

**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 55-10135 (Joyce Livestock Co.)**
Case No. 39576) **and 55-11061, 55-11385 & 55-12452**
) **(USDI / BLM)**
)
) **ORDER DENYING MOTION TO ALTER**
) **OR AMEND**

BACKGROUND

On October 6, 2003, the Special Master entered a 26 page *Report and Recommendation* in the above four subcases recommending that Joyce Livestock Company's claim (55-10135) be denied and that the United States' claims (55-11061, 55-11385 and 55-12452) be decreed with a June 28, 1934 priority date, as recommended by IDWR.¹

Joyce Livestock Claim

Joyce Livestock claimed a beneficial use stockwater right mostly on federal public land along Jordan Creek in the Silver City Grazing Allotment (Owyhee County) where it currently is the sole active permittee. It argued that its claim was perfected by its predecessors-in-interest (grantors) and the stockwater right is appurtenant to its base property, the Joyce Ranch.

The law of the SRBA case is that "in the absence of unity of title between the water right and the land on which the water right is used, as a matter of law the water right cannot automatically pass as an appurtenance to the land [in the present subcases, Joyce Livestock's base property, the Joyce Ranch] via the instrument conveying the land." Former-Presiding Judge Barry Wood's April 25, 2000 *Memorandum Decision and Order on Challenge*, subcases 55-10288A, *et al.* ("*LU Decision*"), at 15. Judge Wood then held that where instruments allegedly

¹ These four subcases were first heard in summary judgment proceedings held on March 22, 2002 (see *Order Denying Joyce Livestock Motions for Summary Judgment*, dated July 24, 2002) and then in a four day trial held on December 3-6, 2002.

conveying an instream stockwater right on federal public land are silent as to the water right, interpretation of those instruments based on the intent of the grantors raises genuine issues of material fact:

At a minimum, an examination of the intent of the grantor is required to determine if the water right was intended to be transferred and if so then by what method the water right was transferred. The circumstances surrounding the mesne conveyances of the water right and the land on which the water right is claimed to be appurtenant become relevant in arriving at the grantor's intent.

LU Decision, at 16.

The key questions concerning Joyce Livestock's claim were: 1) whether Joyce Livestock's predecessors-in-interest *intended* to appropriate the water of Jordan Creek for instream stockwater use and 2) if so, did they *intend* to convey such a right to their successors. The Special Master found that Joyce Livestock's claim was insufficient as a matter of law. The circumstances surrounding the mesne conveyances of the claimed water right and the land to which the water right was claimed to be appurtenant (Joyce Ranch), plus various applications for grazing preferences filed by Joyce Livestock's predecessors-in-interest, demonstrated that Joyce Livestock and its predecessors-in-interest: 1) never intended to appropriate the water of Jordan Creek for instream stockwater use, 2) never acknowledged that they had appropriated such a right and 3) never intended to transfer any water right on federal public land. Each of Joyce Livestock's predecessors-in-interest from 1898, through the present, were solely concerned with access to graze on federal public land, not water rights on federal public land:

Nowhere in the Joyce Ranch chain of title was there any reference to instream stockwater rights on federal public land nor are such rights noted in the various applications for grazing preferences. Joyce Livestock's predecessors-in-interest intended to transfer appurtenant grazing preferences or permits, not water rights on federal public land [emphasis added].

Report and Recommendation, at 1.

USDI / BLM Claims

The three United States claims for instream stockwater rights along Jordan Creek overlap all of Joyce Livestock's claim, except where the places of use are entirely privately owned. For all practical purposes, the parties intended their claims to be mutually exclusive – that is, if one party prevailed, the other's claim(s) must be denied.

The Special Master found that, contrary to Joyce Livestock's argument, the issue of whether the United States can be awarded a 1934 priority date or later for an instream stockwater right on federal public land, even though it does not actually own stock, has **not** been addressed by the SRBA Court, except by default. See *Report and Recommendation*, at 23, fn. 30. The Special Master then held that the United States had demonstrated the three fundamental requirements to appropriate the water of Jordan Creek for instream stockwater use: intent to divert the water for a beneficial use:

The BLM [United States] is entitled to its claimed instream stockwatering rights along Jordan Creek. Making the public land available for livestock grazing – plus BLM's comprehensive management of the permittees, their livestock, the land and the water – support valid appropriations of water under Idaho law.

Report and Recommendation, at 1.

Joyce Livestock's Motion to Alter or Amend

On November 24, 2003, Joyce Livestock filed its *Motion to Alter or Amend the Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law* stating:

Joyce Livestock believes that the Court erred in determining that Joyce Livestock's predecessors-in-interest did not intend to transfer appurtenant water rights, that the Court erred in failing to recognize that water rights can be held in common, that the Court erred in concluding that the practice of grazing in common somehow precludes the appropriation of water or Joyce Livestock's claim in particular, and that the Court erred in holding that the BLM is entitled to its claimed rights [footnotes omitted].

Joyce Livestock's *Motion to Alter or Amend*, at 2.

Joyce Livestock's argument concerning water held in common relates to the Special Master's point that Joyce Livestock's claim related back to the earliest patent in the Joyce Ranch chain of title acquired by Mary and Anna Joyce on June 1, 1898:

Assuming, *arguendo*, that Mary and Anna Joyce perfected a valid appropriation in 1898, and assuming that such right became appurtenant to their land and ultimately to the current Joyce Ranch, that would necessarily mean that Joyce Livestock based its claim on that single water right. However, Joyce Livestock offered the very evidence that rebuts its claim. It proved that multiple ranchers grazed livestock along Jordan Creek for decades in direct competition with Mary and Anna Joyce and their successors. Admittedly, nearly all of the ranches were ultimately consolidated into the Joyce Ranch, but from 1898 until 1934, and even later, there were no fences, the cattle followed the green grass and different brands watered along Jordan Creek. With that in mind, it is difficult to argue that an 1898 instream stockwater right along Jordan Creek ever existed because no

one recognized or defended such a right. The logical conclusion is that no one in Joyce Livestock's chain of title acquired such a right – the water was shared by all grazers with access to the land – because the concern of all grazers from 1898 through the present was access to graze on federal public land, not water rights on the federal public land.

Report and Recommendation, at 22.

Joyce Livestock's Opening Brief

Joyce Livestock lodged its *Opening Brief in Support of Motion to Alter or Amend* on January 9, 2004. It argued that amendment of the ***Report and Recommendation*** is appropriate because:

[T]he Court's ruling contains significant legal and factual errors,² the practical effects of which would preclude private ownership of water rights on federally administered land, contravene well established precedent that water rights, as property rights, can be held in common, contravene precedent regarding transfers of rights as appurtenances, contravene Idaho law that a beneficial use water right requires actual beneficial use of the water, and, for the first time, subscribe to a riparian theory of water right ownership. The ruling conflicts not only with statutory law, case law, and common law principles at large, but also conflicts directly with other opinions issued by the SRBA court that are law of the case.

Joyce Livestock's *Opening Brief*, at 1.

United States' Memorandum in Opposition

The United States lodged its *Memorandum in Opposition to Joyce Livestock Company's Motion to Alter or Amend* on February 13, 2004. The United States argued that: 1) Joyce Livestock failed to prove that its predecessors-in-interest satisfied the test of a valid appropriation, hence there was no valid stockwater right to convey as an appurtenance to any base property; 2) even if there were a valid stockwater right, there was no evidence that any of Joyce Livestock's predecessors-in-interest intended to convey such a right; and 3) the United States, in its proprietary capacity as a landowner which makes its land available to others for livestock pasturage under the Taylor Grazing Act, validly appropriated the water of Jordan Creek for livestock use in compliance with Idaho law.

² Joyce Livestock's *Opening Brief* alleged there were significant factual errors in the ***Report and Recommendation***, yet its *Motion to Alter or Amend*, its *Opening Brief* and its *Reply* failed to describe such errors. Paul Nettleton, a general partner of Joyce Livestock (a limited partnership), along with his wife (Patricia), "generally agreed" with the Special Master's summary of the key facts in these subcases – the history of the Joyce Ranch. ***Report and Recommendation***, at 9, fn. 15. Also see the July 24, 2002 ***Order Denying Joyce Livestock Motions for Summary Judgment***, at 7-8, fn. 13, describing Mr. Nettleton's role with Joyce Livestock.

Joyce Livestock's Reply

Joyce Livestock lodged its *Reply to United States' Memorandum in Opposition to Joyce Livestock Company's Motion to Alter or Amend* on March 9, 2004. It argued that: 1) a valid appropriation of a stockwater right is not dependent upon whether there was exclusive use of the water source; 2) judicial precedent, both within the SRBA and other courts, support Joyce Livestock's claims; and 3) there is no factual or legal support for the United States' claim of a common law appropriative water right.

Hearing on Joyce Livestock's Motion to Alter or Amend

A hearing on Joyce Livestock's *Motion to Alter or Amend* was held by telephone on April 1, 2004. Elizabeth P. Ewens and Michael J. Van Zandt, along with Brian J. Coffey as local counsel, appeared for Joyce Livestock and Larry A. Brown appeared for the United States.

DISCUSSION

Joyce Livestock's *Motion to Alter or Amend*, its *Opening Brief* and its *Reply* reiterated essentially the same arguments made during earlier summary judgment proceedings and the trial. Those arguments were rejected then and there is no apparent reason why they should not be rejected a third time. But Joyce Livestock raised one additional issue after the trial that warrants further discussion. That is its argument that the Special Master denied Joyce Livestock's claim for an instream stockwater right, in part, "because there were multiple appropriations of stockwater from the same source." Joyce Livestock's *Opening Brief*, at 3. It argued that 1) water can be appropriated even if there is non-exclusive use and 2) multiple parties can hold water rights in a common water source.

Joyce Livestock's arguments miss the whole point of why its *Motions for Summary Judgment* were denied and the matter proceeded to trial. As noted earlier, the key questions in these subcases were: 1) whether Joyce Livestock's predecessors-in-interest *intended* to appropriate the water of Jordan Creek for instream stockwater use and 2) if so, did they *intend* to convey that right to their successors. Its arguments cloud the discussion by using such phrases as "multiple appropriations" and multiple parties holding "water rights" in a common water source. Instead of recognizing a distinction between the use of water and the appropriation of a water right, Joyce Livestock equates the two concepts. In other words, Joyce Livestock would have the Court believe that use of water equals appropriation of that water wholly disregarding the concept of intent. To follow Joyce Livestock's argument, every stock owner who ever grazed

livestock along Jordan Creek appropriated its water for instream stockwater use merely by allowing their stock to drink water from Jordan Creek.

The Special Master did not conclude “that the practice of grazing in common somehow precludes the appropriation of water” as alleged by Joyce Livestock. Joyce Livestock’s *Motion to Alter or Amend*, at 2. Rather, the Special Master found “that multiple ranchers grazed livestock along Jordan Creek for decades in direct competition” with the earliest land owners from whom Joyce Livestock traces its base property. *Report and Recommendation*, at 22. The Special Master then concluded that because there was no evidence that any of the ranchers recognized or defended an instream stockwater right along Jordan Creek, therefore such a right likely never existed.

Virtually all grazers with access to the federal public land, later designated the Silver City Grazing Allotment, shared the same water. The concern of those grazers from 1898 through the present was access to graze on the land, not water rights on the land. None of the grazers intended to acquire an instream stockwater right in Jordan Creek. None of the documents conveying land that eventually comprised the Joyce Ranch described water rights on federal public land. And none of Joyce Livestock’s grantors claimed water rights on any federal public land as part of their base property to qualify for grazing preferences on the Allotment. The very evidence Joyce Livestock offered concerning historical transfers of ranching operations demonstrated that when ranches were bought, sold and traded (at least around 1936), the real value of the “ranch unit” was its appurtenant grazing preferences or privileges (access to grazing on federal public land) – not water rights on the federal public land.

Because Joyce Livestock has failed to show legal or factual errors in its *Motion to Alter or Amend*, the *Motion* must be denied. Joyce Livestock’s claim (55-10135) should be denied and the United States’ claims should be adjudicated as recommended by IDWR and as described in the *Special Master Recommendations for Partial Decrees for Water Rights 55-11061, 55-11385 and 55-12452*.

ORDER

THEREFORE, IT IS ORDERED that Joyce Livestock’s *Motion to Alter or Amend the Special Master’s Report and Recommendation, Findings of Fact and Conclusions of Law* is **denied**.

DATED July 22, 2004.

/s/ Terrence A. Dolan
TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication