Nos. 32278 and 32279

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re: SRBA Case No. 39576 (Subcase Nos. 55-10135, 55-11061, 55-11385 and 55-12452

JOYCE LIVESTOCK,
Appellant,
v.

UNITED STATES,
Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the SRBA District Court of the Fifth Judicial District
of the State of Idaho, in and for Twin Falls County
Honorable John M. Melanson, Presiding Judge

Michael J. Van Zandt
Elizabeth P. Ewens
McQuaid Bedford & Van Zandt LLP
221 Main Street, 16th Floor
San Francisco, CA 94105

Roger D. Ling
Ling, Robinson & Walker
P.O. Box 396
Rupert, ID 83350

Attorneys for Appellant

Elizabeth Ann Peterson
U.S. Department of Justice
Environment & Natural Resources
P.O. Box 23795
Washington, DC 20026

David Negri
U.S. Department of Justice
Environment & Natural Resources
550 West Fort Street, MSC 022
Boise, ID 83724

Attorneys for Respondent

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

A. Procedural History 2

B. Statement of Facts 4

II. ISSUES PRESENTED ON APPEAL 9

III. ATTORNEYS FEES ON APPEAL 10

IV. ARGUMENT 11

A. Standard of Review 10

B. The Unrebutted Evidence at Trial Conclusively Establishes That Joyce Livestock's Predecessors in Interest Appropriated the Water Rights Prior to 1898 and Transferred Those Water Rights to Today's Joyce Livestock Company. ... 11

1. Under the Prior Appropriation Doctrine, Parties Are Entitled to a Priority Date Representing the Date that the Water Was First Put to Beneficial Use. 11

2. Through Its Own Water Right Claims, the United States Admitted that the Water Rights at Issue Herein Were First Appropriated in 1874. 15

C. Under the Prior Use Rule, the Fact That Grazing Preferences Were Adjudicated in Favor of Joyce Livestock's Predecessors Is Conclusive Evidence That They Used the Same Range and the Water Thereon Prior to 1934. 16

V. CONCLUSION 22

TABLE OF CASES AND AUTHORITIES

Cases

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935) 11

Clear Springs Foods, Inc. v. Clear Lakes Trout Company, 136 Idaho 761, 764 (2002) 10

Conley v. Whittlesey , 133 Idaho 265, 269 (1999) 10

Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984) 11, 13

Hage v. United States, 51 Fed. Cl. 570 (2002) 12

Hunter v. United States, 388 F.2d 148, 153 (9th Cir. 1967) 12-14

Loomis v. Church, 76 Idaho 87, 93-94 (1954) 16

Nampa & Meridian Irrigation District v. Washington Federal Savings, 135 Idaho 518, 521 (2001) 10

Nielson v. Parker, 19 Idaho 727 (1911) 12

Public Lands Counsel v. Babbitt, 529 U.S. 728, 732-733 (2000) 17-20, 22

R.T. Nahas Co. v. Hulet, 114 Idaho 23, 26 (1988) 12

Steptoe Live Stock Co. v. Gulley, 295 P. 772 (Nev. 1931) 12

Statutes

Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d) 10

I.C. § 42-113(2) 13

Idaho Constitution, art. VX, § 3 ..... 1, 11

Mining Act of July 26,1866, 14 Stat. 253, Ch. 262, §9, codified at 43 U.S.C. §661 ..... 1, 11

The Desert Land Entry Act of 1877, 43 U.S.C. §§ 321-323 11

The Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316 . . . . . 1, 6, 7, 11, 16, 17, 22

Other

2 App. 818-819 (Rules for Administration of Grazing Districts (June 14, 1937) 22

Water Rights Law in the Nineteen Western States Wells A. Hutchins, J.D.. Vol. I, p. 485 13

I. STATEMENT OF THE CASE

At issue in this appeal is the priority date to be assigned to private water rights along Jordan Creek in Owyhee County, Idaho which have been in continuous use by Joyce Livestock Company and its predecessors in interest since 1898. Joyce Livestock's water rights have been adjudicated in its favor by the Snake River Basin Adjudication Court. In so doing, the District Court correctly confirmed the rights of private individuals to acquire and maintain water rights on the public domain or within federally administered allotments pursuant to Idaho state law and as recognized by federal statutory law. *See* Idaho Constitution, art. XV, §3; *see also* the Mining Act of July 26,1866, 14 Stat. 253, Ch. 262, §9, codified at 43 U.S.C. §661. However, the Court failed to assign the correct priority date to these historic rights.

The history of these confirmed water rights is a family history, dating back to Joyce Livestock's earliest predecessors, Mary and Anna Joyce, who first patented the base ranch property in 1898. Despite overwhelming evidence of the family ranching operation and accompanying use of Jordan Creek for stockwatering, and corroborating historic documents and grazing preference awards which document use of the waters in Jordan Creek prior to 1934 for stockwatering, the District Court awarded Joyce Livestock its claimed rights with an April 26, 1935 priority date. In doing so, the District Court erroneously relied on the date that Joyce Livestock's predecessors were first awarded a grazing preference under the federal Taylor Grazing Act (43 U.S.C. §315b) in determining the priority date, instead of looking to the date

that the water rights were first appropriated to beneficial use under Idaho state law. Accordingly, while Joyce Livestock agrees with the District Court's Order awarding Joyce Livestock's claimed water rights, it disagrees with the priority date assigned by the Court. For this reason, Joyce Livestock has appealed this narrow portion of the ruling.

A. Procedural History

The proceedings in this case originated with the filing of Joyce Livestock's water right claim in 1989, for water rights in and along Jordan Creek based on the beneficial use method of appropriation and with an original claimed priority date of 1865. *See* ROA, Vol. I, p. 1-10.[1] The United States filed overlapping claims to the waters of Jordan Creek, also based on the beneficial use method of appropriation, with a claimed priority date of 1874. *See* ROA Vol. I, p. 11-49 (Subcase Nos. 55-11061, 55-11385, and 55-12452).[2] The parties later amended their claimed priority dates, with Joyce Livestock claiming a priority date of 1898, representing the patent dates for Mary and Anna Joyce. The United States claimed an amended priority date of June 28, 1934 as a result of a settlement agreement reached with the State of Idaho. *See* ROA Vol. I, p. 82-100;

---

[1] As used herein, "ROA" refers to the Record on Appeal.

[2] The United States' claims were eventually denied in their entirety by the District Court. *See* Memorandum Decision, p. 21-29. The District Court correctly held that the United States' water right claims 55-11061, 55-11385, 55-12452 should be disallowed. Joyce Livestock has not appealed that portion of the Memorandum Decision, but the United States has. *See* Supreme Court No. 32279. The Joyce Livestock appeal and the United States' appeal have been consolidated, with each of the parties' opening briefs due on April 19, 2006.

see also Special Master Report and Recommendation, p. 4.

Following summary judgment proceedings, the consolidated subcases proceeded to trial before Special Master Dolan. Following trial, the Special Master found that there was evidence that Joyce Livestock's predecessors in interest, from Mary and Anna Joyce in 1898 forward, grazed and watered their cattle in common along the waters of Jordan Creek and that those ranching operations were, over time, consolidated to form what today is the Joyce Livestock Company. *See* Special Master Report and Recommendation, p. 22. Specifically, based on the evidence presented, the trial judge held the following:

> (Joyce Livestock) proved that multiple ranchers grazed livestock along Jordan Creek for decades in direct competition with Mary and Anna Joyce and their successors. Admittedly, nearly all of the ranches were ultimately consolidated into the Joyce Ranch, but from 1898 until 1934, and even later, there were no fences, the cattle followed the green grass and different brands watered along Jordan Creek.

See Special Master Report and Recommendation, p. 22. While the trial court held that the evidence demonstrated that Joyce Livestock's predecessors in interest beneficially used the waters of Jordan Creek from 1898 forward, the Special Master erroneously concluded that because Joyce Livestock's predecessors used the waters of Jordan Creek in common with one another, there was no valid appropriation. On that basis, the Special Master recommended that Joyce Livestock's claims be denied.

Joyce Livestock filed a Notice of Challenge with the SRBA District Court, contesting the Special Master's conclusions of law and their application to the facts of the case. The District

Court correctly held that 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. *See* Memorandum Decision, p. 11. Specifically, the District Court reversed the Special Master on the issue of the effect of grazing and watering in common on water rights. The District Court correctly applied existing Idaho law and held that the overt act of grazing livestock in proximity to available water sources, and the livestock drinking from those sources, constituted a valid appropriation under Idaho law, and that water rights so acquired are not defeated by the fact that various parties used the water in common with one another. The District Court went on to hold that Joyce Livestock established valid water rights, and assigned a priority date of April 26, 1935.

As noted, above, Joyce Livestock does not dispute the District Court's ruling regarding the validity of the appropriation of the water rights by Joyce Livestock's predecessors, nor does Joyce Livestock dispute the Court's ruling that these water rights, once acquired, can and do transfer as appurtenances to the base ranch properties. However, Joyce Livestock does appeal the priority date assigned to these water rights. Based on the applicable law as applied to the unrebutted evidence of pre-1934 appropriation of the waters of Jordan Creek by Joyce Livestock's predecessors, a pre-1934 priority date, specifically a priority date of 1898, should have been awarded in this case.

B. Statement of Facts

From 1898 forward, Joyce Livestock and its predecessors have continuously used the

waters of Jordan Creek to sustain their livestock operation. The rights were initiated by Joyce Livestock's original predecessors in interest, Joyce family members Anna and Mary Joyce. From 1898 forward, the family ranching operation grew, resulting in the complete consolidation of ranching operations into what is today Joyce Livestock Company. *See* Trial Exhibit ("Tr. Exh.") 1 (Chain of Title); *see also* Tr. Trans. p. 659-661, 674-686 (Testimony of Paul Nettleton). Throughout this history, Joyce Livestock and its predecessors have relied on the water in Jordan Creek to sustain their ranching operation. Under the doctrine of relation back, all elements of these appropriative water rights transferred through Joyce Livestock's predecessors to today's Joyce Livestock, including the priority date representing the first date that the waters of Jordan Creek were appropriated to beneficial use by Joyce Livestock's earliest predecessors.

No one was better able to describe the history of the Joyce Livestock operation and the historic use of Jordan Creek than Paul Nettleton, general partner of Joyce Livestock. As was made clear through Mr. Nettleton's testimony, the history of the use of the waters of Jordan Creek is inextricably intertwined with his family history and its historic livestock operation. One of the original appropriators, Anna Joyce, is Paul Nettleton's great aunt. *See* Trial Tr. p. 655 (Testimony of Paul Nettleton); *see also* Trial Tr. p. 654-685 (Testimony of Paul Nettleton) . Anna Joyce, together with other original family homesteaders, had a milk cow operation and sold dairy products to the mines beginning in the 1860s and 1870s. *See* Trial Tr. p. 667-668. From there, the family cattle operation expanded into beef cattle herds. *See* Trial Tr. p. 668-669. Anna

Joyce was one of the members of the Joyce Brothers Livestock Company, in existence and using the waters of Jordan Creek both before and after the enactment of the Taylor Grazing Act in 1934. Anna Joyce, together with other family members, enlisted Paul Nettleton's father, born in 1897, to help with the ranch. Mr. Nettleton's father was an integral part of the livestock operation, and the consolidation of the ranching operations, and spent his life engaged in this livestock business and teaching his son the same. *See* Trial Tr. p. 654-675; 685-686. Today, Joyce Livestock represents the consolidation of all of the entities that grazed and watered in the Jordan Creek and Sinker Creek areas, including many entities run or held by members of the Joyce and Nettleton families. As testified to by Mr. Paul Nettleton:

> All of the entities that grazed in the Jordan Creek/Sinker Creek area have now been picked up by Joyce Livestock Company ... Q: And that includes the people that historically were in Jordan Creek; is that correct? A: Yes. That would include the Sheas, the Jump Creek Sheep Company, Augustine Salove ... of course, the Joyces, the Nettletons... there's no other person that has a claim in the Jordan Creek that hasn't been picked up.

Trial Tr. p. 660-661 (Testimony of Paul Nettleton). In sum, between the original appropriations from Jordan Creek made by Anna and Mary Joyce as part of their milk cow operation, through today's livestock operations run by Joyce Livestock, the cattle operation expanded to include the acquisition and merger of all ranching operations that appropriated the waters of Jordan Creek. *See* Trial Tr. p. 659-661, 674-683 (Testimony of Paul Nettleton); *see also* Trial Exh. 1 (Chain of Title).

The above history of the continuous use of the waters of Jordan Creek by Joyce Livestock and its predecessors was corroborated by the testimony of Mr. Gene Lewis, who personally observed and participated in grazing and watering operations in the Jordan Creek area prior to 1934. Mr. Lewis testified not only as to the continuous use of Jordan Creek and the surrounding range by Joyce Livestock's predecessors, but also testified that Jordan Creek and its tributaries had the only water available to Joyce Livestock and its predecessors in the summertime and, therefore, Jordan Creek was absolutely essential to sustain the cattle operation. *See* Trial Tr. p. 313-316, 321 (Testimony of Mr. Gene Lewis). The historic, pre-1934 use of the waters of Jordan Creek by Joyce Livestock's predecessors also was admitted by one of the United States' own witnesses, Mr. Gary Madenford. *See* Trial Tr. p. 391-393 (Testimony of Gary Madenford).

In addition to the above testimony, there is substantial documentation of the pre-1934 appropriation of the waters of Jordan Creek by Joyce Livestock's predecessors found in the United States' grazing adjudication records. At the time of the enactment of the Taylor Grazing Act, three of Joyce Livestock's predecessors filed preference grazing applications for the newly created grazing allotment surrounding Jordan Creek. As part of those applications, two of Joyce Livestock's predecessors, in sworn statements, certified as to their historic use of the range surrounding Jordan Creek prior to 1934 and as far back as 1866.

The first such application was made by John T. Shea, who filed both for entry under the Stock-Raising Homestead Act in 1927 and later filed for a grazing application pursuant to the Taylor Grazing Act on April 26, 1935. *See* Trial Exh. 20, 87, O and S. In each, Mr. Shea

certified that he had used the lands, and thereby the waters thereon, prior to 1934. Importantly, Mr. Shea certified that he had used the range applied for, which covered the Jordan Creek drainage, for a period of ten years prior to the date of the application, or 1925. When read in total, there is no doubt that when Mr. Shea referred to the ten years of prior use, he was referring to the use of the public range and, by necessary implication, the waters thereon:

> 8. Have you previously used the lands covered by this application for a grazing permit? (A:) Yes. If so, how many years and what is the usual period of use each year? (A:) 10 years, 3 months for summer near Silver City and 6 mos. On land adjacent to the ranches ...
> Note: The Range herein applied for is land that I have had almost exclusive use of for range for the past 10 years.

Trial Exh. 87, bsn 2308-2309 (April 26, 1935 Shea Application for Grazing Permit). In a later grazing application, Shea similarly attests to the use the public range, including the use of the waters of Jordan Creek. *See* Trial Exh. O, bsn 2398. Between the two grazing applications, Shea certified to the pre-1934 use of all of the area covered by Joyce Livestock's water right claims at issue herein. *See* Trial Exh. 87, O and S; *see also* Memorandum Decision, p. 18-19.

The second pertinent grazing application was filed by Joyce Brothers Livestock on June 12, 1935. *See* Trial Exh. 85. Anna Joyce, on behalf of Joyce Brothers Livestock, certified in the application to use of the same public range covered by the grazing application beginning in 1866. The application states as follows:

> 8. Have you previously used the lands covered by this application for grazing permit? (A:) yes. If so, how many years and what is the usual period of use each year? (A:) Began use in the year 1866. About 8 months. How many sotck have you grazed thereon during the average year? (A:) About 1900.

Trial Exh. 85, bsn 1153 (June 12 Joyce Bros. Livestock Co. Application for Grazing Permit). The application also asked for the identification of the public range historically used. In response, Joyce Brothers Livestock listed areas that include Jordan Creek. *See* Trial Exh. 85, bsn 1152.

Importantly, the evidence of continuous, historic beneficial use of the waters of Jordan Creek from 1866 forward by Joyce Livestock and its predecessors was completely unrebutted at trial.

II. ISSUES PRESENTED ON APPEAL

Joyce Livestock raises the following issues on appeal:

a. whether Joyce Livestock is entitled to an 1898 priority date based on unrebutted evidence of appropriation in that year;

b. whether Joyce Livestock 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 Joyce Livestock and its 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;

d. whether the evidentiary standard applied by the District Court on the issue of priority date constitutes an unrealistic and insurmountable evidentiary hurdle; and

e. Whether qualified grazing preferences are evidence of historic use of water sources pre-dating the enactment of the Taylor Grazing Act;

III. ATTORNEYS FEES ON APPEAL

Joyce Livestock filed a Motion for Attorneys Fees pursuant to I.C. §12-121 and pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d). That Motion was denied by the District Court and is on separate appeal to the Idaho Supreme Court, case number 32846. In addition to the attorneys fees requested under Idaho law and pursuant to the EAJA, Joyce Livestock seeks its attorneys fees on appeal pursuant to I.A.R. 41.

IV. ARGUMENT

A. Standard of Review

While a district court's findings of fact are given deference on appeal, the Court does exercise free review over the lower court's conclusions of law. *See Clear Springs Foods, Inc. v. Clear Lakes Trout Company*, 136 Idaho 761, 764 (2002) ("This (Supreme) Court freely reviews the SRBA district court's conclusions of law.") In addition to addressing whether the lower court correctly stated the applicable law, the Court must determine whether the legal conclusions are sustained by the facts found. *See Nampa & Meridian Irrigation District v. Washington Federal Savings*, 135 Idaho 518, 521 (2001). Appellate review of a district court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *See Nampa & Meridian Irrigation District v. Washington Federal Savings*, 135 Idaho 518, 521 (2001), *citing Conley v. Whittlesey* , 133 Idaho 265, 269 (1999).

B. The Unrebutted Evidence at Trial Conclusively Establishes That Joyce Livestock's Predecessors in Interest Appropriated the Water Rights Prior to 1898 and Transferred Those Water Rights to Today's Joyce Livestock Company.

1. Under the Prior Appropriation Doctrine, Parties Are Entitled to a Priority Date Representing the Date that the Water Was First Put to Beneficial Use.

Under the laws of the state of Idaho and the laws of the United States, absent reservation all water within the bounds of the state of Idaho are subject to appropriation even if the water flows on federally administered public land. *See* Idaho Constitution, art. VX, § 3 (absent a claim for a reserved right, all water within the boundaries of Idaho is subject to appropriation). These state based rights sited on public lands have been given consistent federal protection and recognition. *See* The Mining Act of 1866, 43 U.S.C. § 661; *see also* The Desert Land Entry Act of 1877, 43 U.S.C. §§ 321-323; The Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935) (the effect of these statutes is to approve and confirm the policy of appropriation for a beneficial use as the test and measure of private rights in and to the non-navigable waters on the public domain). It is by the laws of the state of Idaho, therefore, and the laws governing the system of prior appropriation in this state that the priority date assigned to Joyce Livestock's water rights is to be determined.

Fundamental to Idaho's prior appropriation laws is the administration of water rights based on priority date. As between appropriators, first in time is first in right. *See Crow v. Carlson*, 690 P.2d 916 (1984) (water rights in Idaho are administered "first in time, first in

right"); *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 26 (1988), *citing Nielson v. Parker*, 19 Idaho 727 (1911). The priority date is assigned based on the first act of beneficial use or appropriation. In the case of stockwatering, that appropriation occurs with the act of watering cattle from the source.

It is well settled that evidence of the user's intent to appropriate stockwater is simply demonstrated by the act of the cattle watering directly from the source. *See In Re SRBA Case No. 39576,* Order Denying Challenges and Adopting Special Master's Report and Recommendations (September 30, 1998) (for an instream stockwater right, the party claiming a stockwater right will point to the act of placing stock it owns or operates near a water source and the drinking of water by the stock as the act constituting an appropriation of water); *see also Hage v. United States*, 51 Fed. Cl. 570 (2002), *citing Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) (recognizing water right based on prior appropriation for stockwatering purposes on public domain based on evidence by owner of livestock that he and members of his family had since prior to 1880 persistently grazed and watered livestock on the public domain); *Steptoe Live Stock Co. v. Gulley*, 295 P. 772 (Nev. 1931) (cattle watering from streams held to be an appropriation of water for stockwatering purposes); *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) (for purposes of stockwatering, appropriation is evidenced by watering livestock directly from the source). In each instance, the priority date assigned to these stockwater rights is the date that the waters were first put to beneficial use.

Under the relation back doctrine, the priority date of water rights relates back to the first

date that the waters were appropriated to a beneficial use. In sum, when a water right is transferred, all elements of that water right transfer with it, including the priority date. This common law principle was codified by the Idaho legislature in I.C. § 42-113(2) which provides as follows:

> For rights to the use of water for in-stream or out-of-stream livestock purposes associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation, the priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code.

Under both common law and statutory law, the original, historic appropriation of water is preserved and the acquired water right transfers with all elements, including the early priority date, in tact. *Id.*; *see also Water Rights Law in the Nineteen Western States* Wells A. Hutchins, J.D.. Vol. I, p. 485 (a beneficial use water right may be transferred, and will carry with it all elements of the water right including the early priority date representing the first date the water was put to beneficial use); *In Re SRBA 39576 (Subcases 55-10288b et al.) Memorandum Decision and Order on Challenge*, Judge Wood (April 25, 2000), p. 18, *citing Crow v. Carlson*, 107 Idaho 461 (1984) (full water right, with early priority date, will transfer even absent specific mention of the water right in the instrument of conveyance).

In no case is the above principle better demonstrated than in *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967). Extraordinarily similar to the facts presented in the present case, the water rights at issue in *Hunter* were acquired on the public domain as part of a family livestock operation. Those water rights were transferred from generation to generation, but the

original appropriation was recognized and given protection. The Court held:

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

Hunter, 388 F.2d at 153.

Similar to the case in *Hunter*, the family livestock operation in Joyce was established in the 1860s and, from the time of the original appropriations forward to today, Joyce Livestock and its predecessors have beneficially used the waters of Jordan Creek and the surrounding rangeland to support their cattle operations. Evidence of this historic use is found in the family history of the Joyce and Nettleton families. *See* Trial Tr., p. 659-684 (Testimony of Paul Nettleton); *see also Trial Tr. p. 313-322 (Testimony of Gene Lewis). Evidence regarding the transfer of the* water rights is found in the documents effecting the transfer and consolidation of the ranch properties from one of Joyce Livestock's predecessors to another. *See* Trial Exh. 1, Y. (uninterrupted chain of title). This historic beneficial use of the waters of Jordan Creek and details of the cattle operations of Joyce Livestock and its predecessors in interest are further memorialized in the grazing adjudication records. *See* Trial Exh. 20, 83, 85, 86, 87, 93, O, and S. All of this evidence relating to the original appropriation of the waters of Jordan Creek and the subsequent transfer of these water rights through the chain of title to Joyce Livestock was completely unrebutted at trial. Under such circumstances, as in *Hunter*, the original

appropriations and early priority date needs to be recognized and protected, and under the relation back doctrine, a priority date of 1898 should be assigned.

2. Through Its Own Water Right Claims, the United States Admitted that the Water Rights at Issue Herein Were First Appropriated in 1874.

In its verified Notices of Claim, the United States claimed a beneficial use water right in and to the waters of Jordan Creek with a priority date of 1874. *See* ROA Vol. I, p. 11-49 (Verified United States Notices of Claims for subcases 55-11061, 55-11385, and 55-12452). Eight years later, the United States amended its claimed priority date as a result of a settlement agreement reached with the State of Idaho. But in the first several years of this litigation, the United States sought to claim for itself a priority date representing the date that private parties, Joyce Livestock's predecessors in interest, first appropriated the waters of Jordan Creek to beneficial use. *See* ROA Vol. I, p. 11-49; *see also* ROA Vol. I, p. 223, ft.n. 11 (Memorandum Decision and Order on Challenge) ("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-users.*") (*emphasis added*). In short, before the United States entered into the settlement agreement with the State of Idaho, the United States actively sought to tack its claimed water rights to the appropriations made by Joyce Livestock's earliest predecessors in interest.[3] In so doing, in this litigation, the United States recognized, and sought to use for its own benefit, the stockwater

[3] As has been established, all of the ranching entities that historically used the waters in Jordan Creek have since been consolidated into Joyce Livestock. *See* Trial Tr. p. 660-661 (Testimony of Paul Nettleton).

appropriations made by Joyce Livetstock's predecessors from Jordan Creek.

Under such circumstances, principles of judicial estoppel preclude the United States from disputing the 1898 priority date claimed by Joyce Livestock. Stated generally, the United States cannot change horses in midstream. A party litigant cannot seek an advantage in litigation by repudiating its former allegations or claims, and then later be permitted to seek a right against another arising out of the same transaction by taking a contradictory position. *See Loomis v. Church*, 76 Idaho 87, 93-94 (1954). As applied to this case, the United States cannot seek an advantage in this adjudication by claiming historic, 1874 beneficial use water rights which were initiated by Joyce Livestock's predecessors, and then later deny the existence or validity of those original appropriations in an attempt to secure for itself better rights. Accordingly, the attempts of the United States to deny the existence or validity of the original appropriations or Joyce Livestock's claimed 1898 priority date should be rejected.

C. Under the Prior Use Rule, the Fact That Grazing Preferences Were Adjudicated in Favor of Joyce Livestock's Predecessors Is Conclusive Evidence That They Used the Same Range and the Water Thereon Prior to 1934.

As a matter of law, the existence of qualified grazing preferences evidence the use of the range and the water thereon prior to the enactment of the Taylor Grazing Act.[4] Relying on its analysis in *LU Ranching v. United States,* SRBA Subcases 55-10288b et al. ("*LU Ranching II*"), the District Court recognized that grazing preference applications and subsequently awarded

---

[4] The Court can take judicial notice of the fact that cattle both eat and drink, and, therefore, the use of the range would include both the consumption of the grass and water thereon.

grazing preferences, read together, provide probative evidence of historic use of the rangeland and the water thereon.[5] While the District Court correctly recognized that grazing applications and subsequently awarded grazing preferences are evidence of historic use *after* the enactment of the Tayor Grazing Act in 1934, at issue is whether the District Court erred in failing to recognize that, as a matter of law, the grazing preferences awarded also are conclusive evidence of the use of same range and the same water in the years *prior* to 1934. As found by the District Court, Joyce Livestock's predecessors were awarded grazing preferences which were then transferred over time to today's Joyce Livestock. *See* Memorandum Decision, p. 11-12. Under the prior use rule, these grazing preferences would not have been awarded to Joyce Livestock's predecessors but for the fact that they had grazed same the public range and used the resources, both grass and water, thereon in the five years prior to the enactment of the Taylor Grazing Act. *See Public Lands Counsel v. Babbitt*, 529 U.S. 728, 734-735 (2000).

The years leading to the enactment of the Taylor Grazing Act were ones in which there was increasing competition for range resources, and resulting injury to the range. *See Public Lands Counsel v. Babbitt*, 529 U.S. 728, 732-733 (2000). The Taylor Grazing Act was enacted to protect the lands from further injury from overgrazing due to competition for the limited range resources. *Id.*, *citing* 48 Stat. 1269. While the Taylor Grazing Act sought to curb use of the range, it also sought to protect ranchers with private lands who were competing for range resources with itinerant herdsmen. For this reason, while the Act was largely supported by

---

[5] *LU Ranching II* is currently on appeal to the Idaho Supreme Court, case number 31994.

ranchers who used the public range in conjunction with their base ranch properties, the Act was opposed by "those who do not make their homes on the land, but who own wandering bands of sheep that are driven hither and thither to eat out the land and render it worthless for the real homemaker." *Public Lands Council*, 529 U.S. at p. 732 (*quoting* President Roosevelt). Largely for this reason, built into the Act was express protection of the higher rights and interests of those who made their homes on the land and used the nearby public range to support their livestock operations before 1934. The Taylor Grazing Act provides as follows:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the ranch ... *Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them.*

43 U.S.C. § 315b (*emphasis added*). Implicit in the preference grazing scheme was recognition by Congress that livestock owners who, prior to the enactment of the Taylor Grazing Act, had been owners of nearby base ranches or homesteads and had been historically operating the same in conjunction with the public land, had earned the right to the highest degree of protection and continued use of the same federal range.

Following the enactment of the Taylor Grazing Act, the Department of Interior began the process of developing regulations to define who should be given preference for the use of the range. A preference system was developed, giving the first and highest priority to those who owned private base ranch properties and had used the same in conjunction with the surrounding

public range prior to 1934. The United States Supreme Court described the preference grazing scheme as follows:

> By 1937, the Department had set the basic rules for allocation of grazing privileges. Those rules recognized that many ranchers had long maintained herds on their own private lands during part of the year, while allowing their herds to graze farther afield on public land at other times. *The rules consequently gave a first preference to owners of stock who also owned "base property," i.e. private land (or water rights) sufficient to support their herds* ***and*** *who had grazed the public range during the five years just prior to the Taylor Act's enactment. See* 2 App. 818-819 (Rules for Administration of Grazing Districts (June 14, 1937)). They gave a second preference to other owners of nearby "base" property lacking prior use. *Ibid.* And they gave a third preference to stock owners without base property, like the nomadic sheep herder. *Ibid.* Since lower preference categories divided capacity left over after satisfaction of all higher preference claims, this system, in effect, awarded grazing privileges to owners of land or water.

Public Lands Council, *supra* at p. 734-735 (*emphasis added*). Administrators charged with implementing the "prior use rule" awarded the highest, class one, grazing preference only to those applicants who could demonstrate that they owned base ranch property and who had grazed the relevant public land prior to 1934. The process of evaluation and awarding preferences was described as follows:

> If one of the purposes of the Taylor Grazing Act is "to stabilize the livestock industry dependent up on the public range," it is obvious that this purpose is well served by granting grazing privileges to applicants who are and have been operating going concerns in connection with the range ... Clearly, if the standard of selection is to be one of prior use of the public lands in connection with the private property held by the applicants, some definition of the nature and extent of such prior use becomes necessary. I am informed by the Director of Grazing that the 5-year period immediately preceding the enactment of the act has been selected as a period within which an applicant may qualify for grazing privileges by having used the public range for one full grazing season because of its definite relation to the existing economic and climatic conditions.

Opinion of the Department of the Interior, by T.A. Walters, First Assistant Secretary, dated January 21, 1937. Based on the above preference grazing scheme, early applicants for grazing preferences were concerned, first and foremost, with the task of demonstrating ownership of base ranch property and use of the surrounding public range prior to 1934.

For the above reasons, the grazing applications reflected the regulations in place and, in particular, the prior use rule. Questions included those regarding ownership of base property and cattle. *See* Trial Exh. 78, bsn 2307 ("Are you the owner, lessee, entryman, bona fide occupant or settler ... upon any ranch property); *see also* Trial Exh. 78, bsn 2308 ("How many head of cattle do you own?"); *Public Lands Council*, *supra* at p. 734-735 (the rules gave a preference to owners of stock who also owned base property). Second, the applicants, to obtain a preference grazing right, were required to demonstrate that they had grazed the same public range during, at a minimum, the five years prior to the enactment of the Taylor Grazing Act. *See* Trial Exh. 87, bsn 2308. Question 8 on the application asked the following:

> Have you previously used *the lands covered by this application for a grazing permit*? If so, how many years and what is the usual period of use each year?

Trial Exh. 87, bsn 2308 (*emphasis added*). These applications, then, confirm not only the use of the relevant rangeland and water *after* the applications were granted, but also confirm the use of the use of the same rangeland and water thereon in the years prior to the enactment of the Taylor Grazing Act.

As found by the District Court, the grazing applications filed by two of Joyce Livestock's

predecessors, Mr. John Shea and Joyce Brothers Livestock, encompassed Jordan Creek and all places of use claimed by Joyce Livestock that are at issue herein. *See* Memorandum Decision, p. 18-21. To reach this conclusion, the District Court accepted the grazing applications as conclusive evidence of the use of Jordan Creek by Joyce Livestock's predecessors, but failed to recognize or give effect to the remainder of the same grazing applications which provide conclusive evidence of the use of Jordan Creek prior to 1934. This inconsistency is illogical, because the grazing applications can only be read as a whole. Those grazing applications, and in particular the grazing applications of John Shea, evidence that the whole of Jordan Creek, including all water at issue in this litigation, was used by Joyce Livestock's predecessors in interest prior to 1934.

As outlined in the statement of facts, above, Mr. Shea certified that he used the lands covered by the application, and by necessary implication both the grass and the water thereon, since 1925. *See* Trial Exh. 87, bsn 2308-2309 (April 26, 1935 Shea Application for Grazing Permit). In a subsequent grazing application, Shea similarly attests to the use the public range,

///

including the use of the waters of Jordan Creek dating back to the 1920s. *See* Trial Exh. O, bsn 2398. Between the two grazing applications, Shea certified to the pre-1934 use of all of the area covered by Joyce Livestock's water right claims at issue herein. *See* Trial Exh. 87, O and S; *See also* Memorandum Decision, p. 18-19. Based on these applications, Shea was awarded Class One grazing preferences. *See* Trial Exh. X. These grazing preferences would only have been awarded by the United States upon a finding by the United States that Shea had satisfied all elements of a grazing preference including ownership of base ranch property and use of the public range at issue in the five years just prior to the Taylor Grazing Act. *See* 2 App. 818-819 (Rules for Administration of Grazing Districts (June 14, 1937); *Public Lands Council*, *supra* at p. 734-735. Under the prior use rule, Shea's grazing applications and subsequently issued grazing preferences conclusively establish that Shea used the waters of Jordan Creek and the surrounding rangeland as early as 1925. Given the applicable law and the unrebutted facts of this case, it was error for the District Court to hold otherwise and error for the Court to award a priority date later than 1934.

/ / /

V. CONCLUSION

As a matter of law, the grazing preferences awarded to Joyce Livestock's predecessors establish pre-1934 priority dates. As a result, based on the grazing preferences awarded and the unrebutted evidence of historic use of the waters of Jordan Creek by Joyce Livestock and its predecessors dating back to the 1860s, it was in error for the District Court to assign a 1935 priority date to Joyce Livestock's water rights. Accordingly, Joyce Livestock respectfully requests that this Court reverse the District Court's Memorandum Decision on the limited issue of the priority date to be assigned to Joyce Livestock's claimed water rights, and award Joyce Livestock its private water rights as claimed with a priority date of 1898.

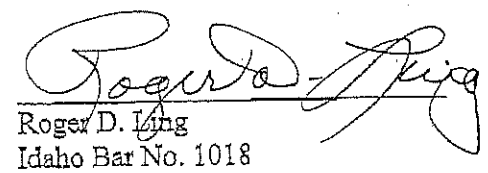
Dated this 17th day of April, 2006.

Respectfully submitted:
McQUAID BEDFORD & VAN ZANDT, LLP

Michael J. Van Zandt
Elizabeth P. Ewens

Dated this 17th day of April, 2006.

LING, ROBINSON & WALKER

By: 
Roger D. Ling
Idaho Bar No. 1018

ATTORNEYS FOR JOYCE LIVESTOCK

CERTIFICATE OF SERVICE

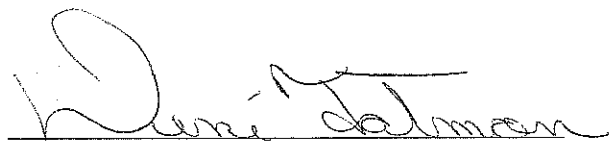
I certify that on April 18, 2006, I served a true and correct copy of foregoing **APPELLANT'S OPENING BRIEF** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

Elizabeth Ann Peterson
U.S. Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 23795
Washington, D.C. 20026

David L. Negri
Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098



Dené W. Tatmon

G:\Docs\21381\001\ID Supreme Ct. Appeal 32278\Appellants Opening Brief.wpd