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IN THE DISTRICT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcases 55-10135 (Joyce Livestock), 55-
	)	11061, 55-11385 and 55-12452 (U.S.D.I. -
Case No. 39576	)	BLM)
	)	
	)	CLOSING ARGUMENT BY JOYCE
	)	LIVESTOCK CO.

CLOSING ARGUMENT BY JOYCE LIVESTOCK CO.

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I. INTRODUCTION

The trial of the above-referenced subcase numbers began on December 3, 2002. Subcase No. 55-10135 represents the claim to a stockwater right in Jordan Creek and its tributaries in and around Silver City in Owyhee County, Idaho based upon prior appropriation and beneficial use by Joyce Livestock Co.'s predecessors in interest including, but not limited to, members of Paul Nettleton's family including Anna F. Joyce, his great-aunt, who began cattle ranching in and around Silver City in 1865 and obtained a United States patent in 1898. Between 1898 and 1935, a number of patents were issued by the United States with respect to land which had been homesteaded by the Nettleton family, the Joyce family and unrelated individuals such as John T. Shea and others, many of whom, on an annual basis, grazed their cattle in the areas surrounding Silver City generally between May and September. As part of these grazing activities, the undisputed testimony is that the cattle and other livestock owned by these early settlers drank the waters of Jordan Creek and its tributaries, which was the only source of water for the summer grazing in the allotments which are now the subject matter of this adjudication. Based upon the chain of title prepared at the joint request of the United States Bureau of Land Management ("BLM") and Joyce Livestock through mesne conveyances beginning in the late 1800s (BLM Exhibit 1); the current applicant - Joyce Livestock - has acquired all of the base property owned by the early settlers together with the water rights appurtenant thereto including, but not necessarily limited to, the water rights in Jordan Creek and its tributaries. Pursuant to administrative adjudications initiated by the United States after the enactment of the Taylor Grazing Act (43 U.S.C. § 315, et seq.) in 1934 "grazing preferences" were determined and "grazing permits" were awarded to predecessors of Joyce Livestock, including John T. Shea,

members of the Joyce and Nettleton families including, but not limited to Paul Nettleton's father and uncle based upon evidence of prior use of public land for stock grazing purposes including use of that land and the water located thereon. The undisputed testimony at trial was that the current applicant has continued the same grazing practices which existed in 1898 by the original patentees. Specifically, cattle are kept on the winter range to the east of Jordan Creek and in the general area west of Murphy, Idaho. During the spring, the cattle are moved to the "base properties" in the general vicinity of Sinker Creek and during the summer are moved to the pastures in and around Silver City and along Jordan Creek including its tributaries and headwaters.¹

Based upon recommendations made by Linda Werner during the course of a meeting held at the offices of IDWR for purposes of completing the Joyce Livestock claim, the places of use and points of diversion identified in the claim were based upon legal descriptions obtained from a map which was then available. (Trial Transcript at p. 686-688). During the course of the trial, the primary purpose of the testimony of Mr. Fred Price was to establish that the legal descriptions set forth in the claim by Joyce Livestock were in error. Specifically, there was much testimony concerning the fact that certain quarter-quarter sections described in the claim should have been more properly identified by "lot" numbers particularly in and around Silver City where there are

¹ One of the concerns expressed by the Court in the ruling denying the motion for summary judgment was whether or not Joyce Livestock was properly claiming a period of use of the stockwater appropriated from Jordan Creek as set forth in the claim of January 1 - December 31 of each year. Keeping in mind that Mr. Nettleton was assisted by an employee of IDWR with respect to filing his claim and was instructed to insert these dates, the testimony by Mr. Nettleton is that in fact stockwatering occurred in the general vicinity of Jordan Creek beginning on or about May 1 of each year (or when the snow melted) and continuing through October of each year depending upon weather conditions. (See Testimony of Paul Nettleton at pp. 688-689 and 695-696.)

several old mining claims, many of which are owned by third parties. There has also been testimony concerning the fact that there are “irregular quarter-quarter sections” which most people acknowledge occurs as a result of the curvature of the earth. While the undersigned takes exception with the testimony of Mr. Price that the legal descriptions based upon a section, township and range are not sufficiently accurate to establish the validity of a claim in this proceeding, it was agreed at the conclusion of the trial that a joint effort would be made to identify at least those portions of the legal descriptions which were in error and particularly those parcels which constitute mining claims or “lots” which are privately owned by non-parties to the case. It was ultimately agreed that after consultations by the undersigned with Mr. Price, a motion would be prepared to clarify alleged discrepancies in the legal descriptions which Mr. Brown agreed that he would not oppose. *See Transcript, pp. 749-754.* While we are somewhat dilatory with respect to completing this aspect of the case in order to clarify the record, such a motion will be filed contemporaneously with this brief. There are no other private claims being asserted in this adjudication with respect to stockwater rights from Jordan Creek and its tributaries and no objections have been filed to the Joyce Livestock claim other than by the BLM, which, by its own admission, is fully aware of all claimed points of discussion and places of use.

The BLM has filed competing claims as evidenced in Subcase Nos. 55-11061, 55-11385 and 55-12452. The BLM amended those claims in 2001 primarily to modify the legal description of the places of use for reasons similar to those which formulate the basis of the BLM objection the legal descriptions contained in the claim by Joyce Livestock. Interestingly, even the amended claims submitted by the United States claim a period of use from January 1 to December 31 of each year. As discussed in detail below, the BLM has never

diverted and beneficially used the water from Jordan Creek and/or its tributaries, has not owned any livestock in this allotment, has not filed for or obtained a statutory permit or license from the state of Idaho with respect to the acquisition of a stockwater right in Jordan Creek, has never purchased a stockwater right involving Jordan Creek or its tributaries and has no agreement with Joyce Livestock nor with any of Joyce Livestock's predecessors with respect to an agency relationship which would support the conclusion that the BLM has acquired a stockwater right. The BLM has presented absolutely no evidence under any recognized legal theory which would support the conclusion that the BLM has acquired a stockwater right from this source.

As discussed in detail below, the whole basis for the BLM claim to a stockwater right is predicated upon testimony of its witnesses that proper range management requires that the BLM have the ability to control the water rights within a particular allotment. This argument ignores and defies the law of the state of Idaho, Judge Hurlbutt's Order Denying Challenges and Accepting Special Master's Reports and Recommendations (subcases 72-15929C, et al.) (September 30, 1998) and the law of all western jurisdictions with respect to prior appropriation and beneficial use. More importantly however, is the fact that it is beyond dispute that the very water rights which the BLM now seeks to have adjudicated in its favor are water rights which were diverted, beneficially used and thus perfected by acts of appropriation which were initiated by predecessors in interest to Joyce Livestock including family members who obtained patents beginning in 1898 and there is no evidence that those water rights have ever been forfeited or abandoned. Accordingly, the BLM claims must fail if for no other reason than that the water rights which it seeks to have adjudicated were already appropriated by Joyce Livestock's predecessors as of the effective date of the enactment of the Taylor Grazing Act in 1934.

Specifically, the only basis upon which the BLM could ever assert stockwater right would be premised upon the fact that it acquired those rights as a result of the cattle consuming the water in Jordan Creek. Since all of the cattle who historically drank water from Jordan Creek were owned by Joyce Livestock or its predecessors in interest and, the BLM has presented no evidence to the contrary, it is submitted that the BLM can not under any theory acquire a second stockwater right as a result of the consumption of water by the same cows. The Taylor Grazing Act of 1934, 43 U.S.C. sections 315-316 recognizes a private party's water rights based upon prior appropriation and perfection thereof on federal lands.

With these premises in mind, the undersigned will first address issues involving the "presumption" arising out of the IDWR Director's Reports in these subcases. Secondly, the undersigned will address the merits or lack thereof of the three claims submitted by the BLM and finally, address the merits of the stockwater claim submitted by Joyce Livestock based upon the claim as amended either according to proof, by stipulation, or, if necessary, by motion to correct legal descriptions.

II. THE PRESUMPTION OF A VALID WATER RIGHT ARISING FROM THE REPORT BY IDWR

It is undisputed that all water rights within the territorial boundaries of the state of Idaho (with the exception of navigable streams) are owned by the state of Idaho and subject to its laws and regulations. See Idaho Constitution, Article XV, section 3 (absent a claim for a reserve right, all water within the boundaries of Idaho is subject to appropriation).² Accordingly, the only

² The United States has not claimed a reserve water right with respect to the claims at issue in this case. See *Winters v. United States*, 207 U.S. 564 (1908). If there are a number of appropriations made from a single source, those appropriations are determined "first in time, first in right." See Idaho Constitution, Article XV, section 3; See also e.g. *Village of Peck v. Denison*,

manner in which the BLM in this case can acquire a stockwater right to Jordan Creek is based upon actual appropriation and beneficial use or, by way of obtaining a permit or license pursuant to Idaho law. The acquisition of an instream stockwater right is governed by Idaho law including, but not necessarily limited to I.C. § 42-113, as amended.³ That section provides that a stockwater right can be obtained by filing for a permit or by appropriation of water for the instream watering of livestock. Whether a stockwater right from instream flows is obtained by way of a permit or based upon appropriation and beneficial use, “the Director, and the District Court where applicable, shall recognize and protect water rights for instream livestock use according to priority, as they do water rights for other purposes.” Section 42-113(1). Accordingly, one must assume that a reasonable interpretation of this statute would require IDWR to make a determination as to who had a “priority” with respect to the instream stockwater rights beneficially used from Jordan Creek. In this case, there is no evidence that the BLM has applied for either a permit or license pursuant to the provisions of Idaho law. The BLM admits that it does not own livestock and has never owned any livestock; and, accordingly, it would therefore be impossible for the BLM to have appropriated water by diversion and beneficial use. In any event, the BLM has conceded that it did not acquire and could not have acquired a stockwater right prior to the enactment of the Taylor Grazing Act of 1934. Accordingly, it would be incumbent upon IDWR to determine when recommending a stockwater right whether or not in this case Joyce Livestock had a valid stockwater right based upon diversion and beneficial use by

450 P.2d 310 (1969).

³Further, that priority date shall be the first date that water historically was used for livestock. I.C. § 42-113(2).

its predecessors including Paul Nettleton's father prior to 1935. Had IDWR made this analysis and determination, it is respectfully submitted that it would not have issued a Director's Report recommending the approval of the claims submitted by BLM.

It is with great reservation that I call into question the presumption which is ordinarily afforded the Director's Report in these proceedings. That presumption is that the recommendation of the Director is valid; however, that presumption is rebuttable. Roxanne Brown testified on behalf of IDWR both with respect to the Joyce Livestock claim as well as the three claims submitted by the BLM. Ms. Brown was faced with a daunting task at best. In my years of working with Ms. Brown, I can personally attest to the fact that she is extremely knowledgeable, well versed in the laws and regulations of the state of Idaho and acts with the upmost of integrity and good faith. These facts notwithstanding, and based upon the testimony of Ms. Brown during the trial, it is readily ascertainable that IDWR does not undertake any investigation which would result in a determination as to the priorities by competing claimants to the same water source nor, for that matter, whether or not a particular claimant has established any right to the water whether it be by prior appropriation and beneficial use or as a result of an application and issuance of a permit. In this case, BLM satisfied neither test and there is no evidence before this Court that can support any other conclusion.

As testified by Ms. Brown, the Department does not determine who owns the land or who owns the cattle. (p. 18).⁴ Ms. Brown did not conduct or undertake any investigation to determine whether or not the United States, BLM owned livestock in the Jordan Creek area. (p. 21). Ms. Brown was not aware of any permit or license issued to the BLM for stockwatering in

⁴Referring to page numbers ("p") and line numbers ("__:_-__") are to the trial transcript.

the Jordan Creek area. (p. 21:18-20). IDWR has never received an application or processed a stockwater right by permit or license for the BLM. (p. 22:1-2). IDWR does not make a determination as to whose cattle are actually appropriating the water. (p. 22:1 - p. 23:8). Ms. Brown acknowledged that there are basically two ways one can acquire a stock water right which would be by consumption of the water from a stream or by applying for a permit or license. (p. 26:4-20). Ms. Brown testified in effect that IDWR does not make a determination when reporting out competing claims as to who in fact is entitled to a preference. (p. 28:1-21). Finally, Ms. Brown testified that the Director will recognize and protect instream stockwater rights according to their priority however, with respect to these cases and perhaps others, there is no determination as to when a particular stockwater right is first appropriated and put to a beneficial use (p. 34:9-35). It is respectfully submitted that based upon Ms. Brown's testimony, the presumption arising under the Director's Report particularly with respect to the BLM claims is unsupportable in fact or law. Based upon the undisputed facts, there can be no presumption arising from the Director's Report that the BLM is entitled to a stockwater right as asserted. Specifically, there is no presumption that the BLM has acquired a water right for instream stockwatering purposes merely as a result of the fact that subsequent to 1934 it managed the grazing privileges of the ranchers who were the actual appropriators of those water rights.

The presumption which arises from the Director's Report with respect to the BLM claims has been burst. Accordingly, in order to prevail, the BLM must have established as a result of evidence produced at the trial that in fact it has acquired an instream stockwater right by prior appropriation and beneficial use as evidenced by consumption of water by livestock which it owns; or, in the alternative, that it has applied for and obtained a valid permit to appropriate state

water for stock grazing purposes. It can do neither. In order for the BLM to prevail in this litigation, the Court is going to have to determine that two parties can claim a stockwater right by appropriation and beneficial use through the consumption of water by the same cow or cattle. In other words, the BLM would have to establish that a cow owned by a third-party appropriated its water rights. Even if such a theory can be sustained, which the undersigned believes it cannot, it completely ignores the fact that the water has already been appropriated as a result of cattle ranching in the Jordan Creek area prior to 1934 by predecessors in interest to Joyce Livestock including immediate family members.

III. THE BLM HAS NOT PROVED THAT IT HAS A STOCKWATER RIGHT BASED UPON PRIOR APPROPRIATION, PERMIT OR OTHERWISE

A. The BLM Cannot appropriate a Stockwater Right Previously Appropriated by Joyce Livestock's Predecessors Prior to the Enactment of the Taylor Grazing Act as Recognized in the Adjudication of the Preference Rights of Those Predecessors

During the course of the trial, Paul Nettleton testified extensively about the settlers, patentees and ranchers generally in the area which now comprises Joyce Livestock's ranch. In summary, with the exception of some properties which have been sold, the current Joyce Livestock ranching operation involves base property which is comprised of essentially all of the ranching operations historically in the Sinker Creek and Jordan Creek areas commonly referred to as the Oreana, Cow Creek and Silver City allotments. This ranch currently is comprised of patented property dating back to 1898 including members of the Joyce and Nettleton families. These early settlers included Bill Nettleton, the grandfather of Paul Nettleton who owned base property in the Sinker Creek area referred to as the west end of the "Gilmore Ranch" deeded in 1898. (pp. 691-692). Herbert E. Nettleton who was Paul Nettleton's father was born in 1897

and continued ranching operations with his father and his brother J.H. Nettleton throughout the 1900s until his death in 1983. The Joyce family was related to the Nettleton family by marriage beginning in the early 1900s. A sister of Anna Joyce, Maggie Joyce was Paul Nettleton's grandmother "Maggie Joyce Nettleton." Mr. Nettleton's father and uncle in the 1930s and specifically shortly after 1935 and at least by 1939 as evidenced by a Deed, acquired most of the Joyce ranching operation which was then held by the corporation "Joyce Brothers Livestock Co." which after the acquisition was dissolved and the properties were held by "Joyce Livestock Co." See pp. 673-679. In fact, by Deed dated March 31, 1939, Joyce Brothers Livestock Co. conveyed to Herbert E. Nettleton, et al. what amounts to what is currently the whole ranch. (pp. 678-680). Paul Nettleton also testified as to his estimate as to the number of cattle that were being run in the Jordan Creek area both before and after the Taylor Grazing Act of 1934. He specifically indicated that "[E]xact numbers would be impossible to tell. I've got an idea that they probably ran at least as many as we do nowadays and probably more." (p. 713). Mr. Nettleton also testified that as his family acquired other ranching operations including John T. Shea and others, the family members "acquired the ranch, and acquired the priority preferences under the Taylor Grazing Act. (p. 715). Specifically, Mr. Nettleton was asked the following question:

Q: "And so when you purchased, in your lifetime, when you purchased property, did you purchase the preferences?"

A: Yes. You - whenever you, whenever you, you bought a ranch, small or large, you know, it was, it was, part of that ranch was, was the, grazing preferences as, as well as all, all the other - and I don't want to use the, the "W" word here, but that all was a part of the ranch." (p. 714-15-716-6)

Accordingly, it is abundantly clear that: 1) the current Joyce Livestock ranching operation is a composite of historic ranches acquired since the early 1900s primarily from family members

either direct relatives or by marriage as well as a result of acquisitions of properties owned in the general area from third parties such as John T. Shea. Paul Nettleton testified that based upon his knowledge of family history as well as his own personal knowledge, when a ranch was acquired, the cattle and water rights were acquired with the ranch and the ranching operation continued as it had prior to the acquisition. He testified that this was the case both before 1934 and after 1934. (p. 657-661, 715-719). All of the water rights which have been previously appropriated and beneficially used by Joyce Livestock and its predecessors pre-date the Taylor Grazing Act. These water rights are prior appropriated rights and they attached to the base property and passed with the base property from one predecessor in the chain to a successor in the chain. Joyce Livestock uses these same water rights today. The United States BLM cannot establish any legal authority for the proposition that it has acquired a stockwater right which was appropriated and continually beneficially used by Joyce Livestock and its predecessors in interest. The only way the United States could support its water right claims in this adjudication would be to prove that it is a successor in interest to the prior appropriators in that the BLM acquired their stockwater rights from them by purchase. The BLM has conceded that it has not acquired a stockwater right as a result of a "agency" relationship with Joyce Livestock or any of its predecessors as was amply pointed out in the Motion for Summary Judgment previously ruled on by this Court. In the same Responses to Request for Admissions and Interrogatories, the United States conceded that it owns no livestock. The United States admits that it has not acquired a stockwater right in the Jordan Creek area as a result of applying for a permit under applicable provisions of Idaho law.

B. The United States Did Not Acquire Stockwater Right as a Result of its Range

Management Activities under the Taylor Grazing Act.

The only remaining argument that the BLM submits is that somehow the United States is entitled to a stockwater right because, since 1934, it has managed the grazing rights in the allotments and charged a fee to the ranchers for the use of that land. In support of this argument, the United States offered non-legal opinions by Dr. Madenford and some limited testimony by Mr. Boltz. However, neither the testimony offered, nor any argument presented by the United States, can overcome the basic fact that what the United States is claiming is a water right perfected and continuously used by someone else. All of the water rights which the BLM now claim were appropriated and have been continually beneficially used by the various Joyce and Nettleton entities and their individual members since the late nineteenth century. The United States has never put the subject water to beneficial use, and therefore must resort to claiming another's water rights for its own. However, in the admitted absence of an agency agreement with Joyce and its predecessors, and given prior rulings in the SRBA stating that the United States cannot own appropriative stockwater rights by virtue of its role in managing the rangeland, and given well settled law recognizing the ability of private parties to obtain and maintain stockwater rights on public land, the United States' stockwater rights claims must be denied.

43 U.S.C. section 315 which establishes grazing districts provides in relevant part that:

“Nothing in this act shall be construed in any way to diminish, restrict, or impair any right which has heretofore, or maybe hereafter initiated under existing law validly affecting the public lands, in which is maintained pursuant to such law except as otherwise expressly provided in this act...”

In addition, 43 U.S.C. section 315(b) provides in relevant part as follows:

“Grazing permits shall be issued only to citizens of the United

States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations or corporations authorized to conduct business under the laws of the state in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bonafide occupants or settlers or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given to the issuance of such permits to any such owner, occupant or settler whose rights were acquired between January 1, 1934 and December 31, 1934...

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

In the context of the SRBA and specific to stockwater rights it is well settled that a private rancher can obtain stockwater rights on public land pursuant to the state law of prior appropriation and that once acquired, these water rights are transferrable. *See In re SRBA, Case No. 39576, Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, Presiding Judge Hurlbutt, Jr., Sept. 30, 1998; *See also Judge Woods' April 5, 2000 Memorandum Decision and Order on Challenge* (hereinafter "Memorandum Decision and Order on Challenge"). Federal law also recognizes a private parties' ability to perfect water rights located on federal lands pursuant to the applicable state laws. *See Mining Act of 1866*, 43 U.S.C. section 661; *see also The Desert Land Act of 1877*, 43 U.S.C. section 321-323 in addition to the Taylor Grazing Act cited above. This right to appropriate water on the public domain was confirmed and recognized by the United States Supreme Court which held, in part:

The effects of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs and the legislation and judicial decisions of the erred land states, as the test and measure of private rights in and to the non-navigable waters of the public domain. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935)

It is submitted that even if the BLM can establish by some convoluted interpretation of Idaho state law that it has acquired an appropriated stockwater right solely based upon its regulatory powers under the Taylor Grazing Act, that right would be subordinate to prior appropriated rights to the water of Jordan Creek owned by Joyce Livestock. By 1934 the Joyce Livestock water rights were “vested” and not subject to appropriation by the BLM or anyone else. Absent an assignment by the owner, the BLM has no claim to these rights.

C. Management of Range Lands by the BLM under the Taylor Grazing Act Does Not Constitute an Appropriation of Water

Larry Brown relies heavily upon the testimony of Dr. Madenford to prove that the United States has actually appropriated a stockwater right as a result of its management of the public grazing lands. Mr. Brown summarizes the testimony of Dr. Madenford by stating “[T]he testimony here goes to that intent to appropriate, whether it be from instream, whether it be an appropriation through a license, whether it be from a development that was done before the licensing, the mandatory permitting statute or whatever; but the intent to appropriate water is there. . . .” It is respectfully submitted that Dr. Madenford can testify as to his “intent” but that thought process does not constitute an actual appropriation of stockwater from Jordan Creek. In fact, Dr. Madenford specifically testified that no permits had been applied for or acquired from the State of Idaho with respect to stockwater rights in Jordan Creek. Dr. Madenford testified that

no improvements have been put in diverting water from Jordan Creek and putting it to a beneficial use for stockwater or any other purpose. The essence of Dr. Madenford's testimony is that he personally believes that he needs to control the instream stockwater rights by regulating livestock access to those water rights in order to protect the grazing lands. No one disputes that proper grazing management requires the use of the land in a prudent fashion and that part of that protocol requires moving cattle so that the rangeland is not overgrazed. In fact, Paul Nettleton testified that he has had arguments with the BLM in certain situations where he has wanted to move his cattle from one part of the allotment in the Silver Creek area to another one so that the land would not be overgrazed, thus jeopardizing his cattle's food source in succeeding years. "Intent" to appropriate is only one element. One must prove diversion and beneficial use. The BLM can prove neither.

Further, Dr. Madenford testified (p. 376) in effect that the United States appropriated a stockwater right by the fact that Mr. Nettleton's cattle are drinking out of the creek. He bases this conclusion on the fact that the BLM is deriving funds from the livestock permits (p. 376:10-25). Dr. Madenford was then asked whether or not there was anything in the permit or the permitting process that charges a fee for the consumption of water out of Jordan Creek. Dr. Madenford, after attempting to avoid answering the question, indicated that he did not know (p. 376:19-378:12). I respectfully suggest that Dr. Madenford is well aware of the fact that grazing permit charges are based solely on the number of "AUMs" which is established based upon the consumption of dry grass or forage within the allotment (see testimony of Kay p. 552).

Since all of the instream flows in the State of Idaho are water rights which belong to the state, subject to prior appropriation or the issuance of a statutory permit, there is no evidence the

BLM has acquired a stockwater right and thus they have nothing to lease to Joyce Livestock. Dr. Madenford and the BLM rely upon a legally unsound interpretation of I.C. § 42-113(1), which provides in part: “[A] permit may be issued but shall not be required for appropriation of water for the instream watering of livestock.” Dr. Madenford admits that the BLM did not apply for a permit or a license with IDWR (p. 428). Dr. Madenford has admitted that the United States does not own any cattle, nor have they ever owned any livestock which consumed water from Jordan Creek. Since beneficial use is a prerequisite to water right appropriation, there is no basis at law or in fact to sustain Dr. Madenford’s opinion that because the BLM manages the grazing activities on BLM land, it has also, through that activity, acquired an instream stockwater right.

Again, whether or not Dr. Madenford or any other representative of the BLM “intended” to acquire a stockwater right is not material nor even relevant to this discussion. The water rights which are the subject matter of this adjudication are instream flows which have never been diverted by the acts of the United States prior to the Taylor Grazing Act or the BLM subsequent thereto. There are no works of improvement. The BLM has no license or permit from IDWR to appropriate or otherwise beneficially use the water from Jordan Creek. There simply is no evidence that the BLM has acquired a stockwater right from Jordan Creek.

Finally, Dr. Madenford opines that the relationship between the BLM and Joyce Livestock and its predecessors is similar to that of an owner of a feed lot who is allowing somebody else’s cattle to put the water to a beneficial use. The argument makes no logical or legal sense. It is common knowledge that ranchers will, in many cases, enter into a contract with an owner of a feed lot for purposes of fattening their cattle for market. By definition, the cattle must drink water during this process. Generally, an owner of a feed lot owns his own land and

water right. In the case before this court, the BLM does not own a water right, at least under any recognized legal theory or by permit. There is no relationship between the feed lot and the ranchers' base or commensurate property. Unlike a contract with a feed lot owner, there has been adjudication under the Taylor Grazing Act which has awarded the owner of the base property a preference or priority with respect to use of the federally administered land for grazing cattle, which preference was granted in part upon the historic use by predecessors in interest with respect to the public land for grazing and stockwatering purposes. Specifically, the rancher does not have a history of prior appropriation and beneficial use of a water right with respect to the owner of the feed lot.

D. The BLM's Reliance on the Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment) (April 15, 1998), Subcase 72-15929c ("Haemmerle Decision") and the Order Denying Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998) in Subcase 72-15929c, et al. ("Judge Hurlbutt's Decision") Is Misplaced in That Neither Ruling Establishes That, as a Matter of Law, the BLM Has Acquired an Instream Stockwater Right as a Result of its Ownership and Management of the Land

As a result of a stipulated settlement agreement between the State of Idaho and the BLM in subcase no. 72-15929C, et al., the United States was granted a stockwater right with a priority date of June 26, 1934 (the date of the enactment of the Taylor Grazing Act). Since the BLM's claim was uncontested, those decisions do not create any precedent which can be relied upon by the BLM in the within action. Further, it is respectfully submitted that neither Special Master Haemmerle nor Judge Hurlbutt concluded that the BLM could legally acquire a stockwater right based solely upon the fact that it owns and manages the grazing lands adjacent to Jordan Creek.

For starters, the Special Master in the Haemmerle Decision adopted by reference sections

1V (A) and (B) of the Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions (March 23, 1997). Therein, the court held that: (1) federal law does not prevent the appropriation of stockwater rights on the public domain by private parties; (2) under state law, water rights appurtenant to land may be owned by a party other than the landowner; (3) exclusive access to the water source is not required to perfect a water right; and (4) the rights claimed by beneficial use, I.C. §§ 42-114 and 42-501, are not relevant or dispositive as to ownership. Judge Hurlbutt, in his Decision, incorporated by reference the findings of fact and conclusions of law set forth in Haemmerle's Decision. These decisions are dispositive of the BLM's theories herein that it has "appropriated" a stockwater right based upon its ownership and management authority over federally owned grazing lands (see Haemmerle Decision, p. 4). First, in this case, the water rights at issue involving Jordan Creek are based upon beneficial use, not a permit or license under I.C. § 42-501. Second, the section merely states that the United States "may appropriate for purpose of watering livestock any water not otherwise appropriated." Nothing in this section states the United States "is" the appropriator of water rights on the public domain. As noted by Special Master Haemmerle, if I.C. § 42-501 is dispositive as to stockwater ownership and the United States is the appropriator of water in the public domain, then I.C. § 42-114 would be rendered a nullity. Most importantly, however, is that Special Master Haemmerle specifically cited the legislative intent of I.C. § 42-114, which 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 would place the beneficial use clearly on the consumption and the ownership of the cattle and not on the land management agencies." Minutes of House Resources and Conservation Committee (Idaho, February 17,

1986), cited in OAG 88-6.

1. **In its Order Denying Joyce Livestock's Motions for Summary Judgment and Order Setting Scheduling Conference (July 23, 2002), this Court Noted at P. 14 Ft.n. 20, as Follows: "It Should Be Noted That in the United States' Claims Before Special Master Haemmerle and Presiding Judge Hurlbutt, the United States Claimed Pre-Taylor Grazing Act Priority Dates (Earlier than June 28, 1934). In Each Case, the Court Denied the Earlier Dates, but Awarded a 1934 Priority Date Because "There Is No Material Issue of Fact or Law That the Priority Date Is June 28, 1934." Joyce Livestock Respectfully Disagrees with this Court's Conclusion.**

The undersigned calls this Court's attention to the "Conclusion" portion of Haemmerle's order, which 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 in 1934. Therefore, the court finds that the United States has a priority date for this right dated June 26, 1934." Haemmerle order at p. 13. The only reason that the United States was awarded the 1934 priority date was because the state conceded that date, and the only reason that state conceded that right 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. Of particular import in this case is the fact that the United States has conceded, in its response to requests for admissions and interrogatories, that there is no claimed agency relationship between the BLM and Joyce Livestock. Specifically, pursuant to Request for Admisison No. 3, the United States was asked to admit that those who own the livestock which actually drank water under the

stockwater rights claimed by the United States were not agents of the United States. In response, the United States stated that it “lacked 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.*”

2. **In Addition, in this Court’s Order Denying the Motion for Summary Judgment Likewise, in Ft.n. 20 on P. 14, Made the Following Observation: “In Other Words, the Issue of Whether the United States (Including the BLM in the Instant Subcases) Is Entitled to a 1934 Priority Date or Later for an Instream Stockwater Right on Federal Public Land, Even Though it Does Not Actually Own Stock, Has Not Been Addressed by the SRBA Court, Except by Default. Logic Suggests That Those Portions of Special Master Haemmerle’s and Presiding Judge Hurlbutt’s Decisions Concerning Permits and Regulations of Stock Grazing on Federal Public Land Are Mere Dicta for 1934 or Later Priority Date Claims Because Such Range Management Began after June 28, 1934 – the Priority Date Awarded the United States’ Claims.”**

The undersigned respectfully requests that this court reconsider its analysis in this regard.

The language regarding the effect of the BLM’s management of rangelands was not mere dicta. Secondly, logic suggests that the earlier courts would not have addressed management issues unless it was meant also to apply to post-1934 priority date claims because it was only after 1934 that the BLM had the authority to manage the rangelands.

It is critical when reviewing Special Master Haemmerle’s order and the ensuing order denying challenges by Judge Hurlbutt that it was the BLM which inserted the following issue into the litigation: whether ownership of stockwater rights depends on an agency relationship with the actual appropriator or whether its ownership and resulting priority date arise out of the United States’ authority to manage the rangeland. See Haemmerle order, p. 1; see also *id.* at p. 4 (“[T]he state asserts that the United States may own a water right only through the efforts of an

agent that actually perfected the water right . . . the United States alleges that its ownership of stockwater rights does not depend on an agency relationship and that it may own stockwater rights by virtue of the United States' ownership and management of the land where the stockwater rights were perfected."'). Special Master Haemmerle devoted a full ten pages of his fourteen page Order Denying Motion to Alter or Amend to explain the reasons for rejecting the United States' argument that water rights can be obtained through its acts of managing the rangeland. The Haemmerle order was fully adopted by Judge Hurlbut and, thus, became the order of the District Court. Because the state conceded the 1934 priority date, clearly neither order addressed application of the findings to a claimed post-1934 priority date. However, both the Special Master and the District Court held that nothing in the Taylor Grazing Act would preclude application of the ruling to claimed post-1934 rights. Further, it only makes sense to apply the Haemmerle and Hurlbutt rulings to 1934 or later priority date claims because it was not until that time, under the authority of the Taylor Grazing Act, that the BLM started to manage the rangeland. In other words, Special Master Haemmerle and Judge Hurlbutt rejected the United States' argument that it has a valid appropriative right by virtue of its role in managing the rangeland. The United States did not begin to actively manage the rangeland until after 1934, therefore, the court's ruling that the United States' management of the rangeland does not make the United States the appropriator of water rights only makes sense if it is universal – with application to post-1934 claims.

Even if, *arguendo*, Special Master Haemmerle's and Judge Hurlbutt's language regarding management of the rangeland is considered "dicta," the end ruling is still controlling. Specifically, the District Court ruled, "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 a showing that the right was conveyed from the party that actually appropriated the right.” Judge Hurlbutt’s Decision at p. 11.

In this case, the BLM has not alleged that it is the appropriator of water, and it has not alleged an agency theory, admitting that it has no such agreement. The BLM admits that it has not acquired by permit or license, pursuant to applicable provisions of Idaho law, a stockwater right from Jordan Creek. The BLM admits that it has never owned livestock which consumed water from Jordan Creek. The fact that Dr. Madenford represents that the BLM intends to acquire a water right as part of its management of the rangeland does not meet any criteria which will support a finding of diversion and beneficial use sufficient to create a valid water right. Therefore, as a matter of law, because it has not alleged a valid basis for its claims, the United States’ claims must fail.

IV. JOYCE LIVESTOCK HAS ESTABLISHED, BY A PREPONDERANCE OF THE EVIDENCE, THAT IT CURRENTLY OWNS A VALID STOCKWATER RIGHT IN JORDAN CREEK WHICH IS APPURTENANT TO THE BASE RANCHES WITH A PRIORITY DATE OF 1898

The uncontradicted testimony of Mr. Nettleton and Mr. Lewis, as well as the documents consisting of the chain of title submitted herewith, clearly establish that Joyce Livestock is the successor in interest to an appropriated stockwater right with the point of diversion identified in all of its claims, consisting of Jordan Creek, the reaches of Jordan Creek, and its tributaries.⁵

⁵The BLM asserts that the legal descriptions used by Joyce Livestock in preparing its claim are in error based upon its plat maps. Joyce Livestock disagrees. Legal descriptions identified by section, range and township are universally agreed to be accurate even with respect to irregular sections based upon the effects of earth curvature. Secondly, the creation of “lots” as a result of the creation of private mining claims does not change this result other than as it relates to whether or not Joyce Livestock intended to file a claim on land in private ownership by third

Keeping in mind that the Joyce and Nettleton families have been ranching in the Silver City area since at least 1898 (coincidentally the year after the birth of Mr. Nettleton's father), the uncontested and unrefutable testimony of Mr. Nettleton supplemented by that of Mr. Lewis is that as ranches were developed, the owner appropriated and beneficially used stockwater from Jordan Creek and/or other streams on rangeland which is currently administered by the BLM with respect to base properties now under ownership by Joyce Livestock. The unrefuted testimony supports a finding that as ranches were acquired by the Nettletons and the Joyces, culminating in the ownership of Joyce Livestock Co., the intent of the purchaser was to acquire the property and all of its appurtenances for purposes of continuing a livestock operation and specifically raising cattle. In fact, in most instances, when there was an acquisition of a ranch, the cattle were part of the acquisition. After 1934, the undisputed testimony supports the finding that no purchase of ranch property would be consummated unless the purchaser could acquire the "preference rights" and the "permit" pursuant to the Taylor Grazing Act. The testimony is undisputed that acquisition of the grazing lands and the post 1934 permit, without the accompanying water right, render the grazing lands valueless. In fact, under the adjudication of grazing preferences after the passage of the Taylor Grazing Act in 1934, and consistent with the express terms and provisions of the Taylor Grazing Act, the establishment of a historic use of

parties. In the first place, many of the mining claims may not have existed in 1898, or, more accurately, 1865 when the Joyce family first began ranching operations in the general vicinity of Jordan Creek. Also, Joyce Livestock is entitled to an adjudicated water right with respect to all land within the legal description set forth in its claim, whether in private ownership or on public land, in view of the fact that the only protestant to Joyce Livestock's claims was the BLM. These facts notwithstanding, Joyce Livestock is filing contemporaneously herewith a motion to amend its claims to delete therefrom only those lots (consisting of mining claims generally) with respect to which it will not assert an ownership interest).

water on the public land was a major consideration.

There has been much discussion in the last four years in rulings by this Court as to whether or not a water right passes as an appurtenance to the base ranch property. The overwhelming weight of authority sustains the legal conclusion that a water right, once appropriated for stock purposes on federally managed land, attaches to the property which is directly benefitted by the use of that water. The land benefitted is the base property. The base property is the “commensurate” property and as such, must have the ability on its own to establish and maintain the livestock for at least some period of time during each calendar year. By definition, for the remainder of any calendar year, the rancher depends on the use of public grazing land and water located thereon in order to establish and maintain a viable ranching operation. At the conclusion of the trial, the BLM and Joyce Livestock agreed to submit a summary of the chain of title with respect to all of the base properties which currently make up the Joyce Livestock ranching operation. It is the understanding of the undersigned that the BLM has elected not to do so. Attached hereto is such a summary, which was initially prepared at the request of Larry Brown on behalf of the BLM based upon an analysis of the chain of title which was prepared by an independent title insurance company and jointly paid for by the parties hereto. The undersigned has prepared a similar summary by modifying that which was prepared by Mr. Brown to reflect the exact language contained in each deed as it relates to “appurtenances” or other specific rights. The same is attached hereto and identified as Exhibit A.

A. The Chain of Title for the Base Properties and the Uncontradicted Testimony of Paul Nettleton and Gene Lewis Establishes That Joyce Livestock’s Predecessors in Interest Actually Grazed Livestock along Jordan Creek, Appropriated the Water and Beneficially Used the Water Which Then Became an Appurtenance to the Base Property

In this Court's Order Denying Joyce Livestock Motions for Summary Judgment, the Court raised several questions and concerns with respect to the adequacy of the record. First, was the concern relative to the asserted priority date of 1898, and specifically, whether or not there was evidence that the predecessors in interest of the applicant actually were grazing cattle in the Jordan Creek area on or before that date. Secondly, the Court was concerned with the number of cattle that would be grazed in the area and, third, was concerned relative to the period of use. The "period of use" issue has been discussed above based upon the detailed testimony of Mr. Nettleton. Additionally, and in conjunction with his analysis and recommendations to the legislature with respect to the amendment of I.C. 42-113, Dr. Gibson testified that he had discussions with representatives of IDWR with respect to the issue of establishing a priority date with respect to appropriation of stockwater rights. In response to that inquiry, and with specific reference to IDWR, Dr. Gibson testified:

"That, their view was that, that the priority date went back to the first appropriation or diversion of beneficial use, which would be the, the first time the livestock grazed there by predecessors in interest." (p. 628)

Your Honor also made inquiry concerning whether or not Joyce Livestock may have acquired multiple instream stockwater claims with different priority dates, quantities, places of use and periods of use. It is respectfully submitted that in the first instance, Joyce Livestock has acquired virtually all of the stockwater rights which were ever perfected on Jordan Creek dating back to 1898. The uncontradicted testimony is that Joyce Livestock and its predecessors continually grazed and watered their livestock along Jordan Creek (p. 680-683). It is respectfully submitted that it is the act of the first appropriation by a predecessor in interest which creates the priority date. Obviously, over the years, the number of cattle actually grazing in the Jordan Creek

watershed will vary. This can depend on conditions such as drought, the general economy, and, after 1934, the number of AUMs authorized under a particular grazing permit for a particular rancher. The original patentees were John H. Crocheron (July 2, 1898), Anna F. Joyce (June 1, 1898), Mary Joyce (June 1, 1898), Matthew Joyce (June 10, 1898) and Quiznee F. Lambert (October 30, 1898). The undisputed testimony is that all of the base properties so patented by these early settlers are now part of the base property of the applicant, Joyce Livestock Co. Anna F. Joyce, Mary Joyce and Matthew Joyce are all relatives of Paul Nettleton, being his great aunts and great uncle respectively. As previously indicated, Paul Nettleton's father was born in 1897 at Black Jack Mine, which is about two miles from Silver City. Paul Nettleton testified that his father was raised in a ranching family and ultimately, through the years, acquired all the properties of the original patentees, as well as the Nettleton family ranches, which were all owned currently by the applicant.⁶ It is also respectfully submitted that the number of cattle which originally grazed and appropriated water within the Jordan Creek area historically is irrelevant to the issue of priority as well as quantity of water rights diverted. The only testimony is that the number of cattle which originally grazed in the Jordan Creek area was either equal to or exceeded the number of cattle currently being run during the summer in the Silver City area, Jordan Creek and its tributaries. The quantity of water being diverted was a function of the initial judications under the Taylor Grazing Act of 1934, and in fact, the undisputed testimony is that the Department of Interior initially made determinations as to the grazing preferences and issued what were originally called licenses based upon historic use, the ownership of base

⁶It should be noted that Paul Nettleton testified that the base ranch properties include those which were the subject matter of the original patents; however, there have been some sales of base property over the years to third parties (p. 681).

property and the historic use of water and the public domain. Accordingly, it is respectfully suggested that the issues of quantity, places of use and periods of use were established as a function of the adjudication of preference rights between 1935 and in some cases, several years thereafter. The issue of quantity of water diverted only became an issue after 1934 and pursuant to the SRBA litigation. Although there has been evidence presented based upon historic documents, including the book published by Paul Nettleton's mother in the 1970's, that there were appropriations of water by members of the Joyce family from Jordan Creek as early as 1865, the claimed priority date was the date of the above-referenced patents. The uncontradicted testimony is that these original patentees were ranching in the area of Sinker Creek and Jordan Creek, and that the cattle and other livestock were in fact grazing and consuming water within that watershed. The priority date established is established by the first act of appropriation. The first act of appropriation occurred on or before June of 1898.⁷

Mr. Nettleton testified that "[A]ll of the entities that grazed in the Jordan Creek/Silver Creek area have now been picked up by Joyce Livestock Co., that's – if that was the question" (p. 659-660). Special Master Dolan pursued that line of questioning and inquired as to whether or not the witness said that all of the people who ever grazed up there are now part of Joyce. In response, Mr. Nettleton testified as follows:

"I'm talking about those that had a base property of, you know – and I mean before the Taylor Grazing Act, not just after it – that those that had owned property in the area, that had a base ranch, that had a, a valid interest in the surrounding rangelands to their ranch, are now a part of Joyce Livestock Co."

⁷In 1978, Paul Nettleton's mother wrote a historic analysis of ranching operations in Owyhee County, including but not limited to the area surrounding Silver City, entitled *Sketches of Owyhee County* (p. 661).

Mr. Pridgen then asked the question: “And that includes the people that historically were in Jordan Creek; is that correct?”

A. Yes. That would include the Sheas, the Jump Creek Sheep Company, Augustine Salove. I am trying to remember all the names that, that Gene Lewis mentioned yesterday, the – of course, the Joyces, the Nettletons. I don’t know who else, but all of those entities now, there’s no, there’s no other person that has a claim in the Jordan Creek area that hasn’t been picked up.

Q. When you say before the turn of the century, you’re talking about not this century, you’re talking about 1900; is that right?

A. Yeah. (p. 660-661)

The Court then makes inquiry as to the issues surrounding the private mining claims which are located in the general area of Silver City and along Jordan Creek. It is respectfully submitted that the inquiry is not relevant. First of all, it is not clear when the mining claims were first patented. Secondly, there has been testimony that at least during the period of time after the enactment of the Taylor Grazing Act, AUMs were awarded based upon the ownership of mining claims in the Jordan Creek area by John T. Shea and perhaps others. Third, there is no evidence that any of the areas in and around Silver City (with the exception, perhaps, of residential areas) were ever fenced off and thus cattle would run through the full length of Jordan Creek and its tributaries. In other words, the cattle did not discriminate between land which was technically a part of the mining claim and BLM land, or before the Taylor Grazing Act, United States land.

This Court has made inquiry as to whether or not the owners of these mining claims historically asserted an instream stockwatering right because these claims bordered Jordan Creek (p. 16 of Order Denying Joyce Livestock Motions for Summary Judgment). It is respectfully submitted that the inquiry is academic. No other entity or individual other than the BLM has asserted a water right claim in this adjudication. The uncontradicted testimony is that Joyce

Livestock's predecessors appropriated and beneficially used all the stockwater rights which are the subject matter of this litigation. Quantity is not an issue since it is impossible to historically calculate and is not relevant to the issue of appropriation and beneficial use. Finally, Joyce Livestock is amending the legal description on the places of use to exclude privately owned mining claims; although, it is respectfully submitted that historically, cattle grazed on those mining claims and, in fact, to the extent they bordered Jordan Creek, undoubtedly consume water, thus putting that water to a beneficial use for the benefit of the ranch owner.

Finally, the Court has also made inquiry with respect to language contained in the deeds conveying base property beginning in 1898 and continuing through the present time. Exhibit A hereto sets forth the language in all the deeds to the extent that the deeds are legible. It is universally the case that these deeds either mention the water rights, the grazing rights, or "appurtenances." More importantly, however, is the percipient testimony of Paul Nettleton, whose father spent his entire life ranching in the Sinker Creek and Jordan Creek-Silver City areas commonly known as the "Oreanna" unit or the "Silver City" unit. I am not going to take the time here to quote all of the testimony from Mr. Nettleton as supported by Mr. Lewis and Dr. Gibson; however, I commend to the Court its review of particularly Mr. Nettleton's testimony with respect to the historic use of all of the rangeland involved in this litigation and its relationship to the base property of the predecessors identified in the chain of title which is memorialized in Exhibit A attached hereto. That testimony begins at p. 677 and continues through p. 704.

The uncontradicted testimony is that it was the intent of all of the predecessors in interest to appropriate and beneficially use the water for the benefit of the base ranches. Through mesne conveyances, Joyce Livestock currently owns all of the active water rights from Jordan Creek

with a priority date of at least 1898. The only evidence presented is that Joyce Livestock has continued to utilize these stockwater rights in the same manner which existed from the time of the initial appropriation and beneficial use, and that the intent universally was that the water rights followed the base property.

B. Private Land Owners Can appropriate Water on Federally Administered Lands, and Thereby Obtain a Valid, Transferable, Property Right in the Appropriated Water.

Under the laws of the state of Idaho and the laws of the United States, absent reservation, all water within the bounds of the state of Idaho are subject to appropriation even if the water flows on federally administered public land. *See* Idaho Constitution, art. XV, § 3 (absent a claim for a reserved right, all water within the boundaries of Idaho is subject to appropriation).⁸ If there are a number of appropriations made from a single source, those appropriations are administered “first in time, first in right”. *See* Idaho Constitution, art. XV, § 3; *see also, e.g., Village of Peck v. Denison*, 450 P.2d 310 (1969). Federal law also recognizes a private party’s ability to perfect water rights located on federal lands pursuant to the applicable state laws. *See* The Mining Act of 1866, 43 U.S.C. § 661; *see also* The Desert Land Act of 1877, 43 U.S.C. §§ 321-323; and The Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316. This right to appropriate water on the public domain was confirmed and recognized by the United States Supreme Court which held, in part:

The effects of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain.

⁸ The United States has not claimed a reserved water rights with respect to the claims at issue in this case. *See Winters v. United States*, 207 U.S. 564 (1908).

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935).

In the context of the SRBA and specific to stockwater rights, it is well settled that a private rancher can obtain stockwater rights on public land pursuant to the state law of prior appropriation and that once acquired, these water rights are transferable. *See In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations, Presiding Judge Hurlbutt, Jr. (September 30, 1998)⁹; *see also* Judge Wood's April 25, 2000 *Memorandum Decision and Order on Challenge* (hereinafter "*Memorandum Decision and Order on Challenge April 25, 2000*"). As with other water rights, the stockwater rights can be transferred as appurtenances to the base ranch properties benefitting from their use. *See* Special Master's Report and Recommendation; Findings of Fact and Conclusions of Law for Water Rights 55-10288B, et al. (Cushman - February 27, 2003).

C. Stockwater Rights Acquired on Federally Administered Lands Are Appurtenant to the Base Ranch Properties in Connection with Which They Are Used

The stockwater rights at issue in this case are appurtenant to the base ranch properties and were intended to be transferred as such. Whether a water right passes with land as an appurtenance involves two questions. The first is whether the water right is an appurtenance, demonstrated by the showing of a nexus between the water right and the use and enjoyment of the subject base land. The second inquiry is whether the appurtenant water right was intended to pass with the land. *See Water Rights Laws in the Nineteen Western States*, Wells A. Hutchins, J.D., Volume I, p. 469, *citing Water Rights in the Western States*, S.C. Wiel, 3d ed., vol. 1, § 550

⁹ The subcases at issue included: 57-04028B, 57-10587B, 57-10588B, 57-10770B, and 72-15929C.

(1911).

It is well settled in the western states recognizing the doctrine of prior appropriation that the appropriative water right is appurtenant to the land in connection with which the use of water is made. Where the subject land cannot be used advantageously without it, the water right is an appurtenance. *See Water Rights Laws in the Nineteen Western States*, Wells A. Hutchins, J.D., Volume I, p. 453; *see also Frank v. Hicks*, 35 P. 475 (Wyo. 1894) (“Whoever grants a thing grants by implication that which is necessary to the beneficial use and enjoyment of the thing granted”). This is so even if the land to which the water is appurtenant and place of use are not the same. *See Memorandum Decision and Order on Challenge April 25, 2000, citing First Security Bank of Blackfoot v. State*, 291 P. 1064 (1930), *Sarrett v. Hunter*, 185 P. 1072 (1919). In such cases where the place of use of the water right and the land to which it is claimed to be appurtenant are different, the relevant inquiry is whether the use of the water right is connected with the use, enjoyment, and economic viability of the base property. The standard does not change just because the subject water is located on federal land. *See Memorandum Decision and Order on Challenge April 25, 2000*, p. 14-15 (“In Idaho it is well established that the ownership of a water right can exist independently from the ownership of the land on which the water right is used ... This same rule can also apply to the appropriation of water on federal public lands.”)

A water right is deemed appurtenant to the tract of land that benefits from its use. *See Parke v. Bell*, 97 Idaho 67, 69 (1975) (the perfected water right is appurtenant to the land that receives the benefit of the water); *Kinney on Irrigation and Water Rights*, Volume 2, sections 997, 1000, 1005 (1912) (“a water right, which secures to the owner of a tract of land water for irrigation of the same, *or for some other purpose*, necessary to the beneficial enjoyment of the

land, the title to which is also in the owner of the land, becomes appurtenant to such land.”)(emphasis supplied). Put another way, specific to the present case, stockwater rights can be appurtenant to the base ranch property upon a demonstration of the nexus between the use of water right and the base property. *See Memorandum Decision and Order on Challenge April 25, 2000*, p.19-22. Recognition of this nexus is found in both the practical realities of running a ranching operation as well as in applicable statutes.

The economic viability of the base ranch property is inextricably tied to the owner’s ability to obtain and use its water rights on the federal allotments. As born out by the testimony of Paul Nettleton; the base ranch property cannot be used advantageously without the water rights at issue and has little or no marketable value absent the water rights and other appurtenances sold with the base ranch property (p. 717-718). Put simply, purchasing a base ranch property is a package deal: one does not purchase a base ranch property without also purchasing the appurtenant water rights which are so inextricably tied to the value and viability of the base property and the cattle operation. The strength of this nexus wholly supports the conclusion that the stockwater rights are appurtenant to the base ranch property.¹⁰

The strength of the nexus between the stockwater right used in conjunction with the grazing allotment and the base ranch property also is recognized by statute. *See Memorandum Decision and Order on Challenge April 25, 2000*, p. 20; *see also* The Taylor Grazing Act, 43 U.S.C. § 43-315b; I.C. § 25-901. In particular, the latter statute provides that the grazing

¹⁰ The economic value of the interests used in connection with the base ranch property is also recognized by case law dividing the value of these interests in adversarial proceedings. *See, e.g., Stevens v. Stevens*, 219 P.2d 1045 (Ariz. 1950)(addressing divisibility of grazing preference with base ranch property upon divorce); *see also Watson v. Barnard*, 469 P.2d 539 (Mont. 1970)(regarding enforcement of contract dividing water rights and base range rights).

preference itself is appurtenant to the base property:

The United States Congress ... passed the Taylor Grazing Act in 1934. Through this act, Congress acknowledged grazing preference rights and provided for adjudication of allotments on which the grazing preference right was exercised. *Livestock ranches are bought, sold, traded and inherited with assurance that the appurtenant grazing preference rights will be transferred to the new base property owner. Therefore, a grazing preference right shall be considered an appurtenance of the base property through which the grazing preference is maintained.*

I.C. § 25-901 (2001)(emphasis supplied). The statute recognizes that because a grazing preference not only benefits, but is necessary to the successful operation of a base ranch property, it is appurtenant to the base ranch property and is transferred as such. Just as a grazing preference is an essential component to the use and operation of the base ranch property, so to are stockwater rights used in conjunction with both the grazing preference and the base ranch property. Practically speaking, both the base ranch property and the appurtenant grazing preferences are worthless if the cattle are permitted to graze, but not permitted to drink. Both the grazing preference and the stockwater rights are essential to ensuring the successful operation of the base ranch property, are necessary for the beneficial use and enjoyment of the base ranch property, and, accordingly, both should be transferred as appurtenances to the base ranch property.

The interdependence of the base ranch property, grazing preferences, and stockwater rights also is recognized by the Taylor Grazing Act. It provides, in pertinent part, “(p)reference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights

owned, occupied or leased by them.” 43 U.S.C. § 315b (2001). Again, the conclusion that water rights should be transferred as appurtenances to the base ranch property is supported by the fact that the stockwater rights are necessary to the operation of the base ranch property and, further, provide the owner of the base ranch property the ability to acquire and maintain a grazing permit, also necessary to the successful operation of the base ranch property.

Judge Wood in his *Memorandum Decision and Order on Challenge April 25, 2000* has already ruled, based on the settled law of appurtenances discussed, above, that stockwater rights on federal land can be transferred as appurtenances to the base ranch properties provided a sufficient nexus is demonstrated between the water right and the base ranch property and the parties to the transfer of the base ranch property intended the subject water rights to be part of the transfer as appurtenances. Moreover, a Nevada court specifically has held that stockwater rights on federally administered land are appurtenant to the base ranch properties. *See In the Matter of the Determination of the Relative Rights in and to the Waters of Monitor Valley -- Southern Part (140-B), Nye County, Nevada*, Fifth Judicial District Court of the State of Nevada in and for the County of Nye, Case No. CV 14906, Findings of Fact and Conclusions of Law (October 8, 1999)(hereinafter “*Monitor Valley Decision*”);¹¹ *Stepcoe Livestock Company v. Gulley*, 295 P.2d 772 (Nevada 1931). In the *Monitor Valley Decision*, the United States argued that neither federal nor state law permit private parties to obtain stockwater rights on federal land. The Court specifically rejected the United States’ argument and held that it was Congress’ intent to grant

¹¹ As this is an unpublished decision, a copy of the *Monitor Valley Decision* was lodged with the Court in Exhibit “A” to Joyce Livestock’s Motion for Summary Judgment. The parties to that case include the United States and stockwater right owners on federal grazing allotments. The Order of Determination on which the *Monitor Valley Decision* was based, was adopted in the opinion *Hage v. United States*, 42 Fed.Cl. 249 (1998).

states control over water rights on public land. *See Monitor Valley Decision*, p. 2-3, citing *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 79 L.Ed. 1356 (1945). The Court went on to hold not only that private parties can acquire stockwater rights on federal land, but that those stockwater rights are appurtenant to the base ranches rather than to the federal land where the livestock drink. *See Monitor Valley Decision*, p. 3, 6, 8. *See also E. Wayne Hage v. The United States*, U.S.C. Federal Claims (January 29, 2002) pp.7-9, lodged herewith as Attachment "B" to the Motion for Summary Judgment herein.

D. The Stockwater Rights at Issue Were Intended to Be Transferred as Appurtenances to the Base Ranch Property.

As recognized by Judge Wood in his *Memorandum Decision and Order on Challenge April 25, 2002*, water rights can transfer as appurtenances to the base property even if the deed transferring the base property is silent on the issue of water rights. *See Memorandum Decision and Order on Challenge April 25, 2002*, p. 18, citing *Crow v. Carlson*, 690 P.2d 916 (Idaho 1984)(unlike an interest in land, a water right can be conveyed without expressly mentioning the water right via the same instrument that conveys the real property to which the water right is appurtenant). Appurtenant water rights will transfer along with the base ranch property so long as that is the intent of the parties to the transaction. *See Memorandum Decision and Order on Challenge April 25, 2002*, p. 18-21.

The starting point on the issue of whether the grantor intended to transfer the water right as an appurtenance is the presumption that the water right is transferred absent an express reservation to the contrary. *See Sheets v. Selden*, 69 U.S. 177, 17 L. Ed 822 (1864) ("The true rule on the subject is this, that everything essential to the beneficial use and enjoyment of the

property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance”); *see also Zolezzi v. Jackson*, 297 P.2d 1081 (Nevada 1956)(water rights transfer with the land to which they pertain unless there is a specific reservation of the water rights in the document of transfer). Similarly, where there is just a general reference to the transfer of appurtenances, the water right will transfer as an appurtenance absent an express reservation. *See Kinney on Irrigation and Water Right*, Volume 2, section 1009 (1912)(“Where there ... is the expression ‘together with all and the singular the appurtenances thereunto belonging and appertaining,’ or one of similar purport, using the word ‘appurtenances,’ unless there is a specific reservation of the water right ... the water right will pass with the transfer of the land the same as though it had been specifically mentioned in the deed.”) Accordingly, contrary to the United States’ position, the fact that a deed does not expressly mention a specific water right is not dispositive of the issue of whether the water rights were transferred with the base ranch property. *See Crow v. Carlson*, 690 P.2d 916 (Idaho 1984)(citing I.C. § 42-220). In fact, the issue is not whether the deed expressly transferred water rights, but rather whether it was the intention of the parties to the transaction to transfer the water rights as appurtenances to the base ranch property or reserve them. *See Memorandum Decision and Order on Challenge April 25, 2002*.

Joyce Livestock’s claim that the water rights were intended to be transferred as appurtenances is supported by the stipulated chain of title, patents, and BLM Dependent Property Records, as well as the practical realities and economics surrounding a ranching operation. The deeds refer to the transfer of all appurtenances and, in some cases, to the transfer of water rights.

in particular.¹² Moreover, the deeds are devoid of any reservation of the water rights in the grantor. Transfers since the enactment of the Taylor Grazing Act were accompanied by proper transfers of the grazing preferences with the Bureau of Land Management. The economic value of the base ranch property is tied to the value of the water rights and the transfer of grazing preferences without the transfer of the water rights renders the transfer of the grazing rights valueless as appurtenances to the base ranch property.

That the grantors in Joyce Livestock's chain of title intended to transfer the water rights as appurtenances to the base ranch properties is also supported by the practical realities associated with the operation of a cattle ranch. As recognized by Judge Woods in his *Memorandum Decision and Order on Challenge April 25, 2002*, it is not only probable, but logical, that the party selling a ranch would intend that the water rights used in conjunction with the ranch would pass as appurtenances to the base ranch property. *See Memorandum Decision and Order on Challenge April 25, 2002*, p. 22 ("When the ranch is transferred as a going concern it defies reason that the parties would have intended that the subject water rights would be forfeited. Rather, it lends credence to the assertion that the rights were intended to be transferred with the base ranch property.")

E. Through the Directors' Report and Stipulated, Uninterrupted Chain of Title, Joyce Livestock Has Established its Priority Dates And, Further, the United States Is Estopped from Disputing the Validity of the Priority Dates.

Stockwater rights transferred as appurtenances carry with them all elements of the water right, including but not limited to the priority date relating back to the first date the water was put to beneficial use. As explained by Wells A. Hutchins:

¹²See Exhibit A.

Effect of informal transfer upon priority of right. One early result of the general rule that a written deed of conveyance is necessary to transfer an appropriative right was the concept that a transfer lacking all formalities operated as an abandonment of the water right, thus forfeiting the original priority and relegating the priority of the transferee to the date of his own beginning actual use of the water. Although this found favor in a few decisions, it tended to operate on the parties to the transaction with unnecessary severity. *And it was clearly irrational in disregarding the fundamental rule that abandonment is an intentional process. The importance of the fallacious concept in the few jurisdictions in which it was accepted diminished or ended long ago.*

See Water Rights Laws in the Nineteen Western States, Wells A. Hutchins, J.D., Volume I, p. 485 (citations omitted)(emphasis supplied). In the present case, the records of the United States establish the grazing priorities which include the water rights on BLM land. The applications and homestead entries presented for U.S. patents beginning in 1898 and the applications for grazing privileges support the conclusion that Joyce Livestock's predecessors grazed and appropriated water from Jordan Creek on stockwater (See Trial Exhibits – Bates Stamped Nos 01150-1154, 01305-01306, 02306-02309, 02614-02620). The date that the water was first appropriated is the priority date, inherited by successors in interest to the base property and appurtenant water rights. *See Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967).

F. Reference to “Water Rights” or Similar Language in Earlier Deeds in the Chain of Title Become “Appurtenances” and Unless Excluded, Are Conveyed in Subsequent Deeds

As previously indicated, absent an express reservation to the contrary, a water right will pass as an “appurtenance.” *Sheets v. Selden, supra*. Further, it has been held that once water is used for the benefit of the property owned by the grantor, “such water so used became an appurtenance to the land, and the conveyance of the land, together with the appurtenances,” would convey not only the land but the water right appurtenant to said land, unless it appeared by

the terms of the conveyance that such right was reserved, or that it was clearly shown by the evidence that both parties intended not to include said water right by such conveyance. *Russell v. Irish* 20 Idaho 194, 118 P. 501. *See also: F.L. Koon v. Empey* 40 Idaho 6, 231 P. 1097.

In addition, and specifically with respect to several of the parcels which constitute the present base property of Joyce Livestock, there are deeds within the chain of title which specifically identify and describe “water rights” and “grazing rights.” Although not required to effectively transfer the water rights as a necessary appurtenance to the land, clearly the intent of the grantor in those conveyances was to pass those interests to the grantee, and by so doing, it is submitted that the grantor defined the appurtenances which then pass to subsequent grantees in the chain of title, including, the ultimate conveyance in 1985 to Joyce Livestock Company.

V. CONCLUSION

There is no theory which will sustain a finding that the United States has appropriated a stockwater right which has been previously appropriated and beneficially used. In fact, the Taylor Grazing Act specifically recognized prior appropriated stockwater rights. The fact that the BLM opines that it needs to control the water rights as part of its range management responsibilities and thus “intends” to appropriate stockwater is of no legal consequence. Let us not lose sight of the fact that under the Taylor Grazing Act, the charge of the BLM is to administer the public lands for the benefit of the ranching community. The ruling of Presiding Judge Hurlbutt, Jr. of September 30, 1998 incorporating and adopting Special Master Haemmerle’s findings of fact and conclusions of law is dispositive of the United States’ claim in this action. Since Joyce Livestock’s stockwater rights are based upon prior appropriation and beneficial use dating to 1898, and were recognized in the adjudications which occurred after the

enactment of the Taylor Grazing Act, the finding by this Court that the BLM has acquired Joyce Livestock's stockwater rights would violate the express provisions of the Taylor Grazing Act. The United States' claims must be denied as a matter of law and fact.

The legal standard recognizing that a prior appropriated and beneficially used stockwater right passes as an appurtenance to the base property is now well established in the SRBA. Once appropriated and beneficially used for ranch purposes, a stockwater right becomes an inseparable asset of the ranching operation and thus benefits the base property or "commensurate property" under the criteria established by the Taylor Grazing Act. The Memorandum of Decision and Order on Challenge, and Order of the Commitment to Special Master Cushman (subcases 55-10288A and B, et al.), April 25, 2000 by the Honorable Barry Wood as implemented and applied by Special Master Cushman in Special Master's Report and Recommendations, Findings of Fact and Conclusion of Law in the subcases dated March 3, 2003 is dispositive of the fact that Joyce Livestock is an owner of the appropriated water rights of Jordan Creek with a priority date of 1898. The unrefuted and overwhelming testimony of Paul Nettleton, Gene Lewis and Dr. Gibson establishes beyond all doubt that these stockwater rights became an integral part of the ranching operations of the predecessors in interest to the current applicant, particularly under circumstances where Paul Nettleton has actual knowledge of the historic practices of grazing in

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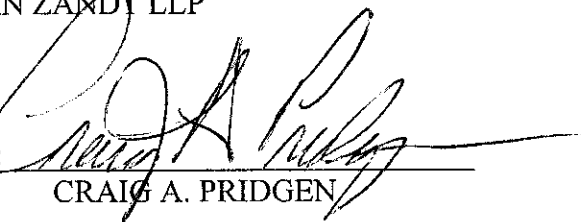
the Jordan Creek area since the original patentees included members of his immediate family.

Joyce Livestock's claim must be approved.

Respectfully submitted,

DATED: March 18, 2003

McQUAID, METZLER, BEDFORD &
VAN ZANDT LLP

By: 

CRAIG A. PRIDGEN

DATED: March ____ 2003

LAW OFFICES OF RICHARD L. HARRIS

By: _____

RICHARD L. HARRIS
Attorneys for Joyce Livestock Co.

CERTIFICATE OF MAILING

I certify that on March 18, 2003, I faxed/mailed the original and copies of the foregoing **CLOSING ARGUMENT BY JOYCE LIVESTOCK CO.** to the following persons as indicated below, the original and/or copies, postage paid and addressed as follows:

1. Original to:

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