

RECEIVED

SEP 24 1996

Department of Water Resources

1996 SEP 23 PM 4: 29

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED _____

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

)

Subcases: 57-11124 et.al.

)

Case No. 39576

)

ORDER ON PARTIAL
SUMMARY JUDGMENT

)

)

I. PROCEDURAL AND FACTUAL BACKGROUND

This matter is before the court on a *Summary Judgment Motion (Motion)* filed by the United States on behalf of the Bureau of Land Management (BLM). The claimants are Harry Richard Bass, Henry Brandau, Ted K. Blackstock, Chipmunk Grazing Association, and Joyce Livestock Company (collectively "claimants"). The claimants did not move for summary judgment. The subject of this *Motion* involves a dispute between the BLM and the claimants regarding the ownership of stock water rights on public land. The claimants, as permittees operating on BLM land, claim ownership of the water rights. The BLM, as the land management agency, claims it owns the water rights perfected on public land.

The undisputed facts are:

1. With respect to each of the water rights claimed by the claimants in these consolidated cases, the United States owns the land claimed for both the point of diversion and the place of use.
2. The claimants' use of the water rights they are claiming in these cases has not been exclusive because other stock owners have used the water they are claiming to water stock.
3. The United States was the first party to put the water it has claimed in these consolidated cases to a beneficial use.

4. The only rights that the claimants have to graze stock on land managed by the BLM are pursuant to the terms of BLM issued grazing permits.

United States' Reply Brief at 3.¹

II. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, 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 judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the nonmoving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. C. Nelson A.I.A. v. M. L. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of nonmoving parties. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

III. ISSUE PRESENTED

Whether Stock Water Permittees Operating Under BLM Licenses May Own Water Rights Perfected On Federal Land.

¹ The undisputed facts arise out of a request for admissions requested by the United State. The request for admissions was not responded to in a timely fashion; therefore, the requests are deemed admitted. I.R.C.P. 36(a).

IV. DECISION

Stock Water Permittees Operating under BLM Licenses May Own Water Rights Perfected on Federal Land.

The specific issue of whether permittees may own water rights while operating on the public domain was answered by the United States Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978). In that case, the primary issue was whether the United States had reserved rights in the Rio Mimbres River running through the Gila National Forest in New Mexico. The Court held that the United States did not have any reserved water rights. As a result of that holding, the Court further held that the stock water rights should be allocated to the permittees under state law:

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 stock watering at various locations along the Rio Mimbres. The United States contends that, since Congress clearly foresaw stock watering on national forests, reserved rights must be recognized for this purpose. **The New Mexico courts disagreed and held that any stock watering rights must be allocated under state law to individual stock waterers. We agree.**

Id. at 716 (emphasis added).

The United States argues that the issue of stock water ownership on federal land was not addressed in *United States v. New Mexico*.² The assertion by the United States is erroneous for a number of reasons. First, a clear reading of *United States v. New Mexico* indicates that the issue was addressed. Second, the history of the case indicates that the issue of stock water ownership was expressly raised. *United States v. New Mexico* was designated at the state level as *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615 (N.M. 1977). In that case, the New Mexico Supreme Court designated the issue as "whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright

² The failure of the United States to cite *United States v. New Mexico* as controlling authority is troublesome. First, the United States was a party in *United States v. New Mexico*. Second, when the issue presented in this summary judgment motion was initially proposed as Basin-Wide Issue 9a, numerous parties, including the United States, cited *United States v. New Mexico* either for or against the proposition that stock water permittees could own water rights on federal land. Certainly, authority from the United States Supreme Court is controlling as to issues dealing with how water rights may be perfected on federal lands. As controlling authority, the United States is reminded of its duty to cite and disclose controlling authority. At the very least, counsel for the United States was obligated to cite and distinguish *United State v. New Mexico* from the facts presented in this matter.

to the United States.” *Id.* at 619. The New Mexico Supreme Court held as follows: “The prior discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.” *Id.* As to this holding, the United States Supreme Court held as follows: “We agree.” *United States v. New Mexico*, at 716.

The holding in *United States v. New Mexico* renders moot many of the arguments advanced by the United States. One of the arguments is that permittees operating under licenses may not own a water right. Finding no significant difference between stock water permittees operating on national forest land as opposed to stock water permittees operating on BLM ground and following *United States v. New Mexico*, this court holds that stock water permittees operating under licenses issued by the BLM may own water rights on BLM land.

The holding in *United States v. New Mexico* is consistent with long-standing Idaho law. “Water may be appropriated for beneficial use on land not owned by the appropriator, and such water rights become appropriator’s property.” *First Security Bank v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930). The exception to this rule is that a trespasser cannot perfect a water right on private property. However, those operating on the unsurveyed public domain are not considered trespassers and, therefore, are entitled to perfect water rights on the public domain. “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.” *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168 (1974); *see also, Mahoney v. Neiswanger*, 6 Idaho 750, 59 P. 561 (1899); *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072 (1919); *First Security Bank v. State of Idaho*, 49 Idaho 740 (1930). Spring water situated wholly on public land is subject to appropriation. *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922); *see also, Keiler v. McDonald*, 37 Idaho 573, 218 P. 365 (1923).

The United States argues that the holding in *Lemmon v. Hardy* is overly broad because it fails to distinguish between “legitimate settlers” and those “who assert control over rangeland without color or claim of title.” *United States’ Opening Brief* at 12, fn. 10. In this case, the claimants have operated under “color or claim of title.” The undisputed facts are that the claimants have grazed cattle on federal land under permits issued by the BLM. In this regard, the claimants have operated

on federal land with permission of the United States. So long as entry onto the land is permissive, a water right may be perfected on that land. *Keiler v. McDonald*, at 577.³

The Idaho Legislature also recognized the ability of permittees to own stock water rights on public land. “Any permit issued for the watering of domestic 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 of persons to who the permit was issued shall be deemed a beneficial use of the water” I.C. § 42-114. The statement of purpose for I.C. § 42-114 reads as follows: “This bill will place the beneficial use clearly with the consumption and the ownership of the cattle and not with the land management agencies.” Minutes of House Resources and Conservation Committee (February 17, 1986), cited in OAG 88-6. While the statement of purpose regarding I.C. § 42-114 is relevant regarding the issue presented in this case, it is not dispositive as to the ownership of stock water rights on federal land because I.C. § 42-501 acknowledges the ability of BLM to file an application for stock watering permits.

Despite the previously cited authority, the United States alleges that a user must demonstrate exclusive dominion and control over the source of water prior to perfecting a water right. In support of its exclusivity argument, the United States cites *Jones v. Hanson*, 320 P.2d 1007 (Mont. 1958); *Lake Shore Duck Club v. Lake View Duck Club*, 166 P. 309 (Utah 1917); *Robinson v. Schoenfeld*, 218 P. 1041, 1043 (Utah 1923); *Brasher v. Gibson*, 406 P.2d 441, 449 (Ariz. App. 1965).⁴ The United States further cites the Unlawful Inclosures Act of 1885, the Stock Water Reservoir Act of 1897, the Stock Raising Homestead Act of 1916, and the Taylor Grazing Act of 1934.⁵ The acts were cited for the following proposition:

³ This opinion does not address the issue of whether those operating on the public domain without any permit may claim a water right.

⁴ All the cases were cited for the general proposition that an “appropriation must be one that inures to the exclusive benefit of the appropriator and subject to his complete dominion and control.” *Robinson v. Schonefeld*, at 1043.

⁵ The Unlawful Inclosure Act prohibited all fencing or other exclusionary acts on public land. Act of February 25, 1885, ch. 149, 23 Stat. 321, codified at 43 U.S.C. § 1061. The Stock Water Reservoir Act provided that water sources must remain available to the public for stock watering. Act of January 13, 1897, ch. 11, 29 Stat. 484, codified at 43 U.S.C. § 952. The Stock Raising Homestead Act of 1916 allowed the designation of certain lands for homesteading. Act of Dec. 29, 1916, ch. 9, 39 Stat. 862, codified at 43 U.S.C. §§ 291-298 (repealed 1976). The Taylor Grazing Act provides that “the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.” Act of 1934, 48 Stat. 1272, codified at 43 U.S.C.A. § 315b.

The express language and legislative history of the acts discussed above make it absolutely clear that Congress never permitted a private party to acquire the exclusive right to forage or to water stock on the public domain. Thus the exclusivity required for a valid appropriation cannot be demonstrated by these private parties.

United States' Opening Brief at 12.⁶

The United States' reliance on these acts and theory of exclusivity is misplaced. First, while the acts of Congress were enacted to prevent the exclusive use of federal lands, it is clear that Congress recognized that water rights had been and would be perfected by individuals on federal land. Prior to statehood and with the passing of the Mining Act of 1866⁷ and the Act of 1870,⁸ Congress acknowledged the ability of appropriators to perfect water rights on the public domain.

The effect of these acts [Mining Act of 1866 and the Act of 1870] is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of 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 nonnavigable waters on the public domain.

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

With the passage of the Desert Land Act of 1877,⁹ the United States effectively ceded any authority over nonnavigable waters to the individual states.

⁶ Under the argument advanced by the United States, the inability to obtain exclusive access to a water source applies to all parties operating on the public domain. The theory of exclusivity is not limited to these claimants. Therefore, all parties would be precluded from perfecting water rights on the public domain.

⁷ The Mining Act of 1866, in pertinent part, reads as follows: "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 herein specified is acknowledged and confirmed." Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253, codified at 30 U.S.C. § 51.

⁸ The Act of 1870, in pertinent part, reads as follows: "All patents granted, or preemption 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 which this act is amendatory." Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218, codified at 30 U.S.C.A. § 52.

⁹ The Desert Land Act of 1877, in pertinent part, reads as follows: "All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other 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 for irrigation, mining and manufacturing purposes subject to existing rights." Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377, codified at 43 U.S.C.A. § 321.

What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," the full power of choice must remain with the state.

Id. at 163-164(citation omitted); *see also, United States v. New Mexico; California v. United States*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976).¹⁰

Acknowledging the historical development of perfecting water rights on the public domain, the more reasonable interpretation of the federal regulations cited by the United States preventing the exclusive use of water sources located on public lands is that the regulations were designed to ensure that every user has equal access to water sources and, therefore, an equal opportunity to appropriate water on the public domain for a beneficial purpose.

More importantly, to the extent that the United States intends to pursue an agency theory alleging that stock water permittees or other parties perfected water rights on behalf of the United States, an exclusivity requirement would render an agency theory moot. If the permittees or other parties, as agents of the United States, cannot perfect a water right on their own behalf, then the United States cannot have a water right under an agency theory. A principal cannot benefit from the illegal act of an agent. *See e.g., Lowe v. April Industries, Inc.*, 531 P.2d 1297, 1298 (Utah 1974). Similarly, a principal cannot claim the benefit of its agent's acts and, at the same time, assert that the agent was acting illegally or without authority. *Stout v. McNary*, 75 Idaho 99, 103, 267 P.2d 625 (1954).

Absent any reserved rights, the United States is no different than any other person or entity who claims a water right under state law. For a state-based stock water right, there has to be an appropriation of water as a precondition to perfecting a water right. I.C. § 42-103. Assuming the United States does not actually appropriate water for stock purposes, then some other entity or

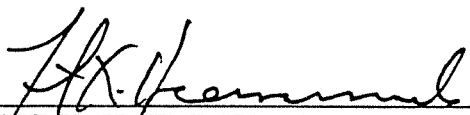
10 In addition to the Mining Act of 1866, the Act of 1870, and the Desert Land Act of 1877, the Taylor Grazing Act of 1934 once again confirmed the ability of users to appropriate waters on public lands. "That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purpose which has heretofore vested or accrued under existing law validly affecting the public lands or which may hereafter initiated or acquired and maintained in accordance with such law." Taylor Grazing Act of 1934, 48 Stat. 1272, 43 U.S.C.A. § 315.

person must appropriate the water on behalf of the United States. An exclusivity argument would prevent all parties, and thereby the United States, from owning stock water rights on the public domain. If no one can own a stock water right on the public domain, then all stock water uses on the public domain would be illegal. "No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists." I.C. § 42-201(2). In order to perpetuate the watering of stock on public lands, a permittee must be able to perfect a water right on his/her own behalf. In the alternative, a permittee or other entity, operating as an agent of the United States, must be able to perfect a stock water right on behalf of the land management agency.¹¹

This decision does not address the ownership of any claim at issue. The holding in this decision is strictly limited to addressing the legal issue of whether permittees may own stock water rights on the public domain. As to this legal issue, the court holds that permittees operating under licenses issued by BLM **may** own water rights on the public domain. Partial Summary Judgment is **granted** in favor of the claimants.

IT IS SO ORDERED.

DATED September 23, 1996.



FRITZ X. HAEMMERLE
Special Master, Reporting Area 2
Snake River Basin Adjudication

11 Acknowledging that a permittee or the United States may not have exclusive rights to a particular water source, the rights to the source would be administered "first in time, first in right" relative to competing stock waterers. 15, § 3, Idaho Const. art. XV, § 3

CERTIFICATE OF MAILING

I certify that a true and correct copy *ORDER ON PARTIAL SUMMARY JUDGMENT* was mailed on September 23, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Director of IDWR
P.O. Box 83720
Boise, ID 83720-0098

Richard Harris
P.O. Box 729
Caldwell, ID 83605



Deputy Clerk