

Nos. 32278 and 32279

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

JOYCE LIVESTOCK,
Appellant,
v.

UNITED STATES,
Respondent.

APPELLANT'S REPLY 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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In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, within the Jefferson River Drainage Area, Including All Tributaries of the Jefferson River in Broadwater, Gallatin, Madison, Jefferson and Silver Bow Counties, Case No. 41G-190, 41G-W-197162-00, 41-W-197167-00, Hamilton Ranches Partnership (Claimant) (July 19, 2005) (“*Hamilton Ranches*”). 16, 25, 26

I. STATEMENT OF THE CASE

In view of the United States' Answering Brief, it is more appropriate to discuss what this case is *not* about instead of beginning with what this case is actually about. This case is not about who owns the federal land. At no time has Joyce Livestock ever asserted an ownership interest in federal land, nor has Joyce Livestock ever challenged the United States' ability to regulate the federal rangeland. Plain and simple, this case is about water rights - water rights that have been validly appropriated to a beneficial use by Joyce Livestock and its predecessors under Idaho law. These water rights were validly acquired pursuant to state law, and are recognized and given explicit protection in the federal Taylor Grazing Act, 43 U.S.C. § 315b. Attempts by the United States to distract this Court from the true issues should be rejected.

The United States also should not be successful in its attempts to leave the Court with the impression that cattle owned by Joyce Livestock and its predecessors wandered aimlessly throughout the range, similar to nomadic herds. The clear and convincing evidence at trial proves otherwise. As detailed below, the use of Jordan Creek in Idaho and the surrounding range by livestock owned by Joyce Livestock and its predecessors occurred on a routine, annual, and consistent basis. As the District Court correctly observed, citing to its decision in *LU Ranches II*,¹ the court must “distinguish the situation between a nomadic herder grazing livestock on public rangeland from the situation involving a livestock rancher that historically and routinely

¹ *Memorandum Decision and Order on Challenge, Subcases 55-10288b, et al. (LU Ranches II)* (January 3, 2005).

used adjacent public rangeland as an integral part of his ranching concern.” Joyce Livestock’s cattle operation was based on ranch land owned in fee simple in close proximity to Jordan Creek and from which it used the claimed water rights historically, continuously, and consistently from the 1860s to present.

Finally, the United States should not be permitted to re-write water law in the state of Idaho, with the effect of turning this prior appropriation state into a riparian state. In arguing that Joyce Livestock’s water rights are not appurtenant to the base ranch properties, the United States asserts that “Instream stock water right(s) on rangelands are appurtenant to the public lands because they are physically necessary to the land’s use for livestock grazing.” United States’ Answering Brief, p. 32. First, these lands are not “public lands.” They are lands withdrawn by the United States under the authority of the Taylor Grazing Act, specifically for the purpose of creating grazing districts. The United States’ theory in this appeal is tantamount to a riparian theory of water right ownership, whereby only the United States can own rights to water that flow through federally administered lands. Such a position is contrary to the laws of state of Idaho and throughout the western states, and is specifically contradicted by the United States’ own concessions in litigation in Montana that private stockwater rights located on federal land are appurtenant to the private base ranch properties. *Hamilton Ranches*, Closing Order (August 29, 2006).² It is also contrary to the dictates of the United States Congress and would have the

² *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, within the Jefferson River Drainage Area, Including All Tributaries of the Jefferson River in Broadwater, Gallatin, Madison, Jefferson and Silver Bow Counties*, Case No. 41G-190, 41G-W-197162-00, 41-W-197167-00, *Hamilton Ranches Partnership (Claimant) Closing Order (August 29, 2006) (“Hamilton Ranches”)*. For the

effect of nullifying provisions in the Taylor Grazing Act, which specifically recognized the right of private parties, who have no ownership interest in the underlying federal land, to appropriate and own water rights located within federally administered grazing allotments. Under Idaho law, these privately owned water rights are appurtenant to the base ranch properties and can be transferred as appurtenances. Joyce Livestock is thus entitled to its water rights with its claimed priority date of 1898.

II. ARGUMENT

A. Recognition of Joyce Livestock’s Private Water Rights Will Not Result in the a “Monopolization” of Federal Rangeland

From the beginning of its brief forward, the United States argues that Joyce Livestock is not entitled to its claimed water rights because it will result in a “monopolization” of the rangeland and because the law does not permit individuals to own federal land. United States’ Answering Brief as Respondent (“United States’ Answering Brief”), p. 4, 20, 33. In support, the United States cites to cases holding that private parties do not have rights to ownership or exclusive use of public land. *Id.* None of this authority supports the United States’ position in this case. First, all of the authority cited by the United States concerns the issue of a private claim to ownership of federal *land* and not water. Second, the Taylor Grazing Act and other federal statutes specifically recognize the right of private parties to own water rights on federal land. Indeed, had the government believed, as it now asserts, that ownership of water rights will lead to an unacceptable consequences – “monopolization” of the surrounding lands – then the

convenience of the Court, a copy of the Hamilton Case is attached hereto as Appendix “C”

United States would not have enacted laws specifically protecting the right of private citizens to appropriate and beneficially use water rights on federal land.

Every one of the cases cited by the United States for the proposition that private parties cannot own water rights on federal land are irrelevant and have no probative value whatsoever because each of the cases involve asserted rights to land, not rights to water and, further, there is separate and clear statutory recognition of private parties' ability to own water rights on federal land. In an attempt to defeat Joyce Livestock's claims, the United States makes the following statement, "[f]urther undermining the presumption of an intent to appropriate stock water on the range by owners of properties dependent on the use of public rangelands to support livestock operations is case law throughout the West to the effect that no individual could assert a greater right than that of the public as a whole to the use of the public grazing commons." United States' Answering Brief, p. 20. Taking each of the cases for this proposition cited by the United States in turn, it is clear that the issues presented in those cases bear no resemblance to the water right issues pending before this Court.

McGinnis v. Friedman, 17 P. 635 (Idaho 1888) involved asserted rights to pasture grown on the public lands. *McGinnis* was a suit between private parties, specifically a party who had used the federal lands for grazing for many years sought to exclude other stockholders from those lands. Appellants argued that they had the right to use the federal lands for pasture, and to exclude others from using the same public lands. *McGinnis*, 17 P. at 636. Appellants based their argument on a theory of adverse possession, and argued that "they have held these (public) ranges for several years, and therefore they hold the same now under an adverse possession, as to

this respondent, from entering thereon with his sheep.” *Id.* Thus Court held that under the laws of the United States, a private party does not, through use, obtain an interest in federal land. *Id.* The present suit, however, is not a dispute between private parties, and it is not a dispute about use or ownership of public land. Joyce Livestock does not seek an ownership interest in federal land, and it is not seeking to exclude, limit, or define allowable grazing within the grazing allotment. Instead, unlike the case in *McGinnis*, this case solely involves a water right claim filed in the Snake River Basin Adjudication (“SRBA”).

Buford v. Houtz also has nothing to do with the ability of private parties to appropriate water rights on federal lands. *Buford v. Houtz*, 133 U.S. 320 (1890). *Buford* was a trespass action described by the United States Supreme Court as follows:

The appellants being stockraisers, like the defendants, whose stock are raised and fattened on the unoccupied lands of the United States mainly, seek ... to exclude the defendants from the use of this public domain as a grazing ground, while they themselves appropriate all of it to their own exclusive use. This they propose to do, not by any act of congress or of any legislative body whatever, but by means of this bill in chancery, obtaining an injunction against the defendants, who they allege to be the owners of 200,000 sheep grazing upon these public lands, which shall exclude defendants from the use of them, and thereby secure to themselves the exclusive right to pasture their 20,000 head of cattle upon the same lands.

The right to pasture on federal lands is not at issue in this case, nor is trespass. Again, the only issue in the present case is recognition of private water rights, an issue that is distinctly absent from the *Buford* decision involving federal lands and pasturage.

Next, the United States cites to *Light v. United States*, 220 U.S. 523 (1911), again for the proposition that the “government’s consent to the use of public lands for grazing did not confer

any vested right on people using the public lands.” United States’ Answering Brief, p. 4. In *Light*, a cattle owner failed to secure a stock-grazing permit for grazing his cattle upon federal reserved land, the Holy Cross Forest Reserve. At issue, then, was the United States’ ability to regulate grazing upon the federal land. No such issue exists in the present litigation. Specifically, Joyce Livestock’s grazing permits are not at issue, only private water rights which exist separate and apart from the land.

The result remains the same with the remaining cases cited by the United States. Again and again, the United States builds its case on legal authority that has nothing to do with private ownership of water on public or federal land. United States’ Answering Brief, p. 4, 20, 33, citing *Camfield v. United States*, 167 U.S. 518 (1897) (an action by the United States to compel the removal of a fence built by defendants to enclose 20,000 acres of public lands for their private and exclusive use); *Anthony Wilkinson Livestock Co. v. McIlquam*, 83 P. 364 (Wyoming 1905) (an action between private parties arising from the defendant’s fencing of private lands and alleged interference with plaintiff’s privilege of pasturage on public lands); *Healy v. Smith*, 83 P.583 (Wyoming 1906) (attempts by private cattle growers to exclude sheep herders from public lands).

Most telling is the United States’ citation to *Utah Power & Light v. United States*, 243 U.S. 389 (1917) and *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209 (10th Cir. 1999).³ The United States claims as follows: “The nexus between base property and rangelands is

³ At issue in *Diamond Bar* was plaintiff’s asserted claim to a private property right to *graze cattle* on the public domain and a possessory right to graze on federal land. *Id.* at p. 1213.

governed by federal law, under a system of permits that is subject to change and confers no permanent right even to use public lands, much less a property interest in them. In addition, Congress has long distinguished between a water right and the privilege to use federal land to make use of water rights. Acquisition of a water right under state law does not carry with it a right to use federal land to exercise that right.” United States’ Answering Brief, p. 33, ft.n. 18. The United States is attempting through these arguments to cloud the issues. This case is not about use of federal lands; that has already been decided in favor of Joyce Livestock by the U.S. Congress under the Taylor Grazing Act. It also is not about a property interest in federal lands, nor is it about access to water rights. None of those issues are before this Court, and none of those issues have any bearing on the case at hand which solely involves the validity of Joyce Livestock’s appropriative water rights and the priority date to be assigned to those rights.

The United States is forced to rely on cases limiting private parties’ property interest in federal *land* because there are no similar cases dealing with water. This is because private parties’ ability to own water rights on federal lands is given specific statutory protection and has been uniformly recognized by the Courts. The Taylor Grazing Act specifically states:

[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.

The Taylor Grazing Act, 43 U.S.C. § 315b.⁴ As the United States’ Supreme Court held in

⁴ This is in accord with other federal laws, dating to 1866, that sever rights to water from interests in land, and that specifically recognize the right of private parties to appropriate water rights on public land, and finally recognize that the disposition of water rights will be determined

California Oregon Power Co. v. Beaver Portland Cement Co., “[b]y its terms, not only all surplus water over and above such as might be appropriated and used by the desert-land entrymen, but ‘the waters 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.’” *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) (*emphasis added*) (*internal citations omitted*).

Broad authority has been given by statute, and confirmed by court decisions at the highest level, that private parties have the right to acquire and hold water rights on the then public domain or on federal land. Clearly, in enacting these laws, the United States Congress did not fear a “monopolization” of federal land by private parties arising from private ownership of water rights, nor did Congress believe that ownership of private water rights would interfere with or affect government management of the surrounding rangelands. The Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. §§ 315-320. As recognized by statutory and decisional law, ownership and control of the federal range is distinctly different from ownership of water. Those issues must not be confused.

B. Under Established Law, the Act of Stock Watering from a Source Constitutes a Valid Appropriation of a Stockwater Right and That Water Right, Once Acquired, Carries with it a Priority Date Relating Back to the First Date That the Water Was Placed to Beneficial Use.

1. All Elements of a Water Right under Idaho Law Are Met by Demonstrating That Cattle Watered from a Source.

by state law. The Mining Act of 1866, 16 Stat. 218, 43 U.S.C. §661; The Desert Land Act, 19 Stat. 37, 43 U.S.C. §321; The Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. §§ 315-320.

Although the only issue presented by Joyce Livestock's appeal No. 32278 is the priority date to be assigned to its water rights decreed to Joyce Livestock by the District Court, the United States nonetheless uses its Answering Brief filed in No. 32278 to challenge the whole of Joyce Livestock's stockwater rights. United States Answering Brief, p. 18-23. The United States' arguments are unavailing. Under the laws of Idaho and throughout the western states, physical application of water to a beneficial use through stockwatering constitutes a valid appropriation. In the case of Joyce Livestock, all requirements for the acquisition of a stockwater right are met, including the manifestation of intent to appropriate a water rights by the physical act of placing the water to a beneficial use.

The fundamental test for an appropriation of water under Idaho law is diversion and application of the water to beneficial use. As described by the Idaho Supreme Court:

The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. Kinney on Irrigation (2d Ed.) § 725. When one diverts water hitherto unappropriated and applies it to a beneficial use, his appropriation is complete, and he acquires a right to the use of such water.

Sarret v. Hunter, 32 Idaho 536, 185 P. 1072, 1074 (1919); *Cantlin v. Carter*, 88 Idaho 179, 186 (1964) ("By actually diverting and applying water to a beneficial use, a legal appropriation is made.") For an instream stockwater right, appropriation through diversion and application to a beneficial use is accomplished by placing stock near a water source and the drinking of water by the stock. I.C. § 42-113(2) (for stockwater rights acquired through the beneficial use method of appropriation the priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land); *Stevenson v. Steele*, 93 Idaho 4, 11 (1969)

(recognizing appropriation of water for watering of stock); *Hunter v. United States*, 388 F.3d 148, 153 (9th Cir. 1967) (for purposes of stockwatering, appropriation is evidenced by watering livestock directly from the source); *Steptoe Livestock Co. V. Gulley*, 295 P. 772 (Nev. 1931) (mere turning of livestock upon the then public domain carrying streams held to be an appropriation of water for stockwatering purposes); *Hage v. United States*, 51 Fed. Cl. 570 (2002). As previously held by the SRBA District Court, for an instream stockwater right, the party claiming a stockwater right will point to the act of placing stock it owns near a water source and the drinking of water by the stock as the act demonstrating intent to appropriate as well as the actual accomplishment of an appropriation of a stockwater right. *In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Report and Recommendation (September 30, 1998).

Notwithstanding the above authority, the United States argues that watering cattle from a stream is insufficient to satisfy the requirement of a "physical diversion." United States' Answering Brief, p. 18-19. This argument is inconsistent with the law in the state of Idaho and throughout the western states, cited above, which uniformly supports stockwater rights acquired by watering livestock from the water source. As a practical matter, it is hard to imagine a more outward, physical demonstration of diversion than cattle drinking water directly from a stream.

It is ironic that the United States claims that watering cattle from a water source is insufficient to appropriate a water right while at the same time arguing in its own appeal, No. 32279, that the act of managing *land* is sufficient to satisfy the requirements of diversion and application of water to a beneficial use. United States' Answering Brief, 18. The United States

is arguing inconsistently and illogically. As between the two, watering from the claimed sources by cattle owned by Joyce Livestock and its predecessors is an outward, physical demonstration of “diversion from the natural source and its application to a beneficial use” and it puts all surrounding parties, including the United States, on notice of the same. *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072, 1074 (1919); *Cantlin v. Carter*, 88 Idaho 179, 186 (1964). In contrast, the United States, which has never actually placed the water at issue to beneficial use, and has done nothing prior to the initiation of these proceedings to put *anyone* on notice of its intent to acquire water rights, is claiming that its management of grass and land is sufficient to support a water right based on the beneficial use method of appropriation.

In an attempt to rebut established authority recognizing stockwater right appropriations, the United States cites to *Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059 (Idaho 1909) and *State ex. rel. Reynolds v. Miranda*, 493 P.2d 409 (N.M. 1972) each for the proposition that use of a stream for livestock watering, or grass surrounding a water source, does not constitute a physical diversion of water sufficient to support a beneficial use water right claim. United States’ Answering Brief, p. 19. However, in *Hutchinson*, the water right claim at issue was based on a *riparian* theory of water right ownership, not based on beneficial use. Because beneficial use was not alleged as a basis of the claimed water right, the Court made *no* decisions on the issue of whether stockwatering is sufficient to support a beneficial use or appropriative water right. *Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059, 1061 (Idaho 1909). The Court stated as follows:

In further discussion of the case, it must be remembered that the *respondent*

has not alleged or established any appropriation or diversion of the waters of this stream for any useful or beneficial purpose. He makes no claim to the water by reason of any appropriation or diversion in accordance with the statute, but rather bases and asserts his right on the fact that he is a riparian proprietor... A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water of the stream and is applying it to beneficial use. To this extent, therefore, the common-law doctrine of riparian rights is in conflict with the Constitution and statutes of this state and has been abrogated thereby.

Id. at p. 1061-1062 (*emphasis added*).

The United States' reliance on *State ex. rel. Reynolds v. Miranda* similarly has no application to the issues at hand. The United States cites that case for the proposition that "use of grass and water by livestock not (sic) an appropriation of water." United States' Answering Brief, p. 19. The actual holding of that case was that a "*man-made diversion*, together with intent to apply water to beneficial use and actual beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes." *State ex. rel. Reynolds v. Miranda*, 493 P.2d 409, 411 (N.M. 1972). However, this New Mexico case cited by the United States is in conflict with established Idaho law which holds that there is *no* diversion requirement for stockwatering. In *State v. United States*, the Idaho Supreme Court held as follows:

Idaho water law generally requires an actual diversion and beneficial use for the existence of a valid water right. Only two exceptions to the diversion requirement exist. *No diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water right for stock watering ...* In addition, State entities acting pursuant to statute may make non-diversionary appropriations for the beneficial use of Idaho citizens.

State v. United States, 134 Idaho 106, 111 (2000), citing *R.T. Nahas Co. v. Hulet*, 106 Idaho 37,

45 (Ct. App. 1983), *Stevenson v. Steele*, 93 Idaho 4, 11 (1969). Contrary to the United States' position, all elements of a beneficial use water right are satisfied by demonstrating that water was historically consumed by livestock in conjunction with their grazing on the surrounding land, and the District Court in its Memorandum Decision was correct to so hold. *Id.*; I.C. 42-113(2).

2. The Validity of Joyce Livestock's Stockwater Appropriations Is Not Affected by the Fact That Their Predecessors Watered Their Livestock in Common with Each Other.

Again, even though the only issue in Joyce Livestock's appeal No. 32278 is the priority date to be assigned to its water rights, the United States repeatedly argues in its Answering Brief that Joyce Livestock and its predecessors could not have acquired a water right because they grazed and watered their cattle in common, and the earliest predecessors did not have "exclusive use" of the water sources. United States' Answering Brief p. 19, 22, 24-26. Contrary to the United States' statements, exclusive use and control over water is not a component of a water right under Idaho law. Indeed, such a requirement would be contrary to the prior appropriation system in Idaho which, by definition, awards water rights to multiple parties using the same water source in common with one another, and assigns priority dates to the various water rights based on the first act of appropriation.

When presented with theories by the United States that exclusive use of a water source is a necessary component of a stockwater right, the District Court correctly rejected the United States' position outright. ROA bsn 195, 209-210: Memorandum Decision and Order on Challenge⁵. The Idaho Constitution and the laws of this state recognize Idaho as a prior

⁵ ROA refers to the Record on Appeal.

appropriation state. By definition, prior appropriation rejects any notion of an “exclusive use of water” requirement and instead defines an entire system for the administration of water rights based on the principal that as between multiple appropriators who use a single water source, priority will be given based on the concept of “first in time is first in right.” Idaho Const., art. XV § 3 (“The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied ... Priority of appropriation shall give the better right as between those using the water ...”); I.C. § 42-106 (“As between appropriators, first in time is first in right.”); *Village of Peck v. Denison*, 92 Idaho 747, 749 (1969) (water from a source is subject to multiple appropriations by different users so long as there is water available for appropriation); *Crow v. Carlson*, 690 P.2d 916 (1984) (water rights in Idaho are administered “first in time, first in right”) . There is simply no requirement under Idaho law that you must exclude others from a water source in order to perfect a water right.

In further pursuit of its “exclusive use” theory, the United States cites to *Stephoe*, *Robinson*, *Jones* and *Tattersfield*. However, as detailed below, absolutely none of these cases hold that exclusive use of a water is a prerequisite to appropriating a water right in the state of Idaho.

The United States cites to *Robinson v. Schoenfeld*, 218 P. 1041 (1923), for the proposition that Joyce Livestock’s water right should be denied for failure to show an intent to appropriate water for an “exclusive use.” It is a 1923 case arising under the laws in the state of Utah and specifically conflicts with the law in the state of Idaho. Further, the *Robinson* case is distinguishable on its facts. In that case, at issue were conflicting claims to the right to water in

certain springs. The Plaintiff in the action claimed ownership based on use of the waters for stockwatering by Plaintiff and his predecessor for over 20 years. The Defendant based his claim on his application to the state engineer to appropriate the waters of the springs. In sum, the case involved a dispute between two parties regarding their respective rights to use the waters in the springs. In contrast, in the present case, there is no dispute between the actual appropriators regarding ownership of the waters at issue; all of the entities that actually appropriated the water at issue herein have been acquired by Joyce Livestock and are now part of the Joyce Ranch. *See* Testimony of Paul Nettleton, p. 659-683. Given the fact that *Robinson* is a 1923 case based upon the state law of Utah, the factual differences between *Robinson* and the present case, and the law of prior appropriation in the state of Idaho which recognizes multiple appropriators on the same source of water, the United States' citation to the *Robinson* case does nothing to bolster the United States' position. *Village of Peck v. Denison*, 92 Idaho 747, 749 (1969) (In Idaho, water from source is subject to multiple appropriations).

Steptoe Live Stock Co. v. Gulley, 295 P. 772-773 (Nev. 1931) also does not, as the United States asserts, stand for the proposition that exclusive use is necessary to establish a water right. This Nevada case addresses the fundamental requirements of an appropriative, common law stockwater right but, contrary to the United States' argument, it does not include a requirement that there be exclusive use of the water. The Court wrote as follows:

[I]n this case the court below found that a well-established, well-recognized custom, of over forty years' duration, of appropriating waters in the manner shown for the watering of live stock, existed in the state of Nevada. We think that our conclusion is not only justified by such well-established custom, but that it is fortified by the act of Congress referring to streams upon the public

domain, *which provides that rights based on priority of possession, which have vested and accrued and are recognized and acknowledged by local custom, shall be maintained and protected...* 43 U.S.C. § 661.

Id. at p. 775. If exclusivity of use was a determinative factor in deciding whether a valid appropriative stockwater right had been acquired, there simply would be no reason for the doctrine of prior appropriation to exist or apply. As discussed previously, by definition, there is no need to apply the doctrine of prior appropriation if there is only one appropriator, or one person putting the water to exclusive beneficial use.

Tattersfield similarly does not stand for the proposition that to appropriate water the use must be exclusive, nor does it stand for the proposition that in Idaho private parties cannot acquire an ownership of water right with a place of use on public land. *Tattersfield v. Putnam*, 41 P.2d 228 (Ariz. 1935). First, this is an Arizona case applying the laws and customs of that state. Second, *Tattersfield* does not concern stockwatering nor does it involve the appropriation of water rights on public lands. Rather, the holding in this private irrigation case was limited to the following: “We hold, therefore, that in order to appropriate the right to use water for irrigation the appropriator must be the owner or possessor of land which is susceptible of irrigation, and that the appropriation once made attaches permanently to such land none other, and cannot be transferred therefrom.” *Id.* at p. 234.

Finally, the United States cites to a Montana case, *Jones v. Hanson* for the proposition, again, that exclusive use of a water source is required to appropriate a water right. United States’ Answering Brief, p. 25, *citing Jones v. Hanson*, 320 P.2d 1007 (Mont. 1958). This theory of

exclusive use has been expressly rejected by Montana Courts. In the *Hamilton Ranches* case⁶, the Montana water court held as follows:

The United States also contends that in order to appropriate a valid water right in Montana prior to July 1, 1973, an appropriator was required to maintain exclusive use, dominion, and control over the claimed water source. The United States bases this argument on statements made by the Montana Supreme Court in *Jones v. Hanson* ... The *Jones* case does not stand for the proposition asserted by the United States. The language in *Jones*, cited by the United States, stands only for the proposition that proof of exclusive use, dominion, and control 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... The Montana Supreme Court set forth the controlling rule in *Bullerdick v. Hermsmeyer*: 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 ... 32 Mont. 541, 554-55, 81 P. 334 (1905). In *St. Onge v. Blakley*, 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” ... 76 Mon. 1, 245 P. 532 (1926) ... More recently, in *Bean Lake III*, the Montana Supreme Court recognized the existence of pre-July 1, 1973 instream recreation, fish and wildlife appropriations. In doing so, it did not include “exclusive use” as an essential element in the appropriation of a valid pre-July 1, 1973 water right in Montana.

Hamilton Ranches, Opinion p. 12-13 (July 19, 2005).

The law in prior appropriation states, including the state of Idaho, is that multiple appropriators can own and maintain water rights on the same water source. Idaho const., Art.

⁶ See Appendix “A”: *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, within the Jefferson River Drainage Area, Including All Tributaries of the Jefferson River in Broadwater, Gallatin, Madison, Jefferson and Silver Bow Counties*, Case No. 41G-190, 41G-W-197162-00, 41-W-197167-00, *Hamilton Ranches Partnership (Claimant)* (July 19, 2005) (“*Hamilton Ranches*”).

XV, § 3; I.C. § 42-106; *Village of Peck v. Denison*, 92 Idaho 747 (1969). Indeed, fundamentally that is what drove the Snake River Basin Adjudication which provided a judicial mechanism to decree water rights to the many, multiple users of the Snake River and its tributaries by, among other things, priority of possession. The United States' arguments with respect to exclusive use are in absolute conflict with the laws of prior appropriation in the state of Idaho and have no bearing on the validity of Joyce Livestock's claimed rights.

3. Evidence That Cattle Grazed upon Particular Land Also Is Evidence That They Consumed the Stockwater Thereon

The evidence in this case is replete with un rebutted evidence of historic water appropriations from the claimed water sources by Joyce Livestock and its predecessors in interest. Moreover, Idaho law specifically recognizes that evidence of grazing near a water source also serves as evidence of the appropriation of water from adjacent sources. Idaho Code § 42-113 states in pertinent part as follows:

For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation, the priority date shall be the first date that water historically was used for livestock watering *associated with grazing on the land*.

I.C. § 42-113(2) (*emphasis added*). As previously briefed in Appellant's Opening Brief, the record in this case demonstrates historic, systematic, routine use of these stockwater sources and the surrounding grazing lands by stock owned by Joyce Livestock and its predecessors in interest since the 1860s. Appellant's Opening Brief, p. 4-9, 16-21.

The United States makes the following assertion, "Joyce's claim to a pre-1935 priority

date fails because there is insufficient evidence of pre-1935 use of the particular places of use ...

The very general testimony by Mr. Lewis and Mr. Nettleton that historically various parties allowed their livestock to graze in the vicinity of Jordan Creek does not constitute sufficient evidence of routine, consistent use of the particular places of use claimed.” United States’

Answering Brief, p. 23. An examination of the actual record reveals otherwise.

Mr. Paul Nettleton described, at length, the historic stock operations of Joyce Livestock and its predecessors. Through his testimony and corroborating documentary and testimonial evidence, it has been established that the stock were taken to water at Jordan Creek and to forage on the surrounding rangeland in the same way, and following the same pattern, for well over a century. Every year from the 1860s forward to today’s Joyce Livestock, the stock were driven up to Jordan Creek as soon as the snow cleared, and stayed there until the snow returned in October or November. His testimony included the following:

(p. 670)

Q: ... from discussions with your mother and your dad and the Joyce family, did they actually take these cattle down into the Jordan Creek area for their dairy operation back in those days?

A: Yes... That would have been the 1860s, probably early 1870s ...

(p. 685)

Q. ... *Do you still run your cattle on an annual basis pretty much, as it’s been done historically?*

A. *Certainly. It’s a – you know, it’s a seasonal business. You have – you have certain seasons where you ... have to move the cattle operation. If that’s what you want me to go through, I can go through that...*

(p. 694-696)

Q. ... the original question is, historically, all these ranches owned by the Joyces, the Nettletons, what is your understanding of how historically they ran cattle on an annual basis ...

A. ... We winter – we have winter range, and the Con Shea allotment and the Fossil Butte allotment, we winter there, we take them to the ranch during the month of March to the main headquarters. They are worked. Calves are branded, what have you. 1st of April they're turned out on the spring range. That would be the – well, this is obviously an old map, but it would be the same area, it's called Oreana spring area here. Also was on this side, this side is also a spring area.

We use it as a rotation system now, and when they got, what – and they followed, like Gene Lewis said, they followed the grass to the mountains and, and just followed the green grass as they went. Long in about October, November, at least, at least by November, when the snows were beginning to come in the high country, they brought the cattle back down, and they subsequently went back on the winter ranges to start the cycle all over again.

Q. And when if ever did they get down to the Jordan Creek area?

A. In the Jordan Creek area, I, I would assume some of them got in there just as soon as the snow would allow, which would have probably been May. We try not to get in there until June nowadays, and mainly because we can't even fix the fences because of the snow, until sometimes close to the first of July. But they, they probably go in, in those days, not worrying about fences, they probably got in there in May, you know, each entity ... They got there as early as May and probably left in late October in the Jordan Creek area.

T.Tr. Vol. I, p. 670-696 (*emphasis added*).

The grazing applications of Joyce Livestock's predecessors corroborate the historic and seasonal use of Jordan Creek and the surrounding rangeland. As found by the District Court, all places of use claimed by Joyce Livestock today are reflected in the grazing applications filed by Joyce's predecessors, Mr. Shea and Joyce Bros. Livestock Co. ROA bsn 195, 212-215:

Memorandum of Decision and Order on Challenge. In those applications, Shea and Joyce Bros. Livestock certified that the same lands covered by the grazing applications (and which contain all places of use for Joyce Livestock pending water right claims) had been in use as part of ongoing ranch operations prior to 1934 and dating back to 1866. T. Exh. 55 bsn 550: Affidavit of John

Shea ("I owned an operated a cow outfit in the Sinker Creek and Jordan Creek water shed beginning in 1928 until I sold out in 1938"); Tr. Exh. 85: Joyce Bros. Livestock Co. Application for Grazing Permit (certifying the use of the same grazing lands covered by the grazing application in the Jordan Creek area, noting the seasonal use of the same, and certifying that the same lands covered by the application have been so used since 1866); T. Exh. 87: John Shea Application for Grazing Permit (certifying the seasonal use of the same lands covered by the grazing application, and certifying that the same lands covered by the application have been used by him for a period of over 10 years); T. Exh."O": Grazing Application of John Shea (specifically identifying use of and control of portions of Jordan Creek). Joyce Livestock and its predecessors have been using the federal lands surrounding Jordan Creek that are today covered by grazing permits issued to Joyce Livestock, since the 1860s. Evidence of that use, including the testimony of Mr. Nettleton, Mr. Lewis, and grazing applications on record, was completely un rebutted at trial.

The United States also has never disputed that under the prior use rule and regulations implemented by the government at the time the Taylor Grazing Act was enacted, grazing preferences like those awarded to Joyce Livestock's predecessors, were only awarded to applicants who had used the range and resources thereon prior to the enactment of the Taylor Grazing Act. *Public Lands Council v. Babbitt*, 529 U.S. 728, 734-735 (2000); Appellant (Joyce Livestock's) Opening Brief, p. 16-22.⁷ What the United States argues, instead, is that "evidence

⁷ *Public Lands Council v. Babbitt* specifically recognizes the five year period prior to the enactment of the Taylor Grazing Act as the operable time period for purposes of applying the prior use rule, and even the United States concedes that the issuance of a class one grazing

of general use of public lands for grazing in common with others prior to the Taylor Grazing Act permit system is insufficient to establish the requisite element of intent to perfect a stock water right with specific places of use on public lands bordering Jordan Creek.” United States’ Answering Brief, p. 22. The United States also asserts that “appropriation of a stock water right cannot be presumed based only on evidence that cattle grazed on the public range” and, finally, that while some evidence showed “where those landowners’ cattle grazed, (it) provide(s) no evidence of water use.” However, the United States’ arguments in this regard are in conflict the laws regarding the appropriation of stockwater rights and, frankly, are in conflict with the laws of nature.

As briefed, at length, evidence of grazing near a stockwater source is probative evidence of appropriation of stockwater. In Idaho for “rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation, the priority date shall be the first date that water historically was used for livestock watering *associated with grazing on the land*” I.C. 42-113(2); *State v. United States*, 134 Idaho 106, 111 (2000); *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) (“The Hunters’ intent to use the water is made plain by the evidence. Year after year for nearly a century they have pastured

preference evidences use of the range dating back to the “priority years” of at least 1932 and 1933, which still predate the Taylor Grazing Act and pre-date the 1935 priority date awarded to Joyce Livestock by the District Court. United States’ Answering Brief, p. 22, ft.n. 13 (“Joyce suggests that the issuance of a so-called class one permit to Shea and Joyce Brothers indicates use of the area for five years prior to the application based on the regulations. However, witnesses at trial testified that the priority years in Idaho were only 1932 and 1933).

their livestock in this isolated enclave ... except for the water provided by these springs and the stream there has been none other available to keep their animals alive.”). Simply, the law in Idaho and throughout the western states recognizes that cattle drink the water as well as consume the surrounding forage. Accordingly, the United States’ argument that “show(ing) where those landowners’ cattle grazed ... provide(s) no evidence of water use” defies reason. United States’ Answering Brief, p. 23. Every year from the time the snow cleared in late spring, until the snow returned in October or November, Joyce Livestock and all of its predecessors in interest drove their stock to Jordan Creek whereupon the stock and cattle grazed upon the lands surrounding Jordan Creek and consumed water from that source. To buy into the United States’ argument, then, would mean that every year the cattle ate grass surrounding Jordan Creek for five summer months, but consumed no water. Even the United States’ own witness acknowledges that “livestock must have forage *and water* to survive while they use public land for grazing.” T.Tr. p. 559: Testimony of Ronald Kay (*emphasis added*).

The unrebutted evidence at trial is that for well over a century, Joyce Livestock and its predecessors in interest systematically and routinely brought their stock to Jordan Creek and, once there, the cattle and horses consumed not only forage on the land, but water from the creek. Under the law of the state of Idaho, this is sufficient to demonstrate a valid appropriation of a stockwater right pursuant to the beneficial use method of appropriation. Accordingly, under the relation back doctrine, Joyce Livestock is entitled to its claimed stockwater rights but with a priority date that relates back to the first date of beneficial use, as claimed, in 1898.

C. As Conceded by the United States in Other Litigation, Water Rights on Federal

Land Are Appurtenant to Private Base Ranch Properties and Are Transferred with the Private Properties.

The United States argues that Joyce Livestock's water rights could not have been conveyed through the chain of title of its predecessors because the transfers of the water rights allegedly were not in writing. However, the writing requirement has been satisfied in this case. The Idaho Supreme Court has recognized that in "Idaho, a water right is legally treated as an interest in real property and therefore can only be conveyed or transferred in the same manner as real property However, unlike an interest in land, a water right can be conveyed without expressly mentioning the water right via the same instrument that conveys the real property to which the water right is appurtenant." *Crow v. Carlson*, 107 Idaho 461 (1984), citing I.C. §42-220. Further, absent reservation, everything that is necessary to the use and enjoyment of the base property is transferred as an appurtenance. *Parke v. Bell*, 97 Idaho 67, 69 (1975) (water rights is appurtenant to the land which receives the benefit of the water and passes when title to the benefited land is transferred); *Kinney on Irrigation and Water Rights*, Vol. 2, Sec. 997, 1000, 1005 (A12) ("A water right which secures to the owner of a tract of land water for irrigation of the same, or for some other purpose, necessary to the beneficial enjoyment of the land, the title to which is also in the owner of the land, becomes appurtenant to such land.")

In this case, the transferred appurtenances include the stockwater rights that are fundamentally necessary for the base ranching operation to survive. As testified to at trial, the base ranch that was transferred through the chain of title was meant to include and did include, the transfer as appurtenances of everything necessary to operate that ranch including grazing

rights and water rights. T.Tr. p. 663, 673, 684 (Testimony of Mr. Paul Nettleton); T.Tr. p. 590 (Testimony of Dr. Chad Gibson). Together with the physical base ranch property, the private water rights located on federal land were necessary to the beneficial use and enjoyment of the base ranch and necessary to sustain the value and viability of the ranching operation, and therefore are appurtenant to the base ranch properties.

This issue was recently addressed by the Water Court of the State of Montana.⁸ In the *Hamilton Ranches* case, stockwater right claims with places of use on federal land were filed by a private ranching entity, the Hamilton Ranches Partnership, and, as in the present case, the United States objected to those claims. Similar to the Joyce Livestock case, in Hamilton Ranches, there was testimony that the water at issue, located on the federal lands, had been used by predecessors including one of the witness' grandfather, for stockwatering as early as 1870. *Hamilton Ranches*, p. 5-8. As was the custom throughout the west, every year cattle were turned out on the public range to graze and drink the water, often in common with cattle belonging to other ranches. *Hamilton Ranches*, p. 6-7. Over time, the ranching operation expanded, and was transferred, from the earliest predecessors in interest to the current owner, Hamilton Ranches. *Id.* at p. 7-8. Similar to the Joyce Livestock case, "[f]or over a century, J.C. Seidensticker and his successors-in-interest continued to use the waters of Cottonwood Creek and the East Fork Steels

⁸ *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, within the Jefferson River Drainage Area, Including All Tributaries of the Jefferson River in Broadwater, Gallatin, Madison, Jefferson and Silver Bow Counties*, Case No. 41G-190, 41G-W-197162-00, 41-W-197167-00, Hamilton Ranches Partnership (Claimant) (July 19, 2005) ("*Hamilton Ranches*"). For the convenience of the Court, a copy of the Hamilton Ranches Case is attached hereto as Appendix "A".

Pass Spring for the benefit of their livestock grazing on public and private lands, and no one (including the United States) ever challenged their right to do so, in court or otherwise.” *Id.* at p. 7.

Based on the historic evidence of use, the Court in *Hamilton Ranches* concluded that the stockwater rights at issue were first appropriated in 1870. The issue, then, became whether those rights were appurtenant to the base ranch property and whether they transferred as appurtenances, carrying with them the early priority date. Ultimately, it was the Court’s decision that the stockwater rights at issue had places of use on federal land but were legally appurtenant to the private base ranch properties. *Hamilton Ranches*, p. 26; *Hamilton Ranches* Closing Order, Case No. 41-G-190, 41-G-W-197162-00, 41G-W-197167-00 (August 29, 2006).⁹ Portions of the Court’s analysis are worth repeating:

[T]he Montana Supreme Court has observed that, “[t]he reason why things pass as parcel of the principal thing, although not named in the deed, is because they are *necessary to the use and enjoyment of the thing granted*, and because parties may be supposed to intend to make these grants beneficial and useful.” *Donnell v. Humphreys* (1872) 1 Mont. 518, 532 (*emphasis in original*) ... In *Tucker v. Jones*, the Supreme Court further explained: [I]t is a rule, in accordance with the natural justice and reason, that, where one sells a house or a farm, every right will pass to the purchaser which is *necessary to the complete use and enjoyment of the property conveyed* unless expressly reserved ... 8 Mont. 225, 231, 19 P. 571, 573 (1888) ...

Today, as in earlier times, a supply of water is as indispensable to a livestock operation as it is to an irrigated farm, a sluice box, or a mill propelled by water power. Without such a supply, neither cattle ranch nor farm, mining claim nor mill, could long survive. The Montana Supreme Court has acknowledged that access to federal range (grazing lease or permit) benefits

⁹ For ease of reference, the August 29, 2006 Closing Order issued in the *Hamilton Ranches* case is attached hereto as Appendix “C”.

and increases the value of deeded base holdings used in conjunction with the federal range. *Watson v. Barnard*(1970), 155 Mont. 75,80, 469 P.2d 539. Similarly, this Court acknowledges that the ownership of water rights appropriated from sources on those federal range lands also benefits and increases the value of the deeded base holdings used in conjunction with the federal range.

Accordingly, this Court agrees with the Water Master that “the water right[s] appropriated became the property of claimant’s predecessors rather than an appurtenance to the public domain as urged by the United States,” and that “the water right – used for the benefit of claimant’s privately owned lands – is appurtenant to claimant’s privately owned lands.”

Hamilton Ranches, p. 22-23. As previously briefed at length, the use of the claimed water sources is absolutely essential to the viability and sustainability of the base ranches owned by Joyce Livestock and its predecessors. Joyce Livestock’s Responsive Brief, p. 31-34; Joyce Livestock’s Opening Brief, p. 5-7; T.Tr. p. 684: Testimony of Mr. Paul Nettleton,; T.Tr. p. 590: Testimony of Dr. Chad Gibson. Accordingly, as in *Hamilton Ranches*, those private water rights located on federal land transfer as appurtenances to the base ranch properties and carry with them an early priority date representing the first date that the water was put to beneficial use.

It is telling that in the *Hamilton Ranches* case, the United States filed a Motion for Reconsideration, but in that Motion the United States did **not** dispute that private water rights on federal land are appurtenant to private base ranch properties. Instead, the United States “asked the Court, to clarify that *this stockwater right (located on federal land) is appurtenant to private land, and to identify the private land to which it is appurtenant.*” *Hamilton Ranches Order and Opinion Granting in Part and Denying in Part United States’ Motion for Reconsideration* (April 26, 2006) (attached hereto in Appendix “B”). The Court held that the place of use on federal

land would be described, with the clarifying remark identifying that the water right is appurtenant to private lands. In the Closing Order issued, the United States withdrew any remaining objections and agreed that all that was required to close the case was language identifying the private lands to which the claims were appurtenant. As held in the Closing Order:

*On July 18, 2006, the United States' Bureau of Land Management and the USDA-Forest Service filed conditional withdrawals of objections conditioned on the Court adding clarification remarks to the abstracts of stockwater claims 41G-W-197162-00 and 41-G-W-1997167-00 **which would identify the private lands to which these two stock claims are appurtenant.** The parties proposed some language for the remarks and, with minor changes, their language has been adopted. Accordingly, it is ORDERED that the following remark be inserted beneath the place of use element on the abstract of claim 41-G-W-197162-00:*

THE PLACE OF USE CONSISTS OF FEDERAL PUBLIC LAND,
BUT THIS RIGHT IS APPURTENANT TO THE FOLLOWING
PRIVATE LANDS IN MADISON COUNTY, MONTANA:
SECTIONS 15, 23, AND SW SECTION 22, TOWNSHIP 2 SOUTH,
RANGE 7 WEST.

Hamilton Ranches Closing Order, p. 2 (Aug. 29, 2006) (*emphasis added*). It is unconscionable that at the same time the United States is arguing before the Idaho Supreme Court that private water rights cannot be appurtenant to private base ranch properties, it is in an almost identical case in the state of Montana proposing language, eventually adopted by the Court, that specifically and explicitly recognizes that private stockwater rights located on federal public land are appurtenant to private base ranch properties. There is simply no rational basis for the United States' disparate treatment of Joyce Livestock or for the fundamentally conflicting positions the United States is taking in these cases and principles of quasi or equitable estoppel must bar the

United States from taking such fundamentally opposite positions on the same issue. *Garner v. Bartschi*, 139 Idaho 430 (2003).

III. CONCLUSION

As previously briefed, the position taken in this case by the United States has been inconsistent and in conflict with all existing federal and state law respecting the right of private parties to acquire appropriative water rights on the federal land and to transfer those water rights as appurtenances to the private base ranch properties. The United States' position in this litigation also is in direct conflict and is diametrically opposite of the position conceded by the United States in litigation in Montana that the place of use for stockwater rights decreed to private ranchers is on federal public land, but those water rights are appurtenant to the private base ranch properties. *Hamilton Ranches Closing Order* (August 29, 2006). The United States should be held to this position in this litigation because it is supported by both the law and the facts of this case.

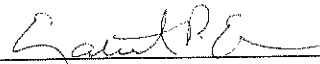
Through un rebutted evidence of historic use of the claimed water sources, and the transfer of those water rights as appurtenances to the base ranch properties, Joyce Livestock has established its right to its claimed water rights with a priority date relating back to 1898. The District Court's Memorandum Decision upholding those rights should be affirmed, but the

priority date awarded reversed to 1898.

Dated this 12th day of October, 2006.

Respectfully submitted:

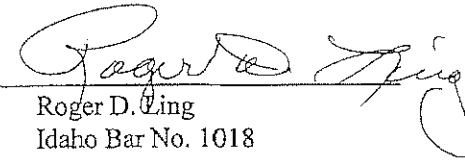
McQUAID BEDFORD & VAN ZANDT, LLP

A handwritten signature in dark ink, appearing to read "Michael J. Van Zandt", is written over a horizontal line.

Michael J. Van Zandt
Elizabeth P. Ewens

Dated this 11th day of October, 2006.

LING, ROBINSON & WALKER

By: 
Roger D. Ling
Idaho Bar No. 1018

ATTORNEYS FOR JOYCE LIVESTOCK

CERTIFICATE OF SERVICE

I certify that on October 12, 2006, I served a true and correct copy of foregoing **APPELLANT JOYCE LIVESTOCK'S REPLY BRIEF** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

1. Original and tencopies to (via overnight mail):

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

2. Two copies each to:

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

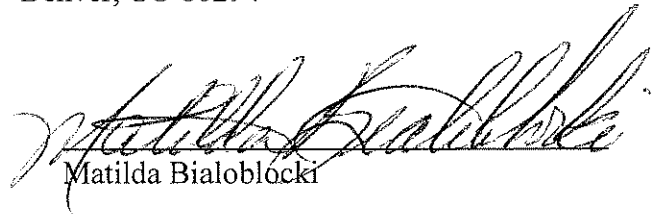
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Matilda Bialoblocki

APPENDIX “A” TO APPELLANT JOYCE’S REPLY BRIEF

C. Bruce Loble
Chief Water Judge
Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)

* * * * *

IN THE MATTER OF THE ADJUDICATION	)	CASE NO. 41G-190
OF THE EXISTING RIGHTS TO THE USE	)	41G-W-197162-00
OF ALL THE WATER, BOTH SURFACE AND	)	41G-W-197167-00
UNDERGROUND, WITHIN THE JEFFERSON	)	
RIVER DRAINAGE AREA, INCLUDING ALL	)	
TRIBUTARIES OF THE JEFFERSON RIVER	)	
IN BROADWATER, GALLATIN, MADISON,	)	
JEFFERSON AND SILVER BOW COUNTIES,	)	
MONTANA.	)	
	)	

CLAIMANT: Hamilton Ranches Partnership

MOTION OF MONTANA WATER COURT

OBJECTOR: United States of America (Bureau of Land Management),
United States of America (USDA Forest Service),
Montana Department of State Lands

OPINION

In the Temporary Preliminary Decree for the Jefferson River Basin (41G), the Seidensticker Ranch Partnership was decreed stockwater claims 41G-W-197167-00 and 41G-W-197162-00. The Seidensticker Ranch Partnership subsequently transferred its claims to Hamilton Ranches Partnership. The Water Court called claim 41G-W-197167-00 in on its own motion to address a point of diversion and place of use issue. The

Montana Department of State Lands (“DSL”) filed objections to the ownership, place of use, point of diversion, and “other” stating that:

This claim includes an implied water right of the Montana Department of State Lands for direct livestock use from Cottonwood Creek in Section 36, T02S, R07W, Madison County, Montana. Specifically: Point of Diversion #03 and place of use #002 in claim 197167 describe section 36 above, which is state school trust land leased by this claimant. These locations should be deleted from this claim and issued in a separate and distinct water right to the state, pursuant to the Montana Supreme Court decision in *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948, 42 St. Rep. 869 (1985). The Department of State Lands did not file a claim, during the filing period, for this location and use.

The United States Department of the Interior, Bureau of Land Management (“BLM”) filed objections to the ownership, place of use, and point of diversion for claim 41G-W-197167-00, stating that:

This water right, as claimed, includes public lands of the United States within the listed points of diversion and/or places of use. All use of public lands for livestock grazing is subject to permit by the Bureau of Land Management; therefore, the water right should be amended to exclude the public lands or should be decreed in whole or in part, as appropriate, to the United States of America (Bureau of Land Management).

The United States Department of Agriculture, Forest Service (“USFS”) filed objections to every element listed on the objection form for claim 41G-W-197162-00, stating that the claim “[s]hould be in the name of United States.”

The claims and objections were assigned to Water Master Michael J. L. Cusick, pursuant to § 85-2-233, MCA, who consolidated them into the present case.

In 1994, Hamilton Ranches (“Claimant”), DSL, BLM, and USFS filed cross-motions for summary judgment with respect to the claims and objections. All parties waived their right to a hearing and submitted motions on briefs alone. The Water Master

issued a Master's Report and Memorandum recommending that the Court enter an order granting the Claimant's motion for summary judgment and denying the motions of the DSL, BLM, and USFS.

With respect to the DSL arguments, the Master concluded that *Pettibone* did not apply in this case, because the Seidensticker appropriation of water in 1870 predated the State's acquisition of title to the Section 36 school trust land. Therefore, the Seidenstickers could not have acted on behalf of the State, as did the lessees in *Pettibone*. (Master's Mem. on Cross-Mot. for Summary J. at 27.) The Master's conclusion was correct. As the DSL did not object to the Master's Report, the Court need not address the DSL's issues any further. *Marriage of Doolittle* (1994), 265 Mont. 168, 171-72, 875 P.2d 331, 334; *Marriage of Hayes* (1993), 259 Mont. 302, 304, 856 P.2d 227, 229.

The BLM and USFS filed objections to the Master's Report and requested the Court to enter summary judgment in their favor and to terminate the claims. In the alternative, the BLM requested that federal land not be described as the place of use for claim 41G-W-197167-00. As the USFS has adopted by reference all arguments made by the BLM in its Objection to the Master's Report, the Court has consolidated the arguments and, where appropriate, refers to the parties as the "United States."

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*, 463 U.S. 545, 549, 103 S. Ct. 3201, 3204-05, 77 L. Ed. 2d 837, 845

(1983); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 812, 96 S. Ct. 1236, 1243, 47 L. Ed. 2d 483, 495 (1976); *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 the Water Court reviews a Water Master's recommendation to grant summary judgment, the Court 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 Court 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 legal issues raised by the parties in their motions for summary judgment are rephrased by the Court as follows:

- A. Whether these stockwater claims are valid water rights under Montana law?

1. Whether Montana law prior to July 1, 1973 recognized the right to appropriate direct instream water rights for private livestock use?
 2. Whether Montana law prior to July 1, 1973 required the appropriator to exercise exclusive use, dominion, and control over a water source in order to appropriate a direct instream water right for private livestock use on federal public lands?
 3. Whether Montana law prior to July 1, 1973 required the appropriator to hold an interest in or the intent to patent the land where the water was appropriated and used in order to appropriate a direct instream water right for private livestock use on federal public lands?
- B. Whether these stockwater rights are owned by the Claimant?
- C. Whether private ownership of these stockwater rights conflicts with federal law?
- D. Whether the policies articulated in *Department of State Lands v. Pettibone* should apply to these claims?

This Opinion is the second in a series of decisions that the Water Court has issued and will issue in the next few weeks involving public land and livestock issues. *See Opinion* in Water Court Case No. 40E-A (June 29, 2005) and Case No. 41G-3.

IV. DISCUSSION

Background

The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, establish that:

Sylvester Seidensticker (“Sy”), testifying on behalf of the Seidensticker Ranch (“Seidensticker”), stated that his grandfather, John C. Seidensticker, Sr. (“J.C. Seidensticker”), appropriated stockwater right claims 41G-W-197167-00 and 41G-W-197162-00 from Cottonwood Creek and the East Fork Steels Pass Spring, respectively, in

1870.¹ Sy testified that shortly thereafter, his grandfather acquired Section 16, T2S, R6W, just southwest of the confluence of Cottonwood Creek and the Jefferson River, in Madison County, where he established a modest livestock operation and supplied local mining camps with beef and mutton. (Sylvester Seidensticker Dep. at 6, 9, and 35 (March 17, 1994) (hereinafter referred to as “Seid. Dep.”)). *See also* the deed from Samuel Getts to John C. Seidensticker filed August 14, 1875. (Claimant’s Mot. for Summary J. Regarding Ownership of Stockwater Claims, Ex. C). Between 1870 and 1904, the Seidensticker family was the only family running livestock in the Cottonwood Creek area. (Seid. Dep. at 35).

In the 1870s, the land surrounding Cottonwood Creek was nearly all public domain – open range, largely unfenced and available for use and homesteading by the public. (Mem. in Support of Objector BLM’s Mot. for Summary J. at 7-8); (Seid. Dep. at 29-31). Like many other early stockmen, J.C. Seidensticker augmented his small, private land holding with free grazing on the public domain. As was the custom, the Seidensticker livestock were turned out to graze on nearby public domain and to drink from the known water sources located on it. (Seid. Dep. at 29) As Sy explained, “That was the days of open range. Why own something when you had it out there to use?” (Mem. in Support of Objector BLM’s Mot. for Summary J. at 7) (quoting Seid. Dep. at 15-16). “Your cattle just scattered everywhere . . . where they had feed and water,” with everyone’s cattle being sorted out “when you brought them in for winter.” (Seid. Dep. at 29).

¹ *Cottonwood Creek* is a small, intermittent stream that commences on or near Section 26 in T2S, R7W, then flows southeasterly across private and public land in sections 26, 36, and 6 to its confluence with the Jefferson River. The *East Fork Steels Pass Spring* is a natural spring that rises in the SW¼ of Section 14, T2S, R7W, and flows into the East Fork Steels Pass Creek, which is tributary to the main stem of Steels Pass Creek in the NW¼ of Section 14, which is tributary to Hells Canyon Creek, which flows southeasterly to

Sy testified that without fences to control them, his grandfather's stock grazed from their home range near Cottonwood Creek clear to "the bar" high in what is now the Deerlodge National Forest, (Seid. Dep. at 36), and that, as anticipated, they watered from the natural sources on the range, including Cottonwood Creek and the East Fork Steels Pass Spring. (Seid. Dep. at 70). Sy testified that the livestock had always depended on water from these sources to live, and that the Seidenstickers would have gone to court to protect their right to use them. (Seid. Dep. at 106).

Over time, J.C. Seidensticker and his successors-in-interest acquired more land and land leases, gradually increasing the size of their private land base. (Seid. Dep. at 17).² They continued, however, to use public grazing lands and the water thereon to augment their growing livestock operation. In the 1960s, the Seidenstickers purchased Sections 25 and 15, adjacent to Section 14, from the Reids. Subsequently, they entered into cooperative agreements with the United States to erect a fence between the private and public land in Section 14, to develop the East Fork Steels Pass Spring, and to install stock tanks on both the public and private sides of the fence. (Seid. Dep. at 57-61).

For over a century, J.C. Seidensticker and his successors-in-interest continued to use the waters of Cottonwood Creek and the East Fork Steels Pass Spring for the benefit of their livestock grazing on public and private lands, and no one (including the United States) ever challenged their right to do so, in court or otherwise.

The United States does not seriously dispute any of these facts. The BLM

its confluence with the Jefferson River.

² Other deeds indicate that J.C. Seidensticker acquired additional lands in the Cottonwood Creek area well before passage of the Taylor Grazing Act. In November 1889, J.C. Seidensticker purchased land in Sections 20 and 21. In 1896, he purchased land in Section 29, T3S, R6W. In 1901, he purchased land in Section 34, T1S, R5W. In October 1901, he purchased land in Section 32, T3S, R6W. In April 1905, he purchased land in Section 3, T3S, R6W. In 1904, he purchased land in Section 27, T3S, R6W. In 1905, he purchased from the Northern Pacific Railway land in Sections 9 and 17, T3S, R6W. Only Section 9 of the foregoing parcels is included within the place of use for claim 41G-W-197167-00. Claimant's Mot. for Summary J. Regarding Ownership of Stockwater Claims, Ex. D-J (May 20, 1994).

recognizes that prior to 1934, Section 26, T2S, R7W and the N½ of Section 6, T3S, R6W (the only place of use currently administered by the BLM) were part of the public domain and “entirely open range with no fences.” (Mem. in Support of Objector BLM’s Mot. for Summary J. at 8) (citing to Seid. Dep. at 26-27). In 1934, Section 26 and the N½ of Section 6 were withdrawn from the public domain pursuant to the Taylor Grazing Act and related executive orders. By 1939, the newly created General Land Office and Grazing Service (precursors to BLM) classified, administered, and managed the land for grazing in conjunction with the State of Montana. Although the Seidensticker Ranch continued to graze its livestock in Sections 6 and 26 after 1934 and 1939, the grazing was subject to the terms and conditions of federal permits.

The USFS concedes that prior to 1907, “many small ranchers commonly used the range and water of Section 14 (including the East Fork of Steels Pass Spring) without restriction for their livestock running at large on the public domain.” (United States’ Mot. for Summary J. and Br. in Support at 10). A notation in USFS official records, in fact, recorded the agency’s belief that J.C. Seidensticker first established himself in the area in 1876 and was issued one of the first permits to graze on Section 14. (United States’ Mot. for Summary J. and Br. in Support, at Ex. B). The Court takes judicial notice of the fact that Section 14 was not withdrawn from the public domain and reserved as part of the Helena Forest Reserve until the Presidential Proclamation of April 12, 1906, or consolidated into the Deerlodge National Forest until the Executive Order of July 1, 1908. In 1907, acting under the broad authority of the Organic Act of 1897, the USFS began regulating Section 14 as part of the national forest system and issuing permits to graze. After 1907, the Seidensticker Ranch continued to graze its livestock on its customary range in Section 14, but the grazing thereafter was subject to the terms and conditions of a USFS grazing permit.

A. Validity under Montana Law

In early Montana, 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.³ The customs of the early water users in their appropriation of water rights, 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, 707-08.⁴

In 1900, the Montana Supreme Court described the historic "use" method of appropriating water rights as follows:

We recognize the doctrine that right to the use of water . . . is a possessory one, that may be obtained by actual appropriation and diversion, perfected by application of the water so appropriated to a beneficial use then present or contemplated, and made before appropriation and use by another.

Toohey v. Campbell (1900), 24 Mont. 13, 17, 60 P. 396, 397. It remained a viable method of appropriation in the unadjudicated streams of Montana until July 1, 1973, when procedures set forth in the Montana Water Use Act superceded all prior methods of appropriation.

The United States cites to Sy's deposition testimony that "there was no mention of water rights whatsoever. . . didn't think about those things in those days," as proof that Sy's grandfather's lacked the intent necessary to appropriate the water rights. (BLM Resp. to Claimant's Mot. for Summary J. on Claim Number 41G-W-197167, at 8). The

³ See cases cited in the Court's *Opinion* in Water Court Case 40E-A (June 29, 2005), fn. 7.

⁴ 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; and cases cited in fn. 3, *supra*.

testimony was actually a response to Attorney McElyea's questions about whether either of the agencies had ever told Sy that they were claiming ownership of either of these water rights. (Seid. Dep. at 65 and 106). Construing Sy's response as a reflection of his grandfather's intent about the Seidensticker Ranch's prima facie water right claims is highly speculative. Speculative, fanciful, conclusory, gauzy, or even suspicious statements are insufficient to raise the genuine issue of fact needed by a party to oppose a motion for summary judgment. *Sprunk v. First Bank Sys.* (1992), 252 Mont. 463, 466-67, 830 P.2d 103, 105; *Cheyenne W. Bank v. Young* (1978), 179 Mont. 492, 497, 587 P.2d 401, 404.

1. Validity of Direct Instream Stockwater Rights

In the BLM Objections to Master's Report, the United States asserted that:

The Montana Supreme Court's conclusion in *Bean Lake* that appropriation of water for recreation and stockwatering was "not theretofore recognized under [Montana] law" is well grounded in prior decisions of the Court, which repeatedly have held that prior to the enactment of a statute prescribing the method of appropriating in 1885, "the essential elements of an appropriation were **a completed ditch** and the application of water through it to a beneficial use."

BLM Objection to Master's Report, at 7 (March 16, 1995) (bolding added) (citing *In the Matter of the Adjudication of the Dearborn Drainage Area* (1988), 234 Mont. 331, 343-44, 766 P.2d 228, 235-36 ("*Bean Lake I*"). The United States also argues that "Other states have also long required an actual diversion to support an appropriation." BLM Objection to Master's Report, at 7 fn. 4.

In *In the Matter of the Adjudication of the Missouri River Drainage Area*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (*Bean Lake III*), the Montana Supreme Court revisited and overruled some of the earlier conclusions in *Bean Lake I*, as follows:

[W]e overrule the *Bean Lake* conclusion that Montana, prior to 1973, did not recognize fish, wildlife and recreation appropriations of water, whether

diversionary or non-diversionary. We hold that Montana [law] recognized fish, wildlife and recreation uses as beneficial and that valid instream and inlake appropriations of water existed in Montana prior to 1973 where the intended beneficial use did not require diversion, and when the facts and circumstances indicate that notice of the appropriator's intent had been given.

Bean Lake III, ¶ 40.⁵ In re-visiting the validity of pre-1973 instream fish, wildlife, and recreation claims, the Court also looked specifically at Montana's "legendary history of cattle and sheep ranching" and found that:

No doubt Montana's stockgrowers would be surprised to learn, as the dissent suggests, that Montana law would not have recognized a right to water stock directly from a stream, lake, pond or slough without a man-made diversion. . . .

The fact that there are no Montana decisions establishing such an instream right merely reflects the fact that that issue was not litigated, not that such a right was beyond the pale of Montana prior appropriation doctrine. . . . Given our history, there is every reason to believe that had the issue arisen, Montana would have followed the lead of Nevada and held that no ditch, dam, reservoir or other artificial means was necessary for watering cattle. If there must be a diversion with intent to apply water to a beneficial use, then 'the drinking by cattle constitutes a diversion, [and] the necessary intent must be that of the cattle.'

. . . .
Given Montana's long history of beneficially using water for purposes of agriculture, mining, cattle and sheep ranching, logging, railroading, fishing and recreation, we . . . **hold that the doctrine of prior appropriation does not require a physical diversion of water where no diversion is necessary to put the water to a beneficial use. Thus instream/inlake appropriations of water for beneficial uses may be valid when the purpose (e.g. stock-watering, fish, wildlife and recreation) does not require a diversion.**

Bean Lake III, ¶¶25, 26, 36 (bolding added) (citations omitted).

⁵ Interestingly, in its Amicus Curiae Brief to the Montana Supreme Court in *Bean Lake III*, the United States, takes the exact opposite of its position in Case 41G-190 (set forth at the top of the page), and states: **the decisions of this Court do not hold that a diversion is an absolute prerequisite for all valid appropriations of water. Indeed, the courts of Montana and other western states have long recognized the validity of appropriations that do not involve a diversion** where no diversion is necessary to achieve the intended beneficial use and the requirements of notice and intent are satisfied. Br. of Amicus Curiae United States, *Bean Lake III*, at 17 (Dec. 2000) (bolding added).

Appropriating stockwater rights directly from sources on the public domain was clearly a well-established and wide-spread custom on the open ranges of the unreserved public domain in Montana in the 1870s. To hold that Montana law did not recognize the validity of such direct stockwater rights prior to July 1, 1973, would be contrary to both Montana history and the Montana Supreme Court's explicit recognition of such rights.

Accordingly, this Court finds and concludes that because the stockwatering in this case did not require a physical (man-made) diversion in order to put the water to beneficial use, and because the facts and circumstances (plain view and custom) indicate that notice of the appropriator's intent was given, the instream stockwater claims in this case were not invalidated by the lack of a physical diversion.

2. Exclusive Use, Dominion, and Control Over Water

The United States also contends that in order to appropriate a valid water right in Montana prior to July 1, 1973, an appropriator was required to maintain exclusive use, dominion, and control over the claimed water source. The United States bases this argument on statements made by the Montana Supreme Court in *Jones v. Hanson* (1958), 133 Mont. 115, 320 P.2d 1007.

The *Jones* case does not stand for the proposition asserted by the United States. The language in *Jones*, cited by the United States, stands only for the proposition that proof of exclusive use, dominion, and control 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, 123.⁶

The Montana Supreme Court set forth the controlling rule in *Bullerdick v. Hermsmeyer*:

⁶

For a more in depth discussion of this issue, see the Court's *Opinion* in Water Court Case 40E-A (June

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.

32 Mont. 541, 554-55, 81 P. 334 (1905). 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.

76 Mont. 1, 16, 245 P. 532 (1926) (citations omitted).

More recently, in *Bean Lake III*, the Montana Supreme Court recognized the existence of pre-July 1, 1973 instream recreation, fish and wildlife appropriations. In doing so, it did not include “exclusive use” as an essential element in the appropriation of a valid pre-July 1, 1973 water right in Montana. *Bean Lake III*, 2002 MT at ¶¶ 20, 22, 23, and 37. Indeed, it would be a rare occasion for an instream appropriator to ever exercise the “exclusive use, dominion, and control” of a water source.

Accordingly, the Court finds as a matter of law that prior to July 1, 1973, appropriators like J.C. Seidensticker did not have to exercise exclusive use, dominion, and control over a water source in order to appropriate a direct instream stockwater right for private livestock use.

29, 2005), which analysis is incorporated herein.

3. “Interest In” or “Intent to Patent” Land

The United States further contends that only those settlers who were in possession of the public domain with the bona fide intention of acquiring title from the United States had such title as would support a valid water right. It bases this argument primarily on statements and holdings by the Montana Supreme Court in *Wood v. Lowney* (1897), 20 Mont. 273, 50 P. 794; *McDonald v. Lannen* (1897), 19 Mont. 78, 47 P. 648; and *Gilcrest v. Bowen* (1933), 95 Mont. 44, 24 P.2d 141.

The *McDonald* and *Gilcrest* holdings, however, do not stand for the proposition that “possession with the intent to patent” the place of use was necessarily *required* in order to appropriate a valid water right in Montana. They simply hold that a squatter on the public domain with only inchoate title to the land could, under narrow circumstances, appropriate and verbally transfer water rights appurtenant to his irrigated land.

The water rights claimed in the three cited cases were all appropriated for the irrigation of agricultural lands at a time when Montana statute provided:

That all persons, who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream, water, creek, or river for the purpose of *irrigation* and making said claim available to the full extent of the soil for agricultural purposes.

Section 1, 1865 Bannack Stat. 367. Accordingly, the Court in *McDonald*, held that a bona fide squatter (possessor) on the unsurveyed public lands of the United States, who had not yet taken the land to patent, had the right to appropriate and transfer appurtenant irrigation water rights. 19 Mont. at 86. The Court applied the *McDonald* holding in *Wood* and *Gilcrest*, where it reiterated that:

This court has long been committed to the holding, in effect, that . . . any person who occupies land, fences and improves it with the bona fide intention of acquiring title from the United States at some time, has such

title as will support a water appropriation -- in common parlance, a "squatter's right" . . . and that such a water right may be orally conveyed with his right in the land so held.

Gilcrest, 95 Mont. at 52.

The controlling rule regarding the appropriation of water rights on the public domain in Montana was set forth in *Smith v. Denniff*, which held that:

[L]egal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right, for the bona fide intention which is required of an appropriator to apply the water to some useful purpose may comprehend a use upon lands and possessions other than those of the appropriator, or a use for purposes other than those for which the right was originally appropriated. Section 1882 of the Civil Code.

24 Mont. 20, 29, 60 P. 398, 401 (1900) (citations omitted). Similarly, in *Bailey v.*

Tintinger, the Montana Supreme Court clarified that:

While the Act of 1870 . . . sought to limit the right to appropriate water for irrigation to persons or corporations owning or in possession of agricultural lands, the provision was omitted advisedly from the Codes of 1895 and 1907, and it has since been held that the appropriator need not be either an owner or in possession of land in order to make a valid appropriation for irrigation purposes.

45 Mont. 154, 175, 122 P. 575, 582.⁷

Wells A. Hutchins explained the rule in Montana as follows:

The Montana rule does not require fee simple title in the appropriator to land to be irrigated under his right. It does apparently contemplate that if

⁷ See also *Department of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948 (validating stockwater rights appropriated by lessees on and for use on school trust land, even though ownership accrued to State); *St. Onge v. Blakely* (1926), 76 Mont. 1, 16, 245 P. 532 (finding that right to use water may be owned without regard to title to land upon which the water is used); *Sayre v. Johnson* (1905), 33 Mont. 15, 81 P. 389 (recognizing validity of water rights appropriated on public domain for use on school trust land, even though appropriator did not own or intend to patent place of use); *Bullerdick v. Hermismeyer* (1905), 32 Mont. 541, 81 P. 334 (recognizing validity of water right appropriated to irrigate land appropriator merely occupied on public domain); *Hays v. Buzard* (1904), 31 Mont. 74, 82, 77 P. 423 (recognizing validity of water right appropriated for use on land rented by appropriator); and *Toohey v. Campbell* (1900), 24 Mont. 13, 17-18, 60 P. 396 (denying claimant full amount of his claim, not because he was not in possession of or did not intend to patent place of use, but because he could not have intended to appropriate irrigation water for land he acquired by Act passed five years after his claimed irrigation appropriation).

the appropriator does not own the land he intends to irrigate, at least rightful possession – that is, a possessory interest – is necessary to his acquisition of a valid water right. This requirement is satisfied by lawful entry and settlement on public lands or a bona fide intent to acquire title to both land and water, or by one holding lands under contract for its purchase. Also acceptable is rightful possession of land under a contract with the owner the nature of which does not appear in the record.

1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, at 263-64 (1971) (citations omitted).

Nor did Montana law ever require an appropriator to own an interest or an easement in the land where the water right was appropriated. An appropriator was simply precluded from appropriating or exercising a water right in trespass. *See Connolly v. Harrel* (1936), 102 Mont. 295, 299, 57 P.2d 781, 782; *Warren v. Senecal* (1924), 71 Mont. 210, 220, 228 P. 71, 74-75. Though the Court in *Smith* stated that, “[o]ne may not acquire a water right on the land of another without acquiring an easement in such land,” it subsequently clarified that while it was necessary for an appropriator to acquire an express or implied grant to appropriate on, or conduct water across the *private* land of another, appropriators already had “by statutory grant, the privilege of appropriating [and conducting] water upon the *public domain*.” *Smith*, 24 Mont. at 22, 25 (emphasis added).

The Montana Supreme Court reiterated this distinction in *Prentice v. McKay*, where it found that:

The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation; but neither has authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. **The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation.**

38 Mont. 114, 117, 98 P. 1081, 1083 (1909) (bolding added) (citations omitted).

In *Connolly v. Harrel*, the Montana Supreme Court reviewed *Prentice v. McKay* and other cases and found that in each case, “the person claiming the water right was attempting to assert the right, as against the owner of the land on which he had committed trespass, either in an attempt to initiate the right or to continue the exercise thereof.” 102 Mont. at 299. Therefore, the Supreme Court limited the general expressions found in those decisions to cases of trespass and upheld the validity of an irrigation water right appropriated pursuant to a verbal license to use another’s point of diversion and ditch, even though that permission was subsequently revoked. 102 Mont. at 301.

Accordingly, this Court concludes that because J.C. Seidensticker was occupying the public domain with the consent of the federal government in 1870, he was not in trespass, and he was not precluded from appropriating these stockwater rights under Montana law. The fact that he did not necessarily intend to acquire title to all of the public domain on which his livestock grazed neither precluded nor invalidated his water rights under Montana law.

B. Ownership of the Water Right

The United States contends that even if these stockwater claims are valid water rights under Montana law, they could not be owned by the Claimant, because under Water Right Claim Examination Rules 4.II and III, and the rule set forth in *Castillo v. Kunnemann* (1982), 197 Mont. 190, 642 P.2d 1019, the water rights became appurtenant to federal land. The Water Master disagreed and concluded that “the water right[s] appropriated became the property of claimant’s predecessors rather than an appurtenance to the public domain as urged by the United States,” and that “the water right – used for the benefit of claimant’s privately owned lands – is appurtenant to claimant’s privately owned lands.” (Master’s Mem. on Cross-Mot. for Summary J. at 20 & 22.) The Master was correct.

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*, 24 Mont. at 26-27. “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 26-27.

Once perfected, the water right included “an incorporeal hereditament . . . the right to have the water flow in the stream, without diminution or deterioration, to the head of the ditch or place of diversion, — an easement in the stream . . . an easement not attached to land, and therefore *akin to an easement in gross* at the common law,” which may or may not become an easement annexed or attached to particular land. *Smith*, 24 Mont. at 25, 27 (emphasis added).

The general statutory rule in Montana is that, “[a] thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit,”⁸ and “the transfer of a thing transfers also all its incidents, unless expressly excepted.”⁹ Thus, the Montana Supreme Court has held that, “a water right acquired by appropriation and *used for a beneficial and necessary purpose in connection with a given tract of land*, is an appurtenance thereto, and as such passes with the conveyance of the land, unless expressly reserved from the grant.” *Yellowstone Valley Co. v. Assoc. Mtg. Investors* (1930), 88 Mont. 73, 81-82, 295 P. 255, 258 (quoting *Lensing v. Day & Hansen Security Co.* (1923), 67 Mont. 382, 384, 215 P.2d 999, 1000). *See also Castillo*, 197 Mont. at 196.

⁸ Section 70-15-105, MCA (initially enacted as §1078, Civ. C. Mont. (1895)). *See, e.g., Castillo v. Kunnemann* (1982), 197 Mont. 190, 201-02, 642 P.2d 1019.

⁹ Section 70-1-520, MCA (initially enacted as §1491, Civ. C. Mont. (1895)). *See, e.g., Lincoln v. Pieper* (1990), 245 Mont 12, 15, 798 P.2d 132, 134-35; *Schwend v. Jones* (1973), 163 Mont. 41, 44-45, 515 P.2d 89, 91; *Tucker v. Jones* (1888), 8 Mont. 225, 231-32, 19 P. 571, 573-74.

The mere use of a water right by the appropriator on land titled in another, however, does not necessarily make the water right appurtenant to that land. The Court in *Smith v. Denniff* explained that “an easement, to be appurtenant to a parcel of land, must be attached to the dominant estate . . . [and] [i]t can become legally attached only by unity of title in the same person to both the dominant estate and the easement claimed.” *Smith*, 24 Mont. at 27-28.

Section 1078 . . . may not be interpreted to mean that a water right acquired by prior appropriation by one who has only possessory title to the land, although with the intent at the time to use the water upon such land, shall, by the mere act of using it as intended, become inseparably attached as an appurtenance, and the appropriator thereby lose his water right. Such an interpretation would not only violate recognized custom and legal principles, but would render inoperative the provisions of Section 1882 of the Civil Code.¹⁰

The common-law rule that an easement acquired by a tenant as an appurtenance to the land inures to the benefit of the landlord upon the expiry of the tenancy is . . . inapplicable to cases arising under the statutes in respect of prior appropriation of water rights.

Smith, Mont. at 30 (citations omitted).¹¹ Without unity of title, a water right could not attach as appurtenant to land titled in another, until: (1) the appropriator obtained title to the land; (2) conveyed the water right to the owner of the land; or (3) the facts and circumstances indicated that the appropriator intended to make the right appurtenant to

¹⁰ A legal appropriator may change the place of its use, and may use the water for other purposes than that for which it was originally appropriated. § 1882 Civ. C. Mont. (1895).

¹¹ A California Court of Appeals came to the same conclusion with respect to a substantially similar statute in California:

[A]ppellant is mistaken in his claim that, under said section 662 of the Civil Code, the mere use of water with land for its benefit makes the water appurtenant to said land. The section provides that “a thing is deemed to be incidental or appurtenant to land when it is by *right* used with the land for its benefit” . . . It would be subversive of the constitutional privilege of property ownership to hold that a person may *without right* use upon his land water belonging to another and by such use make it appurtenant to his land. Manifestly, the use must coexist with the ownership of the water right to make it appurtenant to his land.

Gause v. Pacific Gas & Electric Co. (Cal. App. 1923), 212 P. 922, 928 (emphasis in the original).

the land.¹²

The United States presented no evidence even suggesting that J.C. Seidensticker conveyed the water rights to the United States or intended to make the water rights appurtenant to the public domain. Accordingly, the Master correctly concluded that, although the stockwater was beneficially used on part on the public domain, title to the water rights vested in J.C. Seidensticker, and did not become appurtenant to the public domain.

The United States argues that the *McDonald* line of cases (supra at p. 13) impliedly overruled the *Smith* “unity of title” rule. However, whether the water rights were actually appurtenant to the land was not a factual issue in those cases and was never discussed. Like the Court in *Smith*, the Court in *McDonald* merely recognized that an appropriator on the public domain was not required to own the place of use in order to appropriate a valid water right, limited the *Barkley v. Tieleke*, 2 Mont. 59 (1874) rule of abandonment upon transfer, and held that in certain narrowly defined circumstances, a settler with inchoate title to land could verbally transfer the land and water rights used in connection with the land.

The issues of whether or when a *stockwater* right becomes appurtenant to particular land has rarely been addressed by American courts. However, an early New Mexico Supreme Court decision found that stockwater rights appropriated on the public domain were held in gross by the appropriator. In *First State Bank of Alamogordo v. McNew*, 269 P. 56 (N.M. 1928), the New Mexico Supreme Court considered whether a stockwater right that was purchased for the purpose of watering livestock grazing on the public domain attached and became appurtenant to the public grazing land and

¹² Whether a water right becomes appurtenant to and transfers with particular land in Montana are matters of intent and questions of fact. The one asserting ownership by appurtenancy has the burden of proving that it is appurtenant. *Smith*, 24 Mont. at 29. See also 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, at

transferred to a subsequent purchaser of the land under the Stock Raising Homestead Act. The Court concluded that, but for the fact that McNew merely held possessory title to the grazing land, the water right would be deemed appurtenant to the grazing land:

[W]ater for stock-raising, as well as for irrigation, may become incident to the beneficial use of land . . . The [irrigation] water right is considered incident or appurtenant to the land irrigated, because that is the use to which it is applied and for which appropriated. For the same reason, it should be deemed incident to the land on which W.H. McNew's cattle grazed.

269 P. at 60 (citations omitted). Because McNew held only a possessory interest in the public grazing land, however, and not fee title, the New Mexico Court concluded that the water right was held in gross and only temporarily used on the public domain.

Consequently, the water right did not become appurtenant to the grazing land, and the subsequent purchaser took title to the land under the Stock Raising Homestead Act *subject to McNew's personal water right and conveyance system*. *Id.* at 62-63. The Court explained that:

In the case of a transfer by one having a unity of interest in the water and the land, there are certain reasons of necessity which may be invoked to sustain the inference that it was intended to transfer the water right with the possession [or title to] the land, and which are not so cogent when we come to consider the rights of the homestead entryman by virtue of his entry alone.

One of the reasons which impels the courts to favor the presumption that the grantor intended the so-called appurtenances to go with the land is that the continuance of the previous use is indispensable to the future enjoyment of the estate granted, in the condition it was when transferred, and that, the grantee having paid a valuable consideration for the transfer, such continued use must have been within the contemplation of the parties.

Id.

Similarly, the Montana Supreme Court has observed that, “[t]he reason why things pass as parcel of the principal thing, although not named in the deed, is because they are *necessary to the use and enjoyment of the thing granted*, and because parties may be supposed to intend to make these grants beneficial and useful.” *Donnell v. Humphreys* (1872), 1 Mont. 518, 532 (emphasis in original). In *Tucker v. Jones*, the Montana Supreme Court further explained:

[I]t is a rule, in accordance with natural justice and reason, that, where one sells a house or a farm, every right will pass to the purchaser which is *necessary to the complete use and enjoyment of the property conveyed*, unless expressly reserved. . . . [W]here, by destination a right of way attaches to and in favor of a certain house, farm, ranch, or plantation, or a certain right of drainage exists in favor of a farm, or the use of a certain ditch and water for the irrigating of a farm, they will pass by the deed, even without the use of the word “appurtenance”; for the acquisition of the easement or servitude was intended for the benefit of the estate, and by destination is to be considered as incidental to the use of and as a part and parcel of the realty.

8 Mont. 225, 231, 19 P. 571, 573 (1888) (emphasis added).

Today, as in earlier times, a supply of water is as indispensable to a livestock operation as it is to an irrigated farm, a sluice box, or a mill propelled by water power. Without such a supply, neither cattle ranch nor farm, mining claim nor mill, could long survive. The Montana Supreme Court has acknowledged that access to federal range (grazing lease or permit) benefits and increases the value of deeded base holdings used in conjunction with the federal range. *Watson v. Barnard* (1970), 155 Mont. 75, 80, 469 P.2d 539. Similarly, this Court acknowledges that the ownership of water rights appropriated from sources on those federal range lands also benefits and increases the value of the deeded base holdings used in conjunction with the federal range.

Accordingly, this Court agrees with the Water Master that “the water right[s] appropriated became the property of claimant’s predecessors rather than an appurtenance

to the public domain as urged by the United States,” and that “the water right – used for the benefit of claimant’s privately owned lands – is appurtenant to claimant’s privately owned lands.”

No Genuine Issues of Material Fact

The USFS also argues that four “unopposed facts” presented in its Motion for Summary Judgment raised genuine issues of material fact regarding the appurtenancy of these stockwater rights to Claimant’s private lands.

The USFS contends that the Claimant failed its own appurtenancy test, because the facts establish that the Claimant’s predecessors-in-interest did not own the sections of land adjacent to Section 14, “to which the Water Master finds claim No. 41G-W-197162 appurtenant,” until the 1960s. The Claimant does not dispute that its predecessors did not acquire the land adjacent to Section 14 until the 1960s. However, the Master concluded that “the water right – used for the benefit of claimants privately owned lands – is appurtenant to claimant’s *privately owned lands*” – not merely the land it currently owns adjacent to section 14. (Master’s Report at 21-22) (emphasis added) Claim 41G-W197162-00 is based on the Seidensticker Ranch’s historical use of the East Fork Steels Pass Spring for its own livestock operation (Seid. Dep. at 64) – not on the Reids’ use of the same spring for their livestock operation. The USFS does not seriously contest that J.C. Seidensticker began acquiring land and appropriating water rights on the public domain for his livestock operation in the mid-1870s. *See, e.g.*, (United States’ Mot. for Summary J. and Br. in Support at 10 & Ex. C).

The USFS also contends that the fact that three other water sources are located on Seidensticker deeded pasture in close proximity to the East Fork Steels Pass Spring shows that:

. . . the water from East Fork Steels Pass Spring was needed in the southwest corner of section 14, not elsewhere. Based on the three other springs available for stock in the privately owned parts of the pasture, and the fact the water was needed in section 14, the United States asserts that Claimant does not need this fourth water source for use on private land in the same pasture.

(USFS Reply Br. on Mot. for Sum. J. at 12).

The record does not support the USFS's own speculative conclusions. The four water sources are in sections 14, 15, 22 and 23 (seemingly a fairly large pasture), and all four springs run "so little water, that . . . you'd just find a few cows here and a few cows there And actually if they were not developed, I mean it would be very difficult for them to get enough water. " (Seid. Dep. at 69-70). Furthermore, "this corner of 14 was the main cow trail. They all passed through the country right there, grazed through." (Seid. Dep. at 70).

The USFS also asserts that the Temporary Preliminary Decree abstract of claim 41G-W-197162 identified the "place of use" as Section 14, T02S, R07W, which is national forest land owned by the United States, and that the Claimant did not object to the claim. It argues that "[t]his creates a fundamental problem with the Water Master's recommendations. While he concludes that the rights are appurtenant to Claimant's privately owned lands, as to claim No. 41G-W-197162, those privately owned lands are not even identified as a part of the claim." (USFS Obj. to Master's Report at 12).

There is no fundamental problem. The place of use identified on the abstract for 41G-W-197162 is based on Water Right Claim Examination Rules 4.II(2) and 4.III(1), which direct that:

For direct instream surface water stock use, the legal land description of the [point of diversion] will be the same as the legal land description of the [place of use].

. . . .

The place of use for stock purposes will be identified and described by the nearest reasonable and concise legal land description. The [place of use] is the actual place where the stock drink the water.

While Rules 4.II(2) and 4.III(1) describe the legal land description to be assigned the point of diversion and place of use for direct instream stockwater rights in this general adjudication, they do not determine the land to which the water rights are appurtenant, or who owns the water rights. *Pettibone*, 216 Mont. at 372; *Yellowstone Valley Co.*, 88 Mont. at 80; *Lensing*, 67 Mont. at 384. If this were otherwise, Rules 4.II(2) and 4.III(1) could effectively and unilaterally divest all appropriators of pre-1973 direct stockwater rights appropriated on lands other than their own – a result which would be contrary to both Constitutional and long-standing Montana law. (See *e.g.*, *Osnes Livestock Co.*, 103 Mont. at 290; *St. Onge*, 76 Mont. at 18; and *Smith*, 24 Mont. at 26-27) Neither this Court, nor the Montana Supreme Court, intended for such a divestiture to occur when these rules were proposed and approved in 1987.

Finally, the USFS objects that the Master's statements about changing the "place of use" for these claims to the Claimant's privately owned lands, and that such a change "is the subject of an administrative proceeding under § 85-2-402, MCA," improperly recognizes a right "dependant on a future act." (USFS Objection to Master's Report at 14). The Master, however, was not conditioning the recognition of this stock right on a future event, but simply pointing out that any potential *change* in the place of use – i.e. the place where the livestock drink – to some other location (for example, if practicable, to Claimant's private lands through the use of an artificial diversion and conveyance system), would be subject to § 85-2-402, MCA. Such a potential future effort is not a condition precedent to this Court's recognition of the water right. Whether such a change happens or not is immaterial to, and has no effect on, the issues presently before this Court.

The United States failed to present any evidence that raised a genuine issue of material fact with respect to J.C. Seidensticker's appropriation, perfection, and ownership of these stockwater rights, or the subsequent transfer of his water rights to the current Claimant. The unopposed facts raised by the USFS in its Motion for Summary Judgment and other briefs, were either immaterial to a decision on the issues, or merely speculative conclusions drawn by the USFS, itself. To defeat a motion for summary judgment, the opposing party's facts must be material and substantial and implications based on the opposing party's opinions are not enough. The presentation of factual issues in conclusory fashion in briefs is not an appropriate means of opposing a motion for summary judgment. *See generally Westlake v. Osborne* (1986), 220 Mont. 91, 713 P.2d 548.

Accordingly, this Court agrees with the Master that "the water right[s] – used for the benefit of claimants privately owned lands – [are] appurtenant to claimant's privately owned lands" and owned by the Claimant. However, in order to prevent confusion over the relationship of Water Right Claim Examination Rules 1.III(45), 4.II(2), and 4.III(1) to the ownership of these water rights, this Court adds the following clarification remark (or similar language) to these direct stockwater rights:

THIS WATER RIGHT IS EITHER HELD IN GROSS BY THE CLAIMANT OR IS APPURTENANT TO LAND OWNED BY THE CLAIMANT AND USED IN CONJUNCTION WITH FEDERAL PUBLIC LAND.

C. No Conflict with Federal Law

The United States argues that even if these stockwater claims are valid under Montana law, they cannot be decreed with a point of diversion or place of use legal description on federal land. The United States asserts that if private parties are decreed water rights on federal public lands, federal agencies will be unable to fulfill their congressional mandate to administer the federal lands for multiple public use. It contends

that when state law conflicts with federal law, federal law preempts state law under the Supremacy Clause of the United States Constitution.

The United States made similar arguments in Water Court Case 40E-A. In that case, this Court found as a matter of law that:

- 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. (*Opinion* in Water Court Case 40E-A at 15)
- 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. (*Id.*)
- The Acts of 1866, 1870, and 1877 acknowledged and confirmed the right to appropriate private stockwater rights in accordance with Montana custom and law. (*Order* in Water Court Case 40E-A at 2.) *See also Opinion* at 15-17.
- By [those Acts], 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.” (*Opinion* at 17 (citations omitted)).
- In light of the long history of congressional deference to state control over the waters on federal public land, there is a presumption that state law will control all non-reserved claims, 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. (*Id.* at 18-20).
- 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. (*Id.* at 28)
- Valid state based water rights appropriated prior to creation of a federal reserved water right are not affected by the federal reservation. (*Id.* at 27)

This Court adopts the analysis set forth in Case 40E-A and incorporates it herein by reference. With these principles in mind, the Court next determines whether federal law prevents recognition of these private stockwater rights.

The Taylor Grazing Act of 1934 and Claim 41G-W-197167

As acknowledged by both the United States and Montana Supreme Courts, from the time Congress opened the public domain to homesteading in 1862, if not before, it acquiesced in the use of federal lands by the public for a multitude of purposes, including the grazing of livestock. Growing “out of that custom of nearly a hundred years” evolved “an implied license . . . that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids their use.” *Buford v. Hountz*, 133 U.S. 320, 326, 10 S. Ct. 305, 307, 33 L. Ed. 618, 620 (1890). *See also Clemmons v. Gillette* (1905), 33 Mont. 321, 326-27, 83 P. 879, 880.

Pursuant to that implied license, J.C. Seidensticker grazed his livestock on the public domain between 1870-1875 and to 1934, and, while doing so, he appropriated water from Cottonwood Creek and the East Fork Steels Pass Spring for the use of his livestock. Appropriated and perfected in accordance with Montana law and custom, these stockwater rights vested in his name and were conveyed to his successors in interest.

Seidensticker’s free and unregulated use of the public domain came to an end on June 28, 1934, when Congress passed the Taylor Grazing Act 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. Act of June 28, 1934, 43 U.S.C. § 315a (2000); *Public Lands Council v. Babbitt*, 529 U.S. 728, 733, 120 S. Ct. 1815, 1819, 146 L. Ed. 2d 753, 760 (2000); *Kidd v. United States Dep't of Interior, Bureau of Land Mgmt.*, 756 F.2d 1410, 1411 (9th Cir. 1985); *In re Kalfell Ranch, Inc.* (1994), 269 Mont. 117, 887 P.2d 241. At approximately that time, pursuant to the Taylor Grazing Act and related executive orders,¹³ Section 26 and the N½ of Section 6, where Cottonwood Creek is located, were withdrawn from the public domain, and by 1939, the land was classified for grazing and managed and regulated by the newly created General Land Office and Grazing Service (precursors to the BLM) in coordination with the State of Montana.

Federal regulation of the grazing land, however, did not divest the Seidensticker Ranch of this stockwater right because the Taylor Grazing 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 hereinafter initiated or acquired and maintained in accordance with such law.

43 U.S.C. § 315b (2000).

The Organic Act of 1897 and Claim 41G-W-197162-00

Section 14, where the East Fork Steels Pass Spring is located, was withdrawn from the public domain by Presidential Proclamation on April 12, 1906, at which time it became part of the Helena Forest Reserve, and was subsequently consolidated into the Deerlodge National Forest by Executive Order of July 1, 1908.

At the time Section 14 was withdrawn from the public domain and reserved, J.C. Seidensticker had already appropriated, perfected, and maintained Claim 41G-W-197162-00 in accordance with Montana law and custom. Any federal water rights

¹³

See, e.g., Exec. Order No. 6910 (Nov. 26, 1934).

impliedly created by the reservation in 1906, therefore, are junior and subject to that prior appropriation. *New Mexico*, 438 U.S. at 698; *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; *Hunter v. United States* (9th Cir. 1967), 388 F.2d 148, 152-53.¹⁴

Livestock Reservoir Act and Public Water Reserve No. 107

Although the United States also cited the Livestock Reservoir Act of January 13, 1897 in support of its case, there is no evidence that either of these claims involved a livestock reservoir constructed pursuant to that Act. Similarly, Public Water Reserve No. 107, also cited by the United States in support of its argument, was issued *after* Section 14 was withdrawn from the public domain for national forest purposes and is not relevant to the issues in this case.

Therefore, none of the Federal Acts cited by the United States precluded or preempted the appropriation of these stockwater rights on this federal land in 1870. Appropriated, perfected, and maintained in accordance with existing Montana law, title to the water rights vested in the appropriator. Only when state law directly conflicts with a clear and explicit exercise of federal power, does federal power preempt state law under the Supremacy Clause of the United States Constitution.

¹⁴ The United States Supreme Court has held that *even after* the reservation of a national forest and concomittal creation of federal reserved water rights, private stockwater rights could still be appropriated on national forest lands in accordance with state law:

While Congress intended the national forests to be put to a variety of uses, including stockwatering, not inconsistent with the two principal purposes of the forests, stockwatering was not itself a direct purpose of reserving the land. If stockwatering could not take place on the Gila National Forest, Congress' purposes in reserving the land would not be defeated. Congress, of course, did intend to secure favorable water flows, and one of the uses to which the enhanced water supply was intended to be placed was probably stockwatering. But Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators 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 716-17 (emphasis added).

D. Department of State Lands v. Pettibone

Finally, the United States argues that the rationale and policies articulated by the Montana Supreme Court in *Department of State Lands v. Pettibone*, should apply to vest title to these stockwater rights in the United States.

In Water Court Case 40E-A, the United States made a similar argument, and this Court found as a matter of law that:

The decision of *Dep't of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948 is applicable to waters appropriated on and for use on Montana school trust lands **and is not applicable to the use of water on federal public lands.**

Order in Water Court Case 40E-A at 2. In its *Opinion*, this Court explained that:

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 . . . this Court will not presume to do so through application of the *Pettibone* decision.

Opinion at 13-14. The Court's analysis with respect to this issue in Case 40E-A is incorporated herein by reference and adopted for purposes of adjudicating claims 41G-W-197162-00 and 41G-W-197162-00.

There is no genuine issue of material fact that at the time these stockwater rights were appropriated in 1870, the land on which they were appropriated had not yet been

surveyed for purposes of the public school trust, and was still part of the unreserved public domain. Appropriated, perfected, and maintained in accordance with existing Montana law, title to the water rights vested in the appropriator.

The fiduciary principles applicable to private charitable trusts that the Montana Supreme Court applied to the public school trust lands in *Pettibone* do not – and should not – apply to the federal public lands in this case. While there may be changing policies and priorities with respect to the management of federal lands and resources, it is the province of the federal government – not this Court – to effect those changes. It is noteworthy that on the most recent occasions when Congress enacted legislation modifying its management policies for public lands and resources, it again chose not to preempt state control over the water resources on federal public lands.¹⁵ The Department of the Interior did not revise its regulations with respect to the appropriation of water rights on federal range land until 1995 – more than a century after these two stockwater rights were appropriated. This Court reiterates that unless the federal government has explicitly and clearly abandoned its historical deference to state control over the water resources on federal lands, this Court will not presume to do so through application of the *Department of State Lands v. Pettibone*.¹⁶

The United States has expressed concern that by decreeing water rights which include federal lands of the United States within the listed points of diversion and/or places of use, the decrees could be interpreted as granting incidental easements in federal

¹⁵ See e.g., Federal Land Policy and Management Act of 1976, P.L. 94-579, Title VII, § 704(a), 90 Stat. 2792; Multiple-Use Sustained Yield Act of 1960, P.L. 86-517, § 1, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-531); *New Mexico*, 438 U.S. 696; *Sierra Club v. Watt* (D.C. 1981), 659 F.2d 203.

¹⁶ See, e.g., *United States v. New Mexico*, 438 U.S. at 700; *California v. United States*, 438 U.S. at 662-63; 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 Env'tl. L. 535, 584 (1982).

land. To avoid this interpretation, the United States has requested, in the alternative, that the water rights be amended to exclude any description of federal public lands.

The Montana Supreme Court has consistently distinguished between incorporeal water rights, which are the subject of this statewide adjudication, and the corporeal (e.g., access) easements that may be used in conjunction with them. *See Connolly*, 102 Mont. at 300 (finding that “water rights and ditch rights are separate and distinct property rights,” and that “one may own a water right without a ditch right, or a ditch right without a water right.”); *Smith*, 24 Mont. at 24 (finding that water rights and easements of access or conveyance are distinct and discreet property rights). Generally, the Water Court does not have jurisdiction to adjudicate the corporeal easements that may accompany a water right. To alleviate the concern of the United States, however, the Court would consider adding clarification remarks to the abstracts of claims 41G-W-197162-00 and 41G-W-197167-00, if the parties can agree on appropriate language.

E. Collateral Estoppel

As noted by Hamilton Ranches in its Motion for Summary Judgment, the general ownership 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. *See Powder River Claim File #3443* (Main Consolidation File). 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?

In its Conclusions of Law, at 5, 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.

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).

In view of this prior litigation (and the Water Court's *Order and Opinion* in Water Court Case 40E-A at 31-32), and despite the fact that the rules prescribing the use of collateral estoppel may vary when the United States is a party in the case, *see e.g., United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed. 2d 379 (1984), the doctrine of collateral estoppel or issue preclusion may be applicable to one or more of the issues in this case. *See e.g., United States v. Stauffer Chemical Co. v. E.P.A.*, 647 F.2d 1075 (10th Cir. 1981); *Peschel v. Jones* (1988), 232 Mont. 516, 521, 760 P.2d 51, 54 and *In re Beneficial Water Use Permit* (1996), 278 Mont. 50, 61-63, 923 P.2d 1073.

V. CONCLUSION

A claim of an existing water right filed in accordance with § 85-2-221, MCA, constitutes prima facie proof of its contents until issuance of the final decree. § 85-2-227,

MCA.¹⁷ In order to succeed on its motions for summary judgment, the United States had the burden of proving that there were no genuine issues of material fact with respect to its objections and that it was entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. To successfully defeat the Claimant's motion for summary judgment, the United States had the burden of presenting evidence that established a genuine issue of material fact with respect to the Claimant's ownership of these water rights. Rule 56(c), M.R.Civ.P.

After a careful review of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," the Court finds that there are no genuine issues of material fact with respect to any of the motions for summary judgment, but that the United States is not entitled to summary judgment on its motions as a matter of law. The Claimant, on the other hand, is entitled to summary judgment with respect to its motion. Accordingly,

The motions for summary judgment by the DSL and the United States, and the objections of the United States to the Master's Report are respectively **DENIED** and **DISMISSED**. The Claimants' motion for summary judgment is **GRANTED**. Stockwater claims 41G-W-197162-00 and 41G-W-197167-00 shall otherwise appear unchanged in the Preliminary Decree for the Jefferson River Basin, except for the addition of the clarification remarks mentioned earlier in this Opinion.

DATED this 19 day of July, 2005.

s/s C. Bruce Loble
C. Bruce Loble
Chief Water Judge

¹⁷ See analysis of this issue in *Memorandum Opinion of the Montana Water Court*, Case No. 40G-2 (March 11, 1997), which the Court incorporates into this Opinion by reference.

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APPENDIX “B” TO APPELLANT JOYCE’S REPLY BRIEF

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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)

* * * * *

IN THE MATTER OF THE ADJUDICATION	)	CASE NO. 41G-190
OF THE EXISTING RIGHTS TO THE USE	)	41G-W-197162-00
OF ALL THE WATER, BOTH SURFACE AND	)	41G-W-197167-00
UNDERGROUND, WITHIN THE JEFFERSON	)	
RIVER DRAINAGE AREA, INCLUDING ALL	)	
TRIBUTARIES OF THE JEFFERSON RIVER	)	
IN BROADWATER, GALLATIN, MADISON,	)	
JEFFERSON AND SILVER BOW COUNTIES,	)	
MONTANA.	)	
	)	

CLAIMANT: Hamilton Ranches Partnership

MOTION OF MONTANA WATER COURT

OBJECTOR: United States of America (Bureau of Land Management)
United States of America (USDA Forest Service)
Montana Department of State Lands

**ORDER AND OPINION
GRANTING IN PART AND DENYING IN PART
UNITED STATES' MOTION FOR RECONSIDERATION**

On July 19, 2005, the Court issued an Opinion and Order recognizing the right to appropriate direct instream water rights in 1870 for private livestock use on federal public lands. In its Order, the Court stated that unless the parties proposed a mutually acceptable clarification remark, the Court would add a remark to the private livestock claims that:

THIS WATER RIGHT IS EITHER HELD IN GROSS BY THE CLAIMANT OR IS APPURTENANT TO LAND OWNED BY THE CLAIMANT AND USED IN CONJUNCTION WITH FEDERAL PUBLIC LAND.

Order at 2-3 and Opinion at 25 and 32.

On September 6, 2005, the United States of America, USDA-Forest Service, filed a Motion for Reconsideration and Brief in Support stating that:

(1) To properly adjudicate and administer the stockwater rights in this case and elsewhere in Montana, the Water Court must clarify its ruling that the stockwater rights are appurtenant to private land, not held in gross, and must identify the land to which it is appurtenant; (2) The Court should clarify that recognition of the water right claims does not create or imply any right of access to federal lands; and (3) The source type and means of diversion for Claim No. 41G-W-192162-00 are inconsistent with the Judge's characterization of this claim as direct-from-source.

United States' Motion for Reconsideration and Brief in Support, filed September 7, 2005, at 1.

The Court has carefully reviewed its Opinion and Order and the briefs filed by the parties. Upon reconsideration, it now affirms its Opinion and Order, as modified herein.

I. Appurtenant Land

The United States has asked the Court, with respect to claim 41G-W-197162-00, to clarify that this stockwater right is appurtenant to private land, and to identify the private land to which it is appurtenant. Alternatively, if the Water Court finds that the water right is held in gross, the United States argues that "[u]nder the circumstances of the instant case, the Court should find that [this stockwater right] . . . is owned by the individual or entity holding the Forest Service grazing permit covering the National Forest System land upon which the water source is located and upon which the water is beneficially used." United States' Motion for Reconsideration at 2, 5, 6-7.

In its Brief, the United States argues that the clarification remark proposed by the Court creates ambiguity regarding the nature of the water right and does not adequately identify the private land to which the water right is appurtenant. United States' Motion for Reconsideration at 2. It further argues that:

Given that the claims are prima facie valid, Mont. Code. Ann. § 85-2-227 (2003), using the private lands identified on the statement of claim is the simplest approach for the Water Court to use to determine private lands to which the water right is appurtenant.

Id. at 5.

In the Claimant's Reply to United States' Motion for Reconsideration, the Claimant agreed with the United States that using the private lands identified on the statement of claim was the simplest procedural approach for the Water Court to use to identify the private lands to which the water right is appurtenant and suggested that the following sentence be added to the Court's proposed clarification remark:

The lands owned by the Claimant to which this right is appurtenant are as follows:
[Insert appropriate legal description].

Claimant's Reply at 2.

In response, the United States argued that the place of use should remain as described on the water right abstract, but that the following clarification remark should be added to the abstract:

The lands owned by the Claimant to which this right is appurtenant are as follows: Sections 15, 23, and the SW1/4 of Section 22, Township 2 South, Range 7 West, Madison County, Montana.

United States' Reply on Motion for Reconsideration at 3.1

Section 85-2-231(4), MCA, provides that the: "temporary preliminary decree or preliminary decree must contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234." Section 85-2-234(6)(e), MCA, provides that: "the final decree must state . . . the place of use and a description of the land, if any, to which the right is appurtenant."

In its Opinion, this Court distinguished between the place of use, as defined by the Water Right Claim Examination Rules, and the land to which a water right is appurtenant. "Place of Use" is defined by Rule 1.III(45) as: "the lands, facilities, or sites

¹ The United States contends that Claimant only owns the SW1/4 of Section 22, and that the remainder of the section is owned by the BLM.

where water is beneficially used." "Beneficial Use" is defined by Rule 1.III(8) and § 85-2-102(2), MCA, as a use of water recognized as beneficial prior to July 1, 1973 and "used for the benefit of the appropriator, other persons or the public. . ." Rule 4.III directs the DNRC to describe the place of use for stock purposes on the water right abstract as "the actual place where the stock drink the water."

Rule 4.III is not a determination that the water right is attached to the land as an appurtenance, or a description of the land to which a stockwater right is appurtenant. As explained by this Court, a water right is in the nature of an easement in gross, "which may or may not become an easement attached to particular land as an appurtenance. Opinion at 17, citing *Smith v. Denniff* (1900), 24 Mont. 20, 25, 27, 60 P. 398. Montana statutes have long provided that "a water right is incidental or appurtenant to specific land, when it is by right used with the land for its benefit," 70-15-105, MCA, and that "the transfer of a thing transfers also all its incidents, unless expressly excepted." 70-1-520, MCA. The Montana Supreme Court has also long held that a water right acquired by appropriation and *used for a beneficial and necessary purpose in connection with a given tract of land*, is an appurtenance thereto, and as such passes with the conveyance of the land, unless expressly reserved from the grant. *Yellowstone Valley Co. v. Assoc. Mtg. Investors* (1930), 88 Mont. 73, 81-82, 295 P. 255, 258 (quoting *Lensing v. Day & Hansen Security Co.* (1923), 67 Mont. 382, 384, 215 P.2d 999, 1000). *See also* § 85-2-403(1), MCA.

The statement of claim for this water right, as well as the record supporting the motions, indicate that prior to July 1, 1973, the Claimant's stock, though consuming the water and grazing on public lands in Section 14, were also grazing on Claimant's private deeded lands in nearby Sections 15, 22, and 23. Exhibits attached to the United States' motion for summary judgment support the fact that Sections 14, 15, 22 and 23 were all included in Claimant's Hells Canyon Forest Service allotment. *See* United States (USDA-Forest Service) Motion for Summary Judgment at 4, 6, 7, 10, 13, and Exhibits C, E, and F, attached to the motion. In its motion for summary judgment, the United States represented that:

As in other areas, the Forest Service allotted the ranchers in the Hells Canyon area joint and common use of this portion of the Deerlodge

National Forest based on the dates the ranchers first established themselves in the area, on the amount of base land the ranchers owned, and on the carrying capacity of the land.

Id. at 10. The cooperative agreement for range improvements entered into between the Forest Service and the Claimant reflects the cooperative and joint nature of land use within the Claimant's allotment. *Id.* at 7; and Exhibit F to motion.

Therefore, upon consideration of the modifications to place of use proposed by the parties, this Court concludes that the place of use for claim 41G-W-192162-00 should remain as described on the temporary preliminary decree water right abstract, but the place of use clarification remark proposed by the Court should be modified to state:

THE PLACE OF USE CONSISTS OF FEDERAL PUBLIC LAND. THIS RIGHT IS APPURTENANT TO THE FOLLOWING PRIVATE LANDS: SECTIONS 15, 23 AND SW1/4 OF SECTION 22, TOWNSHIP 02 SOUTH, RANGE 07 WEST, MADISON COUNTY, MONTANA.

II. Right of Access

The United States also argues that by decreeing water rights which include federal public lands within the listed points of diversion and/or places of use, the decrees could be interpreted as granting incidental easements in federal land. To avoid this interpretation, the United States has asked the Court to exclude any description of federal public lands in the point of diversion or place of use, and/or to add the following clarification remark to the water right abstract:

Entry of a decree containing this water right does not create any right, title or interest in the use of or access across any federal lands.

United States' Reply at 6.

The language proffered by the United States suggests a judicial determination has been made on the access issue when, in fact, no such determination has been decided by the Montana Supreme Court or the federal courts. Opinion at 32. For example, in *Hunter v. United States of America*, 388 F.2d 148 (1967), the Ninth Circuit concluded that

“although Hunter is not entitled to an easement to graze livestock on the lands within the boundaries of the Monument, he should be allowed a right of way over those lands to divert the water by one of the methods contemplated by the statute.” 388 F.2d at 154 citing at footnote 4 to *Patterson v. Ryan*, 37 Utah 410, 108 P. 1118 (1910); *Davis v. Gale*, 32 Cal. 26 (1867). Although the case was remanded for further proceedings to resolve the easement issue, no further history of the case was reported. Therefore, the legal issue of the right to cross federal public lands to access the private water rights in that case does not appear as if it was ever fully resolved. Furthermore, the adjudication of access easements is beyond the jurisdiction of the Water Court. See e.g., §§ 3-7-224 and 3-7-501, MCA. Some other court will need to resolve the access issue when, or if, the issue ever arises.

III. Characterization of Claim 41G-W-197162-00

Finally, the United States asserts that the: “Water Court’s opinion erroneously refers to Claim No. 41G-W-197162-00 as a direct from source claim from a spring. Opinion at pp. 24, 25.” It argues that:

Given that the Court did not acknowledge that Claim No. 41G-W-197162-00 is a groundwater claim as opposed to a direct from source claim, questions regarding priority date, source, expansion of the right with development, and groundwater permit needs are not addressed in the Court’s opinion, but are raised by the facts in the case.

United States’ Motion for Reconsideration at 9. The United States further argues that, in light of the Court’s characterization of the claim as a “direct from source right,” and its conclusion that the right is appurtenant to lands other than those described as the place of use, the Court should clarify “that the volume used under the right will be determined by the actual number of animals that graze and consume water in Section 14 under Forest Service permit.” *Id.*

The Claimant replied that “the Court is free to include a remark for this claim indicating that use is limited to 400 cattle, and that volume should be quantified as 21,600

gallons per day, which were both listed on the statement of claim. Claimant's Reply at 7. The United States argues that this quantification is "inconsistent with the DNRC Claims Examination Rules and . . . with [other] calculations made on the statement of claim form." United States' Reply at 7. Therefore, the United States has also requested that the volume be remanded back to the Water Master for clarification and quantification.

In reviewing the summary judgment motion, the Court reviewed the history of the water right, as represented in the pleadings, depositions, answers to interrogatories, and admissions and affidavits on file with the court. This Court ultimately found that there was no genuine issue of material fact with respect to the claim that this water right was appropriated in 1870 by J.C. Seidensticker as a result of his livestock drinking directly from the East Fork of Steel's Pass Spring, and that in the 1960s the spring was improved and developed, and stock tanks were installed on the public and private sides of the fence. Opinion at 7. All of the legal arguments raised by the United States to contradict the claim challenged the validity and ownership of the water right. Therefore, the Court's discussion most often referred to the water right as it existed at the time of its original appropriation in 1870, i.e. a direct instream stockwater right, appropriated from an undeveloped spring.²

At some point, the spring was apparently "developed," perhaps in 1953, perhaps in 1967. The United States asserts it has grazing association meeting notes from 1954 indicating that "a spring was developed in the Steels Pass area the previous year." United States' Motion for Summary Judgment and Brief in Support (USDA-FS Motion) filed May 20, 1994 at 6. The 1981 Affidavit of S. J. Seidensticker, attached to the statement of claim,

²

The Court notes that the Forest Service, itself, has confused the nature of this stockwater right. In its Reply Brief to Cross-Motions for Summary Judgment, the Forest Service characterized the water right as follows: "Claim 41G-W-197162 is also a **direct from source stockwater claim**, the type of claim for which the point of diversion and place of use are identical. See Exhibit D, DNRC Water Rights Claims Examination Manual, May 1992 Edition at 352, 354. Therefore, on its face, Claim 41G-W-197162 appears not to be a stockwater right for cattle which graze on private land, but for cattle which graze on National Forest." United States' (USDA-Forest Service) Reply to Cross-Motions for Summary Judgment, filed August 15, 1994, at 11.

states that water from the spring was originally appropriated in 1870, but that the Affiant constructed "a catch basin and ran the water by pipe to a metal water trough" in 1967.

The claim was filed with a flow rate of 15 gpm from a source identified as a "spring." It was decreed with a flow rate of 15 gpm from a "developed spring." The extent of the development and whether this claim was a "direct from source" claim was not raised as an issue in the motions for summary judgment. As previously noted, the summary judgment issues were directed at the validity and ownership of a private water right first used on public lands.

Now that the issues raised in the motions for summary judgment have been resolved, the Court and the parties may now address the other issues raised by the objections. Accordingly, the Court will set a status conference to address what needs to be done to bring this case to a close.

CONCLUSION

After careful consideration, the Court affirms its prior Opinion and Order Amending and Adopting Master's Report except for the Place of Use clarification remark set forth above. Further proceedings will be held to resolve any remaining objections to claims 41G-W-197162-00 and 41G-W-197167-00.

DATED this 27 day of April, 2006.

s/s C. Bruce Loble
C. Bruce Loble
Chief Water Judge

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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)

* * * * *

IN THE MATTER OF THE ADJUDICATION	)	CASE NO. 41G-190
OF THE EXISTING RIGHTS TO THE USE	)	41G-W-197162-00
OF ALL THE WATER, BOTH SURFACE AND	)	41G-W-197167-00
UNDERGROUND, WITHIN THE JEFFERSON	)	
RIVER DRAINAGE AREA, INCLUDING ALL	)	
TRIBUTARIES OF THE JEFFERSON RIVER	)	
IN BROADWATER, GALLATIN, MADISON,	)	
JEFFERSON AND SILVER BOW COUNTIES,	)	
MONTANA.	)	
_____	)	

CLAIMANT: Hamilton Ranches Partnership

MOTION OF MONTANA WATER COURT

OBJECTOR: United States of America (Bureau of Land Management),
United States of America (USDA Forest Service)

CLOSING ORDER

On July 19, 2005, the Water Court issued its Opinion, and its Order Amending and Adopting Master's Report. Following the filing of a Motion for Reconsideration, the Water Court issued its Order and Opinion Granting in Part and Denying in Part the United States' Motion for Reconsideration. On May 25, 2006, counsel and the Court held a telephone conference to determine what additional matters needed to be accomplished in order to close the case. The parties agreed that all that was needed to bring this case to a close was the development of suitable language to identify the private lands to which these two claims were appurtenant.

On July 18, 2006, the United States' Bureau of Land Management and the USDA-Forest Service filed conditional withdrawals of objections conditioned on the Court adding clarification remarks to the abstracts of stockwater claims 41G-W-197162-00 and 41G-W-197167-00 which would identify the private lands to which these two stock claims are appurtenant. The parties proposed some language for the remarks and, with minor changes, their language has been adopted. Accordingly, it is

ORDERED that the following remark be inserted beneath the place of use element on the abstract of claim 41G-W-197162-00:

THE PLACE OF USE CONSISTS OF FEDERAL PUBLIC LAND, BUT THIS RIGHT IS APPURTENANT TO THE FOLLOWING PRIVATE LANDS IN MADISON COUNTY, MONTANA: SECTIONS 15, 23, AND SW SECTION 22, TOWNSHIP 2 SOUTH, RANGE 7 WEST.

ORDERED that the following remark be inserted beneath the place of use element on the abstract of claim 41G-W-197167-00:

THE PLACE OF USE CONSISTS, IN PART, OF FEDERAL PUBLIC LAND, BUT THIS RIGHT IS APPURTENANT TO THE FOLLOWING PRIVATE LANDS IN MADISON COUNTY, MONTANA: SENE, NWSE SECTION 26, SECTION 35, TOWNSHIP 2 SOUTH, RANGE 7 WEST; S2 SECTION 31, TOWNSHIP 2 SOUTH, RANGE 6 WEST; AND S2 SECTION 6, SW SECTION 5, N2 SECTION 8, AND W2 SECTION 9, TOWNSHIP 3 SOUTH, RANGE 6 WEST.

ORDERED that a Post Decree Abstract of Water Right Claims 41G-W-197162-00 and 41G-W-197167-00 be served with this Order to confirm that the centralized record system has been properly updated.

DATED this 29 day of August, 2006.

s/s C. Bruce Loble
C. Bruce Loble
Chief Water Judge

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MCA.¹⁷ In order to succeed on its motions for summary judgment, the United States had the burden of proving that there were no genuine issues of material fact with respect to its objections and that it was entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. To successfully defeat the Claimant's motion for summary judgment, the United States had the burden of presenting evidence that established a genuine issue of material fact with respect to the Claimant's ownership of these water rights. Rule 56(c), M.R.Civ.P.

After a careful review of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," the Court finds that there are no genuine issues of material fact with respect to any of the motions for summary judgment, but that the United States is not entitled to summary judgment on its motions as a matter of law. The Claimant, on the other hand, is entitled to summary judgment with respect to its motion. Accordingly,

The motions for summary judgment by the DSL and the United States, and the objections of the United States to the Master's Report are respectively **DENIED** and **DISMISSED**. The Claimants' motion for summary judgment is **GRANTED**. Stockwater claims 41G-W-197162-00 and 41G-W-197167-00 shall otherwise appear unchanged in the Preliminary Decree for the Jefferson River Basin, except for the addition of the clarification remarks mentioned earlier in this Opinion.

DATED this 19 day of July, 2005.

s/s C. Bruce Loble
C. Bruce Loble
Chief Water Judge

¹⁷ See analysis of this issue in *Memorandum Opinion of the Montana Water Court*, Case No. 40G-2 (March 11, 1997), which the Court incorporates into this Opinion by reference.