

**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)
)	and 55-11061, 55-11385 and 55-12452
Case No. 39576)	(USDI/BLM)
)	
)	ORDER DENYING JOYCE LIVESTOCK
)	MOTIONS FOR SUMMARY JUDGMENT
)	and ORDER SETTING SCHEDULING
)	CONFERENCE

SUMMARY

In the absence of unity of title between an instream stockwater right and the federal public land on which the water right is used, as a matter of law the water right cannot automatically pass as an appurtenance to the base property via the instrument conveying the base property.

Where instruments allegedly conveying an instream stockwater right are silent as to the water right, interpretation of those instruments based on the intent of the grantors raises genuine issues of material fact precluding summary judgment.

PROCEDURAL BACKGROUND

55-10135 (Joyce Livestock)

Claim

Joyce Livestock Company, c/o Paul Nettleton, Murphy, Idaho 83650, filed a *Notice of Claim* on January 19, 1989, claiming .23 cfs from Jordan Creek for year-'round instream stockwater use with a priority date of April 1, 1865, based on beneficial use ("I am a holder of

BLM grazing rights.”).¹ The *Notice of Claim* described 35 points of diversion and 138 places of use, all in Owyhee County.

Director’s Recommendation

The Director of the Idaho Department of Water Resources filed his *Director’s Report for Domestic and Stockwater, Reporting Area 6, Volume One (IDWR Basin 55)* on July 31, 1997. Joyce Livestock’s claim and the 3 United States claims were reported in the same *Director’s Report*. The Director recommended claim 55-10135 as filed, but for .02 cfs. Under explanatory material, the Director noted: “BLM Allotment 0570, BLM Allotment 0569, stockwater 1,000 range cattle.”

Objection

The United States of America, Department of Interior, Bureau of Land Management (“BLM”) filed an *Objection* on December 5, 1997, objecting to priority date, points of diversion and places of use.

55-11061, 55-11385 and 55-12452 (USDI/BLM)

Director’s Recommendations

The Director recommended claims 55-11061, 55-11385 and 55-12452 to the United States of America, Department of Interior, Bureau of Land Management, Idaho State Office, 1387 S. Vinnell Way, Boise, Idaho 83709-1657, each claim for .02 cfs from Jordan Creek for year-round instream stockwater use with a priority date of January 1, 1874, based on beneficial use.² Under explanatory material for 55-11061 and 55-11385, the Director noted: “Stockwater, 1900 range cattle;” for 55-12452, the Director noted: “Stockwater, 1244 range cattle.”

Objections

The State of Idaho filed *Objections* on December 3, 1997, alleging the priority date should be no earlier than June 28, 1934.³ Joyce Livestock was granted leave to file late

¹ Joyce Livestock later amended its claimed quantity to .02 cfs and its claimed priority date to June 1, 1898.

² IDWR later amended its recommended priority date to June 28, 1934.

³ On April 28, 2000, the BLM and the State filed a *Stipulation* in 55-11061, 55-11385 and 55-12452 agreeing that if the 3 BLM claims are decreed, the priority date would be no earlier than June 28, 1934, the date of enactment of the Taylor Grazing Act (43 USCA §§ 315, *et seq.*). Special Master Terrence A. Dolan entered an *Order Dismissing the State of Idaho’s Objection* on May 9, 2000.

objections in subcases 55-11061, 55-11385 and 55-12452 on May 6, 1998.⁴ In its *Objection*, Joyce Livestock objected to name and address and alleged:

This water right was developed by historic use for stockwater by private individuals on unappropriated open range. Our current Federal grazing permit is based on that historic use and was awarded through an adjudication process in 1935. Our privately owned grazing permit can be bought, sold, traded, inherited and taxed, and is totally dependent upon our continued use of this water right. Therefore the name on this water right should be ours.

Consolidation

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. From that date forward, the 4 claims proceeded together.

Joyce Livestock Motions for Partial Summary Judgment

On October 15, 1998, Joyce Livestock filed identical *Motions for Partial Summary Judgment* in subcases 55-10135 (Joyce Livestock) and 55-11061, 55-11385 and 55-12452 (BLM) alleging:

JOYCE LIVESTOCK is entitled to judgment as to its right to claim the stockwater which has been beneficially used by JOYCE LIVESTOCK and identified in said subcases on the basis of the law and on the basis of the doctrine of collateral estoppel by which the law found and concluded by the Special Master in the Subcases 57-11324 et al as to JOYCE LIVESTOCK and the United States is binding on the same parties in these cases

On March 2, 1999, Joyce Livestock filed an *Amended Motion for Partial Summary Judgment* in subcase 55-10135, but neither the *Amended Motion* nor the earlier *Motions* were pursued after Joyce Livestock retained additional counsel from San Francisco.

Amended Order of Reference

On September 22, 1999, former-Presiding Judge Barry Wood entered an *Amended Order of Reference Appointing Terrence A. Dolan Special Master* in subcases 55-10135, 55-11060, 55-11061, 55-11385, 55-12452 and 55-13450.⁵

⁴ See former-Special Master Fritz X. Haemmerle's *Order Granting, in Part, Denying in Part, Joyce Livestock's Motion to File Late Objections*, 55-11060, *et al.*, dated May 6, 1998.

⁵ Claim 55-11060 was decreed to the BLM on February 10, 2000; 55-13450 (LU Ranching Company, Inc.) remains at issue.

Motion to Stay

On December 27, 2000, the United States filed a *Motion to Stay Subcases Pending Completion of Litigation in Subcases with Similar Issues of Law and Fact, or in the Alternative, Motion to Consolidate* in 19 subcases in Basin 55, including subcases 55-10135 (Joyce Livestock) and 55-11061, 55-11385 and 55-12452 (BLM). Later, the BLM moved to withdraw its *Motion* and on January 25, 2001, Presiding Judge Roger Burdick entered his *Order Granting United States' Motion to Withdraw Motion to Stay*.

Amended Claims and Amended Director's Reports

55-11061, 55-11385 and 55-12452 (BLM)

On September 28, 2001, Special Master Dolan entered an *Order Granting Motions to File Amended Notices of Claims* allowing the BLM to amend its claims (55-11061, 55-11385 and 55-12452) because the "BLM mistakenly removed previously claimed places of use to the headwaters of Jordan Creek." IDWR filed its *Amended Director's Reports, Subcase Nos. 55-11061, 55-11385 & 55-12452* on October 26, 2001, recommending the amended claims as filed with a priority date of June 28, 1934.

55-10135 (Joyce Livestock)

On December 4, 2001, Special Master Dolan entered an *Order Granting Motion to File Amended Notice of Claim* allowing Joyce Livestock to amend its claim 55-10135 because: "Investigation and discovery have shown that the claimed and reported priority date of 1865 should be amended to be 1898." Joyce Livestock also amended its claimed quantity from .23 cfs to .02 cfs as recommended earlier by IDWR. On its *Amended Notice of Claim*, Joyce Livestock said: 1) the stockwater rights claimed by the BLM in 55-11061, 55-11385 and 55-12452 are the same rights claimed by Joyce Livestock in its *Amended Notice of Claim*, and 2) Joyce Livestock was not aware of any other claimant or actual user of the stockwater.⁶

⁶ Investigation of Joyce Livestock's amended claim and the filing of a supplemental director's report, along with objection and response periods, were waived by the Special Master because the amended claim was for a later priority date than originally claimed and recommended.

Joyce Livestock Motions for Summary Judgment

On March 8, 2002, Joyce Livestock filed *Motions for Summary Judgment by Joyce Livestock Co.: for 1. An Order Decreeing a Stockwater Right as Reported in Subcase 55-10155, 2. An Order Disallowing the Claimed Stockwater Rights in Subcases 55-11061, 55-11385 and 55-12452* (“Joyce Livestock’s *Motions for Summary Judgment*”).

BLM Opposition

The BLM lodged its *Memorandum in Opposition to Joyce Livestock Co.’s Motion for Summary Judgment* on March 21, 2002, along with an *Affidavit of Larry A. Brown* and a *Statement of Facts* (“United States’ *Opposition*”). The BLM did not file its own motion for summary judgment even though some of its documents were marked: “in support of the United States’ Motion for Summary Judgment.”

Hearing

A hearing on Joyce Livestock’s *Motions for Summary Judgment* was held on March 22, 2002, in Boise, Idaho. Larry A. Brown appeared for the BLM, along with Fredric W. Price; Craig A. Pridgen and Richard L. Harris appeared for Joyce Livestock, along with Paul Nettleton; and Garrick L. Baxter appeared for IDWR.

Post-Hearing Matters

A week after the hearing on Joyce Livestock’s *Motions for Summary Judgment*, and upon agreement with the BLM, Joyce Livestock lodged its *Reply Brief to Memorandum in Opposition to Joyce Livestock Co.’s Motion for Summary Judgment* on March 29, 2002.

On July 3, 2002, Joyce Livestock filed its *Motion to Supplement Briefs in Support of Motion for Summary Judgment* (“Joyce Livestock’s *Motion to Supplement Briefs*”). The *Motion* essentially asked the Special Master to take judicial notice of Presiding Judge Burdick’s *Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Trout)*, subcase 65-05663B, dated May 9, 2002. However, on July 19, 2002, Joyce Livestock filed a *Motion to Withdraw Motion to Supplement Briefs in Support of Motion for Summary Judgment* along with its *Citation to Supplemental Authority* – again citing Judge Burdick’s *Memorandum Decision* for authority. In this circumstance, the Special Master deemed Joyce

Livestock's earlier *Motion to Supplement Briefs* as withdrawn, requiring no further action by the court.

THE EVIDENCE

Land Ownership

Places of Use

Joyce Livestock's claim (55-10135) for instream stockwater rights includes 27 quarter-quarters along Jordan Creek starting at the headwaters of Jordan Creek above Silver City and continuing downstream (northward) to where Jordan Creek enters State-owned land.⁷ Joyce Livestock's claim includes: 14 quarter-quarters owned by the BLM, 7 quarter-quarters with mixed BLM / private ownership and 6 privately owned quarter-quarters.⁸

In the mixed ownership quarter-quarters in the vicinity of Silver City, Joyce Livestock owns several mining claims. *Deposition of Paul Nettleton*, January 9, 2002, at 25 (hereinafter "*Nettleton Deposition*"). It is not clear from the record whether Joyce Livestock argued the mining claims are part of its base property with the allegedly appurtenant instream stockwater right. There was no evidence of who owns the remaining private lands.

The BLM's instream stockwater claims (55-11061, 55-11385 and 55-12452) in 21 quarter-quarters along Jordan Creek overlap most of Joyce Livestock's claim, except where the quarter-quarters are entirely privately owned. All of Joyce Livestock's and the BLM's claims are within the Silver City Grazing Allotment in Owyhee County.⁹ Joyce Livestock is currently the sole active permittee in the Allotment.

Base Property

In its *Motions for Summary Judgment*, Joyce Livestock said its instream stockwater claim (55-10135) is based on beneficial use. Joyce Livestock argued it or its predecessors-in-interest

⁷ For a helpful overview, see the 36" x 51" map, part of Attachment 7 to the Affidavit of Fredric W. Price, United States' *Opposition*, Bate Stamp 004774.

⁸ Paul Nettleton may not agree that the United States owns *any* land in the Silver City Grazing Allotment. When asked whether he agrees that the federal public land within the Allotment is owned by the United States, he answered: "I guess I could take the Bill Clinton defense and say what do you mean by 'owned'? They don't have a warranty deed to it, I don't believe." *Nettleton Deposition*, at 51.

⁹ In Idaho, the BLM manages over 11 million acres for livestock grazing; there are 1,567 grazing allotments and 2,180 permittees authorized to use public lands for livestock grazing. United States' *Opposition*, Affidavit of Gary Madenford, at 4.

“perfected the stockwater right appurtenant to real property owned by Joyce Livestock with a priority date of 1898.” Joyce Livestock’s *Motions for Summary Judgment*, at 1.

Its arguments are as follows: 1) Joyce Livestock owns certain real property known as the Joyce Ranch - its “base property;”¹⁰ 2) the chain of title to some portion of the Joyce Ranch can be traced back to patents as early as 1898; 3) some of Joyce Livestock’s predecessors-in-interest to the Joyce Ranch grazed livestock on public land along Jordan Creek, perhaps as early as 1898; 4) those predecessors-in-interest thus perfected an instream stockwater right; 5) the stockwater right is appurtenant to the Joyce Ranch; and 6) ownership of the instream stockwater right along Jordan Creek was transferred with each successive conveyance of the Jordan Ranch – eventually to the Joyce Livestock Company.¹¹

The BLM agreed with Joyce Livestock on the chain of title for Joyce Ranch – the base property. The earliest patents in the chain of title were issued to Mary and Anna Joyce on June 1, 1898. Three other parcels in the chain of title were issued later that same year (Matthew Joyce, John Crocheron and Quiznee Lambert). Through mesne conveyances, Joyce Livestock acquired title and now those lands are part of the Joyce Ranch.

Other lands acquired by Joyce Livestock and now part of the Joyce Ranch were patented in: 1901 and 1907 (George Crocheron), 1908 (Matthew Joyce), 1910 (Q.F. Lambert), 1913 (Mary Paul), 1914 (Clare Jennew), 1918 (William Stobie and Lorenzo Pedrocini or Perdacini), 1919 (Erneterio or Emeterio Quintana), 1920 (S.E. Drollinger), 1921 (Anna Joyce), 1925 (Herbert Nettleton), 1935 (John Shea), 1941 (Samuel Drollinger), 1957 (Joyce Livestock Company and Helen Nettleton), 1965 (Anna Joyce) and 1971 (Joseph Nettleton).¹²

In his deposition, Paul Nettleton, a general partner of Joyce Livestock,¹³ explained how the owners of the Joyce Ranch bought small ranches and acquired their grazing preferences:

¹⁰ On April 6, 2000, Joyce Livestock reported that it owns 9,334 acres - the Joyce Ranch – as its base property for a grazing preference on public lands administered by the BLM. United States’ *Opposition*, Affidavit of Michael J. Boltz, Attachment 1, Tab 1. Neither Joyce Livestock nor any of its predecessors-in-interest claimed water rights as base property to establish a grazing preference in the Silver City Grazing Allotment. *Nettleton Deposition*, at 58.

¹¹ Joyce Livestock also sought summary judgment on the overlapping BLM claims (55-11061, 55-11385 and 55-12452) because the BLM cannot show that: 1) it appropriated and beneficially used the water source, 2) it is a successor-in-interest to the actual appropriator or 3) it is the actual owner based upon an agency relationship with the actual appropriator. Joyce Livestock’s *Motions for Summary Judgment*, at 22-27.

¹² See United States’ *Opposition*, Exhibit 1.

¹³ Until the early 1900’s, Joyce Livestock’s predecessors-in-interest were individuals, plus the Jump Creek Sheep Company. Then, sometime in the early 1900’s, Joyce Brothers Livestock Company was formed as an informal partnership, then a general partnership, then a corporation and finally back to a general partnership. Basically, there

Many of these individuals were very small ranchers. This actual Jordan Creek drainage is a rather small part of a very large allotment that we – “we” being Joyce Livestock Company – acquired from quite a few individuals. They may not have run particularly in the Jordan Creek area when they had this small amount of cows, although their cattle could have drifted in here. But you know, beings the whole thing was part of the allotment, it was common for cattle to drift into the area. Whether their preference actually included Jordan Creek drainage or not, I can’t really say.

...

Some of the land didn’t involve any grazing preferences; therefore, it didn’t involve any cattle grazing or watering in Jordan Creek. But I’m not 100 percent sure, at least from personal knowledge, which is which. And I think that’s the reason all those individuals are listed there, and there’s also some additional ones that probably should have been listed.

Q And it would be your testimony that you received these water rights through general appurtenance clauses and deeds down through time?

A Yes.

Nettleton Deposition, at 40-41.

Appurtenancy

All of the mesne conveyances of these patented lands contained appurtenance clauses such as: “. . . together with all water rights and appurtenances thereto.” Joyce Livestock’s *Motions for Summary Judgment*, at 3, and Exhibit B. However, none of the title documents specifically described water rights on federal public land.¹⁴ *Nettleton Deposition*, at 14. When asked why such water rights were not mentioned, Mr. Nettleton said:

It was understood. I mean, you own the permit, you own the water rights. I mean, it was just – it was a part of – it was a part of the outfit. I mean, cows need water to drink if they’re going to graze on the land. It was just – I guess it was a – in hindsight, I wish I had, but you know, at the time you would expect – you would always expect that you have a water right if you have a grazing right.¹⁵

Nettleton Deposition, at 16.

Since none of the title documents or deeds specifically mentioned water rights on federal public land, Mr. Nettleton was asked:

was a consolidation of the Joyce and Nettleton family holdings. Next, Joyce Livestock Company was formed as a general partnership which later merged with the Hubert E. Nettleton Estate and the current entity, Joyce Livestock Company, a limited partnership, was formed in 1985. *Nettleton Deposition*, at 32-34. Paul Nettleton and his wife, Patricia, are both general partners of Joyce Livestock, a limited partnership. *Nettleton Deposition*, at 17-18

¹⁴ A 1951 deed from the Sheas to J.H. Nettleton and Joyce Livestock Company mentioned mining claims near Silver City and “grazing rights,” but not water rights on federal public land. Joyce Livestock’s *Motions for Summary Judgment*, Exhibit H, paragraph 17.

¹⁵ A grazing preference is transferable with the base property; a grazing permit or lease is not. 43 C.F.R. § 4110.2-3.

Q Unless those water rights were described in a deed, how would anyone know that those water rights exist?

A Through the simple fact of the grazing – the grazing rights in the area that were adjudicated to that base property.

Q If there is no grazing preference or grazing permit that's described in your deed, again, how would anyone know that that exists?

A I suppose through the records of the Bureau of Land Management.

Nettleton Deposition, at 44.

Property Interest

Mr. Nettleton was asked whether he had seen a particular sentence in Joyce Livestock's grazing permits issued by the BLM: "This permit conveys no right, title, or interest in United States property."¹⁶ Mr. Nettleton responded:

Yes, I've seen that language . . . all I can say in that response is that I do believe that I own the grass and the water as a part of my grazing permit. Whether it was intended to convey that from the federal government or not is a legal matter. . . . But I believe from traditional usage and in the historical data of the settlement of the Old West, that it was pretty well understood you owned certain rights on public land when you owned a right to graze there.

Nettleton Deposition, at 30-31.

A Brief History of Stock Grazing in Owyhee County

Pre-1934

In 1932, the Forest Service prepared a survey of grazing lands in Owyhee County entitled: "Owyhee County: The Public Domain as a Land Resource." United States' *Opposition*, Affidavit of Michael J. Boltz, Attachment 1, Tab 68. The 39 page survey reported that the first settlement in Owyhee County was in the Bruneau Valley near the present site of the town of Bruneau in 1868. Sheep were brought into the county around 1886. By 1888, 100,000 cattle and at least 50,000 head of sheep were grazed in Owyhee County and the range was considerably depleted. Then, a hard winter in 1888-1889 struck northern Nevada and southwestern Idaho killing an estimated 80% of the cattle and horses.

By 1910, there were 28,758 cattle, 7,465 horses and 167,000 sheep in Owyhee County. During World War I, some of the better wild horses or mustangs were rounded up and sold to

¹⁶ "[T]he issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands." Taylor Grazing Act, 43 USC § 315b. As against the United States, a permittee can acquire no right or interest in federal grazing lands. *Holland Livestock Ranch v. U.S.*, C.A.9 (Nev.) 1981, 655 F.2d 1002.

various governments. Between 1927 and 1932, at least 10,000 horses were sold to packing houses for about \$7.50 each for chicken and fox feed and meat by-products.

In 1932, the Forest Service reported the range was fully occupied and over-utilized. The survey concluded that some “agency of the people” must control and manage the land:

The great need in the county is control and management of the public lands. Numbers of animals grazed must be reduced to the carrying capacity of the land. Too early grazing in the spring should be prevented so far as it is consistent with the essential needs of the livestock industry. Livestock must be properly managed on the range. The forage, game and timber resources need to be rehabilitated. The many years of uncontrolled use which has existed up to the present time shows that such use leads only to destruction of the resources. A change that will cure these economic ills should be effected. The people cannot afford to own and control the land. This limits the field of control and management to public agencies, who are in a position to handle it. The people must decide which of these agencies should be given this responsibility, but no matter which, rehabilitation or restoration of the resources rather than exploitation and revenue production, or use as a political plum or football, must be the objective. The country, though young, is virtually worn out already. Surely, we are long past the time when some agency of the people should be charged with the responsibility of taking care of these valuable resources. Further delay should not be tolerated.

Survey, at 32-33.

When Mr. Nettleton was asked who first appropriated the instream stockwater right in Jordan Creek now claimed by Joyce Livestock, he said:

That would probably be Joyce Livestock Company and the predecessors of John Shea, which would probably be – Con Shea I think was an uncle of John Shea. Con Shea was the first – the first gentleman to drive cattle into the area in any numbers, beef cattle—what am I trying to say – a cattle ranching operation into the area.

Nettleton Deposition, at 34.

In his deposition, Paul Nettleton was asked whether he was familiar with the term “grazing commons.” He answered, “Yes.” Then, he was asked whether that meant that anyone, regardless of whether they had ranch property in the area was free to use the grass and water on federal public land before 1934. Again, Mr. Nettleton answered, “Yes. I would agree with that.”

Nettleton Deposition, at 35-36.

Post-Taylor Grazing Act (June 28, 1934)

John T. Shea filed the earliest “Application for Grazing Permit” for the Jordan Creek area in the SRBA Court’s record. On April 26, 1935, Mr. Shea filed his application and reported that

he owned 100 acres of irrigated ranch land with the “usual water right acquired with lands under laws of Idaho.” He then described his water right as “springs & creeks running on & through the ranches.” Next, Mr. Shea said he had used the land covered by the application for a grazing permit for the last 10 years during the 3 months of summer.¹⁷ He reported he and his wife owned 280 cattle (over 6 months old) and 5 horses. They trailed their stock from the spring range (“Paul Place”) south to the summer range (near “Pedracini Place” and Silver City) using the stage road. Finally, Mr. Shea wrote:

Note: The Range herein applied for is land that I have had almost exclusive use of, for range, for the past 10 years, excepting, of course, a few straggling from other herds & other ranges and probably 100 head of range horses. I acquired the holdings shown on the plat (excepting the homestead & mining claims) from the Stanfield Sheep Co., who over grazed the land and went broke – this, of course, forced other stock off the range, which accounts for the facts which I have stated. Since running cattle here I have used every effort to protect and improve the range, holding the “two mile limit”¹⁸ from the homestead. At the present time it is recognized as one of the best small ranges for cattle in Owyhee County.

¹⁷ Another predecessor-in-interest to Joyce Livestock (Joyce Brothers Livestock Company) filed a later “Application for Grazing Permit” on June 12, 1935. It stated it began using the area in 1866 by grazing an average of 1,900 head of cattle and horses for about 8 months each year. Joyce Livestock’s *Motions for Summary Judgment*, Exhibit G.

¹⁸ In 1918, Justice Brandeis, writing for the U. S. Supreme Court, upheld the misdemeanor conviction in Idaho of Secundino Omaechevarria for pasturing sheep on a cattle range:

For more than forty years the raising of cattle and sheep have been important industries in Idaho. The stock feeds in part by grazing on the public domain of the United States. This is done with the government’s acquiescence, without payment of compensation, and without federal regulation. [citation omitted] Experience has demonstrated, says the state court, that in arid and semi-arid regions cattle will not graze, nor can they thrive, on ranges where sheep are allowed to graze extensively; that the encroachment of sheep upon ranges previously occupied by cattle results in driving out the cattle and destroying or greatly impairing the industry; and that this conflict of interests led to frequent and serious breaches of the peace and the loss of many lives. Efficient policing of the ranges is impossible; for the state is sparsely settled and the public domain is extensive, comprising still more than one-fourth of the land surface. To avert clashes between sheep herdsmen and the farmers who customarily allowed their few cattle to graze on the public domain near their dwellings, the territorial Legislature passed in 1875 the so called ‘Two Mile Limit Law.’ It was enacted first as a local statute applicable to three counties, but was extended in 1879 and again in 1883 to additional counties, and was made a general law in 1887. After the admission of Idaho to the Union, the statute was reenacted and its validity sustained by this court in *Bacon v. Walker*, 204 U.S. 311, 27 Sup. Ct. 289, 51 L.Ed. 499. To avert clashes between the sheep herdsmen and the cattle rangers, further legislation was found necessary; and in 1883 the law (now section 6872 of the Revised Code) was enacted which prohibits any person having charge of sheep from allowing them to graze on a range previously occupied by cattle [footnotes omitted].

Omaechevarria v. State of Idaho, 246 U.S. 343, 344-345, 38 S.Ct 323, 324, 62 L.Ed. 763 (1918).

In 1946, Thomas Rock, a Silver City miner, unsuccessfully tried to expand Idaho’s Two Mile Limit Law by posting signs written in English and Basque around his unpatented mining claims. The signs read: “Sheep grazing

United States' *Opposition*, Affidavit of Michael J. Boltz, Attachment 1, Tab 67.

During his deposition, Paul Nettleton explained his understanding of the purpose of the 1934 Taylor Grazing Act:

I believe that was the purpose of the Taylor Grazing Act was to adjudicate the water and the grass to individuals who had base property and had – by rights ought to be there rather than the itinerant drifting herds that were common in the era before 1934.

Nettleton Deposition, at 35.¹⁹

Gene Lewis was born in Murphy, Idaho in 1925. He worked as a cowboy for one of Joyce Livestock's predecessor-in-interest, John Shea, in 1933 and 1934. Then, he started work for Paul Nettleton's father, Hubert Nettleton, in 1936. At that time, Hubert Nettleton grazed horses and cattle along Jordan Creek and its tributaries – even in the streets of Silver City. John Shea and Jeane Heazle also ran cattle in the same area.

During his deposition, Mr. Lewis was asked whether those ranchers tried to exclude others from using the Jordan Creek area for grazing or livestock watering. Mr. Lewis answered: “No, not at all – in those days, there were no fences, so it was all open range.” *Deposition of Gene Lewis* (“*Lewis Deposition*”), January 9, 2002, at 15.

Mr. Lewis recalled that Joe Mitchell, Zack Montini and Steve Romali ran cattle in the Jordan Creek Area before 1934, along with John Shea and Hubert Nettleton. When Mr. Lewis was asked whether John Shea and Hubert Nettleton used the area for livestock grazing exclusively *after* 1934, he said:

No. The same others. Nothing changed for years. I don't know when it did change. But like I say, if they had permits, they still ran in common.

Lewis Deposition, at 17.

Paul Nettleton agreed with Gene Lewis' recollection of how livestock were grazed along Jordan Creek before and after the Taylor Grazing Act:

prohibited on this area, Heavy Blasting, Cattle Only.” United States' *Opposition*, Affidavit of Michael J. Boltz, Attachment 1, Tab 58.

¹⁹ “Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them. . . .” Taylor Grazing Act, 43 USC § 315b. The purposes of the Act are to stabilize the livestock industry and to permit the use of public range according to the needs and qualifications of livestock operators with base holdings. *Chournos v. U.S.*, C.A. 10 (Utah) 1951, 193 F.2d 321, certiorari denied 343 U.S. 977, 72 S.Ct. 1074, 96 L.Ed. 1369.

It sounded accurate. He [Gene Lewis] was referring to ranchers that were from out of the area that cattle had drifted in and, you know, that happened. I mean, the Joyce cattle drifted over into Boulder Creek I'm sure in some numbers, probably not deliberately put there, but you know, there were no fences.

...

That was just a common occurrence in open range conditions until allotments were fenced and boundaries formalized. It occurred – was probably more prevalent before the Taylor Grazing Act of 1934, but certainly still occurred up until the '60s and '70s to a certain extent.

Nettleton Deposition, at 38.

DISCUSSION

Law of the SRBA Case

Judge Burdick's Memorandum Decision

In its *Motion to Supplement Briefs in Support of Motion for Summary Judgment*, Joyce Livestock urged the Special Master to consider Presiding Judge Roger S. Burdick's admonitions to special masters in his *Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Trout)*, subcase 65-05663B, dated May 9, 2002. In that *Memorandum Decision*, Judge Burdick held that special masters are appointed for a limited purpose, their primary function is one of fact finding and they do not possess authority independent of the district court. "Therefore, it is not within the purview of the authority conferred upon a special master to 'reconsider' the prior legal rulings of the district court." *Memorandum Decision*, at 9.

Judge Hurlbutt's Order Denying Challenges

Joyce Livestock argued that the law of the SRBA case is that "managing rangeland operations and issuing permits do not qualify as acts of putting water to beneficial use." Joyce Livestock's *Motion to Supplement Briefs*, at 3. Therefore, the BLM claims must fail and Joyce Livestock's *Motions for Summary Judgment* should be granted.

Joyce Livestock's argument is that the controlling law of the SRBA case in this matter was established in the *Order Denying Challenges and Adopting Special Master's Reports and Recommendations* entered by Presiding Judge Daniel C. Hurlbutt, Jr., in subcases 57-04028B, *et al.*, on September 30, 1998. In that *Order*, Judge Hurlbutt adopted 3 closely related decisions made by Special Master Fritz X. Haemmerle:

1. ***Order on Motion and Cross-Motion for Summary Judgment***, subcase 72-15929C, dated February 6, 1998;
2. ***Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Admissions***, subcases 57-11124, et al., dated March 23, 1997, and incorporated into above Order on Motion and Cross-Motion for Summary Judgment as Exhibit A; and
3. ***Order Denying Motion to Alter or Amend***, subcase 72-15929C, dated April 15, 1998.

Joyce Livestock cited 2 key passages from Special Master Haemmerle's April 15, 1998 ***Order Denying Motion to Alter or Amend*** as the law of the SRBA case:

However, the law of the case as it currently stands in the state of Idaho is that "the fact that the United States issues permits to operate on public lands *does not* make the United States the appropriator of water rights perfected by permittees" and "the 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."

Joyce Livestock's *Motion to Supplement Briefs*, at 2.²⁰

Judge Wood's LU Decision

On April 25, 2000, Presiding Judge Barry Wood entered his ***Memorandum Decision and Order on Challenge***, subcases 55-10288A, et al. ("***LU Decision***"). In those subcases, Judge Wood held there is no hard and fast rule that instream stockwater rights allegedly perfected on federal public land are, *per se*, appurtenant to the federal land. "However, 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 [base property] via the instrument conveying the land." ***LU Decision***, at 15.

²⁰ It should be noted that in the United States' claims before Special Master Haemmerle and Presiding Judge Hurlbutt, the United States claimed pre-Taylor Grazing Act priority dates (earlier than June 28, 1934). In each case, the Court denied the earlier dates, but awarded a 1934 priority date because "there is no material issue of fact or law that the priority date for this right is June 28, 1934." ***Order Denying Motion to Alter or Amend***, subcase 72-15929C, dated April 15, 1998, at 12. In other words, the issue of whether the United States (including the BLM in the instant subcases) is entitled to 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. Logic suggests that those portions of Special Master Haemmerle's and Presiding Judge Hurlbutt's decisions concerning permits and regulation of stock grazing on federal public land are mere dicta for *1934 or later* priority date claims because such range management began *after* June 28, 1934 – the priority date awarded the United States' claims.

Judge Wood then held that where instruments allegedly 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. As such, genuine issues of material fact exist and summary judgment was not appropriate.

LU Decision, at 16.

Genuine Issues of Material Fact

Intent of Joyce Livestock's Grantors

Some facts are clear. First, Joyce Livestock and its predecessors-in-interest never claimed water rights as base property to establish grazing preferences in the Silver City Grazing Allotment. Instead, they relied solely on their ownership of land. Second, none of the documents conveying the land that eventually comprised the Joyce Ranch specifically described water rights on federal public land. Joyce Livestock was left to argue those water rights were conveyed by such appurtenance clauses as: “. . . together with all water rights and appurtenances thereto.”

In the present subcases, where there is 1) an absence of unity of title between the water right and the land on which the water right is used and 2) the instruments allegedly conveying the water right are silent as to the water right, “as a matter of law the water right cannot automatically pass as an appurtenance to the land via the instrument conveying the land.” *LU Decision*, at 15. The circumstances surrounding the mesne conveyances of Joyce Livestock's land must be examined to determine the intent of the grantors. Did the grantors intend to transfer an instream stockwater right and if so, how? Hence, the law of the SRBA case requires a finding that genuine issues of material fact exist and summary judgment is not appropriate.

Priority Date, Quantity and Period of Use

Joyce Livestock's base property, the 9,334 acre Joyce Ranch, is a consolidation of small ranches patented as early as 1898, and as late as 1971. Some of those small ranchers grazed cattle or sheep in the Jordan Creek area and some did not. Mr. Nettleton could not say for sure

who did, but because it was common for cattle to drift into the area, Joyce Livestock listed everyone.

The difficulty with this approach of casting a wide net is the lack of certainty. Assuming for a moment that some instream stockwater right was perfected on the federal public land and then conveyed to Joyce Livestock as an appurtenance to the base property, the court is left to guess: 1) which of Joyce Livestock's predecessors-in-interest actually grazed livestock along Jordan Creek and when they first started grazing [**priority date**], 2) how many head of stock were grazed [**quantity**] and 3) how long the stock were grazed [**period of use**]. The record, as it now stands, would have the court assume that Joyce Livestock's earliest predecessor-in-interest, whoever that might be, perfected claim 55-10135 by grazing cattle virtually the whole length of Jordan Creek year 'round beginning in 1898.²¹ This ignores the possibility that Joyce Livestock may have acquired multiple instream stockwater claims with different priority dates, quantities, places of use and periods of use.

Places of Use

Joyce Livestock's instream stockwater claim covers approximately 4,320 acres (27 quarter-quarters with 160 acres each) along Jordan Creek. Most of that land is owned by the United States, but at least 13 of the 27 quarter-quarters have some privately owned land. There was a consensus that Joyce Livestock is entitled to some instream stockwater rights in the 6 privately owned quarter-quarters. The United States did not object to that portion of Joyce Livestock's claim, but of course, there remains the question of priority date and perhaps quantity.

But there remain mixed factual and legal questions concerning Joyce Livestock's claim where there is both United States and private ownership. For instance, whose land borders Jordan Creek, the claimed source, and is that conclusive of who owns the instream stockwatering right in that quarter-quarter? Is there an issue of joint ownership of the right? Can there be only one right?

And then there remains the matter of Joyce Livestock's mining claims near Silver City. Are the claims patented and do they entitle Joyce Livestock to an instream stockwater right in

²¹ In a 1935 "Application for Grazing Permit," Joyce Brothers Livestock Company claimed the longest period of use for grazing in the area mentioned in the SRBA Court's record -- "about 8 months." Joyce Livestock's *Motions for Summary Judgment*, at Exhibit G.

that quarter-quarter regardless of whether they are part of its base property for purposes of a grazing preference?

Summary Judgment on BLM Claims

The second part of Joyce Livestock's *Motions for Summary Judgment* sought summary judgment on the overlapping BLM claims (55-11061, 55-11385 and 55-12452) because: 1) the BLM did not appropriate and beneficially use the water, 2) it is not a successor-in-interest to the actual appropriator and 3) it is not the owner based on an agency relationship with the actual appropriator. Of course, that argument assumes that Joyce Livestock or its predecessors-in-interest actually appropriated an instream stockwater right that preempts BLM's claims. However, as discussed above, there remain genuine issues of material fact concerning Joyce Livestock's claim which preclude summary judgment.

ORDER

THEREFORE, IT IS ORDERED that:

1. Joyce Livestock's *Motions for Summary Judgment* are **denied**, and
2. A scheduling conference shall be held by telephone on **Thursday, August 22, 2002, 11:30 a.m.** Counsel should expect a trial setting within two (2) months.

DATED July 23, 2002.

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