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

18 In Re SRBA

Subcase Numbers 55-10135, 55-11061,
55-11385 and 55-12452

19 Case No. 39576

JOYCE LIVESTOCK'S OPENING BRIEF
IN SUPPORT OF CHALLENGE

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I. INTRODUCTION

At issue before this Court is a report and recommendation which, if left to stand, will reverse over one hundred years of well developed state and federal law and deny private citizens their right to own, transfer, and protect valid appropriative rights acquired on the federally administered land, pursuant to federal law and Idaho state law. If upheld, it will, for the first time result, in a finding that a claimant can acquire a beneficial use water right based on the mere act of managing the land, even though it is undisputed that the claimant at issue, the United States, has never diverted the water or actually applied it to a beneficial use. If adopted, the report and recommendation will have a devastating affect on ranchers who, for generations, have bought, sold, and transferred their ranches based on the value of the ranching unit as a whole, which includes not only the value of the base ranch properties but the appurtenant private water rights sited on what once was the public domain and is now a federally administered allotment. If adopted, the decision will go against established state and federal law, including the precedent already established within the Snake River Basin Adjudication. Accordingly, under principles of law of the case, the applicable law and the facts of this case require reversal of the Special Master's Report and Recommendation. *See In Re: SRBA Case No. 39576 (Wood v. Trout)*, Memorandum Decision and Order on Challenge, p. 9-10 (May 9, 2002) ("For obvious reasons not every decision coming out of the SRBA is appealed. However, until such a time as a decision is appealed and precedent established, rulings by the district court are considered to be law of the case in the SRBA.") (internal citations omitted).

II. STATEMENT OF ISSUES ON CHALLENGE

Broadly speaking, the issues in this case can be defined as whether the Special Master erred in granting the United States' its claimed water rights and erred in denying Joyce Livestock's claimed water rights. However, the specific issues can be further broken down by claimant.

With respect to the United States' claimed rights, at issue is whether the Special Master erred as a matter of law in holding that the mere management, without more, of federally administered grazing allotments constitutes a beneficial use of water sufficient to support a constitutional or beneficial use water right under Idaho law. Specifically implicated is the legal definition of a beneficial use or constitutional water right acquired under Idaho law and whether, as

1 a claimant who has undisputably never owned cattle or diverted water to a beneficial use
2 (stockwatering), the United States has met the test for a beneficial use water right.

3 With respect to the Joyce Livestock claim, the issues are similar and include the Special
4 Master's legal conclusions with respect to beneficial use water rights: how they are acquired, how
5 they are transferred, and whether the use of water in common with others prevents the water rights
6 from ever coming into existence. Related to this is the issue of whether Joyce Livestock acquired
7 and transferred valid appropriative water rights that should be decreed as claimed.^{1/}

8 **III. STANDARD OF REVIEW**

9 In contrast to the standard of review of a special master's findings of fact, a special master's
10 conclusions of law are not binding upon a district court and will be adopted only to the extent that
11 they correctly state the law. *See In Re: SRBA Case No. 39576, Wood v. Trout*, Memorandum
12 Decision and Order on Challenge, p. 7 (May 9, 2002). Further, if a finding in a special master's
13 opinion is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. *Id.*,
14 at p. 7-8 (*internal citations omitted*).

15 As to findings of fact, while the District Court is to adopt a special master's findings of fact
16 unless they are clearly erroneous, the parties are entitled to an actual review and examination of all
17 of the evidence in the record to determine whether the findings of fact are clearly erroneous. *Id.*, p.
18 6 (*internal citations omitted*). The district court may find findings of fact clearly erroneous, and
19 thereby reject the same, if the findings at issue are without adequate evidentiary support or were
20 induced by an erroneous view of the law. *Id.*, p. 6 (*internal citations omitted*).

21
22
23 ^{1/} The matters at issue herein have been briefed at length. Accordingly, in
24 addition to the arguments contained herein, Joyce Livestock refers the court to the following
25 briefs, and incorporates the same herein by reference: Motions for Summary Judgment by
26 Joyce Livestock Co. for an Order Decreeing a Stockwater Right as Reported in Subcase 55-
27 10135 and an Order Disallowing the Claimed Stockwater Rights in Subcases 55-11061, 55-
28 10385 and 55-12452; Reply Brief to Memorandum in Opposition to Joyce Livestock Co.'s
Motion for Summary Judgment; Closing Argument by Joyce Livestock Co.; Joyce
Livestock's Opening Brief in Support of Motion to Alter or Amend the Special Master's
Report and Recommending Findings of Fact and Conclusions of Law; and Joyce
Livestock's Reply the United States' Memorandum in Opposition to Joyce Livestock
Company's Motion to Alter or Amend.

IV. STATEMENT OF FACTS

A. THE UNITED STATES' CLAIMS

The pertinent facts relative to the United States' claims are simple. The United States does not own cattle nor does it own a stock operation along Jordan Creek. *See* Testimony of Dr. Madenford, Trial Transcript p. 391. The United States has never actually diverted the water of Jordan Creek nor actually applied the water to a beneficial use. It does not now, nor has it ever, had an agency relationship with the parties who have actually applied the water to a beneficial use, Joyce Livestock or its predecessors in interest. Instead, the sole basis of the United States' "beneficial use" water right claims is its management of the lands that surround the waters of Jordan Creek.

B. JOYCE LIVESTOCK'S CLAIMS

Joyce Livestock's claims for instream stockwater use include places of use stretching along Jordan Creek, through both areas designated as a federally administered rangeland as well as private land. *See* Exhibit 8. The history of the use of waters as part of a ranching operation is really a family history dating back to the Joyce Livestock's earliest predecessors in interest, Mary and Anna Joyce. *See* Report and Recommendation, 8, 13; Testimony of Paul Nettleton, Trial Transcript pp. 659-661, 674-683; *see also* Exhibit 1 (Chain of Title). Over time, the various ranching operations combined into what is today Joyce Livestock Company, but through it all, Joyce Livestock and its predecessors in interest continually grazed and watered their livestock along Jordan Creek. *See* Exhibit 1 (chain of title); *see also* Testimony of Paul Nettleton, Trial Transcript, pp. 660-661; Report and Recommendation, p. 8-9. The United States, at the trial in this case, through its witness Mr. Gary Madenford, admitted that Joyce Livestock's predecessors in interest were using the waters of Jordan Creek for stockwater purposes dating back to a time prior to the enactment of the Taylor Grazing Act in 1934. *See* Testimony of Gary Madenford, Trial Transcript pp. 392-393.

The waters at issue in this case are now and have always been necessary to sustain and maintain the viability of the Joyce Livestock cattle operations and that of its predecessors in interest. *See* Testimony of Paul Nettleton, Trial Transcript, pp. 683-686; Testimony of Gene Lewis, Trial

1 Transcript p. 321; Testimony of Dr. Chad Gibson, p. 610. For this reason, when Paul Nettleton
2 transferred the base ranch property to Joyce Livestock Company, he intended to and did in fact
3 transfer the base property together with all appurtenances including the water rights at issue herein.
4 See Testimony of Paul Nettleton, Trial Transcript pp. 673-684. Mr. Nettleton, who is intimately
5 familiar with the history of ranching operations at issue, testified that he knows of no situation
6 wherein his predecessors would have transferred the ranch without also transferring the water rights
7 in Jordan Creek. See Testimony of Paul Nettleton, Trial Transcript, pp. 718-719. Mr. Nettleton's
8 testimony is corroborated by the testimony of Mr. Gene Lewis, who personally observed and
9 participated in grazing operations in the area prior to 1934. Mr. Gene Lewis described not only the
10 use of the waters of Jordan Creek, but the necessity of the use of the waters to the ranch operation.
11 Quite simply, Jordan Creek and its tributaries had the only water available to Joyce Livestock and
12 its predecessors in interest in the summertime. See Testimony of Gene Lewis, Trial Transcript, p.
13 321. The water rights, therefore, were absolutely essential to the sustained viability of the ranching
14 operation both then and now.

15 V. ARGUMENT

16 A. THE SPECIAL MASTER INCORRECTLY STATED AND APPLIED THE LAW 17 REGARDING BENEFICIAL USE WATER RIGHTS TO THE UNITED STATES' CLAIMS

18 1. The Special Master Erred in Holding That the Management of Federally 19 Administered Grazing Allotments Constitutes a Beneficial Use of Water 20 Sufficient to Support a Constitutional or Beneficial Use Water Right under Idaho Law.

21 The only basis for the water rights claimed by the United States under Idaho law in this
22 litigation is beneficial use. In the state of Idaho, there are only three ways to obtain a beneficial use
23 water right: (1) to actually appropriate water and beneficially use the water, (2) to be a successor in
24 interest to an actual appropriator, or (3) to have an agency relationship with the actual appropriator.
25 See *In Re: SRBA Case No. 39676, Subcase 72-15929C*, Special Master's Order Denying Motion to
26 Alter or Amend, p. 5 (April 15, 1998), *affirmed In Re: SRBA Case No. 39576*, Order Denying
27 Challenges and Adopting Special Master's Report and Recommendation, Sept. 30, 1998 ("If the
28 party claiming ownership of the water right is not the same party that actually appropriated the

1 water, the only way the nonappropriating party can legitimately claim the right is through an agency
2 theory or by a showing that the right was conveyed from the party that actually appropriated the
3 right.”) The United States has not claimed, nor could it, that it is either the successor in interest to
4 an actual appropriator or has an agency relationship with the actual appropriator.^{2/} Accordingly, the
5 only possible remaining basis for the United States’ claims is an argument that it has beneficially
6 used the water at issue.^{3/} However, there is a total absence of any evidence demonstrating that the
7 United States has actually placed the water to beneficial use, and neither the United States nor the
8 Special Master have pointed to any legal authority which recognizes the “management of the
9 rangeland” as a beneficial use of water justifying an award of a constitutional or beneficial use,
10 water right.

11 The law regarding beneficial use water rights is clear and consistent with respect to the most
12 basic requirement that to acquire such a right through beneficial use, there must be actual diversion
13 and *use of the water*. Specific to stockwatering, the act of diverting water and placing it to
14 beneficial use is accomplished by leading cattle to the water to drink. The Special Master’s opinion
15 that management of the rangeland constitutes a beneficial use of water is unrecognized in the law
16 and, in fact, this theory of a “management based” water right has been specifically rejected by the
17 SRBA Court in a prior suit. *In Re: SRBA Case No. 39576, Subcase No. 72-15929C, pp. 4-5, 8-10*
18 *(September 30, 1998)*.

19 In Idaho, the basis of a beneficial use water right is the Idaho State Constitution. Under
20 Idaho Constitution Article 15, section 3, the right to divert and use unappropriated water of any
21 natural stream is guaranteed. As applied, a person could acquire a protected constitutional right to
22 water based upon actual diversion and beneficial use. *See R.T. Nahas Co. v. Hulet*, 114 Idaho 23,
23 25-26 (1988). It is by “*actually diverting and applying water to a beneficial use* (that) a legal
24 appropriation is made.” *See Cantlin v. Carter*, 88 Idaho 179, 186 (1964) (*emphasis added*). In the

25
26 ^{2/} As discussed at greater length herein, the sole and actual appropriators, the
27 parties who have actually diverted Jordan creek water and applied it to a beneficial use, are
Joyce Livestock and its predecessors in interest.

28 ^{3/} The United States has not claimed any federal reserve water rights in these
waters. *See Winters v. U.S.*, 207 U.S. 564, 28 S.Ct. 207 (1908).

1 case of stockwatering, an appropriation to beneficial use is accomplished through the diversion of
2 water from its natural source or by watering livestock directly from the source. *See Hage v. United*
3 *States*, 51 Fed. Cl. 570 (2002), *citing Hunter v. United States*, 388 F.2d 148, 153 (S.D. Cal. 1967);
4 *see also Steptoe Live Stock Co. v. Gulley*, 295 P. 772 (Nev. 1931) (cattle watering from streams held
5 to be an appropriation of water for stockwatering purposes); *R.T. Nahas Co. v. Hulet*, 106 Idaho 37,
6 1044 (1983). That a beneficial use stockwater right is demonstrated through the act of cattle
7 drinking from the water source was also explicitly recognized by the SRBA court. *See In Re: SRBA*
8 *Case No. 39576*, Special Master's Order Denying Motion to Alter or Amend, p. 7 (April 15, 1998)
9 (for an instream stockwater right, the party claiming a stockwater right will point to the act of
10 placing stock it owns or operates near a water source and the drinking of water by the stock as the
11 act constituting an appropriation of water), *affirmed In Re: SRBA Case No. 39576*, Order Denying
12 Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998). It
13 is through the act of watering one's livestock from the stream that one acquires a beneficial use
14 stockwater right, and this is something that the United States has never done in the case at hand.

15 Notwithstanding the above, the United States maintains, and the Special Master erroneously
16 opined, that the United States' acts of managing rangeland operations and issuing grazing permits
17 qualify as acts of placing water to beneficial use. There is simply no legal support for this theory.
18 In fact, it is a theory that has been soundly rejected by the SRBA Court. In an April 15, 1998 Order
19 Denying Motions to Alter or Amend, later adopted and incorporated by reference by the SRBA
20 Presiding Judge, the Court held the following:

21 [T]he court finds that the United States is not the appropriator of water based solely
22 on the fact that it issues permits and that Congress regulates access to water sources.
23 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 ... or the right must be
conveyed to the United States from a party who actually perfected the right.

24 *In Re: SRBA Case No. 39576, Subcase 72-15929C*, Special Master's Order Denying Motion to Alter
25 or Amend, p. 11 (April 15, 1998); *In Re: SRBA Subcase No. 39576*, Order Denying Challenges and
26 Adopting Special Master's Reports and Recommendations (September 30, 1998). Even the Special
27 Master whose Report and Recommendation is at issue herein recognized that the law in the SRBA
28 is that the United States is not the appropriator of water simply because it manages the public

1 domain. In a prior opinion, the Special Master wrote and recognized the following:

2 The Presiding Judge (in the Order Denying Challenges and Adopting Special
3 Master's Reports and Recommendations) then adopted and incorporated by reference
4 Special Master Haemmerle's Report and Recommendation in subcase 72-15929C.
5 Special Master Haemmerle held that the United States does not own a water right
6 simply because it manages the public domain: [T]he court finds that the United
7 States is not the appropriator of water based solely on the fact that it issues permits
8 and that Congress regulates access to water sources...

9 *In Re: SRBA Case No. 39576*, Subcase 35-12939 et al., Amended Special Master's Report, Special
10 Master Dolan (December 1, 1998). In holding that management of the range constitutes a beneficial
11 use of the water sited thereon, the Special Master in the instant case incorrectly stated and
12 subsequently incorrectly applied the law. Accordingly, the Special Master's Report and
13 Recommendation must be rejected.

14 **2. Alternative Legal Bases for Water Rights Were Not Claimed and Therefore
15 Cannot Be Used to Support the United States' Water Right Claims.**

16 In recommending the United States' beneficial use claims, the Special Master relied on
17 alternative rationales including Idaho law governing statutory based water rights to justify the
18 decision. However, the Special Master cannot turn the United States' claims into something they
19 are not, nor cure deficiencies without supporting evidence. The United States did not claim a
20 statutory based water right and the United States did not claim a reserved water right, nor could it do
21 either. As a matter of law, therefore, it was in error for the Special Master to rely on the law
22 respecting statutory based water rights or rationale premised on the law of federal reserved water
23 rights to substantiate the United States' claims.

24 The Special Master relied almost exclusively on the law of statutory based water rights to
25 justify his recommendation of the United States' Claims. *See* Special Master Report and
26 Recommendation, pp. 23-26. However, it was in error for the court to rely on that authority.
27 Statutory based water rights are entirely different, separate and distinct from beneficial use water
28 rights, and the methods of acquiring and proving up the two different types of water rights simply
are not interchangeable. As described by the Idaho Supreme Court:

 The right to divert and use the unappropriated water of any natural stream is
guaranteed by the Idaho Constitution in article 15, §3. Until the law changed in 1971
... a person desiring to appropriate the water of a stream could do so either by

1 actually diverting the water and applying it to a beneficial use *or* by pursuing the
2 statutory method, which entailed an application to the Department of Water
Resources for a permit and then fulfilling the requirements of the permit.

3 *See R.T. Nahas v. Hulet*, 114 Idaho 23, 26-27 (1988) (*emphasis added*). Looking to the statutory
4 provisions relied upon by the Special Master, each are triggered only by the filing of an application
5 for a permit. *See* I.C. § 42-113 (“Any *permit* issued for the watering of domestic livestock shall be
6 issued to the person or association of persons *making application therefore* and the watering of
7 domestic livestock by the person or association of persons *to whom the permit was issued* shall be
8 deemed a beneficial use of water”) (*emphasis added*); *see also* I.C. § 42-501 (“The department of
9 water resources shall, *upon application* in such form and of such content as it shall by rule prescribe
10 issue permit and license and certificate of water right within a reasonable time in such form as it
11 shall prescribe for such appropriation”) ; I.C. § 42-114. Similarly, the Attorney General Opinion,
12 quoted at length by the Special Master, deals strictly with statutory based water rights when an
13 application for a water right has been made and a permit has been issued. *See* Report and
14 Recommendation, p. 25.

15 The Special Master’s reliance on the above statutory authority is unavailing. A statutory
16 right is a paper right. It is acquired by filling out a form application and meeting certain written
17 statutory requirements. In contrast, a beneficial use water right is, in this case, acquired through
18 labor and as a result of the watering of livestock from the same water sources for a period of over
19 one hundred years. *See In Re: SRBA Case No. 39576, Subcase 72-15929C*, Order Denying Motion
20 to Alter or Amend, p. 7 (for an instream stockwater right, the party claiming a stockwater right will
21 point to the act of placing stock it owns or operates near a water source and the drinking of water by
22 the stock as the act constituting an appropriation of water). A statutory based water right is
23 substantially different from a beneficial use right which, by definition, can only be acquired through
24 actually diverting water and actually applying that water to a beneficial use. In the present case, the
25 United States has never filed an application for a permit for a water right and did not claim a
26 statutory based water in the this litigation. *See* Testimony of Roxanne Brown, Trial Transcript p.
27 21; Testimony of Gary Madenford, Trial Transcript pp. 427-428. Accordingly, the question is not
28

1 whether the United States *could* qualify for a statutory based water right under the facts of this case,
2 the question is whether the United States has a bona fide beneficial use stockwater right when the
3 United States has never actually applied the water to a beneficial use (stockwatering). Under the
4 law of the case in the SRBA, and the law regarding beneficial use stockwater rights, it was error as a
5 matter of law to hold that because the United States may have qualified for a statutory based water
6 right, that it is therefore entitled to a beneficial use right.

7 The United States and Special Master also have relied on an argument that BLM ownership
8 of these stockwater rights is necessary for the Bureau of Land Management to fulfill its obligations
9 under the Taylor Grazing Act. *See* Report and Recommendation, pp. 16-18, 26. Such rationale is
10 derivative of the law respecting federal reserved water rights, and is inapplicable to this case
11 because federal reserved rights have not been claimed and could not have been claimed in this case.

12 If, as argued in this litigation, ownership of the water rights on the federally administered
13 lands is essential to the ability of the United States to manage those lands and fulfill the purposes of
14 the Taylor Grazing Act, then the United States Congress could have provided for an express
15 reservation of rights in the Taylor Grazing Act. The United States Congress did not do this.
16 Instead, it specifically recognized and protected the right of private parties to acquire and maintain
17 water rights pursuant to state law on those lands. The Taylor Grazing Act states, in pertinent part:

18 Nothing in this subchapter shall be construed or administered in any way to diminish
19 or impair any right to the possession and use of water for mining, agriculture,
20 manufacturing, or other purpose *which has heretofore vested or accrued under
existing law validly affecting the public lands or which may be hereafter initiated or
acquired and maintained in accordance with such law.*

21 Taylor Grazing Act, 43 U.S.C. § 315 (*emphasis added*). Unappropriated water rights on the then
22 public domain were not reserved to the United States, and, further there is absolutely no indication
23 that it was necessary for the United States to hold the water rights in order to fulfill the purposes of
24 the Taylor Grazing Act. Congress has stated the very opposite in the Taylor Grazing Act. The
25 situation is similar to that presented in *United States v. New Mexico*, in which the United States
26 unsuccessfully argued that Congress intended to reserve water from the Rio Mimbres in the Gila
27 National Forest for stockwatering purposes. In support, the United States offered the fact that it
28 issued permits to private cattle owners to graze their livestock within the national forest and

1 Congress must have foreseen stockwatering within national forests. *See United States v. New*
2 *Mexico*, 438 U.S. 696, 715-716 (1978). The Court rejected the United States' arguments and wrote:

3 The United States contends that, since Congress clearly foresaw stockwatering on
4 national forests, reserved rights must be recognized for this purpose. The New
5 Mexico courts disagreed and held that any stockwatering rights must be allocated
6 under state law to individual stockwaterers. We agree ... Congress intended the
7 water supply from the Rio Mimbres to be allocated among private appropriators under
8 state law.

9 *United States v. New Mexico*, 438 U.S. at 715-717. Under such circumstances, the issue of whether
10 it is necessary for the United States to hold the water rights in order to fulfill the purpose of the
11 Taylor Grazing Act is irrelevant *unless* what is being claimed is a federal reserved water right, and
12 even then under *United States v. New Mexico*, that theory would have to be rejected. In the present
13 case, the United States has not claimed a federal reserved right, nor is one implicated given the
14 language in the Taylor Grazing Act. To the contrary, the explicit language of the Taylor Grazing
15 Act recognizes that water rights on what was to become federally administered grazing allotments
16 could to be initiated or acquired and maintained by private parties in accordance with state law.

17 The United States' claims should be rejected in their entirety based on the application of the
18 Idaho law to the facts of this case. In case of stockwatering, beneficial use appropriation for
19 stockwater purposes is evidenced solely by watering livestock from the source. In this case, there is
20 no evidence that the United States has ever watered livestock from Jordan Creek. There is simply
21 no other manner of recognizing a beneficial use water right, and certainly no case law or other
22 recognition of a beneficial use right premised on the management of others. In the absence of any
23 legal authority supporting a "management based" beneficial use water right, as a matter of law the
24 Special Master's recommendation of a beneficial use water right to the United States was in error.

25 **B. THE SPECIAL MASTER MISSTATED AND MISAPPLIED THE LAW TO JOYCE**
26 **LIVESTOCK'S CLAIMS.**

27 The basis for the recommendation to deny Joyce Livestock's claim is found in the
28 Conclusions of Law, and is identified broadly as Joyce Livestock's Grantors' Lack of Intent to
29 Appropriate. *See Report and Recommendation*, p. 19. First, the Special Master concluded that
30 there was no intent to appropriate because Joyce Livestock's predecessors watered their cattle in
31 common with others. *See Report and Recommendation* p. 20. Second, it was concluded that there

1 was no intent to appropriate or transfer the water rights because the deeds and other documents did
2 not specifically identify the water rights on federal public land. The Court's holding that watering
3 in common defeats a water right and failure to recognize and correctly apply the settled law of
4 appurtenances constitute legal errors that must be corrected on review.

5 **1. The Special Master Erred as a Matter of Law in Holding That the Use of Water**
6 **in Common with Others Does Not Constitute an Appropriation.**

7 The Special Master stated as a basis for the decision the following: "A fundamental principle
8 of water law is that mere use of water in common with others does not constitute an appropriation."
9 See Report and Recommendation, p. 20, fn. 28. The Court goes on to opine that the "fatal flaw" in
10 Joyce Livestock's claim is that Joyce Livestock's predecessors in interest watered their cattle with
11 one another. See Report and Recommendation, p. 22. The Court's analysis in this regard is
12 contrary to settled law and the law of the case within the SRBA.

13 In addressing the issue of the affect of multiple appropriators using stockwater in common
14 with one another, the Presiding Judge of the SRBA explicitly recognized that non-exclusive use of a
15 water source does not defeat a stockwater right claim. Presiding Judge Hurlbutt, Jr. wrote as
16 follows:

17 [A]ll the waters of the state, when flowing in their normal channels, including the
18 waters of all natural springs and lakes within the boundaries of the state are declared
19 to be the property of the state ..." I.C. § 42-101. No river, lake, or spring is under any
20 exclusive dominion and control, yet the legitimacy of appropriations made from
21 these sources **cannot be denied** because access to the source is not exclusive.
22 Absent a claim for a reserved right, all water within the boundaries of this state is
23 subject to appropriation. If there are a number of appropriations made from a single
24 source, those appropriations are administered "first in time, first in right."

25 *In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Report and
26 Recommendations (September 30, 1998) (*emphasis added*), citing Idaho Const. art. XV, § 3;
27 *Village of Peck v. Denison*, 92 Idaho 747, 749-750 (Idaho 1969). In truth, it could be no other way,
28 otherwise there could be only one appropriator per water source in the state of Idaho. Such a result
would be illogical and in direct conflict with the "first in time" doctrine which is the law in the state
of Idaho. *Id.*; see also I.C. § 42-106 ("As between appropriators, first in time is first in right"); see
also *Crow v. Carlson*, 690 P.2d 916 (1984) (water rights in Idaho are administered "first in time,

1 first in right”); *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26 (1988), *citing Nielson v. Parker*, 19 Idaho
2 727 (1911). Clearly, use of a water source in common with others does not prevent a party from
3 acquiring a water right. Otherwise, there would be no need for the doctrine of prior appropriation,
4 no need for the “first in time” principle, no need for priorities and, indeed, no need for the Snake
5 River Basin Adjudication, a primary purpose of which is to determine, as between various common
6 appropriators, who has the most senior most right.

7 In the present case, when Joyce Livestock and its predecessors-in-interest watered their cattle
8 from Jordan Creek, they were separately appropriating water from that source. The evidence of the
9 appropriators’ intent to appropriate is simply demonstrated by the act of the cattle watering directly
10 from the source. *See Hage v. United States*, 51 Fed. Cl. 570 (2002), *citing Hunter v. United States*,
11 388 F.2d 148, 153 (9th Cir. 1967) (for purposes of stockwatering, appropriation is evidenced by
12 watering livestock directly from the source). In response to this reasoning, in the Order Denying
13 Motion to Alter or Amend, the Special Master in this case stated as follows: “To follow Joyce
14 Livestock’s argument, every stock owner who ever grazed livestock along Jordan Creek
15 appropriated its water for instream stockwater use merely by allowing their stock to drink water
16 from Jordan Creek.”^{4/} Yes! An appropriation of an instream stockwater right occurs and is
17 evidenced through the act of watering cattle from the stockwatering source. *In Re SRBA Case No.*
18 *39576*, Order Denying Challenges and Adopting Special Master’s Report and Recommendations
19 (September 30, 1998) (for an instream stockwater right, the party claiming a stockwater right will
20 point to the act of placing stock it owns or operates near a water source and the drinking of water by
21 the stock as the act constituting an appropriation of water); *see also Hage v. United States*, 51 Fed.
22 Cl. 570 (2002), *citing Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) (recognizing water
23 right based on prior appropriation for stockwatering purposes on public domain based on evidence
24 by owner of livestock that he and members of his family had since prior to 1880 persistently grazed
25 and watered livestock on the public domain); *Steptoe Live Stock Co. v. Gulley*, 295 P. 772 (Nev.
26 1931) (cattle watering from streams held to be an appropriation of water for stockwatering

27
28 ^{4/}
original).

See Order Denying Motion to Alter or Amend, p. 6 (*emphasis in*

1 purposes); *see also Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) (for purposes of
2 stockwatering, appropriation is evidenced by watering livestock directly from the source).

3 Although unstated, it can be inferred from the Order Denying Motion to Alter or Amend that
4 there is a concern that if this standard of law is applied, every person who may have watered
5 livestock from Jordan Creek, including quite possibly itinerant herdsman, may have appropriated
6 water and thereby acquired beneficial use water rights which would be entitled to protection. This
7 concern regarding unknown appropriators, however, is unfounded. If, in that hypothetical, a party
8 appropriated water one year, never to return to the water source, the water right thus acquired could
9 be lost due through forfeiture or abandonment due to non-use. However, in the present case, no
10 claim has ever been made against Joyce Livestock or its predecessors in interest based on either
11 forfeiture or abandonment. To the contrary, the evidence demonstrates that Joyce Livestock and its
12 predecessors in interest have put the waters of Jordan Creek to beneficial use for stockwatering
13 purposes continuously since 1898 and all livestock operations that appropriated water from Jordan
14 Creek have been consolidated into what is today the Joyce Livestock Company. *See* Testimony of
15 Paul Nettleton, Trial Transcript pp. 659-661, 680-683; *see also* Exhibit 1 (Chain of Title); Report
16 and Recommendation, p. 8.

17 **2. The Absence of Language Specifically Describing the Water Sources at Issue**
18 **Does Not Defeat this Claim.**

19 An alternative basis for denying Joyce Livestock's claim was that the "concern of all grazers
20 from 1898 through the present was access to graze on federal public land, not water rights on the
21 federal public land." *See* Report and Recommendation, p. 22. In support, it is argued that the
22 absence of specific references to the water rights in the deeds and grazing applications evidence that
23 Joyce Livestock's predecessors in interest were concerned only about grazing rights, and not water
24 rights. However, such an argument ignores settled law regarding water rights acquired on the public
25 domain, the law of appurtenances, the fact that the value of the water rights was included in the
26 value of the base ranch as a whole, and the practical reality that cows who do not have water to
27 drink will die.

28 Private stockwater rights on the public domain were of such great value and importance that

1 they were acknowledged and given specific protection in the Taylor Grazing Act. *See* 43 U.S.C.
2 §315b. If, indeed, these private water rights acquired on the public domain were of no use or value,
3 then there would be no need to offer such protection. Accordingly, consistent with the Mining Act
4 of 1866 (43 U.S.C. § 661) and the Desert Land Entry Act of 1877 (43 U.S.C. § 321-323), the Taylor
5 Grazing Act confirmed and protected these valuable water rights.

6 The fact that the deeds transferring the base ranch properties reference appurtenances, but by
7 and large do not specifically identify the private water rights along Jordan Creek, does not mean that
8 they were not of value, and does not defeat the transfer. The SRBA Court has already ruled that a
9 water right can be conveyed without expressly mentioning the water right in the same instrument
10 that conveys the real property to which the water right is appurtenant. *See In Re: SRBA 39576*
11 *(Subcase 55-10288b et al.)*, Memorandum Decision and Order on Challenge, Judge Wood, April 25,
12 2000, p. 18, *citing Crow v. Carlson*, 690 P.2d 916 (1984); *see also Zolezzi v. Jackson*, 297 P.2d
13 1081 (Nev. 1956) (water rights transfer with the land to which they pertain unless there is a specific
14 reservation of the water rights in the document of transfer). In such cases, the water rights will
15 transfer as appurtenances if that was the grantor's intent. *Id.* In the case of stockwatering rights,
16 "where the use of the grazing allotments and water rights are necessarily connected with the use and
17 enjoyment of the base ranch property, it is reasonable that a grant of the ranch would include both
18 the grazing preference and the water rights used thereon." *See In Re: SRBA 39576 (Subcase 55-*
19 *10288b et al.)*, Memorandum Decision and Order on Challenge, p. 19-20 (April 25, 2000); *see also*
20 *Parke v. Bell*, 97 Idaho 67, 69 (1975)(the perfected water right is appurtenant to the land that
21 receives the benefit of the water); Kinney on Irrigation and Water Rights, Vol. 2, sec. 997, 1000,
22 1005 (1912) ("a water right, which secures to the owner of a tract of land water for irrigation of the
23 same, *or for some other purpose*, necessary to the beneficial enjoyment of the land, the title to
24 which is also in the owner of the land, becomes appurtenant to such land.") (*emphasis added*). One
25 court described the relationship between the base ranch property and the appurtenant stockwater
26 rights on federally administered lands as follows:

27 While the BLM might commission a genetically engineered cow that will drink only
28 where preprogrammed, until then it is highly unlikely that you will be able to make a
 cow differentiate between water they can drink because it is on base property and

1 water that is attached to public land. For centuries, no one has been able to lead the
2 cow without it drinking at will. In a sense, the point of use for the water is the cow's
3 head, which is an extension of the base ranch.

4 *Hage v. United States*, 51 Fed.Cl. 570, 586 (2002).

5 When the above standards are applied to the facts of the case, it is clear that the private water
6 rights on the grazing allotments were absolutely essential to the use, enjoyment, and value of the
7 base ranch property, those water rights are appurtenant to the base ranch property, and were
8 transferred as such.

9 That it was the intent of the grantors to transfer the appurtenant water rights is confirmed by
10 testimony at trial. Testimony at trial included that of one of Joyce Livestock's predecessors in
11 interest, Mr. Paul Nettleton. Mr. Nettleton testified both about his intent to transfer the water rights
12 with the base ranch property as well as the essential value of those water rights to the value and
13 operation of the ranch. *See* Trial Transcript, Testimony of Paul Nettleton, pp. 673-684, 718-719.
14 The fact that the water rights sited on what are now federally administered allotments are necessary
15 for the beneficial use and enjoyment of the base ranch was additionally testified to by Dr. Chad
16 Gibson. He testified that the ranch unit would have been essentially worthless absent water rights
17 located on the summer range or the allotments at issue, and further testified that the ranches were
18 bought, sold and traded as a unit which included these appurtenant stockwater rights. *See* Trial
19 Testimony, Dr. Chad Gibson, pp. 586-588, 590, 610-611. Finally, in a statement that, perhaps better
20 than all others, sums it all up is the following testimony from Mr. Gene Lewis: "just keep in mind
21 that the cattle follow the green grass, and they've got to have water when they get there." *See*
22 Testimony of Gene Lewis, Trial Transcript, p. 330.

23 The fact that the deeds transferred the water rights as apputenances does not defeat these
24 water right claims, nor does the fact that the grazing applications at issue did not specifically
25 identify the water rights at issue herein. The primary method of acquiring a grazing preference
26 under the Taylor Grazing Act was to demonstrate the ownership of base ranch property. *See* Taylor
27 Grazing Act, 43 U.S.C. 315b ("Preference shall be given in the issuance of grazing permits to those
28 within or near a district who are landowners engaged in the livestock business.") Because of this, it

1 makes sense that the grazing applications would focus on identification of commensurate base ranch
2 property (the land) as opposed to appurtenant water rights. This does not mean, however, that there
3 were not water rights on the federal public land that belonged to the applicants. To the contrary, the
4 fact that the applications for grazing preferences and permits were granted evidences the fact, first,
5 that the applicants were using the land and appropriating the water prior to 1934. *See* Testimony of
6 Dr. Gibson, pp. 593-594 (regarding the requirements of a history and priority of use of prior to the
7 enactment of the Taylor Grazing Act). Given the above, it was error for the Special Master to find
8 that these water rights were somehow waived or abandoned by virtue of grazing applications. As
9 correctly noted by Special Master Cushman in a case where similar issues have been presented,
10 grazing applications "are ambiguous and legally insufficient to transfer or waive preexisting water
11 rights obtained under the Idaho Constitution ... (and) are insufficient to result in an abandonment of
12 a water right." *See In Re: SRBA Case No. 39576, Subcase 55-10288b et al.*, Special Master's
13 Report and Recommendation, pp. 9-10 (February 27, 2003).

14 It was the intent of Joyce Livestock's predecessors in interest to transfer the ranching
15 operations and the base ranches as a going concern, by including everything necessary to sustain the
16 ranch, most importantly, the appurtenant stockwater rights in Jordan Creek. Such transfers of water
17 rights as appurtenances are supported by law, and the grazing applications, though relevant to
18 demonstrate grazing and watering of cattle in the area prior to 1934, are legally insufficient to
19 constitute a waiver of otherwise valid water rights.

20 **3. The Special Master's Failure to Address Water Rights on Private Land Was in**
21 **Error.**

22 For the most part, Joyce Livestock and the United States' claims mirror each other. *See*
23 Exhibit 8. However, a portion of Joyce Livestock's claim is sited on privately held land. *See*
24 Exhibit 8. No rationale was offered to deny those portions of the water right claim and, given the
25 evidence at trial, those water rights on private lands should have been recommended with a priority
26 date of 1898.

27 Also, in reference to places of use, the Special Master declined to rule on Joyce Livestock's
28 Motion to Amend Legal Descriptions of Points of Diversion of Stockwater Rights by Joyce

1 Livestock Co., Claim No. 55-10135 (Silver City area) according to proof. *See* Report and
2 Recommendation, p. 22. Accordingly, Joyce Livestock renews said Motion and requests that all
3 places of use along Jordan Creek be decreed to Joyce Livestock as claimed or amended by motion,
4 with a priority date of 1898.

5 **C. THE EFFECT OF THE REPORT AND RECOMMENDATION IS TO DEPRIVE**
6 **INDIVIDUALS OF THEIR RIGHT TO OWN AND MAINTAIN WATER RIGHTS**
7 **ON FEDERALLY ADMINISTERED ALLOTMENTS, IN CONTRAVENTION OF**
8 **ESTABLISHED LAW.**

8 It is appropriate in this case to look at the big picture and the practical effect of the Report
9 and Recommendation. If left to stand, the Report and Recommendation will effectively extinguish
10 private water rights perfected by private ranchers, like Joyce Livestock and its predecessors in
11 interest, simply because they are located on what are now federally administered allotments. This
12 runs afoul of historic recognition of private appropriative rights on federal land, and is contrary to
13 established law regarding the same.

14 Historically, private water rights on the public domain have been given considerable
15 protection, based originally on the United States' efforts to encourage settlement in the west. These
16 private water rights on the public domain were specifically recognized and protected through the
17 passage of the Mining Act of 1866, 43 U.S.C. § 661, the Desert Land Entry Act of 1877, 43 U.S.C.
18 §§ 321-323, and the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316. In each of these statutes,
19 the right to appropriate water from the public domain was confirmed and given specific prospective
20 protection. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155
21 (1935) (the effect of these statutes is to approve and confirm the policy of appropriation for a
22 beneficial use as the test and measure of private rights in and to the non-navigable waters on the
23 public domain). If the savings provisions in those statutes, and the protection offered to private
24 water rights in the Taylor Grazing Act in particular, are to be given any effect, then they must be
25 applied so as to protect parties, like Joyce Livestock, whose predecessors in interest perfected
26 private water rights on the then public domain, and transferred the same subsequently as
27 appurtenances to the base ranch property.

28 At the same time, the opinion below recommends water rights to the United States based on

1 the United States' theory of a "beneficial use" water right based on its management of the
2 rangeland surrounding these water sources. Such a claim is unprecedented and without foundation,
3 and the United States has provided no legal authority for its claims. The arguments raised by the
4 United States and relied upon by the Special Master in support of the Report and Recommendation
5 at issue herein have been raised and rejected by the SRBA Court before, and yet they still continue
6 to resurface, again and again. In this regard, it is worth quoting, at length, a portion of an opinion
7 issued by a Presiding Judge in the SRBA:

8 In reviewing stock water ownership on the public domain, the court has several
9 important observations. In litigating these subcases, the United States has advanced
10 several legal theories addressing stock water ownership. Ft.n. 8. Following is a
11 chronology of these theories. (1) Private parties may not appropriate water located
12 on the public domain when that public is not open to entry, settlement and
13 acquisition of private title ... (2) Since water is appurtenant to federal land, unity of
14 title requires the owner of land to own water rights perfected on that land ... (3)
15 Exclusive access to the water source is required to perfect a water right located on
16 the public domain. The United States relied on federal law in support of this
17 proposition before the Special Master. On challenge, the United States relied on
18 state law for this proposition. (4) The United States is the owner of water right
19 located on the public domain because it gives permission to the private party to
20 operate on the public domain. Many of these theories are not necessarily consistent,
21 but all the theories lead to the same *erroneous* conclusion: The United States is the
22 only party which may own water rights located on the public domain. *None of the*
23 *theories can be reconciled with existing federal or state law.*

24 *In Re: SRBA Case No. 39576, Subcase No. 72-15929C et al., Order Denying Challenges and*
25 *Adopting Special Master's Reports and Recommendations, p. 8 (September 30, 1998) (emphasis*
26 *added) (internal citations omitted).* The arguments outlined by the Presiding Judge in the
27 September 30, 1998 Order are the same arguments and rationale relied upon by the United States
28 and the Special Master in the present case. These arguments were rejected once before. They must
be rejected once again.

29 VI. CONCLUSION

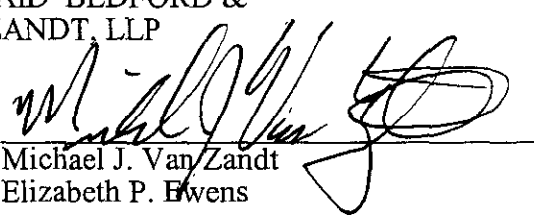
30 The Report and Recommendation is premised on an erroneous statement of the law as it
31 pertains to both the United States' claims and Joyce Livestock's claim. Accordingly, Joyce
32 Livestock respectfully requests that this Court grant its Challenge, and order that the United States'
33 claims be denied in their entirety, and decree Joyce Livestock's claims to the waters in Jordan Creek
34 with a priority date of 1898.

1 Dated this 5th day of December, 2004.

2 Respectfully submitted,

3 McQUAID BEDFORD &
4 VAN ZANDT, LLP

5 By:


6 Michael J. Van Zandt
Elizabeth P. Ewens

7 DATED this ____ day of December, 2004.

8 LING, ROBINSON & WALKER

9 By:

10 Roger D. Ling (ISB No. 1018)

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1 Dated this ____ day of December, 2004.

2 Respectfully submitted,

3 McQUAID BEDFORD &
4 VAN ZANDT, LLP

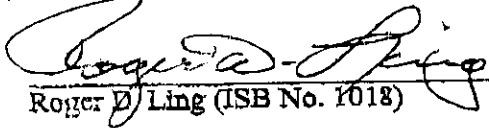
5 By:

6 Michael J. Van Zandt
Elizabeth P. Ewens

7 DATED this ____ day of December, 2004.

8 LING, ROBINSON & WALKER

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10 By:

11 
12 Roger D. Ling (ISB No. 1018)

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CERTIFICATE OF SERVICE

I certify that on December 9, 2004, I served a true and correct copy of foregoing

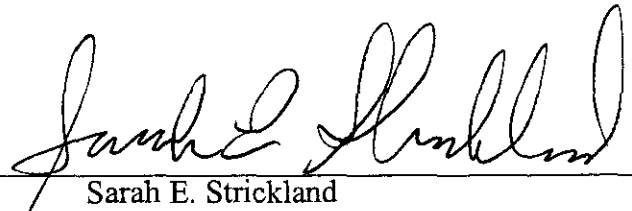
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