No. _____

In The
Supreme Court of the United States

JOYCE LIVESTOCK COMPANY &
LU RANCHING COMPANY,

Joint Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States has waived its sovereign immunity such that in a state water rights adjudication, a state court having jurisdiction over the United States is authorized to award attorney fees against the United States to a prevailing party under Title 28 U.S.C. § 2412(d) (2000) (Equal Access to Justice Act), as to which state supreme courts are in conflict.

PARTIES TO THE PROCEEDING

Petitioners are the Joyce Livestock Company ("Joyce Livestock") and LU Ranching Company, Inc. ("LU Ranching"). Respondent is the United States of America.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies owning 10% or more of Joyce Livestock Company's or LU Ranching Company's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTES, LEGISLATIVE HISTORY AND RULES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

These cases originated in the State of Idaho Snake River Basin Adjudication, in proceedings before the District Court of the Fifth Judicial District for Idaho. Following separate trials before special masters, the recommendations of the special masters were reviewed by the District Court and resulted in a Memorandum Decision and Order on Challenge, entered in *In Re SRBA Case No. 39576, Joyce Livestock v. United States,* Subcase Nos. 55-10135 *et al*. (5 Dist. Idaho Aug. 3, 2005) ("*Joyce Livestock v. United States*"), reproduced in the Appendix at 68-114. The Memorandum Decision and Order on Challenge of the District Court entered in *In Re SRBA Case No. 39576, LU Ranching v. United States,* Subcase Nos. 55-10288B *et al.* (5 Dist. Idaho Jan. 3, 2005) ("*LU Ranching v. United States*") is reproduced in the Appendix at 132-199.[1] As the prevailing parties in each of the cases, both Joyce Livestock and LU Ranching filed motions requesting attorney fees under both Idaho state law and the federal Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) (2000); App. 242-247. The Memorandum Decision and Order Re: Attorney Fees issued by the District Court in *Joyce Livestock v. United States,* is found in the Appendix at 54-67. The Memorandum Decision and Order Re: Attorneys Fees issued by the District Court in *LU Ranching v. United States* is found in the Appendix at 115-137.

Both the District Court's substantive opinions and orders on the motions for attorney fees were appealed to the Idaho Supreme Court. The original opinion of the Idaho Supreme Court in *Joyce Livestock v. United States* is reported at 144 Idaho 1, 156 P.3d 502 (2007), and is reproduced in the Appendix at 1-42. The original opinion

[1] As detailed herein, while all claims within the general water adjudication contain the caption "*In Re SRBA Case No. 39576*," each claim is assigned a separate subcase number, and proceeds through the adjudication as a separate case.

of the Idaho Supreme Court in *LU Ranching v. United States* is reported at 144 Idaho 89, 156 P.3d 590 (2007), and is reproduced in the Appendix at 43-53.

JURISDICTION

The Idaho Supreme Court reviewed the District Court decisions in *Joyce Livestock v. United States* and *LU Ranching v. United States*, and issued its opinions in each of the cases on February 9, 2007. App. 1, 43. The Idaho Supreme Court unanimously affirmed the private water right claims of Joyce Livestock and LU Ranching, and unanimously denied the United States' water right claims in *Joyce Livestock v. United States*. App. 41-42, 53. The Idaho Supreme Court, however, denied Joyce Livestock and LU Ranching's requests for attorney fees under the EAJA holding a state court did not have authority to award fees under the EAJA. *Id.* Joyce Livestock and LU Ranching each filed timely Petitions for Rehearing on the attorney fees issue. On March 30, 2007, the Idaho Supreme Court denied each Petition for Rehearing. App. 238-241. Although the Idaho Supreme Court remanded the case for further proceedings, the federal attorney fees issue survives and requires a decision, regardless of the outcome of the anticipated state proceedings. *Radio Station WOW v. Johnson*, 326 U.S. 120, 127 (1945). Pursuant to Supreme Court Rule 13, this Petition for Certiorari is filed within ninety (90) days of the Orders Denying Petitions for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The attorney fees issues at stake in each case were virtually identical. Indeed, in its opinion in *LU Ranching v. United States*, the Idaho Supreme Court cited and relied upon its analysis in *Joyce Livestock v. United States*. App. 53. Accordingly, a single Petition for Certiorari is filed on behalf of Joyce Livestock and LU Ranching pursuant to Supreme Court Rule 12.4.

STATUTORY PROVISIONS

The primary statute at issue is the Equal Access to Justice Act, 28 U.S.C. § 2412 (2000) (EAJA), which states, in part:

> (d)(1)(a) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

App. 242-247.

Also relevant to the issues presented is 43 U.S.C. § 666 (2000), commonly referred to as the McCarran Amendment. App. 248-249. It provides, in pertinent part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like

> circumstances: *Provided*, That no judgment of costs shall be entered against the United States in any such suit.

App. 248-249.

STATEMENT OF THE CASE

The Equal Access to Justice Act, 28 U.S.C. § 2412, explicitly authorizes any court having jurisdiction over an action to award attorney fees to a prevailing party, other than the United States, in any action brought by or against the United States. Even though Idaho state courts had jurisdiction over the United States in these water right cases pursuant to the McCarran Amendment, 43 U.S.C. § 666, the Idaho Supreme Court rejected a claim for fees under the EAJA based solely on its conclusion that state courts do not have jurisdiction to award fees against the United States under the EAJA. The Idaho Supreme Court decision is in direct conflict with a Nevada Supreme Court case in which that court decided the United States had waived sovereign immunity for a state court to award attorney fees under the EAJA.

For over a decade, the United States pursued litigation against two family owned and operated cattle operations, LU Ranching and Joyce Livestock, the sole purpose of which was to challenge the existence of historic water rights for ranching operations located on federally administered grazing allotments. The ranchers had two options available: (1) concede their water rights to the United States, even though to do so could threaten the continued viability of their family ranching businesses; or (2) defend their historic family water rights against the United States, even though they could ill afford to do so. In the end, these private ranchers defended their water rights and prevailed. The Idaho Supreme Court rejected each and every legal theory raised by the United States in this litigation, holding that the United States' theories were contrary to all applicable, well established, state and

federal law. Indeed, the Idaho Supreme Court went so far as to say with respect to one of the United States' theories that the "argument of the United States reflects a misunderstanding of water law." *Joyce Livestock*, App. 39. These private ranchers stood up to the United States, defended their rights against the United States' baseless attacks, and won, but at a tremendous personal cost.[2] These are the people the EAJA was designed to protect, and these are precisely the type of cases to which the EAJA is meant to apply.

In 1985, the Idaho Legislature enacted Idaho Code § 42-1406A, authorizing the adjudication of water rights within the Snake River Basin in Idaho. In furtherance of the same, in 1987 the director of the Idaho Department of Water Resources filed a petition in the district court for the state of Idaho for "the general adjudication *inter se* of all rights arising under state or federal law to the use of surface and ground waters from the Snake River basin water system and for the administration of such rights." *State of Idaho ex rel. Higginson v. United States,* 115 Idaho 1, 4, 764 P.2d 78, 81 (1988). The petition included the adjudication of the rights to the use of all surface and ground waters within the Snake River Basin, including all claims of the United States under the McCarran Amendment. *Id.*; 43 U.S.C. § 666.

While all proceedings in the Snake River Basin Adjudication ("SRBA") are subject to the Idaho Rules of Civil Procedure and Idaho Rules of Evidence, additional rules to administer the litigation are found in SRBA Administrative Order 1. *See In Re SRBA Case No. 39576* (5 Dist. Idaho, Feb. 10, 1988), http://www.srba.state.id.us/AO1NC.HTM (last visited June 25, 2007). Under the adopted procedures, individual water right claimants file

[2] The litigation involving United States' claims and objections to Petitioners' water rights has persisted for over ten years and has resulted in attorney fees of more than one million dollars combined.

water right claims with the Idaho Department of Water Resources ("IDWR"). The IDWR, in turn, issues a Director's Report with a recommended determination with respect to the claimed water right. *Id.* at §§ 3-5. If any party objects to the claimed right, an objection will be filed, the case will be assigned a subcase number, and adversary proceedings between the claimant and objectors in the SRBA are initiated. *Id.* at § 10. The individual subcases are treated as separate and distinct cases, moving forward with their own case management orders, discovery schedules, trials and, if necessary, appeals. *Id.* at §§ 10-15.

The cases at issue herein arise out of three sets of water right claims filed in the SRBA: (1) private beneficial use stockwater claims filed by Joyce Livestock and objected to by the United States; (2) competing beneficial use stockwater claims filed by the United States to the same sources of water, objected to by Joyce Livestock; and (3) private beneficial use stockwater rights filed by LU Ranching, objected to by the United States.

Joyce Livestock filed beneficial use stockwater claims to instream sources located on federal grazing allotments administered by the United States Bureau of Land Management. The United States objected to Joyce Livestock's claims. *Joyce Livestock v. United States,* Memorandum Decision and Order on Challenge, App. 72-91. In an attempt to claim rights to the same water sources for itself, competing stockwater right claims were filed by the United States, also under the beneficial use method of appropriation. *Joyce Livestock v. United States,* Memorandum Decision and Order on Challenge, App. 69. The United States based its claims, and its objections to Joyce Livestock's claims, on the United States' contention that as between the United States and the private parties who actually put the water to beneficial use, the United States should be decreed the water rights by virtue of its ownership and management of the surrounding rangeland. *Joyce Livestock v. United States,* Memorandum Decision and

Order on Challenge, App. 84. Because the claims filed by Joyce Livestock and the United States involved claims to the same sources of water, the subcases were consolidated into one action. Ultimately, each of the United States' arguments raised in the consolidated proceedings were rejected outright, the United States' claims were denied in their entirety, and the validity of Joyce Livestock's private stockwater rights was recognized. *Joyce Livestock,* App. 9, 12, 18-21, 25, 26, 28, 33, 39-41.

The third set of water right claims were filed by LU Ranching and, like Joyce Livestock, involved private stockwater rights located on federally administered land, acquired through the beneficial use method of appropriation. Identical to its tactic in Joyce Livestock, the United States objected to LU Ranching's private stockwater rights based on the United States' contention that private parties could not appropriate stockwater rights located on federal land because the private appropriators did not have exclusive use or control over the federal land and did not own the federal land. *LU Ranching v. United States*, Memorandum Decision and Order on Challenge, App. 145. Following a separate trial and appeal, the United States' arguments were rejected and were held to be contrary to all established law. *See LU Ranching v. United States*, App. 51-53.

Even at the initiation of the litigation between these private parties and the United States, the success of the private stockwater right claims, and the failure of the United States' claims, was a foregone conclusion. The arguments raised by the United States lacked any basis in state or federal law and, in fact, were contrary to established law. At various times throughout the ten years of litigation, the United States persisted in its pursuit of the following legal theories:

1. The United States argued that the water right claimant must have possessory interest in the land designated as a place of use. This riparian theory of water right ownership was

rejected by the State of Idaho in *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 493, 101 P. 1059, 1062 (1909). The United States' theory also is contrary to federal statutes and United States Supreme Court precedent holding that Congress has severed the ownership of federal lands from the ownership of water rights in nonnavigable waters located thereon. *Ickes v. Fox*, 300 U.S. 82, 95 (1937); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 161 (1935).

2. The United States argued that use of water in common defeats a water right. App. 9. This is contrary to established law and the prior appropriation doctrine. *Graham v. Leek*, 65 Idaho 279, 290, 144 P.2d 475, 480-81 (1943).

3. The United States claimed that it was entitled to a beneficial use stockwater right, based not on its application of the water to a beneficial use, but on its ownership and control of federal lands. App. 35. This is contrary to both state and federal precedent. *Sarret v. Hunter*, 32 Idaho 1, 27-28, 178 P. 81, 87 (1919) (the constitutional method of appropriation in Idaho requires that the appropriator actually apply the water to a beneficial use); *United States v. New Mexico*, 438 U.S. 696, 704 (1978).

4. The United States argued that "recognition of a private appropriative water right to take water from streams on public lands in the course of grazing would likewise effectively lead to monopoly of federal grazing and interfere with federal administration of the lands (under the Taylor Grazing Act)." App. 39. This argument is contrary to the plain language of the Taylor Grazing Act which specifically recognizes the right of

> private parties to appropriate stockwater rights on federal lands. Taylor Grazing Act, 43 U.S.C. § 315 (2000).

Despite the fact that the United States' legal theories raised in these cases were contrary to all established law, the Government continued to litigate these issues, and LU Ranching and Joyce Livestock were forced to rebut the United States' arguments, for almost ten years.

The common theme running throughout each of the United States' arguments is that as between the Government and the actual appropriators of stockwater, only the United States can obtain and hold the water right. However, over twenty years before *Joyce Livestock* and *LU Ranching* became an issue, the United States Supreme Court rejected this theory. In *United States v. New Mexico,* the Court held that stockwater rights located on federal land are held by the private stockwaterers who actually place the water to beneficial use, and not the United States. The Court explained:

> The District Court concluded that the United States had not established a reserved right to minimum instream flows for any of the purposes for which the Gila National Forest was established, and that any water rights arising from cattle grazing by permittees on the forest should be adjudicated "to the permittee under the law of prior appropriation and not to the United States" . . . The United States issues permits to private cattle owners to graze their stock on the Gila National Forest and provides for stockwatering at various locations along the Rio Mimbres. The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. *The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree.*

United States v. New Mexico, 438 U.S. at 704, 716 (emphasis added). Based on this, and other long established legal authority, the positions taken by the United States never had any basis in the law. Indeed, from 1866 forward federal and state law has recognized and protected the right of private parties to appropriate and maintain water rights on what were once public lands. The Mining Act of 1866, 43 U.S.C. § 661 (2000); The Desert Land Entry Act of 1877, 43 U.S.C. §§ 321-323 (2000); The Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316 (2000); *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. at 155. In complete disregard of this law, that was well known to the United States prior to its initiation of this litigation, the United States objected to Joyce Livestock and LU Ranching's water right claims, and filed its own stockwater right claims, even though the United States had no basis in the law to do so.

The EAJA requires an award of attorney fees in cases such as these. 28 U.S.C. § 2412(d). There are three basic requirements under the EAJA which, if satisfied, trigger the provision in the EAJA mandating an award of attorney fees. Both Joyce Livestock and LU Ranching meet each of these requirements.

The first requirement is that the private party claiming fees must be the prevailing party in the action. As addressed, above, Joyce Livestock and LU Ranching are the clear and unequivocal prevailing parties in the litigation against the United States. In *Joyce Livestock v. United States*, the Idaho Supreme Court rejected the United States' water right claims, and confirmed Joyce Livestock's private stockwater right claims, leaving Joyce Livestock as the sole and senior water right holder for the instream sources at issue. *Joyce Livestock v. United States*, App. 41-42. In the same way, the United States' objection to LU Ranching's stockwater right claims was rejected by the Idaho Supreme Court. *LU Ranching v. United States*, App. 50-53.

The second requirement under the EAJA is that Joyce Livestock and LU Ranching must demonstrate that their individual net worth does not exceed the threshold defined by statute. Pursuant to the EAJA, an eligible party includes "any partnership, corporation, association, unit of local organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B). Both Joyce Livestock and LU Ranching qualify for an EAJA attorney fee award under this provision. *See In Re SRBA Case No. 39576, Joyce Livestock v. United States,* Subcase Nos. 55-10135 *et al*., Motion for Attorney's Fees and Declaration of Paul Nettleton In Support of Joyce Livestock's Motion for Attorney's Fees; *In Re SRBA Case No. 39576, LU Ranching v. United States,* Subcase Nos. 55-10288B *et al.,* Motion for Attorney's Fees and Declaration of Tim Lowry In Support of LU Ranching's Motion for Attorney's Fees.[3]

The final issue under the EAJA tests whether the position of the United States in connection with the litigation was substantially justified. It is the United States' burden to demonstrate that its position was substantially justified and, moreover, to show that it was justified at every stage of the proceedings. 28 U.S.C. § 2412(d); *Garcia v. Bowen*, 702 F. Supp. 409, 410 (S.D.N.Y. 1988); *Fed. Deposit Ins. Corp. v. Addison Airport of Texas, Inc.*, 733 F. Supp. 1121, 1125 (N.D. Tex. 1990). As detailed above, given the established law that existed prior to the initiation of this litigation, this is a burden that the United States simply cannot meet.

The only basis for rejecting Joyce Livestock and LU Ranching's EAJA claims was the Idaho Supreme Court's determination that as a state court, it lacked jurisdiction to apply the EAJA to this case. The federal question

[3] Joyce Livestock and LU Ranching's Motions and Declarations in Support Thereof are on file with the Idaho Supreme Court in the record for the Joyce Livestock and LU Ranching cases.

presented now, namely, whether the EAJA by its terms authorizes state courts having jurisdiction over the United States to award attorney fees to a prevailing party, is of substantial importance and is a question on which different state supreme courts disagree. While the Idaho Supreme Court held that it did not have authority to award attorney fees under the EAJA, when presented with an identical issue, the Nevada Supreme Court reached a completely opposite conclusion in *United States v. Hood*, 101 Nev. 201, 205-06, 699 P.2d 98, 101 (1985).[4] In that case, the Nevada Supreme Court held that the federal Quiet Title Act, 28 U.S.C. § 2409 *et seq.*, authorizing quiet title actions involving the United States to be heard in state court, coupled with the plain terms of the EAJA, constituted a waiver of the United States' sovereign immunity and gave the state court authority to enter an attorney fees award against the United States. *Hood*, App. 254-256. On that basis, the Nevada Supreme Court awarded attorney fees to the prevailing private party litigant, holding that "it would be an injustice to deprive a prevailing party of attorney fees and costs merely because that party chose to litigate in a state court, as specifically authorized by (federal statute). . . ." *Id.* at 256. In the state of Ohio, the Court of Appeals also applied the EAJA to a motion for attorney fees against the United States in state court proceedings arising out of a dispute involving negotiable notes. *Fed. Deposit Ins. Corp. v. Chaney*, 1986 WL 1283 (Ohio App. 8 Dist. 1986).[5] While the Ohio court ultimately denied the EAJA request for attorney fees because the private party was no longer the prevailing party by virtue of the appellate court's reversal of the trial court's substantive decision, no party questioned the state court's ability to award fees under the EAJA in an appropriate case.

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[4] For the convenience of the Court, *United States v. Hood* is reproduced in full in the Appendix at pages 250-256.

[5] *Fed. Deposit Ins. Corp. v. Chaney* is reproduced in full in the Appendix at pages 257-261.

Accordingly, while unpublished, this Ohio case further illustrates the conflict between state courts on the issue of a state court's authority to award attorney fees under the EAJA in cases where the state court has jurisdiction over the United States.

In order to resolve the conflict between two state supreme courts and to give guidance to litigants in state court when the United States is a party, it is important for the United States Supreme Court to grant certiorari in this case to decide whether the United States has waived sovereign immunity for attorney fees under the EAJA. As briefed in detail herein, the decision of the Idaho Supreme Court is demonstrably wrong, and if left to stand, it will affect individuals and small businesses far beyond the parties to this case and will have a chilling effect on the ability of private parties to defend themselves in litigation against the United States brought in state courts. Accordingly, Joyce Livestock and LU Ranching request that the Court issue a Writ of Certiorari to review the decisions of the Idaho Supreme Court and reverse the decisions below on the issue of the authority of a state court to award attorney fees to a private prevailing party under the EAJA.

REASONS FOR GRANTING THE PETITION

There are three reasons this Court should grant the Petition. First, the Petition should be granted to resolve an important question of federal statutory construction involving the EAJA and the conflict between the decisions of the Idaho Supreme Court and the Nevada Supreme Court. Second, because the Idaho Supreme Court's decision is contrary to Congress' express waiver of sovereign immunity under the McCarran Amendment and the EAJA, the decision below ignores the plain language of the statutes and undermines the express purpose of the EAJA. Third, public policy considerations embedded in the EAJA

dictate that state courts have the authority to award attorney fees against the United States.

I. A Conflict Exists Between State Supreme Courts On The Issue Of Whether State Courts Have Authority To Award Attorney Fees To A Prevailing Party Pursuant To The EAJA.

Granting a Petition for Certiorari is appropriate when state courts of last resort have issued conflicting decisions on the construction of a federal statute. *United States v. Oregon*, 366 U.S. 643, 644-45 (1961). In the present case, the decisions of the Idaho Supreme Court and the Nevada Supreme Court do not merely conflict, they are diametrically opposed to one another. The Idaho Supreme Court denied the parties' request for attorney fees under the EAJA holding that the EAJA "does not authorize state courts to award attorney fees against the United States." *Joyce Livestock*, App. 34; *LU Ranching*, App. 52 (adopting the holding and rationale in *Joyce Livestock*). Presented with the identical issue, however, the Nevada Supreme Court correctly held that "the language of (the EAJA) is plain and clearly gives the state court authority to award attorney fees" and went on to award attorney fees to the private party, and against the United States, in that case. *Hood*, App. 256.

Ignoring the plain language of the EAJA, the Idaho Supreme Court affirmed the District Court decision denying the attorney fees claims under the EAJA, holding that as a state supreme court, it lacked authority to award fees under the statute. The Idaho Supreme Court simply held that "waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text," and had Congress intended to waive sovereign immunity to allow state courts to award attorney fees under the EAJA, it would have explicitly stated so in the statute. *Joyce Livestock*, App. 33, 34 (*citing United States v. Idaho Dept. of Water Resources*, 508 U.S. 1, 6 (1993)). On this basis, the Idaho Supreme Court concluded that "28 U.S.C. § 2412(d)

does not authorize state courts to award attorney fees against the United States" and denied Joyce Livestock and LU Ranching their EAJA claims. *Joyce Livestock,* App. 34; *LU Ranching*, App. 52.

Employing almost identical analysis, the Nevada Supreme Court reached a completely opposite conclusion in *Hood*, App. 253-256. In that case, a private litigant, Hood, owned property, and sold that property to Charles Silver (Silver) and Linda Province (Province). Under the contract, legal title would not pass to Silver and Province until the balance of the purchase price was paid in full by the purchasers. *Id.* at 251. Silver and Province subsequently defaulted on their payments and, unbeknownst to Hood, the United States assessed a federal tax deficiency against Silver and filed a notice of federal tax lien against Silver. The purchasers' interest in the property was extinguished by Hood in a non-judicial forfeiture proceeding. *Id.* Thereafter, Hood learned of the federal tax lien filed against Silver, and resorted to administrative procedures promulgated by the Internal Revenue Service to remove the lien. *Id.* He was denied the requested relief, and advised that the United States was in search of a good "test case" to determine the validity of the loss of its lien through forfeiture under executory land contracts. *Id.* at 251-252.

Prior to filing suit to quiet title to the property, Hood advised the United States IRS of legal authority directly addressing the issues presented in this case that was "diametrical to the government's position." *Id.* at 252. Notwithstanding its knowledge of authority completely adverse to its case, the United States pressed forward in its "test case" against Hood. *Id.*

Predictably, Hood prevailed in its case against the United States. *Id.* at 253. Hood sought, and was awarded, his attorney fees and costs under the EAJA. *Id.* The District Court ruled "that the United States was 'not substantially justified, or at all, in requiring . . . [Hood] to

expend time, effort and money to protect his property rights' . . . [i]f ever there were a case in which a governmental party should be required to reimburse an individual for costs and attorney's fees, this is it." *Id.*

On appeal to the Nevada Supreme Court, the United States argued that it had not waived its sovereign immunity, and that as a state court, no authority existed to award attorney fees under the EAJA. *Id.* The Nevada Supreme Court rejected each of these arguments, and carefully detailed its rationale. *Id*. at 253-256. While the Nevada Supreme Court correctly recognized that costs and attorney fees cannot be awarded against the United States absent a specific waiver of sovereign immunity, the Nevada Supreme Court held that such a waiver did, in fact, exist. *Id.* at 254 (*citing Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)). In *Hood*, the Nevada Supreme Court held that the United States waived sovereign immunity when it enacted a statute consenting to be sued in state court in an action for quiet title pursuant to 28 U.S.C. § 2410.[6] *Id.* at 254.

The Nevada Supreme Court went on to hold that a second, explicit, waiver of sovereign immunity could be found in the text of the EAJA. Read in conjunction with 28 U.S.C. § 2410 giving state courts jurisdiction over the United States in quiet title actions, the Nevada Supreme Court held the following:

> 28 U.S.C. § 2412(b) clearly provides that "any court having jurisdiction of such action" . . . may award reasonable attorney fees and expenses

[6] The applicable provision of 28 U.S.C. § 2410 provides: "Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, *or in any State court having jurisdiction of the subject matter* (1) to quiet title to, (2) to foreclose a mortgage or other lien upon, (3) to partition, (4) to condemn, or (5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a) (2000) (emphasis added).

> to the prevailing party in any civil action brought by or against the United States. As stated earlier, section 2410 clearly gives the state court, being an appropriate forum, jurisdiction to entertain the quiet title action. Hence, the state court must necessarily be included within the language of "*any*" court having jurisdiction."

Id. (emphasis in original). The Nevada Supreme Court went on to hold that "it would be an injustice to deprive a prevailing party of attorney fees and costs merely because that party chose to litigate in a state court" as specifically authorized by a federal statute. *Id.* at 256.

An identical scenario was presented to the Idaho Supreme Court in the Joyce Livestock and LU Ranching cases, but with opposite results. As in *Hood*, through an existing federal statute, the McCarran Amendment, the United States waived its sovereign immunity and consented to be joined in water adjudication proceedings proceeding in state court. 43 U.S.C. § 666, McCarran Amendment, App. 248. Just as 28 U.S.C. § 2410 gave the Nevada state courts jurisdiction over the action in *Hood*, thereby clearing the way for application of the EAJA, so too does the McCarran Amendment bestow jurisdiction on state courts over the United States in water right adjudications. Under the express and plain language of the EAJA, state courts having jurisdiction over the United States in any action pending before them also have the authorization, by statute, to award attorney fees under the EAJA.

II. The Idaho Supreme Court Interpreted And Applied The EAJA In A Way That Conflicts With The Plain Meaning, Policy Behind, And Legislative History Of The EAJA And The Decision Of The Court Below Is Demonstrably Wrong.

A. The Idaho Supreme Court Decision Conflicts With The Plain Language Of The EAJA.

The Court's intervention in this matter is also warranted because the Idaho Supreme Court interpreted and applied a federal statute, the EAJA, in a way that conflicts with the plain meaning of the statute and the statute's legislative history. *See* SUP. CT. R. 10(c). The Idaho Supreme Court held in these cases that section 2412(d) of the EAJA does not authorize state courts to award attorney fees against the United States. *See Joyce Livestock, Co.,* App. 34; *LU Ranching Co.,* App. 52. In doing so, the Idaho Supreme Court erroneously analogized the EAJA, a federal statute, to a Utah state tax statute that this Court evaluated in *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573 (1946). *Joyce Livestock*, App. 33-34. The Idaho Supreme Court also reasoned that if Congress had wanted the EAJA to apply to attorney fee awards in state courts, it would have expressly included state courts as EAJA courts in the text of the statute. *Id.* at 34.

Yet, the plain language of the EAJA mandates unequivocally, without limitation that "*any court* having jurisdiction" over any civil action brought by or against the United States, may award attorney fees to a prevailing party other than the United States, if the position of the United States was not substantially justified. Equal Access to Justice Act, App. 242 (emphasis added).

Throughout the history of American jurisprudence courts have interpreted statutory provisions according to their plain meanings. There is a strong presumption that the language of a statute expresses congressional intent. *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991). In *Connecticut*

Nat'l Bank v. Germain this Court emphasized, that, in interpreting a statute, "a court should always turn first to one, cardinal canon before all others . . . [and] must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" 503 U.S. 249, 253-54 (1992) (*citing United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241-42 (1989); *Rubin v. United States,* 449 U.S. 424, 430 (1981); *United States v. Goldenberg,* 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton,* 6 Cranch 53, 68 (1810)). *See also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In EAJA cases as well, this Court relies on the plain meaning of statutory language to discern the application and effect of a statute. For example, in *Ardestani v. I.N.S.*, this Court held that the plain meaning of the EAJA statutory phrase "adjudication under section 554" was "unambiguous in the context of the EAJA," and did not support petitioner's reading of the statute. 502 U.S. at 135. Likewise, in *Melkonyan v. Sullivan*, this Court looked to the plain language of the EAJA to ultimately hold that EAJA term "final judgment" is "a judgment rendered by a court that terminates the civil action for which EAJA fees may be received." 501 U.S. 89, 89 (1991).

Here, the plain meaning of the phrase "any court" is unambiguous, and means what it says – Congress intended *any court* that existed when it drafted the EAJA, with jurisdiction over the United States, to award EAJA attorney fees. Black's Law Dictionary defines the term "court" as "[a] governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice," and further provides that a court "is a permanently organized body, with independent judicial powers defined by law . . . for the judicial public administration of justice." BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "court"). Idaho state courts are organized pursuant to Article Five of the Idaho State Constitution, and adjudicate

disputes and administer justice throughout the state of Idaho and undoubtedly fall within the general legal definition of a court. *See* Constitution of the State of Idaho, Art. V (approved July 3, 1890).

The Idaho district court in this matter had jurisdiction over the United States pursuant to the McCarran Amendment. And the district court in this matter constituted "any court," within the language of the EAJA because, when Congress enacted the EAJA in 1980, Idaho state courts existed and the McCarran Amendment was in place. *See* Equal Access to Justice Act, Pub. Law 96-481, 198 H.R. 5612, 101st Cong., 94 Stat. 2325 (1980) (EAJA enacted in 1980); McCarran Amendment, C. 651, Title 2, §§ 208(a)-(c), 66 Stat. 560 (1952) (McCarran Amendment enacted in 1952). Thus, when the EAJA was enacted, the United States had already consented to the jurisdiction of state courts in cases involving the adjudication of water rights. As also provided by the terms of the EAJA, the state district court with McCarran Amendment jurisdiction in this matter should have awarded attorney fees to Petitioners as prevailing parties that have satisfied the EAJA's statutory requirements.

B. The Idaho Supreme Court Decision Conflicts With The Legislative Intent Of The EAJA.

The strong presumption that the plain language of a statute expresses congressional intent is rebutted only in "rare and exceptional circumstances," when Congress expresses clearly contrary legislative intent. *Ardestani*, 502 U.S. at 135-36 (*citing I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 432 n. 12 (1987); *Rubin v. United States,* 449 U.S. at 430; *GTE Sylvania,* 447 U.S. at 108). Here, the legislative intent of the EAJA does nothing but bolster the plain language of the statute, as Congress describes in its discussion of the purpose of the EAJA and indicates through its amendments to the EAJA. The Idaho Supreme

Court's decision circumvents what this Court has already held to be the legislative purpose of the EAJA.

The legislative history of the EAJA provides:

> The Purpose of the 'Equal Access to Justice Act,' as originally enacted in 1980, was to expand the liability of the United States for attorneys' fees and other expenses. . . .
>
> The primary purpose of the Act was to ensure that certain individuals, partnerships, corporations, businesses, associations or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights. The Act reduces the disparity in resources between individuals, small business and other organizations with limited resources and the federal government.

H.R. Rep. No. 99-120(I), 99th Cong. (1985), reprinted in 1985 U.S.C.C.A.N. 132.

In keeping with its intent to expand the liability of the United States under the EAJA, Congress also has amended the EAJA such that the language "any court" is defined and construed expansively and inclusively. Every time a question has been raised as to whether a newly-created court is within the purview of the EAJA, Congress has enacted amendments to show that the EAJA does apply. For instance, in the Federal Courts Improvement Act of 1982, Congress designated a new "United States Claims Court" as the forum for cases pending in the then Court of Claims. Pub. Law 97-164, 96 Stat. 25, 97th Cong. (April 2, 1982). Shortly thereafter, Congress amended the EAJA to specifically provide that "'court' includes the United States Claims Court." Pub. Law 99-80, 99 Stat. 183, 99th Cong. (January 3, 1985). *See also Essex Electro Engineers, Inc. v. U.S.*, 757 F.2d 247, 251-53 (Fed. Cir. 1985). Likewise, Congress' mention of the Veteran's Court in the EAJA was in response to a specific case

that held the Veteran's Court could not award attorney fees under the EAJA. *Jones v. Derwinski*, 2 Vet. App. 231, 235 (1992). This decision was specifically disavowed in the Federal Courts Improvement Act of 1992, as recognized in *Jones v. Principi*, 985 F.2d 582, 582 (Fed. Cir. 1992). Such an amendment was not necessary with respect to Idaho state courts because Idaho state courts already had jurisdiction over the United States pursuant to the McCarran Amendment at the time the EAJA was initially enacted. There was, therefore, no need to clarify that these courts were "courts having jurisdiction of that action" under the EAJA.

In *Commissioner, I.N.S. v. Jean*, this Court held that "the specific purpose of the EAJA is to eliminate for the average person the disincentive to challenge unreasonable governmental actions." 496 U.S. 154, 163 (1990) (*citing Sullivan v. Hudson*, 490 U.S. 877, 883 (1989)). Indeed, Congress prefaced the EAJA with the following statement of the statute's purposes:

> (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
>
> (b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.
>
> (c) It is the purpose of this title –
>
> (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award

> of attorney fees, expert witness fees, and other costs against the United States; and
>
> (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

Comm'r, I.N.S., 496 U.S. at 163 n. 11 (*citing* Congressional Findings and Purposes, note following 5 U.S.C. § 504).

Authorizing only federal courts to award EAJA attorney fees would vitiate any incentive to the average person to litigate substantive claims against the United States. *See, e.g., Comm'r, I.N.S.*, 496 U.S. at 163 (*citing Sullivan*, 490 U.S. at 883). A substantial number of individuals, ranchers and family farm organizations are involved in comprehensive water rights adjudications in state courts in the western states. For example, the Snake River Basin Adjudication in Idaho currently has over 110,000 participants and 185,000 water rights claims. *See* Dividing the Waters http://www.dividingthewaters.org/adjudications/single_detail.php?id=id (last visited June 25, 2007) (a website resource for judicial officers presiding over complex water litigation). Over 65,000 federal claims for water rights by the United States have been filed in the Snake River Basin Adjudication. *Id.* The typical stream adjudication may take decades to complete and cost millions of dollars for the claimants to pursue. *See* Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Water Rights*, 28 NAT. RESOURCES J. 63, 68 (1988).

In many cases, water rights adjudication claimants, like LU Ranching and Joyce Livestock, are individuals and family farms and ranches that are adverse to the United States, where the United States is joined in state court water rights adjudications pursuant to the McCarran Amendment. For instance, a search of the Snake River Basin Adjudication water rights claims in Basin 55, the basin in the Snake River Basin Adjudication where the

water rights of LU Ranching lie, shows that the majority of claims and objections to water rights in Snake River Basin 55 are by individuals and small family ranches and farms, and the United States. *See* Idaho Department of Water Resources Water Right and Adjudication Search, http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp (last visited June 25, 2007).

The Idaho Supreme Court's ruling deters individuals and small businesses with limited financial means involved in water rights adjudications against the United States from seeking review of, or defending against, unjustified governmental action or unreasonable governmental positions because otherwise EAJA-qualified organizations or individuals may not recover attorney fees. It also increases the disparity in resources between individuals and small organizations and the federal government in water rights adjudications. The Idaho Supreme Court ruling that the EAJA does not authorize state courts to award attorney fees against the United States runs counter to Congress' purpose in enacting the EAJA – to level the financial playing field between individuals and small organizations and the federal government, and give smaller organizations an opportunity to litigate their claims against the United States despite their limited financial resources and the likelihood of great litigation expense.

III. Public Policy Requires A Supreme Court Ruling That State Courts May Award EAJA Attorney Fees.

A. Waivers Of Sovereign Immunity Under Various Federal Statutes Provide Opportunities For Recurrence Of The Attorney Fees Issue.

The Court should also grant LU Ranching and Joyce Livestock's Petition because the EAJA attorney fees issue has the potential to recur and circumvent what this Court has held to be the purpose of the EAJA – "to eliminate for

the average person the disincentive to challenge unreasonable governmental actions." *Comm'r, I.N.S.*, 496 U.S. at 163. "The EAJA applies to a wide range of awards in which the cost of litigating fee disputes would equal or exceed the cost of litigating the merits of the claim." *Id.* at 163-64. Many of these fee disputes have the potential to occur and recur in state court.

In water rights adjudications alone, the EAJA attorney fees issue has the potential to affect numerous ranchers, farmers and small communities involved in water rights adjudications with the United States. Currently, the majority of the western states are involved in general stream adjudications. *See* Dividing the Waters, http://www.dividingthewaters.org/adjudications/index.php (last visited June 25, 2007). There is very little, if any, deterrent to prevent the United States Government from claiming that the United States alone owns and must control the water resources at issue in these adjudications. As a result, the United States and its federal agencies continue to assert in numerous state water rights adjudications that the United States has a management right to own and control all water resources on federally administered lands in the west. Local ranchers, farmers and small farming cooperatives must enter into fierce litigation with the United States to secure their water rights and their livelihoods.

Outside of water rights adjudications, the Idaho Supreme Court's decision, if left to stand, also has the potential to affect other individuals forced to litigate against the United States in state court, where the United States has waived its sovereign immunity. For example, individuals engaged in litigation with the United States to quiet title to real or personal property on which the United States has or claims a mortgage, or other lien, pursuant to 28 U.S.C. § 2410, would not be able to recover EAJA attorney fees for unjustified and unreasonable governmental positions in asserting liens or other claims on private property. *See, e.g., Hood*, App. 253-256. *See also United States By And For I.R.S. v. Union Inv.*, 732 S.W.2d 505,

506 (Ky. App. 1987); *Simmons v. United States Through Farmers Home Admin., U.S. Dept. of Agric.*, 53 N.C. App. 216, 219, 280 S.E. 2d 463, 465-66 (1981); *Baldassari v. U.S.*, 79 Cal. App. 3d 267, 269, 144 Cal. Rptr. 741, 743 (1978); *United States. v. Weissman*, 9 A.F.T.R. 2d 504, 505, 135 So. 2d 235, 236 (Fla. App. 2 Dist. 1961); *United States. v. Bullard*, 209 Ga. 426, 427-28, 73 S.E. 2d 179, 180-81 (1952).

As exemplified in *Fed. Deposit Ins. Corp. v. Chaney*, another EAJA case, the United States also may be involved in state court litigation by virtue of the Federal Deposit Insurance Corporation's interest in negotiable notes issued by federally-insured financial institutions. App. 257-261. Individuals involved in litigation with the United States and the FDIC, too, may be harmed if the Idaho Supreme Court's decision were left to stand.

The importance of this litigation is considerable, and a ruling by the United States Supreme Court on this matter will have broad implications. If the United States prevails and the Idaho Supreme Court opinion stands, individuals, family farms and other small businesses litigating against the federal government would be better served to abandon litigation against the United States, no matter how baseless the United States' position is in the litigation, simply because the individuals cannot afford to defend their rights against the United States. A United States Supreme Court ruling in favor of LU Ranching and Joyce Livestock, on the other hand, would assure individuals and small organizations and small communities the means to pursue legitimate legal positions against the United States and take advantage of the true purpose of the EAJA – to challenge unreasonable governmental positions in any court with jurisdiction over the matter.

B. To Fulfill The Purpose And Policy Behind The EAJA, The Court Should Determine That Sovereign Immunity Has Been Waived.

Under the EAJA, an award of attorney fees to a qualified prevailing party is mandatory, unless the court finds that the position of the United States was substantially justified. App. 243. Importantly, the burden of establishing that the position of the United States was "substantially justified" under the EAJA must be shouldered by the United States government. *Scarborough v. Principi*, 541 U.S. 401, 414-15 (2004) (*citing Pierce v. Underwood*, 487 U.S. 552, 567 (1988)). Under controlling United States Supreme Court precedent, it is the United States' burden to demonstrate that its arguments were "justified in substance or in the main." *Pierce,* 487 U.S. at 565-66. However, as previously held by this Court, to be substantially justified, the United States' position must be "more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Id.*

The arguments raised by the United States in *Joyce Livestock v. United States* and *LU Ranching v. United States* were arguments that previously had been rejected, outright, by the United States Supreme Court. The United States claimed to have appropriated stockwater rights on federal land not based upon its actual application of the water to beneficial use, but rather based "upon its ownership and control of the public lands coupled with the Bureau of Land Management's comprehensive management of public lands under the Taylor Grazing Act." *Joyce Livestock,* App. 35. Almost twenty years before *Joyce Livestock* and *LU Ranching* became at issue, the United States Supreme Court rejected an almost identical argument raised by the United States Forest Service. In *United States v. New Mexico,* the Supreme Court expressly held that water rights arising from cattle grazing by permittees belong not to the United States, but to the individual stockwaters who are actually placing the water to beneficial use. *United*

States v. New Mexico, 438 U.S. at 704, 716; *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. at 155. Moreover, the United States' arguments are at odds with federal statutes addressing the issue. 43 U.S.C. § 661 (2000) (Mining Act of 1866); 43 U.S.C. §§ 321-323 (2000) (Desert Land Entry Act of 1877); 43 U.S.C. §§ 315-316 (2000) (Taylor Grazing Act of 1934). In complete disregard of these precedents and statutes, for over ten years United States pursued its stockwater right claims, and objected to those filed by Joyce Livestock and LU Ranching, even though the Government had no basis in the law to do so.

Absent the availability of relief to private parties under the EAJA, there is very little, if any, deterrent to prevent the United States Government from claiming that the United States alone owns and must control the natural resources of the west, including, and most especially, water resources.[7] The United States, in the Snake River Basin Adjudication and other forums, has claimed that it has a management based right to own and control all water resources on federally administered lands in the west, to the exclusion of private individuals who, for decades, have been the actual individuals appropriating

[7] The complex and lengthy lawsuits that constitute general stream adjudications are among the largest civil proceedings ever to be litigated in state and federal courts, and many of the water resources at issue in these adjudications are located on federal lands. *See* Dividing the Waters, http://www.dividingthewaters.org/adjudications/index.php. According to data posted on the Dividing the Waters website, the United States and various federal agencies are involved in at least five western water adjudications in Colorado, Idaho, Montana, New Mexico and Texas.

See Dividing the Waters at http://www.dividingthewaters.org/adjudications/single_detail.php?id=co (Colorado); http://www.dividingthewaters.org/adjudications/single_detail.php?id=id (Idaho); http://www.dividingthewaters.org/adjudications/single_detail.php?id=mt (Montana); http://www.dividingthewaters.org/adjudications/single_detail.php?id=nm (New Mexico); http://www.dividingthewaters.org/adjudications/single_detail.php?id=tx (Texas).

the waters and placing them to beneficial use. In its attempt to secure these rights for the Government, the United States can and does muster the full power of its agencies and the United States Department of Justice in litigation against these private citizens. It is a legal fight that most individuals and small businesses simply cannot afford. The practical reality is that even if the United States' litigation position has no basis in the law, most citizens will be forced to compromise their rights to avoid protracted litigation against the United States. This is precisely the type of situation the EAJA is meant to redress. In fact, it is the stated purpose of the EAJA to "diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees . . . against the United States." *Comm'r, I.N.S.,* 496 U.S. at 163 n. 11 (*citing* Congressional Findings and Purposes, note following 5 U.S.C. § 504). In this way, to the extent that the United States files and prosecutes claims that have no basis in the law, the United States is held accountable under the EAJA for the damage it does to private individuals who are forced to defend themselves in these actions.

As a matter of law and United States Supreme Court precedent, a fee award to a qualified individual or business under the EAJA cannot be avoided when there was no legal basis for the arguments raised by the United States. 28 U.S.C. § 2412(d); *Pierce*, 487 U.S. at 565-66. This is so whether the court exercising its jurisdiction over the United States is a federal court or a state court. Indeed, as held by the Nevada Supreme Court, it would be an injustice to hold otherwise. *Hood*, App. 256.

CONCLUSION

As the name implies, the Equal Access to Justice Act was designed to protect the rights of individuals and small businesses in litigation against the United States. It

recognizes the disproportionate resources at the disposal of the United States that will act as a deterrent to private parties seeking to vindicate or protect their rights as against unwarranted and unjustifiable litigation initiated by the government. When the United States pursues litigation without any substantial basis in the law for its position, to the detriment of private individuals, those private parties have recourse under the express terms of the EAJA which plainly authorizes and instructs "any court having jurisdiction of that action" to award attorney fees to the private prevailing party.

The Idaho Supreme Court's decision to abdicate its responsibilities under the EAJA was plain error. As held by the Nevada Supreme Court, and as is evident in the plain language of the EAJA, state courts having jurisdiction over the United States in any action also have the authority under the EAJA to award attorney fees under that statute. Accordingly, Petitioners respectfully request that the Court grant the Petition for Writ of Certiorari and reverse the Idaho Supreme Court's decision to reject the EAJA petition on jurisdictional grounds. Alternatively, Petitioner requests summary reversal of the Idaho Supreme Court's decision with respect to the asserted EAJA claim.

Respectfully submitted,

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June 27, 2007

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket Nos. 32278, 32279, & 32846

IN RE: SRBA CASE NO. 39576, (SUBCASE NOS. 55-10135, 55-11061, 55-11385 AND 55-12452).

JOYCE LIVESTOCK COMPANY,

Appellant-Respondent,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

Twin Falls, November 2006 Term

2007 Opinion No. 23

Filed: February 9, 2007

Stephen W. Kenyon, Clerk

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for Twin Falls County. The Hon. John M. Melanson, District Judge.

The judgment is *affirmed* in part, *vacated* in part, and *remanded* for further proceedings.

McQuaid Bedford & Van Zandt LLP, San Francisco, California, and Roger D. Ling, Rupert, counsel for Joyce Livestock Company. Elizabeth P. Ewens argued. United States Department of Justice for the United States of America. Ellen J. Durkee argued.

EISMANN, Justice.

This is an appeal from a judgment upholding Joyce Livestock Company's claim to instream water rights on federal rangeland for watering livestock, determining the priority dates of those water rights, and rejecting the claim of the United States that it also has instream water rights based upon appropriations by those it permitted to use the rangeland after enactment of the Taylor Grazing Act in 1934. The district court also denied Joyce Livestock Company's request for an award of attorney fees. We affirm the district court's holding that Joyce Livestock Company has instream water rights, vacate its determination of priority, and remand for a redetermination of the priority dates of such rights. We uphold its denial of the water rights claimed by the United States and its denial of Joyce Livestock Company's request for attorney fees.

I. FACTS AND PROCEDURAL HISTORY

Joyce Livestock Company (Joyce Livestock), a limited partnership formed in 1985, is a cattle operation located in Owyhee County, Idaho. It owns approximately 10,000 acres of land that is an accumulation of twenty-nine different homesteads and small ranches. The earliest patents in the chain of title of the properties owned by Joyce Livestock were issued in 1898. It filed a claim for instream[1] stockwater rights in Jordan Creek with a priority date of 1898. The United States filed overlapping

[1] Although we refer to them as "instream" water rights, the water sources do not need to be streams. They can be any natural water source, including springs that simply form pools of water. Calling them instream water sources simply means that the water was applied to a beneficial use without diverting it from the water source.

claims for instream stockwatering with a priority date of 1934, the year of adoption of the Taylor Grazing Act, 43 U.S.C. § 315 *et seq*.

The matter was first heard by a special master. He recommended that the water rights claimed by Joyce Livestock be denied because there was no evidence that Joyce Livestock's predecessors had attempted to exclude other ranchers from using the water source used by the predecessors. Absent such evidence, the special master concluded that the predecessors lacked the requisite intent to acquire water rights. The special master also recommended that the water right claimed by the United States be granted, with a priority date of June 28, 1934, the date of enactment of the Taylor Grazing Act. According to the special master, the actions of the United States, through the Bureau of Land Management, in making the rangeland available to ranchers combined with its management of the rangeland demonstrated an intent to appropriate water and constituted a diversion of the water and an application of it to a beneficial use.

The district court reviewed the special master's recommendations. It held that the special master erred in holding that Joyce Livestock's predecessors lacked the intent required to obtain a water right. The district court ruled that the necessary intent could be inferred from the act of watering livestock. The district court determined, however, that Joyce Livestock's predecessors could not have obtained water rights on federal land unless their applications for grazing permits filed under the Taylor Grazing Act showed that they understood or believed they had acquired such water rights. Because such evidence was lacking from the grazing permit applications, the district court held that the earliest priority date Joyce

Livestock could establish for its water rights was April 26, 1935. That was the date on which John T. Shea filed an application for a grazing permit.

The district court also denied the United States's water rights claim. There was no evidence that the United States had appropriated any water by grazing livestock. The district court noted that under Idaho law, a water right obtained by the lessee of real property is owned by the lessee unless the lessee was acting as an agent of the lessor in acquiring the water right. In this case, the United States did not show that any of Joyce Livestock's predecessors were acting as its agent when they acquired water rights.

The district court entered a judgment awarding Joyce Livestock a water right with a priority date of April 26, 1935, and denying the claims of the United States. It certified the judgment as final pursuant to Rule 54(b) of the Idaho Rules of Civil Procedure.

Joyce Livestock sought an award of attorney fees against the United States. The district court held that it was not entitled to an award under Idaho Code § 12-121 because the United States did not act frivolously, unreasonably, or without foundation in asserting its water rights claim and opposing the claim of Joyce Livestock. It likewise denied an award pursuant to 28 U.S.C. 2412(d) because it found the position of the United States substantially justified. Both Joyce Livestock and the United States appealed.

II. ISSUES ON APPEAL

1. Did the district court err in finding that Joyce Livestock had acquired a water right on federal land for watering stock?

2. Did the district court err in determining the priority date of Joyce Livestock's water right?

3. Did the district court err in denying Joyce Livestock's request for an award of attorney fees under Idaho Code § 12-121 and 28 U.S.C. § 2412(d)?

4. Did the district court err in denying the United States's claim for a water right for watering stock?

5. Is Joyce Livestock entitled to an award of attorney fees on appeal?

III. ANALYSIS

A. Did the District Court Err in Finding that Joyce Livestock Had Acquired a Water Right on Federal Land for Watering Stock?

1. An appropriator can obtain a water right in nonnavigable waters located on federal land. When the arid regions of the West were initially settled, local custom and usage held that the first appropriator of water for a beneficial use had the better right to the use of the water to the extent of his actual use. *California Oregon Power Co. v. Beaver Portland Cement Co*., 295 U.S. 142 (1935). "The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection." *Id.* at 154. That custom likewise prevailed among the early settlers in

what became the State of Idaho. As this Court explained in *Drake v. Earhart,* 2 Idaho 750, 753-54, 23 P. 541, 542 (Idaho Terr. 1890), with respect to the early emigrants to this area:

> They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject. Very soon these customs attracted the attention of the legislatures, where they were approved and adopted, and next we find them undergoing the crucial test of judicial investigation.

"This general policy [of prior appropriation] was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935). Section 9 of that Act, codified at 30 U.S.C. § 51, provided:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and

> accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"This provision was 'rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.'" *Id.* at 155 (quoting *Broder v. Natoma Water & Min. Co.,* 101 U.S. 274, 276 (1879)).

In 1877 Congress passed the Desert Land Act to encourage and promote the economic development of the arid and semiarid public lands of the Western United States, including those in what would become the State of Idaho. "The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately." *Ickes v. Fox,* 300 U.S. 82, 95 (1937). As the Supreme Court said two years earlier in *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 161 (1935), with reference to the Desert Land Act, "It is hard to see how a more definite intention to sever the land and water could be evinced."

The Court also stated that the Desert Land Act "simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation. . . . The public interest in such state control in the arid land states is definite and substantial." *Id.* at 164.

Thus, the appropriation of the nonnavigable waters within this State, including those located on federal land, is a matter of state law. "[A]ll nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states." *Ickes v. Fox,* 300 U.S. 82, 95 (1937). "While the basics of the doctrine of prior appropriation is the same from state to state, the doctrine has evolved to meet the specific needs of each state and thus differs among the western states. Congress understood this fact and that is why the laws concerning appropriation were left up to each individual state." *Idaho Dept. of Water Resources v. U.S.,* 122 Idaho 116, 124, 832 P.2d 289, 297 (1992).

"One who has appropriated water and beneficially used it has a right to the use of the water independent of his ownership of the land." *Sanderson v. Salmon River Canal Co.,* 34 Idaho 145, 160, 199 P. 999, 1003 (1921). Idaho has long recognized that an appropriator can obtain a water right in waters located on federal land. *Keller v. McDonald,* 37 Idaho 573, 218 P. 365 (1923); *Short v. Praisewater,* 35 Idaho 691, 208 P. 844 (1922); *Sarret v. Hunter,* 32 Idaho 536, 185 P. 1072 (1919); *Le Quime v. Chambers,* 15 Idaho 405, 98 P. 415 (1908); *Hillman v. Hardwick,* 3 Idaho 255, 28 P. 438 (1891). The appropriator simply must follow Idaho law in obtaining that water right.

The United States argues that prior to the enactment of the Taylor Grazing Act, the ranchers should not have been able to obtain a water right by grazing livestock on public lands because they did not have the right to exclude others from those lands or from water sources located on those lands. The United States is correct that one rancher did not have the right to exclude another from grazing livestock on public lands. *Buford v. Houtz,* 10 U.S. 305 (1890). A water right, however, is not based upon having exclusive access to a water source. It does not constitute ownership of the water. *See, Idaho Conservation League, Inc. v. State,* 128 Idaho 155, 156-57, 911 P.2d 748, 749-50 (1995) ("The state's ownership of the water that is the subject of the adjudication, is not before the SRBA court, nor is that ownership interest in any way diminished by the adjudication of claimants' rights. The proprietary rights to use water, which are the subject of the SRBA, are held subject to the public trust"). The prior appropriation doctrine recognizes that two or more parties can obtain a right to use water from the same source. "[T]wo parties may at the same time be in possession of water from a creek and neither hold adverse to the other; each may justly claim the right to use the water he is using, without affecting the rights of the other." *Graham v. Leek,* 65 Idaho 279, 144 P.2d 475, 480-81 (1943) (quoting from *St. Onge v. Blakely,* 245 P. 532, 536 (Mont. 1926)). Thus, an appropriator need not have exclusive access to federal lands in order to obtain a water right in waters situated on those lands.

2. Under the constitutional method, an appropriator could obtain a water right for stock watering without diverting the water from the water source. "Until 1971 Idaho recognized two methods of appropriating water of the state both of which were

equally valid: the statutory method of appropriation and the constitutional method of appropriation." *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.,* 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996). In 1971 the legislature amended Idaho Code §§ 42-103 and 42-201 to require compliance with the statutory application, permit, and license procedure in order to acquire new water rights. Ch. 177, §§ 1 & 2, 1971 Idaho Sess. Laws 843-44. "Although new appropriations could not be made under the constitutional method after 1971, the validity of existing constitutional appropriations continues to be recognized." *State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000) (citation omitted).

The constitutional method of appropriation generally requires an actual diversion in order to obtain a water right. Under the constitutional method, however, "[n]o diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water right for stock watering." *State v. U.S.,* 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). Thus, Joyce Livestock's predecessors could obtain a water right under the constitutional method by watering their livestock at water sources on the public range without having to divert the water or modify the water source.

Even though we refer to it as the constitutional method of appropriating water, the Idaho Constitution did not create the doctrine of prior appropriation. "The rights of appropriators were regulated in the first instance by local customs, and out of these initial sources grew our present laws and rules with respect to irrigation." *Sarret v. Hunter*, 32 Idaho 536, 542, 185 P. 1072, 1074 (1919). "The framers and adopters of our Constitution were familiar

with the prevailing customs and rules governing the manner in which water might be appropriated . . . , and they gave it form and sanction by writing it in the fundamental law of the state." *Id.* at 543, 185 P. at 1075. "The rule in this state, both before and since the adoption of our constitution, is . . . that he who is first in time is first in right." *Brossard v. Morgan,* 7 Idaho 215, 219-20, 61 P. 1031, 1033 (1900). Thus, water rights obtained in a manner that is now called the constitutional method of appropriation are entitled to protection even though the water was appropriated prior to the adoption and ratification of our Constitution in 1889 and its approval by Congress in 1890. *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.,* 57 Idaho 403, 66 P.2d 115 (1937) (upholding priorities of 1864, 1869, and 1887); *Branstetter v. Williams,* 6 Idaho 574, 57 P. 433 (1899) (upholding priority of 1863); *Drake v. Earhart*, 2 Idaho 716, 23 P. 541 (1890) (upholding priority of 1879).

3. Joyce Livestock's predecessors obtained water rights on federal land for stock watering. Under the constitutional method of appropriation, "a water user could make a valid appropriation without a permit, most commonly by diverting the water and putting it to beneficial use." *State v. U.S.,* 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). Because no diversion is required in order to obtain a water right for stock watering under the constitutional method, *Id.,* Joyce Livestock's predecessors could obtain water rights for stock watering simply by applying the water to a beneficial use. There is no dispute that watering livestock is a beneficial use of water. *Stevenson v. Steele,* 93 Idaho 4, 453 P.2d 819 (1969). Therefore, they could obtain water rights simply by watering their

livestock in the springs, creeks, and rivers on the range they used for forage.

The United States argues that there must also be evidence that Joyce Livestock's predecessors intended to obtain a water right. The district court agreed, but held that the intent could be inferred if the predecessors applied the water to a beneficial use. We have not held that an intent to obtain a water right was a requirement for appropriating water under the constitutional method.

The two essentials for obtaining a water right under the constitutional method were typically diversion and application to a beneficial use. *State v. U.S.*, 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). As we stated in *Morgan v. Udy,* 58 Idaho 670, 680, 79 P.2d 295, 299 (1938), "In other words, in this state one may have a valid appropriation though only a temporary and revocable way of conveyance for his water; diversion and application to a beneficial use being the two essentials." The statement in *Morgan v. Udy* is consistent with the history of obtaining water rights prior to the adoption of our Constitution.

The first act passed by the territorial legislature concerning the appropriation of water was in 1881. *Kirk v Bartholomew,* 3 Idaho 367, 369-70, 29 P. 40, 41 (1892). That act, compiled at Idaho Revised Statutes §§ 3155 *et seq.* (1887), provided a statutory procedure for obtaining a water right. The person first posted a written notice at the point of diversion and then, within sixty days, commenced construction of the diversion works. If the person diligently prosecuted that construction work to completion, the priority date of the water right would relate back to the date the notice was posted. The act also included a provision recognizing the validity of water rights that had

been acquired prior to 1881 by diverting the water and applying it to a beneficial use, stating that such diversion and application to a beneficial use "shall be taken to have secured the right to the waters claimed."[2] The territorial legislature did not indicate that there was an additional intent element to obtaining valid water rights under the constitutional method.

"The right to appropriate unappropriated water is guaranteed by article XV, section 3 of the Idaho Constitution." *Parker v. Wallentine,* 103 Idaho 506, 513, 650 P.2d 648, 655 (1982). "Prior to adoption of a mandatory permit system in 1971 this constitutional declaration was construed as authorizing a person to appropriate the water of a stream simply by 'actually diverting the water and applying it to a beneficial use.'" *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.,* 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996) (quoting from *Sand Point Water & Light Co. v. Panhandle Dev. Co.,* 11 Idaho 405, 413, 83 P. 347, 349 (1905)). As we stated in *Cantlin v. Carter,* 88 Idaho 179, 186, 397 P.2d 761, 765 (1964), "By actually diverting and applying water to a beneficial use, a legal appropriation is

[2] In *Kirk v. Bartholomew*, 3 Idaho 367, 369-70, 29 P. 40, 41 (1892), we quoted that portion of the statute as follows:

> Section 8 of said act secures to persons who had made appropriations of water prior to the date of said act all of the water so appropriated, and is as follows: "Sec. 8. All ditches, canals, and other works heretofore made, constructed, or provided, and by means of which the waters of any stream have been diverted and applied to any beneficial use, shall be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed, without regard to or compliance with the requirements of this act."

made." Likewise, in *Furey v. Taylor*, 22 Idaho 605, 127 P. 676, 678 (1912), we said, "[T]he appellant having made an appropriation of 350 inches from the water flowing in Pass creek by actually diverting the water and applying the same to a beneficial use, such appropriation was legal and clearly authorized by section 3, art. 15, of the Constitution."

The district court held that there must be an "intent to appropriate" in order to have obtained a water right under the constitutional method. It is not clear what the district court meant by an intent to appropriate. The court could have meant an intent to obtain a water right that would be recognized and protected under the law, or it could have meant an intent to apply the water to a beneficial use. We have not required either intent in order to obtain a water right under the constitutional method of appropriation.

The district court read *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.,* 101 Idaho 677, 619 P.2d 1130 (1980), as requiring three elements for a valid appropriation under the constitutional method: (1) intent to appropriate, (2) physical diversion from a natural watercourse, and (3) application of the water to a beneficial use. That case involved a dispute between two appropriators, and the issue being addressed was whether the actions of one of them were sufficient to constitute diverting water from a spring. When addressing that issue, we stated:

> First, Hidden Springs argues that the water constituting Spring A was never successfully diverted by Hagerman, and therefore could not have been included in the 1906 decree. Based on the record, we do not find this argument persuasive.

Diversion is a prerequisite to appropriation of water, along with the application of such water to a beneficial use, but diversion as such has not been defined. For example: "The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use." *Sarret v. Hunter,* 32 Idaho 536, 541, 185 P. 1072, 1074 (1919). "It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use, existing at the time or contemplated in the future, followed by diversion from the natural channel by means of a ditch, canal, or other structure and also an active application of the water, within a reasonable time, to a beneficial use." 78 Am.Jur.2d Waters § 321 (1975) (footnotes omitted). I.C. § 42-101 provides that the "waters of the state, when flowing in their natural channels," are subject to appropriation. *See also Rabido v. Furey,* 33 Idaho 56, 190 P. 73 (1920). It is Hidden Springs' contention that the diversion necessary for appropriation must be from the natural source of the water, and that here the spring field is the natural source, including both Spring A and the springs from which the water first emerged. Since the water never left the spring field, Hidden Springs argues the water was never diverted. In considering this contention, we rely upon those cases which refer to diversion from the natural channel of the water, making it sufficient, for establishing diversion, that the water flows in a different channel than it would have done absent intervention by the appropriator.

Here, there can be no dispute that Hagerman did divert the water from its natural channel; instead of running downhill directly into the

> creek, the water entered a pipe and traveled approximately one-half mile before the water here in dispute was lost as seepage and re-emerged as Spring A. There can be no question but that had Hagerman made use of the water at the point of the seepage loss, it would have been considered diverted for purposes of appropriation.

101 Idaho at 679-80, 619 P.2d at 1132-33. The district court read our quotation from American Jurisprudence Second as adding the requirement that an appropriator must intend to apply the water to some beneficial use. The appropriator's intent was not even an issue in the *Hidden Springs* case. Had we intended to add intent as a required element, we would not have included the quotation from *Sarret v. Hunter* stating, "The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use." There is no mention in that quotation of also having an intent to apply the water to a beneficial use.

Application to a beneficial use was necessary to obtain the water right under the constitutional method of appropriation. You could certainly infer that a person who diverts water and applies it to a beneficial purpose intended to do so. In such case, however, the intent is shown by the person's actions. In order for that person to have obtained a water right under the constitutional method of appropriation, there did not also have to be evidence showing that when the person applied the water to a beneficial use, he or she intended to do so.

We have mentioned an intent to apply water to a beneficial use when discussing the permit method of appropriation. For example, in *Sarret v. Hunter*, 32 Idaho

536, 541-42, 185 P. 1072, 1074 (1919) (citation omitted), we stated:

> In determining whether a valid appropriation of water has been made, or the respective priorities of contending appropriators, the law does not concern itself with disputes relative to the title to the lands for which it is claimed the water was appropriated. The test of a valid appropriation of water is its diversion from the natural source and its application to a beneficial use. When one diverts water hitherto unappropriated and applies it to a beneficial use, his appropriation is complete, and he acquires a right to the use of such water, which is at least coextensive with his possession, and so when one makes application for a permit to divert and appropriate water, the query is, not upon whose lands does he intend to apply it, but upon what lands he intends to apply it, and to what use does he expect to put it when so applied. His right to possession, or the character of his occupancy as between claimants to the right to the use of the public waters of the state, is not in issue.

An intent to apply the water to a beneficial use was relevant when making an application for a permit. At the time *Sarret v. Hunter* was decided, that application was made to the state engineer. The application for the permit had to set forth "the nature of the proposed use." Rev. Codes of Idaho § 3253 (1908). The engineer could issue a permit if the application "contemplate[d] the application of water to a beneficial use." Rev. Codes of Idaho § 3254 (1908). If the application did not indicate an intent to apply the water to a beneficial use, the state engineer would not issue a permit. If a permit was issued, the applicant then had to timely complete the diversion works

and apply the water to a beneficial use. "After the holder of a permit has fulfilled all the requirements of the statute, and made proof to the state engineer that he has put the water to the beneficial use for which the diversion was intended, he is entitled to a license from the state engineer confirming such use." *Basinger v. Taylor,* 30 Idaho 289, 297, 164 P. 522, 524 (1917). It was the license, not the permit, that granted the water right, but the priority date related back to the date the permit was issued. *Id*; *Washington State Sugar Co. v. Goodrich,* 27 Idaho 26, 147 P. 1073 (1915).

Under the constitutional method of appropriation, a water user could make a valid appropriation without a permit by diverting the water and putting it to beneficial use. *State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000). Because no diversion is required in order to obtain a water right for stock watering under the constitutional method, *Id.,* Joyce Livestock's predecessors could obtain water rights for stock watering simply by applying the water to a beneficial use, which they did by watering their stock.

The United States asks us to require a mental element in this situation because without it "a livestock grazer could appropriate a water right without actually being aware of the fact." From its arguments, the mental element that the United States would require includes two aspects. First, there would have to be evidence showing that the rancher grazing livestock on public land knew of the water sources on the land and knew that his or her livestock were drinking from those water sources. Second, there would have to be evidence showing that the rancher understood or believed that a water right recognized by law could be obtained by the instream watering of livestock.

With respect to the first aspect, the early settlers to this area could obtain homesteads of 160 or 640 acres, depending upon when they made entry on the federal lands. The Homestead Act of 1862 authorized the entry of 160 acres, and it was amended in 1891 to permit the entry of 640 acres. The Stock-Raising Homestead Act enacted in 1916 permitted the entry of 640 acres. Regardless of whether the settler obtained a patent to 160 acres or 640 acres, the patented property alone was not sufficient to sustain a livestock operation capable of supporting a single family unit in this arid part of the country. Livestock must have adequate forage and water. To succeed, the rancher had to use adjoining or nearby public lands and the water on those lands. The demand for water in this arid region was greater than the supply. The argument of the United States assumes that these ranchers would have acquired a homestead and several hundred head of livestock without first making any investigation to see whether there was sufficient forage and water to support those livestock. In other words, the government's argument assumes that these ranchers lacked common sense. It is inconceivable that a rancher would either homestead or purchase land and invest in hundreds of head of livestock without having made any investigation as to whether there was sufficient water available for the livestock to survive. The rancher's hope was to raise horses, cattle, or sheep for market, not to have them die from lack of water. When putting livestock out onto the range, the rancher clearly wanted them to drink water from the available water sources.

With respect to the second aspect, we have never held that in order to obtain a valid water right under the constitutional method of appropriation there must have

been evidence showing that the appropriator understood that the manner in which he or she was securing and using the water would ultimately be recognized under the law as creating a valid water right. We have never required appropriators to be lawyers or seers. Water rights based upon prior appropriation were recognized by custom in the land that later became the State of Idaho before there were any statutes or controlling court decisions on the issue.

The doctrine of prior appropriation grew out of the sense of justice of the miners who came to the west in search of gold and other precious metals. *Atchison v. Peterson,* 87 U.S. 507 (1874). Congress first recognized the doctrine in 1866. *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935). It was not until 1881 that the legislature of the Idaho Territory first enacted legislation concerning the appropriation of water. *Kirk v. Bartholomew*, 3 Idaho 367, 29 P. 40 (1892). The Supreme Court of the Territory of Idaho first recognized the doctrine of prior appropriation in 1888. *Malad Valley Irrigation Co. v. Campbell,* 2 Idaho 378, 18 P. 52 (1888). Yet, we have recognized a water right with a priority date of 1864, *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.,* 57 Idaho 403, 66 P.2d 115 (1937), which would have been obtained before there were any statutes or court decisions recognizing the doctrine of prior appropriation in what became Idaho.

"It should be noted that a 'constitutional appropriation' is not pursuant to specific procedures specified by the constitution, but instead is allowed by the grant of authority of the constitutional language." *State v. U.S.,* 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). It was not until 1974 that we addressed whether diversion was required in

order to appropriate water under the constitutional method. *State, Dep't of Parks v. Idaho Dep't of Water Admin.,* 96 Idaho 440, 530 P.2d 924 (1974). It was not until 2000 that we held that a water right could be obtained for stock watering without diverting the water from the watercourse. *State v. U.S.,* 134 Idaho 106, 996 P.2d 806 (2000). Adopting the intent element urged by the United States would result in a holding that no water rights for instream stock watering could have been obtained before those cases were decided unless the court also found that those watering their stock at the water source decades ago were sufficiently prescient to have known how we would decide those cases. It could also affect the priorities of water rights originally obtained under the constitutional method of appropriation if the original appropriator is no longer available to testify as to his or her understanding of water law.

4. The water rights that ranchers obtained by watering their livestock on federal land were appurtenant to their patented properties. The district court held that the water rights obtained by Joyce Livestock's predecessors on federal grazing land were appurtenant to their patented properties. The district court reasoned, "[M]any livestock owners nonetheless depended on the use of adjacent public rangeland in conjunction with their patented property to support a viable livestock operation. . . . It can be reasonably concluded that both the rangeland as well as the water right benefited the livestock owners patented property." In seeking to have that holding reversed, the United States argues, "[A]n instream stock water right appropriated on a public grazing allotment has no physical relationship to base property and cannot be an appurtenance to it in any recognized sense."

We have not held, however, that appurtenance is dependent upon a "physical relationship" as contended by the United States.

In *Nelson v. Johnson,* 106 Idaho 385, 679 P.2d 662 (1984), the Wakes owned real property that they used for a dry farming operation and a cattle ranch. Each year they would drive their cattle from the home ranch down a county road and then over an access road on their farmland to Butler Springs, also located on their land. The cattle would then graze on adjacent federal land, returning each day to the springs for water. At the onset of winter, the Wakes drove their cattle back along the same route to winter on their home ranch.

In 1956 the Wakes sold the farmland to the Hesses and reserved water rights in Butler Springs and an easement in the land surrounding the springs. They did not reserve an easement in the access road that ran from the county road to the springs. Several years later, the Hesses sold the farmland to the Johnsons.

In 1964 the Wakes sold their home ranch and cattle operation. After several mesne conveyances, the Nelsons purchased the cattle ranch in 1973. In 1979 the Johnsons prevented the Nelsons from using the access road to the Butler Springs area, and the Nelsons filed suit to enforce their right to use the access road and the area around the springs.

In defending the lawsuit, the Johnsons contended that the easement in the land surrounding Butler Springs was not appurtenant to the ranch property and therefore did not pass with the ranch property when it was conveyed to the Nelsons. The trial court held that the easement around Butler Springs reserved by the Wakes in 1956

when they sold the farmland was appurtenant to the ranch property and therefore passed with it in the subsequent conveyances of the ranch property. This Court affirmed, reasoning as follows:

> The definitions of "appurtenant" and "in gross" further make it clear that the easement is appurtenant. The primary distinction between an easement in gross and an easement appurtenant is that in the latter there is, and in the former there is not, a dominant estate to which the easement is attached. An easement in gross is merely a personal interest in the land of another, whereas an easement appurtenant is an interest which is annexed to the possession of the dominant tenement and passes with it. An appurtenant easement must bear some relation to the use of the dominant estate and is incapable of existence separate from it; any attempted severance from the dominant estate must fail. The easement in the Butler Springs area is a beneficial and useful adjunct of the cattle ranch, and it would be of little use apart from the operations of the ranch. Moreover, in case of doubt, the weight of authority holds that the easement should be presumed appurtenant. Accordingly, the decision of the trial court is affirmed as to the reserved easement.

106 Idaho at 387-88, 679 P.2d at 664-665 (citations omitted).

When deciding that a water right passes with the property to which it is appurtenant even though not mentioned in the deed, we reasoned by analogy from the law applicable to easements. In *Bothwell v. Keefer,* 53 Idaho 658, 27 P.2d 65 (1933), the issue was whether an attachment of real property which had an appurtenant

water right created a lien on the water right when the water right was not mentioned in the writ of attachment. We held that an appurtenant water right passed with the land even though not expressly mentioned. In doing so, we reasoned by analogy from appurtenant easements, holding that water rights and easements were sufficiently similar to have the relevant law applicable to appurtenant easements apply to appurtenant water rights.

> This court has held, construing the Shannon Case [*Cooper v. Shannon,* 85 P. 175 (Colo. 1906)], that a water right passes with the realty to which it is appurtenant unless there is intention to the contrary, and easements pass with the realty, concerning which this court has held the following: "And the general rule is that, where an easement is annexed to land, either by grant or prescription, it passes as an appurtenance with the conveyance 'of the dominant estate, although not specifically mentioned' in the deed, or even without the use of the term 'appurtenances,' 'unless expressly reserved from the operation of the grant.' "
>
> Conceding that an easement is different from a water right, water rights and appliances connected therewith have been considered, so far as the point here is concerned sufficiently similar to easements, to pass with the land though not mentioned as such or as appurtenances.

53 Idaho 662, 27 P.2d at 66-67 (citations omitted).

Like the easement around Butler Springs in *Nelson v. Johnson,* the water rights on public lands obtained by the predecessors of Joyce Livestock were beneficial and useful adjuncts to their cattle ranches and would be of little use apart from the operations of their ranches. Indeed, the

patented property alone was not sufficient to sustain a livestock operation capable of supporting a single family unit in this arid part of the country. Also, those water rights would be of little use independent of the ranch properties. It would be illogical to hold that an easement on the land surrounding a spring can be appurtenant to the cattle ranch as in *Nelson v. Johnson,* but that a water right in that spring cannot be appurtenant because the water is not used on the ranch. The sole purpose of the easement on the land surrounding the springs in *Nelson v. Johnson* was to permit the cattle to congregate there in order to drink water from the springs. We therefore hold that the district court did not err in holding that the water rights on federal land acquired by the predecessors of Joyce Livestock were appurtenant to their deeded ranches.

5. A water right appurtenant to real property is conveyed with the real property unless it is expressly reserved or the parties clearly intended that the conveyance not include the water right. The district court held that predecessors of Joyce Livestock had stockwater rights on federal land that were appurtenant to their deeded properties. The court also held that whether those appurtenant water rights passed with the land when it was conveyed depended upon the intent of the grantor. With respect to proof of that intent, the court stated, "Intent is evidenced by the terms of the instrument conveying the land, or, when the instrument is silent or ambiguous, then by other facts and circumstances surrounding the conveyance." The district court then conducted an analysis of the documents in the record to determine whether the grantors intended to convey appurtenant water rights with the land when the water

rights were not mentioned in the deeds. In doing so, the district court erred.

Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention "appurtenances." *Silverstein v. Carlson,* 118 Idaho 456, 797 P.2d 856 (1990); *Bothwell v. Keefer,* 53 Idaho 658, 27 P.2d 65 (1933). Thus, the inquiry is not whether there is evidence indicating that the grantor intended to convey the water rights with the land. Rather, the inquiry is whether the water rights were expressly reserved in the deed conveying the land or whether there is clear evidence that the parties intended that the grantor would reserve them. There is nothing in the record indicating that any of Joyce Livestock's predecessors in interest intended to reserve their water rights on public land when they conveyed their ranches. Therefore, the conveyances of the land included the appurtenant water rights.

The United States argues that the statute of frauds prevents a conveyance of water rights unless they are expressly mentioned in the deed. It relies upon *Olson v. Idaho Department of Water Resources,* 105 Idaho 98, 666 P.2d 188 (1983); *Gard v. Thompson,* 21 Idaho 485, 123 P. 497 (1912); and *Russell v. Irish,* 20 Idaho 194, 118 P. 501 (1911). None of those cases support the position of the United States.

The *Olson* case held that an executory oral agreement to settle a lawsuit by changing priority dates and amounts of use of the parties' water rights was within the statute of frauds. The *Gard* case held that merely handing water

permits to another person with no intention to pass title did not constitute a conveyance of the water rights represented by the permits. The *Russell* case held that a conveyance of land included the appurtenant water rights even though they were not specifically mentioned in the deed.

The deeds executed by Joyce Livestock's predecessors conveyed the land and, under the law, any appurtenances including water rights. No separate writing or express mention of the water rights was required by the statute of frauds. A separate writing would be required if there had been an attempt to convey the water rights separately.

B. Did the District Court Err in Determining the Priority Date of Joyce Livestock's Water Right?

Joyce Livestock claimed twenty different places of use along Jordan Creek. The district court determined that the earliest priority would be April 26, 1935, the date that a predecessor-in-interest John T. Shea applied for a grazing permit under the Taylor Grazing Act. In making that determination, the district court held that it would not recognize any earlier priority absent an historical document acknowledging the existence of the water rights or showing where cattle were grazed.

On April 26, 1935, Shea applied for a grazing permit under the Taylor Grazing Act, which had been enacted the preceding year. In that application, he stated that he had been grazing specified areas of federal rangeland for ten years. Likewise, on June 12, 1935, Joyce Bros. Livestock Co. submitted an application for a grazing permit on federal rangeland. In that application, it stated that it began using that rangeland in 1866. The district court

held that because these applications for grazing permits did not state that Shea and Joyce Bros. Livestock Co. believed they had water rights on the federal rangeland, they could not have had any such water rights. The court held, however, that they did obtain water rights by grazing their livestock on that same rangeland pursuant to the grazing permits subsequently issued. In making this determination, the district court erred in several respects.

First, it held that it would not recognize instream water rights on federal rangeland unless the applications for grazing permits identified those water rights. These predecessors of Joyce Livestock filed applications for grazing permits, not applications for water rights. The federal government could not grant water rights under the applicable law.

Second, the district court apparently construed certain answers on the applications as disclaiming any water rights on federal rangeland. The application completed by Shea included a question asking, "Do you own or control any source of water supply needed or used for livestock purposes? Describe it?" Shea answered, "usual water right acquired with lands under the laws of Idaho." The district court upheld the special master's finding that Shea's answer referred to water sources on his deeded land. Based upon that interpretation, the district court held that Shea's answer indicated he did not believe he owned any water rights on federal rangeland, and therefore he could not have intended to convey any such water rights. The identical question was included on the application completed by Joyce Bros. Livestock Co., and the answer did not identify any water rights on federal land. The district court likewise concluded that Joyce Bros.

Livestock Co. therefore did not have any water rights on federal land when it made the application.

The question did not ask whether the applicant for a grazing permit claimed any water rights on federal land. It asked him whether the applicant owned or controlled any source of water needed or used for livestock purposes. A water right does not make the appropriator the owner of the source of water, nor does it give the appropriator control over that source. *Hutchinson v. Watson Slough Ditch Co.,* 16 Idaho 484, 101 P. 1059 (1909) (the right to divert all of the water out of a watercourse during the irrigation season does not make the appropriator the sole and exclusive owner of the watercourse). It does not even make the appropriator the owner of the water. We have long recognized that an appropriator may not waste water, but must permit others to use the water when the appropriator is not applying it to a beneficial use. *Hall v. Blackman,* 8 Idaho 272, 68 P. 19 (1902) (although the owner of real estate need not make or allow any use of the land, an appropriator cannot waste the water but must permit others to use it when the appropriator is not applying it to a beneficial use). A water right simply gives the appropriator the right to the use of the water from that source, which right is superior to that of later appropriators when there is a shortage of water.

The abandonment of water rights requires both the intent to abandon and the actual surrender or relinquishment of the water rights. *Sears v. Berryman,* 101 Idaho 843, 623 P.2d 455 (1981). "The intent to abandon a water right must be evidenced by clear, unequivocal and decisive acts and mere non-use is not per se abandonment." *Id.* at 847, 623 P.2d at 459. Nothing in the grazing applications states that the failure to list all water rights claimed will

constitute an abandonment of the water rights. The failure to list a water right in the application for a grazing permit would not constitute clear and unequivocal evidence of an intent to abandon the omitted water right, nor would it show non-use of the water right.

Third, the district court failed to give consideration to the fact that at least Shea was issued Class I grazing rights. The significance of Class 1 grazing rights was explained by the United States Supreme Court in *Public Lands Council v. Babbitt,* 529 U.S. 728, 734 (2000) (emphasis theirs). "The rules [for allocating grazing privileges under the Taylor Grazing Act] 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." A Class 1 permit could have been issued to Shea only if he had been grazing the public range for at least five years prior to the enactment of the Taylor Grazing Act in 1934.

Any water rights obtained by Joyce Livestock's predecessors must be based upon their application of the water to a beneficial use by grazing livestock where they would have access to the water sources at issue. Their water rights are not based upon whether or not there are historical documents indicating that they claimed or believed they had acquired water rights. Their claim was not based upon the permit system of obtaining a water right but upon the constitutional method of appropriation.

The district court was correct in holding that it must examine where the individual predecessors grazed their livestock when determining whether they had acquired

any water rights. When purchasing the various parcels of land and their appurtenant water rights, Joyce Livestock could acquire no greater water rights than the grantor had. *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 154 P.2d 507 (1944).

Because the district court erred in its analysis of Joyce Livestock's priority, we vacate that part of the judgment and remand this case for a redetermination of priority in a manner consistent with this opinion.

C. Did the District Court Err in Denying Joyce Livestock's Request for an Award of Attorney Fees under Idaho Code § 12-121 and 28 U.S.C. § 2412(d)?

The district court found that Joyce Livestock was the prevailing party in this litigation. Joyce Livestock requested an award of attorney fees against the United States pursuant to Idaho Code § 12-121 and 28 U.S.C. § 2412(d). The district court denied the requested award under § 12-121 on the ground that the United States did not assert a claim or defense frivolously, unreasonably, or without foundation. The district stated that there were two issues of first impression: whether the administration of grazing allotments on federal land was sufficient to support the claim of the United States to an instream appropriation of water and whether instream water rights obtained by ranchers on federal land were appurtenant to the ranchers' deeded properties. The district court stated, "The 'bottom-line' in this matter is that the issues pertaining to the ownership of stockwater rights on the public domain are not well settled. . . . Additionally, the resolution of these issues is conflicting among other states." The district court also denied the request for an award of

attorney fees pursuant to 28 U.S.C. § 2412(d). It held that the position of the United States in this litigation was substantially justified in that it had a reasonable basis in law and fact. Based upon that finding, the district court declined to address whether 28 U.S.C. § 2412(d) authorized state courts to award attorney fees. Joyce Livestock asserts on appeal that the district court erred in denying its request for an award of attorney fees.

"An award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *McGrew v. McGrew,* 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). "If there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be awarded under this statute even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation." *Thomas v. Madsen,* 142 Idaho 635, 639, 132 P.3d 392, 396 (2006).

There was at least one legitimate issue of law presented in this case. We had not previously addressed whether instream water rights in water sources not located on the appropriator's land could be appurtenant to the appropriator's real property. The district court therefore did not err in denying Joyce Livestock's request for attorney fees under Idaho Code § 12-121.

Joyce Livestock also challenges the district court's denial of its request for an award of attorney fees pursuant to subsection (d) of 28 U.S.C. § 2412, which provides:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Joyce Livestock argues that the statute permits "any court having jurisdiction of the action" to award attorney fees and the district court had jurisdiction over the United States pursuant to the McCarran Amendment, 43 U.S.C. § 666. The United States argues that the statute does not constitute a waiver of sovereign immunity permitting state courts to award attorney fees against the United States. The United States Supreme Court has not addressed the issue of whether the statute applies to litigation in state courts.

"There is no doubt that waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." *United States v. Idaho Dept. of Water Resources,* 508 U.S. 1, 6 (1993). In *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573 (1946), the United States Supreme Court held that a Utah statute authorizing actions to recover taxes to be brought against the state "in any court of competent jurisdiction" did not include federal courts. In so holding, the Court noted that a clear indication of a state's consent to suit against itself in federal court is required because of the direct impact such litigation upon the state's finances. Although the *Kennecott* case

dealt with a state's waiver of sovereign immunity, such waiver is closely analogous to the federal government's waiver of sovereign immunity. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666 (1999).

The statute at issue is part of the Equal Access to Justice Act (EAJA). "The EAJA renders the United States for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." *Ardestani v. Immigration and Naturalization Service,* 502 U.S. 129, 137 (1991). The EAJA states, " '[C]ourt' includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims." 28 U.S.C. § 2412(d)(2)(F). Had the Congress intended that the word "court" also include state courts, it undoubtedly would have expressly included them. Since the EAJA involves a partial waiver of sovereign immunity by the United States, it is much more unlikely that the word court would be construed to include state courts than it is that it would be construed to include the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims. If Congress had intended that state courts also be included, it certainly would also have included a specific reference to them. We therefore hold that 28 U.S.C. § 2412(d) does not authorize state courts to award attorney fees against the United States. We affirm the district court's denial of Joyce Livestock's request for an award of attorney fees under that statute.

D. Did the District Court Err in Denying the United States's Claim for a Water Right for Watering Stock?

The United States claimed instream water rights for stock watering based upon its ownership and control of the public lands coupled with the Bureau of Land Management's comprehensive management of public lands under the Taylor Grazing Act. The district court held that such conduct did not constitute application of the water to a beneficial use, and denied the claimed water rights. The United States appealed that ruling.

Under the constitutional method of appropriation, "a water user could make a valid appropriation without a permit, most commonly by diverting the water and putting it to beneficial use." *State v. U.S.,* 134 Idaho 106, 111, 996 P.2d 806, 811 (2000). Because no diversion is required in order to obtain a water right for stock watering under the constitutional method, *Id.,* the United States could obtain water rights for stock watering simply by applying the water to a beneficial use. Whether by implied license, *Buford v. Houtz,* 133 U.S. 320 (1890), or express permission after the enactment of the Taylor Grazing Act, the United States has permitted ranchers to graze their livestock on public lands. The United States has not, however, used any of the water at issue to water its livestock. Under Idaho law, a landowner does not own a water right obtained by an appropriator using the land with the landowner's permission unless the appropriator was acting as agent of the owner in obtaining that water right.

> This court has repeatedly held that a water right is not necessarily appurtenant to the land on which it is used and may be separated from it, and this is the general rule.

> If the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as the agent of the owner.

First Security Bank of Blackfoot v. State, 49 Idaho 740, 746, 291 P. 1064, 1065 (1930). The United States does not contend that any of the ranchers who obtained the water rights at issue did so as an agent of the United States. The Taylor Grazing Act expressly recognizes that the ranchers could obtain their own water rights on federal land. The United States seeks to distinguish *First Security Bank of Blackfoot v. State* on the ground that the appropriator in that case was a tenant while the ranchers in this case were licensees. That is a distinction without a difference.

Under Idaho law, an appropriator need not have a possessory interest in the land upon which the water source is located in order to obtain a water right. "[I]n this state one may have a valid appropriation though only a temporary and revocable way of conveyance for his water; diversion and application to a beneficial use being the two essentials." *Morgan v. Udy,* 58 Idaho 670, 680, 79 P.2d 295, 299 (1938). The limitation is that a water right cannot be initiated by trespass upon private property. *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974).

The United States cites Idaho Code § 42-501 in support of its argument that it acquired water rights in the water sources on the federal land at issue in this case. That statute, enacted in 1939,[3] permits the Bureau of

[3] As enacted in 1939, the statute provided:

> The division of grazing of the department of Interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain. The department of Reclamation shall, upon

(Continued on following page)

Land Management to "appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain" by using the permit procedure for obtaining a water right. The United States does not contend that it attempted to obtain any water rights by complying with the statute. Rather, it argues that if it could have obtained a water right under the statute without actually using any of the water, it should also be able to do so under the constitutional method of appropriation.

The constitutional method of appropriation requires that the appropriator actually apply the water to a beneficial use. *Sarret v. Hunter,* 32 Idaho 536, 541, 185 P. 1072, 1074 (1919); *Reno v. Richards,* 32 Idaho 1, 178 P. 81

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application in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation. With each such application there shall be paid to the department of Reclamation a fee of one dollar and there shall be no further fee required for the issuance of the permit or license and certificate of water right, nor for any other proceedings in connection with such application. Such permit, license and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefore on the public domain. The maximum flow for which permit, license and certificate of water right may issue hereunder shall be five miner's inches, and the maximum storage for which permit, license and certificate of water right may issue hereunder shall be fifteen acre feet in any one storage reservoir.

Ch 205, § 1, 1939 Idaho Sess. Laws 412, 413. The statute was amended in 1971 to change the "division of grazing" to the "bureau of land management," to change the "department of reclamation" to the "department of water administration," and to set the application fee at $10.00. Ch. 152, § 1, 1971 Idaho Sess. Laws 752.

(1918). If that use is stock watering, then the appropriator must actually water stock. The constitutional method of appropriation and the permit method were two separate means for acquiring water rights. A statute creating a procedure for obtaining a water right under the permit system does not amend the constitutional method for obtaining a water right.

In *State v. U.S.,* 134 Idaho 106, 996 P.2d 806 (2000), the United States claimed a nondiversionary water right for wildlife habitat under the constitutional method of appropriation. It based its claim upon our opinion in *State, Department of Parks v. Idaho Department of Water Administration,* 96 Idaho 440, 530 P.2d 924 (1974), where we upheld the ability of the Department of Parks to comply with a statute directing it to utilize the permit process to appropriate the unappropriated natural spring flow of Malad Canyon for scenic beauty and recreation without having to make a physical diversion of the water. We held that our opinion in the *State, Department of Parks* case did not support the claimed constitutional appropriation because the water right at issue there was made pursuant to the permit system of appropriation, not the constitutional method. "The limited public purpose exception stated in *State, Department of Parks* does not support the United States' claim because it applies only to appropriations made under Idaho's permit system." 134 Idaho at 112, 996 P.2d at 812. We concluded, "The United States has not requested, pursuant to I.C. § 42-1504, that the Idaho Water Resource Board file an application for appropriating a minimum streamflow for Smith Springs. Therefore, the limited public purpose exception does not apply to its claim." *Id.*

The same reasoning applies here. The United States has not sought a water right pursuant to Idaho Code § 42-501. Rather, it bases its claim upon the constitutional method of appropriation. That method requires that the appropriator actually apply the water to a beneficial use. Since the United States has not done so, the district court did not err in denying its claimed water rights.

The United States contends that the denial of its claimed water rights conflicts with the Taylor Grazing Act and any requirement of state law that it actually apply the water to a beneficial use is invalid under the Supremacy Clause of the Constitution of the United States. The United States does not point to any provision of the Taylor Grazing Act allegedly in conflict with Idaho water law. Rather, it claims that application of Idaho water law to it would violate the purposes underlying the Act. It argues,

> Recognition of a private appropriative water right to take water from streams on public lands in the course of grazing would likewise effectively lead to monopoly of federal grazing and interfere with federal administration of the lands unless the ability of others to graze there under permit by BLM under the Taylor Grazing Act is preserved through a decree of stock water rights to BLM that could be used by common and future permittees.

The argument of the United States reflects a misunderstanding of water law.

A water right does not constitute the ownership of the water; it is simply a right to use the water to apply it to a beneficial use. *Idaho Conservation League, Inc. v. State,* 128 Idaho 155, 911 P.2d 748 (1995). "In the absence of a beneficial use, actual or at least potential, a water right

can have no existence." *Strong v. Twin Falls Canal Co.,* 44 Idaho 427, 434, 258 P. 173, 175 (1927). A person who is not applying the water to a beneficial purpose cannot waste it or exclude others from using it. *Hall v. Blackman,* 8 Idaho 272, 68 P. 19 (1902). Ownership of a water right does not include the right to trespass upon the land of another in order to access the water. *Branson v. Miracle,* 107 Idaho 221, 227, 687 P.2d 1348 (1984). Indeed, Idaho law could not authorize anyone to trespass upon federal land. Joyce Livestock cannot water its livestock at water sources located on federal rangeland unless the government grants it permission to have its livestock on such land. It also cannot transfer the place of use of the water without first obtaining permission after following the required statutory procedure. *First Sec. Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930); I.C. § 42-108.

Other than making the assertion, the United States has been unable to explain how denying its claim or affirming the water rights of Joyce Livestock will in any way lead to a monopoly of the federal rangelands. As the United States has held, Congress has severed the ownership of federal lands from the ownership of water rights in nonnavigable waters located on such lands. *Ickes v. Fox,* 300 U.S. 82, 95 (1937); *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 161 (1935). Joyce Livestock's ownership of water rights in water sources located on federal rangeland would not give Joyce Livestock a possessory interest in the rangeland. It does not give Joyce Livestock ownership or control of the water sources. *Hutchinson v. Watson Slough Ditch Co.,* 16 Idaho 484, 101 P. 1059 (1909). Such water rights would not give Joyce Livestock the right to interfere with the government's administration of the rangeland, nor would it give

Joyce Livestock the right to exclude from that rangeland others who had been granted permission by the government to be there.

E. Is Joyce Livestock Entitled to an Award of Attorney Fees on Appeal?

Joyce Livestock seeks an award of attorney fees on appeal pursuant to Idaho Code § 12-121 and 28 U.S.C. § 2412(d). As we have held, the latter statute does not authorize state courts to award attorney fees against the United States.

Attorney fees can be awarded on appeal under Idaho Code § 12-121 only if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Gustaves v. Gustaves,* 138 Idaho 64, 57 P.3d 775 (2002). If there is a legitimate issue presented by the appeal, attorney fees cannot be awarded under this statute. *Lamprecht v. Jordan,* 139 Idaho 182, 79 P.3d 743 (2003); *D & M Country Estates Homeowners Ass'n v. Romriell,* 138 Idaho 160, 59 P.3d 965 (2002). The United States has presented a legitimate issue of whether water rights on federal rangeland can be appurtenant to real property owned by the appropriator. We had not previously addressed that issue. We therefore deny Joyce Livestock's request for an award of attorney fees on appeal.

IV. CONCLUSION

We affirm the judgment of the district court holding that Joyce Livestock has established a water right, disallowing the water right claims of the United States, and denying Joyce Livestock's request for an award of attorney fees. We vacate the district court's determination of the

priority date(s) of Joyce Livestock's water rights and remand this case for redetermination of such priority date(s) in a manner consistent with this opinion. We deny Joyce Livestock's request for an award of attorney fees on appeal.

Chief Justice SCHROEDER, and Justices TROUT, BURDICK and JONES **CONCUR**.

156 P.3d 590

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 31994

IN RE: SRBA CASE NO. 39576 (SUBCASE NUMBERS 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295B, 55-10296, 55-10297B, 55-55-10298, 55-10299B, 55-10300, 55-10301B, 55-10303B, 55-13451, 55-13846 AND 55-13844.)	Twin Falls, November 2006 Term 2007 Opinion No. 24 Filed: February 9, 2007 Stephen W. Kenyon, Clerk
LU RANCHING CO., Appellant-Cross Respondent, v. UNITED STATES OF AMERICA, Respondent-Cross Appellant.	

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for Twin Falls County. The Hon. John M. Melanson, District Judge.

The judgment is *affirmed* in part, *vacated* in part, and *remanded* for further proceedings.

McQuaid Bedford & Van Zandt LLP, San Francisco, California, and Roger D. Ling, Rupert, counsel for appellant. Elizabeth Ewens argued.

United States Department of Justice for respondent. Elizabeth Ann Peterson argued.

EISMANN, Justice.

This is an appeal from a judgment upholding LU Ranching Company's claim to instream water rights on federal rangeland for watering livestock and determining the priority dates of those water rights. The district court also denied Lu Ranching Company's request for an award of attorney fees. We affirm the district court's holding that LU Ranching Company has instream water rights, vacate its determination of priority, and remand for a redetermination of the priority dates of such rights.

I. FACTS AND PROCEDURAL HISTORY

LU Ranching Company (LU Ranching) is a corporation that has a cattle operation located in Owyhee County, Idaho. It owns approximately 5,000 acres of land that it purchased in 1976. LU Ranching's predecessors had over the years acquired smaller ranches in order to accumulate holdings totaling 5,000 acres. When LU Ranching purchased its real property, it also acquired grazing rights located on three allotments pursuant to the Taylor Grazing Act, 43 U.S.C. § 315 *et seq*. Those three allotments are called the South Mountain, the Cow Creek, and the Cliffs grazing allotments.

LU Ranching claimed instream[1] stock watering rights with a priority date of May 20, 1872, in thirteen water sources located on federal land within those three grazing

[1] Although we refer to them as "instream" water rights, the water sources do not need to be streams. They can be any natural water source, including springs that simply form pools of water. Calling them instream water sources simply means that the water was applied to a beneficial use without diverting it from the water source.

allotments. The United States filed an objection, and the matter was first heard by a special master. The special master found that the patents and affidavits filed as proof of homestead by LU Ranching's predecessors were sufficient to establish that they had been using federal land and the water located thereon from the time the original patent holder began living on the land. The earliest patent issued to one of LU Ranching's predecessors was issued on September 29, 1886, to Ezra Mills. In his affidavit submitted to obtain the patent, Mills stated that he had lived on and worked the homestead since June 10, 1876. The special master therefore found that LU Ranching was entitled to a priority date of June 10, 1876, for all of its claimed water rights. Both parties sought review by the district court.

The district court first addressed the law to be applied. It held that private parties could appropriate water on federal land both prior to and after the adoption of the Taylor Grazing Act in 1934; that no physical diversion was required to appropriate water for stock watering; that an intent to appropriate was required, but such intent could be inferred from the application of the water to a beneficial use; that water rights obtained on federal land were appurtenant to the livestock owner's nearby deeded ranch property; and that the water rights would pass with a conveyance of the ranch property if such was the grantor's intent, which could be inferred from the circumstances. The district court then analyzed the facts in light of its statement of law.

The district court held that the special master erred in basing a priority date for all claimed water rights upon the historical use of only one of the patented properties and in failing to analyze which water rights were acquired and

transferred as appurtenances to which patented properties. The district court examined the facts with respect to each of the three grazing allotments: South Mountain, Cow Creek, and Cliff's. For clarity, the water rights claimed in the South Mountain allotment can be further divided into those appurtenant to the Duncan homestead and those acquired by Galo Mendieta. Likewise, the water rights claimed in the Cow Creek allotment can be subdivided into those related to that portion of the Mills homestead located in Section 25 and that portion located in Section 26.

South Mountain allotment – Duncan homestead. Warren C. Duncan was the first of LU Ranching's predecessors to acquire real property in the vicinity of the South Mountain allotment. In 1910 Duncan filed a homestead entry application on 160 acres in Owyhee County and received a patent for the homestead entry on December 9, 1914. The district court found that there was no evidence in the record indicating that Duncan raised livestock.

After several mesne conveyances, Patrick O'Keefe purchased the Duncan property on July 14, 1928. With the passage of the Taylor Grazing Act in 1934, ranchers were required to obtain a grazing permit to pasture livestock on federal lands. On June 24, 1935, O'Keefe applied for a grazing permit for 200 head of cattle. That permit was rejected on August 22, 1935, on the ground that O'Keefe did not own any cattle. On April 7, 1937, O'Keefe again applied for a grazing permit, which was granted in 1938 for forty head of cattle and four horses on federal land within the South Mountain allotment. On October 14, 1941, O'Keefe sold the Duncan homestead to Galo Mendieta.

The district court held that the earliest priority date for water rights obtained by O'Keefe was July 1, 1938, which was the commencement date for the 1938 grazing season. The court noted that after 1934, O'Keefe could not have obtained water rights on other federal rangeland located outside of the land covered by his grazing permit because a valid water right cannot be initiated by trespass onto another's property. Had he obtained water rights on such other federal rangeland prior to 1934, he could not have continued to use the water located thereon because he would not have had access to that land. The water rights claims related to the Duncan homestead are 55-10290B and 55-10292B.

Cow Creek allotment – Mills homestead. Ezra Mills was the first of LU Ranching's predecessors to acquire real property in the vicinity of the Cow Creek grazing allotment. The district court determined that there was no evidence that Mills was engaged in the livestock business prior to or contemporaneous with the issuance of his patent. Mills sold his property on July 9, 1892, and after several mesne conveyances it was acquired by Mary Shea on May 8, 1909. The district court found that at that point in the chain of title there was no evidence that the owner of the Mills property had used it or adjacent federal rangeland for raising livestock.

Mills homestead in Section 26. On November 8, 1913, Mary Shea conveyed to George Kellogg the one-half of the Mills property that was located in Section 26. Kellogg conveyed the property to William Flora on May 3, 1937. Flora applied for a grazing permit, but it did not contain specific information. After mesne conveyances, the land was purchased by Henry and Hattie Fretwell on January 3, 1947. The district court determined that there

was no evidence as to when the property or adjacent public rangeland was used in connection with any livestock operation prior to the date the Fretwells acquired the property. On September 6, 1949, the Fretwells sold the property to Galo Mendieta. The sale included grazing privileges for twenty head of cattle within the Trout Creek allotment, which is within the Cow Creek allotment. The district court found that Mendieta typically began grazing on public rangelands on April 1 of each year, and so he would not have begun livestock grazing on public land in connection with his purchase of this property until April 1, 1950. Thus, the court found that water rights 55-10299B and 55-10300 have an April 1, 1950 priority date.

Mills homestead in Section 25. On October 15, 1919, Mary Shea conveyed to Harry Staples one-half of the Mills property, which was located in Section 25. After several mesne conveyances, Patrick O'Keefe purchased the property on January 30, 1933. On April 7, 1937, O'Keefe submitted an application for a grazing permit, and he was issued a permit for twenty head of cattle in the Cow Creek grazing allotment commencing on April 15, 1937. The district court held that O'Keefe could not have had any water rights on federal land prior to that date because he failed to mention any such water rights in his application for a grazing permit. O'Keefe sold the property to Galo Mendieta on August 4, 1941. Based upon the foregoing, the district court determined that water rights 55-10295, 55-10296, 55-10297B, and 55-10298 have an April 15, 1937 priority.

South Mountain and Cow Creek allotments – Mendieta. On September 6, 1949, Galo Mendieta purchased from the Fretwells the half of the Mills homestead that was located in Section 26. He had previously

purchased the other half of the Mills homestead and the Duncan homestead. After his purchase from the Fretwells, Mendieta applied for and obtained grazing permits in the South Mountain and Cow Creek allotments that exceeded the boundaries of the grazing permits previously associated with the Duncan and Mills homesteads. Based upon when Mendieta typically began grazing on public lands, the district court determined that the priority dates for water rights claimed as a result of Mendieta expanding his grazing operations would be April 1, 1950. That priority date applies to water rights 55-10288B, 55-10289B, 55-10293B, and that portion of 55-10290B and 10292B not located within the land covered by O'Keefe's grazing permit.

Cliff's allotment. In 1909 George Ewings, Jr., filed a homestead application for 160 acres of land in Owyhee County, and he received a patent on July 26, 1910. None of the historical documents in support of the homestead entry suggest that Ewings was engaged in the livestock business. On July 16, 1912, Ewings conveyed the property to Clyde Foster. On January 12, 1937, Foster applied for and received a grazing permit, although a copy of it was not in the record. In his application, Foster was asked to identify all sources of water owned or leased by him in connection with his livestock operation on the public domain. Because Foster did not list any water sources within the Cliff's allotment, the district court held that any water rights he obtained in Cliff's allotment were based upon appropriations occurring after he made the grazing application. The district court therefore held that the earliest priority date for water right 55-10303B located in the Cliff's allotment was July 1, 1937, the date he would have begun grazing under the permit.

Other grazing rights. LU Ranching acquired other grazing privileges by transfer from others. The district court held that there was no evidence in the record of the historic use of those grazing privileges. Therefore, LU Ranching failed to prove it had obtained any water rights in connection with those transfers. The United States also challenged the special master's descriptions of the places of use for some of the water rights. The district court rejected those challenges on the ground that the special master's findings were not clearly erroneous.

The district court entered a judgment in conformity with its findings, and it certified that judgment as final pursuant to Rule 54(b) of the Idaho Rules of Civil Procedure. LU Ranching timely sought an award of attorney fees under Idaho Code § 12-121 and 28 U.S.C. § 2412(d). The district court held that attorney fees were not awardable under Idaho Code § 12-121 because the United States did not assert or defend any matter frivolously, unreasonably, or without foundation. With respect to the requested award under 28 U.S.C. § 2412(d), the district court held that attorney fees were not awardable under that statute because the position of the United States was at all times substantially justified. Based upon that ruling, the district court did not address the issue of whether 28 U.S.C. § 2412(d) permitted a state court to award attorney fees against the United States. LU Ranching timely appealed and the United States timely cross-appealed.

II. ISSUES ON APPEAL

1. Did the district court err in determining the priority dates for LU Ranching's water rights?
2. Did the district court err in denying LU Ranching's request for an award of attorney fees?

3. Is LU Ranching entitled to an award of attorney fees on appeal pursuant to Idaho Code § 12-121 or 28 U.S.C. § 2412(d)?

4. Did the district court err in holding that instream water rights on federal land can be appurtenant to privately owned property?

III. ANALYSIS

This is a companion case to *Joyce Livestock Company v. United States of America,* Nos. 32278, 32279, & 32846 (Idaho February 9, 2007). In *Joyce Livestock* we addressed the legal issues applicable to the appeal in this case. We will not analyze those issues again here, but will merely refer to the opinion in *Joyce Livestock* when appropriate.

A. Did the District Court Err in Determining the Priority Dates for LU Ranching's Water Rights?

In the *Joyce Livestock* case, we vacated the district court's determination of priority dates because of certain errors in law made by the district court. It had held that a livestock owner could not obtain water rights on federal land for instream stock watering without evidence of "an intent to appropriate." It also held that the failure to list such water rights in applications for grazing permits showed the lack of such intent. It had also held that water rights appurtenant to real property would not pass with a conveyance of that real property absent evidence that the grantor also intended to convey the appurtenant water rights. Finally, it failed to recognize the significance of predecessors being granted Class 1 grazing permits. The district court made the same errors when analyzing the evidence in this case. We therefore vacate

its determination of priorities for the water rights claimed by LU Ranching and remand for a redetermination of those priorities in a manner consistent with our opinion in *Joyce Livestock Company v. United States.*

B. Did the District Court Err in Denying LU Ranching's Request for an Award of Attorney Fees?

Both LU Ranching and Joyce Livestock sought an award of attorney fees pursuant to Idaho Code § 12-121 and 28 U.S.C. § 2412(d). The district court denied both of their requests for the same reasons. With respect to Idaho Code § 12-121, it found that the United States had not pursued or defended the matter frivolously, unreasonably, or without foundation. We affirmed the district court in the *Joyce Livestock* case, and for the same reasons we affirm the district court in this case. In both cases the district court also denied LU Ranching's and Joyce Livestock's requests for attorney fees pursuant to 28 U.S.C. § 2412(d) because the positions of the United States were substantially justified. In *Joyce Livestock* we affirmed the district court's denial on the ground that the statute does not authorize state courts to award attorney fees against the United States. We likewise affirm the denial in this case on the same basis.

C. Is LU Ranching Entitled to an Award of Attorney Fees on Appeal Pursuant to Idaho Code § 12-121 or 28 U.S.C. § 2412(d)?

LU Ranching seeks an award of attorney fees on appeal pursuant to Idaho Code § 12-121 and 28 U.S.C. § 2412(d). For the same reasons we denied the request in

the *Joyce Livestock* case, we do not award attorney fees on appeal to LU Ranching.

D. Did the District Court Err in Holding that Instream Water Rights on Federal Land Can Be Appurtenant to Privately Owned Property?

In its cross appeal, the United States raises two legal issues. First, it argues that a water right for instream livestock watering cannot be appropriated without manifestation of some intent to obtain a water right which goes beyond merely applying the water to a beneficial use. Second, it argues that instream stock watering rights on federal land cannot as a matter of law be appurtenant to privately owned property. It raised both arguments in the *Joyce Livestock* case. For the same reasons we rejected those arguments in that case, we reject them in this one.

IV. CONCLUSION

We affirm the judgment of the district court holding that LU Ranching has established water rights and denying its request for an award of attorney fees. We vacate the district court's determination of the priority dates of LU Ranching's water rights and remand this case for redetermination of such priority date(s) in a manner consistent with our opinion in *Joyce Livestock Company v. United States*. We deny LU Ranching's request for an award of attorney fees on appeal.

Chief Justice SCHROEDER, and Justices TROUT, BURDICK and JONES **CONCUR**.

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 **Case No. 39576**	**SUBCASES: 55-10135** **55-11061** **55-11385** **55-12452** **MEMORANDUM DECISION AND ORDER** **RE: ATTORNEYS' FEES**

A hearing was held in open court on December 14, 2005 on the motion of Joyce Livestock Co. for attorneys' fees pursuant to IRCP 54(e)(1), I.C. §12-121 and 28 U.S.C. §2412(d). Appearances were as follows:

Joyce Livestock Co:	Ms. Elizabeth P. Ewens McQuaid, Bedford & VanZandt, LLP
United States of America:	Mr. Larry A. Brown U.S. Department of Justice

The matter was submitted for decision on the day following the hearing. The Court, having considered the argument of counsel, the file in this matter and the memoranda submitted now enters the following:

MEMORANDUM DECISION

1. Facts and Procedural History.

The relevant facts and the procedural history of this case were summarized in this Court's ***Memorandum***

Decision and Order on Challenge (August 3, 2005) and are restated here for the convenience of the reader. Joyce Livestock Company (Joyce Livestock or Joyce) filed a single instream *Notice of Claim to a Water Right,* claiming .23 cfs from Jordan Creek in Owyhee County based on beneficial use with a priority date of 1865 for instream stockwater. The United States, Department of Interior, Bureau of Land Management (United States or BLM) filed three notices of claim, each for .02 cfs for instream stockwater with a January 1, 1874, priority date based on beneficial use, which largely overlapped the stream reaches of Joyce's claimed right. Both sets of claims are to water used in conjunction with a federal grazing allotment administered by the United States on which Joyce Livestock or its predecessors have historically grazed cattle pursuant to a grazing permit. The Director of the Idaho Department of Water Resources issued the *Director's Report for Domestic and Stockwater, Reporting Area 6 (IDWR Basin 55)* on July 31, 1997. Joyce Livestock's claim and the three United States claims were listed. The Director recommended Joyce's claim with a reduction to .02 cfs, and the United States' claim as claimed.

The United States timely filed an objection to the recommendation for Joyce Livestock's claim, objecting to the claimed priority date, the points of diversion and places of use. The State of Idaho filed timely objections to the recommendations for the United States' claims, alleging that the priority date should be no earlier than June 28, 1934, the date of the enactment of the Taylor Grazing Act. On April 28, 2000, the BLM and the State of Idaho filed a stipulation, stating that if the three United States' claims are decreed, the priority date would be no earlier than June 28, 1934. This stipulation ended the State of

Idaho's participation in these subcases.[1] On May 6, 1998, the Court granted Joyce Livestock leave to file late objections to the United States' water right claims. Joyce Livestock's objections alleged that the name on the United States' water right claims should be Joyce Livestock, not the United States.

On July 16, 1998, Special Master Haemmerle entered an ***Order Consolidating Subcases for Summary Judgment*** in subcases 55-10135, 55-11061, 55-11385 and 55-12452. On September 22, 1999, then-Presiding Judge Barry Wood entered an ***Amended Order of Reference Appointing Terrence A. Dolan Special Master*** in the above subcases. On September 28, 2001, the Special Master allowed the United States to amend the above claims to correct places of use and to amend the priority

[1] The State of Idaho filed objections to all of the United States' beneficial use instream stockwater claims. On June 11, 1999, and July 1, 1999, the State of Idaho and the United States entered into stipulations which among other things resolved the State's objections to the United States' beneficial use claims and resolved the subcases where the State of Idaho was the only objector. *Stipulation to Resolve Objections,* consolidated subcase nos. 23-10859, 24-10221, 25-13659, 27-11604 and 65-19685 (June 11, 1999); *Stipulation to Resolve Objections,* subcase nos. 01-10249 *et seq.* (July 1, 1999). Pursuant to the *Stipulation to Resolve Objections* the State of Idaho and the United States agreed that the priority date for all of the state-based beneficial use stockwater claims made by the United States (BLM) in 34 subbasins would be June 28, 1934, (the date of enactment of the Taylor Grazing Act), unless the United States had previously acquired the land from a third party with an earlier priority date or the claim was based on previously licensed or permitted right with a different priority date. The *Stipulation to Resolve Subcases* agreed to the elements of approximately 2000 stockwater rights where the claims were based solely on state law and the State of Idaho was the only objector. The *Stipulation* provided that the elements would be as reported by the Idaho Department of Water Resources (IDWR) except that the priority date would be June 28, 1934.

date of the rights to June 28, 1934, in accordance with the stipulation reached with the State of Idaho. On December 4, 2001, the Special Master allowed Joyce Livestock to amend the above claimed water right to change the priority date to 1898, and to change the quantity to .02 cfs. On March 8, 2002, Joyce Livestock filed a *Motion for Summary Judgment,* which was denied by the Special Master on July 24, 2002.

On December 3-6, 2002, the Special Master held a trial on the objections to the four claims. On October 6, 2003, the ***Report and Recommendation of the Special Master*** was filed, recommending that Joyce's claim to water right 55-10135 be denied, and that the United States' claims to water rights 55-11061, 55-11385 and 55-12452 be decreed as amended. On November 24, 2003, Joyce Livestock filed a *Motion to Alter or Amend Special Master's Report,* which was denied by the Special Master on July 22, 2004. On August 4, 2004, Joyce Livestock filed its *Notice of Challenge*. After a series of briefs were filed by both Joyce Livestock and the United States, oral argument was heard on June 15, 2005.

For reasons set forth in the ***Memorandum Decision and Order on Challenge***, this Court reversed the Special Master's decision and denied the United States' state-law based claims and granted Joyce Livestock's claim with a priority date of April 26, 1935 rather than the priority date claimed by Joyce. On August 17, 2005, Joyce filed a timely Motion for Attorneys' Fees and Memorandum of Points and Authorities under IRCP 54(e)(1), I.C. §12-121 and the Equal Access to Justice Act, 28 U.S.C. §2412(d). The United States filed a Motion to Disallow Costs which the Court will treat as an objection to costs pursuant to IRCP 54(d)(5). Joyce then filed a Reply to the objection.

2. Applicable Law

Joyce seeks an award of attorneys' fees pursuant to IRCP 54(e)(1), I.C. §12-121 and 28 U.S.C. §2412(d). Idaho follows the "American Rule" which requires parties to litigation to pay their own attorney fees absent statutory authority or contractual right. *Owner-Operator Indep. Drivers Assoc. of Idaho v. Idaho Public Util. Comm'n,* 125 Idaho 401, 871 P.2d 818 (1994); *Great Plains Equip. Inc. v. Northwest Pipeline Corp.,* 132 Idaho 754, 979 P.2d 627 (1999); IRCP 54(e).

I.C. §12-121 provides a statutory basis for an award of attorney fees in civil cases as follows:

> **Attorney's Fees.** – In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. §12-121 is, however, modified by IRCP 54(e)(1) which provides:

> **Attorney Fees.** In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation;

> but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

Plainly, therefore, attorney fees can only be awarded under I.C. §12-121 if the court finds that the party seeking attorney fees was the prevailing party and that the case was brought, pursued or defended frivolously, unreasonably or without foundation by the opposing party. The term "prevailing party" is defined in IRCP 54(d)(1)(B) as follows:

> **Prevailing Party**. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Thus, a determination of the prevailing party is addressed to the court's discretion guided by the provisions of IRCP 54(d)(l)(b) and cases decided applying that rule.

Joyce also seeks attorney fees pursuant to 28 U.S.C. §2412(d). In relevant part, §2412 provides:

> **§ 2412. Costs and fees**
>
> . . . .
>
> **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to a prevailing

> party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> **(B)** A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.
>
> . . . .

Finally, the Court notes that the Snake River Basin Adjudication is a comprehensive stream adjudication pursuant to the McCarran Amendment, 43 U.S.C. §666, which provides, in relevant part:

Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, that no judgment for costs shall be entered against the United States in any such suit.

(b) . . .

3. Analysis and Decision.

a. Attorney Fees Under I.C. 12-121 and IRCP 54(e)(1).

1. Determination of Prevailing Party.

The threshold issue for an award of attorney fees under Idaho law is a determination of the prevailing party. This determination is committed to the discretion of the court. Here, Joyce first claimed a priority date for its

water rights of 1865. That claim was later amended to 1898. The United States objected to the claimed priority date, as well as the points of diversion and place of use elements of the right. Ultimately, this Court ruled that Joyce was not entitled to the claimed priority date but that the evidence supported a later priority date. Joyce has appealed this decision. The United States claimed largely overlapping rights based upon beneficial use. The Court denied the claims of the United States ruling that the administration of public lands, standing alone, does not constitute a beneficial use of water for purposes of establishing a state law based beneficial use stockwater right. Joyce did not prevail on all issues but, considering the final result in comparison to the relief sought, Joyce was the prevailing party in this case. Although Joyce was not awarded the priority date claimed, it nevertheless was awarded a water right. Joyce prevailed on its objection to the United States' claims. Ultimately, Joyce was awarded the senior, and only, right on the source.

2. The case was not brought, pursued or defended frivolously, unreasonably or without foundation.

The two issues of importance decided in this case were whether administration of federal administered grazing allotments, without more, constitutes beneficial use sufficient to support the United States' claims to instream stockwater rights and whether Joyce or its predecessors had demonstrated the requisite intent to appropriate or transfer an instream stockwater right based upon its interest, or lack of interest, in the property to which the water right was "appurtenant." The later issue required application of the evidentiary standard established by this

Court in the ***Memorandum Decision and Order on Challenge, Subcases 55-10288B, et al.*** **(LU Ranches II)** (January 3, 2005). The issues raised therein have not been squarely addressed by our Supreme Court and that case is on appeal. As noted by this Court in its ***Memorandum Decision and Order Re: Attorney's Fees Subcases 55-10288B, et al.*** (LU Ranching) (August 2, 2005):

> Regarding the appurtenance issue the United States cited and argued decisions from other jurisdictions holding that water rights claimed on public lands are not appurtenant to other privately owned property. *Robinson v. Schoenfeld,* 218 P. 1041, 1042-1043 (Utah 1923) and that appropriation may not be made by a temporary possessor of land. *Tattersfield v. Putnam,* 41P.2d 228 (Ariz. 1935). In addition, the United States made a good faith argument for an extension of the holding in *Lemmon v. Hardy,* 95 Idaho 778, 519 P.2d 1168 (1980) (water right claimant must have a possessory interest in the land designated as a pace of use) to include claims such as those made by LU.

As to the priority date issue, an issue on which Joyce did not entirely prevail, the United States correctly pointed to certain deficiencies in the evidence offered in support of Joyce's claims. Joyce's claims for water rights cannot be said to have been based upon "well-settled" law. Further, the assertion that the United States is not entitled to a water right based upon administration, an issue on which Joyce prevailed, the United States cited and this Court considered numerous good faith arguments contrary to the decision ultimately entered. This Court has found no instance in this case in which the United States has asserted or defended any matter frivolously, unreasonably

or without foundation. It would be an abuse of the Court's discretion to award attorney fees under these circumstances.

The "bottom-line" in this matter is that the issues pertaining to the ownership of stockwater rights on the public domain are not well settled. The need for resolution of the issues was first identified in 1996 in the context of a motion to have the issues designated as Basin-Wide Issue 9A. However, because of the piecemeal (interlocutory) nature of subsequent orders addressing these issues and ultimately a stipulation between the state of Idaho and the United States and a "global" settlement between the United States and almost all other ranching entities claiming stockwater rights on grazing allotments, these issues did not become ripe for appeal to the Idaho Supreme Court until LU Ranches II and the instant case.[2] Additionally, the resolution of these issues is conflicting among other states.

b. Attorneys' Fees under 28 U.S.C. 2412(d).

A decision to award or deny attorneys' fees Attorneys fees pursuant to 28 U.S.C. §2412(d), the Equal Access to Justice Act, is reviewed under an abuse of discretion standard. *See Pierce v. Underwood,* 487 U.S. 552, 108 S.Ct. 2541, 2546-49, 101 L.Ed.2d 490 (1988); *Minor v. United States,* 797 F.2d 738, 739 (9th Cir.1986) (per curiam). Pursuant to 28 U.S.C. §2412(d), if the United States shows

[2] The United States entered into a "global" settlement with almost all of the ranching entitles claiming stockwater rights an public grazing allotments, except LU Ranches, Joyce Livestock and one other ranching entity. The case involving the other ranching entity is currently pending before the Special master.

that its position was substantially justified the court may not award attorney' fees. The United States Supreme Court has defined the term "substantially justified" noting that the two common connotations of the word "substantially" are "justified to a high degree," and "justified in substance or in the main." The Court held:

> We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main" – that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. (Citations omitted). To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.[3]

Pierce v. Underwood, 487 U.S. 552, 564-566, 108 S.Ct. 2541, 2549 – 2550 (U.S.Dist.Col.,1988). The Court further explained, by way of footnote: " . . . a position can be justified even though it is no correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* 487 U.S. 552, 566, 108 S.Ct. 2541, 2550, fn.2. The United States need not show that it had a substantial likelihood of prevailing. *Bay*

[3] Here, the Court is referring to *sanctions,* presumably such as those provided in Rule 11, F.R.C.P.

Area Peace Navy v. United States, 914 F.2d 1224, 1230 (9th Cir. 1990) and no presumption is raised that the government's position was not substantially justified because it did not entirely prevail. *Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988).

Here, for the reasons stated in this Court's determination of attorney fees under state law, the United States has shown that its position was, at all times, substantially justified. While the United States did not prevail, its position taken in the case at all times had a reasonable basis in the law. Accordingly, it would be an abuse of discretion to award attorneys' fees pursuant to 28 U.S.C. §2412(d).

c. Sovereign Immunity, Intergovernmental Immunity and the McCarran Amendment.

The Court has ruled that Joyce is not entitled to an award of attorneys' fees under applicable provisions of either state or federal law. Accordingly, it is not necessary for the Court to decide whether the United States is immune from an award of attorneys' fees under the doctrines of sovereign immunity or intergovernmental immunity. Similarly, the Court need not decide whether the McCarran Amendment's prohibition of an award of costs against the United States also bars an award of attorneys' fees.

ORDER

Based upon the foregoing, it is hereby ORDERED that the Motion for Attorneys' Fees of Joyce Livestock Company is, in all respects, DENIED.

Dated February 3, 2006

/s/ John Melanson
John Melanson
Presiding Judge
Snake River Basin Adjudication

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

In Re SRBA	**Subcases: 55-10135 (Joyce Livestock) 55-11061, 55-11385, 55-12452 (BLM).**
Case No. 39576	**MEMORANDUM DECISION AND ORDER ON CHALLENGE**

Reversing Special Master and denying United States' state-law based claims 55-11061, 55-11385, and 55-12452 based solely on administration of lands. Granting Joyce Livestock's claim 55-10135 with April 26, 1935, priority.

Appearances

Elizabeth P. Ewens, McQuaid, Bedford & Van Zandt LLP, San Francisco, CA, for Joyce Livestock.

Roger D. Ling, Ling, Robinson and Walker, Rupert, ID, for Joyce Livestock.

Larry A. Brown, U.S. Department of Justice, Natural Resources Section, Environmental Resources Division, for U.S. Department of Interior, Bureau of Land Management.

I.

PROCEDURAL BACKGROUND

A. The procedural background of these cases is set forth in detail in the ***Special Master's Report and Recommendation in Subcases 55-10135 and 55-11061, 55-11385, 55-12452*** (October 6, 2003), and is summarized briefly here. Joyce Livestock Company (Joyce Livestock or Joyce) filed a single instream *Notice of Claim to a Water Right,* claiming .23 cfs from Jordan Creek in Owyhee County based on beneficial use with a priority date of 1865 for instream stockwater. The United States, Department of Interior, Bureau of Land Management (United States or BLM) filed three notices of claim, each for .02 cfs for instream stockwater with a January 1, 1874, priority date based on beneficial use, which largely overlapped the stream reaches of Joyce's claimed right. The Director of the Idaho Department of Water Resources issued the *Director's Report for Domestic and Stockwater, Reporting Area 6 (IDWR Basin 55)* on July 31, 1997. Joyce Livestock's claim and the three United States claims were listed. The Director recommended Joyce's claim with a reduction to .02 cfs, and the United States' claim as claimed.

B. The United States timely filed an objection to the recommendation for Joyce Livestock's claim, objecting to the claimed priority date, the points of diversion and places of use. The State of Idaho filed timely objections to the recommendations for the United States' claims, alleging that the priority date should be no earlier than June 28, 1934, the date of the enactment of the Taylor Grazing Act. On April 28, 2000, the BLM and the State of Idaho filed a stipulation, stating that if the three United States' claims are decreed, the priority date would be no earlier

than June 28, 1934. This stipulation ended the State of Idaho's participation in these subcases.[1] On May 6, 1998, the Court granted Joyce Livestock leave to file late objections to the United States' water right claims. Joyce Livestock's objections alleged that the name on the United States' water right claims should be Joyce Livestock, not the United States.

C. On July 16, 1998, Special Master Haemmerle entered an ***Order Consolidating Subcases for Summary Judgment*** in subcases 55-10135, 55-11061, 55-11385 and 55-12452. On September 22, 1999, then-Presiding Judge Barry Wood entered an ***Amended Order of Reference Appointing Terrence A. Dolan Special Master*** in the above subcases. On September 28, 2001, the Special Master allowed the United States to amend the above

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claims to correct places of use and to amend the priority date of the rights to June 28, 1934, in accordance with the stipulation reached with the State of Idaho. On December 4, 2001, the Special Master allowed Joyce Livestock to amend the above claimed water right to change the priority date to 1898, and to change the quantity to .02 cfs. On March 8, 2002, Joyce Livestock filed a *Motion for Summary Judgment,* which was denied by the Special Master on July 24, 2002.

D. On December 3-6, 2002, the Special Master held a trial on the objections to the four claims. On October 6, 2003, the ***Report and Recommendation of the Special Master*** was filed, recommending that Joyce's claim to water right 55-10135 be denied, and that the United States' claims to water rights 55-11061, 55-11385 and 55-12452 be decreed as amended. On November 24, 2003, Joyce Livestock filed a *Motion to Alter or Amend Special Master's Report,* which was denied by the Special Master on July 22, 2004. On August 4, 2004, Joyce Livestock filed its *Notice of Challenge.* After a series of briefs were filed by both Joyce Livestock and the United States, oral argument was heard on June 15, 2005.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on June 15, 2005. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or June 16, 2005.

III.

ISSUES PRESENTED ON CHALLENGE

Summarily stated, the following issues are presented to the Court on Challenge:

A. Whether the Special Master erred as a matter of law in recommending that the management of federally administered grazing allotments, without more, constitutes a beneficial use sufficient to support the United States' beneficial use claims to instream stockwater rights.

B. Whether the Special Master erred in recommending that Joyce Livestock failed to establish a beneficial use stockwater right by holding that neither Joyce Livestock nor any of its predecessors demonstrated the requisite intent to either appropriate or transfer an instream stockwater right.

IV.

STANDARD OF REVIEW OF A SPECIAL MASTER'S RECOMMENDATION

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

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); Rodriguez *v. Oakley Valley Stone, Inc.,* 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard,* 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase

"clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

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

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

[2] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, or special master – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not

(Continued on following page)

evidence. *Seccombe,* 115 Idaho at 435, 767 P.2d at 278; *Higley,* 124 Idaho at 534, 861 P.2d at 104.

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

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.,* 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied,* 91 S.Ct. 582 (1971).

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

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come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's, Inc.,* 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

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

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

B. Conclusions of Law of a Special Master.

A special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.,* 120 Idaho at 378, 816 P.2d at 334; *Higley,* 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley,* 124 Idaho at 534, 861 P.2d at 104.

Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra,* § 2588; *East v. Romine, Inc.,* 518 F.2d 332, 338 (5th Cir. 1975).

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

V.

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER

A. Joyce Livestock's Claim.

The Special Master first addressed Water Right 55-10135, claimed by Joyce Livestock. The Special Master found that the key issues involved in Joyce Livestock's claims were: 1) whether Joyce Livestock's grantors appropriated the water of Jordan Creek for instream stockwater use as early as 1898, and 2) if so, whether the water right was an appurtenance to land which passed via instruments conveying that land to Joyce Livestock. The Special Master viewed the key issue as one of intent. "Did Joyce Livestock's grantors *intend* to appropriate the water and if so, did they *intend* to convey that right to their successors?" ***Master's Report and Recommendation*** at 19. The Special Master went on to state that:

> In the present subcases, the answer to the first question of intent answers both questions of intent. The preponderance of the evidence is that

none of Joyce Livestock's grantors intended to appropriate the water of Jordan Creek for in-stream stockwatering. Hence, there was no water right to convey and there is no evidence that they intended to convey such a right.

While it is true that some grantors of Joyce Livestock grazed horses, sheep and cattle in the Jordan Creek drainage and their livestock drank from the stream, there is no evidence that any one rancher intended to appropriate the water. On the contrary, their concern was solely to have *access* to public land for grazing their livestock, along with other grazers.

Before 1934, and enactment of the Taylor Grazing Act, the "privilege or right of pasturage upon the public lands of the government, which are left open and uninclosed [sic], and are not reserved or set apart for other public uses, is common to all who may wish to enjoy it" *Anthony Wilkinson Live Stock Co. v. McIlquam,* 83 P. 364, 369 (Wyo., 1905). In those days, different brands watered along Jordan Creek, there were no fences and the cattle followed the green grass. Gene Lewis, TTr, at 315.

None of the documents conveying land that eventually comprised the Joyce Ranch specifically described water rights on federal public land. That left Joyce Livestock to argue that such water rights were conveyed by such generic appurtenance clauses as: "TOGETHER With all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof." But since the appurtenance clauses were silent as to water rights on federal

public land, Joyce Livestock was left to search for the intent of the grantors in the circumstances surrounding the mesne conveyances of the land to which the water right is claimed to be appurtenant.

Paul Nettleton testified that in 1985, when he and the Hubert E. Nettleton Estate conveyed the Joyce Ranch to Joyce Livestock, he intended to convey the ranch as one unit, including "everything as being necessary to operate that ranch, which would include grazing rights, water rights. . . . " TTr, at 673. But that evidence alone would entitle Joyce Livestock to a priority date of no earlier than 1985. To go back further, to its claimed 1898 priority date, it had to demonstrate intent based on other "circumstances surrounding the mesne conveyances."

First, Joyce Livestock called Dr. Chad C. Gibson to testify about historical transfers of ranching operations. Dr. Gibson said that in his experience, "ranches were bought and sold and traded as a unit, which included all of the necessary resources to operate that ranch." TTr, at 586-588. "[A]nd the ranch unit would have been essentially worthless if it didn't have a right to, to use water that went with whatever range land that was associated with that ranch unit." TTr, at 590. But Dr. Gibson acknowledged that he based much of his understanding on records of the 1936 Salt Lake City District Advisors' Conferences. Those records reveal that the advisors' concerns were about *access to grazing* on federal public land, not water rights. The conclusion, then, is that when ranches were bought, sold and traded around 1936, the real value of the "ranch unit" was its appurtenant grazing *preferences* or *privileges* (access to grazing on federal public

land) – not water rights on the federal public land.

Joyce Livestock was then left to argue that its grantors' applications for grazing preferences beginning in 1935, somehow showed that they owned instream stockwater rights on federal public land by the applicants' claims that such rights were appurtenant to their base property. The premise was that if Joyce Livestock could at least show that its grantors believed that they owned such rights, that might be some evidence of their intent to transfer the rights when they sold their land. But the facts are just the opposite. *None of Joyce Livestock's grantors claimed water rights on federal public land as part of their base property.*

John T. Shea, the first of Joyce Livestock's grantors to apply for a grazing permit in 1935, was asked whether he owned or controlled any source of water supply needed or used for livestock purposes. He responded: "Usual water right acquired with lands under laws of Idaho." Mr. Shea was then asked where the sources of water supply were located. He responded: "Springs & creeks running on & through the ranches." U.S. Trial Exhibit 87. In other words, the only water rights Mr. Shea owned or controlled were located on his deeded lands. Mother grantor of Joyce Livestock was Joyce Brothers Livestock Company. On its 1935 application for a grazing preference, it, too, listed only water rights on its own land. Finally, even Paul Nettleton in 2000, on his grazing application listed only the Joyce Ranch as Joyce Livestock's base property for a grazing preference – no water rights on federal public land.

> The fatal flaw in Joyce Livestock's claim to an instream stockwater right on federal public land can be illustrated in the following scenario. Joyce Livestock filed one claim with an 1898 priority date that corresponds to the earliest patents in the Joyce Ranch chain of title – Mary and Anna Joyce (June 1, 1898). Assuming, *arguendo,* that Mary and Anna Joyce perfected a valid appropriation in 1898, and assuming that such right became appurtenant to their land and ultimately to the current Joyce Ranch, that would necessarily mean that Joyce Livestock based its claim on that single water right. However, Joyce Livestock offered the very evidence that rebuts its claim. It proved that multiple ranchers grazed livestock along Jordan Creek for decades in direct competition with Mary and Anna Joyce and their successors. Admittedly, nearly all of the ranches were ultimately consolidated into the Joyce Ranch, but from 1898 until 1934, and even later, there were no fences, the cattle followed the green grass and different brands watered along Jordan Creek. With that in mind, it is difficult to argue that an 1898 instream stockwater right along Jordan Creek ever existed because no one recognized or defended such a right. The logical conclusion is that no one in Joyce Livestock's chain of title acquired such a right – the water was shared by all grazers with access to the land – because the concern of all grazers from 1898 through the present was *access to graze* on federal public land, *not water rights* on the federal public land.

Special Master's Report and Recommendation at 20-22.

Based on this analysis, the Special Master denied Joyce Livestock's claim.

B. United States' Claims.

The Special Master ruled that the United States had made valid appropriations of water under Idaho law by making it available, along with grazing allotments, for use by grazers:

> In the present subcases, the Special Master agrees with the BLM that it is entitled to its claimed instream stockwatering rights along Jordan Creek. Making the public land available for livestock grazing – plus BLM's comprehensive management of the permittees, their livestock, the land and the water – support valid appropriations of water under Idaho law. The BLM has demonstrated an *intent* to appropriate the water, along with a *diversion* of the water for a *beneficial use.*
>
> The fact that the BLM does not own the livestock which actually consume the water is irrelevant. State water law specifically authorizes the BLM to "appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain . . . [so long as] the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefor on the public domain." I.C. § 42-501. And there is no restriction on how BLM appropriates such water: "Nothing herein shall be construed to deprive the department of water resources of the United States from filing application for waters nor from obtaining permit, license and certificate of water right under the general laws of the state having to do with the

appropriation of waters of the state." I.C. § 42-503. A further restriction is that no change in use of the stockwater right may be made "without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock." I.C. § 42-113(4). Beyond those restrictions unique to stockwater rights on the public domain/federal grazing allotments, the BLM is considered the same as any other landowner who makes their land available for grazing. Since neither Joyce Livestock and its grantors, nor any other grazer, have appropriated the water of Jordan Creek, there is no state law barring the BLM's present claims.

Idaho Code § 42-114 states: "Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water." Some interpret the above statute as requiring that a stockwater right must be issued solely to the stock owner (Joyce Livestock) and not the landowner (BLM).

In 1988, IDWR Director R. Keith Higginson asked Attorney General Jim Jones: "Does Section 42-114, Idaho Code, prohibit the issuance of a water right permit to a landowner for stock watering purposes if the land is or is intended to be leased to another person for the grazing of livestock?" The Attorney General's opinion, written by Deputy Attorney General David J. Barber, is worth quoting at length because it closely parallels the circumstances in the present subcases:

The statute, by its express language, requires the department to issue the permit for stock watering "to the person or association of persons making application therefor." It provides no restriction on who may apply. Therefore, any person, including a landowner who leases his land to stockmen, may file an application for a water right.

The statute further provides that "watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water." This sentence addresses an issue of particular importance to the livestock industry in a state that depends on summer grazing on lands administered by the U.S. Forest Service and by the Bureau of Land Management. In such a case, the owner of the cattle has no legal title to the summer grazing land. This provision makes it clear that the owner of cattle is making beneficial use of the water even without ownership in the underlying place of use.

. . .

Idaho Code § 42-114 does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock. Section 42-114 merely affirms that stock watering is a beneficial use of water and that any person

> may file an application for that use [emphasis added].
>
> 1988 Idaho Op. Atty. Gen. 41, Opinion No. 88-6, October 21, 1988.

While the above Attorney General's opinion deals with permits, rather than beneficial use claims, as in the present subcases, it is fair to conclude that Idaho law has never required ownership of livestock as a condition precedent to ownership of a livestock water right. But there remains the matter of priority date for the BLM's claims. Idaho Code § 42-113(2) requires that the priority date for instream stockwater rights established by beneficial use on federally owned land "shall be the first date that water historically was used for livestock watering associated with grazing on the land . . . ."

The record indicates that a wide variety of stock owners grazed their livestock in and around the Jordan Creek drainage as early as 1865. However, "the many years of uncontrolled use which has existed up to the present time [1932]"[3] came to an end with enactment of the Taylor Grazing Act in 1934. Thereafter, only "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights" within or near the district were given a preference. Taylor Grazing Act, 43 U.S.C. § 315b.

Because the BLM's appropriations of Jordan Creek water for instream stockwater use arise from its management of public lands for livestock

[3] 1932 Forest Service survey, "Owyhee County: The Public Domain as a Land Resource," U.S. Trial Exhibit 88.

> grazing under the Taylor Grazing Act, it is logical – and consistent with the BLM's April 28, 2000 *Stipulation* with the State – that the BLM be awarded a priority of June 28, 1934, the date of enactment of the Taylor Grazing Act.

Special Master's Report and Recommendation at 24-26.

VI.

ANALYSIS AND DISCUSSION

A. The Special Master erred as a matter of law in concluding that Joyce Livestock or its predecessors lacked the requisite intent to appropriate a water right.

Joyce Livestock's stockwater claim as amended describes twenty different forty-acre (quarter-quarter) tracts of land as places of use along Jordan Creek within the Silver Creek Allotment for which Joyce now holds the grazing preference. Joyce Livestock is an Idaho limited partnership entity formed in 1985. Joyce owns approximately 10,000 acres in the adjacent Sinker Creek Basin which serves as "base ranch" property for its grazing preference. The 10,000 acres consists of the accumulation of a number of smaller ranches ultimately acquired by Joyce Livestock. Some of these smaller ranches were in existence and used adjacent public grazing land encompassing Jordan Creek as early as 1898. After the United States began administering public grazing lands pursuant to the Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315) ("Taylor Grazing Act") some of the ranch operators acquired grazing rights along Jordan Creek. Joyce's

acquisition of some of these ranches also included the transfer of grazing rights. Joyce Livestock asserts that its predecessors-in-interest appropriated instream stockwater rights within the boundaries of these grazing allotments, which also transferred to Joyce. Joyce does not have any deeds or other instruments of conveyance evidencing the transfer of water rights from a predecessor-in-interest. Joyce asserts that the stockwater rights transferred as appurtenances to the various acquired patented or base ranch properties.

The Special Master ruled that Joyce's predecessors-in-interest did not appropriate water rights by simply grazing cattle on open public rangeland or on defined grazing allotments following the implementation of the Taylor Grazing Act. The Special Master ruled that grazing cattle in common on the public rangeland was insufficient to establish the requisite intent needed to establish a water right. The Special Master held "the preponderance of the evidence is that none of Joyce Livestock's grantor's intended to appropriate the water of Jordan Creek for instream watering." The Special Master recommended that Joyce therefore failed to acquire a stockwater right from any of its predecessors-in-interest. Since the issuance of the *Special Master's Recommendation,* this Court issued a decision involving similar issues wherein this Court discussed the criteria for appropriating an instream stockwater right on public land. ***Memorandum Decision and Order on Challenge****, Subcases 55-10288B, et al.* (***LU Ranches II****),* 17-22 (January 3, 2005).

In ***LU Ranches II****,* this Court held that requisite intent to appropriate could be inferred from the act of watering livestock as no physical diversion was necessary. *Id.* The Court also distinguished the situation between a

nomadic herder grazing livestock on public rangeland from the situation involving a livestock rancher that historically and routinely used adjacent public rangeland as an integral part of his ranching concern. *Id.* at 17-22. The Court's prior reasoning from that decision is herein adopted.

In this Court's opinion, the Special Master incorrectly applied the element of "intent" in holding that Joyce Livestock's predecessors did not intend to appropriate a water right. The requirements for establishing a beneficial use water right consist of intent to apply water to a beneficial use, diversion from a natural watercourse, and the application of the water to a beneficial use. *See Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.,* 101 Idaho 677, 680-81, 19 P.2d 1130, 1133-34 (1980).[4] The satisfaction of these requirements provides actual notice of the appropriation to every potential water user intending to appropriate from the same or connected source. The appropriation of water requires that the appropriator intend the water to be applied to a beneficial use at the time the water is taken as opposed to merely intending to create a water right. *Neilson v. Parker,* 19 Idaho 727, 729, 115 P. 488, 490 (1911) (citations omitted) ("It is like a man actually being in possession of realty. . . ."). Ordinarily, the

[4] "It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use, existing at the time or contemplated in the future, followed by diversion from the natural channel by means of a ditch, canal or other structure and also an active application of the water, within a reasonable time, to a beneficial use."

Hidden Springs Trout Ranch v. Hagerman Water Users, Inc., 101 Idaho 677, 680-81, 19 P.2d 1130, 1133-34 (1980) (quoting 78 Am.Jur 2d Waters § 321(1975)).

requisite intent is implied from the overt act of diverting the water and applying the same to a beneficial use.[5] Although, no diversion is required for purposes of establishing an instream stockwater right, the other two requirements, intent to apply to a beneficial use and application to a beneficial purpose, still apply.[6] As with the situation of a diversionary right, the requisite intent to apply the water to a beneficial use can be inferred from the overt act of grazing livestock in a particular area and the livestock drinking water from available sources. The proximity of available water sources is essential to the grazing of livestock. In the SRBA decision regarding

[5] Under the constitutional method of appropriation the diversion requirement provides actual notice of intent to potential appropriators. The permit process provides constructive notice of intent to potential appropriators and provides a period within which to put the water to a beneficial use from the time the application is approved. This protects the claimant's priority from intervening appropriators. Idaho also had a statute whereby notice of intent could be posted. Under either method an overriding concern is providing notice of the intent to appropriate.

[6] *In re SRBA Case No. 39576, Minidoka National Wildlife Refuge, SRBA Subcase No. 36-15452, ("Smith Springs"),* 134 Idaho 106, 996 P.2d 806 (2000), in discussing the elements of a constitutional appropriation the Idaho Supreme Court discussed the limited exception to the diversion requirement for stock watering. *Id.* (citing *R.T.Nahas Co. v. Hulet,* 106 Idaho at 45 (Ct. App. 1983); *Stevenson v. Steele,* 93 Idaho 4, 11, 453 P.2d 819, 826 (1969)). No exceptions were discussed for the remaining two elements.

In *Town of Genoa v. Westfall,* 349 P.2d 370, the Colorado Supreme Court held:

> It is not necessary in every case for an appropriator of water to construct ditches or artificial ways through which the water might be taken from the stream in order that a valid appropriation be made. The only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use.

Id. at 547.

executive order Public Water Reserve (PWR) 107, Judge Burdick discussed at length the fact that the person that controlled the limited isolated water sources could control vast amounts of surrounding rangeland. ***Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman, Consolidated Subcases 23-10872 et al., Joint Submission Subcases 23-10894 et al.*** 12-14 (December 28, 2001). The very purpose of PWR 107 was to prevent the *de facto* control over rangeland through the control of available water sources. *Id.* at 19 ("Throughout the history leading up to the issuance of PWR 107, the unequivocal intent of the public water reserve policy was to attempt to prevent the monopolization of the public rangelands through the control of the limited water sources"). Accordingly, PWR 107 withdrew land from the public domain surrounding such sources. The testimony of Roxanne Brown regarding IDWR's policy regarding the investigation of *de minimus* stockwater rights also exemplifies the relationship between grazing and available water supplies.

> Q. [Does IDWR] determine whether or not there, in fact, are cows even consuming water from this source as part of your – .
>
> A. In a general sense we do. We understand clearly that, that range land grazing and watering occur throughout the areas of the state, where each of the stockwater rights is occurring or is claimed. So in a general sense, we assume that stock are in fact drinking.

Tr. p 26. "Livestock must have forage and water to survive while they use public land for grazing." Testimony of

Ronald Kay, Tr. at 559. Given this integral relationship between available water sources and grazing land it is self-evident that the grazing of livestock includes the intent that livestock will beneficially use available water sources. Although there is no physical diversion putting other intending water users on notice, the overt act of grazing livestock in proximity to available water sources, and the livestock drinking from those sources, provides notice to intending water users. This is particularly true with respect to the rancher who historically and routinely used the same rangelands in conjunction with a ranching operation as opposed to the itinerant livestock grazer. In *Hunter v. United States,* 388 F.2d 148 (9th Cir. 1967), in upholding an instream appropriation of stockwater, the Court held:

> To constitute an appropriation, therefore, there must co-exist 'the intent to take, accompanied by some open physical demonstration of the intent, and for some valuable use.' . . . The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use . . . but it can also be evidenced in other ways, for example, as in this case by watering livestock directly from the source or as in other cases by placing water wheels in a stream in order to use the flowage as power to operate a mill located on the bank.
>
> In this case there is no lack of proof of the asserted appropriation; to the contrary, a clearer showing of intent to use the water is made plain by the evidence. Year after year for nearly a century they have pastured their livestock in this isolated enclave, surrounded by miles of impassible desert; except for the water provided by these

> springs and the stream, there has been none other available to keep their animals alive.
>
> Their intended (and actual) use has been for a beneficial purpose, as the trial court specifically found. Indeed a contrary finding could hardly have been justified, particularly since cattle watering has been judicially recognized in California as 'a reasonable beneficial use'.

Hunter at 153 (internal citations omitted).

The United States argues that in order to establish the requisite intent to appropriate a stockwater right there must be some requirement of exclusivity or dominion exercised over the water source by the appropriator. *See Robinson v. Schoenfield,* 218 P. 1041 (Utah 1923). This Court disagrees. While this may be a requirement in some jurisdictions, in *R.T. Nahas Co. v. Hulet,* the Idaho Supreme Court did not discuss or otherwise impose such a requirement. *See R.T. Nahas Co. v. Hulet,* 106 Idaho 37, 674 P.2d 1036 (Ct.App. 1983). Moreover, because the water rights at issue are located on public lands, legally a livestock grazer could not exclude another from using such lands until after the implementation of the Taylor Grazing Act. *See e.g.* Unlawful Enclosures Act of 1885, Act of Feb. 25, 1885, c. 149, 23 Stat. 321 (codified at 43 U.S.C. § 1061). A livestock grazer would not need to exclude another water user from a particular source if a sufficient water supply existed. In light of the nature of an instream stockwater right, the conditions argued by the United States do not reflect the realities of livestock grazing, nor are they required by law.

B. The intent to transfer water rights by predecessors-in-interest.

Even if it is determined that Joyce Livestock's predecessors established water rights in the Jordan Creek area under the foregoing analysis, Joyce Livestock does not possess any deeds or other instruments conveying the water rights. Because water rights are interests in real property, the statute of frauds requires that transfers be in writing. I.C. § 9-503; *Olsen v. Idaho Department of Water Resources,* 105 Idaho 98, 101, 666 P.2d 188 (1983); *Gard v. Thompson,* 21 Idaho 484, 496, 123 P. 497 (1912). Water rights can also transfer along with the property to which they are appurtenant. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). The general rule is that when an instrument conveying real property is silent as to water rights, any appurtenant water rights automatically transfer along with the property. *Id.* Joyce Livestock asserts that the stockwater rights on Jordan Creek transferred as appurtenances to the base ranch properties acquired by Joyce. In ***LU Ranches II***, this Court held that given the nexus or connection between private or base ranch property and the use of adjacent public lands or grazing allotments that a grantor could have intended to transfer water rights appropriated on public land as appurtenances to base ranch property. ***Lu Ranches II*** at 22-25.[7] Whether any stockwater rights transferred depends on the intent of the grantor and is a question of fact. *Id.* The Special Master ruled that because Joyce's predecessors did not intend to appropriate stockwater rights they could not have intended

[7] In 1998, the Idaho legislature acknowledged this relationship and statutorily made grazing preferences appurtenant to base ranch property. I.C. § 25-901 (2005).

to transfer any stockwater rights as appurtenances. This Court disagrees. As discussed previously, the intent to apply the water to a beneficial use objectively satisfies the element of intent to appropriate.

In ***LU Ranches II***, in trying to ascertain the intent of the grantor, the Court looked at the totality of circumstances surrounding the use of the base ranch properties in conjunction with adjacent public grazing land. ***LU Ranches II*** at 26. Factors this Court took into account included the historical use of defined areas of adjacent public land in conjunction with a bona fide livestock operation, the award of grazing preferences based on such historical practices and predecessor's representations made to the United States in the applications for grazing permits. If it could be demonstrated that private property and adjacent public rangeland were used in connection with a ranching operation, and that operation was acquired by a successor, the grantor would have intended to convey not only the private property but also any stockwater rights used in connection with the operation. The Court essentially applied an objective test in determining the subjective intent of the grantor.

In determining the elements of the water right, the Court looked at where the predecessors historically grazed on public lands in connection with the ranching operation and relied on written representations made by predecessors in the grazing permit applications. The grazing permit applications were primarily awarded based on historical use and/or control over water sources and as such, applicants were specifically asked to identify where and when they historically grazed livestock on the public domain and to identify any particular water rights held and used in connection with the ranching operation.

Because the Court applied an objective test, to the extent an applicant/predecessor either represented in the grazing application that he held no water rights on public land or otherwise failed to identify any such rights when specifically asked, in ascertaining the intent of the grantor, the Court concluded that the grantor could not have intended to convey as an appurtenance to a different parcel of property something he did not claim or otherwise believe he owned. On the other hand, where the grazing application specifically mentioned or evidenced a water right, the Court was unwilling to conclude that the predecessor intended to forfeit the water rights rather than transfer the right along with the base ranch property and/or grazing privileges. In most cases the applications provide the only record of the predecessor's grazing practices and ownership of water rights.

C. Joyce Livestock's claim.

Joyce Livestock's claim includes twenty different places of use (quarter-quarter sections) along Jordan Creek. Joyce Livestock does not assert that it appropriated the claimed water right; rather Joyce contends that the right was appropriated by predecessors-in-interest and conveyed as an appurtenance to private property that now comprises Joyce Livestock's base ranch property. The record in this case is voluminous, and only a portion of the exhibits admitted via stipulation of the parties have relevance pertaining to the interests of Joyce Livestock's predecessors in the Jordan Creek area. In addition, not all of Joyce's predecessors historically grazed the same areas that now comprise the place of use for Joyce's claim. Animal Unit Months (AUMs) were also transferred without the transfer of base ranch property. This raises the

issue whether water rights transferred with AUMs or remained with base ranch property.

Other than general appurtenance clauses, none of the deeds in the chain of title for Joyce Livestock's base ranch property refer to water rights located on lands other than those lands specifically being conveyed. U.S. Exhibit 1. Further there are no historical documents acknowledging the existence of water rights or specifying where predecessors, other than those who filed for grazing privileges after the enactment of the Taylor Grazing Act, specifically grazed cattle in conjunction with a ranching operation. Although the Joyce Livestock base ranch property is an accumulation of 29 different homesteads and small ranches, only John T. Shea, Joyce Bros. Livestock Co., Nettleton Bros., the Jump Creek Sheep Co., and Jean Heazle are the predecessors-in-interest to Joyce's grazing preference. U.S. Exhibit 22. Only John T. Shea, Joyce Bros. Livestock Co., and the Nettleton Bros., originally filed for grazing privileges on the allotment after the implementation of the Taylor Grazing Act. In reviewing the grazing permit applications, only John T. Shea and Joyce Bros. Livestock filed for grazing privileges on lands covered by Joyce Livestock's claim.

John T. Shea filed for an entry under the Stock-Raising Homestead Act in 1927. U.S. Exhibit 20. Shea filed for a grazing permit application on April 26, 1935. Joyce Exhibit 87. Shea's application indicates that he used the lands applied for in conjunction with his ranching operation for the prior 10 years. Although Shea did not offer water rights as base property, the application identified water rights used in conjunction with his livestock operation as "usual water right acquired with lands under the laws of Idaho" and identified such rights as "springs

and creeks running on and through the ranches." The application also states that Shea had been using the lands almost exclusively for the previous 10 years. However, the permit application only pertained to a portion of the place of use for Joyce Livestock's overall claim. The application identified historical grazing located in Township 5 South, Range 3 West, Sections 6, 7, and 8 and Township 4 South, Range 3 West Section 31. Omitted were the portions of Joyce's claim located in Township 5 South, Range 3 West, Sections 17, 18, and 19. In a February 14, 1936, application for the grazing season commencing April 1, 1936, Shea identifies all of Township 5 South, Range 3 West, (exclusive of patented property) as the areas of the public domain normally being "used in connection with [his] ranching operation." Joyce Exhibit O. The application also refers to a small portion of Jordan Creek (near Silver City) located in Township 5 South, Range 3 West. This covered the remainder of Joyce Livestock's claim. A dependent property record prepared in 1937, refers to private lands owned by Shea in Township 4 South, Range 3 West and Township 5 South, Range 3 West, and notes that the lands have "been owned by Mr. Shea and used in connection with his livestock operation since 1925." Joyce Exhibit S. In an affidavit signed by Shea in 1957, Shea states "I owned and operated a cow outfit in the Sinker Creek and Jordan Creek water shed beginning in 1928 until I sold out in 1938." U.S. Exhibit 55, bsn 550. Through mesne conveyances, Shea's base ranch property, together with grazing rights and appurtenant water rights was transferred to Joyce Livestock. U.S. Exhibit 1, Joyce Exhibit Y.

The Special Master made the specific finding that Shea's reference to "springs and creeks running through the ranches" referred to only to Shea's deeded lands.

Special Master's Report and Recommendation at 22. "In other words, the only water rights Mr. Shea owned or controlled were located on his deeded lands." *Id.* Although the term "ranches" is ambiguous, the Court cannot conclude that the finding was clearly erroneous, Therefore, the Court must conclude that the earliest Shea appropriated a water right would be April 26, 1935. This ruling is consistent with ***LU Ranches II,*** in which this Court stated:

> Again, *in the 1937 application O'Keefe fails to identify any water rights located on the public domain and the permit was awarded based on O'Keefe's representations.* Thus, it must be concluded that any appurtenant water rights were appropriated after the issuance of the grazing permit or April 15, 1937. In ascertaining the intent of the grantor, the Court cannot infer that the grantor conveyed something he didn't claim he owned.

Memorandum Decision and Order on Challenge, Subcases 55-10288B *et al.* **(*LU Ranches II*)** (January 3, 2005) at 35. The Court also holds that the documents in evidence show that Shea grazed his cattle throughout the Jordan Creek drainage, so this priority date is applicable to all of the reaches within 55-10135.

On June 12, 1935, Joyce Bros. Livestock Co. filed an application for a grazing permit. U.S. Exhibit 85. The application seeks grazing privileges in various areas but only identifies that portion of Joyce Livestock's water right claim located in Township 4 South, Range 3 West, a part of which is located in the Jordan Creek drainage. The application states that the applicant began use of the lands covered by the application in 1866. The application also

includes a schedule of water rights, together with maps, and meticulously identifies the specific water rights held by Joyce Bros. Livestock Co. U.S. Exhibit 85. The schedule also states that "there are numerous springs which have not been marked on the maps, for lack of knowledge of the correct location." However, none of the water rights identified are located on public domain. Joyce Bros. does not identify any water rights on Jordan Creek. In 1936, Joyce Bros. Livestock Co. filed a subsequent application for the 1936 grazing season. U.S. Exhibit 83. The application does not identify any lands in the Jordan Creek drainage. The application asks: "list and describe all livestock watering facilities owned, leased or controlled by you, which are used in connection with your livestock operation on public domain." Joyce Bros. identifies "Springs and natural flow of the above listed creeks" which includes "Bates, Fossil, Sinker, No. Castle; also Meadow Creek, Josephine, Rose, Combination, and heads of Short and Langdon Creeks." Jordan Creek is not identified.

Hubert E. Nettleton and J.H. Nettleton filed an application for a grazing permit on June 8, 1935. The application only identifies the "use of the water on Sinker Creek." Exhibit 86. In an application for 1936, the Nettletons identify "Springs in Sinker, Bates and Fossil Creeks." U.S. Exhibit 84. Any water right on Jordan Creek would have had to have been appropriated by Nettletons after 1936.

On December 2, 1966, Jump Creek Sheep Company transferred a portion of its AUM's (Animal Unit Months) from its base property to J.H. Nettleton's base property. No mention of water rights is included in the transfer, nor is it clear what if any water rights existed, or if they did exist, whether it was intended that the water rights transfer

along with the AUMs or remain with the base ranch property. U.S. Exhibit 93.

Accordingly, based on the foregoing, this Court holds that the earliest date Joyce Livestock can establish for its claim would be April 26, 1935, relating to Shea's use of the Jordan Creek area.

D. The United States is not entitled to a beneficial use state-based water right based solely on its administration of grazing lands.

The Special Master recommended that the United States' claims be decreed essentially as a matter of law based solely on the United States' role as the administrator of the grazing allotments on which the claimed water rights are located. The Special Master relied on Idaho Code § 42-501 in finding that the administration of public lands by the United States constitutes a beneficial use for purposes of establishing a state-law based stockwater right. Idaho Code § 42-501, which has been in effect since 1939 and reads substantially the same today, provides:

> **Appropriation by the United States bureau of land management, department of interior-Fee-Conditions of permit-Flow**
>
> The bureau of land management of the department of interior of the United States may appropriate for the purpose of watering livestock any water otherwise not appropriated, on the public domain. The department of water resources shall, upon application in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation. With each

> such application there shall be paid to the department of water resources a fee of ten ($10.00) dollars and there shall be no further fee required for the issuance of the permit or license and certificate of water right, nor for any other proceedings in connection with such application. Such permit, license and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefore on the public domain. The maximum flow for which permit, license and certificate of water right may issue hereunder shall be five (5) miner's inches, and the maximum storage for which permit, license and certificate of water right may issue hereunder shall be fifteen (15) acre feet in any one storage reservoir.

I.C. § 42-501 (2003 & Supp. 2005).

This Court disagrees with the Special Master's reliance on I.C. § 42-501. The United States' claims are not based on the operation of I.C. § 42-501. The United States did not follow the permit and licensing procedures set forth in the statute. Nor does I.C. § 42-501 support the conclusion that the ownership of land and the administration of the grazing allotments alone can be sufficient to establish a beneficial use water right, without regard for whether the United States or someone acting on behalf of the United States was beneficially using the water. The requirements pertaining to the beneficial-use or constitutional method for appropriating a water right apply to the United States just the same as they would apply to any other appropriator of a state-based water right. In particular, a beneficial use appropriation requires that the water be put to beneficial use either by the appropriator or someone acting on behalf of the appropriator. This Court

agrees that as a general principle the administration or ownership of land by one person or entity when coupled with the beneficial use of water by another can be sufficient to establish a water right in the administrator or owner – if the beneficial user is acting on behalf of the owner or administrator. *See First Security Bank of Blackfoot v. State,* 49 Idaho 740, 291 P. 1064 (1930). However, this is not what occurred with respect to the water right claims at issue. Joyce Livestock claims that it and its predecessors are the beneficial users of the water. Joyce asserts that it appropriated and/or acquired its own water right and was beneficially using that right on the grazing allotment. Joyce Livestock contends that it was not acting on behalf of the United States or beneficially using the United States' water rights. Therefore, the issue becomes whose water right, if any, was being used in conjunction with the grazing allotment.

The issue regarding the establishment and ownership of a water right where there is not unity of title between the appropriator of the water right and the owner of the land on which the right is used was previously decided and has been applied consistently in the SRBA. *See e.g.* ***Memorandum Decision and Order on Challenge; Order Denying Motion to File Amicus Curiae Brief; Order of Recommitment to Special Master Cushman,*** Subcases 55-10288 A & B, *et al.* (***LU Ranches I***) (April 25, 2000); ***Memorandum Decision and Order on Challenge,*** *Subcases 55-10288B, et al.* (***LU Ranches II***) (March 1, 2005). To date this ruling has not been reviewed by the Idaho Supreme Court and thus still remains law-of-the-case.[8] The issue arose in the context of the ownership of

[8] ***LU Ranches II*** is currently on appeal to the Idaho Supreme Court.

stockwater rights on federal grazing allotments as between the United States and the livestock rancher who grazed the cattle and actually put the water to beneficial use.[9] In ***Order on Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw Objections,*** Subcases 57-11124 *et al.* (Mar. 25, 1997); ***Order On Motions to Alter or Amend; Order on Motion for Permissive Appeal,*** Subcases 57-04028 *et al.* (June 26, 1997), one of the issues before Special Master Hammerle was whether the United States as administrator of a grazing allotment could perfect a beneficial-use right despite not actually grazing or watering livestock. Special Master Hammerle ruled that because the permittee, not the United States, beneficially used the water, the only way in which the United States could perfect a state-law based (non-statutory) water right was through an agency relationship between the permittee and the United

[9] In 1996, the United States, the State of Idaho and various ranching interests sought to have the SRBA Court decide various issues surrounding the ownership of a water right claim on a grazing allotment as between the permittee, who actually grazed the cattle on the allotment, and the United States who administered the allotment. Judge Hurlbutt denied the motion to designate basin-wide issue 9A, because the parties were unable to agree on a set of paradigm facts for creating test cases. The Court did not want to decide test cases in a "vacuum" and then have the parties seek to distinguish the facts of their particular case requiring that the individual subcases be litigated anyway. Judge Hurlbutt decided the cases were fact driven and should proceed through the SRBA process case-by-case. *Order Designating Basin-Wide Issue No.9; Order Denying Designation of Basin-Wide Issue No. 9A; Order Setting Expedited Schedule and Hearing Date for Basin-Wide Issue No. 9,* Case No. 91-00009 (March 8, 1996). In 2000, Judge Burdick also denied a joint motion by various parties to create and decide test cases addressing the same issues on the same basis as Judge Hurlbutt. *Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master Dolan and Stay Related Subcases,* (Approx. 7500 subcases) (Jan. 30, 2000).

States, whereby the permittee appropriating the water was acting on behalf of the United States. *Id.* The situation was analogized to that of a lessor and lessee, where the lessee appropriates the water right. Under Idaho common law if a lessee appropriated a beneficial use water right used in conjunction with the leasehold, absent an agency relationship with the lessor or a lease provision or agreement to the contrary, title to the water right vested in the lessee who appropriated the right not the lessor who held fee title to the leasehold. *See First Security Bank v. State,* 49 Idaho 740, 746, 291 P. 1064 (1930) ("This court has repeatedly held that a water right is not necessarily appurtenant to the land on which it is used and may be separated from it, and this is the general rule. If the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as agent of the owner.").

The Special Master's reasoning and ruling was subsequently adopted by Judge Hurlbutt. ***Order Denying Challenges and Adopting Special Master's Reports and Recommendations,*** Subcase 57-04028B (Joyce Livestock) (Sept. 30, 1998). Judge Wood, who succeeded Judge Hurlbutt, adopted this same reasoning in a subsequent consolidated subcase involving similar issues. ***Memorandum Decision and Order on Challenge; Order Denying Motion to File Amicus Curiae Brief; Order of Recommitment to Special Master Cushman,*** Subcases 55-10288 A & B, *et al.* (***LU Ranches I***) (April 25, 2000). Judge Burdick applied the same reasoning in ***Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master and Stay Related Subcases,*** (Jan. 3, 2001), based on the reasoning that each of the claims was fact specific. Recently, this Court applied the same reasoning.

Memorandum Decision and Order on Challenge, *Subcases 55-10288B, et al.* (***LU Ranches II***) (Jan. 3, 2005).

This reasoning is also consistent with the Taylor Grazing Act as well as the federal regulations governing the issuance of grazing permits and preferences. The Taylor Grazing Act expressly acknowledged that permittees could be using their own water rights on the grazing allotments as opposed to water rights held by the United States. (Thus if a permittee was using their own water right, they were not appropriating a beneficial-use right for the benefit of the United States.) The Taylor Grazing Act provides:

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

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

The regulations also expressly acknowledged that the permittee could be using their own water rights on the grazing allotment as opposed to water rights held by the United States. 43 C.F.R. § 4100.0-5 (1998). Specifically, in order to be awarded a grazing preference, the applicant needed to have base property either in the form of private land used in conjunction with the grazing allotment or water rights used in conjunction with grazing cattle on the allotment, which could include water rights located on the

allotment. *Id.* Prior to 1995, the federal regulations did not address the ownership of water rights used on grazing allotments. In 1995, the regulations were amended to provide that any water rights perfected on grazing allotments would vest in the United States.[10] 43 C.F.R. § 4120.3-9 (1998). As of 1995, it is abundantly clear that a permittee appropriating a water right acts on behalf of the United States. However, prior to that time it is equally clear that the permittee could have appropriated and beneficially used its own water right. *See generally* ***Memorandum Decision and Order on Challenge,*** *Subcases 55-10288B, et al.* (***LU Ranches II***) (Mar. 1, 2005). (discussing at length the ability of a permittee to perfect a water right on grazing allotments).

In applying the law of the case to the instant subcases, the United States does not contend that it ever physically appropriated a water right by grazing livestock, nor does it contend that there was a regulation or agreement in place with Joyce or its predecessors specifying that the title to any beneficial use water rights established on the subject allotments would vest in the United States. Joyce asserts that as a permittee it never had an

[10] The regulations provide:

> 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 water right shall be acquired, perfected, maintained, and administered in the name of the United States.

43 C.F.R. § 4120.3-9 (1998)

agreement with the United States regarding the ownership or use of water rights on its grazing allotments, and that Joyce has been using its own water rights in conjunction with the allotments. Accordingly, the United States has failed to establish a beneficial-use state-law based water right.

In this Court's opinion, concluding that the United States can establish a beneficial use water right based solely on the administration of the lands without regard for beneficial use, either by the United States or someone acting on behalf of the United States, would be more akin to a federal reserved water right or a riparian water right than a water right based on state law. Furthermore, the requirements for establishing such a right would be less stringent than for a federal reserved water right. For example, in order for a federal reserved water right to exist, the primary purpose of a federal withdrawal would have to be entirely defeated without an implied reservation of water. Under the theory now asserted by the United States, the fact that the United States administers lands alone would be sufficient to establish a water right. Although the provisions of the Taylor Grazing Act made it clear that the operation of the Act was not intended to create federal reserved water rights, an "administrative" type of water right without regard for beneficial use appears to be an end run around that intent and the requirements for establishing a federal reserved water right or some type of riparian right.

The state of Idaho statutorily created a means for the United States to establish stockwater rights on the grazing allotments through the permit and licensing process. The United States did not follow that process in this case. However, even under that licensing process, the United

States would have been required to demonstrate beneficial use of its permitted right prior to the issuance of the license. This potentially would have forced the same issue that is now before the Court regarding whether the right beneficially used was that of the grazing permittee or that of the United States. As such, this Court does not read the statute to support the argument that I.C. § 42-501 creates a special type of beneficial use right based on administration without regard for beneficial use.

Additionally, the fact that there existed a statutory means for establishing a particular type of water right does not necessarily authorize the same type of right under the constitutional method. This point was demonstrated in *In re SRBA Case No. 39576, Minidoka National Wildlife Refuge, SRBA Subcase No. 36-15452, ("Smith Springs"),* 134 Idaho 106, 996 P.2d 806 (2000). In *Smith Springs,* the United States filed a claim for instream flows from Smith Springs inside the Minidoka National Wildlife Refuge based on the constitutional method of appropriation. One of the arguments raised relied on I.C. § 42-1501 *et seq.,* which provides a statutory scheme for establishing minimum stream flows and declares minimum stream flows to be a beneficial use. The Idaho Supreme Court rejected the argument that the declaration of beneficial use extended to the constitutional method of appropriation and held that the exception to the diversionary requirement was limited to appropriations made under Idaho's permit system as provided for by I.C. § 42-1501 *et seq. Smith Springs* at 134 Idaho at 112, 996 P.2d at 812 (citing *State, Dep't of Parks v. Idaho Dep't of Water Admin.,* 96 Idaho 440, 444, 530 P.2d 924, 928 (1974)).

In this Court's view, the Special Master may have treated the issue of intent to appropriate differently as

between Joyce Livestock and the United States. It appears that the issue of intent with respect to the United States was decided more as a matter of law, but that the issue of intent with respect to Joyce Livestock was decided as a factual issue. This led to a conclusion with respect to Joyce Livestock that mere use alone was insufficient to establish the requisite intent to appropriate a beneficial use water right, and that additional overt conduct of intent to appropriate is required. However, the same standard was not applied with respect to the United States. Even assuming that the administration of lands, without more, could be sufficient for purposes of appropriating a beneficial use water right, the Special Master did not require the United States to prove intent to appropriate. Even though the United States administers the land there is no evidence in the record that it intended to appropriate water. The United States acts and expresses its intentions through legislation, regulations and contracts. As previously discussed, neither the Taylor Grazing Act nor the regulations governing its application, which authorize the actions of the United States in administering grazing lands, expressed any intent to appropriate a water right. All expressions and inferences are to the contrary.

In addition, since the United States did not actually apply the water to a beneficial use by grazing its own cattle, it is not clear whether the United States intended to apply water to a beneficial use by having the permittee act on behalf of the United States in beneficially using the water or whether the United States intended that the permittee either utilize the permittee's existing water right or have the permittee appropriate a new water right. Again, a permittee could offer his own water rights on public land as base ranch property for a grazing preference

and it was not until August 21, 1995, that the grazing regulations made it clear that any water rights perfected on public land would be perfected in the name of the United States. *See* 43 C.F.R. § 4120.3-9.

The United States cites *State v. Morros*, 766 P.2d 263 (1988), a Nevada case which determined that the United States acting in its proprietary capacity as a landowner could appropriate instream stock and wildlife rights based on its ownership of lands. *Morros* is not inconsistent with the law in Idaho concerning the stockwater rights. *Morros* dealt with a permit application which was denied. Idaho specifically has a permit statute in place allowing the United States to appropriate water for such purposes. By following the permit process, the United States provides constructive notice to other intending appropriators on a particular source and is able to appropriate a water right subject to the limitations set forth in the statute. Here, the United States did not follow the permit process.

In the ***Order Denying Motions to Alter or Amend (Amended Order on State's Motion for Summary Judgment),*** Subcase 72-15929C (April 15, 1998), a subcase to which the United States and the State of Idaho were the only objectors, Special Master Hammerle ruled that the United States could not appropriate water based solely on the fact that it issues permits and regulates access to water sources.

> [The fact that the United States gives 'permission' to stockmen has no relevance to a claim that the United States is the appropriator under state law. As previously stated, the United States is treated like any other landowner as it relates to a claim for a state-based water right. As such, the rule in Idaho is that unless there is an

> agreement between the landowner and the party actually appropriating the water on the landowner's property, the water right belongs to the party perfecting the right . . . Finally if the United States theory were accepted, then the only party that can claim a water right on the public domain is the United States. The result of such a theory would be to create either a quasi-riparian or quasi-reserved theory of water right ownership where only the United States may own a water right located on the public domain. (footnote omitted).

Special Master's Order at 9. This ruling was adopted by Judge Hurlbutt. ***Order Denying Challenges and Adopting Special Master's Reports and Recommendations,*** subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B and 72-15929C (Sept. 30, 1998). Although the issue raised by the State of Idaho only dealt with the ability of the United States to perfect a water right prior to the passage of the Taylor Grazing Act, the reasoning extended beyond the enactment of the Taylor Grazing Act to the ability of the United States to perfect a state-law based water right solely based on the administration of lands. Pursuant to a global stipulation between the United States and the State of Idaho, which resolved numerous subcases, the decision was not appealed. Nonetheless, the ruling remains law of the case.

This Court acknowledges that partial decrees have been issued by the SRBA Court to the United States for a significant number of state-based beneficial use water rights with a priority date as of the date of enactment of the Taylor Grazing Act, which corresponds to the date the

United States began administering public rangeland.[11] However, these decrees either came about through settlement agreements with parties who objected to the claims or the claims were uncontested. Because the *Director's Report* for these rights established a *prima facie* case for the state-law based claims, and because it is factually and legally possible for the United States to appropriate a state-law based beneficial-use right for the reasons just stated, the Court did not need to conduct further proceedings on either uncontested or stipulated rights to decided whether the permittee or the United States owned the water right. Accordingly, these uncontested or stipulated agreements provide no precedence for those claims where objections were filed.

Finally, this Court also acknowledges that there are situations where the United States has developed water sources and diversionary works for use on grazing allotments. However, the Court need not decide whether such development would result in the United States appropriating a water right as that is not the situation with the subject claimed places of use along Jordan Creek.

VII.

CONCLUSION

The issue over the ownership of stockwater rights on the public domain is an issue that has persisted in the SRBA since 1996 when Judge Hurlbutt entertained a

[11] It should be noted that the claims filed by the United States did not initially claim a 1934 priority date, indicating that the theory behind the claims was not based on administration, but rather actual beneficial use of the water by the end-user.

motion to designate the issue as a basin-wide issue. What is apparent in this case, as well as in other cases involving the same issue that have been before this Court, is that neither the United States nor the rancher-permittee contemplated stockwater rights on the public domain. Despite the arguments by both the United States and Joyce Livestock regarding the importance of stockwater rights on the public domain, in the voluminous exhibits in this case representing approximately 140 years of history, there is not one specific reference to a water right on the public domain by either the United States or by Joyce Livestock's predecessors, albeit the water rights on private land are often described with particularity. This dispute over water rights has less to do with the administration of water than the contemporary administration of public lands. In IDWR's I.R.E. 706 Report explaining IDWR's policy for recommending stockwater rights on public land, it is noted that IDWR has never prohibited a party from watering livestock on federal rangeland and cites a lack of historical conflict over the issue. U.S. Exhibit 17. IDWR also noted that many permittees did not even file claims in the SRBA. Because of the realities and limitations of an instream stockwater right on federal land it becomes apparent why neither the United States nor former permittees considered water rights on grazing allotments. In ***ORDER ON LU RANCHING CO.'S MOTION FOR RECONSIDERATION***, Subcases 55-10288B *et al*, (May 2, 2005), this Court stated:

> 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. [The] Grazing preferences [in this case] 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 [necessity of transferring] a water right on a grazing allotment.

Id. at 6. This same reasoning holds true for the United States.

For the above-stated reasons, this Court holds that Joyce Livestock has established an April 26, 1935, priority date for water right claim 55-10135. The Special Master did not address the issues pertaining to the recommended place of use for the claim based on the conclusion that Joyce Livestock failed to establish a water right. In the interest of avoiding further delay by remanding for additional findings on the place of use this decision will be certified as final for purposes of appeal.

Water right claims 55-11061, 55-11385, 55-12452 filed by the United States are denied and will be decreed disallowed.

I.R.C.P. 54(b) Certification

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

DATED August 3, 2005.

/s/ John Melanson
JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

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 **Case No. 39576**	**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, 55-13451, 55-13846 and 55-13844.** **MEMORANDUM DECISION AND ORDER** **RE: ATTORNEYS' FEES** (Filed Aug. 2, 2005)

A hearing was held in open court on June 15, 2005, on the motion of LU Ranching Co. for attorneys' fees pursuant to IRCP 54(e)(1), I.C. §12-121 and 28 U.S.C. §2412(d). Appearances were as follows:

LU Ranching Co:	Ms. Elizabeth P. Ewens McQuaid, Bedford & VanZandt, LLP
United States of America:	Mr. Lary A. Brown U.S. Department of Justice

The matter was submitted for decision on the day following the hearing. The Court, having considered the argument of

counsel, the file in this matter and the memoranda submitted now enters the following:

MEMORANDUM DECISION

1. Facts and Procedural History.

The relevant facts and the procedural history of this case were set forth in this Court's ***Memorandum Decision and Order on Challenge***, Subcases 55-10288B *et al* (LU Ranches) (January 4, 2005) and are restated here for the convenience of the reader.

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

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

The subcases were originally referred to Special Master Fritz Hammerle. In the proceedings before Special

Master Hammerle, the United States filed a motion for summary judgment asserting that LU had no deeds or other instruments from a predecessor-in-interest conveying any of the subject water rights. LU argued that the water rights were appropriated by its predecessors-in-interest to the patented or "base ranch" properties to which its grazing allotments are attached. LU also argued that the rights transferred as appurtenances to the base ranch properties via the appurtenancy clauses contained in LU's chain of title. Special Master Hammerle granted summary judgment in favor of the United States, holding that because water rights are interests in real property and transfers of real property require a written instrument, the alleged water rights were not properly conveyed. Special Master Hammerle also ruled that without a written instrument the earliest priority date LU could prove was September 23, 1976, the date LU was incorporated. *Order Granting United States' Motion for Summary Judgment,* Subcases 55-10288 *et al.* (Jan 8, 1999).

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

judge of the SRBA. ***Order Denying Challenges and Adopting Special Master's Reports and Recommendations,*** Subcases 57-04028B *et al.* (Sept. 30, 1998).

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

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

Judge Wood ruled that for purposes of conveying the water right, the statute of frauds would be satisfied

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

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

On challenge LU only raised issues pertaining to certain recommended places of use for some of its claims. LU did not challenge the recommended priority date. The United States on challenge raised a legal issue regarding

the inability of a private party to perfect a water right on land to which the party does not hold a possessory interest. The United States also raised a legal issue regarding the ability to transfer a water right as an appurtenance to the private ranch property, particularly prior to 1934 when the concepts of base ranch property and grazing allotments did not exist. Factually, the United States challenged the sufficiency of the evidence supporting the Special Master's recommended 1876 priority date for each of the rights even assuming the rights could legally be appropriated on the public domain and transferred as appurtenances to the private property. The United States also challenged certain legal descriptions of the water rights.

A hearing was held on November 10, 2004. The Court issued a ***Memorandum Decision*** on January 4, 2005, ruling that the Special Master erred as a matter of law in failing to trace the chain of title in the mesne conveyances in accordance with Judge Wood's prior ruling for purposes of establishing priority dates for the claims, and that the Special Master erred by recommending a 1876 priority date for each of the claims based upon a lack of evidence in the record to support that priority date. The Court's priority date ruling was based primarily on the inability of LU to show that its predecessors intended to transfer a water right. This Court ordered, based upon the evidence in the record, that Partial Decrees would be issued to LU as follows:[1]

[1] While 13 claims were filed, 15 Partial Decrees were issued because of splitting of certain claims as set forth in the ***Memorandum Decision.***

55-10288B	04/01/1950
55-10289B	04/01/1950
55-10290B	07/01/1938
55-13844	04/01/1950
55-10292B	07/01/1938
55-13846	04/01/1950
55-10293B	04/01/1950
55-10295	04/15/1937
55-10296	04/15/1937
55-10297B	04/15/1937
55-10298	04/15/1937
55-10299B	04/01/1950
55-10300	04/01/1950
55-10303B	07/01/1937
55-13451	07/01/1937

LU filed a timely *Motion for Reconsideration and/or Motion to Amend. A* hearing on the motion was held, and on May 2, 2005, this Court entered an order denying that motion. On January 18, 2005, LU filed a *Motion for Attorneys' Fees and Memorandum of Points and Authorities* under IRCP 54(e)(1), IC. §12-121 and the Equal Access to Justice Act, 28 U.S.C. §2412(d). The motion, though premature under the rule, was considered to be timely. *Crowley v. Lafayette Life Ins. Co.,* 106 Idaho 818, 683 P.2d 854 (1984); IRCP 54(d)(5). The United States filed a *Motion to Disallow Costs,* which the Court will treat as an *Objection to Costs* pursuant to IRCP 54(d)(5). Thereafter, LU filed a *Reply* to the *Objection.*

2. Applicable Law

LU seeks an award of attorneys' fees pursuant to IRCP 54(e)(1), I.C. §12-121 and 28 U.S.C. §2412(d). Idaho follows the "American Rule" which requires parties to litigation to pay their own attorney fees absent statutory authority or contractual right. *Owner-Operator Indep. Drivers Assoc. of Idaho v. Idaho Public Util. Comm'n,* 125 Idaho 401, 871 P.2d 818 (1994); *Great Plains Equip. Inc. v. Northwest Pipeline Corp.,* 132 Idaho 754, 979 P.2d 627 (1999); IRCP 54(e).

I.C. §12-121 provides a statutory basis for an award of attorney fees in civil cases as follows:

> **Attorney's Fees. –** In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. §12-121 is, however, modified by IRCP 54(e)(1) which provides:

> **Attorney Fees.** In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation;

> but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

Plainly, therefore, attorney fees can only be awarded under I.C. §12-121 if the Court finds that the party seeking attorney fees was the prevailing party and that the case was brought, pursued or defended frivolously, unreasonably or without foundation by the opposing party. The term *prevailing party* is defined in IRCP 54(d)(1)(B) as follows:

> **Prevailing Party.** In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Thus, a determination of the prevailing party is addressed to the Court's discretion guided by the provisions of IRCP 54(d)(1)(b) and cases decided applying that rule.

LU also seeks attorney fees pursuant to 28 U.S.C. §2412(d). In relevant part, §2412 provides:

> § **2412. Costs and fees**
>
> . . . .
>
> **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to a prevailing

party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

. . . .

Finally, the Court notes that the Snake River Basin Adjudication is a comprehensive stream adjudication pursuant to the McCarran Amendment, 43 U.S.C. §666, which provides, in relevant part:

Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) . . .

3. Analysis and Decision.

a. Attorney Fees Under I.C. 12-121 and IRCP 54(e)(1).

1. Determination of Prevailing Party.

The threshold issue for an award of attorney fees under Idaho law is a determination of the prevailing party. This determination is committed to the discretion of the court. *See Sun Valley Shopping Center v. Idaho Power Co.,*

119 Idaho 87, 803 P.2d 993 (1991) (setting forth parameters of court's discretion). Here, LU claimed a priority date for its water rights of May 20, 1872. The United States initially objected to the priority date but not to LU's water right. Ultimately, this Court ruled that LU was not entitled to the claimed 1872 priority date but that the evidence supported priority dates ranging from 1937 to 1950. LU has appealed this decision. The elements of a water right are: source, quantity, date of priority, point of diversion, purpose of use, period of use and place of use. I.C. §42-1411. Here, only the date of priority was contested at first. Late in the litigation, the United States asserted that a water right with a place of use on BLM lands could not transfer as an appurtenance to base ranch property. Even then, however, the United States argued in the alternative that LU was not entitled to the early priority dates claimed. Plainly, LU did prevail on the question of whether a stockwater right could transfer as an appurtenance of patented or base ranch property. LU was not the prevailing party, however, on the priority date issue. Because Idaho follows the prior appropriation doctrine, the relative priority date of a water right is of paramount importance. The United States argued that LU's water rights had priority dates junior to the United States' water rights, which corresponded to the date of the enactment of the Taylor Grazing Act of 1934. The Court eventually found that LU's rights were junior to 1934. The most that can be said, therefore, is that LU prevailed only in part in this case.

2. The case was not brought, pursued or defended frivolously, unreasonably or without foundation.

As set forth above, the two issues of importance decided in this case were whether a water right on public land could transfer as an appurtenance to base ranch property and whether LU was entitled to the early priority dates claimed. The later issue necessarily required a determination by the Court of the evidentiary standard to be applied in such cases when determining intent. None of these issues has been squarely addressed by our Supreme Court. Regarding the appurtenance issue, the United States cited and argued decisions from other jurisdictions holding that water rights claimed on public lands are not appurtenant to other privately owned property. *Robinson v. Schoenfeld,* 218 P. 1041, 1042-1043 (Utah 1923) and that appropriation may not be made by a temporary possessor of land. *Tattersfield v. Putnam*, 41 P.2d 228 (Ariz. 1935). In addition, the United States made a good faith argument for an extension of the holding in *Lemmon v. Hardy,* 95 Idaho 778, 519 P.2d 1168 (1980) (water right claimant must have a possessory interest in the land designated as a place of use), to include claims such as those made by LU. As to the priority date issue, an issue on which the United States prevailed in part, the United States correctly noted certain deficiencies in the evidence supporting LU's claims. This Court has found no instance in this case in which the United States has asserted or defended any matter frivolously, unreasonably or without foundation. It would be an abuse of the Court's discretion to award attorney fees under these circumstances.

b. Attorneys' Fees under 28 U.S.C. 2412(d).

A decision to award or deny attorneys' fees pursuant to 28 U.S.C. §2412(d), the Equal Access to Justice Act, is reviewed under an abuse of discretion standard. *See Pierce v. Underwood,* 487 U.S. 552, 108 S.Ct. 2541, 2546-49, 101 L.Ed.2d 490 (1988); *Minor v. United States,* 797 F.2d 738, 739 (9th Cir. 1986) (per curiam). Pursuant to 28 U.S.C. §2412(d), if the United States shows that its position was substantially justified, the Court may not award attorney's fees. The United States Supreme Court has defined the term "substantially justified" noting that the two common connotations were "justified to a high degree," and "justified in substance or in the main." The Court held:

> We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main" – that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. (Citations omitted). To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.[2]

[2] Here, the Court is referring to *sanctions,* presumably such as those provided in Rule 11, F.R.C.P.

Pierce v. Underwood, 487 U.S. 552, 564-566, 108 S.Ct. 2541, 2549-2550 (U.S.Dist.Col., 1988). The Court further explained, by way of footnote: " . . . a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id*. 487 U.S. 552*,* 566, 108 S.Ct. 2541, 2550, fn.2. The United States need not show that it had a substantial likelihood of prevailing. *Bay Area Peace Navy v. United States,* 914 F.2d 1224, 1230 (9th Cir. 1990). No presumption is raised that the government's position was not substantially justified because it did not entirely prevail. *Kali v. Bowen,* 854 F.2d 329, 334 (9th Cir. 1988).

Here, for the reasons stated in this Court's determination of attorney fees under state law, the United States has shown that its position was, at all times, substantially justified. While the United States did not entirely prevail, its position taken in the case at all times had a reasonable basis in the law and the facts. The United States successfully challenged the Special Master's recommended priority date, which resulted in LU's priority date being found to be at least 60 years junior to the claimed date. The United States also raised reasonable arguments regarding the law of appurtenances, an issue that has not been squarely addressed by our Supreme Court. Accordingly, it would be an abuse of discretion to award attorneys' fees pursuant to 28 U.S.C. §2412(d).

c. Sovereign Immunity, Intergovernmental Immunity and the McCarran Amendment.

The Court has ruled that LU is not entitled to an award of attorneys' fees under applicable provisions of either state or federal law. Accordingly, it is not necessary for the Court to decide whether the United States is immune from an award of attorneys' fees under the doctrines of sovereign immunity or intergovernmental immunity. Similarly, the Court need not decide whether the McCarran Amendment's prohibition of an award of costs against the United States also bars an award of attorneys' fees.

ORDER

Based upon the foregoing, it is hereby ORDERED that the Motion for Attorneys' Fees of LU Ranching Co. is, in all respects, DENIED.

Dated August 2, 2005

/s/ John Melanson
John Melanson
Presiding Judge
Snake river Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER RE ATTORNEYS' FEES was mailed on August 02, 2005, with sufficient first-class postage to the following:

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/S/ DIANA R. DELANEY
Deputy Clerk

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,**
Case No. 39576	**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
	MEMORANDUM DECISION AND ORDER ON CHALLENGE
	ORDER OF PARTIAL DECREES

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

Claimant must establish through the chain of title, grazing applications, permits and related documents what water rights, if any, were appropriated and transferred by predecessors-in-interest. Where a deed is otherwise silent, a generalized showing that a particular region was historically used by the public for grazing is insufficient to establish that a particular predecessor-in-interest grazed cattle for purposes of establishing a water right. Claimant must trace instruments showing what rights were appurtenant and transferred from a particular permittee to claimant as the use of allotments was

not exclusive and use was also limited to specific areas within allotments.

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

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

I.

PROCEDURAL BACKGROUND

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

B. LU claimed a priority date of May 20, 1872, for each of the subject claims. On July 31, 1997, the Director of IDWR filed a *Director's Report,* recommending each right with

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

the priority date as claimed. The United States filed objections to the recommended priority date for each of LU's claims asserting that the priority date should be September 23, 1976, which corresponds with the date the LU entity was created and started beneficially using the water.

C. The subcases were originally referred to Special Master Fritz Hammerle. In the proceedings before Special Master Hammerle, the United States filed a motion for summary judgment asserting that LU had no deeds or other instruments from a predecessor-in-interest conveying any of the subject water rights. LU argued that the water rights were appropriated by its predecessors-in-interest to the patented or "base ranch" properties to which its grazing allotments are attached. LU also argued that the rights transferred as appurtenances to the base ranch properties via the appurtenancy clauses contained in LU's chain of title. Special Master Hammerle granted summary judgment in favor of the United States, holding that because water rights are interests in real property and transfers of real property require a written instrument, the alleged water rights were not properly conveyed. Special Master Hammerle also ruled that without a written instrument the earliest priority date LU could prove was September 23, 1976, the date LU was incorporated. *Order Granting United States' Motion for Summary Judgment,* Subcases 55-10288 *et al.* (Jan 8, 1999).

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

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nexus between the instream stock water right and the adjacent private ranch property, it was conceivable that instream rights could transfer as an appurtenancy to the ranch base property, particularly if a ranching operation was sold in its entirety as a going concern.

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

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

those lands. Both the United States and LU filed motions to alter or amend the *Recommendation.*

F. On challenge LU only raises issues pertaining to certain recommended places of use for some of its claims. LU does not challenge the recommended priority date. The United States on challenge raises the legal issue regarding the inability of a private party to perfect a water right on land to which the party does not hold a possessory interest. The United States also raises the legal issue regarding the ability to transfer a water right as an appurtenance to the private ranch property, particularly prior to 1934 when the concepts of base ranch property and grazing allotments did not exist. Factually, the United States challenges the sufficiency of the evidence supporting the Special Master's recommended 1876 priority date for each of the rights even assuming the rights could legally be appropriated on the public domain and transferred as appurtenances to the private property. The United States also challenges certain legal descriptions of the rights.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

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

III.

ISSUES RAISED ON CHALLENGE

A. The United States

The United States raises the following issues on Challenge:

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

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

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

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

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

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

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

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

B. LU

LU raises the following issues on Challenge:

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

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

IV.

STANDARD OF REVIEW OF A SPECIAL MASTER'S RECOMMENDATION

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

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); Rodriguez *v. Oakley Valley Stone, Inc.,* 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); Higley *v. Woodard, 124* Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase

"clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

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

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

[2] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding – whether it be by a jury, trial judge, or special master – was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not

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Seccombe, 115 Idaho at 435, 767 P.2d at 278; *Higley,* 124 Idaho at 534, 861 P.2d at 104.

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

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp., 429* F.2d 873, 876 (7th Cir. 1970), *cert. denied,* 91 S.Ct. 582 (1971).

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

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come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.,* 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's, Inc.,* 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

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

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

B. Conclusions of law of a special master.

A special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.,* 120 Idaho at 378, 816 P.2d at 334; *Higley,* 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley,* 124 Idaho at 534, 861 P.2d at 104.

Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra,* § 2588; *East v. Romine, Inc.,* 518 F.2d 332, 338 (5th Cir. 1975).

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

V.

DISCUSSION

A. Preliminary Foundational Legal Issues.

There are several legal issues raised in these subcases pertaining to the appropriation of stock water rights on public land, some of which have been previously addressed in the SRBA. To date, none of these prior rulings have been appealed.[3] The United States again raises some of

[3] The issue of stock water rights on public lands as between the holders of grazing allotments and the United States Bureau of Land Management has a lengthy history in the SRBA. In 1996, the United States, the State of Idaho and certain other parties to the adjudication sought to have various issues concerning the ownership of stock water rights on the public domain decided as a Basin-Wide Issue. Judge Hurlbutt denied the motion to designate Basin-Wide Issue 9A, because the parties were unable to agree on a set of paradigm facts for creating test cases. The Court did not want to decide test cases in a "vacuum" and then have the parties seek to distinguish the facts of their particular case requiring that the individual subcases be litigated anyway. *Order Designating Basin-Wide Issue No.9; Order Denying Designation of Basin-Wide Issue No. 9,4; Order Setting Expedited Schedule and*

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these same preliminary issues in the instant matter. These issues include: 1) Whether a water user can appropriate a water right when the water user does not hold a possessory interest in the land on which the right is appropriated; 2) What proof is required to establish intent to appropriate an instream stock water right; 3) Can an instream water right with a place of use on federal land transfer as an appurtenance to adjacent patented property when all are used in conjunction with a ranching operation; and 4) If the deed to the patented property is silent, can such a transfer still be made?

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

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Hearing Date for Basin-Wide Issue No. 9, Case No. 91-00009 (March 8, 1996). Later in 2000, Judge Burdick also denied a joint motion by various parties to create and decide test cases addressing the same issues on the same basis. *Order Denying Joint Motion to Consolidate Subcases, Vacate Order of Reference to Special Master Dolan and Stay Related Subcases,* subcases 47-04514 *et al.,* (Jan. 30, 2000) (Approx. 7,500 subcases). Nonetheless, some of these foundational legal issues have already been addressed in individual subcases. However, mostly as a result of "global" stipulations between the United States and the State of Idaho and between the United States and various ranching entities, none of these issues have been appealed.

and recapitulation of the law of the case is therefore warranted.

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

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

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

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

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

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

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

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

> In Idaho it is well established that the ownership of a water right can exist independently from the ownership of the land on which the water is used. *See e.g. First Security Bank of Blackfoot v. State,* 49 Idaho 740, 291 P. 1064 (1930); *Sarrett v. Hunter,* 32 Idaho 536, 541-42, 185 P. 1072 (1919). In other words, there is not always unity of title between the water right and the land on which it is used. This rule has been applied in the context of the appropriation of water in conjunction with a leasehold. *First Security Bank of Blackfoot* at 746, 291 P. at 1070 (holding that a water right perfected by a lessee is property of lessee unless lessee is acting as *an* agent of landowner). This same rule can also apply to the appropriation of water on federal public lands. *Keller v. McDonald,* 37 Idaho

> 573, 218 P. 365 (1923); *Short v. Praisewater,* 35 Idaho 691, 208 P. 844 (1922) (ownership of waters subject to appropriation on federal land vests in the appropriator); *Hunter v. United States,* 388 F.2d 148 (9th Cir. 1967) (recognizing private ownership of water right perfected on federal land pursuant to state law).

Memorandum Decision at 14-15 (footnotes omitted). Judge Wood also noted that this is not the general rule in all states. *Id.* at 14, fn. 14 (citing *Dept. of Lands v. Pettibone,* 702 P.2d 948 (Mont. 1985) (water rights perfected by lessees of state trust lands remain property of state); *Tattersfeld v. Putnam,* 41 P.2d 288 (Ariz. 1935) (temporary possessor of land cannot make appropriation of water). This same rule was also applied by Judge Hurlbutt in a case involving Joyce Livestock Company and the United States. *See Order Denying Challenges and Adopting Special Master's Reports and Recommendations,* Subcases 57-04028B *et al.* (Sept. 30, 1998) (*Joyce Livestock Decision*). In the context of the United States' ability to appropriate a stock water right on federal land without actually grazing cattle, Judge Hurlbutt ruled:

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

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

The foregoing make it clear that the general rule in Idaho is that the appropriator of a water right need not own the land on which the right is used, nor does such a right automatically vest in the owner of the land. The exception to this rule is trespass. A person cannot initiate a water right on the land of another through trespass. *Branson v. Miracle,* 107 Idaho 221, 226, 687 P.2d 1348 (1984). However, prior to the enactment of the Taylor Grazing Act, stock grazing on the public domain was largely unregulated and open to the public in general, thus water rights could be appropriated without the appropriator either holding a possessory or ownership interest in the land or engaging in trespass. *See generally Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights),* Consolidated Subcase Nos. 23-10872 *et al.* pp. 12-14 (Dec. 28, 2001) (Judge Burdick's opinion discusses at length the unregulated public domain with respect to grazing in the context of PWR 107). The public essentially held an implied license to use federal rangelands for grazing. In *Buford v. Houtz,* 133 U.S. 320, 326-328 (1890), the United States Supreme Court held:

> We are of the opinion that there is an implied license, growing out of a custom of nearly a hundred years, that the public lands of the United States, especially those in which the native

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

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

Id. at 326-28.

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

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

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

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

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

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

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

> All surplus water over and above such actual appropriation and use, together with the water of lakes, rivers, and other sources of water supply upon the public land and not navigable, shall remain and be held free for the appropriation and

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

> use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

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

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

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

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

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

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

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

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

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

livestock and is available and accessible, to the authorized livestock when the public land are used for livestock grazing." 43 C.F.R. § 4100.0-5 (1998) (emphasis added). The award of the preference based on preexisting uses or base property was explained in *Public Lands Council v. Babbit*, 167 F.3d 1287 (10th Cir. 1999), wherein the Court of Appeals wrote:

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

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

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

> Any right acquired on or after August 21, 1995, to use water on public land for the purpose of livestock watering on public land shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State within which the land is located, any water right shall be acquired, perfected, maintained, and administered in the name of the United States.

43 C.F.R. § 4120.3-9 (1998). Implicit in this regulation is the acknowledgement that permittees could historically perfect water rights on the public domain after the implementation of the Taylor Grazing Act and prior to 1995.

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

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

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

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

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

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

to appropriate a water right. Rather, they were simply using available water sources in common.

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

Intent to appropriate is a factual issue. Obviously, direct testimony by the original appropriator or a recitation of the right in an instrument of conveyance to a successor would be dispositive of intent to appropriate as opposed to mere use of water. Neither of those situations

exist in these subcases.[10] However, the lack of either is not fatal to proving requisite intent to appropriate. In this Court's opinion, there is a significant distinction between a nomadic or itinerant livestock grazer on the public domain and the homesteader who historically and regularly used adjacent or nearby public rangeland in conjunction with the homesteaded property to support a livestock operation.

The early land entry statutes that authorized the entry and eventual fee ownership of public lands did not provide for the acquisition of enough land to sustain a viable livestock raising operation. For example, the Homestead Act of 1862 authorized the entry of 160 acres, which was later expanded to 640 acres. (R.S. § 2289, Act of March 3, 1891, c 561, § 5, 26 Stat. 1097 (codified at 43 U.S.C.A §§ 161 *et seq*. (2003)) (repealed by FLPMA, Pub. L. No 94-579, 90 Stat 2792 (1976)) (codified at 43 U.S.C.A §§ 1701 *et seq*. (1994). The Stock-Raising Homestead Act authorized the entry of up to 640 acres. Act of December 29, 1916, ch. 9. 39 Stat. 862 (codified at 43 U.S.C.A §§ 291 *et seq*. (2003)) (also repealed by FLPMA). As a general matter, it is widely accepted that the patented property alone was insufficient to sustain a livestock operation capable of supporting a single family unit in the arid west. *See* GEORGE CAMERON COGGINS *et al.* FEDERAL PUBLIC LAND AND RESOURCES LAW at 746 (4th ed. 2001). The testimony of Doctor Chad Gibson presented at trial also supports this conclusion. Doctor Gibson testified

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

that based on the level of forage in Owyhee County, on average, one cow would need ten acres per month to sustain itself. Tr. pp. 385-86. For one year, 120 acres would be required. *Id.* Therefore, 160 acres would support a little more than one head of cattle over a one year period. Six hundred forty (640) acres would support approximately five head of cattle. *Id.*[11] In light of these limitations, Doctor Gibson testified:

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

Tr. pp. 387-88.

The United States obviously recognized the need for the adjacent public land to sustain a viable ranching operation when it embraced the historical practice by awarding grazing preferences based on the prior use of the public land. *See e.g. supra, Public Lands Council v. Babbit,* at 1295. Doctor Gibson also testified that in awarding grazing preferences: "The two primary things were prior

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

use and commensurate base property. The prior-use rule that was finally adopted was that you had to have grazed there two consecutive years, or three years not consecutively out of the previous five years prior to 1934." Tr. p. 391.

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

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

Hunter at 153.

The United States argues that a finding of requisite intent to appropriate merely by cattle drinking water from a stream in common with the rest of the public somehow creates a double-standard with respect to establishing instream stock water rights. This Court disagrees. In fact, just the opposite is true. As noted earlier, with respect to other water rights such as irrigation or mining, intent to

appropriate can be sufficiently inferred from the diversion and application to beneficial use. Testimony regarding the appropriator's state of mind is not requisite to establishing intent. Consequently, because no physical diversion is necessary to appropriate a stock water right, intent to appropriate should able to be inferred alone from the application to beneficial use. In *R.T. Nahas Co. v. Hulet,* 106 Idaho 37, 674 P.2d 1036 (Ct. App.1983), the Idaho Court of Appeals held:

> We must also consider the practical realties of raising livestock in this state. We think it unlikely that a rancher would divert water from a stream running through his property for livestock watering when the same result is achieved without effort simply by allowing livestock to drink directly from the stream. To link recognition of an appropriation for livestock watering to the existence of a diversion could very well jeopardize stock watering rights of ranchers who have watered stock directly from streams or springs for decades. Finally, we cannot justify imposing an economic burden, by requiring a diversion, which will not advance the interests of the public by promoting more efficient use of water, or reducing waste.

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

With the above reasoning in mind, assume *arguendo* that a livestock owner went on the public rangeland and constructed a diversion into a stock pond for watering livestock out of the pond. Under this scenario there would be little argument concerning the livestock owner's intent to appropriate a water right. Intent could clearly be inferred. Accordingly, it would be somewhat paradoxical, as well as in direct contravention with the ruling in *Nahas*

and *Hunter*, to hold that although no physical diversion is necessary to appropriate an instream water right, a diversion is nonetheless necessary to establish the requisite intent. The fact that the rangeland was open to the public in general should not be fatal to establishing the appropriation of a water right. This Court agrees that a one time use of a source by a nomadic livestock grazer raises issues regarding the user's intent to appropriate a water right and without more under such attendant circumstances, the evidence may be insufficient to show intent. However, those circumstances substantially differ from the situation where the livestock owner historically and routinely used the same water sources on adjacent public domain in connection with a livestock operation and was eventually awarded a grazing permit based on those historic uses. Moreover, the issue of the itinerant or nomadic grazer is not at issue in these subcases.

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

> But for the purpose of effecting a valid appropriation of water under the statutes of this state we are decidedly of the opinion that the beneficial use contemplated in making the appropriation must be of one that inures to the exclusive benefit of the appropriator and subject to his complete dominion and control. *See also* sections 759 *et seq.*, 2 Kinney on Irrigation.

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

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

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

Once it can be established that the original appropriator established a stock water right, the next issue involves the ability to convey the right as an appurtenance to either the patented property prior to the implementation of the Taylor Grazing Act or as an appurtenance to the

base ranch property after the implementation of the Taylor Grazing Act. Judge Wood previously ruled in these subcases that given the relationship between public land and patented property used in connection with a ranching operation, and the fact that no physical diversion is required for a stock water right as a matter of law, it would be possible for an instream stock water right on public land to transfer as an appurtenance to the patented or base property, even though the place of use for the right is located on the public land. The issue is one of fact and depends on the intent of the grantor. April 25, 2000, *Memorandum Decision* at 18-22. This Court agrees.

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

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

> light, air, or heat from or across the land of another.

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

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

Hayes at 425 (internal citations omitted). Therefore, it is within the realm of possibility that the place of use for a water right could be different from the land to which the right is appurtenant. In this Court's opinion, the historical use of the public rangeland in conjunction with patented property and the subsequent regulations which not only gave preference to those practices but also established a legal relationship between the patented property and public rangeland allow such a circumstance.

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

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[12] As one commentator discusses:

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

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

The regulations implementing the Taylor Grazing Act then made the grazing preference expressly appurtenant to the base ranch property. *See* 43 C.F.R. § 4100.0-5 (1998) (preferences attach to the base property owned or controlled by the permittee or lessee). Idaho Code § 25-901 (2000) also provides that the grazing preference is appurtenant to the base ranch property. The United States as well as the Idaho legislature essentially acknowledged and codified a relationship between the patented or base ranch property and the use of the public rangeland. Accordingly, there is a sufficient enough connection or "nexus" between the water right and the patented or base property from which a grantor could reasonably intend to convey the water right as an appurtenance even though the place of use for the right differs from patented or base property.

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

license, or a lease to access the public land. Nonetheless, the connection or "nexus" between the private property and the water right still exists. Again, the United States even ratified this connection in the process of awarding of the grazing preference.

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

5. Summary of Analysis

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

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

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

This ruling is not intended to lessen the standard of proof for establishing beneficial use rights. General averments that grazing existed historically by the public at

large in a general area are insufficient to establish the existence and transfer of water rights. In proving any beneficial use right by a predecessor-in-interest, a claimant must still establish the existence and scope of the right and then connect the chain of title and appurtenant water rights from the original appropriator to the claimant.[13] There [sic]

B. Application to LU's Claims.

1. LU's Claims

LU Ranches claimed an 1872 priority date for the subject beneficial use instream stock water rights. The sources for the claims are all located on public land and within the boundaries of three grazing allotments to which

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

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

LU holds grazing permits. The claims were never previously decreed. LU asserts that the rights were appropriated by its predecessors-in-interest to the three patented properties that now comprise LU's base ranch properties for its three grazing allotments. LU does not have separate instruments conveying the water rights. LU asserts the claims transferred as appurtenances to the three patented properties. Most of the deeds in LU's chain of title for the patented properties contain clauses expressly conveying all appurtenances.

2. *Director's Recommendation*

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

3. The Special Master's Findings

The Special Master found that LU proved a priority date of 1876 for each of the claims. The finding was based

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

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

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

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

In this regard the Special Master erred in failing to separately analyze each patented property and associated

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

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

Such reasoning is inconsistent with the same reasoning the Special Master used to reject the claimed 1872 priority date. Therefore, this Court has carefully reviewed the evidence presented at trial.

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

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

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

South Mountain Allotment and the Duncan Homestead

In 1910, Warren C. Duncan filed a homestead entry application on 160 acres of land in Owyhee County described as the SE1/4NW1/4, NE1/4SW1/4 and S1/2SW1/4, Section 11, T9S, R5W, Exhibit BB. On September 7, 1911, Duncan filed a new application for the same homestead. Exhibit BB. Nothing in the homestead application indicates that Duncan was in the livestock business. The

various proofs filed therewith describe the number of acres reclaimed for crops and the type of crops grown but do not refer to livestock raising.[14] Exhibit BB, bate stamp number (bsn) 4068-4111. On December 9, 1914, Duncan received a patent for the homestead entry. Exhibit 2, p.13.

Between 1923, and July 6, 1928, a series of conveyances (via tax deed, redemption deed, quitclaim deed, and sheriff's deed) transferred interest to R. W. Swagler on July 6, 1928. All instruments contained standard language providing "together with all water rights connected therewith or appertaining thereto."[15] Exhibit 2, pp. 115-120. On July 14, 1928, Swagler conveyed the property to Patrick O'Keefe, together with all appurtenances. Exhibit 2, p. 323.

On June 24, 1935, Patrick O'Keefe applied for a grazing permit for 200 cattle. Exhibit Y, bsn 2003. In the application O'Keefe represented that he grazed cattle in "Deary Dist. # 8" and in portions of Section 24 T5S R6W. O'Keefe also represented that he controlled water sources for livestock purposes out of Trout Creek and Cabin Creek "running through described land," which appears to be

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

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

referring to private land he owned. On August 22, 1935, O'Keefe's application was rejected because he did not own livestock. Exhibit Y, bsn 2079. The notice of rejection indicates the case was closed.

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

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

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

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

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

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

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

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

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

Cow Creek Allotment and Mills homestead.

In 1881, Ezra Mills filed a homestead entry application for 160 acres in Owyhee County described as S1/2NW1/4, Sec. 25 and the S1/2NE1/4, Sec. 26, T5S R6W. Exhibit CC, bsn 4048-4067. There is no evidence in the homestead application or affidavits of proof in support of the homestead that Mills was engaged in the livestock business or engaged in an enterprise dependent on adjacent public land. Exhibit CC, bsn 4048-4067. The Special Master's finding of an 1876 priority date was based on Mills' representation in the proof of homestead that "he lived on and worked the homestead from June 10, 1876." *Special Master's Report and Recommendation* at 3. Nothing in the record suggests that Mills was in the livestock business prior to or contemporaneous with the issuance of the patent. LU admitted into evidence a historical newspaper article describing the Mills homestead but the article only refers to milk cows. Exhibit UU. In September 1887, Mills received a patent to the homestead entry.

Exhibit 2, p. 220. On July 9, 1892, Mills conveyed the property to Jerey Shea. Exhibit 2, p. 222.

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

Portion of Mills Homestead in Section 25.

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

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

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

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

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

cannot infer that the grantor conveyed something he didn't claim he owned.

On August 4, 1941, O'Keefe conveyed the portion of the Mills homestead in Section 25 to Galo Mendieta. Exhibit 2 p. 91. The abstract for the deed states that all "water, water rights . . . thereunto appertaining or belonging" were transferred. On October 14, 1941, O'Keefe also conveyed the Duncan homestead property to Mendieta, together with all appurtenances. Exhibit 2, p. 309. On February 28, 1942, Mendieta notified the United States that he purchased the O'Keefe "holdings on Trout Creek and the grazing 800 acres also." Exhibit Y, bsn 3037. Exhibit C, bsn 1092. On January 22, 1943, Mendieta received the authorization to graze in the previously permitted portion of the South Mountain Allotment, used in conjunction with the Duncan property, and in the Trout Creek portion of the Cow Creek Allotment, used in conjunction with the eighty acres consisting of the Section 25 Mills property. Exhibit C, bsn 1178-79. Cow Creek Pastures # 05621 and # 05622 include the places of use for water rights 55-10295, 55-10296, 55-10297B and 55-10298. *See map* Exhibit 19.

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

Portion of Mills Homestead in Section 26.

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

On September 6, 1949, Henry and Hattie Fretwell conveyed the eighty acres to Mendieta, together with appurtenances. Exhibit 2, p. 298. The purchase also included privileges for 20 head within the Trout Creek Allotment. Exhibit C, bsn 1161. Mendieta was previously using the property and the grazing rights acquired from O'Keefe in conjunction with his livestock operation as early as 1942. Exhibit C, bsn 1181. Mendieta applied for the grazing permits for the Trout Creek Allotment and portions of the South Mountain Allotment. *Id.* Mendieta

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

On December 13, 1965, Mendieta conveyed the land comprising the Duncan homestead and the land comprising

the full 160 acres of the Mills homestead to William and Nita Lowry. William Lowry later became the president of LU. The transfer includes all appurtenances but does not mention water rights. Exhibit 2, p. 17. The contract of sale addresses the transfer of grazing rights located in the Cow Creek Unit, with no mention of rights in the South Mountain Allotment. Exhibit Q, bsn 99; Exhibit S, bsn 125. A dependent property survey dated December 20, 1966, refers to AUM's in the Cow and Trout Creek Allotments. The reference to the South Mountain Allotment is based on a state lease. Exhibit W, bsn 1074. *See* Map Exhibit 20. William and Nita Lowry could have only received what Mendieta owned.

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

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

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

Cliff's Allotment

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

On July 16, 1912, Ewings conveyed the land to Clyde C. Foster, together with "all water rights, canal and ditch rights, rights of way and other appurtenances. . . ." Exhibit 2, p. 329. On January 12, 1937, Foster filed a grazing permit application for lands customarily used in the Pole Creek Unit[19] for the previous 25 years. Exhibit 5. The water rights identified in the application were all listed on private land. Exhibit 5, p. 3. Foster described the base property and water used in conjunction with the livestock operation as being located in T9S R5W, Sections 4, 8 and 9. Exhibit 5, pp. 3 and 5. This legal description borders the west boundary of the Cliffs Allotment. *See* map Exhibit 19.

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

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

On April 22, 1946, the Ewings property was conveyed by Foster to Frank and Louise Maher. Exhibit 2, p. 308. The grazing privileges were transferred to Maher. Exhibit

M, bsn 3851, Exhibit N, bsn 3424.[20] On January 24, 1955, Maher conveyed the Ewings property to Donald and Elizabeth McKay, together with "all water, water rights, ditches and ditch rights and rights to the use of water appurtenant to the above-described real property or used in connection therewith. . . . Exhibit 2, p. 7. As indicated previously, in the analysis addressing the McKay privileges, it was acknowledged that McKay obtained the grazing preference that was attached to the Foster (Ewings) property. Exhibit M, bsn 3852. McKay also obtained grazing privileges from the W.J. Shea base property. *Id.* However, the Shea privileges appear to be related to the South Mountain not the Cliffs Allotment.[21] Exhibits 14, 15 and 16. Only applications for Shea's permits are in the record. Exhibits 12-16.

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

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

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

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

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

The Lowry's and/or LU acquired additional grazing privileges but the history surrounding the use of those privileges is not clear from the record. For example, the Application and Transfer of Grazing Privileges of 1966 from Jump Creek Sheep Co. to William R. Lowry describes the base property from which the grazing privileges are being transferred. There is no mention of water rights and the historic use of the grazing privileges for purposes of establishing water rights cannot be determined from the record. Exhibit RR. The Application and Transfer of Grazing Privileges of 1966 from John and Don Archibal to William A. Lowry describes the base property from which the grazing privileges are being transferred. There is no mention of water rights and the historic use of the grazing privileges for purposes of establishing water rights is not in the record. Exhibit SS. As such, to the extent LU attributes acquiring water rights through these acquisitions there is no evidence from which to establish the existence of water rights.

d) Conclusion as to priority date issues.

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

The allotments in these subcases were not historically grazed exclusively by one party. Thus, several different parties could have potentially appropriated water rights. This is not a situation where only one preference and

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

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

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

restrictions and multiple uses within the allotment, the claimant must also show what areas were grazed pursuant to the acquired privileges. (If a permit only authorized a predecessor, such as O'Keefe, to graze in a particular area within an allotment, a successor could only acquire water rights to those sources where the predecessor was permitted to graze).

In addition, grazing permits can lapse or be denied. *See e.g.* Exhibit Y, bsn 2079. In this Court's opinion, there is a significant difference between a circumstance where a permit lapses or is not renewed and a new permittee applies for and is issued a permit to graze in the same area; and the circumstance where privileges are specifically conveyed or transferred to a successor's base property or new base property is acquired with attached grazing privileges. In the former, the court cannot infer intent to convey a water right to a successor because nothing was conveyed; in the latter, it is reasonable to infer that any water rights were intended to follow the grazing privileges or base property. However, the claimant must still demonstrate how and when in the chain of title the rights were acquired. Without evidence, and given the multiple factors affecting the use of grazing allotments, the Court cannot infer that the privileges for the entire three allotments were either initially attached to the respective homesteads or were properly transferred from other properties. Under the realities of how the rangeland was administered, privileges that are conveyed and transferred from one base property to another base property have a different history of use which would ultimately affect the priority date of any appurtenant water right.

The Court agrees that water rights on adjacent public land can transfer as an appurtenance to private property

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

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

The following issues involve challenges to the *Special Master's Recommendations* regarding legal descriptions for elements to certain rights. For some of the issues raised, the evidence presented was conflicting as to whether a particular stream reach was accurately depicted by a map. The Special Master also did not view the subject premises in conjunction with presentation of evidence on these issues. On the motion to alter or amend, the Special Master ordered IDWR to file an I.R.E. 706 report and the

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

parties to file briefing in response. The process did not resolve all of the conflicts. Therefore, to the extent discrepancies exist as to these issues the Court must defer to the Special Master's findings.

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

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

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

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

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

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

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

reason to include the points of diversion argued by the United States.

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

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

The United States challenges the *Special Master's Recommendation,* stating that the *Recommendation* should be amended to delete the source designated as "Unnamed Stream" tributary to "Jordan Creek," because the source does not exist. The *Director's Report* included this description, which was adopted by the Special Master. The United States does not present enough evidence to show that the Special Master's findings were clearly erroneous; therefore, the *Special Master's Recommendation* is entitled to deference in this regard.

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

quarter quarter section is a beginning point of diversion for this right. Because the point of diversion was included in the *Director's Report* as an instream beginning point of diversion for this water right, it is appropriate to include it as a place of use as well, pursuant to I.R.C.P. 60(a).

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

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

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

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

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

VI.

CONCLUSION

For the reason set forth above, this Court holds that the Special Master erred as a matter of law in failing to properly trace the chain of title in the mesne conveyances in accordance with Judge Wood's prior ruling for purposes of establishing priority dates for the above-captioned claims. Following an review of the evidence presented, this Court

also concludes that the Special Master erred as a matter of fact by recommending an 1876 priority date for each of the claims based on the lack of evidence in the record necessary to establish such a priority.

VII.

ORDER OF PARTIAL DECREES

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

VIII.

ORDER DISALLOWING WATER RIGHT CLAIM 55-10301B

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

THEREFORE IT IS ORDERED AND ADJUDGED that water right claim 55-10301B is hereby **disallowed with prejudice** and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case

No. 39576, in whatever form that final decree may take or be styled.

RULE 54(b) CERTIFICATE

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

IT IS SO ORDERED

Dated January 3, 2005

/s/ John Melanson
JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

**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 Case No. 39576	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. **MEMORANDUM DECISION AND ORDER ON CHALLENGE** **ORDER DENYING MOTION TO FILE AMICUS CURIAE BRIEF** **ORDER OF RECOMMITMENT TO SPECIAL MASTER CUSHMAN**

I.

APPEARANCES

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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[1]

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

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.

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 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

[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*

(Continued on following page)

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.

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

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Master's Reports and Recommendations (November 28, 1997), which in turn incorporates the Special Master's June 26, 1997 Order.

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 *AOI* 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.*

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[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 gazing permits or permitees includes leases and lessees as well.

[5] See fn 3.

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 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

[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.

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

[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.

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Master's holding rests on a finding 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. *SM 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.*

Farmers Nat. Bank v. Shirey, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994) (court is vested with authority to reconsider its 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.

(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).

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 in-stream 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

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

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 Special Master, in the *SM.*

[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

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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

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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 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.

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 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

[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

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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); *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

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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).

[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).

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:

[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."

> 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:

> [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 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

[17] Prior to being amended in 1986, the provision relating to water rights becoming appurtenant to land in Idaho Code § 42-1402 applied only to water rights used for irrigation. S.L. 1986, p. 561.

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.

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 stock-water 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

[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).

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

Id. at 1295(emphasis added)(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 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

[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).

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.

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

[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).

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 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

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[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?
>
> **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.*

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 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

[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."

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 stock-water 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 ***AOI***. 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.

In the Supreme Court of the State of Idaho

IN RE: SRBA CASE NO. 39576, (SUBCASE NO. 55-10135).

JOYCE LIVESTOCK COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Respondent.

IN RE: SRBA CASE NO. 39576, (SUBCASE NOS. 55-10135, 55-11061, 55-11385 AND 55-12452).

JOYCE LIVESTOCK COMPANY,

Respondent,

v.

UNITED STATES OF AMERICA,

Appellant.

IN RE: SRBA, CASE NO. 39576 (SUBCASE NO. 55-10135, 55-11061, 55-11385 AND 55-12452).

ORDER DENYING PETITION FOR REHEARING

NO. 32278/32279/32846
Ref. No. 07RH-10

JOYCE LIVESTOCK COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Respondent.

Joyce Livestock Company having filed a PETITION FOR REHEARING on March 2, 2007 and supporting BRIEF on March 15, 2007 of the Court's Opinion released February 9, 2007; therefore, after due consideration,

IT IS HEREBY ORDERED that Joyce Livestock Company's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 30 day of March 2007.

By Order of the Supreme Court

/s/ Stephen Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
West Publishing
Lexis/Nexis
Goller Publishing

In the Supreme Court of the State of Idaho

IN RE: SRBA CASE NO. 39576 (SUBCASE NUMBERS 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295B, 55-10296, 55-10297B, 55-55-10298, 55-10299B, 55-10300, 55-10301B, 55-10303B, 55-13451, 55-13846 AND 55-13844.)	ORDER DENYING PETITION FOR REHEARING NO. 31994 Ref. No. 07RH-9
LU RANCHING CO., Appellant-Cross Respondent, v. UNITED STATES OF AMERICA, Respondent-Cross Appellant.	

The Appellant having filed a PETITION FOR REHEARING on March 2, 2007 and supporting BRIEF on March 15, 2007 of the Court's Opinion released February 9, 2007; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 30 day of March 2007.

By Order of the Supreme Court

/s/ Stephen W. Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
West Publishing
Lexis/Nexis
Goller Publishing

28 U.S.C.A. § 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his

or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time

expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection –

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost

of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the

civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial

review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

Current through P.L. 110-26 approved 05-11-07

43 U.S.C.A. § 666. Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the

right of States to the use of the water of any interstate stream.

Current through P.L. 110-27 approved 05-25-07

699 P.2d 98

Supreme Court of Nevada.

The UNITED STATES of America,
DEPARTMENT of the TREASURY, INTERNAL
REVENUE SERVICE, Appellant,

v.

Delos W. HOOD, Respondent.

No. 15468.

April 26, 1985.

Lamond R. Mills, U.S. Atty., Shirley Smith, Asst. U.S. Atty., Reno, Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, William S. Estabrook and Bruce R. Ellisen, Attorneys, Tax Div., Dept. of Justice, Washington, D.C., for appellant.

Cal Hoover, Reno, for respondent.

OPINION

PER CURIAM:

This appeal addresses the issue of whether an award of attorney fees and costs may be awarded against the United States when the suit is brought in a state court. Appellant contends that sovereign immunity, with respect to attorney fees and costs, has not been waived so as to permit such an award. We disagree. For the following reasons we conclude the district court's award was proper.

Delos W. Hood (Hood) owned certain real property situated in Reno, Nevada. On March 28, 1979, Hood sold the property to Charles R. Silver (Silver) and Linda Province (Province) using an executory land sale contract. Pursuant to the terms of the contract and accompanying

escrow instructions, legal title to the property would not pass to the purchasers until the entire balance of the contract price, secured by a first deed of trust encumbering the property, was paid in full by the purchasers. The contract further provided that upon default the purchasers would relinquish all rights under the agreement and that all monies paid by the purchasers would be considered rent for the use of the property to the time of default and as settled and liquidated damages.

Beginning in November 1980, and thereafter, Silver and Province defaulted under the terms of the contract by failing to make timely monthly payments. In May 1981, Province conveyed her interest in the property to Silver.

On October 30, 1981, the United States assessed a federal tax deficiency against Silver in the amount of $84,415.82. Thereafter, on November 5, 1981, the United States recorded with the county recorder of Washoe County, Nevada, a notice of federal tax lien against Silver based upon the unpaid taxes.

Hood mailed a notice and demand to Silver and Province on November 18, 1981, advising them to cure their default within 35 days or face forfeiture of their interest in the property. The default was not cured and on January 13, 1982, Silver's interest in the property was extinguished by a non-judicial forfeiture and recordation of a quitclaim deed from Silver and Province to Hood.

Hood had no actual notice of the federal tax lien against Silver until it was disclosed in a preliminary title report on December 31, 1981. Hood resorted to administrative procedures promulgated by the IRS in an attempt to remove the lien. Hood was denied relief and was advised that the IRS was in search of a good test case on

which to determine the validity of the loss of its lien through forfeiture under executory land sale contracts.

The United States asserted that the lien attached to Silver's equitable interest in the property and wasn't extinguished by the nonjudicial forfeiture because Hood had failed to give notice of the forfeiture to the United States. The United States based its position upon the Federal Tax Lien Act of 1966, 26 U.S.C. § 7425(b), which provides that when the United States has or claims a tax lien against property " . . . a sale . . . made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment on the obligation secured by such an instrument, or pursuant to a nonjudicial sale under a statutory lien on such property . . . " shall be made subject to the tax lien if notice of the sale is not given in writing by certified or registered mail or by personal service to the Secretary of the Treasury not less than twenty-five days prior to the sale.

Prior to filing his quiet title suit, Hood advised the IRS of recently published opinions of the federal courts directly addressing that issue. *See Hedlund v. Brellenthin,* 520 F.Supp. 81 (W.D.Wash.1981); *United States v. Wharton,* 514 F.2d 406 (9th Cir.1975). In addition, approximately one week prior to trial the United States Circuit Court for the Ninth Circuit entered a decision in *Brookbank, Inc. v. Hubbard,* 712 F.2d 399 (9th Cir.1983), affirming its prior position in *Runkel v. United States,* 527 F.2d 914 (9th Cir.1975), and that of *Hedlund*. These cases were diametrical to the government's position and held that a forfeiture of a real estate contract was not a sale of property within the meaning of 26 U.S.C. § 7425(b). Notwithstanding this information, the IRS sought a decision from a Nevada court, thus creating a Nevada precedent.

The district court, as would be expected, rejected the United States' argument and held that the instant case did not involve a "nonjudicial sale" of property within the meaning of Section 7425; therefore, notice of the forfeiture was not required. Accordingly, the court entered the judgment quieting Hood's title in the property. The court also provided that Hood receive judgment for his costs and reasonable attorney's fees. Judge Barrett ruled that the United States was "not substantially justified, or at all, in requiring . . . [Hood] to expend time, effort and money to protect his property rights." Moreover, "[i]f ever there were a case in which a governmental party should be required to reimburse an individual for costs and attorney's fees, this is it."

The United States is not challenging the district court's decision in the underlying quiet title action. By not appealing the substantive issue, the IRS has avoided the establishment of a Nevada precedent contrary to its position, thereby preserving the potential for a similar action against another property owner in what the IRS might hope to be a more receptive forum. We therefore note in this opinion that notice in this type of situation is not necessary and to commence litigation for lack of such notice is improper.

The United States is, however, challenging the district court's jurisdiction to award attorney's fees and costs to respondent. The United States contends that sovereign immunity was not waived so as to permit such an award. An examination of Title 28 reveals the infirmity of appellant's position.

It is recognized that the United States, as sovereign, is immune from suit in the absence of its consent to be

sued. *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953-54, 47 L.Ed.2d 114 (1976). Moreover, the waiver of sovereign immunity "cannot be implied but must be unequivocally expressed" by Congress. Thus, the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. *Id.* Accordingly, it is well settled that costs and attorney's fees cannot be awarded against the United States absent a specific waiver of sovereign immunity. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983).

Sovereign immunity is waived by the United States in an action for quiet title pursuant to 28 U.S.C. § 2410, which provides in relevant part as follows:

> (a) Under the conditions prescribed in this section and section 1444 of this Title for the protection of the United States, the United States may be named as a party in any civil action or suit in any district court, or in any state court having jurisdiction of the subject matter-(1) to quiet title to, real or personal property on which the United States has or claims a mortgage or other lien.

Continuing, 28 U.S.C. § 2412(a) specifically provides that "any court having jurisdiction of such action" brought by or against the United States, may award costs as enumerated in 28 U.S.C. § 1920. 28 U.S.C. § 2412(b) clearly provides that "any court having jurisdiction of such action" may award reasonable attorney fees and expenses to the prevailing party in any civil action brought by or against the United States. As stated earlier, section 2410 clearly gives the state court, being an appropriate forum, jurisdiction to entertain the quiet title action. Hence, the state court must necessarily be included within the language of "*any* court having jurisdiction." (Emphasis added.)

The United States takes the position that when section 2412 made reference to § 1920 concerning allowable costs that may be awarded, that it also incorporated the prefatory language of § 1920. Section 1920 utilizes the language "any court of the United States," as opposed to "any court having jurisdiction." The former phrase is defined in 28 U.S.C. § 451 as follows:

As used in this title:

> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by Chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

This definition thus indicates "courts of the United States" are Article III courts. Hence, the United States contends that inasmuch as the district court was not an Article III court, it could not award costs against the United States. Moreover, the United States contends it would be anomalous to hold that attorney's fees and other expenses could be awarded on the authority of Sections 2412(b) and (d), if the court has no authority to award costs under 2412(a). *See Bowen v. C.I.R.*, 706 F.2d 1087 (11th Cir.1983).

Unlike *Bowen,* we do not view the words "as enumerated in § 1920" as incorporating the restricting jurisdictional language also found in that section. To so hold would render the language in § 2412-"in any court having jurisdiction" superfluous. We are convinced that reference to § 1920 was only for the purpose of setting forth the costs which could be awarded and not to limit the waiver of

sovereign immunity. Indeed, it would be an injustice to deprive a prevailing party of attorney fees and costs merely because that party chose to litigate in a state court, as specifically authorized by § 2410, as opposed to a federal court.[1]

The language is plain and clearly gives the state court authority to award attorney fees and costs. Accordingly, we hold that the appeal of this issue was frivolous and therefore order appellant to pay costs and reasonable attorney fees incurred by Hood as a result of this appeal. The district court's decision is hereby affirmed.

[1] Moreover, it appeared from the argument of counsel that respondent was actually encouraged by appellant to file suit in state court. Such conduct, if true, makes appellant's position on appeal all the more unbecoming.

1986 WL 1283

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Appellant

v.

E. Bruce CHANEY, Defendant-Appellee.

No. 48798.

Jan. 30, 1986.

Civil appeal from Common Pleas Court
Case No. 947418

Robin G. Weaver, Barbara A. Rutigliano, Squire, Sanders & Dempsey, Cleveland, Ohio, for plaintiff-appellant.

John A. Hallbauer, Ebert Weidner, Parks, Eisele & Bates, Cleveland, Ohio, for defendant-appellee.

STILLMAN, Presiding Judge (retired of the Eighth Appellate District, sitting by assignment).

The Federal Deposit Insurance Corporation (hereafter FDIC) seeks reversal of an award to appellee W. Bruce Chaney of attorney fees and expenses pursuant to Section 2412, Title 28, U.S.Code.

In an earlier decision,[1] this court reversed a jury verdict finding Chaney not liable on two negotiable notes issued by him to the non-defunct Northern Ohio Bank. While the matter was pending on appeal, appellee Chaney

[1] Federal Deposit Insurance Corporation v. Chaney (June 14, 1984), Cuyahoga App. No. 47178, unreported.

filed an application in the lower court for fees and expenses pursuant to Section 2412, Title 28, U.S.Code.

The trial court found, among other things, that the defendant was the prevailing party on the merits of the civil contract action; that the defendant was an eligible "party" under Section 2412(d)(2)(B), Title 28, U.S.Code; and that the position of plaintiff FDIC in connection with the litigation was not substantially justified. Attorney fees and expenses in the amount of $34,404.97, plus interest, were awarded to defendant Chaney.

Plaintiff FDIC appeals the award, assigning two errors.[2]

ASSIGNMENT OF ERROR NO. I:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S APPLICATION FOR ATTORNEY FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d).

Appellant FDIC argues and appellee Chaney concedes that Chaney is not entitled to attorney fees and expenses since he is not the prevailing party by virtue of this court's reversal of the decision of the trial court and entry of judgment on behalf of FDIC. Appellant also asserts that the position of the United States in the underlying action was substantially justified.

[2] The principles of judicial economy, as well as the economy of the parties, would have been better served had the appellant filed a motion with the trial court pursuant to Civ.R. 60(B)(4) which provides relief from judgment where the prior judgment upon which a challenged judgment is based has been reversed, as happened here.

Section 2412(d)(1)(A), Title 28, U.S.Code, provides in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a *prevailing party* other than the United States fees and other expenses * * * incurred by that party in any civil action * * * brought by * * * the United States in any court having jurisdiction of that action, *unless the court finds that the position of the United States was substantially justified* or that special circumstances make an award unjust. (Emphasis added)

Accordingly, since appellee Chaney was not the prevailing party and the position of appellant FDIC was substantially justified, we hold that the award of attorney fees was not authorized by the applicable statute.

However, we find that there is no merit to appellant's contentions that appellee waived his right to attorney fees during trial and that his application for attorney fees and expenses was not timely filed.

The application for attorney fees must be made within thirty days of final judgment, according to Section 2412(d)(1)(B), Title 28, U.S.Code. Appellant's motion for a new trial and/or judgment not withstanding the verdict was overruled on June 21, 1983. That was the final judgment of the trial court as provided by App.R. 4(A). Since the application was filed on July 18, 1983, we hold it was timely.

The first assignment of error has merit in that it was error to award attorney fees and expenses.

ASSIGNMENT OF ERROR NO. II:

II. THE TRIAL COURT ERRED IN GRANTING THE FULL AMOUNT OF DEFENDANT-APPELLEE'S APPLICATION FOR ATTORNEY'S FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d).

Appellant's second assignment of error that the award itself was excessive is argued only in the alternative should we sustain the award. However, any issue as to the amount is moot because of our holding that it was error to grant the motion for attorney fees and expenses.

Judgment reversed and entered for appellant.

This cause is reversed and judgment entered for appellant.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DAHLING*, J., concurs.

BROWN**, J., not participating.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure.

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* *Sitting by assignment:* Judge Alfred E. Dahling of the Eleventh Appellate District.

** Justice William B. Brown, retired of the Supreme Court of Ohio, heard oral arguments in this case but died before journalization of this entry.

This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.
