

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.

**JOYCE LIVESTOCK'S RESPONSIVE BRIEF
AS RESPONDENT IN NO. 32279**

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

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I. STATEMENT OF THE CASE

What is fundamentally at issue in this litigation is the legal definition of a beneficial use or constitutional water right in Idaho, and whether the parties in this litigation have satisfied the requirements of a beneficial use water right. The District Court in its Memorandum Decision and Order on Challenge correctly held that under Idaho law, the United States, acting through the Bureau of Land Management (BLM) is not entitled to beneficial use water rights based on its performance of administrative functions in managing the rangeland and that those who are the actual appropriators of water, private parties like Joyce Livestock, can acquire water rights even when the water sources are located on federal land. Those rights, once acquired, can be transferred by the private water right owners as appurtenances to base property owned by the private parties.

The United States' brief demonstrates a complete lack of any legal support for the United States' beneficial use claims. Indeed, the United States fails to cite, and cannot cite, to a single case that holds that the United States acquires a beneficial use water right by virtue of its management of land. No such case exists because it goes against the very definition of a beneficial use water right which requires, at its most basic level, physical diversion and actual use of the water.

It is important to note that when it initially filed its beneficial use water rights claims, the United States did not assert that its management of the rangeland served as the basis for the claimed "appropriation." Rather, the United States' basis for its claimed water appropriations is

the acts of appropriation made by private parties that the United States then attempted to claim as its own. While now the United States focuses solely on its duties under the Taylor Grazing Act to support its beneficial use claims, its original claims asserted a priority date of January 1, 1874, a full sixty years prior to the enactment of the Taylor Grazing Act. *See* United States' Opening Brief, p 2 ("BLM filed claims for three in-stream stock watering rights in Jordan Creek . . . with a priority date of January 1, 1874 (later amended to June 28, 1934) ¹ At least at the initiation of this litigation, then, the United States understood that a beneficial use appropriation claim had to be connected, somehow, to the actual use of the water.

The United States asserts beneficial use water right claims in this litigation even though it has never physically placed this water to beneficial use. Quite simply, the United States does not own cattle or operate a livestock operation and, accordingly, it does not have and never has had the practical ability to appropriate a stockwater right. T.Tr. p. 391 (Testimony of Gary Madenford).

In light of the above, the United States asserts alternative theories of water right ownership to support its claims. It relies on Idaho statutory law to support its beneficial use claim even though the United States never filed an application for a permitted water right and failed to comply with any of the applicable statutory provisions. T.Tr. p. 21 (Testimony of Roxanne Brown); T.Tr. p. 427-428 (Testimony of Gary Madenford). The United States also relies heavily on reserved rights theories arguing that the purpose of the Taylor Grazing Act

¹ The Taylor Grazing Act was enacted on June 28, 1934

cannot be fulfilled absent water rights on federal land held by the United States. However, the Taylor Grazing Act does not reserve water rights to the United States and, further, gives the United States authority to manage the land and specifically delegates to the individual states the authority to administer the water. Taylor Grazing Act, 42 U.S.C. § 315.

In contrast to the United States, Joyce Livestock and its predecessors have continuously, openly appropriated these waters to a beneficial use for over a century. As detailed in Joyce Livestock's Opening Brief, year after year, Joyce Livestock and its predecessors used the waters of Jordan Creek to support the livestock operation, each year following the same historic pattern of use. Appellant's Opening Brief, p. 4-9; T.Tr. p. 660 - 661, 666 - 671, 678 - 686 (Testimony of Paul Nettleton). This historic use of the waters of Jordan Creek by these ranchers, predating the enactment of the Taylor Grazing Act, has been unrebutted by the United States, and, indeed, was conceded by the United States at trial. T.Tr. p. 391-393 (Testimony of Dr. Gary Madenford).

The waters of Jordan Creek are now and historically have been necessary to sustain the base ranch property and the cattle ranching operation. Because of this, Joyce Livestock's predecessors, when they transferred the base ranch property, intended to and did in fact transfer with it the appurtenant water rights located on federal land. T.Tr. p. 673 -684, 718 - 719 (Testimony of Paul Nettleton). The nexus between the base ranch and these water rights is one of necessity, for the ranch simply cannot survive, and the cattle literally cannot survive, without these water rights. T.Tr. p. 673 - 719 (Testimony of Paul Nettleton); T.Tr. p. 321 (Testimony of Gene Lewis).

II. ADDITIONAL ISSUES ON APPEAL

No additional issues on appeal are presented

III. ATTORNEY FEES ON APPEAL

As outlined in Joyce Livestock's Opening Brief, in addition to the attorneys fees requested pursuant to I.C. § 12-121 and pursuant to the Equal Access to Justice Act [28 USC § 2412(d)], and its attorneys fees at issue in *Joyce Livestock v. United States*, Idaho Supreme Court No. 32846, Joyce Livestock seeks all of its attorneys fees on appeal pursuant to I.A.R. 41.

IV. ARGUMENT

A. BLM MANAGEMENT OF THE RANGELAND DOES NOT EQUATE TO A BENEFICIAL USE OF WATER UNDER ANY INTERPRETATION OF IDAHO LAW.

The United States bases its claims solely on the fact that the United States, through the Bureau of Land Management, acts as the administrator of grazing lands on which the water sources are located. This does not satisfy either the legal or factual requirements of a constitutional based water right in the state of Idaho

Constitutional based water rights derive from Idaho Constitution Article 15, section 3. To acquire a water right under this method, "there must be a bona fide intent to apply (the water) to some beneficial use ... 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, Inc. V. Hagerman Water Users, Inc*, 619 P 2d 1130, 1132-1133 (Idaho 1980). Otherwise known as beneficial use or appropriative water rights,

Idaho state law requires first and foremost a demonstration of actual diversion of the water and application of the water to a beneficial use. *R T Nahas Co v. Hulet*, 114 Idaho 23, 26 (1988); *see also Cantlin v Carter*, 88 Idaho 179, 186 (1964) (it is by actually diverting and applying water to a beneficial use that a legal appropriation is made). As applied to stockwater, this physical diversion and application to beneficial use is accomplished by taking one's cattle to the water source and allowing them to drink from it. As explained by the Snake River Basin Adjudication (SRBA) Court in prior unrelated proceedings:

[T]he well-established constitutional principle (is) that it is the actual appropriator who owns the water right. For an instream stock water right like the water right at issue, the party claiming a stock water 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. I.C. §42-113; *R T Nahas v. Hulet*, 114 Idaho 23 (Ct.App. 1988).

In Re SRBA Case No. 39576, Special Master's Order Denying Motion to Alter or Amend, p. 7 (April 15, 1998), *affirmed and analysis adopted in In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998). This is consistent with law throughout the western United States which holds that a beneficial use stockwater right is acquired and evidenced by the act of cattle owned by an appropriator drinking from the water source. *Stephoe Live Stock Co v. Gulley*, 295 P. 772 (Nev. 1931) (cattle watering from streams held to be an appropriation of water for stockwatering purposes); *Hage v United States*, 51 Fed Cl. 570 (2002), *citing Hunter v. United States*, 388 F.2d 148, 153 (S.D. Cal. 1967). As explained by the Court in *Hunter*:

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 use . . . but it also can 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 into a stream in order to use the flowage as power to operate a mill located on the bank.

Hunter v. United States, 388 F 2d 148, 153 (S.D. Cal. 1967) (*internal citations omitted*)

(*emphasis added*). There must, under prevailing law in Idaho and the law throughout the western states, be an actual physical diversion of the water, and in the case of stockwatering this means cattle drinking directly from the source. These requirements apply equally to all parties asserting a constitutional based water right. Therefore, the United States, just like any other appropriator, must demonstrate that it actually physically used the water in order to obtain water rights under the constitutional method of appropriation.²

Contrary to the position it takes with respect to its own appropriative water right claims, with respect to Joyce Livestock's claims the United States strenuously argues that there must be an outward, physical diversion of water from the sources at issue to put others on notice of an intent to appropriate a water right. See United States' Opening Brief, p. 34. In other proceedings

² As previously held, in the State of Idaho, there are only three ways to obtain a beneficial use water right: (1) to actually appropriate water and beneficially use the water, (2) to be a successor-in-interest to an actual appropriator, or (3) to have an agency relationship with the actual appropriator. In this case, the United States has not claimed it is either a successor-in-interest to Joyce Livestock or its predecessors nor has it claimed an agency relationship because neither situation exists in this case. *In Re SRBA Case No. 39576, Subcase 72-J5 929(C)*, Special Master's Order Denying Motion to Alter or Amend, p. 5 (April 15, 1998), *affirmed In RE SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Report and Recommendation (Sept. 30, 1998).

as well, the United States has explicitly acknowledged that when the issue is what is a common law beneficial use water right, an act of physical diversion of the water is required in order to prove intent to appropriate a water right or to substantiate the claimed right. In briefs filed in *LU Ranching v United States*, Case No. 31994 currently pending before this Supreme Court, the United States also argued that an actual physical diversion of water is necessary to prove an appropriation of water under the beneficial use method of appropriation.³ In its brief, the United States argued as follows:

[A] valid appropriation of a water right ordinarily requires intent, diversion, and application of water to beneficial use *Where an appropriator does not apply for a permit, intent must (be) manifested by some physical act*. For example, intent could be manifested by posting notice at the point of diversion. *An actual physical diversion is also a physical manifestation of intent that provides notice to potential appropriators*.

See United States Brief as Respondent/Cross-Appellant in *LU Ranching v United States*, Idaho Supreme Court No. 31994, p. 16 (*emphasis added*). This argument, as applied to the facts of the United States' claims in *Joyce Livestock v United States* absolutely defeats the United States' claims which are based not on any diversion of water but rather are based on the United States' administrative management of rangeland. The United States has not made any physical diversions from these waters, and has failed to demonstrate a "physical manifestation of intent

³ While the *Joyce Livestock v United States* and *LU Ranching v United States* cases are separate cases on appeal before this Supreme Court, they involve substantially the same issues and are part of the single water adjudication *In Re SRBA Case No. 39576 (Snake River Basin Adjudication)*, In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls

that provides notice to potential appropriators” of the United States’ intent to appropriate the waters of Jordan Creek. Accordingly, under principles of judicial estoppel and based on the United States’ own arguments, the United States cannot base its appropriative water right claims on anything other than the United States’ physical act of placing the actual water to beneficial use. The United States admits it has not done so.

Principles of judicial estoppel prevent a party from assuming inconsistent positions before this Court. *See Robertson Supply Inc. v. Nicholls*, 131 Idaho 99, 101 (Ct. App. 1998). In this case, the United States is attempting to gain an advantage in this litigation at the court’s expense by taking inconsistent positions with respect to identical legal issues. Accordingly, to protect the dignity of the judicial proceedings, limits must be imposed such that the United States should be prevented from shifting its position in the course of this litigation and the Snake River Basin Adjudication to suit its needs at the time. *See Wolford v. Tankersley*, 107 Idaho 1062, 695 P.2d 1201, 1215 (1984), *quoting MacDonald v. Long*, 100 W.Va. 551, 131 S.E. 252, 253 (1926) (“There are limits beyond which a party may not skirt his position in the course of litigation. Parties will not be permitted to assume successive inconsistent positions in the course of a suit or series of suits in reference to the same fact or state of facts.”)

In the present case, the United States argues, on one hand, that to prove that a water right has been acquired under the constitutional method of appropriation, a party must demonstrate intent to appropriate a water right by a physical, objective manifestation of intent to appropriate a water right through diversion of the water and application of the water to a beneficial use.

United States' Opening Brief, p. 34 (applying standard to Joyce Livestock's claims). However, the United States apparently believes that it is exempt from this requirement because it fails to apply the same standard to its own appropriative water right claims. Simply, the United States continues to argue that it is entitled to beneficial use stockwater rights even though the United States owns no cattle, has not beneficially used the water at issue, and has accomplished no physical diversions from these water sources which would put others on notice of its intent to appropriate water rights.

The United States cannot point to any act of physical diversion of the water by the United States to support its constitutional based water right claims. Thus, the United States argues that its appropriative water right claims are supported by language in the Taylor Grazing Act through which Congress delegated "broad authority" to do things "necessary to accomplish the purposes of this subchapter." United States' Opening Brief, p. 19. Congress may have delegated to the United States broad authority to manage the rangelands, but it also specifically and unequivocally recognized private water rights within the newly created grazing districts as well as the supremacy of state law as it relates to the acquisition of water rights. Taylor Grazing Act, 43 U.S.C. § 315. The fact that the Taylor Grazing Act gives the United States authority over the land only, and not over the water, is admitted by the United States in its brief:

The Taylor Grazing Act does provide that it is not to be construed "as limiting or restricting the power or authority of any State as to matters within its jurisdiction (43 U.S.C. §315), *and the State thereby retains its authority with respect to the administration of water rights*. But the effective management of the federal lands is a matter exclusively within federal jurisdiction.

United States' Opening Brief, p. 32, ft.n. 24 (*emphasis added*). No one in this litigation is challenging the United States' authority to manage the land. What the United States fails to comprehend, however, is that this case is not about the land, it is about the water, and as to water, state law applies.

The only way the purposes of the Taylor Grazing Act would be at issue in this case is if the United States' claims were based on a reserved water rights theory. Importantly, the United States did not claim a reserved water right in this case. Even if it had, however, there would be no support for the United States' claims. The United States' theory of this case is that it cannot fulfill its duties under the Taylor Grazing Act absent ownership and control of the water sources on federal land. Such an argument is nearly identical to what was presented by the United States, and rejected by the United States Supreme Court, in *United States v. New Mexico*, 438 U.S. 696 (1978). In that case, the United States argued that Congress intended to reserve water from the Rio Mimbres in the Gila National Forest to fulfill the purposes of the reservation of the forest lands. In support of its claimed water rights, the United States offered the fact that it issued permits to private cattle owners to graze their livestock within the national forests. The District Court held, and the United States Supreme Court agreed, that the United States was *not* entitled to reserved water rights and that those rights belonged instead to the ranchers who actually appropriated the water. The Supreme Court wrote:

The District Court concluded that the United States had not established a reserved right to a minimum instream flow for any of the purposes for which the Gila National Forest was established, and that any water rights arising from cattle grazing by permittees on the forest should be adjudicated "to the permittee under

the law of prior appropriation and not to the United States” ... The United States issues permits to private cattle owners to graze their stock on the Gila National Forest and provides for stockwatering at various locations along the Rio Mimbres. The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree.

United States v New Mexico, 438 U.S. 696, 704 and 716 (1978) In the present case, the United States has not claimed a reserved water right, nor is one implicated in the Taylor Grazing Act. To the contrary, the laws of the United States evidence the opposite intent because instead of reserving those water rights to the United States, the United States explicitly recognizes appropriations pursuant to state law by the actual appropriators of the water – the ranchers who have beneficially used the water sources.

The United States could have reserved unappropriated water for itself through the enactment of the Taylor Grazing Act, which would have been a form of notice to third parties of the United States’ intent to hold those water rights, but the United States did not do this. The United States also could have applied for a statutory based water right under Idaho law, and, as detailed below, in complying with those statutes would have given notice to others of the United States’ intention to hold water rights. The United States did not do this either. Indeed, viewed in total, until the initiation of this lawsuit, the United States did absolutely nothing to lay claim to these waters.

B. THERE IS NO SUPPORT IN EITHER IDAHO STATUTORY LAW OR JUDICIAL PRECEDENT FOR THE UNITED STATES' THEORIES.

1. Idaho Case Law Does Not Support the United States' Appropriative Water Right Claims

The United States asserts that there is support for its appropriative water rights claims even though none exists. The cases relied on by the United States simply do not involve appropriative stockwater water rights. See United States Opening Brief at p. 21-24, citing *United States v. State of Idaho*, 959 P.2d 449 (Idaho 1998) (federal reserved water rights under PWR 107); *State v. United States* ("Smith Springs"), 134 Idaho 106 (2000) (denial of wildlife water claims); *State of Nevada v. Morros*, 766 P.2d 263 (Nev 1988) (Nevada statutory water rights). As detailed, below, none of the judicial authority cited by the United States supports its beneficial use stockwater claims in this case

The first case relied upon by the United States is *United States v. State of Idaho*, 131 Idaho 468 (1998) ("*United States v. State*"). As acknowledged by the United States, *United States v. State* does not recognize beneficial use stockwater rights, but rather federal reserved water rights created pursuant to a specific federal reservation, PWR 107. In that case, the Idaho Supreme Court detailed the Congressional authority leading to the drafting and eventual approval of PWR 107 by executive order of President Coolidge in 1926. *Id.* at p. 470-471.⁴ The United

⁴ It should be noted that a precondition of federal reserved water rights created by PWR 107 was that the reservation only applied to water sources that were not already appropriated. In this case, the waters at issue were appropriated by Joyce Livestock's predecessors in interest prior to the enactment of the Taylor Grazing Act.

States now stresses the rationale in the *United States v. State* opinion that supports the reservation of water rights under PWR 107 arguing that the reserved water was critical to the operation of the BLM's grazing program. United States' Opening Brief, p. 21. However, it is telling that the Taylor Grazing Act, enacted eight years *after* PWR 107 went into effect, did not contain a reservation of water rights. If, as the United States argues, the instream stockwater rights at issue today were essential to the ability of the BLM to administer its functions under the Taylor Grazing Act, then the United States Congress could have, and should have, reserved those water rights in the Taylor Grazing Act similar to the way in which the government, prior to the enactment of the Taylor Grazing Act, went about securing a reservation of water rights in springs pursuant to PWR 107. Instead of reserving water rights in the name of the United States, Congress did the opposite and specifically recognized and protected the right of *private parties*, including the individuals using the grazing land both prior to and subsequent to the enactment of the Taylor Grazing Act, to acquire and maintain water rights pursuant to state law on those federal lands. The Taylor Grazing Act states:

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 affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law*

Taylor Grazing Act, 43 U.S.C. §315 (*emphasis added*). If the United States Congress believed that the purpose and goals of the Taylor Grazing Act could not be met unless the United States held all water rights on federally administered land, then the Taylor Grazing Act would have

contained a reservation of water rights similar to PWR 107 and, moreover, Congress would *not* have included specific language recognizing the rights of private parties to acquire those water rights pursuant to state law.

The United States also argues that the “BLM unquestionably intended to appropriate the water needed for its grazing program” and cites, as authority, law authorizing BLM management of the land. However, as briefed herein, management of the *rangeland* does not put others on notice of an intent to appropriate *water* nor does it satisfy the requirements under Idaho law for an appropriative or beneficial use water right. In addition, none of the laws or regulations cited by the United States even concern the regulation or management of water. Without exception, the legal authority granted to the BLM by the Taylor Grazing Act and its implementing regulations cited by the United States expressly concerns only management of the land or the range, and not the water thereon. *See* United States’ Brief, p. 22. No one in this litigation disputes the BLM’s ability to manage the rangeland as specified by law, but the United States cannot claim its management and control of *land* somehow equates to the appropriation of *water*. Again, as explicitly recognized in the Taylor Grazing Act, rights to water and rights to the use of land are two separate and distinct issues.

The United States also cites to *Smith Springs*, 134 Idaho 106 (2000) for the proposition that “BLM meets the elements for a valid appropriation for a stock water right.” United States’ Opening Brief, p. 23. This is not the holding of the *Smith Springs* case. First, BLM appropriation of stockwater rights was not at issue in that case. Rather, at issue was the ability

(or, as the Court held, the United States' inability) to acquire a constitutional based water right based on beneficial use for wildlife purposes. *Id.* at p. 108. Second, nothing in *Smith Springs* states or implies that the United States, through management activities, can obtain a beneficial use stockwater right. To the contrary, the Supreme Court in *Smith Springs* holds the United States to the same strict standards for an appropriation (including physical diversion requirements) that are applied to all other parties seeking appropriative water rights. Further, as it relates to the diversion requirement and the acquisition of water rights pursuant to the constitutional method of appropriation, the Court confirmed existing Idaho law as follows:

Idaho water law generally requires an actual diversion and beneficial use for the existence of a valid water right...Only two exceptions to the diversion requirement exist. No diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water right for stock watering. In addition, State entities acting pursuant to statute may make non-diversionary appropriations for the beneficial use of Idaho citizens.. Neither of these exceptions covers the United States' claim. Although the stock-watering exception applies to appropriations made under the constitutional method, *it applies only to watering livestock* and does not extend to beneficial use for wildlife habitat

Smith Springs, 134 Idaho at 111-112 (*emphasis added*) (*internal citations omitted*) As recognized by the Idaho Supreme Court, there is a physical diversion requirement for stockwatering which is satisfied only by the watering of livestock from the source. *Id.* The United States does not now, and has not ever, watered stock from the waters of Jordan Creek and, therefore, the United States cannot satisfy the test for a valid appropriation under Idaho state law.

Finally, the United States relies on the Nevada case, *State of Nevada v Morros*, 104 Nev

709 (Nevada 1988) In addition to the fact that the *Morros* case involves Nevada law, and not Idaho law, the *Morros* case also does not concern beneficial use appropriations but rather statutory water rights acquired pursuant to Nevada statute. In *Morros*, the United States filed water right applications pursuant to Nevada statute, and the case derived from an order by the Nevada State Engineer granting those water right applications. See *Morros*, 104 Nev 709, 711-712 (1988) In granting those applications, the Court considered whether the United States qualified for statutory water rights based on Nevada statutory law and whether the United States' water rights applications filed pursuant to statute should be granted or denied. *Id* While the case may be instructive regarding the interpretation of Nevada statutory law, it does nothing to shed light on whether the United States has satisfied the requirements for a constitutional based water right under Idaho law.

The United States pleads the relevance of the *Morros* case by arguing that "there is no meaningful difference between the elements of an appropriation under the statutory method and the constitutional method " United States' Opening Brief, p. 23, ft.n. 18. However, there is a fundamental difference between statutory water rights and appropriative water rights, and based on its own briefs in this case the United States should be the first to recognize it. When an application for a statutory water right is filed, there are specific notice provisions through which other existing or future appropriators are given notice of the applicant's *intent* to appropriate a water right. See I.C. §42-203A (notice and publication requirements). In contrast, a beneficial use water right, by means of the actual use of the water, gives notice to others of the

appropriator's intent to appropriate a water right through the outward demonstration of beneficial use of the waters. As explained by the Idaho Supreme Court:

The doctrine prevailed prior to statehood, and in the earliest territorial history, that the "first in time is the first in right," in the diversion and use of the public waters ... It has never been the intention, so far as we are advised, of the Legislature to cut off the right an appropriator and user of water *may acquire by the actual diversion of the water and its application to a beneficial use This constitutes actual notice to every intending appropriator of the water of such a stream*

Nielson v Parker, 115 P. 488, 490 (1911)(*emphasis added*). Because the United States has never physically applied the water to beneficial use, there has been no notice to others of the United States' purported intent to appropriate a water right through the constitutional or beneficial use method of appropriation. Further, because the United States failed to file an application for a statutory based water right, no notice of the United States' intent to acquire a water right pursuant to statute has been given either. As repeated often by the United States, in order to acquire a water right there must be notice to others of an intent to appropriate a water right, and in this case, none has been given by the United States.

The United States has never actually diverted the waters of Jordan Creek to beneficial use. It has not reserved the water in Jordan Creek, and it has not filed an application for a statutory based water right in and to the waters of Jordan Creek. Under such circumstances there is, simply, no basis for the United States' beneficial use claims.

2. Idaho Statutory Law

As detailed, above, there is a fundamental difference between the constitutional method of appropriation and statutory water rights. Beneficial use water rights, by definition, require the

actual use of water and, through that use, notice is given to others of an intent to appropriate the waters. The United States has not done this and, therefore, it relies on Idaho statutory law in an attempt to support its water right claims. What is at issue in this case, however, are beneficial use water right claims filed by the United States, not statutory based water right claims. The United States cannot retroactively change the basis of its claim to turn it into something it is not, especially when the United States has not complied with the requirements for a statutory based water right.

Idaho statutory law is inapplicable to this case because statutory water rights have not been claimed, beneficial use water rights have, and the two are fundamentally different. A water right based on the beneficial use or constitutional method of appropriation is initiated by actually diverting water and placing it to beneficial use. In contrast, in Idaho a statutory based water right is initiated by filing a paper application with a government agency. *R T Nahas v Hulet*, 114 Idaho 23, 26-27 (1988) (holding that beneficial use and statutory use methods of acquiring a water right are separate and distinct); I.C. §§ 42-113 and 42-501 (filing an application is a prerequisite to obtaining a statutory right). A water right based on the beneficial use method of appropriation gives notice to others of the appropriator's intent to acquire a water right by the outward manifestation of that intent through the actual physical diversion of the water from the source and application of that water to beneficial use. *See Nielson v Parker*, 115 P. 488, 490 (1911) In contrast, notice of an intent to acquire a water right through statutory means is accomplished by complying with very specific written notice requirements and publication of

that notice in a “newspaper printed within the county wherein the point of diversion lies.” I.C. § 42-201A

Whether the United States could have acquired a statutory based water right to the waters of Jordan Creek is not at issue and is irrelevant to these proceedings because there has been no attempt by the United States to apply for a statutory water right or to comply with the explicit requirements of the statute. Further, as correctly noted by the District Court, in order to obtain a statutory based water right, the applicant must demonstrate beneficial use before the permit will issue. Memorandum Decision and Order on Challenge, p. 26. Because the United States has never placed these waters to beneficial use, it is doubtful that it would have been able to secure a statutory right even if the United States had filed an application for the same.

3. There is No Public Policy or Other Justification to Support the United States’ Claims.

The United States argues that “allowance of BLM’s claims is the most sensible result.” United States’ Opening Brief, p. 30. Not so. Indeed, allowance of the United States’ claims would reverse over a century of Idaho law regarding appropriative water rights and that, most certainly, would not be a “sensible” result. None of the “public policy” arguments raised by the United States justify overturning all existing law on this subject. In fact, by making these arguments, the United States is demonstrating that its claims have no basis in fact or law, proving there is absolutely no justification for its position. Moreover, the extensive statutory and case law supporting Joyce Livestock’s position is proof of the futility of the United States’ asserted position.

The fact that others in the Snake River Basin Adjudication did not claim water rights located on federal lands or settled disputed water right claims with the United States simply has no bearing on whether in this case, with respect to these waters, the United States physically diverted the water and applied it to a beneficial use. Similarly, whether “it was generally assumed” by others, including the United States, that the United States owned water rights has no relevance or probative effect. It is for this Court, applying the laws of the state of Idaho, to determine whether as to the waters at issue the United States satisfied each of the requirements of a beneficial use appropriation and whether, in so doing, the United States is entitled to water rights under the constitutional method of appropriation.

The United States also argues that the United States should be entitled to its beneficial use water right claims because the Idaho Department of Water Resources “could not track private rights.” See United States Opening Brief, p. 30. Whatever administrative burden may exist with private water rights on federal lands is not relieved by awarding the water rights to the United States instead. Simply, even if, *arguendo* there are bureaucratic difficulties associated with tracking private water right claims, such difficulties cannot affect a determination of whether the United States appropriated stockwater rights.

4. The District Court’s Denial of the United States Claims was Correct and Well Grounded in Idaho State Law.

The United States disputes the District Court’s reliance on *First Security Bank of Blackfoot v State*, 291 P 1064 (1930). United States’ Opening Brief, p. 27-28. However, *First Security* is probative of the issues in this case and was correctly relied upon by the District Court

Ironically, although the United States disputes the relevance of *First Security* now, the United States actually cited to and relied upon *First Security* as probative authority in the United States' Responsive Brief in Opposition to Joyce Livestock's Challenge, p 17-18. Further, if you look at the facts and issues presented in *First Security*, its relevance cannot be missed. *First Security* details and analyzes Idaho law as it applies to water rights initiated by appropriators who are not the owners of the underlying land:

As near as we can determine from the record, and the court so found, *(the water right) was initiated by the predecessors of Reese and Ziegler while the land was part of the public domain of the United States.* Since that time the land on which the water has been used has been owned by the state of Idaho and since 1919 by the Wood Live Stock Company. Water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator. . . This has been held in cases where the water was appropriated for use on land on which the appropriator was a mere trespasser . . . where the appropriator had leased the land on which he intended to use the water . . . and where the appropriator was a lessee of state school lands. 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. *There is no reason why a lessee of state land should be excepted from this privilege.*

First Security Bank of Blackfoot v. State, 291 P. 1064 (Idaho 1930) (*internal citations omitted*) (*emphasis added*).

Similarly, there is no reason to depart from this rule when what is at issue is an appropriation of a water right on federal land. Such appropriative water rights under the law in the state of Idaho are the property of the actual appropriator. *Id.* Further, these private water rights have been given specific recognition and protection under federal law. *See* Mining Act of

July 26, 1866, 14 Stat. 253, Ch. 262, § 9; 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 United States attempts to avoid application of the above by arguing that a “licensee has no possessory or property interest in the grazing lands.” United States’ Opening Brief, p. 28. The United States’ reliance on *Buford v. Houtz*, 133 U.S. 320, 326 (1890) is misplaced. *Buford* does not deal with monopolization of water but rather it deals with use of the public range, where the Supreme Court addressed whether the owner of a large, patchwork tract of land could exclude from his lands trespassing cattle. *Buford*, 133 U.S. at 325-26. Joyce Livestock is not claiming a possessory interest, or any other interest in the land. It is claiming a water right, validly appropriated under Idaho law and recognized by federal law. Accordingly, cases cited by the United States regarding rights in and to federal land simply have no bearing on or relevance in this case.

C. THE DISTRICT COURT’S DECISION DENYING THE UNITED STATES’ CLAIMS IS FULLY CONSISTENT WITH THE TAYLOR GRAZING ACT AND ITS RELATED REGULATIONS.

The United States argues that there is an impermissible conflict between state water law and the federal Taylor Grazing Act. See United States’ Opening Brief, p. 31. There is, however, no conflict between federal and state law. To the contrary, on the issue of water rights, the Taylor Grazing Act expressly yields to state law and unequivocally provides that state law will govern issues relating to water rights.

Whether a federal law preempts or conflicts with state law is an issue of the Supremacy clause of the United States Constitution. U.S.C.A. Const. Art. VI cl. 2. The Supremacy Clause invalidates only those state laws or local ordinances that interfere with, or are contrary to, federal law. *Hillsborough County, Fla. v. Automated Medical Labs, Inc.*, 471 U.S. 707, 712 (1985). The Idaho Supreme Court has adopted the United States Supreme Court's delineation of the elements of preemption to help determine whether Congress has enacted legislation that preempts any portions of the state law:

State law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Boundary Backpackers v. Boundary County, 128 Idaho 371, 378, 913 P.2d 1141, 1146 (1996) (quoting *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580, 107 S.Ct. 1419, 1424-25, 94 L.Ed.2d 577 (1987)). Further, "[t]he preemption of state law is not to be readily inferred. In order for preemption to be applied, it must be determined that state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Estate of Mundell*, 124 Idaho at 153 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981)).

For preemption to apply, federal and state law must be in direct conflict with each other. That is not the case here. On the issue of water law, the Taylor Grazing Act expressly provides

that the states retain continued authority with respect to water rights. *See* Taylor Grazing Act, 43 U.S.C. §315. On the other side, on the issue of the regulation of federal grazing lands, nothing in Idaho law seeks to interfere with the United States' regulatory authority over federal grazing lands. This scheme, whereby the United States maintains regulatory control over the land and the individual states maintained control over the disposition of water, is not a product of the District Court's Order as argued by the United States, but rather was created by specific design by the United States when it drafted and enacted the Taylor Grazing Act. The United States Congress deferred to and conceded authority over water rights to the states with full knowledge at the time of the enactment of the Taylor Grazing Act that western states, including Idaho, administered and recognized water rights pursuant to the prior appropriation doctrine. If the United States Congress believed that it would be impossible to accomplish the objectives of the Taylor Grazing Act if private parties held water rights pursuant to state law, then Congress would not have specifically stated in the Taylor Grazing Act that state law governs the administration of water rights.

The United States also argues that the Taylor Grazing Act's "stated objectives require the Secretary to secure the use of the water sources necessary to support the grazing program established by the Taylor Grazing Act." *See* United States' Opening Brief, p. 32. As analyzed herein, such arguments are tantamount to a reservation of rights theory, and there is no reservation of water rights, either express or implied, in the Taylor Grazing Act. If water was necessary to fulfill the purposes of the Taylor Grazing Act, the Act, simply, would have

contained such a reservation. Furthermore, the United States' conduct since 1934 is inconsistent with its position that securing water rights from the subject sources is essential to its ability to manage the rangeland. Since 1939, Idaho law has recognized the right of the United States to apply for a water right pursuant to Idaho statutory law. *See* I C 42-501 [1939, ch 205, § 1, p 412; am. 1971, ch. 152, § 1, p. 752]. From 1939 until the initiation of the Snake River Basin Adjudication, the United States failed to avail itself of this opportunity to "secure water rights" to the waters of Jordan Creek which waters, the United States argues now, are essential to its ability to do its job under the Taylor Grazing Act. For over a half a century, the United States has managed the grazing allotments at issue herein, and there is no evidence to support its argument that its ability to do so was somehow impeded or hampered by the fact that during that time, the United States did not hold a water right.

The United States' argument that if it does not own the water rights, there will be a "monopolization" of the rangelands is similarly without merit. No one is attempting to monopolize the rangeland. Even if, *arguendo*, that was the intent, it would be impossible given the Taylor Grazing Act and the regulations implementing that statute. Recognizing private ownership of water rights on federal land does nothing to diminish the United States' ability to regulate the surrounding rangeland according to law.

D. THE DISTRICT COURT CORRECTLY HELD THAT JOYCE LIVESTOCK IS ENTITLED TO ITS CLAIMED WATER RIGHTS

1. The Appropriations Initiated by Joyce Livestock's Predecessors Satisfy All Requirements for the Appropriation of a Beneficial Use Water Right Under Idaho Law

As previously briefed, under the prior appropriation doctrine, parties are entitled to a priority date representing the date that the water was first put to beneficial use. *See* Joyce Livestock's Opening Brief on Appeal, p. 11-15. Further, as briefed extensively herein, Idaho law recognizes appropriative water rights upon a demonstration of actual physical diversion of the water and application of the water to a beneficial use. In the case of stockwater, valid appropriations are accomplished by taking one's cattle to the water source and allowing them to drink from it. *Stevenson v. Steele*, 93 Idaho 4, 11 (1969); *see also R T. Nahas Co. v. Hulet*, 114 Idaho 23, 26 (1988); *Cantlin v. Carter*, 88 Idaho 179, 186 (1964); *In Re SRBA Case No. 39576*, Special Master's Order Denying Motion to Alter or Amend, p. 7 (April 15, 1998), *affirmed and analysis adopted in In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Reports and Recommendations (September 30, 1998); *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).

The state based stockwater rights, even when situated on federal land, have been given specific recognition and protection by federal law. 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. As held in *California Oregon Power Co. v. Beaver Portland*

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

Despite the above, the United States challenges the District Court's conclusion that given the "integral relationship between available water sources and grazing land it is self-evident that grazing of livestock includes the intent that livestock will beneficially use the water." See United States brief, p. 35, *citing* Memorandum Decision and Order on Challenge, R. Vol. I. p. 209. However, the District Court correctly recognized that when the cattle grazed the lands surrounding these water sources, the cattle would naturally drink water from the available sources. As confirmed by the Idaho legislature:

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.

I.C. §42-113(2). Historic use of water sources, which can be evidenced by the concurrent grazing on the surrounding rangelands, satisfies the requirements under Idaho law for appropriative water rights including the requirement of intent.

Intent to appropriate a stockwater right under the constitutional method of appropriation is evidenced by the act of watering livestock from the source. There simply are no other

requirements for the manifestation of intent to appropriate a water right. As analyzed and held in

Hunter v United States:

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. Just as in *Hunter*, at issue in this case is a family ranching operation spanning well over one hundred years. From generation to generation, Joyce Livestock and its predecessors, principally comprised of members of the Joyce and Nettleton families, have taken their cattle to graze and water along Jordan Creek. See T. Tr., p. 659-684 (Testimony of Paul Nettleton); see also T. Tr. p. 313-322 (Testimony of Gene Lewis). The use of the waters of Jordan Creek was essential to the survival of the cattle, and was essential to the survival of the ranching operation.

Contrary to settled law, the United States argues that the use of a stream for livestock watering does not constitute an appropriation of water. See United States Opening Brief, p. 35-36. The United States cites to only one Idaho case for this proposition, *Hutchinson v Watson Slough Ditch Co.*, 101 P. 1059 (Idaho 1909). The United States argues that under Idaho law, as set forth in the *Hutchinson* case, the "use of a stream for livestock watering for 17 years by owner of riparian property does not amount to an appropriation." See United States' Opening Brief, p. 36, citing *Hutchinson*, *supra*. Contrary to the United States' representation, the holding in

Hutchinson has absolutely nothing to do with the issue of whether the act of watering livestock from a source as constituting a valid appropriation under the constitutional method of appropriation in Idaho. Rather, the Court in *Hutchinson* denied the claimed water right because the only basis of the asserted claim was a *riparian* theory of ownership not an *appropriative* theory of ownership. It was the riparian theory of ownership that the Court rejected:

In the further discussion of the case, it must be remembered that the respondent has not alleged or established any appropriation or diversion of the waters of this stream for any useful or beneficial purpose. He makes no claim to the water by reason of any appropriation or diversion in accordance with the statute, but rather bases and asserts his right on the fact that he is a riparian proprietor, and that as such he has for more than 17 years been using the water for "domestic, culinary and household purposes and for the use of his live stock, and that the waters of the stream have continuously flowed through is lands, "moistening the same." Whatever rights, therefore, respondent has established, are wholly dependent upon his proprietary rights as a riparian owner of lands through which this stream flows.

Hutchinson, 101 P. 1059, 1061 (Idaho 1909) (*emphasis added*). The Court goes on to reject the respondent's riparian water right claim, holding that the riparian doctrine is "in conflict with and repugnant to both the Constitution and the statutes of this state." *Id.* at p. 1062.

The United States also argues that Joyce Livestock's predecessor, John Shea, failed to demonstrate an intent to appropriate a stockwater right. However, under the law in this state, intent to appropriate a stockwater right is evidenced by the historic use of the water sources by the appropriator's cattle. In this case, there is overwhelming and un rebutted evidence of Mr. Shea's use of the Jordan Creek drainage as part of his livestock operation. In 1927, Mr. Shea filed for entry under the Stock-Raising Homestead Act and later filed for a grazing application

pursuant to the Taylor Grazing Act. *See* Trial Exh. 20, 87, O and S. In each, Mr. Shea certified that he had used this range, 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 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 (identifying waters used in connection with use of public range including portion of Jordan Creek). Between the 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.

All of the entities that grazed and watered livestock in the Jordan Creek area since the mid 1800s have been acquired by Joyce Livestock and are now part of the Joyce Ranch. T.Tr. p 659-661, 674-683; (Testimony of Paul Nettleton) Exhibit 1(Chain of Title). The un rebuttal evidence at trial, including the testimony of Paul Nettleton based on his personal

knowledge, was that his family, Joyce Livestock's predecessors-in-interest, consistently used the waters of Jordan Creek as part of their livestock operation beginning in the late 1800's T.T.P. 654-683. Even the United States' own witness from the BLM admits that Joyce Livestock's predecessors in interest were using the waters of Jordan Creek for stockwatering purposes prior to the enactment of Taylor Grazing Act. See Testimony of Gary Madenford, p. 392-393. The consistent beneficial use of the water in Jordan Creek for stockwatering by Joyce Livestock and its predecessors over a period of more than a century, is more than sufficient evidence of an appropriative water right that is legally protected under both Idaho and federal law. The District Court correctly recognized and upheld those rights.

2. The District Court Correctly Recognized that as a Matter of Law and Fact, Joyce Livestock's Predecessors Transferred Their Water Rights As Appurtenances to the Base Ranch Properties

The District Court in this case correctly applied the law of the case in the SRBA as it pertains to the ability of private parties to convey water rights as appurtenances to base ranch properties. Contrary to the arguments of the United States, such appurtenance clauses contained in written conveyances of the base ranch property satisfy the statute of frauds. The United States' second line argument is that the water rights can only be attached to the place of use and, therefore, the water right can only be held by the owner of the underlying real property. This is a riparian theory of water right ownership which has been properly and soundly rejected by the courts.

As recognized by the District Court, water rights can transfer along with the property to

which they are appurtenant. See Memorandum Decision and Order on Challenge, p. 16, *citing Crow v. Carlson*, 107 Idaho 461 (1984). Further, 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.* The stockwater rights at issue in this case are appurtenant to the base ranch properties and were intended to be transferred as such.

Under Idaho law, the proper identification of land to which stockwater rights are appurtenant depends on the question of what property is benefitted or improved by the use of the water. See *Parke v. Bell*, 97 Idaho 67, 69 (1975); see also *Kinney on Irrigation and Water Rights*, Vol. 2, sec. 997, 1000, 1005 (1912) (“a water right, which secures to the owner of a tract of land water for irrigation of the same, or for some other purpose, necessary to the beneficial enjoyment of the land, the title to which is also in the owner of the land, becomes appurtenant to such land.”) (*emphasis added*). Stockwater rights sited on public lands or within today’s federally administered allotments are necessary to the beneficial use and enjoyment of the base property and are necessary to sustain the viability and value of the base ranch property. See Tr. p. 684 (Testimony of Paul Nettleton); see also Tr. p. 590 (Testimony of Dr. Chad Gibson). As detailed in the District Court’s Order, different judges within the SRBA have consistently held that stockwater rights on federal land are deemed appurtenant to base ranch properties so long as a sufficient nexus is demonstrated between the water right and the base ranch properties and the parties to the transfer intended the subject water rights to be part of the transfer as appurtenances. See Memorandum Decision and Order on Challenge, p. 22-24. This is

consistent with recognized law throughout the western United States that a water right is an appurtenance if there is a nexus between the water right and the use and enjoyment of the subject base land. See *Water Rights Laws in the Nineteen Western States*, Wells A. Hutchins, J.D., Volume I, p. 469, citing *Water Rights in the Western States*, S.C. Wiel, 3d ed., Vol. I, § 550 (1911); see also *Memorandum Decision and Order on Challenge*, Judge Wood, p. 18-21 (April 25, 2000); *In the Matter of the Determination of the Relative Rights in and to the Waters of Monitor Valley – Southern Part (140-B)*, Nye County, Nevada, Fifth Judicial District of the State of Nevada in and for the County of Nye, Case No. CV 14906, Findings of Fact and Conclusions of Law (October 8, 1999) (“*Monitor Valley Decision*”); *Steptoe Livestock Company v. Gulley*, 295 P.2d 772 (Nevada 1931); *Crow v. Carlson*, 690 P.2d 916 (Idaho 1984). No unity of title between the water right and the designated place of use is required.

In the context of stockwater rights, one court described the nexus between the base ranch property and the appurtenant stockwater rights on federally administered lands as follows:

While the BLM might commission a genetically engineered cow that will drink only where preprogrammed, until then it is highly unlikely that you will be able to make a cow differentiate between water they can drink because it is on base property and water that it is attached to public land. For centuries, no one has been able to lead the cow without it drinking at will. In a sense, the point of use for the water is the cow’s head, which is an extension of the base ranch.

Hage v. United States, 51 Fed.Cl. 570, 586 (2002). The nexus between the stockwater rights and the base ranch properties is found in the historic use of the public range in conjunction with the base ranch property and it is found from the fact that the value of the base ranch property is inextricably intertwined with the stockwater rights located on federal land. T.Tr. p. 590

(Testimony of Dr. Chad Gibson); Tr. p. 673 (Testimony of Paul Nettleton) The undeniable connection between the base ranch property and range resources, including water, also is demonstrated through the United States' own statutory and regulatory scheme which specifically ties range activities within federal allotments to the private base ranch properties

The relationship between instream stockwater rights on federal land and base ranch properties is recognized and confirmed in the Taylor Grazing Act, which provides that preference for the grazing allotments is based upon ownership of base property and historic use of the range in question which would, by definition, include not only use of the forage but the use of stockwater as well. *See* 43 U.S.C. §315b. As correctly recognized by the District Court, in implementing the Taylor Grazing Act, the government enacted regulations that made the grazing preferences 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); *see also* I.C. §25-901 (2000) (recognizing that grazing preferences are appurtenant to the base ranch property). There is an undeniable connection between the resources on the range, and the base ranch property. This is a connection, a nexus, that cannot be denied by the United States in light of its own laws.

In the alternative, the United States has argued that a water right can only be attached to the land underlying the actual place of use. In this case, that would mean that the stockwater rights at issue can only be appurtenant to the federal land and, therefore, because private parties do not have an interest in that land, only the United States can own the water right. *See* United

States' Opening Brief, p. 42 ("instream stock water right is both part and parcel of the grazing land on which it is located and is necessary to the full enjoyment of the rangelands for livestock grazing. These water rights therefore are necessarily appurtenant to their places of use by virtue of the nature and character of the right.") This is a riparian theory that is contrary not only to the Taylor Grazing Act which specifically recognizes the right of private parties to appropriate water rights on federal lands but is also contrary to the laws in the state of Idaho which specifically reject riparian theories of ownership. Taylor Grazing Act, 43 U.S.C. §315; *see also Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059, 1062 (Idaho 1909) (the riparian doctrine is in conflict with and repugnant to both the Constitution and the statutes of the state of Idaho).

The United States next attempts to cloud the issues by arguing that Joyce Livestock is attempting to make one body of land (federal rangeland) appurtenant to another body of land (the base ranch property). United States Opening Brief, p. 43 ("the range cannot be made appurtenant to other land"). The United States is attempting to confuse the issues. Joyce Livestock is not claiming that the rangeland is appurtenant to the base ranch property, nor is Joyce Livestock claiming any interest in land at all. What is at issue in this case is water, and under prevailing law, this water sited on federal land can be held by private parties and can be appurtenant to the base ranch properties that benefit from its use. As detailed at great length in Joyce Livestock's Opening Brief, Joyce Livestock and its predecessors-in-interest, dating back to Anna and Mary Joyce in 1898, have consistently and continuously appropriated the waters of Jordan Creek to beneficial use. The District Court correctly recognized these private water rights and transfers of

the same, but should have awarded a priority date of 1898.

**E. THROUGH THIS LITIGATION, THE UNITED STATES IS
ATTEMPTING TO FORCE THIS COURT TO RE-WRITE THE
TAYLOR GRAZING ACT AND TO RE-WRITE IDAHO LAW
REGARDING CONSTITUTIONAL BASED WATER RIGHTS**

Through this lawsuit, the United States is attempting to re-write established federal and state law. The United States would have this Court re-write the Taylor Grazing Act to include a federal reserved water right in and to all waters within federal grazing allotments. Further, the United States would have this Court erase provisions in the Taylor Grazing Act that delegate to the individual states sole authority over the administration of water rights. Similarly, the United States would redact federal law that specifically confirms and protects water rights located on federal land that have been acquired by private parties pursuant to state law. Finally, the United States would have this Court re-write Idaho law regarding appropriative water rights such that unlike every other person or entity, the United States would not have to prove physical diversion of water and actual application of that water to beneficial use to prove a constitutional water right claim. This Court does not have the authority to re-write these laws, and the United States has no basis on which to ask the Court to re-write these laws based on policy.

Judicially extending or re-writing a statute exceeds the boundaries of judicial function and impermissibly infringes upon legislative prerogatives and authority. The legislature, in enacting the Taylor Grazing Act, had a full opportunity to consider the result that would flow from delegating to the states matters involving the administration of water rights located on federal lands and reserving for the federal government authority to regulate the rangeland and not

the water. Given the clearly expressed delegation of responsibility of water rights to the states, neither the United States nor this Court is free in this judicial proceeding to make new law and amend the Taylor Grazing Act. As held by the Idaho Supreme Court,

“A due regard for the differing branches of the legislative and judicial branches of government requires that courts refrain from re-writing , under the context of interpretation, the clearly expressed language of a legislative enactment which the court deems to be preferable to that which the legislation requires. In the field of legislation, the legislative is supreme. Courts must apply legislative enactments according to their plain terms.”

Blackburn v State Farm Mut. Auto Ins Co., 108 Idaho 85, 88 (Idaho 1985)

The plain terms of the Taylor Grazing Act and the uncontroverted law in the state of Idaho regarding appropriative water rights, lead to the inescapable conclusion that there is no legal or factual support for the United States' beneficial use stockwater claims. Further, under established state law, recognized and confirmed by the laws of the United States, Joyce Livestock and its predecessors are the actual appropriators of this water are entitled to the beneficial use stockwater right with a priority date relating back to the first date that the water was place to a beneficial use.

V. CONCLUSION

It is the United States' position that no one other than the United States is entitled to hold water rights on federal land. This position is contrary to all applicable federal and state law which specifically confirm the right of private parties to appropriate water rights on federal land. As detailed at length by one SRBA Judge as follows:

In reviewing stock water ownership on the public domain, the court has several important observations. In litigating these subcases, the United States has advanced several legal theories addressing stock water ownership ... (1) Private parties may not appropriate water located on the public domain when that public land is not open to entry, settlement and acquisition of private title ... (2) Since water is appurtenant to federal land, unity of title requires the owner of land to own water rights perfected on that land ... (3) Exclusive access to the water source is required to perfect a water right located on the public domain ... (4) The United States is the owner of water rights located on the public domain because it gives permission to the private party to operate on the public domain. Many of these theories are not necessarily consistent, but all the theories lead to the same *erroneous* conclusion: The United States is the only party which may own water rights located on the public domain. *None of the theories can be reconciled with existing federal or state law*

See In Re SRBA Case No. 39576, Subcase No. 72-15929C et al, Order Denying Challenges and Adopting Special Master's Reports and Recommendations, p. 8 (September 30, 1998) (*emphasis added*). The United States' arguments raised today, before this Supreme Court, are variations of the same theme through which the United States seeks to own and control all water within the federal allotments to exclusion of a private party who, for over a century, has actually appropriated the waters and applied them to a beneficial use. As detailed herein and in Joyce Livestock's Opening Brief as Appellant, the United States' arguments must be rejected.

Accordingly, Joyce Livestock respectfully requests that this Court affirm the District Court's Order denying the United States' beneficial use claims, affirm the District Court's Order confirming Joyce Livestock's water right claims, and reverse the District Court's order 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: June 14, 2006

Respectfully submitted:

By:



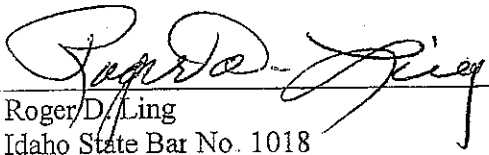
Michael J. Van Zandt

Elizabeth P. Ewens

Dated this 13, day of June, 2006.

Dated this 13th day of June, 2006.

LING, ROBINSON & WALKER

By: 
Roger D. Ling
Idaho State Bar No. 1018

ATTORNEYS FOR JOYCE LIVESTOCK

CERTIFICATE OF SERVICE

I certify that on June 14, 2006, I served a true and correct copy of foregoing **JOYCE LIVESTOCK'S RESPONSIVE BRIEF AS RESPONDENT IN NO. 32279** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

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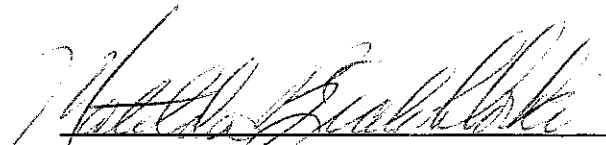
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