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

	)	**SPECIAL MASTER'S REPORT AND**
In Re SRBA	)	**RECOMMENDATION**
	)	
	)	**FINDINGS OF FACT AND**
	)	**CONCLUSIONS OF LAW**
Case No. 39576	)	
	)	**FOR WATER RIGHTS 55-10288B ET. AL.**
_____	)	

I. INTRODUCTION AND PROCEDURAL BACKGROUND

LU Ranching Company ("LU") filed several claims for the above referenced stockwater rights in 1992. Portions of the places of use for these claims are located on federal public lands of the United States Bureau of Land Management ("BLM") that are also known as grazing allotments. LU claimed a priority date of May 20, 1872 for each of these rights. The Director of the State of Idaho Department of Water Resources (IDWR) examined the water system and investigated these water rights. On July 31, 1997, the Director of IDWR filed a *Director's Report,* recommending each water right with the priority date claimed, May 20, 1872. The BLM objected to the *Director's Report*, specifically objecting to the priority date.

These subcases were originally referred to Special Master Fritz Haemmerle. On October 15, 1998, the United States filed a *Motion for Partial Summary Judgment and Memorandum in Support,* asserting that LU was not entitled to the 1872 priority date. LU filed a *Motion for Partial Summary Judgment,* asserting that LU was entitled to the 1872 priority date as a matter of law. Special Master Haemmerle granted the United States' motion. *Order Granting United States' Motion for Summary Judgment* (January 8, 1999). Special Master Haemmerle held that the priority date of the in stream

stockwater rights claimed by LU with a place of use on federal public land was September 23, 1976.[1] Special Master Haemmerle issued a *Special Master's Report and Recommendation* recommending these rights with a priority date of September 23, 1976.

The SRBA District Court overruled Haemmerle's decision, holding that the conclusions reached on priority date could not be reached as a matter of law. ***Memorandum Decision and Order on Challenge*** (April 25, 2000). Then SRBA Judge Barry Wood held that there were genuine issues of material fact regarding priority dates and about whether the water rights were conveyed with the base property. Although the BLM brought up additional issues during the pendency of these subcases, it stipulated that the only issue in dispute was priority.

II. STANDARD OF REVIEW

The *Director's Report* has *prima facie* weight as set forth in I.C. § 42-1411(4)-(5). The term *prima facie* evidence is an alternative label for a rebuttable presumption. *State v. Hagerman Water Right Owners,* 130 Idaho 736, 947 P.2d 409, 418 (1997); *State v. Hebner,* 108 Idaho 196, 97 P.2d 1210 (Ct. App. 1985). Thus, giving evidence *prima facie* status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *Prima facie* proof does not shift the burden of persuasion on an issue. *Reddy v. Johnson,* 77 Idaho 412, 293 P.2d 945 (1956); D.Craig Lewis, IDAHO TRIAL HANDBOOK §§ 1.4-12.7 (1995). When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue. *State v. Hagerman Water Right Owners,* 130 Idaho 736, 947 P.2d 409, 418 (1997).

The *Director's Report* as *prima facie* evidence draws a conclusion as to particular elements of a water right. A presumption exists until the objector presents "substantial evidence that the element is other than as recommended. If the objector presents such evidence, the presumption disappears. Nevertheless, the facts upon which the

[1] That is the date LU was created as a corporate entity. Haemmerle held that LU's priority date was the date it became a corporate entity. The Special Master reasoned that stockwater rights are appurtenant to the federal public lands and not to LU's privately owned base property. Haemmerle determined therefore, that no written conveyances described the water rights on federal land, and thus, as a matter of law, any rights perfected by LU's predecessors-in-interest had not been conveyed to LU.

presumption is based are to be weighed with all other facts that may be relevant. *Id*. at 419. The claimant must present proof to a preponderance of evidence that, in this case, concerning the objected element of the water right exists. Once a claimant has done that, the only way an objector can defeat the claim (or objected to element) is to show by clear and convincing evidence that the right or element has been abandoned or forfeited. *In re: SRBA (24 HagermanSubcases) v. Hager Water right Owners, Inc., et al* 130 Idaho 736, 947 P.2d 409 (1997).

III. FINDINGS OF FACT

The claimant in these subcases is LU Ranching Company. LU claimed a May 20, 1872 priority date for each of these water rights. The Idaho Department of Water Resources issued *Director's Reports* for these claims with a priority date of May 20, 1872. (Testimony of Roxanne Brown, Exhibit J) The BLM objected to each subcase, asserting that the priority dates are either September 26, 1976 or June 28, 1984.

The cattle ranching industry began in Owyhee County in the 1860's. By the late 1880's there were approximately 100,000 cattle in Owyhee County. The cattle were distributed throughout Owyhee County. LU's claimed priority date of 1872 was not based on direct evidence that cattle grazed on the base ranch property at that time. LU does not know who was using these water rights in 1872. Instead, the claimed priority date is based on general information that livestock began grazing in the area in the 1860's, was widespread by the 1870's, and was occurring in the vicinity in 1872.

LU owns approximately 5,000 acres of private land in Owyhee County, Idaho on which it runs a cattle ranching operation. This private land is known as the base property. LU's base property was created by putting together smaller ranches for which LU's predecessors had received government patents. These original ranches were 160 acres in size. Given the vegetation in this area of Owyhee County the original ranchers had to graze their cattle on nearby government land, as 160 acres was insufficient for an economically viable ranching operation. The earliest of these patents was issued on September 29, 1886. In the *Affidavit of Proof* filed by Ezra Mills to obtain the homestead he indicated that he had lived on and worked the homestead from June 10, 1876. (Claimants Exhibit CC). The second of these patents was issued to George

Ewings, on December 15, 1909. In the affidavit filed by Mr. Ewing, at the time he requested homestead, he claimed he had lived on and worked the property since October 15, 1901. (Claimant's Exhibit K) The third homestead was to Patrick O'Keefe on November 24, 1928. (Claimant's Exhibit AA) While Mr. O'Keefe must have lived and worked the property for several years before receiving the patent, his affidavit was not part of the exhibit and that date is unknown. However, logically, that date must have preceded PWR 107, or there would have been no water available to homestead a ranch. All these patents were for ranching operations, which used nearby government land for grazing. This was economically necessary and the custom and practice in Owyhee County at those times. Each of LU's predecessors used the open federal land and the water thereon, in common with each other and other ranchers. After obtaining the property, LU had the grazing rights or grazing preferences from the BLM on federal land near its base property transferred in to its name. The grazing rights are located on three allotments. The immediate predecessor to LU is William Lowry. Mr. Lowry purchased several properties that were eventually combined to make up the ranch that is now owned by LU. Mr. Lowry purchased a ranch from Galo Mendieta in 1965. This property derives from the Ezra Mills patent. In the process of evaluating whether to buy the Mendieta ranch, Lowry inspected the private property and BLM allotments where Mendieta was ranching. Lowry understood that he was purchasing the deeded land, the grazing rights, the water rights, stockwater rights and any appurtenances. A contract of sale between Mr. Mendieta and Mr. Lowry set forth the terms and conditions of the purchase. The Lowry's went to the BLM office after purchasing the property from Mendieta to transfer the grazing privileges into Lowry's name.

LU was incorporated in the fall of 1976. Mr. Lowry transferred property to LU in 1976, and intended to transfer the base property, all appurtenances, buildings, irrigation water rights, and all grazing and stock water rights. When LU paid off the contract to Mr. Mendieta, it received a deed to the property.

Mr. Lowry inspected land owned by Mr. McKay that had cattle grazing on the Cliffs allotment. Mr. Lowry purchased land owned by Mr. McKay. This property began as the Ewing patent.

In order to have acquired a grazing preference from the BLM, a rancher was required to have grazed livestock prior to 1937 or to purchase property from someone who grazed livestock prior to 1934. Thomas George Skinner personally observed cattle grazing in the South Mountain allotment in 1928 and 1929. The cattle owned by several ranchers were running in common on the allotment.

IV. ANALYSIS

A. The Director's Report

The *Director's Report* has *prima facie* weight as set forth in I.C. § 42-1411(4)-(5). The term *prima facie* evidence is an alternative label for a rebuttable presumption. *State v. Hagerman Water Right Owners,* 130 Idaho 736, 947 P.2d 409, 418 (1997); *State v. Hebner,* 108 Idaho 196, 97 P.2d 1210 (Ct. App. 1985). Thus, giving evidence *prima facie* status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *Prima facie* proof does not shift the burden of persuasion on an issue. *Reddy v. Johnson,* 77 Idaho 412, 293 P.2d 945 (1956); D.Craig Lewis, IDAHO TRIAL HANDBOOK §§ 1.4-12.7 (1995). When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue. *State v. Hagerman Water Right Owners,* 130 Idaho 736, 947 P.2d 409, 418 (1997).

The significance of the *Director's Report* for these subcases was specifically analyzed in the ***Memorandum Decision and Order on Challenge:***

> [S]ince 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.

Memorandum Decision and Order on Challenge (April 25, 2000)

The *Director's Report* conclusion that the priority date is May 20, 1872 has *prima facie* weight until substantial evidence is presented to burst the bubble of the presumption. There was substantial evidence presented at trial that rebutted the 1872 priority date. A BLM employee with extensive experience with maps and legal descriptions testified that LU did not have grazing rights on some of the federal lands claimed. (testimony of Fred W. Price) (55-10288, 10289, 55-10290) In addition, the only evidence offered at trial in support of the 1872 priority date is inadequate to support such a conclusion. It is unknown whether these water rights were used in 1872. The claim and recommendation for that date were based merely on a newspaper article that asserted grazing occurred in the vicinity in 1872. That information, at best is insufficient to show a water right existed in 1872.

B. Evidence of Priority Dates

The claims for these rights asserts a priority date of May 20, 1872. The *Director's Report* recommendation of May 20, 1872 was apparently based on the claim and on the evidence presented to IDWR. At trial, the only facts supporting that date were derived from a newspaper article referring to livestock grazing in the vicinity in 1872. There was no evidence that livestock grazed on the base property or surrounding federal property in 1872. Likewise, no evidence was introduced showing the *Director's Report* recommendation was based on any evidence of cattle grazing on the base property or surrounding federal lands. To establish a priority date for a water right, there must be, at a minimum, evidence of or an inference of water use with a direct nexus to the land in question. Proof of water use by some unknown person, somewhere in the area is not enough. There was insufficient evidence presented at trial to support a priority date of 1872.

Next, we examine whether there is evidence supporting a later priority date. Multiple documents were admitted into evidence showing BLM recommendations for preferences on federal allotments, grazing permits, and transfers of grazing permits. (*See, e.g.* Exhibits D, F, P, S, V, A, C, D, E, F, G, H, I) Acquiring a grazing preference required prior use and commensurate base property. Furthermore, to acquire a grazing preference from BLM and commensurate base property in the 1960's required grazing prior to 1934.

There was proof of a grazing preference for each of these water rights. Further, this special master is satisfied that the existence of the patents and affidavits filed as proof of homestead are sufficient to establish the use of federal land and water located thereon from the time the original patent holder began living upon the land. The United States asserted that because others were using the land and water, in common, no one could obtain a water right. This assertion attacks the very nature of the prior appropriation doctrine and would return water use to a theory based upon exclusive possession and control of the water source. Under prior appropriation multiple users can use the same source or point of diversion. It is their respective priority dates that controls use and administration, not exclusive possession. It is irrelevant that the land and water were being used, in common, or that not all of those whose predecessors were using the water have made claims in the SRBA. The Taylor Grazing Act expressly recognizes that those using water on federal land prior to its enactment (and PWR 107) owned the water right.

The next question is whether the water rights were conveyed.

C. Evidence of Conveyance

LU asserts that it acquired these water rights and the priority dates, from its predecessors in interest. Specifically, LU asserts that water rights vested when privately owned cattle grazed on federal land. LU further asserts these rights were transferred with the deeds that transferred the privately owned base property.

Judge Wood reasoned that "in the absence of unity of title 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." ***Memorandum Decision and Order on Challenge*** at 15. Where there is an 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. *Id.*

> 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 transferred.

Id.

Judge Wood held that said genuine issues of material fact existed and summary judgment was not appropriate.

Mr. William Lowry owned the base property before it was conveyed to LU. He testified that at the time he conveyed the property to LU, he intended to convey water rights relating to grazing cattle on federal land. It was his understanding that transferring the base property also transferred these grazing rights. (Testimony of William Lowry) No evidence was admitted to contradict this direct evidence of the intent of the transfer. This court holds that Lowry transferred to LU any water rights that he had relating to the grazing on federal land. The next question is whether Lowry had any rights to transfer, and if so what were the priority dates of these rights?

D. Water Rights of Predecessors

Exhibit J is the *Director's Reports* for all the water rights. Each water right was recommended with a quantity of 02 cfs. This Exhibit shows the allotment for each water right number, which may help in linking the evidence up to the water right. The predecessors to LU include William Lowry, Sa'lo Mendieta, and Don McKay

Exhibit 4 – Application for Grazing Permit by Frank and Amy Maher dated March 8, 1937, to the U.S. Department of Interior states the question 5 water rights owned or leased by him. Lists a spring, a reservoir, and a creek. (has attached maps)

Exhibit 5 – Application for grazing permit by Clyde Foster dated January 12,, 1937 to the U.S. Department of Interior. States on Question 5, describe water rights. Lists reservoir, dated 1914, springs, and Juniper Creek (attached maps)

Exhibit 6 – Application for grazing permit, Dec. 7, 1937 by Harry Staples. Did not fill in question 5 asking to describe water or water rights owned or leased by you and used in livestock operations. (But he also left a lot of the other questions blank)

Exhibit 7 – Application for Grazing Permit, April 20, 1935 by Wm? Duncan. On question 6 do you own or control any source of water supply needed or used for livestock purposes. Filled it out "NO"

Exhibit 8 – Application for Grazing Permit, March 22, 1943 by W.H. Flora. On question 5, describe and locate all water or water rights owned or leased by you and used in your livestock operations on the public domain. Left it blank. But the rest of the application has a lot of blank questions.

Exhibit 9 – Stafford Bro.s application for Grazing Permit 1-7-1947. Left question 5 describe all water or water rights used in your livestock operations on the public domain. Many other questions left blank.

Exhibit 12 – Bill Shea application for Grazing Permit November 30, 1940. Under question 5 locate all water rights owned or leased by you and used in your livestock operations on public domain. . .left it blank.

Exhibit 13 – Bill Shea Application for Grazing Permit July 6, 1940. Under question 5 locate all water rights owned or leased - states "none"

Exhibit 14 – W. J. Shea, Application for Grazing Permit March 20, 1937. Under question 5 left blank.

Exhibit 15, WJ Shea application for grazing permit May 11, 1935. Under question 5 do you own or control any source of water supply needed or used for livestock purposes? Says yes describe it says Juniper creek, Spring creek, and (??) Creek.

Exhibit 16, W.J. Shea application for grazing permit dated 1936. Under question 5 list and describe all livestock watering facilities owned leased and or controlled by you and used in conjunction with public domain. Lists part of Spring Creek, Buck Creek and Juniper Creek.

Cliffs allotment is 10303 and 13451. Noon Creek in that one is intermittent. 10288 is related to Lone Tree Creek . 10289 claims Juniper Creek. 10290 claims unnamed streams and Buck Creek. 10297 claims Trout Creek. 10298 claims Split Rock Canyon. 10299 is Chimney Creek. 10300 is Trout Creek. 10301 is Swisher Creek.

However, the United States granted grazing privileges and recognized their preference under the Taylor Act. Further, these documents are ambiguous and legally

insufficient to transfer or waive preexisting water rights obtained under the Idaho Constitution. At a minimum a document waiving or transferring a water right must have the clarity and precession of deed convening real property or a portion of such estate. These documents were not recorded with the county, as well. They are insufficient to result in an abandonment or forfeiture of a water right.

V. CONCLUSION

The analysis of these subcases begins with an examination of the *Director's Report*. For each subcase the *Director's Report* recommended the date May 20, 1872 as claimed. At trial, the evidence showed that the only facts supporting that date were derived from a reprint of a newspaper article referring to livestock that grazed in the general area in 1872. LU's claimed priority of May 20, 1872 was not supported by any evidence connecting cattle grazing or other water use on the base property or the surrounding federal property. Likewise, no evidence was introduced showing the *Director's Report* recommendation of May 20, 1872 was based on any evidence or information with a direct link to the base property or surrounding federal lands. This Special Master holds that evidence of priority must have some direct nexus to the land in question or a direct nexus to water use in question to adequately support this element of a water right. The type of evidence upon which this right was based may be sufficient for IDWR to base a recommendation. Once that recommendation is examined, however, it cannot stand on such a tenuous basis as a reprint of a newspaper article saying merely that cattle were grazing in the area. Thus, the presumption afforded the *Director's Report* conclusion as to priority is burst.

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.

Dated February 27, 2003.

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THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication