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: 55-10288B, 55-10289B,**
	)	**55-10290B, 55-10292B, 55-10293B, 55-**
Case No. 39576	)	**10295, 55-10296, 55-10297B, 55-10298, 55-**
	)	**10299B, 55-10300, 55-10301B, 55-10303B**
	)	**and 55-13451**
	)	
	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON CHALLENGE**
	)	
_____	)	**ORDER OF PARTIAL DECREES**

Summary of Ruling: Holding private party could perfect water right on public rangeland before and after the implementation of the Taylor Grazing Act. Water rights appropriated on public rangeland could transfer as appurtenance to private base ranch property when used in conjunction with livestock operation.

Claimant must establish through the chain of title, grazing applications, permits and related documents what water rights, if any, were appropriated and transferred by predecessors-in-interest. Where a deed is otherwise silent, a generalized showing that a particular region was historically used by the public for grazing is insufficient to establish that a particular predecessor-in-interest grazed cattle for purposes of establishing a water right. Claimant must trace instruments showing what rights were appurtenant and transferred from a particular permittee to claimant as the use of allotments was not exclusive and use was also limited to specific areas within allotments.

Special Master erred as matter of law by failing to trace chain of title to show what rights, if any, existed and were transferred. Based on evidence presented, Special Master erred in finding that claimant LU Ranching Company, established 1876 priority date for each of the above-captioned claims.

Evidence presented supports priority date for each claim earlier than asserted by objector United States, Bureau of Land Management.

I.

PROCEDURAL BACKGROUND

A. At issue are thirteen beneficial use claims[1] filed by LU Ranching Company (LU) for instream stock water rights located on federal public lands within the boundaries of three different grazing allotments for which LU holds grazing permits. The allotments are situated on lands administered by the United States Bureau of Land Management (United States), pursuant to The Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986))("Taylor Grazing Act").

B. LU claimed a priority date of May 20, 1872, for each of the subject claims. On July 31, 1997, the Director of IDWR filed a *Director's Report*, recommending each right with the priority date as claimed. The United States filed objections to the recommended priority date for each of LU's claims asserting that the priority date should be September 23, 1976, which corresponds with the date the LU entity was created and started beneficially using the water.

C. The subcases were originally referred to Special Master Fritz Hammerle. In the proceedings before Special Master Hammerle, the United States filed a motion for summary judgment asserting that LU had no deeds or other instruments from a predecessor-in-interest conveying any of the subject water rights. LU argued that the water rights were appropriated by its predecessors-in-interest to the patented or "base ranch" properties to which its grazing allotments are attached. LU also argued that the rights transferred as appurtenances to the base ranch properties via the appurtenancy clauses contained in LU's chain of title. Special Master Hammerle granted summary judgment in favor of the United States, holding that because water rights are interests in real property and transfers of real property require a written instrument, the alleged water rights were not properly conveyed. Special Master Hammerle also ruled that without a written instrument the earliest priority date LU could prove was September 23, 1976, the

[1] Water right claim 55-10301B is listed in caption but is not at issue. *See infra*.

date LU was incorporated. *Order Granting United States' Motion for Summary Judgment*, Subcases 55-10288 *et al.* (Jan 8, 1999).

Special Master Hammerle ruled further that instream stock water rights on public land are as a matter of law appurtenant to the public land and therefore could not transfer as an appurtenance to private land. The Special Master's decision incorporated his reasoning from a prior decision in an unrelated consolidated subcase (Joyce Livestock) involving a number of "foundational" issues pertaining to the ability of both the United States and private parties to appropriate beneficial use instream stock water rights on public land. *See Order on Motion to Alter or Amend: Order on Motion for Permissive Appeal*, Subcases 57-04028 *et al*. (June 26, 1997). Special Master Hammerle's reasoning and ruling in the Joyce Livestock case was later adopted by Judge Hurlbutt, then presiding judge of the SRBA. *Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, Subcases 57-04028B *et al.* (Sept. 30, 1998).

D. LU challenged Special Master Hammerle's *Order Granting United States' Motion for Summary Judgment*, before Judge Wood, who succeeded Judge Hurlbutt as the presiding judge. Judge Wood reversed the Special Master holding that summary judgment was inappropriate because there were genuine issues of material fact. *Memorandum Decision and Order On Challenge; Order Denying Motion to File Amicus Curie Brief; Order of Recommitment to Special Master Cushman*; Subcases 55-10288 A & B *et al*. (April 25, 2000).

Judge Wood ruled that the instream rights appropriated on public land by a private party were not necessarily deemed appurtenant to the public land because a private individual could appropriate a water right on public land without having an ownership interest in the land on which the water was located. In such a situation, the water right would not be "appurtenant" to the public land at least for purposes of a conveyance because no unity of title existed between the land and the water right; as one cannot convey what one does not own. Judge Wood also ruled that given the customary practices surrounding livestock grazing, depending on the particular circumstances and nexus between the instream stock water right and the adjacent private ranch property, it

was conceivable that instream rights could transfer as an appurtenancy to the ranch base property, particularly if a ranching operation was sold in its entirety as a going concern.

Judge Wood ruled that for purposes of conveying the water right the statute of frauds would be satisfied without a separate writing conveying the water rights under the general rule that unless expressly reserved, water rights appurtenant to land transfer with the conveyance of the land. Judge Wood ruled that the issue of whether a water right transferred as an appurtenance via the appurtenance clause in the deed would depend on the intent of the grantor and was an issue of fact. The matter was then recommitted to Special Master Tom Cushman, who succeeded Special Master Hammerle, for a trial on the merits.

E. Special Master Cushman held a trial on the merits and issued a *Special Master's Report and Recommendation; Findings of Fact and Conclusions of Law*, subcases 55-10288B *et al*. (Feb 27, 2003). Special Master Cushman held that in accordance with Judge Wood's reasoning, LU proved an 1876 priority date for each of the claims instead of the claimed 1872 priority date. The *Special Master's Recommendation* was based on the finding that LU's predecessors-in-interest to the respective patented parcels, which now comprise some of LU's base ranch property, grazed and watered cattle on the adjacent public domain in the general areas where the claimed rights are located as early as 1876. However, Special Master Cushman ruled that LU was unable to prove that grazing and watering existed as early as the claimed 1872 priority date. Special Master Cushman also found that the appropriated rights were conveyed as appurtenances in LU's chain of title to those lands. Both the United States and LU filed motions to alter or amend the *Recommendation*.

F. On challenge LU only raises issues pertaining to certain recommended places of use for some of its claims. LU does not challenge the recommended priority date. The United States on challenge raises the legal issue regarding the inability of a private party to perfect a water right on land to which the party does not hold a possessory interest. The United States also raises the legal issue regarding the ability to transfer a water right as an appurtenance to the private ranch property, particularly prior to 1934 when the concepts of base ranch property and grazing allotments did not exist. Factually, the

United States challenges the sufficiency of the evidence supporting the Special Master's recommended 1876 priority date for each of the rights even assuming the rights could legally be appropriated on the public domain and transferred as appurtenances to the private property. The United States also challenges certain legal descriptions of the rights.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on November 10, 2004. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or November 12, 2004.

III.
ISSUES RAISED ON CHALLENGE

A. The United States

The United States raises the following issues on Challenge:

1. Whether the Special Master's findings of fact are clearly erroneous?

2. Whether the Special Master erred in holding that LU was entitled to a priority date earlier than September 23, 1976, for water rights 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 5510298, 55-10299B, and 55-10300?

3. Whether the Special Master erred in holding that LU was entitled to a priority date earlier than June 28, 1984, for water right 55-10303B and 55-13451?

4. Whether the Special Master erred in not deleting T7S, R6W, S35, SENE as a place of use and erred in establishing beginning and ending points of diversion in the place of use for 55-10288B?

5. Whether the Special Master erred in not deleting "Unnamed Streams" tributary to "Juniper Creek" as a source for water right 55-10289B?

6. Whether the Special Master erred in not amending the points of diversion for water right 55-10296?

7. Whether the Special Master erred in not deleting the source "Unnamed Stream" tributary to "Jordan Creek" and erred in not amending the points of diversion for water right 55-10297B?

8. Whether the Special Master erred in not deleting T9S R5W, S33, NWNW as a place of use, in not deleting T9S, R4W, S18, Lot 3 (SENWSE) and T9S, R5W, S33, NWNW as points of diversion, and in not amending the source description to read "Unnamed Stream" tributary to "Corral Creek" in water right 55-10303B?

B. LU

LU raises the following issues on Challenge:

1. Whether the Special Master erred in failing to recommend T5S R6W S23 NWNE as a place of use for water right 55-10296?

2. Whether the Special master erred in failing to recommend T5S R6W S13 SWSW as a place of use for water right 55-10297B?

IV.

STANDARD OF REVIEW OF A SPECIAL MASTER'S RECOMMENDATION

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

A. Findings of fact of a special master.

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

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court,

> though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

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

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

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

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are

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

clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied,* 91 S.Ct. 582 (1971).

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

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor D. Craig Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook." Lewis, Idaho Trial Handbook, § 35.14 (1995), (citing *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.).

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

B. Conclusions of law of a special master.

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

reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

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

V.
DISCUSSION

A. Preliminary Foundational Legal Issues.

There are several legal issues raised in these subcases pertaining to the appropriation of stock water rights on public land, some of which have been previously addressed in the SRBA. To date, none of these prior rulings have been appealed.[3] The United States again raises some of these same preliminary issues in the instant matter. These issues include: 1) Whether a water user can appropriate a water right when the water user does not hold a possessory interest in the land on which the right is appropriated; 2) What proof is required to establish intent to appropriate an instream stock water right; 3) Can an instream water right with a place of use on federal land

[3] The issue of stock water rights on public lands as between the holders of grazing allotments and the United States Bureau of Land Management has a lengthy history in the SRBA. In 1996, the United States, the State of Idaho and certain other parties to the adjudication sought to have various issues concerning the ownership of stock water rights on the public domain decided as a Basin-Wide Issue. Judge Hurlbutt denied the motion to designate Basin-Wide Issue 9A, because the parties were unable to agree on a set of paradigm facts for creating test cases. The Court did not want to decide test cases in a "vacuum" and then have the parties seek to distinguish the facts of their particular case requiring that the individual subcases be litigated anyway. *Order Designating Basin-Wide Issue No.9; Order Denying Designation of Basin-Wide Issue No. 9A; Order Setting Expedited Schedule and Hearing Date for Basin-Wide Issue No. 9*, Case No. 91-00009 (March 8, 1996). Later in 2000, Judge Burdick also denied a joint motion by various parties to create and decide test cases addressing the same issues on the same basis. *Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master Dolan and Stay Related Subcases*, subcases 47-04514 *et al*., (Jan. 30, 2000) (Approx. 7,500 subcases). Nonetheless, some of these foundational legal issues have already been addressed in individual subcases. However, mostly as a result of "global" stipulations between the United States and the State of Idaho and between the United States and various ranching entities, none of these issues have been appealed.

transfer as an appurtenance to adjacent patented property when all are used in conjunction with a ranching operation; and 4) If the deed to the patented property is silent, can such a transfer still be made?

Although Judge Wood, in his April 25, 2000, *Memorandum Decision and Order on Challenge* previously addressed and ruled on two of these issues, no final order or decree has been entered as to those rulings. As such, the United States is entitled to have these issues readdressed before the successor presiding judge in addition to preserving the issues for appeal. *Farmers National Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994)(successor judge can reconsider rulings of predecessor judge before entry of final judgment). Furthermore, this Court notes that there are several other subcases at issue in the SRBA which turn on the same principle of law. A comprehensive analysis and recapitulation of the law of the case is therefore warranted.

1. Adoption Judge Wood's April 25, 2000, opinion.

Although this opinion addresses and expands on the same issues addressed by Judge Wood in April 25, 2000, *Memorandum Decision and Order on Challenge* previously issued in these subcases, this Court adopts the reasoning set forth in that opinion.

2. Historically, private parties could appropriate beneficial use water rights on the public domain both prior and subsequent to the enactment of the Taylor Grazing Act.

Central to LU's claims is the issue of whether historically a private individual could appropriate a water right on public land. The United States argues that a water user must hold a possessory interest in the land on which the right is used in order to appropriate a water right. This argument is without merit. Idaho's laws governing water rights coupled with the United States' historical deference to state water law; the myriad of congressional acts aimed at encouraging settlement of the west acknowledging private ownership of water rights on federal land; and the Taylor Grazing Act's acknowledgement of private ownership of water rights on federal land as a precondition

to the award of a grazing preference, overwhelmingly suggest the contrary. Each is addressed below.

a. The federal government historically deferred to state water law with respect to the appropriation of water on the public domain.

First, as concerns the appropriation of water on federal lands, it is well established in western water law that the federal government historically deferred to state water law for the appropriation of water. *California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935)*; *Buford v. Houtz*, 133 U.S. 320, 326-328 (1890). This point is not contested.

b. The general rule in Idaho is that excluding trespass, an appropriator need not have an ownership interest in the land in order to appropriate a water right.

In turning to applicable state law, Judge Wood ruled in the April 25, 2000, *Memorandum Decision,*

> In Idaho it is well established that the ownership of a water right can exist independently from the ownership of the land on which the water is used. *See e.g. First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930); *Sarrett v. Hunter*, 32 Idaho 536, 541-42, 185 P. 1072 (1919). In other words, there is not always unity of title between the water right and the land on which it is used. This rule has been applied in the context of the appropriation of water in conjunction with a leasehold. *First Security Bank of Blackfoot* at 746, 291 P. at 1070 (holding that a water right perfected by a lessee is property of lessee unless lessee is acting as an agent of landowner). This same rule can also apply to the appropriation of water on federal public lands. *Keiler v. McDonald*, 37 Idaho 573, 218 P. 365 (1923); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922)(ownership of waters subject to appropriation on federal land vests in the appropriator); *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967)(recognizing private ownership of water right perfected on federal land pursuant to state law).

Memorandum Decision at 14-15 (footnotes omitted). Judge Wood also noted that this is not the general rule in all states. *Id.* at 14, fn. 14 (citing *Dept. of Lands v. Pettibone*, 702

P.2d 948 (Mont. 1985)(water rights perfected by lessees of state trust lands remain property of state); *Tattersfield v. Putnam*, 41 P.2d 288 (Ariz. 1935)(temporary possessor of land cannot make appropriation of water). This same rule was also applied by Judge Hurlbutt in a case involving Joyce Livestock Company and the United States. *See Order Denying Challenges and Adopting Special Master's Reports and Recommendations*, Subcases 57-04028B *et al.* (Sept. 30, 1998) (*Joyce Livestock Decision*). In the context of the United States' ability to appropriate a stock water right on federal land without actually grazing cattle, Judge Hurlbutt ruled:

> If the party claiming ownership of the water right [by virtue of owning the land on which the right is used] is not the same party that actually appropriated the water, the only way the nonappropriating party can legitimately claim the right is through an agency theory or by a showing that the right was conveyed from the party that actually appropriated the right. '**If the water right was initiated by the lessee, the right is the lessee's property unless the lessee was acting as an agent of the owner**.'

Id. at 10 (citing *First Security Bank v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930)).[4]

The foregoing make it clear that the general rule in Idaho is that the appropriator of a water right need not own the land on which the right is used, nor does such a right automatically vest in the owner of the land. The exception to this rule is trespass. A person cannot initiate a water right on the land of another through trespass. *Branson v. Miracle*, 107 Idaho 221, 226, 687 P.2d 1348 (1984). However, prior to the enactment of the Taylor Grazing Act, stock grazing on the public domain was largely unregulated and open to the public in general, thus water rights could be appropriated without the appropriator either holding a possessory or ownership interest in the land or engaging in trespass. *See generally Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights)*, Consolidated Subcase Nos. 23-10872 *et al*.pp. 12-14 (Dec. 28, 2001)(Judge Burdick's opinion discusses at length the unregulated public domain with respect to grazing in the context of PWR 107). The public essentially held an implied

[4] Although this ruling has never been appealed, it nonetheless remains law of the case and forms the basis for a private party to appropriate a water right on the public domain without having an interest in the land. The United States has had numerous state-based water rights decreed based on this ruling.

license to use federal rangelands for grazing. In *Buford v. Houtz*, 133 U.S. 320, 326-328 (1890), the United States Supreme Court held:

> We are of the opinion that there is an implied license, growing out of a custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to people who seek to use them where they are left open and unenclosed, and no act of government forbids this use . . . . The government of the United States, in all its branches, has known of this use, has never forbidden it, nor has taken steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we will attempt to show, with its direct encouragement. . . . Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze.

Id. at 326-28.

In conclusion, given the federal government's historical treatment of the public domain with respect to grazing, Idaho law clearly supports the ability of a private party to appropriate a water right thereon. This Court acknowledges that the result may not be the same in other states.

c. The various congressional acts aimed at settling and reclaiming the west all acknowledged private ownership of pre-existing water rights on the public domain.

Further support for the conclusion that private parties could appropriate on the public domain can be found in the early congressional acts providing for the disposition of public lands, which specifically acknowledged the ownership of pre-existing water rights. As Judge Hurlbutt noted in the *Joyce Livestock Decision*, the Mining Act of 1866, provided:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by local customs, laws and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way

> for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.

Joyce Livestock Decision at 3, fn. 2 (quoting Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C.A. § 51 (1986))).[5] The Act of 1870 provided:

> All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

Id. at 4, fn. 3 (quoting Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (Codified at 30 U.S.C.A. § 52 (1986))). The Desert Land Act of 1877, in relevant part provided:

> All surplus water over and above such actual appropriation and use, together with the water of lakes, rivers, and other sources of water supply upon the public land and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Id. at 4, fn. 4 (quoting Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377 (codified at 43 U.S.C.A. § 321 (1986))). The Taylor Grazing Act provided:

> That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing or other purpose which has heretofore vested or accrued under existing law validly effecting the public lands which may hereafter be initiated or acquired and maintained in accordance with law.

Id. at 4, fn. 5 (quoting Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986))).

All of the foregoing congressional acts clearly acknowledged pre-existing water rights on the public domain.[6]

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[5] In this case, the recognition of existing water rights under the 1866 Act is specifically acknowledged in a letter regarding the recognition for existing ditches and right of ways dated September 26, 1984, addressed to district managers in the State of Oregon Office for the Bureau of Land Management. *See* Exhibit DD.

d. The operation of the Taylor Grazing Act expressly provides for the ownership of preexisting water rights in awarding grazing preferences and also allowed for private ownership of water rights after its implementation.

Lastly, and probably of most significance, is that the Taylor Grazing Act specifically took into account preexisting water rights on public lands for the purpose of awarding grazing preferences. 43 C.F.R. § 4100.0-5 (1998). After the implementation of the Taylor Grazing Act, it was not until 1995 that the regulations governing the application of the Taylor Grazing Act provided that any water rights perfected on the public domain would vest in the name of the United States. 43 C.F.R. § 4120.3-9 (1998).

Pursuant to the Taylor Grazing Act and the regulations governing its application, a "grazing preference" is defined as a "superior or priority position against others for the purpose of receiving a grazing permit or lease." 43 C.F.R. § 4100.0-5 (1998). A "grazing permit" is defined as "a document authorizing the use of public lands within a grazing district." *Id*. [7] In awarding a grazing preference, applicants who previously used the public land in connection with their livestock operation or owned preexisting water rights were given priority over other applicants. Private land and water rights are referred to as "base property." "Base property" is defined as "(1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or **(2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public land are used for livestock grazing**." 43 C.F.R. § 4100.0-5 (1998) (emphasis added). The award of

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[6] The United States has also claimed and had decreed a significant number of stock water claims based on executive order Public Water Reserve 107. There has been a significant amount of litigation in the SRBA over these federal reserved rights. One key point that can be gleaned from the various issues that have previously been raised with respect to PWR 107, which is relevant to this discussion, is the historical circumstances that gave rise to the reserved rights. PWR 107 was issued to prevent the monopolization of water sources by private individuals in anticipation of the forthcoming Taylor Grazing Act. *United States v. State of Idaho*, 131 Idaho 468, 472 (1998). Based on these circumstances the United States was aware that water rights were being appropriated on the public domain. Although PWR 107 expressly withdrew land surrounding springs and watering holes to prevent land entry abuses, presumably if appropriation by private individuals was not an issue, no concomitant water right would have been necessary to fulfill the primary purpose of the reservation as no private party would have been able to appropriate a water right after the land surrounding subject springs and waterholes was withdrawn from settlement.

[7] A "grazing lease" authorizes use outside of a grazing district.

the preference based on preexisting uses or base property was explained in *Public Lands Council v. Babbit*, 167 F.3d 1287 (10th Cir. 1999), wherein the Court of Appeals wrote:

> After enactment of the [Taylor Grazing Act] in 1934, the Secretary of the Interior began the process of establishing grazing districts, issuing permits, and granting leases. At the time of the TGA's passage, the number of applicants far exceeded the amount of grazing land available to accommodate them. Therefore, the Department of Interior (DOI) instituted a detailed adjudication process, guided by a set of priorities articulated in section three of the TGA, to determine which applicants would receive grazing permits. **First priority in the issuance of permits went to applicants who owned land or water, i.e., "Base property," in or near a grazing district, who were dependent on the public lands for grazing, who had used the land or water for livestock operations in connection with the public lands in the five years preceding the TGA's enactment, and whose land or water was situated so as to require the use of public rangeland for "economic" livestock operations.** Once the Secretary issued a favorable grazing decision regarding an individual applicant, the applicant received a ten-year permit which specified the maximum number of livestock, measured in AUM's, that the permittee was entitled to place in a grazing district.

Id. at 1295 (emphasis added) (citations omitted).

Contained in the body of the application for the grazing preference, the applicants are specifically asked whether they own preexisting water rights used in conjunction with the public land. *See e.g.* United States' *Exhibit* 17.[8] Even after a grazing permit was issued, the United States continued to acknowledge that the permittee could still perfect a private water right on the public land within the grazing allotment. Only after 1995, were the regulations governing grazing on public lands amended to require that the title to any appropriated water right vest in the United States.

> Any right acquired on or after August 21, 1995, to use water on public land for the purpose of livestock watering on public land shall be acquired,

[8] One of the questions on the application asks: "Describe and locate all of the water rights owned or leased by you and used in your livestock operations on the public domain: . . . ." United States' *Exhibit* 17, p.3. Water rights on the public domain are significant in awarding the preference because the required "base property" could either be in the form of private property used in conjunction with the livestock operation or in the form of water rights "available and accessible, to the authorized livestock when the public lands are used for livestock grazing." 43 C.F.R. § 4100.0-5. (Definition of base ranch property).

> perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State within which the land is located, any water right shall be acquired, perfected, maintained, and administered in the name of the United States.

43 C.F.R. § 4120.3-9 (1998). Implicit in this regulation is the acknowledgement that permittees could historically perfect water rights on the public domain after the implementation of the Taylor Grazing Act and prior to 1995. Since its inception, the Taylor Grazing Act made it clear that "the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C.A. § 315(b). Therefore, based on the express language and operation of the Taylor Grazing Act, it can reasonably be concluded that the United States had also acknowledged that a private individual could perfect a water right on the public domain despite not having a possessory interest in the land - both before and after the implementation of the Taylor Grazing Act.[9]

Based on the foregoing, this Court holds that a private party could appropriate a water right on the public domain without having a possessory or ownership interest in the land.

3. Criteria for demonstrating intent to appropriate an instream stock water right on the public domain.

The next issue concerns the criteria for establishing a beneficial use instream stock water right. One of the arguments raised by the United States is that the itinerant and nomadic grazers, which predominately occupied the public range prior to the enactment and implementation of the Taylor Grazing Act, lacked the requisite intent to appropriate a water right. Rather, they were simply using available water sources in common.

[9] After the implementation of the Taylor Grazing Act and prior to the 1995 regulation governing water rights going into effect, it should be fairly easy for the permittee to establish a water right as of the date of issuance of the permit because the permittee was grazing cattle within the authorized boundaries of the allotment and absent an agreement to the contrary, the water right did not vest in the United States.

In Idaho, until 1971, a right for the use of surface water could be appropriated under the "constitutional" or "beneficial use" method of appropriation by showing three elements; 1) intent to appropriate; 2) a physical diversion from a natural watercourse; and, 3) the application of water to beneficial use. *Hidden Springs Trout Ranch, Inc.v. Hagerman Water Users, Inc*., 101 Idaho 677, 679-80, 619 P.2d 1130, 1132-33 (1980)(citing *Sarrett v. Hunter*, 32 Idaho 536, 541, 185 P. 1072, 1074 (1919)). Typically, intent to appropriate could be inferred from the physical diversion and application to beneficial use. *Id.* (test of valid appropriation is diversion from natural source and application to beneficial use). A unique set of circumstances is involved for instream stock water rights on the public range prior to the range being regulated under the Taylor Grazing Act. First, no physical diversion was required to perfect a water right for stock water. *State v. United States*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000)(citing *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 45, 674 P.2d 1036, 1044 (Ct.App. 1983)). Second, as discussed previously, the public rangeland was open to the public in general. *Buford v. Houtz*, 133 U.S. 320, 326-328 (1890). The issue then arises as to whether the individuals watering their livestock in common on the open range intended to appropriate a water right or were merely using an available water source that was open to the public in general.

Intent to appropriate is a factual issue. Obviously, direct testimony by the original appropriator or a recitation of the right in an instrument of conveyance to a successor would be dispositive of intent to appropriate as opposed to mere use of water. Neither of those situations exist in these subcases.[10] However, the lack of either is not fatal to proving requisite intent to appropriate. In this Court's opinion, there is a significant distinction between a nomadic or itinerant livestock grazer on the public domain and the homesteader who historically and regularly used adjacent or nearby public rangeland in conjunction with the homesteaded property to support a livestock operation.

[10] As discussed *infra*, LU relies on the general "appurtenance clause" in the deeds to show that the water right was conveyed. However, the general appurtenance clause of limited probative value in determining whether or not a water right was actually appropriated by a predecessor-in-interest.

The early land entry statutes that authorized the entry and eventual fee ownership of public lands did not provide for the acquisition of enough land to sustain a viable livestock raising operation. For example, the Homestead Act of 1862 authorized the entry of 160 acres, which was later expanded to 640 acres. (R.S. § 2289, Act of March 3, 1891, c 561, § 5, 26 Stat. 1097 (codified at 43 U.S.C.A §§ 161 *et seq*. (2003))(repealed by FLPMA, Pub. L. No 94-579, 90 Stat 2792 (1976))(codified at 43 U.S.C.A §§ 1701 *et seq*. (1994). The Stock-Raising Homestead Act authorized the entry of up to 640 acres. Act of December 29, 1916, ch. 9. 39 Stat. 862 (codified at 43 U.S.C.A §§ 291 *et seq*. (2003))(also repealed by FLPMA). As a general matter, it is widely accepted that the patented property alone was insufficient to sustain a livestock operation capable of supporting a single family unit in the arid west. *See* GEORGE CAMERON COGGINS *et al.* FEDERAL PUBLIC LAND AND RESOURCES LAW at 746 (4th ed. 2001). The testimony of Doctor Chad Gibson presented at trial also supports this conclusion. Doctor Gibson testified that based on the level of forage in Owyhee County, on average, one cow would need ten acres per month to sustain itself. Tr. pp. 385-86. For one year, 120 acres would be required. *Id.* Therefore, 160 acres would support a little more than one head of cattle over a one year period. Six hundred forty (640) acres would support approximately five head of cattle. *Id.* [11] In light of these limitations, Doctor Gibson testified:

> When you go back to the homestead days when they had 160 acres, they obviously had to use the land around them. And even after 1916 when the Homestead Act allowed 640 acres, that still wasn't enough; and they still had to use the land around them. And so most of the ranches have been developed as a combination of base property and outside property. So if you're going to have a viable ranching operation, you would probably have to combine quite a number of base properties if you weren't going to use the federal land around it. . . . If you had 160 acres there today, you would have to have some other source of forage to have a ranching operation.

Tr. pp. 387-88.

The United States obviously recognized the need for the adjacent public land to sustain a viable ranching operation when it embraced the historical practice by awarding

[11] The Court acknowledges that cattle are grazed on a seasonal basis and based on AUMs.

grazing preferences based on the prior use of the public land. *See e.g. supra*, *Public Lands Council v. Babbit*, at 1295. Doctor Gibson also testified that in awarding grazing preferences: "The two primary things were prior use and commensurate base property. The prior-use rule that was finally adopted was that you had to have grazed there two consecutive years, or three years not consecutively out of the previous five years prior to 1934." Tr. p. 391.

In *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967), a case involving the appropriation of an instream stock water right on the public domain, the court held:

> To constitute an appropriation, therefore, there must co-exist 'the intent to take, accompanied by some open, physical demonstration of intent, and for some valuable use. The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use. . . but it can also be evidenced in other ways, for example, as in this case, by watering livestock directly from the source. . . .In this case there is no lack of proof of the asserted appropriation; to the contrary, a clearer showing could hardly be imagined. The Hunter's intent to use is made plain by the evidence. Year after year for nearly a century they have pastured their livestock in this isolated enclave, surrounded by miles of impassible desert: except for the water provided by these springs and the stream, there has been none other to keep their animals alive.

Hunter at 153.

The United States argues that a finding of requisite intent to appropriate merely by cattle drinking water from a stream in common with the rest of the public somehow creates a double-standard with respect to establishing instream stock water rights. This Court disagrees. In fact, just the opposite is true. As noted earlier, with respect to other water rights such as irrigation or mining, intent to appropriate can be sufficiently inferred from the diversion and application to beneficial use. Testimony regarding the appropriator's state of mind is not requisite to establishing intent. Consequently, because no physical diversion is necessary to appropriate a stock water right, intent to appropriate should able to be inferred alone from the application to beneficial use. In *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App.1983), the Idaho Court of Appeals held:

> We must also consider the practical realties of raising livestock in this state. We think it unlikely that a rancher would divert water from a stream running through his property for livestock watering when the same result

> is achieved without effort simply by allowing livestock to drink directly from the stream. To link recognition of an appropriation for livestock watering to the existence of a diversion could very well jeopardize stock watering rights of ranchers who have watered stock directly from streams or springs for decades. Finally, we cannot justify imposing an economic burden, by requiring a diversion, which will not advance the interests of the public by promoting more efficient use of water, or reducing waste.

Id. at 44, 674 P.2d at 1044.

With the above reasoning in mind, assume *arguendo* that a livestock owner went on the public rangeland and constructed a diversion into a stock pond for watering livestock out of the pond. Under this scenario there would be little argument concerning the livestock owner's intent to appropriate a water right. Intent could clearly be inferred. Accordingly, it would be somewhat paradoxical, as well as in direct contravention with the ruling in *Nahas* and *Hunter,* to hold that although no physical diversion is necessary to appropriate an instream water right, a diversion is nonetheless necessary to establish the requisite intent. The fact that the rangeland was open to the public in general should not be fatal to establishing the appropriation of a water right. This Court agrees that a one time use of a source by a nomadic livestock grazer raises issues regarding the user's intent to appropriate a water right and without more under such attendant circumstances, the evidence may be insufficient to show intent. However, those circumstances substantially differ from the situation where the livestock owner historically and routinely used the same water sources on adjacent public domain in connection with a livestock operation and was eventually awarded a grazing permit based on those historic uses. Moreover, the issue of the itinerant or nomadic grazer is not at issue in these subcases.

This Court notes that there is authority to the contrary from other states. In *Robinson v. Schoenfield*, 218 P.1041 (Utah 1923), the Utah Supreme Court held that in order to show intent to appropriate water on the public domain, ownership and use had to be proven by exclusive control or complete dominion over the source. *Id*. at 1043. Further,

> But for the purpose of effecting a valid appropriation of water under the statutes of this state we are decidedly of the opinion that the beneficial use contemplated in making the appropriation must be of one that inures to the

> exclusive benefit of the appropriator and subject to his complete dominion and control. *See also* sections 759 *et seq*., 2 Kinney on Irrigation.

Id. (quoting *Lake Shore Duck Club v. Lake View Duck Club et al*., 50 Utah at 82 (1918)). However, that case dealt with the interpretation of Utah's appropriation statutes and is not followed in other states. See *Steptoe Live Stock Co. v. Gulley*, 295 P.2d 772, 775 Nev. 1931) (finding intent to appropriate instream right based on historic local custom). Under Idaho's constitutional method of appropriation for appropriating stock water rights, no such requirement has been imposed. The "exclusive control requirement" is suspiciously close to a diversion requirement and ignores the "practical realities of raising livestock" which formed the basis of the holding in *Nahas.*

In this Court's opinion, the customary and routine use of adjacent or nearby public lands in connection homesteaded property to sustain a livestock operation, and the United States' acknowledgment of prior grazing use in awarding grazing preferences is distinguishable from the circumstance where on a single occasion a nomadic or itinerant stock raiser used available land and water sources in common with the public. This Court concludes that based on the attendant circumstances, customary and routine use can be sufficient to establish the requisite intent to appropriate an instream stock water right.

4. An instream stock water right appropriated on the public domain can transfer as an appurtenance to patented or base ranch property.

Once it can be established that the original appropriator established a stock water right, the next issue involves the ability to convey the right as an appurtenance to either the patented property prior to the implementation of the Taylor Grazing Act or as an appurtenance to the base ranch property after the implementation of the Taylor Grazing Act. Judge Wood previously ruled in these subcases that given the relationship between public land and patented property used in connection with a ranching operation, and the fact that no physical diversion is required for a stock water right as a matter of law, it would be possible for an instream stock water right on public land to transfer as an appurtenance to the patented or base property, even though the place of use for the right

is located on the public land. The issue is one of fact and depends on the intent of the grantor. April 25, 2000, *Memorandum Decision* at 18-22. This Court agrees.

One of the exceptions to the writing requirement for transferring a water right is the case where the title to the water right passes to the grantee with the sale of the land as an appurtenance. *See e.g. Russell v. Irish*, 20 Idaho 194, 198-99, 118 P. 510, 514-15 (1911); Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1005 (2nd Ed. 1912). Whether or not the water right passes as an appurtenance is a question of fact depending entirely on the intention of the parties. *Kinney* at §§ 1005, 1007, 1008 (2nd Ed. 1912). Intent is evidenced by the terms of the instrument conveying the land, or, when the instrument is silent or ambiguous, then by other facts and circumstances surrounding the conveyance. *Id.* Blacks' Law Dictionary defines appurtenant as:

> A thing is 'appurtenant' to something else when it stands in relation of an incident to a principal and is necessarily connected with use and enjoyment of the latter. A thing is deemed to be incidental or *appurtenant* to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of passage of light, air, or heat from or across the land of another.

BLACKS LAW DICTIONARY 103 (6th Ed. 1990). Although the term is sometimes loosely used as a synonym for proximity, it more accurately describes a legal relationship between land and the thing benefiting the land. Idaho Code § 42-1402 now makes the water right appurtenant to the land on which the right is used. However, prior to 1986, the statute only applied to irrigation rights. 1986 Idaho Session Laws ch. 86, p. 561. In *Hayes v. Buzard*, 77 P. 423 (1904), the Montana Supreme Court discussed this issue with respect to a dispute regarding whether a water right passed as an appurtenance to conveyed land. The Court stated:

> If title to the land in no wise affects the title to the water right, the fact that it has been used at this or that place, or upon particular land, will not of itself determine its character as an appurtenance. One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving that they are appurtenances, and must connect himself with the title of the prior owner.

Hayes at 425 (internal citations omitted). Therefore, it is within the realm of possibility that the place of use for a water right could be different from the land to which the right is

appurtenant. In this Court's opinion, the historical use of the public rangeland in conjunction with patented property and the subsequent regulations which not only gave preference to those practices but also established a legal relationship between the patented property and public rangeland allow such a circumstance.

As discussed previously, prior to the implementation of the Taylor Grazing Act, and prior to the concept of "base ranch property," many livestock owners nonetheless depended on the use of adjacent public rangeland in conjunction with their patented property to support a viable livestock operation. The livestock owner held no possessory interest in the rangeland itself but could still appropriate a water right. It can be reasonably concluded that both the rangeland as well as the water right benefited the livestock owners patented property. Later, after the implementation of the Taylor Grazing Act, and after the patented property could be considered "base property," the United States characterized the relationship between the base property and adjacent rangeland as one of dependence and acknowledged this dependence in awarding grazing preferences.[12]

The regulations implementing the Taylor Grazing Act then made the grazing preference expressly appurtenant to the base ranch property. *See* 43 C.F.R. § 4100.0-5 (1998) (preferences attach to the base property owned or controlled by the permittee or lessee). Idaho Code § 25-901 (2000) also provides that the grazing preference is appurtenant to the base ranch property. The United States as well as the Idaho legislature essentially acknowledged and codified a relationship between the patented or base ranch

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[12] As one commentator discusses:

> The framers of the Taylor Grazing Act were of course, perfectly aware there was far more use of the range than was desirable; therefore, if some use and users were to be eliminated, a system of priorities had to be set up. "Circular 2" set forth the preferences in detail. Applicants were placed into one of three classes of priority.
>
> Priority 1. Qualified applicants with **dependent commensurate property** and with prior use of public grazing land.
>
> Priority 2. Qualified applicants with prior use but not adequate commensurate property.
>
> Priority 3. Qualified applicants with adequate commensurate property but without prior use.

Calef, Wesley, *Private Grazing on Public Lands*, p. 60, (Arnoo Press, New York, 1979)(emphasis added). *See also* Exhibit Y (dependent property survey).

property and the use of the public rangeland. Accordingly, there is a sufficient enough connection or "nexus" between the water right and the patented or base property from which a grantor could reasonably intend to convey the water right as an appurtenance even though the place of use for the right differs from patented or base property.

This is not a situation where the water right and the property being conveyed are entirely unrelated. For example, if water from a source on the public domain were diverted onto the patented property to water livestock there would be no argument regarding an intended appurtenancy relationship between the land and the water. Furthermore, because livestock can be brought to the water instead of bringing the water to the livestock, if the deed conveying the patented property contained an easement to herd the livestock over the property of another to access water, it is relatively easy to conceptualize and conclude that the water right with a different place of use is appurtenant to the patented property. In the instant situation, there is no easement to access the water because one is not necessary. Prior to the implementation of the Taylor Grazing Act, there was an implied license to access the rangeland. After the implementation of the Taylor Grazing Act, a livestock owner had either a permit, a license, or a lease to access the public land. Nonetheless, the connection or "nexus" between the private property and the water right still exists. Again, the United States even ratified this connection in the process of awarding of the grazing preference.

Finally, assuming that a water right could be proven to historically exist, concluding that the water right could not transfer as an appurtenance to the patented or base property would result in an immediate abandonment or forfeiture of the water right five years after the property was conveyed. The successor-in-interest would then be appropriating a new right when the same water source was used to water cattle. In interpreting the instrument of conveyance the court would have to conclude that rather than the right being conveyed as an appurtenance, the grantor intended that the right be abandoned, or forfeited five years later.

5. Summary of Analysis

This Court holds that intent to appropriate an instream stock water right can be inferred from the stock merely drinking out of a particular source, and that no diversion is required. This Court holds further that such an instream stock water right could have been perfected on the public domain both prior and subsequent to the enactment of the Taylor Grazing Act. Prior to the enactment of the Taylor Grazing Act, a water right could be perfected without engaging in trespass. However, after the implementation of the Taylor Grazing Act and until 1995 (1971 in Idaho), a water right could only be perfected within the boundaries of where the permittee was authorized to graze; otherwise, the issue of trespass arises.

This Court holds further a water right appropriated on the public domain used in connection with a livestock operation can transfer as an appurtenance to patented or base ranch property. Whether an instream stock water right passed as an appurtenance to patented or base ranch property is an issue of fact and depends on the intent of the grantor. Absent express language in the instrument of conveyance, intent can be inferred from the circumstances surrounding the mesne conveyances in the chain of title.

In sum, as with any other type of water right, if the chain of title does not particularly describe a water right, a claimant must present proof that a water right was in fact appropriated by a predecessor-in-interest. In the case of instream stock water rights on the public domain, a claimant must show that the predecessor grazed livestock on the public domain and where on the public domain the predecessor grazed the livestock. Where a deed is otherwise silent, a generalized showing that a particular region was historically used by the public for grazing is insufficient to establish that a particular predecessor-in-interest grazed cattle for purposes of establishing a water right. Homestead applications and proofs, applications for grazing permits, grazing permits and other historic documents typically memorialized historic uses. Lastly, a claimant must show that the rights were conveyed as an appurtenance to the patented or base ranch property, based on the intent of the grantor. Intent can be inferred by showing the property and adjacent public land on which the rights are located was used consistent with the use of the original appropriator.

This ruling is not intended to lessen the standard of proof for establishing beneficial use rights. General averments that grazing existed historically by the public at large in a general area are insufficient to establish the existence and transfer of water rights. In proving any beneficial use right by a predecessor-in-interest, a claimant must still establish the existence and scope of the right and then connect the chain of title and appurtenant water rights from the original appropriator to the claimant.[13] There

B. Application to LU's Claims.

1. LU's Claims

LU Ranches claimed an 1872 priority date for the subject beneficial use instream stock water rights. The sources for the claims are all located on public land and within the boundaries of three grazing allotments to which LU holds grazing permits. The claims were never previously decreed. LU asserts that the rights were appropriated by its predecessors-in-interest to the three patented properties that now comprise LU's base ranch properties for its three grazing allotments. LU does not have separate instruments conveying the water rights. LU asserts the claims transferred as appurtenances to the three patented properties. Most of the deeds in LU's chain of title for the patented properties contain clauses expressly conveying all appurtenances.

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[13] For example a claimant can trace his or her chain of title back to the patent and demonstrate that the original homesteader was engaged in the livestock business. This can be demonstrated from subsequent grazing permit applications wherein the applicant was required to set forth the prior historic use of the adjacent public domain in conjunction with the homesteaded property. Any subsequent preference and permit issued would certainly be probative of the historic use, for two reasons: First, because the preference and resulting permit was issued based on the representations by the applicant; and secondly, because the preference would be "attached" to the land (or water right) by operation of law.

Subsequent conveyances of the base property together with attached grazing privileges and the continued use of the grazing privileges are probative that any water rights transferred as appurtenances to the base property. New rights could not be established outside the boundaries authorized by a permit, since after the Taylor Grazing Act, new rights would require trespass in order to appropriate. The use of water rights alleged to have existed prior to the Taylor Grazing Act, but located outside of the boundaries of a subsequently issued permit would not have been able to be maintained. Finally, subsequently acquired grazing rights transferred to base property could also carry with them the historical use and priority.

2. *Director's Recommendation*

The *Director's Recommendations* for each of the rights recommended an 1872 priority date. The Special Master found that the recommendation of the 1872 priority date was based solely on the reprint of a newspaper article merely stating cattle were grazing in common in the area. The Special Master concluded that the presumption afforded the *Director's Report* had "burst" because there was no evidence linking LU's predecessors-in-interest to the patented properties with use of adjacent rangeland and water sources as early as 1872. "Proof of water use by some unknown person, somewhere in the area is not enough." *Special Master's Report and Recommendation* at 6. Once the presumption created by the *Director's Recommendation* was determined to have "burst", LU retained the burden of persuasion on each of the elements of its claimed right.

3. The Special Master's Findings

The Special Master found that LU proved a priority date of 1876 for each of the claims. The finding was based on evidence pertaining to the earliest of the three patented homestead properties, which indicated that cattle had been grazed on the homestead property by LU's predecessor-in-interest as of June 10, 1876. *See* Claimant's *Exhibit* 6. The Special Master then applied this priority date to the water rights related to the two other patented base properties. The Special Master concluded:

> LU has, however, been able to show that their predecessors in interest were using open federal land and the water thereon from the dates that the original patent holders occupied and commenced working their homesteads. This resulted in different dates for the base property as it was pieced together. However, this special master believes that these amount to distinguishments without a difference. LU has not claimed multiple water rights for each location with a different priority for each of its predecessors who were using the water in common. They claimed only one right for each location, which their earliest predecessors used in common with each other and with others. They are entitled to the earliest of those dates proven which is June 10, 1876.

Special Master's Report and Recommendation at 6. This Court agrees that evidence of grazing by the public in general would be insufficient to establish a water right.

However, as stated earlier, the claimant must demonstrate that it was a *predecessor-in-interest* who grazed cattle on the place of use to establish the existence of the water right and then show how the claimant is connected to the title.

In this regard the Special Master erred in failing to separately analyze each patented property and associated grazing allotment individually until all properties were eventually acquired by LU for its livestock operation. The three base properties were homesteaded by different individuals and were patented on different dates. The three base properties are associated with three different grazing allotments, the South Mountain Allotment, the Cow Creek Allotment or Unit (which contains the former Trout Creek Allotment), and the Cliff's Allotment. Consistent with Judge Wood's reasoning and this Court's foregoing reasoning, findings should have been made regarding the historical circumstances surrounding the use of the three patented properties in conjunction with the adjacent rangeland that eventually formed the basis for the grazing allotments. Although evidence was presented regarding the circumstances surrounding each of the three properties, the Special Master failed to identify, weigh the evidence and make findings as to which claimed rights transferred as appurtenances to which patented properties for purposes of establishing the nexus between the property and the appurtenant rights.

The Special Master specifically concluded that evidence of grazing in common was insufficient to establish an 1872 priority date because there was insufficient proof of a nexus between the patented properties and the use of adjacent rangeland. The Special Master then recommended the 1876 priority date based on the historical use of only one of the patented properties but applied the same priority date for all of the rights without establishing a connection or nexus between the use of property and the adjacent rangeland. Thus, the recommendations made for the water rights on two of the allotments were made without any finding that the adjacent rangeland was used in connection with a livestock operation as early as 1876. Such reasoning is inconsistent with the same reasoning the Special Master used to reject the claimed 1872 priority date. Therefore, this Court has carefully reviewed the evidence presented at trial.

4. Whether the Special Master erred in holding that LU was entitled to a priority date earlier than September 23, 1976, for water rights 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, and 55-10300?

a. Water right claims 55-10288B, 55-10289B, 55-10290B, 55-10292B and 55-10293B.

Water right claims 55-10288B, 55-10289B, 55-10290B, 55-10292B, and 55-10293B all originate from sources located on rangeland within the boundaries of the South Mountain Allotment. Part of the base ranch property for the South Mountain Allotment, now owned by LU, consists of 160 acres which is referred to as the Duncan property, based on Warren C. Duncan, who was issued the original patent by the United States. Exhibit 2. p. 13. The history and circumstances surrounding the use and subsequent conveyances of the Duncan property are as follows.

South Mountain Allotment and the Duncan Homestead

In 1910, Warren C. Duncan filed a homestead entry application on 160 acres of land in Owyhee County described as the SE1/4NW1/4, NE1/4SW1/4 and S1/2SW1/4, Section 11, T9S, R5W, Exhibit BB. On September 7, 1911, Duncan filed a new application for the same homestead. Exhibit BB. Nothing in the homestead application indicates that Duncan was in the livestock business. The various proofs filed therewith describe the number of acres reclaimed for crops and the type of crops grown but do not refer to livestock raising.[14] Exhibit BB, bate stamp number (bsn) 4068- 4111. On December 9, 1914, Duncan received a patent for the homestead entry. Exhibit 2, p.13.

Between 1923, and July 6, 1928, a series of conveyances (via tax deed, redemption deed, quitclaim deed, and sheriff's deed) transferred interest to R. W. Swagler on July 6, 1928. All instruments contained standard language providing

[14] All three patented base properties involved in these subcases were homesteaded pursuant to the Homestead Act as opposed to the later Stock-Raising Homestead Act in which ground that was unsuitable for agriculture was specifically homesteaded for raising livestock. Under the original Homestead Act, lands were reclaimed for farming. This doesn't mean the lands couldn't also be used for livestock. However, without some corroborating evidence it would be untenable to automatically infer that the land must have been used in conjunction with a livestock operation.

"together with all water rights connected therewith or appertaining thereto."[15] Exhibit 2, pp.115-120. On July 14, 1928, Swagler conveyed the property to Patrick O'Keefe, together with all appurtenances. Exhibit 2, p. 323.

On June 24, 1935, Patrick O'Keefe applied for a grazing permit for 200 cattle. Exhibit Y, bsn 2003. In the application O'Keefe represented that he grazed cattle in "Deary Dist. # 8" and in portions of Section 24 T5S R6W. O'Keefe also represented that he controlled water sources for livestock purposes out of Trout Creek and Cabin Creek "running through described land," which appears to be referring to private land he owned. On August 22, 1935, O'Keefe's application was rejected because he did not own livestock. Exhibit Y, bsn 2079. The notice of rejection indicates the case was closed.

In a subsequent April 7, 1937, grazing application, O'Keefe represented that he owned and used land in conjunction with his livestock operation described as SE1/4SW1/4, Section 24, S1/2NW1/4, N1/2NE1/4, Section 25, T5S R6W. Exhibit Y, bsn 2009. The map attached to the application identifies the Duncan property as well as stream reaches located on private property in sections, 2, 11, 24 and 25, within the same township and range as the Duncan property. The application also asks to identify water or water rights used in conjunction with the livestock operation on the public domain. O'Keefe identified "Trout Creek" in T5S R6W, Sections 24 and 25. *The identified stream reaches were located on private property*. The application also states that the *base lands and water* had been used in connection with the public domain for the prior 30 years.[16] Based on those representations, in 1938, O'Keefe was issued a permit to graze 40 cattle and four horses in a portion of the South Mountain Allotment, commencing July 1, 1938. Exhibit Y, bsn 2077. The legal description for O'Keefe's portion of the South Mountain Allotment described in the permit was limited to the W1/2 Section 35, T8S R5W, the N1/2NW1/4, Section 2, T9S R5W, E1/2E1/2, SW1/4NE1/4, W1/2SE1/4, Section 11, T9S

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[15] This language would not necessarily establish the existence of a water right. However, to the extent a water right could be shown to exist, this language would operate to convey an appurtenant right.

[16] The Court acknowledges that with respect to this region, land as opposed to water, was used for establishing base land property. Nonetheless in interpreting the intent of the grantors in the prior mesne conveyances where the deeds do not particularly describe water rights, O'Keefe must not have believed that water rights were transferred.

R5W. The dependent property survey included the legal description for the entire 160 acres of the Duncan property as dependent base property. Exhibit Y, bsn 2062. In 1939, a subsequent grazing application by O'Keefe was rejected.

Based on the representations contained in the application, the earliest priority that the evidence establishes for sources located within the area described in the permit for the described portion of the South Mountain Allotment would be for the 1938 grazing season commencing on July 1, 1938, as set forth in the permit. Exhibit Y, bsn 2077. Only portions of the places of use for water rights 55-10290B and 55-10292B are located within the area covered by this permit and would acquire a July 1, 1938, priority. Under O'Keefe's 1938 permit, O'Keefe was authorized to graze cattle in the west half of Section 35, T8S R5W. The west half of section 35 T8S R5W, includes portions of water rights 55-10292B (Cabin Creek) and portions of water right 55-10290B (Unnamed Stream and Buck Creek). The *Director's Report* and the *Special Master's Recommendation* for water rights 55-10290B and 55-10292B indicate that the water rights extend well upstream from the stream's reaches within the west half of Section 35 T8S R5W, as well as extending outside of the west half of Section 35 T8S R5W. However, no evidence presented supports that O'Keefe had obtained authorization to graze cattle outside of the boundaries described in the permit. Therefore the Court must conclude that Water Rights 55-10290B and 55-10292B, with the O'Keefe priority date of July 1, 1938, are limited to within the west half of Section 35, T8S R5W. This does not preclude LU from establishing another water right with a different priority date for the stream reaches outside of the west half of Section 35, T8S R5W.

After the enactment of the Taylor Grazing Act, when the grazing was not open to the public in general, O'Keefe could have only perfected water rights in those areas where he was authorized to graze cattle; otherwise the trespass prohibition would apply. *See e.g.* Exhibit C, bsn 1177 (notification of trespass without license). Additionally, O'Keefe could not have continued to use water rights alleged to have been appropriated prior to the enactment of the Taylor Grazing Act with places of use outside of the boundaries where O'Keefe was authorized to graze.

On October 14, 1941, O'Keefe conveyed the Duncan Homestead to Galo Mendieta, Jr. Exhibit X. The deed contained an appurtenance clause. On December 13, 1966, Galo and Mary Mendieta, husband and wife, conveyed the Duncan parcel to William and Nita Lowry, husband and wife. *Id.* This deed also contained an appurtenance clause. On October 1, 1976, William and Nita Lowry conveyed the Duncan parcel to LU Ranching Company. *Id.* The deed was silent as to appurtenances, but William Lowry testified that he intended to transfer all appurtenant water rights. Tr. p. 296.

Therefore, this Court concludes that O'Keefe acquired a water right to 55-10290B and 55-10292B on July 1, 1938, within the west half of Section 35, T8S R5W. These rights passed to Galo Mendieta, then to William and Nita Lowry, and finally to LU Ranching Company. The places of use for water rights 55-10288B, 55-10289B and 55-10293B were not connected with the chain of title for the Duncan property at this juncture. These rights are discussed *infra*.

b. Water right claims 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, and 55-10300.

Water rights claims 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, and 55-10300 originate from sources located on rangeland within the boundaries of the Cow Creek Allotment. Part of the base ranch property for the Cow Creek Allotment, now owned by LU, consists of 160 acres which is referred to the as the Mills property, based on Ezra Mills, who was issued the original patent by the United States. Exhibit 2. The history and circumstances surrounding the use and subsequent conveyances of the property are as follows.

Cow Creek Allotment and Mills homestead.

In 1881, Ezra Mills filed a homestead entry application for 160 acres in Owyhee County described as S1/2NW1/4, Sec. 25 and the S1/2NE1/4, Sec. 26, T5S R6W. Exhibit CC, bsn 4048-4067. There is no evidence in the homestead application or

affidavits of proof in support of the homestead that Mills was engaged in the livestock business or engaged in an enterprise dependent on adjacent public land. Exhibit CC, bsn 4048-4067. The Special Master's finding of an 1876 priority date was based on Mills' representation in the proof of homestead that "he lived on and worked the homestead from June 10, 1876." *Special Master's Report and Recommendation* at 3. Nothing in the record suggests that Mills was in the livestock business prior to or contemporaneous with the issuance of the patent. LU admitted into evidence a historical newspaper article describing the Mills homestead but the article only refers to milk cows. Exhibit UU. In September 1887, Mills received a patent to the homestead entry. Exhibit 2, p. 220. On July 9, 1892, Mills conveyed the property to Jerey Shea. Exhibit 2, p. 222.

On April 16, 1906, Jerey Shea and Mary L. Shea, husband and wife, conveyed the Mills property to John T. Shea. Exhibit 2, p. 223. On May 8, 1909, John T. Shea and Myrtle Hastings Shea, husband and wife, conveyed the land back to Mary L. Shea. Exhibit 2, p. 224. All of the deeds, except the deed from Mills to Shea contain clauses "together with all water rights . . . used in or about or in connection with the irrigation of said land." Exhibit 2, pp. 220, 222-224. However, at this point in the chain of title there is no evidence that the property or any adjacent public rangeland was used in conjunction with a livestock operation in any manner.

Portion of Mills Homestead in Section 25.

On October 15, 1919, Mary L. Shea conveyed half of the Mills homestead - the eighty acres located in Section 25 - to Harry F. Staples. The deed conveyed "all water rights thereunto belonging or appertaining or to appertain." Exhibit 2, p. 226. On October 31, 1923, Staples conveyed the property to his wife Aileen R. Staples. Exhibit 2, p. 227. On April 12, 1928, Aileen R. Staples and Harry F. Staples, husband and wife, conveyed the land to the Estate of Mary L. Shea. Exhibit 2, p. 228.[17] On January 30, 1933, John T. Shea, the administrator of the estate of Mary L. Shea, conveyed the eighty

[17] Staples applied for a grazing permit on December 7, 1937, for customary use in the Cow Creek Unit. However, this appears to be associated with a different parcel of land and Staples did not own the Mills property at the time. Exhibit 6, bsn 2182.

acres of the Mills homestead located in Section 25 to O'Keefe. Exhibit 2, p. 229. All deeds in the chain of title contain clauses conveying all appurtenant water rights.

On April 7, 1937, when O'Keefe submitted the application for the grazing permit which included the legal description for the Duncan homestead property, the application also included the legal description for the eighty acres of the Section 25 Mills homestead property. Exhibit Y, bsn 2007-2012. O'Keefe was issued a permit to graze 20 head of cattle on the public land in the "Cow Creek Unit," commencing April 15, 1937. Exhibit Y, bsn, 2079. The permit does not provide a legal description limiting grazing to a specific area within the Cow Creek Unit. However, in a subsequent transfer it is apparent that the area was limited to the Cow Creek pasture # 05621 and # 05622 located within the Cow Creek Unit.[18] The dependent property survey for O'Keefe includes the legal description for the eighty acres of the Section 25 Mills property. Exhibit Y, bsn, 2062. Again, *in the 1937 application O'Keefe fails to identify any water rights located on the public domain and the permit was awarded based on O'Keefe's representations*. Thus, it must be concluded that any appurtenant water rights were appropriated after the issuance of the grazing permit or April 15, 1937. In ascertaining the intent of the grantor, the Court cannot infer that the grantor conveyed something he didn't claim he owned.

On August 4, 1941, O'Keefe conveyed the portion of the Mills homestead in Section 25 to Galo Mendieta. Exhibit 2 p. 91. The abstract for the deed states that all "water, water rights … thereunto appertaining or belonging" were transferred. On October 14, 1941, O'Keefe also conveyed the Duncan homestead property to Mendieta, together with all appurtenances. Exhibit 2, p. 309. On February 28, 1942, Mendieta notified the United States that he purchased the O'Keefe "holdings on Trout Creek and the grazing 800 acres also." Exhibit Y, bsn 3037. Exhibit C, bsn 1092. On January 22, 1943, Mendieta received the authorization to graze in the previously permitted portion of the South Mountain Allotment, used in conjunction with the Duncan property, and in the

[18] The permit was limited to the "Trout Creek Allotment" which is located in the Cow Creek Unit, now Cow Creek Allotment. *See* Attachment 2 to *United States' Memorandum In Support of Challenge*. This becomes apparent in the subsequent notification to the United States regarding the sale of the base property and grazing rights. The reference is specifically to the Trout Creek Allotment. See Exhibit C, bsn 1155; Exhibit Y, bsn 2037.

Trout Creek portion of the Cow Creek Allotment, used in conjunction with the eighty acres consisting of the Section 25 Mills property. Exhibit C, bsn 1178-79. Cow Creek Pastures # 05621 and # 05622 include the places of use for water rights 55-10295, 55-10296, 55-10297B and 55-10298. *See map* Exhibit 19.

Under this Court's reasoning, as determined previously, only those portions of water right claims 55-10290B and 55-10292B in the South Mountain Allotment could have transferred to Mendieta as appurtenances to the Duncan property, with the July 1, 1938, priority date. Only water right claims 55-10295, 55-10296, 55-10297B and 55-10298, within the Cow Creek Allotment could have transferred as appurtenances to the eighty acres of the Mills property in Section 25, with an April 15, 1937, priority date.

Portion of Mills Homestead in Section 26.

On November 8, 1913, Mary L. Shea (a married woman) conveyed, together with water rights, the portion of the Mills homestead in Section 26 to George Kellogg. Exhibit 2. p. 43. On May 3, 1937, Kellogg conveyed to William Flora, also together with water rights. Exhibit 2, p. 74. There is a grazing permit application in the record filed by a W. H. Flora, which references an allotment in Idaho but contains no specifics. Exhibit 8. On October 25, 1937, Flora conveyed to Carleton Fretwell. Exhibit 2, p. 88. On September 26, 1946, the land was conveyed to Olive Fretwell. Exhibit 2, p. 94. These two deeds are silent as to water rights. On January 3, 1947, the land was conveyed to Henry and Hattie Fretwell, together with all appurtenances. Exhibit X. There is no permit application or permit in the record for a grazing preference associated with the Section 26 Mills property. However, there is evidence in the record that a grazing preference was eventually issued for the Cow Creek Allotment for the Section 26 Mills property. Exhibit W, bsn 74, 78, 79. At this juncture in the chain of title there is no evidence as to when the property or adjacent public land was used in connection with any livestock operation.

On September 6, 1949, Henry and Hattie Fretwell conveyed the eighty acres to Mendieta, together with appurtenances. Exhibit 2, p. 298. The purchase also included privileges for 20 head within the Trout Creek Allotment. Exhibit C, bsn 1161. Mendieta was previously using the property and the grazing rights acquired from O'Keefe in

conjunction with his livestock operation as early as 1942. Exhibit C, bsn 1181. Mendieta applied for the grazing permits for the Trout Creek Allotment and portions of the South Mountain Allotment. *Id*. Mendieta also purchased grazing privileges from a Jack Staples in 1954 or 1955. Exhibit C, bsn 1147-48, Exhibit ZZ, bsn 3827 and 1234. All privileges acquired from Staples were also in the Trout Creek Allotment, within the Cow Creek Unit. Exhibit ZZ, bsn 1234. These privileges attached to the Section 26 property. Exhibit ZZ, bsn 3827. Thereafter Mendieta applied for a series of additional permits for uses in the South Mountain and Cow Creek Allotments, which appear to exceed the boundaries of the historic use associated with the Duncan and Mills properties. The permit applications do not provide legal descriptions. Exhibit C. William Lowry also testified that Mendieta was grazing cattle on the entire South Mountain and Cow Creek Allotments. Lowry inspected the allotments with Mendieta in conjunction with the sale to Lowry. Tr. pp. 272-733, 276-77, 281-82. Therefore, the earliest use that the evidence would support with respect to the remainder of the boundaries of the South Mountain Allotment and the Cow Creek Allotment would be the date Mendieta acquired the Section 26 property or September 6, 1949. Based on the customary dates contained in Mendieta's grazing applications, the grazing season would have commenced April 1, 1950. Prior to that time the only evidence of use by Mendieta pertains to the privileges already acquired from O'Keefe. Therefore the earliest priority date the evidence would show for the remainder of the claims in the South Mountain and Cow Creek Allotments would be April 1, 1950. This includes water right claims 55-10288B, 55-10289B, 55-10293B, 55-10299B, 55-10300 and the remaining portions of 55-10290B and 55-10292B that were not included in O'Keefe's original grazing permit.

On December 13, 1965, Mendieta conveyed the land comprising the Duncan homestead and the land comprising the full 160 acres of the Mills homestead to William and Nita Lowry. William Lowry later became the president of LU. The transfer includes all appurtenances but does not mention water rights. Exhibit 2, p. 17. The contract of sale addresses the transfer of grazing rights located in the Cow Creek Unit, with no mention of rights in the South Mountain Allotment. Exhibit Q, bsn 99; Exhibit S, bsn 125. A dependent property survey dated December 20, 1966, refers to AUM's in the

Cow and Trout Creek Allotments. The reference to the South Mountain Allotment is based on a state lease. Exhibit W, bsn 1074. *See* Map Exhibit 20. William and Nita Lowry could have only received what Mendieta owned.

On October 1, 1976, William A. and Nita Lowry, husband a wife, conveyed to LU the land comprising the Duncan and Mills properties, which were used in conjunction with the land comprising the South Mountain and Cow Creek Allotments. Exhibit 2, p. 15. The deed is silent as to water rights or appurtenances. *Id.* However, William Lowry testified that he intended to transfer all appurtenant water rights. Tr. p. 296.

Therefore, based on the foregoing this Court concludes that the Special Master erred in finding an 1876 priority date for water rights 55-10288B, 55-10289B, portions of 55-10290B and 55-10292B, 55-10293B, 55-10299B and 55-10300. Based on this Court's review the priority date the evidence supports is April 1, 1950.

c. Whether the Special Master erred in holding that LU was entitled to a priority date earlier than June 28, 1984, for water right 55-10303B and 55-13451?

Cliff's Allotment

Water rights 55-10303B and 55-13451 are based on the chain of title related to the Ewing's homestead. In 1909, George Ewings, Jr. filed a homestead application for 160 acres of public land in Owyhee County, Idaho, described as the W1/2NE1/4, SE1/4NW1/4 and the NE1/4SW1/4, Section 9, T9S, R5W. Exhibit K, bsn 4211. Ewings received a patent for the property entry on July 26, 1910. None of the historical documents in support of the homestead entry suggest that Ewings was engaged in the livestock business. The proof of entry refers only to the number of acres of cultivated crops. Exhibit K.

On July 16, 1912, Ewings conveyed the land to Clyde C. Foster, together with "all water rights, canal and ditch rights, rights of way and other appurtenances . . . ." Exhibit 2, p. 329. On January 12, 1937, Foster filed a grazing permit application for lands customarily used in the Pole Creek Unit[19] for the previous 25 years. Exhibit 5. The

[19] The "Pole Creek Unit" is located in the E1/2W1/2, T9S. R3W, which is located east of the Cliff's Allotment. See Attachment #2, *United States Memorandum in Support of Challenge*.

water rights identified in the application were all listed on private land. Exhibit 5, p. 3. Foster described the base property and water used in conjunction with the livestock operation as being located in T9S R5W, Sections 4, 8 and 9. Exhibit 5, pp. 3 and 5. This legal description borders the west boundary of the Cliff's Allotment. *See* map Exhibit 19. Although a permit is not in the record, one was apparently issued. In an analysis of grazing preferences pertaining to Don McKay, a successor-in-interest to Foster, the legal description for the allotment which attached to the Foster property was described as Sections 3, 4, 5, 10, 11, T9S R5W. None of this described property covers the places of use for water right 55-10303, within the Cliffs Allotment. *See* map, Exhibit 19; Exhibit M . However, the analysis also references additional privileges in the "Cliffs Cattle Allotment in the South Mountain Unit" without providing a legal description for these privileges. Exhibit M, bsn 3850, *see also* Exhibit UU. The analysis states that the McKay privileges were obtained from two purchases. "In 1950, Mr. McKay purchased the W.J. Shea base property and in 1955, McKay purchased the Clyde Foster base lands from Frank Maher." Exhibit M, bsn 3850. It was acknowledged that Foster had "94 AU's" in the Cliffs Allotment. Exhibit M, bsn 3851. When exactly Clyde Foster began grazing the Cliffs Allotment is not specified in the record. However, in Foster's grazing permit application he was asked to identify all sources of water owned or leased by him in connections with his livestock operation on the public domain. Exhibit 5, p. 3. *Foster did not identify any sources inside the Cliff's Allotment*. Therefore, it can only be inferred that any water rights not identified in the application were appropriated after its filing. The application was filed for the grazing season beginning July 1, 1937, and is dated January 12, 1937. Thus, the earliest priority date the evidence would support is July 1, 1937, for water right claim 55-10303B.

On April 22, 1946, the Ewings property was conveyed by Foster to Frank and Louise Maher. Exhibit 2, p. 308. The grazing privileges were transferred to Maher. Exhibit M, bsn 3851, Exhibit N, bsn 3424.[20] On January 24, 1955, Maher conveyed the

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[20] Maher also had privileges in the South Mountain Unit related to a state lease. *See* Exhibit 4. However, no water rights within the South Mountain Unit are identified in the application. The rights identified are unrelated to the rights at issue.

Ewings property to Donald and Elizabeth McKay, together with "all water, water rights, ditches and ditch rights and rights to the use of water appurtenant to the above-described real property or used in connection therewith. . . . Exhibit 2, p. 7. As indicated previously, in the analysis addressing the McKay privileges, it was acknowledged that McKay obtained the grazing preference that was attached to the Foster (Ewings) property. Exhibit M, bsn 3852. McKay also obtained grazing privileges from the W.J. Shea base property. *Id.* However, the Shea privileges appear to be related to the South Mountain not the Cliffs Allotment.[21] Exhibits 14, 15 and 16. Only applications for Shea's permits are in the record. Exhibits 12-16.

On June 28, 1984, McKay conveyed the Ewings property, and other ranch land to LU. The deed conveyed "all water rights, ditches and ditch rights used thereon or appurtenant thereto. . . ." Exhibit 2, p. 26. The grazing preference in the Cliff's Allotment attached to McKay's base property was transferred to LU, together with the July 1, 1937, priority date for claim 55-10303B. Exhibit M, bsn 3853.

The *Director's Report* states that water right 55-13451 is a spring-fed domestic water right that is used for a home and 15 horses. The claim appears to be on federally managed land within the Cliff's allotment. Since the Court has ruled that water right claim 55-10303B acquired a July 1, 1937 priority date based on Foster's use of the Cliff's allotment, the Court finds it appropriate to give the same priority date to water right 55-13451.

Lowry's and LU's acquisition of other grazing rights.

The Lowry's and/or LU acquired additional grazing privileges but the history surrounding the use of those privileges is not clear from the record. For example, the Application and Transfer of Grazing Privileges of 1966 from Jump Creek Sheep Co. to William R. Lowry describes the base property from which the grazing privileges are

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[21] There are several permit applications in the in the record for W. J. Shea, wherein Shea identified water rights that he owned or controlled. However, the rights identified are located on private land west of the South Mountain Allotment. Exhibit 15, bsn 1992, *see* Map Exhibit 19. In a 1940 permit application Shea identifies "none" in response to the question of water rights. Exhibit 12, bsn 1969.

being transferred. There is no mention of water rights and the historic use of the grazing privileges for purposes of establishing water rights cannot be determined from the record. Exhibit RR. The Application and Transfer of Grazing Privileges of 1966 from John and Don Archibal to William A. Lowry describes the base property from which the grazing privileges are being transferred. There is no mention of water rights and the historic use of the grazing privileges for purposes of establishing water rights is not in the record. Exhibit SS. As such, to the extent LU attributes acquiring water rights through these acquisitions there is no evidence from which to establish the existence of water rights.

d) Conclusion as to priority date issues.

In applying the standard of review of a special master's findings of fact, this Court holds that there was insufficient evidence in the record from which the Special Master could have found an 1876 priority date for the water rights in question. This is not a situation where different inferences could be drawn from specific evidence. The Special Master incorrectly applied Judge Wood's opinion on recommitment.[22] The Special Master allowed LU to "tack" pre-existing uses in establishing the priority date rather than trace the chain of title and attached grazing privileges from the original appropriator to LU. The Special Master simply allowed LU to attempt to show generally that the land comprising the areas in the three allotments was historically grazed by homesteaders prior to the enactment of the Taylor Grazing Act; that the land historically grazed was divided into grazing allotments and now LU owns the three original homesteads and all of the grazing rights for the three allotments. Such a process does not reflect how the public grazing lands were administered as reflected by the voluminous record and greatly oversimplifies the Court's prior ruling.

The allotments in these subcases were not historically grazed exclusively by one party. Thus, several different parties could have potentially appropriated water rights.

[22] At the time of Judge Wood's ruling the chain of title and grazing permits were not in the record. *Memorandum Decision* at 14, fn.12, so the issues were essentially being decided in the hypothetical. The decision concluded that it would be possible to demonstrate a transfer of water rights but that the claimant still needed to trace the water rights back to the original appropriator.

This is not a situation where only one preference and subsequent permit was issued for each allotment and held exclusively by one party and the only way a successor could obtain the preference was through a mesne conveyance from that party. Nor in this case were original permits issued for the entire allotments and attached to the three respective base (homestead) properties. Instead, in some circumstances, multiple preferences and permits were issued for uses within each allotment to a number of parties in common. In other circumstances parties were only authorized to graze within specifically defined pastures within an allotment.[23] There are multiple different water sources within an allotment. Accordingly, a claimant would not automatically acquire a water right of past permittees just because they all grazed cattle in the same common area. The claimant must demonstrate privity between the claimant and the former permittee(s) either through an actual transfer of grazing privileges to the claimant's base property by a particular permittee or by the claimant's acquisition of property from a permittee to which grazing privileges are attached. Because of the restrictions and multiple uses within the allotment, the claimant must also show what areas were grazed pursuant to the acquired privileges. (If a permit only authorized a predecessor, such as O'Keefe, to graze in a particular area within an allotment, a successor could only acquire water rights to those sources where the predecessor was permitted to graze).

In addition, grazing permits can lapse or be denied. *See e.g*. Exhibit Y, bsn 2079. In this Court's opinion, there is a significant difference between a circumstance where a permit lapses or is not renewed and a new permittee applies for and is issued a permit to graze in the same area; and the circumstance where privileges are specifically conveyed or transferred to a successor's base property or new base property is acquired with

[23] Take, for example, the Duncan property and the South Mountain Allotment. After 1934, Duncan's successor established a grazing preference within the South Mountain Allotment but the permit did not authorize grazing in the entire allotment. The only evidence of where grazing historically took place was in the representations made in the permit application and in the issuance of the permit. The permit authorized grazing within a subsection of the allotment. Therefore only water rights within the boundaries of the permit could be established or maintained. Additional water rights within the remaining areas of the South Mountain Allotment would either have to be transferred from another party and attach to the Duncan property or Duncan's successor could get a permit for a different area within the Allotment. In either case, the priority date would be based on the history of the acquired transfer or based on when grazing occurred in the other areas of the Allotment covered by the new permit.

attached grazing privileges. In the former, the court cannot infer intent to convey a water right to a successor because nothing was conveyed; in the latter, it is reasonable to infer that any water rights were intended to follow the grazing privileges or base property. However, the claimant must still demonstrate how and when in the chain of title the rights were acquired. Without evidence, and given the multiple factors affecting the use of grazing allotments, the Court cannot infer that the privileges for the entire three allotments were either initially attached to the respective homesteads or were properly transferred from other properties. Under the realities of how the rangeland was administered, privileges that are conveyed and transferred from one base property to another base property have a different history of use which would ultimately affect the priority date of any appurtenant water right.

The Court agrees that water rights on adjacent public land can transfer as an appurtenance to private property or in conjunction with the transfer of grazing privileges; however, claimants still need to show what particular right was transferred and when it was transferred or made appurtenant. Absent express language in the instruments of conveyance, this can only be determined by examining the historical uses surrounding the chain of title. In particular, the grazing applications, transfer applications and permits all memorialized the past uses of land and water and authorized the boundaries for future uses. If the claimant of a beneficial use right is not the original appropriator, the claimant needs to prove when the right was appropriated and how it was acquired. For the Court to hold otherwise would result in the application of a double standard.[24]

C. Issues pertaining to certain recommended legal descriptions for various rights.

The following issues involve challenges to the *Special Master's Recommendations* regarding legal descriptions for elements to certain rights. For some of

[24] In these subcases, the Court finds it perplexing that, given the historical importance of water with respect to controlling rangeland, that in the approximately one hundred years involving numerous transfers of base property and grazing privileges there is no mention in any of the documents of a pre-existing water right located on public domain within the three allotments.

the issues raised, the evidence presented was conflicting as to whether a particular stream reach was accurately depicted by a map. The Special Master also did not view the subject premises in conjunction with presentation of evidence on these issues. On the motion to alter or amend, the Special Master ordered IDWR to file an I.R.E. 706 report and the parties to file briefing in response. The process did not resolve all of the conflicts. Therefore, to the extent discrepancies exist as to these issues the Court must defer to the Special Master's findings.

Other issues raised concern the Special Master recommending legal descriptions for either places of use or points of diversion that were not originally claimed by LU or recommended in the *Director's Report* but were raised by LU in its objection. **Each is addressed below.**

1. The Special Master did not err by not deleting T07S, R06W, S35, SENE as a place of use and in establishing beginning and ending points of diversion for water right claim 55-10288B.

The United States challenges the *Special Master's Recommendation* that the description T7S R6W, Section 35, SENE should be retained as a Place of Use because it is not located within the South Mountain Allotment. *See* map, exhibit 19. Conflicting evidence was introduced at trial as to whether a portion of the quarter-quarter section was within the South Mountain Allotment. The Special Master included language in the recommendation for the above water right limiting the use of the stream in the quarter-quarter section to within the South Mountain Allotment. Although the evidence is conflicting, the *Special Master's Recommendation* is entitled to deference. The clarifying language in the recommendation is sufficient to assure that no place of use for the water right is located outside of the South Mountain Allotment.

2. The Special Master did not err by not deleting "Unnamed Streams" tributary to "Juniper Creek" as a source for water right claim 55-10289B.

The United States challenges the *Special Master's Recommendation* that the source described as "Unnamed Streams" tributary to "Juniper Creek" should not be deleted as a source of water. This description was included on the *Director's Report*, as well as the *Special Master's Recommendation*. The United States did not present sufficient evidence to show that the Special Master's findings were clearly erroneous; therefore, the *Special Master's Recommendation* is entitled to deference.

3. The Special Master did not err by not amending the points of diversion (instream) for water right claim 55-10296.

The United States Challenges the *Special Master's Recommendation*, stating that to complete the description of the Point of Diversion, two PODs should be added to the *Recommendation*: T5S R6W, Section 14, SWSWSE, and Section 23, NENENW. LU Challenges the *Special Master's Recommendation*, stating that the quarter- quarter section defined as T5S R6W, Section 23, NWNE should be included as a place of use. The evidence at trial, including the *Director's Reports* and the Exhibit 21 map, show that the Place of Use that LU wishes to include in the partial decree lies between the instream beginning point and the instream ending point for the point of diversion. Since the above right is an instream stock watering claim, it is appropriate to add the place of use requested by LU pursuant to I.R.C.P 60(a). It would make no sense to decree the right otherwise. The Court does not find any reason to include the points of diversion argued by the United States.

4. Whether the Special Master erred by not deleting the source "Unnamed Stream" tributary to "Jordan Creek" and by not amending the points of diversion for water right claim 55-10297B.

Both the United States and LU raised challenges to legal descriptions contained in this water right.

The United States challenges the *Special Master's Recommendation*, stating that the *Recommendation* should be amended to delete the source designated as "Unnamed Stream" tributary to "Jordan Creek," because the source does not exist. The *Director's*

Report included this description, which was adopted by the Special Master. The United States does not present enough evidence to show that the Special Master's findings were clearly erroneous; therefore, the *Special Master's Recommendation* is entitled to deference in this regard.

The United States also challenges the Special Master's inclusion of T5S R6W, Section 13, SWSW as a point of diversion in the *Recommendation*, because it was not claimed as a place of use by LU. LU challenges the *Special Master's Report*, stating that the SWSW quarter quarter description should have been included as a place of use. The quarter quarter was listed as a point of diversion for the water right in the *Director's Report*, so it does not appear to this Court that there are any notice problems raised by LU's failure to claim the quarter quarter as a place of use, particularly since this right is an instream stock water right. Exhibit 22 also shows that the SWSW quarter quarter section is a beginning point of diversion for this right. Because the point of diversion was included in the *Director's Report* as an instream beginning point of diversion for this water right, it is appropriate to include it as a place of use as well, pursuant to I.R.C.P. 60(a).

The United States also argues that the points of diversion designated as T5S R6W, Section 14, NENE and SENE were not claimed as places of use in 55-10297B, but were claimed as POUs in 55-10296. However, the above quarter quarter sections were included in the *Director's Report* as points of diversion. Therefore, again, because of the nature of the water right as an instream flow stock water right, there is no reason why the court should disallow the point of diversions simply because corresponding places of use were not reported. (It does not appear that LU has made any motion for the quarter quarters to be included as places of use at this time.)

The United States further argues that the places of use designated as T5S R6W, Section 14, NESE and T5S R6W, Section 23, SWNE should be deleted from the places of use because there is no water source. The United States refers to the map, Exhibit 21, to support this challenge. The places of use in question were recommended by IDWR, and the recommendations were adopted by the Special Master. The United States has not

shown clear error in this matter, and the *Special Master's Reommendation* is due deference.

5. The Special Master did not err by not deleting T9S R5W, S33, NWNW as a place of use; and by not amending the source description to read "Unnamed Stream" tributary to "Corral Creek" in water right 55-10303B.

The United State Challenges the *Master's Recommendation*, stating the *Recommendation* should be amended so the source reads "Unnamed Stream" tributary to Corral Creek, rather than Unnamed Streams. The *Directors Report* used the language unnamed streams, and while the map Exhibit 23 shows only one beginning point and ending point for an unnamed stream, the evidence is conflicting in this matter, therefore the *Special Master's Recommendation* is due deference in this regard.

The United States further argues that the *Special Master's Recommendation* should be amended to delete T9S R5W, Section 33 NWNW as a place of use. The United States argues that the claimed source does not run through the described tract. The map prepared by the United States shows that the water source appears to run between the NWNW and the SWNW. The Special Master drew an inference that the NWNW should be included, and that inference is also due deference.

VI.
CONCLUSION

For the reason set forth above, this Court holds that the Special Master erred as a matter of law in failing to properly trace the chain of title in the mesne conveyances in accordance with Judge Wood's prior ruling for purposes of establishing priority dates for the above-captioned claims. Following an review of the evidence presented, this Court also concludes that the Special Master erred as a matter of fact by recommending an 1876 priority date for each of the claims based on the lack of evidence in the record necessary to establish such a priority.

VII.
ORDER OF PARTIAL DECREES

Therefore, IT IS ORDERED that the above-captioned water right claims are hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***. Consistent with this Court's ruling, water right 55-10292B was split into 55-10292B and 55-13846, and water right 55-10290B was split into 55-10290B and 55-13844.

VIII.
ORDER DISALLOWING WATER RIGHT CLAIM 55-10301B

In the *Special Master's Order on Motion to Alter or Amend* dated April 15, 2004**,** water right claim 55-10301B was recommended disallowed. The Special Master concluded that the parties were in agreement that the right should be recommended disallowed. Although the claim number appears in the caption of LU's challenge, the claim was never substantively addressed by either party. Therefore the Court concludes that LU did not intend to Challenge the *Special Master's Recommendation* with respect to 55-10301B.

THEREFORE IT IS ORDERED AND ADJUDGED that water right claim 55-10301B is hereby **disallowed with prejudice** and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

RULE 54(b) CERTIFICATE

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

IT IS SO ORDERED

Dated January 3, 2005

___/s/John Melanson_____

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication