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) 55-11061, 55-11385, 55-12452 (BLM).**
	)	
Case No. 39576	)	**MEMORANDUM DECISION AND ORDER ON CHALLENGE**
	)	
	)	

Reversing Special Master and denying United States' state-law based claims 55-11061, 55-11385, and 55-12452 based solely on administration of lands. Granting Joyce Livestock's claim 55-10135 with April 26, 1935, priority.

Appearances

Elizabeth P. Ewens, McQuaid, Bedford & Van Zandt LLP, San Francisco, CA, for Joyce Livestock.
Roger D. Ling, Ling, Robinson and Walker, Rupert, ID, for Joyce Livestock.

Larry A. Brown, U.S. Department of Justice, Natural Resources Section, Environmental Resources Division, for U.S. Department of Interior, Bureau of Land Management.

I.
PROCEDURAL BACKGROUND

A. The procedural background of these cases is set forth in detail in the ***Special Master's Report and Recommendation in Subcases 55-10135 and 55-11061, 55-11385, 55-12452*** (October 6, 2003), and is summarized briefly here. Joyce Livestock Company (Joyce Livestock or Joyce) filed a single instream *Notice of Claim to a Water Right*, claiming .23 cfs from Jordan Creek in Owyhee County based on beneficial use with a priority date of 1865 for instream stockwater. The United States, Department of Interior, Bureau of Land Management (United States or BLM) filed three notices of claim, each for .02 cfs for instream stockwater with a

January 1, 1874, priority date based on beneficial use, which largely overlapped the stream reaches of Joyce's claimed right. The Director of the Idaho Department of Water Resources issued the *Director's Report for Domestic and Stockwater, Reporting Area 6 (IDWR Basin 55)* on July 31, 1997. Joyce Livestock's claim and the three United States claims were listed. The Director recommended Joyce's claim with a reduction to .02 cfs, and the United States' claim as claimed.

B. The United States timely filed an objection to the recommendation for Joyce Livestock's claim, objecting to the claimed priority date, the points of diversion and places of use. The State of Idaho filed timely objections to the recommendations for the United States' claims, alleging that the priority date should be no earlier than June 28, 1934, the date of the enactment of the Taylor Grazing Act. On April 28, 2000, the BLM and the State of Idaho filed a stipulation, stating that if the three United States' claims are decreed, the priority date would be no earlier than June 28, 1934. This stipulation ended the State of Idaho's participation in these subcases.[1] On May 6, 1998, the Court granted Joyce Livestock leave to file late objections to the United States' water right claims. Joyce Livestock's objections alleged that the name on the United States' water right claims should be Joyce Livestock, not the United States.

C. On July 16, 1998, Special Master Haemmerle entered an ***Order Consolidating Subcases for Summary Judgment*** in subcases 55-10135, 55-11061, 55-11385 and 55-12452. On September 22, 1999, then-Presiding Judge Barry Wood entered an ***Amended Order of Reference Appointing Terrence A. Dolan Special Master*** in the above subcases. On September 28, 2001,

[1] The State of Idaho filed objections to all of the United States' beneficial use instream stockwater claims. On June 11, 1999, and July 1, 1999, the State of Idaho and the United States entered into stipulations which among other things resolved the State's objections to the United States' beneficial use claims and resolved the subcases where the State of Idaho was the only objector. *Stipulation to Resolve Objections*, consolidated subcase nos. 23-10859, 24-10221, 25-13659, 27-11604 and 65-19685 (June 11, 1999); *Stipulation to Resolve Objections*, subcase nos. 01-10249 *et seq*. (July 1, 1999). Pursuant to the *Stipulation to Resolve Objections* the State of Idaho and the United States agreed that the priority date for all of the state-based beneficial use stockwater claims made by the United States (BLM) in 34 subbasins would be June 28, 1934, (the date of enactment of the Taylor Grazing Act), unless the United States had previously acquired the land from a third party with an earlier priority date or the claim was based on previously licensed or permitted right with a different priority date. The *Stipulation to Resolve Subcases* agreed to the elements of approximately 2000 stockwater rights where the claims were based solely on state law and the State of Idaho was the only objector. The *Stipulation* provided that the elements would be as reported by the Idaho Department of Water Resources (IDWR) except that the priority date would be June 28, 1934.

the Special Master allowed the United States to amend the above claims to correct places of use and to amend the priority date of the rights to June 28, 1934, in accordance with the stipulation reached with the State of Idaho. On December 4, 2001, the Special Master allowed Joyce Livestock to amend the above claimed water right to change the priority date to 1898, and to change the quantity to .02 cfs. On March 8, 2002, Joyce Livestock filed a *Motion for Summary Judgment*, which was denied by the Special Master on July 24, 2002.

D. On December 3-6, 2002, the Special Master held a trial on the objections to the four claims. On October 6, 2003, the ***Report and Recommendation of the Special Master*** was filed, recommending that Joyce's claim to water right 55-10135 be denied, and that the United States' claims to water rights 55-11061, 55-11385 and 55-12452 be decreed as amended. On November 24, 2003, Joyce Livestock filed a *Motion to Alter or Amend Special Master's Report*, which was denied by the Special Master on July 22, 2004. On August 4, 2004, Joyce Livestock filed its *Notice of Challenge.* After a series of briefs were filed by both Joyce Livestock and the United States, oral argument was heard on June 15, 2005.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on June 15, 2005. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or June 16, 2005.

III.
ISSUES PRESENTED ON CHALLENGE

Summarily stated, the following issues are presented to the Court on Challenge:

A. Whether the Special Master erred as a matter of law in recommending that the management of federally administered grazing allotments, without more, constitutes a beneficial use sufficient to support the United States' beneficial use claims to instream stockwater rights.

B. Whether the Special Master erred in recommending that Joyce Livestock failed to establish a beneficial use stockwater right by holding that neither Joyce Livestock nor any of its predecessors demonstrated the requisite intent to either appropriate or transfer an instream stockwater right.

IV.
STANDARD OF REVIEW OF A SPECIAL MASTER'S RECOMMENDATION

The following standard of review of a special master's report and recommendation has been consistently applied throughout the course of the SRBA.

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); Rodriguez *v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App.1989); *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to

determine whether they are supported by substantial,[2] although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo.* Wright and Miller, *Federal Practice and Procedure* § 2614 (1995); *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra,* § 2585.

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied,* 91 S.Ct. 582 (1971).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1st Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor D. Craig Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well

[2] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook." Lewis, Idaho Trial Handbook, § 35.14 (1995), (citing *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.).

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151,153, 922 P.2d 1077, 1079 (Ct. App. 1996).

B. Conclusions of Law of a Special Master.

A special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley,* 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley,* 124 Idaho at 534, 861 P.2d at 104. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

In sum, findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

V.

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

A. Joyce Livestock's Claim.

The Special Master first addressed Water Right 55-10135, claimed by Joyce Livestock. The Special Master found that the key issues involved in Joyce Livestock's claims were: 1)

whether Joyce Livestock's grantors appropriated the water of Jordan Creek for instream stockwater use as early as 1898, and 2) if so, whether the water right was an appurtenance to land which passed via instruments conveying that land to Joyce Livestock. The Special Master viewed the key issue as one of intent. "Did Joyce Livestock's grantors *intend* to appropriate the water and if so, did they *intend* to convey that right to their successors?" ***Master's Report and Recommendation*** at 19. The Special Master went on to state that:

> In the present subcases, the answer to the first question of intent answers both questions of intent. The preponderance of the evidence is that none of Joyce Livestock's grantors intended to appropriate the water of Jordan Creek for instream stockwatering. Hence, there was no water right to convey and there is no evidence that they intended to convey such a right.
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> While it is true that some grantors of Joyce Livestock grazed horses, sheep and cattle in the Jordan Creek drainage and their livestock drank from the stream, there is no evidence that any one rancher intended to appropriate the water. On the contrary, their concern was solely to have <u>access</u> to public land for grazing their livestock, along with other grazers.
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> Before 1934, and enactment of the Taylor Grazing Act, the "privilege or right of pasturage upon the public lands of the government, which are left open and uninclosed [sic], and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it." *Anthony Wilkinson Live Stock Co. v. McIlquam*, 83 P. 364, 369 (Wyo., 1905). In those days, different brands watered along Jordan Creek, there were no fences and the cattle followed the green grass. Gene Lewis, TTr, at 315.
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> None of the documents conveying land that eventually comprised the Joyce Ranch specifically described water rights on federal public land. That left Joyce Livestock to argue that such water rights were conveyed by such generic appurtenance clauses as: "TOGETHER With all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof." But since the appurtenance clauses were silent as to water rights on federal public land, Joyce Livestock was left to search for the intent of the grantors in the circumstances surrounding the mesne conveyances of the land to which the water right is claimed to be appurtenant.
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> Paul Nettleton testified that in 1985, when he and the Hubert E. Nettleton Estate conveyed the Joyce Ranch to Joyce Livestock, he intended to convey the ranch as one unit, including "everything as being necessary to operate that ranch, which would include grazing rights, water rights. . . ." TTr, at 673. But that evidence alone would entitle Joyce Livestock to a priority date of no earlier than 1985. To go back further, to its claimed 1898 priority date, it had to demonstrate intent based on other "circumstances surrounding the mesne conveyances."

First, Joyce Livestock called Dr. Chad C. Gibson to testify about historical transfers of ranching operations. Dr. Gibson said that in his experience, "ranches were bought and sold and traded as a unit, which included all of the necessary resources to operate that ranch." TTr, at 586-588. "[A]nd the ranch unit would have been essentially worthless if it didn't have a right to, to use water that went with whatever range land that was associated with that ranch unit." TTr, at 590. But Dr. Gibson acknowledged that he based much of his understanding on records of the 1936 Salt Lake City District Advisors' Conferences. Those records reveal that the advisors' concerns were about access to grazing on federal public land, not water rights. The conclusion, then, is that when ranches were bought, sold and traded 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.

Joyce Livestock was then left to argue that its grantors' applications for grazing preferences beginning in 1935, somehow showed that they owned instream stockwater rights on federal public land by the applicants' claims that such rights were appurtenant to their base property. The premise was that if Joyce Livestock could at least show that its grantors believed that they owned such rights, that might be some evidence of their intent to transfer the rights when they sold their land. But the facts are just the opposite. None of Joyce Livestock's grantors claimed water rights on federal public land as part of their base property.

John T. Shea, the first of Joyce Livestock's grantors to apply for a grazing permit in 1935, was asked whether he owned or controlled any source of water supply needed or used for livestock purposes. He responded: "Usual water right acquired with lands under laws of Idaho." Mr. Shea was then asked where the sources of water supply were located. He responded: "Springs & creeks running on & through the ranches." U.S. Trial Exhibit 87. In other words, the only water rights Mr. Shea owned or controlled were located on his deeded lands. Another grantor of Joyce Livestock was Joyce Brothers Livestock Company. On its 1935 application for a grazing preference, it, too, listed only water rights on its own land. Finally, even Paul Nettleton in 2000, on his grazing application listed only the Joyce Ranch as Joyce Livestock's base property for a grazing preference – no water rights on federal public land.

The fatal flaw in Joyce Livestock's claim to an instream stockwater right on federal public land can be illustrated in the following scenario. Joyce Livestock filed one claim with an 1898 priority date that corresponds to the earliest patents in the Joyce Ranch chain of title – Mary and Anna Joyce (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.

Special Master's Report and Recommendation at 20-22.

Based on this analysis, the Special Master denied Joyce Livestock's claim.

B. United States' Claims.

The Special Master ruled that the United States had made valid appropriations of water under Idaho law by making it available, along with grazing allotments, for use by grazers:

> In the present subcases, the Special Master agrees with the BLM that it 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. The BLM has demonstrated an intent to appropriate the water, along with a diversion of the water for a beneficial use.
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> The fact that the BLM does not own the livestock which actually consume the water is irrelevant. State water law specifically authorizes the BLM to "appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain . . . [so long as] the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefor on the public domain." I.C. § 42-501. And there is no restriction on how BLM appropriates such water: "Nothing herein shall be construed to deprive the department of water resources of the United States from filing application for waters nor from obtaining permit, license and certificate of water right under the general laws of the state having to do with the appropriation of waters of the state." I.C. § 42-503. A further restriction is that no change in use of the stockwater right may be made "without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock." I.C. § 42-113(4). Beyond those restrictions unique to stockwater rights on the public domain / federal grazing allotments, the BLM is considered the same as any other landowner who makes their land available for grazing. Since neither Joyce Livestock and its grantors, nor any other grazer,

have appropriated the water of Jordan Creek, there is no state law barring the BLM's present claims.

Idaho Code § 42-114 states: "Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the 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." Some interpret the above statute as requiring that a stockwater right must be issued solely to the stock owner (Joyce Livestock) and not the landowner (BLM).

In 1988, IDWR Director R. Keith Higginson asked Attorney General Jim Jones: "Does Section 42-114, Idaho Code, prohibit the issuance of a water right permit to a landowner for stock watering purposes if the land is or is intended to be leased to another person for the grazing of livestock?" The Attorney General's opinion, written by Deputy Attorney General David J. Barber, is worth quoting at length because it closely parallels the circumstances in the present subcases:

> The statute, by its express language, requires the department to issue the permit for stock watering "to the person or association of persons making application therefor." It provides no restriction on who may apply. Therefore, any person, including a landowner who leases his land to stockmen, may file an application for a water right.
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> 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 by the Bureau of Land Management. In such a case, the owner of the 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 ownership in the underlying place of use.
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> . . .
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> Idaho Code § 42-114 does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock. Section 42-114 merely affirms that stock watering is a beneficial use of water and that any person may file an application for that use [emphasis added].
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> 1988 Idaho Op. Atty. Gen. 41, Opinion No. 88-6, October 21, 1988.

> While the above Attorney General's opinion deals with permits, rather than beneficial use claims, as in the present subcases, it is fair to conclude that Idaho law has never required ownership of livestock as a condition precedent to ownership of a livestock water right. But there remains the matter of priority date for the BLM's claims. Idaho Code § 42-113(2) requires that the priority date for instream stockwater rights established by beneficial use on federally owned land "shall be the first date that water historically was used for livestock watering associated with grazing on the land. . . ."
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> The record indicates that a wide variety of stock owners grazed their livestock in and around the Jordan Creek drainage as early as 1865. However, "the many years of uncontrolled use which has existed up to the present time [1932]"[3] came to an end with enactment of the Taylor Grazing Act in 1934. Thereafter, only "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights" within or near the district were given a preference. Taylor Grazing Act, 43 U.S.C. § 315b.
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> Because the BLM's appropriations of Jordan Creek water for instream stockwater use arise from its management of public lands for livestock grazing under the Taylor Grazing Act, it is logical – and consistent with the BLM's April 28, 2000 *Stipulation* with the State – that the BLM be awarded a priority of June 28, 1934, the date of enactment of the Taylor Grazing Act.

Special Master's Report and Recommendation at 24-26.

VI.

ANALYSIS AND DISCUSSION

A. The Special Master erred as a matter of law in concluding that Joyce Livestock or its predecessors lacked the requisite intent to appropriate a water right.

Joyce Livestock's stockwater claim as amended describes twenty different forty-acre (quarter-quarter) tracts of land as places of use along Jordan Creek within the Silver Creek Allotment for which Joyce now holds the grazing preference. Joyce Livestock is an Idaho

[3] 1932 Forest Service survey, "Owyhee County: The Public Domain as a Land Resource," U.S. Trial Exhibit 88.

limited partnership entity formed in 1985. Joyce owns approximately 10,000 acres in the adjacent Sinker Creek Basin which serves as "base ranch" property for its grazing preference. The 10,000 acres consists of the accumulation of a number of smaller ranches ultimately acquired by Joyce Livestock. Some of these smaller ranches were in existence and used adjacent public grazing land encompassing Jordan Creek as early as 1898. After the United States began administering public grazing lands pursuant to the Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315)("Taylor Grazing Act") some of the ranch operators acquired grazing rights along Jordan Creek. Joyce's acquisition of some of these ranches also included the transfer of grazing rights. Joyce Livestock asserts that its predecessors-in-interest appropriated instream stockwater rights within the boundaries of these grazing allotments, which also transferred to Joyce. Joyce does not have any deeds or other instruments of conveyance evidencing the transfer of water rights from a predecessor-in-interest. Joyce asserts that the stockwater rights transferred as appurtenances to the various acquired patented or base ranch properties.

The Special Master ruled that Joyce's predecessors-in-interest did not appropriate water rights by simply grazing cattle on open public rangeland or on defined grazing allotments following the implementation of the Taylor Grazing Act. The Special Master ruled that grazing cattle in common on the public rangeland was insufficient to establish the requisite intent needed to establish a water right. The Special Master held "the preponderance of the evidence is that none of Joyce Livestock's grantor's intended to appropriate the water of Jordan Creek for instream watering." The Special Master recommended that Joyce therefore failed to acquire a stockwater right from any of its predecessors-in-interest. Since the issuance of the *Special Master's Recommendation,* this Court issued a decision involving similar issues wherein this Court discussed the criteria for appropriating an instream stockwater right on public land. ***Memorandum Decision and Order on Challenge***, *Subcases 55-10288B, et al.* (***LU Ranches II***), 17-22 (January 3, 2005).

In ***LU Ranches II***, this Court held that requisite intent to appropriate could be inferred from the act of watering livestock as no physical diversion was necessary. *Id.* The Court also distinguished the situation between a nomadic herder grazing livestock on public rangeland from the situation involving a livestock rancher that historically and routinely used adjacent public

rangeland as an integral part of his ranching concern. *Id.* at 17-22. The Court's prior reasoning from that decision is herein adopted.

In this Court's opinion, the Special Master incorrectly applied the element of "intent" in holding that Joyce Livestock's predecessors did not intend to appropriate a water right. The requirements for establishing a beneficial use water right consist of intent to apply water to a beneficial use, diversion from a natural watercourse, and the application of the water to a beneficial use. *See Hidden Springs Trout Ranch v. Hagerman Water Users, Inc*., 101 Idaho 677, 680-81, 19 P.2d 1130, 1133-34 (1980).[4] The satisfaction of these requirements provides actual notice of the appropriation to every potential water user intending to appropriate from the same or connected source. The appropriation of water requires that the appropriator intend the water to be applied to a beneficial use at the time the water is taken as opposed to merely intending to create a water right. *Neilson v. Parker*, 19 Idaho 727, 729, 115 P. 488, 490 (1911) (citations omitted) ("It is like a man actually being in possession of realty…."). Ordinarily, the requisite intent is implied from the overt act of diverting the water and applying the same to a beneficial use.[5] Although, no diversion is required for purposes of establishing an instream stockwater right, the other two requirements, intent to apply to a beneficial use and application to a beneficial purpose, still apply.[6] As with the situation of a diversionary right, the requisite intent

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[4] "It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use, existing at the time or contemplated in the future, followed by diversion from the natural channel by means of a ditch, canal or other structure and also an active application of the water, within a reasonable time, to a beneficial use."

Hidden Springs Trout Ranch v. Hagerman Water Users, Inc., 101 Idaho 677, 680-81, 19 P.2d 1130, 1133-34 (1980)(quoting 78 Am.Jur 2d Waters § 321(1975)).

[5] Under the constitutional method of appropriation the diversion requirement provides actual notice of intent to potential appropriators. The permit process provides constructive notice of intent to potential appropriators and provides a period within which to put the water to a beneficial use from the time the application is approved. This protects the claimant's priority from intervening appropriators. Idaho also had a statute whereby notice of intent could be posted. Under either method an overriding concern is providing notice of the intent to appropriate.

[6] *In re SRBA Case No. 39576, Minidoka National Wildlife Refuge, SRBA Subcase No. 36-15452, ("Smith Springs")*, 134 Idaho 106, 996 P.2d 806 (2000), in discussing the elements of a constitutional appropriation the Idaho Supreme Court discussed the limited exception to the diversion requirement for stock watering. *Id*. (citing *R.T.Nahas Co*. v. *Hulet*, 106 Idaho at 45 (Ct. App. 1983); *Stevenson v. Steele*, 93 Idaho 4, 11, 453 P.2d 819, 826 (1969)). No exceptions were discussed for the remaining two elements.

In *Town of Genoa v. Westfall*, 349 P.2d 370, the Colorado Supreme Court held:

to apply the water to a beneficial use can be inferred from the overt act of grazing livestock in a particular area and the livestock drinking water from available sources. The proximity of available water sources is essential to the grazing of livestock. In the SRBA decision regarding executive order Public Water Reserve (PWR) 107, Judge Burdick discussed at length the fact that the person that controlled the limited isolated water sources could control vast amounts of surrounding rangeland. ***Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman, Consolidated Subcases 23-10872 et al., Joint Submission Subcases 23-10894 et al.*** 12-14 (December 28, 2001). The very purpose of PWR 107 was to prevent the *de facto* control over rangeland through the control of available water sources. *Id*. at 19 ("Throughout the history leading up to the issuance of PWR 107, the unequivocal intent of the public water reserve policy was to attempt to prevent the monopolization of the public rangelands through the control of the limited water sources"). Accordingly, PWR 107 withdrew land from the public domain surrounding such sources. The testimony of Roxanne Brown regarding IDWR's policy regarding the investigation of *de minimus* stockwater rights also exemplifies the relationship between grazing and available water supplies.

> Q. [Does IDWR] determine whether or not there, in fact, are cows even consuming water from this source as part of your--.
>
> A. In a general sense we do. We understand clearly that, that range land grazing and watering occur throughout the areas of the state, where each of the stockwater rights is occurring or is claimed. So in a general sense, we assume that stock are in fact drinking.

Tr. p 26. "Livestock must have forage and water to survive while they use public land for grazing." Testimony of Ronald Kay, Tr. at 559. Given this integral relationship between available water sources and grazing land it is self-evident that the grazing of livestock includes the intent that livestock will beneficially use available water sources.

> It is not necessary in every case for an appropriator of water to construct ditches or artificial ways through which the water might be taken from the stream in order that a valid appropriation be made. The only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use.

Id. at 547.

Although there is no physical diversion putting other intending water users on notice, the overt act of grazing livestock in proximity to available water sources, and the livestock drinking from those sources, provides notice to intending water users. This is particularly true with respect to the rancher who historically and routinely used the same rangelands in conjunction with a ranching operation as opposed to the itinerant livestock grazer. In *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967), in upholding an instream appropriation of stockwater, the Court held:

> To constitute an appropriation, therefore, there must co-exist 'the intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use.' . . . The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use . . . but it can also be evidenced in other ways, for example, as in this case by watering livestock directly from the source or as in other cases by placing water wheels in a stream in order to use the flowage as power to operate a mill located on the bank.
> In this case there is no lack of proof of the asserted appropriation; to the contrary, a clearer showing of intent to use the water is made plain by the evidence. Year after year for nearly a century they have pastured their livestock in this isolated enclave, surrounded by miles of impassible desert; except for the water provided by these springs and the stream, there has been none other available to keep their animals alive.
> Their intended (and actual) use has been for a beneficial purpose, as the trial court specifically found. Indeed a contrary finding could hardly have been justified, particularly since cattle watering has been judicially recognized in California as 'a reasonable beneficial use'.

Hunter at 153 (internal citations omitted).

The United States argues that in order to establish the requisite intent to appropriate a stockwater right there must be some requirement of exclusivity or dominion exercised over the water source by the appropriator. *See Robinson v. Schoenfield,* 218 P. 1041 (Utah 1923). This Court disagrees. While this may be a requirement in some jurisdictions, in *R.T. Nahas Co. v. Hulet*, the Idaho Supreme Court did not discuss or otherwise impose such a requirement. *See R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct.App. 1983). Moreover, because the water rights at issue are located on public lands, <u>legally</u> a livestock grazer could not exclude another from using such lands until after the implementation of the Taylor Grazing Act. *See e.g.* Unlawful Enclosures Act of 1885, Act of Feb. 25, 1885, c. 149, 23 Stat. 321 (codified at 43

U.S.C. § 1061). A livestock grazer would not need to exclude another water user from a particular source if a sufficient water supply existed. In light of the nature of an instream stockwater right, the conditions argued by the United States do not reflect the realities of livestock grazing, nor are they required by law.

B. The intent to transfer water rights by predecessors-in-interest.

Even if it is determined that Joyce Livestock's predecessors established water rights in the Jordan Creek area under the foregoing analysis, Joyce Livestock does not possess any deeds or other instruments conveying the water rights. Because water rights are interests in real property, the statute of frauds requires that transfers be in writing. I.C. § 9-503; *Olsen v. Idaho Department of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188 (1983); *Gard v. Thompson*, 21 Idaho 484, 496, 123 P. 497 (1912). Water rights can also transfer along with the property to which they are appurtenant. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). The general rule is that when an instrument conveying real property is silent as to water rights, any appurtenant water rights automatically transfer along with the property. *Id*. Joyce Livestock asserts that the stockwater rights on Jordan Creek transferred as appurtenances to the base ranch properties acquired by Joyce. In ***LU Ranches II***, this Court held that given the nexus or connection between private or base ranch property and the use of adjacent public lands or grazing allotments that a grantor could have intended to transfer water rights appropriated on public land as appurtenances to base ranch property**.** ***Lu Ranches II*** at 22-25. [7] Whether any stockwater rights transferred depends on the intent of the grantor and is a question of fact. *Id.* The Special Master ruled that because Joyce's predecessors did not intend to appropriate stockwater rights they could not have intended to transfer any stockwater rights as appurtenances. This Court disagrees. As discussed previously, the intent to apply the water to a beneficial use objectively satisfies the element of intent to appropriate.

In ***LU Ranches II***, in trying to ascertain the intent of the grantor, the Court looked at the totality of circumstances surrounding the use of the base ranch properties in conjunction with

[7] In 1998, the Idaho legislature acknowledged this relationship and statutorily made grazing preferences appurtenant to base ranch property. I.C. § 25-901 (2005).

adjacent public grazing land. ***LU Ranches II*** at 26. Factors this Court took into account included the historical use of defined areas of adjacent public land in conjunction with a bona fide livestock operation, the award of grazing preferences based on such historical practices and predecessor's representations made to the United States in the applications for grazing permits. If it could be demonstrated that private property and adjacent public rangeland were used in connection with a ranching operation, and that operation was acquired by a successor, the grantor would have intended to convey not only the private property but also any stockwater rights used in connection with the operation. The Court essentially applied an objective test in determining the subjective intent of the grantor.

In determining the elements of the water right, the Court looked at where the predecessors historically grazed on public lands in connection with the ranching operation and relied on written representations made by predecessors in the grazing permit applications. The grazing permit applications were primarily awarded based on historical use and/or control over water sources and as such, applicants were specifically asked to identify where and when they historically grazed livestock on the public domain and to identify any particular water rights held and used in connection with the ranching operation. Because the Court applied an objective test, to the extent an applicant/predecessor either represented in the grazing application that he held no water rights on public land or otherwise failed to identify any such rights when specifically asked, in ascertaining the intent of the grantor, the Court concluded that the grantor could not have intended to convey as an appurtenance to a different parcel of property something he did not claim or otherwise believe he owned. On the other hand, where the grazing application specifically mentioned or evidenced a water right, the Court was unwilling to conclude that the predecessor intended to forfeit the water rights rather than transfer the right along with the base ranch property and/or grazing privileges. In most cases the applications provide the only record of the predecessor's grazing practices and ownership of water rights.

C. Joyce Livestock's claim.

Joyce Livestock's claim includes twenty different places of use (quarter-quarter sections) along Jordan Creek. Joyce Livestock does not assert that it appropriated the claimed water right; rather Joyce contends that the right was appropriated by predecessors-in-interest and conveyed as

an appurtenance to private property that now comprises Joyce Livestock's base ranch property. The record in this case is voluminous, and only a portion of the exhibits admitted via stipulation of the parties have relevance pertaining to the interests of Joyce Livestock's predecessors in the Jordan Creek area. In addition, not all of Joyce's predecessors historically grazed the same areas that now comprise the place of use for Joyce's claim. Animal Unit Months (AUMs) were also transferred without the transfer of base ranch property. This raises the issue whether water rights transferred with AUMs or remained with base ranch property.

Other than general appurtenance clauses, none of the deeds in the chain of title for Joyce Livestock's base ranch property refer to water rights located on lands other than those lands specifically being conveyed. U.S. Exhibit 1. Further there are no historical documents acknowledging the existence of water rights or specifying where predecessors, other than those who filed for grazing privileges after the enactment of the Taylor Grazing Act, specifically grazed cattle in conjunction with a ranching operation. Although the Joyce Livestock base ranch property is an accumulation of 29 different homesteads and small ranches, only John T. Shea, Joyce Bros. Livestock Co., Nettleton Bros., the Jump Creek Sheep Co., and Jean Heazle are the predecessors-in-interest to Joyce's grazing preference. U.S. Exhibit 22. Only John T. Shea, Joyce Bros. Livestock Co., and the Nettleton Bros., originally filed for grazing privileges on the allotment after the implementation of the Taylor Grazing Act. In reviewing the grazing permit applications, only John T. Shea and Joyce Bros. Livestock filed for grazing privileges on lands covered by Joyce Livestock's claim.

John T. Shea filed for an entry under the Stock-Raising Homestead Act in 1927. U.S. Exhibit 20. Shea filed for a grazing permit application on April 26, 1935. Joyce Exhibit 87. Shea's application indicates that he used the lands applied for in conjunction with his ranching operation for the prior 10 years. Although Shea did not offer water rights as base property, the application identified water rights used in conjunction with his livestock operation as "usual water right acquired with lands under the laws of Idaho" and identified such rights as "springs and creeks running on and through the ranches." The application also states that Shea had been using the lands almost exclusively for the previous 10 years. However, the permit application only pertained to a portion of the place of use for Joyce Livestock's overall claim. The application identified historical grazing located in Township 5 South, Range 3 West, Sections

6,7, and 8 and Township 4 South, Range 3 West Section 31. Omitted were the portions of Joyce's claim located in Township 5 South, Range 3 West, Sections 17, 18, and 19. In a February 14, 1936, application for the grazing season commencing April 1, 1936, Shea identifies all of Township 5 South, Range 3 West, (exclusive of patented property) as the areas of the public domain normally being "used in connection with [his] ranching operation." Joyce Exhibit O. The application also refers to a small portion of Jordan Creek (near Silver City) located in Township 5 South, Range 3 West. This covered the remainder of Joyce Livestock's claim. A dependent property record prepared in 1937, refers to private lands owned by Shea in Township 4 South, Range 3 West and Township 5 South, Range 3 West, and notes that the lands have "been owned by Mr. Shea and used in connection with his livestock operation since 1925." Joyce Exhibit S. In an affidavit signed by Shea in 1957, Shea states "I owned and operated a cow outfit in the Sinker Creek and Jordan Creek water shed beginning in 1928 until I sold out in 1938." U.S. Exhibit 55, bsn 550. Through mesne conveyances, Shea's base ranch property, together with grazing rights and appurtenant water rights was transferred to Joyce Livestock. U.S. Exhibit 1, Joyce Exhibit Y.

The Special Master made the specific finding that Shea's reference to "springs and creeks running through the ranches" referred to only to Shea's deeded lands. ***Special Master's Report and Recommendation*** at 22. "In other words, the only water rights Mr. Shea owned or controlled were located on his deeded lands." *Id.* Although the term "ranches" is ambiguous, the Court cannot conclude that the finding was clearly erroneous. Therefore, the Court must conclude that the earliest Shea appropriated a water right would be April 26, 1935. This ruling is consistent with ***LU Ranches II***, in which this Court stated:

> Again, *in the 1937 application O'Keefe fails to identify any water rights located on the public domain and the permit was awarded based on O'Keefe's representations*. Thus, it must be concluded that any appurtenant water rights were appropriated after the issuance of the grazing permit or April 15, 1937. In ascertaining the intent of the grantor, the Court cannot infer that the grantor conveyed something he didn't claim he owned.

Memorandum Decision and Order on Challenge, Subcases 55-10288B *et al.* (***LU Ranches II***) (January 3, 2005) at 35. The Court also holds that the documents in evidence show that Shea

grazed his cattle throughout the Jordan Creek drainage, so this priority date is applicable to all of the reaches within 55-10135.

On June 12, 1935, Joyce Bros. Livestock Co. filed an application for a grazing permit. U.S. Exhibit 85. The application seeks grazing privileges in various areas but only identifies that portion of Joyce Livestock's water right claim located in Township 4 South, Range 3 West, a part of which is located in the Jordan Creek drainage. The application states that the applicant began use of the lands covered by the application in 1866. The application also includes a schedule of water rights, together with maps, and meticulously identifies the specific water rights held by Joyce Bros. Livestock Co. U.S. Exhibit 85. The schedule also states that "there are numerous springs which have not been marked on the maps, for lack of knowledge of the correct location." However, none of the water rights identified are located on public domain. Joyce Bros. does not identify any water rights on Jordan Creek. In 1936, Joyce Bros. Livestock Co. filed a subsequent application for the 1936 grazing season. U.S. Exhibit 83. The application does not identify any lands in the Jordan Creek drainage. The application asks: "list and describe all livestock watering facilities owned, leased or controlled by you, which are used in connection with your livestock operation on public domain." Joyce Bros. identifies "Springs and natural flow of the above listed creeks" which includes "Bates, Fossil, Sinker, No. Castle; also Meadow Creek, Josephine, Rose, Combination, and heads of Short and Langdon Creeks." Jordan Creek is not identified.

Hubert E. Nettleton and J.H. Nettleton filed an application for a grazing permit on June 8, 1935. The application only identifies the "use of the water on Sinker Creek." Exhibit 86. In an application for 1936, the Nettletons identify "Springs in Sinker, Bates and Fossil Creeks." U.S. Exhibit 84. Any water right on Jordan Creek would have had to have been appropriated by Nettletons after 1936.

On December 2, 1966, Jump Creek Sheep Company transferred a portion of its AUM's (Animal Unit Months) from its base property to J.H. Nettleton's base property. No mention of water rights is included in the transfer, nor is it clear what if any water rights existed, or if they did exist, whether it was intended that the water rights transfer along with the AUMs or remain with the base ranch property. U.S. Exhibit 93.

Accordingly, based on the foregoing, this Court holds that the earliest date Joyce Livestock can establish for its claim would be April 26, 1935, relating to Shea's use of the Jordan Creek area.

D. The United States is not entitled to a beneficial use state-based water right based solely on its administration of grazing lands.

The Special Master recommended that the United States' claims be decreed essentially as a matter of law based solely on the United States' role as the administrator of the grazing allotments on which the claimed water rights are located. The Special Master relied on Idaho Code § 42-501 in finding that the administration of public lands by the United States constitutes a beneficial use for purposes of establishing a state-law based stockwater right. Idaho Code § 42-501, which has been in effect since 1939 and reads substantially the same today, provides:

> **Appropriation by the United States bureau of land management, department of interior-Fee-Conditions of permit-Flow**
> The bureau of land management of the department of interior of the United States may appropriate for the purpose of watering livestock any water otherwise not appropriated, on the public domain. The department of water resources shall, upon application in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation. With each such application there shall be paid to the department of water resources a fee of ten ($10.00) dollars and there shall be no further fee required for the issuance of the permit or license and certificate of water right, nor for any other proceedings in connection with such application. Such permit, license and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefore on the public domain. The maximum flow for which permit, license and certificate of water right may issue hereunder shall be five (5) miner's inches, and the maximum storage for which permit, license and certificate of water right may issue hereunder shall be fifteen (15) acre feet in any one storage reservoir.

I.C. § 42-501 (2003 & Supp. 2005).

This Court disagrees with the Special Master's reliance on I.C. § 42-501. The United States' claims are not based on the operation of I.C. § 42-501. The United States did not follow

the permit and licensing procedures set forth in the statute. Nor does I.C. § 42-501 support the conclusion that the ownership of land and the administration of the grazing allotments alone can be sufficient to establish a beneficial use water right, without regard for whether the United States or someone acting on behalf of the United States was beneficially using the water. The requirements pertaining to the beneficial-use or constitutional method for appropriating a water right apply to the United States just the same as they would apply to any other appropriator of a state-based water right. In particular, a beneficial use appropriation requires that the water be put to beneficial use either by the appropriator or someone acting on behalf of the appropriator. This Court agrees that as a general principle the administration or ownership of land by one person or entity when coupled with the beneficial use of water by another can be sufficient to establish a water right in the administrator or owner -- if the beneficial user is acting on behalf of the owner or administrator. *See First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930). However, this is not what occurred with respect to the water right claims at issue. Joyce Livestock claims that it and its predecessors are the beneficial users of the water. Joyce asserts that it appropriated and/or acquired its own water right and was beneficially using that right on the grazing allotment. Joyce Livestock contends that it was not acting on behalf of the United States or beneficially using the United States' water rights. Therefore, the issue becomes whose water right, if any, was being used in conjunction with the grazing allotment.

The issue regarding the establishment and ownership of a water right where there is not unity of title between the appropriator of the water right and the owner of the land on which the right is used was previously decided and has been applied consistently in the SRBA. *See e.g.* ***Memorandum Decision and Order on Challenge; Order Denying Motion to File Amicus Curiae Brief; Order of Recommitment to Special Master Cushman***, Subcases 55-10288 A & B, *et al*. (***LU Ranches I***)(April 25, 2000); ***Memorandum Decision and Order on Challenge***, *Subcases 55-10288B, et al.* (***LU Ranches II***)(March 1, 2005). To date this ruling has not been reviewed by the Idaho Supreme Court and thus still remains law-of-the-case.[8] The issue arose in the context of the ownership of stockwater rights on federal grazing allotments as between the United States and the livestock rancher who grazed the cattle and actually put the water to

[8] ***LU Ranches II*** is currently on appeal to the Idaho Supreme Court.

beneficial use.[9] In ***Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Objections*****,** Subcases 57-11124 *et al*. (Mar. 25, 1997)**;** ***Order On Motions to Alter or Amend; Order on Motion for Permissive Appeal***, Subcases 57-04028 *et al*. (June 26, 1997), one of the issues before Special Master Hammerle was whether the United States as administrator of a grazing allotment could perfect a beneficial-use right despite not actually grazing or watering livestock. Special Master Hammerle ruled that because the permittee, not the United States, beneficially used the water, the only way in which the United States could perfect a state-law based (non-statutory) water right was through an agency relationship between the permittee and the United States, whereby the permittee appropriating the water was acting on behalf of the United States. *Id.* The situation was analogized to that of a lessor and lessee, where the lessee appropriates the water right. Under Idaho common law if a lessee appropriated a beneficial use water right used in conjunction with the leasehold, absent an agency relationship with the lessor or a lease provision or agreement to the contrary, title to the water right vested in the lessee who appropriated the right not the lessor who held fee title to the leasehold. *See First Security Bank v. State,* 49 Idaho 740, 746, 291 P. 1064 (1930) ("This court has repeatedly held that a water right is not necessarily appurtenant to the land on which it is used and may be separated from it, and this is the general rule. If the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as agent of the owner.").

The Special Master's reasoning and ruling was subsequently adopted by Judge Hurlbutt. ***Order Denying Challenges and Adopting Special Master's Reports and Recommendations***, Subcase 57-04028B (Joyce Livestock) (Sept. 30, 1998). Judge Wood, who succeeded Judge Hurlbutt, adopted this same reasoning in a subsequent consolidated subcase involving similar

[9] In 1996, the United States, the State of Idaho and various ranching interests sought to have the SRBA Court decide various issues surrounding the ownership of a water right claim on a grazing allotment as between the permittee, who actually grazed the cattle on the allotment, and the United States who administered the allotment. Judge Hurlbutt denied the motion to designate basin-wide issue 9A, because the parties were unable to agree on a set of paradigm facts for creating test cases. The Court did not want to decide test cases in a "vacuum" and then have the parties seek to distinguish the facts of their particular case requiring that the individual subcases be litigated anyway. Judge Hurlbutt decided the cases were fact driven and should proceed through the SRBA process case-by-case. *Order Designating Basin-Wide Issue No.9; Order Denying Designation of Basin-Wide Issue No. 9A; Order Setting Expedited Schedule and Hearing Date for Basin-Wide Issue No. 9*, Case No. 91-00009 (March 8, 1996). In 2000, Judge Burdick also denied a joint motion by various parties to create and decide test cases addressing the same issues on the same basis as Judge Hurlbutt. *Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master Dolan and Stay Related Subcases*, (Approx. 7500 subcases) (Jan. 30, 2000).

issues**.** ***Memorandum Decision and Order on Challenge; Order Denying Motion to File Amicus Curiae Brief; Order of Recommitment to Special Master Cushman***, Subcases 55-10288 A & B, *et al*. (***LU Ranches I***)(April 25, 2000). Judge Burdick applied the same reasoning in ***Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master and Stay Related Subcases***, (Jan. 3, 2001), based on the reasoning that each of the claims was fact specific. Recently, this Court applied the same reasoning. ***Memorandum Decision and Order on Challenge***, *Subcases 55-10288B, et al.* (***LU Ranches II***)(Jan. 3, 2005).

This reasoning is also consistent with the Taylor Grazing Act as well as the federal regulations governing the issuance of grazing permits and preferences. The Taylor Grazing Act expressly acknowledged that permittees could be using their own water rights on the grazing allotments as opposed to water rights held by the United States. (Thus if a permittee was using their own water right, they were not appropriating a beneficial-use right for the benefit of the United States.) The Taylor Grazing Act provides:

> 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 effecting the public lands which may hereafter be initiated or acquired and maintained in accordance with law.

Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986).

The regulations also expressly acknowledged that the permittee could be using their own water rights on the grazing allotment as opposed to water rights held by the United States. 43 C.F.R. § 4100.0-5 (1998). Specifically, in order to be awarded a grazing preference, the applicant needed to have base property either in the form of private land used in conjunction with the grazing allotment or water rights used in conjunction with grazing cattle on the allotment, which could include water rights located on the allotment. *Id.* Prior to 1995, the federal regulations did not address the ownership of water rights used on grazing allotments. In 1995, the regulations were amended to provide that any water rights perfected on grazing allotments would vest in the United States.[10] 43 C.F.R. § 4120.3-9 (1998). As of 1995, it is abundantly

[10] The regulations provide:

clear that a permittee appropriating a water right acts on behalf of the United States. However, prior to that time it is equally clear that the permittee could have appropriated and beneficially used its own water right. *See generally* ***Memorandum Decision and Order on Challenge***, *Subcases 55-10288B, et al.* (***LU Ranches II***)(Mar. 1, 2005). (discussing at length the ability of a permittee to perfect a water right on grazing allotments).

In applying the law of the case to the instant subcases, the United States does not contend that it ever physically appropriated a water right by grazing livestock, nor does it contend that there was a regulation or agreement in place with Joyce or its predecessors specifying that the title to any beneficial use water rights established on the subject allotments would vest in the United States. Joyce asserts that as a permittee it never had an agreement with the United States regarding the ownership or use of water rights on its grazing allotments, and that Joyce has been using its own water rights in conjunction with the allotments. Accordingly, the United States has failed to establish a beneficial-use state-law based water right.

In this Court's opinion, concluding that the United States can establish a beneficial use water right based solely on the administration of the lands without regard for beneficial use, either by the United States or someone acting on behalf of the United States, would be more akin to a federal reserved water right or a riparian water right than a water right based on state law. Furthermore, the requirements for establishing such a right would be less stringent than for a federal reserved water right. For example, in order for a federal reserved water right to exist, the primary purpose of a federal withdrawal would have to be entirely defeated without an implied reservation of water. Under the theory now asserted by the United States, the fact that the United States administers lands alone would be sufficient to establish a water right. Although the provisions of the Taylor Grazing Act made it clear that the operation of the Act was not intended to create federal reserved water rights, an "administrative" type of water right without regard for

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> Any right acquired on or after August 21, 1995, to use water on public land for the purpose of livestock watering on public land shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State within which the land is located, any water right shall be acquired, perfected, maintained, and administered in the name of the United States.

43 C.F.R. § 4120.3-9 (1998)

beneficial use appears to be an end run around that intent and the requirements for establishing a federal reserved water right or some type of riparian right.

The state of Idaho statutorily created a means for the United States to establish stockwater rights on the grazing allotments through the permit and licensing process. The United States did not follow that process in this case. However, even under that licensing process, the United States would have been required to demonstrate beneficial use of its permitted right prior to the issuance of the license. This potentially would have forced the same issue that is now before the Court regarding whether the right beneficially used was that of the grazing permittee or that of the United States. As such, this Court does not read the statute to support the argument that I.C. § 42-501 creates a special type of beneficial use right based on administration without regard for beneficial use.

Additionally, the fact that there existed a statutory means for establishing a particular type of water right does not necessarily authorize the same type of right under the constitutional method. This point was demonstrated in *In re SRBA Case No. 39576, Minidoka National Wildlife Refuge, SRBA Subcase No. 36-15452, ("Smith Springs")*, 134 Idaho 106, 996 P.2d 806 (2000). In *Smith Springs*, the United States filed a claim for instream flows from Smith Springs inside the Minidoka National Wildlife Refuge based on the constitutional method of appropriation. One of the arguments raised relied on I.C. § 42-1501 *et seq.*, which provides a statutory scheme for establishing minimum stream flows and declares minimum stream flows to be a beneficial use. The Idaho Supreme Court rejected the argument that the declaration of beneficial use extended to the constitutional method of appropriation and held that the exception to the diversionary requirement was limited to appropriations made under Idaho's permit system as provided for by I.C. § 42-1501 *et seq*. *Smith Springs* at 134 Idaho at 112, 996 P.2d at 812 (citing *State, Dep't of Parks v. Idaho Dep't of Water Admin*., 96 Idaho 440, 444, 530 P.2d 924, 928 (1974)).

In this Court's view, the Special Master may have treated the issue of intent to appropriate differently as between Joyce Livestock and the United States. It appears that the issue of intent with respect to the United States was decided more as a matter of law, but that the issue of intent with respect to Joyce Livestock was decided as a factual issue. This led to a conclusion with respect to Joyce Livestock that mere use alone was insufficient to establish the requisite intent to appropriate a beneficial use water right, and that additional overt conduct of

intent to appropriate is required. However, the same standard was not applied with respect to the United States. Even assuming that the administration of lands, without more, could be sufficient for purposes of appropriating a beneficial use water right, the Special Master did not require the United States to prove intent to appropriate. Even though the United States administers the land there is no evidence in the record that it intended to appropriate water. The United States acts and expresses its intentions through legislation, regulations and contracts. As previously discussed, neither the Taylor Grazing Act nor the regulations governing its application, which authorize the actions of the United States in administering grazing lands, expressed any intent to appropriate a water right. All expressions and inferences are to the contrary.

In addition, since the United States did not actually apply the water to a beneficial use by grazing its own cattle, it is not clear whether the United States intended to apply water to a beneficial use by having the permittee act on behalf of the United States in beneficially using the water or whether the United States intended that the permittee either utilize the permittee's existing water right or have the permittee appropriate a new water right. Again, a permittee could offer his own water rights on public land as base ranch property for a grazing preference and it was not until August 21, 1995, that the grazing regulations made it clear that any water rights perfected on public land would be perfected in the name of the United States. *See* 43 C.F.R. § 4120.3-9.

The United States cites *State v. Morros*, 766 P.2d 263 (1988), a Nevada case which determined that the United States acting in its proprietary capacity as a landowner could appropriate instream stock and wildlife rights based on its ownership of lands. *Morros* is not inconsistent with the law in Idaho concerning the stockwater rights. *Morros* dealt with a permit application which was denied. Idaho specifically has a permit statute in place allowing the United States to appropriate water for such purposes. By following the permit process, the United States provides constructive notice to other intending appropriators on a particular source and is able to appropriate a water right subject to the limitations set forth in the statute. Here, the United States did not follow the permit process.

In the ***Order Denying Motions to Alter or Amend (Amended Order on State's Motion for Summary Judgment)***, Subcase 72-15929C (April 15, 1998), a subcase to which the United States and the State of Idaho were the only objectors, Special Master Hammerle ruled that the

United States could not appropriate water based solely on the fact that it issues permits and regulates access to water sources.

> [T]he fact that the United States gives 'permission' to stockmen has no relevance to a claim that the United States is the appropriator under state law. As previously stated, the United States is treated like any other landowner as it relates to a claim for a state-based water right. As such, the rule in Idaho is that unless there is an agreement between the landowner and the party actually appropriating the water on the landowner's property, the water right belongs to the party perfecting the right. . . Finally if the United States theory were accepted, then the only party that can claim a water right on the public domain is the United States. The result of such a theory would be to create either a quasi-riparian or quasi-reserved theory of water right ownership where only the United States may own a water right located on the public domain. (footnote omitted).

Special Master's Order at 9. This ruling was adopted by Judge Hurlbutt. ***Order Denying Challenges and Adopting Special Master's Reports and Recommendations***, subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B and 72-15929C (Sept. 30, 1998). Although the issue raised by the State of Idaho only dealt with the ability of the United States to perfect a water right prior to the passage of the Taylor Grazing Act, the reasoning extended beyond the enactment of the Taylor Grazing Act to the ability of the United States to perfect a state-law based water right solely based on the administration of lands. Pursuant to a global stipulation between the United States and the State of Idaho, which resolved numerous subcases, the decision was not appealed. Nonetheless, the ruling remains law of the case.

This Court acknowledges that partial decrees have been issued by the SRBA Court to the United States for a significant number of state-based beneficial use water rights with a priority date as of the date of enactment of the Taylor Grazing Act, which corresponds to the date the United States began administering public rangeland.[11] However, these decrees either came about through settlement agreements with parties who objected to the claims or the claims were uncontested. Because the *Director's Report* for these rights established a *prima facie* case for the state-law based claims, and because it is factually and legally possible for the United States

[11] It should be noted that the claims filed by the United States did not initially claim a 1934 priority date, indicating that the theory behind the claims was not based on administration, but rather actual beneficial use of the water by the end-user.

to appropriate a state-law based beneficial-use right for the reasons just stated, the Court did not need to conduct further proceedings on either uncontested or stipulated rights to decided whether the permittee or the United States owned the water right. Accordingly, these uncontested or stipulated agreements provide no precedence for those claims where objections were filed.

Finally, this Court also acknowledges that there are situations where the United States has developed water sources and diversionary works for use on grazing allotments. However, the Court need not decide whether such development would result in the United States appropriating a water right as that is not the situation with the subject claimed places of use along Jordan Creek.

VII.
CONCLUSION

The issue over the ownership of stockwater rights on the public domain is an issue that has persisted in the SRBA since 1996 when Judge Hurlbutt entertained a motion to designate the issue as a basin-wide issue. What is apparent in this case, as well as in other cases involving the same issue that have been before this Court, is that neither the United States nor the rancher-permittee contemplated stockwater rights on the public domain. Despite the arguments by both the United States and Joyce Livestock regarding the importance of stockwater rights on the public domain, in the voluminous exhibits in this case representing approximately 140 years of history, there is not one specific reference to a water right on the public domain by either the United States or by Joyce Livestock's predecessors, albeit the water rights on private land are often described with particularity. This dispute over water rights has less to do with the administration of water than the contemporary administration of public lands. In IDWR's I.R.E. 706 Report explaining IDWR's policy for recommending stockwater rights on public land, it is noted that IDWR has never prohibited a party from watering livestock on federal rangeland and cites a lack of historical conflict over the issue. U.S. Exhibit 17. IDWR also noted that many permittees did not even file claims in the SRBA. Because of the realities and limitations of an instream stockwater right on federal land it becomes apparent why neither the United States nor former permittees considered water rights on grazing allotments. In ***ORDER ON LU RANCHING CO.'S MOTION FOR RECONSIDERATION,*** Subcases 55-10288B *et. al,*(May 2, 2005), this Court stated:

> Also relevant to a grantor's intent to convey a water right post-Taylor Grazing Act, are the realities of using instream rights in conjunction with a grazing allotment. The water rights are instream rights and as such can only be used in conjunction with the grazing allotment for which a permit is required. Given the remoteness of the water sources and the fact that such sources are located on public land it is unlikely that a rancher would be able to transfer the place of use. Accordingly, the water right can only be used in conjunction with the grazing allotment. Any subsequent permittee to a grazing allotment could appropriate a new water right for use in conjunction with the grazing allotment. Because a grazing permit is necessary to access the sources for grazing, the livestock rancher is not in competition with other users on the source for the use and administration of the water. [The]Grazing preferences [in this case] were not awarded based on the applicant having a pre-existing water right. Given these underlying circumstances it is doubtful that a livestock rancher would have considered the [necessity of transferring] a water right on a grazing allotment.

Id. at 6. This same reasoning holds true for the United States.

For the above-stated reasons, this Court holds that Joyce Livestock has established an April 26, 1935, priority date for water right claim 55-10135. The Special Master did not address the issues pertaining to the recommended place of use for the claim based on the conclusion that Joyce Livestock failed to establish a water right. In the interest of avoiding further delay by remanding for additional findings on the place of use this decision will be certified as final for purposes of appeal.

Water right claims 55-11061, 55-11385, 55-12452 filed by the United States are denied and will be decreed disallowed.

I.R.C.P. 54(b) Certification

With respect to the issues determined by said Order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the said Order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED August 3, 2005.

/s/ John Melanson

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication