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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In RE SRBA	)	Subcase 57-11124 et. al.
	)	Memorandum In Opposition to
Case No. 39756	)	United States Motion for Summary Judgment

DESCRIPTIVE SUMMARY

This Memorandum sets forth the legal position which the claimants-objectors seek to have the Court consider when determining the United States Motion for Summary Judgment. It directly responds to the United States Motion and Memorandum In Support of Summary Judgment received by the claimants-objectors on July 22, 1996.

INTRODUCTION

The Government seeks summary judgment on the legal issue that the claimants-objectors are not entitled to seek adjudication of their applications because they do not have exclusivity of access to and use of the water which is situated on lands to which the Government claims ownership. The Government urges its legal position regardless of the Court's decision on the claimants-objectors motions to extend time for responding to discovery.

The claimants-objectors contend that the exclusivity doctrine urged by the Government is not a bar to their seeking adjudication of their applications under Idaho law. They contend that under Idaho law they are entitled to adjudication of their stockwatering claims as to beneficial use of water existing on the public lands.

The Government claims that the claimants-objectors are barred from disputing the mixed fact and law requests for admission which were filed by the Government on June 17, 1996, less than one month before the due date for motions for summary judgment. In a separate memorandum, supported by affidavits, the claimants-objectors seek the Court's exercise of discretion in granting the motion for extension of time for filing responses because of the extraordinary circumstances facing these claimants-objectors during the period following June 17, 1996, and because the short delay in responding to the requests for admission did not prejudice the Government. As shown by the Government's brief in support of summary judgment, the same

exclusivity argument would have been advanced by the Government with or without responses to the requests for admission.

The Government mailed the motion for summary judgment and supporting brief on July 15, 1996 by regular mail. On Thursday, July 18, 1996, counsel for claimants-objectors called the Court to obtain a copy of the Government's motion and supporting brief because no copy had been received. Counsel's secretary was advised that the Court had not yet received the motion or memorandum, but had been advised that they had been mailed. On Monday, July 22, 1996, counsel for claimants-objectors received the Government's motion and supporting memorandum, just 21 days prior to the hearing scheduled by this Court. This memorandum is filed in opposition to the Government's motion for summary judgment on the issue of exclusivity.

ARGUMENT

I. UNDER IDAHO LAW IT IS NOT NECESSARY THAT AN APPROPRIATOR EXERCISE EXCLUSIVE DOMINION AND CONTROL OVER THE LAND ON WHICH EXISTS THE SOURCE OF THE WATER FROM WHICH APPROPRIATION IS MADE.

The Government contends that the claimants-objectors cannot sustain a claim to stockwatering use from water on the public lands because they cannot "demonstrate exclusive dominion and control over the water claimed." The exclusivity concept advanced by the Government is over-broad. Idaho law does not require exclusivity as to control of the source of the water from which stock water is appropriated or as to control or dominion over the land upon which the source of the water exists. Such exclusivity would by its very nature limit the stockwatering right to the owner of the land on which the water source exists. Idaho law does not so limit such stockwatering rights. Rather Idaho law contemplates multiple use of water for stockwatering. Those multiple uses are then to be permitted in accordance with "first in use" appropriation.

The state law of appropriation is applicable in this case. The Idaho Constitution was adopted on August 6, 1889, and ratified by the people in November, 1889. The Congress enacted the Idaho Admission Act on July 3, 1890. 26 Stat. 215 Section 1 of the Admission Act provided that Idaho was admitted into the Union "on an equal footing with the original states" and that the constitution ratified by the people was "accepted, ratified, and confirmed." (Vol. I, Idaho Code, pp. 61-69) Article 15, Section

1 of that "approved" Idaho Constitution provided that the use of all waters, appropriated and unappropriated, was a "public use" and was "subject to the regulations and control of the state." Article 15, Section 3 provided that:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of appropriation shall give the better right as between those using the water."

(Compiler's notes to Article 15, Section 3, Vol. I, Idaho Code, p. 313)

So, when the Congress admitted Idaho to the Union and approved the Idaho Constitution, it approved a mandate that water rights be governed by state law. Neither the Idaho Constitution, nor the statutes enacted to implement the Constitution, established exclusivity of "dominion" over the source of the water as a requirement or qualification for appropriator status. Neither did they establish ownership of the land on which the source of the water exists as a requirement or qualification for appropriator status.

In First Security Bank v. State, 49 Idaho 740, 291 P. 1064 (1930), the Idaho Supreme Court held that water may be appropriated for beneficial use on land not owned by the appropriator. The Court also held that the water right which emanates from such appropriation becomes the property of the appropriator. In that case, First Security's predecessor in interest was decreed a water right for use on unsurveyed public land. When the land was surveyed, title to a section passed to the state and was thereafter leased from the state by the

predecessor in title. When the First Security acquired the land it sought to transfer the water right related to the leased land to other land owned by the bank. The Court allowed the transfer, holding that First Security possessed a water right which could be transferred. The bifurcation between ownership of (and thus dominion over) the land and the water right was thus recognized.

The bifurcation recognized in First Security, supra, was specifically acknowledged to apply to appropriations of water situated on public lands in Lemmon v. Hardy, 95 Idaho 778, 519 P. 2d 1168 (1974). The Idaho Supreme Court stated the Idaho rule to be that "a water right initiated on the unsurveyed public domain is valid". 95 Idaho at 780. The Court relied upon Mahoney v. Neiswanger, 6 Idaho 750, 59 P. 561 (1899), Sarret v. Hunter, 32 Idaho 536, 185 P. 1072 (1919), and First Security Bank v. State, supra, stating that all three cases validate "appropriations that were made on unsurveyed federally owned land." Id. The Court also relied upon C. Finney, The Law of Irrigation and Water Rights, Section 687, p. 1180, for the proposition that a "settler upon the unsurveyed lands of the United States has never been regarded as a trespasser." Id. The Idaho rule was thus established as follows:

The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid. 95 Idaho at 780.

In Keiler v. McDonald, 37 Idaho 573, 218 P. 365 (1923), the Idaho Supreme Court made it clear that even spring water wholly

located on government land was subject to appropriation for a beneficial use. The Court also held that an appropriator of such spring water could restrain a subsequent patentee of the government land from interfering either with the use of the water or the right of way to reach such water. The Court rejected the contention that any use of such water located on government land was merely permissive, subject to revocation at will. The Court stated:

"This position is wholly at variance with the entire theory of the law with reference to the right to appropriate and use the unappropriated public waters of the state, including that of natural springs. Some of counsel's contentions might be tenable in sovereignties that do not recognize rights to the prior use of water, but such principles have no application in any of the jurisdictions which recognize the right to appropriate water for beneficial use.

The facts of this case and the legal questions involved are quite analogous in many respects to those involved in Short v. Praisewater, 35 Ida. 691, 208 Pac. 844, wherein it is held that the waters of a spring situate upon government land are subject to appropriation, and that after the same have been appropriated and applied to a beneficial use, one who thereafter secures title from the government takes such title:

'Subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized by the local laws, customs and decisions of courts, etc.'" 37 Idaho at 577-578

These authorities make it clear that an appropriator of water use for a beneficial use need not possess exclusive control or dominion over the total source of the water being used. An appropriator of water for a beneficial use need only have exclusive control over the particular beneficial use for

which he appropriates water. For example, the claimants-objectors need not demonstrate exclusive control and dominion over the water sites from which they appropriate for the beneficial use of watering their stock. They need only have exclusive control over the beneficial use to which they put the water appropriated, i.e., their livestock. This is the rule which forms the base of the cases cited by the Government which has simply tried to stretch the rule into a requirement broader than allowed by Idaho law.

In Lake Shore Duck Club v. Lake View Duck Club, 166 Pac. 309 (Utah 1917), a case relied upon by the Government, the Utah Supreme Court considered a case in which a duck hunting club claimed a water right for irrigating land to allow the growth of grasses and other vegetation "suitable for feeding wild water fowl". The duck hunting club would not have had exclusive access to the water fowl who would feed on this growth, so it was not making its own beneficial use of the water. Rather it was using the water for the benefit of the full general public. The Court held that no valid appropriation existed when the beneficial use of that appropriation "will belong equally to every human being who seeks to enjoy it." The Court held that the beneficial use which underlies a valid water claim "must be one that inures to the exclusive benefit of the appropriator and subject to his complete dominion and control." 166 Pac. 311. In the instant cases, the claimants-objectors claim to have appropriated water for the watering of their own, privately owned livestock. They have not appropriated their stockwater

for the use of "every human being who seeks to enjoy it." To the contrary, the beneficial use to which they put their stockwater is exclusively their own use, for the use of their own livestock. Their claims do not set forth a beneficial use for the general public. They set forth a beneficial use for watering the claimants' own livestock. Ironically, the Lake Shore Duck Club decision sets forth the rule of law which favors the claimants-objectors. The Court stated:

It is almost a matter of common knowledge, even among laymen that water may be appropriated and used on the public domain, and such a right acquired thereby as will be recognized and sustained, even though the appropriator never acquires title to the land.

In Jones v. Hanson, 320 P.2d 1007 (Montana, 1958), another case relied upon by the Government, the Court also emphasized that the exclusivity requirement refers to the exclusivity of the particular beneficial use to which the appropriator puts the water. See 320 P.2d at 1012 where the Court cites and relies upon the language contained in the Lake Shore Duck Club decision, supra. The same is true of the decision in Brasher v. Gibson, 406 P.2d 441 (Arizona App. 1965).

In the instant case, the beneficial use made by the claimants-objectors is stockwatering of their own personally owned or controlled livestock. They control the particular use to which they put the water they appropriate. That beneficial use is for their own personal use, not for the use of the general public. Under the law of Idaho, they need not claim

exclusive use of all the water that exists in the source from which they appropriate their use. They need only prove that they have appropriated water for their stockwatering needs which have been defined as a beneficial use.

Moreover, Idaho law mandates that livestock operators be allowed to appropriate water through in-stream watering of livestock. In 1984 the Idaho legislature enacted Idaho Code, Section 42-113 which provides:

"A permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock."

The statute also provides that the director of water resources shall impose reasonable conditions as necessary to protect downstream water rights for in-stream livestock use. It further provides that the director and the district court "shall recognize and protect water rights for in-stream livestock use, according to priority, as they do water rights for other purposes."

These statutory mandates negate any notion that exclusivity as to the source of the water is a requirement for establishment of the water right. The legislature clearly contemplated multiple uses of the in-stream water source by providing for protection of "downstream water rights for in-stream livestock use" and by providing that the director and court "shall recognize and protect" such water rights "according to priority". If, in fact, a livestock operator were required to established exclusivity as to the water source, the clearly

stated legislative mandates would be meaningless. The fact that the legislature provided for multiple users of the in-stream water source for stockwatering certainly forecloses the Government's argument that the claimants are barred from establishing their claims because they do not have exclusive control of the source.

In 1986 the Idaho legislature enacted Idaho Code, Section 42-114 which makes it abundantly clear that the permit for stockwatering use should be issued to the livestock operator, regardless of ownership of the land upon which the water is situate. Perhaps, as suggested by the Idaho Attorney General, the in Opinion No. 88-6, Section 42-114 was enacted because of the conceptual difficulty which some watercourses into the appropriative water rights doctrine." Whatever the rationale, it is clear from the enactment that is not a requirement for issuance of a permit for stockwatering use. Section 42-114 provides:

livestock shall be issued to the person or association of persons making application therefore and the watering of domestic livestock by the person or association to whom the permit was issued shall be deemed a beneficial use of the water.

The statute makes it clear that the owner of the livestock is the personal making beneficial use of the water and that the right to such use is not necessarily linked to ownership of the land on which the source of water exists and on which the use is made. As the Attorney General stated:

The statute further provides that 'watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water.' This sentence addresses an issue of particular importance to the livestock industry in a state that depends on summer grazing on lands administered by the U.S. Forest Service and the Bureau of Land Management. In such a case, the owner of cattle has no legal title to the summer grazing land. This provision makes it clear that the owner of cattle is making beneficial use of the water even without any ownership in the underlying place of use.

1988 Opinions of the Attorney General, p. 42

II. HISTORICALLY THE CONGRESS OF THE UNITED STATES HAS RECOGNIZED WATER RIGHTS CREATED BY PRIOR APPROPRIATION AND HAS ACTED TO PROTECT SUCH RIGHTS.

The Government sets forth a brief history of legislation regarding the public lands in an effort to demonstrate that Congress has acted to prevent exclusive control by private parties over the public lands. The Government uses this history in an attempt to argue that that Congress has never intended that a private party should be able to stake out a water right by prior appropriation of water existing on public land. But, the Government has ignored critical portions of the legislative history relating to the public lands in the western states. When viewed in full, that history supports the position taken by Idaho law which favors these claimants-objectors.

The principle of "First in use, first in right" became firmly established by practice in the California gold fields in the mid-1800's, and then in the settlements which developed to support the gold fields. The principle spread with settlement of the west. Ultimately the courts were called upon to validate the principle, and in Eddy v. Simpson, 3 Cal. 249 (1853) and Irwin v.

Phillips, 5 Cal. 140 (1855) the California Supreme Court clearly established the prior appropriation doctrine, i.e., prior possession of water on the public land gives the exclusive right to its use.

Even as the prior appropriation doctrine settled disputes between individual water users, there was a widely held belief that the rule did not apply to the Federal Government as the owner of the so-called public lands. So it was believed that a patent holder or other grantee of the Federal Government could dispossess a miner or settler of their prior held water right. Some court decisions so ruled. Van Sickle v. Haines, 7 Nev. 249 (1872) and Union Mill and Mining Co. v. Haines, 2 Saw. 176, 24 Fed. Cas. 594 (C.C. Nev. 1872). This belief may have directly lead to the enactment by Congress of the Mining Act of 1866 which provided the pivotal turning point for development of western water law.

The Act of 1866 provided:

"That 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 the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid, is hereby acknowledged and confirmed"

The United States Supreme Court has stated that the purpose of this provision of the Act of 1866 was to "give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local

customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands." Jennison v. Kirk, 98 U.S. 453 (1879) In other words, the Congress did not CREATE possessory water rights in the Act of 1866; rather, the Congress ACKNOWLEDGED the existence of such possessory water rights which arose from local customs, laws and decisions of the courts, and extended protection to such rights.

Four years later, in the Act of 1870, Congress reaffirmed the mandate that state and local water laws would control even water on public lands when it provided that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights."

In California, Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), the Court reaffirmed the prior statement that the acts of 1866 and 1870 DID NOT CREATE possessory water rights, but rather ACKNOWLEDGED the existence of such rights and extended protection to them as accrued and in the future the Court stated:

"They [the Acts of 1866 and 1870] reach into the future as well, and appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain."

In so interpreting the Acts of 1866 and 1870 as ACKNOWLEDGEMENTS OF ALREADY EXISTING POSSESSORY WATER RIGHTS WHICH AROSE FROM LOCAL RULES AND CUSTOMS, the Court explained the history of the west which lead to passage of the Acts:

"For the light which it will reflect upon the meaning and scope of [the acknowledgement of water rights provision] and its bearing upon the present question, it is well to pause at this point to consider the then-existing situation with respect to and water rights in the states and territories named. These states and territories comprise the western third of the United States--a vast empire in extent, but still sparsely settled. From a line east of the Rocky Mountains almost to the Pacific Ocean, and from the Canadian border to the original thirteen states--the lands capable of redemption, in the main, constituted a desert, impossible of agricultural use without artificial irrigation.

"In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes. These western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wrestling a living and creating homes from the raw elements about them, and threw down the gage of battle to the forces of nature. With imperfect tools, they built dams, excavated canals, constructed ditches, plowed and cultivated the soil, and transformed dry and desolate lands into green fields and leafy orchards. In the success of that effort, the general government itself was greatly concerned--not only because, as owner, it was charged through Congress with the duty of disposing of the lands, but because the settlement and development of the country in which the lands lay was highly desirable."

So, Congress sanctioned the controlling exercise of state sovereignty over water rights on the public lands, such sovereignty being implemented by local rules, customs and court decisions. The base of such sovereignty stems not only from such Congressional sanction. It lies also on the constitutional principle of "equal footing" of the states upon their admission into the Union. When the western states were admitted into the Union, they were admitted on an "equal footing" with the first thirteen states. Such admission brought with it the inherent power to exert authority over their waters and the underlying

beds. Oregon v. Corvallis Land and Gravel Co., 429 U.S. 363 (1977) and Montana v. United States, 450 U.S. 544 (1981). In United States v. New Mexico, 438 U.S. 696 (1978) the Court referred to the powers which the states had acquired over their waters as a result of congressional action "and admission into the Union."

In California v. United States, 438 U.S. 645 (1978), the Court again recognized that in the early Acts of 1866 and 1870 the Congress had ACKNOWLEDGED the already existing water rights:

" . . . the doctrine of prior appropriation, linked to beneficial use of the water, arose through the local customs, laws, and judicial decisions. Even in this early stage of the development of Western water law, before many of the Western States had been admitted to the Union, Congress deferred to the growing local law. Thus, in Broder v. Water Co., 101 U.S. 274 (1879), the Court observed that local appropriation rights were 'rights' which the government had, by its conduct recognized and encouraged and was bound to protect.'"

In its abbreviated historical sketch, the Government contends that the Taylor Grazing Act foreclosed any right to the claimants-objectors to claim a water right as to use of water situated on public lands. The Government contends that such is the result of the language of the Act which states that issuance of a grazing permit "shall not create any right, title, interest, or estate in or to the lands." (Government's Brief, p. 11) But, the claimants-objectors do not need to claim title to the public lands in order to prove their stockwatering right by prior appropriation. For, the Government ignores the relevant

provision of the Taylor Grazing Act which stated:

That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, 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.A. Section 315b.

The Taylor Grazing Act was not designed to prevent continued use of water situated on the public lands which had already been appropriated for stockwatering purposes. Neither was it designed to prevent such appropriations for future use. The purpose of the Taylor Grazing Act was to limit grazing use of the public lands to those who would qualify for a grazing permit, i.e. those who were engaged in the "livestock business" and who either owned a base property or held water rights sufficient to sustain proper use of the public lands. See 43 U.S.C.A. Section 315b. In fact, the purpose of the Taylor Grazing Act was to restrict and make more exclusive the grazing use of the public lands, exclusive to those whose grazing preferences were to be adjudicated pursuant to the Act. The Act was not designed to open use of water on the public lands to the entire general public; rather, it was designed to restrict the use of the public lands for grazing and use of water to those to whom grazing permits were issued to evidence the grazing preference adjudicated.

The Taylor Grazing Act did not contain a Congressional attempt to limit the impact or parameter of an already appropriated water use. The Act provided that:

Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, . . . nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction.

43 U.S.C.A. Section 315. It should be noted that the Congressional intent to avoid interference with any water right established under state law was also evidenced upon passage of the Federal Land Policy and Management Act of 1976. Section 701 of Public Law 94-579, 90 Stat. 2744, provided that nothing in the Act should be construed as "affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands."

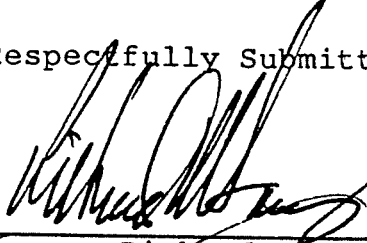
The Government contends that "any attempt to prove exclusionary acts on the public lands would also be proof of a trespass on the public land." See Government Brief, p. 12, footnote 10. But, the Taylor Grazing Act established the mechanism by which the federal government itself grants exclusionary grazing preference to the permit holder. No person other than the person with the grazing preference for a particular allotment can graze there. The person holding the grazing preference has the exclusive grazing preference to that allotment. Idaho law has granted to the appropriator of stockwater the exclusive claim to the particular beneficial use to which the appropriator puts the water used. Each of the federal statutes relating to the public lands, from the time of the Mining Act of 1866, have preserved water rights recognized under local custom and culture and/or state law. To that extent,

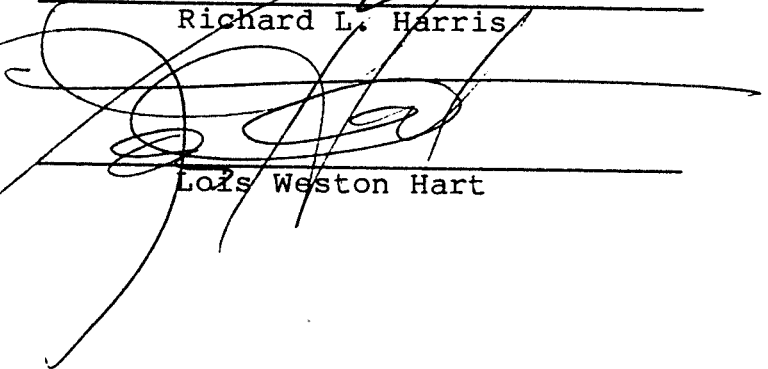
the federal government itself has granted to the particular appropriators of stockwater the exclusive claim to that water appropriated for the particular beneficial use of water the appropriator's stock.

CONCLUSION

The claimants-objectors respectfully request that the United States Motion for Summary Judgment be denied.

Respectfully Submitted,



Richard L. Harris

Lois Weston Hart

CERTIFICATE OF SERVICE

I the undersigned do hereby certify that a true and correct copy of the foregoing instrument was served on the following this 5th day of August, 1996.

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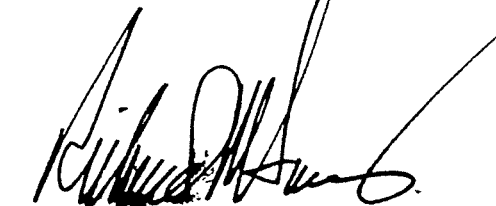
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