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 DISTRICT COURT-SRBA
 TWIN FALLS CO., IDAHO
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UNITED STATES OF AMERICA

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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
	)
	) UNITED STATES' MEMORANDUM
Case No. 39576	) IN OPPOSITION TO JOYCE
	) LIVESTOCK CO.'S MOTION IN
	) LIMINE

I. INTRODUCTION.

Joyce Livestock Co., Ltd. (hereinafter "Joyce") moved the Special Master for an Order excluding United States Trial Exhibits 2, 9 through 15, 17, 22, and 88. Joyce Livestock Company's Motion in Limine to Exclude Evidence Identified by the United States Bureau of Land Management

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 MOTION IN LIMINE; SUBCASE NUMBERS 55-10135, 55-11061, 55-11385,
 AND 55-12452

[I.R.E. 402], In Re SRBA, Case No. 39576, Subcases 55-10135, et al. (hereinafter "Joyce's Motion"). Joyce further moved for an order excluding anticipated testimony by employees of the U.S. Department of the Interior, Bureau of Land Management (hereinafter "BLM"). Joyce argues that presentation of the exhibits and testimony at trial would violate law of the case established in the District Court in 1998 Order Denying Challenges and Adopting Special Master's Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase No. 72-15929C, et. al. dated September 30, 1998. Joyce's Motion in Limine should be denied. The United States' Trial Exhibits and testimony of BLM witnesses are relevant facts showing the United States appropriated water rights with a June 28, 1934 priority on public land managed for livestock grazing, just as the District Court affirmed in its 1998 Order.

II. ARGUMENT.

A. The 1998 District Court Order Relied On By Joyce Did Not Hold that the United States Can Only Appropriate Livestock Water On the Public Domain Through an "Agent," and Remarks in the Court's Opinion Suggesting as Much are Not Law of the Case Here.

Joyce argues that an order earlier entered by the District Court in subcases in Basin 57, Order Denying Challenges and Adopting Special Master's Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10598B, 57-10770B and 72-15929C (hereinafter "1998 Basin 57 Order"), dated September 30, 1998, is law of the case that holds the United States can only appropriate livestock water on the public domain through an agent that actually appropriated the water, or through a conveyance from the party that actually appropriated the

water. Joyce's Motion, pp. 2-9. Thus, according to Joyce, the above-referenced exhibits and testimony are not relevant and should be excluded. Joyce's Motion, pp. 9-14.

The District Court's 1998 Order involved several Basin 57 subcases and consolidated subcase 72-15929C, and was issued in response to, among other things, Notices of Challenge filed by Joyce and the United States to Special Master's Report and Recommendations in subcases 57-04028B, et al., where the District Court affirmed the Special Master's recommendation that the United States appropriated a stockwatering right on public land with a priority date of June 28, 1934. 1998 Basin 57 Order, p. 7; see Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment), In Re SRBA, Case No. 39576, Subcase 72-15929C dated April 10, 1998, p. 14.

The relevant issue before the District Court in its 1998 Basin 57 Order, was "[w]hether the Special Master erred in determining that the United States has a water right in the stock water available on federal land in spite of the fact that the United States does not own stock and does not water livestock in connection with any water right located on the public domain." 1998 Basin 57 Order, p. 1. Because "Joyce failed to file a motion to alter or amend in the subcases where a Notice of Challenge was filed[.]" the District Court dismissed Joyce's challenge, and affirmed the Special Master's Recommendation that granted the United States a water right with a 1934 priority date. 1998 Basin 57 Order, p. 2. Thus, notwithstanding Joyce's contention that the "the Special Master erred in determining that the United States has a water right in the stock water available on federal land in spite of the fact that the United States does not own stock and does not water livestock in connection with any water

right located on the public domain," the District Court affirmed the United States' entitlement to the water rights and dismissed Joyce's challenge. 1998 Basin 57 Order, p. 1.

Although the District Court ruled in favor of the United States, the Court's opinion includes numerous remarks about various theories of federal ownership and private ownership of stockwater on public land. It is these remarks, and Special Master Haemmerle's remarks in his Order Denying Motion to Alter or Amend, supra., that Joyce relies upon as putative law of the case. Joyce's Motion, pp. 2-5. For the reasons set forth below, Joyce is wrong to characterize the 1998 Basin 57 Order as law of the case applicable here, or as standing for the proposition that the United States can only appropriate livestock water on the Public Domain through an "agent."

The Special Master Has Already Rejected Joyce's Argument and Should Do So Again Here.

The Special Master has already determined that the District Court's 1998 Basin 57 Order does not have the effect claimed by Joyce. Earlier in the case now before the Special Master, in its motion for summary judgment, Joyce made the exact same argument it makes now in its motion in limine. The Special Master specifically rejected that argument:

[T]he 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 regulation 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.

Order Denying Joyce Livestock Motions for Summary Judgment and Order Setting Scheduling Conference, In Re SRBA, Case No. 39576, Subcases 55-10135, et al., p. 14 n. 20, dated July 23, 2002. The conclusion stated by the Special Master is dispositive. Joyce's motion in limine should be denied.

The Portions of the 1998 Basin 57 Order Relied Upon By Joyce Do Not Warrant Application as Law of the Case Here.

Language in the Court's 1998 Opinion suggesting that the United States can only appropriate livestock water on the Public Domain through an agent does not meet the requirements for law of the case applicable here. Law of the case is a discretionary doctrine. "The doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" Leslie Salt Co. v. United States, 55 F.3d 1388, 1393 (9th Cir. 1995) (quoting Messenger v. Anderson, 225 U.S. 436, 444 (1912)), cert. denied, 516 U.S. 955 (1995). The Idaho Court of Appeals provided an extensive discussion of the doctrine of law of the case in Sun Valley Ranches, Inc. v. Prairie Power Co-op. Inc., 124 Idaho 125, 856 P.2d 1292 (Idaho Ct. App.1993). In Idaho, the doctrine is defined as follows:

where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same. The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation. The doctrine is well established in Idaho and is limited to the appellate court's legal pronouncements and holdings necessary to decide the particular issue presented. It is similar to the doctrine of stare decisis, which requires that a statement of law be necessary to the ultimate disposition of the case in order to be

binding on the lower courts. Otherwise, the statement is considered to be dictum and not controlling. Like stare decisis, the "law of the case" protects against relitigation of settled issues and assures that inferior courts will follow the decisions of superior courts.

Id. at 129, 856 P.2d 1296 (internal citations omitted) (emphasis added).

Idaho's law of the case doctrine tracks the federal application of the doctrine. In Hegler v. Borg, 50 F.3d 1472 (9th Cir. 1995), cert. denied, 516 U.S. 1029 (1995), the Ninth Circuit Court of Appeals provided guidelines on following a superior court's ruling on an issue of law. The prior decision should be followed unless "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." Hegler, 50 F.3d at 1475.

Importantly, dicta is not, and cannot be, law of the case. Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 715- 716 (9th Cir. 1990) ("law of the case doctrine gives no preclusive effect to dicta"); Ducey v. United States, 830 F.2d 1071, 1072 (9th Cir.1987). Dicta is an abbreviation of *obiter dicta*, and is defined as "words of an opinion entirely unnecessary for the decision of the case." BLACK'S LAW DICTIONARY 740 (6th ed.1991). Examples of dicta include a:

remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument.

Id.

In its 1998 Basin 57 Order, the District Court states "[t]he United States does not own or operate stock, and therefore, must rely on private appropriators for its claim to stock water rights."

1998 Basin 57 Order, p. 4. Joyce here mistakenly contends that this statement constitutes law of the case.

First, because the District Court affirmed the Special Master's recommendation to confirm the United States' water right – and dismissed Joyce's objection without ruling on its merits – it is clear that the Court's discussion of Joyce's theories of ownership cannot be 'necessary to the holding' of the Court and, thus, must be dicta. See Order Denying Joyce Livestock Motions for Summary Judgment and Order Setting Scheduling Conference, In Re SRBA, Case No. 39576, Subcases 55-10135, et al., p. 14 n. 20, dated July 23, 2002 ("Logic suggests that those portions of Special Master Haemmerle's and Presiding Judge Hurlbutt's decisions concerning permits and regulation 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.").

This conclusion is reinforced by the District Court's own characterization of its discussion. The District Court's 1998 Basin 57 Order states in its' conclusion, that "[i]n reviewing stock water ownership on the public domain, the court has several important observations." 1998 Basin 57 Order, p. 8. The District Court's observations do not have the force and effect of a holding by a superior court. Thus, the entire discussion following the word "observations" was not necessary to the District Court's 1998 Basin 57 Order and should not be used to determine the issues presented in these subcases. Sun Valley Ranches, Inc., 124 Idaho at 126, 856 P.2d 1292; Milgard Tempering, Inc., 902 F.2d at 715- 716; Ducey v. United States, 830 F.2d at 1072.

Second, the District Court's discussion of ownership theories does not warrant application as law of the case here because the facts underlying the 1998 Basin 57 Order are substantially different than the facts in the instant subcases. The 1998 Basin 57 Order identifies an issue "[w]hether the Special Master erred in granting a second water right for the same beneficial use as an existing water right." 1998 Basin 57 Order, p. 1. In the 1998 subcases, the District Court declined to rule on this issue because the Court found that "none of the rights before the court involve[d] competing claims" 1998 Basin 57 Order, p. 6. In the case before the Special master, the record shows that the United States' water right claims and Joyce's water right claim directly compete. Thus, the Special Master can freely decide the issue of whether there can be two water rights for instream livestock watering on Jordan Creek, and, if Joyce does have a water right, whether that water right should be limited. See Sun Valley Ranches, Inc., 124 Idaho at 126, 856 P.2d 1292; Hegler, 50 F.3d at 1475.

Third, the District Court's discussion of ownership theories does not warrant application as law of the case here because the issues in the 1998 Basin 57 Order are significantly different from the issues in the instant subcases. The 1998 Basin 57 Order identifies an issue "[w]hether the Special Master erred in ruling that the United States is not entitled to a priority date earlier than June 28, 1934" Court's Order, p. 2. In the 1998 subcases, the United States claimed a priority date earlier than 1934. In the instant subcases, the United States' reported priority date is June 28, 1934. Thus, because the issue before the District Court in 1998 – whether the United States is entitled to a stockwater right with a priority date earlier than June 28, 1934 – was fundamentally different than the issue in the instant subcases – whether the United States is entitled to a stockwater right with a priority date equal to June

28, 1934 – the District Court's discussion of ownership theories does not warrant application as law of the case here. See Sun Valley Ranches, Inc., 124 Idaho at 126, 856 P.2d 1292.

Finally, even if the District Court's remarks were not dicta, they would not warrant application as law of the case here because they are clearly erroneous. In its 1998 Basin 57 Order, the District Court states "[t]he United States does not own or operate stock, and therefore, must rely on private appropriators for its claim to stock water rights." 1998 Basin 57 Order, p. 4. This statement cannot be traced to any Idaho statute, any judicial precedent from any jurisdiction, or to any IDWR administrative rule. In fact, the opposite is true, as thoroughly explained in the United States' Memorandum in Opposition to Joyce Livestock Co.'s Motion for Summary Judgment, In Re SRBA, Case No. 39576, Subcase Numbers 55-10135, et al. dated March 19, 2002, pp. 14-18 (no livestock ownership prerequisite to a license for, or a recommendation for, a water right used for providing water to domestic livestock). See e.g. Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.).

The District Court's statement can be traced to an erroneous conclusion stated by Special Master Haemmerle:

For an instream stock water right like the water right at issue, the party claiming a stock water right will point to the act of placing stock it owns or operates near a water source and the drinking of water by the stock as the act constituting an appropriation. I.C. § 42-113; R.H. [sic] Nahas v. Hulet, 114 Idaho 23, 752 P.2d 625 (Ct. App. 1988). The United States does not own or operate cattle so it cannot rely on this type of act to appropriate its own stock water right.

Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment), In Re SRBA, Case No. 39576, Subcase 72-15929C, dated April 10, 1998, p. 7 (adopted

and incorporated by reference in the 1998 Basin 57 Order, p. 10). The Special Master's citation to the Nahas case is error because that particular case does not even mention livestock watering. The Special Master's citation to I.C. § 42-113 is also error because 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.

The District Court, in its 1998 Basin 57 Order, cites First Security Bank of Blackfoot v. State, 49 Idaho 740, 746, 291 P. 1064, 1066 (1930), for the general theory that the only way the United States could appropriate livestock water was through an agency relationship with the owners of the livestock who actually consume water. 1998 Basin 57 Order, p. 10. Joyce specifically relies on a similar theory postulated in Special Master Haemmerle's Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment), In Re SRBA, Case No. 39576, Subcase 72-15929C, dated April 10, 1998, p. 11 as law of the case. See Joyce's Motion, p. 5. Special Master Haemmerle stated that "the court finds that the United States is not the appropriator of water based solely on the fact that it issues permits and that Congress regulates access to water resources. Again, if the United States is not the actual appropriator of water, it must perfect a water right through an appropriator under an agency theory" Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment), In Re SRBA, Case No. 39576, Subcase 72-15929C, dated April 10, 1998, p. 11. Notwithstanding this finding, the Special Master found "that the United States has a priority date for this right dated June 26 (sic), 1934. Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment), In Re SRBA, Case No.

39576, Subcase 72-15929C, dated April 10, 1998, p.14. The priority date for United States' water rights in this action is June 28, 1934. U.S. Trial Exhibit 6. Thus, Special Master Haemmerle's Order stands for the proposition that the United States' state law based in-stream stockwatering rights have a priority date of June 28, 1934.

Special Master Haemmerle's reliance on the First Security case for his postulation that the only way the United States could appropriate livestock water was through an agency relationship with the owners of the livestock who actually consume water was erroneous. The subject of the First Security case was a bona fide lease. Joyce, as the holder of a grazing permit, is not a lessee, but a licensee grazing by permission of the United States. United States v. Fuller, 409 U.S. 488 (1973); Swim v. Bergland, 696 F.2d 712 (9th Cir 1983). Before enactment of the Taylor Grazing Act, Joyce's predecessors in interest, were licensees by implication. Buford v. Houtz, 133 U.S. 320, 326-327 (1890). A license is defined as "the permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein. It is a personal, revocable, and unassignable privilege, conferred either by writing or parol." 25 AM. JUR. 2D *Easements & Licenses* § 137 (1966). The distinction between a license and a lease:

is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license.

Kaiser Co. v. Reid, 184 P.2d 879, 884 (Cal. 1947) (emphasis added) (quoting Goerlitz v. Turner, 150 P.2d 278, 280 (Cal. Ct. App. 1944); Branson v. Miracle, 111 Idaho 933, 936, 729 P.2d 408, 411 (Ct. App. 1986) ("While acting pursuant to permission the claimant's rights are in the form of a license.

Unless the licensor is estopped, a license is revocable at will No interest in property vests in the licensee."); 43 U.S.C. 315b ("issuance of a permit pursuant to the provisions of . . . [the Taylor Grazing Act] shall not create any right, title, interest, or estate in or to the lands."). No interest in public lands can vest in a mere licensee. See Lemmon v. Hardy, 95 Idaho 778, 781, 519 P.2d 1168, 1171 (Idaho 1977) ("Lack of a possessory interest in the property designated as the place of use is speculation. Persons may not file an application for a water right and then seek a place of use thereof."). Because livestock grazing permittees on public land are licensees, not lessees, and because Special Master Haemmerle erroneously assumed that the First Security case applies to licensees using public land for livestock grazing, the Special Master is not bound by the 1998 Basin 57 Order.

Further, the District Court's observations rely upon dicta in United States v. New Mexico, 438 U.S. 696 (1978). The District Court stated that the "United States Supreme Court held that absent any reserved rights, stockwater rights located in the national forests belong to the stockmen who perfected the rights." 1998 Basin 57 Order, p. 9 (emphasis added). The Supreme Court made no such holding. The issue on appeal was "what quantity of water, if any, the United States reserved out of the Rio Mimbres when it set aside the Gila National Forest in 1899." New Mexico, 438 U.S. at 698. The Supreme Court held:

The United States contends that, since Congress clearly foresaw stock watering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stock waterers. We agree.

Id. at 716. The statement that livestock water must be allocated under state law to individual stock waterers was not necessary to the Supreme Court's holding that the United States did not reserve livestock water in the Rio Mimbres when the land comprising the Gila National Forest was reserved. Therefore, the Supreme Court's statement is dicta and should not be given preclusive effect. Sun Valley Ranches, Inc., 124 Idaho at 126, 856 P.2d 1292; Milgard Tempering, Inc., 902 F.2d at 715-716; Ducey v. United States, 830 F.2d at 1072.

Indeed, the most reasonable interpretation of the Supreme Court's statement "we agree," is approval of the New Mexico Supreme Court's conclusion that livestock water was not a purpose of the reservation of the Gila National Forest. The only other meaning that can reasonably be attributed to the Supreme Court is that it indicates general agreement that stock water rights should be "allocated under state law." Id. It is apparent that the Supreme Court followed the New Mexico Supreme Court's holding that livestock water was to be allocated "in accordance with state law." Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 564 P.2d 615, 619 (N.M. 1977), *aff'd*, 438 U.S. 696 (1978). The BLM claims at issue here are applications for allocation of livestock water under state law with a June 28, 1934 priority date, not a federal reserved water right. Thus, the Supreme Court's decision has no bearing on the issues presented here.

Further, the Supreme Court recognized that the United States could appropriate water under state law:

Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

Congress indeed has appropriated funds for acquisition under state law of water to be used on federal reservations. . . . The agencies responsible for administering the federal reservations have also recognized Congress' intent to acquire under state law any water not essential to the specific purposes of the reservation.

New Mexico, 438 U.S. at 702-703 (emphasis added). Here, the United States is petitioning the Idaho Department of Water Resources (hereinafter "IDWR") and the SRBA Court to allocate livestock water to the BLM with a priority date of June 28, 1934 to provide water to permitted livestock under Idaho law, "in the same manner as any other public or private appropriator" who make their land available for livestock pasturage. *Id.* at 702. The New Mexico case does not foreclose this request. Therefore, the 1998 Basin 57 Order, pp. 8-10 (Conclusion), has no preclusive effect on the issues before the Special Master in the instant subcases.

In sum, the District Court's "observations", and Special Master Haemmerle's conclusions regarding the methods the United States' may appropriate stockwatering rights are erroneous. As such, they do not warrant application as law of the case here. Hegler, 50 F.3d at 1475.

B. The United States' Trial Exhibits And The Testimony Of The United States' Witnesses Are Relevant And Should Not be Excluded.

The Idaho Rules of Evidence state:

All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Idaho R. Evid. 402.

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probably that it would be without the evidence.

Idaho R. Evid. 401. Admissibility of evidence is a preliminary matter to be determined by the Court.

Idaho R. Evid. 104.

Joyce moved the Special Master for an order excluding United States' Trial Exhibit (hereinafter "Exhibit") 17 because it is not relevant. Joyce's Motion, p. 12. Exhibit 17 is the Affidavit of David R. Tuthill and IDWR's I.R.E. 706 Report entitled Report Regarding IDWR Recommendations with Competing Claims to Ownership (hereinafter "Report"), filed in In Re SRBA, Case No. 39576, Subcase Numbers 57-10587, 57-10598, and 57-10770 dated June 9, 1997 where Joyce was the claimant and the United States was the objector. IDWR is the SRBA Court's "independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported" I.C. § 42-1401B. The Report advised the parties (Joyce and the United States) of the expert's findings in accordance with Idaho R. Evid. 706. The Report is already part of the SRBA's record, and is relevant to the fact that Idaho statutes and IDWR's interpretation of Idaho statutes confirm the BLM's status as a valid appropriator of water, even though BLM does not own the livestock that actually drink the water. I.C. § 42-501; I.C. § 42-503; Idaho Op. Atty. Gen. No 88-6, 1988 WL 385554 (Idaho A.G.), p. 4. The Report should be admitted because it makes it more probable that IDWR's recommendations of Water Right Numbers 55-11061, 55-11385, and 55-12452 were correct, and less probable that Joyce will be able to rebut the presumption that the Director's Reports "constitute prima facie evidence of the nature and extent of the water rights acquired under state law."

I.C. § 42-1411(4). The Report is relevant and should be admitted as evidence. Idaho R. Evid. 401 and 402.

Joyce moved to exclude Exhibits 22 and 88. Joyce's Motion, p. 13. Exhibit 22 is a summary of Joyce's grazing preference in the Silver City Allotment prepared by a BLM employee as an illustrative Exhibit. Exhibit 22 is intended to help the Special Master understand the testimony, is probative of Joyce's priority date, quantity, places of use, points of diversion, and season of use, and is, therefore, relevant evidence. State v. Raudebaugh, 124 Idaho 758, 864 P.2d 596 (Idaho 1993). Exhibit 88 is an official report by the United States Forest Service that is intended to help the Special Master understand the history of livestock grazing in Owyhee County, Idaho (the place where the Silver City Grazing Allotment is located), is probative of the concept of the federal grazing commons in Owyhee County, and is relevant to show that it would be less probable that Joyce's predecessors in interest ever appropriated and conveyed water rights from water sources located on public lands. Thus, Exhibits 22 and 88 are relevant and should not be excluded. Idaho R. Evid. 401 and 402.

Joyce moved to exclude Exhibits 9 through 15, and moved to exclude testimony by BLM's witnesses regarding management of public lands for livestock grazing. Exhibits 9 through 15 are official BLM documents that are probative of BLM's management of public lands for livestock grazing. As explained in the United States' Memorandum in Opposition to Joyce's Motion for Summary Judgment, the United States appropriated livestock water on the public lands it manages for livestock grazing. The Exhibits and testimony of BLM's witnesses are intended to present facts regarding, *inter alia*, BLM livestock grazing management, adjudications of grazing preferences, grazing permits, transfers of

grazing privileges, and management of water sources. The Exhibits and testimony presents facts that would be of consequence to the Special Master's determination of whether the United States appropriated a livestock watering right with a priority date of June 28, 1934 should Joyce successfully rebut the prima facie effect of the Director's Reports. Thus, the Exhibits and testimony is relevant and should not be excluded. Idaho R. Evid. 401 and 402.

III. CONCLUSION.

For the above-stated reasons, Joyce's Motion should be denied.

DATED this 20th day of November, 2002.

UNITED STATES OF AMERICA



Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on Nov. 20, 2002, I served a true and correct copy of the foregoing **UNITED STATES' MEMORANDUM IN OPPOSITION TO JOYCE LIVESTOCK CO.'S MOTION IN LIMINE** 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:

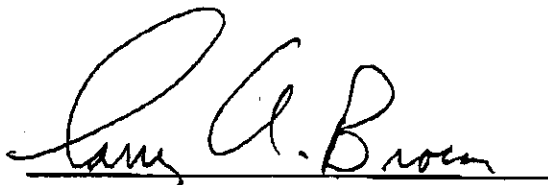
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