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MICHAEL J. VAN ZANDT
CRAIG A. PRIDGEN
ELIZABETH P. EWENS
ANTHONY L. FRANCOIS
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, California 94105
Telephone: (415) 905-0200
Facsimile: (415) 905-0202

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1438
1023 Arthur Street
Caldwell, Idaho 83605
Telephone: (208) 459-1588
Facsimile: (208) 459-1300

Attorneys for Joyce Livestock Company

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

In Re SRBA	)	Subcase Numbers 55-10135, 55-11061
	)	55-11385, and 55-12452
Case No. 39576	)	
	)	JOYCE LIVESTOCK COMPANY'S
	)	MOTION IN LIMINE TO EXCLUDE
	)	EVIDENCE IDENTIFIED BY THE
	)	UNITED STATES BUREAU OF LAND
	)	MANAGEMENT [I.R.E. RULE 402]
	)	

JOYCE LIVESTOCK COMPANY'S MOTION
IN LIMINE TO EXCLUDE EVIDENCE IDENTIFIED
BY THE UNITED STATES BUREAU OF LAND MANAGEMENT

I. INTRODUCTION

Joyce Livestock Company (subcase no. 55-10135) requests that the Court exclude from evidence at the time of trial in the above-captioned subcases (U.S. claims) all documentary evidence and related testimony which supports or tends to support the legal position asserted by the United States that it owns and has acquired a stockwater right on the allotments which are the subject matter of this litigation on any basis other than: (1) the United States' ownership of livestock, which appropriated and beneficially used the water right on the allotments; (2) as a result of an express agency relationship between the United States and Joyce Livestock and/or its predecessors in interest; or (3) as the result of a conveyance of said stockwater rights from the party that actually appropriated the water and put that water to a beneficial use for stock watering purposes. Specifically, the United States has advanced a theory that it is an "appropriator" of stockwater rights because the United States gives permission to all those who operate on the public domain and because Congress passes laws regulating water sources (*see* United States' Memorandum in Opposition to Joyce Livestock Co.'s Motion for Summary Judgment). Additionally, the United States alleges that it should be considered as the appropriator of the water right as a result of its ability to acquire a permit or a license under I.C. § 42-501; or, in the alternative, that it has acquired a stockwater right to its ability to regulate and manage the public range land. These arguments are in direct conflict with Idaho law, the Idaho Constitution, and other decisions previously rendered in the SRBA, including, but not limited to, the Order Denying Motion to Alter or Amend (Amended Order on States' Motion for Summary Judgment) in Subcase No. 72-15929C (April 15, 1998), the Order Denying Challenges and Adopting

Special Master's Reports and Recommendations in Subcase No. 72-15929C by Presiding Judge Daniel C. Hurlbutt, Jr. (September 30, 1998), the Order on Motion to Alter or Amend Order on Summary Judgment; and the Order on Motion to Withdraw Admissions (subcase 57-04028B, March 25, 1999) at 11-12. In the September 30, 1998 ruling, the court adopted and incorporated by reference the decisions of the Special Master of March 25, 1997 and April 15, 1998. These recent decisions are "the law of the case."

Special Master Haemmerle and subsequently, Judge Hurlbutt, rejected the United States' theories that the United States became an "appropriator" of stockwater rights because of its operation and management of the public domain. Specifically the court adopted the Special Master's conclusion that:

- (a) "[i]f true, then all water rights on the public domain would belong to the United States irrespective of the relationship between the United States and the party that actually appropriated the water. For stockwater rights claimed under state law, the United States is no different than any landowner and, as such, must perfect a water right through an agent or the water rights must be conveyed from the party that actually appropriated the water to the United States. Order Denying Motion to Alter or Amend, subcase 72-15929C, April 15, 1998, p. 3.

State law governs all water rights located within the State of Idaho, other than reserved water rights. *See*: I.C. § 42-101, and § 42-104. Absent a claim of a reserved water right, all water rights within the boundaries of this state are subject to appropriation. If there are a number of appropriations made from a single source, those appropriations are administered "first in time, first in line." Idaho Constitution, Article XV, § 3.

Further, the United States' theory that it acquires a water right without ownership of

livestock, without appropriation and beneficial use, and without the establishment of an acquisition by purchase or an agency agreement with the original appropriator is inconsistent with congressional enactments specifically recognizing a private party's ability to perfect water rights located on public land. *See*: The Mining Act of 1866, Act of July 26, 1866, ch. 262, § 9, 14 stat. 251, 253 (codified at 30 U.S.C.A. § 51 (1986)), the Act of 1870, Act of July 9, 1870, ch. 235 § 17, 16 stat. 217, 218 (codified at 30 U.S.C.A. § 52); the Desert Land Act of 1877, Act of March 3, 1877, ch. 107 § 1, 19 stat. 377 (codified at 43 U.S.C.A. § 321); and the Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, § 1, 48 stat. 1269 (codified at 43 U.S.C.A. § 315). The United States' theory would override well established legal precedent whereby water located on the public domain is separated from the land ownership and the water located on the public domain, absent reserved rights, is open for appropriation by private individuals.

The United States claims that the 1998 ruling of Special Master Haemmerle, as specifically adopted by Judge Hurlbutt in his order denying challenges, etc. in subcase no. 72-15929C, are mere "dicta" is contradicted by the express language contained in those rulings; and, as importantly, reflect what is in fact the law of the State of Idaho based upon constitutional, statutory and case law. In his order denying motion to alter or amend, Special Master Haemmerle stated the issue raised by the United States as follows:

"The United States argues that its ownership to stockwater rights does not depend on an agency relationship with the actual appropriator and that its ownership and resulting priority date arise out of its authority to manage the federal land." *Id.*, p. 1.

Citing Idaho statutory law, Special Master Haemmerle noted that "[T]he court notes that

the legislative intent of I.C. § 42-114 is to place ownership of stockwater rights on the association or persons owning or operating cattle and not with the land management agency. 'This bill will place the beneficial use clearly with the consumption and the ownership of the cattle and not with the land management agency.' Minutes of House Resource and Conservation Committee (Idaho, February 17, 1986), cited OAG 86-6." Idaho Code § 42-501 does state that the United States "may" be an appropriator of water for stockwater rights; however, that section requires that the United States apply for and obtain a permit and license and certificate of water right appropriation from the State of Idaho. The United States has not acquired such a permit or certification in these cases. Finally, Special Master Haemmerle went on to make a specific ruling and legal finding with respect to this issue when he stated that "the court finds that the United States is not the appropriator of water based solely on the fact that it issues permits and that Congress regulates access to water resources." *Id.*, p. 11. It is respectfully submitted that that specific ruling was incorporated by Judge Hurlbutt in his Order Denying Challenges, etc. of September 30, 1998.

II. THE UNITED STATES HAS ADMITTED THAT IT DOES NOT OWN LIVESTOCK WITH RESPECT TO JOYCE LIVESTOCK'S GRAZING ALLOTMENTS, IS NOT THE AGENT OF JOYCE LIVESTOCK, AND ASSERTS ITS WATER RIGHT OWNERSHIP NOT AS THE RESULT OF A PURCHASE OR ACQUISITION BUT AS A RESULT OF ITS OWNERSHIP OF THE LAND

Joyce Livestock propounded requests for admissions and interrogatories on the United States in subcase numbers 55-11061, 55-11385, and 55-12452, to which the United States responded. The United States responded to requests for admissions and interrogatories therein as follows:

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Request for Admission No. 2: Admit that the United States does [sic] claim the water rights asserted herein on the basis that it owns any of the livestock that actually drank the water under the stockwater right claimed herein.

After objecting to the fact that the request was vague and confusing, the United States denied the request but indicated that “[T]he above-captioned water right claims are not based upon the United States’ ownership of livestock.”

Request for Admission No. 3: Admit that those who owned the livestock which actually drank water under the stockwater rights claimed herein were not agents of the United States.

After objecting, the United States’ response was that “[T]he United States lacks sufficient information to admit or deny, and therefore denies this request for admission; except the United States admits that Joyce Livestock Co., Ltd., is not a general agent of the United States for any purpose.” The United States went on in its response to assert there may be an implied agency relationship under state law.

Request for Admission No. 5: Admit that the United States’s [sic] claim to the stockwater right claimed herein is not based upon any claim that the United States has acquired said right as a successor in interest to the original appropriator.

The United States responded by stating “[T]he United States lacks sufficient information to admit or deny, and therefore denies this request for admission; except the United States admits that it is the original and sole appropriator of the above-captioned water right claims. *See* Response to Interrogatory No. 1.” As noted below, the response to Interrogatory No. 1 deals specifically with the claim of the United States that it has acquired the stockwater rights herein not by appropriation, not through an agency agreement and not by purchase or adverse possession

but solely as a result of its ability to regulate the public land under the Taylor Grazing Act.

Interrogatory No. 1 propounded on the United States asked the United States to state all facts on which the United States bases its claim to water rights asserted herein. The response was as follows:

[T]he United States is the owner of the lands where points of diversion and places of use described in the above-captioned water right claims are located. Pursuant to the Taylor Grazing Act, the United States issues permits to qualified individuals to use the United States' property for the purpose of livestock grazing. The United States receives an economic benefit from the use of the United States' property for the purpose of livestock grazing. The United States controls the number of livestock, the places of livestock use, livestock access to grazing land and water sources, the development of water sources, the subletting of grazing permits, the assignment of grazing permits, the sale of grazing permits, and the season of use. The United States has the only right to exclude and/or introduce other users of forage and water sources, and has the sole right to prosecute trespassers."

It is respectfully submitted that the sole basis of the United States' stockwater claims set forth in the subcases being litigated herein which seek to perfect a stockwater right in and to the allotments which have historically been beneficially used by Joyce Livestock and its predecessors, including homesteaders and patentees, beginning in the late 1800s, is not supported in law or fact. In-stream flows of water, which are the sole subject matter of the within subcases, are regulated by state law. The water in those streams is owned by the State of Idaho, and not the United States. It is unequivocally the law of this case, as evidenced by the decisions of the Special Master and Judge Hurlbutt above-referenced, that the United States cannot own and does not own a stockwater right as a result of its regulatory powers over the grazing rights on public domain. The undersigned recognizes that this court has addressed this issue in its order denying

Joyce Livestock's motion for summary judgment dated July 23, 2002. The undersigned, however, respectfully disagrees with the analysis that the rulings by Special Master Haemmerle, as approved and incorporated by Judge Hurlbutt, are "dicta." This Court will recall the State of Idaho has stipulated that the United States could acquire a stockwater right with a priority date of June 28, 1934. That was not an adjudication that the United States acquired a stockwater right as a result of their administrative powers to implement regulations promulgated by Congress with respect to grazing allotments. The April 15, 1998 order in subcase 72-15929C reads, in full, as follows: "In this case, as a matter of fact and law, the State has elected not to contest the basis of the United States' right to stockwater claims after passage of the Taylor Grazing Act of 1934. Therefore, the Court finds that the United States has a priority date of this right dated June 26, 1934." Order Denying Motion to Alter or Amend (Amended Order on States' Motion for Summary Judgment, April 15, 1998). The only reason that the United States was awarded a 1934 priority date was because the State conceded that date, and the only reason the State conceded that date was because it was the State's position that since the United States did not actually own stock, the United States can own a stockwater right only provided the United States entered into an agency relationship with the party that actually appropriated the water and the federal government did not have the authority to enter into such an agency relationship until after the passage of the Taylor Grazing Act. *Id* at p. 1. The District Court went on to specifically hold that:

"If the party claiming ownership of the water right is not the same party that actually appropriated the water, the only way the non-appropriating party can legitimately claim the right is through an agency theory or by showing that the

right was conveyed from the party that actually appropriated the water right.”

Order Denying Challenges and Adopting Special Master’s Reports and Recommendations (September 30, 1998).

In the present case, the United States has not alleged that it is the appropriator of water and it has not alleged an agency theory. Therefore, as a matter of law, because it has not alleged a valid basis for its claims, the United States’ claims must fail.

III. POINTS AND AUTHORITIES

A. Idaho Rules of Evidence, Rule 402, provides as follows:

“All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.” (Adopted January 8, 1985, effective July 1, 1985.)

The U.S. can produce evidence that it owns cattle, but it *cannot* introduce or rely on evidence of its management and ownership of land to support a beneficial use water right. The evidence outlined in detail below which the United States has identified as exhibits, together with accompanying and allegedly supporting testimony by its witnesses, is not relevant to these proceedings in that as a matter of law, the United States is precluded from asserting and attempting to establish that it has acquired a stockwater right merely as the result of its authorization to manage public lands pursuant to regulations promulgated under the Taylor Grazing Act. The only relevant evidence and testimony is whether or not the United States Bureau of Land Management can establish that it has itself appropriated and beneficially used the stockwater right on the allotment which is the subject matter of this litigation. The United States does not own livestock by its own admission and accordingly could not have appropriated water

and put it to a beneficial use under State law. The United States admits that it is not a principal in an agency agreement with Joyce Livestock and/or its predecessors in interest. The United States cannot establish that it has purchased or otherwise acquired by adverse possession, condemnation or otherwise the stockwater rights which have historically been used by Joyce Livestock and its predecessors in interest since long before the enactment of the Taylor Grazing Act in 1934. The fact that the State of Idaho has stipulated that the United States “may acquire” a stockwater right with a priority date of 1934 for purposes of a stipulated judgment in the SRBA is not binding on Joyce Livestock. Likewise, the fact that the United States can acquire a stockwater right in Idaho by complying with the relevant statutes which would allow it to apply for and obtain a permit for a water right have no bearing under the facts and circumstances of these cases. Specifically, the United States is asserting that it has the stockwater rights claimed in its subcases as a result of its ability to regulate and manage the range being occupied by Joyce Livestock and its predecessors. Accordingly, all evidence offered by the United States, either documentary or by way of percipient witness testimony, must be excluded.

Under the recent memorandum of decision and order on challenge; and, order of partial decree (*Wood v. Troutt*), Judge Burdick, in SRBA subcase no. 65-05663B (May 9, 2002), specifically addressed the doctrine of “law of the case” as established in Idaho and with respect to which Special Masters are bound in SRBA litigation (*see* memorandum decision, *supra*, p. 8). In part, Judge Burdick made the following observations:

“The reason for applying law of the case as between special masters and the SRBA District Court is even more compelling. Special masters do not possess authority independent from the jurisdiction of the District Court. (Citation

omitted) Special masters are appointed for a limited purpose pursuant to an order of reference issued by the District Court . . . ultimately, the District Court is charged with the specific duty of reviewing a special master's conclusions of law. Therefore, it is not within the purview of the authority conferred upon a special master to 'reconsider' the prior legal rulings of the District Court. Further, much of the benefit realized through the use of special masters is undermined if the District Court has to repeatedly set aside a special master's conclusions of law for failing to follow the legal principle already set forth by the District Court."

Accordingly, and with all due respect to this Court's prior ruling with respect to the motion for summary judgment submitted by Joyce Livestock, the "law of the case" as articulated in Special Master Haemmerle's ruling of April 15, 1998 and specifically adopted and incorporated by reference by Judge Hurlbutt dated September 30, 1998, in the order denying challenges and adopting Special Master's reports and recommendations (*supra*), it is the law of the case with respect to whether or not the United States can acquire a stockwater right merely as a result of its authority to regulate the public domain with respect to livestock grazing.

IV. EVIDENCE TO BE EXCLUDED

Joyce Livestock respectfully requests that the Court exclude from evidence at the time of trial the following exhibits or any portion thereof which the United States alleges supports or tends to support the legal theory that it has acquired a stockwater right as the result of its ownership and management of the land. Specifically, under Idaho state law, a stockwater right may be obtained only by actual appropriation and beneficial use by the individual or entity claiming to own the stockwater right. Specifically, under the doctrine of the "law of the case," the United States has been determined not to be the appropriator of water based solely on the fact that it issues permits and that Congress regulates access to the water sources. If the United States

is not the actual appropriator of the water right, it must perfect the water right through an appropriator under an agency theory (*see: First Security Bank of Blackfoot v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930)) or the right must be conveyed to the United States from a party who actually perfected the right; or, in the alternative, the record must reflect that the United States acquired the right by adverse possession. Absent evidence that the United States owns livestock, which it denied in its response to requests for admissions, the only evidence that is admissible is to establish one or more of the legal bases through which the United States can acquire a stockwater right articulated above. To the extent that the evidence outlined below is offered for any other purpose, it is irrelevant and inadmissible, and should be excluded.

The evidence which should be excluded is as follows:

Exhibit 2, Public Land Statistics 2000;

Exhibit 9, BLM Manual 4180 (Range Land Health Standards);

Exhibit 10, Range Land Health Standards Handbook – 4180-1);

Exhibit 11, Idaho Standards for Rangeland Health and Guidelines for Livestock Grazing Management – Final;

Exhibit 12, BLM Instruction Memorandum ID-99-055 plus attachments;

Exhibit 13, BLM Instruction Memorandum 99-039;

Exhibit 14, BLM Instruction Memorandum, 99-023;

Exhibit 15, BLM Instruction Memorandum, ID-98-077 plus attachments;

Exhibit 17, Affidavit of David R. Tuthill, Jr. and IRE 706 report for subcase numbers 57-10587, 57-10598, and 57-10770;

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Exhibit 22, History of Joyce Livestock Co.'s Grazing Preference in the Silver City
Grazing Allotment – prepared by Michael J. Boltz;

Exhibit 88, Forest Service Report of Public Domain as a land resource.

Additionally, this Court is respectfully requested to enter an order excluding percipient witness testimony with respect to whether or not a particular witness has formulated an opinion that the United States has or may acquire a stockwater right as a result of its ownership of the public domain which is the subject matter of grazing permits or otherwise as a result of its regulatory and congressionally mandated authority to regulate grazing activities on the public domain, including but not limited to its authority to regulate the number of livestock that can be grazed, the location of the grazing of the livestock, the time of year and period of time within which the livestock may graze on public domain, issues as to whether or not the United States receives an economic benefit from the use of United States property for purpose of livestock grazing, and livestock access to grazing lands and water sources, together with the development of those water sources and the season of use, and, as a result of any of these activities or similar activities regulated, permitted or authorized by the United States. Further, all of the witnesses designated by the United States have been designated as percipient lay witnesses. The United States has not designated expert witnesses and any attempt by any of the named witnesses to testify with respect to matters requiring expert testimony should be excluded unless the witness can be qualified as an expert under Rule 702. The designated witnesses by the United States are Frederick W. Price, Dr. Gary A. Madenford, Ronald W. Kay, Michael J. Boltz, and Robert B. Mallis.

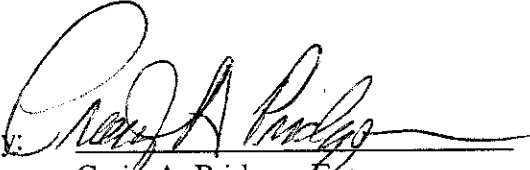
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Finally, Joyce Livestock reserves the right to object during the course of trial to any evidence offered by the United States which is objectionable on the grounds and based upon the authority cited hereinabove.

DATED: November 13, 2002

Respectfully submitted,

McQUAID, METZLER, BEDFORD
& VAN ZANDT LLP

By: 
Craig A. Pridgen, Esq.

LAW OFFICES OF RICHARD L. HARRIS

DATED: November __, 2002

By: _____

Richard L. Harris, Esq.
Attorneys for Joyce Livestock
Company

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing instrument was served on the following this 12 day of November, 2002 by first class mail, postage prepaid.

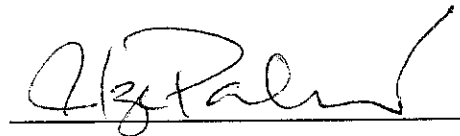
U.S.D.I. Bureau of Land Management
Idaho State Office
1387 S. Vinnell Way
Boise, ID 83709

State of Idaho
Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

Larry A. Brown, Esq.
United States Department of Justice
General Litigation Section
Environment and Natural Resources
Division
P.O. Box 663
Washington, DC 20044-0663

A handwritten signature in dark ink, appearing to read 'Ilze Palms', is written over a horizontal line.

Ilze Palms