 315a, and 315b." Public Lands Council, 529 U.S. at 733. Thus, the implied license to freely use the public lands for livestock grazing was revoked. See Light, 220 U.S. at 535.

⁷ The agency of the Department of the Interior originally charged with rangeland management was the Division of Grazing. The agency's name changed to the Grazing Service, and eventually to the BLM. For the purposes of this memorandum, BLM means the Division of Grazing, the Grazing Service, and/or the BLM.

⁸ BLM administration of livestock grazing on public land began in 1934. See generally Exhibit BBB-1, pp. 37-38 (completed range examinations, investigated grazing trespasses, and recommended criminal prosecutions) and Exhibit BBB-1, pp. 4-14 (established grazing districts, actively administered grazing on public land, hired Director of Grazing in Sept. 1934); see also Public Lands Council, 529 U.S. at 734-739.

private property,⁹ determined the livestock carrying capacity of commensurate property¹⁰ and public lands, and adjudicated grazing preferences¹¹ among the many users of public lands. The BLM issued annual grazing licenses and, eventually, ten year grazing permits¹² to qualified applicants, charged reasonable fees for grazing use of public lands, and conferred grazing preferences for the issuance of grazing permits upon local landowners and water right owners.

⁹ "Property - shall consist of land and its products or stock water owned or controlled and used according to local custom in livestock operations. Such property is: (a) Dependent if public range is required to maintain its proper use" Trial Exhibit BBB-1, p. 58; see 43 C.F.R. §§ 501.2 (d) - (n) (1938).

¹⁰ "Commensurate for a license for a certain number of livestock if such property provides proper protection according to local custom for said livestock during the period for which the public range is inadequate." Trial Exhibit BBB-1, p. 58; see generally 43 C.F.R. § 501.4 (1938).

¹¹ "*Grazing preference or preference* means a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee." 43 C.F.R. § 4100.0-5; see 43 C.F.R. § 501.1(b) (1938). "*Base property* means: (1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing." 43 C.F.R. § 4100.0-5; see 43 C.F.R. § 501.2 (1938).

¹² "*Grazing permit* means a document authorizing use of the public lands within an established grazing district. Grazing permits specify all authorized use including livestock grazing, suspended use, and conservation use. Permits specify the total number of AUMs apportioned, the area authorized for grazing use, or both." 43 C.F.R. 4100.0-5 ; see 43 C.F.R. §§ 501.1(c) and 501.6(b) (1938). "*Animal unit month (AUM)* means the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." 43 C.F.R. 4100.0-5; see 43 C.F.R. § 501.2(i) (1938).

See 43 U.S.C. § 315b; Public Lands Council, 529 U.S. at 735.¹³ Those applicants who did not establish a priority of use determined by the BLM through surveys of dependent base property and examination of customary grazing use on public lands during 1932 and 1933 were not authorized to use public lands for livestock grazing, which resulted in barring nomadic herdsman, and even some local landowners, from using public lands for livestock grazing. Exhibit BBB-1, p. 35; 43 C.F.R. §§ 501.2(g) - (n), 501.4, and 501.6 (1938).

Livestock cannot legally access forage and water on public lands unless the BLM issues a qualified stock grower a grazing permit and the stock grower pays grazing fees to the BLM. 43 C.F.R. § 4140.1(b)(1); see 43 C.F.R. 501.21(1938).¹⁴ Further, “the issuance of a permit subject to the provisions of [the Taylor Grazing Act does] not create any right, title, interest, or estate in or to the lands.” 43 U.S.C. § 315b.

¹³ “As grazing allocations were determined, the Department would issue a permit measuring grazing privileges in terms of ‘animal unit months’ (AUMs), i.e., the right to obtain the forage needed to sustain one cow (or five sheep) for one month. Permits were valid for up to 10 years and usually renewed as suggested by the Act. See 43 U.S.C. § 315b; Public Land Law Review Commission, One third of the Nation’s Land 109 (1970). But the conditions placed on permits reflected the leasehold nature of grazing privileges; consistent with the fact that Congress had made the Secretary the landlord of the public range and basically made the grant of grazing privileges discretionary. The grazing regulations in effect from 1938 to the present day made clear that the Department retained the power to modify, fail to renew, or cancel a permit or lease for various reasons.”

¹⁴ Livestock must have forage and water to survive while they use public land for grazing. Reporters’s Transcript, In Re SRBA, Case No. 39576, Subcase No. 55-10288B et al. (hereinafter “T. Tr.”), p. 386, line 21 - p. 387, line 3 (Testimony of Chad Gibson).

2. LU's chain of title to the water rights at issue

LU is authorized to use public lands for livestock grazing through permits issued by the BLM under authority of the Taylor Grazing Act. LU filed the water right claims at issue in the above-captioned subcases, and asserts that it acquired the water rights, and its priority date, from its predecessors in interest to the privately owned ranch property it now relies upon to establish a grazing preference to use the public lands for livestock grazing. See LU Ranching Co.'s Trial Brief, In Re SRBA, Case No. 39576, Subcases 55-10288B et al., dated February 14, 2001, pp. 2-

3. Tim Lowry, Vice President of LU, stated that LU's chain of title to the water rights at issue traces back to homestead patents as follows:

1. December 9, 1914 Patent from U.S. to Warren C. Duncan, South Mountain Allotment,¹⁵ Water Right Claim Numbers 55-10288, 55-10289, 55-10290, 55-10292, and 55-10293.
2. September 7, 1887 Patent from U.S. to Ezra Mills, Cow Creek Allotment, Water Right Claim Numbers 55-10295, 55-10296, 55-10297, 55-10298, 55-10299, 55-10300, and 55-10301.
3. July 26, 1910 Patent from U.S. to George Ewings, Cliffs Allotment 501, Water Right Claim Numbers 55-10303 and 55-13451.

Affidavit of Tim Lowry dated October 29, 1998, In Re SRBA, Case No. 39576, Subcase Numbers 55-10288, et al., p. 3, filed simultaneously with LU Ranching Co.'s Motion for

¹⁵ The water right claims are located within grazing allotments designated by the BLM as the South Mountain Allotment, Cow Creek Allotment (formerly known as the Trout Creek Allotment), and Cliffs Pasture of the South Mountain Allotment (hereinafter "Cliffs Allotment"). See Trial Exhibits (hereinafter "Exhibits") 22 and 23. "*Allotment* means an area of land designated and managed for grazing of livestock." 43 C.F.R. § 4100.0-5.

Summary Judgment, In Re SRBA, Case No. 39576, Subcase Numbers 55-10288 et al., dated October 29, 1998.¹⁹ LU has always contended that the water rights at issue were conveyed to LU as appurtenances to land through the chain of title originating from the above-referenced homestead patents. Exhibit 1, p. 18, line 15 through p. 22, line 7; p. 27, line 25 through p. 28, line 5; LU Ranching Co.'s Trial Brief, In Re SRBA, Case No. 39576, Subcases 55-10288B et al., dated February 14, 2001, pp. 2-3; T. Tr., pp. 331-332. The Special Master recommended an 1876 priority date for all of the water rights at issue based solely upon the date Ezra Mills entered into possession of the homesteaded land. SMRR, pp. 3-4 and 11.

3. South Mountain Allotment - Duncan Homestead

In 1910, Warren C. Duncan filed a homestead entry application on 160 acres of land in Owyhee County, Idaho described as the SENW, NESW, SWSW, and SESW, Section 11, T.9S., R.5W., B.M. Exhibit BB, Bates Stamp Number (hereinafter "BSN") 4075-4076. For various reasons, on September 7, 1911, Duncan reapplied for the same homestead. Exhibit BB, BSN 4098. There is no evidence in the trial record showing that Duncan was in the livestock business or that livestock owned by Duncan depended upon public lands for forage and water.

On December 9, 1914, Duncan received a patent to the above-described homestead entry. Exhibit 2, p. 13. In 1928, Owyhee County took possession of the land under a Tax Deed, and the

¹⁹ A chain of title to all of LU's ranch property was filed as Trial Exhibit 2. LU provided a chain of title to the water rights to the United States in response to requests for production of documents. Affidavit of Tim Lowry, p. 2-3.

land was conveyed to Patrick O'Keefe on July 14, 1928. Exhibit 2, pp. 115, 117 - 120 and 323. The deeds do not purport to convey any water rights. Exhibit 2 pp. 115-120 and 323.¹⁷

On June 24, 1935, O'Keefe filed an application for grazing permit with the BLM. Exhibit Y, BSN 2003. O'Keefe said he owned the SENW, NESW, SESW, and SWSW, Section 11, T.9S., R.5W., B.M., and said he had grazed livestock in "Deary Dist #8" and in portions of Section 24, T.5S., R.6W., B.M. Exhibit Y, BSN 2003-2004. The application specifically asked if O'Keefe owned or controlled water sources needed or used for his livestock operation on public land, and O'Keefe described locations of water sources on Cabin Creek and Trout Creek "[r]unning through above described land." Exhibit Y, BSN 2004. In this application, O'Keefe described water sources on his privately owned land, not on public lands. Exhibit Y, BSN 2004; T. Tr., pp. 167-173 (Testimony of Fred Price regarding water rights described on Exhibits 17 and 18). The BLM rejected O'Keefe's application because he did not own any livestock. Exhibit Y, BSN 2080. O'Keefe appealed and said he intended to buy more livestock. Exhibit Y, BSN 2081.

In a 1937 grazing permit application, O'Keefe stated that the "[l]and in Sec. 2, 3, & 11 [T.9S., R.5W.] are grazing land owned by me in Dist #2. I sell same for grazing until I can restock it & apply a permitt [sic] there if needed." Exhibit Y, BSN 2011. In 1937, the BLM completed O'Keefe's dependent property survey. Exhibit Y, BSN 2058 - 2067. O'Keefe's ranch

¹⁷ The deed conveying the property to O'Keefe purports to convey appurtenances through the clause, "TO HAVE AND TO HOLD the said above described and granted premises unto the aforesaid party of the second part . . . together with . . . appurtenances thereunto belonging or in anywise appertaining." Exhibit 2, p. 323. There is no evidence in the trial record that shows water rights designating land owned by another as POUs were an appurtenance to the property conveyed to O'Keefe.

land on Trout Creek, Cabin Creek, and Juniper Creek was determined to be dependent property. Exhibit Y, BSN 2059. Water rights were not dependent base property.

In 1938, the BLM issued O'Keefe a Class 1 license to graze 40 cattle and four horses in an Individual South Mountain Allotment.¹⁸ Exhibit Y, BSN 2077. The Individual South Mountain Allotment contains only three POUs described in 55-10292B and one POU described in 55-10290B. See Exhibit Y, BSN 2077, 2076, 2074, 2072; compare legal descriptions to Exhibit 23.¹⁹ The BLM rejected O'Keefe's 1939 grazing permit application because he had leased his Cabin Creek property to another and the Trout Creek property had no priority for use of public lands. Exhibit Y, BSN 2068.

4. Cow Creek Allotment²⁰ - Mills Homestead

In 1881, Ezra Mills filed a homestead entry application for 160 acres of land in Owyhee County, Idaho described as the S ½ NW 1/4, Section 25 and the S ½ NE 1/4, Section 26, T.5S., R.6W., B.M. Exhibit CC, BSN 4065. There is no evidence in the trial record that shows Mills was in the livestock business or that livestock owned by Mills depended upon public lands for forage and water. Exhibit CC, BSN 4048-4067. The only evidence regarding agricultural use of

¹⁸ There is no evidence in the trial record that O'Keefe ever used the South Mountain Allotment for livestock grazing prior to the time the BLM attached a grazing preference to the Cabin Creek property.

¹⁹ The legal description of the Individual South Mountain Allotment is the W ½ Sec. 35, T.8S., R.5W., and the N 1/2NW, E ½ E ½, SWNE, W ½ SE, Sec. 11, T.9S., R.5W., B.M. The W ½ of Section 35, T.8S., R.5W., B.M. is the only area within the entire Individual South Mountain Allotment that contains water sources at issue in these subcases.

²⁰ Throughout this Memorandum, the Cow Creek Allotment may also be referred to as the "Trout Creek Allotment."

the homestead entry is that Mills had "fields . . . which can be converted into meadow land or made to produce wheat, barley, corn, pumpkins or potatoes." Exhibit UU, p. 2. "[L]ong stacks of timothy hay may be seen in the barnyard, around which hungry horses and faithful milch cows may gather in the winter and feed without starvation looking them in the face." Exhibit UU, p. 2.

On September 7, 1887, Mills received a patent to the above-described homestead entry. Exhibit 2, p. 220. On July 9, 1892, Ezra Mills and Katrina Mills, husband and wife, conveyed the land to Jere Shea. Exhibit 2, p. 222. On April 16, 1906, Jerrey Shea and Mary L. Shea, husband and wife, conveyed the land to John T. Shea. Exhibit 2, p. 223. On May 8, 1909, John T. Shea and Myrtle Hastings Shea, husband and wife, conveyed the land back to Mary L. Shea. Exhibit 2, p. 224. There is no evidence in the trial record that shows Jerrey (Jere) Shea, Mary L. Shea, John T. Shea or Myrtle H. Shea were in the livestock business or that livestock owned by any of them depended upon public lands for forage and water. There is no evidence in the trial record that shows Jerrey (Jere) Shea, Mary L. Shea, John T. Shea or Myrtle H. Shea used the Mills homestead as a base ranch for livestock that used public lands for consumption of forage and water. The deeds do not purport to convey water rights that designate land owned by another as POUs. Exhibit 2, pp. 220, 222-224.

a. 80 Acres of the Mills Homestead in Section 25

On October 15, 1919, Mary L. Shea, a widow, conveyed that portion of the Mills homestead located in Section 25 to Harry F. Staples. Exhibit 2, p. 226.^{21/} On October 31, 1923, Staples conveyed the property to Aileen R. Staples, his wife. Exhibit 2, p. 227. On April 12, 1928, Aileen R. Staples and Harry F. Staples, husband and wife, conveyed the land in Section 25 to the Estate of Mary L. Shea. Exhibit 2, p. 228. There is no evidence in the trial record that shows Harry or Aileen Staples used the land as a base ranch for livestock that used public lands for consumption of forage and water.

On December 7, 1937, Harry F. Staples filed a grazing permit application with the BLM. Exhibit 6, pp. 1-10. Staples said that 150 cattle and 20 horses customarily used land within the Cow Creek Allotment in common with other users. Exhibit 6, p. 1. However, his dependent base property was the W ½ (not including the NWNW), Section 26 and the E ½ (not including the NENE), Section 27, T.5S., R.6W., B.M. Exhibit 6, p. 5. Staples did not describe any of the Mills homestead as dependent base property.^{22/} When specifically asked to described and locate all water rights owned and used in his livestock operations on public lands, Staples did not identify any water or water rights. Exhibit 6, p. 6.

^{21/} The deed conveys "all water rights thereunto belonging or appertaining or to appertain." Exhibit 2, p. 226. However, there is no evidence in the trial record that shows water rights designating land owned by another as POUs were appurtenant to the property conveyed to Staples. Subsequent deeds conveying the same land to Aileen R. Staples and then to the Estate of Mary L. Shea contain the same clause. Exhibit 2, pp. 227 - 228.

^{22/} Staples conveyed the Mills homestead to the Estate of Mary L. Shea nearly 10 years before the date on the grazing permit application. In 1933, the land was conveyed to O'Keefe.

On January 30, 1933, John T. Shea, the administrator of the estate of Mary L. Shea, conveyed that portion of the Mills homestead located in Section 25 to O'Keefe. Exhibit 2, p. 229. On April 7, 1937, O'Keefe applied for a grazing permit on 240 acres in Section 25 and 480 acres in Section 24, T.5S., R.6W., B.M. Exhibit Y, BSN 2007 and 2012. The grazing permit application asked O'Keefe to described and locate all water rights he owned and used in his public land livestock operation and O'Keefe identified water sources on Trout Creek in Sections 24, and 25, T.5S., R.6W. Exhibit Y, BSN 2009. Trout Creek passes through private land in an area designated by the BLM as Lowry FFR Pasture #04771 adjacent to the south boundary of the Cow Creek Allotment, Pasture #0562. Exhibit 22; T. Tr., pp. 167-173 (Testimony of Fred Price regarding water rights described on Exhibits 17 and 18). Trout Creek does not pass through public lands within the Cow Creek Allotment.

In 1937, the BLM completed a dependent property survey for O'Keefe. Exhibit Y, BSN 2058-2067. O'Keefe's lands on Trout Creek, Cabin Creek, and Juniper Creek were determined to be dependent base property. Exhibit Y, BSN 2058-2067. However, O'Keefe could not establish that he used the Mills homestead on Trout Creek as base property for livestock grazing in the Trout Creek Allotment. Exhibit Y, BSN 2037.²³

²³ Even though O'Keefe did not establish a customary use in the Cow Creek Unit, the BLM awarded O'Keefe limited use of public land in the Cow Creek Unit. Exhibit Y, BSN 2079. However, a grazing preference was not attached to O'Keefe's Trout Creek Ranch because O'Keefe did not establish a customary use that resulted in a priority being assigned for the Trout Creek Allotment. Exhibit Y, BSN 2068.

b. 80 Acres of the Mills Homestead in Section 26

On November 8, 1913, Mary L. Shea, a married woman, conveyed that portion of the Mills homestead located in Section 26 to George Kellogg. Exhibit 2, p. 43. On May 3, 1937, Kellogg conveyed the Mills homestead land in Section 26 to William H. Flora. Exhibit 2, p. 74. On October 25, 1937, Flora conveyed the land to Carleton Fretwell. Exhibit 2, p. 88. On September 26, 1946, the land was conveyed to Olive Fretwell. Exhibit 2, p. 94. On January 3, 1947, the land was conveyed to Henry and Hattie Fretwell. Exhibit X (deed added to Exhibit X at trial). There is no evidence in the trial record that shows Kellogg or Flora used the land in Section 26 as a base ranch for livestock that used public lands in the Cow Creek Allotment for consumption of forage and water. The BLM eventually attached a grazing preference in the Cow Creek Allotment for 43 head of livestock to the 80 acres of land in Section 26 homesteaded by Mills.²⁴ Exhibit W, BSN 74, 78, 79; Exhibit 3, p. 3.

5. Mendieta's Acquisition of the Duncan and Mills homesteads

On August 4, 1941, O'Keefe conveyed the 80 acres of land in Section 25, T.5S., R.6W., B.M. that was half of the Mills homestead to Galo Mendieta.²⁵ Exhibit 2, p. 91. On October 14, 1941, O'Keefe conveyed the Duncan homestead to Mendieta. Exhibit 2, p. 309. The deed does

²⁴ LU failed to put in the record any applications for grazing permits that may have been submitted to the BLM by Kellogg, Flora, or any of the Fretwells. There is simply no evidence that Kellogg, Flora, or the Fretwells used forage and water located on public lands.

²⁵ The document purports to convey "all water, water rights, ditches and ditch rights thereunto appertaining or belonging." Exhibit 2, p. 91. There is no evidence in the trial record that shows water rights designating land owned by another as POUs were an appurtenance to the property conveyed to Mendieta.

not purport to convey any water rights.²⁶ Exhibit 2, p. 309. On February 28, 1942, Mendieta informed the BLM of the land conveyance. Exhibit Y, BSN 2037. The BLM informed Mendieta that the full extent of grazing use on public lands would be the “individual allotment [Individual South Mountain Allotment] attached to the 800 acres” Exhibit Y, BSN 2037. The BLM advised Mendieta that “technically he is not entitled to use the Trout Creek allotment because of the fact that no priority was established from his base holdings in that area.” Exhibit Y, BSN 2037.

In June, 1942, Mendieta applied for a grazing permit and said he owned only four horses. Exhibit C, BSN 1183. In 1942, Mendieta received “nonuse”²⁷ in the Trout Creek Allotment and in the Individual South Mountain Allotment. Exhibit C, BSN 1181. On January 22, 1943, Mendieta applied for a grazing permit for 25 cattle and four horses in the Trout Creek Allotment and in the Individual South Mountain Allotment.²⁸ Exhibit C, BSN 1178 - 1179. The BLM authorized Mendieta to graze 25 cattle and 4 horses in the Trout Creek Allotment from April 1 to June 30, and the same number of livestock in the Individual South Mountain Allotment from

²⁶ The document purports to convey appurtenances through the clause, “TO HAVE AND TO HOLD the said premises with their appurtenances unto the said grantee.” Exhibit 2, p. 309. There is no evidence in the trial record that shows water rights designating land owned by another as POUs were an appurtenance to the property conveyed to Mendieta.

²⁷ “Nonuse license or permit. A license or permit issued to an applicant who is otherwise eligible for a regular license or permit but who either elects or is required for conservation purposes not to have livestock on the Federal range for a designated time.” 43 C.F.R. § 501.2(q) (1938); 43 C.F.R. § 4100.0-5 (“*Temporary nonuse* means the authorized withholding, on an annual basis, of all or a portion of permitted livestock in response to a request of the permittee or lessee.”).

²⁸ The Individual Allotment is in the NW 1/4, W 1/2 SW 1/4, SESW, Section 35, T.8S., R.5W., B.M.; and in Lots 3 and 4, Section 2, E 1/2 E1/2, SWNE, W1/2 SE 1/4, Section 11, T.9S., R5W., B.M. Exhibit C, BSN 1179 and 1180; see Exhibit 23.

July 1 to September 30. Exhibit C, BSN 1180. Over time, the BLM increased authorized livestock use to 40 cattle and 4 horses, but the increase was never based upon Mendieta's acquisition of additional base property. Exhibit C, BSN 1163-1174, 1155.

On September 6, 1949, Henry and Hattie Fretwell conveyed the 80 acres of land in Section 26, T.5S., R.6W., B.M. that comprised half of the Mills homestead to Mendieta. Exhibit 2, p. 298. The deed does not purport to convey any water rights. Exhibit 2, p. 298.²⁹ On December 30, 1949, Mendieta applied for an increase in authorized use because "[t]he property of Henry Fretwell that I bought gives me 20 head cattle in the Trout Creek Cattle Allotment." Exhibit C, BSN 1161. Mendieta owned 75 cattle and 4 horses at that time. Exhibit C, BSN 1161. The BLM approved the change in authorized use. Exhibit C, BSN 1160. In 1951, the BLM approved another increase in the number of cattle authorized to use public lands. Exhibit C, BSN 1158.³⁰ Mendieta's authorized use remained the same in 1952 and 1953. Exhibit C, pp. 1149 - 1154.

²⁹The deed purports to convey appurtenances through the clause, "TOGETHER, With all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining" Exhibit 2, p. 298-299. There is no evidence in the trial record that shows water rights designating land owned by another as POUs were an appurtenance to the property conveyed to Mendieta.

³⁰The BLM rejected Mendieta's request to increase grazing use in excess of Class I grazing privileges. Exhibit C, BSN 1158; BSN 1156-1157. The BLM authorized use of public lands by 88 cattle and 4 horses. Exhibit C, BSN 1158. Mendieta's 1943 through 1953 ten-year grazing permit authorized 61 cattle and 4 horses to use the Trout Creek Allotment from April 1 to June 30, and 65 cattle to use the Individual South Mountain Allotment. Exhibit G, BSN 1085. The Individual South Mountain Allotment contains three POUs described in 55-10292B and one POU described in 55-10290B. For the first time, the trial record shows that a predecessor of LU may have watered livestock at four POUs in the Individual South Mountain Allotment from 1943 through 1953.

In 1955, Mendieta obtained grazing privileges from Jack Staples and the BLM authorized a grazing use increase. Exhibit C, BSN 1147 - 1148. The increase in authorized grazing use was not based upon acquisition of land or water rights.

In 1957, the BLM authorized an increase in Mendieta's use to 158 cattle in the Trout Creek Allotment. Exhibit C, BSN 1139. In 1959, Mendieta's use in the Trout Creek Allotment within the Cow Creek Unit was, by adjudication under 43 C.F.R. 161.5(d), reduced to 155 animal units. Exhibit C, BSN 1137; BSN 1133 (On February 2, 1960, the BLM approved Mendieta's application for grazing privileges acquired from Stafford Brothers and authorized 155 cattle in the Trout Creek Allotment in 1960).^{31/} In 1965, the BLM adopted the decision of the Advisory Board, subdivided the Cow Creek Unit into allotments, and adjudicated the individual qualifications for grazing privileges. Exhibit F, BSN 1112 - 1116. In 1965, Mendieta's total authorized use was 57 animal units in the South Mountain Unit to be used from July 1, 1965 to September 30, 1965; 180 animal units in the Trout Creek Allotment to be used from April 1, 1965 to June 30, 1965; 50 animal units in the Trout Creek Allotment to be used from October 11, 1965 to November 10, 1965; 75 animal units in the Cow Creek Allotment to be used from April 15, 1965 through June 15, 1965; and authorization for 4 horses to use the Trout Creek Allotment

^{31/} Mendieta applied for a new use in 1959 for 50 cattle and 7 horses in Cow Creek Unit 2, apparently based upon acquiring grazing privileges from Stafford Brothers. Exhibit C, BSN 1131; see BSN 1133; see Exhibit 2, pp. 31-32 (the indenture is dated June 15, 1984). The Stafford purchase apparently included 1,360 acres of land and an attached 65 animal unit priority in the area of Chimney Creek. Exhibit W, BSN 74; see Exhibit 23, 55-10299.

from April 1, 1965 to September 30, 1965. Exhibit C, BSN 1103.^{32/} Mendieta last applied to use these grazing privileges on November 12, 1965. Exhibit C, BSN 1080. Mendieta's grazing privileges were always attached to land, not water rights.

6. William and Nita Lowry's Acquisition of the Duncan and Mills homesteads.

On December 13, 1965, Mendieta conveyed the land comprising the Duncan homestead and the land comprising the Mills homestead to William and Nita Lowry. Exhibit 2, p. 17; see also Exhibit Q (Contract of Sale).^{33/} On January 13, 1966, the BLM authorized a transfer of grazing privileges from Mendieta to Lowry. Exhibit S, BSN 125 ("William A. Lowry furnished a contract of sale on January 13, 1966 whereby he has purchased all of the Galo Mendieta base property and attached Federal range privileges."). In 1966, a BLM Dependent Property and Adjudication Summary determined that Lowry's dependent property was land and leases of land. Exhibit W, BSN 74; see also Exhibit W, BSN 86 (1972 Dependent Property and Adjudication Summary). There is no evidence in the trial record that shows Lowry's dependent base property was ever water rights.

^{32/} To review the progression of authorized livestock use from 1961 through 1964, see Exhibit C, BSN 1107-1130 and Exhibit R. Thorough review of the documents reveals no evidence that shows the increases in authorized use were due to acquisition of land or water rights.

^{33/} Neither the deed nor the contract of sale purport to convey any water rights. The deed purports to convey appurtenances through the clause, "TOGETHER, With all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining . . ." Exhibit 2, p. 17. The contract of sale does not contain an appurtenance clause, but does purport to convey grazing privileges, subject to BLM approval. Exhibit Q, BSN 99.

7. Cliffs Allotment - Ewings Homestead

In 1909, George Ewings, Jr. filed a homestead entry application for 160 acres of public land in Owyhee County, Idaho described as the W ½ NE 1/4, SENW, and NESW, Section 9, T.9S., R.5W., B.M. Exhibit K, BSN 4211. On July 26, 1910, Ewings received a patent to the above-described homestead entry. Exhibit 2, p. 331. There is no evidence that shows Ewings was in the livestock business or that livestock owned by Ewings depended upon public lands for forage and water. On July 16, 1912, Ewings conveyed the land to Clyde C. Foster. Exhibit 2, p. 329. The deed conveys “all water rights, canal and ditch rights, rights of way and other appurtenances” Exhibit 2, p. 329.³⁴ The deed does not purport to convey water rights that designate land owned by another as POUs. Exhibit 2, p. 329.

On January 12, 1937, Clyde C. Foster filed a grazing permit for non-use with the BLM. Exhibit 5, pp. 1- 5. The 160 acres homesteaded by Ewings were part of the ranch land used in Foster’s livestock operations. Exhibit 5, pp. 2 and 5. The grazing permit application specifically asked if Foster owned or leased any water or water rights used by in his livestock operations on public lands, and Foster did not identify any water rights located on land designated as POUs in any of the water rights at issue here. Exhibit 5, p. 3; compare to Exhibit 23.

Foster’s application said he intended to graze 200 cattle on public lands customarily used by him in the Pole Creek Unit where his livestock would use forage and water in common with others. Exhibit 5, p. 1-4. The land designated as POUs in 55-10303 is all located in T.9S., R.5W. and in approximately the W ½ of T.9S., R.4W., B.M. Exhibit 23 (Cliffs Pastures #05012

³⁴ There is no evidence that water rights designating land owned by another as POUs were appurtenant to the property conveyed to Foster.

and #05013). The closest boundary of the Pole Creek Unit is approximately the E ½ W ½ of T.9S., R.3W., a straight-line distance of nearly five miles. Exhibit 6, p. 10.³⁵ Thus, Foster's livestock did not customarily use public lands within the Cliffs Allotment for forage and water.

On April 22, 1946, the land was conveyed to Frank and Louise Maher. Exhibit 2, p. 308. The deed does not purport to convey any water rights. Exhibit 2, p. 308.³⁶ Maher had a grazing privilege for 180 cattle in the Cliffs Cattle Allotment in 1946. Exhibit N, BSN 3424. In 1950, a BLM Commensurate Property Summary assigned a grazing preference for 94 cattle and 376 AUMs in the Cliffs Grazing Allotment of the South Mountain Unit to the "Clyde Foster Ranch." Exhibit N, BSN 3370. The "Foster Allotment" is within Sections 3, 4, 5, 10, and 11, T.9S., R.5W., B.M. Exhibit M, BSN 3850. None of the land designated as POUs in 55-10303 or 55-13451 is located within the "Foster Allotment." See Exhibit 23. There is no evidence in the trial record that shows Maher obtained any of the grazing privilege for the Cliffs Allotment in a transfer of grazing privileges from Foster. However, Foster had established a priority for 120 animal units. Exhibit M, BSN 3851. "In 1953, by board action, the Maher privilege was established as" 94 animal units with 376 animal unit months in the Cliffs Allotment and 26 animal units with 104 animal unit months in an individual allotment. Exhibit M, BSN 3851.

³⁵ Foster's base ranch was in Section 9, T.9S., R.5W., B.M. Foster applied to use the Pole Creek Unit in common with others on public lands customarily used for grazing of sheep, cattle, and horses. Exhibit 5, p. 3. Foster must have intended to trail his livestock over 12 miles from his base ranch to the customary range in the Pole Creek Unit. See Exhibit 6, p. 10.

³⁶ The deed conveys "appurtenances there unto belonging, or in anywise appertaining" Exhibit 2, p. 08. There is no evidence in the trial record that show water rights designating land owned by another as POUs were an appurtenance to the ranch property conveyed to the Mahers.

On January 24, 1955, Maher conveyed the Ewings homestead to Donald J. and Elizabeth McKay. Exhibit 2, p. 7. The deed conveyed "all water, water rights, ditches and ditch rights and rights to the use of water appurtenant to the above described real property or used in connection therewith" Exhibit 2, p. 7.³⁷ McKay obtained the grazing preference that was attached to the Foster base lands, for adjudication purposes, of 117 animal units with 480 animal unit months. Exhibit M, BSN 3852. By adjudication, the preference was adjusted to 664 animal unit months in the Cliffs Allotment. Exhibit M, BSN 3855-3856.

8. LU's Acquisition of the Duncan, Mills, and Ewings Homesteads

LU was incorporated in 1976. Affidavit of Tim Lowry, p. 3. William Lowry, Tim Lowry's father, is the President. Id. Tim Lowry is the Vice President. Id. Vernita Lowry, Tim Lowry's mother, is the Secretary-Treasurer. Id.

On October 1, 1976, William A. and Nita Lowry (aka Vernita E. Lowry), husband and wife, conveyed to LU the land comprising the Duncan and Mills homesteads. Exhibit 2, p. 15. The Duncan and Mills homesteads were base property for attached grazing preferences in the South Mountain and Cow Creek Allotments. The deed does not purport to convey water rights. Exhibit 2, p. 15. The deed does not contain a clause conveying appurtenances. Exhibit 2, p. 15. William Lowry testified that his livestock and LU's livestock used public lands in the South Mountain and Cow Creek Allotments for forage and water pursuant to BLM grazing permits. T. Tr., pp. 290-293.

³⁷ There is no evidence in the trial record that water rights designating land owned by another as POUs were appurtenant to the property conveyed to the McKays.

William Lowry testified that he intended to purchase the water rights that designated public lands within the South Mountain and Cow Creek Allotments as POUs when he purchased ranch land from Galo Mendieta. T. Tr., p. 284 (Testimony of William Lowry). William Lowry testified that he intended to convey to LU “the appurtenances which would include all the buildings, all the ditches, all the irrigation water rights, all of the grazing rights. That would include the grass and the stock water.” T. Tr., p. 296; see also Affidavit of William Lowry dated October 29, 1998, In Re SRBA, Case No. 39576, Subcase Numbers 55-10288, et al., p. 2, filed simultaneously with LU Ranching Co.’s Motion for Summary Judgment, In Re SRBA, Case No. 39576, Subcase Numbers 55-10288 et al., dated October 29, 1998. There is no other evidence in the trial record that shows conveyance of water rights that designated public lands in the South Mountain and Cow Creek Allotments as POUs through a chain of title to LU.

On June 28, 1984, the McKays conveyed the Ewings homestead, and other ranch land, to LU. Exhibit 2, p. 26. The deed conveyed “all water and water rights, ditches and ditch rights used thereon or appurtenant thereto” Exhibit 2, p. 26. The grazing preference in the Cliffs Allotment attached to McKay’s base property was transferred to LU. Exhibit M, BSN 3853. Tim Lowry testified that LU’s livestock used public lands in the Cliffs Allotment for forage and water pursuant to BLM grazing permits. T. Tr., pp. 338-339, 349-356. There is no evidence in the trial record that shows conveyance of water rights that designated public lands in the Cliffs Allotment as POUs through a chain of title to LU.

In 1984, Tim Lowry offered “land” as LU’s dependent “base property for a grazing preference on the public lands.” Exhibit 3, p. 1. Tim Lowry certified “that the base property

listed is described correctly and the property meets the requirement of the grazing regulations . . . and . . . [concurred] with the attachment of the grazing preference by allotment.” Exhibit 3, p. 1; see Exhibit 3, p. 2 (showing the attached grazing preference by allotment). Water rights were not offered as base property. There is no evidence in the trial record showing anyone in LU’s chain of title ever offered water rights as base property to obtain grazing privileges on public land.

C. Proceedings Below

On March 25 and April 3, 1992, LU filed 12 water right claims in-stream watering of livestock and one domestic water right that designated POUs on public lands and designated the priority date as May 20, 1872. On July 31, 1997, the Director of the Idaho Department of Water Resources (hereinafter “IDWR”) filed Director’s Reports recommending LU’s stock watering and domestic claims. The United States, by and through the BLM, filed timely objections to LU’s claims.

On October 15, 1998, the United States filed its Motion for Partial Summary Judgment and Memorandum in Support arguing that LU was not entitled to its claimed priority date because there was no evidence that a pre-existing water right was established, then conveyed to LU, in writing, through a chain of title, as required by Idaho law. On October 29, 1998, LU filed its Motion for Summary Judgment arguing that IDAHO CODE § 42-113(2)³⁹ allowed LU a priority date established by predecessors in interest. On January 8, 1999, the Special Master filed an

³⁹ The statute was enacted by the Idaho Legislature on March 25, 1998, and states: “(2) For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with federally owned or managed land, established under the diversion and application to beneficial use method of appropriation, the priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code.”

Order Granting the United States' Motion for Summary Judgment because there was no evidence that the claimed water rights were conveyed to LU, in writing, through a chain of title, as required by Idaho law. The Special Master denied LU's Motion for Summary Judgment, holding that IDAHO CODE § 42-113(2), as retroactively applied, violated Article 11, Section 12 of the Idaho Constitution which prohibits the retroactive application of laws that diminish other vested rights. On April 23, 1999, the Special Master filed Reports and Recommendations recommending a September 23, 1976 priority date for LU's water rights.

On May 24, 1999, LU filed its Motion to Alter or Amend the Special Master's Reports and Recommendations. On July 8, 1999, the Special Master held a hearing on LU's Motion to Alter or Amend and denied LU's Motion from the bench. On July 27, 1999, the Special Master filed an Order Denying Motion to Alter or Amend. On August 10, 1999, LU filed a timely Notice of Challenge. After extensive briefing, the District Court filed its Memorandum Decision remanding the above-captioned subcases for trial.³⁹

On February 21, 22, and 23, and on March 14, 2001, the above-captioned subcases were tried on the merits. Reporters' Transcript, In Re SRBA, Case No. 39576, Subcase No. 55-10288B et al. On February 27, 2003, the Special Master filed the SMRR and recommended, among other things, that LU's water rights be decreed with a June 10, 1876 priority date. On March 28, 2003, the United States filed its Motion to Alter or Amend the SMRR. On April 15, 2004, the Special Master filed the Order on Motion to Alter or Amend, Amended Special

³⁹ The Memorandum Decision recommitted the subcases to Special Master Cushman because the Special Master who filed the previous orders had earlier resigned. See Memorandum Decision, pp. 3-4, 26-27.

Master's Report and Recommendation, In Re SRBA, Case No. 39576, Subcase No. 55-10288B et al. denying, in part, the United States' Motion to Alter or Amend. Pursuant to Administrative Order 1, 13.c., the United States challenged that Order.

III. STANDARD OF REVIEW

The standard of review of a Special Master's findings of fact and conclusions of law is well stated by the SRBA District Court in its Memorandum Decision and Order on Challenge; and, Order of Partial Decree (Wood v. Troutt), In Re SRBA, Case No. 39576, Subcase 65-05663B (hereinafter "Troutt"), pp. 5-8, and is incorporated herein by this reference.

IV. ARGUMENT

A. Introduction

The District Court declined to address whether IDAHO CODE § 42-113(2), as retroactively applied, violated Article 11, Section 12 of the Idaho Constitution which prohibits the retroactive application of laws that diminish other vested rights,⁴⁹ and remanded the above-captioned subcases to the Special Master because there were "genuine issues of material fact." Memorandum Decision, p. 28. The District Court stated that "the question of whether any water

⁴⁹The Special Master did not rely upon IDAHO CODE § 42-113(2) in holding that LU was entitled to an 1876 priority date. Indeed, LU presented no reliable historical evidence that domestic livestock used the water sources at issue. However, because the District Court declined to address the constitutionality of IDAHO CODE § 42-113(2), it appears that the Special Master's holding that the statute is unconstitutional is still in effect. Memorandum Decision, p. 26. Therefore, the United States incorporates by reference the United States' Response to LU Ranching's Motion for Summary Judgment, Including the United States' Analysis of Revised I.C. § 42-113, In Re SRBA, Case No. 39579, Subcase Nos. 55-10288 et al., dated December 7, 1998, the United States' Rebuttal to LU Ranching's Notice of Challenge, In Re SRBA, Case No. 39579, Subcase Nos. 55-10288 et al., dated September 21, 1999, and all documents and affidavits filed therewith.

rights, perfected by LU's predecessors-in-interest, have become appurtenant to any particular property interest which has been conveyed to LU, is an issue of fact to be ascertained from the instruments of conveyance and the circumstances surrounding each conveyance." Memorandum Decision, pp. 13-14 (footnote omitted). Moreover the District Court required LU "to support its theory that each conveyance in its chain of title back to 1872 (or whatever priority date LU can prove) carried with it a grant of the subject water rights." Memorandum Decision, p. 26. After trial on the merits, the Special Master erroneously concluded: (1) that LU's predecessors perfected rights for in-stream livestock watering even where there is no evidence that LU's predecessors satisfied the test of a valid appropriation, and (2) LU established an 1876 priority date by tacking back to the first water user even where there is no evidence of any conveyance of a pre-existing water right.

**B. LU failed to prove that Duncan, Mills, or Ewings
appropriated water on public lands**

The Special Master recommended an 1876 priority date for each of the water rights at issue based upon the date Mills, a homesteader Tim Lowry identified as the first user of stock water in the Cow Creek Allotment, entered into possession of a homestead. SMRR, pp. 3-4 and 11. There is no evidence in the trial record that shows Mills met the minimum requirements of a valid appropriation of water on public lands because there is no evidence that his livestock ever used water located on public lands. Hidden Springs Trout Ranch, Inc., 619 P.2d at 1132-1133. Indeed, there is no evidence that Duncan, Mills, or Ewings^{41/} had livestock that used public lands

^{41/} Tim Lowry identified Duncan, Mills, and Ewings as the first users of water in LU's chain of title to the water rights at issue and linked the chain of title to homestead patents issued by the United States to Duncan, Mills, and Ewings.

for forage and water, nor is there evidence that these homesteaders used their homesteads as base ranches for livestock that depended upon public lands grazing.^{42/} There is certainly no evidence that Duncan, Mills, or Ewings appropriated a domestic water right in the Cliffs Allotment, as claimed in 55-13451. Therefore, the Special Master's findings of fact that homestead patents were for ranching operations that used nearby government land for forage and water, that each of LU's predecessors used the open federal land and water thereon, and that Mills appropriated stock water and water for domestic purposes on June 10, 1876 are clearly erroneous and should be set aside. See Troutt, pp. 5-7.

**C. Successors to Duncan, Mills, and Ewings
did not perfect water rights on public lands**

1. Introduction

Without citation to any statute or judicial precedent, the Special Master concluded:

The United States asserted that because others were using the land and water, in common, no one could obtain a water right. This assertion attacks the very nature of the prior appropriation doctrine and would return water use to a theory based upon exclusive possession and control of the water source. Under prior appropriation multiple users can use the same source or point of diversion. It is their respective priority dates that controls use and administration, not exclusive possession. It is irrelevant that the land and water were being used, in common, or that not all of those whose predecessors were using the water have made claims in the SRBA. The Taylor Grazing Act expressly recognizes that those using water on federal land prior to its enactment (and PWR 107) owned the water right.

^{42/} Furthermore, there is no basis for the Special Master's recommendation of an 1876 priority date for the water right claims located on public lands in the South Mountain Allotment or in the Cliffs Allotment because Tim Lowry identified the Mills homestead as the link to livestock use of the Cow Creek Allotment only, and not livestock use of the South Mountain Allotment or the Cliffs Allotment.

SMRR, p. 7. These conclusions of law do not comport with the law of prior appropriation and should be set aside.

Contrary to the Special Master's conclusion, the Taylor Grazing Act does not expressly recognize those who use water on public lands as owners of a water right. The Taylor Grazing Act states:

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

43 U.S.C. 315b. The plain language of the Taylor Grazing Act does not recognize that all those who use stock water on public lands own a stock watering right. See United States v. Oregon & C. R. Co., 164 U.S. 526, 539 (1896) (regarding rules of construction applicable to granting acts); see Camfield v. United States, 167 U.S. 518, 524-528 (1897); see Schmutz, 56 F.2d at 270.

Instead, it recognizes such rights as might have "heretofore vested or accrued under existing law," without begging the question whether such rights did vest or accrue for those using water on federal land, as the Special Master wrongly assumed. In Idaho, a water right can accrue only upon proof of satisfaction of the test of a valid appropriation. The Taylor Grazing Act does not recognize water rights not validly appropriated under state law, therefore, the Special Master's contrary conclusion of law should be set aside.

As stated above, the three elements of prior appropriation of water are a bona fide intent to divert water for a beneficial use. Hidden Springs Trout Ranch, Inc., 619 P.2d at 1132-1133. Even though the doctrine of relation back would allow an appropriator to perfect a water right

with a priority date at the time intent to appropriate was first formed, that intent must be an open physical demonstration that gives notice to others that a person intends to appropriate water for a beneficial use. 3 D. GETCHES, WATER LAW IN A NUTSHELL 88-91 (3rd ed., 1997).

“The diversion requirement provides notice to present and prospective appropriators that water has been appropriated, and gives authorities and courts a concrete basis to determine an appropriator’s priority date.” Id. at 92. In Idaho, there need not be an actual physical diversion to appropriate stock water. R.T. Nahas Company, 674 P.2d at 1044. Therefore, the Idaho Courts must look to other concrete bases to determine the priority date for a stock water appropriation.

Mere use of stock water in common with others on public lands open to all for livestock grazing does not satisfy the test of a valid appropriation. Robinson, 218 P. at 1043. However, use of public lands for forage and water, to the exclusion of others, has, in two cases, provided sufficient bases to satisfy the test of a valid appropriation. Hunter v. United States, 388 F.2d 148, 153 (9th Cir. 1967); Steptoe Live Stock Co. v. Gulley, 295 P. 772, 773 (Nev. 1931); see contra 43 U.S.C. §§ 1061-1066 and Schmutz, 56 F.2d 270; cf. Camfield, 167 U.S. at 524-528 and Wilkinson Live Stock Co., 83 P. at 369.

A water right claimant must have a possessory interest in the land designated as a place of use. Lemmon, 519 P.2d at 1171; cf. Sunol, 1 Cal. at 261-262 (cattle & horses roaming over and grazing upon unenclosed land does not constitute a possessory interest in the land). Where, as here, there is no actual physical diversion of water that supplies the required notice to others that water has actually been appropriated, the exclusion of others from the place of use serves not only to provide the required permanency to the beneficial use, but also to provide the required

notice. 2 R. BECK, WATERS AND WATER RIGHTS § 12.02(c)(1) n.52 (2000) (“[i]f a water user could be dispossessed at any time, the beneficial use would be illusory.”); cf. Tattersfeld, 41 P.2d at 234-235; cf. Schmutz, 56 F.2d at 270. The “possessory interest” in the land designated as a place of use, required by the Idaho Supreme Court in Lemmon, 519 P.2d at 1171, provides the only concrete basis from which this Court can determine a priority date that might be established by a stockgrower such as LU. See 3 D. GETCHES, WATER LAW IN A NUTSHELL 92 (3rd ed., 1997).

LU completely failed to prove, by a preponderance of the evidence, that its predecessors satisfied the test of a valid appropriation. Thus, the water claimed was still available for everyone to “dip therefrom or water his animals therein” Portage Irrigation, Reservoir & Power Co., 72 P.2d at 652-653. Neither LU, nor any of LU’s predecessors, ever offered water rights as base property to gain an advantage over others in the various grazing preference adjudications. As late as 1984, if there were any water rights, they were completely ignored by LU when only land was offered as base property. Exhibit 3, p. 1. The logical inference from the lack of evidence of vested water rights is that no one established or defended water rights on public land. The Special Master completely ignored the most basic tenets of prior appropriation. As demonstrated above, the original homesteaders identified by Tim Lowry as the original appropriators of the water rights at issue did not have vested water rights to convey to successors in interest. As shown below, there is simply no evidence that any of the successors perfected in-stream livestock watering rights or a domestic water right.

2. O'Keefe

In 1928, O'Keefe acquired the Duncan homestead. In 1933, O'Keefe acquired 80 acres of the Mills homestead. As a local landowner, O'Keefe competed for grazing privileges on public lands pursuant to the provisions of the Taylor Grazing Act.^{43/} On grazing permit applications, O'Keefe was asked if he owned water rights that could be considered dependent base property. O'Keefe listed water rights located on private land, and did not list any water rights on public land that were used for livestock operations on public lands. Moreover, O'Keefe did not affirmatively state that he had a customary use anywhere in the South Mountain Allotment, and said he sold the Duncan homestead "for grazing until I can restock it & apply a permitt [sic] there if needed." Exhibit Y, BSN 2011. O'Keefe could not even establish a customary use of forage and water in the Trout Creek Allotment. Exhibit Y, BSN 2037. In fact, the BLM rejected O'Keefe's first grazing permit application because he owned no livestock. Exhibit Y, BSN 2080. The BLM rejected his second grazing permit application because he had

^{43/} The Special Master found that the documents used by the United States to adjudicate grazing preferences among the many applicants for public lands grazing were "ambiguous and legally insufficient to transfer or waive preexisting water rights obtained under the Idaho Constitution. At a minimum a document waiving or transferring a water right must have the clarity and precession [sic] of deed convening [sic] real property or a portion of such estate. These documents were not recorded with the county, as well. They are insufficient to result in an abandonment or forfeiture of a water right." SMRR, pp. 9-10. This finding is clearly erroneous and should be set aside because it presumes, without evidence, that LU's predecessors satisfied the test of a valid appropriation and therefore had vested water rights for the United States to deem abandoned or forfeited. The documents in the trial record contain the only credible evidence that any of LU's predecessors to the water rights at issue used public lands for livestock forage and water. The United States argued that LU failed to prove its predecessors intent to divert water from the sources claimed for a beneficial use. Here, there is no evidence that LU's predecessors to the water rights at issue (except William Lowry) actually watered their livestock from any of the sources claimed at the POUs claimed. Thus, there were no pre-existing vested water rights to be conveyed, and hence there were no vested water rights to abandon or forfeit.

leased his land to another and had no prior use of the Trout Creek Allotment. Because there is no evidence that O'Keefe's livestock actually used public lands for forage and water now designated as POUs in LU's water right claims, O'Keefe could not have appropriated the water rights at issue.⁴⁴

3. Sheas

In 1892, Mills conveyed his homestead to Jerrey Shea and Mary L. Shea. In 1906, the land was conveyed to John T. Shea and Myrtle H. Shea, and then back to Mary L. Shea in 1909. The record is completely void of evidence that any of the Sheas were in the livestock business, that livestock owned by any of the Sheas depended upon public land for forage and water, or that any of the Sheas used the Mills homestead as a base ranch for livestock that depended upon public lands for forage and water. Because there is no evidence that any of the Sheas watered livestock from the sources at issue here, the Sheas could not have established the water rights.

4. Staples

In 1919, Mary L. Shea conveyed 80 acres of the Mills homestead to Harry Staples. Harry Staples conveyed the property of Aileen Staples.⁴⁵ There is no evidence that the Staples used the

⁴⁴O'Keefe may have grazed livestock on public lands from 1938 to October 14, 1941 (the date he conveyed ranch land to Mendieta). However, he still did not satisfy the test of a valid appropriation because he lacked the required possessory interest in the land now designated as water right POUs (Lemmon, 519 P.2d at 1171) and his grazing use of public lands was pursuant to permit issued by the BLM under authority of the Taylor Grazing Act. 43 U.S.C. § 315b. Moreover, if O'Keefe had satisfied the test of a valid appropriation, which he did not, the only use he could have had was in the Individual South Mountain Allotment, and that particular area contains only three POUs described in 55-10292B and one POU described in 55-10290B. See Exhibit Y, BSN 2072, 2074, 2076, 2077; compare legal descriptions to Exhibit 23.

⁴⁵In 1928, this land was conveyed back to the estate of Mary L. Shea. Exhibit 2, p. 228. In 1933, this land was conveyed to O'Keefe. Exhibit 2, p. 229.

land as a base ranch for livestock that depended upon public lands for forage and water. Staples filed a grazing permit application and said his livestock customarily used land in the Cow Creek Allotment in common with other users, but Staple's dependent base property was not the Mills homestead. Exhibit 6, pp. 1 and 5. When specifically asked if he owned water rights used in his livestock operations on public lands, Staples did not identify one water right. Exhibit 6, p. 6. Therefore, Staples did not establish any of the water rights at issue here.

5. Kellogg

In 1913, Mary L. Shea conveyed 80 acres of the Mills homestead to George Kellogg. There is no evidence that Kellogg used the Mills homestead as a base ranch for livestock that depended upon public lands for forage and water. Indeed, there is no evidence that Kellogg used any part of the Cow Creek Allotment, nor is there any evidence that Kellogg appropriated water from sources in the Cow Creek Allotment. Even though the BLM apparently did authorize Kellogg to use public lands for grazing under a license, there is nothing in the trial record that shows the location of that use. Exhibit Z. A 1936 letter from the BLM, the only evidence regarding Kellogg's use of public lands, states that Carlton Fretwell purchased property directly from Kellogg. Fretwell purchased his interest in the Mills homestead from Flora in 1937, not from Kellogg in 1936. Exhibit 2, p. 74. Kellogg's grazing use of public lands had nothing to do with the Mills homestead. Therefore, it is unlikely that Kellogg established any of the water rights at issue here.

6. Flora

In 1937, Kellogg conveyed 80 acres of the Mills homestead to Flora. Exhibit 2, p. 74. As demonstrated below, Flora sold the Mills Homestead in 1937, shortly he obtained it from Kellogg. In 1943, over five years after selling the Mills homestead, Flora applied for a grazing permit, but there is no evidence that livestock owned by Flora depended upon public lands in the Cow Creek Allotment for forage and water. Thus, there is no evidence that Flora established any of the water rights at issue.

7. Fretwells

In 1937, Flora conveyed 80 acres of the Mills homestead to Carlton Fretwell. Exhibit 2, p. 88. In 1946, the land was conveyed to Olive Fretwell. Exhibit 2, p. 94. In 1947, the land was conveyed to Henry and Hattie Fretwell. Exhibit X (deed added to Exhibit X at trial). There is no evidence that shows any of the Fretwells used the Mills homestead as a base ranch for livestock that depended upon public land for forage and water. However, the BLM, at some point during the Fretwells' ownership of the Mills homestead, attached a grazing preference for 43 head of livestock in the Trout Creek Allotment (Cow Creek Allotment) to 80 acres of the Mills homestead. Exhibit W, BSN 74, 78, 79; Exhibit 3, p. 3. The trial record does not explain how the grazing preference was acquired, nor does it identify any of the water rights at issue as base property. Thus, there is no evidence that the Fretwells established any of the water rights.

8. Foster

In 1912, Ewings conveyed his homestead to Foster, and Foster used the Ewings homestead as a base ranch for livestock that depended upon public lands for forage and water. In

his grazing permit application, Foster stated that he customarily grazed 2,000 sheep, and 200 cattle and horses in the Pole Creek Unit. Exhibit 5, p. 1 (Foster applied for a non-use permit to graze 200 cattle on public lands, "customarily used by [Foster] within Pole Creek Unit" Foster apparently used the Pole Creek Unit for 25 years to graze 2000 sheep and 200 horses and cattle. Exhibit 5, p. 3.). As demonstrated above, the Pole Creek Unit is over 5 miles straight line distance from the nearest POU in the Cliffs Allotment, therefore Foster did not establish any of the water rights at issue here.

A grazing preference was eventually attached to the Ewings homestead for grazing use of the "Foster Allotment." Exhibit M, BSN 3850. The Foster Allotment does not contain any of the POUs described in 55-10303 or 55-13451. There is no evidence that Foster's livestock used public lands described as POUs 55-10303 for forage and water. There is no evidence that Foster used water for domestic purposes at the location described in 55-13451. Therefore, there is no evidence that Foster satisfied the test of a valid appropriation of water from the sources claimed in 55-10303 and 55-13541.

9. Mendieta

In 1941, Mendieta acquired the Duncan homestead and 80 acres of the Mills homestead from O'Keefe. In 1942, the BLM authorized non-use of grazing privileges, probably because Mendieta owned only four horses. There is no evidence in the trial record that shows Mendieta used public lands for forage and water in 1941 or 1942.

In 1943, the BLM authorized Mendieta to graze 25 cattle and 4 horses in the Trout Creek Allotment even though O'Keefe had not established a grazing preference for that allotment. The

BLM authorized the same number of livestock to use the Individual South Mountain Allotment. Therefore, in 1943, for the first time, a predecessor of LU's actually grazed livestock on public lands designated as POUs by water rights at issue. However, Mendieta's use of the Individual South Mountain Allotment was limited to three POUs in 55-10292B and one POU in 55-10290B. Exhibit G, BSN 1085, compared to Exhibit 23. If Mendieta's use in the Trout Creek area was similar to O'Keefe's, then Mendieta only used 480 acres in Section 24 and 240 acres in Section 25, T.5S., R.6W., B.M. Exhibit Y, BSN 2008 and 2012. None of the water rights at issue designate POUs in Section 25, T.5S., R.6W., B.M. If Mendieta used 480 acres in Section 24, that use would probably be limited to the southern most three-quarters of Section 24 nearest the base ranch on Trout Creek. That area contains exactly 480 acres of public land and only 6 POUs described in 55-10297. See Exhibit 21.

In 1949, Mendieta acquired the remaining 80 acres of the Mills homestead along with a grazing preference for 20 cattle in the Trout Creek Allotment (Cow Creek Allotment). The trial record indicates that Mendieta was eventually authorized to use forage and water on public lands throughout the Cow Creek Allotment and the South Mountain Allotment.⁴⁹ See Exhibit C. However, Mendieta's BLM authorized use of public lands did not result in a valid appropriation of any of the water rights at issue. 43 U.S.C. § 315b; Lemmon, 519 P.2d at 1171.

⁴⁹ In 1956, Mendieta, by agreement with other users of the Trout Creek Allotment, apparently acquired the exclusive use of a portion of the Trout Creek Allotment. Exhibit E. In 1965, the Cow Creek Unit was subdivided into pastures pursuant to Grazing Advisory Board Recommendation. Exhibit F. The areas of the Cow Creek Unit now used exclusively by LU pursuant to BLM grazing permits issued under a grazing preference attached to the Mills homestead, and other commensurate dependent ranch land, is designated by the BLM as Cow Creek Pasture #05622 and Cow Creek Pasture #05623. Exhibit 22.

10. Maher

In 1946, Maher⁴⁷ acquired the Ewings homestead from Foster. Foster's grazing preference was attached to the Ewings homestead. As demonstrated above, Foster's livestock did not use public lands described as POUs in 55-10303, and Foster did not use water for domestic purposes on public lands described as POUs in 55-13451. See Exhibit M, BSN 3850 (Foster Allotment).

In 1953, through a grazing advisory board adjudication, Maher obtained a grazing preference in the Cliffs Allotment, that was attached to the Ewings homestead. Until the grazing preference was adjudicated, neither Foster nor Maher had ever customarily used land and water within the Cliffs Allotment described as POUs in the water rights at issue. The Ewings homestead was not even a base ranch for livestock using the POUs described in 55-10303 until 1953. Therefore, Maher's use of the Cliffs Allotment did not result in a valid appropriation of water on public lands. 43 U.S.C. § 315b; Lemmon, 519 P.2d at 1171.

11. McKay

In 1955, McKay acquired the Ewings homestead from Maher, and acquired Maher's grazing preference that was attached to the Ewings homestead. See Exhibit M, BSN 3850-3852. McKay's livestock used the Cliffs Allotment in common with other stock growers pursuant to

⁴⁷Maher's grazing preference for 149 animal units months in the Cliffs Allotment that was attached to a lease of State land, was lost until 1953 when Jeff Anderson assigned the State lease back to Maher. Exhibit M, BSN 3851.

permits issued by the BLM under authority of the Taylor Grazing Act. Exhibit M, BSN 3855. Like Maher, McKay's BLM authorized grazing use of the Cliff's Allotment did not result in a valid appropriation of water on public lands. 43 U.S.C. § 315b; Lemmon, 519 P.2d at 1171.

12. Lowry

In 1965, Lowry acquired the Duncan homestead and the Mills homestead. Mendieta's grazing preferences for use of the South Mountain and Cow Creek Allotments were attached to the land conveyed to Lowry. Lowry testified that his livestock used the water sources at issue located in the South Mountain and Cow Creek Allotment, and that he intended to acquire the water rights from Mendieta as an appurtenance to the ranch property. Because Mendieta did not have stock watering rights that designate public lands as POUs to convey to Lowry, Lowry could not have acquired the stock watering rights located in the South Mountain and Cow Creek Allotments from Mendieta. Memorandum Decision, p. 15 ("The landowner cannot convey something he/she does not own."). Lowry's grazing use in the South Mountain and Cow Creek Allotments was pursuant to Taylor Grazing Act permits, therefore Lowry did not appropriate any of the water rights at issue. 43 U.S.C. § 315b; Lemmon, 519 P.2d at 1171.

13. Conclusion

In sum, LU did not prove that any predecessor to the water rights at issue intended to divert water to a beneficial use. LU's predecessors lacked a possessory interest in the land designated as places of use, and, at most, grazed their livestock on the open unenclosed public grazing commons along side livestock owned by other users of the federal grazing commons

which fails to satisfy the test of a valid appropriation of livestock water.^{48/} After 1934, LU's predecessors used public lands for livestock grazing under grazing permits issued by the BLM under authority of the Taylor Grazing, which cannot result in a vested water right that designates public lands as places of use. Therefore, none of LU's predecessors owned vested water rights that could be conveyed to LU.

D. If water rights were perfected by LU's predecessors, there is no evidence that the water rights were conveyed to LU

1. Introduction

There is no document in the trial record that conveys any water rights that designate public lands as POUs to anyone in LU's chain of title to ranch land. Exhibit I (Deposition of Tim Lowry), p. 20, ln. 19 through p. 22, ln. 7. If water rights were perfected on public lands, then the law, as correctly applied to the facts, leads to the conclusion that LU's earliest priority date for water rights that designate POUs on public lands is the date LU first used public lands for livestock grazing.^{49/} Therefore, the Special Master erroneously recommended an 1876 priority date based upon the intention of William Lowry to transfer the water rights to LU by deed in 1976. SMRR, p. 8. The Special Master also erroneously tacked LU's water use back to presumed water use by Mills on public land in 1876. SMRR, p. 10.

^{48/} There has never been a requirement to obtain a water right for in-stream watering of livestock. See e.g., IDAHO CODE § 42-113(1) ("A permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock."). Thus, in-stream watering of livestock without a water right on public lands or private lands is not, and has never been, an illegal use of water.

^{49/} September 23, 1976 for water rights in the Cow Creek Allotment and the South Mountain Allotment, and June 28, 1984 for water rights in the Cliffs Allotment.

2. Water rights were not conveyed as appurtenances to grazing preferences

The District Court theorized that LU's water rights could have been transferred as appurtenances to grazing preferences that were conveyed in writing. Memorandum Decision, pp. 19-20. The District Court suggested that silence as to the putative transfer of water rights could be overcome by evidence of the grantor's intent.⁵⁰ Id. at 23. As demonstrated above, there is no evidence that LU's predecessors to grazing preferences ever owned the water rights at issue. Thus, LU's predecessors could not have conveyed the water rights to successors in interest to grazing preferences under any circumstances. Moreover, there is no evidence that LU's predecessors intended to transfer the water rights as an appurtenance to grazing preferences.

The evidence demonstrated that LU's predecessors did not have water rights on the public lands to which the grazing preference could be, or were, attached. The evidence demonstrated that the grazing preferences were never attached to water rights, but were instead attached to land base property. Accordingly, the water rights could not be conveyed as appurtenances to grazing preferences.

3. If water rights were perfected, they are independent water rights not appurtenant to land

When the above-captioned subcases were remanded for trial, the District Court adopted a principle stated by Kinney in his seminal water rights treatise:

⁵⁰ The BLM grants grazing preferences and the BLM must approve transfers of grazing preferences. See 43 U.S.C. § 315b and 43 C.F.R. §§ 4110.2 - 4110.2-3 (1999). Thus, the AUMs represented by grazing preferences, and the grazing preferences themselves, belong to the United States, not the permittee. When base property is conveyed to another, filing an application for transfer of a grazing preference attached to the base property is essential for a property to continue to be qualified as a base property.

“A water right used in connection with a certain tract of land for the irrigation thereof, where necessary to the beneficial enjoyment of the land, together with the ditch, canal or other works necessary to conduct the water to the places of use, become appurtenances to the land, provided that they are all owned by the same parties. But they must be the property of the owner of the land to which it is claimed they are appurtenant, and not the property of another.” Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1011 (2nd Ed. 1912).

Memorandum Decision, p. 15 (emphasis added). The Idaho Supreme Court recognized that same principle:

Water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator. . . . [A] water right is not necessarily appurtenant to the land on which it is used and may be separated from it, and this is the general rule.

First Security Bank of Blackfoot, 291 P. at 1066. Thus, a water right that designates POUs on land owned by another, results in an independent water right not appurtenant to land because there is no unity of title between the water right and the land designated as POUs. *Id.* at 16 (“[a]rguably, non-unity of title effectuates a severance of any alleged appurtenancy relationship.”).

Regardless of the District Court’s directions, the Special Master recommended an 1876 priority date for water rights supposedly owned by LU, but designating land owned by another as places of use, and there is no evidence that those independent water rights were ever conveyed to LU. The Special Master must have reached that erroneous conclusion because he presumed that the water rights at issue were conveyed as an appurtenance to the ranch land acquired by LU. The Special Master undoubtedly erred because there is no unity of title between the water right, supposedly owned by LU, and the public lands designated as places of use in the water rights at issue. Thus, there is no “appurtenancy relationship” between the water rights, the public lands

designated as POUs, or LU's ranch land. See Memorandum Decision, p. 16. Accordingly, the water rights that designate public lands as places of use could not be conveyed to LU through a chain of title to LU's ranch land because there is no unity of title between the water rights and the land designated as places of use.

4. The evidence does not support the finding that grantors intended to convey the water rights at issue

The District Court required the Special Master to examine the grantor's intent to determine if any water rights were conveyed. Memorandum Decision, pp. 16, 21, 22, 23, and 24. William Lowry conveyed privately owned ranch property to LU on September 23, 1976. Lowry was, and continues to be, the President of LU. Exhibit 2, pp. 345-347; T. Tr., p. 301; Exhibit 1, p. 4 (Deposition of Tim Lowry, p. 4, ln. 17). Lowry, 25 years after the ranch land conveyance, testified that he intended to convey the water rights at issue from himself to a corporation that he owns and operates. T. Tr., p. 296. Lowry's self-serving testimony should not be entitled to deference or weight, and should not have been relied upon as conclusive proof of a grantor's intent to convey the water rights at issue. District of Columbia v. Murphy, 314 U.S. 441, 446 (1941) (testimony regarding intention can be considered, "but is subject to the infirmity of any self-serving declaration," and may not be persuasive or can be contradicted by other declarations and inconsistent acts); cf. Malcom v. Hanmer, 127 P.2d 331, 337 (Idaho 1942) (acts or declarations that are self-serving, or in the interest of the parties making them, are generally not admissible).

William Lowry's statement is also inconsistent with the Warranty Deed where William A. Lowry and Nita Lowry conveyed ranch land to LU Ranching Company, which is the best

evidence of the grantor's intent in 1976. Exhibit 2, p. 15. The deed has no clause that conveys appurtenances. The deed has no description of water rights whatsoever. The deed is unambiguous and conveys only ranch land. If the water rights on public land were as important to the livestock operation as Lowry would have this Court believe, then the water rights with POUs designated on land not owned by Lowry should have been described in a deed that conveyed the water rights to LU, as required by Idaho law. Gard, 123 P. at 502.

There is no extrinsic evidence of the intent of grantors of ranch land conveyances regarding the transfer of the water rights at issue. The Lowry/LU Warranty Deed conveys only ranch property. Exhibit 2, p. 15. The McKay/LU Warranty Deed conveys ranch property and specifically described water rights, contains a clause that conveys unnamed appurtenances, and purports to convey "1,635 AUM's, Federal Grazing Permits" which were not McKays to convey.^{51/} Exhibit 2, p. 26. Neither the Lowry/LU deed nor the McKay/LU deed describe any water rights that designate land owned by another as POUs. Indeed, there is no evidence that any of the grantors in LU's chain of title, except William Lowry through his own self-serving testimony, intended to convey any of the water rights at issue.

Without any written conveyance of the water rights whatsoever, LU cannot now improve its priority date over all other water users by "tacking" its use of water sources back to the date of earlier water uses by unknown stock growers who allowed their livestock to roam at large on public land in common with livestock owned by other stock growers:

^{51/} "The regional grazer is vested with authority, in his discretion and in the light of all facts and circumstances, to issue or refuse to issue a grazing license. . . ." 43 C.F.R. § 501.9 (1938); see 43 C.F.R. § 4110.2-3 (1999).

The great weight of authority upon this subject throughout the Western States now holds that a parol or verbal sale of a water right, accompanied by actual possession and use for some beneficial purpose, is valid as between the parties to such an agreement. But, in such a case it is further held that the grantee does not acquire the grantor's priority, but that he acquires a new right as an appropriator by actual diversion, dating only from the date of the transfer and such actual possession, which is, in effect, the same as though the grantee had upon that date consummated the appropriation himself.

2 C. KINNEY, IRRIGATION AND WATER RIGHTS § 999; see § 997; see § 787; see McGinness, 55 P. at 1021-1022.

Even though Lowry testified that he intended to transfer the water rights to LU, the earliest possible priority date that LU could establish for water rights located on public land in the South Mountain and Cow Creek Allotments would be the date Lowry could first use water on public land. Similarly, the earliest priority date that LU could establish for the water rights located on the Cliffs Allotments would be the date LU could first use water on public land. According to the most recent deeds in LU's chain of title, ranch land was conveyed to LU on September 23, 1976 and June 28, 1984. In this case, the unambiguous warranty deeds conveying ranch land are the best evidence of the grantors' intent.^{52/} There is no deed or other document that purports to convey any water rights that describe land owned by another as POUs, as required by Idaho law. Gard, 123 P. at 502 ("a water right is real estate, and any interest therein

^{52/} Daugharty v. Post Falls Highway Dist, 9 P.3d 534, 538 (Idaho 2000) (when construing an instrument that conveys an interest in land, courts seek to give effect to the intent of the parties to the transaction; the intent of the parties is determined by viewing the conveyance instrument as a whole); City of Kellogg v. Mission Mtn. Interests Ltd., Co., 16 P.3d 915, 919-920 (Idaho 2000) (interpretation of an unambiguous deed is a question of law to be settled by its plain language; ambiguity exists only if the language of the conveyance instrument is subject to conflicting interpretations). Here, the language in the deeds is not ambiguous. The intent of the grantors was to convey ranch land.

is an interest in real estate, if [LU's predecessors] secured a water right . . . [they] could not transfer it to another, except by a written conveyance, such as would convey the title to real estate."). There is no evidence, except the self-serving testimony of William Lowry, that the grantors in LU's chain of title intended to convey the water rights at issue. McGinness, 55 P. at 1021-1022.⁵³ Thus, the Special Master erred when he concluded that LU was entitled to a priority date that pre-dates LU's first use of the water sources at issue. Therefore, if water rights were perfected, then the United States respectfully requests that LU's recommended priority date be amended to not earlier than September 23, 1976 for water rights with places of use in the South Mountain Allotment and Cow Creek Allotment (recommendations for 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, and 55-10299B), and to June 28, 1984 for the water rights with places of use in the Cliffs Allotment (recommendations for 55-10303B and 55-13451).

E. Certain water right descriptions should be amended

1. 55-10288B

The legal description in the SMRR for 55-10288B that reads T. 07 S., R 06 W., Section 35, SENE should not be retained as a POU because it does not reside within the South Mountain Grazing Allotment. T. Tr., pp. 58-59 and 323-325; Exhibit 23. Because the POU should be deleted, the two additional points of diversion (hereinafter "POD") that describe the POU should

⁵³ "[A]ny attempt to transfer an independent water right by a mere parol or verbal contract is void as against the rights of appropriators subsequent to the inception of the right attempted to be transferred and prior to the date of the attempted transfer, although such a sale, accompanied by the actual possession and use of the right, may be good as between the parties to the agreement." 2 C. KINNEY, IRRIGATION AND WATER RIGHTS § 997 (emphasis added).

also be deleted from the SMRR. Since this POU should be deleted from the SMRR, there should be no remark that confines water use to the South Mountain Allotment.

2. 55-10289B

The source described as “Unnamed Streams” tributary to “Juniper Creek” should be deleted from the SMRR. There is no evidence that such a source exists. See Exhibit 23. If such a source did exist, LU should have designated beginning and ending points for all such sources, as required by IDWR’s instructions to claimants for completing Notices of Claim, Form No. 42-1409(2)a (“describe the location of the point of diversion to the 40-acre tract or government lot within a section. If possible, describe the point of diversion to the 10-acre tract within the section.”).

3. 55-10296

In order to properly complete the description of the PODs, two PODs should be added to the SMRR. The PODs are T.05S., R.06W., Section 14, SWSWSE and T.05S., R.06W., Section 23, NENENW. See Exhibit 22.

4. 55-10297B

The SMRR for 55-10297B should be amended to delete the source designated as “Unnamed Stream” tributary to “Jordan Creek” because the source does not exist. See Exhibit 22.

The POD designated as T.05S., R.06W., Section 13, SWSW was not claimed by LU as an in-stream place of use, and therefore should not have been designated as a POD in the SMRR. The PODs designated as T.05S., R.06W., Section 14, NENE and SENE were not claimed as

POUs in 55-10297, but were claimed as POU's in 55-10296. The SMRR for 55-10296 designates T.05S., R.06W., Section 14, NENE and SENE as POU's. These two legal descriptions are not properly claimed, reported, or recommended as PODs in 55-10297B, and should be deleted.

The POU's designated as T.05S., R.06W., Section 14, NESE and T.05S., R.06W., Section 23, SWNE should be deleted from the places of use because there is no water source within the POU's. Exhibit 21. There is no in-stream beginning or ending point designated in either legal description that would indicate the presence of an unnamed stream. The POU's are outside the Cow Creek Allotment and cannot be used by LU. Exhibit 20. Therefore, T.05S., R.06W., Section 14, NESE and T.05S., R.06W., Section 23, SWNE should be deleted from the list of POU's in 55-10297B.

5. 55-10303B

The SMRR for 55-10303B should be amended so that the source reads "Unnamed Stream" tributary to "Corral Creek." Exhibit 23 shows only one beginning point and one ending point for an unnamed stream tributary to Corral Creek. LU did not claim any other beginning points or ending points that indicate there is another water source that could be an unnamed stream tributary to Corral Creek.

The SMRR for 55-10303B should be amended to delete T.09S., R.05W., Section 33, NWNW as a POU. Exhibit 23 shows that the claimed source does not run through the described tract, therefore, livestock cannot use water within that tract of land.

Furthermore, T.09S., R.04W., Section 18, Lot 3 (SWNESE) should be deleted as a POD.

The tract of land described lies outside of the Cliffs Allotment.

V. CONCLUSION.

For all of the above-stated reasons, the Special Master's findings of fact are clearly erroneous and should be set aside. Furthermore, the Special Master's conclusions of law incorrectly apply legal principals to the trial evidence and should be set aside. Based upon the evidence in the trial record, the United States' respectfully requests that the District Court determine that there is no evidence that anyone in LU's chain of title to the water rights at issue satisfied the test of a valid appropriation of in-stream livestock water or water for domestic purposes. Thus, for the above-stated reasons, the United States' respectfully requests that the water rights at issue be decreed with priority dates reflecting the date LU first used the water sources located within each grazing allotment. The priority dates should be not earlier than September 23, 1976 for stock water rights with POUs in the South Mountain Allotment and Cow Creek Allotment (55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, and 55-10299B) , and June 28, 1984 for the water rights with POUs in the Cliffs Allotment (55-10303B and 55-13451).

The United States established valid livestock watering rights with a June 28, 1934 priority date which describe public land POUs in the same place as the water rights at issue here. If LU's stock water claims are valid, they would describe the same public land POUs as the United States' stock water rights. Thus, LU and the United States would have water rights with identical POUs, and the water would be used for the same beneficial purpose, *i.e.*, providing water to

permitted domestic livestock. Idaho statutes provide that water shall not be allocated “in excess of the amount actually used for beneficial purposes for which such right is claimed” IDAHO CODE § 42-1402. Because there are water rights owned by two separate claimants that allocate water for consumption by the same domestic livestock, LU’s rights would have to be limited so that water would not be allocated “in excess of the amount actually used” Id.

VI. RELATED CASES.

Special Master Report and Recommendation, In Re SRBA, Case No. 39576, Subcase Numbers, 55-10135, 55-11061, 55-11385, and 55-12452 holding that BLM proved a valid appropriation of water for in-stream watering of Taylor Grazing Act permittees’ livestock watering, and a Taylor Grazing Act permittee failed to prove a valid appropriation water for in-stream watering of livestock.

DATED this 29th day of July, 2004.

Respectfully submitted,

UNITED STATES OF AMERICA

A handwritten signature in black ink, appearing to read "Larry A. Brown", is written over a horizontal line.

Larry A. Brown

Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on July 29, 2004, that I served a true and correct copy of foregoing **UNITED STATES' MEMORANDUM IN SUPPORT OF THE UNITED STATES' CHALLENGE OF THE SPECIAL MASTER'S ORDER ON MOTION TO ALTER OR AMEND; SUBCASES 55-10288B ET AL.** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

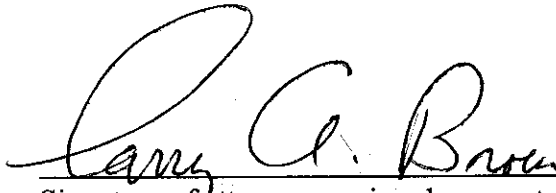
U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Mr. Roger D. Ling
Attorney at Law
Ling, Robinson, & Walker
P.O. Box 396
Rupert, ID 83350

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

Mr. Michael J. Van Zandt
Ms. Elizabeth P. Ewens
Attorneys at Law
McQuaid, Metzler, Bedford & Van Zandt, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105



Signature of attorney serving document

1. South Mountain Allotment
Tracking Duncan Homestead
Patent Date Dec. 9, 1914

Attachment 1

T.9S., R.5W., Section 11, SENW, NESW, SWSW, and SESW, 160 acres of land

2. Cow Creek Allotment
Tracking Mills Homestead
Patent Date Sep. 7, 1887

T.5S., R.6W.,
 Section 25,
 SWNW, SENW,

T.5S., R.6W.,
 Section 26, SWNE,
 SENE,

↓
 TO
 Shea - Staples - Shea
 ↓
 TO
 Shea - Kellogg - Flora

↓
 TO
 O'Keefe
 Jan. 30, 1933
 Trout Creek Ranch
 ↓
 TO
 Fretwell
 Oct. 25, 1937

↓
 TO
 Mendieta
 Aug. 4, 1941
 ↓
 TO
 Mendieta
 Sep. 6, 1949

↓
 William and Nita Lowry
 Dec. 13, 1965

↓
 TO
 LU
 Oct. 1 1976 (Duncan/Mills Homestead)
 June 28, 1984 (Ewings Homestead)

↓
 TO
 Patrick O'Keefe
 July 14, 1928
 Cabin Creek Ranch

↓
 TO
 Mendieta
 Oct. 14, 1941

5. Cliffs Allotment
Tracking Ewings Homestead
Patent Date Jul. 26, 1910

T.9S., R.5W., Section 9, W 1/2 NE 1/4, SENW, and NESW,

↓
 TO
 Clyde C. Foster
 Jul. 16, 1912
 Clyde Foster Ranch

↓
 TO
 Frank & Louise Maher
 Apr. 22, 1946

↓
 TO
 Donald J. & Elisabeth McKay
 Jan. 24, 1955

ATTACHMENT 1, MEMORANDUM IN SUPPORT OF THE UNITED STATES' CHALLENGE OF THE
 SPECIAL MASTER'S ORDER ON MOTION TO ALTER OR AMEND; SUBCASES 55-10288B ET AL.

Attachment 2

Historic Reference

Trout Creek Allotment

Individual S. Mtn Allotment/Unit (aka 800 acre allotment)

Cliffs Cattle Allotment (aka Cliffs Grazing Allotment)

Foster Allotment

Pole Creek Unit

Current Reference

Portion of today's Cow Creek Pasture #05622 and/or Cow Creek Pasture #05621 within Cow Creek Allotment.

Portion of today's S. Mtn Area Pasture #05611 within the S. Mtn Allotment

Portion of today's Cliffs Pasture #05012 and/or Cliffs Pasture #05013 within Cliffs Allotment

Portion of today's Northern arm of Cliffs Pasture # 05012 of Cliffs Allotment. Portions of Sec 3,4,5,10, and 11 T.9S., R.5W.

Five Miles away from Cliffs Allotment; E1/2 W1/2 T.9S., T.3W., not shown on Map Exhibits.

ATTACHMENT 2, MEMORANDUM IN SUPPORT OF THE UNITED STATES' CHALLENGE OF THE SPECIAL MASTER'S ORDER ON MOTION TO ALTER OR AMEND; SUBCASES 55-10288B ET AL.