

RECEIVED

OCT 01 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

Case No. 39576

) 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
)
) **UNITED STATES' MEMORANDUM**
) **IN REPLY TO LU RANCHING**
) **COMPANY, INC.'S MEMORANDUM**
) **IN OPPOSITION TO THE UNITED**
) **STATES' CHALLENGE OF THE**
) **SPECIAL MASTER'S ORDER ON**
) **MOTION TO ALTER OR AMEND**

--

--

--

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii-v
I. INTRODUCTION	2
II. ARGUMENT	2-24
A. Standard of Review	2-4
B. LU's Statements Of Fact Are Not Supported By The Trial Evidence	4-10
C. Contrary To LU's Arguments, The Special Master Failed To Correctly Apply Idaho Law To The Evidence In The Trial Record	10-23
1. Hage v. United States	11-12
2. Steptoe Live Stock Co. v. Gulley	12-14
3. Hunter v. United States	14-16
4. District Court's Order Denying Challenges and Adopting Special Master's Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B and 72-15929C	16-17
5. Clear Springs Foods, Inc. v. Clear Lakes Trout Company	18-19
6. District Court's Memorandum Decision and Order on Challenge, Subcases 55-10288	19-23
D. Federal Law Recognizes Water Rights That Have Vested And Accrued Under State Water Law	23-24
III. CONCLUSION	25

TABLE OF AUTHORITIES

I. CASES

A. Federal

<u>District of Columbia v. Murphy</u> , 314 U.S. 441 (1941)	20
<u>Hage v. United States</u> , 42 Fed.Cl. 249 (1998)	12
<u>Hage v. United States</u> , 51 Fed.Cl. 570 (2002)	11-12
<u>Hegler v. Borg</u> , 50 F.3d 1472, (9th Cir.), <u>cert. denied</u> , 516 U.S. 1029 (1995)	17
<u>Hunter v. United States</u> , 388 F.2d 148 (9th Cir. 1967)	14-15,17,24
<u>Public Lands Council v. Babbitt</u> , 529 U.S. 728 (2000)	8
<u>U.S. v. S. Volpe & Co.</u> , 359 F.2d 132 (1st Cir. 1966)	3
<u>Locklin v. Day-Glo Color Corp.</u> , 429 F.2d 873 (7th Cir. 1970), <u>cert. denied</u> , 400 U.S. 1020 (1971)	3
<u>United States v. Schmutz</u> , 56 F.2d 269 (D. Utah 1932)	24

B. State

<u>Adams v. Portage Irrigation, Reservoir & Power Co.</u> , 72 P.2d 648 (Utah 1937)	10
<u>Branson v. Miracle</u> , 729 P.2d 408 (Ct. App. 1986)	22
<u>Clear Springs Foods, Inc. v. Clear Lakes Trout Company</u> , 40 P.3d 119 (Idaho 2002)	18
<u>Crow v. Carlson</u> , 690 P.2d 916 (Idaho, 1984)	18
<u>First Security Bank of Blackfoot v. State</u> , 291 P. 1064 (Idaho 1930)	21-22
<u>Gard v. Thompson</u> , 123 P. 497 (Idaho 1912)	23
<u>Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.</u> , 619 P.2d 1130 (Idaho 1980)	11
<u>Kaiser Co. v. Reid</u> , 184 P.2d 879 (Cal. 1947)	22

<u>Lemmon v. Hardy</u> , 519 P.2d 1168 (Idaho 1974)	18
<u>Steptoe Live Stock Co. v. Gulley</u> , 295 P. 772 (Nev. 1931)	12-14,17
<u>Malcom v. Hanmer</u> , 127 P.2d 331 (Idaho 1942)	20
<u>McGinness v. Stanfield</u> , 55 P. 1020 (Idaho 1898)	21,23
<u>Olson v. Idaho Department of Water Resources</u> , 666 P.2d 188 (Idaho 1983)	23
<u>Robinson v. Schoenfeld</u> , 218 P. 1041 (Utah 1923)	10,13-16
<u>Sun Valley Ranches, Inc. v. Prairie Power Co-op, Inc.</u> , 856 P.2d 1292 (Idaho Ct.App. 1993)	16-17
<u>Sunol, et al. v. Hepburn, et al.</u> , 1 Cal. 254 (Cal. 1850)	19

C. SRBA District Court and Special Master Cases

Memorandum, Decision and Order on Challenge; and Order of Partial Decree (Wood v. Troutt), <u>In Re SRBA</u> , Case No. 39576, Subcase 66-05663B	2-4,10
District Court's Order Denying Challenges and Adopting Special Master's Reports and Recommendations, <u>In Re SRBA</u> , Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10598B, 57-10770B and 72-15929C	16-17
District Court's 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.	19-22

II. STATUTES

A. Federal

43 U.S.C. §315b	8,23
43 U.S.C. § 661	23

B. State

IDAHO CODE § 9-503	23
IDAHO CODE § 9-505	23

III. FEDERAL REGULATIONS

43 C.F.R. § 4100.0-5	8
43 C.F.R. § 4110.2-3	8
43 C.F.R. § 4130-8.1(c)	5

IV. CONSTITUTIONS

IDAHO CONST., art. XV, § 3	18
----------------------------------	----

V. TREATISES

25 Am. Jur.2d Easements & Licenses § 137 (1966)	22
2 C. KINNEY, KINNEY ON IRRIGATION AND WATER RIGHTS § 999 (2 nd Ed. 1912)	
§ 787	23
§ 997	21,23
§ 999	23

§ 1011	21
LEWIS, IDAHO TRIAL HANDBOOK § 35.14 (1995)	3

VI. RESTATEMENTS OF THE LAW

RESTATEMENT OF PROPERTY (FIRST) § 7 (1936)	19
--	----

VII. RULES OF CIVIL PROCEDURE

IDAHO R. CIV. P. 52(a)	3
IDAHO R. CIV. P. 53(e)(2)	3

VIII. SRBA ADMINISTRATIVE ORDER 1

ADMINISTRATIVE ORDER 1, 13.(f)	3
--------------------------------------	---

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	)
	) UNITED STATES' MEMORANDUM
	) IN REPLY TO LU RANCHING
	) COMPANY, INC.'S MEMORANDUM
	) IN OPPOSITION TO THE UNITED
	) STATES' CHALLENGE OF THE
	) SPECIAL MASTER'S ORDER ON
	) MOTION TO ALTER OR AMEND

I. INTRODUCTION

On August 30, 2004, LU Ranching Company (hereinafter "LU") filed a Memorandum in Opposition to United States' Challenge of the Special Master's Order on Motion to Alter or Amend, In Re SRBA, Case 39576, Subcases 55-10288B, et al. (hereinafter "LU's Memo"). This Memorandum is a reply to LU's representations of fact and LU's arguments in opposition of the United States' challenge of the Special Master's order denying the United States' Motion to Alter or Amend the 1876 priority date erroneously awarded in the Reports and Recommendations filed in the above-captioned subcases.

II. ARGUMENT

A. Standard of Review

LU infers that the Snake River Basin Adjudication District Court (hereinafter "District Court") is bound by the Special Master's erroneous conclusions of law simply because a special master evaluates witness credibility and draws inferences from testimony and documents. LU's Memo, pp. 1-2. The standard of review of a special master's findings of fact and conclusions of law is less restrictive than LU would have the District Court believe. See 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.

In reviewing a special master's findings of fact, the District Court must review the entire trial record and determine whether the findings of fact "are supported by substantial, although perhaps conflicting, evidence." Troutt, p. 6. The District Court should "not consider and weigh the evidence *de novo*" (Troutt, p. 6), but should set aside findings of fact as clearly erroneous if

they are “without adequate evidentiary support or [were] induced by an erroneous view of the law.” Troutt, p. 6; Idaho R. Civ. P. 53(e)(2) (court may “adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions[.]” however, clearly erroneous findings of fact should be set aside); see Administrative Order 1, 13.(f).

In this case, the United States is “entitled to an actual review and examination of all of the evidence in the record . . . to determine whether the findings of fact are clearly erroneous.” Troutt, p. 6 (citing Locklin v. Day-Glo Color Corp., 429 F.2d 873, 876 (7th Cir. 1970), cert. denied, 400 U.S. 1020 (1971)). The District Court only owes “due regard” to the Special Master’s inferences regarding the credibility of the witnesses and inferences from documentary evidence. Troutt, p. 7 (citing Idaho R. Civ. P. 52(a), U.S. v. S. Volpe & Co., 359 F.2d 132, 134 (1st Cir. 1966), and Lewis, Idaho Trial Handbook, § 35.14 (1995)).

In the United States’ Memorandum in Support of the United States’ Challenge of the Special Master’s Order on Motion to Alter or Amend filed in this case (hereinafter “U.S. Memorandum”), the United States has met its burden of showing error in the Special Master’s findings of fact. See Troutt, p. 7. Even though the facts in the trial record are reviewed in the light most favorable to LU, the thorough review of those facts presented in the U.S. Memorandum, pp. 11-27 and 30-52, demonstrates that the Special Master’s findings of fact are not supported by substantial evidence, are without adequate evidentiary support, and/or were induced by an erroneous view of Idaho law. See Troutt, p. 7.

Moreover, the Special Master's conclusions of law are freely reviewable and are not binding upon this Court. Troutt, p. 7. The United States, in the U.S. Memorandum, pp. 3-6 and 30-49, demonstrated that the Special Master's conclusions of law are unpersuasive and incorrectly state the law. See Troutt, p. 7. Thus, the District Court should set aside the Special Master's findings of fact because they are not supported by competent and substantial evidence, and should set aside the Special Master's conclusions of law for failure to apply correct legal principles to the facts in the trial record. Troutt, p. 8.

B. LU's Statements Of Fact Are Not Supported By The Trial Evidence

LU states that its predecessors were "using open federal land and appropriating water to a beneficial use, stockwatering, in the areas at issue since at least 1876." LU's Memo, p. 2. This statement is unsupported by the trial record. There is no evidence that shows LU's pre-1943 predecessors satisfied Idaho's test of a valid appropriation on the public land designated by LU as places of use (hereinafter "POU") in the water right claims at issue here. U.S. Memorandum, pp. 30-43. In fact, there is no evidence in the trial record that Ezra Mills, Warren Duncan, or George Ewings, the original homesteaders LU identified as being the first users of the water claimed in the above-captioned water right claims, were stockgrowers who depended upon public land for forage and water.

LU relies upon Exhibit X and Chad Gibson's testimony to substantiate that "original appropriations are traced back to LU Ranching's original predecessor in interest, Ezra Mills[,] and "Mr. Mills, as well as the other original patent holders, used both their patented lands and surrounding unoccupied public lands and water thereon to support the homesteads and their

cattle.” LU’s Memo, p. 2. Neither Exhibit X, nor Gibson’s testimony, support those statements because there is simply no evidence that Mills, Duncan, or Ewings were stockgrowers who depended upon public lands for water and forage. Given the complete lack of evidence of how Mills, Duncan, and Ewings supported their homesteads, it is just as likely that the homesteads were used as cropped farm land or dairies, and not for livestock ranching. Moreover, Gibson did not testify, and had no personal knowledge, that Mills, Duncan, or Ewings were stockgrowers who depended upon public land for water and forage.

Gibson’s unsupported statement that “a 160 acre homestead site was sufficient only to support one cow and one calf for a period of one year[,]” (LU’s Memo, p. 3), grossly understates the capability of Owyhee County to produce livestock forage. If Gibson’s statement were true, then it would have taken 20,800,000 acres to support the “100,000 head of cattle and 150,000 sheep”^{1/2} that Gibson said were within Owyhee County “at the end of the 1880s[.]” LU’s Memo, p. 3. Since Owyhee County contains less than 5,000,000 acres, including cropped farm land and the Duck Valley Indian Reservation, Gibson’s testimony is clearly wrong and is, at best, misleading. See www.idoc.state.id.us/statistic (County Profiles).

LU relies on Thomas Skinner’s testimony to support the statement that “original patent holders were engaged in the livestock industry” LU’s Memo, p. 3. LU states that from 1926 onward, “Skinner was an eye witness to and obtained personal knowledge regarding the ranching operations of LU Ranching’s predecessors” LU’s Memo, p. 4. In 1926, Mills and

^{1/2} Five sheep is the equivalent of one cow. See 43 C.F.R. § 4130-8.1(c). Therefore 100,000 head of cattle and 150,000 head of sheep equals 130,000 animal units. 130,000 animal units X 160 acres/animal unit = 20,800,000 acres.

Ewings, two of the original patent holders were long gone. See Exhibit 2, p. 222 (Mills conveyed to Jere Shea in 1892); Exhibit 2, p. 329 (Ewings conveyed to Foster in 1912). Furthermore, it is highly unlikely that Skinner had any knowledge of Duncan's business because Owyhee County took possession of Duncan's homestead in 1923. Exhibit 2, p. 115 (the judgement and decree of foreclosure was "rendered and entered . . ." on July 24, 1923). Mr. Skinner's familiarity with grazing in Idaho is limited to what he saw as he "drove by." Trial Transcript (hereinafter T. Tr.) at 489. His family's ranching operations were located in Oregon, not Idaho. T. Tr. at 516-517. Skinner was absent from the area for many years. T. Tr. at 458-464, 471-475. Indeed, the majority of Skinner's testimony was based upon hearsay, speculation, and generality, and not based upon personal knowledge. See T. Tr. at 482-524. Furthermore, Skinner's testimony does not support LU's representation that "original patent holders were engaged in the livestock industry[.]" LU's Memo, p. 3, because Skinner's testimony shows no personal knowledge of the O'Keefe, McKay, Shea, Medieta, Mills, Stanford, Staples, and Lowry livestock operations.

LU states that the grazing records in Trial Exhibits A, C, D, E, F, G, H, I, M, P, S, and V, as well as Gibson's testimony, support "the conclusion that the water at issue herein was used for livestock purposes by LU Ranching's predecessors" LU's Memo, pp. 4. Contrary to LU's representation, the careful review of the grazing records presented in the U.S. Memorandum, pp. 11-27, leads to the logical conclusion that the first evidence that any of LU's predecessors used any of the water located on the places of use at issue here was Galo Mendieta's 1943 ten-year grazing permit, and that permit is evidence that Mendieta's livestock, more likely than not, used

the water sources located within only three public land POUs designated in 55-10292B and only one public land POU designated in 55-10290B. See U.S. Memorandum, p. 20 n.30 (citing Exhibit G, BSN 1085). Moreover, Gibson incorrectly inferred that Exhibit M, BSN 3850-3852 was evidence that Foster, Maher, and McKay, LU's predecessors in the Cliffs Allotment, had livestock that used the Cliffs Allotment for water and forage. T. Tr. pp. 371-379. That this testimony is flawed is shown in Exhibit 5 where Foster said his prior use was in the Pole Creek Unit (see Exhibit 6, p. 10), about 5 miles from the nearest POU in the Cliffs Allotment; in Exhibit M, BSN 3850, showing that Maher's and McKay's use of the "Foster Allotment" and the "Shea Allotment" was not on any of the public land POUs within the Cliffs Allotment where 55-10303's POUs (see Exhibit 23) are located; and, Exhibit M, BSN 3855 showing that McKay received a preference for grazing use within the Cliffs Allotment in 1962 by BLM Adjudication, and not because there was any prior use of the Cliffs Allotment by any of McKay's predecessors. Therefore Gibson's knowledge of grazing adjudications, grazing records, and BLM grazing regulations was general and incomplete, and resulted in flawed testimony that is unsupported by the documents admitted into the trial record. See T. Tr. 368-389.

LU states that its "predecessors in interests (sic) acquired and transferred grazing permits concurrently with the transfer of the base ranch properties, which evidences an intent to transfer the ranch and the ranching operations as a whole, including rights to forage and water rights on the allotments." LU's Memo, p. 5. LU, as the possessor of grazing permits issued by the BLM to use public lands for livestock grazing, misapprehends the entire concept of public land grazing authorized under the provisions of the Taylor Grazing Act. The Supreme Court stated that

grazing privileges on public lands are a “leasehold” and that the Taylor Grazing Act “made the Secretary the landlord of the public range and basically made the grant of grazing privileges discretionary.” Public Lands Council v. Babbitt, 529 U.S. 728, 735 (2000). A “grazing preference” is determined by the BLM and attached to base property; in LU’s case, ranch land base property, not water rights. See 43 C.F.R. § 4100.0-5. Obviously, LU and LU’s predecessors never established or defended any stockwatering rights on public land because a grazing preference was never attached to water “base property.” See 43 C.F.R. § 4100.0-5. Transfers of grazing permits must, in all cases, be approved by the BLM. See 43 C.F.R. § 4110.2-3. Furthermore, “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. Therefore, the evidence is that buyers (grantees) of ranch property intended to gain access to public land for the purpose of livestock grazing through grazing permits issued by the BLM by, in all cases, filing an application for transfer of the grazing preference in accordance with BLM’s grazing regulations, after acquiring the base property. There is no evidence in the trial record that LU’s predecessors intended to convey water rights that designate public land as POUs to successors in interest.

LU also states that deeds in the chain of title, the lack of water right reservations in those deeds, and the grazing records “supports the conclusion that the stockwater rights acquired by LU Ranching’s predecessors in interest were transferred as appurtenances with the base ranch properties.” LU’s Memo, p. 5. As shown in the U.S. Memorandum, pp. 30-43, there is no evidence that LU’s predecessors satisfied the test of a valid appropriation from any of the water

sources located within the POUs designated in any of the water rights at issue here. Indeed, when specifically asked if they owned or controlled water sources needed or used for a livestock operation on public land, not one of LU's predecessors said they owned any water rights on public land. See e.g., Exhibit 5, p. 3 (Foster), Exhibit 17, p. 3 (O'Keefe), Exhibit 18 p. 2 (O'Keefe). As late as 1984, LU did not identify one water right as being dependent base property for a grazing preference on public lands. See Exhibit 3, p. 1. Thus, even if the law allowed a water right located on land owned by someone other than the water right claimant to become appurtenant to the water right claimant's property (which, as shown in the U.S. Memorandum, pp. 44-46, it does not), there is no evidence that LU's predecessors owned any water rights that designate POUs on public land that could have been, or were, conveyed as appurtenances to base ranch properties.

LU states that their ranch property "would have little or no economic value without the water rights at issue because the water rights were necessary to support the livestock or ranching operation as a whole." LU's Memo, p. 6. This statement fails to comport with LU's own documentary evidence. LU's Exhibit BBB indicates that grazing permits, which provide legal access to forage and water on public land, constitute a value to privately owned ranch properties with grazing preferences. Exhibit BBB, pp. 35-36. Grazing preferences, if they were attached to water base property, would presumably provide additional value to water rights. Here, water rights were never established, never defended, and never offered as base property. Therefore, the economic value in LU's ranch is in the land base property and the attached grazing preference, not the water right claims at issue here.

LU states that the Special Master's findings of fact support the June 10, 1876 priority date awarded in the Special Master's Reports and Recommendations. LU's Memo, p. 6. However, as shown above, and as thoroughly demonstrated in the U.S. Memorandum, pp. 30-49, neither LU's representations, nor the Special Master's findings of fact, are supported by the trial record. Because the Special Master's findings of fact are unsupported by the trial record, they are clearly erroneous and should be set aside. Troutt, pp. 5-7.

C. Contrary To LU's Arguments, The Special Master Failed To
Correctly Apply Idaho Law To The Evidence In The Trial Record

LU argues that the Special Master correctly concluded that mere use of water in common with others on the open federal grazing commons resulted in LU's predecessors capturing stockwater to their use, thereby satisfying the test of a valid appropriation. LU's Memo, pp. 6-9. However, there is insufficient evidence to support the Special Master's conclusion that LU's predecessors established stockwater rights in the sources claimed which entitled LU to an 1876 priority date. The evidence is, that all those stockgrowers who were using public lands designated as POUs in the water right claims at issue for livestock grazing were watering their animals from the same sources. No one defended a water right. No one defended their own use of public land. Therefore, the water sources were still public waters available to everyone to "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). Thus, LU failed to

provide evidence sufficient to show that their predecessors intended to divert water to a beneficial use. Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 619 P.2d 1130, 1132-1133 (Idaho 1980).

LU attempts to salvage their claims by contending that because LU's predecessors allegedly watered livestock directly from the source, the stockgrowers manifested their intent to divert water to a beneficial use, and such water rights were then conveyed through a chain of title to LU as appurtenances to ranch property used as "base ranches" for livestock dependent upon public land for water and forage. LU's Memo, pp. 7-11. As shown in the U.S. Memorandum, pp. 33-48, neither Idaho law, nor the principles of prior appropriation, support LU's arguments or the Special Master's conclusions. As demonstrated below, the judicial precedent relied upon by LU does not support their contentions.

1. Hage v. United States

LU cites Hage v. United States, 51 Fed.Cl. 570 (2002) in support of their contention that mere use of water in common with other stockgrowers on public land established water rights, and those rights were conveyed to LU as appurtenances to privately owned ranch property. LU's Memo, p. 7. Hage is a takings case being litigated in the Federal Court of Claims and, as such, relates to whether there has been a taking of a property interest, and if so, what just compensation must be paid by the United States for that taking. Hage does not deal directly with the issue in this case, namely whether the claimant's predecessors in interest intended to appropriate water rights, whether those water rights were conveyed to the claimant, and whether there is sufficient evidence in the record to establish the claimant's priority date.

In the Southern Monitor Valley Adjudication litigation referenced in Hage as the “State Engineer’s report on the Southern Monitor Valley,” Hage, 51 Fed.Cl. at 578 (quoting Hage v. United States, 42 Fed.Cl. 249, 250 (1998) (rescinded 51 Fed.Cl. at 573 (“except as explicitly reaffirmed herein.”)), the Nevada State Engineer determined that Hage, as a grantee to the base ranch, had acquired water rights as an appurtenance.

Here, the United States is challenging the Special Master’s findings of fact and conclusions of law. The Special Master’s findings of fact are not supported by the trial evidence, Idaho law, or the principles of prior appropriation. Therefore, this case is easily distinguished from the facts considered by the Federal Claims Court in Southern Monitor Valley, and the Hage case is irrelevant here. Furthermore, the Hage, case is still being contested in the Court of Federal Claims. See Hage, 51 Fed.Cl. at 592 (“next and final stage” is a trial “to finally resolve this case.”). Thus, Hage is not yet settled law, much less controlling or even persuasive in the Snake River Basin Adjudication.

2. Stepcoe Live Stock Co. v. Gulley

LU cites “Stepcoe” (sic) Live Stock Co. v. Gulley, 295 P. 772 (Nev. 1931) in support of their contention that the mere turning out of livestock upon public land containing streams is a valid appropriation of stockwater. LU’s Memo, p. 7. Stepcoe Live Stock Co. does not support this contention.

In Stepcoe Live Stock Co., the Nevada Supreme Court held that a physical diversion device was not required in order for a claimant to appropriate a stockwater right. This case is not on point because the holding addresses the diversion element of stockwater rights. However,

even if it were on point, the Nevada Supreme Court's opinion in Steptoe Live Stock Co. would support the United States contentions here.

The facts, as found by the court, were:

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

Steptoe Live Stock Co., 295 P. at 773 (emphasis added). The Nevada Supreme Court declined to follow the Utah Supreme Court decision in Robinson, 218 P. at 1042-1043 (holding that the claimant was not entitled to a water right because the claimant merely allowed livestock to roam at large on unenclosed public land using grass and water in common with other stockgrowers' livestock). The Nevada Supreme Court observed that the facts in Robinson "failed to show an exclusive right in plaintiff to the use of the waters in question and the public range thereabouts. Such are not the facts in this case." Steptoe Live Stock Co., 295 P. at 775. The Nevada Supreme Court suggested in dicta that they would follow the holding in Robinson where, as here, the "proof failed to show an exclusive right" to use the water and the public range adjacent to the water source. Steptoe Live Stock Co., 295 P. at 775.

The evidence in this case shows that if LU's predecessors were stockgrowers, those predecessors used water and public range in common with multiple stockgrowers. Thus,

according to the trial evidence, LU's predecessors were, for decades, in direct competition with other stockgrowers who used the same public land for forage and water. The logical conclusion is that no one in LU's chain of title acquired a stockwatering right because the water was equally shared by all grazers with access to public land. LU's arguments, and the Special Master's conclusions, are not in accord with Robinson, 218 P. at 1042-1043, and not in accord with the Nevada Supreme Court's dicta because the evidence here fails to show "an exclusive right in plaintiff to the use of the waters in question and the public range thereabouts." Steptoe Live Stock Co., 295 P. at 775.

3. Hunter v. United States

LU cites Hunter v. United States, 388 F.2d 148 (9th Cir. 1967) in support of their contention that LU's predecessors established water rights be merely turning out livestock on public lands. LU's Memo, pp. 7 and 9. Hunter does not support LU's contention. The pertinent conclusions of law and findings of fact, as stated by the Hunter Court, are as follows:

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

In this case there is no lack of proof of the asserted appropriation; to the contrary, a clearer showing could hardly be imagined. The Hunters' intent to use the water is made plain by the evidence. Year after year for nearly a century they have pastured their livestock in this isolated enclave, surrounded by miles of impassable desert; except for the water provided by these springs and the stream, there has been none other available to keep their animals alive.

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

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

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

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

The Hunter Court's findings of fact are similar to the findings of fact in the Steptoe Live Stock Co. case, and are clearly different from the trial evidence in LU's case.

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

The facts in LU's case are most similar to the findings of fact in Robinson, 218 P. at 1042-1043. There, as here, the plaintiff's livestock used the public range and water sources on the public range in common with other stockgrowers, and the plaintiff had never defended an exclusive right to the public range or the water located on the public range. The Utah Supreme

Court held that the plaintiff's proof "did not show such appropriation or use of the waters of the springs as would authorize the trial court to decree to plaintiffs the use of the waters against defendant." *Id.* at 1043. As in Robinson, LU's proof also failed to show any intent to appropriate water for their predecessors' use. Therefore, in this case, the Special Master incorrectly allowed an 1876 priority date for LU's water right claims. SMRR, p. 10.

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

LU argues that the District Court's Order Denying Challenges and Adopting Special Master's Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B and 72-15929C [hereinafter "Court's Order"], dated September 30, 1998, p. 3, is law of the case that holds private ranchers are entitled to a water right on public land simply because predecessors used public land for livestock pasturage. LU's Memo, p. 12. The Court's Order is not law of the case that should be followed here because it does not address the specific issues argued by the United States, i.e., LU's predecessors did not acquire a stockwater right because there was no evidence that LU's predecessors intended to appropriate the claimed water, then convey the resulting water rights to successors.² Sun Valley Ranches, Inc. v. Prairie Power Co-op, Inc., 856 P.2d 1292 (Idaho

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

Ct.App. 1993) (Order is not applicable to subcases where the issues are different than those decided by the District Court and Order is not applicable to subcases where the facts are substantially different); see Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir.), cert. denied, 516 U.S. 1029 (1995).

In this case, LU rebutted its own claims. The documentary evidence shows that multiple stockgrowers grazed livestock along the sources now claimed by LU for decades in direct competition with each other. LU's evidence of intent to appropriate a stockwatering right "failed to show an exclusive right in plaintiff to the use of the waters in question and of the public range thereabouts." Steptoe Live Stock Co., 295 P. at 775. The trial evidence in LU's case shows that no one in LU's chain of title acquired such water rights because the water was shared by all stockgrowers who wished to use the same public land for livestock pasturage. The issues here are not the same as those addressed in the Court's Order. Therefore, the Court's Order is not law of the case that should be applied to this case.

specifically recognizing a private party's ability to perfect water rights located on the public domain . . . , override established legal precedent . . . , [and] foreclose any ownership of stock water rights located on the public domain." Court's Order, pp. 3-4.

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

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

LU cites Clear Springs Foods, Inc. v. Clear Lakes Trout Company, 40 P.3d 119 (Idaho 2002) in support of its contention that there can be multiple appropriations of stockwater from a common point of diversion and place of use. LU's Memo, p. 13. In Clear Springs Foods, the Idaho Supreme Court agreed with the SRBA District Court's findings of fact that each party was essentially diverting water from the same source, not separate sources. There is no such issue in this case. Even so, LU cites Clear Springs Foods to bolster its argument that multiple parties could hold water rights in a common water source. See LU's Memo, p. 12-13. The United States agrees that there can be multiple appropriations from the same water source, and the "[p]riority of appropriations shall give the better right as between those using the water" . . . as between appropriators, first in time is first in right." Crow v. Carlson, 690 P.2d 916, 920 (Idaho 1984) (quoting IDAHO CONST. Art. 15 § 3). However, here, no one recognized or defended water rights, which is evidence that no one in LU's chain of title acquired stockwatering and/or domestic water rights. Clear Springs Foods has nothing at all to do with whether or not a stockgrower manifested an intent to divert water to a beneficial purpose, and if water rights were established, whether those rights were conveyed to successors.

Furthermore, the Clear Springs Foods case is distinguishable because each party used water in separate fish hatchery facilities where each claimant retained a possessory interest in their own place of use. See Lemmon v. Hardy, 519 P.2d 1168, 1171 (Idaho 1974) (claimant must

have a possessory interest^{3/} in the land designated as a place of use). In contrast, LU's predecessors were using public land and water located on public land in common with many other stockgrowers, none of whom recognized or defended an exclusive use of the grazing land or the stockwater at any particular place of water use. Clear Springs Foods has no relation to the facts in LU's trial record or to the Special Master's conclusions of law in the LU case and provides no useful precedent for consideration by the District Court.

6. District Court's Memorandum Decision and Order on Challenge, Subcases 55-10288

LU cites the District Court's 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"), as law of the case in the SRBA that a stockwater right can pass as an appurtenance to the base ranch property if that was the intent of the grantor. LU's Memo, pp. 9-11, 14-15. The Memorandum Decision does not support LU's contention. The District Court stated that "the question of whether any water rights, perfected by LU's predecessors-in-interest, have become appurtenant to any particular property interest which has been conveyed to LU, is an issue of fact to be ascertained from the instruments of conveyance and the circumstances surrounding each conveyance." Memorandum Decision, pp. 13-14 (footnote omitted). Therefore it is not law of the case that water rights that have places of use designated on real property not owned by the water right claimant are necessarily appurtenant to the claimant's own

^{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 FIRST OF THE LAW OF PROPERTY § 7 (1936). Cf. Sunol, et al. v. Hepburn, et al., 1 Cal. 254, 262 (1850).

privately owned ranch property. It is only an issue of fact to be determined by the Special Master.

In its remand order, the District Court required LU “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. LU argues that they presented sufficient evidence to meet this burden through the testimony of William Lowry, Tim Lowry, Chad Gibson, and Thomas Skinner. LU argues that the testimony shows the intent of the grantors in the mesne conveyances of LU’s chain of title to its privately owned ranch land to transfer water rights located on public land to successors in interest. LU’s Memo, pp. 8-9. On the contrary, none of the testimony is evidence of acts by LU’s predecessors that could possibly make the water rights at issue appurtenant to LU’s privately owned ranch land. Mr. William Lowry⁴, the only witness with personal knowledge, did testify that he intended to transfer the water rights at issue to LU as an appurtenance to ranch base property. See T. Tr., p. 296.

However, Mr. Lowry’s testimony is self-serving and inconsistent with a warranty deed that does not even mention water rights. See District of Columbia v. Murphy, 314 U.S. 441, 456 (1941) (testimony regarding intention can be considered, but is subject to the “infirmity of any self-serving declaration,” and may not be persuasive or can be contradicted by other declarations and inconsistent acts); cf. Malcom v. Hanmer, 127 P.2d 331, 337 (Idaho 1942) (acts or declarations

⁴ Mr. William Lowry was the only “grantor” to testify. He had personal knowledge, as the grantor, of only one real property conveyance in LU’s entire chain of title. Gibson, Skinner, and Tim Lowry were not grantors in any property conveyance. Indeed, Gibson and Skinner had no personal knowledge of any of the conveyances in LU’s chain of title.

that are self-serving, or in the interest of the parties making them, are generally not admissible). Thus, the evidence fails to show that “each conveyance” in LU’s chain of title “carried with it a grant of the subject water rights.” Memorandum Decision, p. 26 (emphasis added).

Furthermore, the District Court specifically recognized that 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, 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). 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);³ Memorandum Decision, p. 16 (“[a]rguably, non-unity of title effectuates a severance of any alleged appurtenancy relationship.”). Here, there is no unity of title between the public land designated as POUs and the water rights claimed by LU. Therefore, the Memorandum Decision

³“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. “[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).

is not law of the case that supports LU's contention that water rights designating public land as POUs were conveyed to LU as appurtenances to its privately owned ranch land.

LU compares the unity of title requirement "to a riparian water right theory, based on the principle that those who own the land, own the water." LU's Memo, p. 14. LU's criticism of the United States' unity of title argument, and the District Court's recognition of the unity of title requirement, is unfounded. First Security Bank of Blackfoot, 291 P. at 1066, states that a water right may be separated from the land on which it is used, and the water right belongs to the person who actually intended to divert irrigation water to a beneficial use, not the landowner who did nothing but lease his lands to another.⁹ Such water rights do not become appurtenant to real property owned by the water right owner, but may then be conveyed to another and transferred for use on another parcel of land where, if there is unity of title between the land where the water is used and the water right, it may become appurtenant to the land. Thus, it logically follows that "non-unity of title effectuates a severance of any alleged appurtenancy relationship."

Memorandum Decision, p. 16 (emphasis added).

LU's water rights, if any such water rights were established, lack unity of title with the land designated as places of use and, therefore, have to be independent water rights that must be

⁹ A bona fide lease creates the necessary possessory interest in land sufficient to satisfy the test of a valid appropriation of water, whereas a license to use land, such as the implied license to graze livestock on the public lands and a license to use public lands for grazing pursuant to permits issued under the Taylor Grazing Act, do not result in such possessory interest. See 25 AM. JUR. 2D *Easements & Licenses* § 137 (1966); see Kaiser Co. v. Reid, 184 P.2d 879, 884 (Cal. 1947); see Branson v. Miracle, 729 P.2d 408, 411 (Idaho Ct. App. 1986) ("While acting pursuant to permission the claimant's rights are in the form of a license. Unless the licensor is estopped, a license is revocable at will. No interest in property vests in the licensee.").

conveyed 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). If there is no written conveyance that describes independent water rights “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, then LU’s predecessors “could not transfer [them] to another” Gard v. Thompson, 123 P. 497, 502 (Idaho 1912). Because there is no evidence of a written conveyance of the water rights at issue, LU will have to be satisfied with a priority date “dating only from the date of the transfer and such actual possession, which is, in effect, the same as though [LU,] 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.

D. Federal Law Recognizes Water Rights That Have
Vested And Accrued Under State Water Law

LU argues that the 1866 Mining Act and the Taylor Grazing Act support LU’s contentions that their predecessors appropriated water from the sources claimed. However, each federal statute cited by LU recognizes only those water rights which have vested or accrued in accordance with state water law. See 43 U.S.C. § 661 (“rights to the use of water . . . [has] vested and accrued . . . [under] local customs, law, and decisions of courts”); 43 U.S.C. § 315b (“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 . . . which has heretofore vested or accrued under existing law validly affecting the public lands”). Thus, whether LU’s predecessors satisfied the test of a valid appropriation, then conveyed the resulting water rights to successors, is neither a matter of common sense (LU’s Memo, p. 10), nor recognized as a given by federal

law, as LU argues here (LU's Memo, 16-17). The fact is, that LU failed to carry its burden of proving that its predecessors satisfied Idaho's test of a valid appropriation, and then, if any water rights were established, conveyed those water rights to successors in accordance with Idaho law. The Mining Law and the Taylor Grazing Act do not beg the question of whether users of public land complied with state law. In fact, federal law recognizes that such water rights can vest or accrue on public lands only when the claimant brings himself within the purview of a statute that would allow a citizen to take lawful possession of public lands (United States v. Schmutz, 56 F.2d 269, 270 (D. Utah 1932)), or when the water right claimant is able to show a use of the public land surrounding water sources tantamount to a possessory interest in the land designated as places of use (Hunter, 388 F.2d at 153). The federal statutes cited by LU do not recognize that such rights did vest or accrue under existing law for those using water on federal land.

Therefore, federal law does not support LU's contentions

III. CONCLUSION

For the above-stated reasons, and for the reasons stated in the U.S. Memorandum, the District Court should grant the United States' challenge and issue partial decrees to LU 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 in-stream livestock watering rights with POU's 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 in-stream livestock watering right and the domestic water right with POU's in the Cliffs Allotment (55-10303B and 55-13451).

DATED this 24th day of September, 2004.

Respectfully submitted,

UNITED STATES OF AMERICA

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

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on Sep 24, 2004, that I served a true and correct copy of foregoing **UNITED STATES' MEMORANDUM IN REPLY TO LU RANCHING COMPANY, INC.'S MEMORANDUM IN OPPOSITION TO 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:

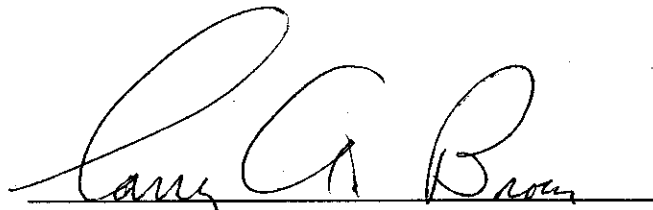
U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

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