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

In Re SRBA	)	Subcase Numbers: 55-10135, 55-11061,
	)	55-11385, and 55-12452
Case No. 39576	)	
	)	**UNITED STATES' POST-TRIAL**
	)	**MEMORANDUM**

I. INTRODUCTION

Joyce Livestock Co. Ltd. (hereinafter "Joyce") objected to three United States Department of the Interior, Bureau of Land Management (hereinafter "BLM") claims for stockwater located entirely upon public land[1] used for livestock grazing by qualified applicants

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

for grazing permits. The BLM objected to one of Joyce's stockwater claims that describes a water source identical to BLM's claims and provides water for livestock using the same public land for grazing.

Trial was held on December 3, 4, 5, and 6, 2002. In lieu of closing argument, the United States respectfully files this Post-Trial Memorandum to assist the Special Master in deciding: (1) whether landowners who make their land available to others for livestock grazing can perfect stockwatering rights; (2) whether a stockgrower who grazes his livestock on land owned by another can perfect a stockwatering right on that land, based upon prior use by other stockgrowers who allowed livestock to roam at large on unenclosed land, by tacking back to the first water user even where there is no evidence of any conveyance of a preexisting water right; and, (3) to the extent the water is already appropriated by the landowner, whether the stockgrower's water right should be limited to avoid an allocation of water in excess of the quantity actually used.

II. STATEMENT OF THE CASE

The United States is entitled to stockwatering rights because making public land available to others for livestock grazing by issuing permits to qualified applicants is a diversion and beneficial use of water that satisfies Idaho's requirements for a valid appropriation. Idaho statutes, the Idaho Attorney General's interpretation of Idaho statutes, and the Idaho Department of Water Resources' recommendation of the water rights confirm that landowners in Idaho who make their land available to others for livestock grazing are valid appropriators of water, even though the landowners may not own the livestock that actually drink the water.

Joyce's claimed priority date is not warranted because there is no evidence that a water right located entirely upon public land was perfected by Joyce's predecessors, and then transferred to Joyce in accordance with state law. For the purpose of determining the priority of water use, Joyce cannot tack its priority date for the use of water back to the first stockwater users, thus gaining a priority date advantage over other water users. Moreover, if there can be two water rights that allocate water for consumption by the same livestock, Joyce's right would have to be limited so that water would not be allocated in excess of the amount actually used.

III. SUMMATION OF EVIDENCE

Public land in Owyhee County, Idaho, was first used for livestock grazing in about 1863 after the discovery of valuable mineral deposits in the upper reaches of Jordan Creek.[2] The public land around Silver City was used as saddle ranches for the miners' horses and pack animals and as livestock ranches that provided meat and dairy products to the miners.[3] Livestock ranching eventually became an economic mainstay of Owyhee County. Exhibit 88, pp. 5-6

Cattle and sheep ranchers located homesteads along streams that provided a dependable water supply, then used public land to provide sustenance to livestock.[4] Testimony of Michael Boltz, Trial Transcript, p. 508; *see* Exhibits 95 and 96. The local cattle ranchers turned out their livestock from winter range in the early spring. Testimony of Gene Lewis, Trial Transcript, p.

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[2] *See* W.J. McConnell, Early History of Idaho (Caldwell, Idaho: The Caxton Printers, 1913), pp. 192-197; *see also* Helen Nettleton, Sketches of Owyhee County, (Nampa, Idaho: Schwartz Printing Co., 1978), p. 166.

[3] Ibid.

[4] *See* Mildretta Adams, Owyhee Cattlemen (Homedale, Idaho: Owyhee Publishing Co., 1978) pp. 8, 23, 43-44, 68-69; *see* The Owyhee Avalance (Ruby City, Idaho, 7 October 1865, p. 3, c. 2.

315. Cattle, in search of grass and water, would roam at large following the snow melt to the tops of ridges and drift as far as Reno, Nevada. Testimony of Gene Lewis, Trial Transcript, pp. 315-316. Cattle were rounded up by the ranchers, and cowboys would ride from ranch to ranch in search of cattle that might belong to a particular stockman. Testimony of Gene Lewis, Trial Transcript, p. 317. Itinerant cattle and sheep herdsman competed for forage and water by grazing livestock on the same public land. Testimony of Michael Boltz, Trial Transcript, p. 444; Exhibit 88, pp. 28-29. Local ranchers did not attempt to exclude anyone from using public land for livestock grazing. Testimony of Michael Boltz, Trial Transcript, p. 444; Deposition of Gene Lewis, p. 15, lines 8-25. Thus, public land in Owyhee County was used as a grazing commons where grass and water were available to all who wished to use them.[5]

By 1888, livestock in Owyhee County had proliferated to about 100,000 head of cattle and over 50,000 head of sheep. Exhibit 88, p. 31. A long, severe winter in 1889-90 killed as much as 80% of the livestock in Owyhee County. Exhibit 88, p. 27. Stockgrowers quickly rebounded from their losses and by 1900 there were about 180,000 sheep and 12,000 cattle grazing on public land in Owyhee County. Exhibit 88, p. 30.

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[5] Under an implied license, the Western public land was an open grazing commons used by all who wished to use them for rearing livestock. Buford v. Houtz, 133 U.S. 320, 326-327 (1890); *see* Public Lands Council v. Babbitt, 529 U.S. 728, 731-733 (2000) ("Ranchers once freely grazed livestock on the publicly owned range as their herds moved from place to place, searching for grass and water."); *see* Anthony Wilkinson LiveStock Co. v. McIlquam, 83 P. 364, 369 (Wyo. 1905) ("This privilege or right of pasturage upon the public lands of the government, which are left open and unenclosed, and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it. It is not a special privilege conferred upon one person or a few persons. No individual has any greater right than another to herd his live stock upon such lands, or to allow them to roam at large thereon.").

The public land was over-stocked. Exhibit 88, p. 31. Consequently, livestock grazing resources were severely depleted. Testimony of Michael Boltz, Trial Transcript, p. 443; Exhibit 88, pp. 10-21. Lack of vegetative cover and soil erosion were serious problems. Exhibit 88, pp. 22-25; *see* Public Lands Council v. Babbitt, 529 U.S. 728,732-733 (2000). By 1930, public land had been so over-grazed that the number of livestock units produced had decreased by 75 to 80 percent as compared to 1888. Exhibit 88, pp. 31-32. Stockgrowers raised or bought hay for winter feeding of livestock. Exhibit 88, p. 32. Competition for grazing resources on public land was intense.[6] Public Lands Council, 529 U.S. at 732. Many ranchers left the livestock business. Exhibit 88, p. 32.

Calls for grazing regulation on public land began as early as 1878. Public Lands Council, 529 U.S. at 732-733. Opposition to regulation eventually diminished, and the erosion caused dust storms of the 1930's finally impressed upon the United States' Congress the critical need to regulate grazing on public land. Public Lands Council, 529 U.S. at 733. On "June 28, 1934, President Franklin Roosevelt signed the Taylor Grazing Act into law." Public Lands Council, 529 U.S. at 733; *see* The Taylor Grazing Act of 1934 (hereinafter "Taylor Grazing Act") (codified at 43 U.S.C. §§ 315-316). Congress enacted the Taylor Grazing Act "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; to stabilize the livestock industry dependent upon the public range; and for other purposes." 48 Stat. 1269 (1934).

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[6] "[I]t was just a fact of life. . . .[Y]ou try to beat your neighbor to the grass, your cows will be fat, and his will get what's left." Testimony of Paul Nettleton, Trial Transcript, p. 696. *See e.g.* Omaechevarria v. Idaho, 246 U.S. 343, 344 fn. 1 (1918) *citing* Pyramid Land and Stock Co. v. Pierce, 30 Nev. 237, 253-255, 95 P. 210 (1908) and Sweet v. Ballentyne, 8 Idaho 431, 447, 69 P. 995 (1902); McKelvey v. United States, 260 U.S. 353 (1922).

For nearly 70 years, the BLM[7] has administered and controlled every aspect of domestic livestock grazing on public land.[8] Testimony of Ronald Kay, Trial Transcript, pp. 541-569; Testimony of Michael Boltz, Trial Transcript, pp. 439-453; Exhibits 9-16, 22-87, 92-94; Exhibits A and B; Testimony of Gene Lewis, Trial Transcript, pp. 319-320. Initially, the BLM verified the extent of dependent private property,[9] determined the livestock carrying capacity of commensurate property[10] and public land, and adjudicated grazing preferences[11] among the many users of public land. Testimony of Michael Boltz, Trial Transcript, pp. 445-454. The BLM

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

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

[9] "Property - shall consist of land and its products or stock water owned or controlled and used according to local custom in livestock operations. Such property is: (a) Dependent if public range is required to maintain its proper use . . . ." Exhibit B, p. 58.

[10] Commensurate property is base property that has "sufficient productive capacity to support the livestock herd for a minimum of four months when they were not on the federal range." Testimony of Michael Boltz, Trial Transcript, pp. 446-447; *see also* Trial Exhibit B, p. 58 ("Commensurate for a license for a certain number of livestock if such property provides proper protection according to local custom for said livestock during the period for which the public range is inadequate.")

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

issued annual grazing licenses and, eventually, 10 year grazing permits[12] to qualified applicants, charged reasonable fees for grazing use of public land, and conferred a grazing preference for the issuance of grazing permits upon local landowners and water right owners. *See* 43 U.S.C. § 315b; Public Lands Council, 529 U.S at 735;[13] Testimony of Michael Boltz, Trial Transcript, pp. 439-454, 507-513. Those users who did not establish a priority of use determined by the BLM through surveys of dependent base property and examination of grazing use on public land during 1932 and 1933[14] were not authorized to use public lands for livestock grazing, which resulted in barring nomadic herdsmen, and even some local landowners, from using public land for livestock grazing. Exhibit A, p. 35; Testimony of Michael Boltz, Trial Transcript, pp. 448-489.

Since 1934, Congress has appropriated a substantial budget for BLM's administration and control of livestock grazing and rangeland improvement. Testimony of Ronald Kay, Trial

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

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

[14] The "priority years." Testimony of Michael Boltz, Trial Transcript, pp. 448-489.

Transcript, p. 545; Exhibit A, p. 8; Exhibit B, p. 47. In addition, the grazing fees[15] paid to the BLM by the grazing permittees are deposited in the United States Treasury, then 50% is distributed to the BLM for range management and range improvement, 37 ½ % is retained in the general fund, and 12 ½ % is distributed to the State of Idaho for its general fund. Testimony of Ronald Kay, Trial Transcript, p. 553. The United States, the State of Idaho, the livestock industry, and all the people of the United States derive substantial benefits from BLM's long history of administration and control of livestock grazing on public land, not only from grazing fee receipts, but from achieving the important national goals of soil stabilization, re-establishment of healthy vegetative communities and ecosystems on public land, public land improvement, and stabilization of the livestock industry. Testimony of Ronald Kay, Trial Transcript, pp. 555-559; Testimony of Gary Madenford, Trial Transcript, pp. 341-360.

Livestock must have forage and water to survive while they use public land for grazing. Testimony of Ronald Kay, Trial Transcript, p. 559. Livestock cannot legally access forage and water on public land unless the BLM issues a qualified stockgrower a grazing permit and the stockgrower pays grazing fees to the BLM. Testimony of Ronald Kay, Trial Transcript, p. 551. The BLM manages livestock access to all water sources (including in-stream water sources) on public land as a key element of administering and controlling grazing use. Testimony of Gary Madenford, Trial Transcript, pp. 344-361;Testimony of Ronald Kay, Trial Transcript, pp. 557 and 559. Managing access to water sources also stabilizes the availability of forage within

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[15] The grazing fees were initially about $.05 per cow per month and $.01 per sheep or goat per month. Exhibit A, p. 42. The current grazing fees are $1.43 per animal unit month. Testimony of Ronald Kay, Trial Transcript, p. 552. Grazing fees must be paid or grazing use is not authorized and considered a trespass. Testimony of Ronald Kay, Trial Transcript, pp. 551-552.

grazing allotments. Testimony of Ronald Kay, Trial Transcript, p. 557; Testimony of Gary Madenford, Trial Transcript, pp. 352-354. In 1938, grazing regulations authorized the BLM to charge non-permittees a separate fee for using livestock water provided by BLM controlled wells. Testimony of Fredric W. Price, Trial Transcript, p. 247-249.

The BLM filed water right claims for instream stockwatering because, in order to effectively administer livestock grazing on public land, water must be available for consumption by livestock owned by whichever qualified stockgrower may have a grazing permit at any one time. Testimony of Fredric W. Price, Trial Transcript, pp. 123-132; Exhibits 3-7. The source claimed in this case is Jordan Creek, a major livestock watering source in one of the many pastures of the Silver City Allotment.[16] Testimony of Fredric W. Price, Trial Transcript, pp. 123-132; Exhibits 3-7. Each place of use is public land used for livestock grazing by Joyce's cattle. Testimony of Fredric W. Price, Trial Transcript, p.127; Exhibits 7 and 8. Water is available for livestock consumption at each place of use. Testimony of Robert Mallis, Trial Transcript, p. 106. Authorized livestock drink water from Jordan Creek at each place of use. Testimony of Robert Mallis, Trial Transcript, p. 107.

Joyce is a limited partnership formed in 1985. Testimony of Paul Nettleton, Trial Transcript, pp. 670-671. Paul Nettleton, his spouse Patricia, and, to a minor extent, their children are partners. Testimony of Paul Nettleton, Trial Transcript, p. 671. Joyce owns about 10,000 acres of ranch land. Testimony of Paul Nettleton, Trial Transcript, p. 723. Joyce has a grazing

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[16] The water right claims are located within a grazing allotment designated by the BLM as the Silver City Grazing Allotment, Allotment Number 0569 (hereinafter "Allotment"). *See* Exhibit 26, Bates Stamp Number (hereinafter "BSN") 1372 (Official Allotment Map, Silver City Allotment). "*Allotment* means an area of land designated and managed for grazing of livestock." 43 C.F.R. § 4100.0-5 (italics in original).

preference based upon its ownership of ranch land base property, and BLM issues a grazing permit to Joyce which, under conditions set by the BLM in accordance with the Taylor Grazing Act and regulations promulgated under the Taylor Grazing Act, authorizes Joyce to use the Allotment for livestock grazing. Testimony of Michael Boltz, Trial Transcript, pp. 439-441; Testimony of Ronald Kay, Trial Transcript, pp. 548-558. Joyce pays grazing fees to the BLM for grazing use of the Allotment. Deposition of Paul Nettleton, p. 52, lines 7-16; p. 54, lines 19-25; p. 59, lines17-23; Testimony of Ronald Kay, Trial Transcript, pp. 548-558. The other permittee authorized to use the Allotment for livestock grazing did not file for a stockwatering right in Jordan Creek, nor is there any evidence in the record that Joyce provided, or could have provided, stockwater to livestock owned by the other permittee. *See* Testimony of Michael Boltz, Trial Transcript, pp. 439.

Joyce filed a Notice of Claim to a Water Right to provide water to its livestock that use the Allotment for livestock grazing. Joyce's water right claim describes 20 places of use on public land within the Allotment. Exhibit 8 (BSN 4774). Joyce claims the identical source claimed by BLM. Exhibit 8 (BSN 4774). Joyce claims an 1898 priority date. Joyce contends that this priority date was established by its predecessors in interest to certain tracts of ranch land now owned by Joyce because the predecessors used Jordan Creek for stockwatering, thus appropriating a stockwatering right. Exhibit 18, pp. 22-23. Joyce contends that the stockwatering rights were conveyed to Joyce because Joyce's predecessors intended to transfer their ranch property to Joyce as a ranch unit, which included water rights located on public land and grazing use of public land. Testimony of Paul Nettleton, Trial Transcript, p. 673.

Joyce's privately owned ranch property was transferred to Joyce through a chain of title originating from those who homesteaded public land along dependable water sources in the Sinker Creek drainage.[17] *See* Exhibits 1, 95 and 96; Testimony of Michael Boltz, Trial Transcript, p. 508. Joyce's grazing preference in the Allotment was obtained through BLM approved transfers[18] from other livestock operators. Exhibit 22. All transfers of grazing preferences must be approved by the BLM before a grazing permit will be issued.[19] Testimony of Ronald Kay, Trial Transcript, pp. 549-551. There is no evidence in any files maintained by the BLM that Joyce, or any of Joyce's predecessors to the grazing preference for the Allotment, ever offered water rights as base property in order to receive a grazing preference, nor has Joyce's grazing preference ever been attached to a perfected water right.

Joyce's predecessors to the grazing preference to use the Allotment are John T. Shea, Joyce Brothers Livestock Co., Nettleton Brothers[20], Jean Heazle[21], and Jump Creek Sheep Co.

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[17] None of Joyce's base property is located in the Jordan Creek drainage. The base property is located in the Sinker Creek drainage which is separated from the Jordan Creek drainage by a substantial geographic ridge. Exhibits 26, 95, and 96.

[18] In many instances, AUMs were transferred to Joyce without a conveyance of base property. Testimony of Michael Boltz, Trial Transcript, pp. 472-473 (Heazle transferred AUMs to Joyce in 1956) and Trial Transcript, pp. 477-478 (Jump Creek Sheep Company transferred AUMs to Joyce in 1966).

[19] *See* 43 C.F.R. §§ 4110.2 - 4110.2-3. Filing an application for transfer of grazing preference is essential for a property to continue to be qualified as a base property.

[20] Nettleton Brothers (J.H. Nettleton and H.E. Nettleton) did not identify Jordan Creek as an area used for grazing during the priority years. Exhibits 86, 95, and 96; Testimony of Michael Boltz, Trial Transcript, pp. 478-480. They claimed prior grazing use of the headwaters of Sinker Creek, which is not in the area where the Joyce's water right claim is located. Id.

[21] Heazle transferred AUMs to Joyce in 1956, but not base property. Exhibit 69. There is no (continued...)

Testimony of Michael Boltz, Trial Transcript, pp. 455-489; Exhibit 22. In applications for grazing permit, only Joyce Brothers Livestock[22], John T. Shea, and Jump Creek Sheep Co. identified public land grazing use in the Jordan Creek drainage during the priority years. Testimony of Michael Boltz, Trial Transcript, pp. 454-457, 471-474, and 484-486; Exhibits 65, 85 and 87. In applications for grazing permit, only John T. Shea and Jump Creek Sheep Co. specifically identified public land in the Jordan Creek drainage that was used to support their livestock operations. Testimony of Michael Boltz, Trial Transcript, 455-463 and pp. 473-478; Exhibits 8 (BSN 4774), 22, 65, 87, 95, and 96.[23] In 1966, Jump Creek Sheep Co. transferred to

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[21](...continued)
evidence in the record that Heazle's livestock operation depended upon the Jordan Creek drainage during the priority years, even though Heazle's livestock may have roamed at large and occasionally used the Jordan Creek area for grazing. *See* Deposition of Gene Lewis, p. 22; Testimony of Gene Lewis, Trial Transcript, pp. 315-319; Testimony of Michael Boltz, Trial Transcript, p. 472.

[22] Joyce Brothers Livestock Co. filed an initial application for grazing permit in 1935 that identified public land grazing use in several townships. Exhibits 85 and 95. Jordan Creek passes through one section of one of the townships where prior grazing use was claimed. Exhibit 95; Testimony of Michael Boltz, Trial Transcript, p. 484. In a 1936 application for license, Joyce Brothers claimed prior use by the more descriptive geographic boundary method , i.e. the heads of Bates Creek, Fossil Creek, Sinker Creek and North Castle Creek; and Jordan Creek was not named as a place of grazing use. Exhibits 83 and 95; Testimony of Michael Boltz, Trial Transcript, p. 485. The description of grazing use of public land in Exhibit 83 makes the most sense because ranch land owned by Joyce Brothers Livestock Co. was located far to the Northeast of the Jordan Creek drainage and is separated from Jordan Creek by a substantial geographic ridge between Sinker Creek and Jordan Creek. Testimony of Michael Boltz, Trial Transcript, pp. 456-457 and 485-487; Exhibits 95 and 96.

[23] Paul Nettleton testified that Shea and several of Mr. Nettleton's relatives used public land in the Jordan Creek area for livestock grazing. Testimony of Paul Nettleton, Trial Transcript, p. 682. However, Mr. Nettleton's testimony was not based upon his personal knowledge because he was born in 1949 and his memory of the ranching operation only goes to about 5 years of age, and he has been part of Joyce's livestock business since about 1964. Deposition of Paul Nettleton, pp. 15-16. Gene Lewis also testified that John T. Shea and the Nettleton Brothers used
(continued...)

Joyce AUMs used on the public land in the Jordan Creek drainage, and that transfer of AUMs was not dependent upon a conveyance of any real property. Testimony of Michael Boltz, Trial Transcript, p. 478; Exhibit 50, (BSN 2773-2783). John T. Shea is Joyce's only predecessor who used public land in the Jordan Creek drainage and conveyed real property to Joyce, which resulted in a transfer of a grazing preference and AUMs to Joyce.[24] Testimony of Michael Boltz, Trial Transcript, pp. 466-471; Exhibits 65 (BSN 660) 75, 82, and 87.[25]

John T. Shea "owned and operated a cow outfit in the Sinker Creek and Jordan Creek watershed beginning in 1928 until he sold out in 1938." Exhibit 65 (BSN 660). Shea's livestock probably grazed on public land in the Jordan Creek drainage. Testimony of Michael Boltz, Trial

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[23](...continued)
public land in the Jordan Creek area for livestock grazing. Testimony of Gene Lewis, Trial Transcript, p. 316. However, the testimony directly conflicts with documentary evidence that Nettleton Brothers and Joyce Brothers Livestock Co. did not depend upon public land in the Jordan Creek drainage for support of their respective livestock operations. Exhibits 83, 85, and 86. The testimony also directly conflicts with documentary evidence that John T. Shea had almost exclusive use of the public land adjacent to Jordan Creek from 1925 to 1935. Exhibit 87 (BSN 2309).

[24] The grazing preference was apparently attached to John T. Shea's real property located in T.4S, R. 3W, Sec. 35, and T.5S., R.3W., Sections 1, 2, 11, and 12.

[25] Evidence of grazing use in the Jordan Creek drainage is also conflicting. Exhibit 64 (BSN 3180 - use by Joyce Livestock, John Shea, Jean Heazle); Exhibit 65 (BSN 634 - use by Joyce Livestock and Nettleton); Exhibit 66 (BSN 2428 and 4467 - Nettleton and Joyce Livestock use). The best evidence is the testimony of Michael Boltz and the statements of the various individuals and entities in 1935 and 1936 before there was competition for AUMs and grazing preferences based upon grazing use in the Jordan Creek drainage. Jump Creek Sheep Co. and John T. Shea are the stockgrowers who specifically cited using public land in the Jordan Creek drainage. Testimony of Michael Boltz Trial Transcript, pp. 454-457 and 471-472. Livestock owned by others roamed at large and drifted into the Jordan Creek drainage. Only John T. Shea actually transferred any real property to Joyce Livestock. As shown below, if John T. Shea did appropriate water from Jordan Creek, and the evidence shows he did not, water rights that describe public land as places of use were not conveyed to Joyce.

Transcript, pp. 454-456; Exhibit 87. Shea stated that he owned or controlled water sources needed or used in his livestock operation that were "springs and creeks running on and through the ranches." Exhibit 87 (BSN 2307). Shea did not offer water rights as base property, and the BLM did not find that Shea's livestock operation depended on water rights in Jordan Creek when grazing preferences were adjudicated. The BLM adjudicated grazing preferences and awarded Shea 81 animal units that were attached to his ranch land base property in T.4S, R. 3W, Sec. 35, and T.5S., R.3W., Sections 1, 2, 11, and 12. Testimony of Michael Boltz, Trial Transcript, p. 457; Exhibit 80. In 1938, Shea sold his livestock, then leased his ranch land base property to Augustine Salove. Testimony of Michael Boltz, Trial Transcript, pp. 462-463; Exhibit 94.

Shea's AUMs were transferred to Salove. Testimony of Michael Boltz, Trial Transcript, p. 463. From 1938 through 1951, Salove used the AUMs in his sheep ranching operation. Testimony of Michael Boltz, Trial Transcript, pp. 464-467. Shea did not have a grazing preference from 1938 to 1951, and Salove did not use Jordan Creek as a water source from 1938 through 1951. Testimony of Michael Boltz, Trial Transcript, pp. 464-467; Testimony of Gene Lewis, Trial Transcript, pp. 327-328.

On September 24, 1951, Shea conveyed ranch land property to Joyce Livestock Company and J.H. Nettleton.[26] Testimony of Michael Boltz, Trial Transcript, pp. 468; Exhibit 1, BSN 100224-100225; Exhibit 75. Shea did not convey water rights located on public land, although

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[26] *See* Exhibit 1, BSN 100273-100276, BSN 100245-100248, BSN 100218-100220, BSN 100198-100202, BSN 100221-100222, BSN 100223 to Exhibit 1, BSN 100280-100281. John T. Shea was in possession of the homestead entry in 1926. Exhibit 9.

"grazing rights" are mentioned in the deed.[27] Exhibit 1, BSN 100224-100225. The BLM deducted 81 animal units from the Salove grazing preference, then approved a transfer of 40 animal units to Joyce Livestock Company and 40 animal units to J.H. Nettleton. Exhibit 75 (BSN 2825). On October 31, 1976, J.H. and Edith Nettleton conveyed the property to Joyce Livestock Company, a co-partnership. Exhibit 1, BSN 100196-100197 (this deed does not convey any water rights located on public land). On August 24, 1985, Joyce Livestock Company, a general partnership conveyed the property to Joyce Livestock Company, a limited partnership. Exhibit 1, BSN 100232-10233 (this deed does not convey any water rights located on public land). There is no document of conveyance in Joyce's chain of title that contains any specific or express description of any water rights located on the public land within the Allotment boundary. *See generally* Exhibit 1.

In fact, Paul Nettleton is not aware of any documents in Joyce's entire chain of title that specifically describe water rights located on public land. Deposition of Paul Nettleton, p. 14, lines 2-9. The most recent warranty deeds conveying property from Helen Nettleton to Joyce and conveying property from Joyce Livestock Company, a general partnership to Joyce, do not contain any description of water rights at all. Exhibit 1, BSN 100073-100076 and BSN 100117-100118. There is no documentary evidence that any of Joyce's predecessors to its ranch property or to its grazing preference ever perfected a water right on the public land described in Joyce's water right claim, used water rights as base property to obtain a grazing preference, depended

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[27] Neither the grazing preference nor the AUMs were Shea's to convey. Testimony of Ronald Kay, Trial Transcript, pp. 550-551. Note that when BLM approved the grazing preference and AUM transfer, the AUMs were deducted from Salove, not Shea. Exhibit, 75 (BSN 2825). Furthermore, BLM does not recognize the sale of grazing permits. Testimony of Ronald Kay, Trial Transcript, p. 550.

upon perfected water rights located on the public land to maintain a livestock operation, or, if they perfected a water right, transferred that water right to Joyce in accordance with State law.

IV. ARGUMENT

A. Water Right Numbers 55-11061, 55-11385 and 55-12452 Are Valid Appropriations of Water by the BLM

1. The BLM Satisfies the Test of a valid Appropriation

"The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. . . ." Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 677, 679-680, 619 P.2d 1130, 1132-1133 (Idaho 1980). A diversion device is not required in order to satisfy the diversion requirement. R.T. Nahas Company v. Hulet, 106 Idaho 37, 674 P.2d 1036, 1044 (Idaho App. 1983) ("for the purpose of establishing the existence of a stockwatering right by the constitutional method of appropriation, a diversion device is not required."). Idaho has always protected the right of a riparian landowner to perfect an instream stockwatering right from water flowing through his own property. Hutchinson v. Watson Slough Ditch Co., 101 P. 1059 (Idaho 1909); *see* Stevenson v. Steele, 453 P.2d 819, 826 (Idaho 1969). The BLM, through its management of public land for livestock grazing under the Taylor Grazing Act, intended to appropriate water for the care and management of livestock owned by a qualified applicant for a grazing permit, thus satisfying all of the requirements for appropriation of the claimed water rights. Lemmon v. Hardy, 519 P.2d 1168, 1171 (Idaho 1974) (claimant must have a possessory interest[28] in the land designated as a place of use).

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[28] A "possessory interest" is a right to exert control over certain land to the exclusion of others, coupled with an intent to exercise that right. RESTATEMENT OF THE LAW OF PROPERTY (VOLUME 1) § 7 (1936). *See also* Sunol, et al. v. Hepburn, et al., 1 Cal. 254, 262 (Cal. 1850).

On June 28, 1934, Congress revoked the implied license to freely graze on public land by enacting the Taylor Grazing Act.[29] Congress directed the Secretary of the Interior (hereinafter "Secretary") to provide for the protection, administration, regulation, and improvement of federal rangelands. 43 U.S.C. § 315a. Congress authorized the Secretary to issue permits to graze livestock on the public lands to a specific class of qualified citizens, collect fees for authorized grazing use, and to regulate all aspects of grazing use. 43 U.S.C. §§ 315a and 315b. Congress authorized the Secretary to facilitate the construction of "wells, reservoirs and other improvements necessary to the care and management of the permitted livestock . . . ." 43 U.S.C. § 315c. In order to administer grazing use of public land, BLM must have water available for the care and management of livestock owned by whichever member of the public may have a grazing permit at any one time.

The Taylor Grazing Act was enacted "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; to stabilize the livestock industry dependent upon the public range; and for other purposes." 48 Stat. 1269 (1934). To accomplish these goals, the Secretary was specifically directed to:

> [M]ake provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to

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[29] The Taylor Grazing Act granted the "Secretary of the Interior authority to divide the public range-lands into grazing districts, to specify the amount of grazing permitted in each district, to issue leases or permits 'to graze livestock,' and to charge 'reasonable fees' for use of the land. 43 U.S.C. §§ 315, 315a, and 315b." Public Lands Council, 529 U.S. at 733. Thus, the implied license to freely use public land for livestock grazing was revoked. *See* Light v. United States, 220 U.S. 523, 535 (1911).

> accomplish the purposes of this subchapter and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range . . . .

43 U.S.C. § 315a.

Pursuant to regulations promulgated under the Taylor Grazing Act and other statutes, the United States, through the BLM, manages rangeland and livestock grazing on public land. *See* 43 C.F.R. §§ 4100.0-1 - 4180.2; Public Lands Council, 529 U.S. at 734-739. This management, based on administration of grazing permits issued to livestock owners, is a use of public land "for the benefit of the United States." United States v. Morrell, 331 F.2d 498, 501 (10th Cir.), *cert denied*, Chournos v. United States, 379 U.S. 879 (1964) (The grant of grazing permits to livestock owners is a use of public land "for the benefit of the United States.").[30] Through the administration of grazing use of public land, national interests are promoted and water is put to beneficial use. Use of the water for grazing on public land would not occur but for the issuance of grazing permits. Without grazing permits, the United States would not receive fees from grazing use of public land[31], and the significant national interests embodied in the Taylor Grazing Act would not be entirely realized. Thus, the consumption of water by domestic livestock authorized to use public land for livestock grazing is a beneficial use of water by the United States.

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[30] "'All the public lands of the nation are held in trust for the people of the whole country.'" Light v. United States, 220 U.S. at 537, *citing* United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890). Under the Property Clause of the Constitution, "[t]he United States can prohibit absolutely or fix the terms on which its property may be used." Id. at 536.

[31] Nor would the State of Idaho receive a share of those grazing fees.

Although no Idaho Court has specifically held that BLM's management of the public land for grazing qualifies for a state-law water right,[32] the Nevada Supreme Court has so held. In a well-reasoned decision, the Nevada Supreme Court held that the United States could hold title to livestock watering rights on the federal public land under Nevada Law. State v. Morros, 766 P.2d 263 (Nevada 1988). The Court stated:

> In managing federal grazing lands, the United States acts in a proprietary capacity. . . . Congress has mandated development of water sources for livestock and wildlife as a component of the federal land management program . . . . Thus, the United States acts in its proprietary capacity as a landowner when federal agencies seek to appropriate water under state law for livestock and wildlife watering. Although the United States does not own the livestock and wildlife, it owns the land on which the water is to be put to beneficial use. In addition, the United States benefits as a landowner from the development of new water sources on federal land.

Id. at 268.

The public land contained within the Allotment boundary is managed for the purpose of providing sustenance to domestic livestock owned by qualified applicants for grazing permits issued under the provisions of the Taylor Grazing Act. As in Morros, 766 P.2d at 268, the United States is acting in its proprietary capacity as a landowner, and validly appropriated livestock water in compliance with Idaho law. All of the elements of a valid appropriation are satisfied. *See* Hidden Springs Trout Ranch, Inc., 619 P.2d at 1132-1133 (diversion and beneficial use); Lemmon, 519 P.2d at 1171 (possessory interest in the land designated as a place of use). The Special Master should follow the Morros Court's persuasive reasoning, not Joyce's

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[32] In United States v. State, 959 P.2d 449 (Idaho 1998), cert. denied, 526 U.S. 1012 (1999), the Idaho Supreme Court recognized BLM's federal reserved water rights for providing water to domestic livestock using the public land.

insupportable assertion that livestock ownership is a prerequisite to ownership of a livestock watering right.[33]

2. Contrary to Joyce's Contention, Livestock Ownership is not a Prerequisite to Ownership of a Livestock Watering Right

In 1939, the Idaho legislature enacted I.C. § 42-501. The statute states, among other things, that the "bureau of land management of the department of interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain." Id. Thus, the Idaho legislature expressly provided for the United States to be a valid appropriator of livestock water. Furthermore, the Idaho legislature did not limit the methods for the BLM to obtain a stockwatering right. I.C. § 42-503.

In 1984, the legislature enacted I.C. § 42-113, which addressed in-stream and other water use for livestock. The legislature amended this Act in 1998. There is no legislative pronouncement in the statute that requires livestock ownership as a prerequisite to a permit being issued for the in-stream watering of livestock. Furthermore, the statute states:

> No change in use of any water rights used for watering of livestock, whether proposed under this section or section 42-222, Idaho Code, shall be made or allowed without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock.

I.C. § 42-113(4). Thus, the statute implicitly recognizes that the water right may be held by the federal government, not the permittee. It would make no sense to give the permittee a right of refusal for a proposed change of use unless the issuer of the grazing permit could seek such a change of use.

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[33] *See* Exhibit 18, p. 21 (Response to Interrogatory #6: Describe the basis of your objections to "BLM claims.").

In 1986, the Idaho legislature enacted I.C. § 42-114, which states:

> Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water.

To address whether there was a potential conflict between I.C. §§ 42-501 and 42-114, the Idaho Department of Water Resources (hereinafter "IDWR") requested an opinion from the Idaho Attorney General addressing whether I.C. § 42-114 prohibited IDWR from issuing a stock water permit to a landowner "if the land is or is intended to be leased to another person for the grazing of livestock[.]" Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.), p. 1. The Idaho Attorney General concluded:

> Idaho Code 42-114 does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock. Section 42-114 merely affirms that stock watering is a beneficial use of water and that any person may file an application for that use.

Idaho Op. Atty. Gen. No 88-6, 1988 WL 385554 (Idaho A.G.), p. 3. Thus, livestock ownership is not, and never has been, a condition precedent to ownership of a livestock watering right.

B. Joyce is Not Entitled to its Claimed Priority Date

1. Joyce's Predecessors Did Not Perfect Water Rights In Jordan Creek

There is no evidence that Joyce's predecessors satisfied the minimum requirements of a valid appropriation of stockwater from Jordan Creek. Hidden Springs Trout Ranch, Inc., 619 P.2d at 1132-1133 (diversion and beneficial use); Lemmon, 519 P.2d at 1171 (possessory interest in the land designated as a place of use). Thus, Joyce's predecessors did not have a water right to convey.

During the BLM's grazing preference adjudications, Joyce's predecessors, who freely used public land for livestock grazing before the Taylor Grazing Act, did not offer water rights as dependent base property. *See* Exhibits 80, 82, 83, 84, 85, 86. BLM's thorough investigation of dependent private property did not reveal that any stockgrower depended upon water rights in Jordan Creek to support a livestock operation. Exhibit 22; *see generally* Testimony of Michael Boltz, Trial Transcript, pp. 437-533. Indeed, none of the competitors for grazing preferences in the Cow Creek or Oreana Grazing Units said they owned any water rights in Jordan Creek in their initial applications for grazing permits or subsequent applications for grazing leases. Exhibits 82, 83, 84, 85, 86. This is not surprising because stockgrowers that allowed their livestock to roam at large on unenclosed public land, and use grass and water in common with other stockgrowers' livestock, have often had difficulty satisfying the test of a valid in-stream stockwater appropriation with a priority date that pre-dates the enactment of the Taylor Grazing Act.[34] United States v. Schmutz, 56 F.2d 269, 270 (D. Utah 1932); Lemmon, 519 P.2d at 1171; Robinson v. Schoenfield, 218 P. 1041, 1042-1043 (Utah 1923); Tattersfield v. Putnam, 41 P.2d 228, 234-235 (Ariz. 1935); *see also* 2 R. BECK, WATERS AND WATER RIGHTS § 12.02(c)(1) and n.52 (2000).

Furthermore, out of all the competitors for grazing preferences in the Cow Creek and Oreana Grazing Units, only the grazing permit applications of Jump Creek Sheep Co. and John T. Shea stated a specific grazing use on public land in the Jordan Creek drainage during the priority years, and only Shea conveyed any real property to Joyce. The evidence shows that Shea

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[34] After enactment of the Taylor Grazing Act, permittees encounter the provision of 43 U.S.C. § 315b that states: "issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands."

intended to abandon any water right he might have had in Jordan Creek when he sold his livestock operation in 1938, leased his ranch land to Salove who did not use Jordan Creek as a livestock watering source for a period of 13 years, and did not sell or otherwise convey a water right in Jordan Creek to anyone. *See* Colthrope v. Mountain Home Irrigation Dist., 157 P.2d 1005 (Idaho 1945). Shea conveyed his ranch land to Joyce and Nettleton in 1951, and the deed does not mention water rights on public land. Thus, Joyce had no predecessor who owned a stockwatering right on public land in the Jordan Creek drainage.

2. If A Water Right Was Perfected By Joyce's Predecessors, The Water Right Was Not Transferred To Joyce In Accordance With State Law

It is well established that a water right is an appurtenance to the land on which it has been used. I.C. § 42-101 ("such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied"); I.C. § 42-220 ("all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted."); I.C. § 42-1402 ("right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which the water is used . . . ."); Russell v. Irish, 118 P. 501, 502 (Idaho 1911); Paddock v. Clark, 126 P. 1053, 1054 (Idaho 1912); Anderson v. Cummings, 340 P.2d 1111 (Idaho 1959); Crow v. Carlson, 690 P.2d 916 (Idaho 1984). Furthermore, a water right is "a real property interest, and is legally protected as such." Crow, 690 P.2d at 920; Idaho Const., Art. XV, §3; I.C. § 55-101 (water rights are real property). The conveyance of a water right can only occur if the conveyance is in writing. Olson v. Idaho Department of Water Resources, 666 P.2d 188, 190-191 (Idaho 1983)(citing I.C. §§ 9-503 and 9-505).

"A water right is defined . . . in terms of the priority, amount, season of use, purpose of use, point of diversion, and place of use." Olson, 666 P.2d at 191. Because "a water right is real estate, and any interest therein is an interest in real estate, if [Joyce's predecessors] secured a water right . . . [they] could not transfer it to another except by a written conveyance, such as would convey the title to real estate." Gard v. Thompson,123 P. 497, 502 (Idaho 1912).[35]

Joyce does not have any deed or other type of conveying document that specifically describes the water right claimed by Joyce. Since a water right on the public land was not effectively conveyed by predecessors in title to real property, the water rights would have to be perfected by each successive stockgrower using public land adjacent to Jordan Creek, with new priority dates.

The only evidence of a mesne grantor's intent to convey the water rights at issue is the testimony of Paul Nettleton. Testimony of Paul Nettleton, Trial Transcript, pp. 672-673. Mr. Nettleton's unsubstantiated testimony that he intended to convey the water rights at issue with the ranch property from Joyce Livestock Company, a general partnership, to Joyce Livestock Company, a limited partnership, is conclusory and self-serving. Such an uncorroborated self-dealing, unwritten contract should not be competent to prove an intention to convey the water

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[35] As fully set-forth in the United States' Trial Memorandum and the United States' Memorandum in Opposition to Joyce Livestock Co.'s Motion for Summary Judgment (incorporated by reference in the United States' Trial Memorandum), Joyce did not, and could not, prove that Joyce had unity of title between the water right and any other type of real property, that its predecessors to its base property and/or grazing preferences perfected stockwatering rights on public land, that the stockwatering right at issue was appurtenant to grazing preferences or base property, that there was any type of oral conveyance of a stockwatering right, or that a stockwatering right was conveyed by a non-executory contract. *See Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief, Order of Recommitment to Special Master Cushman*, Subcases 55-10288 A & B, et al. (J. Wood presiding) (April 25, 2000), pp. 14-26.

right at issue, and give Joyce a priority date senior to other water users in the Jordan Creek drainage who did comply with Idaho's law of prior appropriation and Idaho's statute of frauds.

Without any written conveyance of the water right whatsoever, Joyce cannot now improve its priority date over all other users of Jordan Creek by "tacking" its use of water sources back to the date of earlier water users:

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

2 C. KINNEY, IRRIGATION AND WATER RIGHTS § 999; *see* § 997; *see also* § 787. According to the most recent deeds in Joyce's chain of title, the base property was conveyed to Joyce on August 24, 1985. The warranty deed consummating the August 24, 1985 conveyances of the ranch property to Joyce is the best evidence of the grantor's intent. That deed does not convey any water rights located on public land, and there is no evidence that any of the other grantors in Joyce's chain of title intended to convey the water right at issue. Thus, Joyce's earliest possible priority date is August 24, 1985.

C. Joyce's Water Right Would be Redundant and Should be Limited

The United States established valid livestock watering rights with a June 28, 1934 priority date which describe public land places of use along Jordan Creek within the Allotment boundary. If Joyce's water right claim is valid, it would describe the same public land places of use as the United States water right claims and should have an August 24, 1985 priority date. Thus, for the places of use on public land within the Allotment, Joyce and the United States would have claims

with identical places of use, and the water would be used for the same beneficial purpose, *i.e.*, providing water to permitted domestic livestock.

Idaho statutes provide that water shall not be allocated "in excess of the amount actually used for beneficial purposes for which such right is claimed . . . ." I.C. § 42-1402. Furthermore, it is "[t]he policy of the law of [Idaho] . . . to secure the maximum use and benefit, and least wasteful use, of its water resources." Poole v. Olaveson, 356 P.2d 61, 65 (Idaho 1960). Thus, if the Special Master recognizes water rights owned by two separate claimants that allocate water for consumption by the same domestic livestock, one of those rights would have to be limited so that water would not be allocated "in excess of the amount actually used . . . ." I.C. § 42-1402.

V. CONCLUSION

For the reasons stated above, the United States is entitled to partial decrees for Water Right Numbers 55-11061, 55-11385, and 55-12452. If Joyce is entitled to a water right, the priority date should not be earlier than August 24, 1985. If Joyce and the United States are both allowed a water right, then Joyce's water right would be redundant and should be limited.

DATED this 18th day of March 2003.

UNITED STATES OF AMERICA

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on March 18, 2003, I served a true and correct copy of the foregoing **UNITED STATES' POST-TRIAL MEMORANDUM; SUBCASE NUMBERS 55-10135, 55-11061, 55-11385, and 55-12452** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

Original to:

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Snake River Basin Adjudication
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Twin Falls, ID 83301

Copies to:

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