



MCQUAID  
BEDFORD &  
VAN ZANDT LLP

221 Main Street 16th Floor  
San Francisco CA 94105-1936  
TEL 415/905-0200  
FAX 415/905-0202

January 18, 2005

*VIA FACSIMILE (208) 736-2121  
AND U.S. MAIL*

Clerk of the Court  
Snake River Basin Adjudication  
253 3<sup>rd</sup> Avenue North  
P.O. Box 2707  
Twin Falls, ID 83303-2707

Re: *In Re SRBA Case No. 39576 (LU Ranching Co. v. United States)*  
Subcase Nos. 55-10288B et al.

Dear Sir or Madam:

Attached please find for filing with the Court **Exhibit "A" to LU Ranching's Motion for Reconsideration and/or Motion to Amend**. The underlying Motion for Reconsideration, together with a number of other documents for filing, was sent to the Court yesterday via overnight courier for filing today, and the attached Exhibit "A" was inadvertently excluded from the packet sent to the Court.

In addition to this facsimile filing, the original Exhibit "A" to LU Ranching's Motion for Reconsideration and/or Motion to Amend is being forwarded to you by mail along with an additional copy and self-addressed stamped envelope. Please return a conformed, date-stamped copy of the same to our office in the return envelope provided.

If you have any questions or concerns regarding the above, please do not hesitate to call. You can reach my assistant, Sarah Strickland, at the number above. In addition, I can be reached directly at (530) 792-1631.

Thank you for your assistance.

Sincerely yours,

Elizabeth P. Ewens

Encl.

(Copies per certificate of Service)

1 MICHAEL J. VAN ZANDT  
ELIZABETH P. EWENS  
2 McQUAID BEDFORD & VAN ZANDT LLP  
221 Main Street, 16<sup>th</sup> Floor  
3 San Francisco, California 94105  
Telephone: (415) 905-0200  
4 Facsimile: (415) 905-0202

5 ROGER D. LING (ISB No. 1018)  
LING, ROBINSON & WALKER  
6 P.O. Box 396  
Rupert, ID 83350  
7 Telephone: (208) 436-4717  
Facsimile: (208) 436-6804

8 Attorneys for LU Ranching  
9

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

12 In Re SRBA

13 Case No. 39576  
14

Subcase Numbers 55-10288B, 55-10289B, 55-  
10290B, 55-10292B, 55-10293B, 55-10295,  
55-10296, 55-10297B, 55-10298, 55-10299B,  
55-10300, 55-10301B, 55-10303B, 55-13451,  
55-13846 and 55-13844<sup>1/</sup>

15 **EXHIBIT "A"**  
16 **TO LU RANCHING CO.'S MOTION FOR**  
**RECONSIDERATION AND/OR MOTION**  
17 **TO AMEND**  
18  
19  
20  
21  
22  
23  
24  
25

26  
27 <sup>1/</sup> In the Memorandum Decision and Order on Challenge and Order of Partial  
28 Decrees, the Court split water right 55-10292B and thereby added water right 55-13846, and  
split water right 55-10290B and thereby added water right 55-13844. The new subcases  
numbers are added to the case caption, above.

15, 261). This doctrine applies to tideands in California. *Weber v. Harbor Commissioners*, *supra*; *Shively v. Bowlby*, *supra*, pp. 29, 30; *United States v. Mission Rock Co.* (189 U. S. 391, 404, 493). Upon the acquisition of the territory from Mexico, the United States acquired the title to tideands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. *Knight v. United States Land Assn.* (142 U. S. 101, 183). There is the established qualification that this principle is not applicable to lands which had previously been granted by Mexico to other parties or subjeeted to trusts which required a different disposition, a limitation resulting from the duty resting upon the United States under the treaty of Guadalupe Hidalgo (9 Stat. 922), and also under principles of international law, to protect all rights of property which had emanated from the Mexican Government prior to the treaty. *San Francisco v. LeRoy* (138 U. S. 636, 671); *Knight v. United States Land Assn.*, *supra*; *Shively v. Bowlby*, *supra*.

It follows that if the land in question was tideand, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tideands, which had thus vested in a State, was early determined. *Pollard v. Hagan*, *supra*; *Goodtitle v. Kibbe*, *supra*.

Title to the lands involved passed to the State of California in 1850. There was then no provision of law for reserving possible mineral deposits. There was no established mineral policy of the United States. In this connection see the case of *York v. Louisiana*, 269 U. S. 250.

The decisions appealed from are affirmed.

*Affirmed.*

### THE NATURE AND EXTENT OF THE DEPARTMENT'S AUTHORITY TO ISSUE GRAZING PRIVILEGES UNDER THE TAYLOR GRAZING ACT

*Opinion, January 21, 1937*

#### PUBLIC LANDS—GRAZING—LICENSES—PREFERENCE.

The provision of section 3 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1260), providing that preference shall be given in the issuance of grazing permits to persons in certain enumerated classes, does not require the extension of grazing privileges to all such persons, but contemplates merely that such privileges shall not be extended to persons without the enumerated classes until all persons within them have received grazing privileges. Accordingly, when the range within a grazing district is inadequate to provide for all members of the preference class, the Secretary may provide, by reasonable regulation, for the granting of grazing privileges to a limited group within that class.

#### PUBLIC LANDS—GRAZING—PRIORITY—CLASSIFICATION OF APPLICANTS.

In determining what persons within the preference class shall be entitled to receive grazing privileges, it is proper for the Secretary to issue regulations granting applicants on the basis of priority of use, such being a reasonable standard that will further the declared purposes of the Act, in adopting priority of use as a factor in the classification of preferred

applicants. It is proper to prefer applicants who have property which has been used in connection with the public range for a full grazing season during the 5-year period immediately preceding the passage of the Act or its amendment (under whichever the grazing district was created) over applicants whose property has not had such use.

#### RECORD, SOLICITOR.

At the request of the Director of the Division of Grazing, certain questions involving the nature and extent of the authority of the Department to issue grazing privileges under the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1260), as amended by the act of June 26, 1936 (49 Stat. 1976), have been submitted to me for opinion.

The following are the Director's questions:

When the public grazing lands within a grazing district are inadequate to permit the proper use of all the lands or water within or near such district which are owned, occupied, or leased by the members of the preferred class of applicants named in the act of June 28, 1934 (48 Stat. 1260), is there authority in said act for the following:

1. To select a part only of the members of said preferred class for grazing privileges?

2. Is prior use of the public lands for grazing purposes in connection with such lands or water owned, occupied, or leased by such applicants a proper test for making such a selection?

3. Will the following classification of such preferred applicants be satisfactory?

(a) Those qualified preferred applicants who have dependent commonest property which has been used in connection with the public range for a full grazing season during the 5-year period immediately preceding the passage of the act or its amendment (under whichever the district was created).

(b) Those qualified preferred applicants who do not have such prior use.

The specific provisions which require examination in connection with the foregoing questions are contained in section 3 of the act:

That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time. \* \* \* Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive. \* \* \*

It is my opinion, for the reasons set forth in the discussion to follow, that all of the Director's questions are to be answered in the affirmative.

## QUESTION 1

Nothing in the provisions quoted above nor in any other portion of the act makes mandatory the extension of grazing privileges to any particular persons or classes of persons. Thus, the first provision quoted merely *authorizes* the Secretary of the Interior to issue permits to certain classes of persons. The next provision quoted requires that "preference shall be given in the issuance of grazing permits" to persons in the enumerated classes. I do not regard this provision, however, as requiring the extension of grazing privileges to *all* such persons. It appears rather to contemplate merely that the Secretary of the Interior shall not act favorably on the application of a person who is *outside* the described classes until all persons *within* them have received grazing privileges. In other words, it means simply that all persons with certain qualifications are to be considered before persons lacking those qualifications, but it does not mean necessarily that the applications of all those in the first class must be granted.

Two reasons for this construction are immediately apparent. First, if a contrary meaning were intended, the Congress more reasonably would have said that "*permits shall be issued* to those within or near a district who are landowners," etc., rather than that "preference shall be given" to those persons. Secondly, a different construction would be inconsistent with the first portion of section 3, which authorizes the Secretary of the Interior to issue permits to "such bona fide settlers, residents, and other stock owners *as under his rules and regulations* are entitled to participate in the use of the range." [Italics supplied.]

I am of the opinion, therefore, that when the range within a grazing district is inadequate to provide for all members of the preference class created in section 3 of the act, the Secretary of the Interior may provide, by reasonable regulation, for the issuance of grazing privileges to a limited group within that class.

## QUESTION 2

Section 3 of the Taylor Grazing Act directs the Secretary of the Interior to—

make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act 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; \* \* \*

Under this provision, the Secretary of the Interior has the power to issue regulations grading applicants within the preferred class on the basis of priority of use, unless to do so is in itself unreasonable, inappropriate, or inconsistent with the provisions of the act. *United States v. Macleod*, 243 U. S. 607, 613-614; *International Ry. v. United States*, 267 U. S. 506, 514. *Cf. United States v. Gribnau*, 220 U. S. 506.

A careful examination of the provisions of the Taylor Act indicates that where the range is insufficient to provide for all applicants in the preference class, prior use of the public lands for grazing purposes in connection with privately held property may be regarded as a most reasonable standard for the granting of grazing privileges. I base this conclusion on two separate but none the less related provisions in section 3 and a portion of the language in which the act is entitled.

First, it is stated in the preference provision "as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them." [Italics supplied.] This provision thus appears to recognize that certain of the privately held properties are economically dependent on the public lands for their proper use, that is to say, that if their proper use is for the raising of livestock, the privilege of grazing on the public lands in connection with the use of the private property is essential in order to attain a degree of economic sufficiency. It follows, therefore, that a standard of selection from among the members of the preference class which is based on a prior use of the public lands for grazing purposes not only is in itself a reasonable standard but furthers one of the declared purposes of the act.

Secondly, the language immediately following the portion of the preference provision heretofore quoted is significant:

\* \* \* except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive \* \* \*

This provision, of course, no longer has literal application to the issuance of grazing privileges, being in operation only from June 28, 1934, the date of the approval of the act, until July 1, 1935. It is important, however, when considered in connection with what already has been said concerning the "proper use" of lands, as demonstrating the intention of the Congress that properties not theretofore used in connection with the public lands should not be made the basis of an application for grazing privileges by persons who otherwise might be in the broad preference class until, presumably, other persons also

in the preference class, but having properties which had been so used, should have had an opportunity to obtain grazing privileges. Lastly, it is to be noted that the Taylor Grazing Act is thus entitled:

AS ACT "To 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. [Italics supplied.]

While it is true that the title is only a formal part of an act, the United States Supreme Court recently has reaffirmed the principle that resort may be had to the title as an aid to the construction of the act. *Bergson v. The Secretary of Justice of the Philippine Islands*, 299 U. S. 410. If one of the purposes of the Taylor Act is "to stabilize the livestock industry dependent upon the public range," it is obvious that this purpose is well served by granting grazing privileges to applicants who are and have been operating going concerns in connection with the range and by denying them, if there is insufficient range for all, to other applicants who also may be in the broad preference class but who have elected to enter the livestock business on properties not heretofore used in connection with the public lands.

#### QUESTION 3

Before discussing the reasonableness of the particular standard of selection proposed by the Director of Grazing, the meaning of the words "dependent commensurate property," as used by the Division of Grazing, should be explained. The following is quoted from the Rules for Administration of Grazing Districts, approved by the Secretary of the Interior on March 2, 1936:

*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.

"(c) *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."

It is my opinion that the rule proposed is a reasonable one. Clearly, if the standard of selection is to be one of prior use of the public lands in connection with the private property held by the applicant, some definition of the nature and extent of such prior use becomes necessary. I am informed by the Director of Grazing that the 5-year period immediately preceding the enactment of the act has been selected as a period within which an applicant may qualify for grazing privileges by having used the public range for one full graz-

ing season because of its definite relation to existing economic and climatic conditions. It is a matter of common knowledge that the period from 1929 to 1934 was one of great economic distress. It also included seasons of severe drought, particularly in the States in which grazing districts have been established. Not to provide for the flexibility afforded by the 5-year rule, as for example, to require that an applicant's property have been used in connection with the public range at the time of the enactment of the act, or during the grazing season last preceding, would necessitate the denial of grazing privileges to an applicant who conceivably had been established in the livestock business and had used the public range in connection with his private property for many years, but who, because of conditions beyond his control, was forced temporarily to suspend his operations for that particular season.

I am informed also by the Director of Grazing that the application of this rule will in fact adequately protect the interests of all applicants who were established in the livestock business at the time of the enactment of the Taylor Grazing Act. In the light of these facts and since the employment of the principle of prior use of the public lands as a standard of selection from among the members of the preference class is deemed sound for the reasons discussed under question 2, it is my belief that the particular rule proposed is open to no legal objection.

Approved: January 21, 1937.

T. A. WALTERS,

*First Assistant Secretary.*

#### SLIGER GOLD MINING COMPANY

*Decided January 23, 1937*

**MINING CLAIM—RECOVERANCE BY UNITED STATES OF RAILROAD GRANT FOR INCLOSURE TO MINERAL PATENT.**

Land patented under a grant to a railroad company is not subject to location under the mining law, and where more than six years have elapsed from the date of patent, the patent is immune from attack by the United States in the absence of fraud in its procurement, and a locator under the mining law of part of such land who also holds the title of the railroad will not be permitted to recover such title to the United States for the purpose of having such part included in a mineral patent to his location.

**MINING CLAIM—WITHDRAWALS UNDER FEDERAL WATER POWER ACT.**

Mining locations for metalliferous mineral on lands withdrawn under the act of June 25, 1910 (36 Stat. 847), made prior to withdrawals of such land under the Federal Water Power Act, and amended for the purpose of covering description after said act, where there is nothing to show that new ground covered by the withdrawals under the Federal Water Power Act

1 **CERTIFICATE OF SERVICE**

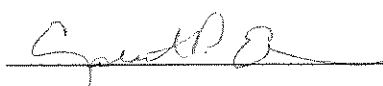
2 I certify that on January 14, 2005, I served a true and correct copy of foregoing **EXHIBIT**  
3 **"A" TO LU RANCHING CO.S' MOTION FOR RECONSIDERATION AND/OR MOTION**  
4 **TO AMEND** upon the following individuals by placing the document in the United States Mail,  
5 postage paid, and addressed as follows:

6 U.S. Department of Justice  
7 General Litigation Section  
8 Environment and Natural Resources Division  
9 550 West Fort Street, MSC 033  
10 Boise, ID 83724

11 Larry Brown  
12 Attorney, U.S. Dept. of Justice  
13 General Litigation Section  
14 Environment and Natural Resources Division  
15 550 West Fort Street, MSC 033  
16 Boise, Idaho 83724

17 Chief, Natural Resources Division  
18 Office of the Attorney General  
19 State of Idaho  
20 P.O. Box 44449  
21 Boise, ID 83720-0098

22 IDWR Document Depository  
23 P.O. Box 83720  
24 Boise, ID 83720-0098

25  
26  
27  
28  
  
Elizabeth Ewens

D:\Documents and Settings\EE\Work\LU Ranching\Exh A Mtn to Amend.wpd