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

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| In Re SRBA | ) | **Subcases: 57-11124 et. al.** |
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| Case No. 39576 | ) | **ORDER ON MOTION TO ALTER OR** |
| | ) | **AMEND; ORDER ON SUMMARY** |
| | ) | **JUDGMENT; AND ORDER ON MOTION** |
| _____ | ) | **TO WITHDRAW ADMISSIONS** |

## I. PROCEDURAL BACKGROUND

The subcases listed in Exhibit A involve beneficial use claims filed by the United States and Joyce Livestock Company (Joyce). Part of the dispute involves claims made by Joyce on Bureau of Land Management (BLM) property. As the party that actually appropriated the water, Joyce claims ownership to its stock water rights. As the land management agency, the United States claims ownership of all water rights appropriated on BLM land despite the fact that some other party actually appropriated the water. The other half of the dispute involves objections filed to the United States' claims. Joyce alleges that the United States cannot own a stock water right where they do not own the stock and are not the party that actually perfected the water right. Based on these allegations, the two primary issues are:

1. **Whether a private party may perfect a water right on the public domain; and**

2. **Whether the United States may own a stock water right when it does not own stock and is not the party actually perfecting the water right.**

This matter originally came before the court on a *Summary Judgment Motion* (July 15, 1996) filed by the United States on behalf of the BLM. At that time, the claimants were Harry Richard

Bass, Henry Brandau, Ted K. Blackstock, Chipmunk Grazing Association, and Joyce. On September 23, 1996, the court entered its ***Order on Partial Summary Judgment*** (***First Order***). In that decision, the court held that a "permittee operating under licenses issued by BLM may own water rights on the public domain." *Id*. at 8. Subsequently, Harry Richard Bass, Henry Brandau, Ted K. Blackstock, and Chipmunk Grazing Association agreed to settle their dispute with the United States. Joyce remains the only claimant pursing its dispute with the United States. The remaining matters before the court are the United States' *Motion to Alter or Amend Order on Partial Summary Judgment* (October 3, 1996), *Motion for Summary Judgment* (December 16, 1996), and Joyce's *Motion to Withdraw Responses to Request for Admissions* (February 19, 1996).

## II. FACTUAL BACKGROUND

### A. Motion to Withdraw Responses to Request for Admissions

Prior to establishing the undisputed material facts, the court must first address Joyce's *Motion to Withdraw Responses to Request for Admissions.* The court may grant relief for any matter deemed admitted when, upon motion of the admitting party, "the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits." I.R.C.P. 36(b).[1]

The requests for admissions at issue were:

(1) With respect to each of the water rights you are claiming in these consolidated cases, please admit that the United States owns the land claimed for both the point of diversion and the place of use;

(2) Please admit that other stock owners have used the water you are claiming in these consolidated cases to water their stock;

(3) Please admit that the United States was the first party to put the water it has claimed in these consolidated cases to a beneficial use; and

(4) Assuming, for the sake of argument, that you have a valid BLM grazing permit, please admit that the only right you have to graze stock on land managed by the BLM is under a BLM issued grazing permit.

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[1] "Any matter admitted under [Rule 36] is conclusively established. . . ." I.R.C.P. 36(b).

*United States' First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents* (June 17, 1996).

The discovery deadline for these admissions was July 1, 1996. The United States agreed to extend this deadline to July 3, 1996. Joyce did not comply with either deadline. On July 5, 1996, Joyce filed a *Motion to Extend Time for Responding to Discovery*. On July 19, 1996, Joyce responded to the request for admissions and other discovery requests. Because Joyce failed to respond to the admissions in a timely fashion, the admissions were deemed admitted. I.R.C.P. 36(a). On August 9, 1996, the court held a hearing on various pending motions. One of the motions was the *Motion to Extend Time for Responding to Discovery*. In order to clarify the dispute, the court specifically asked Joyce's attorney about the status of the United States' request for admissions. At that time, Joyce's attorney informed the court that his clients would be bound by the admissions. (August 9, 1996, Tr., p. 3, L. 18-22).

As to the first part of the test for considering whether to withdraw admissions, the United States demonstrated the requisite prejudice necessary to uphold the admissions. The United States proceeded and the court entered its ***First Order*** (September 23, 1996) based on the admissions. Nearly five months after the ***First Order*** was entered, the United States relied on the admissions in pursing its *Motion to Alter or Amend* and *Motion for Second Summary Judgment*. Joyce did not file the *Motion to Withdraw Responses to Request for Admissions* until February 19, 1997, the date of the hearing on the *Motion to Alter or Amend* and *Motion for Summary Judgment*. This case has proceeded too far based on the admissions. Having gone this far, the court cannot allow the admissions to be withdrawn and have the case proceed under different factual parameters.

The second part of the test for reviewing a motion to withdraw admissions is whether the action would be "subserved" or facilitated by the withdrawal. I.R.C.P. 36(b). Here, Joyce states that they "will go forward to rebut the [Director's Report] at trial." *Joyce Summary Judgment Brief* at 30. To date, Joyce has not offered any evidence of any kind, including evidence to show that the admissions are wrong. Because Joyce has rested on mere allegations, the court cannot find that the action would be subserved or facilitated by withdrawal of the admissions. *See e.g., Jones v. Jones*, 100 Idaho 510, 512-513, 601 P.2d 1 (1979) (admissions held binding and summary judgment upheld where party did not demonstrate admissions were wrong).

As justification for failing to respond to the request for admissions, Joyce alleged that certain events surrounding their farming and ranching practices prevented a timely response. The court appreciates the hardships intendant to farming and ranching. However, when evaluating a motion to withdraw admissions, the court is required to focus on the test outlined under I.R.C.P. 36(b) and not the reason or excuse for failing to respond. *F.D.I.C. v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994); *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1391 (E.D. Cal. 1991).

Like any other party to the SRBA, the United States has a right to the orderly and speedy resolution of its claims. Because Joyce failed to demonstrate just cause why the admissions should be withdrawn, the *Motion to Withdraw Responses to Request for Admissions* is **DENIED**.

**B. Undisputed Facts**

In support of its *Motion for Summary Judgment*, the United States included two discovery responses obtained from Joyce. Joyce did not move for summary judgment and did not counter with any affidavits, depositions, interrogatories, or admissions of its own. Based on these discovery responses and the Director's Report, the undisputed facts are:

1. With respect to each of the water rights claimed by Joyce in these consolidated cases, the United States owns the land claimed for both the point of diversion and the place of use. *Joyce Admission.*

2. Joyce's use of the water rights it is claiming in these cases has not been exclusive because other stock owners have used the same water for their livestock. *Joyce Admission.*

3. The United States was the first party to put the water it has claimed in these consolidated cases to a beneficial use. *Joyce Admission.*

4. Joyce does not claim to have initiated the water rights it is claiming in these cases. Instead, Joyce claims these rights were originally appropriated by Joyce's predecessors in interest and passed to Joyce through the general appurtenance clauses of the deeds in its chain of title. *See, Joyce Response* (November 14, 1996) Interrogatory Nos. 1 and 2.

5. Joyce's objection to the water rights claimed by the United States is based on the fact that the United States does not own the cattle drinking the water at issue. *See, Joyce Response* (November 14, 1996) Interrogatory No. 3.

6. Where the United States and Joyce filed competing claims to the same stock water right, the Director of the Idaho Department of Water Resources (IDWR)

recommended ownership to the United States and not to Joyce. *See,* Director's Report for Joyce's rights.

7. The earliest claims by Joyce were perfected by Matthew Joyce between 1865 and 1893. Following Matthew Joyce, the claims were owned by "Joyce Brothers Livestock Company" between 1893 and 1939. The first time any entity named "Joyce Livestock Company" used these water rights was in 1939. *See, Joyce Response* (July 18, 1996) Interrogatory No. 6.

## III. STANDARD OF REVIEW

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. M. L. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). 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*, 110 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).

The Director's Report constitutes *prima facie* evidence of the water right. I.C. § 42-1411(4). When a party relies on the Director's Report, that party is relieved from offering any facts in support of the summary judgment motion. "Giving evidence '*prima facie*' status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary." ***In Re SRBA, Order Granting Summary Judgment in Part; Request for Additional Briefing***, Subcase 36-00046 *et.al.* (December 31, 1996). On summary judgment, the party opposing any element in the Director's Report has the burden of raising an issue of material fact in order to defeat

summary judgment. I.C. § 42-1411(4). Presumptions may support either the moving or nonmoving party on summary judgment. *See e.g., Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990); *Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (1994).

## IV. MOTION TO ALTER OR AMEND

### A. Federal Law Does Not Prevent the Appropriation of Stock Water Rights on the Public Domain

Relying on federal law, the United States alleges that private parties may not appropriate water located on the public domain when that public domain is "not open to entry, settlement and acquisition of private title." *United States Brief in Support of Motion to Alter or Amend* p. 7. This inquiry necessarily involves a review of state and federal jurisdiction with respect to the appropriation of water located on the public domain.

At the outset, it must be noted that the state's control over nonnavigable water exists absent any congressional act. *California v. United States*, 438 U.S. 645, 656 (1978); *United States v. Rio Grande Dam & Irrigation, Co.*, 174 U.S. 690, 702-703 (1899).[2] Under the "equal footing" doctrine, new states entering the Union were entitled to plenary control of water located within their territory just as the original states controlled water within their territory. *Kansas v. Colorado*, 206 U.S. 46, 92-95 (1907). The state's exclusive control over water is subject only to reserved rights and navigation servitudes. *United States v. Rio Grande* at 662.

Despite the state's exclusive control over water, Congress enacted several laws to address the appropriation of water located on the public domain. The purpose of these enactments was not to "federalize the prior appropriation doctrine." *California v. United States* at 657. Rather, the purpose of the enactments was to "recognize and give sanction" to the state and local doctrine of appropriation and to "remove what otherwise might be an impedient to its full and successful operation." *Id.* at 658. In other words, Congress did not want federal law impeding the operation of state law or there to be any doubt that state law controls the appropriation of all water located within the territory of each state.

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[2] This principle was noted by the California Supreme Court in *In Re Water of Hallett Creek Stream System*, 749 P.2d 324 (Cal. 1988): "The State of California's authority to regulate and control the water within its boundaries does not, however, rest on the Desert Land Act; that merely recognized the state's pre-existing authority over waters under the 'equal footing' doctrine." *Id*. at 336 fn. 15.

As to the appropriation of water located on the public domain, the two most often cited acts are the Mining Act of 1866[3] and the Act of 1870.[4] In those Acts, Congress acknowledged the ability of appropriators to perfect water rights on the public domain.

> The effect of these acts [Mining Act of 1866 and the Act of 1870] is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain.

*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935).

With the passage of the Desert Land Act of 1877,[5] Congress formally recognized the state's plenary control over nonnavigable water.

> What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' the full power of choice must remain with the state.

*Id.* at 163-164 (citation omitted); *see also, United States v. New Mexico*; *Cappaert v. United States*, 426 U.S. 128 (1976).

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[3] The Mining Act of 1866, in pertinent part, reads: "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." Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253, codified at 30 U.S.C.A. § 51 (1986), partially repealed Pub.L. 90-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793 (FLPMA).

[4] The Act of 1870, in pertinent part, reads: "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." Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218, codified at 30 U.S.C.A. § 52 (1986), partially repealed Pub.L. 90-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793 (FLPMA).

[5] The Desert Land Act of 1877, in pertinent part, reads: "All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377, codified at 43 U.S.C.A. § 321 (1986).

The effect of the previously mentioned Acts was more than a recognition of the states plenary control of nonnavigable water. The effect of the Acts amounted to congressional acknowledgment that water located on the public domain existed separate and apart from the land.

> The fair construction of the provision now under review [Desert Land Act] is that Congress intended to establish the rule that for future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.

*Id.* at 295 U.S. 142, 162. "Under the Desert Land Act 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).

Under federal law, it is clear that prior to 1934 Congress acknowledged that water located on the public domain was separated from the land and that water located on the public domain must be appropriated in accordance with state law. The United States argues that all the previously mentioned principles changed with passage of the Taylor Grazing Act of 1934. The United States argues that with the passage of the Taylor Grazing Act, Congress foreclosed private individuals from appropriating water on land "not unqualifiedly open to settlement."[6]

In support of this argument, the United States relies on *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955). In that case, the issue was whether the Federal Power Commission had exclusive jurisdiction to grant a license for a water power project under the Federal Power Act. The State of Oregon, citing the Mining Act, the Act of 1870, and the Desert Land Act, argued that these Acts granted the state plenary power to regulate nonnavigable water and, therefore, the State had licensing authority for the power project. The United States Supreme Court dismissed Oregon's argument concluding that none of the Acts had any affect on "reserved" lands.

> Even without that express restriction of the Desert Land Act to sources of water on public lands, these Acts would not apply to reserved lands. 'It is a familiar principle of public lands law that statutes providing generally for disposal of the public domain

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[6] Prior to any discussion of the applicability of the Taylor Grazing Act, the court notes that most of the claims at issue were reported in the Director's Report as having a priority date well before 1934. Therefore, unless it can be established that the claims actually have a priority date after 1934, neither the Taylor Grazing Act nor any other act subsequent to 1934 would have any bearing on most of these claims. Any argument that an act, established after a right had been perfected, somehow affects a vested water right would necessarily involve a regulatory taking question. The only right that would be affected by the Taylor Grazing Act is 57-10487 which is reported as having a priority date of 1943.

> are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose.'

*Id*. at 448, *citing United States v. O'Donnell,* 303 U.S. 501, 510 (1938).

Based on this holding, the United States argues that only the Desert Land Act allowed settlers to appropriate water on the public domain and that the Desert Land Act does not apply to BLM land withdrawn from settlement under the Taylor Grazing Act. The United States' reliance on both the Taylor Grazing Act and *Federal Power Commission* for this proposition is misplaced. First, *Federal Power Commission* dealt with the licensing of a dam. The case did not, in any way, address the appropriation of water or alter the well-accepted principle that the United States defers to each state with respect to the control of water within the territory of each respective state. Second, designation of land as being "reserved," "withdrawn," or "not open to settlement" is not dispositive as to whether water rights located within that land may be appropriated by private parties. Even if land has been reserved, it is entirely possible that Congress intended the water within the land reserve to be available for private appropriation.

In this regard, *Federal Power Commission* must be viewed in light of *United States v. New Mexico,* 438 U.S. 696 (1978). In that case, one of the issues before the court was whether the United States had reserved stock water rights in the Gila National Forest. Concluding that no reserved stock water rights existed, the United States Supreme Court held that any such rights must be issued to the permittee under state law.

> What we have said also answers the Government's contention that Congress intended to reserve water from the Rio Mimbres for stock watering purposes. The United States issues permits to private cattle owners to graze their stock on the Gila National Forest and provides for stock watering at various locations along the Rio Mimbres. The United States contends that, since Congress clearly foresaw stock watering on national forests, reserved rights must be recognized for this purpose. **The New Mexico courts disagreed and held that any stock watering rights must be allocated under state law to individual stock waterers. We agree. . . . But Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators under state law.**

*United States v. New Mexico*, 438 U.S. at 716-717 (emphasis added).

In arriving at its decision that stock water rights "must" be perfected by the permittee on national forest land, the court relied on the Organic Administration Act of 1897. *Id*. That Act provided:

> All waters within the boundaries of the national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder.

Act of June 4, 1897, ch. 2, § 1, 30 Stat. 36, as amended, codified at 16 U.S.C.A. § 481 (1985).

At the very least, *United States v. New Mexico* stands for the proposition that private rights may be perfected on any type of federal land regardless of its status so long as the relevant act contemplates the ability of parties to perfect water rights on that land.[7] In this case, the Taylor Grazing Act specifically allows for the appropriation of private water rights on land under the purview of the Act. The relevant portion of the Taylor Grazing Act reads:

> 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 affecting the public lands or **which may hereafter initiated** or acquired and maintained in accordance with such law.

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

To summarize, under the rule announced in *United States v. New Mexico,* it is not enough that the United State show that land has been reserved in order to defeat private appropriations of water within the reservation. Even on reserved lands, it is clear that the organic legislation creating the reservation, withdrawal, or other land interest may specifically allow for the private appropriation of

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[7] The United States argues that the issue of stock water ownership on federal land was not addressed in *United States v. New Mexico*. The assertion by the United States is erroneous for a number of reasons. First, a clear reading of *United States v. New Mexico* indicates that the issue was addressed. Second, the history of the case indicates that the issue of stock water ownership was expressly raised. *United States v. New Mexico* was designated at the state level as *Mimbres Valley Irrigation Co. v. Salopek,* 564 P.2d 615 (N.M. 1977). In that case, the New Mexico Supreme Court designated the issue as "whether the water rights used by permittee of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States." *Id.* at 619. The New Mexico Supreme Court held: "The prior discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held the permittee in accordance with state law." *Id.* As to this holding, the United States Supreme Court held: "We agree." *United States v. New Mexico*, at 716.

water under state law.[8] Just like the Mining Act of 1866, the Act of 1870, and the Desert Land Act of 1877, the Taylor Grazing Act of 1934 constituted congressional acknowledgment that water located on lands within the purview of the Act could be appropriated by private parties in accordance with state law. There being no federal prohibition against private parties appropriating water on the public domain, the next inquiry is whether state law allows private parties to appropriate water located on the public domain.

### B. As a Matter of State Law, a Water Right May Be Perfected on Federal Land by a Private Party

#### 1. Water rights appurtenant to land may be owned by a party other than the landowner.

Under state law arguments, the United States argues that ownership of the water right should depend on the ownership of the land. "[A]lthough there may indeed be some layer of removal between the owner of the water and the literal 'user' of the water, the use could not be made were it not for the larger organization, and as a matter of law and policy it is the larger organization that should be considered the 'appropriator' of the water right." *United States' Memorandum in Support of Motion for Summary Judgment* p. 10-11. As a corollary to this argument, the United States also argues that since water is appurtenant to federal land, unity of title requires the owner of land to own water rights perfected on that land. The United States also alleges that Joyce perfected its rights through trespass. All of these arguments may be addressed at once.

In Idaho, water rights are appurtenant to the land upon which the water is used. I.C. §§ 42-220 and 42-220; *see also, Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). However, the fact that water is appurtenant to the land does not answer the question of who owns the water right. The rule in Idaho has long been that "[w]ater may be appropriated for beneficial use on land not owned by the appropriator, and such water rights become appropriator's property." *First Security Bank v. State,* 49 Idaho 740, 746, 291 P. 1064 (1930). The exception to this rule is that a trespasser cannot perfect a water right on private property. "The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated

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[8] The more interesting question implicated by *United States v. New Mexico* is whether a private party could perfect a water right on reserved land when no competing reserved rights are claimed and the act creating the reservation is silent as to the ability of private parties to perfect water rights on the land reservation. This issue is not currently before court.

by trespass on private property is invalid." *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168 (1974); *see also, Mahoney v. Neiswanger*, 6 Idaho 750, 59 P. 561 (1899); *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072 (1919); *First Security Bank v. State*, 49 Idaho 740 (1930). Spring water situated wholly on public land is subject to appropriation. *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922); *see also, Keiler v. McDonald*, 37 Idaho 573, 218 P. 365 (1923).

Despite the previously mentioned authority, the United States attempts to distinguish the key holding in *First Security Bank v. State* from the facts of these subcases. In *First Security Bank*, the appropriator was operating on land where the water right had been perfected as a lessee. *Id*. at 743. In this case, Joyce has operated on BLM land as a licensee. The United States argues that there is a difference between appropriators operating on land under a "lease" versus those who operate on land under a "license." The United States concedes that those operating on land under a lease may perfect a water right but that those who operate under a license have no possessory interest in the land and, therefore, may not perfect a water right.[9] The argument is summarized as follows:

> A license 'is defined as a personal, revocable, and unassigned privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein.' A lease is a property interest. It gives the lessee 'exclusive possession of the premises against all the world, including the owner. In contrast to a lease, a license is not a property interest and does not give the licensee rights against the landowner. 'A license is revocable at will. . . . No interest in property vests in the licensee.'

*United States Brief in Support of Summary Judgment* p. 20 (citations ommitted).

This argument fails in light of *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967). In that case, the appropriator had "persistently grazed and watered his cattle within the boundaries of the Death Valley National Monument without a permit from the National Park Service." *Id*. at 150. The

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[9] In a further attempt to distinguish *First Security Bank*, the United States argues that the type of water right perfected is relevant in determining whether or not a party can perfect a water right on property owned by a third party. In determining who is the "appropriator," the United States argues that a private party could be considered the "appropriator" only when a party makes an "actual diversion" involving a considerable investment. The United States further argues that a party claiming an instream right does so without any investment and, therefore, the United States should be considered the "appropriator" when deciding the relevant owner of the instream right. This argument lacks any merit. The court is not prepared to rank types of water rights in deciding whether a private party can perfect a water right located on the public domain. All water rights, whether or not there is a diversion and without regard to the degree of investment, are property rights deserving of similar treatment and protection.

United States brought an injunction against further alleged trespass. The appropriator countered arguing that his use of a number of different springs located on the public domain "constituted an appropriation vesting in his predecessors a water right. . . . which rights the general government was bound to honor. . . ." *Id.*

In *Hunter*, the appropriator operated on the land prior to its designation as a national monument and prior to any permitting requirements. During that time, the appropriator was operating on the public domain under an "implied" license.

> During the settlement of the Western United States it was the common practice of the immigrants and others to graze their livestock upon the public lands. The government acquiesced in this practice and, there thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent.

*Id*. at 155 fn. 6, *citing Buford v. Houtz*, 133 U.S. 320 (1890).

After designation of the land as a national monument, the appropriator remained on the land where the water had been appropriated without a permit. At no time was the appropriator operating under a lease or other instrument conveying any property interest. Nevertheless, citing California principles of prior appropriation identical to those in Idaho, the court held that the private appropriator owned the water rights located on the public domain even though no permits for operation on land within the national monument had ever been obtained.

> We believe that a legal basis for the acquisition of an appropriation to water by virtue of local decisions has been established. On the basis of the facts found by the district court, we conclude that Hunter's predecessors must be deemed to have appropriated these waters; that the right is equivalent of a grant of the use of the waters from the federal government; and that it is entitled to protection.

*Id*. at 153.

Based on the holding in *Hunter*, it is irrelevant whether or not the appropriator has a possessory interest in the land. Again, as it relates to the public domain, water is separated from the land. *See*, § IV(A), *infra*. At the very least, and for all the reasons previously mentioned, federal law contemplates and state law allows those properly operating on the public domain to perfect stock water rights. In this case, Joyce was at all times operating on the public domain under "implied" licensing authority or they were operating under permits issued by the BLM. Nothing in the permits issued to Joyce prevented or addressed the appropriation of water. (February 19, 1997, Tr. p. 68,

L. 25 - p. 69, L. 7). Consequently, absent any other legal impediments, Joyce could perfect stock water rights on the public domain. Furthermore, since it is clear that Joyce was not a squatter, there is no reason to address any trespass issue.[10]

In support of its various arguments, the United States relies on *State v. Morros*, 766 P.2d 263 (Nevada 1988), for the proposition that water rights protected on the public domain belong to the United States. In *Morros*, the state engineer, over numerous objections, approved stock water and wildlife applications filed by the United States. The district court reversed the state engineer holding that the United States could not file applications for stock watering permits because it did not own livestock and was not the party who actually put the water to a beneficial use. *Id*. at 716. The Nevada Supreme Court reversed the holding of the district court concluding that "[a]lthough the United States does not own the livestock and wildlife, it owns the land on which the water is put to a beneficial use. In addition, the United States benefits as a landowner from the development of new water sources on federal land."

*State v. Morros* does not stand for the proposition that all stock water claims perfected on the public land belong to the United States. The cases stands for the simple proposition that if the United States applies for a stock water permit under Nevada law, they may do so even though they are not the party who actually applies the water to a beneficial use. This proposition is not unique in that I.C. § 42-501 recognizes the ability of the United States to file for stock water permits. Furthermore, *State v. Morros* did not address the issue of whether a private party may own a water right on the public domain.

The United States also relies on *Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985). The case is cited for the proposition that "sound public policy" mandates that water rights located on the public domain should be owned by the land management agency. In *Pettibone*, the Montana Supreme Court held that any water rights perfected on state school trust lands are held by the state. *Id*. at 955. However, as to water rights perfected by private individuals on the public

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[10] There being no issue of trespass before the court, this opinion cannot be construed, in any way, for the proposition that a squatter on the public domain may or may not perfect a stock water right. However, it should be noted that the court in *Hunter v. United States*, at least in dicta, concluded: "The rule is well settled that a squatter on the public domain may acquire by appropriation the right to the use of water that is used by him to irrigate such lands and that if he is evicted he may nevertheless divert the water elsewhere if he is able. *Patterson v. Ryan* , 37 Utah 410, 108 P. 1118 (1910); *Davis v. Gale*, 32 Cal. 26 (1867)." *Id*. at 154 fn. 4.

domain, *Pettibone* supports the claimant's position. The Montana Supreme Court concluded that school trust lands are not considered part of the public domain and, therefore, "school trust lands are subject to a different set of rules than other public lands." *Id*. Citing this distinction, the Montana Supreme Court acknowledged that private parties could appropriate and perfect a water right on the public domain.

> 'The legal title to the land upon which a water right acquired by appropriation made on the public domain is used or intended to be used in no wise affects the appropriator's title to the water right. . . .' [*Hayes v. Buzard*, 77 P. 423, 425 (Mont. 1904)]. 'Congress did not intend that the [school trust] lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people. . . .' [*United States v. Ervien*, 246 F. 277, 280 (8th Cir. 1917)].

*Id; see also, Fallini v. Hodel*, 725 F.Supp. 1113 (1989).[11]

The bottom line is that ownership of the land can be separated from ownership of the water right. Absent any claim that the water on the federal public domain has been reserved, the fact that water is appurtenant to BLM land does not mandate that all water rights perfected by private parties be owned by the United States. At the very least, those operating under "implied" licenses on land constituting the public domain or those operating under permits on land administered by the BLM may perfect stock water rights.

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[11] *Fallini v. Hodel* was cited by the United States. The case actually supports Joyce's argument. In *Fallini*, a groundwater right had been perfected on BLM land. The BLM attempted to interfere with the permittee's operation of the water right. The court concluded that such interference "effected a regulatory taking of ranchers' water rights contrary to the Fifth Amendment." *Id*. at 1113.

**2. Exclusive access to the water source is not required to perfect a water right.**

The United States argues that claimants must demonstrate exclusive dominion and control over the water claimed in order to perfect a valid stock water right. The United States cites *Robinson v. Schoenfeld*, 218 P. 1041 (Utah 1923) wherein the Utah Supreme Court held that where "other stock owners having cattle on this range had enjoyed the same rights and privileges with respect to the waters of the springs here in question as did plaintiffs" no water right could result. *Id.* at 1043. If exclusivity is required, the United States would have no basis to claim any stock water rights under state law.

The United States has numerous state-based claims in the SRBA. At least for the United States claims at issue, the United States was not the party that actually appropriated or perfected the water right. Rather, the basis to the United States' state-based stock water claims is that private parties moved West, watered their livestock from sources located on the public domain, and because the land is public domain, the United States owns the water right by virtue of the efforts of private parties. (February 19, 1997, Tr., p. 34, L. 4 - p. 36, L. 4).[12]

As a matter of law, none of these parties moving West on the open range would ever have had exclusive access to water sources.[13] Despite the lack of exclusivity on the part of settlers moving West, the United States claims the benefit of those settlers' efforts in perfecting their own stock water rights. The United States cannot argue for an exclusivity requirement as it relates to private parties operating on the public domain and, at the same time, claim the benefit of that non-exclusive use when it comes to perfecting its own state-based stock water right.

Furthermore, as it relates to the United States' obtaining a stock water right through the efforts of private parties acting as agents of the United States, an exclusivity requirement would render an agency theory moot. If the permittees or other parties, as agents of the United States, cannot perfect a water right on their own behalf, then the United States cannot have a water right

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12 The validity of this basis for the United States to perfect a water right on the public domain is not before the court and no party has yet objected to this basis.

13 Various congressional Acts prevented the inclosure of water sources on the public domain by private parties. *See*, Unlawful Inclosure Act, Act of February 25, 1885, ch. 149, 23 Stat. 321, codified at 43 U.S.C.A. § 1061 (1986); Stockwater Reservoir Act, Act of January 13, 1897, ch. 11, 29 Stat. 484, codified at 43 U.S.C.A. § 952 (1986), repealed Pub.L. 90-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793 (FLPMA); Stock Raising Homestead Act, Act of December 29, 1916, ch. 9, 39 Stat. 862, repealed Pub.L. 90-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793 (FLPMA).

under an agency theory. A principal cannot benefit from the illegal act of an agent. *See e.g., Lowe v. April Industries, Inc.*, 531 P.2d 1297, 1298 (Utah 1974). Similarly, a principal cannot claim the benefit of its agent's acts and, at the same time, assert that the agent was acting illegally or without authority. *Stout v. McNary*, 75 Idaho 99, 103, 267 P.2d 625 (1954).

Absent any reserved rights, the United States is no different than any other person or entity who claims a water right under state law. For a state-based stock water right, there has to be an appropriation of water as a precondition to perfecting a water right. I.C. § 42-103. Assuming the United States does not actually appropriate water for stock purposes, then some other entity or person must appropriate the water on behalf of the United States. An exclusivity argument would prevent all parties, and thereby the United States, from owning stock water rights on the public domain.

If no one can own a stock water right on the public domain, then all stock water uses on the public domain would be illegal. "No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists." I.C. § 42-201(2). In order to perpetuate the watering of stock on public lands, a permittee must be able to perfect a water right on his/her own behalf. In the alternative, a permittee or other entity, operating on behalf of the United States, must be able to perfect a stock water right on behalf of the land management agency.[14]

For all these reasons, the court concludes that exclusive access to the water source is not required in order to perfect a stock water right on the public domain.

**3. Idaho Code §§ 42-114 and 42-501 are not relevant to these claims.**

Both sides have relied on I.C. §§ 42-114 and 42-501 to support their respective arguments that they are the proper owner of the rights at issue. Joyce relies on I.C. § 42-114 for the proposition that stock water rights must be owned by the party actually perfecting the water right and not by the land management agency. The United States relies on I.C. § 42-501 for the proposition that the legislature intended stock water rights perfected on BLM land to be owned by the United States.

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[14] Acknowledging that a permittee or the United States may not have exclusive rights to a particular water source, the rights to the source would be administered "first in time, first in right" relative to competing stock waterers. 15, § 3, Idaho Const. art. XV, § 3

The Idaho Legislature has recognized the ability of permittees to own stock water rights on public land. "Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefore and the watering of domestic livestock by the person or association of persons to who the permit was issued shall be deemed a beneficial use of the water . . . ." I.C. § 42-114. On its face, I.C. § 42-114 does not require the person making application for a stock watering permit to own the underlying land for the place of use where the permit is sought.

The United States argues that I.C. § 42-114 does not apply to those seeking a permit on the public domain. (February 19, 1997, Tr. P. 27, L. 16-22). I.C. § 42-114 does not clearly indicate whether permittees may apply for a stock watering permit on the public domain. Therefore, to the extent that an ambiguity exits and in order to construe and reconcile both I.C. §§ 42-114 and 42-501, the court is entitled to go outside the plain and ordinary words of the statute to determine the legislative intent. *State v. Seamons*, 126 Idaho 809, 892 P.2d 484 (Ct. App. 1995).[15] To determine the intent of the legislature, the statement of purpose for I.C. § 42-114 is relevant and reads: "This bill will place the beneficial use clearly with the consumption and the ownership of the cattle and not with the land management agencies." Minutes of House Resources and Conservation Committee (February 17, 1986), cited in OAG 88-6. In view of the plain and ordinary meaning and the legislative purpose of the statute, the court concludes that stock water permits may be issued to private individuals operating on the public domain under I.C. § 42-114.

The United States argues that I.C. § 42-501 requires stock water permits to be issued to the BLM. I.C. § 42-501, in pertinent part, reads: "The bureau of land management 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." (Emphasis added). On its face, I.C. § 42-501 does not require that any water right on BLM property be issued to the BLM. When read together, I.C. §§ 42-114 and 42-501 stand for the proposition that either private parties or the United States may

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15 "When construing two separate statutes that deal with the same subject matter, the statutes should be construed harmoniously, if at all possible, so as to further the legislative intent. Similarly, in determining the legislative intent, we should examine the reasonableness of the proposed interpretations and the policy behind the statutes so that all of the applicable sections can be construed together." *State v. Seamons* at 487 (citations omitted).

file for stock water permits on BLM property. Neither statute requires stock water permits to be issued to the United States as the land management agency.

All the claims at issue are based on beneficial use and, therefore, do not involve permits. Consequently, neither I.C. §§ 42-114 nor 42-501 are relevant as to the ownership of these claims located on the public domain.[16]

### 4. Summary

For all these reasons, the *Motion to Alter or Amend* is **DENIED**. The rule continues to be that a private party may appropriate water on the public domain. This order shall supersede the court's ***First Order*** in all respects.

## V. MOTION FOR SUMMARY JUDGMENT

### A. United States Claims

Joyce objected to the United States' claims alleging that there was no basis for the United States to claim any stock water rights. Since the United States does not actually own stock and is not the party who actually appropriates the water, Joyce alleges that the United States must prove, through an agency theory, that some other party appropriated the water on behalf of the United States. The United States alleges that the *prima facie* effect of the Director's Report relieves them of the burden of going forward with evidence on the ownership question and that their ownership is presumed until Joyce "bursts the bubble" and proves otherwise.

In addressing these inquires, it is helpful to understand the United States' status with respect to its role as a proprietor of land. When the United States acts in its proprietary capacity, it exercises the right of any other ordinary proprietor under state law. *In Re Water of Hallett Creek Stream System*, 749 P.2d 324 (Cal. 1988).

> [T]he United States Supreme Court has long recognized that 'the [federal] government has, with respect to its own lands, the rights of an ordinary proprietor,

[16] The United States' position that I.C. § 42-501 is somehow relevant to its claims is suspect considering that the United States' position that I.C. § 42-114 is not at all relevant to Joyce's claims.

> to maintain its possession and to prosecute trespassers. It may deal with such land precisely as a private individual may deal with his farming property.'

*Id.* at 329.[17]

Since the United States acts as any other ordinary landowner with regard to the possession of its property, the United States may perfect a water right the same way as any other private landowner. As any landowner in Idaho, possession of the land does not include possession of the water perfected on that land.[18] In order for the landowner to possess a water right, the landowner must perfect the water right or some other party must perfect the water right on behalf of the landowner. Assuming the United States does not perfect its own right, a third party must perfect the water right on behalf of the United States. "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." *First Secuirty Bank v. State*, 49 Idaho 740, 746, 291 P. 1064 (1930).

Since the United States does not own stock and is not in the stock watering business (February 19, 1997, Tr., p. 30, L. 4-7), the United States would have to prove that an agency relationship existed with a private appropriator to support any state-based stock water claim. *See e.g., Brown v. Caldwell School District No. 132*, 127 Idaho 112, 117, 898 P.2d 43 (1995) ("The burden of establishing an agency relationship is on the party asserting it"). For these claims and for the following reasons, the United States is relieved from establishing that any agency relationship existed with any private appropriator.

The elements stated in the Director's Report constitute *prima facie* evidence of the water right. I.C. § 42-1411(4). Because the United States relies on the Director's Report, the *prima facie* effect of the Director's Report relieves the United States from going forward with any facts in order to establish any element of its claimed water rights. In subcases where ownership of the water right is reported in favor of the United States, the United States remains the owner of the right until the objector presents evidence "bursting the bubble" as to the ownership element. "Any party filing an

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[17] "Private and government ownership of land obviously differ in certain fundamental respects. Unlike private property, government land usually cannot be seized, or obtained by adverse possession." *In Re Hallett Creek Stream System*, at 328.

[18] Until appropriated, the water belongs to the State of Idaho. I.C. § 42-101. Once an appropriation has been completed, the right holder enjoys a usefuctory right to the water.

objection to any portion of the director's report shall have the burden of going forward with evidence to rebut the director's report as to all issues raised by the objection." I.C. § 42-1411(4); s*ee e.g., Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986). Failure of a party to rebut a presumption may support summary judgment. *See e.g., Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990); *Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (1994).

In this case, Joyce has submitted legal theories as to why the United States does not own its claimed water rights. Since none of the legal theories are dispositive as to the issues raised in the *Motion for Summary Judgment*, Joyce is not relieved from offering evidence to defeat the presumptions created by the Director's Report. Because Joyce has failed to submit any evidence to "burst the bubble" on the ownership issue, the court concludes that the United States is the proper owner of the water rights at issue where the Director of IDWR reported ownership in favor of the United States. There being no material and genuine issue of fact, the court holds:

1. Summary judgment is **GRANTED** in favor of the United States for claim numbers 57-11124, 57-11128, 57-11129, 57-11130, 57-11132, 57-11133, 57-11134, 57-11334, 57-11342, 57-11343, 57-11345, and 57-11346;

2. Summary judgment is **PARTIALLY GRANTED** in favor of the United States as to Joyce's objections in subcase numbers 57-11125, 57-11126, 57-11127, 57-11131, 57-11341, and 57-11344. In these subcases, the only remaining objections were filed by the United States. These objections were not addressed in this motion.

**B. Joyce Claims**

For the Joyce claims, the United States' primary argument is that private parties may not perfect a stock water right on the public domain. For all the reasons contained herein, the court finds that Joyce may own water rights on BLM land. The only remaining inquires are whether Joyce's chain of title is clear and whether there are any competing federal water rights preventing Joyce from claiming its water rights.

The first inquiry is whether Joyce has clear title to its claimed water rights. A water right is a real property interest. I.C. § 55-101; *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959). The transfer or conveyance of a water right requires that certain formalities be observed. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 448, 244 P.2d 151, 157 (1952); s*ee e.g., Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374, 1378 (Colo. 1982). Water rights that are not

specifically described in a conveying document can pass as an appurtenance with the land on which the water has been used. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984).

The United States argues that the earliest Joyce can claim a water right is 1985 based on breaks in chain of title. The undisputed chain of title is as follows:

> The earliest claims by Joyce were perfected by Matthew Joyce between 1865 and 1893. Following Matthew Joyce, the claims were owned by "Joyce Brothers Livestock Company" between 1893 and 1939. The first time any entity named "Joyce Livestock Company" used these water rights was in 1939.

*See, Joyce Response* (July 18, 1996) Interrogatory No. 6.

The United States is incorrect in alleging that the earliest Joyce can claim proper title is 1985. After 1893, certain water rights were claimed by the same corporation, Joyce Livestock Company, known at various times as "Joyce Brothers Livestock Company" or "Joyce Livestock Company, Ltd." At these various time periods, the corporation has had different shareholders. The fact that the corporation has changed names or that the corporation has had different shareholders does not alter the fact that the rights were held by one corporate entity from 1893. I.C. § 30-1-58; *see e.g.*, *Alley v. Miramon*, 614 F.2d 1372 (5th Cir. 1980) (Change of corporation's name is not a change of the identity of a corporation and has no effect on a corporation's property, rights, or liabilities).[19] In this case, claim numbers 57-04028 (June 1, 1922), 57-10486 (July 26, 1917), 57-10487 (December 31, 1943), and 57-10598 (October 8, 1915) all have priority dates corresponding with ownership by Joyce Livestock Company. Since these rights have been held by one entity since 1893, there is no issue of an improper conveyance. As to these claims, there is clear title.

Claim numbers 57-10770, 57-10588, and 57-10587 all have a claimed priority date of April 1, 1865, and do involve a conveyance problem. These rights could only have been perfected by Matthew Joyce who operated on the public domain until 1893. Joyce claims that these water rights were passed under the general appurtenance provision of deeds conveying Matthew Joyce's property

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[19] "The change in the name of a corporation has no effect whatever upon its property, rights, or liabilities. It continues as before responsible in its new name for liabilities previously contracted or incurred, and has the right to sue on contracts made or liabilities incurred to it -- before the change. After the change it should, by proper averments showing the change, sue and be sued by its new name. The change in the name of a corporation has no more effect upon its identity, as a corporation, than the change in the name of a natural person has upon his identity." *Stewart v. Preston et al*, 86 So. 348 (Fla. 1920) (emphasis added) (citing 1 Morawetz on Private Corporations, 354).

to Joyce Livestock Company. The difficulty with this argument is that the water rights were perfected on federal land and remain appurtenant to federal land. Since the water rights are appurtenant to federal land, Matthew Joyce could not have conveyed these rights when he conveyed his property to Joyce Livestock Company.

As to claim numbers 57-10770, 57-10588, and 57-10587, the court finds that the United States has burst the presumption as to the priority elements for these water rights. However, there is no dispute that Joyce used these rights after 1893. Although Matthew Joyce's use of the water lapsed because the right was not properly conveyed, Joyce's use of the water constituted a new appropriation of the water requiring a priority date matching the date of the new appropriation. The exact priority date is subject to further proof as to the date Joyce appropriated the particular water rights at issue.

One of the undisputed facts is that the United States was the first party to put the water to a beneficial use. As to competing claims, this fact would be relevant. However, one of the undisputed facts is that where the United States and Joyce filed competing claims to the same stock water right, the Director of IDWR recommended that title to the water right be decreed to the United States and not to Joyce. *See,* Director's Report for Joyce rights. Since claim numbers 57-04028, 57-10486, 57-10487, 57-10587, 57-10588, 57-10598, and 57-10770 were reported to Joyce, the court concludes that these rights, as reported, do not compete with any rights claimed by the United States.

There being no material and genuine issue of fact as to chain of title and there being no competing claims made by the United States to any of Joyce's claims as reported, the court holds:

1. Summary judgment is **GRANTED** in favor of Joyce as to claim number 57-04028;

2. Summary judgment is **PARTIALLY GRANTED** in favor of Joyce as to claim number 57-10588* pending further evidence on priority date.

3. Summary judgment is **PARTIALLY GRANTED** in favor of Joyce as to objections filed by the United States in subcase numbers 57-10486 and 57-10487*. These two subcases have pending objections filed by Jay Hulet which have not been addressed in this motion;

4. As reported, claim numbers 57-10587, 57-10598, and 57-10770* do not compete with any rights claimed by the United States. Therefore, as to objections filed by the United States and as reported, summary judgment is **PARTIALLY GRANTED**.

However, Joyce has filed objections to these water rights to reclaim certain portions of the rights that overlapped with claims filed by the United States. To the degree that these rights overlap with claims filed by the United States, Joyce is bound by the admission that the United States is the first party to put the water to a beneficial use. The court could grant summary judgment in favor of the United States as to Joyce's objections were it not for the fact that the United States stipulated that all *de minimis* stock water claims, including instream claims, would be limited to 13,000 gallons per day. ***Special Master's Second Amended Recommendation Re: Basin-Wide Issue 12*** (August 12, 1996) at 8. To the extent that the place of use in dispute can support a quantity in excess of 13,000 gallons per day and Joyce proves it operated on the disputed land, Joyce is entitled to claim the disputed overlapping places of use. Consequently, in these subcases there remains a material issue of fact as to whether or not the overlapping disputed areas may support further appropriation.

5. Summary judgment is **DENIED** in subcase number 57-04008. This subcase involved a claim filed by Joyce that was disallowed because of competing claims (57-11134 and 57-11179) filed by the United States. As stated in paragraph four, there is an issue of material fact as to whether or not the source in question can support an appropriation in excess of 13,000 gallons per day. Since this case was recommend as "disallowed," Joyce bears the burden of establishing each element of the claimed right. I.C. § 42-1411(5).

6. The United States has indicated that they intend to withdraw their objection to claim number 57-04008.

7. All claims indicated with an "*" require further evidence as to priority date.

## VI. SUMMARY

For all the reasons outlined herein, the court concludes:

1. The *Motion to Withdraw Admissions* is **DENIED**;

2. The *Motion to Alter or Amend* is **DENIED**;

3. Summary judgment is **GRANTED** in favor of the United States for claim numbers 57-11124, 57-11128, 57-11129, 57-11130, 57-11132, 57-11133, 57-11134, 57-11334, 57-11342, 57-11343, 57-11345, and 57-11346;

4. Summary judgment is **PARTIALLY GRANTED** in favor of the United States as to Joyce's objections in claim numbers 57-11125, 57-11126, 57-11127, 57-11131, 57-11341, and 57-11344;

5. Summary judgment is **GRANTED** in favor of Joyce as to claim number 57-04028;

6. Summary judgment is **PARTIALLY GRANTED** in favor of Joyce as to claim numbers 57-10588, 57-10486, 57-10487, 57-10587, 57-10598, and 57-10770; and

7. Summary judgment is **DENIED** in subcase number 57-04008.

IT IS SO ORDERED.

DATED March 25, 1997

_____

FRITZ X. HAEMMERLE
Special Master, Reporting Area 2
Snake River Basin Adjudication

## CERTIFICATE OF MAILING

I certify that a true and correct copy **ORDER ON MOTION TO ALTER OR AMEND; ORDER ON SUMMARY JUDGMENT; AND ORDER ON MOTION TO WITHDRAW ADMISSIONS** was mailed on March 25, 1997, with sufficient first-class postage to the following:

Chief, Natural Resources Division
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Murphy, Idaho 83650

Jay Hulet
HC 79 Box 2020
Murphy, Idaho 83650

_____
Deputy Clerk

## EXHIBIT A

| | JOYCE CLAIMS OBJECTED TO BY BLM | | BLM CLAIMS OBJECTED TO BY JOYCE |
|---|---|---|---|
| | 57-04028 | | 57-11124 |
| a | 57-10486 | c | 57-11125 |
| a | 57-10487 | c | 57-11126 |
| b | 57-10587 | c | 57-11127 |
| | 57-1-588 | | 57-11128 |
| b | 57-10598 | | 57-11129 |
| b | 57-10770 | | 57-11130 |
| | | c | 57-11131 |
| | | | 57-11132 |
| | | | 57-11133 |
| | | | 57-11134 |
| | | | 57-11334 |
| | | c | 57-11341 |
| | | | 57-11342 |
| | | | 57-11343 |
| | | c | 57-11344 |
| | | | 57-11345 |
| | | | 57-11346 |

NOTE: All the Joyce claims enumerated above involve legal descriptions on private land as well as public domain.

57-10586 This is a Joyce claim that IDWR disallowed entirely in favor of BLM claims 57-11134 and 57-11179. Joyce objected to the disallowance of this claim.

a Jay Hulet also objected to these Joyce claims.

b Joyce also objected to its own claim to reclaim portions of its filing that IDWR disallowed in favor of overlapping portions of BLM claims.

c BLM also objected to its own claim to address errors in the Director's Report recommendation.