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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

Case No. 39576

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

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

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I. INTRODUCTION

In its Response Brief, the United States relies on legal theories that are no longer law of the case, and arguments that have no basis in law or fact. Most notably, the United States all but ignores guiding principles set forth by the SRBA Court in the recent LU Ranching Decision. *See In Re: SRBA Subcase 39576, Memorandum Decision and Order on Challenge*, Subcase Nos. 55-10288b et al. (January 4, 2005) ("LU Ranching Decision"). Under current applicable law and the evidence in this case, the United States' beneficial use claims should be denied in their entirety and the Special Master's recommendation to disallow Joyce Livestock's claims reversed.

II. ARGUMENT

A. The United States' Arguments in Support of its Claims Have No Basis in Law or Fact.

In reviewing the United States' Responsive Brief, it is ironic that the United States actually acknowledges, through extensive citation to legal authority, that an appropriative or beneficial use water right is obtained by diversion from a water course and the actual application of water to a beneficial use, but then offers no such evidence of actual diversion and use of water to support its own claims. *See* United States' Responsive Brief, p. 15-16. The United States offered no evidence that it diverted water from Jordan Creek, put forth no evidence the United States actively applied the water to a beneficial use, and, importantly, no evidence of an "open, physical demonstration that gives notice to others that a person intends to appropriate water for his own use." *See* United States' Responsive Brief, p. 16, *citing* 3D. Getches, Water Law in a Nutshell, p. 88-91 (3rd ed., 1977). The only theory relied upon by the United States in support of its beneficial use claims is that management of *land* equates to a beneficial use of *water*. This theory has no basis in either law or fact.

As previously briefed, the law in Idaho is clear: it is by actually diverting and applying water to a beneficial use that a legal beneficial use appropriation is made. *See Cantlin v. Carter*, 88 Idaho 179, 186 (1964). For an instream stockwater right, the SRBA Court has held that placing stock the claimant owns or operates near a water source and the drinking of water by the stock is the act constituting an appropriation of water. *See In Re: SRBA Case No. 39576*, Special Master's Order

Denying Motion to Alter or Amend, p. 7 (April 15, 1998), *affirmed In Re: SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998). Further, this Court has rejected the arguments asserted by the United States that management of the rangeland constitutes an appropriation of water. As explained in a prior opinion:

> [T]he fact that the United States issues permits to operate on public lands does not make the United States the appropriator of water rights perfected by permittees. Second, the fact that federal land is regulated by Congress in no way evidences an intent by Congress to make the United States the appropriator of all water rights located on the public domain ... Furthermore, the fact that the United States gives "permission" to stockmen has no relevance to a claim that the United States is the appropriator under state law.

Id., at p. 8-9. As the SRBA Court has repeatedly recognized, even as recently as January 2005, if the claimant is not the actual appropriator of water, "the *only* way the nonappropriating party can legitimately claim the right is through an agency theory or by a showing that the right was conveyed from the party that actually appropriated the right." *See LU Decision,* p. 12 (*emphasis added*), *quoting Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, Subcases 57-04028B *et al.* (September 30, 1998)[1/]; *see also In Re: SRBA Case No. 39576*, Special Master's Order Denying Motion to Alter or Amend, p. 9 (April 15, 1998), *quoting First Sec. Bank of Blackfoot v. State*, 49 Idaho 740, 746 (1930) ("If the water right was initiated by the lessee, the right is the lessee's property unless the lessee was acting as [an] agent of the owner.") The United States is not the actual appropriator of water. *Id.* Accordingly, under the law of the case and the law of state of Idaho, the only way that it can support its beneficial use claim is either through an agency theory or by showing that the right was conveyed to it by Joyce Livestock or its predecessors in interest. The United States has not claimed an agency theory, and no water rights were conveyed

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[1/] The United States claims that this ruling from the September 30, 1998 *Order Denying Challenges and Adopting Special Master's Reports and Recommendations* is not law of the case because the United States was ultimately decreed a water right for its stockwater claims. *See* United States' Responsive Brief, p. 24. However, the United States was only awarded a stockwater right because of a settlement reached between the United States and the State of Idaho. Further, as noted above, the SRBA Court in the *LU Decision* specifically recognized the Court's September 30, 1998 *Order*. *See LU Decision*, p. 12.

to it by Joyce Livestock or its predecessors, and no where is "management of the rangeland" identified as a way for a nonappropriating party to claim a water right based on the constitutional or beneficial use method.

It is telling that the United States fails to cite to a single case in which a court holds that "management of the rangeland" constitutes a beneficial use of water sufficient to support a common law appropriative water right claim. The United States does cite to *State of Nevada v. Morros*, 104 Nev. 709 (1988), but that case does not deal with constitutional or common law based beneficial use water rights, but rather statutory water rights under the laws of the state of Nevada. In *Morros*, the United States filed water right applications pursuant to Nevada statute, and the case derived from an order by the Nevada State Engineer granting those water right applications. *See Morros*, 104 Nev. 709, 711-712 (1988). In granting those applications, the Court considered whether the United States qualified for statutory water rights based on Nevada statutory law and whether the United States' water right application filed pursuant to Nevada statute should be granted or denied. The *Morros* case, while instructive on interpretation of Nevada statutes, does nothing to clarify whether under Idaho law the United States should be entitled to a constitutional or beneficial use water right.

Similar to its attempt to bolster it's beneficial use claim through citation to the *Morros* case, the United States turns to Idaho statutory authority to support its beneficial use claim forgetting, apparently, that it has not asserted a statutory based claim in this litigation. In its argument, the United States asserts that the elements under each are the same. *See* United States' Responsive Brief, p. 21. However, the elements are fundamentally different. A water right based on the beneficial use or constitutional method of appropriation is initiated by actually diverting water and placing it to a beneficial use. In contrast, in Idaho a statutory based water right is initiated by filing a paper application with a government agency. *See R.T. Nahas v. Hulet*, 114 Idaho 23, 26-27 (1988) (holding that beneficial use and statutory methods of acquiring a water right are separate and distinct); *see also* I.C. 42-113 and 42-501 (filing an application is a prerequisite to obtaining a statutory right). Finally, the fact that the United States could have obtained a statutory based water right is irrelevant when there has been no attempt to apply for or claim such a right.

The United States also asserts that Joyce's argument that the United States' claim is akin to a

reserved water right claim is a "red herring." *See* United States' Responsive Brief, p. 22. However, if you look at the substance of the United States' arguments, that is exactly what they are claiming even though there is no legal basis for that argument. The United States argues that in order to fulfill its obligations under the Taylor Grazing Act for the management of livestock, it must have a stockwater right. *See* United States' Responsive Brief, p. 9, 22. As previously briefed, the issue of whether it is necessary for the United States to hold water rights in order to fulfill its mandate under the Taylor Grazing Act is irrelevant unless what is being claimed is a federal reserved water right, and even then under *United States v. New Mexico*, that theory would have to be rejected. *See United States v. New Mexico,* 438 U.S. 696, 715-717 (1978). Similar to the *New Mexico* case, there is every indication that Congress intended the water supply to be allocated among private appropriators under state law, and no indication that in the Taylor Grazing Act that Congress foresaw any need for the BLM to allocate water for stockwatering to its permittees. *Id.*; *see also* 43 U.S.C. § 315.

The United States is correct that if it wants to acquire a stockwater right, it must do so in the same manner as any other party pursuant to state law. *See* United States' Responsive Brief, p. 22 - 23, *citing United States v. New Mexico*, 438 U.S. at 702-703. Under Idaho State law, the United States is not the actual appropriator of stockwater on federally administered allotments. *See In Re: SRBA Case No. 39576, Order Denying Motion to Alter or Amend*, p. 8-9 (April 15, 1998); *see also In Re: SRBA Case No. 39576, Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, p. 10 (September 30, 1998). Any other party in the state of Idaho who is not the actual appropriator of water can only acquire a beneficial use water right through an agency theory or by showing that the right was conveyed from the party who actually appropriated the water. *Id.; see also LU Decision*, p. 12. The only other avenue available is to file an application for a statutory based water right pursuant to Idaho statute. In this case, the United States has not claimed an agency theory, has not claimed that Joyce or its predecessors conveyed their water rights to the United States, and the United States has not availed itself of Idaho statutory law by filing an application for a water right permit. Given such failings, any other non-appropriating party would be denied a water right. The result should not be any different in the present case simply because

the non-appropriating party is the United States.

B. The United States' Arguments Regarding Joyce's Claims Rely on Legal Theories that Have Been Rejected by the SRBA Court.

The applicable law applied to evidence of historic use by Joyce Livestock and its predecessors in interest has been detailed at some length for the Court both in Joyce Livestock's Opening Brief in Support of Challenge and Joyce Livestock's Supplemental Opening Brief in Support of Challenge and, therefore, the analysis will not be repeated here. *See* Joyce Livestock's Opening Brief; *see also* Joyce Livestock's Supplemental Opening Brief, p. 6-15. However, there are issues raised by the United States in its Responsive Brief, and matters glaringly omitted from the United States' Responsive Brief, that warrant further discussion. In particular, the United States relies throughout its argument on erroneous statements of fact and on legal theories that have been rejected by this Court.

The United States claims in its argument that there is no evidence that Joyce Livestock's predecessors other than Shea watered livestock along Jordan Creek. *See* United States' Responsive Brief, p. 11-12. This is contrary to the evidence presented at trial. Mr. Gene Lewis who worked for Mr. Shea and the Nettletons, testified that in the early 1930s, the Nettletons, Sheas, Joe Mitchell (whose ranching interests were eventually purchase by the Nettletons) all ran cattle in the Silver City area and watered cattle from Jordan Creek. *See* Testimony of Gene Lewis, Trial Transcript, p. 314-318. There also was lengthy and very specific testimony provided by Paul Nettleton at trial regarding the consolidation of ranching operations that used Jordan Creek into Joyce Livestock. Mr. Nettleton specifically testified that all of the entities that grazed in both the Jordan Creek and Sinker Creek areas have now been consolidated into Joyce Livestock Company. As explained by Mr. Nettleton:

> A. All of the entities that grazed in the Jordan Creek/Sinker Creek area have now been picked up by Joyce Livestock Company ... I'm talking about those that had a base property of, you know – and I mean before the Taylor Grazing, not just after it – that those that had owned property in the area, that had a base ranch and had a, a valid interest in the surrounding range lands to their ranch, are now a part of Joyce Livestock Company.
> Q: And that includes the people that historically were in Jordan Creek; is that correct?
> A. Yes. That would include the Sheas, the Jump Creek Sheep Company, Augustine Salove ... of course, the Joyces, the Nettletons ...

Q. And when you say before the turn of the century, you're talking not about this century, your talking about before 1900; is that right?
A. Yeah.

Testimony of Paul Nettleton, Trial Transcript p. 659-661. Mr. Nettleton goes on to testify again about the family history of the Joyce Livestock operation, and the use of Jordan Creek by Joyce Livestock's predecessors in interest, including his father. Mr. Nettleton testified:

Q. And as part of that ranch and based on your discussions with your father and your personal knowledge, did that ranch include ranching in the areas, including the area we're talking about here in this litigation?
A. Yes.
Q. And so, after that occurred, and in your lifetime, you continued to run cattle in Jordan Creek?
A. Yes.
Q. And did your father continue to run cattle in Jordan Creek?
A. Yes. ...
Q. And do you know whether your family continued operating and running their cattle in the same areas that Mr. Shea did?
A. Yes.
Q. And did that include Jordan Creek?
A. Yes.
Q. Do you still run cattle in Jordan Creek?
A. Yes.
Q. Did his uncle run cattle in Jordan Creek?
A. Yes.
Q. Did the Joyces run cattle in Jordan Creek in the beginning?
A. Certainly, yeah.

See Testimony of Paul Nettleton, p. 680-681.

In addition to the above, the United States' concedes in its brief that the Shea ranching operation used the waters of Jordan Creek. *See* United States' Responsive Brief, p. 12-13 (acknowledging Shea's use of Jordan Creek prior to 1934). In addition, the United States' own witness, through reference to the Joyce Brothers Livestock Company grazing application, testified that the application identified use along Jordan Creek by Joyce Brothers Livestock Company:

Q: ... Joyce Brothers Livestock Company filed an application on June 2nd. That's Bates stamp number 1150. Do you have that one?
A. Yes I do.
Q: And that's the one that lists the, specifically lists the area that would include Jordan Creek; is that correct? If you look at the legal description.
A. Yes. It's based on township and range descriptions.

See See Trial Testimony of Michael Boltz, p. 497. Like many of the arguments raised by the United States, there is no support for its assertion that the record lacks evidence of historic use of Jordan

Creek. To the contrary, as found by the Special Master, multiple ranchers grazed livestock along Jordan Creek for decades with Anna and Mary Joyce, Joyce Livestock's earliest predecessors in interest, and nearly all of those ranches that made use of Jordan Creek ultimately were consolidated into Joyce Livestock. *See* Special Master Report and Recommendation, p. 22.

The United States asserts that "because the Special Master correctly applied the law to the facts found, the District Court should sustain the SMRR[2/]." *See United States' Responsive Brief,* p. 31. The problem with the United States' position is that the Report and Recommendation was decided before the *LU Decision*, and both the law applied by the Special Master and the arguments continued to be advanced by the United States are at odds with the law of the case regarding stockwater rights appropriated by private parties on public lands. First, the United States is wrong as a matter of law when it argues that unity of title is required to obtain a water right and it is wrong when it argues that exclusive use of water sources is required.

The United States continues to rely on its argument that 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 a place of use and the water right. *See* United States' Responsive Brief, p. 17. This is not the law. In the *LU Decision*, this Court explicitly recognized private ownership of water rights on federal land, and that the water rights on federal land can be transferred as an appurtenance to the base ranch property without specific reference to the water right. The Court wrote:

> Judge Wood previously ruled in these subcases that given the relationship between public land and patented property used in connection with a ranching operation, and the fact that no physical diversion is required for a stock water right as a matter of law, it would be possible for an instream stock water right on public land to transfer as an appurtenance to the patented or base property, even though the place of use for the right is located on public land ... One of the exceptions to the writing requirement for transferring a water right is the case where the title to the water right passes to the grantee with the sale of the land as an appurtenance.

LU Decision, p. 22-23.

Second, the United States also is wrong in its attempts to place Joyce and its predecessors in the same class as itinerant cattlemen or stockgrowers. *See* United States' Responsive Brief, p. 26.

[2/] Special Master Report and Recommendation

As this Court noted, the case of cattle ranchers who used the range as part of their base ranch operations and who applied for and were granted grazing preferences as a result of that use, are entirely distinguishable from itinerant herdsmen. The Court held:

> In this Court's opinion, the customary and routine use of adjacent or nearby public lands in connection (with) homesteaded property to sustain a livestock operation, and the United States' acknowledgment of prior grazing use in awarding grazing preferences is distinguishable from the circumstance where on a single occasion a nomadic or itinerant stock raiser used available land and water sources in common with the public.

See LU Decision, p. 22. As in *LU*, Joyce's predecessors in interest historically and routinely used the places of use at issue as part of their ranching operation, both before and after grazing preferences were awarded. Under such circumstances, the United States' attempted analogy to nomadic herdsman in an attempt to defeat Joyce's claim is without merit, and is particularly offensive given the United States' award of grazing preferences to Joyce's predecessors in interest based on their history of prior use of the subject range. *See, e.g.,* Exhibit N (Shea Application evidencing prior use dating back to 1925); *see also* Exhibit V (decision granting Shea grazing privileges).

The United States' misstatements of the law continue with its assertion that the use of water in common defeats a water right. *See* United States' Responsive Brief, p. 26-27, 31-32. The United States specifically argues that 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." *See* United States' Responsive Brief, p. 27. The brief then goes on to analyze the law in the state of Utah regarding exclusive use. *See* United States' Responsive Brief, p. 30-31, *citing Robinson v. Schoenfeld*, 218 P. 1041 (1923). The United States makes these arguments even though it is well aware of the *LU Decision,* the Court's rejection of the United States' theories regarding watering in common and, moreover, rejection of the United States' reliance on the *Robinson* decision. As stated by this Court:

> The fact that the rangeland was open to the public in general should not be fatal to establishing the appropriation of a water right ... This Court notes that there is authority to the contrary from other states. In *Robinson v. Schoenfield*, 218 P. 1041 (1923), the Utah Supreme Court held that in order to show intent to appropriate water on the public domain, ownership and use had to be proven by exclusive control or

> complete dominion over the source ... However, that case dealt with interpretation of Utah's appropriation statutes and is not followed in other states ... *Under Idaho's constitutional method of appropriation for appropriating stock water rights, no such requirement has been imposed. The "exclusive control requirement" is suspiciously close to a diversion requirement and ignores the "practical realities of raising livestock" which formed the basis of the holding in Nahas.*

LU Decision, p. 21-22 (*emphasis added*).

Finally, the United States also argues that Joyce Livestock's predecessors could not acquire the claimed water rights because they were there pursuant to "license." *See* United States' Responsive Brief, p. 17-18. Specifically, the United States argues in a footnote that "an interest or estate in land owned by another cannot be established where the land use is pursuant to license." *See* United States' Responsive Brief, p. 18, ft.n. 26. The United States' argument fails for two reasons. First, the establishment of the water rights at issue herein predate any permitting scheme. Anna and Mary Joyce and their successors put the waters of Jordan Creek to beneficial use prior to the enactment of the Taylor Grazing Act in 1934. *See* Special Master's Report and Recommendation, p. 22;[3/] *see also* United States Exhibit 85 (grazing application of Joyce Brothers Livestock Company: "Q. Have you previously used the lands covered by this application for grazing permit? A. Yes; Q. If so, how many years...? A. Began use in the year 1866."); United States Exhibit 87 (Shea grazing application certifying use back to1925); Testimony of Paul Nettleton, Trial Transcript p. 659-661, 674-683 (regarding prior historic use, quoted herein, *supra*). These conclusions regarding pre-1934 use also are supported by the Special Master ruling in which he held that Joyce Livestock "proved that multiple ranchers grazed livestock *along Jordan Creek for decades ... with Mary and Anna Joyce and their successors"* and, further, that nearly all of the ranches that grazed and watered livestock along Jordan Creek were ultimately consolidated into Joyce Ranch. *See* Special Master's Report and Recommendation, p. 22 (*emphasis added*).[4/]

[3/] "[Joyce Livestock] 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 into 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."

[4/] The United States is apparently attempting to make an argument that Joyce Livestock and its predecessors did not have the ability to perfect the claimed water rights (continued...)

Accordingly, when Joyce Livestock's predecessors first acquired the water rights, they were present along Jordan Creek not as a result of a permit or "license" which render the United State "license" theory unavailing.

Based on this Court's analysis in the *LU Decision* and the facts of this case, the Court can only do one thing which is to award Joyce Livestock water rights with a priority date predating the enactment of the Taylor Grazing Act and relating back to the claimed priority date of 1898. Such a conclusion is supported by the evidence, including the historic testimony of Paul Nettleton and Gene Lewis cited and quoted herein at length. It is supported by the grazing application of the Joyce Bros. Livestock Company in which they certify that they have been using the lands (and therefore the water thereon) covered by their grazing application for grazing permit since 1866. *See* United States Exhibit 85. It is supported by the Shea grazing application in which John Shea certifies that he has been using the lands covered by the application since 1925. Finally, and possibly most important, use prior to 1934 is supported by the admissions of the United States who acknowledge Shea's prior use of Jordan Creek in the years prior to 1934. *See* United States' Responsive Brief, p. 12-13; *see also* Testimony of Michael Boltz, p. 457-458 ("Q: Was (Shea) adjudicated a preference for his use of this property, public land, during the priority years? A: Yes, he was ... Initially he was given 102 animal units tied to these, tied to these properties, which included some mining claims that he had ... that are actually along Jordan Creek ...") As found by the Special Master, and detailed herein and in prior briefs submitted with the Court, the overwhelming, conclusive, and undisputed evidence supports the conclusion that Joyce Livestock's predecessors in interest put the waters of Jordan Creek to beneficial use and that, therefore, Joyce Livestock under the prevailing law should be awarded beneficial use water rights with the claimed priority date of 1898.

The Report and Recommendation that is the subject of this Challenge was decided before the Special Master had the benefit of this Court's ruling in the *LU Decision*. The *LU Ranching*

[4/] (...continued)
because they did not beneficially use the waters of Jordan Creek. However, in Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. *See* I.R.C.P. 53(e)(2); *see also Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377(1991). This Special Master specifically found in its factual findings that Joyce Livestock and its predecessors have used the waters of Jordan Creek since at least 1898.

Decision clarified the standard to be applied to private water right claims sited on federally administered allotments. Tellingly, the United States fails in its response brief to analyze Joyce's claims in light of the law of the case now in effect, and instead continues to cling to an interpretation of the law that has since been overruled. It is the law of the case in the SRBA that unity of title is not required for a water right to be appurtenant to a ranch property, that ranchers such as Joyce and its predecessors who historically used the range and water in conjunction with their base ranch and who were granted grazing preferences by the United States are not "itinerant stockgrowers, that the use of water in common does not defeat of water right, and that private parties can perfect a water right on what became federally administered land both before and after the enactment of the Taylor Grazing Act. The United States has no legal or factual support for, nor is it justified, in advancing its contrary theories. Accordingly, the fact that the United States continues to advance contrary theories based on old law defies reason.

IV. CONCLUSION

The Special Master's Report and Recommendation and the United States arguments submitted during this Challenge each relay on an erroneous statement of the law as it pertains to both the United States' claims and Joyce Livestock's claims. Accordingly, Joyce Livestock respectfully requests that this Court grant its Challenge, and order that the United States claims be denied in their entirety, and decreeing Joyce Livestock's claims to the waters in Jordan Creek with a priority date of 1898.

Dated this 5th day of May, 2005.

Respectfully submitted,
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By: _____
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DATED this 5th day of May ___, 2005.

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CERTIFICATE OF SERVICE

I certify that on May 5, 2005, I served a true and correct copy of foregoing **JOYCE LIVESTOCK'S REPLY TO UNITED STATES' RESPONSIVE BRIEF IN OPPOSITION TO JOYCE LIVESTOCK'S CHALLENGE** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

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