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

11
12 In Re SRBA

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

13
14 Case No. 39576

**JOYCE LIVESTOCK'S
SUPPLEMENTAL OPENING BRIEF IN
SUPPORT OF CHALLENGE**

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1 **I. INTRODUCTION**

2 This case is before the Court based on Joyce Livestock's challenge on the issue of the
3 ownership of beneficial use or appropriative water rights acquired on lands administered by the
4 United States Bureau of Land Management ("BLM"). Pursuant to the scheduling order then in
5 effect, on December 10, 2004 Joyce Livestock filed an Opening Brief in Support of Challenge.^{1/}
6 Subsequent to that filing, this Court issued a Memorandum Decision and Order on Challenge in *In*
7 *Re SRBA Case No. 39576 (LU Ranching)*, Subcase no. 55-10288b et al. ("LU Decision"), on
8 January 4, 2005. The legal issues presented in the LU Decision substantially mirror the issues in the
9 present case and, therefore, the LU Decision is highly relevant to the determination of matters at
10 issue herein. Accordingly, Joyce Livestock filed an Unopposed Motion to File Supplemental
11 Opening Brief and Unopposed Motion to Amend Scheduling Order so that Joyce Livestock would
12 have the opportunity to address and incorporate the LU Decision into its analysis. The Court
13 granted Joyce Livestock's request for supplemental briefing on January 25, 2005.

14 **II. ARGUMENT**

15 **A. The Prevailing Law Supports Joyce Livestock's Argument That the United States Is**
16 **Not Entitled to Beneficial Use Water Rights Based Simply on its Management of the**
Rangeland.

17 As detailed at length in Joyce Livestock's Opening Brief in Support of Challenge, there is no
18 legal or factual basis for the United States' beneficial use stockwater right claims. *See* Joyce
19 Livestock's Opening Brief, pp. 4-10. The undisputed evidence at trial is that the United States is not
20 now, and never has been the actual appropriator of the water at issue. Instead, the United States
21 relies on a "management based" water right theory to state that as the "owner" and manager of the
22 rangeland, it is entitled to the claimed water rights. This argument is unavailing, particularly in light
23 of this Court's recognition in the LU Decision that the owner of the land is not automatically
24 entitled to a water right. Citing to a prior decision issued by the then Presiding Judge, this Court
25 wrote the following:

26
27 ^{1/} Joyce Livestock hereby incorporates its Opening Brief in Support of
28 Challenge in its entirety. The arguments contained in the within Supplemental Opening
Brief are meant to augment, not replace, the arguments raised in Joyce Livestock's original
Opening Brief.

1 In the context of the United States' ability to appropriate a stock water right on
2 federal land without actually grazing cattle, Judge Hurlbutt ruled: "If the party
3 claiming ownership of the water right [by virtue of owning the land on which the
4 right is used] is not the same party that actually appropriated the water, the only way
5 the nonappropriating party can legitimately claim the right is through an agency
6 theory or by a showing that the right was conveyed from the party that actually
7 appropriated the right. **'If the water right was initiated by the lessee, the right is
8 the lessee's property unless the lessee was acting as an agent of the owner.'**"

9 LU Decision, p. 12, *citing Order Denying Challenges and Adopting Special Master's Reports and*
10 *Recommendations*, Subcases 57-04028B *et al.* (Sept. 30, 1998) (*emphasis in original*). In the
11 present case, the United States is not now and has never been the actual appropriator of water.
12 Simply, they do not own, graze, or water cattle and never have. Under the law of the case, then, the
13 only way the United States can claim beneficial use water rights is through an agency theory or by a
14 showing that Joyce Livestock or its predecessors in interest conveyed the water rights to the United
15 States. In the present case, the United States has not claimed an agency theory, has not claimed that
16 any rights have been conveyed to it, and, for what it is worth, has not claimed any other alternative
17 basis for its water rights such as a statutory based water right or federal reserved water right. The
18 *only* theory that the United States has advanced in support of its claims is that of beneficial use.
19 Because there is absolutely no legal or factual support for the United States' beneficial use claims,
20 they must be denied in their entirety.

21 **B. The Conclusions of Law in the LU Decision Are Consistent with the Legal Arguments**
22 **Raised by Joyce Livestock on Challenge and Support Joyce Livestock's Water Right**
23 **Claims.**

24 **1. The LU Decision correctly recognizes the right of private parties to perfect and**
25 **maintain private water rights on the BLM lands.**

26 The LU Decision correctly recognizes the historic basis of private water rights on the BLM
27 administered lands and set forth the standard by which these rights will be defined and decreed in
28 the Snake River Basin Adjudication. These conclusions of law constitute a rejection of theories
advanced by the United States and adopted by the Special Master in the present litigation, and
require a reversal of the Special Master's Report and Recommendation in the Joyce Livestock case.
Specifically, the Court in the LU Decision rejected the United States' argument that a water user
must hold a possessory interest in the land on which the right is used in order to appropriate a water

1 right,^{2/} rejected the argument that predecessors in interest were akin to “itinerant and nomadic
2 grazers”,^{3/} rejected the argument that grazing and watering in common defeats a water right or the
3 intent to appropriate a water right,^{4/} and rejected arguments that an instream stockwater right
4 appropriated on the former public domain cannot be transferred as an appurtenance to patented or
5 base ranch property.^{5/} In total, the LU Decision recognizes and protects private water rights
6 perfected on federal land.

7 The starting point in the LU Decision is the recognition of the right of private parties to
8 appropriate beneficial use water rights on BLM administered lands that is grounded in both federal
9 and Idaho state law. With the exception of trespass, the law in Idaho is that an appropriator need
10 not have an ownership interest in the land in order to appropriate a water right. *See* LU Decision, p.
11 11-13. Importantly, the LU Decision also recognizes Congressional protection of private water
12 rights on the former public domain. *See* LU Decision, p. 13-17, *citing* The Mining Act of 1866, the
13 Act of 1870, the Desert Land Act of 1877 and the Taylor Grazing Act.^{6/} This right to perfect a water
14 right on the public domain existed both before and after the enactment of the Taylor Grazing Act.
15 *Id.* at p. 17.

16 Historically, public individuals have held water rights on public land, and this is not a new
17 concept or a novel one. The first case addressing the Mining Act of 1866 to reach the United States
18 Supreme Court held in *Basey v. Gallagher*, that the right to water on the public domain by prior
19 appropriation is entitled to protection. *Basey v. Gallagher*, 87 U.S. 670, 683 (1875). The court also

21 ^{2/} *See* LU Decision, p. 10-11

22 ^{3/} *See* LU Decision, p. 17-18

23 ^{4/} *See* LU Decision, p. 20-22

24 ^{5/} *See* LU Decision, p. 23-26

25 ^{6/} Given a clear and consistent history of Congressional recognition of private
26 water rights on the public domain, the United States’ position in this litigation that private
27 parties cannot appropriate a water right on federal land is unfathomable, as is the United
28 States’ almost complete failure to address the Mining Act of 1866, or to mention any one of
the 139 cases in the annotations to the same that recognize that private citizens can
appropriate water rights on the public domain. *See* 43 U.S.C.S. § 661 and annotations
thereto.

1 held that ever since the settlement of the territory it had been the custom of the settlers to dig ditches
2 and turn out the water of some stream to irrigate; and that "this right had been generally recognized
3 by the people of the territory"; therefore, the rights to water claimed under the customs, laws, and
4 decisions of courts of the Territory, and act of Congress, should be recognized and protected. *Id.* at
5 685, 686.

6 In 1890, the Supreme Court of Idaho, held that the superior rights of prior appropriation
7 were acknowledged by "our territorial law since 1881" and by the decisions of our courts. *Drake v.*
8 *Earhart*, 23 P. 541, 543 (1890). The *Drake* court also cited *Basey v. Gallagher* which clearly
9 indorses the superior right of prior appropriation between agricultural claimants. *Id.* at 543. The
10 court also held that the *Basey* ruling is equally applicable to the use of water on public lands for the
11 purposes of irrigation. *Id.* at 543. Under the Mining Act of 1866, the government enacted
12 legislation that allows an individual the rights to go upon public land for the purposes of procuring
13 water, and when such right become vested and accrued, they are recognized and acknowledged by
14 the local customs laws and decisions of the courts. *Bear Lake & River Water Works & Irrig. Co. v.*
15 *Garland*, 164 U.S. 1, 18 (1896).

16 Having established a legal basis for the recognition of private water rights on the BLM
17 administered lands, the Court turned to issues of proof and the criteria to be applied for establishing
18 a beneficial use stock water right on theses former public domain lands. In Idaho, what is required
19 is an intent to appropriate, a physical diversion from a natural watercourse, and the application of
20 water to beneficial use. See LU Decision, p. 18, citing *Hidden Springs Trout Ranch, Inc. v.*
21 *Hagerman Water Users, Inc.*, 101 Idaho 677, 679-80 (1919). In the case of stockwater
22 appropriations, appropriation of a water right is demonstrated through the act of cattle watering
23 directly from a stream. See LU Decision, p. 20-21. Importantly, the Court specifically held that
24 exclusive use of the water source is *not* necessary to acquire a beneficial use water right. This is in
25 contrast to the standard applied by the Special Master in the Report and Recommendation issued in
26 the Joyce Livestock litigation.

27 This Challenge arises from a decision to deny Joyce Livestock's claim based on the
28 conclusion that Joyce Livestock failed to prove an intent to appropriate because Joyce Livestock's

1 predecessors in interest watered their cattle in common with others. *See* Report and
2 Recommendation, p. 19-20, ft. 28 (“a fundamental principle of water law is that mere use of water
3 in common with others does not constitute an appropriation”); *see also* Report and
4 Recommendation p.22 (describing the fact that Joyce Livestock’s predecessors in interest watered
5 their cattle in common with one another as the “fatal flaw” in Joyce Livestock’s case). However, as
6 held in the LU Decision, exclusive use of a water source is not necessary to establish and instream
7 stock water right. As explained by this Court:

8 The United States argues that a finding of requisite intent to appropriate merely by
9 cattle drinking water from a stream in common with the rest of the public somehow
10 creates a double-standard with respect to establishing instream stock water rights.
11 This Court disagrees. In fact, just the opposite is true ... intent to appropriate should
12 (be) able to be inferred alone from the application to beneficial use ... The fact that
13 the rangeland was open to the public in general should not be fatal to establishing the
14 appropriation of a water right. This Court agrees that a one time use of a source by a
nomadic livestock grazer raises issues regarding the user’s intent to appropriate a
water right and without more under such attendant circumstances, the evidence may
be insufficient to show intent. However, those circumstances substantially differ
from the situation where the livestock owner historically and routinely used the same
water sources on adjacent public domain in connection with a livestock operation
and was eventually awarded a grazing permit based on those historic uses.

15 *See* LU Decision, p. 20-21. The Special Master rejected Joyce Livestock’s claims based on an
16 erroneous statement of the law as it pertains to the intent to appropriate a water right when the
17 appropriator is using the water in common with others. Because this Court now has held that
18 watering in common does not defeat a beneficial use water right, Joyce Livestock’s Challenge
19 should be granted.

20 This Court also rejected the Special Master’s conclusions that there can be no intent to
21 appropriate or transfer water rights because deeds transferring the base properties and other
22 documents do not specifically identify water rights on the BLM land. Specific mention of water
23 rights in the deeds is only one of many ways to evidence the acquisition and transfer of water rights.
24 Instead, as stated by the court:

25 In the case of instream stock water rights on the public domain, a claimant must
26 show that the predecessor grazed livestock on the public domain and where on the
27 public domain the predecessor grazed the livestock ... Homestead applications and
28 proofs, applications for grazing permits, grazing permits and other historic
documents typically memorialized historic uses. Lastly, a claimant must show that
the rights were conveyed as an appurtenance to the patented or base ranch property,
based on the intent of the grantor. *Intent can be inferred by showing the property*

1 *and adjacent public land on which the rights are located was used consistent with*
2 *the use of the original appropriator.*

3 See LU Decision, p. 26 (*emphasis added*). Evidence of the acquisition and transfer of water rights
4 also can be demonstrated by tracing his or her chain of title back to the patent and through a
5 demonstration that the original homesteader was engaged in the livestock business. See LU
6 Decision, p. 27, ft.n. 13.

7 2. **The correct conclusions of law applied to the evidence in the Joyce Livestock**
8 **case support the conclusion that Joyce Livestock's claimed water rights should**
9 **be decreed with an 1898 or earlier priority date.**

10 Application of the correct law to the Special Master's findings of fact leads to only one
11 conclusion: Joyce Livestock is entitled to decreed stockwater rights with a priority date of 1898.
12 Under the applicable law, the appropriation of a stockwater right in the state of Idaho is
13 accomplished through the act of watering cattle directly from the source. See LU Decision, p. 20-
14 21; *see also* Joyce Livestock's Opening Brief, p. 10-16. Exclusive use of the water source simply is
15 not required to perfect an instream stockwater right. Applying this standard to the Special Master's
16 findings of fact and the unrebutted evidence at trial, Joyce Livestock is entitled to instream
17 stockwater rights for the sources claimed.

18 a. **Corrected conclusions of law regarding stockwater appropriation**
19 **applied to the Special Master's findings of fact support an award of**
20 **beneficial use stockwater rights to Joyce Livestock.**

21 The Special Master specifically found that Joyce Livestock's interests traced back to even
22 before the original patent holders, Mary and Anna Joyce and three others predecessors who acquired
23 various patents in 1898. See Report and Recommendation, p. 8. Until the early 1900's, Joyce
24 Livestock's grantors were individuals, plus the Jump Creek Sheep Company, until the formation of
25 the Joyce Brothers Livestock Company formed in the early 1900's basically as a result of the
26 consolidation of Joyce and Nettleton family holdings.^{2/} See Report and Recommendation, p. 8-9.
27 Supporting testimony regarding the history of livestock operations was additionally provided at trial

28 ^{2/} It is noteworthy that evidence of the fact that Joyce Livestock's predecessors
 in interest were engaged in the livestock business prior to the enactment of 1934 can be
 found as simply in the name of the company formed to operate the family ranching
 operation: the Joyce Brothers *Livestock* Company.

1 by Paul Nettleton, partner in Joyce Livestock, and Gene Lewis who worked as a cowboy for one of
2 Joyce Livestock's predecessors in interest between 1933 and 1935. *See* Testimony of Paul
3 Nettleton, Trial Transcript p. 659-661, 674-683; *see also* Testimony of Gene Lewis, Trial Transcript
4 p. 312-329. As summarized in the Special Master's factual findings, "the history of the Joyce
5 Ranch actually goes back to 1865, when Matt Joyce settled near Sinker Creek. The original
6 homesteads were dairy operations ... (and) Con Shea brought the first beef cattle herds into Owyhee
7 County in the late 1860s or the early 1870s." *See Report and Recommendation*, p. 13. Later in the
8 opinion, the Special Master acknowledged evidence of Joyce Livestock's predecessors watering
9 cattle from the waters of Jordan Creek and the surrounding areas, but then denied Joyce Livestock's
10 claims not because evidence of use was lacking, but because of the erroneous conclusion that the
11 evidence of the predecessors watering livestock in common defeated the claim. The Special Master
12 opined:

13 (Joyce Livestock) proved that multiple ranchers grazed livestock along Jordan Creek
14 for decades in direct competition with Mary and Anna Joyce and their successors.
15 *Admittedly, nearly all of the ranches were ultimately consolidated into the Joyce
16 Ranch, but from 1898 until 1923, and even later, there were no fences, the cattle
17 followed the green grass and different brands watered along Jordan Creek. The
18 water was shared by all grazers with access to the land.*^{8/}

19 *See Report and Recommendation*, p. 22 (*emphasis added*).^{9/}

20 In addition to recognizing the history of the Joyce Livestock ranching operation dating back
21 to 1865,^{10/} the Special Master also recognized corroborating evidence in the grazing applications
22 that Joyce Livestock's predecessors were engaged in the livestock business and were using the
23 public range and water thereon to support the same. While the contents of the grazing applications
24 and the conclusions that should be drawn from the issuance of grazing permits are detailed in more
25 length, below, the Special Master's citation to these grazing applications as evidence of prior use is

26 ^{8/} "All grazers with access to the land" would have included Joyce's
27 predecessors, among them the Nettletons, John Shea, Jeane Heazle and Joe Mitchell who
28 watered all along Jordan Creek and its tributaries and in the Silver City area. *See Report and
Recommendation*, p. 15, *citing* Trial Testimony of Gene Lewis.

^{9/} The history of the consolidation of the various ranches can also be traced
through the chain of title. *See* U.S. Trial Exh. 1.

^{10/} *See Report and Recommendation*, p. 7-13.

1 notable. With respect to the Application for Grazing Permit filed by Joyce Brothers Livestock
2 Company, the Special Master notes:

3 Another grantor of Joyce Livestock (Joyce Brothers Livestock Company) filed a later
4 "Application for Grazing Permit" on June 12, 1935. It stated it began using the area
5 in 1866, by grazing an average of 1900 head of cattle and horses for about eight
6 months each year.

7 Report and Recommendation, p. 14, ft.n. 13, *citing* U.S. Trial Exhibit 85.^{11/} Evidence of use of the
8 range, and identification of the specific areas of the public range used, also is recognized in the
9 Report and Recommendation through citation to the Shea grazing application. The Special Master
10 found the following:

11 Next, Mr. Shea said he had used the land covered by the (April 26, 1935) application
12 for a grazing permit for the last ten years during the three months of summer. He
13 reported he and his wife owned 280 cattle (over six months old) and five horses.
14 They trailed their stock from the spring range ("Paul's Place") south to the summer
15 range (near "Pedracini Place and Silver City) using the stage road. Finally, Mr. Shea
16 wrote: "Note: The Range herein applied for is land that I have had almost exclusive
17 use of, for range, for the past 10 years, excepting, of course, a few straggling from
18 other herds & other ranges and probably 100 head of range horses ... At the present
19 time, it is recognized as one of the best small ranges for cattle in Owyhee County."

20 Report and Recommendation, p. 14, *quoting* U.S. Trial Exhibit 87: Application for Grazing Permit
21 filed by John T. Shea. It almost goes without saying, but must be mentioned nonetheless: if the
22 cattle referenced were grazing on the range, the cattlemen were also appropriating the water thereon
23 in the years prior to 1934. Moreover, it must be noted that Mr. Shea refers to the ten year time
24 period as one of exclusive use and does not include time periods where cattle were run in common
25 with others.

26 Through citation to testimony and documentary evidence admitted at trial, the Special
27 Master's findings specifically recognize historic use of the range at issue and the water thereon for
28 the purposes of supporting the livestock operations of Joyce Livestock and its predecessors in
interest dating back to the 1860s when Con Shea brought the first beef cattle herds into Owyhee

^{11/} As recognized in the LU Decision, grazing that number of cattle would have, out of necessity, required Joyce Brothers Livestock Company to make use of the public range beyond the base ranch property. See LU Decision, p. 19 ("[I]t is widely accepted that the patented property alone was insufficient to sustain a livestock operation capable of supporting a single family unit in the arid west ... based on the level of forage in Owyhee County, on average, one cow would need ten acres per month to sustain itself.")

1 county. The reason that Joyce Livestock's water right claims were denied was not because there
2 was insufficient evidence of use and appropriation, it was because the evidence was that Joyce
3 Livestock's predecessors in interest were using the water sources in common with each other before
4 the varying interests were consolidated. That impediment has now been lifted, with a ruling from
5 this Court that watering in common does not defeat a water right. The Special Master's findings of
6 fact, which are to be adopted unless clearly erroneous, demonstrate that Joyce Livestock has
7 produced evidence of the acquisition and transfer of water rights by tracing the chain of title to the
8 original patent holders and demonstrating that Joyce Livestock's predecessors in interest were
9 engaged in the livestock business and used the public range and the water thereon to support the
10 same. *See* Report and Recommendation, p. 7-16; *see also* Joyce Livestock's Opening Brief
11 (discussing evidentiary and legal support for Joyce Livestock's appropriative water right claims).
12 The evidence presented, and the findings of fact adopted by the Special Master, provide
13 overwhelming and un rebutted evidence in support of Joyce Livestock's water right claims. *See* LU
14 Decision, p. 26-27.

15 **b. The fact that the grazing applications do not specifically identify the water**
16 **rights at issue herein does not mean that the water rights were not appropriated**
16 **prior to 1934.**

17 Both the Special Master and the Court in the LU Decision gave weight to the fact that the
18 grazing applications at issue generally do not specifically identify by legal description the water
19 rights that are now being claimed as part of this SRBA adjudication. In the Joyce Livestock case, the
20 Special Master focused on the fact that Joyce Livestock's predecessors did not identify water rights
21 on the federal public land as part of their base ranch properties in their grazing applications.
22 *See* Report and Recommendation, p. 21. This Court in the LU Decision used a similar analysis in
23 support of the decision to award LU Ranching a post-1934 priority date. *See* LU Decision, p. 30-
24 43.^{12/} However, the fact the specific water rights are not identified with specificity in the grazing
25 applications is not dispositive of the issue of whether beneficial use water rights were perfected
26

27 ^{12/} LU Ranching filed a Motion for Reconsideration on the issue of the priority
28 date and the affect of the grazing applications on the same. That Motion is currently pending
 before the Court.

1 prior to 1934. To the contrary, the fact that grazing applications were granted and permits issued is
2 evidence in and of itself that the grazing applicants and their predecessors in interest were using the
3 public range that was the subject of the grazing application and the water thereon in support of their
4 livestock operations prior to 1934.

5 As a preliminary matter, it is important to recognize grazing applications for what they are.
6 They are not water right applications, they are grazing applications, plain and simple. To require the
7 same mathematical precision in the identification of water rights in a grazing application as would
8 be required in a water right application is fundamentally in error. Holding grazing applicants to
9 such a standard gives too much effect to the absence of a reference to water rights sited on federal
10 public land, and not enough to the grazing applications themselves. Indeed, even absent specific
11 identification of the water right sources on the public domain, the grazing applications still provide
12 probative and compelling evidence of use of the water sources on the range by Joyce Livestock and
13 its predecessors dating back prior to 1934. The grazing preferences are in and of themselves
14 evidence that Joyce Livestock's predecessors in interest made use of the rangeland at issue, and the
15 water thereon, prior to 1934. The earliest regulations and adjudications made clear that grazing
16 applications would be granted on the basis of priority of use, and the highest preferences were
17 awarded to those, like Joyce Livestock's predecessors in interest, who were able to demonstrate
18 commensurate base property used in connection with the public range during the five year period
19 prior to the enactment of the Taylor Grazing Act.

20 This Court's analysis in the LU Decision regarding the proof necessary to establish the
21 existence and scope of water rights, and priority date in particular, is summarized in the following
22 portion of the Court's opinion:

23 General averments that grazing existed historically by the public at large in a general
24 area are insufficient to establish the existence and transfer of water rights. In proving
25 any beneficial use right by a predecessor-in-interest, a claimant must still establish
26 the existence and scope of the right and then connect the chain of title and
27 appurtenant water rights from the original appropriator to the claimant. *Ft.n. 13* For
28 example a claimant can trace his or her chain of title back to the patent and
demonstrate that the original homesteader was engaged in the livestock business.
This can be demonstrated from subsequent grazing permit applications wherein the
applicant was required to set forth the prior historic use of the adjacent public
domain in conjunction with the homesteaded property. Any subsequent preference
and permit issued would certainly be probative of the historic use, for two reasons:

1 First, because the preference and resulting permit was issued based on the
2 representations by the applicant; and secondly, because the preference would be
3 “attached” to the land (or water right) by operation. Subsequent conveyances of the
4 base property together with attached grazing privileges and the continued use of the
5 grazing privileges are probative that any water rights transferred as appurtenances to
6 the base property.

7 Order, p. 27. What follows in the LU Decision is a detailed analysis of the claims at issue,
8 culminating in the conclusion that LU is entitled to its claimed water rights, but with a priority date
9 that corresponds to the dates that LU’s predecessors grazed and watered its cattle on the allotments
10 after the permits were issued. While this analysis is relevant to Joyce Livestock’s claims, in both
11 the LU Decision and in the present case, it fails to give the proper legal significance to the
12 adjudication of the preference grazing right evidenced by the permit itself. The grazing applications
13 would not have been granted and the permits would not have been issued to LU or to Joyce
14 Livestock unless the applicants were able to demonstrate historic use of the same rangeland prior to
15 the enactment of the Taylor Grazing Act in 1934. Subsequent conveyances of the base ranch
16 properties together with all appurtenances and the transfer of the attached grazing privileges is
17 evidence of the transfer of the water rights with a priority date relating back to the first
18 appropriations prior to 1934.

19 The fact that grazing permits evidence prior use of the public rangeland and the water
20 thereon prior to 1934 is recognized in the LU Decision. The LU Decision contains the following
21 language regarding evidence of prior use:

22 The United States obviously recognized the need for the adjacent public land to
23 sustain a viable ranching operation when it embraced the historical practice by
24 awarding grazing preferences *based on the prior use of the public land*. See e.g.
25 *supra*, *Public Lands Council v. Babbitt*, at p. 1295. Doctor Gibson also testified that
26 in awarding grazing preferences: “The two primary things were *prior use* and
27 commensurate base property. The prior-use rule that was finally adopted was that
28 *you had to have grazed there two consecutive years, or three years not consecutively*
out of the previous years prior to 1934.” Tr. p. 391.

29 Order, p. 19-20 (*emphasis added*).^{13/} The only way for applicants, like Joyce Livestock’s
30 predecessors in interest, to obtain a preference grazing right was to demonstrate to the satisfaction of
31 the United States when their grazing applications were being reviewed that they owned

32 ^{13/} Similar evidence was provided by Dr. Gibson in the Joyce Livestock trial.

1 commensurate base property and used that base property in connection with the public range prior to
2 the passage of the Taylor Grazing Act. If the applicants met this showing, class 1 permits were
3 issued to enable them to continue to use the same range.

4 Details of the prior use requirement are found in the body of the Taylor Grazing Act, in a
5 United States Supreme Court case analyzing that Act, in a decision by the Department of the Interior
6 regarding the adjudication of grazing preferences in the 1930s, and the Advisory Board Minutes
7 detailing the development of the prior use rule. Each source confirms that the award of preference
8 grazing rights is dispositive evidence of the fact that the applicants were on the public range and
9 were making use of the grass and water thereon to support their livestock operation prior to 1934.

10 The basis for grazing preferences is set forth in the Taylor Grazing Act, 43 U.S.C. § 315b.
11 The statute recognizes that preference shall be given to those within or near a grazing district and
12 who are landowners engaged in the livestock business. *Id.* Following the enactment of the Taylor
13 Grazing Act the focus shifted to determining how to apply that language and how best to administer
14 that Act. That process, and the prior use rule that developed, was described by the United States
15 Supreme Court as follows:

16 By 1937 the (Interior) Department had set the basic rules for allocation of grazing
17 privileges. Those rules recognized that many ranchers had long maintained herds on
18 their own private lands during part of the year, while allowing their herds to graze
19 farther afield on public land at other times. The rules consequently gave a first
20 preference to owners of stock who also owned "base property," i.e. private land (or
water rights) sufficient to support their herds, *and* who had grazed the public range
during the five years just prior to the Taylor Act's enactment. See 2 App. 818-819
(Rules for Administration of Grazing Districts (June 14, 1937)).

21 *Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000) (*emphasis in original*). Application of
22 the prior use rule also is found in decisions of the Department of the Interior considering the criteria
23 to be applied to earliest applications for grazing preferences under the Taylor Grazing Act. Faced
24 with task of determining who was entitled to the highest preferences, the Department of Interior
25 turned to and relied upon the prior use rule. In a decision issued on January 21, 1937, it was held:

26 If one of the purposes of the Taylor Grazing Act is "to stabilize the livestock industry
27 dependent upon the public range," it is obvious that this purpose is well served by
28 granting grazing privileges to applicants who are and have been operating going
concerns in connection with the range ... 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

1 the applicants, some definition of the nature and extent of such prior use becomes
2 necessary. I am informed by the Director of Grazing that the 5-year period
3 immediately preceding the enactment of the act has been selected as a period within
4 which an applicant may qualify for grazing privileges by having used the public
5 range for one full grazing season because of its definite relation to the existing
6 economic and climatic conditions.

7 Opinion of the Department of the Interior, by T.A. Walters, First Assistant Secretary, dated January
8 21, 1937, p. 66-67.^{14/} As this Court recognized, the highest and first grazing priority was assigned to
9 those applicants who demonstrated that they had dependent commensurate property with prior use
10 of the public grazing land. *See* Order, p. 24, ft.n. 12. Evidence that such grazing preferences were
11 granted is evidence that the range, and the water thereon, was used and appropriated prior to 1934 as
12 part of an ongoing livestock operation.

13 While the award of grazing permits to Joyce Livestock's predecessors in interest speaks for
14 itself on the issue of prior use of the applicable rangeland and water thereon, it is also important to
15 note that the grazing applicants also specifically cited to their prior use of the subject range, which
16 would include beneficial use of the waters thereon, prior to 1934. Evidence of prior use dating back
17 to 1866 is found in the grazing application of Joyce Brothers Livestock Company. *See* U.S. Exh.
18 85 ("Have you previously used the lands covered by this application for grazing permit? Yes. If so,
19 how many years and what is the usual period of use each year? Began use in the year 1866. About 8
20 months.") Evidence of prior use dating back to 1925 also is found in the grazing applications of
21 John F. Shea. *See* U.S. Exh. 87 ("Have you previously used the lands covered by this application
22 for grazing permits? Yes. If so, how many years and what is the usual period of use each year? 10
23 years, 3 months for summer near Silver City and 6 months on land adjacent to the ranches."); *see*
24 also Joyce Exh. N (April 26, 1935 Grazing Application); Joyce Exh. S (Dependent property record
25 detailing priority history). Further evidence of prior use is specified in the June 8, 1935 grazing
26 application of Hubert E. Nettleton. *See* U.S. Exhibit 86 ("Have you previously used the lands
27 covered by this application for grazing permit? Yes. If so, how many years and what is the usual
28 period of use each year? Two years for 7 or 8 months each year.") Corroborating evidence of prior

^{14/} Although part of the public record, for the Court's convenience, a copy of the Department of the Interior Decision is attached hereto as Exhibit "A".

1 use also is found in an affidavit submitted by H.E. Nettleton to the Department of Interior. Mr.
2 H.E. Nettleton swore as to his prior engagement in the livestock business as follows: "That I was
3 born and raised on Sinkers Creek and since 1920 I have had an active part in riding this entire range.
4 I have owned and operated a livestock outfit in this vicinity for the Joyce Livestock Company as well
5 as my own interests. We always had cattle get in the Silver City area and some get into the
6 headwaters of Jordan and had to ride this area every year." *See* U.S. Exh. 65.

7 As described herein and detailed in Joyce Livestock's Opening Brief, evidence of prior use
8 of the range and the water thereon for livestock purposes is well documented through the chain of
9 title, grazing applications, and transfers of grazing applications. It is also well established through
10 the testimony of Paul Nettleton who described the historic family livestock operation dating back to
11 Anna and Mary Joyce, and the first hand testimony of Mr. Gene Lewis who was a cowboy working
12 for one of Joyce Livestock's predecessors, Mr. Shea, in the early 1930s. Based on the totality of the
13 evidence, under the standards for demonstrating a beneficial use water right adopted by this Court in
14 the LU Decision, Joyce Livestock has presented evidence that fully supports its claimed water rights
15 with a priority date of at least 1898.

16 It is critical to note that the evidence of historic use of the water for livestock purposes
17 dating back to the late 1800s has gone absolutely un rebutted by the United States. The United
18 States offered no evidence at trial to rebut or disprove evidence of continuous historic use of these
19 water rights since the date the original patent holders first settled the land. The United States is fond
20 of arguing that it "can't prove a negative." No one has asked the United States to prove a negative.
21 The United States did have a burden, however, to rebut evidence of continuous prior use of the
22 water at issue. If the United States thought they could have rebutted evidence that Joyce Livestock
23 and its predecessors beneficially and continuously used the water for livestock purposes since the
24 1860s, then they should have done so at trial. But in failing to offer *any* evidence in rebuttal, they
25 have conceded the point: Joyce Livestock and its predecessors in interest have been engaged in the
26 livestock business and have been watering livestock from Jordan Creek and surrounding sources
27 since the 1860s. In fact, even the United States' own witness admitted that Joyce Livestock's
28 predecessors were using the waters of Jordan Creek prior to 1934. *See* Testimony of Gary

1 Madenford, Trial Transcript p. 392-393. Given the Special Master's findings of fact, and the
2 applicable law as detailed in the LU Decision, it was, therefore, in error for the Special Master to
3 disallow Joyce Livestock's claim.

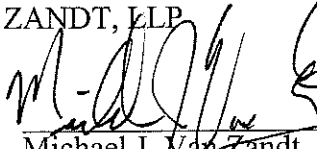
4 **IV. CONCLUSION**

5 The Report and Recommendation is premised on an erroneous statement of the law,
6 particularly in light of this Court's recent LU Decision. Based on the evidence submitted at trial and
7 the applicable law of the case, Joyce Livestock respectfully requests that this Court grant its
8 Challenge, and order that the United States' claims be denied in their entirety, and decree Joyce
9 Livestock's claims in their entirety with a priority date of 1898.

10
11 Dated this 30 day of March, 2005.

12 Respectfully submitted,
13 McQUAID BEDFORD &
14 VAN ZANDT, LLP

15 By:

16 
17 Michael J. Van Zandt
18 Elizabeth P. Ewens
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1 DATED this 3rd day of March, 2005.

LING, ROBINSON & WALKER

By:

Roger D. Ling (ISB No. 1018)

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CERTIFICATE OF SERVICE

I certify that on March 3, 2005, I served a true and correct copy of foregoing

JOYCE LIVESTOCK'S SUPPLEMENTAL OPENING BRIEF IN SUPPORT OF

CHALLENGE upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

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

Larry Brown
Attorney, U.S. Dept. of Justice
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Sarah E. Strickland

15, 26). This doctrine applies to tidelands in California. *Weber v. Harbor Commissioners*, *supra*; *Shively v. Bowlby*, *supra*, pp. 29, 30; *United States v. Mission Rock Co.* (139 U. S. 391, 404, 405). Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands 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. 161, 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 subjected 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. 650, 671); *Knight v. United States Land Assn.*, *supra*; *Shively v. Bowlby*, *supra*. It follows that if the land in question was tideland, 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 tidelands, 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 *Work 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. 1269), 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 grading 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.

MARGOLN, *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. 1269), 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. 1269), 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 commensurate 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 *without* 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 2 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. Morehead*, 243 U. S. 607, 613-614; *International Ry. v. Boardman*, 257 U. S. 506, 514. Cf. *United States v. Grimaud*, 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 that persons in the described classes shall be given preferences "*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:

AN 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. *Bergzon 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 gra-

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 drouth, 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 24, 1937.

T. A. WALTERS,

First Assistant Secretary.

SLIGER GOLD MINING COMPANY

Decided January 23, 1937

MINING CLAIM—RECONVEYANCE TO UNITED STATES OF RAILROAD GRANT FOR INCLUSION IN 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 reconvey 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 correcting description after said act, where there is nothing to show that new ground covered by the withdrawals under the Federal Water Power Act