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

In Re SRBA	) Subcase Numbers 55-10135, 55-11061,
	) 55-11385, and 55-12452
	)
Case No. 39576	) MEMORANDUM IN OPPOSITION TO
	) JOYCE LIVESTOCK CO.'S MOTION
_____	) FOR SUMMARY JUDGMENT

I. INTRODUCTION.

Like Joyce Livestock, the United States recognizes the critical need to provide water for cattle as part of the grazing program on federal lands. This need drove the establishment of public water reserves in 1926. This need has been the impetus for ranchers and the Bureau of Land Management

to enter into hundreds of cooperative agreements to develop and maintain watering sources on federal lands in Idaho. And it is with this need in mind that the United States has filed for three in-stream livestock watering rights on Jordan Creek.

Given the common interest between the ranching community and the United States in ensuring the availability of water for all permittees, it is not surprising that in the vast majority of subcases in this adjudication the United States' claims for stockwater have either been uncontested or resolved amicably through negotiation. Unfortunately, the parties in the present subcase have not yet been able to resolve their differences, thus necessitating the filing of this brief in opposition to Joyce Livestock's Motion for Summary Judgment.

In its motion, Joyce Livestock argues that it alone is entitled to a stock water right on Jordan Creek and that any stock water claim by the United States must be rejected as a matter of law. Moreover, Joyce Livestock asserts it has complied with state law in asserting an 1898 priority date.

The United States does not deny that, under appropriate circumstances, a private party may acquire a water right on federally owned land. But it is equally true that the United States may also hold a water right on land it owns and administers. To argue otherwise, as Joyce Livestock does, is to reject the hundreds of licenses issued by the State of Idaho, and other states, to the United States for stockwatering, is to ignore the state statute enacted in 1939 recognizing that the Bureau of Land Management "may appropriate for the purpose of watering livestock any water not otherwise appropriated on the public domain" (I.C. § 42-501), and is to ignore the thousands of partial decrees

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already issued by this Court to the United States in this very proceeding. Joyce Livestock is thus simply wrong to assert that the United States can never hold stock water rights on its own land.

In the remainder of this opposition brief, the United States will first show that it is entitled to stock water rights on Jordan Creek under Idaho state law, as the Idaho Department of Water Resources has recommended. We will then show that Joyce Livestock is not entitled to summary judgment on its claim of an 1898 priority date. While the United States remains hopeful that this matter can be resolved through agreement of the parties, the application of Idaho state law to the facts of this subcase do not warrant the relief requested by Joyce Livestock.

II. ARGUMENT.

The United States Department of the Interior, Bureau of Land Management (hereinafter "BLM") has filed claims for in-stream livestock watering from Jordan Creek. These claims were assigned claim numbers 55-11061, 55-11385, and 55-12452 in the Snake River Basin Adjudication (hereinafter "SRBA"). All places of use are located on public land^{1/} owned by the United States and managed by the BLM for, among other things, domestic livestock grazing. The general area where the claims are located is within a grazing allotment designated by the BLM as the Silver City Grazing

^{1/}In this memorandum, the term "public lands" means "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership" 43 U.S.C. § 1702(e). Historically, the term "public lands" can also mean lands owned by the United States within the several States "subject to sale or other disposal under general laws." Barker v. Harvey, 181 U.S. 481, 490 (1901) (quoting Newhall v. Sanger, 92 U.S. 761, 763 (1875)).

Allotment, Allotment Number 0569 (hereinafter "Allotment")^{2/} The BLM asserts that the priority date is June 28, 1934.^{3/} On May 6, 1998, over opposition by the United States, Special Master Haemmerle allowed Joyce Livestock Co., LTD (hereinafter "Joyce") to file late objections to Water Right Claims 55-11061, 55-11385, and 55-12452.^{4/}

Joyce is an entity authorized by the BLM to use public land for livestock grazing under the provisions of the Taylor Grazing Act of 1934 (hereinafter "Taylor Grazing Act") (codified at 43 U.S.C. §§ 315-316). BLM issues annual grazing permits to Joyce to use the Allotment for domestic livestock grazing.^{5/} Joyce filed a Notice of Claim to a Water Right Acquired Under State Law for Water Right Claim Number 55-10135. A majority of the places of use are located on public land within the Allotment boundary. Order Granting Motion to File Amended Notice of Claim, In Re SRBA, Case

^{2/} "*Allotment* means an area of land designated and managed for grazing of livestock." 43 C.F.R. § 4100.0-5 (italics in original).

^{3/} On "June 28, 1934, President Franklin Roosevelt signed the Taylor Grazing Act into law." Public Lands Council v. Babbitt, 529 U.S. 728, 733 (2000).

^{4/} The objections state, "[t]his water right was developed by historic use for stockwater by private individuals on unappropriated open range. Our current Federal grazing permit is based on that historic use and was awarded through an adjudication process in 1935. Our privately owned grazing permit can be bought, sold, traded, inherited and taxed, and is totally dependent upon our continued use of this water right. Therefore the name on this water right should be ours." Domestic and Stock Water Right Objection, In Re SRBA, Case No. 39576, Subcase Numbers 55-11061, 55-11385 and 55-12452.

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

No. 39576, Subcase 55-10135 dated December 4, 2001. For the places of use on public land, Joyce and the United States have claims with identical places of use and purpose of use, *i.e.*, providing water to permitted domestic livestock. On December 5, 1997, the BLM filed a timely objection to Water Right Claim Number 55-10135.

On March 8, 2002, Joyce filed a Motion for Summary Judgment (hereinafter "Motion"). Joyce argues that the United States cannot acquire water rights on federal land for livestock watering because it owns no livestock, so the United States' claims for water rights on Jordan Creek should be denied. Joyce further argues that it is entitled to an order decreeing Water Right Number 55-10135 with a priority date of June 1, 1898. Joyce argues that its claimed priority date is valid because the water right is based on historic grazing use by the predecessor in interest to Joyce's ranch property, that the water right is appurtenant to Joyce's deeded ranch property, that the historic water right was intended to be conveyed from mesne grantors to grantees, and that conveyances of the water right occurred through an uninterrupted chain of title to Joyce's deeded ranch property.

Contrary to Joyce's contentions, the BLM has satisfied the requirements for a valid appropriation of livestock water under Idaho law by managing the public lands in question for purposes of providing sustenance to permitted livestock under the provisions of the Taylor Grazing Act.^{6/} There is no requirement under Idaho law that the appropriator own domestic livestock in order to perfect a water right to be used for providing water to domestic livestock. Because the BLM's appropriation of

^{6/} A separate Statement of Facts, the Affidavit of Fredric W. Price, Affidavit of Ronald W. Kay, the Affidavit of Michael J. Boltz, the Affidavit of Gary A. Madenford, the Affidavit of Robert R. Mallis, the Affidavit of Larry A. Brown, the transcript of the Deposition of Paul Nettleton, the transcript of the Deposition of Gene Lewis, and Exhibits 1-11 in support of this Memorandum are filed herewith.

livestock watering rights is valid under Idaho law, Joyce's Motion should be denied, and Joyce's objections to the United States' claims should be dismissed. The United States' is entitled to partial decrees as a matter of law for Water Right Numbers 55-11061, 55-11385, and 55-12452, with June 28, 1934 priority dates. Idaho R. Civ. P. 56(c). Brummett v. Ediger, 106 Idaho 724, 726, 682 P.2d 1271, 1273 (Idaho 1984).

With respect to Joyce's claims for in-stream water rights on Jordan Creek, the record does not support Joyce's claim for a priority date of June 1, 1898. There is simply no documentary evidence that water rights located on United States property were appropriated as of that date and subsequently transferred to Joyce. As will be shown below, any water right decreed for Joyce should have a priority date no earlier than August 24, 1985, the date Joyce Livestock Co., Ltd first grazed its livestock in the Allotment. Moreover, to the extent water consumed by Joyce's livestock on public land is already appropriated by the BLM for consumption by permitted livestock, Joyce's water right should be limited to avoid an allocation of water in excess of the quantity actually used

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

1. Summary of the Argument.

Pursuant to the Taylor Grazing Act, the BLM issues permits to qualified applicants to use public lands in Idaho for livestock grazing. 43 U.S.C. § 315b; Public Lands Council, 529 U.S. at 735.^{2/}

^{2/} "As grazing allocations were determined, the Department would issue a permit measuring grazing privileges in terms of 'animal unit months' (AUMs), i.e., the right to obtain the forage needed to sustain one cow (or five sheep) for one month. Permits were valid for up to 10 years and usually renewed as suggested by the Act. See 43 U.S.C. § 315b; Public Land Law Review Commission, One third of the Nation's Land 109 (1970). But the conditions placed on permits reflected the leasehold nature of

Without water available for livestock consumption, there would be no livestock grazing on public lands.

BLM's management of grazing on public lands is a beneficial use of water sufficient to support a livestock watering right. The United States satisfies the requirements for establishing a water right under Idaho law by diverting the water from Jordan Creek through the Taylor Grazing Act process of providing access to the water for beneficial use by permitted livestock. Furthermore, 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.

2. Contrary to Joyce's Argument, The BLM Diverts and Uses Water for a Beneficial Purpose.

a. United States' Management of Public Lands is Sufficient to Support Livestock Watering Rights.

The Idaho Supreme Court stated that a water right claimant must have a possessory interest in the land designated as a place of use in order for an appropriation to be valid. Lemmon v. Hardy, 95 Idaho 778, 781, 519 P.2d 1168, 1171 (Idaho 1974). Further, "[t]he test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. . . ." Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 677, 679-680, 619 P.2d 1130, 1132-1133 (Idaho 1980); *see also* Rabido v. Furey, 33 Idaho 56, 190 P. 73 (1920). In Idaho, a diversion device is not required in order to satisfy the diversion requirement. R.T. Nahas Company v. Hulet, 106 Idaho 37, 674 P.2d 1036, 1044 (Idaho App. 1983) ("for the purpose of establishing the existence of a stock watering right by the constitutional method of appropriation, a diversion device is

grazing privileges; consistent with the fact that Congress had made the Secretary the landlord of the public range and basically made the grant of grazing privileges discretionary. The grazing regulations in effect from 1938 to the present day made clear that the Department retained the power to modify, fail to renew, or cancel a permit or lease for various reasons."

not required.”). As early as 1909, Idaho recognized that a riparian landowner may protect the right to water livestock from in-stream water flowing through his own property. Hutchinson v. Watson Slough Ditch Co., Ltd., 16 Idaho 485, 487, 101 P. 1059 (Idaho 1909); see Stevenson v. Steele, 94 Idaho 4, 11, 453 P.2d 819, 826 (Idaho 1969).

In this case, BLM satisfied the requirements for appropriation of the claimed water rights by managing the Allotment for grazing pursuant to federal law. On June 28, 1934, Congress recalled the implied license to freely graze on public lands by enacting the Taylor Grazing Act.^{8/} Congress directed the Secretary of the Interior (hereinafter “Secretary”) to provide for the protection, administration, regulation, and improvement of federal rangelands. 43 U.S.C. § 315a. Congress authorized the Secretary to issue permits to graze livestock on the public lands to a specific class of qualified citizens, collect fees for authorized grazing use, and to closely regulate grazing use. 43 U.S.C. §§ 315a and 315b. Congress also authorized the Secretary to facilitate the construction of “wells, reservoirs and other improvements necessary to the care and management of the permitted livestock . . .” 43 U.S.C. § 315c. Having water available for the care and management of permitted domestic livestock is a necessary and integral part of BLM’s management of livestock grazing.

The Taylor Grazing Act was enacted in order “[t]o stop injury to the public grazing lands by

^{8/} The use of the public lands in Idaho for rearing livestock was customary under an implied license. Buford v. Houtz, 133 U.S. 320, 326-327 (1890). The Taylor Grazing Act granted the “Secretary of the Interior authority to divide the public range lands into grazing districts, to specify the amount of grazing permitted in each district, to issue leases or permits ‘to graze livestock,’ and to charge ‘reasonable fees’ for use of the land. 43 U.S.C. §§ 315, 315a, and 315b.” Public Lands Council, 529 U.S. at 733. Thus, the implied license to use the public lands for livestock grazing was recalled. See Light v. United States, 220 U.S. 523, 535 (1911).

preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; to stabilize the livestock industry dependent upon the public range; and for other purposes." 48 Stat. 1269. To accomplish these goals, the Secretary was specifically directed to:

[M]ake provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this subchapter and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range

43 U.S.C. § 315a.

Pursuant to regulations promulgated under the Taylor Grazing Act and other statutes,^{9/} the United States, through the BLM, manages rangeland and livestock grazing. *See* 43 C.F.R.

§§ 4100.0-1 - 4180.2; Public Lands Council, 529 U.S. at 734-739.^{10/} This management, based on

^{9/}*See e.g.* The Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1701 *et seq.*) and The Public Rangelands Improvement Act of 1978 (43 U.S.C. § 1901 *et seq.*).

^{10/} Among other things, the BLM determines the persons and/or entities qualified to be permittees (43 C.F.R. § 4110.1-1); determines the qualification of lands and water rights as base property, and the qualification of base property for grazing preferences (43 C.F.R. § 4110.2-1); specifies permitted uses (43 C.F.R. § 4110.2-2); approves or denies transfers of grazing preferences (43 C.F.R. § 4110.2-3); determines the boundaries of areas where grazing use is permitted (43 C.F.R. § 4110.2-4); changes grazing use, increases grazing use, or decreases grazing use (43 C.F.R. §§ 4110.3 through 4110.3-3); manages and approves construction, maintenance, and modification of range improvements (43 C.F.R. § 4120.3); authorizes and issues grazing permits to qualified applicants (43 C.F.R. § 4130.1); manages the kind and number of livestock, the period of use, the allotment to be used, the amount of grazing use, the breed of livestock allowed in allotments, and/or whether grazing is authorized at all (43 C.F.R. §§ 4130.3 - 4130.3-3); determines the ownership, control, and identification of livestock in authorizing grazing use (43 C.F.R. § 4130.7); collects fees paid by permittees for grazing use of public lands (43 C.F.R. § 4130.8); and, insures prosecution of prohibited acts (43 C.F.R., Subpart 4140) and insures prosecution of unauthorized grazing use (43 C.F.R., Subpart 4150).

administration of grazing permits issued to livestock owners, is a use of public lands "for the benefit of the United States." United States v. Morrell, 331 F.2d 498, 501 (10th Cir.), *cert denied*, Chournos v. U.S., 379 U.S. 879 (1964) (The grant of grazing permits to livestock owners is a use of public lands "for the benefit of the United States.")^{11/} Through the administration of grazing use of public lands, national interests are promoted and water is put to beneficial use. Use of the water for grazing on public land would not occur but for the administration of grazing permits. Without grazing permits, the United States would not receive fees from allowing grazing use of public lands, and the significant national interests embodied in the Taylor Grazing Act would not be entirely realized. Thus, the consumption of water by domestic livestock authorized to use public lands for livestock grazing is a beneficial use of water that redounds to the United States.

Although no Idaho Court has specifically held that BLM's management of the public lands for grazing qualifies for a state-law water right,^{12/} the Nevada Supreme Court has so held. In a well-reasoned decision, the Nevada Supreme Court held that the United States could hold title to livestock watering rights on the federal public land under Nevada Law. State of Nevada v. Morros, 766 P.2d 263 (Nevada 1988). The Court stated:

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^{11/} "All the public lands of the nation are held in trust for the people of the whole country." Light v. United States, 220 U.S. at 537, *citing* United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890). Under the Property Clause of the Constitution, "[t]he United States can prohibit absolutely or fix the terms on which its property may be used." Id. at 536.

^{12/} In United States v. State of Idaho, 131 Idaho 468, 959 P.2d 449 (Idaho 1998), however, the Idaho Supreme Court recognized BLM's federal reserved water rights for providing water to domestic livestock using the public lands.

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

Id. at 268.

The United States owns the public lands contained within the Allotment boundary, and the BLM manages those lands for the purpose, among other things, of providing sustenance to domestic livestock owned by qualified applicants for grazing permits issued under the provisions of the Taylor Grazing Act. As in Morros, 766 P.2d at 268, the United States is acting in its proprietary capacity as a landowner, and validly appropriated livestock water in compliance with Idaho law. All of the elements of a valid appropriation are satisfied. Hidden Springs Trout Ranch, Inc., 101 Idaho at 679-680, 619 P.2d at 1132-1133; Lemmon, 95 Idaho at 781, 519 P.2d at 1171. The Special Master should follow the Morros Court's persuasive reasoning, not Joyce's insupportable assertion that livestock ownership is a prerequisite to ownership of a livestock watering right.^{13/} Motion, pp. 22-27. Accordingly, the

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^{13/} "Joyce is informed and believes that the United States owns and has owned no livestock which have consumed stockwater from the sources claimed in the United States claims herein. Joyce is informed and believes that no actual user of the stockwater claimed herein has ever acted as an agent of the United States, and that the United States has never perfected a stockwater right on the sources claimed under Idaho State law, or any other law. Joyce is informed and believes that the water rights claimed under the United States' claims herein are in fact those of Joyce and its predecessors, and that the United States is seeking in this proceeding not to establish any claim to water rights that it perfected but to improperly acquire title to water rights perfected by Joyce and/or its predecessors." Exhibit 5, p. 21 (Response to Interrogatory #6: Describe the basis of your objections to "BLM claims.").

United States is entitled, as a matter of law, to partial decrees for the water rights claimed in Subcases 55-11061, 55-11385, and 55-12452.

b The United States Diverts and Applies Livestock Water to a Beneficial Use.

Idaho law recognizes the right of a riparian landowner to appropriate in-stream water for consumption by domestic livestock. Hutchinson v. Watson Slough Ditch Co., Ltd., 16 Idaho 485, 487, 101 P. 1059 (Idaho 1909); see Stevenson v. Steele, 94 Idaho 4, 11, 453 P.2d 819, 826 (Idaho 1969); see R.T. Nahas Company, 106 Idaho 37, 674 P.2d at 1044. The United States' use of water satisfied the test of a valid appropriation of livestock water. Lemmon, 95 Idaho at 781, 519 P.2d at 1171; Hidden Springs Trout Ranch, Inc., 101 Idaho at 679-680, 619 P.2d at 1132-1133; see also Rabido, 33 Idaho 56, 190 P. 73.

(i) The United States Diverts Livestock Water.

The United States causes domestic livestock to enter its property, i.e. the Allotment, in order to consume available forage and to consume water from Jordan Creek by issuing Joyce permits under the provisions of the Taylor Grazing Act. Without a permit from BLM, Joyce cannot lawfully cause its own livestock to enter the Allotment to consume available forage or to consume water from Jordan Creek.^{14/} The United States, by permitting livestock to consume forage and water located on public lands adjacent to a stream, is actually diverting livestock water, just like any other proprietor of riparian land

^{14/} "Violation of § 4140.1(b)(1) constitutes unauthorized grazing use." 43 C.F.R. § 4150.1. "Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth in §§ 4170.1 and 4170.2 . . . [a]llowing livestock or other privately owned or controlled animals to graze on or be driven across these lands . . . [w]ithout a permit or lease, and an annual grazing authorization" 43 C.F.R. § 4140.1(b)(1)(i).

who makes land available to owners of livestock for pasturage. Therefore, the United States satisfies the diversion prong of the test of a valid appropriation.

(ii) The United States Applies Water From Jordan Creek to a Beneficial Purpose.

The grant of grazing permits to livestock owners, and receiving a fee from the holders of the grazing permits, is a use of public lands "for the benefit of the United States." Morrell, 331 F.2d at 501. The use of water on the public lands for the production of domestic livestock that contributes to the national economy and generates grazing fees for the public fisc is an appropriation of water for a beneficial purpose by the United States, therefore, the United States also satisfies the beneficial use prong of the test for a valid appropriation.

In the Taylor Grazing Act, Congress recognized that water is "necessary to the care and management of the permitted livestock" 43 U.S.C. § 315c. Congress enacted the Taylor Grazing Act "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement and development; to stabilize the livestock industry, and for other purposes." 48 Stat. 1269. Thus, Congress intended for the United States to appropriate water for the care and management of domestic livestock using public land under permits issued to qualified applicants under the Taylor Grazing Act. The United States applies the water from Jordan Creek to a beneficial purpose because the United States receives the economic benefit from the use of the water, and the United States receives a substantial benefit from the orderly use and management of the public lands.

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Use of water on public lands is an integral part of the orderly and efficient management of public lands in accordance with the provisions of the Taylor Grazing Act and range management regulations. The United States applies the water from Jordan Creek to a beneficial purpose, and is entitled to a water right just like any other proprietor who makes their land available to others for livestock pasturage.

(iii) Conclusion.

The BLM, in its sole discretion, authorizes qualified permittees to use the Allotment for domestic livestock grazing purposes. Thus, the United States diverts water from Jordan Creek and applies the water to a beneficial purpose. Accordingly, the United States' appropriation of water from Jordan Creek is valid under Idaho law. There are no genuine issues of material fact. The United States is entitled to partial decrees as a matter of law.

c. Contrary to Joyce's Contention, Idaho Statutes do not Require Livestock Ownership as a Prerequisite to Ownership of a Livestock Watering Right.

In 1939, the Idaho legislature enacted I.C. § 42-501. The statute states, among other things, that the "bureau of land management of the department of interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain." Id. Thus, the legislature expressly provided for the United States to be a valid appropriator of livestock water. The legislature also expressed its intent to allow the United States to continue to file "application for waters" under "permit, license and certificate of water right under the general laws of the state having to do with the appropriation of waters of the state." I.C. § 42-503.

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

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

I.C. § 42-113(4). Thus, the statute implicitly recognizes that the water right might be held by the federal government, not the permittee; it would make no sense to give the permittee a right of refusal for a proposed change of use unless someone other than the permittee - the United States - could seek such a change of use.

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

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

To address whether there was a potential conflict between I.C. §§ 42-501 and 42-114, IDWR requested an Idaho Attorney General's Opinion addressing whether I.C. § 42-114 prohibited IDWR from issuing a stock water permit to a landowner "if the land is or is intended to be leased to another person for the grazing of livestock[]" Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.), p. 1 (filed herewith as Exhibit 3). The Idaho Attorney General concluded:

I.C. § 42-114 does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner

leases his land to another person for the grazing of stock. Section 42-114 merely affirms that stock watering is a beneficial use of water and that any person may file an application for that use.

Idaho Op. Atty. Gen. No 88-6, 1988 WL 385554 (Idaho A G), p. 4. Thus, livestock ownership is not, and never has been, a legislative condition precedent to ownership of a livestock watering right.

d. IDWR's Interpretation of Idaho Water Law Does Not Require Livestock Ownership as a Prerequisite to Livestock Water Appropriation, and that Interpretation is Entitled to Substantial Deference.

IDWR's interpretation of Idaho water law, as it concerns appropriation of livestock water, is contained in its Report Regarding IDWR Recommendations with Competing Claims to Ownership, In Re SRBA, Case No. 39576, Subcase Numbers 57-10587, 57-10598, and 57-10770 dated June 9, 1997 (hereinafter "Report") (filed herewith as Exhibit 4):

IDWR has long held the position that the owner of a water right, for the purposes of permits, licenses or adjudication recommendations, should be the title holder when a non-title holder also claims ownership of the water right. IDWR has followed this policy since prior to the inception of the SRBA. Under this position, if only a non-fee holder claims the water right, IDWR will consider the non-fee holder to own the water right.

Report, p. 2. Therefore, IDWR does not require livestock ownership as a prerequisite to appropriation of livestock water.

The United States owns the land where the water source is located and where the water is used. According to IDWR's policy based upon IDWR's interpretation of Idaho water law, Water Right Numbers 55-11061, 55-11385, and 55-12452 are correctly recommended, even though the BLM does not own the livestock that actually drink the water.

The SRBA Court, and its Special Masters, should defer to IDWR's long-standing

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interpretation of Idaho water law. The Idaho Supreme Court held that IDWR's construction of a statute is entitled to deference if:

(1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present.^{15/}

State v. Hagerman Water Right Owners, 130 Idaho 727, 734, 947 P.2d 400, 407 (Idaho 1997). The Court held that because IDWR is entrusted with the responsibility to administer water resources in the state, and the controlling statute did not expressly treat the precise question at issue, IDWR's interpretation of the statute was reasonable. The Court declined "to 'unsettle[] the repose of all those who have detrimentally relied on . . . agency interpretations,' . . . and will accord IDWR's interpretation deference in this case." Hagerman Water Right Owners, 130 Idaho at 734, 947 P.2d at 407.

As in Hagerman Water Right Owners, IDWR is entrusted with the responsibility to administer Idaho's water resources, and there is no statute that deals precisely with the issue of whether livestock ownership is a condition precedent to ownership of a livestock watering right. IDWR construes Idaho water law so that it is unnecessary for the claimant to own the livestock that actually drink the water. The interpretation is express in IDWR's policy, and is implicit in IDWR's recommendations of Water Right Numbers 55-11061, 55-11385, and 55-12452. The interpretation is reasonable because the

^{15/} The five rationales justifying judicial deference are: "when the agency's interpretation has been relied upon for a number of years; when the agency's interpretation represents a practical interpretation; when the statutory test has not been altered by the legislature in light of the interpretation, or when the interpretation is formulated contemporaneously with the enactment of the statute; and when the interpretation involves an area of expertise developed by the agency." Garner v. Horkley Oil, 123 Idaho 831, 834 n.3, 853 P.2d 576, 579 n.3 (Idaho 1993) citing J.R. Simplot Co. v. Tax Com'n, 120 Idaho 849, 857-859, 820 P.2d 1206, 1214-1216 (Idaho 1991).

Idaho Attorney General concluded that IDWR could issue "a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock." Idaho Op. Atty. Gen. No 88-6, 1988 WL 385554 (Idaho A.G.), p. 4.

Like the Supreme Court in Hagerman Water Right Owners, the Special Master should decline "to 'unsettle[] the repose of all those who have detrimentally relied on . . . agency interpretations,' . . . and . . . accord IDWR's interpretation deference in this case." 130 Idaho at 734, 947 P.2d at 407; see J.R. Simplot Co. v. Tax Com'n, 120 Idaho 849, 857, 820 P.2d 1206, 1214 (Idaho 1991). All landowners who make their property available to others for pasturage, including the BLM, have relied on IDWR's interpretation. The United States has no knowledge of any instance in the SRBA, or in any licensing proceeding, where IDWR required livestock ownership as a prerequisite to a recommendation for a livestock watering right or issuing a license for livestock water. There is no reason to require livestock ownership as a prerequisite to a livestock watering right now. Thus, Joyce's objections to Water Right Numbers 55-11061, 55-11385, and 55-12452 should be dismissed with prejudice. The United States is entitled to partial decrees as a matter of law.

C. Joyce is Not Entitled to its Claimed Priority Date.

1. Summary of the Argument.

Joyce claims the water at issue in Subcase 55-10135 under the following theory:

The original settlers' appropriation of stock water rights (which consisted of the consumption of water from the sources claimed by livestock owned by Joyce and its predecessors in interest and perfection of the water right by regular use of the same water sources in connection with their ranching operations and proving up of their homestead applications and receipt of patents for the same) complied with all requirements of Idaho State law. The original settlers acquired access rights of way to

allow their livestock to reach said stock water sources by operation of law under Section 9 of the Mining Act, and said water rights and rights of way became appurtenant to their homesteads by virtue of the economic and agricultural nexus between the stock water rights, associated rights of way, and the homesteads. In 1964 the grazing preference for the Silver City Area was adjudicated in part to Joyce, and said preference became appurtenant to the base property then owned by Joyce. The deeds by which the homesteads were conveyed from the original settlers to their present owners contain appurtenance clauses which convey said rights of way along with the stock water rights through the chain of title to the present owners.

Joyce Livestock Co.'s Objections and Responses to U.S. Discovery, In Re SRBA, Case No. 39576, Subcases 55-10135, 55-11061, 55-11383, and 55-12452, pp. 21-22 (filed herewith as Exhibit 5).

In this case, there is no evidence that Joyce, or Joyce's predecessors in interest, ever brought themselves within the purview of the Mining Law. Deposition of Fredric W. Price., p. 33 line 10 through p. 35, line 6.^{16/} Joyce is asserting that it acquired the water rights at issue, and its priority date, from its predecessors in interest to the privately owned ranch property it now relies upon to establish a grazing preference to use the Allotment for livestock grazing. Exhibit 5, pp. 21-22; Motion, pp. 6-12. In order to qualify for a grazing preference, "an applicant must own or control land or water base property" 43 C.F.R. § 4110.1(a). Joyce named its predecessors in interest to its base property, and presumably the water right at issue, as follows:

John H. Crocheron, Anna F. Joyce, Mary Joyce, Matthew Joyce, Quiznee F. Lambert, George A. Crocheron, Rowland C. Taylor, . . . William F. Stobie, Lorenzo Pedracini, Emeterio Quintana, and John T. Shea.

Exhibit 5, pp. 21-22; Motion, pp. 7-8.

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^{16/} See United States v. Schmutz, 56 F.2d 269, 270 (D. Utah 1932).

Joyce does not have any deed or other type of conveying document that specifically describes the water right claimed by Joyce. Since water rights on the public lands were not effectively conveyed by predecessors in title to private property, the water rights would have to be perfected by each successive owner of private land utilizing the public lands, with new priority dates. As such, the earliest priority date Joyce is entitled to would be the date Joyce first grazed livestock on public lands. In this case, Joyce never watered any livestock on the public lands in Idaho until August 24, 1985, the date the base property was conveyed to Joyce Livestock Co., Ltd. Therefore, Joyce cannot claim any vested water rights for stock watering with earlier priority dates.

4. Joyce's Predecessors in Interest to its Base Property Did Not Perfect
Livestock Watering Rights on Public Lands.

In an earlier ruling denying summary judgment in different subcases, the District Court indicated that in certain circumstances it might recognize a putative transfer of stock water rights not mentioned in the written transfer of base property or grazing preferences. The Court recognized a legal truism: A landowner cannot convey something which the landowner does not own. LU Decision, p. 15 (quoting 2 C. Kinney, Irrigation and Water Rights, § 1011 (2nd Ed. 1912)). The evidence establishes Joyce's predecessors did not claim or perfect any water rights on federal lands. Accordingly, even under the theories articulated by the District Court, Joyce cannot demonstrate that the predecessors to its base property owned the water rights at issue, and, thus, the earliest priority date which Joyce can claim is the date on which Joyce first appropriated the water.

Shortly after Congress enacted the Taylor Grazing Act, Joyce's predecessors in interest filed

applications for grazing permits. Each of these applications asked the applicant to list all water rights owned by the applicant and used in the applicant's livestock operations on the public lands. None of the predecessors in interest attested to owning water rights used in their livestock operations on the public lands.^{19/} Anna Joyce specifically stated, "[m]ost of the above mentioned streams, as well as those shown on the accompanying (sic) maps, are open for the free use of watering of stock and all are open at convenient places along the ranches." Boltz Aff., Attachment 1, tab 65, BSN 1306. Indeed, the evidence that Joyce's predecessors in interest to its base property did not have stock water rights on the public lands cannot be refuted. Because Joyce cannot demonstrate that the predecessors to its base property owned the water rights at issue, the earliest priority date which Joyce can claim is, as shown above, August 24, 1985, the date on which Joyce Livestock Company, a limited partnership, first used the water in Jordan Creek.

5. Joyce's Predecessors in Interest to its Grazing Preferences Did Not Perfect Livestock Watering rights on Public Lands.

As with Joyce's predecessors in interest to its base property, Joyce has no evidence that its predecessors to grazing preferences ever owned the stock water rights at issue. Accordingly, even if water rights can pass as appurtenances to grazing preferences, Joyce cannot demonstrate that the

^{19/} Matthew Joyce was a shareholder, director, and officer of Joyce Brothers Livestock Company. Exhibit 6, pp. 12-14. Matthew Joyce is a predecessor in interest to Joyce Livestock Company, a limited partnership. Exhibit 5, p. 15. In 1935, Matthew Joyce stated that he did not own or control any source of water supply needed or used for livestock purposes. Exhibit 2, p. 2. This statement is consistent with a similar statement by Joyce Brothers Livestock Company. Boltz Aff., Attachment 1, tab 65, BSN 1306.

predecessors to its grazing preferences owned the water rights at issue, and, thus, the earliest priority date which Joyce can claim is August 24, 1985, the date on which Joyce first used the water in Jordan Creek.^{20/}

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6. No Water Rights Were Conveyed as Appurtenances,
by Oral Contract, or by Non-Executory Contract.

a. The evidence does not support a finding that any oral conveyances occurred.

The District Court's order requires an examination of the grantor's intent to determine if any water rights were conveyed LU Decision, pp. 16, 21, 22, 23, and 24. The only evidence of a mesne grantor's intent to convey the water rights at issue would be the testimony of Paul Nettleton.^{21/} According to the most recent deeds in Joyce's chain of title, Joyce's base property was conveyed to Joyce on August 24, 1985. Mr. Nettleton is a general partner in the limited partnership known as Joyce Livestock Co. Nettleton Depo., p. 17, line 18 through p. 18, line 5. Obviously, Mr. Nettleton's unsubstantiated testimony that he intended to convey the water rights at issue with the ranch property from Joyce Livestock Company, a general partnership, to Joyce Livestock Company, a limited partnership, is conclusory and self-serving. Mr. Nettleton essentially entered into an oral contract with

^{20/} Because of the relationship between grazing preferences and base property, the predecessors in interest to Joyce's grazing preferences are the same parties who are predecessors to Joyce's base property.

^{21/} Paul Nettleton is the only person with knowledge of the facts disclosed by Joyce in response to the United States' Second Set of Discovery Requests. Joyce Livestock Co.'s Objections and Responses to U.S. Discovery, In Re SRBA, Case No. 39576, Subcases 55-10135, 55-11061, 55-11383, and 55-12452.

himself to convey the water right at issue from Joyce Livestock Company, a general partnership, to Joyce Livestock Company, a limited partnership. Such an uncorroborated 'self-dealing,' unwritten contract should not be competent to prove an intention to convey the water right at issue.

Further, the District Court stated, that extrinsic evidence may be considered by the Court to ascertain the intent of the parties with respect to what was intended to be conveyed via the appurtenance clause of an otherwise unambiguous deed. LU Decision, p. 18. The warranty deeds consummating the August 24, 1985 conveyances of the ranch property to Joyce merely convey the property described with its appurtenances. As demonstrated above, the water right at issue cannot be conveyed through a general appurtenance clause.

Finally, Joyce cannot present any evidence that any of the other grantors in Joyce's chain of title intended to convey the water right at issue. Accordingly, even if the Special Master were to accept Mr. Nettleton's testimony as the basis for Joyce's priority dates, the earliest priority date that Joyce could establish would be the first date of Mr. Nettleton's use of stock water at each of the claimed places of use.^{22/} No other evidence can be presented that any of Joyce's predecessors intended to convey any stock water rights.

b. Any attempted oral transfer would not be effective for Joyce's water right claims.

(i) Because the water right claim has not been improved, there has

^{22/} The date Paul Nettleton first used the water is October 31, 1976. Quitclaim Deed dated October 31, 1976 transferring ranch property from J.H. Nettleton and Edith Nettleton to Joyce Livestock Company, a co-partnership, Exhibit 1, BSN 100196-100197. Mr. Paul Nettleton was a member of Joyce Livestock Company, a general partnership. Nettleton Depo., p. 17, lines 18-20.

been no partial performance of any oral conveyance of such water rights.

The District Court, citing I.C. § 9-504, held that Idaho recognizes an exception to the writing requirement of the statute of frauds where a parol non-executory contract has been partly performed. LU Decision, p. 22. The evidence in this case demonstrates that partial performance of any oral contract has not occurred.

Joyce's stock water right is an in-stream right, with no development. See IDWR Director's Report for Subcase 55-10135. What constitutes partial performance depends upon the particular facts of each case. Bear Island Water Association, Inc. v. Brown, 125 Idaho 717, 874 P.2d 528, 533 (Idaho 1993). The most important acts which constitute a sufficient partial performance are actual possession and permanent and valuable improvements. Id. Because in-stream livestock watering rights are, by definition, undeveloped, the evidence in this case completely fails to meet the test of Bear Island Water Association. Accordingly, even if a parol, non-executory contract existed, no partial performance could have occurred.

(ii) The United States had no notice and was a stranger to any oral contract purporting to convey water rights.

The District Court postulated that a parol contract to convey water rights, if proven, is valid against the grantor and against all parties having notice thereof. LU Decision, p. 23. The District Court's opinion is consistent with a line of cases holding that, while an oral contract to convey water rights may be enforceable against a privy to such contract, it is unenforceable against a stranger to the contract. In McGinness, the Idaho Supreme Court refused to enforce an oral contract to convey a

water right against individuals who were not parties to the contract. The Court declared that under "statutes of Idaho a verbal contract for the sale or transfer of real estate is not admissible in evidence against a stranger to such contract." McGinness, 6 Idaho 372, 55 P. at 1020.^{23/} In contrast, the Idaho Supreme Court has enforced oral contracts for the conveyance of water rights against the parties to the contract. Male v. Leflang, 7 Idaho 348, 63 P. 108 (1900); Feeney v. Chester, 7 Idaho 324, 63 P. 192 (1900). In so doing, the Court cited with approval the rule of McGinness, quoted above, and distinguished Male and Feeney because the parties were privy to the oral contract. Male, 63 P. at 109-110; Feeney, 63 P. at 194. Kinney's treatise on Irrigation and Water Rights is in accord:

[A]ny attempt to transfer an independent water right by a mere parol or verbal contract is void as against the rights of appropriators subsequent to the inception of the right attempted to be transferred and prior to the date of the attempted transfer, although such a sale, accompanied by the actual possession and use of the right, may be good as between the parties to the agreement

2 C. KINNEY, IRRIGATION AND WATER RIGHTS §997 (2nd Ed. 1912).

Even if there were an oral conveyance, which Mr. Nettleton admitted there was not, the United States was not a party to any oral conveyance and received no notice of any oral conveyance. Accordingly, any oral contract purporting to convey the water rights at issue cannot be valid against the United States.

(iii) The claimed water rights were not adjudicated or decreed at the time that the base property was conveyed.

^{23/} In so holding, the Court relied upon section 6007 of the laws of the first session of the territorial legislature. McGinness, 55 P. at 1020. Section 6007 is identical to present day I.C. § 9-503.

In the LU Decision, the District Court relied on Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984) and I.C. § 42-220 as support for his theories of stock water conveyance. Id. at 18. Crow was cited for the proposition that a water right can be conveyed without expressly mentioning the water right via the same instrument that conveys the real property to which the water right is appurtenant. Id. Crow cites I.C. § 42-220 as support for this proposition. Crow, 690 P.2d at 921. I.C. § 42-220 does not apply to water rights that are not adjudicated or licensed at the time of the conveyance. LU Decision, p. 16.^{24/} Joyce's water right claim has never been decreed or licensed. Thus, because the water right claim was neither adjudicated nor licensed, the holding of Crow and I.C. § 42-220 are inapplicable to the facts of this case. Accordingly, Joyce cannot rely upon any purported oral conveyance as support for its claimed priority date.

In addition, Crow's holding that a water right may be conveyed without a complete legal description, 690 P.2d at 921, n.1, has little relevance to these proceedings. The land conveyance documents at issue not only lack a complete legal description, but any description or mention whatsoever. The lack of any description of water rights located on United States' property in any document of conveyance goes far beyond Crow's acceptance of an incomplete legal description.

(iv) Even if an oral contract exists, Joyce cannot acquire its predecessor's priority date.

In the LU Decision, the District Court cited Kinney's treatise on Irrigation and Water Rights as

^{24/} I.C. § 42-220, titled "Effect of License," provides that "all rights to water confirmed under the provisions of this chapter, or by a decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted."

an authoritative treatise on water law. LU Decision, pp. 15-16. Kinney clearly describes the effect of Joyce's attempt to "tack" its use of water sources back to the date of earlier appropriators:

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

2 C. KINNEY, IRRIGATION AND WATER RIGHTS § 999; *see also* § 787.

Kinney makes clear that any parol transfer of water rights will not effect the priority date for Joyce's water right claims. Thus, Joyce cannot obtain any earlier priority dates based upon purported oral transfers of water rights to Joyce.

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

As demonstrated above, the United States established valid livestock watering rights with a June 28, 1934 priority date. The water right claims describe public land places of use along Jordan Creek within the Allotment boundary. Price Aff., ¶ 17.

As demonstrated above, Joyce should be entitled to a priority date no earlier than August 24, 1985 for places of use designated on public land. Joyce's water right claim describes the same public land places of use as the United States water right claims. Price Aff., ¶ 18. Thus, for the places of use on public land within the Allotment boundary, Joyce and the United States have claims with identical places of use and purpose of use, and the water is used for the same beneficial purpose, *i.e.*, providing

water to permitted domestic livestock.^{25/} The places of use in Joyce's water right claim that describe public lands within the Allotment should be limited so that a water allocation to Joyce is not in excess of the amount actually used for beneficial purposes.

Idaho statutes provide:

In allotting the waters of any water system by the district court according the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied The right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which such water is used, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant. The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed

I.C. § 42-1402 (emphasis added). Further, the Idaho Supreme Court stated, that "[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." Poole v. Olaveson, 82 Idaho 496, 502, 356 P.2d 61, 65 (Idaho 1960). Thus, if the Special Master recognizes water rights owned by two separate claimants that allocates water for consumption by the same domestic livestock, those rights would have to be limited so that they would not be "in excess of the amount actually" used for the beneficial purpose of providing water to permitted domestic livestock. I.C. § 42-1402; Olaveson, 82 Idaho at 502, 356 P.2d at 65.

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^{25/} The United States here assumes, arguendo, that Joyce may have a water right based on a "nonexclusive appropriation" that overlaps with the BLM's right. See 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, at 2-5.

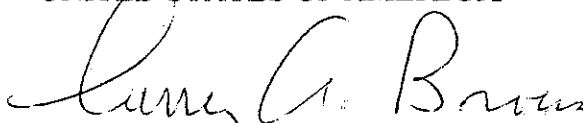
III. CONCLUSION.

For the reasons stated in Part II, A, the United States is entitled to partial decrees for Water Right Numbers 55-11061, 55-11385, and 55-12452. For the reasons stated in Part II, B, Joyce is entitled to a priority date not earlier than August 24, 1985. For the reasons stated in Part II, C, if Joyce and the United States are both allowed a water right, then Joyce's water right would be redundant and should be limited. There are no genuine issues of material fact. The United States is entitled to judgment as a matter of law.

DATED this 19th day of March, 2002.

Respectfully submitted,

UNITED STATES OF AMERICA



Larry A. Brown

Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on March 19, 2002, I served a true and correct copy of the foregoing **UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, Subcase Numbers 55-10135, 55-11061, 55-11385, and 55-12452** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

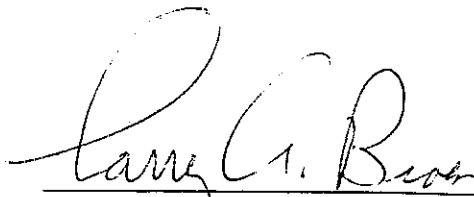
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