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DEPARTMENT OF  
WATER RESOURCES

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Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: SNAKE RIVER BASIN  
ADJUDICATION CASE NO. 39576

) SUPREME COURT CASE NO. 31994

LU RANCHING CO.,

) LU RANCHING CO.'S NOTICE OF  
) CITATION TO SUPPLEMENTAL  
) AUTHORITY

Appellant,

v.

UNITED STATES OF AMERICA,

Respondent.

LU Ranching Co., by and through its attorneys of record, pursuant to I.A.R. 34(f) and the Court's order setting Hearing by Supreme Court issued September 18, 2006, hereby requests that the Court take notice of the following supplemental authority:

- In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within the Missouri River Basin Drainage Area, Between the Musselshell River and Fort Peck Dam Including All Tributaries of the Missouri River Between the Musselshell River and Fort Peck Dam in Garfield, McCone, Phillips, Prairie, & Valley Counties, Montana, Case No. 40E-A, Opinion (June 29, 2005)*

(attached hereto as Appendix "A").

2. *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within the Missouri River Basin Drainage Area, Between the Musselshell River and Fort Peck Dam Including All Tributaries of the Missouri River Between the Musselshell River and Fort Peck Dam in Garfield, McCone, Phillips, Prairie, & Valley Counties, Montana, Case No. 40E-A, Order (Summary of Decision) (June 29, 2005) (attached hereto as Appendix "B")*
3. *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, Montana, Case No. 41G-190, Closing Order (August 29, 2006) (attached hereto as Appendix "C")*
4. *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, Montana, Case No. 41G-190, Opinion (July 19, 2005) (attached hereto as Appendix "D")*
5. *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, Montana, Case No. 41G-190, Order and Opinion Granting in Part and Denying In Part United States' Motion for Reconsideration (April 27, 2006) (attached hereto as Appendix "E")*

Dated this 23 day of October, 2006

Respectfully submitted,

McQUAID BEDFORD & VAN ZANDT, LLP

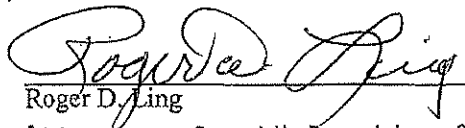
By:

  
Michael J. Van Zandt  
Elizabeth P. Ewens

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Dated this 24<sup>th</sup> day of October, 2006

LING, ROBINSON & WALKER

By:   
Roger D. Ling  
Attorneys for LU Ranching Co.



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CERTIFICATE OF SERVICE

I certify that on October 24, 2006, I served a true and correct copy of foregoing **LU RANCHING CO.'S NOTICE OF CITATION TO SUPPLEMENTAL AUTHORITY** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

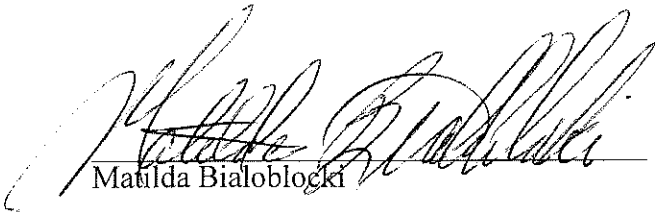
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**APPENDIX “A” TO LU  
RANCHING’S NOTICE OF  
CITATIONS TO SUPPLEMENTAL  
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Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER  
AND FORT PECK DAM - BASIN (40E)

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

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

**OPINION**

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

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

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

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

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

## **I. JURISDICTION**

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

## **II. STANDARD OF REVIEW**

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

### III. LEGAL ISSUES

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

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

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

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

States.<sup>2</sup>

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

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

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

## IV. DISCUSSION

### Background

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

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

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

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

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

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

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

the permittee.

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

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

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

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

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

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

#### A.

#### Exclusive Use, Dominion, and Control

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

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

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

Water law in Montana was born in the rough and primitive gold fields of California, where an enforceable water right was acquired simply by taking possession of water on the public domain and putting it to beneficial use, with first in time being first in right.<sup>7</sup> Those customs ripened into well-recognized rules, known as the prior appropriation doctrine, which were subsequently adopted by Montana's early settlers and ultimately given the force of law by Congress, the Montana legislature, the United States Supreme Court and the Montana Supreme Court. *Mettler v. Ames Realty Co.* (1921), 61 Mont. 152, 170-71, 201 P. 702, 707-08.<sup>8</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

....

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

....

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

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

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

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

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

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

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

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

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

**B.**

**Department of State Lands v. Pettibone**

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

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

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

. . . .

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

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

the State.

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

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

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

*Pettibone*, 216 Mont. at 372.

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

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

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

### C.

#### Federal Law

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

#### Concurrent Authority Over Water

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

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

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

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

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

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

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

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

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

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

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

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

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

*Basey*, 87 U.S. at 684.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Assistant Attorney General emphasized, however, that:

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

6 Op. O.L.C. at 383.<sup>11</sup>

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

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

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

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

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

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

#### Act of January 13, 1897

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

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

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rights under state laws.

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

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

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

....

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

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

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

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

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

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

H.R. Rep. No. 1527 (1896) (emphasis added).<sup>12</sup>

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

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

#### D.

##### **Stock Raising Homestead Act and Public Water Reserve No. 107**

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Federal Reserved Water Right Doctrine

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

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

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

federal reserved water right doctrine as follows:

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

....

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

....

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

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

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

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

....

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

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

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

What we have said also answers the Government's contention that Congress intended to reserve water from the Rio Mimbres for stock watering purposes. The United States issues permits to private cattle owners to graze their stock on the Gila National Forest and provides for stockwatering at various locations along the Rio Mimbres. The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stock waterers. We agree.

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

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

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

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

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

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

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

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

#### E.

#### The Taylor Grazing Act of 1934

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

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

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

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

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

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

[N]othing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands *or which may be hereafter initiated or acquired and maintained in accordance with such law.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### F.

##### **Charles M. Russell and UL Bend National Wildlife Refuges**

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

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

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

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

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

#### G.

#### Collateral Estoppel

Although not mentioned by the attorneys, the primary issue in this case was litigated by the United States to final judgment before the Water Court in the Powder River Preliminary Decree in 1983.<sup>23</sup> In its March 31, 1983, Findings of Fact and Conclusion of Law, the Water Court identified the issue as follows:

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

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

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

#### II.

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

#### III.

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

#### IV.

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

<sup>23</sup> See Powder River Claim File #3443 (Main Consolidation File).

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

V.

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

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

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

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

### Conclusion

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

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

DATED this 29th day of June, 2005.

/s/ C. Bruce Loble

C. Bruce Loble  
Chief Water Judge

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**APPENDIX “B” TO LU  
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IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER  
AND FORT PECK DAM - BASIN (40E)

\*\*\*\*\*

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

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

**ORDER**

This matter came before this Court on the cross-motions of the Claimants and the United States for partial summary judgment on issues of law. In conjunction with Rule 16, M.R.Civ.P., partial summary judgment is appropriate to formulate and simplify the

issues and facilitate the final disposition of the action. Rules 16 and 56(d), M.R.Civ.P.

After careful consideration of the statements of position, the briefs submitted by the parties, the Master's Report, and the law, and for the reasons set forth in the accompanying Opinion, it is Ordered:

1. The Master's Report is **AMENDED** to conform to the analysis set forth herein and, as so amended, is **ADOPTED**;

2. The United States' motions for partial summary judgment and to modify the Master's Report are **DENIED**;

3. The Claimants' motion for partial summary judgment is **GRANTED** as follows:

- Montana law, as it existed prior to the Water Use Act of 1973, recognized and acknowledged the right to appropriate and impound private stockwater rights for livestock grazing on federal public lands. It did not require the exclusive use, dominion or control of water in order to appropriate a private water right, nor did it require the appropriator to hold an easement or interest in, or the intent to patent, the place where the water right was appropriated or used.
- 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.
- The Acts of 1866, 1870, and 1877 acknowledged and confirmed the right to appropriate private stockwater rights in accordance with Montana custom and law.
- The Act of January 13, 1897, the Stock Raising Homestead Act of 1916, and Public Water Reserve No. 107 do not preclude or preempt state law with respect to the appropriation of private stockwater rights on the water sources involved in this case.
- The Taylor Grazing Act of 1934 did not preclude or preempt the right under Montana law to appropriate private stockwater rights for livestock grazing on lands classified by the Act.
- The right of the Claimants, under pre-July 1, 1973 Montana law, to appropriate private stockwater rights on federal public land was not without

limitation. Whether federal regulations or agreements in effect at the time of any individual appropriation affected the right to appropriate such rights must be decided on a case-by-case basis.

- Whether the United States owns federal reserved water rights by virtue of creation of the Fort Peck Game Range, Charles M. Russell National Wildlife Refuge, or UL Bend National Wildlife Refuge is not an issue presently before this Court in this case.
- The creation of federal refuges, however, does not necessarily preclude or preempt the right under state law to appropriate private stockwater rights on reserved lands. Any state based water right found to be vested and accrued prior to creation of a federal reserved water right would not be affected by the federal right; any state based water right found to be vested and accrued after creation of a federal reserved water right in the same source would ordinarily be subordinate and subject to such a federal right.

None of these partial summary judgment rulings as set forth above, or as discussed in the accompanying Opinion, constitute an ultimate finding of fact or conclusion of law with respect to any individual water right claim in this case.

4. The claims involved in this case will be scheduled for an evidentiary hearing to determine the remaining factual and legal issues, if any, but which might include:

- Whether the individual stockwater claims in this case are valid, existing water rights under Montana law, and the scope and extent of any such rights as defined by §§ 85-2-234(6)(a) through (i), MCA?
- Whether any of the individual stockwater claims in this case were precluded, preempted, or otherwise restricted by federal regulation or voluntary agreement?

5. The issuance of the Opinion in this case resolves an issue that has long been debated and awaited. The Clerk of Court is instructed to mail copies of this Order and accompanying Opinion to the current claimants of the 104 claims involved in this case, in addition to the copies sent to the attorneys. Additionally, a copy of the Order and Opinion shall also be mailed to the individuals identified on the Certificate of Service under the heading "Courtesy Copies."

DATED this 29th day of June, 2005.

/s/ C. Bruce Loble

C. Bruce Loble

Chief Water Judge

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**APPENDIX “C” TO LU  
RANCHING’S NOTICE OF  
CITATIONS TO SUPPLEMENTAL  
AUTHORITIES**

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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  | ) | <b>CASE NO. 41G-190</b> |
| 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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**APPENDIX “D” TO LU  
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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  | ) | <b>CASE NO. 41G-190</b> |
| 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.                           | ) |                         |
| <hr/>                              |   |                         |

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.<sup>1</sup> 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 everyplace . . . where they had feed and water." with everyone's cattle being sorted out "when you brought them in for winter." (Seid. Dep. at 29).

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<sup>1</sup> *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).<sup>2</sup> 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

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its confluence with the Jefferson River.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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

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

<sup>4</sup> 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.<sup>5</sup> 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).

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<sup>5</sup> 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.<sup>6</sup>

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

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<sup>6</sup>

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.

### 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. Lamm* (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.<sup>7</sup>

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

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<sup>7</sup> 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. *Osnos 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.” *Osnos 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,”<sup>8</sup> and “the transfer of a thing transfers also all its incidents, unless expressly excepted.”<sup>9</sup> 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.

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<sup>8</sup> 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.

<sup>9</sup> 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.<sup>10</sup>

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).<sup>11</sup> 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

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<sup>10</sup> 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).

<sup>11</sup> 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.<sup>12</sup>

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

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<sup>12</sup> 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,<sup>13</sup> 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

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<sup>13</sup>

*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.<sup>14</sup>

#### 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.

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<sup>14</sup> The United States Supreme Court has held that *even after* the reservation of a national forest and concomitant 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. *Osnos 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." *Osnos 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.<sup>15</sup> 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*.<sup>16</sup>

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

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<sup>15</sup> 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.

<sup>16</sup> 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 Envtl. 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 (10<sup>th</sup> 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.<sup>17</sup> 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

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<sup>17</sup> 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 “E” TO LU  
RANCHING’S NOTICE OF  
CITATIONS TO SUPPLEMENTAL  
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IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
JEFFERSON RIVER BASIN (41G)

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|                                    |   |                         |
|------------------------------------|---|-------------------------|
| IN THE MATTER OF THE ADJUDICATION  | ) | <b>CASE NO. 41G-190</b> |
| 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

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<sup>1</sup> 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.<sup>2</sup>

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,

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<sup>2</sup> 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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