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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	)	UNITED STATES' RESPONSIVE
	)	BRIEF IN OPPOSITION TO JOYCE
	)	LIVESTOCK'S CHALLENGE

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Case No. 39576	)	UNITED STATES' RESPONSIVE
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I. INTRODUCTION

Joyce Livestock Company (hereinafter "Joyce") challenged the Special Master's Order Denying [Joyce's] Motion to Alter or Amend, In Re SRBA, Case No. 39576, Subcase No. 55-10135 *et al.* and the Special Master Report and Recommendation, In Re SRBA, Case No. 39576, Subcase No. 55-10135 *et al.* (the "SMRR") which recommended denying Joyce's Water Right

Claim 55-10135 and recommended awarding partial decrees to the United States Department of the Interior, Bureau of Land Management (the "BLM") for Water Right Claims 55-11061, 55-11385, and 55-12452. The purpose of this Memorandum is to oppose Joyce's challenge.

II. STATEMENT OF THE CASE

Jordan Creek is a perennial stream located in Owyhee County, Idaho. The United States, is the owner and proprietor of certain public lands¹ adjacent to Jordan Creek. Public lands in Idaho were used by livestock ranchers and itinerant herdsmen for livestock grazing under an implied license before Congress enacted the Taylor Grazing Act of 1934 and under an express license thereafter. Under the authority of the Taylor Grazing Act, the United States, by and through the BLM, makes its land available for livestock grazing to qualified applicants for grazing permits. A valid grazing permit provides legal access to forage and water located on public lands to a qualified permit holder's livestock.

The BLM, as the owner and proprietor of public lands in Idaho, applied for three stockwatering rights based upon state law of prior appropriation and beneficial use to provide a reliable source of water for the care and management of livestock authorized to use the public lands adjacent to Jordan Creek for livestock grazing. Joyce, the holder of a grazing permit that authorizes livestock to use public lands adjacent to Jordan Creek for livestock grazing, applied for one stockwatering right that designated the same public lands as places of use ("POUs") that are claimed as POUs in the three BLM claims. After trial on the merits, the Special Master

¹ "The term 'public lands' means any land and interest in land owned by the United 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).

concluded that the BLM should be awarded partial decrees for its three stockwatering claims because making public lands available to others for livestock grazing, coupled with BLM's comprehensive management of permittees, livestock, land, and water satisfied Idaho's test of a valid appropriation of stockwater. The Special Master denied Joyce's stockwatering claim because Joyce failed to prove that its predecessors had intended to appropriate a stockwatering right, as required by Idaho's test of a valid appropriation, and hence, there was no valid stockwatering right to convey to successors.² Joyce challenged the Special Master's Reports and Recommendations, urging that Joyce, as the owner of the livestock that actually drink the water in Jordan Creek, should be awarded the stockwatering right it claimed, and the BLM's stockwatering rights should be disallowed because the BLM does not own the livestock that actually drink the water.

III. FACTUAL BACKGROUND

Public lands in Owyhee County, Idaho were first used for livestock grazing in about 1864 after the discovery of valuable mineral deposits in the upper reaches of Jordan Creek. The public lands around Silver City were used as saddle ranches for the miners' horses and pack animals and as livestock ranches that provided meat and dairy products to the miners. Livestock ranching eventually became an economic mainstay of Owyhee County.

² The United States' position on the issues that are the subject of Joyce's challenge was earlier presented to the Special Master in the United States' Memorandum in Opposition to Joyce Livestock Company's Motion to Alter or Amend, the United States' Post-Trial Memorandum, the United States' Memorandum in Opposition to Joyce Livestock Co.'s Motion in Limine, and the United States' Memorandum in Opposition to Joyce Livestock Co.'s Motion for Summary Judgment, which are incorporated herein by this reference. Many of the arguments and assertions in Joyce Livestock's Opening Brief in Support of Challenge (hereinafter "Joyce's Memo") are addressed in these previously filed Memoranda and will not be reargued here.

Cattle and sheep ranchers located homesteads along streams that provided a dependable water supply, then used public land to provide sustenance to livestock. See Exhibits 95 and 96. Local stockgrowers turned out cattle from winter range in the early spring. Testimony of Gene Lewis, Trial Transcript (hereinafter "T. Tr.") at 315. Cattle, in search of grass and water, would roam at large following the snow melt to the tops of ridges and drift as far as Reno, Nevada. Testimony of Gene Lewis, T. Tr. at 315-316. Cattle were rounded up by the ranchers, and cowboys would ride from ranch to ranch in search of cattle that might belong to a particular stockgrower. Testimony of Gene Lewis, T. Tr. at 317. Itinerant herdsman competed for forage and water by grazing livestock on the same public lands. Exhibit 88 at 28-29. Local stockgrowers did not attempt to exclude anyone from using the public lands for livestock grazing. Testimony of Michael Boltz, T. Tr. at 444; Deposition of Gene Lewis at 15, lines 8-25. Thus, the public lands in Owyhee County were used as a grazing commons where grass and water were available to all who wished to use them.³

By 1888, livestock had proliferated to about 100,000 head of cattle and over 50,000 head of sheep. Exhibit 88 at 31. A long, severe winter in 1889-90 killed about 80% of the livestock in Owyhee County. Exhibit 88 at 27. Stockgrowers quickly rebounded from their losses and by

³ Under an implied license, the Western public lands were an open grazing commons used by all who wished to use them for rearing livestock. Buford v. Houtz, 133 U.S. 320, 326-327 (1890); see Public Lands Council v. Babbitt, 529 U.S. 728, 731-733 (2000) ("Ranchers once freely grazed on the publicly owned range as their herds moved from place to place, searching for grass and water."); see Anthony Wilkinson LiveStock Co. v. McIlquam, 83 P. 364, 369 (Wyo. 1905) ("This privilege or right of pasturage upon the public lands of the government, which are left open and unenclosed, and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it. It is not a special privilege conferred upon one person or a few persons. No individual has any greater right than another to herd his live stock upon such lands, or to allow them to roam at large thereon.").

1900 there were about 180,000 sheep and 12,000 cattle using public lands in Owyhee County for livestock grazing. Exhibit 88 at 30.

The public land was over-stocked. Exhibit 88 at 31. Consequently, livestock grazing resources were severely depleted. Testimony of Michael Boltz, T. Tr. at 443; Exhibit 88 at 10-21. Lack of vegetative cover and soil erosion were serious problems. Exhibit 88 at 22-25; see Public Lands Council, 529 U.S. at 732-733. By 1930, public land had been so over-grazed that the number of livestock units produced had decreased by 75 to 80 percent as compared to 1888. Exhibit 88 at 31-32. Stockgrowers raised or bought hay for winter feeding of livestock. Exhibit 88 at 32. Competition for grazing resources on public lands was intense.⁴ Public Lands Council, 529 U.S. at 732. Many ranchers left the livestock business. Exhibit 88 at 32.

Calls for grazing regulation on public lands began as early as 1878. Public Lands Council, 529 U.S. at 732-733. Opposition to regulation eventually diminished, and the erosion caused dust storms of the 1930s finally impressed upon the United States' Congress the critical need to regulate grazing on public land. Public Lands Council, 529 U.S. at 733. On "June 28, 1934, President Franklin Roosevelt signed the Taylor Grazing Act into law." Public Lands Council, 529 U.S. at 733; see The Taylor Grazing Act of 1934 (hereinafter "Taylor Grazing Act") (codified at 43 U.S.C. §§ 315-316). Congress enacted the Taylor Grazing Act "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for

⁴ "[I]t was just a fact of life. . . . [Y]ou try to beat your neighbor to the grass, your cows will be fat, and his will get what's left." Testimony of Paul Nettleton, T. Tr. at 696. See e.g. Omaechevarria v. Idaho, 246 U.S. 343, 344 fn. 1 (1918) citing Pyramid Land and Stock Co. v. Pierce, 30 Nev. 237, 253-255, 95 P. 210 (1908) and Sweet v. Ballentyne, 8 Idaho 431, 447, 69 P. 995 (1902); McKelvey v. United States, 260 U.S. 353 (1922).

their orderly use, improvement, and development; to stabilize the livestock industry dependent upon the public range; and for other purposes.” 48 Stat. 1269.

For over 70 years, the BLM⁵ has administered and controlled every aspect of domestic livestock grazing on public land.⁶ Testimony of Ronald Kay, T. Tr. at 541-569; Testimony of Michael Boltz, T. Tr. at 439-453; Exhibits 9-16, 22-87, 92-94; Exhibits A and B; Testimony of Gene Lewis, T. Tr. at 319-320 (BLM built a drift fence and helped herd livestock). Initially, the BLM verified the extent of dependent private property,⁷ determined the livestock carrying capacity of commensurate property⁸ and public land, and adjudicated grazing preferences⁹

⁵ The agency originally charged with rangeland management was the Division of Grazing. The agency’s name changed to the Grazing Service, and eventually to the BLM. For the purposes of this memorandum, BLM means the Division of Grazing, the Grazing Service, and/or the BLM.

⁶ Direct Federal administration of public lands used for grazing began with Congress’ enactment of the Unlawful Enclosures Act. 43 U.S.C. § 1061 *et seq.* BLM administration of livestock grazing on public land began in 1934. See generally Exhibit A at 37-38 (completed range examinations, investigated grazing trespasses, and recommended criminal prosecutions) and Exhibit B at 4-14 (established grazing districts, actively administered grazing on public land, hired Director of Grazing in Sept. 1934); see also Public Lands Council, 529 U.S. at 734-739.

⁷ “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” Exhibit B at 58.

⁸ Commensurate property is base property that has “sufficient productive capacity to support the livestock herd for a minimum of four months when they were not on the federal range.” Testimony of Michael Boltz, T. Tr. at 446-447; see also Trial Exhibit B at 58 (“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.”)

⁹ “*Grazing preference or preference* means a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee.” 43 C.F.R. § 4100.0-5. “*Base property* means:
(continued...) ”

among the many users of public land. Testimony of Michael Boltz, T. Tr. at 445-454. The BLM issued annual grazing permits and, eventually, 10 year grazing permits¹⁰ to qualified applicants, charged reasonable fees for grazing use of public land, and conferred a grazing preference for the issuance of grazing permits upon local landowners and water right owners. See 43 U.S.C. § 315b; Public Lands Council v. Babbitt, 529 U.S. at 735;¹¹ Testimony of Michael Boltz, T. Tr. at 439-454, 507-513. Those users who did not establish a priority of use determined by the BLM through surveys of dependent base property and examination of grazing use on public land during 1932 and 1933¹² were not authorized to use public lands for livestock grazing, which

⁹(...continued)

(1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing.” 43 C.F.R. § 4100.0-5.

¹⁰ “*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. “*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.

¹¹ “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 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.”

¹² The “priority years.” Testimony of Michael Boltz, T. Tr. at 448-489.

resulted in barring nomadic herdsman, and even some local landowners, from using public land for livestock grazing. Exhibit A at 35; Testimony of Michael Boltz, T. Tr. at 448-489.

Since 1934, Congress has appropriated a substantial budget for BLM's administration and control of livestock grazing and rangeland improvement. Testimony of Ronald Kay, T. Tr. at 545; Exhibit A at 8; Exhibit B at 47. In addition, the grazing fees paid to the BLM by the grazing permittees are deposited in the United States Treasury, then 50% is distributed to the BLM for range management and range improvement, 37 ½ % is retained in the general fund, and 12 ½ % is distributed to the State of Idaho for its general fund. The United States, the State of Idaho, the livestock industry, and all the people of the United States derive substantial benefits from BLM's long history of comprehensive management, administration, and control of all aspects of livestock grazing on public land, not only from grazing fee receipts, but from achieving the important national goals of soil stabilization, re-establishment of healthy vegetative communities and ecosystems on public land, public land improvement (including livestock watering sources), and stabilization of the livestock industry. Testimony of Ronald Kay, T. Tr. at 555-559; Testimony of Gary Madenford, T. Tr. at 341-360.

Livestock must have forage and water to survive while they use public land for grazing. Testimony of Ronald Kay, T. Tr. at 559. Livestock cannot legally access forage and water on public land unless the BLM issues a qualified stockgrower a grazing permit and the stockgrower pays grazing fees¹³ to the BLM. Testimony of Ronald Kay, T. Tr. at 551. The BLM manages

¹³ The grazing fees were initially about \$.05 per cow per month and \$.01 per sheep or goat per month. Exhibit A at 42. The current grazing fees are \$1.43 per animal unit month. Testimony of Ronald Kay, T. Tr. at 552. Grazing fees must be paid or grazing use is not authorized and (continued...)

livestock access to water sources as a key element of administering and controlling grazing on public land. Testimony of Gary Madenford, T. Tr. at 344-361; Testimony of Ronald Kay, T. Tr. at 557 and 559. In 1938, the BLM charged non-permittees a separate fee for using livestock water provided by BLM controlled wells. Testimony of Fredric W. Price, T. Tr. at 247-249.

The BLM filed water right claims for instream stockwatering because, in order to effectively administer livestock grazing on public land, water must be available for the care and management of livestock owned by whichever qualified stockgrower may have a grazing permit at any one time. Testimony of Fredric W. Price, T. Tr. at 123-132; Exhibits 3-7. The source claimed in this case is Jordan Creek, a livestock watering source in one of the many pastures of the Silver City Allotment.¹⁴ Testimony of Fredric W. Price, T. Tr. at 123-132; Exhibits 3-7. Each place of use is public land used for livestock grazing by Joyce's cattle. Testimony of Fredric W. Price, T. Tr. at 127; Exhibits 7 and 8. Water is available for livestock consumption and authorized livestock drink water at each designated place of use. Testimony of Robert Mallis, T. Tr. at 106-107.

Joyce is a limited partnership formed in 1985. Testimony of Paul Nettleton, T. Tr. at 670-671. Paul Nettleton, his spouse Patricia, and, to a minor extent, their children are partners. Testimony of Paul Nettleton, T. Tr. at 671. Joyce owns about 10,000 acres of ranch land.

¹³(...continued)
considered a trespass. Testimony of Ronald Kay, T. Tr. at 551-552.

¹⁴ The water right claims are located within a grazing allotment designated by the BLM as the Silver City Grazing Allotment, Allotment Number 0569 (hereinafter "Allotment"). See Exhibit 26, BSN 1372 (Official Allotment Map, Silver City Allotment). "*Allotment* means an area of land designated and managed for grazing of livestock." 43 C.F.R. § 4100.0-5.

Testimony of Paul Nettleton, T. Tr. at 723. Joyce has a grazing preference based upon its ownership of ranch land base property, and BLM issues a grazing permit to Joyce which, under conditions set by the BLM, the Taylor Grazing Act, and regulations promulgated under the Taylor Grazing Act, authorizes Joyce to use the Allotment for livestock grazing.¹⁵ Testimony of Michael Boltz, T. Tr. at 439-441; Testimony of Ronald Kay, T. Tr. at 548-558. Joyce pays grazing fees to the BLM for grazing use of the Allotment. Deposition of Paul Nettleton at 52, lines 7-16; p. 54, lines 19-25; p. 59, lines 17-23; Testimony of Ronald Kay, T. Tr. at 548-558.

Joyce filed a Notice of Claim to a Water Right to provide water to its livestock that use the Allotment for livestock grazing. Joyce's water right claim describes 20 tracts of land as POUs that are public land within the Allotment. Joyce claims the identical source claimed by BLM. Joyce's claimed priority date is 1898. Joyce contends that this priority date was established by its predecessors in interest to certain tracts of ranch land now owned by Joyce because the predecessors used Jordan Creek for stockwatering, thus appropriating a stockwatering right. Exhibit 18 at 22-23. Joyce contends that the stockwatering rights were conveyed to Joyce because Joyce's predecessors intended to transfer their ranch property to Joyce as a ranch unit, which included water rights located on public land and grazing use of public land. Testimony of Paul Nettleton, T. Tr. at 673.

Joyce's privately owned ranch property was transferred to Joyce through a chain of title originating from those who homesteaded public land along dependable water sources in the

¹⁵ "[I]ssuance of a permit pursuant to . . . [the Taylor Grazing Act] shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b.

Sinker Creek drainage.¹⁶ See Exhibits 95 and 96; Testimony of Michael Boltz, T. Tr. at 508.

Joyce purchased base property and grazing preferences¹⁷ from other livestock operators in order to establish the current grazing preference for the Allotment. Exhibit 22. All transfers of grazing preferences must be approved by the BLM. Testimony of Ronald Kay, T. Tr. at 549-550. There is no evidence in any files maintained by the BLM that Joyce, or any of Joyce's predecessors in interest to Joyce's grazing preference for the Allotment, ever offered water rights as base property in order to receive a grazing preference.

Joyce's predecessor's in interest to its grazing preference are John T. Shea, Joyce Brothers Livestock Co., Nettleton Brothers¹⁸, Jean Heazle¹⁹, and Jump Creek Sheep Co.

Testimony of Michael Boltz, T. Tr. at 455-489; Exhibit 22. Only Joyce Brothers Livestock,²⁰

¹⁶ None of Joyce's ranch property is in the Jordan Creek drainage. The ranch property is in the Sinker Creek drainage which is separated from the Jordan Creek drainage by a substantial ridge. Exhibits 26, 95, and 96.

¹⁷ In many instances, AUMs were transferred to Joyce without a conveyance of base property. Testimony of Michael Boltz, T. Tr. at 472-473 (Heazle transferred AUMs to Joyce in 1956) and at 477-478 (Jump Creek Sheep Company transferred AUMs to Joyce in 1966).

¹⁸ Nettleton Brothers (J.H. Nettleton and H.E. Nettleton) did not identify Jordan Creek as an area used for grazing during the priority years. Exhibits 86, 95, and 96; Testimony of Michael Boltz, T. Tr. at 478-480. They claimed prior grazing use of the headwaters of Sinker Creek, which is not in the area where Joyce's water right claim is located. *Id.*

¹⁹ Heazle transferred AUMs to Joyce in 1956, but not base property. Exhibit 69. There is no evidence in the record that Heazle identified Jordan Creek as an area used for grazing during the priority years, even though Heazle's livestock may have roamed at large and occasionally used the Jordan Creek area for grazing. See Deposition of Gene Lewis at 22; Testimony of Gene Lewis, T. Tr. at 315-319; Testimony of Michael Boltz, T. Tr. at 472.

²⁰ Joyce's Brothers Livestock Co. filed an initial application for grazing permit in 1935 that identified public land grazing use in several townships. Exhibits 85 and 95. Jordan Creek passes through one section of one of the townships where prior grazing use was claimed. Exhibit 95;

(continued...)

Shea, and Jump Creek Sheep Co. listed public land grazing use in the Jordan Creek drainage during the priority years. Testimony of Michael Boltz, T. Tr. at 454-457, 471-474, and 484-486; Exhibits 65, 85 and 87. Only Shea and Jump Creek Sheep Co. specifically listed public land used to support their livestock operations in the Jordan Creek drainage. Testimony of Michael Boltz, T. Tr. at 455-463 and 473-478; Exhibits 8 (4774), 22, 65, 87, 95, and 96. In 1966, Jump Creek Sheep Co. transferred to Joyce AUMs used on the public lands in the Jordan Creek drainage, and that transfer of AUMs was not dependent upon a conveyance of any real property. Testimony of Michael Boltz, T. Tr. at 478; Exhibit 50, (2773-2783). Shea is Joyce's only predecessor who claimed grazing use of public lands in the Jordan Creek drainage and conveyed real property to Joyce, which resulted in a transfer of a grazing preference and AUMs to Joyce.²¹ Testimony of Michael Boltz, T. Tr. at 466-471; Exhibits 65 (660) 75, 82, and 87.²²

²⁰(...continued)

Testimony of Michael Boltz, T. Tr. at 484. In a later application for license, Joyce Brothers claimed prior use more specifically by naming the heads of Bates Creek, Fossil Creek, Sinker Creek and North Castle Creek, but Jordan Creek was not named as a place of grazing use. Exhibits 83 and 95; Testimony of Michael Boltz, T. Tr. at 485. The description of grazing use of public lands in Exhibit 83 makes the most sense because ranch land owned by Joyce Brothers Livestock Co. was located far to the Northeast of the Jordan Creek drainage and is separated from Jordan Creek by a substantial ridge between Sinker Creek and Jordan Creek. Testimony of Michael Boltz, T. Tr. at 456-457 and 485-487; Exhibits 95 and 96.

²¹ The grazing preference was apparently attached to Shea's real property located in T.4S., R. 3W., Sec. 35, and T.5S., R.3W., Sections 1, 2, 11, and 12.

²² Evidence of grazing use in the Jordan Creek drainage is also conflicting. Exhibit 64 (3180 - use by Joyce Livestock, Shea, Jean Heazle); Exhibit 65 (634 - use by Joyce Livestock and Nettleton); Exhibit 66 (2428 and 4467 - Nettleton and Joyce Livestock use). The best evidence is the testimony of Michael Boltz and the statements of the various individuals and entities in 1935 and 1936. Jump Creek Sheep Co. and Shea are the only stockgrowers who specifically cited using public land in the Jordan Creek drainage. Testimony of Michael Boltz. Livestock owned
(continued...)

Shea “owned and operated a cow outfit in the Sinker Creek and Jordan Creek watershed beginning in 1928 until he sold out in 1938.” Exhibit 65 (660). Shea’s livestock probably grazed on the public lands in the Jordan Creek drainage. Testimony of Michael Boltz, T. Tr. at 454-456; Exhibit 87. When specifically asked if he owned or controlled water sources needed or used in his livestock operation, Shea stated that he owned or controlled “springs and creeks running on and through the ranches.” Exhibit 87 (2307). Shea did not offer water rights as base property, and the BLM did not find that Shea’s livestock operation depended on water rights in Jordan Creek when grazing preferences were adjudicated. The BLM adjudicated grazing preferences and awarded Shea 81 animal units that were attached to his ranch land base property in T.4S., R. 3W., Sec. 35, and T.5S., R.3W., Sections 1, 2, 11, and 12. Testimony of Michael Boltz, T. Tr. at 457; Exhibit 80.

In 1938, Shea sold his livestock, then leased his ranch land to Augustine Salove. Testimony of Michael Boltz, T. Tr. at 462-463; Exhibit 94. Shea’s AUMs were transferred to Salove. Testimony of Michael Boltz, T. Tr. at 463. From 1938 through 1951, Salove used the AUMs in his sheep ranching operation. Testimony of Michael Boltz, T. Tr. at 464-467. Shea did not have a grazing preference from 1938 to 1951, and neither Shea nor Salove used Jordan Creek as a water source from 1938 through 1951. Testimony of Michael Boltz, T. Tr. at 464-467; Testimony of Gene Lewis, T. Tr. at 327-328.

²²(...continued)

by others roamed at large and drifted into the Jordan Creek drainage. Only Shea actually transferred any real property to Joyce. As shown below, if Shea did appropriate water from Jordan Creek, and the evidence shows he did not, there is no evidence that water rights that describe public land as POUs were conveyed to Joyce.

On September 24, 1951, Shea conveyed ranch land to Joyce Livestock Company and J.H. Nettleton.²³ Testimony of Michael Boltz, T. Tr. 468; Exhibit 1, BSN 100224-100225; Exhibit 75. Shea did not convey water rights located on public land, although “grazing rights” are mentioned in the deed.²⁴ Exhibit 1, BSN 100224-100225. The BLM deducted 81 animal units from Salove’s grazing preference, then approved a transfer of 40 animal units to Joyce Livestock Company and 40 animal units to J.H. Nettleton. Exhibit 75 (2825). On October 31, 1976, J.H. and Edith Nettleton conveyed the property to Joyce Livestock Company, a co-partnership. Exhibit 1, BSN 100196-100197 (this deed does not convey any water rights located on public land). On August 24, 1985, Joyce Livestock Company, a general partnership conveyed the property to Joyce Livestock Company, a limited partnership. Exhibit 1, BSN 100232-10233 (this deed does not convey any water rights located on public land). There is no document of conveyance in Joyce’s chain of title that contains any specific or express description of any water rights located on the public lands within the Allotment boundary. See generally Exhibit 1. Paul Nettleton is not aware of any documents in Joyce’s entire chain of title that specifically describe water rights located on public land. Nettleton Depo. at 14, lines 2-9. The most recent warranty deeds conveying property from Helen Nettleton to Joyce and conveying property from Joyce Livestock Company, a general partnership to Joyce, do not contain any description of water

²³ See Exhibit 1, BSN 100273-100276, BSN 100245-100248, BSN 100218-100220, BSN 100198-100202, BSN 100221-100222, BSN 100223 to Exhibit 1, BSN 100280-100281. John T. Shea was in possession of the homestead entry in 1926. Exhibit 9.

²⁴ Neither the grazing preference nor the AUMs were Shea’s to convey. Testimony of Ronald Kay, T. Tr. at 550-551. BLM does not recognize the sale of grazing permits. Testimony of Ronald Kay, T. Tr. at 550.

rights at all. Exhibit 1, BSN 100073-100076 and BSN 100117-100118. There is no documentary evidence that any of Joyce's predecessors to its ranch land property or to its grazing preference ever established or defended a water right on the public land described in Joyce's water right, used water rights as base property to obtain a grazing preference, depended upon established water rights located on the public land to maintain a livestock operation, or if they did have water rights, transferred those water rights to Joyce in accordance with State law.

IV. ARGUMENT

A. Establishing and Conveying Appropriative Stockwater Rights

This case is a dispute between the United States and Joyce over the priority of use of in-stream water consumed by livestock that use public lands for pasturage. In Idaho, the water within the boundaries of the state is owned and controlled by the state. IDAHO CODE § 42-101; Walbridge v. Robinson, 125 P. 812, 814 (Idaho 1912) ("title to the public waters of the state is vested in the state for the use and benefit of all the citizens of the state under such rules and regulations as may be prescribed from time to time by the lawmaking power of the state."). The citizens of Idaho, including the owners and proprietors of land within the boundaries of Idaho who make their land available to others for the pasturage of livestock, may obtain a usufructuary right²⁵ to divert the state's water for a beneficial purpose under the doctrine of prior appropriation and the priority of appropriation gives the better right between those using the water. See IDAHO CONST., art XV, § 3. The test of a valid prior appropriation of water is as follows:

²⁵ "[A]ppropriative rights are usufructuary only and confer no right of private ownership in a water course." 78 Am. Jur. 2d Waters § 49 (2004).

“The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use.” Sarret v. Hunter, 32 Idaho 536, 541, 185 P. 1072, 1074 (1919). “It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use, existing at the time or contemplated in the future, followed by diversion from the natural channel by means of a ditch, canal, or other structure and also an active application of the water, within a reasonable time, to a beneficial use.” 78 Am.Jur.2d Waters § 321 (1975) (footnotes omitted).

Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 619 P.2d 1130, 1132-1133 (Idaho 1980).

The element of intent is manifested by an open, physical demonstration that gives notice to others that a person intends to appropriate water for his own use. 3 D. GETCHES, WATER LAW IN A NUTSHELL 88-91 (3rd ed., 1997). “The diversion requirement provides notice to present and prospective appropriators that water has been appropriated, and gives authorities and courts a concrete basis to determine an appropriator’s priority date.” Id. at 92. Thus, intent cannot be inferred, but must have a concrete basis in fact. Although there need not be an actual physical diversion to appropriate instream stockwater, R.T. Nahas Company v. Hulet, 674 P.2d 1036, 1044 (Idaho Ct.App. 1983), the mere use of livestock water in common with others on the open unenclosed public grazing commons does not satisfy the test of a valid appropriation. Robinson v. Schoenfeld, 218 P. 1041, 1043 (Utah 1923); cf. Lake Shore Duck Club v. Lake View Duck Club, 166 P. 309, 310-311 (Utah 1917); cf. Tattersfield v. Putnam, 41 P.2d 228, 234-235 (Ariz.1935) (“It would be contrary to the spirit, as well as the letter of our law, to hold that it is possible for a temporary occupant of lands, who has no intention or ability of acquiring a permanent title thereto, to make a valid appropriation of a water right which must be necessarily

appurtenant to that land.”) Therefore, the District Court must find a concrete basis to determine the priority date for a stockwater appropriation.

A water right may be an appurtenance to the land on which it has been used. IDAHO CODE § 42-101 (“such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied”); IDAHO CODE § 42-220; IDAHO CODE § 42-1402; Russell v. Irish, 118 P. 501, 502 (Idaho 1911). However, in order for a water right to be appurtenant to a tract of land, there must be unity of title between the land designated as POU and the water right:

“A water right used in connection with a certain tract of land for the irrigation thereof, where necessary to the beneficial enjoyment of the land, together with the ditch, canal or other works necessary to conduct the water to the places of use, become appurtenances to the land, provided that they are all owned by the same parties. But they must be the property of the owner of the land to which it is claimed they are appurtenant, and not the property of another.” Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1011 (2nd Ed. 1912).

Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief, Order of Recommitment to Special Master Cushman, In Re SRBA, Case No. 39576, Subcases 55-10288 A & B, et al. (hereinafter “Memorandum Decision”) at 15. Thus, a valid appropriation of water with POU designated on land not owned by the appropriator of water, results in an independent water right not appurtenant to land because there is no unity of title between the water right and the land designated as POU.²⁶ See First Security Bank of

²⁶ In the District Court’s Memorandum Decision and Order on Challenge, Order of Partial Decrees, In Re SRBA, Case No. 39576, Subcases: 55-10288B *et al.* (Jan. 3, 2005) (hereinafter “LU Decision”) at 23-25, the District Court held that stockwater rights on public lands are conveyed as an appurtenance to privately owned ranch land. The District Court stated that “there is no easement to access the water because one is not necessary.” LU Decision at 25. Joyce’s
(continued...)

Blackfoot, 291 P. at 1066 (“Water may be appropriated . . . on land not owned by the appropriator, and this water right becomes the property of the appropriator. . . . [A] water right is not necessarily appurtenant to the land on which it is used and may be separated from it, and this is the general rule.”); Memorandum Decision at 16 (“non-unity of title effectuates a severance of any alleged appurtenancy relationship.”). Such water right is real property and must be conveyed in writing. See Crow v. Carlson, 690 P.2d 916, 920 (Idaho 1984) and IDAHO CODE § 55-101 (water rights are real property); see Olson v. Idaho Department of Water Resources, 666 P.2d 188, 190-191 (Idaho 1983) (citing IDAHO CODE §§ 9-503 and 9-505) (the conveyance of a water right can only occur if the conveyance is in writing) and Gard v. Thompson, 123 P. 497, 502 (Idaho 1912). “[A]ny attempt to transfer an independent water right by a mere parol or verbal contract is void as against the rights of appropriators” 2 C. KINNEY, KINNEY ON IRRIGATION AND WATER RIGHTS § 997 (emphasis added). Such water right is entitled to a

²⁶(...continued)

counsel has made it abundantly clear that they view stockwater rights on public lands as servitudes, and that ranch land base property is the dominant estate. See Joyce Livestock’s Reply to United States’ Memorandum in Opposition to Joyce Livestock Company’s Motion to Alter or Amend, Exhibit E (Colvin Complaint). However, an interest or estate in land owned by another cannot be established where the land use is pursuant to a license. See 25 Am. Jur. 2d Easements and Licenses in Real Property §§ 2, 117, and 119 (2004); Branson v. Miracle, 729 P.2d 408, 411 (Idaho Ct. App. 1986) (“While acting pursuant to permission the claimant’s rights are in the form of a license. Unless the licensor is estopped, a license is revocable at will No interest in property vests in the licensee.”); 43 U.S.C. 315b (“issuance of a permit pursuant to the provisions of . . . [the Taylor Grazing Act] shall not create any right, title, interest, or estate in or to the lands.”). No interest in land, publicly or privately owned, can vest in a mere licensee. Indeed, if the LU Decision means a water right is a servitude on lands owned by another, there would be an undesirable effect on privately owned land because “the existence of water rights to which conveyed property is subject constitutes a breach of the covenant against encumbrances.” 20 Am. Jr. 2d Covenants, Conditions, and Restrictions § 87 (2004). Here, Joyce claimed similar stockwater rights on private land not owned by Joyce. See Joyce’s Memo at 16.

priority from the date the current user took possession and used the water. McGinness v. Stanfield, 55 P. 1020, 1021-1022 (Idaho 1898).

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

1. The BLM Satisfied The Test Of A Valid Appropriation

“In Idaho, the United States owns 32,015,827.7 acres . . .” and “11,142,021 acres are used primarily for range land.” SMRR at 16. The BLM, like hundreds of other landowners in Idaho, makes range land available to others for the pasturage of livestock. Making public range lands available to others for livestock grazing, and comprehensive grazing management, based on administration of grazing permits issued to qualified stockgrowers, 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).

Livestock using public lands for grazing must have forage and water to survive. Testimony of Ronald Kay, T. Tr. at 559. Livestock cannot legally access forage and water on public lands unless the BLM issues a qualified stockgrower a grazing permit and the stockgrower pays grazing fees to the BLM. Testimony of Ronald Kay, T. Tr. at 551. The BLM manages livestock access to water sources as a key element of administering and controlling grazing on public lands. Testimony of Gary Madenford, T. Tr. at 344-361; Testimony of Ronald Kay, T. Tr. at 557 and 559. Thus, the Special Master properly held that in accordance with Idaho water law, the BLM, acting in its proprietary capacity as a landowner, intended to appropriate water for the care and management of livestock owned by whichever qualified applicant may have a grazing

permit at any one time. SMRR at 24; see Hidden Springs Trout Ranch, Inc., 619 P.2d at 1132-1133 (intent, diversion and beneficial use).

Joyce argues that the United States cannot be the actual appropriator of stockwater because there can be no diversion or beneficial use of water where the claimant cannot demonstrate the act of watering livestock directly from the instream source. Joyce's Memo at 5-6; Joyce Livestock's Supplemental Opening Brief in Support of Challenge (hereinafter "Supplemental Brief") at 1-2. Contrary to Joyce's representation, the undisputed facts disclose that livestock have used the sources claimed by the BLM since before the claimed priority date. SMRR at 14-16. As the Special Master recognized, "[t]he fact that the BLM does not own the livestock which actually consumes the water is irrelevant." SMRR at 24. "State water law specifically authorizes the BLM 'to appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain'" SMRR at 24 (quoting IDAHO CODE § 42-501). Not only did the Idaho Legislature expressly provide for the United States to be a valid appropriator of livestock water, it did not limit the methods for the BLM to obtain a stockwatering right. SMRR at 24 (citing IDAHO CODE § 42-503). Moreover, in 1984, the legislature enacted IDAHO CODE § 42-113, which addressed in-stream and other livestock water use. Even though the legislature amended this Act in 1998, there is no legislative pronouncement in this, or in any other statute that requires livestock ownership as a condition precedent for owning stockwatering rights. In fact, 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 Idaho legislature implicitly recognized that a water right may 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 the issuer of the grazing permit could seek such a change of use. There simply is no Idaho law that requires “ownership of livestock as a condition precedent to ownership of a livestock water right[,]” even if the landowner who claims the stockwatering right leases his land to another for the grazing of livestock. SMRR at 25 (citing Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.)); see Testimony of Roxanne Brown, T. Tr. at 16.

Joyce contends that because the statutory method of appropriation is so fundamentally different from the constitutional method of appropriation, the Special Master incorrectly based his holding on the above-cited statutes that authorize stockwater appropriation by permit or license. Joyce’s Memo at 7-9. There is no basis in fact or law for this contention. The elements of appropriation under the constitutional method are the same as the elements of appropriation under the statutory method. Under the law of prior appropriation, the beneficial use that must be proved is exactly the same no matter what the basis for the water right, i.e., that livestock consumed water on the land designated as POUs. Testimony of Roxanne Brown, T. Tr. at 14-18 and 37. As demonstrated above, neither method of appropriation requires livestock ownership as a condition precedent to a landowner being entitled to a stockwatering right.

Joyce states that there is no legal support for the theory that BLM’s grazing management activities resulted in an appropriation of a stockwatering right. Joyce’s Memo at 6. However, in State of Nevada v. Morros, 766 P.2d 263 (Nevada 1988), the Nevada Supreme Court stated:

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 (emphasis added). In this case, as in Morros, the United States is acting in its proprietary capacity as an owner of land chiefly valuable for grazing, and validly appropriated stockwater in compliance with Idaho law. Therefore, the Special Master correctly held that the BLM was entitled to “its claimed instream stockwater rights” SMRR at 24.

Joyce contends that the Special Master erred in relying on the argument that BLM ownership of stockwatering rights is necessary to fulfill obligations under the Taylor Grazing Act, which, Joyce argues, is akin to a federal reserve water right and not applicable here. Joyce’s Memo at 9-10 (citing United States v. New Mexico, 438 U.S. 696, 699-700 (1978)). Since the BLM’s stockwatering claims at issue here are not federal reserve claims, Joyce’s argument is nothing more than a red herring. New Mexico is a reserved rights case that does not have preclusive effect here. See United States’ Memorandum in Opposition to Joyce Livestock Co.’s Motion in Limine at 12-14. Moreover, the Supreme Court in New Mexico specifically noted:

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

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

438 U.S. at 702-703 (emphasis added). The Taylor Grazing Act authorizes the Secretary of the Interior to reserve public lands “from all forms of entry” to form grazing districts. 43 U.S.C. § 315. Thus, “there arises the inference” that Congress intended the United States to acquire stockwatering rights in the same manner as any other “public or private appropriator” who makes his land available to others for livestock pasturage. New Mexico, 438 U.S. at 702-703. Therefore, the United States’ stockwater rights on public lands set aside from entry and managed for livestock grazing under the Taylor Grazing Act are not foreclosed by the dicta from the New Mexico case relied upon by Joyce.²⁷

In sum, there is no Idaho law that forecloses a landowner’s claim to a stockwatering right, even though the landowner does not own the livestock that actually consume the water.²⁸ See Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.); see Testimony of Roxanne Brown, T. Tr. at 16. Indeed, the Idaho Supreme Court has previously held that a landowner could establish an appropriative stockwatering right where livestock drink directly from a stream flowing through the landowner’s property. R.T. Nahas Company, 674 P.2d 1044-1045 (citing

²⁷ Joyce stated that Congress did not indicate “that it was necessary for the United States to hold the water rights in order to fulfill the purposes of the Taylor Grazing Act. Congress has stated the very opposite in the Taylor Grazing Act” Joyce’s Memo at 9. Nowhere in the Act does Congress state that it is unnecessary for the United States to hold water rights to fulfill the purposes of the Act. 43 U.S.C. § 315a. Indeed, the Act is silent on who can or must hold stockwater rights. Rather, the Act delegates broad authority to the Secretary of the Interior to, among other things, “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” Id. (emphasis added).

²⁸ Literally hundreds of private landowners in Idaho who make their land available to others for the pasturage of livestock are similarly situated and have also established valid livestock watering rights in streams running through their own property. IDWR has never denied a stockwatering right to those landowners. Testimony of Roxanne Brown, T. Tr. at 16.

Stevenson v. Steele, 453 P.2d 819, 826 (Idaho 1969). Thus, the Special Master correctly applied Idaho law to the findings of fact when he held that “[m]aking public land available for livestock grazing – plus BLM’s comprehensive management of the permittees, their livestock, the land and the water – support valid appropriations of water under Idaho law. The BLM has demonstrated an intent to appropriate the water along with a diversion of the water for a beneficial use.” SMRR at 24; see Hidden Springs Trout Ranch, Inc., 619 P.2d at 1132-1133 (intent, diversion and beneficial use). Therefore, the SMRR should be sustained by the District Court.

2. The District Court’s 1998 Basin 57 Order Does Not Preclude BLM’s Stockwatering Rights

Joyce argues that the District Court’s Order Denying Challenges and Adopting Special Master’s Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10598B, 57-10770B and 72-15929C (hereinafter “1998 Basin 57 Order”), dated September 30, 1998, is law of the case that holds the United States can only appropriate livestock water on the public domain through an agent that actually appropriated the water, or through a conveyance from the party that actually appropriated the water. Joyce’s Memo at 4-7; Supplemental Memo at 1-2. The 1998 Basin 57 Order did not disallow the BLM’s stockwatering claims. The 1998 Basin 57 Order actually affirmed the Special Master’s recommendation that the United States appropriated a stockwatering right on public lands with a priority date of June 28, 1934. 1998 Basin 57 Order at 7; see Order Denying Motion to Alter or Amend (Amended Order on State’s Motion for Summary Judgment), In Re SRBA, Case No. 39576, Subcase 72-15929C dated April 10, 1998 at 14 (hereinafter “Haemmerle Order”).

Notwithstanding the District Court’s favorable holding for the United States, the District Court in its 1998 Basin 57 Order proceeded to make numerous “observations” about various

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theories of federal ownership and private ownership of stockwater on public lands. It is these remarks, and the Haemmerle Order, that Joyce relies upon as putative law of the case. Joyce's Memo at 4-7; Supplemental Memo at 2.

The Special Master in this case previously held "that those portions of Special Master Haemmerle's and Presiding Judge Hurlbutt's decisions concerning permits and regulation of stock grazing on federal public land are mere dicta for 1934 or later priority date claims because such range management began after June 28, 1934 - the priority date awarded the United States' claims." Order Denying Joyce Livestock Motions for Summary Judgment at 14 n.20. The District Court's "observations" are indeed mere dicta that is not, and cannot be, law of the case. See United States' Memorandum in Opposition to Joyce Livestock Co.'s Motion in Limine at 2-14; see also Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 715- 716 (9th Cir. 1990) ("law of the case doctrine gives no preclusive effect to dicta"). The District Court, in its 1998 Basin 57 Order, specifically decided that the BLM appropriated a stockwatering right on public lands with a June 28, 1934 priority date, and there is no pronouncement that such water rights were acquired because of any agency relationship with stockgrowers using public lands for grazing pursuant to grazing permits. Therefore, the Special Master in this case correctly held that the BLM appropriated a stockwatering right on public lands with a June 28, 1934 priority date because making land available to others for livestock grazing, plus comprehensive management of permittees, livestock, grazing land, and stockwater, is a valid appropriation of stockwater under Idaho law.

C. Joyce Is Not Entitled To The Water Right It Claims On The Public Lands

1. Joyce Failed to Prove That Its Predecessors In Interest Satisfied Idaho's Test Of A Valid Appropriation

Before the Taylor Grazing Act, the local custom was for stockgrowers to turn out cattle from winter range in the early spring. Cattle, in search of grass and water, would roam at large following the snow melt to the tops of ridges and drift as far as Reno, Nevada. Cattle were rounded up by the ranchers, and cowboys would ride from ranch to ranch in search of cattle that might belong to a particular stockgrower. See Testimony of Gene Lewis, T. Tr. at 315-317. Itinerant cattle and sheep herdsman competed for forage and stockwater by grazing livestock on the same public lands. Exhibit 88 at 28-29. Local stockgrowers did not attempt to exclude anyone from using the public lands for livestock grazing. Testimony of Michael Boltz, T. Tr. at 444; Deposition of Gene Lewis at 15, lines 8-25.

During the BLM's grazing preference adjudications, Joyce's predecessors did not offer water rights as dependent property base property. See Exhibits 80, 82, 83, 84, 85, 86. There is no evidence in the trial record that any stockgrower depended upon water rights in Jordan Creek to support a livestock operation on public lands. Exhibit 22; see generally Testimony of Michael Boltz, T. Tr. at 437-533. When, in their initial applications for grazing permits or subsequent applications for grazing permits, stockgrowers were specifically asked if they owned water rights that supported livestock operations on public lands, not one of the competitors for grazing preferences said they owned any water rights in Jordan Creek. Exhibits 82, 83, 84, 85, 86. As late as April 6, 2000, Joyce offered ranch land, not water rights, as base property for Joyce's grazing preference. Exhibit 23. Hence, there is no evidence in the trial record that Joyce, or Joyce's predecessors, established or defended a stockwatering right. SMRR at 20.

In summary of the pertinent findings of fact, the Special Master observed:

Joyce Livestock offered the very evidence that rebuts its claim. It proved that multiple ranchers grazed livestock along Jordan Creek for decades in direct competition with Mary and Anna Joyce and their successors. Admittedly, nearly all of the ranches were ultimately consolidated in the Joyce ranch, but from 1898 until 1934, and even later, there were no fences, the cattle followed the green grass and different brands watered along Jordan Creek. With that in mind, it is difficult to argue that an 1898 instream stockwater right along Jordan Creek ever existed because no one recognized or defended such a right. The logical conclusion is that no one in Joyce Livestock's chain of title acquired such a right – the water was shared by all grazers with access to the land – because the concern of all grazers from 1898 through the present was access to graze on federal public land, not water rights on the federal public land.

SMRR at 22. The Special Master correctly concluded that “[a] fundamental principle of water law is that mere use of water in common with others does not constitute an appropriation. Intent to appropriate, along with diversion for a beneficial use, is an important element of a valid appropriation: ‘The three elements were designed to prevent fraud and to provide some order in an otherwise unstructured system.’ David H. Getches, *Water Law in a Nutshell* (2d Ed., 1990), at 88.” SMRR at 20 n.28; accord Robinson, 218 P. at 1042-1043 (stockgrowers who allowed their livestock to roam at large on public lands and use grass and water in common with other stockgrowers did not establish stockwatering rights on public lands) and Hidden Springs Trout Ranch, Inc., 619 P.2d at 1132-1133 (intent, diversion and beneficial use); cf. United States v. Schmutz, 56 F.2d 269, 270 (D. Utah 1932) (no water right where claimant lacks lawful possession of public lands under homestead acts or mining law); cf. 2 R. BECK, WATERS AND WATER RIGHTS § 12.02(c)(1) and n.52 (2000) (no water right can result where this is no permanency of beneficial use because, “[i]f a water user could be dispossessed at any time, the beneficial use would be illusory.”).

Use of public lands for forage and water, to the exclusion of others, has, in two cases, provided a sufficient basis to satisfy the test of a valid appropriation. Hunter v. United States, 388 F.2d 148, 153 (9th Cir. 1967); Steptoe Live Stock Co. v. Gulley, 295 P. 772, 773 (Nev. 1931); see contra Schmutz, 56 F.2d 270. However here, the evidence is that no one in Joyce's chain of title intended to use Jordan Creek as a water source year after year. The local custom was for stockgrowers to turn out cattle from winter range in the early spring, then cattle, in search of grass and water, would roam at large following the snow melt to the tops of ridges and drift as far as Reno, Nevada; the cattle were eventually rounded up by the stockgrowers; and, cowboys would ride from ranch to ranch in search of cattle that might belong to a particular stockgrower. See Testimony of Gene Lewis, T. Tr. at 315-317. Thus, there is no proven permanency to the diversion and beneficial use that could result in an established stockwater right because all stockgrowers were, in a sense, itinerant stockgrowers whose livestock used Jordan Creek only by virtue of their livestock roaming at large, by chance using the Jordan Creek drainage, and drifting as far as Reno, Nevada in search of such grass and water. See 2 R. BECK, WATERS AND WATER RIGHTS § 12.02(c)(1) n.52 (2000) (water right not established where there is no permanency to the beneficial use); see also LU Decision at 18 ("significant distinction between a nomadic or itinerant livestock grazer on the public domain and the homesteader who historically and regularly used adjacent or nearby public rangeland in conjunction with the homesteaded property to support a livestock operation.").

Moreover, the public lands in the Jordan Creek drainage are neither adjacent nor nearby any of the homesteads that comprise the Joyce Ranch. Indeed, the Shea homestead is separated from Jordan Creek by a distance of five miles. Exhibit 96. All of the homesteads are separated

from Jordan Creek by a substantial ridge and a number of patented mining claims. Exhibit 96.

The nearby and adjacent public lands lie along Sinker Creek and its tributaries. Exhibit 96.

Joyce completely failed to prove, by a preponderance of the evidence, that its predecessors satisfied the test of a valid appropriation. Thus, the water claimed was still available to all who wished to use it. Neither Joyce, nor any of Joyce's predecessors, ever offered water rights as base property to gain an advantage over others in the various grazing preference adjudications. As late as April of 2000, Joyce offered only privately owned ranch land as base property and did not acknowledge water rights on public lands that might qualify as base property. Exhibit 23. Based upon the evidence in the trial record, the Special Master logically found that no one ever sought, acknowledged, established, or defended water rights on public land. SMRR at 20.

Joyce attempts to salvage its claim by contending that use of stockwater on the open, unenclosed public lands, in common with other stockgrowers, constitutes a valid appropriation because stockwater can be appropriated from one source by multiple stockgrowers. Joyce's Memo at 11-13. The Special Master correctly determined that Joyce presented no evidence that "Joyce Livestock's grantors intended to appropriate the water of Jordan Creek for instream stockwatering. Hence, there was no water right to convey and there is no evidence that they intended to convey such a right." SMRR at 20. The Special Master found that "[i]f any one rancher appropriated the water of Jordan Creek as early as 1898, as Joyce Livestock argued, then that 'water right' has been ignored for over 100 years - only grazing preferences under the Taylor Grazing Act were sought and recognized." SMRR at 20 n.28. The Special Master observed that Dr. Chad C. Gibson, Joyce's own witness, stated:

that in his experience, “ranches were bought and sold and traded as a unit, which included all of the, the [sic] necessary resources to operate that ranch.” TTr, at 586-588. “[A]nd the ranch unit would have been essentially worthless if it didn’t have a right to, to [sic] use water that went with whatever range land that was associated with that ranch unit.” TTr, at 590. But Dr. Gibson acknowledged that he based much of his understanding on the records of the 1936 Salt Lake City District Advisor’s Conferences. Those records reveal that the advisors’ concerns were about access to grazing on federal public land, not water rights. The conclusion, then, is that when ranches were bought, sold and traded around 1936, the real value of the “ranch unit” was its appurtenant grazing preferences or privileges (access to grazing on federal public land) - not water rights on the federal public land.

SMRR at 21; see SMRR at 10-12. The Special Master found that “[n]one of Joyce Livestock’s grantors claimed water rights on federal public land as part of their base property.” SMRR at 21; see SMRR at 9, 13-15. These findings of fact led the Special Master to conclude that “no one recognized or defended such” a stockwatering right in Jordan Creek, and “no one in Joyce Livestock’s chain of title acquired such a right” SMRR at 22. The Special Master undoubtably rejected Joyce’s contention that the local custom of turning out livestock in the spring, allowing them to roam at large alongside other local and itinerant stockgrowers’ livestock to follow the green grass and water, and drift as far as Reno, Nevada could result in a valid stockwatering right because there was simply no evidence “that any one rancher intended to appropriate the water.” SMRR at 20 (emphasis added).

In sum, the evidence in the trial record led the Special Master to conclude that the water in Jordan Creek was shared equally by all those using the Jordan Creek drainage for livestock grazing. Since there was no evidence that any one rancher intended to establish a stockwatering right or defended a stockwatering right, there was no stockwatering right to convey to Joyce. The water was still public water and anyone using public lands for grazing was free to water livestock

in Jordan Creek. See Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648, 652-653

(Utah 1937). Because the Special Master correctly applied the law to the facts found, the District Court should sustain the SMRR.

2. Judicial Precedent Relied Upon By Joyce
Does Not Support Joyce's Arguments

Joyce cites Steptoe Live Stock Co., 295 P. 772 in support of its arguments. Joyce's Memo at 12. The Nevada Supreme Court's opinion in Steptoe Live Stock Co. actually supports the Special Master's conclusions here. The facts, as found by the Nevada Supreme Court, evince clear notice that the stockgrower intended to divert water for a beneficial use, even though there was no actual diversion device:

[F]or more than forty years last past the plaintiff and its predecessors in interest have had and now have a subsisting right to water in excess of 500 head of live stock at and upon the water courses in question, and have watered their live stock in sufficient numbers to utilize substantially all that portion of the public range available to live stock watering at such places; . . . that the use of said waters and range by such live stock of the plaintiff and its predecessors during said period was exclusive, except as to other live stock that would drift or stray in, and that said right on the part of the plaintiff to water their said live stock in sufficient numbers to utilize substantially all that portion of the public range readily available to live stock watering at said places was recognized by other owners of live stock whose stock drifted or strayed to such places.

Steptoe Live Stock Co., 295 P. at 773 (emphasis added). The Nevada Supreme Court declined to follow the Utah Supreme Court decision in Robinson, 218 P. at 1042-1043 (holding that the claimant was not entitled to a water right because the claimant merely allowed livestock to roam at large on unenclosed public lands using grass and water in common with other stockgrowers' livestock), observing that the facts in Robinson "failed to show an exclusive right in plaintiff to the use of the waters in question and the public range thereabouts." Steptoe Live Stock Co., 295 P. at 775. The Nevada Supreme Court suggested in dicta that they would follow the holding in

Robinson where, as here, the “proof failed to show an exclusive right” to use the water and the public range adjacent to the water source. Steptoe Live Stock Co., 295 P. at 775.

Joyce also cites Hunter, 388 F.2d 148, in support of its arguments. Joyce’s Memo at 12-

13. The pertinent conclusions of law and findings of fact, as stated by the Hunter Court, are as follows:

To constitute an appropriation, therefore, there must co-exist ‘the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use.’

In this case there is no lack of proof of the asserted appropriation; to the contrary, a clearer showing could hardly be imagined. The Hunters’ intent to use the water is made plain by the evidence. Year after year for nearly a century they have pastured their livestock in this isolated enclave, surrounded by miles of impassable desert; except for the water provided by these springs and the stream, there has been none other available to keep their animals alive.

...

And their use has been prior in point of time to that of any other person; indeed it appears that few people have ever ventured into this desolate area and there have never been any users other than the Hunters.

Hunter, 388 F.2d at 153 (citations omitted) (emphasis added). Hunter’s open, physical demonstration of intent to appropriate water was manifested through nearly a century of pasturing livestock in an isolated enclave, surrounded by miles of impassable desert, with virtually no use of the public range and available water by anyone else. In contrast, the evidence in this case shows that public lands and water in the Jordan Creek drainage were used in common with other stockgrowers’ livestock that was turned out from winter range to roam at large and drift as far as Reno, Nevada. In this case, unlike in Hunter, there is simply no evidence that any one rancher ever openly or physically demonstrated an intent to establish a stockwatering right.

Joyce argues that the 1998 Basin 57 Order at 2-5 is law of the case that holds private ranchers are entitled to a water right on public lands simply because predecessors used public lands for livestock pasturage. Joyce's Memo at 11-12 and 18. The 1998 Basin 57 Order does not address the specific issue decided by the Special Master in this case, i.e. Joyce's predecessors did not acquire a stockwater right because there was no evidence that any of Joyce's predecessors intended to appropriate the water in Jordan Creek for instream stockwatering.²⁹ Therefore, the 1998 Basin 57 Order is not law of the case that should be applied here. Sun Valley Ranches, Inc. v. Prairie Power Co-op, Inc., 856 P.2d 1292 (Idaho Ct.App. 1993) (Order is not applicable to subcases where the issues are different than those decided by the District Court and Order is not applicable to subcases where the facts are substantially different); see Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995), cert. denied, 516 U.S. 1029 (1995).³⁰

²⁹ In its 1998 Basin 57 Order, the District Court criticized two theories not advanced by the United States here: (1) "that a private party operating on the public domain must have exclusive 'dominion and control' of a water source to perfect a water right at that source[.]" and (2) that only the United States "has exclusive dominion and control of the public domain and, therefore, only it can perfect water rights on the public domain." Id. at 2-3. These theories were criticized because they would "create[] a quasi-riparian legal theory whereby it is the only party that may own stock water rights on the public domain . . . , nullify several Congressional enactments specifically recognizing a private party's ability to perfect water rights located on the public domain . . . , override established legal precedent . . . , [and] foreclose any ownership of stock water rights located on the public domain." Id. at 3-4. Hunter, supra. and Steptoe Live Stock Co., supra. state that ranchers using public lands for pasturage prior to enactment of the Taylor Grazing Act could perfect stockwatering rights on public lands. The United States does not dispute that stockgrowers can perfect stockwatering rights on public lands, provided the evidence of intent meets or exceeds the standards set forth in Hunter and Steptoe Live Stock Co.

³⁰ Moreover, neither Hage v. United States, 51 Fed.Cl. 570 (2002), nor Special Master Cushman's Report and Recommendation, Findings of Fact and Conclusions of Law in Subcases 55-10288B et al., as argued in Joyce's Memo at 12 and 14-16, are judicial precedent that should be followed here. See United States' Memorandum in Opposition to Joyce Livestock Company's Motion to Alter or Amend at 7-8 and 14-15. Indeed, the District Court's LU Decision overruled

(continued...)

**D. In The Alternative, Joyce's Priority Date Should
Not Be Earlier Than September 24, 1951**

As demonstrated supra. at 10-15, Joyce's predecessors in interest to its grazing preference are Shea, Joyce Brothers Livestock Co., Nettleton Brothers, Jean Heazle, and Jump Creek Sheep Co. Only Shea, and Jump Creek Sheep Co. specifically listed public land grazing use in the Jordan Creek drainage during the priority years. Shea is Joyce's only predecessor who claimed grazing use of public lands in the Jordan Creek drainage and conveyed real property to Joyce, which resulted in a transfer of a grazing preference and AUMs to Joyce.

Shea owned and operated a livestock business in the Sinker Creek and Jordan Creek watersheds from 1928 to 1938. The BLM adjudicated grazing preferences and awarded Shea 81 animal units that were attached to his ranch land base property. When specifically asked if he owned or controlled water sources needed or used in his livestock operation, Shea stated that he owned or controlled "springs and creeks running on and through the ranches," and such water rights are not located in the Jordan Creek drainage. Exhibit 87 (BSN 2307). Shea did not offer water rights as base property, and the BLM did not find that Shea's livestock operation depended on water rights in Jordan Creek when grazing preferences were adjudicated.

In 1938, Shea leased his ranch land to Augustine Salove, and Shea's AUMs were transferred to Salove. Testimony of Michael Boltz, T. Tr. at 462-463; Exhibit 94. From 1938 through 1951, Salove used the AUMs in his sheep ranching operation and, from 1938 through 1951, neither Shea nor Salove used Jordan Creek for stockwatering. Testimony of Michael Boltz, T. Tr. at 464-467; Testimony of Gene Lewis, T. Tr. at 327-328. Shea abandoned any

³⁰(...continued)

water right he might have had in Jordan Creek when he sold his livestock operation in 1938 and leased his ranch land to Salove who did not use Jordan Creek as a livestock watering source for a period of 13 years. See Colthrope v. Mountain Home Irrigation Dist., 157 P.2d 1005 (Idaho 1945).

On September 24, 1951, Shea conveyed his ranch land to Joyce Livestock Company and J.H. Nettleton. The BLM deducted 81 animal units from Salove's grazing preference, then approved a transfer of 40 animal units to Joyce Livestock Company and 40 animal units to J.H. Nettleton. Exhibit 75 (BSN 2825). If, *arguendo*, Joyce has a valid water right that was conveyed to Joyce as an appurtenance to the Shea homestead, the absolute earliest priority date that Joyce can establish is September 24, 1951, the date Shea's grantees first could have legally accessed the stockwater in Jordan Creek. LU Decision at 22-27.

On October 31, 1976, J.H. and Edith Nettleton conveyed the property to Joyce Livestock Company, a co-partnership. Exhibit 1, BSN 100196-100197. On August 24, 1985, Joyce Livestock Company, a general partnership conveyed the property to Joyce Livestock Company, a limited partnership. Exhibit 1, BSN 100232-10233. There is no document of conveyance in Joyce's chain of title that contains any specific or express description of any water rights located on the public lands within the Allotment boundary. See generally Exhibit 1. Paul Nettleton is not aware of any documents in Joyce's entire chain of title that specifically describe water rights located on public land. Nettleton Depo. at 14, lines 2-9. The most recent warranty deeds conveying property from Helen Nettleton to Joyce and conveying property from Joyce Livestock Company, a general partnership to Joyce, do not contain any description of water rights at all. Exhibit 1, BSN 100073-100076 and BSN 100117-100118. If, *arguendo*, Joyce's claimed water

right is valid but was not conveyed as an appurtenance to the Shea homestead, then Joyce has an independent water right and the priority date should be not earlier than August 24, 1984, the earliest date Joyce could legally access water in Jordan Creek. Olson, 666 P.2d at 190-191 (water right is real property and conveyance can only occur in writing) and Gard, 123 P. at 502; McGinness, 55 P. at 1021-1022 (priority date is the date the grantee took possession); 1998 Basin 57 Order at 10 (adopting and incorporating by reference Special Master Haemmerle's Findings of Fact and Conclusions of Law, Subcases 57-10486 et al at 4 (Joyce established independent water rights on public lands. "Because the alleged water rights claimed on the public domain were never legally conveyed, Joyce Livestock Co., Ltd., cannot lay claim to any water right located on the public domain prior to August 24, 1985"))).

E. Federal Law Recognizes Water Rights That Have Vested And Accrued Under State Water Law

Joyce argues that the 1866 Mining Act, the Desert Land Entry Act, and the Taylor Grazing Act support Joyce's contention that their predecessors appropriated water from the claimed source. Joyce's Memo at 17-18. This argument "encounters the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that grants must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language - - inferences being resolved not against but for the government." Caldwell v. United States, 250 U.S. 14, 20 (1919); Walbridge v. Robinson, 125 P. 812, 816 (Idaho 1912) ("A gift or grant of state property or a public franchise, or a right which must emanate from the sovereignty representing the whole people, ought not to arise by mere inference or failure of the sovereignty to speak on the subject. On the other hand, a failure to speak on the subject or to confer the right in specific terms ought to be construed in favor of

the state and against those claiming the right.”). Each federal statute cited by Joyce recognizes only those water rights which have vested or accrued in accordance with state water law. See e.g. 43 U.S.C. § 661 (“Whenever by priority of possession, rights to the use of water . . . [has] vested and accrued . . . [under] local customs, law, and decisions of courts”); 43 U.S.C. § 315b (“nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water . . . which has heretofore vested or accrued under existing law validly affecting the public lands”). Even though Joyce invokes the 1866 Mining Law as authority that supports appropriation of instream stockwatering rights on public land, Joyce failed to present any evidence that any predecessor established a stockwater right by “priority by possession” or that it was the local custom or law that such rights could have vested.^{31/} Thus, whether Joyce’s predecessors satisfied the test of a valid appropriation, then conveyed the resulting water rights to successors, is not recognized as a given by federal law, as Joyce argues here. The fact is, Joyce failed to carry its burden of proving that its predecessors intended to appropriate a stockwatering right, and then, conveyed a water right to successors.

The Mining Law, the Desert land Act, and the Taylor Grazing Act do not beg the question of whether users of public lands complied with state law. In fact, federal law recognizes that such water rights can vest or accrue on public lands only when the claimant brings himself within the purview of a statute that would allow a citizen to take lawful possession of public lands

³¹ In the LU Decision, the District Court relied upon federal statutes to reach a conclusion that a “private party could appropriate a water right on the public domain without having a possessory or ownership interest in the land.” LU Decision at 17. The federal statutes relied upon by the District Court only recognize that by “priority of possession, rights to the use of water . . . [has] vested and accrued . . . [under] local customs, law, and decisions of courts” 43 U.S.C. § 661. In this case, there is no evidence that a stockwatering right vested in Joyce or Joyce’s predecessors by priority of possession, local custom, Idaho law, or decisions of the courts.

(Schmutz, 56 F.2d at 270), or when the water right claimant is able to show a nearly exclusive use of the public lands surrounding water sources (Hunter, 388 F.2d at 153). The federal statutes cited by Joyce do not recognize that such rights did vest or accrue under existing law for those merely using water on federal land.

The practical reality of using the public lands for livestock pasturage under a license, implied or express, strongly suggests that there was no local law or custom allowing appropriation of instream stockwater rights that designate public lands as POUs. Stockgrowers operated with full knowledge that they could be preempted at any time by those who brought themselves within the purview of the homestead acts and mining laws. Indeed, the stockgrowers in Joyce's chain of title to ranch land established homesteads along dependable water sources in the Sinker Creek drainage long after livestock began grazing public lands in Owyhee County. There is no evidence that any such homestead entry, or any mining claim in the Silver City area, were entered subject to instream stockwatering rights. Therefore, there is a strong inference that it was not the local law or custom that stockgrowers established instream stockwater rights on public lands.

Public lands along dependable water sources in Idaho that were historically and routinely used for livestock grazing were entered and preempted by literally thousands of homestead entries and mining claims. There is not one shred of evidence that stockgrowers in Owyhee County, or anywhere in Idaho, ever asserted that homestead entries and mining claims were interfering with pre-existing stockwatering rights. Since the trial record lacks any evidence whatsoever that stockwater rights were established by priority of possession or that it was the local law and/or custom for stockgrowers to establish instream stockwatering rights on public

lands used for grazing, either before or after the Taylor Grazing Act was enacted, it was completely proper for the Special Master to find that no such stockwatering right was ever established, defended, sought, or conveyed to successors. SMRR at 20 n.28 and 22. The evidence clearly shows that only grazing preferences were sought, established, and transferred in accordance with the Taylor Grazing Act and its implementing regulations. As Chad Gibson, Joyce's own witness, had to admit, it was access to public land that contained forage and water that was important to stockgrowers, not water rights that designated public lands as POUs. SMRR at 21; Testimony of Chad Gibson, T. Tr. at 641.

Joyce still has access to public land pursuant to grazing permits issued by the BLM under the Taylor Grazing Act. Lack of a water right that designates public land along Jordan Creek as POUs will not prevent Joyce from operating a livestock business as a ranch unit that includes livestock access to the Silver City Allotment. Furthermore, Joyce can still offer the ranch, as a ranch unit, as collateral for bank loans, and can still convey the ranching operation as a ranch unit without loss of value. Any argument to the contrary is not supported by the trial record. Because the SMRR is supported by the evidence in the trial record, and the law was correctly applied to the facts found, the SMRR should be sustained by the District Court.

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V. CONCLUSION.

For the reasons stated above, the United States is entitled to partial decrees and Joyce's water right claim should be dismissed.

DATED this 31st day of March 2005.

Respectfully submitted,

UNITED STATES OF AMERICA

A handwritten signature in cursive script, reading "Larry A. Brown", is written over a horizontal line.

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on March 30, 2005, I served a true and correct copy of the foregoing **UNITED STATES' RESPONSIVE BRIEF IN OPPOSITION TO JOYCE LIVESTOCK'S CHALLENGE; SUBCASES 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:

Original to:

Clerk of the Court
Snake River Basin Adjudication
253 3rd Avenue North
Twin Falls, ID 83301

Copies to:

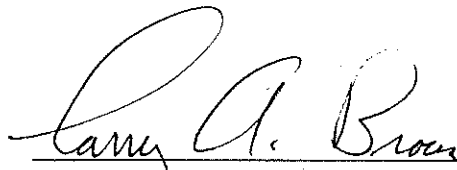
U.S. Department of Justice
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