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

In Re SRBA	)	
	)	**Subcases 55-10135 (Joyce Livestock Co.)**
Case No. 39576	)	**and 55-11061, 55-11385 & 55-12452**
	)	**(BLM)**
	)	
	)	**SPECIAL MASTER REPORT**
	)	**AND RECOMMENDATION**

SUMMARY

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

2. The BLM 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.

FINDINGS OF FACT[1]

I. PROCEDURAL BACKGROUND

55-10135 (Joyce Livestock)

► Claim

Joyce Livestock Company, c/o Paul Nettleton, Murphy, Idaho, 83650 ("Joyce Livestock"), filed a single instream stockwater *Notice of Claim* (55-10135) on January 19, 1989,

[1] For the convenience of readers, many of the facts (both procedural and evidentiary) are repeated from the Special Master's July 24, 2002 ***Order Denying Joyce Livestock Motions for Summary Judgment***. At trial, the parties stipulated to the admissibility of all exhibits (except US Exhibit 17 and Joyce Livestock's depositions from Basin 57) – essentially the same exhibits offered during summary judgment proceedings. The evidence (testimony and exhibits) admitted at trial was substantially the same as the summary judgment record.

claiming .23 cfs from Jordan Creek for year-'round use with a priority date of April 1, 1865, based on beneficial use[2] – "I am a holder of BLM grazing rights."[3] 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 (IDWR Basin 55)* on July 31, 1997. Joyce Livestock's claim and the three BLM overlapping claims (see below) were reported in the same *Director's Report*. The Director recommended Joyce Livestock's claim as filed, but for .02 cfs. Under explanatory material, the Director noted: "BLM Allotment 0570, BLM Allotment 0569, stockwater 1,000 range cattle."[4]

► **Objection**

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

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

► **Director's Recommendations**

The Director recommended three overlapping instream stockwater 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 use with a priority date of January 1, 1874, based on beneficial use.[5] 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 BLM's claimed priority date should be no earlier than June 28, 1934.[6] Joyce Livestock was granted leave to file

[2] Joyce Livestock later amended its claimed quantity to .02 cfs and its claimed priority date to June 1, 1898. At trial, Paul Nettleton said livestock historically grazed in the Jordan Creek area from May until late October. Trial Transcript ("TTr"), at 696.

[3] Throughout these proceedings, Joyce Livestock referred to "grazing rights" while the BLM used the term "grazing privileges" – an indication of their fundamentally different points of view.

[4] The Joyce Livestock and overlapping BLM claims are within the Silver City Grazing Allotment No. 0569, historically described as the "Oreana Unit No. 3" or the "Cow Creek allotment."

[5] IDWR later amended its recommended priority date to June 28, 1934.

[6] On April 28, 2000, the BLM and the State filed a *Stipulation* in 55-11061, 55-11385 and 55-12452 agreeing that if the three BLM claims are decreed, the priority date would be no earlier than June 28, 1934, the date of enactment of

late objections in subcases 55-11061, 55-11385 and 55-12452 on May 6, 1998.[7] 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.[8] 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 four 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 it's [sic] 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, that JOYCE LIVESTOCK is entitled to judgment as to the earliest priority date of use of said stockwater by JOYCE LIVESTOCK'S predecessors in title, and that JOYCE LIVESTOCK is entitled to judgment that the United States has made no beneficial use of said stockwater for the purpose of livestock watering.

Joyce Livestock's *Motions for Partial Summary Judgment*, at 1.

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 legal counsel from San Francisco.

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the Taylor Grazing Act (43 USCA §§ 315, *et seq*.). See the Special Master's ***Order Dismissing the State of Idaho's Objection***, dated May 9, 2000.

[7] See 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.

[8] "Adjudicating a grazing preference involves determining who had . . . a livestock operation on federal lands during those priority years [1932 and 1933], where they ran and what kind and how many they ran." "Adjudicating" in this context meant an administrative determination without court involvement, except where a decision by the district grazier (a federal official), with the aid of a grazing advisory board (comprised of stock grazers from the area), was appealed. Michael J. Boltz, TTr, at 448 and 452-454.

Amended Order of Reference

On September 22, 1999, 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.[9]

Motion to Stay

On December 27, 2000, the BLM 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 it wrote: "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 it wrote: "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-

[9] Water right 55-11060 was decreed to the BLM on February 10, 2000. Claim number 55-13450 (LU Ranching Company, Inc.) remains at issue.

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.[10]

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*.

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*. 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."

Summary Judgment Hearing and Order

A hearing on Joyce Livestock's *Motions for Summary Judgment* was held on March 22, 2002, in Boise, Idaho. On July 24, 2002, the Special Master entered an ***Order Denying Joyce Livestock Motions for Summary Judgment*** because there were genuine issues of material fact. The two legal conclusions stated in the ***Order*** were:

> 1. 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.
> 2. 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.

Order, at 1 and 15.

Trial

The single stockwater claim filed by Joyce Livestock (55-10135) was tried along with the three overlapping stockwater claims filed by the BLM (55-11061, 55-11385 and 55-12452) over a four day period (December 3-6, 2002) in Boise, Idaho. Larry A. Brown appeared for the BLM;

[10] 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 and a lower quantity than originally claimed and recommended.

Craig A. Pridgen, along with Richard L. Harris as local counsel, appeared for Joyce Livestock; and Garrick L. Baxter appeared for IDWR.[11]

Post-Trial Matters

The BLM lodged its *Post-Trial Memorandum* on March 19, 2003, in lieu of closing argument at trial. Joyce Livestock lodged its *Closing Argument* with *Appendix 1* the same date and also filed its *Motion to Amend Legal Descriptions of Points of Diversion of Stockwater Rights by Joyce Livestock Co., Claim No. 55-10135 (Silver City Area) According to Proof*.

Joyce Livestock's claimed "point of diversion" and "place of use," if amended according to the testimony of the BLM's Frederic W. Price at trial, would be as follows:

Point of Diversion:	Within Owyhee County				
T5S, R3W, §19	Lot 3 ~~SENWSW~~ (instream beginning point)				
T4S, R3W, §31	SWNWNW (instream ending point)				
Place of Use: Stockwater	Within Owyhee County				
T4S, R3W, §31	NWNW	SWNW	SENW	NESW	
	NWSE	Lot 4 ~~SWSE~~			
T5S, R3W, §6	Lot 12 ~~NWNE~~	Lot 107 ~~SWNE~~	Lot 106 ~~SENW~~	Lot 110 ~~NESE~~	
	SESE				
§7	Lot 8 ~~NENE~~	Lot 13 ~~SENE~~	Lot 14 ~~NESE~~		
§8	Lot 13 ~~NWSW~~	Lot 14 ~~SWSW~~			
§17	NWNW	SWNW	NWSW	~~SWSW~~ [12]	
§18	SESE				

[11] Joyce Livestock called four witnesses and offered 59 exhibits; the BLM called six witnesses and offered 96 exhibits. Many of the same documents were submitted as exhibits by both parties. The transcript totaled 761 pages.
[12] Mr. Price testified that Jordan Creek does not pass through this particular tract of land. TTr, at 151.

§19	NENE	NWNE	SWNE	SENW
	NESW	Lot 3 ~~NWSW~~		

See testimony of Frederic W. Price, TTr, at 138-152, and statement by counsel for Joyce Livestock, TTr, at 750.

II. THE EVIDENCE

Land Ownership

► Places of Use

Joyce Livestock's claim (55-10135) for instream stockwater rights included 27 places of use (some are quarter-quarters and some are lots) 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.[13] Joyce Livestock's claim included: 14 places of use owned by the BLM, seven places of use with mixed BLM / private ownership and six privately-owned places of use. At trial, Paul Nettleton said he intended to claim "every place where cattle can drink out of Jordan Creek, be it private, public, whatever, where the creek flowed, the cattle drank." TTr, at 689. But later, Joyce Livestock deleted from its claim all privately-owned places of use, other than the mining claims Joyce Livestock owns. Counsel for Joyce Livestock, TTr, at 750.

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

► Joyce Ranch

In its *Motions for Summary Judgment* and at trial, Joyce Livestock argued its instream stockwater claim (55-10135), based on beneficial use, was perfected by its predecessors-in-interest ("grantors") and the stockwater right is appurtenant to real property now owned by Joyce Livestock, with a priority date of 1898.

[13] For a helpful overview, see the 36" x 51" map, part of U.S. Trial Exhibit 8, Bates Stamp 004774.

Its arguments were as follows: 1) Joyce Livestock owns certain real property known as the Joyce Ranch – its "base property;"[14] 2) the chain of title to several portions of the Joyce Ranch can be traced back to patents as early as 1898 (some of Joyce Livestock's grantors grazed livestock on public land along Jordan Creek as early as 1865); 3) those grantors thus perfected an instream stockwater right along Jordan Creek; 4) the stockwater right is appurtenant to the Joyce Ranch; and 5) ownership of the instream stockwater right along Jordan Creek was transferred with each successive conveyance of Joyce Ranch property – eventually to the Joyce Livestock Company. Also Joyce Livestock's post-trial *Closing Argument by Joyce Livestock Co.*, at 11.

The BLM did not significantly dispute Joyce Livestock's chain of title to the Joyce Ranch – the base property for its grazing preferences. 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 Larenzo 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). At trial, Paul Nettleton said the current Joyce Ranch is an accumulation of 29 different homesteads and small ranches and comprises all the ranches historically used as base properties for grazing preferences in the Jordan Creek area. TTr, at 659-661.

Until the early 1900's, Joyce Livestock's grantors 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 was a consolidation of the Joyce and Nettleton family

[14] 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. U.S. Trial Exhibit 23. No water rights were included in the description of its base property. Later at trial, Paul Nettleton said the Joyce Ranch consists of approximately 11,000 deeded acres, plus 114,000 acres of BLM range land, where they raise 650 mother cows and 15 horses. TTr, at 722-724. None of Joyce Livestock's base property is located in the Jordan Creek drainage. Its ranch is located in the Sinker Creek drainage which is separated from the Jordan Creek drainage by a high ridge.

holdings. Next, Joyce Livestock Company was formed as a general partnership which later merged with the Hubert E. Nettleton Estate and finally, in 1985, the current entity, Joyce Livestock Company, a limited partnership, was formed. Paul Nettleton, his wife, Patricia, and their children are the partners. Paul Nettleton, TTr, at 670.[15]

Appurtenancy

All of the early mesne conveyances of Joyce Livestock's patented lands contained a generic appurtenance clause, such 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." Deed from John H. Crocheron to Mary Crocheron, dated July 7, 1901, U.S. Trial Exhibit 1, Bates Stamp 100019-100021. A later deed from Emeline A. Nettleton, "spinster," to Hubert and Helen Nettleton, dated January 2, 1951, read: "Together with all reservoirs, reservoir sites, water, water rights, ditches and rights-of-way for ditches belonging or in anywise appertaining to any and every piece and parcel of land hereinabove described." U.S. Trial Exhibit 1, Bates Stamp 100069-100072. An even later deed from Emeline A. Nettleton to H.E. and Helen Nettleton, dated December 9, 1965, simply read: "together with their appurtenances." U.S. Trial Exhibit 1, Bates Stamp 100043. However, none of the title documents specifically described water rights on federal public land.[16]

► Paul Nettleton

At trial, Paul Nettleton was asked if he was aware that the deeds conveying the Joyce Ranch to Joyce Livestock in 1985 do not mention stockwater rights. He replied,

> I – yeah. I'm not sure they mention any water rights, but – don't mention the houses, they don't mention – I think there is mention of equipment, because that's, that's not something that would be appurtenant to the land. That would be something that would be mobile.
> But as far as something that's attached to the land and attached to their property, like water rights, either irrigation rights or federal stock or grazing permit, are not mentioned there, they're covered under the appurtenances.

TTr, at 672.

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[15] At trial, Paul Nettleton generally agreed with the above history of the Joyce Ranch. TTr, at 676-677.

[16] A 1951 deed from John and Myrtle Shea to J.H. Nettleton and the Joyce Livestock Company included mining claims at Silver City and "grazing rights," but not water rights on federal public land. U.S. Trial Exhibit 1, Bates Stamp 100115-100116. A 1985 deed from Helen A. Nettleton to Joyce Livestock Company also included patented mining claims, plus two houses in Silver City, but again, no mention of water rights on federal public land. U.S. Trial Exhibit 1, Bates Stamp 100073-100076.

When Mr. Nettleton was asked what he intended when the Joyce Livestock Company (a general partnership) and the Hubert E. Nettleton Estate jointly conveyed the Joyce Ranch to the current Joyce Livestock (a limited partnership) in 1985, he said,

> Well, as I've already stated, it was a whole ranch. I mean, the ranch was one unit, and that was what was being conveyed, and including, obviously everything as being necessary to operate that ranch, which would include grazing rights, water rights, everything were certainly intended to be conveyed and, and were conveyed, in my mind.

TTr, at 673.

When Mr. Nettleton was asked about the importance of instream stockwater along Jordan Creek to the Joyce Ranch operation, he said:

> When I talk about my ranch, I'm not just talking about the real property, I'm talking about the range land, and it would include the water, because the water is essential to the range land, and Jordan Creek is an essential part in the Jordan Creek area, is an essential part of my range land, my grazing permit, and Jordan Creek is an essential part of that for watering purposes for livestock.

TTr, at 684.

► **Dr. Chad C. Gibson**

Joyce Livestock offered the testimony of Dr. Chad C. Gibson on the issue of appurtenancy. Dr. Gibson holds a Ph.D. in range management from the University of Idaho. First, he testified briefly about the historical development of I.C. § 42-113(2):

> For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation, the priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code.

Then, Dr. Gibson spoke about historical grazing and water use on public range lands and transfers of ranching operations:

> I had certain amount of experience with that in obtaining the degree that I have, certain amount of history you have to look at and study; and in looking at that, the history, the ranches from around the turn of the century, probably before, when a ranch was established, there was a base private property and associated with that some public land, at that time a grazing (unintelligible) in a particular area where a person had a ranch unit, and those were typically bought and sold and traded on the basis of that unit. In other words, if a unit would run X number of animal units, the price was based on that number of animal units. . . . The ranches were

> bought and sold and traded as a unit, which included all of the, the necessary resources to operate that ranch.

TTr, at 586-588.

Dr. Gibson based much of his testimony on his review of records from meetings held in 1936, to determine how to implement the newly-enacted (1934) Taylor Grazing Act. District Advisors' Conferences, Salt Lake City, Utah, January 13-14 and December 9-11, 1936, Joyce Trial Exhibits A and B. Dr. Gibson said:

> [W]hen you read the discussions that went on at those meetings, one of the primary interests was being able to finance a ranch unit which involved all of the resources necessary to run whatever number of cattle this ranch would run.
> And in those, those documents, it's fairly clear that ranches were bought and sold and traded in that manner; and 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.

Dr. Gibson was then asked how the availability of water for cattle to drink affects the overall value of a cattle ranch:

> It's an essential part of, of being able to have a ranch unit that supports the grazing portion of the ranch unit. The base property that produces winter feed and the grazing area that produces or supplies summer feed, then the diversion of water on that summer range to be able to make use of that range is an essential part of the total ranch unit.

TTr, at 610-611.

On cross examination, Dr. Gibson acknowledged that he is not an historian and has no experience as an employee with the BLM. Then, he was asked about the relationship he testified to earlier between water and the transfer of ranches:

> Q. I've read those [records of the 1936 Salt Lake City District Advisors' Conferences] thoroughly, and I really can't find anything, except for the fact that they were worried about having a permit so that they could show that to the banks, to show that they had used the federal property in certain areas. I didn't see anything about water rights. I just saw something about permits, and that was mentioned several times. So if you can point us to something that said exactly that water rights were the important thing, I would sure appreciate that.
> **A. I – I'm not sure I'm following what you're getting at.**
> Q. Well, the ranch was transferred as a unit, you said; is that right?
> **A. Yes.**
> Q. And that was discussed in the, in the meeting [1936 Salt Lake City District Advisors' Conferences] then at someplace, and you had tied that directly to water rights; is that correct?

A. I don't know that I tied it to water rights. It –

Q. Well, I recall Mr. Pridgen [counsel for Joyce Livestock] asking questions about water rights during that – and you said the water rights were part of a unit.

A. The, the access to use of water was a part of the unit, yes.

Q. Doesn't the permit, after 1934, provide the access and the use of the unit? After 1934, doesn't the permit provide the access to and the use of the unit on public land?

A. Yes.

Q. So what they were really worried about was having a permit in their hands that they could show the bank? Isn't that what the documents say?

A. Yes.

TTr, at 640-641.

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." U.S. Trial Exhibit 88. The 39 page survey reported that the first settlement in Owyhee County was in 1868, in the Bruneau Valley near the present site of the town of Bruneau. 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.[17] During World War I, some of the better wild horses or mustangs were rounded up and sold to 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 public lands:

> 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

[17] "This 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. It is not a special privilege conferred upon one person or a few persons. No individual has any greater right than another to herd his live stock upon such lands, or to allow them to roam at large thereon." *Anthony Wilkinson Live Stock Co. v. McIlquam*, 83 P. 364, 369 (Wyo., 1905).

> cure these economic ills should be affected. 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.

US Trial Exhibit 88, at 32-33.

At trial, Paul Nettleton said the history of the Joyce Ranch actually goes back to 1865, when Matt Joyce settled near Sinker Creek, but patents were not filed until the 1890's because the area was not yet surveyed. The original homesteads were dairy operations to sell milk, cheese and butter to miners in the Silver City area. Con Shea brought the first beef cattle herds into Owyhee County in the late 1860s or the early 1870s. TTr, at 666-669.[18]

► **Post-1934 (Taylor Grazing Act)** [19]

John T. Shea, a predecessor-in-interest to Joyce Livestock, filed the earliest "Application for Grazing Permit" for the Jordan Creek area on April 26, 1935.[20] On the form, Mr. Shea 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

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[18] At trial, the Special Master noted that Paul Nettleton's family history *is* the non-Indian history of Owyhee County. TTr, at 722. His mother has written about that history. See Helen Nettleton, *Sketches of Owyhee County*, Nampa, Idaho: Schwartz Printing Co., 1978.

[19] "The purpose of the Taylor Grazing Act is to stabilize the livestock industry and to permit the use of the public range according to the needs and the qualifications of the livestock operators with base holdings." *Chorunos* v. *U.S.*, 193 F.2d 321, 323 (10th Cir. 1951). A portion of the Act reads:

> 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. . . . Provided further, That nothing in this Act 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 purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safe-guarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act 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 the federal grazing lands." *Holland Livestock Ranch v. U.S.*, 655 F.2d 1002, 1005 (9th Cir. 1981).

[20] For a complete history of Joyce Livestock's grazing preferences, see Attachment 1 (19 pages) to Affidavit of Michael J. Boltz entitled "History of Joyce Livestock Co.'s Grazing Preference in the Silver City Grazing Allotment." U.S. Trial Exhibit 22.

was then asked where the sources of water supply were located. He responded: "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 ten years during the three months of summer.[21] He reported he and his wife owned 280 cattle (over six months old) and five 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" from the homestead.[22] At the present time it is recognized as one of the best small ranges for cattle in Owyhee County.

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[21] Another grantor of 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 eight months each year. U.S. Trial Exhibit 85.

[22] In 1918, Justice Louis D. Brandeis, writing for the U. S. Supreme Court, upheld the criminal misdemeanor conviction in Idaho of Secundino Omaechevarria for pasturing sheep on what was considered cattle range, a violation of Idaho's Two Mile Limit Law:

> 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, invoked Idaho's Two Mile Limit Law by posting signs written in English and Basque around his unpatented mining claims on public land. The signs read: "Sheep grazing prohibited on this area, Heavy Blasting, Cattle Only." Mr. Rock "was advised to remove his signs from the Federal

U.S. Trial Exhibit 87.

The Joyce Brothers Livestock Company, another grantor of Joyce Livestock, filed another "Application for Grazing Permit" for the Jordan Creek area on June 12, 1935. It, too, was asked whether it owned or controlled any source of water supply needed or used for livestock purposes. It (by Anna F. Joyce) responded, "Yes. See accompanying schedual [sic] of water rights." The attachment, "Water Rights of the Joyce Bros. Live Stock Co.," listed water rights in various creeks, rivers and springs and concluded: "There are also numerous springs which have not been marked on the maps, for lack of knowledge of their correct location." U.S. Trial Exhibit 85, Bates Stamp 001150-001154, 001305-001306, 001100-001107 and 001097-001099. However, there is no indication that any of the water rights were on federal public land.

Finally, on April 6, 2000, Joyce Livestock Company, c/o Paul Nettleton, filed a "Grazing Application" for multiple allotments, including the Silver City #0569 (Jordan Creek area). The form asks whether land or water are being offered as base property for a grazing preference on the public lands administered by the BLM. Joyce Livestock only checked "land" (the Joyce Ranch), with a total of 9,334 owned acres. U.S. Trial Exhibit 23, Bates Stamp 001561-001563.

► **Gene Lewis**

Joyce Livestock called Gene Lewis to testify. He was born in Oreana, Idaho, in 1925. He worked as a cowboy for one of Joyce Livestock's grantors, John Shea, between 1933 and 1935. Then, he started work for Paul Nettleton's father, Hubert Nettleton, in 1936. At that time, Hubert Nettleton grazed mostly horses and a few cattle along Jordan Creek – even in the streets of Silver City ("between Silver City and Dewey and a little bit up above Silver City"). TTr, at 318.

Different brands watered along Jordan Creek and its tributaries at the same time, but mostly it was the Nettletons, John Shea, Jeane Heazle and Joe Mitchell. The Nettletons eventually bought out the others, but the same cattle still grazed in Silver City. In those days, there were no fences, so the cattle followed the green grass. Mr. Lewis recalled his first experience with BLM management of grazing in the Jordan Creek area:

> **A. BLM, I remember, first I knew about the BLM, they built a drift fence from Rabbit Creek across the Sinker Creek and at a certain time – I don't remember when it was now – but they [the ranchers] were supposed to get**

Range area and not to molest the sheep grazing these areas on which they were properly licensed." U.S. Trial Exhibit 78.

their cattle off the desert [winter range] and above that drift fence, and the BLM sent two guys out to help them the first time, and they were really good. They were – well, they were pretty much local people that worked for the BLM. But they were really good, and they really helped the ranchers

. . .

That was the first year, so they just came out to help the ranchers and to explain what they were doing, which was great.

Q. Right. Now, I assume that when the cattle were in the Silver City area, not only did they eight [eat] the green grass, but did they drink the water out of Jordan Creek?

A. They have to drink water.

Q. That was – was that a main source for them in the summertime?

A. Yes. That's the only source, well, Jordan Creek and its tributaries, but they all, the only choice they have in this Silver City basin.

TTr, at 319-321.[23]

BLM Management of Federal Public Range Lands in Idaho

In Idaho, the United States owns 32,015,827.7 acres. Of that land, 11,142,021 acres are used primarily for range land. In fiscal year 2000, there were 2,180 permittees on 1,567 grazing allotments for a total of 1,323,215 animal units per month (aum's) which yielded $1,499,342 in gross receipts. Frederic W. Price, TTr, at 133-134 and Dr. Gary A. Madenford, TTr, at 345. The gross receipts were then divided 37½% to the United States Treasury, 50% to the BLM and 12½% to the State of Idaho.[24] Ronald W. Kay, TTr, at 553.

► Dr. Gary A. Madenford

The BLM called Gary A. Madenford, a natural resource specialist with a Ph.D. in agronomy from Iowa State University, who coordinates BLM's efforts in the Snake River Basin Adjudication. The BLM argued his testimony was relevant to show "how the United States has managed the grazing program and how water is an integral part of that grazing program and that would, by way of argument, lead the court to believe that the United States had an intention to establish water rights for the furtherance of its grazing program and that intention is critical . . . to establishing a water right." Counsel for the BLM, TTr, at 338-339.[25]

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[23] On the record, Mr. Lewis testified that in 1944 (at age 19), he volunteered to join the Army, despite a deferral because he worked in the livestock business. Off the record, he said he flew 12 combat missions as a ball-turret gunner aboard a B-17 bomber in WW II. The ball-turret gunner was "crammed into a tiny, rotating Plexiglas sphere that hung below the plane just behind the bomb bay doors." Stephen E. Ambrose, *Citizen Soldiers* (1997), at 293. Mr. Ambrose described duty as a bomber crew member as both glamorous and "the most hazardous service in the war." Ambrose, *D-Day, June 6, 1944, The Climactic Battle of World War II* (1994), at 240.

[24] "The grant of grazing permits is a use of the public domain for the benefit of the United States, which receives a fee from the holder of preferential permits, and of those holding grazing permits." *U.S. v. Morrell*, 331 F.2d 498, 501 (10th Cir. 1964).

[25] In its closing argument, the BLM wrote:

Dr. Madenford began by saying, "You manage the cattle by managing the water." TTr, at 344. To prevent overgrazing and mitigate some of the damage to soil resources caused by livestock grazing, the BLM distributes livestock around the allotment by developing water sources such as springs, wells, reservoirs, pipelines and troughs. TTr, at 347-348. Dr. Madenford said that proper management of grazing through distribution of water reduces soil erosion near the water sources:

> I have seen some areas that were bare ground, and every time it rained, the soil was immediately picked up and carried into the streams, whereas, if you maintain the vegetative cover, the vegetation itself and the roots bind the soil together so that when it rains, it minimizes the amount of soil loss. And once you start to lose the stream banks, then gullies start to form. When gullies form, the groundwater table drops. Then it's more difficult to get the native vegetation back again.
> So by distributing the water out and managing water and distributing it to livestock through the allotment, it greatly enhances the condition of the soils and vegetation.

TTr, at 351-352.

When Dr. Madenford was asked whether healthy native plant species near streams may actually increase the amount of water available for livestock and wildlife in instream situations, he said:

> It actually does, because what happens is, a stream system acts like a sponge, if it's properly functioning. And during the springtime when you have your spring floods, the water distributes out and soaks into the ground and then is released later in the year.

TTr, at 352.

Dr. Madenford recalled an instance where a permittee in the Burley BLM district held the license for a water development on an allotment and would not allow another permittee to use the water:

> And so we were limited in our ability to manage grazing on public lands. . . . Permittees come and permittees go.[26] Some of them have been there a lot longer than others, some get out of the business and some sell out. Another permittee will come in and take their place. . . . By the permittee owning the water right, it

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> The United States is entitled to stockwatering rights because making public land available to others for livestock grazing by issuing permits to qualified applicants is a diversion and beneficial use of water that satisfies Idaho's requirements for a valid appropriation. . . . [L]andowners in Idaho who make their land available to others for livestock grazing are valid appropriators of water, even though the landowners may not own the livestock that actually drink the water.

United State's Post-Trial Memorandum, at 2.

[26] Dr. Madenford estimated that each year in Idaho, there are 100 transfers or exchanges of grazing privileges from one permittee to another. TTr, at 355.

greatly inhibits the BLM's ability to manage the land according to the direction that we've been given from Congress.

TTr, at 354.

► **Ronald W. Kay**

Next, the BLM called Ronald W. Kay, a range land manager specialist in the BLM state office in Boise. Mr. Kay introduced a number of publications spelling out BLM's policies, standards and guidelines for administration of grazing on federal public lands under the Taylor Grazing Act. U.S Trial Exhibits 9-15. Mr. Kay said that in Idaho, the BLM employs a range staff of 43 professionals, technicians and clerical personnel, plus wildlife biologists, soil scientists, watershed specialists, archaeologists and endangered species specialists. TTr, at 546. The range staff checks for compliance with the terms and conditions of grazing permits, inspects range improvements and monitors livestock use of forage and water sources. TTr, at 548-549. BLM managers approve all applications for transfers of grazing preferences – "We don't recognize that a grazing permit is sold. It's transferred." TTr, at 550-551.[27]

Mr. Kay then explained how the BLM range staff responds when the range land health is impaired:

A. Our procedures today, as we are implementing our range land health standards and guidelines, we, we go out onto the allotments and we look at what standards are applicable to that allotment and we go through an assessment and evaluate the indicators of those standards. And then we also look at all the past inventory and monitoring data and come out with an assessment. If the assessment is – if the conclusions of the assessment determines that we are not meeting a standard by regulation, we are to modify the grazing permit, if it's been determined that livestock are the cause, to make changes to that grazing permit, to start making significant progress to improve the standard or the condition of that standard.

. . .

Q. So you can change the season of use and that normally helps?

A. That is one of the tools that we use.

Q. How about realigning grazing allotment boundaries? Is that ever used?

A. That does occur sometimes, too.

Q. How about managing livestock access to water sources to more evenly distribute forage use? Is that ever used?

A. Yes, it is.

TTr, at 556-557.

CONCLUSIONS OF LAW

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

Prima Facie Evidence

By statute, I.C. § 42-1411(4), the IDWR Director's reports constitute *prima facie* evidence of the nature and extent of water rights acquired under state law. Since both Joyce Livestock's claim and the BLM's claims were based on state law (beneficial use), the Director's recommendations would normally be presumed to be true unless disproved by some evidence to the contrary. However, for all practical purposes, these claims are to the same water (Jordan Creek), for the same use (instream stockwater) and the same places of use. In theory, both parties could be awarded virtually identical rights, perhaps with different priority dates, but it was apparent from the beginning that the parties intended their claims to be mutually exclusive. As will be seen later, that is not exactly how the Special Master viewed the evidence. Both parties' claims were weighed independently on their own merits with no presumption that either parties' claim(s) excluded the other's.

Joyce Livestock's Grantors' Lack of Intent to Appropriate

The key issues in Joyce Livestock's claims are: 1) whether its 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. In both instances, intent had to be shown. Did Joyce Livestock's grantors *intend* to appropriate the water and if so, did they *intend* to convey that right to their successors?

Some law of the SRBA case concerning instream stockwater rights is reasonably clear. 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 that 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 [in the present subcases, Joyce Livestock's base property, the Joyce Ranch] via the instrument conveying the land." ***LU Decision***, at 15.

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.

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.

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.[28] On the contrary, their concern was solely to have access to public land for grazing their livestock, along with other grazers.

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.

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

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[28] A fundamental principle of water law is that mere use of water in common with others does not constitute an appropriation. Intent to appropriate, along with diversion for a beneficial use, is an important element of a valid appropriation: "The three elements were designed to prevent fraud and to provide some order in an otherwise unstructured system." David H. Getches, *Water Law in a Nutshell* (2d Ed., 1990), at 88.

> 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 resource. A change that will cure these economic ills should be affected.

1932 Forest Service survey of grazing land in Owyhee County entitled: "Owyhee County: The Public Domain as a Land Resource,", at 32-33. U.S. Trial Exhibit 88. If any one rancher appropriated the water of Jordan Creek as early as 1898, as Joyce Livestock argued, then that "water right" has been ignored for over 100 years – only grazing preferences under the Taylor Grazing Act were sought and recognized.

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.

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, 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 <u>access to grazing</u> 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 <u>preferences</u> or <u>privileges</u> (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. <u>None of Joyce Livestock's grantors claimed water rights on federal public land as part of their base property</u>.

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.[29]

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 <u>access to graze</u> on federal public land, <u>not water rights</u> on the federal public land.

BLM Appropriation

[29] In light of the above conclusions of law concerning Joyce Livestock's claim, there is no need to address Joyce Livestock's pending *Motion to Amend Legal Descriptions of Points of Diversion of Stockwater Rights by Joyce Livestock Co., Claim No. 55-10135 (Silver City Area) According to Proof.*

At trial, as it did during earlier summary judgment proceedings, 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 July 3, 2002 *Motion to Supplement Briefs in Support of Motion for Summary Judgment*, at 3; also see its March 19, 2003 *Closing Argument by Joyce Livestock*, at 17-22. Therefore, by this argument, the BLM claims must fail. For the convenience of readers, the portion of the Special Master's July 24, 2002 ***Order Denying Joyce Livestock Motions for Summary Judgment*** (including footnote 30 below) discussing that argument is repeated in the following two paragraphs.

Joyce Livestock's argument is that the controlling law of the SRBA case 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 three closely related decisions made by Special Master Haemmerle:

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

Joyce Livestock cited two key passages (in quotes) 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 July 3, 2002 *Motion to Supplement Briefs*, at 2.[30]

[30] 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

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.

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

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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.

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.
>
> 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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> . . .
>
> 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].

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. . . ."

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]"[31] 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.

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.

RECOMMENDATION

THEREFORE, IT IS RECOMMENDED that:

1. Joyce Livestock's claim (55-10135) be **denied**; and
2. The BLM be awarded partial decrees adjudicating water rights for claims 55-11061, 55-11385 and 55-12452 as recommended by IDWR and as described in the attached ***Special Master Recommendations for Partial Decrees for Water Rights 55-11061, 55-11385 and 55-12452***.

DATED October 6, 2003.

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TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

[31] 1932 Forest Service survey, "Owyhee County: The Public Domain as a Land Resource," U.S. Trial Exhibit 88.