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DEPARTMENT OF
WATER RESOURCES

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LU RANCHING CO.,

Movant-Appellant,

v.

UNITED STATES OF AMERICA.

Respondent.

JOYCE LIVESTOCK CO.,	)	SUPREME COURT CASE NO. 32278
	)	
Movant-Appellant,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	
_____	)	
	)	
JOYCE LIVESTOCK CO.,	)	SUPREME COURT CASE NO. 32279
	)	
Respondent,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellant.	)	
_____	)	

LU Ranching Co. (“LU Ranching”) and Joyce Livestock Co. (“Joyce Livestock”), Appellants in the above captioned appeals pending before this Court, move this Court for an order consolidating or joining the two appeals for purposes of briefing, oral argument, and decision. This motion is made on the grounds that the legal questions presented by both appeals are so related as to make it advisable to consolidate them and consolidation furthers the interest of judicial economy. This motion is based on the memorandum of points and authorities contained herein.

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO CONSOLIDATE APPEALS

I. PROCEDURAL HISTORY

These appeals involve three parties consisting of two private ranching companies (LU Ranching and Joyce Livestock), and the United States. Each of the cases arise out of litigation between the United States and LU Ranching and Joyce Livestock, respectively, in the Snake River Basin Adjudication (“SRBA”) and, specifically, disputes between the United States and the private parties regarding the ownership of stockwater rights sited on what are now federally administered allotments.

The appeal in the LU Ranching case arises from the District Court’s Memorandum Decision and Order on Challenge and Order for Reconsideration, and was filed on June 10, 2005. The United States filed a Cross-Appeal, filed July 1, 2005. Subsequent to the filing of the substantive appeals, LU Ranching filed an appeal of the District Court’s Memorandum Decision and Order Re: Attorneys Fees. LU Ranching’s substantive appeal, the United States’ Cross-Appeal, and LU Ranching’s appeal of the Attorneys Fees Order all are being considered as part of Supreme Court Case Number 31994. The due date for briefing has been stayed by the Court pending preparation of the Supplemental Reporter’s Transcript and Clerk’s Record due to be filed with the Court by November 14, 2005. *See* September 13, 2005 Notice from the Idaho Supreme Court Re: Supplemental Transcript and Clerk’s Record Due; *see also* September 13, 2005 Notice from the Idaho Supreme Court Re: Appeal Record Filed/Briefing Stayed.

Concurrent with the filing of the appeals and cross-appeal in the LU Ranching case, an appeal was filed by Joyce Livestock arising from the District Court’s Memorandum Decision and

Order on Challenge dated September 8, 2005. A Cross-Appeal was filed by the United States on September 14, 2005. The two appeals were consolidated by the Idaho Supreme Court. *See* September 23, 2005 Amended Order Consolidating Appeals, docket numbers 32278 and 32279. The Clerk's Record and Reporter's Transcript in these consolidated appeals are due on December 21, 2005. *See* September 22, 2005 Notice from the Idaho Supreme Court re: Notice of Appeal, Docket No. 32278; *see also* September 22, 2005 Notice from the Idaho Supreme Court re: Notice of Appeal, Docket No. 32279.

Briefing has not begun in either the LU Ranching appeal or the Joyce Livestock appeal. In each case, preparation and finalization of the Reporter's Transcript and Clerk's Record are pending.

II. ARGUMENT

A. Consolidation of Cases is Appropriate When It Will Further the Interests of Judicial Economy and to Minimize the Expense upon the Public and the Parties Alike.

Motions may be made at any time, before or after oral argument. *See* I.A.R. 32(c).

While specific provision for consolidation of appeals is not made in the Idaho Appellate Rules, the Court maintains the authority to act "in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof." *See* I.A.R. 48. In the present case, there is precedent both within the appeals at issue herein, and in other unrelated cases that have come before courts in the state of Idaho, for the consolidation of these cases.

In general, it is recognized that a court may order the consolidation of proceedings when actions involving common questions of law or fact are pending before a court. *See* I.R.C.P. 42(a) ("When actions involving a common question of law or fact are pending before the court, it may

order a joint hearing or trial of any and all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”) Most often, consolidation is accomplished at the trial court level when “the court is of the opinion that (consolidation) may expedite its business and further the interests of the litigants, at the same time minimizing the expense upon the public and the litigants alike.” *See Bantom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 509, 365 P.2d 958, 961 (1961). Similarly, courts have consolidated cases where there exist a unity of parties, issues, and requested relief in the two cases. *See e.g. Jones v. Jones*, 117 Idaho 621, 634, 790 P.2d 914, 916 (1990). Consolidation does not change the rights of the parties, but rather “is permitted as a matter of convenience and economy in administration.” *Id.*, citing *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-498, 53 S.Ct. 721, 727-728 (1933). In the present case, the two appeals involving Joyce Livestock and the United States were consolidated, *sua sponte* by the Court. *See* September 23, 2005 Amended Order Consolidating Appeals for Supreme Court Nos. 32278 and 32279.

Rarely does there exist both the cause and opportunity to consolidate cases brought by different parties at the appellate court level. However, given the almost identical legal issues present in the cases at issue herein, coupled with anticipated overlapping briefing schedules, such consolidation of these appellate proceedings is appropriate and justified.

B. The Legal Issues in the LU Ranching Appeal and Joyce Livestock Appeal, and the Legal Issues Raised by the United States in its Respective Cross-Appeals, Are Virtually Identical and Support Consolidation of These Cases on Appeal.

There exist in these cases an almost perfect unity of legal issues and requested relief by the

respective parties. As outlined, below, the appeals and cross-appeals involve virtually identical issues of law. For that reason, consolidation is warranted.

In the LU Ranching Appeal, LU Ranching raises the following issues on appeal: (a) whether qualified grazing preferences are evidence of historic use of water sources pre-dating the enactment of the Taylor Grazing Act, (b) whether LU Ranching is entitled to a priority date that pre-dates the enactment of the Taylor Grazing Act by virtue of the grazing preferences and grazing permits issued to LU Ranching's predecessors in interest, (c) whether the post-1934 priority dates are contrary to the unrebutted evidence of historic use of the water sources at issue, and (d) whether the evidentiary standard applied by the District Court on the issue of priority date constitutes an unrealistic and insurmountable evidentiary hurdle. *See* LU Ranching Co.'s Notice of Appeal from the Honorable John M. Melanson's Order on Challenge, Orders on Partial Decrees, and Order on Reconsideration. The Notice of Appeal filed by Joyce Livestock identifies virtually identical issues on appeal. *See* Joyce Livestock's Notice of Appeal from the Honorable John M. Melanson's Order on Challenge, Orders on Partial Decrees, and Order on Reconsideration. Indeed, the District Court relied on the legal rationale provided in the LU Ranching decision to serve as the primary basis for its decision in the Joyce Livestock case. *See* Exhibit A: LU Ranching Memorandum Decision and Order on Challenge; *see also* Exhibit "B": Joyce Livestock Memorandum Decision and Order on Challenge.

In addition to the overlapping issues raised on appeal by LU Ranching and Joyce Livestock, the United States also has raised almost identical issues by way of its cross-appeals in the two cases. In each cross-appeal filed by the United States, the United States raises issues relating to the ability of private ranchers to hold water rights transferred to them by their predecessors in interest

when those water rights are sited on federally administered grazing allotments. *See* United States' Notice of Cross-Appeal (versus LU Ranching), p. 2 ("The issue on cross-appeal is whether the District Court erred in awarding LU Ranching Co. Stockwatering rights that designate public lands as places of use with priority dates that pre-date the time LU Ranching Co. first used the claimed stockwater."); *see also* United States' Notice of Cross-Appeal (versus Joyce Livestock), p. 2 ("The issues on cross-appeal are: a. whether the District Court erred in awarding Joyce Livestock Company – a licensee using public lands for the pasturage of livestock – a stockwatering right that designates the licensor's lands as the place of use, where there is no evidence that predecessor licensees or the current licensee intended to appropriate a stockwater right on the licensor's lands; b. whether the District Court erred in awarding to Joyce Livestock Company – a licensee using public lands for the pasturage of livestock – a stockwater right with a priority date that pre-dates the time the licensee first used the claimed stockwater located on the licensor's lands, where there is no evidence such a stockwater right was first established by a predecessor licensee and then conveyed to the current licensee in writing.") Again, in each of the appeals, the United States challenges the District Court's ruling that the private ranchers could acquire and maintain stockwater rights on federally administered allotments that were transferred to them by their predecessors in interest.

There are issues raised on appeal and cross-appeal that differ, however those issues can be addressed by the parties and the Court within the consolidated proceedings. In the LU Ranching appeal, LU Ranching appeals the District Court's Memorandum Decision and Order re: Attorneys Fees. In the Joyce Livestock case, the United States raised in its cross-appeal issues relating to the District Court's denial of its claimed stockwater rights. Each of these issues stand alone, separate

and apart from the legal issues that overlap, and can be briefed by the parties as part of the consolidated proceedings. The existence of these additional issues, however, does not obviate the advisability of consolidating these appeals. In short, the issues in common in these cases far outweigh the additional issues that differ.

If the cases are not consolidated, the Court will be presented with legal briefs in the two different cases, each arguing virtually identical issues. The time frame for the legal briefing and for oral argument of the two cases will overlap. Under such circumstances, consolidation is appropriate and will serve to expedite the business of this court and minimize the expense to the public and to the parties. *See Branom v. Smith Frozen Foods of Idaho, supra.*

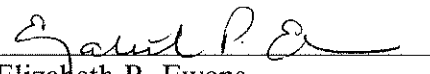
IV. CONCLUSION

The questions presented by both appeals are nearly identical and are pending before this Court at the same time. For this reason, in the interest of judicial economy, LU Ranching and Joyce Livestock respectfully request that this Court consolidate or join the two appeals, and related cross-appeals, for purposes of briefing and oral argument.

Dated this 1 day of November, 2005.

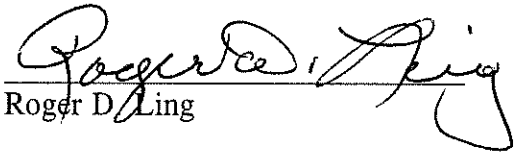
Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 2, 2005, I served a true and correct copy of foregoing **MOTION TO CONSOLIDATE APPEALS** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

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A handwritten signature in black ink, appearing to read "T. J. King", is written over a horizontal line.

EXHIBIT "A"

**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	)	Subcases: 55-10288B, 55-10289B,
Case No. 39576	)	55-10290B, 55-10292B, 55-10293B, 55-
	)	10295, 55-10296, 55-10297B, 55-10298, 55-
	)	10299B, 55-10300, 55-10301B, 55-10303B
	)	and 55-13451
	)	
	)	MEMORANDUM DECISION AND
	)	ORDER ON CHALLENGE
	)	
	)	ORDER OF PARTIAL DECREES

Summary of Ruling: Holding private party could perfect water right on public rangeland before and after the implementation of the Taylor Grazing Act. Water rights appropriated on public rangeland could transfer as appurtenance to private base ranch property when used in conjunction with livestock operation.

Claimant must establish through the chain of title, grazing applications, permits and related documents what water rights, if any, were appropriated and transferred by predecessors-in-interest. Where a deed is otherwise silent, a generalized showing that a particular region was historically used by the public for grazing is insufficient to establish that a particular predecessor-in-interest grazed cattle for purposes of establishing a water right. Claimant must trace instruments showing what rights were appurtenant and transferred from a particular permittee to claimant as the use of allotments was not exclusive and use was also limited to specific areas within allotments.

Special Master erred as matter of law by failing to trace chain of title to show what rights, if any, existed and were transferred. Based on evidence presented, Special Master erred in finding that claimant LU Ranching Company, established 1876 priority date for each of the above-captioned claims.

Evidence presented supports priority date for each claim earlier than asserted by objector United States, Bureau of Land Management.

I.

PROCEDURAL BACKGROUND

A. At issue are thirteen beneficial use claims¹ filed by LU Ranching Company (LU) for instream stock water rights located on federal public lands within the boundaries of three different grazing allotments for which LU holds grazing permits. The allotments are situated on lands administered by the United States Bureau of Land Management (United States), pursuant to The Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986)) (“Taylor Grazing Act”).

B. LU claimed a priority date of May 20, 1872, for each of the subject claims. On July 31, 1997, the Director of IDWR filed a *Director's Report*, recommending each right with the priority date as claimed. The United States filed objections to the recommended priority date for each of LU's claims asserting that the priority date should be September 23, 1976, which corresponds with the date the LU entity was created and started beneficially using the water.

C. The subcases were originally referred to Special Master Fritz Hammerle. In the proceedings before Special Master Hammerle, the United States filed a motion for summary judgment asserting that LU had no deeds or other instruments from a predecessor-in-interest conveying any of the subject water rights. LU argued that the water rights were appropriated by its predecessors-in-interest to the patented or “base ranch” properties to which its grazing allotments are attached. LU also argued that the rights transferred as appurtenances to the base ranch properties via the appurtenancy clauses contained in LU's chain of title. Special Master Hammerle granted summary judgment in favor of the United States, holding that because water rights are interests in real property and transfers of real property require a written instrument, the alleged water rights were not properly conveyed. Special Master Hammerle also ruled that without a written instrument the earliest priority date LU could prove was September 23, 1976, the

¹ Water right claim 55-10301B is listed in caption but is not at issue. *See infra*.

date LU was incorporated. *Order Granting United States' Motion for Summary Judgment*, Subcases 55-10288 *et al.* (Jan 8, 1999).

Special Master Hammerle ruled further that instream stock water rights on public land are as a matter of law appurtenant to the public land and therefore could not transfer as an appurtenance to private land. The Special Master's decision incorporated his reasoning from a prior decision in an unrelated consolidated subcase (Joyce Livestock) involving a number of "foundational" issues pertaining to the ability of both the United States and private parties to appropriate beneficial use instream stock water rights on public land. *See Order on Motion to Alter or Amend: Order on Motion for Permissive Appeal*, Subcases 57-04028 *et al.* (June 26, 1997). Special Master Hammerle's reasoning and ruling in the Joyce Livestock case was later adopted by Judge Hurlbutt, then presiding judge of the SRBA. *Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, Subcases 57-04028B *et al.* (Sept. 30, 1998).

D. LU challenged Special Master Hammerle's *Order Granting United States' Motion for Summary Judgment*, before Judge Wood, who succeeded Judge Hurlbutt as the presiding judge. Judge Wood reversed the Special Master holding that summary judgment was inappropriate because there were genuine issues of material fact. *Memorandum Decision and Order On Challenge; Order Denying Motion to File Amicus Curie Brief; Order of Recommitment to Special Master Cushman*, Subcases 55-10288 A & B *et al.* (April 25, 2000).

Judge Wood ruled that the instream rights appropriated on public land by a private party were not necessarily deemed appurtenant to the public land because a private individual could appropriate a water right on public land without having an ownership interest in the land on which the water was located. In such a situation, the water right would not be "appurtenant" to the public land at least for purposes of a conveyance because no unity of title existed between the land and the water right; as one cannot convey what one does not own. Judge Wood also ruled that given the customary practices surrounding livestock grazing, depending on the particular circumstances and nexus between the instream stock water right and the adjacent private ranch property, it

was conceivable that instream rights could transfer as an appurtenancy to the ranch base property, particularly if a ranching operation was sold in its entirety as a going concern.

Judge Wood ruled that for purposes of conveying the water right the statute of frauds would be satisfied without a separate writing conveying the water rights under the general rule that unless expressly reserved, water rights appurtenant to land transfer with the conveyance of the land. Judge Wood ruled that the issue of whether a water right transferred as an appurtenance via the appurtenance clause in the deed would depend on the intent of the grantor and was an issue of fact. The matter was then recommitted to Special Master Tom Cushman, who succeeded Special Master Hammerle, for a trial on the merits.

E. Special Master Cushman held a trial on the merits and issued a *Special Master's Report and Recommendation; Findings of Fact and Conclusions of Law*, subcases 55-10288B *et al.* (Feb 27, 2003). Special Master Cushman held that in accordance with Judge Wood's reasoning, LU proved an 1876 priority date for each of the claims instead of the claimed 1872 priority date. The *Special Master's Recommendation* was based on the finding that LU's predecessors-in-interest to the respective patented parcels, which now comprise some of LU's base ranch property, grazed and watered cattle on the adjacent public domain in the general areas where the claimed rights are located as early as 1876. However, Special Master Cushman ruled that LU was unable to prove that grazing and watering existed as early as the claimed 1872 priority date. Special Master Cushman also found that the appropriated rights were conveyed as appurtenances in LU's chain of title to those lands. Both the United States and LU filed motions to alter or amend the *Recommendation*.

F. On challenge LU only raises issues pertaining to certain recommended places of use for some of its claims. LU does not challenge the recommended priority date. The United States on challenge raises the legal issue regarding the inability of a private party to perfect a water right on land to which the party does not hold a possessory interest. The United States also raises the legal issue regarding the ability to transfer a water right as an appurtenance to the private ranch property, particularly prior to 1934 when the concepts of base ranch property and grazing allotments did not exist. Factually, the

United States challenges the sufficiency of the evidence supporting the Special Master's recommended 1876 priority date for each of the rights even assuming the rights could legally be appropriated on the public domain and transferred as appurtenances to the private property. The United States also challenges certain legal descriptions of the rights.

II. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on November 10, 2004. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or November 12, 2004.

III. ISSUES RAISED ON CHALLENGE

A. The United States

The United States raises the following issues on Challenge:

1. Whether the Special Master's findings of fact are clearly erroneous?
2. Whether the Special Master erred in holding that LU was entitled to a priority date earlier than September 23, 1976, for water rights 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, and 55-10300?
3. Whether the Special Master erred in holding that LU was entitled to a priority date earlier than June 28, 1984, for water right 55-10303B and 55-13451?
4. Whether the Special Master erred in not deleting T7S, R6W, S35, SENE as a place of use and erred in establishing beginning and ending points of diversion in the place of use for 55-10288B?
5. Whether the Special Master erred in not deleting "Unnamed Streams" tributary to "Juniper Creek" as a source for water right 55-10289B?
6. Whether the Special Master erred in not amending the points of diversion for water right 55-10296?

7. Whether the Special Master erred in not deleting the source "Unnamed Stream" tributary to "Jordan Creek" and erred in not amending the points of diversion for water right 55-10297B?

8. Whether the Special Master erred in not deleting T9S R5W, S33, NWNW as a place of use, in not deleting T9S, R4W, S18, Lot 3 (SEWNSE) and T9S, R5W, S33, NWNW as points of diversion, and in not amending the source description to read "Unnamed Stream" tributary to "Corral Creek" in water right 55-10303B?

B. LU

LU raises the following issues on Challenge:

1. Whether the Special Master erred in failing to recommend T5S R6W S23 NWNE as a place of use for water right 55-10296?

2. Whether the Special master erred in failing to recommend T5S R6W S13 SWSW as a place of use for water right 55-10297B?

IV.

STANDARD OF REVIEW OF A SPECIAL MASTER'S RECOMMENDATION

The following standard of review of a special master's report and recommendation has been consistently applied throughout the course of the SRBA.

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court,

though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe v. Wees*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App.1989); *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,² although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. Wright and Miller, *Federal Practice and Procedure* § 2614 (1995); *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra*, § 2585.

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are

² Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 582 (1971).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1st Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor D. Craig Lewis states that “[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the ‘clearly erroneous’ standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook.” Lewis, *Idaho Trial Handbook*, § 35.14 (1995), (citing *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.).

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151, 153, 922 P.2d 1077, 1079 (Ct. App. 1996).

B. Conclusions of law of a special master.

A special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534, 861 P.2d at 104. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely

reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

In sum, findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

V.

DISCUSSION

A. Preliminary Foundational Legal Issues.

There are several legal issues raised in these subcases pertaining to the appropriation of stock water rights on public land, some of which have been previously addressed in the SRBA. To date, none of these prior rulings have been appealed.³ The United States again raises some of these same preliminary issues in the instant matter. These issues include: 1) Whether a water user can appropriate a water right when the water user does not hold a possessory interest in the land on which the right is appropriated; 2) What proof is required to establish intent to appropriate an instream stock water right; 3) Can an instream water right with a place of use on federal land

³ The issue of stock water rights on public lands as between the holders of grazing allotments and the United States Bureau of Land Management has a lengthy history in the SRBA. In 1996, the United States, the State of Idaho and certain other parties to the adjudication sought to have various issues concerning the ownership of stock water rights on the public domain decided as a Basin-Wide Issue. Judge Hurlbutt denied the motion to designate Basin-Wide Issue 9A, because the parties were unable to agree on a set of paradigm facts for creating test cases. The Court did not want to decide test cases in a “vacuum” and then have the parties seek to distinguish the facts of their particular case requiring that the individual subcases be litigated anyway. *Order Designating Basin-Wide Issue No.9; Order Denying Designation of Basin-Wide Issue No. 9A; Order Setting Expedited Schedule and Hearing Date for Basin-Wide Issue No. 9*, Case No. 91-00009 (March 8, 1996). Later in 2000, Judge Burdick also denied a joint motion by various parties to create and decide test cases addressing the same issues on the same basis. *Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master Dolan and Stay Related Subcases*, subcases 47-04514 *et al.*, (Jan. 30, 2000) (Approx. 7,500 subcases). Nonetheless, some of these foundational legal issues have already been addressed in individual subcases. However, mostly as a result of “global” stipulations between the United States and the State of Idaho and between the United States and various ranching entities, none of these issues have been appealed.

transfer as an appurtenance to adjacent patented property when all are used in conjunction with a ranching operation; and 4) If the deed to the patented property is silent, can such a transfer still be made?

Although Judge Wood, in his April 25, 2000, *Memorandum Decision and Order on Challenge* previously addressed and ruled on two of these issues, no final order or decree has been entered as to those rulings. As such, the United States is entitled to have these issues readdressed before the successor presiding judge in addition to preserving the issues for appeal. *Farmers National Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994)(successor judge can reconsider rulings of predecessor judge before entry of final judgment). Furthermore, this Court notes that there are several other subcases at issue in the SRBA which turn on the same principle of law. A comprehensive analysis and recapitulation of the law of the case is therefore warranted.

1. Adoption Judge Wood's April 25, 2000, opinion.

Although this opinion addresses and expands on the same issues addressed by Judge Wood in April 25, 2000, *Memorandum Decision and Order on Challenge* previously issued in these subcases, this Court adopts the reasoning set forth in that opinion.

2. Historically, private parties could appropriate beneficial use water rights on the public domain both prior and subsequent to the enactment of the Taylor Grazing Act.

Central to LU's claims is the issue of whether historically a private individual could appropriate a water right on public land. The United States argues that a water user must hold a possessory interest in the land on which the right is used in order to appropriate a water right. This argument is without merit. Idaho's laws governing water rights coupled with the United States' historical deference to state water law; the myriad of congressional acts aimed at encouraging settlement of the west acknowledging private ownership of water rights on federal land; and the Taylor Grazing Act's acknowledgement of private ownership of water rights on federal land as a precondition

to the award of a grazing preference, overwhelmingly suggest the contrary. Each is addressed below.

a. The federal government historically deferred to state water law with respect to the appropriation of water on the public domain.

First, as concerns the appropriation of water on federal lands, it is well established in western water law that the federal government historically deferred to state water law for the appropriation of water. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935); *Buford v. Houtz*, 133 U.S. 320, 326-328 (1890). This point is not contested.

b. The general rule in Idaho is that excluding trespass, an appropriator need not have an ownership interest in the land in order to appropriate a water right.

In turning to applicable state law, Judge Wood ruled in the April 25, 2000, *Memorandum Decision*,

In Idaho it is well established that the ownership of a water right can exist independently from the ownership of the land on which the water is used. See e.g. *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930); *Sarrett v. Hunter*, 32 Idaho 536, 541-42, 185 P. 1072 (1919). In other words, there is not always unity of title between the water right and the land on which it is used. This rule has been applied in the context of the appropriation of water in conjunction with a leasehold. *First Security Bank of Blackfoot* at 746, 291 P. at 1070 (holding that a water right perfected by a lessee is property of lessee unless lessee is acting as an agent of landowner). This same rule can also apply to the appropriation of water on federal public lands. *Keiler v. McDonald*, 37 Idaho 573, 218 P. 365 (1923); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922)(ownership of waters subject to appropriation on federal land vests in the appropriator); *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967)(recognizing private ownership of water right perfected on federal land pursuant to state law).

Memorandum Decision at 14-15 (footnotes omitted). Judge Wood also noted that this is not the general rule in all states. *Id.* at 14, fn. 14 (citing *Dept. of Lands v. Pettibone*, 702

P.2d 948 (Mont. 1985)(water rights perfected by lessees of state trust lands remain property of state); *Tattersfield v. Putnam*, 41 P.2d 288 (Ariz. 1935)(temporary possessor of land cannot make appropriation of water). This same rule was also applied by Judge Hurlbutt in a case involving Joyce Livestock Company and the United States. *See Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, Subcases 57-04028B *et al.* (Sept. 30, 1998) (*Joyce Livestock Decision*). In the context of the United States' ability to appropriate a stock water right on federal land without actually grazing cattle, Judge Hurlbutt ruled:

If the party claiming ownership of the water right [by virtue of owning the land on which the right is used] is not the same party that actually appropriated the 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. **'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.'**

Id. at 10 (citing *First Security Bank v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930)).⁴

The foregoing make it clear that the general rule in Idaho is that the appropriator of a water right need not own the land on which the right is used, nor does such a right automatically vest in the owner of the land. The exception to this rule is trespass. A person cannot initiate a water right on the land of another through trespass. *Branson v. Miracle*, 107 Idaho 221, 226, 687 P.2d 1348 (1984). However, prior to the enactment of the Taylor Grazing Act, stock grazing on the public domain was largely unregulated and open to the public in general, thus water rights could be appropriated without the appropriator either holding a possessory or ownership interest in the land or engaging in trespass. *See generally Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights)*, Consolidated Subcase Nos. 23-10872 *et al.* pp. 12-14 (Dec. 28, 2001)(Judge Burdick's opinion discusses at length the unregulated public domain with respect to grazing in the context of PWR 107). The public essentially held an implied

⁴ Although this ruling has never been appealed, it nonetheless remains law of the case and forms the basis for a private party to appropriate a water right on the public domain without having an interest in the land. The United States has had numerous state-based water rights decreed based on this ruling.

license to use federal rangelands for grazing. In *Buford v. Houtz*, 133 U.S. 320, 326-328 (1890), the United States Supreme Court held:

We are of the opinion that there is an implied license, growing out of a custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to people who seek to use them where they are left open and unenclosed, and no act of government forbids this use The government of the United States, in all its branches, has known of this use, has never forbidden it, nor has taken steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we will attempt to show, with its direct encouragement. . . . Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze.

Id. at 326-28.

In conclusion, given the federal government's historical treatment of the public domain with respect to grazing, Idaho law clearly supports the ability of a private party to appropriate a water right thereon. This Court acknowledges that the result may not be the same in other states.

c. The various congressional acts aimed at settling and reclaiming the west all acknowledged private ownership of pre-existing water rights on the public domain.

Further support for the conclusion that private parties could appropriate on the public domain can be found in the early congressional acts providing for the disposition of public lands, which specifically acknowledged the ownership of pre-existing water rights. As Judge Hurlbutt noted in the *Joyce Livestock Decision*, the Mining Act of 1866, provided:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way

for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.

Joyce Livestock Decision at 3, fn. 2 (quoting Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C.A. § 51 (1986))).⁵ The Act of 1870 provided:

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

Id. at 4, fn. 3 (quoting Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (Codified at 30 U.S.C.A. § 52 (1986))). The Desert Land Act of 1877, in relevant part provided:

All surplus water over and above such actual appropriation and use, together with the water of lakes, rivers, and other sources of water supply upon the public land and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Id. at 4, fn. 4 (quoting Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377 (codified at 43 U.S.C.A. § 321 (1986))). The Taylor Grazing Act provided:

That 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 for mining, agriculture, manufacturing or other purpose which has heretofore vested or accrued under existing law validly effecting the public lands which may hereafter be initiated or acquired and maintained in accordance with law.

Id. at 4, fn. 5 (quoting Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986))).

All of the foregoing congressional acts clearly acknowledged pre-existing water rights on the public domain.⁶

⁵ In this case, the recognition of existing water rights under the 1866 Act is specifically acknowledged in a letter regarding the recognition for existing ditches and right of ways dated September 26, 1984, addressed to district managers in the State of Oregon Office for the Bureau of Land Management. See Exhibit DD.

- d. **The operation of the Taylor Grazing Act expressly provides for the ownership of preexisting water rights in awarding grazing preferences and also allowed for private ownership of water rights after its implementation.**

Lastly, and probably of most significance, is that the Taylor Grazing Act specifically took into account preexisting water rights on public lands for the purpose of awarding grazing preferences. 43 C.F.R. § 4100.0-5 (1998). After the implementation of the Taylor Grazing Act, it was not until 1995 that the regulations governing the application of the Taylor Grazing Act provided that any water rights perfected on the public domain would vest in the name of the United States. 43 C.F.R. § 4120.3-9 (1998).

Pursuant to the Taylor Grazing Act and the regulations governing its application, a “grazing preference” is defined as a “superior or priority position against others for the purpose of receiving a grazing permit or lease.” 43 C.F.R. § 4100.0-5 (1998). A “grazing permit” is defined as “a document authorizing the use of public lands within a grazing district.” *Id.*⁷ In awarding a grazing preference, applicants who previously used the public land in connection with their livestock operation or owned preexisting water rights were given priority over other applicants. Private land and water rights are referred to as “base property.” “Base property” is defined as “(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 land are used for livestock grazing.**” 43 C.F.R. § 4100.0-5 (1998) (emphasis added). The award of

⁶ The United States has also claimed and had decreed a significant number of stock water claims based on executive order Public Water Reserve 107. There has been a significant amount of litigation in the SRBA over these federal reserved rights. One key point that can be gleaned from the various issues that have previously been raised with respect to PWR 107, which is relevant to this discussion, is the historical circumstances that gave rise to the reserved rights. PWR 107 was issued to prevent the monopolization of water sources by private individuals in anticipation of the forthcoming Taylor Grazing Act. *United States v. State of Idaho*, 131 Idaho 468, 472 (1998). Based on these circumstances the United States was aware that water rights were being appropriated on the public domain. Although PWR 107 expressly withdrew land surrounding springs and watering holes to prevent land entry abuses, presumably if appropriation by private individuals was not an issue, no concomitant water right would have been necessary to fulfill the primary purpose of the reservation as no private party would have been able to appropriate a water right after the land surrounding subject springs and waterholes was withdrawn from settlement.

⁷ A “grazing lease” authorizes use outside of a grazing district.

the preference based on preexisting uses or base property was explained in *Public Lands Council v. Babbitt*, 167 F.3d 1287 (10th Cir. 1999), wherein the Court of Appeals wrote:

After enactment of the [Taylor Grazing Act] in 1934, the Secretary of the Interior began the process of establishing grazing districts, issuing permits, and granting leases. At the time of the TGA's passage, the number of applicants far exceeded the amount of grazing land available to accommodate them. Therefore, the Department of Interior (DOI) instituted a detailed adjudication process, guided by a set of priorities articulated in section three of the TGA, to determine which applicants would receive grazing permits. **First priority in the issuance of permits went to applicants who owned land or water, i.e., "Base property," in or near a grazing district, who were dependent on the public lands for grazing, who had used the land or water for livestock operations in connection with the public lands in the five years preceding the TGA's enactment, and whose land or water was situated so as to require the use of public rangeland for "economic" livestock operations.** Once the Secretary issued a favorable grazing decision regarding an individual applicant, the applicant received a ten-year permit which specified the maximum number of livestock, measured in AUM's, that the permittee was entitled to place in a grazing district.

Id. at 1295 (emphasis added) (citations omitted).

Contained in the body of the application for the grazing preference, the applicants are specifically asked whether they own preexisting water rights used in conjunction with the public land. *See e.g.* United States' *Exhibit 17*.⁸ Even after a grazing permit was issued, the United States continued to acknowledge that the permittee could still perfect a private water right on the public land within the grazing allotment. Only after 1995, were the regulations governing grazing on public lands amended to require that the title to any appropriated water right vest in the United States.

Any right acquired on or after August 21, 1995, to use water on public land for the purpose of livestock watering on public land shall be acquired,

⁸ One of the questions on the application asks: "Describe and locate all of the water rights owned or leased by you and used in your livestock operations on the public domain:" United States' *Exhibit 17*, p.3. Water rights on the public domain are significant in awarding the preference because the required "base property" could either be in the form of private property used in conjunction with the livestock operation or in the form of water rights "available and accessible, to the authorized livestock when the public lands are used for livestock grazing." 43 C.F.R. § 4100.0-5. (Definition of base ranch property).

perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State within which the land is located, any water right shall be acquired, perfected, maintained, and administered in the name of the United States.

43 C.F.R. § 4120.3-9 (1998). Implicit in this regulation is the acknowledgement that permittees could historically perfect water rights on the public domain after the implementation of the Taylor Grazing Act and prior to 1995. Since its inception, the Taylor Grazing Act made it clear that “the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.” 43 U.S.C.A. § 315(b). Therefore, based on the express language and operation of the Taylor Grazing Act, it can reasonably be concluded that the United States had also acknowledged that a private individual could perfect a water right on the public domain despite not having a possessory interest in the land - both before and after the implementation of the Taylor Grazing Act.⁹

Based on the foregoing, this Court holds that a private party could appropriate a water right on the public domain without having a possessory or ownership interest in the land.

3. Criteria for demonstrating intent to appropriate an instream stock water right on the public domain.

The next issue concerns the criteria for establishing a beneficial use instream stock water right. One of the arguments raised by the United States is that the itinerant and nomadic grazers, which predominately occupied the public range prior to the enactment and implementation of the Taylor Grazing Act, lacked the requisite intent to appropriate a water right. Rather, they were simply using available water sources in common.

⁹ After the implementation of the Taylor Grazing Act and prior to the 1995 regulation governing water rights going into effect, it should be fairly easy for the permittee to establish a water right as of the date of issuance of the permit because the permittee was grazing cattle within the authorized boundaries of the allotment and absent an agreement to the contrary, the water right did not vest in the United States.

In Idaho, until 1971, a right for the use of surface water could be appropriated under the “constitutional” or “beneficial use” method of appropriation by showing three elements; 1) intent to appropriate; 2) a physical diversion from a natural watercourse; and, 3) the application of water to beneficial use. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 679-80, 619 P.2d 1130, 1132-33 (1980)(citing *Sarrett v. Hunter*, 32 Idaho 536, 541, 185 P. 1072, 1074 (1919)). Typically, intent to appropriate could be inferred from the physical diversion and application to beneficial use. *Id.* (test of valid appropriation is diversion from natural source and application to beneficial use). A unique set of circumstances is involved for instream stock water rights on the public range prior to the range being regulated under the Taylor Grazing Act. First, no physical diversion was required to perfect a water right for stock water. *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000)(citing *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 45, 674 P.2d 1036, 1044 (Ct.App. 1983)). Second, as discussed previously, the public rangeland was open to the public in general. *Buford v. Houtz*, 133 U.S. 320, 326-328 (1890). The issue then arises as to whether the individuals watering their livestock in common on the open range intended to appropriate a water right or were merely using an available water source that was open to the public in general.

Intent to appropriate is a factual issue. Obviously, direct testimony by the original appropriator or a recitation of the right in an instrument of conveyance to a successor would be dispositive of intent to appropriate as opposed to mere use of water. Neither of those situations exist in these subcases.¹⁰ However, the lack of either is not fatal to proving requisite intent to appropriate. In this Court’s opinion, there is a 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.

¹⁰ As discussed *infra*, LU relies on the general “appurtenance clause” in the deeds to show that the water right was conveyed. However, the general appurtenance clause of limited probative value in determining whether or not a water right was actually appropriated by a predecessor-in-interest.

The early land entry statutes that authorized the entry and eventual fee ownership of public lands did not provide for the acquisition of enough land to sustain a viable livestock raising operation. For example, the Homestead Act of 1862 authorized the entry of 160 acres, which was later expanded to 640 acres. (R.S. § 2289, Act of March 3, 1891, c 561, § 5, 26 Stat. 1097 (codified at 43 U.S.C.A §§ 161 *et seq.* (2003)))(repealed by FLPMA, Pub. L. No 94-579, 90 Stat 2792 (1976))(codified at 43 U.S.C.A §§ 1701 *et seq.* (1994). The Stock-Raising Homestead Act authorized the entry of up to 640 acres. Act of December 29, 1916, ch. 9. 39 Stat. 862 (codified at 43 U.S.C.A §§ 291 *et seq.* (2003))(also repealed by FLPMA). As a general matter, it is widely accepted that the patented property alone was insufficient to sustain a livestock operation capable of supporting a single family unit in the arid west. *See* GEORGE CAMERON COGGINS *et al.* FEDERAL PUBLIC LAND AND RESOURCES LAW at 746 (4th ed. 2001). The testimony of Doctor Chad Gibson presented at trial also supports this conclusion. Doctor Gibson testified that based on the level of forage in Owyhee County, on average, one cow would need ten acres per month to sustain itself. Tr. pp. 385-86. For one year, 120 acres would be required. *Id.* Therefore, 160 acres would support a little more than one head of cattle over a one year period. Six hundred forty (640) acres would support approximately five head of cattle. *Id.* ¹¹ In light of these limitations, Doctor Gibson testified:

When you go back to the homestead days when they had 160 acres, they obviously had to use the land around them. And even after 1916 when the Homestead Act allowed 640 acres, that still wasn't enough; and they still had to use the land around them. And so most of the ranches have been developed as a combination of base property and outside property. So if you're going to have a viable ranching operation, you would probably have to combine quite a number of base properties if you weren't going to use the federal land around it. . . . If you had 160 acres there today, you would have to have some other source of forage to have a ranching operation.

Tr. pp. 387-88.

The United States obviously recognized the need for the adjacent public land to sustain a viable ranching operation when it embraced the historical practice by awarding

¹¹ The Court acknowledges that cattle are grazed on a seasonal basis and based on AUMs.

grazing preferences based on the prior use of the public land. *See e.g. supra, Public Lands Council v. Babbitt*, at 1295. Doctor Gibson also testified that in awarding grazing preferences: "The two primary things were prior use and commensurate base property. The prior-use rule that was finally adopted was that you had to have grazed there two consecutive years, or three years not consecutively out of the previous five years prior to 1934." Tr. p. 391.

In *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967), a case involving the appropriation of an instream stock water right on the public domain, the court held:

To constitute an appropriation, therefore, there must co-exist 'the intent to take, accompanied by some open, physical demonstration of intent, and for some valuable use. The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use. . . but it can also be evidenced in other ways, for example, as in this case, by watering livestock directly from the source. . . .In this case there is no lack of proof of the asserted appropriation; to the contrary, a clearer showing could hardly be imagined. The Hunter's intent to use 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 impassible desert: except for the water provided by these springs and the stream, there has been none other to keep their animals alive.

Hunter at 153.

The United States argues that a finding of requisite intent to appropriate merely by cattle drinking water from a stream in common with the rest of the public somehow creates a double-standard with respect to establishing instream stock water rights. This Court disagrees. In fact, just the opposite is true. As noted earlier, with respect to other water rights such as irrigation or mining, intent to appropriate can be sufficiently inferred from the diversion and application to beneficial use. Testimony regarding the appropriator's state of mind is not requisite to establishing intent. Consequently, because no physical diversion is necessary to appropriate a stock water right, intent to appropriate should able to be inferred alone from the application to beneficial use. In *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App.1983), the Idaho Court of Appeals held:

We must also consider the practical realities of raising livestock in this state. We think it unlikely that a rancher would divert water from a stream running through his property for livestock watering when the same result

is achieved without effort simply by allowing livestock to drink directly from the stream. To link recognition of an appropriation for livestock watering to the existence of a diversion could very well jeopardize stock watering rights of ranchers who have watered stock directly from streams or springs for decades. Finally, we cannot justify imposing an economic burden, by requiring a diversion, which will not advance the interests of the public by promoting more efficient use of water, or reducing waste.

Id. at 44, 674 P.2d at 1044.

With the above reasoning in mind, assume *arguendo* that a livestock owner went on the public rangeland and constructed a diversion into a stock pond for watering livestock out of the pond. Under this scenario there would be little argument concerning the livestock owner's intent to appropriate a water right. Intent could clearly be inferred. Accordingly, it would be somewhat paradoxical, as well as in direct contravention with the ruling in *Nahas* and *Hunter*, to hold that although no physical diversion is necessary to appropriate an instream water right, a diversion is nonetheless necessary to establish the requisite intent. 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 agrees that a one time use of a source by a nomadic livestock grazer raises issues regarding the user's intent to appropriate a water right and without more under such attendant circumstances, the evidence may be insufficient to show intent. However, those circumstances substantially differ from the situation where the livestock owner historically and routinely used the same water sources on adjacent public domain in connection with a livestock operation and was eventually awarded a grazing permit based on those historic uses. Moreover, the issue of the itinerant or nomadic grazer is not at issue in these subcases.

This Court notes that there is authority to the contrary from other states. In *Robinson v. Schoenfield*, 218 P.1041 (Utah 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. *Id.* at 1043.

Further,

But for the purpose of effecting a valid appropriation of water under the statutes of this state we are decidedly of the opinion that the beneficial use contemplated in making the appropriation must be of one that inures to the

exclusive benefit of the appropriator and subject to his complete dominion and control. *See also* sections 759 *et seq.*, 2 Kinney on Irrigation.

Id. (quoting *Lake Shore Duck Club v. Lake View Duck Club et al.*, 50 Utah at 82 (1918)). However, that case dealt with the interpretation of Utah's appropriation statutes and is not followed in other states. *See Steptoe Live Stock Co. v. Gulley*, 295 P.2d 772, 775 Nev. 1931) (finding intent to appropriate instream right based on historic local custom). 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*.

In this Court's opinion, the customary and routine use of adjacent or nearby public lands in connection 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. This Court concludes that based on the attendant circumstances, customary and routine use can be sufficient to establish the requisite intent to appropriate an instream stock water right.

4. An instream stock water right appropriated on the public domain can transfer as an appurtenance to patented or base ranch property.

Once it can be established that the original appropriator established a stock water right, the next issue involves the ability to convey the right as an appurtenance to either the patented property prior to the implementation of the Taylor Grazing Act or as an appurtenance to the base ranch property after the implementation of the Taylor Grazing Act. 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 the public land. The issue is one of fact and depends on the intent of the grantor. April 25, 2000, *Memorandum Decision* at 18-22. This Court agrees.

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. *See e.g. Russell v. Irish*, 20 Idaho 194, 198-99, 118 P. 510, 514-15 (1911); Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1005 (2nd Ed. 1912). Whether or not the water right passes as an appurtenance is a question of fact depending entirely on the intention of the parties. *Kinney* at §§ 1005, 1007, 1008 (2nd Ed. 1912). Intent is evidenced by the terms of the instrument conveying the land, or, when the instrument is silent or ambiguous, then by other facts and circumstances surrounding the conveyance. *Id.* Blacks' Law Dictionary defines appurtenant as:

A thing is 'appurtenant' to something else when it stands in relation of an incident to a principal and is necessarily connected with use and enjoyment of the latter. A thing is deemed to be incidental or *appurtenant* to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of passage of light, air, or heat from or across the land of another.

BLACKS LAW DICTIONARY 103 (6th Ed. 1990). Although the term is sometimes loosely used as a synonym for proximity, it more accurately describes a legal relationship between land and the thing benefiting the land. Idaho Code § 42-1402 now makes the water right appurtenant to the land on which the right is used. However, prior to 1986, the statute only applied to irrigation rights. 1986 Idaho Session Laws ch. 86, p. 561. In *Hayes v. Buzard*, 77 P. 423 (1904), the Montana Supreme Court discussed this issue with respect to a dispute regarding whether a water right passed as an appurtenance to conveyed land. The Court stated:

If title to the land in no wise affects the title to the water right, the fact that it has been used at this or that place, or upon particular land, will not of itself determine its character as an appurtenance. One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior owner.

Hayes at 425 (internal citations omitted). Therefore, it is within the realm of possibility that the place of use for a water right could be different from the land to which the right is

appurtenant. In this Court's opinion, the historical use of the public rangeland in conjunction with patented property and the subsequent regulations which not only gave preference to those practices but also established a legal relationship between the patented property and public rangeland allow such a circumstance.

As discussed previously, prior to the implementation of the Taylor Grazing Act, and prior to the concept of "base ranch property," many livestock owners nonetheless depended on the use of adjacent public rangeland in conjunction with their patented property to support a viable livestock operation. The livestock owner held no possessory interest in the rangeland itself but could still appropriate a water right. It can be reasonably concluded that both the rangeland as well as the water right benefited the livestock owners patented property. Later, after the implementation of the Taylor Grazing Act, and after the patented property could be considered "base property," the United States characterized the relationship between the base property and adjacent rangeland as one of dependence and acknowledged this dependence in awarding grazing preferences.¹²

The regulations implementing the Taylor Grazing Act then made the grazing preference expressly appurtenant to the base ranch property. *See* 43 C.F.R. § 4100.0-5 (1998) (preferences attach to the base property owned or controlled by the permittee or lessee). Idaho Code § 25-901 (2000) also provides that the grazing preference is appurtenant to the base ranch property. The United States as well as the Idaho legislature essentially acknowledged and codified a relationship between the patented or base ranch

¹² As one commentator discusses:

The framers of the Taylor Grazing Act were of course, perfectly aware there was far more use of the range than was desirable; therefore, if some use and users were to be eliminated, a system of priorities had to be set up. "Circular 2" set forth the preferences in detail. Applicants were placed into one of three classes of priority.

- Priority 1. Qualified applicants with **dependent commensurate property** and with prior use of public grazing land.
- Priority 2. Qualified applicants with prior use but not adequate commensurate property.
- Priority 3. Qualified applicants with adequate commensurate property but without prior use.

Calef, Wesley, *Private Grazing on Public Lands*, p. 60, (Arnoo Press, New York, 1979)(emphasis added). *See also* Exhibit Y (dependent property survey).

property and the use of the public rangeland. Accordingly, there is a sufficient enough connection or “nexus” between the water right and the patented or base property from which a grantor could reasonably intend to convey the water right as an appurtenance even though the place of use for the right differs from patented or base property.

This is not a situation where the water right and the property being conveyed are entirely unrelated. For example, if water from a source on the public domain were diverted onto the patented property to water livestock there would be no argument regarding an intended appurtenancy relationship between the land and the water. Furthermore, because livestock can be brought to the water instead of bringing the water to the livestock, if the deed conveying the patented property contained an easement to herd the livestock over the property of another to access water, it is relatively easy to conceptualize and conclude that the water right with a different place of use is appurtenant to the patented property. In the instant situation, there is no easement to access the water because one is not necessary. Prior to the implementation of the Taylor Grazing Act, there was an implied license to access the rangeland. After the implementation of the Taylor Grazing Act, a livestock owner had either a permit, a license, or a lease to access the public land. Nonetheless, the connection or “nexus” between the private property and the water right still exists. Again, the United States even ratified this connection in the process of awarding of the grazing preference.

Finally, assuming that a water right could be proven to historically exist, concluding that the water right could not transfer as an appurtenance to the patented or base property would result in an immediate abandonment or forfeiture of the water right five years after the property was conveyed. The successor-in-interest would then be appropriating a new right when the same water source was used to water cattle. In interpreting the instrument of conveyance the court would have to conclude that rather than the right being conveyed as an appurtenance, the grantor intended that the right be abandoned, or forfeited five years later.

5. Summary of Analysis

This Court holds that intent to appropriate an instream stock water right can be inferred from the stock merely drinking out of a particular source, and that no diversion is required. This Court holds further that such an instream stock water right could have been perfected on the public domain both prior and subsequent to the enactment of the Taylor Grazing Act. Prior to the enactment of the Taylor Grazing Act, a water right could be perfected without engaging in trespass. However, after the implementation of the Taylor Grazing Act and until 1995 (1971 in Idaho), a water right could only be perfected within the boundaries of where the permittee was authorized to graze; otherwise, the issue of trespass arises.

This Court holds further a water right appropriated on the public domain used in connection with a livestock operation can transfer as an appurtenance to patented or base ranch property. Whether an instream stock water right passed as an appurtenance to patented or base ranch property is an issue of fact and depends on the intent of the grantor. Absent express language in the instrument of conveyance, intent can be inferred from the circumstances surrounding the mesne conveyances in the chain of title.

In sum, as with any other type of water right, if the chain of title does not particularly describe a water right, a claimant must present proof that a water right was in fact appropriated by a predecessor-in-interest. In the case of instream stock water rights on the public domain, a claimant must show that the predecessor grazed livestock on the public domain and where on the public domain the predecessor grazed the livestock. Where a deed is otherwise silent, a generalized showing that a particular region was historically used by the public for grazing is insufficient to establish that a particular predecessor-in-interest grazed cattle for purposes of establishing a water right. Homestead applications and proofs, applications for grazing permits, grazing permits and other historic documents typically memorialized historic uses. Lastly, a claimant must show that the rights were conveyed as an appurtenance to the patented or base ranch property, based on the intent of the grantor. Intent can be inferred by showing the property and adjacent public land on which the rights are located was used consistent with the use of the original appropriator.

This ruling is not intended to lessen the standard of proof for establishing beneficial use rights. General averments that grazing existed historically by the public at large in a general area are insufficient to establish the existence and transfer of water rights. In proving any beneficial use right by a predecessor-in-interest, a claimant must still establish the existence and scope of the right and then connect the chain of title and appurtenant water rights from the original appropriator to the claimant.¹³ There

B. Application to LU's Claims.

1. LU's Claims

LU Ranches claimed an 1872 priority date for the subject beneficial use instream stock water rights. The sources for the claims are all located on public land and within the boundaries of three grazing allotments to which LU holds grazing permits. The claims were never previously decreed. LU asserts that the rights were appropriated by its predecessors-in-interest to the three patented properties that now comprise LU's base ranch properties for its three grazing allotments. LU does not have separate instruments conveying the water rights. LU asserts the claims transferred as appurtenances to the three patented properties. Most of the deeds in LU's chain of title for the patented properties contain clauses expressly conveying all appurtenances.

¹³ For example a claimant can trace his or her chain of title back to the patent and demonstrate that the original homesteader was engaged in the livestock business. This can be demonstrated from subsequent grazing permit applications wherein the applicant was required to set forth the prior historic use of the adjacent public domain in conjunction with the homesteaded property. Any subsequent preference and permit issued would certainly be probative of the historic use, for two reasons: First, because the preference and resulting permit was issued based on the representations by the applicant; and secondly, because the preference would be "attached" to the land (or water right) by operation of law.

Subsequent conveyances of the base property together with attached grazing privileges and the continued use of the grazing privileges are probative that any water rights transferred as appurtenances to the base property. New rights could not be established outside the boundaries authorized by a permit, since after the Taylor Grazing Act, new rights would require trespass in order to appropriate. The use of water rights alleged to have existed prior to the Taylor Grazing Act, but located outside of the boundaries of a subsequently issued permit would not have been able to be maintained. Finally, subsequently acquired grazing rights transferred to base property could also carry with them the historical use and priority.

2. Director's Recommendation

The *Director's Recommendations* for each of the rights recommended an 1872 priority date. The Special Master found that the recommendation of the 1872 priority date was based solely on the reprint of a newspaper article merely stating cattle were grazing in common in the area. The Special Master concluded that the presumption afforded the *Director's Report* had "burst" because there was no evidence linking LU's predecessors-in-interest to the patented properties with use of adjacent rangeland and water sources as early as 1872. "Proof of water use by some unknown person, somewhere in the area is not enough." *Special Master's Report and Recommendation* at 6. Once the presumption created by the *Director's Recommendation* was determined to have "burst", LU retained the burden of persuasion on each of the elements of its claimed right.

3. The Special Master's Findings

The Special Master found that LU proved a priority date of 1876 for each of the claims. The finding was based on evidence pertaining to the earliest of the three patented homestead properties, which indicated that cattle had been grazed on the homestead property by LU's predecessor-in-interest as of June 10, 1876. *See Claimant's Exhibit 6*. The Special Master then applied this priority date to the water rights related to the two other patented base properties. The Special Master concluded:

LU has, however, been able to show that their predecessors in interest were using open federal land and the water thereon from the dates that the original patent holders occupied and commenced working their homesteads. This resulted in different dates for the base property as it was pieced together. However, this special master believes that these amount to distinguishments without a difference. LU has not claimed multiple water rights for each location with a different priority for each of its predecessors who were using the water in common. They claimed only one right for each location, which their earliest predecessors used in common with each other and with others. They are entitled to the earliest of those dates proven which is June 10, 1876.

Special Master's Report and Recommendation at 6. This Court agrees that evidence of grazing by the public in general would be insufficient to establish a water right.

However, as stated earlier, the claimant must demonstrate that it was a *predecessor-in-interest* who grazed cattle on the place of use to establish the existence of the water right and then show how the claimant is connected to the title.

In this regard the Special Master erred in failing to separately analyze each patented property and associated grazing allotment individually until all properties were eventually acquired by LU for its livestock operation. The three base properties were homesteaded by different individuals and were patented on different dates. The three base properties are associated with three different grazing allotments, the South Mountain Allotment, the Cow Creek Allotment or Unit (which contains the former Trout Creek Allotment), and the Cliff's Allotment. Consistent with Judge Wood's reasoning and this Court's foregoing reasoning, findings should have been made regarding the historical circumstances surrounding the use of the three patented properties in conjunction with the adjacent rangeland that eventually formed the basis for the grazing allotments. Although evidence was presented regarding the circumstances surrounding each of the three properties, the Special Master failed to identify, weigh the evidence and make findings as to which claimed rights transferred as appurtenances to which patented properties for purposes of establishing the nexus between the property and the appurtenant rights.

The Special Master specifically concluded that evidence of grazing in common was insufficient to establish an 1872 priority date because there was insufficient proof of a nexus between the patented properties and the use of adjacent rangeland. The Special Master then recommended the 1876 priority date based on the historical use of only one of the patented properties but applied the same priority date for all of the rights without establishing a connection or nexus between the use of property and the adjacent rangeland. Thus, the recommendations made for the water rights on two of the allotments were made without any finding that the adjacent rangeland was used in connection with a livestock operation as early as 1876. Such reasoning is inconsistent with the same reasoning the Special Master used to reject the claimed 1872 priority date. Therefore, this Court has carefully reviewed the evidence presented at trial.

4. Whether the Special Master erred in holding that LU was entitled to a priority date earlier than September 23, 1976, for water rights 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, and 55-10300?

a. Water right claims 55-10288B, 55-10289B, 55-10290B, 55-10292B and 55-10293B.

Water right claims 55-10288B, 55-10289B, 55-10290B, 55-10292B, and 55-10293B all originate from sources located on rangeland within the boundaries of the South Mountain Allotment. Part of the base ranch property for the South Mountain Allotment, now owned by LU, consists of 160 acres which is referred to as the Duncan property, based on Warren C. Duncan, who was issued the original patent by the United States. Exhibit 2, p. 13. The history and circumstances surrounding the use and subsequent conveyances of the Duncan property are as follows.

South Mountain Allotment and the Duncan Homestead

In 1910, Warren C. Duncan filed a homestead entry application on 160 acres of land in Owyhee County described as the SE1/4NW1/4, NE1/4SW1/4 and S1/2SW1/4, Section 11, T9S, R5W, Exhibit BB. On September 7, 1911, Duncan filed a new application for the same homestead. Exhibit BB. Nothing in the homestead application indicates that Duncan was in the livestock business. The various proofs filed therewith describe the number of acres reclaimed for crops and the type of crops grown but do not refer to livestock raising.¹⁴ Exhibit BB, bate stamp number (bsn) 4068- 4111. On December 9, 1914, Duncan received a patent for the homestead entry. Exhibit 2, p.13.

Between 1923, and July 6, 1928, a series of conveyances (via tax deed, redemption deed, quitclaim deed, and sheriff's deed) transferred interest to R. W. Swagler on July 6, 1928. All instruments contained standard language providing

¹⁴ All three patented base properties involved in these subcases were homesteaded pursuant to the Homestead Act as opposed to the later Stock-Raising Homestead Act in which ground that was unsuitable for agriculture was specifically homesteaded for raising livestock. Under the original Homestead Act, lands were reclaimed for farming. This doesn't mean the lands couldn't also be used for livestock. However, without some corroborating evidence it would be untenable to automatically infer that the land must have been used in conjunction with a livestock operation.

“together with all water rights connected therewith or appertaining thereto.”¹⁵ Exhibit 2, pp.115-120. On July 14, 1928, Swagler conveyed the property to Patrick O’Keefe, together with all appurtenances. Exhibit 2, p. 323.

On June 24, 1935, Patrick O’Keefe applied for a grazing permit for 200 cattle. Exhibit Y, bsn 2003. In the application O’Keefe represented that he grazed cattle in “Deary Dist. # 8” and in portions of Section 24 T5S R6W. O’Keefe also represented that he controlled water sources for livestock purposes out of Trout Creek and Cabin Creek “running through described land,” which appears to be referring to private land he owned. On August 22, 1935, O’Keefe’s application was rejected because he did not own livestock. Exhibit Y, bsn 2079. The notice of rejection indicates the case was closed.

In a subsequent April 7, 1937, grazing application, O’Keefe represented that he owned and used land in conjunction with his livestock operation described as SE1/4SW1/4, Section 24, S1/2NW1/4, N1/2NE1/4, Section 25, T5S R6W. Exhibit Y, bsn 2009. The map attached to the application identifies the Duncan property as well as stream reaches located on private property in sections, 2, 11, 24 and 25, within the same township and range as the Duncan property. The application also asks to identify water or water rights used in conjunction with the livestock operation on the public domain. O’Keefe identified “Trout Creek” in T5S R6W, Sections 24 and 25. *The identified stream reaches were located on private property.* The application also states that the *base lands and water* had been used in connection with the public domain for the prior 30 years.¹⁶ Based on those representations, in 1938, O’Keefe was issued a permit to graze 40 cattle and four horses in a portion of the South Mountain Allotment, commencing July 1, 1938. Exhibit Y, bsn 2077. The legal description for O’Keefe’s portion of the South Mountain Allotment described in the permit was limited to the W1/2 Section 35, T8S R5W, the N1/2NW1/4, Section 2, T9S R5W, E1/2E1/2, SW1/4NE1/4, W1/2SE1/4, Section 11, T9S

¹⁵ This language would not necessarily establish the existence of a water right. However, to the extent a water right could be shown to exist, this language would operate to convey an appurtenant right.

¹⁶ The Court acknowledges that with respect to this region, land as opposed to water, was used for establishing base land property. Nonetheless in interpreting the intent of the grantors in the prior mesne conveyances where the deeds do not particularly describe water rights, O’Keefe must not have believed that water rights were transferred.

R5W. The dependent property survey included the legal description for the entire 160 acres of the Duncan property as dependent base property. Exhibit Y, bsn 2062. In 1939, a subsequent grazing application by O'Keefe was rejected.

Based on the representations contained in the application, the earliest priority that the evidence establishes for sources located within the area described in the permit for the described portion of the South Mountain Allotment would be for the 1938 grazing season commencing on July 1, 1938, as set forth in the permit. Exhibit Y, bsn 2077. Only portions of the places of use for water rights 55-10290B and 55-10292B are located within the area covered by this permit and would acquire a July 1, 1938, priority. Under O'Keefe's 1938 permit, O'Keefe was authorized to graze cattle in the west half of Section 35, T8S R5W. The west half of section 35 T8S R5W, includes portions of water rights 55-10292B (Cabin Creek) and portions of water right 55-10290B (Unnamed Stream and Buck Creek). The *Director's Report* and the *Special Master's Recommendation* for water rights 55-10290B and 55-10292B indicate that the water rights extend well upstream from the stream's reaches within the west half of Section 35 T8S R5W, as well as extending outside of the west half of Section 35 T8S R5W. However, no evidence presented supports that O'Keefe had obtained authorization to graze cattle outside of the boundaries described in the permit. Therefore the Court must conclude that Water Rights 55-10290B and 55-10292B, with the O'Keefe priority date of July 1, 1938, are limited to within the west half of Section 35, T8S R5W. This does not preclude LU from establishing another water right with a different priority date for the stream reaches outside of the west half of Section 35, T8S R5W.

After the enactment of the Taylor Grazing Act, when the grazing was not open to the public in general, O'Keefe could have only perfected water rights in those areas where he was authorized to graze cattle; otherwise the trespass prohibition would apply. *See e.g.* Exhibit C, bsn 1177 (notification of trespass without license). Additionally, O'Keefe could not have continued to use water rights alleged to have been appropriated prior to the enactment of the Taylor Grazing Act with places of use outside of the boundaries where O'Keefe was authorized to graze.

On October 14, 1941, O'Keefe conveyed the Duncan Homestead to Galo Mendieta, Jr. Exhibit X. The deed contained an appurtenance clause. On December 13, 1966, Galo and Mary Mendieta, husband and wife, conveyed the Duncan parcel to William and Nita Lowry, husband and wife. *Id.* This deed also contained an appurtenance clause. On October 1, 1976, William and Nita Lowry conveyed the Duncan parcel to LU Ranching Company. *Id.* The deed was silent as to appurtenances, but William Lowry testified that he intended to transfer all appurtenant water rights. Tr. p. 296.

Therefore, this Court concludes that O'Keefe acquired a water right to 55-10290B and 55-10292B on July 1, 1938, within the west half of Section 35, T8S R5W. These rights passed to Galo Mendieta, then to William and Nita Lowry, and finally to LU Ranching Company. The places of use for water rights 55-10288B, 55-10289B and 55-10293B were not connected with the chain of title for the Duncan property at this juncture. These rights are discussed *infra*.

b. Water right claims 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, and 55-10300.

Water rights claims 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, and 55-10300 originate from sources located on rangeland within the boundaries of the Cow Creek Allotment. Part of the base ranch property for the Cow Creek Allotment, now owned by LU, consists of 160 acres which is referred to as the Mills property, based on Ezra Mills, who was issued the original patent by the United States. Exhibit 2. The history and circumstances surrounding the use and subsequent conveyances of the property are as follows.

Cow Creek Allotment and Mills homestead.

In 1881, Ezra Mills filed a homestead entry application for 160 acres in Owyhee County described as S1/2NW1/4, Sec. 25 and the S1/2NE1/4, Sec. 26, T5S R6W. Exhibit CC, bsn 4048-4067. There is no evidence in the homestead application or

affidavits of proof in support of the homestead that Mills was engaged in the livestock business or engaged in an enterprise dependent on adjacent public land. Exhibit CC, bsn 4048-4067. The Special Master's finding of an 1876 priority date was based on Mills' representation in the proof of homestead that "he lived on and worked the homestead from June 10, 1876." *Special Master's Report and Recommendation* at 3. Nothing in the record suggests that Mills was in the livestock business prior to or contemporaneous with the issuance of the patent. LU admitted into evidence a historical newspaper article describing the Mills homestead but the article only refers to milk cows. Exhibit UU. In September 1887, Mills received a patent to the homestead entry. Exhibit 2, p. 220. On July 9, 1892, Mills conveyed the property to Jerrey Shea. Exhibit 2, p. 222.

On April 16, 1906, Jerrey Shea and Mary L. Shea, husband and wife, conveyed the Mills property to John T. Shea. Exhibit 2, p. 223. On May 8, 1909, John T. Shea and Myrtle Hastings Shea, husband and wife, conveyed the land back to Mary L. Shea. Exhibit 2, p. 224. All of the deeds, except the deed from Mills to Shea contain clauses "together with all water rights . . . used in or about or in connection with the irrigation of said land." Exhibit 2, pp. 220, 222-224. However, at this point in the chain of title there is no evidence that the property or any adjacent public rangeland was used in conjunction with a livestock operation in any manner.

Portion of Mills Homestead in Section 25.

On October 15, 1919, Mary L. Shea conveyed half of the Mills homestead - the eighty acres located in Section 25 - to Harry F. Staples. The deed conveyed "all water rights thereunto belonging or appertaining or to appertain." Exhibit 2, p. 226. On October 31, 1923, Staples conveyed the property to his wife Aileen R. Staples. Exhibit 2, p. 227. On April 12, 1928, Aileen R. Staples and Harry F. Staples, husband and wife, conveyed the land to the Estate of Mary L. Shea. Exhibit 2, p. 228.¹⁷ On January 30, 1933, John T. Shea, the administrator of the estate of Mary L. Shea, conveyed the eighty

¹⁷ Staples applied for a grazing permit on December 7, 1937, for customary use in the Cow Creek Unit. However, this appears to be associated with a different parcel of land and Staples did not own the Mills property at the time. Exhibit 6, bsn 2182.

acres of the Mills homestead located in Section 25 to O'Keefe. Exhibit 2, p. 229. All deeds in the chain of title contain clauses conveying all appurtenant water rights.

On April 7, 1937, when O'Keefe submitted the application for the grazing permit which included the legal description for the Duncan homestead property, the application also included the legal description for the eighty acres of the Section 25 Mills homestead property. Exhibit Y, bsn 2007-2012. O'Keefe was issued a permit to graze 20 head of cattle on the public land in the "Cow Creek Unit," commencing April 15, 1937. Exhibit Y, bsn, 2079. The permit does not provide a legal description limiting grazing to a specific area within the Cow Creek Unit. However, in a subsequent transfer it is apparent that the area was limited to the Cow Creek pasture # 05621 and # 05622 located within the Cow Creek Unit.¹⁸ The dependent property survey for O'Keefe includes the legal description for the eighty acres of the Section 25 Mills property. Exhibit Y, bsn, 2062. Again, *in the 1937 application O'Keefe fails to identify any water rights located on the public domain and the permit was awarded based on O'Keefe's representations.* Thus, it must be concluded that any appurtenant water rights were appropriated after the issuance of the grazing permit or April 15, 1937. In ascertaining the intent of the grantor, the Court cannot infer that the grantor conveyed something he didn't claim he owned.

On August 4, 1941, O'Keefe conveyed the portion of the Mills homestead in Section 25 to Galo Mendieta. Exhibit 2 p. 91. The abstract for the deed states that all "water, water rights ... thereunto appertaining or belonging" were transferred. On October 14, 1941, O'Keefe also conveyed the Duncan homestead property to Mendieta, together with all appurtenances. Exhibit 2, p. 309. On February 28, 1942, Mendieta notified the United States that he purchased the O'Keefe "holdings on Trout Creek and the grazing 800 acres also." Exhibit Y, bsn 3037. Exhibit C, bsn 1092. On January 22, 1943, Mendieta received the authorization to graze in the previously permitted portion of the South Mountain Allotment, used in conjunction with the Duncan property, and in the

¹⁸ The permit was limited to the "Trout Creek Allotment" which is located in the Cow Creek Unit, now Cow Creek Allotment. See Attachment 2 to *United States' Memorandum In Support of Challenge*. This becomes apparent in the subsequent notification to the United States regarding the sale of the base property and grazing rights. The reference is specifically to the Trout Creek Allotment. See Exhibit C, bsn 1155; Exhibit Y, bsn 2037.

Trout Creek portion of the Cow Creek Allotment, used in conjunction with the eighty acres consisting of the Section 25 Mills property. Exhibit C, bsn 1178-79. Cow Creek Pastures # 05621 and # 05622 include the places of use for water rights 55-10295, 55-10296, 55-10297B and 55-10298. *See map* Exhibit 19.

Under this Court's reasoning, as determined previously, only those portions of water right claims 55-10290B and 55-10292B in the South Mountain Allotment could have transferred to Mendieta as appurtenances to the Duncan property, with the July 1, 1938, priority date. Only water right claims 55-10295, 55-10296, 55-10297B and 55-10298, within the Cow Creek Allotment could have transferred as appurtenances to the eighty acres of the Mills property in Section 25, with an April 15, 1937, priority date.

Portion of Mills Homestead in Section 26.

On November 8, 1913, Mary L. Shea (a married woman) conveyed, together with water rights, the portion of the Mills homestead in Section 26 to George Kellogg. Exhibit 2, p. 43. On May 3, 1937, Kellogg conveyed to William Flora, also together with water rights. Exhibit 2, p. 74. There is a grazing permit application in the record filed by a W. H. Flora, which references an allotment in Idaho but contains no specifics. Exhibit 8. On October 25, 1937, Flora conveyed to Carleton Fretwell. Exhibit 2, p. 88. On September 26, 1946, the land was conveyed to Olive Fretwell. Exhibit 2, p. 94. These two deeds are silent as to water rights. On January 3, 1947, the land was conveyed to Henry and Hattie Fretwell, together with all appurtenances. Exhibit X. There is no permit application or permit in the record for a grazing preference associated with the Section 26 Mills property. However, there is evidence in the record that a grazing preference was eventually issued for the Cow Creek Allotment for the Section 26 Mills property. Exhibit W, bsn 74, 78, 79. At this juncture in the chain of title there is no evidence as to when the property or adjacent public land was used in connection with any livestock operation.

On September 6, 1949, Henry and Hattie Fretwell conveyed the eighty acres to Mendieta, together with appurtenances. Exhibit 2, p. 298. The purchase also included privileges for 20 head within the Trout Creek Allotment. Exhibit C, bsn 1161. Mendieta was previously using the property and the grazing rights acquired from O'Keefe in

conjunction with his livestock operation as early as 1942. Exhibit C, bsn 1181. Mendieta applied for the grazing permits for the Trout Creek Allotment and portions of the South Mountain Allotment. *Id.* Mendieta also purchased grazing privileges from a Jack Staples in 1954 or 1955. Exhibit C, bsn 1147-48, Exhibit ZZ, bsn 3827 and 1234. All privileges acquired from Staples were also in the Trout Creek Allotment, within the Cow Creek Unit. Exhibit ZZ, bsn 1234. These privileges attached to the Section 26 property. Exhibit ZZ, bsn 3827. Thereafter Mendieta applied for a series of additional permits for uses in the South Mountain and Cow Creek Allotments, which appear to exceed the boundaries of the historic use associated with the Duncan and Mills properties. The permit applications do not provide legal descriptions. Exhibit C. William Lowry also testified that Mendieta was grazing cattle on the entire South Mountain and Cow Creek Allotments. Lowry inspected the allotments with Mendieta in conjunction with the sale to Lowry. Tr. pp. 272-733, 276-77, 281-82. Therefore, the earliest use that the evidence would support with respect to the remainder of the boundaries of the South Mountain Allotment and the Cow Creek Allotment would be the date Mendieta acquired the Section 26 property or September 6, 1949. Based on the customary dates contained in Mendieta's grazing applications, the grazing season would have commenced April 1, 1950. Prior to that time the only evidence of use by Mendieta pertains to the privileges already acquired from O'Keefe. Therefore the earliest priority date the evidence would show for the remainder of the claims in the South Mountain and Cow Creek Allotments would be April 1, 1950. This includes water right claims 55-10288B, 55-10289B, 55-10293B, 55-10299B, 55-10300 and the remaining portions of 55-10290B and 55-10292B that were not included in O'Keefe's original grazing permit.

On December 13, 1965, Mendieta conveyed the land comprising the Duncan homestead and the land comprising the full 160 acres of the Mills homestead to William and Nita Lowry. William Lowry later became the president of LU. The transfer includes all appurtenances but does not mention water rights. Exhibit 2, p. 17. The contract of sale addresses the transfer of grazing rights located in the Cow Creek Unit, with no mention of rights in the South Mountain Allotment. Exhibit Q, bsn 99; Exhibit S, bsn 125. A dependent property survey dated December 20, 1966, refers to AUM's in the

Cow and Trout Creek Allotments. The reference to the South Mountain Allotment is based on a state lease. Exhibit W, bsn 1074. See Map Exhibit 20. William and Nita Lowry could have only received what Mendieta owned.

On October 1, 1976, William A. and Nita Lowry, husband and wife, conveyed to LU the land comprising the Duncan and Mills properties, which were used in conjunction with the land comprising the South Mountain and Cow Creek Allotments. Exhibit 2, p. 15. The deed is silent as to water rights or appurtenances. *Id.* However, William Lowry testified that he intended to transfer all appurtenant water rights. Tr. p. 296.

Therefore, based on the foregoing this Court concludes that the Special Master erred in finding an 1876 priority date for water rights 55-10288B, 55-10289B, portions of 55-10290B and 55-10292B, 55-10293B, 55-10299B and 55-10300. Based on this Court's review the priority date the evidence supports is April 1, 1950.

c. Whether the Special Master erred in holding that LU was entitled to a priority date earlier than June 28, 1984, for water right 55-10303B and 55-13451?

Cliff's Allotment

Water rights 55-10303B and 55-13451 are based on the chain of title related to the Ewing's homestead. In 1909, George Ewings, Jr. filed a homestead application for 160 acres of public land in Owyhee County, Idaho, described as the W1/2NE1/4, SE1/4NW1/4 and the NE1/4SW1/4, Section 9, T9S, R5W. Exhibit K, bsn 4211. Ewings received a patent for the property entry on July 26, 1910. None of the historical documents in support of the homestead entry suggest that Ewings was engaged in the livestock business. The proof of entry refers only to the number of acres of cultivated crops. Exhibit K.

On July 16, 1912, Ewings conveyed the land to Clyde C. Foster, together with "all water rights, canal and ditch rights, rights of way and other appurtenances . . ." Exhibit 2, p. 329. On January 12, 1937, Foster filed a grazing permit application for lands customarily used in the Pole Creek Unit¹⁹ for the previous 25 years. Exhibit 5. The

¹⁹ The "Pole Creek Unit" is located in the E1/2W1/2, T9S, R3W, which is located east of the Cliff's Allotment. See Attachment #2, *United States Memorandum in Support of Challenge*.

water rights identified in the application were all listed on private land. Exhibit 5, p. 3. Foster described the base property and water used in conjunction with the livestock operation as being located in T9S R5W, Sections 4, 8 and 9. Exhibit 5, pp. 3 and 5. This legal description borders the west boundary of the Cliff's Allotment. *See* map Exhibit 19. Although a permit is not in the record, one was apparently issued. In an analysis of grazing preferences pertaining to Don McKay, a successor-in-interest to Foster, the legal description for the allotment which attached to the Foster property was described as Sections 3, 4, 5, 10, 11, T9S R5W. None of this described property covers the places of use for water right 55-10303, within the Cliffs Allotment. *See* map, Exhibit 19; Exhibit M. However, the analysis also references additional privileges in the "Cliffs Cattle Allotment in the South Mountain Unit" without providing a legal description for these privileges. Exhibit M, bsn 3850, *see also* Exhibit UU. The analysis states that the McKay privileges were obtained from two purchases. "In 1950, Mr. McKay purchased the W.J. Shea base property and in 1955, McKay purchased the Clyde Foster base lands from Frank Maher." Exhibit M, bsn 3850. It was acknowledged that Foster had "94 AU's" in the Cliffs Allotment. Exhibit M, bsn 3851. When exactly Clyde Foster began grazing the Cliffs Allotment is not specified in the record. However, in Foster's grazing permit application he was asked to identify all sources of water owned or leased by him in connections with his livestock operation on the public domain. Exhibit 5, p. 3. *Foster did not identify any sources inside the Cliff's Allotment.* Therefore, it can only be inferred that any water rights not identified in the application were appropriated after its filing. The application was filed for the grazing season beginning July 1, 1937, and is dated January 12, 1937. Thus, the earliest priority date the evidence would support is July 1, 1937, for water right claim 55-10303B.

On April 22, 1946, the Ewings property was conveyed by Foster to Frank and Louise Maher. Exhibit 2, p. 308. The grazing privileges were transferred to Maher. Exhibit M, bsn 3851, Exhibit N, bsn 3424.²⁰ On January 24, 1955, Maher conveyed the

²⁰ Maher also had privileges in the South Mountain Unit related to a state lease. *See* Exhibit 4. However, no water rights within the South Mountain Unit are identified in the application. The rights identified are unrelated to the rights at issue.

Ewings property to Donald and Elizabeth McKay, together with “all water, water rights, ditches and ditch rights and rights to the use of water appurtenant to the above-described real property or used in connection therewith. . . . Exhibit 2, p. 7. As indicated previously, in the analysis addressing the McKay privileges, it was acknowledged that McKay obtained the grazing preference that was attached to the Foster (Ewings) property. Exhibit M, bsn 3852. McKay also obtained grazing privileges from the W.J. Shea base property. *Id.* However, the Shea privileges appear to be related to the South Mountain not the Cliffs Allotment.²¹ Exhibits 14, 15 and 16. Only applications for Shea’s permits are in the record. Exhibits 12-16.

On June 28, 1984, McKay conveyed the Ewings property, and other ranch land to LU. The deed conveyed “all water rights, ditches and ditch rights used thereon or appurtenant thereto. . . .” Exhibit 2, p. 26. The grazing preference in the Cliff’s Allotment attached to McKay’s base property was transferred to LU, together with the July 1, 1937, priority date for claim 55-10303B. Exhibit M, bsn 3853.

The *Director’s Report* states that water right 55-13451 is a spring-fed domestic water right that is used for a home and 15 horses. The claim appears to be on federally managed land within the Cliff’s allotment. Since the Court has ruled that water right claim 55-10303B acquired a July 1, 1937 priority date based on Foster’s use of the Cliff’s allotment, the Court finds it appropriate to give the same priority date to water right 55-13451.

Lowry’s and LU’s acquisition of other grazing rights.

The Lowry’s and/or LU acquired additional grazing privileges but the history surrounding the use of those privileges is not clear from the record. For example, the Application and Transfer of Grazing Privileges of 1966 from Jump Creek Sheep Co. to William R. Lowry describes the base property from which the grazing privileges are

²¹ There are several permit applications in the in the record for W. J. Shea, wherein Shea identified water rights that he owned or controlled. However, the rights identified are located on private land west of the South Mountain Allotment. Exhibit 15, bsn 1992, *see* Map Exhibit 19. In a 1940 permit application Shea identifies “none” in response to the question of water rights. Exhibit 12, bsn 1969.

being transferred. There is no mention of water rights and the historic use of the grazing privileges for purposes of establishing water rights cannot be determined from the record. Exhibit RR. The Application and Transfer of Grazing Privileges of 1966 from John and Don Archibal to William A. Lowry describes the base property from which the grazing privileges are being transferred. There is no mention of water rights and the historic use of the grazing privileges for purposes of establishing water rights is not in the record. Exhibit SS. As such, to the extent LU attributes acquiring water rights through these acquisitions there is no evidence from which to establish the existence of water rights.

d) Conclusion as to priority date issues.

In applying the standard of review of a special master's findings of fact, this Court holds that there was insufficient evidence in the record from which the Special Master could have found an 1876 priority date for the water rights in question. This is not a situation where different inferences could be drawn from specific evidence. The Special Master incorrectly applied Judge Wood's opinion on recommitment.²² The Special Master allowed LU to "tack" pre-existing uses in establishing the priority date rather than trace the chain of title and attached grazing privileges from the original appropriator to LU. The Special Master simply allowed LU to attempt to show generally that the land comprising the areas in the three allotments was historically grazed by homesteaders prior to the enactment of the Taylor Grazing Act; that the land historically grazed was divided into grazing allotments and now LU owns the three original homesteads and all of the grazing rights for the three allotments. Such a process does not reflect how the public grazing lands were administered as reflected by the voluminous record and greatly oversimplifies the Court's prior ruling.

The allotments in these subcases were not historically grazed exclusively by one party. Thus, several different parties could have potentially appropriated water rights.

²² At the time of Judge Wood's ruling the chain of title and grazing permits were not in the record. *Memorandum Decision* at 14, fn.12, so the issues were essentially being decided in the hypothetical. The decision concluded that it would be possible to demonstrate a transfer of water rights but that the claimant still needed to trace the water rights back to the original appropriator.

This is not a situation where only one preference and subsequent permit was issued for each allotment and held exclusively by one party and the only way a successor could obtain the preference was through a mesne conveyance from that party. Nor in this case were original permits issued for the entire allotments and attached to the three respective base (homestead) properties. Instead, in some circumstances, multiple preferences and permits were issued for uses within each allotment to a number of parties in common. In other circumstances parties were only authorized to graze within specifically defined pastures within an allotment.²³ There are multiple different water sources within an allotment. Accordingly, a claimant would not automatically acquire a water right of past permittees just because they all grazed cattle in the same common area. The claimant must demonstrate privity between the claimant and the former permittee(s) either through an actual transfer of grazing privileges to the claimant's base property by a particular permittee or by the claimant's acquisition of property from a permittee to which grazing privileges are attached. Because of the restrictions and multiple uses within the allotment, the claimant must also show what areas were grazed pursuant to the acquired privileges. (If a permit only authorized a predecessor, such as O'Keefe, to graze in a particular area within an allotment, a successor could only acquire water rights to those sources where the predecessor was permitted to graze).

In addition, grazing permits can lapse or be denied. *See e.g.* Exhibit Y, bsn 2079. In this Court's opinion, there is a significant difference between a circumstance where a permit lapses or is not renewed and a new permittee applies for and is issued a permit to graze in the same area; and the circumstance where privileges are specifically conveyed or transferred to a successor's base property or new base property is acquired with

²³ Take, for example, the Duncan property and the South Mountain Allotment. After 1934, Duncan's successor established a grazing preference within the South Mountain Allotment but the permit did not authorize grazing in the entire allotment. The only evidence of where grazing historically took place was in the representations made in the permit application and in the issuance of the permit. The permit authorized grazing within a subsection of the allotment. Therefore only water rights within the boundaries of the permit could be established or maintained. Additional water rights within the remaining areas of the South Mountain Allotment would either have to be transferred from another party and attach to the Duncan property or Duncan's successor could get a permit for a different area within the Allotment. In either case, the priority date would be based on the history of the acquired transfer or based on when grazing occurred in the other areas of the Allotment covered by the new permit.

attached grazing privileges. In the former, the court cannot infer intent to convey a water right to a successor because nothing was conveyed; in the latter, it is reasonable to infer that any water rights were intended to follow the grazing privileges or base property. However, the claimant must still demonstrate how and when in the chain of title the rights were acquired. Without evidence, and given the multiple factors affecting the use of grazing allotments, the Court cannot infer that the privileges for the entire three allotments were either initially attached to the respective homesteads or were properly transferred from other properties. Under the realities of how the rangeland was administered, privileges that are conveyed and transferred from one base property to another base property have a different history of use which would ultimately affect the priority date of any appurtenant water right.

The Court agrees that water rights on adjacent public land can transfer as an appurtenance to private property or in conjunction with the transfer of grazing privileges; however, claimants still need to show what particular right was transferred and when it was transferred or made appurtenant. Absent express language in the instruments of conveyance, this can only be determined by examining the historical uses surrounding the chain of title. In particular, the grazing applications, transfer applications and permits all memorialized the past uses of land and water and authorized the boundaries for future uses. If the claimant of a beneficial use right is not the original appropriator, the claimant needs to prove when the right was appropriated and how it was acquired. For the Court to hold otherwise would result in the application of a double standard.²⁴

C. Issues pertaining to certain recommended legal descriptions for various rights.

The following issues involve challenges to the *Special Master's Recommendations* regarding legal descriptions for elements to certain rights. For some of

²⁴ In these subcases, the Court finds it perplexing that, given the historical importance of water with respect to controlling rangeland, that in the approximately one hundred years involving numerous transfers of base property and grazing privileges there is no mention in any of the documents of a pre-existing water right located on public domain within the three allotments.

the issues raised, the evidence presented was conflicting as to whether a particular stream reach was accurately depicted by a map. The Special Master also did not view the subject premises in conjunction with presentation of evidence on these issues. On the motion to alter or amend, the Special Master ordered IDWR to file an I.R.E. 706 report and the parties to file briefing in response. The process did not resolve all of the conflicts. Therefore, to the extent discrepancies exist as to these issues the Court must defer to the Special Master's findings.

Other issues raised concern the Special Master recommending legal descriptions for either places of use or points of diversion that were not originally claimed by LU or recommended in the *Director's Report* but were raised by LU in its objection. **Each is addressed below.**

1. The Special Master did not err by not deleting T07S, R06W, S35, SENE as a place of use and in establishing beginning and ending points of diversion for water right claim 55-10288B.

The United States challenges the *Special Master's Recommendation* that the description T7S R6W, Section 35, SENE should be retained as a Place of Use because it is not located within the South Mountain Allotment. *See* map, exhibit 19. Conflicting evidence was introduced at trial as to whether a portion of the quarter-quarter section was within the South Mountain Allotment. The Special Master included language in the recommendation for the above water right limiting the use of the stream in the quarter-quarter section to within the South Mountain Allotment. Although the evidence is conflicting, the *Special Master's Recommendation* is entitled to deference. The clarifying language in the recommendation is sufficient to assure that no place of use for the water right is located outside of the South Mountain Allotment.

2. The Special Master did not err by not deleting "Unnamed Streams" tributary to "Juniper Creek" as a source for water right claim 55-10289B.

The United States challenges the *Special Master's Recommendation* that the source described as "Unnamed Streams" tributary to "Juniper Creek" should not be deleted as a source of water. This description was included on the *Director's Report*, as well as the *Special Master's Recommendation*. The United States did not present sufficient evidence to show that the Special Master's findings were clearly erroneous; therefore, the *Special Master's Recommendation* is entitled to deference.

3. The Special Master did not err by not amending the points of diversion (instream) for water right claim 55-10296.

The United States Challenges the *Special Master's Recommendation*, stating that to complete the description of the Point of Diversion, two PODs should be added to the *Recommendation*: T5S R6W, Section 14, SWSWSE, and Section 23, NENENW. LU Challenges the *Special Master's Recommendation*, stating that the quarter- quarter section defined as T5S R6W, Section 23, NWNE should be included as a place of use. The evidence at trial, including the *Director's Reports* and the Exhibit 21 map, show that the Place of Use that LU wishes to include in the partial decree lies between the instream beginning point and the instream ending point for the point of diversion. Since the above right is an instream stock watering claim, it is appropriate to add the place of use requested by LU pursuant to I.R.C.P 60(a). It would make no sense to decree the right otherwise. The Court does not find any reason to include the points of diversion argued by the United States.

4. Whether the Special Master erred by not deleting the source "Unnamed Stream" tributary to "Jordan Creek" and by not amending the points of diversion for water right claim 55-10297B.

Both the United States and LU raised challenges to legal descriptions contained in this water right.

The United States challenges the *Special Master's Recommendation*, stating that the *Recommendation* should be amended to delete the source designated as "Unnamed Stream" tributary to "Jordan Creek," because the source does not exist. The *Director's*

Report included this description, which was adopted by the Special Master. The United States does not present enough evidence to show that the Special Master's findings were clearly erroneous; therefore, the *Special Master's Recommendation* is entitled to deference in this regard.

The United States also challenges the Special Master's inclusion of T5S R6W, Section 13, SWSW as a point of diversion in the *Recommendation*, because it was not claimed as a place of use by LU. LU challenges the *Special Master's Report*, stating that the SWSW quarter quarter description should have been included as a place of use. The quarter quarter was listed as a point of diversion for the water right in the *Director's Report*, so it does not appear to this Court that there are any notice problems raised by LU's failure to claim the quarter quarter as a place of use, particularly since this right is an instream stock water right. Exhibit 22 also shows that the SWSW quarter quarter section is a beginning point of diversion for this right. Because the point of diversion was included in the *Director's Report* as an instream beginning point of diversion for this water right, it is appropriate to include it as a place of use as well, pursuant to I.R.C.P. 60(a).

The United States also argues that the points of diversion designated as T5S R6W, Section 14, NENE and SENE were not claimed as places of use in 55-10297B, but were claimed as POUs in 55-10296. However, the above quarter quarter sections were included in the *Director's Report* as points of diversion. Therefore, again, because of the nature of the water right as an instream flow stock water right, there is no reason why the court should disallow the point of diversions simply because corresponding places of use were not reported. (It does not appear that LU has made any motion for the quarter quarters to be included as places of use at this time.)

The United States further argues that the places of use designated as T5S R6W, Section 14, NESE and T5S R6W, Section 23, SWNE should be deleted from the places of use because there is no water source. The United States refers to the map, Exhibit 21, to support this challenge. The places of use in question were recommended by IDWR, and the recommendations were adopted by the Special Master. The United States has not

shown clear error in this matter, and the *Special Master's Recommendation* is due deference.

5. The Special Master did not err by not deleting T9S R5W, S33, NWNW as a place of use; and by not amending the source description to read "Unnamed Stream" tributary to "Corral Creek" in water right 55-10303B.

The United State Challenges the *Master's Recommendation*, stating the *Recommendation* should be amended so the source reads "Unnamed Stream" tributary to Corral Creek, rather than Unnamed Streams. The *Directors Report* used the language unnamed streams, and while the map Exhibit 23 shows only one beginning point and ending point for an unnamed stream, the evidence is conflicting in this matter, therefore the *Special Master's Recommendation* is due deference in this regard.

The United States further argues that the *Special Master's Recommendation* should be amended to delete T9S R5W, Section 33 NWNW as a place of use. The United States argues that the claimed source does not run through the described tract. The map prepared by the United States shows that the water source appears to run between the NWNW and the SWNW. The Special Master drew an inference that the NWNW should be included, and that inference is also due deference.

VI. CONCLUSION

For the reason set forth above, this Court holds that the Special Master erred as a matter of law in failing to properly trace the chain of title in the mesne conveyances in accordance with Judge Wood's prior ruling for purposes of establishing priority dates for the above-captioned claims. Following an review of the evidence presented, this Court also concludes that the Special Master erred as a matter of fact by recommending an 1876 priority date for each of the claims based on the lack of evidence in the record necessary to establish such a priority.

VII.
ORDER OF PARTIAL DECREES

Therefore, IT IS ORDERED that the above-captioned water right claims are hereby **decreed** as set forth in the attached *Partial Decree Pursuant to I.R.C.P. 54(b)*. Consistent with this Court's ruling, water right 55-10292B was split into 55-10292B and 55-13846, and water right 55-10290B was split into 55-10290B and 55-13844.

VIII.
ORDER DISALLOWING WATER RIGHT CLAIM 55-10301B

In the *Special Master's Order on Motion to Alter or Amend* dated April 15, 2004, water right claim 55-10301B was recommended disallowed. The Special Master concluded that the parties were in agreement that the right should be recommended disallowed. Although the claim number appears in the caption of LU's challenge, the claim was never substantively addressed by either party. Therefore the Court concludes that LU did not intend to Challenge the *Special Master's Recommendation* with respect to 55-10301B.

THEREFORE IT IS ORDERED AND ADJUDGED that water right claim 55-10301B is hereby **disallowed with prejudice** and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED

Dated January 3, 2005

/s/John Melanson

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

EXHIBIT “B”

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	)	Subcases: 55-10135 (Joyce Livestock) 55-11061,
	)	55-11385, 55-12452 (BLM).
Case No. 39576	)	MEMORANDUM DECISION AND
	)	ORDER ON CHALLENGE
	)	

Reversing Special Master and denying United States' state-law based claims 55-11061, 55-11385, and 55-12452 based solely on administration of lands. Granting Joyce Livestock's claim 55-10135 with April 26, 1935, priority.

Appearances

Elizabeth P. Ewens, McQuaid, Bedford & Van Zandt LLP, San Francisco, CA, for Joyce Livestock.

Roger D. Ling, Ling, Robinson and Walker, Rupert, ID, for Joyce Livestock.

Larry A. Brown, U.S. Department of Justice, Natural Resources Section, Environmental Resources Division, for U.S. Department of Interior, Bureau of Land Management.

I.

PROCEDURAL BACKGROUND

A. The procedural background of these cases is set forth in detail in the *Special Master's Report and Recommendation in Subcases 55-10135 and 55-11061, 55-11385, 55-12452* (October 6, 2003), and is summarized briefly here. Joyce Livestock Company (Joyce Livestock or Joyce) filed a single instream *Notice of Claim to a Water Right*, claiming .23 cfs from Jordan Creek in Owyhee County based on beneficial use with a priority date of 1865 for instream stockwater. The United States, Department of Interior, Bureau of Land Management (United States or BLM) filed three notices of claim, each for .02 cfs for instream stockwater with a

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January 1, 1874, priority date based on beneficial use, which largely overlapped the stream reaches of Joyce's claimed right. The Director of the Idaho Department of Water Resources issued the *Director's Report for Domestic and Stockwater, Reporting Area 6 (IDWR Basin 55)* on July 31, 1997. Joyce Livestock's claim and the three United States claims were listed. The Director recommended Joyce's claim with a reduction to .02 cfs, and the United States' claim as claimed.

B. The United States timely filed an objection to the recommendation for Joyce Livestock's claim, objecting to the claimed priority date, the points of diversion and places of use. The State of Idaho filed timely objections to the recommendations for the United States' claims, alleging that the priority date should be no earlier than June 28, 1934, the date of the enactment of the Taylor Grazing Act. On April 28, 2000, the BLM and the State of Idaho filed a stipulation, stating that if the three United States' claims are decreed, the priority date would be no earlier than June 28, 1934. This stipulation ended the State of Idaho's participation in these subcases.¹ On May 6, 1998, the Court granted Joyce Livestock leave to file late objections to the United States' water right claims. Joyce Livestock's objections alleged that the name on the United States' water right claims should be Joyce Livestock, not the United States.

C. On July 16, 1998, Special Master Haemmerle entered an *Order Consolidating Subcases for Summary Judgment* in subcases 55-10135, 55-11061, 55-11385 and 55-12452. On September 22, 1999, then-Presiding Judge Barry Wood entered an *Amended Order of Reference Appointing Terrence A. Dolan Special Master* in the above subcases. On September 28, 2001,

¹ The State of Idaho filed objections to all of the United States' beneficial use instream stockwater claims. On June 11, 1999, and July 1, 1999, the State of Idaho and the United States entered into stipulations which among other things resolved the State's objections to the United States' beneficial use claims and resolved the subcases where the State of Idaho was the only objector. *Stipulation to Resolve Objections*, consolidated subcase nos. 23-10859, 24-10221, 25-13659, 27-11604 and 65-19685 (June 11, 1999); *Stipulation to Resolve Objections*, subcase nos. 01-10249 *et seq.* (July 1, 1999). Pursuant to the *Stipulation to Resolve Objections* the State of Idaho and the United States agreed that the priority date for all of the state-based beneficial use stockwater claims made by the United States (BLM) in 34 subbasins would be June 28, 1934, (the date of enactment of the Taylor Grazing Act), unless the United States had previously acquired the land from a third party with an earlier priority date or the claim was based on previously licensed or permitted right with a different priority date. The *Stipulation to Resolve Subcases* agreed to the elements of approximately 2000 stockwater rights where the claims were based solely on state law and the State of Idaho was the only objector. The *Stipulation* provided that the elements would be as reported by the Idaho Department of Water Resources (IDWR) except that the priority date would be June 28, 1934.

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the Special Master allowed the United States to amend the above claims to correct places of use and to amend the priority date of the rights to June 28, 1934, in accordance with the stipulation reached with the State of Idaho. On December 4, 2001, the Special Master allowed Joyce Livestock to amend the above claimed water right to change the priority date to 1898, and to change the quantity to .02 cfs. On March 8, 2002, Joyce Livestock filed a *Motion for Summary Judgment*, which was denied by the Special Master on July 24, 2002.

D. On December 3-6, 2002, the Special Master held a trial on the objections to the four claims. On October 6, 2003, the *Report and Recommendation of the Special Master* was filed, recommending that Joyce's claim to water right 55-10135 be denied, and that the United States' claims to water rights 55-11061, 55-11385 and 55-12452 be decreed as amended. On November 24, 2003, Joyce Livestock filed a *Motion to Alter or Amend Special Master's Report*, which was denied by the Special Master on July 22, 2004. On August 4, 2004, Joyce Livestock filed its *Notice of Challenge*. After a series of briefs were filed by both Joyce Livestock and the United States, oral argument was heard on June 15, 2005.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on June 15, 2005. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or June 16, 2005.

III.

ISSUES PRESENTED ON CHALLENGE

Summarily stated, the following issues are presented to the Court on Challenge:

A. Whether the Special Master erred as a matter of law in recommending that the management of federally administered grazing allotments, without more, constitutes a beneficial use sufficient to support the United States' beneficial use claims to instream stockwater rights.

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B. Whether the Special Master erred in recommending that Joyce Livestock failed to establish a beneficial use stockwater right by holding that neither Joyce Livestock nor any of its predecessors demonstrated the requisite intent to either appropriate or transfer an instream stockwater right.

IV.

STANDARD OF REVIEW OF A SPECIAL MASTER'S RECOMMENDATION

The following standard of review of a special master's report and recommendation has been consistently applied throughout the course of the SRBA.

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989); *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to

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determine whether they are supported by substantial,² although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. Wright and Miller, *Federal Practice and Procedure* § 2614 (1995); *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra*, § 2585.

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 582 (1971).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1st Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor D. Craig Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well

² Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

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as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook.” Lewis, *Idaho Trial Handbook*, § 35.14 (1995), (citing *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.).

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151, 153, 922 P.2d 1077, 1079 (Ct. App. 1996).

B. Conclusions of Law of a Special Master.

A special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534, 861 P.2d at 104. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

In sum, findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

V.

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

A. Joyce Livestock's Claim.

The Special Master first addressed Water Right 55-10135, claimed by Joyce Livestock. The Special Master found that the key issues involved in Joyce Livestock's claims were: 1)

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whether Joyce Livestock's grantors appropriated the water of Jordan Creek for instream stockwater use as early as 1898, and 2) if so, whether the water right was an appurtenance to land which passed via instruments conveying that land to Joyce Livestock. The Special Master viewed the key issue as one of intent. "Did Joyce Livestock's grantors *intend* to appropriate the water and if so, did they *intend* to convey that right to their successors?" *Master's Report and Recommendation* at 19. The Special Master went on to state that:

In the present subcases, the answer to the first question of intent answers both questions of intent. The preponderance of the evidence is that none of 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.

While it is true that some grantors of Joyce Livestock grazed horses, sheep and cattle in the Jordan Creek drainage and their livestock drank from the stream, there is no evidence that any one rancher intended to appropriate the water. On the contrary, their concern was solely to have access to public land for grazing their livestock, along with other grazers.

Before 1934, and enactment of the Taylor Grazing Act, the "privilege or right of pasturage upon the public lands of the government, which are left open and unclosed [sic], and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it." *Anthony Wilkinson Live Stock Co. v. McIlquam*, 83 P. 364, 369 (Wyo., 1905). In those days, different brands watered along Jordan Creek, there were no fences and the cattle followed the green grass. Gene Lewis, TTr, at 315.

None of the documents conveying land that eventually comprised the Joyce Ranch specifically described water rights on federal public land. That left Joyce Livestock to argue that such water rights were conveyed by such generic appurtenance clauses as: "TOGETHER With all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof." But since the appurtenance clauses were silent as to water rights on federal public land, Joyce Livestock was left to search for the intent of the grantors in the circumstances surrounding the mesne conveyances of the land to which the water right is claimed to be appurtenant.

Paul Nettleton testified that in 1985, when he and the Hubert E. Nettleton Estate conveyed the Joyce Ranch to Joyce Livestock, he intended to convey the ranch as one unit, including "everything as being necessary to operate that ranch, which would include grazing rights, water rights. . . ." TTr, at 673. But that evidence alone would entitle Joyce Livestock to a priority date of no earlier than 1985. To go back further, to its claimed 1898 priority date, it had to demonstrate intent based on other "circumstances surrounding the mesne conveyances."

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First, Joyce Livestock called Dr. Chad C. Gibson to testify about historical transfers of ranching operations. Dr. Gibson said that in his experience, “ranches were bought and sold and traded as a unit, which included all of the 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 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 records of the 1936 Salt Lake City District Advisors’ 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.

Joyce Livestock was then left to argue that its grantors’ applications for grazing preferences beginning in 1935, somehow showed that they owned instream stockwater rights on federal public land by the applicants’ claims that such rights were appurtenant to their base property. The premise was that if Joyce Livestock could at least show that its grantors believed that they owned such rights, that might be some evidence of their intent to transfer the rights when they sold their land. But the facts are just the opposite. None of Joyce Livestock’s grantors claimed water rights on federal public land as part of their base property.

John T. Shea, the first of Joyce Livestock’s grantors to apply for a grazing permit in 1935, was asked whether he owned or controlled any source of water supply needed or used for livestock purposes. He responded: “Usual water right acquired with lands under laws of Idaho.” Mr. Shea was then asked where the sources of water supply were located. He responded: “Springs & creeks running on & through the ranches.” U.S. Trial Exhibit 87. In other words, the only water rights Mr. Shea owned or controlled were located on his deeded lands. Another grantor of Joyce Livestock was Joyce Brothers Livestock Company. On its 1935 application for a grazing preference, it, too, listed only water rights on its own land. Finally, even Paul Nettleton in 2000, on his grazing application listed only the Joyce Ranch as Joyce Livestock’s base property for a grazing preference – no water rights on federal public land.

The fatal flaw in Joyce Livestock’s claim to an instream stockwater right on federal public land can be illustrated in the following scenario. Joyce Livestock filed one claim with an 1898 priority date that corresponds to the earliest patents in the Joyce Ranch chain of title – Mary and Anna Joyce (June 1, 1898). Assuming, *arguendo*, that Mary and Anna Joyce perfected a valid appropriation in 1898, and assuming that such right became appurtenant to their land and ultimately to the current Joyce Ranch, that would necessarily mean that Joyce Livestock based its claim on that single water right. However, 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

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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. 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.

Special Master's Report and Recommendation at 20-22.

Based on this analysis, the Special Master denied Joyce Livestock's claim.

B. United States' Claims.

The Special Master ruled that the United States had made valid appropriations of water under Idaho law by making it available, along with grazing allotments, for use by grazers:

In the present subcases, the Special Master agrees with the BLM that it is entitled to its claimed instream stockwatering rights along Jordan Creek. Making the 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.

The fact that the BLM does not own the livestock which actually consume the water is irrelevant. State water law specifically authorizes the BLM to “appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain . . . [so long as] the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefor on the public domain.” I.C. § 42-501. And there is no restriction on how BLM appropriates such water: “Nothing herein shall be construed to deprive the department of water resources of the United States from filing application for waters nor from obtaining permit, license and certificate of water right under the general laws of the state having to do with the appropriation of waters of the state.” I.C. § 42-503. A further restriction is that no change in use of the stockwater right may be made “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). Beyond those restrictions unique to stockwater rights on the public domain / federal grazing allotments, the BLM is considered the same as any other landowner who makes their land available for grazing. Since neither Joyce Livestock and its grantors, nor any other grazer,

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have appropriated the water of Jordan Creek, there is no state law barring the BLM's present claims.

Idaho Code § 42-114 states: "Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water." Some interpret the above statute as requiring that a stockwater right must be issued solely to the stock owner (Joyce Livestock) and not the landowner (BLM).

In 1988, IDWR Director R. Keith Higginson asked Attorney General Jim Jones: "Does Section 42-114, Idaho Code, prohibit the issuance of a water right permit to a landowner for stock watering purposes if the land is or is intended to be leased to another person for the grazing of livestock?" The Attorney General's opinion, written by Deputy Attorney General David J. Barber, is worth quoting at length because it closely parallels the circumstances in the present subcases:

The statute, by its express language, requires the department to issue the permit for stock watering "to the person or association of persons making application therefor." It provides no restriction on who may apply. Therefore, any person, including a landowner who leases his land to stockmen, may file an application for a water right.

The statute further provides that "watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water." This sentence addresses an issue of particular importance to the livestock industry in a state that depends on summer grazing on lands administered by the U.S. Forest Service and by the Bureau of Land Management. In such a case, the owner of the cattle has no legal title to the summer grazing land. This provision makes it clear that the owner of cattle is making beneficial use of the water even without ownership in the underlying place of use.

...

Idaho Code § 42-114 does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock. Section 42-114 merely affirms that stock watering is a beneficial use of water and that any person may file an application for that use [emphasis added].

1988 Idaho Op. Atty. Gen. 41, Opinion No. 88-6, October 21, 1988.

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While the above Attorney General's opinion deals with permits, rather than beneficial use claims, as in the present subcases, it is fair to conclude that Idaho law has never required ownership of livestock as a condition precedent to ownership of a livestock water right. But there remains the matter of priority date for the BLM's claims. Idaho Code § 42-113(2) requires that the priority date for instream stockwater rights established by beneficial use on federally owned land "shall be the first date that water historically was used for livestock watering associated with grazing on the land. . . ."

The record indicates that a wide variety of stock owners grazed their livestock in and around the Jordan Creek drainage as early as 1865. However, "the many years of uncontrolled use which has existed up to the present time [1932]"³ came to an end with enactment of the Taylor Grazing Act in 1934. Thereafter, only "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights" within or near the district were given a preference. Taylor Grazing Act, 43 U.S.C. § 315b.

Because the BLM's appropriations of Jordan Creek water for instream stockwater use arise from its management of public lands for livestock grazing under the Taylor Grazing Act, it is logical – and consistent with the BLM's April 28, 2000 *Stipulation* with the State – that the BLM be awarded a priority of June 28, 1934, the date of enactment of the Taylor Grazing Act.

Special Master's Report and Recommendation at 24-26.

VI.

ANALYSIS AND DISCUSSION

A. The Special Master erred as a matter of law in concluding that Joyce Livestock or its predecessors lacked the requisite intent to appropriate a water right.

Joyce Livestock's stockwater claim as amended describes twenty different forty-acre (quarter-quarter) tracts of land as places of use along Jordan Creek within the Silver Creek Allotment for which Joyce now holds the grazing preference. Joyce Livestock is an Idaho

³ 1932 Forest Service survey, "Owyhee County: The Public Domain as a Land Resource," U.S. Trial Exhibit 88.

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limited partnership entity formed in 1985. Joyce owns approximately 10,000 acres in the adjacent Sinker Creek Basin which serves as “base ranch” property for its grazing preference. The 10,000 acres consists of the accumulation of a number of smaller ranches ultimately acquired by Joyce Livestock. Some of these smaller ranches were in existence and used adjacent public grazing land encompassing Jordan Creek as early as 1898. After the United States began administering public grazing lands pursuant to the Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315)(“Taylor Grazing Act”) some of the ranch operators acquired grazing rights along Jordan Creek. Joyce’s acquisition of some of these ranches also included the transfer of grazing rights. Joyce Livestock asserts that its predecessors-in-interest appropriated instream stockwater rights within the boundaries of these grazing allotments, which also transferred to Joyce. Joyce does not have any deeds or other instruments of conveyance evidencing the transfer of water rights from a predecessor-in-interest. Joyce asserts that the stockwater rights transferred as appurtenances to the various acquired patented or base ranch properties.

The Special Master ruled that Joyce’s predecessors-in-interest did not appropriate water rights by simply grazing cattle on open public rangeland or on defined grazing allotments following the implementation of the Taylor Grazing Act. The Special Master ruled that grazing cattle in common on the public rangeland was insufficient to establish the requisite intent needed to establish a water right. The Special Master held “the preponderance of the evidence is that none of Joyce Livestock’s grantor’s intended to appropriate the water of Jordan Creek for instream watering.” The Special Master recommended that Joyce therefore failed to acquire a stockwater right from any of its predecessors-in-interest. Since the issuance of the *Special Master’s Recommendation*, this Court issued a decision involving similar issues wherein this Court discussed the criteria for appropriating an instream stockwater right on public land. ***Memorandum Decision and Order on Challenge, Subcases 55-10288B, et al. (LU Ranches II)***, 17-22 (January 3, 2005).

In ***LU Ranches II***, this Court held that requisite intent to appropriate could be inferred from the act of watering livestock as no physical diversion was necessary. *Id.* The Court also distinguished the situation between a nomadic herder grazing livestock on public rangeland from the situation involving a livestock rancher that historically and routinely used adjacent public

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rangeland as an integral part of his ranching concern. *Id.* at 17-22. The Court's prior reasoning from that decision is herein adopted.

In this Court's opinion, the Special Master incorrectly applied the element of "intent" in holding that Joyce Livestock's predecessors did not intend to appropriate a water right. The requirements for establishing a beneficial use water right consist of intent to apply water to a beneficial use, diversion from a natural watercourse, and the application of the water to a beneficial use. See *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 680-81, 19 P.2d 1130, 1133-34 (1980).⁴ The satisfaction of these requirements provides actual notice of the appropriation to every potential water user intending to appropriate from the same or connected source. The appropriation of water requires that the appropriator intend the water to be applied to a beneficial use at the time the water is taken as opposed to merely intending to create a water right. *Neilson v. Parker*, 19 Idaho 727, 729, 115 P. 488, 490 (1911) (citations omitted) ("It is like a man actually being in possession of realty...."). Ordinarily, the requisite intent is implied from the overt act of diverting the water and applying the same to a beneficial use.⁵ Although, no diversion is required for purposes of establishing an instream stockwater right, the other two requirements, intent to apply to a beneficial use and application to a beneficial purpose, still apply.⁶ As with the situation of a diversionary right, the requisite intent

⁴ "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."

Hidden Springs Trout Ranch v. Hagerman Water Users, Inc., 101 Idaho 677, 680-81, 19 P.2d 1130, 1133-34 (1980)(quoting 78 Am.Jur 2d Waters § 321(1975)).

⁵ Under the constitutional method of appropriation the diversion requirement provides actual notice of intent to potential appropriators. The permit process provides constructive notice of intent to potential appropriators and provides a period within which to put the water to a beneficial use from the time the application is approved. This protects the claimant's priority from intervening appropriators. Idaho also had a statute whereby notice of intent could be posted. Under either method an overriding concern is providing notice of the intent to appropriate.

⁶ *In re SRBA Case No. 39576, Minidoka National Wildlife Refuge, SRBA Subcase No. 36-15452, ("Smith Springs")*, 134 Idaho 106, 996 P.2d 806 (2000), in discussing the elements of a constitutional appropriation the Idaho Supreme Court discussed the limited exception to the diversion requirement for stock watering. *Id.* (citing *R.T.Nahas Co. v. Hulet*, 106 Idaho at 45 (Ct. App. 1983); *Stevenson v. Steele*, 93 Idaho 4, 11, 453 P.2d 819, 826 (1969)). No exceptions were discussed for the remaining two elements.

In *Town of Genoa v. Westfall*, 349 P.2d 370, the Colorado Supreme Court held:

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to apply the water to a beneficial use can be inferred from the overt act of grazing livestock in a particular area and the livestock drinking water from available sources. The proximity of available water sources is essential to the grazing of livestock. In the SRBA decision regarding executive order Public Water Reserve (PWR) 107, Judge Burdick discussed at length the fact that the person that controlled the limited isolated water sources could control vast amounts of surrounding rangeland. *Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman, Consolidated Subcases 23-10872 et al., Joint Submission Subcases 23-10894 et al.* 12-14 (December 28, 2001). The very purpose of PWR 107 was to prevent the *de facto* control over rangeland through the control of available water sources. *Id.* at 19 (“Throughout the history leading up to the issuance of PWR 107, the unequivocal intent of the public water reserve policy was to attempt to prevent the monopolization of the public rangelands through the control of the limited water sources”). Accordingly, PWR 107 withdrew land from the public domain surrounding such sources. The testimony of Roxanne Brown regarding IDWR’s policy regarding the investigation of *de minimus* stockwater rights also exemplifies the relationship between grazing and available water supplies.

Q. [Does IDWR] determine whether or not there, in fact, are cows even consuming water from this source as part of your--.

A. In a general sense we do. We understand clearly that, that range land grazing and watering occur throughout the areas of the state, where each of the stockwater rights is occurring or is claimed. So in a general sense, we assume that stock are in fact drinking.

Tr. p 26. “Livestock must have forage and water to survive while they use public land for grazing.” Testimony of Ronald Kay, Tr. at 559. Given this integral relationship between available water sources and grazing land it is self-evident that the grazing of livestock includes the intent that livestock will beneficially use available water sources.

It is not necessary in every case for an appropriator of water to construct ditches or artificial ways through which the water might be taken from the stream in order that a valid appropriation be made. The only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use.

Id. at 547.

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Although there is no physical diversion putting other intending water users on notice, the overt act of grazing livestock in proximity to available water sources, and the livestock drinking from those sources, provides notice to intending water users. This is particularly true with respect to the rancher who historically and routinely used the same rangelands in conjunction with a ranching operation as opposed to the itinerant livestock grazer. In *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967), in upholding an instream appropriation of stockwater, the Court held:

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.' . . . The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use . . . but it can also be evidenced in other ways, for example, as in this case by watering livestock directly from the source or as in other cases by placing water wheels in a stream in order to use the flowage as power to operate a mill located on the bank.

In this case there is no lack of proof of the asserted appropriation; to the contrary, a clearer showing of 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 impassible desert; except for the water provided by these springs and the stream, there has been none other available to keep their animals alive.

Their intended (and actual) use has been for a beneficial purpose, as the trial court specifically found. Indeed a contrary finding could hardly have been justified, particularly since cattle watering has been judicially recognized in California as 'a reasonable beneficial use'.

Hunter at 153 (internal citations omitted).

The United States argues that in order to establish the requisite intent to appropriate a stockwater right there must be some requirement of exclusivity or dominion exercised over the water source by the appropriator. See *Robinson v. Schoenfield*, 218 P. 1041 (Utah 1923). This Court disagrees. While this may be a requirement in some jurisdictions, in *R.T. Nahas Co. v. Hulet*, the Idaho Supreme Court did not discuss or otherwise impose such a requirement. See *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct.App. 1983). Moreover, because the water rights at issue are located on public lands, legally a livestock grazer could not exclude another from using such lands until after the implementation of the Taylor Grazing Act. See *e.g.* Unlawful Enclosures Act of 1885, Act of Feb. 25, 1885, c. 149, 23 Stat. 321 (codified at 43

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U.S.C. § 1061). A livestock grazer would not need to exclude another water user from a particular source if a sufficient water supply existed. In light of the nature of an instream stockwater right, the conditions argued by the United States do not reflect the realities of livestock grazing, nor are they required by law.

B. The intent to transfer water rights by predecessors-in-interest.

Even if it is determined that Joyce Livestock's predecessors established water rights in the Jordan Creek area under the foregoing analysis, Joyce Livestock does not possess any deeds or other instruments conveying the water rights. Because water rights are interests in real property, the statute of frauds requires that transfers be in writing. I.C. § 9-503; *Olsen v. Idaho Department of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188 (1983); *Gard v. Thompson*, 21 Idaho 484, 496, 123 P. 497 (1912). Water rights can also transfer along with the property to which they are appurtenant. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). The general rule is that when an instrument conveying real property is silent as to water rights, any appurtenant water rights automatically transfer along with the property. *Id.* Joyce Livestock asserts that the stockwater rights on Jordan Creek transferred as appurtenances to the base ranch properties acquired by Joyce. In *LU Ranches II*, this Court held that given the nexus or connection between private or base ranch property and the use of adjacent public lands or grazing allotments that a grantor could have intended to transfer water rights appropriated on public land as appurtenances to base ranch property. *Lu Ranches II* at 22-25.⁷ Whether any stockwater rights transferred depends on the intent of the grantor and is a question of fact. *Id.* The Special Master ruled that because Joyce's predecessors did not intend to appropriate stockwater rights they could not have intended to transfer any stockwater rights as appurtenances. This Court disagrees. As discussed previously, the intent to apply the water to a beneficial use objectively satisfies the element of intent to appropriate.

In *LU Ranches II*, in trying to ascertain the intent of the grantor, the Court looked at the totality of circumstances surrounding the use of the base ranch properties in conjunction with

⁷ In 1998, the Idaho legislature acknowledged this relationship and statutorily made grazing preferences appurtenant to base ranch property. I.C. § 25-901 (2005).

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adjacent public grazing land. *LU Ranches II* at 26. Factors this Court took into account included the historical use of defined areas of adjacent public land in conjunction with a bona fide livestock operation, the award of grazing preferences based on such historical practices and predecessor's representations made to the United States in the applications for grazing permits. If it could be demonstrated that private property and adjacent public rangeland were used in connection with a ranching operation, and that operation was acquired by a successor, the grantor would have intended to convey not only the private property but also any stockwater rights used in connection with the operation. The Court essentially applied an objective test in determining the subjective intent of the grantor.

In determining the elements of the water right, the Court looked at where the predecessors historically grazed on public lands in connection with the ranching operation and relied on written representations made by predecessors in the grazing permit applications. The grazing permit applications were primarily awarded based on historical use and/or control over water sources and as such, applicants were specifically asked to identify where and when they historically grazed livestock on the public domain and to identify any particular water rights held and used in connection with the ranching operation. Because the Court applied an objective test, to the extent an applicant/predecessor either represented in the grazing application that he held no water rights on public land or otherwise failed to identify any such rights when specifically asked, in ascertaining the intent of the grantor, the Court concluded that the grantor could not have intended to convey as an appurtenance to a different parcel of property something he did not claim or otherwise believe he owned. On the other hand, where the grazing application specifically mentioned or evidenced a water right, the Court was unwilling to conclude that the predecessor intended to forfeit the water rights rather than transfer the right along with the base ranch property and/or grazing privileges. In most cases the applications provide the only record of the predecessor's grazing practices and ownership of water rights.

C. Joyce Livestock's claim.

Joyce Livestock's claim includes twenty different places of use (quarter-quarter sections) along Jordan Creek. Joyce Livestock does not assert that it appropriated the claimed water right; rather Joyce contends that the right was appropriated by predecessors-in-interest and conveyed as

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an appurtenance to private property that now comprises Joyce Livestock's base ranch property. The record in this case is voluminous, and only a portion of the exhibits admitted via stipulation of the parties have relevance pertaining to the interests of Joyce Livestock's predecessors in the Jordan Creek area. In addition, not all of Joyce's predecessors historically grazed the same areas that now comprise the place of use for Joyce's claim. Animal Unit Months (AUMs) were also transferred without the transfer of base ranch property. This raises the issue whether water rights transferred with AUMs or remained with base ranch property.

Other than general appurtenance clauses, none of the deeds in the chain of title for Joyce Livestock's base ranch property refer to water rights located on lands other than those lands specifically being conveyed. U.S. Exhibit 1. Further there are no historical documents acknowledging the existence of water rights or specifying where predecessors, other than those who filed for grazing privileges after the enactment of the Taylor Grazing Act, specifically grazed cattle in conjunction with a ranching operation. Although the Joyce Livestock base ranch property is an accumulation of 29 different homesteads and small ranches, only John T. Shea, Joyce Bros. Livestock Co., Nettleton Bros., the Jump Creek Sheep Co., and Jean Heazle are the predecessors-in-interest to Joyce's grazing preference. U.S. Exhibit 22. Only John T. Shea, Joyce Bros. Livestock Co., and the Nettleton Bros., originally filed for grazing privileges on the allotment after the implementation of the Taylor Grazing Act. In reviewing the grazing permit applications, only John T. Shea and Joyce Bros. Livestock filed for grazing privileges on lands covered by Joyce Livestock's claim.

John T. Shea filed for an entry under the Stock-Raising Homestead Act in 1927. U.S. Exhibit 20. Shea filed for a grazing permit application on April 26, 1935. Joyce Exhibit 87. Shea's application indicates that he used the lands applied for in conjunction with his ranching operation for the prior 10 years. Although Shea did not offer water rights as base property, the application identified water rights used in conjunction with his livestock operation as "usual water right acquired with lands under the laws of Idaho" and identified such rights as "springs and creeks running on and through the ranches." The application also states that Shea had been using the lands almost exclusively for the previous 10 years. However, the permit application only pertained to a portion of the place of use for Joyce Livestock's overall claim. The application identified historical grazing located in Township 5 South, Range 3 West, Sections

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6,7, and 8 and Township 4 South, Range 3 West Section 31. Omitted were the portions of Joyce's claim located in Township 5 South, Range 3 West, Sections 17, 18, and 19. In a February 14, 1936, application for the grazing season commencing April 1, 1936, Shea identifies all of Township 5 South, Range 3 West, (exclusive of patented property) as the areas of the public domain normally being "used in connection with [his] ranching operation." Joyce Exhibit O. The application also refers to a small portion of Jordan Creek (near Silver City) located in Township 5 South, Range 3 West. This covered the remainder of Joyce Livestock's claim. A dependent property record prepared in 1937, refers to private lands owned by Shea in Township 4 South, Range 3 West and Township 5 South, Range 3 West, and notes that the lands have "been owned by Mr. Shea and used in connection with his livestock operation since 1925." Joyce Exhibit S. In an affidavit signed by Shea in 1957, Shea states "I owned and operated a cow outfit in the Sinker Creek and Jordan Creek water shed beginning in 1928 until I sold out in 1938." U.S. Exhibit 55, bsn 550. Through mesne conveyances, Shea's base ranch property, together with grazing rights and appurtenant water rights was transferred to Joyce Livestock. U.S. Exhibit I, Joyce Exhibit Y.

The Special Master made the specific finding that Shea's reference to "springs and creeks running through the ranches" referred to only to Shea's deeded lands. ***Special Master's Report and Recommendation*** at 22. "In other words, the only water rights Mr. Shea owned or controlled were located on his deeded lands." *Id.* Although the term "ranches" is ambiguous, the Court cannot conclude that the finding was clearly erroneous. Therefore, the Court must conclude that the earliest Shea appropriated a water right would be April 26, 1935. This ruling is consistent with ***LU Ranches II***, in which this Court stated:

Again, in the 1937 application O'Keefe fails to identify any water rights located on the public domain and the permit was awarded based on O'Keefe's representations. Thus, it must be concluded that any appurtenant water rights were appropriated after the issuance of the grazing permit or April 15, 1937. In ascertaining the intent of the grantor, the Court cannot infer that the grantor conveyed something he didn't claim he owned.

Memorandum Decision and Order on Challenge, Subcases 55-10288B *et al.* (***LU Ranches II***) (January 3, 2005) at 35. The Court also holds that the documents in evidence show that Shea

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grazed his cattle throughout the Jordan Creek drainage, so this priority date is applicable to all of the reaches within 55-10135.

On June 12, 1935, Joyce Bros. Livestock Co. filed an application for a grazing permit. U.S. Exhibit 85. The application seeks grazing privileges in various areas but only identifies that portion of Joyce Livestock's water right claim located in Township 4 South, Range 3 West, a part of which is located in the Jordan Creek drainage. The application states that the applicant began use of the lands covered by the application in 1866. The application also includes a schedule of water rights, together with maps, and meticulously identifies the specific water rights held by Joyce Bros. Livestock Co. U.S. Exhibit 85. The schedule also states that "there are numerous springs which have not been marked on the maps, for lack of knowledge of the correct location." However, none of the water rights identified are located on public domain. Joyce Bros. does not identify any water rights on Jordan Creek. In 1936, Joyce Bros. Livestock Co. filed a subsequent application for the 1936 grazing season. U.S. Exhibit 83. The application does not identify any lands in the Jordan Creek drainage. The application asks: "list and describe all livestock watering facilities owned, leased or controlled by you, which are used in connection with your livestock operation on public domain." Joyce Bros. identifies "Springs and natural flow of the above listed creeks" which includes "Bates, Fossil, Sinker, No. Castle; also Meadow Creek, Josephine, Rose, Combination, and heads of Short and Langdon Creeks." Jordan Creek is not identified.

Hubert E. Nettleton and J.H. Nettleton filed an application for a grazing permit on June 8, 1935. The application only identifies the "use of the water on Sinker Creek." Exhibit 86. In an application for 1936, the Nettletons identify "Springs in Sinker, Bates and Fossil Creeks." U.S. Exhibit 84. Any water right on Jordan Creek would have had to have been appropriated by Nettletons after 1936.

On December 2, 1966, Jump Creek Sheep Company transferred a portion of its AUM's (Animal Unit Months) from its base property to J.H. Nettleton's base property. No mention of water rights is included in the transfer, nor is it clear what if any water rights existed, or if they did exist, whether it was intended that the water rights transfer along with the AUMs or remain with the base ranch property. U.S. Exhibit 93.

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Accordingly, based on the foregoing, this Court holds that the earliest date Joyce Livestock can establish for its claim would be April 26, 1935, relating to Shea's use of the Jordan Creek area.

D. The United States is not entitled to a beneficial use state-based water right based solely on its administration of grazing lands.

The Special Master recommended that the United States' claims be decreed essentially as a matter of law based solely on the United States' role as the administrator of the grazing allotments on which the claimed water rights are located. The Special Master relied on Idaho Code § 42-501 in finding that the administration of public lands by the United States constitutes a beneficial use for purposes of establishing a state-law based stockwater right. Idaho Code § 42-501, which has been in effect since 1939 and reads substantially the same today, provides:

Appropriation by the United States bureau of land management, department of interior-Fee-Conditions of permit-Flow

The bureau of land management of the department of interior of the United States may appropriate for the purpose of watering livestock any water otherwise not appropriated, on the public domain. The department of water resources shall, upon application in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation. With each such application there shall be paid to the department of water resources a fee of ten (\$10.00) dollars and there shall be no further fee required for the issuance of the permit or license and certificate of water right, nor for any other proceedings in connection with such application. Such permit, license and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefore on the public domain. The maximum flow for which permit, license and certificate of water right may issue hereunder shall be five (5) miner's inches, and the maximum storage for which permit, license and certificate of water right may issue hereunder shall be fifteen (15) acre feet in any one storage reservoir.

I.C. § 42-501 (2003 & Supp. 2005).

This Court disagrees with the Special Master's reliance on I.C. § 42-501. The United States' claims are not based on the operation of I.C. § 42-501. The United States did not follow

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the permit and licensing procedures set forth in the statute. Nor does I.C. § 42-501 support the conclusion that the ownership of land and the administration of the grazing allotments alone can be sufficient to establish a beneficial use water right, without regard for whether the United States or someone acting on behalf of the United States was beneficially using the water. The requirements pertaining to the beneficial-use or constitutional method for appropriating a water right apply to the United States just the same as they would apply to any other appropriator of a state-based water right. In particular, a beneficial use appropriation requires that the water be put to beneficial use either by the appropriator or someone acting on behalf of the appropriator. This Court agrees that as a general principle the administration or ownership of land by one person or entity when coupled with the beneficial use of water by another can be sufficient to establish a water right in the administrator or owner -- if the beneficial user is acting on behalf of the owner or administrator. *See First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930). However, this is not what occurred with respect to the water right claims at issue. Joyce Livestock claims that it and its predecessors are the beneficial users of the water. Joyce asserts that it appropriated and/or acquired its own water right and was beneficially using that right on the grazing allotment. Joyce Livestock contends that it was not acting on behalf of the United States or beneficially using the United States' water rights. Therefore, the issue becomes whose water right, if any, was being used in conjunction with the grazing allotment.

The issue regarding the establishment and ownership of a water right where there is not unity of title between the appropriator of the water right and the owner of the land on which the right is used was previously decided and has been applied consistently in the SRBA. *See e.g. Memorandum Decision and Order on Challenge; Order Denying Motion to File Amicus Curiae Brief; Order of Recommitment to Special Master Cushman*, Subcases 55-10288 A & B, *et al. (LU Ranches I)*(April 25, 2000); *Memorandum Decision and Order on Challenge, Subcases 55-10288B, et al. (LU Ranches II)*(March 1, 2005). To date this ruling has not been reviewed by the Idaho Supreme Court and thus still remains law-of-the-case.⁸ The issue arose in the context of the ownership of stockwater rights on federal grazing allotments as between the United States and the livestock rancher who grazed the cattle and actually put the water to

⁸ *LU Ranches II* is currently on appeal to the Idaho Supreme Court.

beneficial use.⁹ In *Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Objections*, Subcases 57-11124 *et al.* (Mar. 25, 1997); *Order On Motions to Alter or Amend; Order on Motion for Permissive Appeal*, Subcases 57-04028 *et al.* (June 26, 1997), one of the issues before Special Master Hammerle was whether the United States as administrator of a grazing allotment could perfect a beneficial-use right despite not actually grazing or watering livestock. Special Master Hammerle ruled that because the permittee, not the United States, beneficially used the water, the only way in which the United States could perfect a state-law based (non-statutory) water right was through an agency relationship between the permittee and the United States, whereby the permittee appropriating the water was acting on behalf of the United States. *Id.* The situation was analogized to that of a lessor and lessee, where the lessee appropriates the water right. Under Idaho common law if a lessee appropriated a beneficial use water right used in conjunction with the leasehold, absent an agency relationship with the lessor or a lease provision or agreement to the contrary, title to the water right vested in the lessee who appropriated the right not the lessor who held fee title to the leasehold. See *First Security Bank v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930) (“This court has repeatedly held that 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. If the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as agent of the owner.”).

The Special Master's reasoning and ruling was subsequently adopted by Judge Hurlbutt. *Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, Subcase 57-04028B (Joyce Livestock) (Sept. 30, 1998). Judge Wood, who succeeded Judge Hurlbutt, adopted this same reasoning in a subsequent consolidated subcase involving similar

⁹ In 1996, the United States, the State of Idaho and various ranching interests sought to have the SRBA Court decide various issues surrounding the ownership of a water right claim on a grazing allotment as between the permittee, who actually grazed the cattle on the allotment, and the United States who administered the allotment. Judge Hurlbutt denied the motion to designate basin-wide issue 9A, because the parties were unable to agree on a set of paradigm facts for creating test cases. The Court did not want to decide test cases in a “vacuum” and then have the parties seek to distinguish the facts of their particular case requiring that the individual subcases be litigated anyway. Judge Hurlbutt decided the cases were fact driven and should proceed through the SRBA process case-by-case. *Order Designating Basin-Wide Issue No. 9; Order Denying Designation of Basin-Wide Issue No. 9A; Order Setting Expedited Schedule and Hearing Date for Basin-Wide Issue No. 9*, Case No. 91-00009 (March 8, 1996). In 2000, Judge Burdick also denied a joint motion by various parties to create and decide test cases addressing the same issues on the same basis as Judge Hurlbutt. *Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master Dolan and Stay Related Subcases*, (Approx. 7500 subcases) (Jan. 30, 2000).

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issues. *Memorandum Decision and Order on Challenge; Order Denying Motion to File Amicus Curiae Brief; Order of Recommitment to Special Master Cushman*, Subcases 55-10288 A & B, *et al. (LU Ranches I)*(April 25, 2000). Judge Burdick applied the same reasoning in *Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master and Stay Related Subcases*, (Jan. 3, 2001), based on the reasoning that each of the claims was fact specific. Recently, this Court applied the same reasoning. *Memorandum Decision and Order on Challenge, Subcases 55-10288B, et al. (LU Ranches II)*(Jan. 3, 2005).

This reasoning is also consistent with the Taylor Grazing Act as well as the federal regulations governing the issuance of grazing permits and preferences. The Taylor Grazing Act expressly acknowledged that permittees could be using their own water rights on the grazing allotments as opposed to water rights held by the United States. (Thus if a permittee was using their own water right, they were not appropriating a beneficial-use right for the benefit of the United States.) The Taylor Grazing Act provides:

That 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 for mining, agriculture, manufacturing or other purpose which has heretofore vested or accrued under existing law validly effecting the public lands which may hereafter be initiated or acquired and maintained in accordance with law.

Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986).

The regulations also expressly acknowledged that the permittee could be using their own water rights on the grazing allotment as opposed to water rights held by the United States. 43 C.F.R. § 4100.0-5 (1998). Specifically, in order to be awarded a grazing preference, the applicant needed to have base property either in the form of private land used in conjunction with the grazing allotment or water rights used in conjunction with grazing cattle on the allotment, which could include water rights located on the allotment. *Id.* Prior to 1995, the federal regulations did not address the ownership of water rights used on grazing allotments. In 1995, the regulations were amended to provide that any water rights perfected on grazing allotments would vest in the United States.¹⁰ 43 C.F.R. § 4120.3-9 (1998). As of 1995, it is abundantly

¹⁰ The regulations provide:

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clear that a permittee appropriating a water right acts on behalf of the United States. However, prior to that time it is equally clear that the permittee could have appropriated and beneficially used its own water right. *See generally Memorandum Decision and Order on Challenge, Subcases 55-10288B, et al. (LU Ranches II)*(Mar. 1, 2005). (discussing at length the ability of a permittee to perfect a water right on grazing allotments).

In applying the law of the case to the instant subcases, the United States does not contend that it ever physically appropriated a water right by grazing livestock, nor does it contend that there was a regulation or agreement in place with Joyce or its predecessors specifying that the title to any beneficial use water rights established on the subject allotments would vest in the United States. Joyce asserts that as a permittee it never had an agreement with the United States regarding the ownership or use of water rights on its grazing allotments, and that Joyce has been using its own water rights in conjunction with the allotments. Accordingly, the United States has failed to establish a beneficial-use state-law based water right.

In this Court's opinion, concluding that the United States can establish a beneficial use water right based solely on the administration of the lands without regard for beneficial use, either by the United States or someone acting on behalf of the United States, would be more akin to a federal reserved water right or a riparian water right than a water right based on state law. Furthermore, the requirements for establishing such a right would be less stringent than for a federal reserved water right. For example, in order for a federal reserved water right to exist, the primary purpose of a federal withdrawal would have to be entirely defeated without an implied reservation of water. Under the theory now asserted by the United States, the fact that the United States administers lands alone would be sufficient to establish a water right. Although the provisions of the Taylor Grazing Act made it clear that the operation of the Act was not intended to create federal reserved water rights, an "administrative" type of water right without regard for

Any right acquired on or after August 21, 1995, to use water on public land for the purpose of livestock watering on public land shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State within which the land is located, any water right shall be acquired, perfected, maintained, and administered in the name of the United States.

43 C.F.R. § 4120.3-9 (1998)

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beneficial use appears to be an end run around that intent and the requirements for establishing a federal reserved water right or some type of riparian right.

The state of Idaho statutorily created a means for the United States to establish stockwater rights on the grazing allotments through the permit and licensing process. The United States did not follow that process in this case. However, even under that licensing process, the United States would have been required to demonstrate beneficial use of its permitted right prior to the issuance of the license. This potentially would have forced the same issue that is now before the Court regarding whether the right beneficially used was that of the grazing permittee or that of the United States. As such, this Court does not read the statute to support the argument that I.C. § 42-501 creates a special type of beneficial use right based on administration without regard for beneficial use.

Additionally, the fact that there existed a statutory means for establishing a particular type of water right does not necessarily authorize the same type of right under the constitutional method. This point was demonstrated in *In re SRBA Case No. 39576, Minidoka National Wildlife Refuge, SRBA Subcase No. 36-15452, ("Smith Springs")*, 134 Idaho 106, 996 P.2d 806 (2000). In *Smith Springs*, the United States filed a claim for instream flows from Smith Springs inside the Minidoka National Wildlife Refuge based on the constitutional method of appropriation. One of the arguments raised relied on I.C. § 42-1501 *et seq.*, which provides a statutory scheme for establishing minimum stream flows and declares minimum stream flows to be a beneficial use. The Idaho Supreme Court rejected the argument that the declaration of beneficial use extended to the constitutional method of appropriation and held that the exception to the diversionary requirement was limited to appropriations made under Idaho's permit system as provided for by I.C. § 42-1501 *et seq.* *Smith Springs* at 134 Idaho at 112, 996 P.2d at 812 (citing *State, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 444, 530 P.2d 924, 928 (1974)).

In this Court's view, the Special Master may have treated the issue of intent to appropriate differently as between Joyce Livestock and the United States. It appears that the issue of intent with respect to the United States was decided more as a matter of law, but that the issue of intent with respect to Joyce Livestock was decided as a factual issue. This led to a conclusion with respect to Joyce Livestock that mere use alone was insufficient to establish the requisite intent to appropriate a beneficial use water right, and that additional overt conduct of

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intent to appropriate is required. However, the same standard was not applied with respect to the United States. Even assuming that the administration of lands, without more, could be sufficient for purposes of appropriating a beneficial use water right, the Special Master did not require the United States to prove intent to appropriate. Even though the United States administers the land there is no evidence in the record that it intended to appropriate water. The United States acts and expresses its intentions through legislation, regulations and contracts. As previously discussed, neither the Taylor Grazing Act nor the regulations governing its application, which authorize the actions of the United States in administering grazing lands, expressed any intent to appropriate a water right. All expressions and inferences are to the contrary.

In addition, since the United States did not actually apply the water to a beneficial use by grazing its own cattle, it is not clear whether the United States intended to apply water to a beneficial use by having the permittee act on behalf of the United States in beneficially using the water or whether the United States intended that the permittee either utilize the permittee's existing water right or have the permittee appropriate a new water right. Again, a permittee could offer his own water rights on public land as base ranch property for a grazing preference and it was not until August 21, 1995, that the grazing regulations made it clear that any water rights perfected on public land would be perfected in the name of the United States. *See* 43 C.F.R. § 4120.3-9.

The United States cites *State v. Morros*, 766 P.2d 263 (1988), a Nevada case which determined that the United States acting in its proprietary capacity as a landowner could appropriate instream stock and wildlife rights based on its ownership of lands. *Morros* is not inconsistent with the law in Idaho concerning the stockwater rights. *Morros* dealt with a permit application which was denied. Idaho specifically has a permit statute in place allowing the United States to appropriate water for such purposes. By following the permit process, the United States provides constructive notice to other intending appropriators on a particular source and is able to appropriate a water right subject to the limitations set forth in the statute. Here, the United States did not follow the permit process.

In the *Order Denying Motions to Alter or Amend (Amended Order on State's Motion for Summary Judgment)*, Subcase 72-15929C (April 15, 1998), a subcase to which the United States and the State of Idaho were the only objectors, Special Master Hammerle ruled that the

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United States could not appropriate water based solely on the fact that it issues permits and regulates access to water sources.

[T]he 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. As previously stated, the United States is treated like any other landowner as it relates to a claim for a state-based water right. As such, the rule in Idaho is that unless there is an agreement between the landowner and the party actually appropriating the water on the landowner's property, the water right belongs to the party perfecting the right. . . Finally if the United States theory were accepted, then the only party that can claim a water right on the public domain is the United States. The result of such a theory would be to create either a quasi-riparian or quasi-reserved theory of water right ownership where only the United States may own a water right located on the public domain. (footnote omitted).

Special Master's Order at 9. This ruling was adopted by Judge Hurlbutt. *Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B and 72-15929C (Sept. 30, 1998). Although the issue raised by the State of Idaho only dealt with the ability of the United States to perfect a water right prior to the passage of the Taylor Grazing Act, the reasoning extended beyond the enactment of the Taylor Grazing Act to the ability of the United States to perfect a state-law based water right solely based on the administration of lands. Pursuant to a global stipulation between the United States and the State of Idaho, which resolved numerous subcases, the decision was not appealed. Nonetheless, the ruling remains law of the case.

This Court acknowledges that partial decrees have been issued by the SRBA Court to the United States for a significant number of state-based beneficial use water rights with a priority date as of the date of enactment of the Taylor Grazing Act, which corresponds to the date the United States began administering public rangeland.¹¹ However, these decrees either came about through settlement agreements with parties who objected to the claims or the claims were uncontested. Because the *Director's Report* for these rights established a *prima facie* case for the state-law based claims, and because it is factually and legally possible for the United States

¹¹ It should be noted that the claims filed by the United States did not initially claim a 1934 priority date, indicating that the theory behind the claims was not based on administration, but rather actual beneficial use of the water by the end-user.

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to appropriate a state-law based beneficial-use right for the reasons just stated, the Court did not need to conduct further proceedings on either uncontested or stipulated rights to decide whether the permittee or the United States owned the water right. Accordingly, these uncontested or stipulated agreements provide no precedence for those claims where objections were filed.

Finally, this Court also acknowledges that there are situations where the United States has developed water sources and diversionary works for use on grazing allotments. However, the Court need not decide whether such development would result in the United States appropriating a water right as that is not the situation with the subject claimed places of use along Jordan Creek.

VII.

CONCLUSION

The issue over the ownership of stockwater rights on the public domain is an issue that has persisted in the SRBA since 1996 when Judge Hurlbutt entertained a motion to designate the issue as a basin-wide issue. What is apparent in this case, as well as in other cases involving the same issue that have been before this Court, is that neither the United States nor the rancher-permittee contemplated stockwater rights on the public domain. Despite the arguments by both the United States and Joyce Livestock regarding the importance of stockwater rights on the public domain, in the voluminous exhibits in this case representing approximately 140 years of history, there is not one specific reference to a water right on the public domain by either the United States or by Joyce Livestock's predecessors, albeit the water rights on private land are often described with particularity. This dispute over water rights has less to do with the administration of water than the contemporary administration of public lands. In IDWR's I.R.E. 706 Report explaining IDWR's policy for recommending stockwater rights on public land, it is noted that IDWR has never prohibited a party from watering livestock on federal rangeland and cites a lack of historical conflict over the issue. U.S. Exhibit 17. IDWR also noted that many permittees did not even file claims in the SRBA. Because of the realities and limitations of an instream stockwater right on federal land it becomes apparent why neither the United States nor former permittees considered water rights on grazing allotments. In ***ORDER ON LU RANCHING CO.'S MOTION FOR RECONSIDERATION***, Subcases 55-10288B *et. al.* (May 2, 2005), this Court stated:

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Also relevant to a grantor's intent to convey a water right post-Taylor Grazing Act, are the realities of using instream rights in conjunction with a grazing allotment. The water rights are instream rights and as such can only be used in conjunction with the grazing allotment for which a permit is required. Given the remoteness of the water sources and the fact that such sources are located on public land it is unlikely that a rancher would be able to transfer the place of use. Accordingly, the water right can only be used in conjunction with the grazing allotment. Any subsequent permittee to a grazing allotment could appropriate a new water right for use in conjunction with the grazing allotment. Because a grazing permit is necessary to access the sources for grazing, the livestock rancher is not in competition with other users on the source for the use and administration of the water. [The]Grazing preferences [in this case] were not awarded based on the applicant having a pre-existing water right. Given these underlying circumstances it is doubtful that a livestock rancher would have considered the [necessity of transferring] a water right on a grazing allotment.

Id. at 6. This same reasoning holds true for the United States.

For the above-stated reasons, this Court holds that Joyce Livestock has established an April 26, 1935, priority date for water right claim 55-10135. The Special Master did not address the issues pertaining to the recommended place of use for the claim based on the conclusion that Joyce Livestock failed to establish a water right. In the interest of avoiding further delay by remanding for additional findings on the place of use this decision will be certified as final for purposes of appeal.

Water right claims 55-11061, 55-11385, 55-12452 filed by the United States are denied and will be decreed disallowed.

I.R.C.P. 54(b) Certification

With respect to the issues determined by said Order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the said Order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED August 3, 2005.

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/s/ John Melanson

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

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