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 55-10288 A & B, 55-10289 A & B, 55-10290 A & B, 55-10292 A & B, 55-10293 A & B, 55-10295, 55-10296, 55-10297 A & B, 55-10298, 55-10299 A & B, 55-10300, 55-10301 A & B, 55-10303 A & B, 55-13451.
Case No. 39576	)	
	)	**MEMORANDUM DECISION AND ORDER ON CHALLENGE**
	)	**ORDER DENYING MOTION TO FILE AMICUS CURIAE BRIEF**
	)	**ORDER OF RECOMMITMENT TO SPECIAL MASTER CUSHMAN**

I.

APPEARANCES

Michael J. Van Zandt, Craig A. Pridgen, and Anthony L. Francois, McQuaid, Metzler, Bedford & Van Zandt, LLP, San Francisco, California, appearing *pro hac vice* for Challenger LU Ranching Company.

Richard L. Harris, Caldwell, Idaho, as local counsel under Idaho Bar Commission Rule 222, for Challenger LU Ranching Company.

Paul F. Holleman, Attorney, U.S. Department of Justice, Environment and Natural Resources Division, Washington, D.C., for Respondent United States.

Larry A. Brown, Special Attorney, U.S. Department of Justice, Environment and Natural Resources Division, Boise, Idaho, for Respondent United States.

Norman M. Semanko, Rosholt, Robertson & Tucker, Twin Falls, Idaho, seeking Amicus Curiae status for the Federal Stock Water Group.

II.

LU RANCHING COMPANY'S CHALLENGE

This is a challenge by LU Ranching Company ("LU") to Special Master Haemmerle's ***Order Denying Motion to Alter or Amend*** (July 27, 1999) in subcases 55-10288 A & B, 55-10289 A & B, 55-10290 A & B, 55-10292 A & B, 55-10293 A & B, 55-10295, 55-10296, 55-10297 A & B, 55-10298, 55-10299 A & B, 55-10300, 55-10301 A & B, 55-10303 A & B, and 55-13451.[1]

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

On November 24, 1999, a motion to file an amicus curiae brief was filed by a group styled the "Federal Stock Water Group." On January 20, 2000, the United States filed a memorandum in opposition to this motion. A hearing on this motion was held on March 2, 2000. Therefore, the matter is deemed fully submitted for decision on the next business day, or March 3, 2000. All other briefing was complete prior to January 22, 2000.

[1] The water right claims which have an "A" or "B" designation have been separated, meaning that, although each of the A and B claims were originally filed as one claim, the portion of the original claim with a place of use on the federal public domain needed to be separated out and designated a separate claim number. The place of use for the newly designated claim numbers with an "A" suffix is on state and/or private land. The place of use for the newly designated claim numbers with a "B" suffix is on federal public land. As noted by the United States in its brief, it is unclear why LU is challenging the "A" claims, because the Special Master recommended the priority dates claimed by LU. Furthermore, this Court can find no issues raised or argued by LU with respect to the "A" claims. Therefore, LU's challenge to the "A" claims is denied, and the remainder of this opinion is addressed solely to LU's water right claims on federal public ground, or the so called "B" claims. *See Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 712, 979 P.2d 107 (1999)(issues raised but not supported with argument or authority need not be addressed)(citing

IV.

BRIEF PROCEDURAL BACKGROUND

1. On March 26 and April 3, 1992, LU filed several claims for stockwater rights, portions of which are for places of use located on federal public land (i.e., grazing allotments). LU claimed a priority date of May 20, 1872 for each of these rights.

2. On July 31, 1997, the Director of IDWR filed a Director's Report, recommending these water rights with priority dates as claimed.

3. On October 15, 1998, the United States filed its *Motion for Partial Summary Judgment and Memorandum in Support*, asserting that LU is not entitled to the early priority dates it claims.

4. On October 15, 1998, LU filed a *Motion for Partial Summary Judgment*, asserting that: 1) LU is entitled to the priority dates established by its predecessors-in-interest; and 2) the United States has not perfected its own stockwater rights. This Court cannot find in the record where the Special Master issued a ruling on LU's motion. However, with respect to the water right claims filed by LU, the issues presented in LU's motion for summary judgment are identical to those raised in the United States' motion for summary judgment. As to LU's assertions regarding stockwater claims filed by the United States, it is unclear whether the United States has filed claims for the same water that is claimed by LU, because LU has not identified which claims filed by the United States it is contesting. *See infra* Issue No. 3 of this decision.

5. On January 8, 1999, Special Master Haemmerle issued an *Order Granting United States' Motion for Summary Judgment* ("*S.M. Order*"), holding that the priority date of the instream stockwater rights claimed by LU (and with a place of use on federal public land) is September 23, 1976. This is the date that LU Ranching Co., an Idaho

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State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)(citing I.A.R. 35).

corporation, was created. *S.M. Order* at 3. The Special Master's holding was in two parts. The first part was based on a prior decision of this Court involving the Joyce Livestock Company. *See Order on Motion to Alter or Amend; Order on Motion for Permissive Appeal*, Subcases 57-04028B et. al. (June 26, 1997), *affirmed* by the District Court (Judge Hurlbutt) in *Order Denying Challenges and Adopting Special Master's Reports and Recommendations* (September 30, 1998)("Joyce Livestock decision").[2] Pursuant to the Joyce Livestock decision, the Special Master held that: 1) the stockwater rights at issue are appurtenant to the federal public lands that make up LU's grazing allotments and are not appurtenant to LU's base property; 2) because there are no written conveyances which specifically describe the water rights, any stockwater rights perfected by LU's predecessors-in-interest have not been conveyed to LU; and 3) therefore, the earliest priority date that LU can claim is September 23, 1976.

The second part of the Special Master's holding was that as applied to these subcases, newly enacted Idaho Code § 42-113(2) works to retroactively change the priority dates of LU's stockwater rights on federal public land, which in turn necessarily impacts other water rights that, but for the statute, would be senior rights. The Special Master held that the retroactive application of Idaho Code § 42-113(2) is in violation of Article 11, Section 12, of the Idaho Constitution, which prohibits the retroactive application of laws that diminish other vested rights.

6. On April 23, 1999, the Special Master issued Reports and Recommendations, recommending that the subject stockwater rights be decreed with a priority date of September 23, 1976.

7. On May 24, 1999, LU filed a *Motion to Alter or Amend* the Special Master's Recommendation.

[2] In his *Order Denying Challenges and Adopting Special Master's Reports and Recommendations* (September 30, 1998), Judge Hurlbutt did not specifically address the Special Master's conclusions regarding Joyce's chain of title to its claimed water rights. Rather, Judge Hurlbutt's decision states that it adopts and incorporates the *Special Master's Reports and Recommendations* (November 28, 1997), which in turn incorporates the Special Master's June 26, 1997 Order.

8. On July 8, 1999, a hearing was held on LU's *Motion to Alter or Amend*, at which the Special Master denied the motion from the bench. This denial was memorialized in an *Order Denying Motion to Alter or Amend* dated July 27, 1999.

9. On August 10, 1999, LU filed its *Notice of Challenge*.

10. On October 26, 1999 the Court issued an *Order for Oral Argument on Challenge and Request for Additional Information and/or Clarification*, in which the Court posed several additional questions to the parties. The parties subsequently stipulated that there would be no oral argument, and that the Court's questions would be answered through additional briefing.

11. On November 29, 1999, attorney Norman Semanko, representing a collection of interested parties referred to as the "Federal Stock Water Group," filed a *Motion to File Amicus Curiae Brief on Additional Questions Raised on Challenge*, and lodged an accompanying brief.

12. On January 14, 2000, the United States and LU filed supplemental briefs in response to the Court's order for additional information/clarification.

13. On January 20, 2000, the United States filed a *Memorandum in Opposition to Motion to File Amicus Curiae Brief on Additional Questions Raised on Challenge*.

14. On January 21, 2000, LU filed a reply brief in response to the United States' supplemental brief.

V.

ORDER DENYING MOTION TO FILE AMICUS CURIAE BRIEF

On November 29, 1999, Norman Semanko, representing a collection of interested parties referred to as the "Federal Stock Water Group," filed a *Motion to File Amicus Curiae Brief on Additional Questions Raised on Challenge*, and lodged an accompanying brief. On January 20, 2000, the United States filed a *Memorandum in Opposition to Motion to File Amicus Curiae Brief on Additional Questions Raised on Challenge*. On March 1, 2000, the Federal Stock Water Group filed a reply to the United States' memorandum. The Federal Stock Water Group's motion was heard in open court on March 2, 2000.

Both the Idaho Rules of Civil Procedure and *AO1* are silent on amicus curiae briefs. Idaho Appellate Rule 8 on amicus curiae is of little guidance to the Court. Therefore, this Court looks to other sources of law as authority. The decision on whether to allow participation, and the extent thereof, of an amicus curiae is discretionary with the trial court. 4 Am. Jur. 2d *Amicus Curiae* § 2. The role of an amicus curiae is to provide the court with information with respect to law or facts in a pending matter that might otherwise escape consideration. *Id*. at § 6. Among other things, a court may evaluate whether the proffered information is timely, useful, or otherwise necessary to the administration of justice. Additionally, a court should look to whether the parties to the lawsuit will adequately present all relevant legal arguments. *Id*. § 8.

Applying these standards to the case at bar, this court finds that the parties to these subcases have adequately responded to the legal questions posed by the Court in its request for additional information/clarification (although at the time this motion was filed in November of 1999 this was not the case). Therefore, the Federal Stock Water Group's motion is **denied**.

VI.

ISSUES PRESENTED

Broadly phrased, the following three issues have been raised in these subcases.

ISSUE No. 1. Did the subject state-law based water rights, used for instream stockwatering on federal grazing allotments, transfer via the instruments (deeds) conveying the privately owned base property to which the grazing preference is attached?

ISSUE No. 2. Is Idaho Code § 42-113(2) unconstitutionally retroactive as applied in these subcases?

ISSUE No. 3. Did the Special Master err in refusing to consider LU's motion for summary judgment regarding the United States' claims for stockwater rights on the grazing allotments?

VII.
STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56 (c); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the nonmoving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of nonmoving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

Justice McDevitt in *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 847 P.2d 1156 (1993), stated the standard of review for summary judgment this way:

> Rule 56(c) of the Idaho rules of Civil Procedure states that summary judgment is to be , 'rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.'
>
> A strong line of cases weaves a tight web of authority that strictly defines and preserves the standards of summary judgment. The reviewing court must liberally construe disputed facts in favor of the non-moving party and make all reasonable inferences in favor of the party resisting the motion. If the record contains any conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. Nevertheless, when a party moves for summary judgement, the opposing party's case must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact.
>
> The burden of proving the absence of a material fact rests at all times upon the moving party. This burden is onerous because even "circumstantial" evidence can create a genuine issue of material fact. However, the Court will consider only that material contained in affidavits or depositions which is based upon personal knowledge and which would be admissible at trial. Summary judgment is properly issued when the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's cases.

Id. at 297-98, 847 P.2d at 1158-59 (citations omitted).

In cases where opposing parties both file motions for summary judgment relying on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact precluding the court from entering summary judgment. *Eastern Idaho Agricultural Credit Assoc. v. Neibaur*, 130 Idaho 623, 626, 944 P.2d 1386, 1389 (1997)(citing *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996)). If however, the parties file cross motions for summary judgment based on different theories, the parties are not considered to have stipulated that there is no genuine issue of material fact. *Id*. (citing *Wells v. Williamson*, 118 Idaho at 40, 794 P.2d at 629).

VIII.

DEFINITIONS

Base property means: "(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 lands are used for livestock grazing." 43 C.F.R. § 4100.0-5 (1998).[3]

Grazing allotment means: "an area of land designated and managed for grazing of livestock." *Id.*

Grazing lease means: "a document authorizing the use of the public lands outside an established grazing district."[4] *Id.*

Grazing permit means: "a document authorizing use of the public lands within an established grazing district."[5] *Id.*

Grazing preference means: "a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee." *Id.*

Place of use means: The element of a water right which describes the legal subdivision(s) of the land where the where the water is actually used or applied. *See* I.C. § 42-1411(2)(h).

IX.

DISCUSSION

This challenge involves a dispute about the priority date of instream stockwater rights claimed by LU for use on its federal grazing allotments. LU claimed, and the Director of IDWR reported, a priority date of May 20, 1872, for each of the subject water

[3] Unless otherwise indicated, all references are to the 1998 version of the Code of Federal Regulations (C.F.R.).

[4] Grazing district is defined as "the specific area within which the public lands are administered under section 3 of the Act. Public lands outside grazing district boundaries are administered under section 15 of the Act." 42 C.F.R. § 4100.0-5. For purposes of this decision, reference to grazing permits or permitees includes leases and lessees as well.

[5] See fn 3.

rights. The United States has objected to the 1872 priority date for these water rights, asserting that there are no writings which purport to convey any water rights that may have been perfected by the previous permitees or lessees of the subject grazing allotments, and therefore any such rights have not been conveyed to LU.

LU has offered two legal theories to support its claim for the 1872 priority dates.[6] **LU's first theory:** LU's first theory is that the subject water rights were originally perfected in 1872 by its predecessors-in-interest and since then have been passed to LU through the mesne conveyances of its private base ranch property. Specifically, LU asserts that the subject water rights have been conveyed as appurtenances to LU's base property.[7]

The Special Master, in his order on summary judgment, rejected this first theory and held that the priority date for the subject stockwater rights is September 23, 1976,[8] the date the corporate entity known as LU Ranching Co. came into existence. In other words, effectively holding that LU first began appropriating water on this date by means of beneficial use of water for livestock, creating new water rights, as opposed to having acquired already existing water rights. It must be understood from the outset that the legal bases for the Special Master's holding in the present case are derived from his prior holding in the Joyce Livestock decision.[9] The Special Master's holding rests on a finding

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[6] Because some litigants assert that the Special Master's prior decisions (affirmed by Judge Hurlbutt) became law of the case at the time, it is unknown whether LU would have advanced other legal theories to support its claims or whether it felt constrained by the Joyce Decision. *See infra* fn. 9.

[7] LU's theory is that the instruments conveying the base property (and the stockwater rights appurtenant thereto) satisfy the writing requirement of the Idaho statute of frauds.

[8] The Special Master did not address whether, in the years between 1971 and 1984, an instream stockwater right could be perfected without following the requirements of the permit system. Specifically, in 1971 the legislature amended Idaho Code § 42-201, making all appropriations thereafter subject to the permit system. Then, in 1984, the legislature adopted Idaho Code § 42-113, which allows for the appropriation of instream water for livestock without first getting a permit.

[9] This Judge did not preside over the Joyce Livestock subcase and therefore it is not clear whether the facts in Joyce Livestock are analogous to the facts surrounding these subcases. One distinguishing characteristic is that several facts were deemed admitted in the Joyce Livestock subcase as a result of the failure to respond to requests for admissions. The facts deemed admitted may have been dispositive of any factual issues raised in that subcase. The United States asserts in its *Response* filed on January 14, 2000, that the Joyce Decision constitutes "law of the case." As a result of the factual distinctions this Court is not making the determination that it is altering the law of the case. However, to the extent that this decision results in modifying the Joyce Decision, this Court nonetheless is vested with the proper authority. *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994)(court is vested with authority to reconsider its

of fact that "LU does not have any deed or other type of conveying document that specifically describes the instream stockwater rights it has claimed, for the places of use located on the public domain." *S.M. Order* at 3. The holding also rests on the following conclusions of law:

1) A water right in Idaho is a real property interest. *S.M. Order* at 3, (citing Idaho Const. Art. XV, § 3; I.C. § 55-101).

2) The transfer or conveyance of a water right can only occur if the conveyance is in writing. *S.M. Order* at 3, (citing I.C. § 9-503; *Olsen v. Idaho Dept. of Water Resources*, 105 Idaho 98, 101, 666 P.2d 188 (1983); *Gard v. Thompson*, 21 Idaho 484, 496, 123 P. 497 (1912)).

3) Water rights which are appurtenant to land pass with a conveyance of such land without being specifically described (unless specifically excluded). Joyce Livestock Decision at 9, (citing I.C. § 42-220; *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984)).

4) In Idaho, water rights are appurtenant to the land upon which the water is used. *Order on Motion to Alter or Amend; Order on Summary Judgement; and Order on Motion to Withdraw Admissions*, Subcases 57-11124 *et. al*. (March 25, 1997)(citing I.C. § 42-220; *Crow v. Carlson*, *supra*).

5) Water rights with a place of use on federal grazing allotments are appurtenant to the land which makes up the federal grazing allotment. Joyce Livestock Decision at 9.[10]

6) For a proper conveyance of a water right which is appurtenant to federal land and owned by a private party, the water rights must be described separately and specifically. Joyce Livestock Decision at 9 (citing *Olsen v. Dept. of Water Resources* at 101).

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legal rulings prior to entry of final judgment). In the context of the SRBA, to the extent the SRBA is treated as one case, final judgment has not been entered. To the extent the SRBA is treated as distinct pieces of litigation, a ruling in one subcase would not be the "same litigation" for purposes of applying the "law of the case" doctrine. Therefore, this Court is not bound by the Joyce Livestock Decision.

[10] It is unclear to this Court whether the Special Master's conclusion in this regard is one of fact, law, or both.

Apparently, based on the conclusions stated above, the Special Master reasoned that there is an inseparable appurtenancy relationship, created by operation of law, between the public domain land that makes up the federal grazing allotments and the subject water rights for instream livestock watering, therefore such water rights cannot have an appurtenancy relationship with the privately owned base property, and hence cannot be conveyed as appurtenances to the privately owned base property. Proceeding in logic, the Special Master next reasoned that a separate writing is unequivocally needed to convey the water rights in compliance with the Idaho statute of frauds (Idaho Code § 9-503).

LU's second theory: LU's second theory to support its claim for the 1872 priority date relies on the newly enacted Idaho Code § 42-113(2), which became effective on March 25, 1998. Idaho Code § 42-113(2) states in its entirety that:

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

I.C. § 42-113(2)(Supp. 1999). LU contends that under this statute, the priority date for its water rights used on its grazing allotments is the date of the patent of the base property to which the allotment is attached. *Brief for Challenger* at 2. Specifically, LU contends that the patent date for the private land associated with the South Mountain allotment is 1914; the patent date for the private land associated with the Cow Creek allotment is 1887; and the patent date for the private land associated with the Cliffs allotment is 1910.[11] *Id*. The

[11] The Special Master found that "LU's predecessors-in-interest on the federal allotments are as follows: Warren C. Duncan, December 9, 1941 [sic (1914)], for water rights 55-10288, 55-10290, 55-10292, and 55-10293: Ezra Mills, September 7, 1887, for water rights 55-10295, 55-10296, 55-10297, 55-10298, 55-10299, 55-10300, and 55-10301; and George Ewings, July 26, 1910, for water rights 55-10303 and 55-13451." *S.M. Order* at 3. (This Court does not know why the Special Master left water right no. 55-10289 off of this list, perhaps it was just a clerical mistake.) In the order for additional information/clarification, this Court asked "[w]here in the record are the facts supporting the Special Master's finding . . . concerning LU Ranching's predecessor's in interest?" The United States responded that this finding appears to be based on statements found in the Affidavit of Tim Lowry regarding LU's chain of title to its base ranch. However, the chain of title documents referenced are not in the record. Additionally, the Court asked about the meaning of the phrase "predecessors-in-interest on the federal allotments." It appears to be a reference

Special Master, in the *S.M.Order*, held that as applied to these subcases, Idaho Code § 42-113(2) works to retroactively change the priority dates of LU's stockwater rights on federal public land, which in turn necessarily impacts other water rights that, but for the statute, would be senior rights. The Special Master held that the retroactive application of Idaho Code § 42-113(2) is in violation of Article 11, Section 12, of the Idaho Constitution, which prohibits the retroactive application of laws that diminish other vested rights.

The Special Master then issued *Special Master's Reports* (April 23, 1999) which recommended the 1976 priority dates. LU then filed a *Motion to Alter or Amend Special Master's Recommendation* on May 24, 1999. The Special Master upheld his conclusions in his July 27, 1999 *Order Denying Motion to Alter or Amend*. LU reasserts in its challenge that the subject water rights have been conveyed to LU as appurtenances to its base property, and alternatively, that LU is entitled to the early priority dates by operation of Idaho Code § 42-113(2).

ISSUE NO. 1: Did the subject water rights, used for instream stockwatering on federal grazing allotments, transfer via the instruments (deeds) conveying the privately owned base property to which the grazing preference is attached?

In the context of a summary judgment proceeding, in the absence of an express writing, the resolution of this issue necessarily involves genuine issues of material fact and is therefore inappropriate for determination on summary judgment. As explained below, this Court disagrees with the Special Master's conclusion that the privately owned stockwater rights are as a matter of law necessarily appurtenant to the federal public land which makes up the federal grazing allotments. Rather, the question of whether any water rights, perfected by LU's predecessors-in-interest, have become appurtenant to any particular property interest which has been conveyed to LU, is an issue of fact to be

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to LU's predecessors-in-interest to the base property, and not necessarily a reference to a history of the permitees or lessees of the grazing allotments.

ascertained from the instruments of conveyance[12] and the circumstances surrounding each conveyance. There are several reasons which support this Court's conclusion.

A.
Genuine issues of material fact exist because there is no unity of title between the subject water rights perfected on the federal grazing allotment and the place of use of the water right.

In this Court's view, it is error to create a "hard and fast rule" that water rights perfected on federal public land are as a matter of law *per se* appurtenant to the federal public land, particularly under the facts of these subcases.[13] 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 right is used.[14] *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 the water right 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 appropriator);

[12] It should be noted that the instruments of conveyance in the chain of title for LU's base property are not in the record.
[13] When speaking of water rights, the concept of "appurtenance" is distinct from the concept of "place of use." The consequence of deeming a water right as appurtenant to land is to create a legal relationship whereby the water right automatically passes with a conveyance of that land, unless specifically excluded. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). The consequence of defining a particular tract of land as the "place of use" for a water right is to create a legal relationship whereby the use of the water cannot be relocated (transferred) to other land without following the procedures mandated by Idaho Code § 42-222. Place of use is a statutory element of a water right; appurtenancy is not. See I.C. § 42-1411(2)(h).
[14] Not all jurisdictions follow this general rule. *See e.g, Dept. of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985)(water rights perfected by lessees of state trust lands remain property of the state); *Tattersfield v. Putnam*, 41 P.2d 228 (Ariz. 1935)(temporary possessor of land cannot make an appropriation of water).

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).[15] In the case of a federal grazing allotment, the permittee can perfect a water right under state law in conjunction with the allotment but the permittee does not own the land.[16] The Taylor Grazing Act provides 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).

In situations where unity of title does not exist between the water right and the land on which the water right is used it is paradoxical or nonsensical to characterize the water right as being "appurtenant" to the land on which the water right is being used. The legal affect of characterizing a water right appurtenant to a parcel of land is to create a legal relationship whereby the water right automatically passes with the conveyance of land unless otherwise specifically excluded. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). However, in the absence of unity of title between the water right and the land on which the water right is used, as a matter of law the water right cannot automatically pass as an appurtenance to the land via the instrument conveying the land. The landowner cannot convey something he/she does not own. Kinney's treatise states:

> The doctrine is well settled in the States of the arid region, that a water right used in connection with a certain tract of land for the irrigation thereof, where necessary to the beneficial enjoyment of the land, together with the ditch, canal or other works necessary to conduct the water to the place of use, become appurtenances to the land, **provided that they are all owned by the same parties. But they must be the property of the owner of the land to which it is claimed they are appurtenant, and not the property of another.**

Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1011 (2nd Ed. 1912)(emphasis added). Also:

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[15] Also, implicit in the federal regulations is the recognition that private ownership of a water right can exist where the water right is used in conjunction with federal land. As indicated in section VIII of this decision, a water right can qualify as "base property." 43 C.F.R. § 4100.0-5 (1998).

[16] This decision does not address the question of how this general rule may be affected by 43 C.F.R. § 4120.3-9, which 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, 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 such water right shall be acquired, perfected, maintained, and administered in the name of the United States."

> [W]here one in possession of a tract of land, simply under a contract from the owner, appropriates and uses water upon the land, such a water right does not become appurtenant to such lands, without a conveyance in writing to the owner of the lands, there being no unity of title.

Kinney at § 1020.

The legal result of having non-unity of title between the water right and its place of use is at best ambiguous as to whether the water right is appurtenant to the land. Arguably, non-unity of title effectuates a severance of any alleged appurtenancy relationship. At a minimum, an examination of the intent of the grantor is required to determine if the water right was intended to be transferred and if so then by what method the water right was transferrred. The circumstances surrounding the mesne conveyances of the water right and the land on which the water right is claimed to be appurtenant become relevant in arriving at the grantor's intent. As such, genuine issues of material fact exist and summary judgment was not appropriate.

B.
Application of Idaho's statutory provisions do not make LU's instream flow stockwater rights appurtenant to the federal land.

Idaho's statutory provisions which operate to establish an appurtenancy relationship between a water right and its place of use do not apply to the facts of this case. Idaho Code § 42-220 provides that water rights confirmed by decree of court or Idaho's permit and licensing provisions "shall become appurtenant to, and shall pass with the conveyance of, the land for which the right of use is granted." I.C. § 42-220 (1996). Idaho Code § 42-1402 provides "[t]he right confirmed by such decree or allotment shall be appurtenant to and shall pass with a conveyance of such land, and such decree shall describe the land to which such water shall become appurtenant." I.C.§ 42-1402 (1996).[17] LU's water right claims were never previously confirmed by decree or based on licensed water rights, therefore neither statute has application to the water rights involved in these subcases. Idaho Code § 42-101 provides that "such [water] right shall become

[17] Prior to being amended in 1986, the provision relating to water rights becoming appurtenant to land in

the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied." I.C. § 42-101 (1996). In the case of an instream flow stockwater right, water is neither physically diverted from a channel or applied to a parcel of land, therefore this statutory provision also does not apply literally. *See e.g*., *Nahas v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (1984)(holding no physical diversion required to appropriate instream flow stockwater right). Therefore, based on Idaho's statutory provisions as applied to the unique facts of this case, this Court cannot hold that LU's claimed water rights necessarily became appurtenant to the federal land as a matter of law.

Furthermore, even if the foregoing statutory provisions did apply, the statutes do not contemplate a situation where unity of title does not exist between the water right and the land on which the water right is used which would again raise issues of fact. The statutes also do not create an inseparable appurtenancy relationship. The owner of a parcel of land with an appurtenant water right can convey the land and expressly exclude conveyance of the water right. *Hard v. Boise City Irr. & Land Co*., 9 Idaho 589, 601, 76 P. 331 (1904); *Frank v. Hicks*, 35 P. 475, 483 (Wyo. 1894); *Kinney* at § 1015. Therefore, even if an appurtenancy relationship were established by operation of law it is clearly severable. Under the facts of this case, since other instruments are alleged to have conveyed the water rights even though the water rights are not specifically described therein, the intent of the grantor(s) as to the water rights is put at issue. The result would be a severance from the federal land (again, not as to place of use but as to appurtenance). In any event, since the instruments are supposedly silent as to the subject water rights, at a minimum the circumstances surrounding the mesne conveyances become relevant and raise genuine issues of material fact precluding summary judgment.

Idaho Code § 42-1402 applied only to water rights used for irrigation. S.L. 1986, p. 561.

C.

The instruments allegedly conveying the base ranch property satisfy applicable statute of frauds requirements. Whether LU's predecessors in title intended to transfer the subject water rights as appurtenances to the base property involves questions of fact as to the interpretation of the instruments.

In Idaho, a water right is legally treated as an interest in real property and therefore can only be conveyed or transferred in the same manner as real property. *Hale v. McCammon Ditch Co*., 72 Idaho 478, 488, 244 P.2d 151 (1952). Title to real property may be transferred by contract or deed of the owners, adverse possession or operation of law. *Id*. (citations omitted). However, unlike an interest in land, a water right can be conveyed without expressly mentioning the water right via the same instrument that conveys the real property to which the water right is appurtenant. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984)(citing I.C.§ 42-220). LU contends that the subject water rights were conveyed via the chain of title conveying the base ranch property. LU concedes that the instruments in the chain of title conveying the base ranch property are otherwise silent as to the subject water rights. LU's argument however, satisfies the statute of frauds writing requirement. Since an instrument does not have to specifically describe an appurtenant water right in order to convey the right, the instrument which conveys the land together with the alleged water right satisfies the statute of frauds. The issue more appropriately turns on the interpretation of the instruments based on the intent of the grantor(s) as to whether the water rights passed as appurtenances. This can be determined by evidence of the circumstances surrounding the mesne conveyances of the base ranch property. General principles of construction permit the admission of extrinsic evidence for purposes of ascertaining the intent of the parties with respect to what was intended to be conveyed via the appurtenance clause of an otherwise unambiguous deed. *See generally,* 23 Am. Jur. 2nd *Deeds* § 221. Therefore LU is not restricted to the language contained within the "four corners" of the instruments conveying the base ranch property. LU is entitled to introduce evidence of the circumstances surrounding the mesne conveyances of the base ranch property.

Since the statute of frauds is satisfied, and under principles of construction LU would be entitled to introduce extrinsic evidence, determination of this issue clearly raises genuine issues of material fact for purposes of summary judgment. The issue really boils down to a question of interpretation. Further, as discussed below, since it is both factually and legally possible for the subject water rights to be transferred via the instrument conveying the base ranch property, as well as by other means, LU is entitled to rest on the presumption created by the Director's Report. LU should also be entitled to its day in court to show factually what occurred in these subcases and to show what documents, if any, exist with respect to the transfers of the grazing preferences, including government records showing the transfers of the preferences.

D.
Because there is a considerable nexus between the base ranch property and the subject water rights, it is factually within the bounds of reason that the subject water rights were intended to be transferred as appurtenances to the base ranch property.

LU asserts that in the conveyances of the ranch, the parties intended to convey the ranch as a going concern, including the base property, the grazing preferences for the various allotments, and the water rights with places of use thereon. Although the subject water rights are not physically diverted onto the base property and the stockwater rights were not made appurtenant to the base ranch property (or any other property) by operation of law, these water rights could still have passed as appurtenances to the base ranch property if such was the intent of the grantors in the mesne conveyances of the base property. Although intent raises questions of fact, this assertion is clearly within the bounds of reason. This is not a situation where no nexus exists between water right and the land to which it is claimed to be appurtenant. The absence of any nexus between the subject water rights and the base ranch property may justifiably exceed the limits of reason when it comes to interpreting the intent of the grantor. However, with respect to water rights appropriated and conveyed with a ranching operation, where the use of the grazing allotments and water rights are necessarily connected with the use and enjoyment

of the base ranch property, it is reasonable that a grant of the ranch would include both the grazing preference and the water rights used thereon.

Based on the application of the defined terms as stated in Section VIII of this decision, the holder of a grazing preference is in a superior position as against others for the purpose of being granted a grazing permit or lease on a designated unit of land known as an allotment. According to the Federal Range Code[18], 43 C.F.R. §§ 4000 *et. seq*., as authorized by the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, codified at 43 U.S.C.A. §§ 315 – 315r, a grazing preference "is attached to base property owned or controlled by the permittee or lessee." *Id*. A grazing preference is transferable with the base property, a grazing permit or lease is not. 43 C.F.R. § 4110.2-3. Although the preference can be transferred to a different base property, it cannot exist independently of a base property. Hence, by operation of federal law there is a considerable nexus between the water right used in conjunction with the grazing allotment and the base property.[19] The following statement from the United States Court of Appeals for the Tenth Circuit illustrates the reasoning giving rise to the nexus. In *Public Lands Council v. Babbit*, 167 F.3d 1287 (10th Cir. 1999), the Court of Appeals stated:

> After enactment of the TGA [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

[18] Although the phrase "Federal Range Code" no longer appears in the Code of Federal Regulations, this colloquial expression is still used by many of those involved in grazing matters. *See generally Delmar & Jo McLean v. Bureau of Land Management*, 133 IBLA 225, 241 n. 8 (1995).

[19] In Idaho, a grazing preference is appurtenant to the base property by operation of law. I.C. § 25-901 (Supp. 1999).

> 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)(internal citations omitted).

Since the permittee owns the water right but not the federal land comprising the grazing allotment, and the permittee's interest in the land which can be transferred essentially amounts to an inchoate right to use the land, it is not inconceivable that a party selling a ranch as a going concern would intend that the water rights used in conjunction with the ranch operation would pass as appurtenances to the base ranch property. For purposes of interpreting intent, given the nature of a permittee's limited "interest" in a grazing allotment, it somewhat defies reason to conclude that a rancher would even contemplate that the water rights would be appurtenant to the federal land.

Also, since the instream stockwater is not actually diverted onto the grazing allotment land, and the grazing allotment is "attached" to the base ranch property, it is not any less plausible that the instream flow water rights are appurtenant to the base ranch property, with the grazing allotment allowing access to the water. The source of the water does not have to originate on the land to which it is applied. Since instream rights are not applied or diverted onto any land, the issue of the appurtenancy of such rights really rests on the intent of the grantor as determined by the surrounding circumstances. In *Hogan v. Blakney*, the Idaho Supreme Court stated:

> In interpreting and construing deeds, the primary rule to be observed is that the real intention of the parties, particularly that of the grantor, is to be sought and carried out whenever possible. The tendency of modern decisions is to disregard technicalities and to treat all uncertainties in a conveyance as ambiguities subject to be cleared up by resort to the intention of the parties as gathered from the instrument itself, the circumstances attending and leading up to its execution, and the subject matter and situation of the parties as of that time.

Hogan v. Blakney, 73 Idaho 274, 279, 251 P.2d 209 (1952).

Lastly, and in the absence of an express conveyance as required by the Special Master, the conclusion that the water rights are *per se* appurtenant to the federal land as a matter of law ultimately results in forfeiture of the existing water right and the creation of

a new water right for the same purpose every time the ranch is transferred. As previously discussed, this result is based on an ambiguous legal technicality. This alone is probative of the fact that the parties to the mesne conveyances could have intended that the water rights transferred with the base property. When the ranch is transferred as a going concern it defies reason that the parties would have intended that the subject water rights would be forfeited. Rather, it lends credence to the assertion that the rights were intended to be transferred with the base ranch property. "Forfeiture or abandonment of water rights is not favored and is not to be presumed and all intendments are to be indulged in against forfeiture." *Hodges v. Trail Creek Irrigation Company*, 78 Idaho 10, 16, 297 P.2d 524 (1956).

E.
Other means by which the subject water rights could have legally transferred.

In addition to LU's contention that the stockwater rights transferred as appurtenances to the base ranch property, there also exists other possibilities by which the stockwater rights could have transferred even under the Special Master's conclusion that the rights were appurtenant to the federal land. First, the water rights could have been conveyed orally pursuant to a non-executory contract. Such a transfer is an exception to the statute of frauds writing requirement and at a minimum allows extrinsic evidence to be admitted for purposes of proving the existence of the agreement. As previously discussed, because a water right is determined to be appurtenant to a particular tract of land does not mean that the appurtenancy relationship cannot be severed and the water right transferred independent of the tract of land. *Hard v. Boise City Irr. & Land Co.*, at 601; *Frank v. Hicks,* at 483. Even though there may not exist an independent writing which conveys the water rights, for purposes of satisfying the statute of frauds, evidence of an oral non-executory contract provides an exception to the statute of frauds. Idaho statutorily recognizes an exception to the writing requirement of the statute of frauds which allows a court to use its equitable power to enforce a parol contract to convey real property, where such contract has been at least partly performed. I.C. § 9-504. The party

claiming a parol conveyance has the burden of demonstrating the existence of the underlying contract by clear and convincing evidence. *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994). A parol contract to convey a water right, if proven, is valid against the grantor and against all parties having notice thereof. *Kinney* at § 998. Therefore it is erroneous to rule that as a matter of law because the water rights are appurtenant to the federal land and because no independent writing exists, that the water rights could not be effectively transferred.

Another means by which the water right could be transferred even if the water rights were held to be appurtenant to the federal land is as an appurtenance to the grazing preference.[20] This would also satisfy the statute of frauds writing requirement. As previously explained, the grazing preference is transferable. Presumably, the federal agency charged with administering grazing preferences (i.e., the Bureau of Land Management) requires some type of paper work to consummate the transfer. Any such writing would satisfy the statute of frauds requirement.[21] Even if the written instrument is silent as to whether the water rights were intended to be transferred with the grazing preference it would depend on the intent of the grantor as determined by the circumstances surrounding the mesne conveyances of the grazing preferences. Where extrinsic evidence is admissible, construction of the instrument clearly involves questions of fact. This is particularly true given that LU could not lawfully graze its cattle on a federal grazing allotment without a valid grazing permit or lease. This being the case, presumably LU obtained the preferences for its allotments from someone, and BLM records would reflect such acquisition.

[20] There is considerable legal precedent from other jurisdictions which supports the proposition that a water right can be transferred as an appurtenance to a possessory "interest" in public domain land. *See e.g. Wood v. Lowney*, 50 P. 794 (Mont. 1897); *McDonald v. Lannen*, 47 P. 648 (Mont. 1897); *Ely v. Ferguson*, 27 P. 587 (Cal. 1891); *Geddis v. Parrish*, 21 P. 314 (Terr. of Wash. 1889); *Tucker v. Jones*, 19 P. 571 (Terr. of Mont. 1888).

[21] In fact, federal regulations require a writing to transfer the grazing preference in the form of an "executed" or "properly completed transfer application." 43 C.F.R. § 4110.2-3(4)(b) & (c).

F.

As to the 1976 conveyance of the base ranch from the Lowrys to LU, the statute of frauds would not apply under the facts of this case if both parties to the transaction admit to the existence of the transfer.

The record in these subcases presents facts which suggest that any stockwater rights owned by the Lowrys (whether perfected by the Lowrys themselves or purchased from their predecessors-in-interest) may have been transferred to LU in the 1976 transfer, even in the absence of a written conveyance. As explained below, assuming *arguendo* that there was not a written conveyance of the water rights in 1976, there is an exception to the statute of frauds which would allow a parol transfer of the water rights from the Lowrys to LU. The Idaho Court of Appeals has noted that:

> [T]he object of the statute [of frauds] is to prevent potential fraud by forbidding disputed assertions of enumerated kinds of contracts without any written basis. This purpose is fully satisfied when the parties themselves accept the contract and mutually perform it. *For the same reason, the statute of frauds is inapplicable when a contract, although not fully performed by both sides, is mutually acknowledged to exist.*

Kelly v. Hodges, 119 Idaho 872, 874, 811 P.2d 48 (Ct. App. 1991)(emphasis in original)(quoting *Frantz v. Parke*, 111 Idaho 1005, 1008-09, 729 P.2d 1068 (Ct. App. 1986), citing 2A CORBIN ON CONTRACTS § 430 (Supp.)). As to the 1976 transfer of water rights from the Lowrys to LU, this exception to the statute of frauds appears to be directly applicable. The record in these subcases indicates that LU Ranching Co. was incorporated on September 23, 1976. *S.M. Order* at 3. William A. Lowry and Vernita Lowry, a.k.a. Nita Lowry, are the predecessors-in-interest to the base property owned by LU. *United States' Rebuttal to LU Ranching's Notice of Challenge*, Ex. No. 2 (Warranty Deed). The officers of LU are William Lowry, President; Tim Lowry, Vice President; and Vernita Lowry, Secretary-Treasurer. *Affidavit of Tim Lowry* ¶ 5. William Lowry states in his affidavit that:

> When my wife and I conveyed the ranch and its operation to LU RANCHING CO after it was incorporated in 1976, I intended to convey to LU RANCHING CO the same property including water rights to the stockwater on the federal lands which make up the allotments which form part of our ranching operation which my wife and I owned and which my

wife and I had acquired in 1966 and with subsequent purchases of private property.

Affidavit of William Lowry ¶ 8. Even in the absence of a writing to evidence a transfer of the water rights at issue from the Lowrys to LU, the statute of frauds would not apply because the parties in privity to the transfer mutually acknowledge the existence of the underlying contract. Here it appears that the transferors and the transferee all agree that the water rights at issue were transferred to LU in 1976. Therefore, based on the record, and with respect to the 1976 transaction, the Special Master's conclusion that there was no transfer of water rights form the Lowrys to LU appears to be erroneous. Again, a trial in which all of the relevant facts are ascertained would answer the question and summary judgment was therefore innappropriate.

G.
In the context of a summary judgment motion, LU is entitled to rely on the presumption created by the Director's Report.

The Director reported an 1872 priority date for the subject water rights and LU is entitled to rest on the presumption created by the report. I.C. § 42-1411(4). Implicit in the Director's Report is the finding by the Director that the water rights at issue exist as claimed and were properly conveyed to LU as claimant of these rights. The United States contends, however, that the "bubble" created by the presumption of the Director's Report has been burst based on the deposition testimony of Tim Lowry, wherein it was admitted that LU does not have any instruments of conveyance which specifically describe the water rights.[22] This Court disagrees that the "bubble" has been burst. LU admits to not

[22] LU concedes that the deeds in the chain of title to the base property do not refer to any specific elements of the claimed water rights. This concession is based on the following colloquy contained in the deposition of Tim Lowry:

> **Q** [by Mr. Holleman] Mr. Lowry, are the water rights that you have claimed in these subcases specifically described in any of the deeds from your predecessors in interest to LU ranching?
> **A** You mean specifically as relating to a specific water source?
> **Q** Yes. Are they described by quantity?
> **A** No.
> **Q** Are they described by legal location?
> **A** No.
> **Q** Are they described in any other fashion?

having instruments (speaking only as to "deeds") in the chain of title which **specifically** describe and convey the subject water rights. As discussed above, LU's plausible contention is that the subject rights passed as appurtenances via the instruments conveying the base property, not to mention the other plausible means discussed by the Court. Therefore, this Court cannot find that the United States has rebutted the presumption of correctness to which LU is entitled. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745, 947 P.2d 409; I.C. § 42-1411.

In moving for summary judgment, the United States was operating under the premise set forth in the Joyce Livestock Decision, therefore, the United States should be given the opportunity to produce evidence to overcome the presumption. In the event that the United States produces such evidence, LU will then have the burden of coming forward with the evidence to support its theory that each conveyance in its chain of title back to 1872 (or whatever priority date LU can prove) carried with it a grant of the subject water rights. I.C. § 42-1411(5).

ISSUE NO. 2: Is Idaho Code § 42-113(2) unconstitutionally retroactive as applied in these subcases?

The Special Master held that, to the extent it is applied retroactively, newly enacted Idaho Code § 42-113(2) violates Article 11, Section 12 of the Idaho Constitution.[23] At this time, the Court declines to address the constitutionality of Idaho Code § 42-113(2) for the simple reason that a fully developed factual record should be made before deciding constitutional issues. *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 437, 708 P.2d 147 (1985). In reviewing the Special Master's legal conclusion regarding Idaho Code § 42-113(2), it is the duty of this Court to consider the facts upon

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A They are described as appurtenances . . ..

Deposition of Tim Lowry, p. 20, l. 19 – p. 21, l. 5 (October 6, 1998), attached as Exhibit 1 to *United States' Motion for Partial Summary Judgment.*

[23] Article 11, Section 12 of the Idaho Constitution states in its entirety that: "The legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past."

which such a conclusion rests. Furthermore, based on the issues raised herein, the application and ultimately the constitutionality of the statute may not need to be addressed. Therefore, in the event resolution of the issue is ultimately required, this issue is also recommitted to Special Master Cushman for a determination of the operation and constitutionality of the statute in light of the relevant facts ultimately found at trial regarding LU's claimed water rights.

ISSUE NO. 3: Did the Special Master err in refusing to consider LU's motion for summary judgment regarding the United States' claims for stockwater rights on the grazing allotments?

In its motion for summary judgment, LU disputes some stockwater claims made by the United States. The record does not indicate whether the Special Master issued a ruling on this issue. LU reasserts in its challenge that the United States has not grazed any livestock on the grazing allotments involved in these subcases, and therefore the United States could not have perfected any stockwater rights. LU's challenge to any stockwater rights claimed by the United Stated is defective for the following reasons.

First, LU has not identified which stockwater right claims made by the United States it is challenging. The caption in LU's notice of challenge for these subcases only lists water right claims filed by LU. Second, even if the claims were identified by LU, this Court cannot see where LU has complied with the objection procedures found in ***AO1***. LU has not erected an adequate procedural foundation to allow this Court to address its assertions regarding any stockwater right claims filed by the United States. Quite simply, LU's assertions as to any water right claims made by the United States are outside the scope of the present proceedings. Therefore, LU's challenge regarding the United States' stockwater claims is **denied** on this procedural basis.

VII.

CONCLUSION

For the reasons set forth above, this Court finds the existence of genuine issues of material fact thereby making resolution of the subcases inappropriate for summary judgment. LU's challenge regarding priority dates is recommitted to Special Master Cushman[24] for further proceedings consistent with this opinion.

IT IS SO ORDERED:

DATED: APRIL 25, 2000

_____

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

[24] Special Master Cushman replaced Special Master Haemmerle who is no longer working for the SRBA.