

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

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE	1
A. Procedural History	3
B. Statement of Facts	5
II. ISSUES PRESENTED ON APPEAL	7
III. ATTORNEYS FEES ON APPEAL	7
IV. ARGUMENT	7
A. Standard of Review	7
B. The EAJA Mandates an Award of Attorneys Fees in this Case and Therefore the District Court Erred in Denying Joyce Livestock's Motion for Attorneys Fees	8
1. In considering Joyce Livestock's Motion for Attorneys Fees, the District Court applied the wrong legal standard	8
2. Joyce Livestock Meets All Requirements of the EAJA for an Award of Attorneys Fees Thereunder	9
C. Because the United States' Case Lacked Any Foundation in Either Fact or Law, Joyce Livestock Is Entitled to An Award of Attorneys Fees under Idaho State Law	23
V. CONCLUSION	25

TABLE OF CASES AND AUTHORITIES

Cases

<i>F.J. Vollmer Co. V. Magaw</i> , 102 F.3d 591, 594 (D.C. Cir. 1996)	10
<i>Ardestani v. Ins.</i> , 502 U.S. 129, 138 (1991)	17
<i>Burns v. Baldwin</i> , 138 Idaho 480, 486, 65 P.3d 502, 508 (2003)	8
<i>California Oregon Power Co. v. Beaver Portland Cement Co.</i> , 295 U.S. 142, 155 (1935)	14, 18, 20
<i>Cantin v. Carter</i> , 88 Idaho 179, 186 (1964)	21
<i>FDIC v. Addison Airport of Texas, Inc.</i> , 733 F. Supp. 1121, 1125 (N.D. Tex. 1990)	11
<i>Garcia v. Bowen</i> , 702 F. Supp. 409, 410 (S.D.N.Y. 1988)	11
<i>Gutierrez v. Barnhart</i> , 274 F.3d 1255, 1262 (9 th Cir. 2001)	17
<i>Lemmon v. Harding</i> , 519 P.2d 1168 (Idaho 1980)	18, 20
<i>Nampa & Meridian Irr. Dist. v. Washington Federal Sav.</i> , 135 Idaho 518, 525, 20 P.3d 702, 709 (2001)	24
<i>Needs v. State</i> , 118 Idaho 207, 208-209, 795 P.2d 912, 913-914 (Ct. App. 1990)	24
<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988)	7, 8, 9
<i>R.T. Nahas Co. v. Hulet</i> , 114 Idaho 23 (1988)	19, 21
<i>Robinson v. Schoenfeld</i> , 218 P. 1041 (Utah 1923)	18, 19
<i>Shettel v. Bamesberger</i> , 130 Idaho 217, 221, 938 P.2d 1255, 1259 (1997)	23
<i>Southern Oregon Citizens Against Toxic Sprays, Inc. V. Clark</i> , 720 F.2d 1475, 1481 (9 th Cir. 1983)	10
<i>Tattersfield v. Putnam</i> , 41 P.2d 228 (Ariz. 1935)	18, 19
<i>Tolley v. THI Co.</i> , 140 Idaho 253, 263-264, 92 P.3d 503, 513-514 (2004)	8

<i>United States v. Hallmark Construction Co.</i> , 200 F.3d 1076, 1079-1080 (7 th Cir. 2000) . . .	14, 15
<i>United States v. New Mexico</i> , 438 U.S. 696 (1978)	22
<i>United States v. Paisley</i> , 957 F.2d 1161 (4 th Cir. 1992)	8
<i>United States v. Real Property at 2659 Roundhill Drive</i> , 283 F.3d 1146, 1151 (9 th Cir. 2002) . .	8

Statutes

Equal Access to Justice Act (“EAJA”) [28 U.S.C. § 2412(d)] . . .	2, 5, 7-9, 11, 14-16, 22, 23, 25
28 U.S.C. § 2412(d)(1)(A)	10
28 U.S.C. §2412(d)(2)(B)	11
The Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316	14, 18, 19, 22
The Desert Land Entry Act of 1877, 43 U.S.C. §§ 321-323	14, 18
Mining Act of 1866, 43 U.S.C. § 661	14, 18
I.A.R. 41	7
I.C. § 42-113(2)	14
I.C. §12-121	5, 7, 8
I.R.C.P. 54(e)	5, 8
I.R.C.P. 54(e)(1)	23, 24
IRCP 54	8

Other

Idaho Constitution Art. 15, Sec. 3	19
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In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Under Ground, Within the Missouri River Basin Drainage Area, Case No. 40E-A Opinion,

p. 19 (In the Water Court of the State of Montana 2005), *citing* Memorandum from Theodore B. Olson, Assistant Att’y Gen. Dep’t of Justice, to Carol E. Dinkins, Ass’t Att’y Gen., Land and Nat. Res. Div., 6 Op. O.L.C. 328, 332, 383 (June 16, 1982) (*emphasis added*) 2, 21

I. STATEMENT OF THE CASE

Throughout over nine years of litigation, the United States has single-mindedly pursued one goal: the acquisition and control of water rights on federal land that rightfully belong to private citizens. Specifically, the United States argues that private parties, and specifically Joyce Livestock, are not entitled to appropriative water rights on federal land, and that only the United States through its “ownership” of the land and its management of range resources, and without following the appropriation process under Idaho laws, has acquired beneficial use water rights that belong to Joyce Livestock. This is a riparian theory that has absolutely no support in the law. Further, the United States pursued this litigation position despite the United States’ own prior admissions that the federal government cannot and does not acquire water rights through its management activities. In a Memorandum prepared by the Assistant Attorney General, Department of Justice, in 1982, seven years before the instant litigation commenced, the United States concluded the following:

The mere assignment of land management functions to a federal agency, without more, does not create any federal rights to unappropriated water necessary to carry out those functions ... We conclude that the rationale of *California [Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935)]* and *(United States v.) New Mexico, [438 U.S. 696 (1978)]* must be applied to any assertion of federal water rights in the western states. ***To the extent the federal non-reserved water rights theory would suggest that federal water rights are created merely by the assignment of land management functions to a federal agency or authorization of a federal project, we believe that it does not have a sound legal or constitutional basis and does not provide an appropriate legal basis for the assertion of water rights by federal agencies.***

In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Under Ground, Within the Missouri River Basin Drainage Area, Case No. 40E-A Opinion, p. 19 (In the Water Court of the State of Montana 2005), *citing* Memorandum from Theodore B. Olson, Assistant Att’y Gen. Dep’t of Justice, to Carol E. Dinkins, Ass’t Att’y Gen., Land and Nat. Res. Div., 6 Op. O.L.C. 328, 332, 383 (June 16, 1982) (*emphasis added*).¹ Notwithstanding the above, in the years that followed, the United States filed non-reserved water right claims based on the beneficial use method of appropriation to stockwater sources on federally administered lands, including competing beneficial use claims adverse to those asserted by Joyce Livestock. In the course of the present litigation, the United States claimed that it was entitled to such water rights by virtue of its management activities even though, as recognized by the District Court and by the United States’ own admission, there is no legal basis for the United States’ common law claims.

In the face of the United States’ unsubstantiated litigation position, Joyce Livestock was faced with two options: stand and fight for the protection of its historic family water rights, or turn away because of the expense that would undoubtedly be incurred (and was incurred) in litigating against the United States. Joyce Livestock chose to stand and defend its rights and Joyce Livestock prevailed. Under such circumstances, pursuant to the Equal Access to Justice Act (“EAJA”) [28 U.S.C. § 2412(d)] and Idaho law, Joyce Livestock is entitled to recoup its attorneys fees incurred as a result of the United States’ insistence upon pursuing theories that

¹ For ease of reference, a copy of the Opinion issued in Case No. 40-E-A is attached hereto.

have no basis in either law or fact.

A. Procedural History

As noted above, this appeal, and the related appeals designated as Idaho Supreme Court Case Nos. 32278 and 32279, have been at issue for nine years. As detailed in part, below, the path of this litigation has been long and has included two summary judgment proceedings, a trial on the merits, a post-trial Motion to Alter or Amend Judgment, proceedings on Challenge before the SRBA District Court, and now three pending appeals.

This case originated with the filing of Joyce Livestock's water right claim in 1989, for beneficial use stockwater rights in and along Jordan Creek with a priority date of 1865, later amended to 1898. Record on Appeal 32278/32279 ("ROA 32278/32279") Vol. I., bsn1-10.² The United States filed claims to the same water sources, also based on the on the beneficial use method of appropriation, with a claimed priority date of 1874. ROA 32278/32279, bsn 11-49. The United States later amended its claimed priority date to 1934, but continued to assert beneficial use as the basis for its claimed water rights. ROA 32278/32279, bsn 82-100. The claims became at issue in 1997 with the filing of objections by United States and Joyce Livestock

² This appeal, Idaho Supreme Court Case No. 32846, is related to Supreme Court Case Nos. 32278 and 32279. As noted in Joyce Livestock's Notice of Appeal in Case No. 32846, the Clerk's Record, trial exhibits, and transcripts designated and prepared in conjunction with the Case Nos. 32278 and 32279 are relevant to the determination of this appeal of the District Court's Memorandum Decision and Order Re: Attorneys' Fees. Accordingly, in Joyce Livestock's Notice of Appeal in Case No. 32846, Joyce Livestock requested that the record, exhibits and transcripts designated in Case Nos. 32278 and 32279 also be designated as part of the record for this appeal in Case No. 32846. *See* ROA 32846, bsn 79 (Joyce Livestock's Notice of Appeal).

to each others' claims.

A consolidated trial was held before Special Master Dolan to determine the rights and priorities of the parties to the claimed water sources. After trial, the Special Master concluded that there was evidence that Joyce Livestock's predecessors, from Mary and Anna Joyce in 1898 forward to the present day, grazed and watered their cattle in common along the waters of Jordan Creek and that the ranching operations of Joyce Livestock's predecessors were consolidated into what is today Joyce Livestock. Special Master Report and Recommendation, p. 22. Notwithstanding this finding, the Special Master denied Joyce Livestock's claims and recommended that the United States be awarded its claimed beneficial use stockwater rights with a priority date of 1934.

Following a Notice of Challenge filed by Joyce Livestock with the SRBA District Court, the District Court completely overruled the Special Master's Report and Recommendation. In its Memorandum Decision and Order on Challenge, the District Court held that the Special Master erred as a matter of law when it denied Joyce Livestock's water right claims and awarded Joyce Livestock a priority date of April 26, 1935. The District Court also rejected the Special Master's recommendation with respect to the United States' claims, and held that there is no legal or factual basis for the United States' beneficial use stockwater claims. Memorandum Decision and Order on Challenge, p. 21- 29. The United States appealed the District Court's ruling in its entirety, and Joyce Livestock appealed only that portion of the District Court's ruling addressing the priority date to be assigned to Joyce Livestock's water rights. Those substantive appeals have

been consolidated and are pending before the Idaho Supreme Court, Case Nos. 32278 and 32279.

Prior to the filing of the substantive appeals, as the prevailing party Joyce Livestock filed a Motion for Attorney's Fees under I.R.C.P. 54(e), I.C. § 12-121 and the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("EAJA"). ROA 32846, bsn 1-37. This appeal arises from the District Court's denial of Joyce Livestock's Motion for Attorneys Fees. ROA 32846, bsn 68-77, Memorandum Decision and Order Re: Attorneys' Fees (February 3, 2006).

The three related appeals, Case Nos. 32278, 32279, and 32846 at issue herein are currently set for oral argument before the Court on November 8, 2006.

B. Statement of Facts

The facts surrounding this litigation are detailed in Joyce Livestock's Opening Brief filed in Case No. 32278 and Joyce Livestock's Responsive Brief filed in Case No. 32279. Appellant's Opening Brief, Case No. 32278, p. 4-9; Joyce Livestock's Responsive Brief as Respondent in Case No. 32279, p. 1-4. Pertinent to the attorney's fees appeal at issue herein is absence of any evidence to support the United States' water right claims. Specifically, the United States presented no evidence to rebut the continuous use of the waters at issue by Joyce Livestock and its predecessors from 1898 forward, and the United States presented no evidence that it ever physically diverted or beneficially used the water it attempts to claim as its own.

By its own admission, the United States has never used the waters of Jordan Creek for stockwatering. The United States does not now, nor has it ever, owned cattle or other livestock, operated a livestock business, or physically put the water at issue to use through stockwatering.

In sum, the United States has never had the practical ability to use the claimed water sources for stockwatering. T. Tr. p. 391 (Testimony of Gary Madenford).

In contrast to the United States, Joyce Livestock presented un rebutted evidence at trial of the continuous use of these water sources for stockwatering from the 1860s forward to today. The history of the use of these waters by Joyce Livestock and its predecessors is a family history, detailed by Paul Nettleton at trial and corroborated by other witnesses and documentary evidence. The ranching operation began with Mr. Nettleton's great-aunt, Anna Joyce. Together with Mary Joyce, Anna Joyce operated a milk cow operation beginning in the 1860s which evolved and grew into a cattle operation, owned and operated over the years by members of the Joyce and Nettleton families. T. Tr. p. 655-661, 674-683. Throughout this time, the waters at issue in this litigation, located on what was once public range, were used consistently by Joyce Livestock and its predecessors to sustain the viability of the cattle operation. T. Tr. p. 683-686. Such evidence of continued beneficial use was corroborated both by witness testimony and documentary evidence demonstrating the use of the claimed sources, and transfer of the claimed water rights, from Anna and Mary Joyce forward through today's Joyce Livestock. T. Tr. p. 654-686 (Testimony of Paul Nettleton); T. Tr. p. 313-316, 321 (corroborating eye-witness testimony by Mr. Gene Lewis); Trial Exh. 1 (Chain of Title); Trial Exh. 20, 85, 87, O, S (grazing applications submitted by Joyce Livestock's predecessors, Shea and Joyce Brothers Livestock, certifying that the range at issue herein, and water sources thereon, were used prior to 1934 to support the livestock operation). Even the United States' witness, Gary Madenford, admitted at trial that

Joyce Livestock's predecessors were using these waters prior to 1934. T. Tr. P. 392-393,
Testimony of Mr. Gary Madenford.

II. ISSUES PRESENTED ON APPEAL

Joyce Livestock raises the following issues on appeal:

- a. Whether the District Court misinterpreted the Equal Access to Justice Act and the standard for an award of attorneys fees thereunder;
- b. Whether the District Court's decision to deny Joyce Livestock's Attorney Fees was an abuse of discretion because it ignored the mandatory attorneys fees provisions contained in the EAJA;
- c. Whether the District Court abused its discretion in denying Joyce Livestock's Motion for Attorneys Fees pursuant to state law.

III. ATTORNEYS FEES ON APPEAL

In addition to attorneys fees sought by Joyce Livestock by way of its Motion for Attorneys Fees pursuant to I.C. §12-121 and pursuant to the EAJA, 28 U.S.C. §2412(d), at issue herein, Joyce Livestock seeks its attorneys fees on appeal pursuant to I.A.R. 41 and the EAJA.

IV. ARGUMENT

A. Standard of Review

In reviewing a lower court's decision on a motion for attorneys fees under the EAJA, the appellate court applies an abuse of discretion standard. *Pierce v. Underwood*, 487 U.S. 552, 558-560 (1988). When the question turns on the District Court's analysis of whether the

government's litigation position was substantially justified under the EAJA, the appellate court will consider whether the district court's decision was based on an erroneous conclusion of law or whether the record contains no evidence on which the district court rationally could have based its decision. *United States v. Real Property at 2659 Roundhill Drive*, 283 F.3d 1146, 1151 (9th Cir. 2002). Such review must be both careful and detailed, and not just a simple "accept-on-faith, rubber-stamping" of a District Court's decision. *United States v. Paisley*, 957 F.2d 1161 (4th Cir. 1992), *citing Pierce v. Underwood*, 487 U.S. 552 (1988).

Like the standard of review of an order on attorneys fees pursuant to the EAJA, a judge's decision on attorneys fees based on motions brought pursuant to I.C. § 12-121 and I.R.C.P. 54(e) is reviewed for an abuse of discretion. *Tolley v. THI Co.*, 140 Idaho 253, 263-264, 92 P.3d 503, 513-514 (2004); *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003). Courts review the decision under 12-121 and IRCP 54 together, under the same analysis. *Tolley*, 140 Idaho at 263-264.

B. The EAJA Mandates an Award of Attorneys Fees in this Case and Therefore the District Court Erred in Denying Joyce Livestock's Motion for Attorneys Fees.

1. In considering Joyce Livestock's Motion for Attorneys Fees, the District Court applied the wrong legal standard

The EAJA mandates an award of attorney fees against the United States if the moving private party is able to demonstrate that it is the prevailing party, that certain eligibility criteria are met, and if the United States' position in the litigation was not substantially justified. 28 U.S.C. § 2412(d). While these requirements are discussed at greater length, below, as a

preliminary matter the District Court committed reversible error in failing to apply the correct legal standard to its review of Joyce Livestock's Motion for Attorney's Fees.

In its Memorandum Decision, the District Court applied an abuse of discretion standard to its review of Joyce Livestock's Motion for Attorney's Fees. ROA 32846 bsn 68, 75 (Memorandum Decision and Order Re: Attorneys' Fees). However, the abuse of discretion standard is not what is to be applied by a district court evaluating an EAJA motion in the first instance, but rather is the standard by which the district court's order will be reviewed on appeal. *Pierce v. Underwood*, 487 U.S. 552, 558-560 (1988). By applying an "abuse of discretion" standard to Joyce Livestock's Motion for Attorney's Fees, the District Court, in effect, began its analysis with an eye toward denying the Motion for Attorney's Fees. Instead, the District Court should have undertaken a careful, and neutral, review of the law and facts at issue in the Motion. Failure to do so constitutes clear error.

2. Joyce Livestock Meets All Requirements of the EAJA for an Award of Attorneys Fees Thereunder

The EAJA states that attorney's fees "shall" be awarded to a private, prevailing party when certain criteria are met. The applicable statute states:

Except as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances made an award unjust.

28 U.S.C. § 2412(d)(1)(A) (*emphasis added*). At issue before the District Court was whether Joyce Livestock was the prevailing party, whether Joyce Livestock met the qualifications under the EAJA, and whether the United States met its burden of proving that its position throughout the litigation was substantially justified.

In this case, the District Court correctly agreed with Joyce Livestock that Joyce Livestock was the prevailing party in this action. Although Joyce Livestock did not obtain the priority date originally claimed, a party need not prevail on all issues to be a prevailing party under the EAJA and will qualify as a prevailing party when the relief granted modifies the other party's behavior in a way that directly benefits the party seeking relief. *Southern Oregon Citizens Against Toxic Sprays, Inc. V. Clark*, 720 F.2d 1475, 1481 (9th Cir. 1983); *F.J. Vollmer Co. V. Magaw*, 102 F.3d 591, 594 (D.C. Cir. 1996). In this case, the United States' water right claims were properly denied in their entirety. ROA 32846 bsn 68, 70 (Memorandum Decision and Order Re: Attorney Fees) (denying the United States' state-law based water right claims and granting Joyce Livestock's stockwater right claims with a 1935 priority date). The relief granted to Joyce Livestock by the District Court places it as the senior water right holder, materially altering the priorities as between Joyce Livestock and the United States with respect to the waters of Jordan Creek. Because Joyce Livestock prevailed in its objections to the United States' claims and was awarded the only, and therefore senior, right to the water sources at issue, the District Court correctly concluded that Joyce Livestock was the prevailing party. ROA 32846 bsn 68, 73 (Memorandum Decision and Order Re: Attorney Fees).

The second requirement under the EAJA is that Joyce Livestock meet basic eligibility requirements pursuant to the statute. Parties eligible for an attorney fee award under the EAJA include “any partnership, corporation, association, unit of local organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed.” *See* 28 U.S.C. §2412(d)(2)(B). By way of a supporting affidavit submitted by Mr. Paul Nettleton, Joyce Livestock established its eligibility for an attorneys fees award under the EAJA. ROA 32846, bsn 30-31 (Declaration of Paul Nettleton). The United States did not dispute whether Joyce Livestock met the qualification criteria under the EAJA, nor did the District Court rest any of its conclusions on this eligibility requirement. Similarly, the United States did not allege any “special circumstances” that would preclude relief under the EAJA, nor did the District Court find that any existed.

The final issue under the EAJA tests whether the position of the United States asserted in the litigation was substantially justified. Importantly, it was the United States’ burden to demonstrate that its position in the litigation was substantially justified, and this was a burden that the United States failed to meet. *Garcia v. Bowen*, 702 F. Supp. 409, 410 (S.D.N.Y. 1988); *FDIC v. Addison Airport of Texas, Inc.*, 733 F. Supp. 1121, 1125 (N.D. Tex. 1990). As detailed, below, not only was there a complete absence of authority to support the United States’ position in this litigation, both the District Court and the United States have admitted that there is no legal basis for the United States’ beneficial use water right claims. Under such circumstances, the District Court abused its discretion when it summarily denied Joyce Livestock’s Motion for

Attorney's Fees.

3. The United States' Position Was Not Justified at Any Stage in This Proceeding

In its Memorandum Decision and Order on Challenge, the District Court detailed the absolute absence of any legal authority to support the United States' beneficial use water right claims. The District Court also detailed the law of the case within the SRBA proceedings which holds that the United States is not entitled to beneficial use water rights based on its mere management of the surrounding land. Importantly, the District Court was not telling the United States anything that the United States did not already know. At least as of 1982, by its own admission, the United States knew that there was no legal support for beneficial use water right claims based on management of federal land. Notwithstanding all of the above, the United States pursued its beneficial use water right claims and subjected Joyce Livestock to prolonged and expensive litigation to defend its rights as against the United States.

From the initiation of this case forward, the law of the case in the SRBA has been and continues to be that the United States is not entitled to a beneficial use stockwater right based on its acts of managing the rangeland. The District Court detailed the long line of cases in the SRBA holding that as between the actual appropriators of the water (in this case, Joyce Livestock) and the United States as the manager of the surrounding land, it is the private appropriator who is entitled to the beneficial use water right. The District Court wrote as follows:

The issue regarding the establishment and ownership of a water right

where there is not unity of title between the appropriator of the water right and the owner of the land on which the right is used was previously decided and has been applied consistently in the SRBA. See e.g. ***Memorandum Decision and Order on Challenge; Order Denying Motion to File Amicus Curiae Brief; Order of Recommitment to Special Master Cushman***, Subcase 55-10288 A&B (***LU Ranches I***) (April 25, 2000); ***Memorandum Decision and Order on Challenge, Subcases 55-10288B, et al. (LU Ranches II)*** (March 1, 2005) ... The issue arose in the context of the ownership of stockwater rights on federal grazing allotments as between the United States and the livestock rancher who grazed the cattle and actually put the water to beneficial use. In ***Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Objections***, Subcases 57-11124 *et al.* (March 25, 1997); ***Order on Motions to Alter or Amend; Order on Motion for Permissive Appeal***, Subcases 57-04028 *et al.* (June 26, 1997), one of the issues before Special Master Hammerle was whether the United States as administrator of a grazing allotment could perfect a beneficial use right despite not actually grazing or watering livestock. Special Master Hammerle ruled that because the permittee, not the United States, beneficially used the water, the only way in which the United States could perfect a state-law based (non-statutory) water right was through an agency relationship between the permittee and the United States, whereby the permittee appropriating the water was acting on behalf of the United States ... The Special Master's reasoning and ruling was subsequently adopted by Judge Hurlbutt. ***Order Denying Challenges and Adopting Special Master's Reports and Recommendations***, Subcase 57-0428B (Joyce Livestock) (Sept. 28, 1998). Judge Wood, who succeeded Judge Hurlbutt, adopted this same reasoning in a subsequent consolidated subcase involving similar issues. ***Memorandum Decision and Order on Challenge; Order Denying Motion to File Amicus Curiae Brief; Order of Recommitment to Special Master Cushman***, Subcase 55-10288 A & B, *et al. (LU Ranches I)* (April 25, 2000). Judge Burdick applied the same reasoning in ***Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master and Stay Related Subcases*** (Jan. 3, 2001)...

ROA 32278/32279 bsn 195, 217-218 (Memorandum Decision and Order on Challenge). It is

now and has been since 1997 the well established and consistent law of the case that as between the private appropriator beneficially using water for the watering of livestock, and the United States as a land manager, it is the private appropriator and not the United States who is entitled to a beneficial use water right under Idaho state law. Such judicial findings are absolutely consistent with both Idaho statutory law and federal law on point. Specifically, I.C. § 42-113(2) recognizes private stockwater rights acquired on federally managed land established under the diversion and application to beneficial use method of appropriation with a priority date representing the first date that the water historically was used for livestock watering associated with grazing on the land. For its part, federal law, including the Taylor Grazing Act, also recognizes and protects the right of private parties to hold water rights on the public domain or on federal land. The Mining Act of 1866, 43 U.S.C. § 661; 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). In complete disregard of this law, the United States persisted in disputing Joyce Livestock's ability to appropriate water rights on federal land and the United States persisted in its pursuit of its own beneficial use water right claims even though the United States had no factual or legal basis for its claims.

When a trial court's merits opinion so strongly favors one party, in this case Joyce Livestock, it is incumbent upon the District Court to provide a thorough explanation for denying a motion for attorneys fees brought under the EAJA. *United States v. Hallmark Construction Co.*, 200 F.3d 1076, 1079-1080 (7th Cir. 2000). In this case, the District Court's thirty-one page

Memorandum Decision on the merits overwhelmingly rejected the United States' litigation position, but the District Court's EAJA analysis rejecting Joyce Livestock's motion for attorney's fees was reduced to less than two pages. ROA 32846 bsn 75-76 (Memorandum Decision and Order on Attorneys Fees). Even if you include in the Court's rationale the District Court's analysis of Joyce Livestock's claim for attorneys' fees under Idaho law, there remains no support for a conclusion that the United States' position was substantially justified, and no basis on which to deny Joyce Livestock its attorneys' fees under the EAJA.

In evaluating whether the United States' position was substantially justified, a district court must provide more than a cursory analysis of the case. As stated by one appellate court:

Where, as here, the trial court's merits opinion so strongly favors the (private party) against the government, a more thorough explanation for denying attorney's fees to the prevailing party is warranted ... It is more important for the district court to examine 'the actual merits of the Government's litigating position' ... and the district court's analysis should contain an evaluation of the factual and legal support for the government's position throughout the entire proceeding. We find the district court's brief description of its reasoning in this case especially troubling, as we are left with the impression that the mere fact that the government succeeded in surviving summary judgment was central to the trial court's determination that its position was substantially justified.

United States v. Hallmark Construction, 200 F.3d at 1080. In the present case, the apparent rationale for the District Court's decision to deny Joyce Livestock's EAJA motion is the fact that similar issues presented in the SRBA have not made their way to the Idaho Supreme Court and, second, that in other similar cases the United States settled its claims against other parties including the State of Idaho and private ranching entities. ROA 32846 bsn 74-75 (Memorandum

Decision and Order Re: Attorney's Fees). Neither the fact that these issues have not reached the Idaho Supreme Court nor the fact that other parties outside of this litigation settled their claims with the United States support the conclusion that the United States' position was substantially justified. It was, therefore, in error for the District Court to rest its analysis on these two facts. Instead, the inquiry by the District Court should have been whether the United States' position in this litigation had any substantial basis in law in fact. As held by the District Court in its decision on the merits, and as evident by the long line of authority rejecting the United States' position, the United States cannot demonstrate any basis for its claims or for its objections to Joyce Livestock's claims.

The fact that an issue has not been decided by the Idaho Supreme Court does not mean that the United States' position was substantially justified, nor does it preclude an award of attorneys fees under the EAJA. In fact, the position taken by the United States in this case is opposed to case law from all levels of courts, up and to and including the United States Supreme Court, for the last 100 years. Accordingly, to reject an attorney's fees motion because the Idaho Supreme Court has not addressed the issues would contravene the very purpose of the EAJA. As explained by the Ninth Circuit:

The matter of first impression before this court in *Gutierrez I* did not involve contested interpretations of an ambiguous legal rule. The only issue of first impression we were required to resolve was the impact of a failure to follow a *clear* rule contained in the SSA's regulations. Thus the government's argument means that whenever it violates its own regulations, or assumably any clear legal rule, for the first time, the private party who succeeds in forcing government compliance nonetheless must be deprived of fees because the

government gets an automatic ‘first impression’ free pass. This position contravenes the purpose of the EAJA, a ‘clearly stated objective of [which] is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority.’

Gutierrez v. Barnhart, 274 F.3d 1255, 1262 (9th Cir. 2001), *citing Ardestani v. Ins.*, 502 U.S. 129, 138 (1991). As detailed herein, the government’s litigation position in this case violated clear precedent from all judicial levels, from SRBA special master proceedings through the United States Supreme Court, as well as clearly established federal and state statutory law which recognize and protect the right of private parties to acquire and hold private water rights on public land or on federally administered land. Accordingly, the fact that in the context of the SRBA these issues have not yet been appealed and decided by the Idaho Supreme Court does not mean that the United States’ position was substantially justified. Similarly, the fact that other parties in the SRBA settled their disputes with the United States also does not mean that the United States’ position was substantially justified. It only means that the other parties, for whatever reasons that are personal to them, chose not continue to engage in protracted, expensive litigation against the United States.

As outlined in the District Court’s substantive opinion and discussed at length in briefs submitted to the Court by Joyce Livestock in case numbers 32278 and 32279, all established legal authority rejects the United States’ litigation position in this case and, therefore, there was no substantial justification for the United States’ insistence upon litigating these issues for a period of nine years.

In its original objections to Joyce Livestock's water right claims, the only stated objection to Joyce Livestock's claims was that the water was located on BLM³ land. Indeed, it has been the consistent position of the United States that only the United States, and not private parties, can acquire water rights on federal land. This has no support in the law. As detailed in the District Court's opinion on the merits and in Joyce Livestock's substantive briefs filed with this Court in case numbers 32278 and 32279, private water rights on federal land have been given specific recognition by the courts and have been recognized by the United States in its enactment of statutes which specifically reserve to private individuals the right to perfect and hold water rights pursuant to state law even when the water rights are located on federal land. The Mining Act of 1866, 43 U.S.C. § 661; 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).

Notwithstanding the above settled law, the District Court in its attorney's fees decision states that the United States' presented "good faith" arguments in this case and cited, as examples, the United States' reliance upon *Robinson v. Schoenfeld*, 218 P. 1041 (Utah 1923), *Tattersfield v. Putnam*, 41 P.2d 228 (Ariz. 1935) and *Lemmon v. Harding*, 519 P.2d 1168 (Idaho 1980). None of these cases support the United States' arguments or overrule existing law.

³ Bureau of Land Management

Robinson was cited by the United States for the proposition that use of a water right had to be exclusive and the private party must take affirmative steps to exclude other appropriators from the source in order to acquire a water right. However, *Robinson* arises under the laws of Utah, not Idaho, and concerns the interpretation of Utah's *statutory* requirement that states that failure to "post" and record a notice under (Utah) statute prior to 1903, and failure to make application in the Utah State Engineer's office, under the present statute, denies the claimant the right to rely upon any work done or effort made in initiating or completing the appropriation. *Robinson*, 218 P. At 1043. No such posting requirement exists under Idaho law, and clearly statutory claims under the laws of Utah are not at issue in this case.

There also is no merit for the contention that the *Tattersfield* case is legitimate authority. *Tattersfield* is an Arizona case cited by the United States for the proposition that water rights are attached to the land on which they are located and, that to appropriate the water right, one must also be the owner of the land. This argument is a riparian theory of water right ownership that is contrary to all established Idaho law identifying Idaho as a prior appropriation state. Idaho Constitution Art. 15, Sec. 3; *R.T. Nahas Co. v. Hulet*, 114 Idaho 23 (1988). Moreover, the United States has specifically recognized by statute the right of private parties to appropriate stockwater rights on the public domain and, even more specific, on federally administered grazing allotments. The Taylor Grazing Act of 1934, 43 U.S.C. § 315 b ("nothing in this Act 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 purposes which has heretofore

vested or accrued under existing law validly affecting public lands or which may be and hereafter initiated or acquired and maintained in accordance with such law.” Further, the United States Supreme Court already has ruled that water rights on federal land are not attached to the land. The United States Supreme Court held:

These (public) lands were subject to entry, not only under the Desert Land Act but under other acts as well... The fair construction of (the Desert Land Act) is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named... *It is hard to see how a more definite intention to sever the land and water could be evidenced.*

California Oregon Power, 295 U.S. at 162 (*emphasis added*).

Finally, the District Court held, without analysis, that the United States reasonably relied on the *Lemmon* case. However, *Lemmon* specifically recognized the right of private appropriators to acquire water rights on federally owned land. *Lemmon*, 95 Idaho 778, 780 (1974). As analyzed, above, established federal and state law recognizes that water rights on federal land are served from that land, and can be appropriated and owned by private parties. Clearly, *none* of the above cases cited by the United States are even arguably sufficient to overrule the 140 years of federal and state judicial and statutory precedent which hold that private parties can appropriate water rights on federal land and that the United States government both recognizes and protects those rights.

Similarly, the District Court stated that the United States presented “good faith” arguments for the proposition that the United States can acquire beneficial use water rights by

virtue of its mere management of the rangeland. Not even the United States believes that there is a legal basis for their “management based” water right claims. Prior to the initiation of the litigation, opinions were issued by counsel for the United States concluding that the United States had no legal or factual basis to pursue beneficial use stockwater rights. The Assistant Attorney General for the United States pronounced: “To the extent the federal non-reserved water rights theory would suggest that federal water rights are created merely by the assignment of land management functions to a federal agency or authorization of a federal project, *we believe that it does not have a sound legal or constitutional basis* and does not provide an appropriate legal basis for the assertion of water rights by federal agencies.” *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Under Ground, Within the Missouri River Basin Drainage Area*, Case No. 40E-A Opinion, p. 19 (In the Water Court of the State of Montana 2005), *citing* Memorandum from Theodore B. Olson, Assistant Att’y Gen. Dep’t of Justice, to Carol E. Dinkins, Ass’t Att’y Gen., Land and Nat. Res. Div., 6 Op. O.L.C. 328, 332, 383 (June 16, 1982)(*emphasis added*). This is consistent with all state law regarding beneficial use appropriations, all of which requires parties to demonstrate actual, physical diversions of water and the use of that water for beneficial purposes in order to obtain an appropriative or beneficial use water right. *R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 25-26 (1988); *Cantin 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). Further, it is telling that the United States failed throughout this entire litigation to cite even a single case - from any court or jurisdiction -

that holds that the United States is entitled to appropriative rights based on its management activities. That is because no such authority exists. If the United States believes water to be necessary to further a reservation of land, then the United States must meet the requirements to establish a federal reserved water right.⁴ *United States v. New Mexico*, 438 U.S. 696 (1978). Despite known precedent within the SRBA, established federal and state law, and its own opinions from counsel, the United States nonetheless advanced and pursued arguments in this litigation against Joyce Livestock that had been previously rejected outright by courts and United States Department of Justice counsel alike.

As the name implies, the Equal Access to Justice Act was designed to protect the rights of individuals and small businesses in litigation against the United States. It recognizes the disproportionate resources at the disposal of the United States that may act as a deterrent to private parties seeking to vindicate or protect their rights. H.R. Rep. No. 96-1418, at 14 (1980). The sole purpose of the United States in this litigation was to defeat Joyce Livestock's private water rights, and, for policy reasons having no basis in the law, to secure for the United States the sole right to the waters in Jordan Creek. It would have been far easier for this family business to retreat from this legal battle and lose its water rights. But our system of government recognizes that it works best when there is a mechanism through which government conduct can be held in check by its citizens. The EAJA was designed, therefore, to provide redress to parties like Joyce

⁴ The United States did not claim a federal reserved water right in this case, it claimed a beneficial use water right. Moreover, there is no basis for a federal reserved water right under the Taylor Grazing Act.

Livestock who have been forced to withstand litigation against the United States when the United States' litigation position lacked a substantial basis in law or in fact.

C. Because the United States' Case Lacked Any Foundation in Either Fact or Law, Joyce Livestock Is Entitled to An Award of Attorneys Fees under Idaho State Law

Idaho law also recognizes a right to attorneys fees in cases such as this. Under Idaho law, a Court is authorized to award attorney's fees to the prevailing party where the case was "brought, pursued or defended frivolously, unreasonably or without foundation." *See* I.R.C.P. 54(e)(1). As examined at length, above, Joyce Livestock was the clear prevailing party in this case and the United States arguments lacked any foundation in fact or in law.

Idaho law defines the term "prevailing party" as follows:

Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and resultant judgment or judgments obtained.

I.R.C.P. 54(e)(1); *see also Shettel v. Bamesberger*, 130 Idaho 217, 221, 938 P.2d 1255, 1259 (1997) (the court must examine the "final result obtained in relation to the relief sought, whether there were multiple claims or issues and the extent to which either party prevailed on each separate issue or claim.") Similar to the application of the EAJA, a party need not prevail on all issues to be a prevailing party under Idaho law. *See* I.R.C.P. 54(e)(1). In this case, while Joyce

Livestock was not awarded the 1898 priority date it claimed, its primary objective in pursuing its claim was to obtain a decreed water right for the places of use claimed, and to obtain a senior water right in relationship to the United States' claims. On each count, Joyce Livestock prevailed. *See* Memorandum Decision and Order on Challenge (granting Joyce Livestock's claim with an April 26, 1935 priority and denying the United States' competing claims in their entirety). As the sole water right holder, Joyce Livestock prevailed in its suit against the United States thus entitling Joyce Livestock to invoke Idaho attorneys fees provisions.

The second prong of the analysis addresses whether the action was pursued, defended or brought frivolously or without foundation by the United States. *See* I.R.C.P. 54(e)(1); *see also Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 525, 20 P.3d 702, 709 (2001). Courts have applied this to mean that when settled law clearly precludes a legal claim, it is both unreasonable and frivolous to pursue that claim. *See Needs v. State*, 118 Idaho 207, 208-209, 795 P.2d 912, 913-914 (Ct. App. 1990). As examined at length, above, this test also is met. The United States' claims from the date of filing forward were unreasonable and, by the United States' own admission, lacked any foundation in the law. Similarly, the United States lacked any legal basis for its argument that private parties cannot appropriate water rights on public land or on federal land. Under such circumstances, Joyce Livestock is entitled to and should be awarded its attorneys fees incurred as a result of the United States' unreasonable pursuit of its claims.

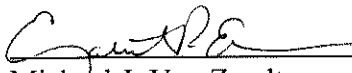
V. CONCLUSION

Through the advice and admissions of its own counsel, the United States knew that its beneficial use claims, and objections to private water right claims, had no basis in either law or fact. The government nonetheless decided to file beneficial use stockwater claims and object to water right claims filed by Joyce Livestock, the actual appropriator of these waters. Thereafter, the United States subjected Joyce Livestock to nine years of protracted and expensive litigation. The United States' conduct in this regard is unconscionable and sanctionable. Under both the mandatory provisions of the EAJA and Idaho law, Joyce Livestock has earned its right to an award of attorneys fees in this case, and therefore respectfully requests that this Court overrule the District Court's Memorandum Decision and Order Re: Attorney's Fees and award Joyce Livestock its reasonable attorney's fees incurred in this case, which to date is in excess of \$300,000 exclusive of appellate fees.

Dated: September 28, 2006

Respectfully submitted:

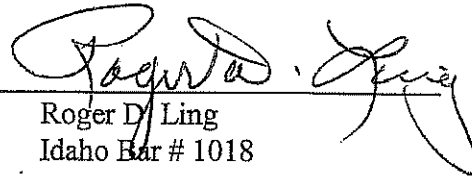
McQUAID BEDFORD & VAN ZANDT, LLP



Michael J. Van Zandt
Elizabeth P. Ewens

Dated: September 27, 2006

LING, ROBINSON & WALKER

By: 
Roger D. Ling
Idaho Bar # 1018

Attorneys for Joyce Livestock

APPELLANT'S OPENING BRIEF

CERTIFICATE OF SERVICE

I certify that on September 28, 2006, I served a true and correct copy of foregoing **APPELLANT JOYCE LIVESTOCK'S OPENING BRIEF** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

1. Original and ten copies to (via UPS overnight mail):

Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83702

2. Two copies each to:

Via UPS Overnight

Elizabeth Ann Peterson
U.S. Department of Justice
Environment & Natural Resources Division
Appellate Section
PHB Mail Room 2121
601 D Street NW
Washington, D.C. 20004

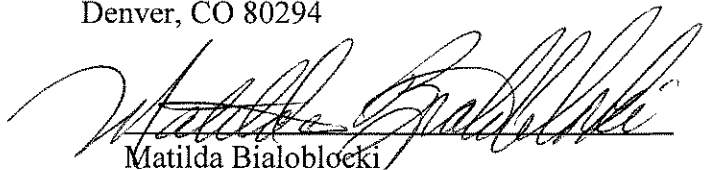
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IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER
AND FORT PECK DAM - BASIN (40E)

IN THE MATTER OF THE ADJUDICATION OF	)	CASE NO. 40E-A
THE EXISTING RIGHTS TO THE USE OF ALL	)	
THE WATER, BOTH SURFACE AND UNDER-	)	
GROUND, WITHIN THE MISSOURI RIVER	)	
BASIN DRAINAGE AREA, BETWEEN THE	)	
MUSSELSHELL RIVER AND FORT PECK DAM	)	
INCLUDING ALL TRIBUTARIES OF THE	)	FILED:
MISSOURI RIVER BETWEEN THE	)	JUNE 29, 2005
MUSSELSHELL RIVER AND FORT PECK	)	MT WATER COURT
DAM IN GARFIELD, McCONE, PHILLIPS,	)	
PRAIRIE, & VALLEY COUNTIES, MONTANA.	)	
	)	
	)	

CLAIMANTS: Lawrence Edwards and Kathleen Edwards; Mike Pierson; James Kirkland and Bobette Kirkland; Don Burke and Myrtle Burke; Dave Huston and Kathryn Huston; Melvin Thomas and Evelyn Thomas; Conservation Fund; Clay Taylor and Karen Taylor; Woods Bar 6 Ranch; Arnston Ranch Inc.; Towe Farms; Silver Dollar Grazing Association; Twitchell Ranch; Gene Buxcel; Lyle E. Nelson Trust; Wittmayer Grazing Assn; Spear J, Inc.; Page Whitham Land and Cattle; Martawn Veseth; Seven Blackfoot Company; McKeever Land and Cattle Company; Russell Nickels; Lester Nickels

OPINION

This case involves the consolidation of fifty six objections filed by the United States Bureau of Land Management ("BLM") and forty eight objections filed by the United States Fish and Wildlife Service to 104 stockwater claims, filed by twenty-two claimants in the Missouri River Basin between the Musselshell River and Fort Peck Dam. Due to their complexity, the late Chief Water Judge W.W. Lessley ordered informational and position

statements by the parties. On February 5, 1990, the parties filed their position statements. The case was referred to Water Master John E. Bloomquist, who reconsolidated the claims into Water Court Case 40E-A.

In December 1990, the Claimants filed a Motion for Partial Summary Judgment on Legal Issues Relating to Private Ownership of Water Rights on Federally Administered Lands, and in February 1991, the United States filed a Motion for Partial Summary Judgment. On April 5, 1991, the Water Master issued an Order and Memorandum on Motions for Partial Summary Judgment which denied the motion of the United States and granted the Claimants' motion.

On June 27, 1991, the United States filed a Motion to Vacate the Master's Order of April 5, 1991, which this Court subsequently denied, but with permission to serve written objections to the Master's Order and Memorandum within certain prescribed time frames.

On September 23, 1991, the United States jointly moved this Court, pursuant to Rule 53(e)(2), M.R.Civ.P., to modify the Water Master's Report in accordance with the objections set forth in a separate document. The parties submitted this matter on briefs and waived oral argument.

I. JURISDICTION

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees under the authority granted in § 85-2-233, MCA. It has concurrent jurisdiction to adjudicate federal rights to the use of water and to review federal objections to state based water right claims filed in comprehensive state water rights adjudications under the authority granted by the McCarran Amendment of 1952, 43 U.S.C. § 666 (2000) and §§ 85-2-231, -233, and -234, MCA. *See Arizona v. San Carlos Apache Tribe* (1983), 463 U.S. 545, 549, 103 S. Ct. 3201, 3204-05, 77 L. Ed. 2d 837, 845; *Colo. River Water Conservation Dist. v. United States* (1976), 424 U.S. 800, 812, 96 S. Ct. 1236, 1243, 47 L. Ed. 2d 483, 495; *State ex rel. Greely v. Confederated Salish & Kootenai Tribes* (1985), 219 Mont. 76, 84, 86, 712 P.2d 754, 759; *State ex rel. Greely v. Water Court* (1984), 214 Mont. 143, 152, 691 P.2d 833, 838.

II. STANDARD OF REVIEW

The Montana Water Court's standard of review for objections to summary judgment rulings by a Water Master is *de novo*. *Mead v. M.S.B., Inc.* (1994), 264 Mont. 465, 470, 872 P.2d 782, 785. When a Water Judge reviews a Water Master's recommendation to grant summary judgment, the judge applies the same evaluation that the Water Master applied to decide the summary judgment motion. *Bruner v. Yellowstone County* (1995), 272 Mont. 261, 264, 900 P.2d 901. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), M.R.Civ.P. The water judge reviews the legal conclusions of a Master in a summary judgment ruling for error. *Bruner*, 272 Mont. at 265. When reviewing objections made on the basis of state law, the court must apply state law; when reviewing objections made on the basis of federal law, the court must apply federal law. *San Carlos Apache Tribe*, 463 U.S. at 551, 571; *Colo. River Water Conservation Dist.*, 424 U.S. at 812-13; *Confederated Salish & Kootenai Tribes*, 219 Mont. at 95.

III. LEGAL ISSUES

The parties briefed their objections to the Master's Report beginning at different starting points. The United States argued the issue from 1934, the Claimants from years earlier. The United States argues that the Master "misstates the issue which is not whether an individual can appropriate water on public land by complying with state procedures. Rather, the issue is whether an individual can claim appropriative rights in water sources on Taylor Grazing Act lands based solely on those permits."¹

For clarity, this Court will begin with the issue presented by the United States in its Motion for Partial Summary Judgment requesting this Court:

[T]o enter summary judgment that Claimants' use of the sources of water located upon the public domain and reserved lands of the United States for livestock watering does not constitute an appropriation of water entitling them to a decree and that the title to the rights to the use of water for livestock watering on the public domain and reserved lands involved is in the United

¹ Objections of the United States to the Water Master's Report, Case 40E-A 16 (Sept. 23, 1991). See also Reply Brief of United States in Support of Objections to Water Master's Report, Case 40E-A 5-6 (Dec. 4, 1991).

States.²

Inherent in this primary issue are the following specific legal issues raised by the parties:

- A. Whether Montana law as it existed prior to July 1, 1973 required the appropriators in this case to maintain “exclusive use, dominion and control” over water in order to appropriate and maintain private water rights?
- B. Whether the rationale for governmental ownership and control of stockwater rights appropriated on and for use on state school trust lands as set forth in *Dep’t of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948 is applicable to the federal public lands in this case?
- C. Whether the Livestock Reservoir Siting Act of January 13, 1897 precluded or preempted the appropriation and impoundment of private stockwater rights for livestock grazing on federal lands?
- D. Whether the Stock Raising Homestead Act of 1916 or Public Water Reserve No. 107 precluded or preempted the appropriation of private stockwater rights from the springs and water holes on the public domain involved in this case?
- E. Whether the Taylor Grazing Act of 1934 precluded or preempted the appropriation of private stockwater rights on lands classified and administered by the Bureau of Land Management involved in this case?
- F. Whether the federal Acts and Orders creating the Charles M. Russell (“CMR”) and UL Bend National Wildlife Refuges (“UL Bend”) precluded or preempted the appropriation of private stockwater rights on the reserved lands involved in this case?

This opinion is the first in a series of decisions that the Water Court will be issuing in the next few weeks involving public land and livestock issues. *See, e.g.*, Water Court Cases 41G-190 and 41G-3.

IV. DISCUSSION

Background

² Motion for Partial Summary Judgment, Case 40E-A (Feb. 11, 1991).

The pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, statements of position, and public records, establish that:

Basin 40E is situated in north-central Montana and includes all water rights within the Missouri River basin between the confluence of the Musselshell River with the Missouri River, and Fort Peck Dam. Historically, the lands were part of the public domain, and livestock owners in the area grazed their livestock on the "open range." Over time, the livestock owners appropriated water from a variety of sources, including surface streams, lakes, Fort Peck Reservoir, springs, potholes, and groundwater. Some of the appropriations were developed or improved with partial or total funding by the United States. Some of the appropriations were impounded in small instream or offstream reservoirs, with or without partial or total funding by the United States.

Both prior to and during the time that these stockwater rights were being appropriated, a number of federal actions influenced the use of this federal land. As a consequence, the land where these stockwater claims were appropriated and used now consists of a jigsaw puzzle of overlapping jurisdictions which includes the public domain, federal reserved lands, U.S. Army Corps of Engineer-administered recreation areas, BLM-managed Wild and Scenic Missouri River, three State Parks, other State lands (including school trust lands), and private inholdings.³ On any given day, therefore, a single cow in an allotment might graze on private, state and federal reserved, federal unreserved, and federal acquired lands and drink water from the variety of sources described above.

In the Information and Position Brief of the United States of America, the United States described the various claims in dispute as fitting into one or more of the following fact patterns:

- The water source is an undeveloped spring or instream water for which the legal descriptions for point of diversion and place of use include public lands. There is no development or apparent investment by either the United States or

³ In 1985-1986, for example, there were sixty-five refuge grazing allotments on the CMR, with eighty eight permittees, five of which resided on private inholdings. *See, e.g.*, Record of Decision for Management of the Charles M. Russell National Wildlife Refuge, Montana, 51 Fed. Reg. 24,935 (July 9, 1986).

the permittee.

- The water source is located on federal public lands and a development appears to have been privately constructed or the BLM has no records of any federal funding for project. Some developments were apparently constructed prior to passage of the Taylor Grazing Act, and some were apparently constructed afterwards.
- The water source is located on public lands and the development appears to have been constructed by BLM or cost-shared by BLM based on priority dates and/or actual funding information.
- Claims in which a field check by BLM personnel at claimed site did not locate any water.
- Permittee claims a priority date *senior* to the reservation date for lands reserved from the public domain. These claims are for water from springs and from Fort Peck Reservoir with priority dates in the 1880s, when the area was first opened as unreserved public domain. However, no claimant has been able to demonstrate a contractual relationship or privity of title with an original appropriator.
- Permittee claims a priority date *junior* to the reservation date for lands reserved from the public domain. These claims are not only for water from Fort Peck Reservoir, but also for developed facilities like wells and small reservoirs.
- Permittee claims a priority date *before* the United States acquired the land.
- Permittee claims a priority date *after* the United States acquired the land.

The following are the United States' primary arguments.⁴ First, Montana water users could not make a valid appropriation of water from a spring or reservoir on the public domain for stock watering because they could not demonstrate their use of water was to the exclusion of others or that the sources were completely subject to their dominion and control, all prerequisites asserted to be required by *Jones v. Hanson* (1958), 133 Mont. 115, 119, 123,

⁴ Reply Brief of United States in Support of Objections to Water Master's Report, Case 40E-A 4-6 (Dec. 4, 1991); United States' Brief in Opposition to Claimants' Motion for Partial Summary Judgment and in Support of the United States' Motion for Partial Summary Judgment, Case 40E-A 4-7, 10 (Feb. 11, 1991); Information and Position Brief of the United States of America, Case 40E-A 5 & 7 (Feb. 5, 1990).

320 P.2d 1007, 1010, 1012. Second, the public policy reasons supporting federal ownership of the water rights on public lands are identical to the policy statements set forth in *Pettibone* and the *Pettibone* holding should, therefore, be applied to the claims involved in this case. Third, the Act of January 13, 1897, the 1916 Stock Raising Homestead Act, and the Executive Order of April 17, 1926 ("Public Water Reserve No. 107") required the water resources at issue here to be open and free for public use, and, therefore, no use of these resources could meet the exclusivity requirements of *Jones v. Hanson*. Fourth, permittees under the Taylor Grazing Act of 1934 cannot use their permits as a vehicle to appropriate water from sources on federal lands.

In their Position Brief, the Claimants argue mostly to the contrary. They do state that they have not claimed private stockwater rights in water projects developed solely by the United States, or projects developed with permission or by license from the United States after passage of the Taylor Grazing Act of 1934, or projects developed by Claimants after passage of the Taylor Grazing Act. The Claimants agree that if the United States later permitted a larger development on a site previously appropriated or developed by a Claimant, and there was no participation by the Claimant or his predecessors-in-interest in the later effort, then the United States' is entitled to a water right for the increased supply of water.

In its last brief, the United States acknowledges that it does not question the principle that the Taylor Grazing Act "protects appropriative water rights acquired *prior* to the enactment of the statute or thereafter validly appropriated."⁵ However, the United States then argues that there are no such rights in Montana because "one who waters stock on the public domain prior to or after the Taylor Grazing Act did not and could not satisfy the exclusivity of use requirement of Montana law."⁶

A.

Exclusive Use, Dominion, and Control

⁵ Reply Brief of United States in Support of Objections to Water Master's Report, Case 40E-A 5 (Dec. 4, 1991).

⁶ Objections of the United States to the Water Master's Report, Case 40E-A 13 (Sept. 23, 1991) (citing Brief in Opposition to Claimant's Motion for Partial Summary Judgment and in Support of United States' Motion for Partial Summary Judgment, Case 40E-A 12 (Feb. 11, 1991)).

The United States first argues that the stockwater claims in this case are invalid under Montana law because prior to July 1, 1973, Montana required appropriators to maintain exclusive use, dominion, and control over water and its source in order to appropriate and maintain a private right to the use of the water on the public domain. The United States relies heavily on *Jones v. Hanson* to support this argument. The United States has misinterpreted Montana water law.

Water law in Montana was born in the rough and primitive gold fields of California, where an enforceable water right was acquired simply by taking possession of water on the public domain and putting it to beneficial use, with first in time being first in right.⁷ Those customs ripened into well-recognized rules, known as the prior appropriation doctrine, which were subsequently adopted by Montana's early settlers and ultimately given the force of law by Congress, the Montana legislature, the United States Supreme Court and the Montana Supreme Court. *Mettler v. Ames Realty Co.* (1921), 61 Mont. 152, 170-71, 201 P. 702, 707-08.⁸

As the settlement of Montana grew and competition for water increased, the early doctrine was augmented by legislation and the rulings of the Montana Supreme Court.

⁷ See generally *In the Matter of the Adjudication of the Missouri River Drainage Area*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396; *In the Matter of the Adjudication of the Dearborn Drainage Area* (1988), 234 Mont. 331, 340, 766 P.2d 228, overruled in part by *Missouri River Drainage Area*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396; *Mettler v. Ames Realty Co.* (1921), 61 Mont. 152, 201 P. 702; *Maynard v. Watkins* (1918), 55 Mont. 54, 173 P. 551; *Bailey v. Tintinger* (1912), 45 Mont. 154, 122 P. 575; *Smith v. Duff* (1909), 39 Mont. 382, 102 P. 984; *Toohy v. Campbell* (1900), 24 Mont. 13, 60 P. 396; *Murray v. Tingley* (1897), 20 Mont. 260, 50 P. 723; *Kleinschmidt v. Greiser* (1894), 14 Mont. 484, 37 P. 5; *Sweetland v. Olsen* (1891), 11 Mont. 27, 27 P. 339; *Woolman v. Garringer* (1872), 1 Mont. 535; *King v. Edwards* (1870), 1 Mont. 235. See also *Broder v. Water Company* (1879), 101 U.S. 274, 25 L. Ed. 790, 11 Otto 274; *Basey v. Gallagher* (1874), 87 U.S. 670, 682, 22 L. Ed. 452, 455, 20 Wall. 670 ("The views [in *Atchison v. Peterson*] expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."); *Atchison v. Peterson* (1874), 87 U.S. 507, 510-11, 22 L. Ed. 414, 415, 20 Wall. 507 ("By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property.").

⁸ See, e.g., Mont. Const. art. III, § 15 (1889); Act of March 3, 1877, 43 U.S.C. § 321; Act of July 9, 1870, 30 U.S.C. § 52 (amending Act of July 26, 1866); Act of July 26, 1866, 43 U.S.C. § 661; § 1, 1885 Mont. Laws 130; §§ 737-38, 1879 Mont. Laws 52; Ch. 34, §§ 11, 12, 1872 Mont. Cod. Stat.; §§ 2, 8, 9, 1869-1870 Mont. Laws; cases cited, *supra* note 15.

However, neither Montana law nor custom has ever required the “exclusive use, dominion, and control” of a water source in order to appropriate a private water right, unless the appropriator was claiming an exclusive right to use an entire water source, or claiming the right by prescription.⁹ The Montana Supreme Court set forth the controlling rule in *Bullerdick v. Hermsmeyer*, where it stated that:

The use of the waters in the streams in this state is declared by the Constitution to be a public use. (Constitution, Art. III, sec. 15) Such being the case, every citizen has a right to divert and use them, so long as he does not infringe upon the rights of some other citizen who has acquired a *prior right* by appropriation. Each citizen may divert and use them without let or hindrance when no *prior right* prevents. When his necessary use ceases, he must restore them to the channel of the stream, whereupon they may be used by any other person who needs them.

Bullerdick v. Hermsmeyer (1905), 32 Mont. 541, 554-55, 81 P. 334 (emphasis added). In *St. Onge v. Blakely*, the Montana Supreme Court reiterated that:

[T]wo parties may at the same time be in possession of water from a creek and neither hold adverse to the other; each may justly claim the right to use the water he is using, without affecting the rights of the other, and therefore, in order to constitute adverse possession of water, the burden is upon the claimant to show that his use of water deprived the prior appropriators of water at times when such prior appropriators actually needed the water . . . and therefore proof merely that the claimant used water and claimed the right to use it is no proof whatever of adverse use.

St. Onge v. Blakely (1926), 76 Mont. 1, 16, 245 P. 532 (citations omitted) .

The language in *Jones v. Hanson*, cited by the United States in support of its argument, stands only for the proposition that proof of exclusive use, dominion, and control

⁹ A fundamental aspect of the early prior appropriation doctrine was that “the one who first appropriates water has the *sole right* to use the same for the purpose for which it was appropriated, *to the exclusion* of any subsequent appropriation for the same purpose or for any other use of the water, and to the full extent of his appropriation if necessary for his beneficial uses.” 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 569 (1971) (emphasis added). This principle was recognized by the Montana Supreme Court in *Mettler v. Ames Realty Co.*, when it held that the doctrine of prior appropriation “sanctions the right of an appropriator to the use of all the waters of a stream, *to the exclusion* of riparian proprietors and junior appropriators, if the entire flow of the stream has been appropriated by him, and the only limitations imposed upon the extent of his appropriation are his needs and facilities for use.” 61 Mont. at 159.

of a water source was required when an appropriator claimed the exclusive use of an entire water source, or claimed a water right by prescription. *Jones*, 133 Mont. at 119, 123.

In *Jones*, the plaintiff claimed the exclusive right to the use of *all* the waters of Bynum Springs based on two notices of appropriation filed by his predecessors-in-interest, and alternatively, upon a right by prescription. *Jones*, 133 Mont. at 117. The lower court granted the plaintiff's alternative claim of right by prescription, because it found that the plaintiff's use of Bynum Springs had been "actual, open, *exclusive*, notorious, adverse, visible, continuous and uninterrupted" for the statutory period and, therefore, the plaintiff had the "exclusive right to the use of all of the waters of Bynum Springs for domestic purposes, for watering of sheep, cattle, and livestock, and for the purpose of irrigating and watering the lands and premises owned by him." *Jones*, 133 Mont. at 119 (emphasis added).

On appeal, the Montana Supreme Court reversed the lower court's grant of the plaintiff's alternative prescriptive claim. The Court identified the issues, the salient facts, and its conclusion as follows:

The pleadings are voluminous, but the issues are narrowed to the question of whether the plaintiff is entitled to the full use of the waters of Bynum Springs, which are located on land belonging to the defendant, for the irrigation of plaintiff's land located some distance from the springs; . . .

....

There is no dispute in the evidence as to the appropriations made by plaintiff's predecessors in interest, which are the basis for his claim to the waters of Bynum Springs. The appropriation was from Spring Coulee, not the springs. Since the point of diversion (which has never been changed) was not at the springs, but was at a point on Bynum Coulee, on a dam or reservoir constructed for the purpose of impounding the waters; the only basis for claiming ownership of the waters of the springs, with the right to the relief granted by court, must necessarily be based on a title by prescription. To sustain the burden of proof, the plaintiff showed that in 1906, or thereabouts, there were constructed two boxes, one around each of two of the three springs, . . .

....

. . . From the preponderance of the evidence, we feel that the [lower] court was hardly justified in finding, if it was the intention of the court to so find, that the plaintiff had used the water for drinking purposes at all times since 1906.

From the evidence it would appear much more likely that he was continuing to haul water occasionally solely to keep in effect his claim to the use of the water . . .

....
Under the evidence offered here, it would appear that at the time the springs were boxed, the plaintiff had no thought that it was being done in connection with the use of the water for irrigation purposes or to assist in the natural flow thereof.

In any event, the use of the springs as a watering place for cattle and of the neighborhood generally for drinking water is undisputed. There is no showing by plaintiff that his use of the water was to the *exclusion* of others and since the springs were not subject to the complete domain and control of the plaintiff, it necessarily follows that the boxing of the springs did not constitute a valid appropriation of water for any purpose, nor could it be one which would ripen into a title by prescription.

Jones, 133 Mont. at 116, 120-21, 123 (emphasis added).

It is the language in the last indented paragraph upon which the United States bases its argument. However, the *Jones* case simply does not stand for the proposition cited by the United States. The issue in the case was not about the plaintiff seeking the appropriation of stock water rights on the public domain. Instead, the case involved a plaintiff seeking the establishment of a prescriptive right to the use of Bynum Springs water and plaintiff's right to protect the springs from trespassing cattle, sheep, hogs, or other livestock. The *Jones* case is not applicable here.

The exclusivity argument was put to rest when the Montana Supreme Court confirmed that the essential elements of an appropriation have always been intent, beneficial use, and, if physically necessary, a diversion. *In the Matter of Adjudication of the Missouri River Drainage Area*, 2002 MT 216, ¶¶ 20, 22, 23, & 37, 311 Mont. 327, ¶¶ 20, 22, 23, & 37, 55 P.3d 396, ¶¶ 20, 22, 23, & 37 ("*Bean Lake III*"). Exclusivity was not mentioned.

Accordingly, this Court finds as a matter of law that prior to July 1, 1973, the exclusive use, dominion, and control of water was not required for the Claimants in this case to appropriate or maintain their private stockwater rights, unless they were claiming the right

to the exclusive use of an entire water source or claiming the water right by prescription.

B.

Department of State Lands v. Pettibone

The United States next contends that the possibility of a federal permittee dictating the use of federal land through the control of a water resource is as “repugnant” to the multiple use management policies of federal public lands as it is to the fiduciary principles applicable to State school trust lands. Although the United States acknowledges that “federal lands are not held in trust as are state school lands,”¹⁰ the United States argues that the trust rationale applied by the Montana Supreme Court in *Pettibone*, 216 Mont. 361, is equally applicable to these appropriations of water on and for use on federal public lands. This Court is unpersuaded by this argument.

In *Pettibone*, the Montana Supreme Court held that water rights appropriated by lessees on and for use on school trust land are owned by the State of Montana for the benefit of the trust, not by the lessees. *Pettibone*, 216 Mont. at 368. The *Pettibone* decision, however, turned on the fact that the grazing lands involved were State school trust lands, which the United States Supreme Court and Montana Supreme Court have held are subject to the same fiduciary principles as private, charitable trusts. *Pettibone*, 216 Mont. at 369-71, 375. Finding that the appropriation of private water rights on trust land could interfere with the State's management of the trust and reduce its value, the Court implied an agency relationship and held that:

The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State. . . . The lessee, under the terms of the lease, is simply entitled to the *use* of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefor.

. . . .

. . . Absent such compensation, the title to the water rights in this case vest in

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Information and Position Brief of the United States of America, Case 40E-A 6 (Feb. 5, 1990).

the State.

Pettibone, 216 Mont. at 368, 376 (italics in original).

The *Pettibone* Court, however, expressly distinguished the fiduciary principles applicable to State school trust lands from the general rules applicable to other public lands and explained that:

Respondents cite several cases that appear to articulate a contrary rule. The first, *Smith v. Denniff*. . . is distinguishable in the fact that it concerned water appropriations made by squatters on the federal lands who diverted water for use on the public domain. . . . As discussed above, school trusts lands are subject to a different set of rules than other public lands. Secondly, they cite *Hayes v. Buzzard* . . . Again, *Hayes* arose on public domain land, not school trust land.

Pettibone, 216 Mont. at 372.

Prior to 1973, a water right appropriated on the public domain in accordance with Montana law or custom generally vested in the appropriator. *Osnes Livestock Co. v. Warren* (1936), 103 Mont. 284, 290, 62 P.2d 206, 209; *St. Onge*, 76 Mont. at 18; *Smith v. Denniff* (1900), 24 Mont. 20, 27, 60 P. 398, 400. “When the right was fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the owner could only be divested in some legal manner.” *Osnes Livestock Co.*, 103 Mont. at 294. See also *Smith*, 24 Mont. at 27 (stating that a water right is “a positive, certain, and vested property right” of which the appropriator could not be divested).

Unless and until the federal government reserves land or water for permanent federal purposes, or explicitly and clearly abandons its historical deference to state control over the water resources within a state’s boundaries (a matter that will be discussed next in great detail), this Court will not presume to do so through application of the *Pettibone* decision. Accordingly, when adjudicating the individual claims in this case, this Court will apply the traditional rules applicable to the appropriation of water on federal public lands in Montana,

and not the fiduciary trust principles uniquely applicable to Montana school trust lands.

C.

Federal Law

The parties and the Master discussed the ramification of several federal congressional acts on the appropriation of water on the public lands within Montana. The United States made most of these federal references as part of its exclusivity argument. A general overview of federal law will be helpful in the review of these federal statutes.

Concurrent Authority Over Water

The Property Clause of the United States Constitution invests Congress with the authority “to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States,” U.S. Const. art. IV, § 3. This is a power which the United States Supreme Court has traditionally construed with an “expansive reading” and with a repeated recognition of the right of the United States “to control their occupation and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them.” *Kleppe v. New Mexico* (1976), 426 U.S. 529, 539-40, 96 S. Ct. 2285, 2292, 49 L. Ed. 2d 34, 44 (quoting *Utah Power & Light Co. v. United States* (1917), 243 U.S. 389, 405, 37 S. Ct. 387, 389, 61 L. Ed. 791, 817). The fact that federal property is located within state geographical boundaries does not diminish that power. *Kleppe*, 426 U.S. at 539-40; *Hancock v. Train* (1976), 426 U.S. 167, 178-79, 96 S. Ct. 2006, 2012-13, 48 L. Ed. 2d 555, 564-65; *United States v. Rio Grande Dam & Irrigation Co.* (1899), 174 U.S. 690, 703, 19 S. Ct. 770, 775, 43 L. Ed. 1136, 1141; *United States v. Montgomery* (D. Mont. 1957), 155 F. Supp. 633, 635.

Montana, however, in its inherent and sovereign capacity, also has dominion and control over the land and waters within its borders. U.S. Const. Amend. X. Absent consent or cession, that dominion and control includes federal lands and the waters on or adjacent to them. Mont. Const. art. IX, § 3(3) (1972); *Kansas v. Colorado* (1907), 206 U.S. 46, 93, 27 S. Ct. 655, 665, 51 L. Ed. 956; *In re Adjudication of the Yellowstone River* (1992), 253

Mont. 167, 179, 832 P.2d 1210.

Only when the federal government properly asserts its authority to control the use of federal property, and state law conflicts with that authority, does federal authority preempt state law under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2; *California v. United States* (1978), 438 U.S. 645, 668-78, 98 S. Ct. 2985, 2997-3003, 57 L. Ed. 2d 1018, 1034-41; *Kleppe*, 426 U.S. at 543.

Whether a federal action actually preempts state law in any single instance depends upon the intent of Congress or the Executive, as expressed in the language of the Act or Order, its legislative or administrative history, contemporary administrative and judicial decisions, the degree of conflict, and the relation of purposes of the federal legislation or executive order to the state aims. *See, e.g., Leo Sheep Co. v. United States* (1979), 440 U.S. 668, 669, 682, 99 S. Ct. 1403, 1411, 59 L. Ed. 2d 677, 688; *California v. United States*, 438 U.S. at 668-78; George Cameron Coggins & Charles F. Wilkinson, *Federal Public Land and Resources Law* 209-10 (2d ed. 1987).

The United States Supreme Court has recognized certain rebuttable presumptions in close cases where congressional intent is unclear. Coggins & Wilkinson, *supra* at 210. Generally, in traditional areas of federal control, or when the Court finds that the need for uniform national regulation is compelling, the Court presumes that Congress intended for federal law to preempt conflicting state law. Coggins & Wilkinson, *supra*. Where no such tradition exists, or when no compelling need for uniform national regulation is present, the Court generally presumes that Congress intended for state law to control the issue. Coggins & Wilkinson, *supra*. In order to overcome either presumption, the Supreme Court has required clear and explicit evidence of congressional intent to the contrary. Coggins & Wilkinson, *supra*.

Acts of 1866, 1870, and 1877 and the Presumption of State Control

At least from 1862, if not before, Congress acquiesced in the use and disposition of the waters located on or under federal lands as fixed by territorial and state custom, rules,

and law. *California Oregon Power Co. v. Beaver Portland Cement Co.* (1935), 295 U.S. 142, 154-55, 162, 55 S. Ct. 725, 727-28, 731, 79 L. Ed. 1356, 1359-60, 1363-64. Out of this historical evolution, established judicial doctrine came to define certain “rights which the government had, by its conduct, recognized and encouraged and was bound to protect.” *Broder*, 101 U.S. at 276. These rights received the formal confirmation of Congress on July 26, 1866, when Congress declared:

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

Act of July 26, 1866, ch. 262, § 9, 14 Sta. 253 (codified at 43 U.S.C. § 661 (2000)).

In its 1874 *Basey v. Gallagher* decision, an appeal from the Supreme Court of the Territory of Montana involving irrigation claimants on the public domain, the United States Supreme Court observed that in enacting the Act of 1866, Congress intended:

to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; . . .

Basey, 87 U.S. at 684.

In 1870, Congress amended the Act of 1866 to clarify that:

All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the [ninth section of the Act of 1866].

Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (codified at 43 U.S.C. § 661 (2000)).

On March 3, 1877, Congress enacted the Desert Land Act, which regulated the entry

and reclamation of desert lands. Act of March 3, 1877, ch. 107, § 1, 19 Stat. 37 (codified at 43 U.S.C. § 321 (2000)). The Supreme Court found that by this Act, if not before, Congress “effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself” and “reserved [the waters] for the use of the public under the laws of the states and territories.” *California v. United States*, 438 U.S. at 657-58 (quoting *California Oregon Power Co.*, 295 U.S. at 158, 162).

The Court emphasized that with respect to the waters of the public domain, this “severance” applied to *all* the waters of the public domain, not merely those waters to be appropriated by entrymen seeking mineral and land patents:

By its terms, *not only* all surplus water over and above such as might be appropriated and used by the desert-land entrymen, *but “the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable,”* were to remain “free for the appropriation and use of the public for irrigation, mining and manufacturing purposes.”

California Oregon Power Co., 295 U.S. at 158 (emphasis added). The Court reasoned that:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. The fair construction of [Chapter 107 of the Desert Land Act] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable “shall remain and be held free for the appropriation and use of the public” are not susceptible of any other construction. . . . It is hard to see how a more definite intention to sever the land and water could be evinced.

California Oregon Power Co., 295 U.S. at 162 (citation omitted). Between 1866 and 1958, Congress passed at least thirty-seven additional statutes in which it expressly recognized the importance of deferring to state water law. *United States v. New Mexico* (1978), 438 U.S. 696, 702, n. 5, 98 S. Ct. 3012, 3015, 57 L. Ed. 2d 1052, 1058.

In 1981, the Solicitor General for the Department of the Interior acknowledged the long history of congressional deference to state control over water in an Opinion stating that:

New Mexico . . . and California . . . reaffirm that congressional deference to state control over water arises from the 1866, 1870, and 1877 Acts . . . and numerous other public land use statutes enacted over the years. The unavoidable conclusion to be reached from these cases is that Congress gave the states broad power to provide for the administration of water rights which would only be limited where necessary to accomplish the original purpose of a congressionally mandated reservation or to protect the navigation servitude. As a result of this implicit grant of power, the *presumption* is that state law will control all non-reserved claims unless Congress provides otherwise. If Congress wishes to abandon its historical practice of deference it must explicitly exercise its power. While Congress has retained the right to amend these laws and reassert legislative control over a portion or all of the remaining unappropriated water in a state, it has chosen not to do so.

Solicitor's Op. 36914, 88 I.D. 1055, 1064 (1981) (emphasis added). *See also* Solicitor's Op. 36914, 88 I.D. 253 (1981); Solicitor's Op. 36914, 96 I.D. 211 (1988).

That Opinion led the Secretary of the Interior to announce that:

[T]here is no such thing as a "Federal non-reserved water right" That means Federal land managers must follow State water laws and procedures except where Congress has specifically established a water right or where Congress has explicitly set aside a Federal land area with a reserved water right. If they need more water for their programs, they must take their place in line like any citizen and let State authorities decide.

News Release, United States Department of the Interior (Sept. 11, 1981) (emphasis added).

Significantly, the Solicitor's Opinion and the Department of Interior's news release were issued during the middle of Montana's claim filing period. Water right claimants, including the United States, were required to file statements of claim of existing water rights by April 30, 1982.

The following year, Assistant Attorney General Theodore B. Olson of the Department of Justice issued an extensive Memorandum also reiterating the long history of deference and the resulting presumption:

[T]he history of federal-state relations with respect to water rights in the western states and Congress' weighing of the competing federal and state interests establish a presumption that . . . in the absence of evidence of specific congressional intent to preempt state water laws, the *presumption* is that federal agencies can acquire water rights only in accordance with state

law. The mere assignment of land management functions to a federal agency, without more, does not create any federal rights to unappropriated water necessary to carry out those functions.

....

We conclude that the rationale of *California* and *New Mexico* must be applied to any assertion of federal water rights in the western states. To the extent the federal non-reserved water rights theory would suggest that federal water rights are created merely by the assignment of land management functions to a federal agency or authorization of a federal project, we believe that it does not have a sound legal or constitutional basis and does not provide an appropriate legal basis for the assertion of water rights by federal agencies. *New Mexico* and *California* make it clear that the federal constitutional authority to preempt state water law must be clearly and specifically exercised, either expressly or by necessary implication. Otherwise, the *presumption* is that the western states retain control over the allocation of unappropriated water within their borders.

Memorandum from Theodore B. Olson, Assistant Att’y Gen., Dep’t of Justice, to Carol E. Dinkins, Ass’t Att’y Gen., Land and Nat. Res. Div., 6 Op. O.L.C. 328, 332, 383 (June 16, 1982) (emphasis added).

The Assistant Attorney General emphasized, however, that:

This does not mean that the federal government is helpless to acquire the water it needs to carry out its management functions on federal lands. If that water cannot be acquired under state law or by purchase or condemnation of existing rights, the remedy lies within the power of Congress. The Supremacy Clause provides Congress ample power, when coupled with the commerce power, the Property Clause, or other grants of federal power, to supercede state law.

6 Op. O.L.C. at 383.¹¹

¹¹ This traditional deference was echoed in a speech given by Secretary of the Interior Norton at an ABA Water Section seminar in San Diego, California, on February 20, 2003. Secretary Norton confirmed that:

There are many areas where national interests predominate over state and local interests, such as defense, immigration, transportation and communication. Where important national interests are at stake or where there is a need for national uniformity of laws, we must look to Washington, D.C. But in the field of water law, we have a different system, one that is based on the unique history and traditions of our national experience. Since the mid-nineteenth century, federal policy has been to defer to the authority of the western states to manage their water rights. Starting more than a century ago, Congress saw development of the lands of the West as a national purpose. . . . But even though the federal government built huge water development projects that have changed the face of the West, Congress has continued to insist the federal projects must comply with state laws, and must acquire their water

Accordingly, the Water Court begins with the presumption that Montana law controls the appropriation of the water rights on the federal lands involved in this case – a presumption which can be overcome only by evidence of a clear and explicit exercise of federal authority to preempt state water law, or by necessary implication.

Federal Acts - “Open” and “Free Use” of Public Lands

In further support of its *Jones* exclusivity argument, the United States cites the language of the Act of January 13, 1897, the 1916 Stock Raising Homestead Act, and the Taylor Grazing Act of 1934. The United States emphasized that these enactments required livestock reservoirs to be open to the free use of persons desiring to water animals of any kind and not to be fenced. The United States argues that the “open” and “free use” language in these acts precludes a Montana water user from appropriating water on the public domain because, under these federal acts, a Montana water appropriator would never be able to meet the exclusivity criteria demanded by *Jones*.

The Court resolved the *Jones* exclusivity argument earlier. As these federal acts were part of the argument, however, they will be addressed on a limited basis.

Act of January 13, 1897

In the Mining Act of 1866 (and as amended), Congress expressly recognized the right under state law to acquire rights of way over the public domain for the construction and use of reservoirs used in the appropriation, storage, and conveyance of private water rights for mining, agriculture, manufacturing, and other purposes. *Utah Power & Light Co.*, 243 U.S. at 405-06. The Supreme Court noted that “the grant was noticeably free from conditions” and that no application, consent, approval, or public recording was required. *Utah Power & Light Co.*, 243 U.S. at 405.

Article III, Section 15 of the Montana Constitution (1889) provided that the

rights under state laws.

Gale Norton, Address at the American Bar Association Annual Water Law Conference (Feb. 20, 2003).

appropriation and use of water “as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.” In *Federal Land Bank v. Morris*, the Montana Supreme Court noted that:

The western part of our state is now dotted with reservoirs, usually built near the headwaters of streams. This work has been encouraged at all times . . . It comes back to nothing else but the old principle that “he who saves something that would otherwise be lost is not only to be protected in what he has saved, but commended for so doing.”

. . . .
. . . We are satisfied that the laws of Montana that apply to the acquisition of running water equally apply to the storage and use of flood or waste water, and the doctrine of “first in time, first in right” applies to both.

Federal Land Bank v. Morris, (1941), 112 Mont. 445, 455-56, 116 P.2d 1007, 1011.

The Act of January 13, 1897 was “an act providing for the location and purchase of public lands for reservoir sites” and provided that:

Any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.*

Act of Jan. 13, 1897, ch. 11, § 1, 29 Stat. 484 (codified at 43 U.S.C. §§ 952-955 (2000)) (emphasis added). The stated purpose of the Act was:

. . . to *facilitate the transportation of stock* from the extensive regions of South Dakota, Montana, and Wyoming. In driving large herds of cattle in these States to the terminal points of the lines of railways reaching into these regions, it is absolutely necessary that the stock should have water at stated intervals.

H.R. Rep. No. 1527 (1896) (emphasis added).¹²

There has been little analysis or application of this Act by the federal or state courts. However, the Act did not explicitly amend or repeal the Acts of 1866, 1870, or 1877 which recognized and confirmed the right to appropriate and impound private water rights in reservoirs on the public domain. Moreover, congressional deference to state control over the severed *waters* of the public domain was still a strong force in 1897 when this Act was enacted. *See California v. United States*, 438 U.S. at 653-63. Accordingly, this Court cannot conclude that the Act of January 13, 1897 was a “clear and explicit” exercise of federal authority to preempt state law.

Therefore, this Court finds that the Water Master was correct in concluding that the Act of January 13, 1897 did not preclude or preempt the right to appropriate private stockwater rights on the public domain under Montana law.

D.

Stock Raising Homestead Act and Public Water Reserve No. 107

On June 25, 1910, Congress passed the Pickett Act, which authorized the President to “temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States . . . and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals. . . .” Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (repealed in 1976). The Federal Land Policy and Management Act of 1976, P.L. 94-579, Title VII, § 704(a), 90 Stat. 2792, repealed the

¹² In 1902, the Senate Committee on Public Lands reported that:
Pursuant to this legislation numerous reservoir sites have been located and reservoirs constructed in different parts of the arid and semiarid West for the purpose of creating watering places for livestock upon the public ranges of the West, and especially in order to have suitable watering places at regular intervals for beef cattle that may be driven from the ranges to the shipping stations during the dry season of the summer and fall. In the main the experiments which have been made under the provisions of this act have been successful and have demonstrated that it is entirely practicable to store large quantities of surface water that come from the melting snows and early rains of the spring time for use during the drought season of the year.

S. Rep. No. 2094, (1902) (emphasis added).

Pickett Act, but all previous withdrawals under the Pickett Act were expressly preserved unless and until modified as specified in the Order. P.L. 94-579, Title VII, § 701(c), 90 Stat. 2786.

To encourage small stock raising homesteads on the public domain, Congress passed the Stock Raising Homestead Act of December 29, 1916 (“SRHA”), which authorized entry on up to 640 acres of land designated as being “chiefly valuable for grazing and raising forage crops.” Act of Dec. 29, 1916, ch. 9, § 10, 39 Stat. 862 (repealed in 1976). Section 10 of the Act directed that:

[L]ands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but *may be reserved under the provisions of [the Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.*

Act of Dec. 29, 1916, ch. 9, § 10, 39 Stat. 862 (repealed in 1976) (emphasis added). The Act also established stock driveways to insure access by the public to watering places which had been reserved, and to allow for the unhampered passage of livestock across the public domain for grazing purposes. Act of Dec. 29, 1916, ch. 9, § 10, 39 Stat. 862 (repealed in 1976). *See also* James Muhn, *The State of the Law, Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 99 (2001).

A Committee Report discussing the Act stated that Section 10 of the Act was a new section which authorized the Secretary of the Interior:

. . . to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country, so that a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.

United States v. City & County of Denver (Colo. 1982), 656 P.2d 1, 32 n.48 (quoting H.R. Rep. No. 35, at 18 (1916)).

On April 17, 1926, pursuant to Section 10 of the SRHA, President Coolidge approved Public Water Reserve No. 107, which withdrew and reserved most tracts of unsurveyed federal land containing substantial springs or waterholes as follows:

[I]t is hereby ordered that every smallest *legal subdivision of public-land* surveys which is *vacant unappropriated unreserved public land and contains a spring or water hole*, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same *is hereby, withdrawn* from settlement, location, sale, or entry, and *reserved* for public use in accordance with the provisions of Section 10 of the act of December 29, 1916.

Exec. Order Pub. Water Reserve No. 107 (April 17, 1926) (emphasis added). The United States contends that “under the rationale of the decision [*City and County of Denver*] relied upon by the Water Master, the United States would be entitled to all the water necessary to provide a watering supply for all stock allowed to graze the permits.”¹³ This contention requires a short discussion of the federal reserved water rights doctrine.

Federal Reserved Water Right Doctrine

In a series of cases beginning in 1897, the United States Supreme Court examined the often conflicting jurisdiction between state and federal government with respect to the waters on or adjacent to federal lands and concluded that whatever power the states had acquired over the waters within their borders as a result of the Acts of 1866, 1870, and 1877, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on “appurtenant” lands withdrawn from the public domain and reserved for specific federal purposes. *New Mexico*, 438 U.S. at 700; *California v. United States*, 438 U.S. at 662-63; *Cappaert v. United States* (1976), 426 U.S. 128, 138, 143-46, 96 S. Ct. 2062, 48 L. Ed. 2d 523; *Arizona v. California* (1963), 373 U.S. 546, 597-98, 83 S. Ct. 1468, 10 L. Ed. 2d 542; *Winters v. United States* (1908), 207 U.S. 564, 577, 28 S. Ct. 207, 52 L. Ed. 340; *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 703.

In *Cappaert v. United States*, the United States Supreme Court summarized the

¹³ Objections of the United States to the Water Master's Report. Case 40E-A 14 (Sept. 23, 1991).

federal reserved water right doctrine as follows:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

....

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

....

The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purposes of the reservation, no more.

Cappaert, 426 U.S. at 138, 139, 141.

In *New Mexico*, the Court discussed the limitations of the doctrine as follows:

While many of the contours of . . . [the doctrine] remain unspecified, the Court has repeatedly emphasized that Congress reserved “only that amount of water necessary to fulfill the purpose of the reservation, no more.” . . .

....

. . . Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. *Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.*

New Mexico, 438 U.S. at 700, 702 (emphasis added).

Even when federal land and water has been reserved and exempted from private appropriation, the United States Supreme Court has confirmed that the federal government may still intend for those unreserved waters, not necessary for the primary purposes of the reservation, to remain available for private appropriation by permittees. *New Mexico*, 438 U.S. at 700, 702. In *New Mexico*, the Court held:

What we have said also answers the Government's contention that Congress intended to reserve water from the Rio Mimbres for stock watering purposes. 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 stock waterers. We agree.

. . . Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators [including grazing permittees] under state law. There is no indication in the legislative histories of any of the forest Acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.

New Mexico, 438 U.S. at 715-17 (citations omitted).

Federal Reserved Water Right Doctrine and Public Water Reserve No. 107

Whether the federal government intended to reserve water when it reserved the land in Public Water Reserve No. 107, has not yet been decided by the United States or Montana Supreme Courts.¹⁴ The Department of the Interior's own interpretation and implementation of Public Water Reserve No. 107 has been conflicting and evolving over time. *See generally* Muhn, *supra*.

It is neither appropriate nor necessary to decide the issue in this case. The claims involved in this case are not for federal reserved water rights, but for private stockwater rights.¹⁵ For purposes of these motions for summary judgment, therefore, this Court simply

¹⁴ Both the Colorado and the Idaho Supreme Courts have concluded that federal water rights were reserved by Public Water Reserve No. 107, but they differ as to the scope and extent of those rights. *See generally* *United States v. City & County of Denver* (Colo. 1982), 656 P.2d 1; *United States v. Idaho* (Idaho 1998), 959 P.2d 449.

¹⁵ At some future date, the issue may be addressed by the Water Court. By letter dated April 2, 1998, the Reserved Water Rights Compact Commission formally notified the Water Court, pursuant to § 85-2-704, MCA, that negotiations between the United States Bureau of Land Management and the State of Montana for any and all reserved water right claims except those for the Upper Missouri National Wild and Scenic River and the Bear Trap Canyon Public Recreation Site were terminated as of April 2, 1998. As a result, the Water Court included three BLM reserved water right claims, based on Public Water Reserve No. 107, in its November 14, 2003 Basin 42KJ Temporary Preliminary Decree Water Court decree.

reiterates the well-established rule that valid state based water rights appropriated prior to creation of a federal reserved water right are not affected by the federal reservation, and that state based water rights appropriated subsequent to the creation of a federal reserved water right in the same source, though not necessarily precluded, *New Mexico*, 438 U.S. at 700-02, are subordinate and subject to the federal reserved right. *Cappaert*, 426 U.S. at 138; *Arizona*, 373 U.S. at 597-600.

E.

The Taylor Grazing Act of 1934

The public's free and unregulated use of the public domain for grazing purposes came to an end on June 28, 1934, when Congress passed the Taylor Grazing Act. Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C. §§ 315 through 320(2000)). The purpose of the Act was to stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; and to stabilize the livestock industry dependent upon the public range. 43 U.S.C. § 315a (2000); *Public Lands Council v. Babbitt* (2000), 529 U.S. 728, 733, 120 S. Ct. 1815, 1819, 146 L. Ed. 2d 753, 760; *Fallini v. Hodel* (9th Cir. 1992), 963 F.2d 275, 279; *Kidd v. United States Dep't of Interior, Bureau of Land Mgmt* (9th Cir. 1985), 756 F.2d 1410, 1411.

The Taylor Grazing Act did not close the public domain. Sections 1 and 2 of the Act authorized the Secretary of the Interior to establish grazing districts of vacant, unappropriated, and unreserved parts of the public domain that were chiefly valuable for grazing and raising forage crops, and to regulate the districts through a permit and lease system in conjunction with the States. 43 U.S.C. § 315a (2000).¹⁶ Under the Act, publication of notice of a proposed grazing district effected a withdrawal of all public lands

¹⁶ Title 76, Chapter 16, of the Montana Code Annotated, known as the Montana Grass Conservation Act, was enacted to provide a means of cooperation between cooperative grazing districts authorized and organized pursuant to Montana law and federal agencies authorized to regulate grazing on federal lands pursuant to the Taylor Grazing Act. See *Kalfell Ranch, Inc. v. Prairie County Coop. State Grazing Dist.*, 2000 MT 317, 302 Mont. 492, 15 P.3d 888; *Watson v. Barnard* (1970), 155 Mont. 75, 79, 469 P.2d 539, 541.

within the exterior boundary of the proposed district from all forms of entry or settlement. 43 U.S.C. § 315a (2000).

The federal courts, the Department of the Interior, and most commentators have consistently taken the position that the Taylor Grazing Act did not effect a permanent reservation or dedication of land or water for specific public purposes and was intended by Congress to be a land classification and management statute only.¹⁷ The United States represented to this Court that it is not asserting reserved rights in Montana's adjudication effort for stockwater pursuant to the Taylor Grazing Act.¹⁸

The Taylor Grazing Act did not explicitly amend or repeal the Acts of 1866, 1870, or 1877, or abandon Congress' historical deference to state control over the appropriation of water on unreserved federal lands. *See Kidd*, 756 F.2d at 1411; *United States v. Fallbrook Pub. Util. Dist.* (S.D. Cal. 1958), 165 F. Supp. 806, 844. In fact, the Act expressly provided that:

[N]othing in this Act 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 purposes 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.*

43 U.S.C. § 315b (2000) (emphasis added).

Although the Taylor Grazing Act did not preclude or preempt private appropriations of water, Sections 2 and 15 of the Act conferred broad authority on the Secretary of the Interior to regulate the occupancy and use of lands both within and outside of grazing districts and to attach such terms and conditions to permits as are reasonably necessary to

¹⁷ See, e.g., *Kidd v. United States* (9th Cir. 1985), 756 F.2d 1410, 1411; Memorandum from Theodore B. Olson, Ass't Att'y Gen., Dep't of Justice, to Carol E. Dinkins, Ass't Att'y Gen., Land and Nat. Res. Div., 6 Op. O.L.C. 328, 360 (June 16, 1982); Solicitor's Op. —36914 (Supp. III), 96 I.D. 211 (1988); Solicitor's Op. —36914 (Supp.), 88 I.D. 253, 256 (1981); Solicitor's Op. —36914, 86 I.D. 553, 592 (1979); George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 Envtl. L. 535, 584 (1982).

¹⁸ United States Brief in Opposition to Claimants' Motion for Partial Summary Judgment and in Support of the United States' Motion for Partial Summary Judgment, Case 40E-A 9 (Feb. 11, 1991).

fulfill the purposes of the Act and the mandates of other federal laws. 43 U.S.C. §§ 315a & 315m (2000).¹⁹ Since the first set of grazing regulations were issued, BLM policies and regulations with respect to the appropriation of private stockwater rights on BLM-managed lands have changed, often depending on the administration in political office at the time.²⁰

Accordingly, when adjudicating private stockwater claims, claimed to have been appropriated on federal lands that are administered and managed pursuant to the Taylor Grazing Act, this Court may need to consider whether any federal regulations, permits, or agreements in effect *at the time of the appropriations* precluded, superceded, or restricted the right to appropriate or exercise private stockwater rights on the federal land. As each statement of claim is *prima facie* proof of its contents, the burden of proving the existence

¹⁹ Section 2 of the Act authorized the Secretary to:
make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range.

43 U.S.C. § 315a. Section 15 of the Act authorized the Secretary to, “where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district . . . to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe.” 43 U.S.C. § 315m.

²⁰ Joseph M. Feller, Professor, College of Law, Arizona State University, states that:

Although BLM had no authority to cancel or modify state-created water rights that pre-dated the Taylor Grazing Act, until the early 1980s BLM typically required that any new livestock water rights on BLM-managed lands be in the name of the United States, thus precluding the establishment of additional private stockwater rights on those lands. . . .

BLM changed course in the 1980s under President Reagan and his Interior Secretary, James Watt. The Reagan Administration not only allowed but encouraged ranchers to file for stockwater rights on BLM lands in their own names. The agency changed course again under the Clinton Administration. The Rangeland Reform regulations promulgated by Interior Secretary Bruce Babbitt in 1995 reestablished the pre-1980s policy and conformed BLM’s policy with that of the Forest Service by providing that stockwater rights on BLM land “shall be acquired, perfected, maintained, and administered in the name of the United States” to the extent permitted by state law.

The current Bush Administration’s proposed new grazing regulations would change the rules concerning public-land stockwater rights once again. The proposed regulations would delete the requirement that new water rights be in the name of the United States. This change would allow rancher-permittees to acquire rights in their own names, while leaving BLM the “option” of acquiring water rights in the federal government’s name where permitted by state law.

Joseph M. Feller, *Ride-em Cowboy: A Critical Look at BLM’s Proposed New Grazing Regulations*, 34 *Env’tl. L.* 1123, 1138 (2004) (footnotes omitted). Although the public review and comment period for a draft environmental impact statement to support the proposed December 8, 2003 revisions has ended, apparently no new rules have yet been finalized.

of any such restrictions would be on any objector advocating such restrictions. Absent such proof, this Court will presume that Montana law controlled the use and disposition of any unreserved water resources on federal public lands.

The Water Master correctly concluded that water rights located in Basin 40E within the grazing districts at issue, withdrawn under the Taylor Grazing Act of 1934, are subject to Montana substantive and procedural water law. (Master's Memorandum at 12).

F.

Charles M. Russell and UL Bend National Wildlife Refuges

In 1936, President Roosevelt created the Fort Peck Game Range by withdrawing approximately 762,000 acres of public domain in Montana.²¹ On March 25, 1969, the Secretary of the Interior withdrew several thousand more acres to create the UL Bend National Wildlife Refuge. Pub. Land Or. 4588 (March 25, 1969). Public Land Order 2591 changed the name of the original Fort Peck Game Range to the Charles M. Russell National Wildlife Refuge.

The claims involved in this case are not for federal reserved water rights, but for private stockwater rights. Therefore, for purposes of these motions for summary judgment, this Court simply reiterates the well-established rule that valid state based water rights appropriated prior to creation of a federal reserved water right are not affected by any federal reservation and that state based water rights appropriated subsequent to the creation of a federal reserved water right in the same source, though not necessarily precluded, *New Mexico*, 438 U.S. at 700-02, are subordinate and subject to the federal reserved right. *Cappaert*, 426 U.S. at 138; *Arizona*, 373 U.S. at 597-600.

Over time, the Department of the Interior has established policies, promulgated regulations, and formed agreements that may have affected the acquisition or exercise of

²¹ Information and Position Brief of the United States of America 2 (Feb. 5, 1990) (quoting Exec. Order No. 7509, 3 C.F.R. 227 (1936)). See also *Schwenke v. Secretary of Interior* (9th Cir. 1983), 720 F. 2d 571, 573.

these private stockwater claims.²² Accordingly, when adjudicating the individual claims in this case that were appropriated on the CMR or UL Bend, this Court may need to consider whether any federal regulation, permit, or agreement in effect at the time of the appropriations precluded, superceded or restricted the right under state law to appropriate or exercise private stockwater rights on these lands. Again, however, the burden of proving such restrictions is on the objector advocating the restriction. Absent such proof, this Court will presume Montana law controls the use and disposition of the unreserved water resources on the refuges in this case.

G.

Collateral Estoppel

Although not mentioned by the attorneys, the primary issue in this case was litigated by the United States to final judgment before the Water Court in the Powder River Preliminary Decree in 1983.²³ In its March 31, 1983, Findings of Fact and Conclusion of Law, the Water Court identified the issue as follows:

Does title to the water right vest in the appropriator (individual permittee) or the United States as owner of the land where the water is diverted?

Although the language used is slightly different, the issue presented by the United States in its Motion for Partial Summary Judgment in the instant case (set forth on pages 3 and 4 hereof) appears to be identical with the issue the United States presented to the Water Court in the 1983 Powder River action.

In its 1983 Conclusions of Law, the Water Court concluded:

II.

The water law of the governing state shall be applied to public domain lands of the United States.

III.

The point of diversion of all water rights at issue is on public domain lands owned by the United States.

IV.

²² See e.g., Joint Regulations of the Secretaries of the Interior and Agriculture Relating to the Protection and Administration of Game Ranges, or Wildlife Refuges, Established in Conjunction with the Organization of Grazing Districts Under the Taylor Grazing Act, Fed. Reg. 37-672 (Feb. 26, 1937, filed March 8, 1937).

²³ See Powder River Claim File #3443 (Main Consolidation File).

The appropriators of the water are individual permittees or their predecessors in interest.

V.

Under Montana law, title to a water right vests in an appropriator regardless of ownership of land.

On April 14, 1983, the Water Court entered its Final Judgment in the Powder River Decree. On May 16, 1983, the United States filed its Notice of Appeal to the Montana Supreme Court. On May 25, 1983, the United States filed its Amended Notice of Appeal. On September 20, 1983, the "appeal of the federal appellant," was dismissed by the Montana Supreme Court (Voluntary Dismissal of Appeal).

Significantly, as noted earlier on pages 18-20, the Solicitor General and Assistant Attorney General Theodore B. Olson issued their Opinion and Memorandum in 1981 and 1982 and both confirmed the legal principle that federal land managers must follow state water laws and procedures in the absence of congressional intent to the contrary. Less than one year after issuance of the Olson Memorandum, the United States dismissed its Powder River appeal.

In view of the prior litigation, the doctrine of collateral estoppel or issue preclusion may be applicable to one or more issues in this case. See *Peschel v. Jones* (1988), 232 Mont. 516, 521, 760 P.2d 51, 54 and *App. For Beneficial Water User Permit* (1996), 278 Mont. 50, 61-62, 932 P.2d 1073.

Conclusion

The application of water to a beneficial use in Montana, together with the requisite intent to appropriate, constitutes an appropriation, unless initiated in trespass. *Missouri River Drainage Area*, ¶ 22; *Connolly*, 102 Mont. at 298-301, 57 P.2d at 782-833; The watering of livestock is a beneficial use of water. *Missouri River Drainage Area*, ¶ 26. The privately owned livestock on the public domain did not arrive through trespass. Instead, for many years, the United States government encouraged its western citizens to use the public domain to pasture and water their flocks and herds. As a result, many private livestock owners appropriated stock rights from water sources on the public domain.

Whether any federal rules, regulations, or agreements in effect on the date of the appropriation work as restrictions on these stock water rights are issues that may have to be resolved on a case by case basis. But, in general, this Court cannot conclude, as a universal principle, that Montana or federal law prohibited private livestock owners from acquiring state based water rights for the use of their livestock on the public domain prior to July 1, 1973; or that title to the rights to the use of water for livestock on the public domain and reserved lands should always be in the name of the United States.

DATED this 29th day of June, 2005.

/s/ C. Bruce Loble

C. Bruce Loble
Chief Water Judge

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