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, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, 55-10300, 55-10301B, 55-10303B and 55-13451**
Case No. 39576	)	
	)	**ORDER ON LU RANCHING CO.'S MOTION FOR RECONSIDERATION**

I.
BRIEF PROCEDURAL BACKGROUND

This Court previously held that based on the unique circumstances surrounding grazing on the public lands, in the absence of an instrument conveying instream stockwater rights appropriated on public lands, a rancher permittee could have conveyed the water rights as an appurtenance to private or "base ranch" property to which the grazing preference attached. Whether the water rights transferred as an appurtenance was an issue of fact dependant on the intent of the grantor. LU Ranching Co. filed a *Motion for Reconsideration and/or to Amend* on January 18, 2005.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on March 16, 2005. 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 March 17, 2005.

III.
ISSUES RAISED ON RECONSIDERATION

The Claimant LU Ranching Co. ("LU" or "LU Ranching") raises the following issues in its *Motion*:

A. Whether, as a matter of law and fact, LU is entitled to priority dates that pre-date the Taylor Grazing Act by virtue of the grazing preferences and grazing permits issued to LU's predecessors-in-interest?

B. Whether the priority dates in the ***Partial Decrees*** are contrary to the unrebutted evidence at trial?

C. Whether the evidentiary standard applied by the Court on the issue of priority date constitutes an unrealistic and insurmountable evidentiary hurdle?

D. Whether collateral estoppel bars the relitigation of the issue of the priority date to be assigned to LU's claims, when LU's related "A" claims already have been decreed, without objection by the United States, with a priority date of 1872?

IV.
DISCUSSION

A. LU is not entitled to priority dates predating the enactment of the Taylor Grazing Act strictly by virtue of the issuance of grazing preferences to LU's predecessors in interest.

LU first argues that the grazing permits are conclusive evidence that LU Ranching's predecessors in interest made use of the rangeland and water prior to 1934. LU argues that the Department of Interior would not have awarded a grazing permit unless the applicant had shown prior use before 1934. According to LU, the only way for applicants to obtain a preference grazing right was to demonstrate prior use of the same

rangeland. LU argues that because the Department of Interior awarded grazing permits based on prior use, the granting of the permit is proof that prior use occurred.

It is true that the Department of Interior did award permits to users showing prior use. However, as the regulations and cases interpreting those regulations make clear, prior use, although the preferred criterion, *was not the only criterion* for awarding grazing permits:

> By 1937, the (Interior) Department had set the basic rules for allocation of grazing privileges. Those rules recognized that many ranchers had long maintained herds on their own private lands during part of the year, while allowing their herds to graze farther a field on public land at other times. The rules consequently gave a first preference to owners of stock who also owned "base property," *i.e*., private land (or water rights) sufficient to support their herds, *and* who had grazed the public range during the five years just prior to the Taylor act's enactment. See 2 App. 818-819 (Rules for the Administration of Grazing Districts (June 14, 1937)). **They gave a second preference to other owners of nearby "base" property lacking prior use.** *Ibid.* **And they gave a third preference to stock owners without base property, like the nomadic sheep herder.** *Ibid.* Since lower preference categories divided capacity left over after satisfaction of all higher preference claims, this system, in effect, awarded grazing privileges to owners of land or water.

Public Lands Council v. Babbitt, 529 U.S. 728, 734 (2000) (*emphasis in original, bolding added).* The regulations certainly gave preference to landowners who showed prior use of the rangeland. However, a landowner who did not show prior use could also gain a grazing permit, as could a nomadic herder (which was not the case here). Because of this, it cannot be said that, as a matter of law, the awarding of a permit would only follow a proof of prior use by the grazing applicant. The regulations governing the order of preference listed three different preferences, with the highest being land ownership and prior use. It is not logical to state that any permit issued *must* have been, as a matter of law, pursuant to that first preference. Perhaps most grazing permits were issued to the highest preference: land ownership and prior use. However, it is not appropriate for this Court to infer that all grazing permits, as a matter of law, were. Therefore, the Court does not agree with LU's argument that a grazing permit is definitive proof that the permittee grazed on the allotment in the five years preceding the enactment of the Taylor Grazing

Act. The Court also does not agree with LU's argument that any permittee should have a water right predating the Taylor Grazing Act by five years.

LU also argues that the testimony of Mr. Skinner, as well as other evidence, shows that the water rights existed prior to the dates found by the Court. Mr. Skinner's testimony does show that certain predecessors in interest were in the cattle ranching business. However, Mr. Skinner's testimony, and other evidence cited by LU, does not establish *where* and *at what time* those predecessors grazed cattle on public land for purposes of establishing the elements of the rights.

More importantly, even if it is established that a predecessor grazed in a particular area for purposes of establishing a water right, the next issue is whether the predecessor intended to transfer the water right with a place of use on public land as an appurtenance to a parcel of private or base ranch property. The issue in these subcases turns on the satisfaction of the statute of frauds. LU introduced no instruments in its chain of title expressly conveying or otherwise even referring to the existence of water rights on the subject public lands. Nevertheless, LU was given the opportunity, at trial, to put on evidence to show that a grantor of private base ranch property intended that the instrument of conveyance included, as an appurtenance, a water right with a place of use located elsewhere.

Special Master Hammerle previously ruled on summary judgment that as a matter of law, based on the statute of frauds, water rights perfected on the public domain could not transfer without a written instrument. Further, absent an instrument evidencing intent to transfer the water rights, the water rights remained appurtenant to the federal land. Any subsequent party grazing on same public lands simply perfected a new water right.

Judge Wood reversed, holding that based on grazing practices and the relationship between public grazing land and base ranch property that LU's predecessors *could have* intended that any water rights perfected on the public domain transferred as appurtenances to the private or base ranch property. Accordingly, if the water rights transferred as appurtenances to the base ranch property, then the statute of frauds writing requirement would be satisfied because of the written instrument transferring the base ranch property. This Court followed that same ruling. In essence, the Court created a

special rule based on the unique circumstances surrounding the use of public grazing lands, which allowed the claimant to put on evidence of the intent of the grantor that otherwise would be inadmissible. However, the Court emphasized that the grantor only *could have* intended to transfer water rights as an appurtenance to base ranch property—not that the rights, if any, automatically transferred as appurtenances.[1] This Court ruled that the intent of the grantor could be determined from the circumstances surrounding the grazing permits and the conveyances in the chain of title. If the grantor was not even cognizant that a water right had been appropriated, it is inconceivable that he intended the water right transfer as an appurtenance to a parcel of property different from the place of use for the instream water right.

This Court reasoned that if a predecessor established a water right, it would be contrary to reason that he intended that the right be abandoned or forfeited rather than conveyed together with the private or base ranch property. However, that reasoning is only sound if the predecessor actually acknowledged that he had appropriated a water right. If a grantor was not aware that a water right even existed, then it cannot be inferred that the grantor intended the water right to transfer as opposed to being forfeited or abandoned.

The record in these subcases strongly suggests that LU's predecessors were not concerned about having instream stockwater rights independent of the grazing privileges. Plainly, the cattle could drink from an instream source flowing over the land on which the cattle grazed. Because of the instream nature of the use, once the rancher ceased to use the public land for grazing, successors grazing the land would still be able to utilize the same source without the transfer of a water right. The evidence at trial and LU's own argument suggests that grazing preferences for the subject lands were not awarded on the basis of having pre-existing water rights on the public grazing lands. Although this Court

[1] If the water right was appurtenant as a matter of law then the water right would have automatically transferred. In 1998, approximately one year after Special Master Hammerle's ruling, the Idaho Legislature enacted I.C. § 25-901 which made grazing preferences appurtenant to base ranch property. After the enactment of the statute it could be argued that any related water rights would pass as an appurtenance as a matter of law. However, the statute would have no effect on the transfers occurring prior to its enactment other than to support the notion that it would not be unreasonable for a grantor to have intended that a water right transfer as an appurtenance to base ranch property.

held that an instream stock water right could be perfected simply by allowing cattle to drink from a stream without any further evidence of intent, the result is that a livestock grazer could appropriate a water right without actually being aware of the fact. In these subcases that was most likely the situation. However, for purposes of making the leap to infer intent to transfer the water right as an appurtenance to a parcel of property that is not the place of use, in this Court's opinion some acknowledgement that a water right even existed is necessary. All of the evidence is to the contrary regarding the claims to water rights that pre-date the issuance of the grazing permits.

Also relevant to a grantor's intent to convey a water right post-Taylor Grazing Act, are the realities of using instream rights in conjunction with a grazing allotment. The water rights are instream rights and as such can only be used in conjunction with the grazing allotment for which a permit is required. Given the remoteness of the water sources and the fact that such sources are located on public land it is unlikely that a rancher would be able to transfer the place of use. Accordingly, the water right can only be used in conjunction with the grazing allotment. Any subsequent permittee to a grazing allotment could appropriate a new water right for use in conjunction with the grazing allotment. Because a grazing permit is necessary to access the sources for grazing, the livestock rancher is not in competition with other users on the source for the use and administration of the water. Grazing preferences were not awarded based on the applicant having a pre-existing water right. Given these underlying circumstances it is doubtful that a livestock rancher would have considered the transfer of a water right on a grazing allotment.

Finally, the legal issues surrounding the requirements for appropriating an instream stockwater right didn't even arise in Idaho until 1983. *See Nahas v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct.App. 1983). The issue of the ownership of water rights on public grazing allotments didn't arise in Idaho prior to the commencement of the SRBA. Other states have arrived at different results on the issue than has this Court. Accordingly, in the face of all of this uncertainty regarding the ability to appropriate, maintain and transfer an instream water right used in conjunction with a grazing

allotment, it is curious that there is not one acknowledgement of the existence or transfer of a water right by any of LU's predecessors.

B. The priority dates for LU's claims are not contrary to the unrebutted evidence at trial.

At issue is the intent of the grantor. Although the evidence demonstrated that LU's predecessors to some of the base ranch property historically grazed in areas for which grazing privileges were acquired by LU, nothing in the record suggests that the predecessors were cognizant of the fact that they may have established a water right on public lands, and that they intended to transfer such rights in conjunction with the transfer of base ranch property. In fact, the grazing permit applications indicate that predecessors were not even aware that they may have appropriated water rights on the public domain. None of the permit applications referred to water rights on the public lands. The grazing preferences were awarded based on the representations contained in the permit applications. In this particular situation where a property right may pass as an appurtenance, not as a matter of law, but as a matter of fact, it cannot be said that a grantor who is not even aware of the existence of the property right, intended to convey that right in an instrument of conveyance that is silent as to the existence of the right.

C. In the absence of a writing specifically conveying the water rights, the evidentiary standard may be difficult but it is not insurmountable.

The evidentiary standard is not insurmountable. Ordinarily, based on the statute of frauds, under the circumstances presented in these subcases, a claimant would not even be able to put on evidence of the transfer of a water right without a written instrument. However, both Judge Wood and this Court ruled that because of the unique circumstances surrounding grazing on public lands that a rancher permittee could have intended to transfer water rights on public land as appurtenances to private or base ranch property. Accordingly, the Court allowed in evidence of the intent of the grantor. At the

time the matter was before Judge Wood, none of the instruments of conveyance or grazing permit applications or permits were in the record. However, after this Court reviewed the evidence, it is clear that at the time the grazing applications were submitted, none of the predecessors were aware that they had appropriated a water right for use on the public lands let alone intended to transfer a water right. Again, in the one-hundred plus years of history surrounding the use of the subject grazing lands contained in the record, there is not one mention of a water right believed to have existed on those lands for purposes of inferring grantor's intent. LU relies exclusively on the constructive legal principles unique to instream stock water rights on public land to infer both the existence and transfer of water rights. However, there is nothing in the record to suggest that a predecessor intended to transfer a water right.

D. The "A" claims do not collaterally estopp the litigation of the "B" claims.

The subject water right claims were initially claimed and reported without regard to whether the places of use were located on public or private lands. The United States' objections only went to the portions of the claims located on public lands. Procedurally, Special Master Hammerle ordered that the rights be split. The rights on state of Idaho or private land were given "A" designation, and the rights located on federal land were given "B" designation. The "A" rights were uncontested and decreed as claimed with a priority date of May 20, 1872. The rights at issue here were given "B" designations. The United States did not object to the recommendation of the "A" rights. The claimant argues that because the "A" rights were uncontested and decreed with the 1872 priority date that the "B" rights must be decreed identically.

This argument is without merit. The "A" rights and "B" rights are separate water rights. They involve different places of use and different points of diversion. The "A" rights are on tracts of land that are owned by parties other than the United States. Other than the director's reports, the facts surrounding the "A" rights are not even in the record. The United States is not bound by decrees entered on separate water rights. A general adjudication could never operate if an uncontested water right was somehow binding on

other water rights. Finally, the legal principles are different. Because of the nature of the interest in the private lands, as a matter of law any water rights located on such lands would transfer as an appurtenance to those lands. The Court need not ascertain whether a grantor intended to transfer the rights as an appurtenance to different parcel of property.

E. LU's Motion to Amend Partial Decree for Water Right 55-10296 Pursuant to I.R.C.P. 60(a).

LU moves the Court to amend the ***Partial Decree*** for water right 55-10296 to include the quarter quarter sections of T5S R6W Section 14, NENE and SENE (hereafter referred to as NENE and SENE) as points of diversion. On page 46 of the Court's ***Order***, the Court identified an anomaly in water right 55-10297B, in which the NENE and SENE quarter quarters in question were identified as beginning and ending points of diversion, but not places of use for water right 55-10297B. Because the Court did not find that the United States had shown clear error on the part of the Special Master, the Court chose to not eliminate the points of diversion for water right 55-10297B, but remarked that there had been no motion by LU to include the NENE and SENE as places of use for water right 55-10297B. The NENE and SENE are included as places of use for water right 55-10296. LU's current motion before the Court asks that water right 55-10296 be amended to include the NENE and SENE as points of diversion for water right 55-10296. The current starting point of diversion for 55-10296 is T5S R6W S12 NWSWSW as an instream beginning point, with the instream ending point being T5S R6W S23 SESWNW. The beginning point, T5S R6W S12 NWSWSW, is upstream from the NENE SENE of section 14. The ending point, T5S R6W S23, is downstream from the NENE SENE of Section 14. See exhibits 19 and 21. Because the NENE and SENE are within the beginning point and ending points of diversion for water right 55-10296, the Court sees no reason to amend the partial decree for 55-10296 to include points of diversion for the NENE and SENE.

V.
CONCLUSION

For all of the above-stated reasons, LU's *Motion for Reconsideration* is **Denied**.

Dated April 29, 2005

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JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication