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Idaho Instream Stock Watering Rights on Federal Land

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CASE NOTE

IDAHO INSTREAM STOCK WATERING RIGHTS ON FEDERAL LAND

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I. INTRODUCTION

Raising cattle in the parched, water-deprived West requires an enormous amount of land. Although the Homestead Act and the Stock-Raising Homestead Act authorized homesteads on federal land of up to 640 acres, this was still not sufficient land to run a successful livestock operation. Therefore, pursuant to the 1934 Taylor Grazing Act ("Act"),¹ ranchers also began grazing on nearby federal land to adequately feed and water their cattle. Although federal law permitted ranchers to use the rangeland, state law recognized watering rights

1. Taylor Grazing Act, 43 U.S.C. § 315 (2000).

within that land. Prior to 2007, Idaho recognized instream stock watering rights on federal land. However, the state lacked a definitive opinion on elements for obtaining those rights, whether those rights automatically passed appurtenant to the patented ranch land, how the Act affected the priority date of such rights, and how the United States could establish its own stock watering rights on federal land. In February 2007, the Supreme Court of Idaho addressed these issues in companion cases *Joyce Livestock Co. v. United States*² and *LU Ranching Co. v. United States*.³

II. FACTS AND PROCEDURE

A. *LU RANCHING CO. V. UNITED STATES*

LU Ranching Company (“LU”) ran a cattle operation in Owyhee County, Idaho and purchased approximately 5,000 acres of land in 1976. Through the purchase and pursuant to the Act, LU acquired grazing rights on three allotments.

LU claimed a May 20, 1872 priority date for instream stock watering rights on federal land within the allotments. The United States objected. By reviewing patents and affidavits, a special master determined the priority date of all LU’s water rights to be June 10, 1876, the date when LU’s earliest predecessors began using federal land and the water located on that land. LU and the United States both requested a review by the District Court of the Fifth Judicial District of the State of Idaho. The district court held that private parties could appropriate water on federal land before and after the adoption of the 1934 Act; an instream stock watering right required an intent to appropriate and an application to a beneficial use, but did not require a physical diversion; instream stock watering rights on federal land were appurtenant to a livestock owner’s ranch property; and such appurtenant rights would pass in a conveyance only if it were the grantor’s intent.

The district court held that the special master should have analyzed each claimed water right separately. It reviewed the facts of each grazing allotment and determined priority dates ranging from 1937 to 1950, dates that were all subsequent to the Act. LU appealed and the United States cross appealed.

B. *JOYCE LIVESTOCK CO. V. UNITED STATES*

Joyce Livestock Company (“Joyce”) is another cattle operation located in Owyhee County, Idaho, owning approximately 10,000 acres of land. Relying on the earliest patents in its chain of title, Joyce claimed

2. *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Idaho 2007).

3. *LU Ranching Co. v. United States*, 156 P.3d 590 (Idaho 2007).

an 1898 priority date for its instream stock watering rights on nearby federal land. The United States claimed overlapping stock watering rights on the same stream but with a priority date of 1934, the date of the Act.

A special master recommended denying Joyce's claimed water rights and recommended granting the United States' claimed water rights. The special master based his decisions on a showing of intent. He claimed Joyce's predecessors did not intend to appropriate because they did not attempt to exclude other ranchers from using the same water source. Alternatively, he reasoned the United States demonstrated an intent to appropriate water, diverted water, and applied it to a beneficial use by making available and managing the rangeland. Therefore, he reasoned, the United States established a priority date that coincided with the date of the Act, June 28, 1934.

Contrary to the special master's suggestions, the district court recognized Joyce's water rights but not the United States' rights. The district court held that Joyce's act of livestock watering demonstrated an intent to appropriate. The district court added that because the predecessors' applications did not suggest any beliefs in previously acquired water rights, the predecessors could not have established water rights prior to the Act. Accordingly, the court recognized stock watering rights, but with a date of April 26, 1935, the date when one of the predecessors filed his grazing permit application. The district court refused to recognize the United States' watering rights because the federal government could show no evidence that it grazed its own cattle on its own land. Under Idaho law, a lessee who obtained a water right owned that right, unless he was acting as the lessor's agent. Because the United States could not show any of the predecessors were acting as its agents, the district court refused to recognize any of the government's claimed water rights. Joyce and the United States both appealed.

III. ISSUES

In *LU*, the Supreme Court of Idaho addressed whether the district court erred in determining the priority dates of *LU*'s stock watering rights or in holding that instream stock watering rights on federal land were appurtenant to private property. In *Joyce*, the same court addressed whether the district court erred in holding that Joyce obtained a stock watering right on federal land, in determining the priority dates of Joyce's stock watering rights, or in denying the United States' claim of stock watering rights. The *Joyce* court thoroughly analyzed all issues between both cases. The court broke down the issues into the following three broad categories: 1) acquiring stock watering rights on federal land; 2) factors that affect priority dates of stock watering rights; and 3) the United States' claim of stock watering rights on federal land.

IV. DISCUSSION

A. ACQUIRING STOCK WATERING RIGHTS ON FEDERAL LAND

The *Joyce* court first explained that state law establishes instream stock watering rights on federal land. It next differentiated between Idaho's statutory and constitutional methods of acquiring water rights. Applying the law to the facts, the court found that Joyce's predecessors acquired instream stock watering rights through the constitutional method, and also found that those rights passed appurtenant to the patented ranch deed all the way up to Joyce.

1. Obtaining a General Water Right on Federal Land

The court discussed a private appropriator's ability to establish a non-navigable water right on federal land. This right stems from the Desert Land Acts of 1877,⁴ which severed public lands from the water located on those lands.⁵ While the land remained in the federal government's control, the water became part of the public domain.⁶ A private appropriator may establish rights in the public domain water, but must follow state law to establish those rights.⁷

The court also rejected the United States' argument that possessing a water right on federal land excluded others from the land or from water sources on that land. This was because a water right did not grant exclusive use or ownership of that water.⁸

4. Desert Lands Act, 43 U.S.C. §§ 321-323, 325, 327-329 (2000).

5. *Ickes v. Fox*, 300 U.S. 82, 95 (1937).

6. *Id.* See also Desert Lands Acts, 43 U.S.C. § 321 ("[T]he 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.").

7. See, e.g., *Ickes*, 300 U.S. at 95 ("Acquisition of the government title to a parcel of land was not to carry with it a water right; but all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states.") (citing *Cal. Or. Power Co. v. Cement Co.*, 295 U.S. 142, 162 (1935)); *Keiler v. McDonald*, 218 P. 365, 366 (Idaho 1923) ("The predecessors in interest of respondents lawfully initiated a valid right to the water of this spring, which was then upon unpatented government land . . . This constitutes a valid appropriation under the laws of this state.") (citations omitted); *Le Quime v. Chambers*, 98 P. 415, 417 (Idaho 1908) ("[T]he appellants' water right had attached in conformity with the state law and the act of Congress prior to the filing of respondent's homestead entry, and that respondent consequently acquired his right in and to the land from the United States subject to the prior right of way and water location of appellants.").

8. *Idaho Conservation League, Inc. v. State*, 911 P.2d 748, 749-50 (Idaho 1995) (stating proprietary rights to use water are held subject to the public trust); *Graham v. Leek*, 144 P.2d 475, 480-81 (Idaho 1943) (holding two or more parties may obtain a water right from the same source).

2. Idaho's Constitutional Requirements for Instream Stock Watering Rights

After establishing that state law controls water rights on federal land, the *Joyce* court explained Idaho's requirements for an instream stock watering right. The court held that under Idaho's constitutional method of appropriation, an appropriator must only put water to a beneficial use to acquire an instream stock watering right. Neither intending to beneficially use nor diverting water is required. The court found that Joyce's predecessors did put water to a beneficial use and therefore obtained a valid instream stock watering right.

The *Joyce* court explained that until 1971 an appropriator could divert through either the constitutional or the statutory method.⁹ This option disappeared in 1971 with the amendment of Idaho Code Annotated Sections 42-103 and 42-201.¹⁰ Under the amended statutes, any new appropriator had to comply with the statute's license and permit requirements. However, Idaho continued to recognize older appropriations established through the constitutional method.¹¹ The court further explained the constitutional method was not limited to appropriations made after the existence of the state constitution.¹² This is because the constitution did not create a new set of requirements. Rather, it merely reflected "prevailing customs and rules"¹³ such as the prior appropriation method. Therefore, an appropriator could have utilized the constitutional method prior to the constitution's enactment.¹⁴

The court next clarified Idaho's constitutional requirements for instream stock watering rights. The analysis began with Article XV, Section 3 of the Idaho Constitution, the provision authorizing prior appropriation.¹⁵ This provision acted only as a general grant of authority

9. See *Freemont-Madison Irrigation Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 926 P.2d 1301, 1303 (Idaho 1996) ("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.").

10. See IDAHO CODE ANN. §§ 42-103, 42-201 (2007).

11. *R.T. Nahas Co. v. Hulet*, 752 P.2d 625, 628-29 (Idaho Ct. App. 1988) (stating that since 1971, the permit method is the exclusive method to acquire water rights, but use of the constitutional method, prior to that time, is still valid).

12. Idaho ratified its constitution in 1889 and approved it in 1890. *Joyce*, 156 P.3d at 509.

13. *Sarret v. Hunter*, 185 P. 1072, 1075 (Idaho 1919).

14. Many Idaho cases upheld water priorities that predated the state constitution. See, e.g., *Hillcrest Irrigation Dist. v. Nampa & Meridian Irrigation Dist.*, 66 P.2d 115 (Idaho 1937); *Branstetter v. Williams*, 57 P. 433 (Idaho 1899); *Drake v. Earhart*, 23 P. 541 (Idaho 1890).

15. This section states that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes."

and did not enumerate any specific procedures for appropriation,¹⁶ but Idaho common law shaped the specific elements. Idaho courts held that the constitutional method required only two elements for a general water right: a diversion and an application of water to beneficial use.¹⁷ Even more relevant, the state courts held that the constitutional method required only one element for instream stock watering rights: the application of water to a beneficial use.¹⁸ Fortunately for cattle grazers, Idaho recognized stock watering as one such beneficial use.¹⁹ Idaho's single element requirement meant that Joyce's predecessors only had to water "their livestock in the springs, creeks, and rivers on the range they used for forage"²⁰ to establish an instream stock watering right. The court found the predecessors did undertake these actions and therefore obtained instream stock watering rights on federal land.

To strengthen its position that instream stock watering required only one element, the court scrutinized and dismissed the district court's reasoning behind an additional intent element. The court stated that the lower court was not clear about what kind of intent element it required, stated that the lower court misread a previous Idaho Supreme Court case, and offered policy reasons for not requiring an intent element.

The court first pointed out the lack of clarity in the lower court's intent requirement. The intent could have been an intent to obtain a recognized water right, or it could have been an intent to apply water to a beneficial use.²¹ However, the court held the distinction to be immaterial because Idaho's constitutional method did not require any type of intent.

The lower court's finding of an intent element developed from misreading a previous Idaho Supreme Court case, *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*²² In *Hidden Springs*, the state supreme court quoted American Jurisprudence Second, saying generally a valid appropriation required a "bona fide intent to apply it to some beneficial use."²³ However, the *Hidden Springs* court also quoted the more specific Idaho source *Sarret v. Hunter*, which held "[t]he test of a valid appropriation of water is its diversion from the natural source

16. *State v. United States*, 996 P.2d 806, 811 (Idaho 2000).

17. *Id.*; *Fremont-Madison Irrigation Dist. & Mitigation Group*, 926 P.2d at 1303; *Cantlin v. Carter*, 397 P.2d 761, 765 (Idaho 1964); *Morgan v. Udy*, 79 P.2d 295, 299 (Idaho 1938); *Furey v. Taylor*, 127 P. 676, 678 (Idaho 1912).

18. *State*, 996 P.2d at 811.

19. *Stevensen v. Steele*, 453 P.2d 819, 826 (Idaho 1969).

20. *Joyce*, 156 P.3d at 509.

21. *Id.* at 510.

22. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 619 P.2d 1130 (Idaho 1980).

23. *Id.* at 1132-33 (quoting AM. JUR. 2D *Waters* § 321 (1975)).

and its application to a beneficial use.”²⁴ The American Jurisprudence reference merely stated the general approach to appropriation while the *Sarret* reference clarified Idaho’s differing standard. The lower court erroneously interpreted the American Jurisprudence reference as establishing an additional intent element.

The court added that an intent element did serve a purpose in some Idaho appropriations, just not in the constitutional method. Unlike the constitutional method, the statutory or permit method of appropriation required an intent to apply water to a beneficial use.²⁵ More specifically, the applicant had to first apply to the state engineer for a permit.²⁶ The state engineer would then consider, among other things, whether the applicant “contemplate[d] the application of water to a beneficial use.”²⁷ After the applicant received a permit, he then had to “timely complete the diversion and apply the water to a beneficial use.”²⁸ The applicant would then go back to the state engineer to prove the beneficial use intended by the diversion. After meeting this burden, the state engineer would issue a license, with the priority date relating back to the permit issue date.²⁹ The court described the statutory method of appropriation only to distinguish it from the constitutional method. Because Joyce’s predecessors appropriated through the constitutional method, none of the statutory requirements applied and they only needed to have applied water to a beneficial use.

After pointing out the differences between the constitutional and statutory methods of appropriation, the court discussed some policy reasons against an intent element. It held that no separate intent element should be required because “[y]ou could certainly infer that a person who diverts water and applies it to a beneficial purpose intended to do so [T]he intent is shown by the person’s action.”³⁰ However, this statement may open the door for argument. The court offers no support for its claim and makes a big assumption that a rancher always intends to apply water to a beneficial use.

In fact, the United States made a similar argument, pointing out that without a mental element, “a livestock grazer could appropriate water without actually being aware of the fact.”³¹ This argument suggests ranchers could obtain a windfall benefit when their cattle stumble upon an unknown water source. The court dismissed the argument,

24. *Sarret v. Hunter*, 185 P. 1072, 1074 (Idaho 1919).

25. *Id.* at 1074 (“[W]hen one makes application for a permit to divert and appropriate water, the query is . . . upon what lands he intends to apply it, and to what use does he expect to put it when so applied.”).

26. *Joyce*, 156 P.3d at 511.

27. *Id.* (quoting REV. CODES OF IDAHO § 3254 (1908)).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 512.

stating an intent element would require the following: 1) evidence showing the rancher knew of water sources and that his cattle would be using those sources; and 2) evidence showing the rancher knew he could obtain instream stock watering right from those sources.³² The court explained that common sense dictated that the first element would always be true. This is because “[i]t is inconceivable that a rancher would either homestead or purchase land and invest hundreds of head of livestock without having made any investigation as to whether there was sufficient water available for the livestock to survive.”³³ To the second element, the court explained that Idaho never required water appropriators to be “lawyers or seers.”³⁴ Because the constitutional method of appropriation followed local custom, a rancher could have conceivably appropriated water prior to the existence of any water laws.

3. The Predecessors’ Instream Stock Watering Rights on Federal Land Passed Appurtenant to Patented Ranch Deeds

The court explained the predecessors’ instream stock watering rights on non-connected federal land were appurtenant to the patented ranch properties, and the rights passed with the properties even though they may not have been mentioned in the deed. The court added that the rights would not automatically pass with the property if the parties expressly reserved them or clearly intended to not include them in the conveyance. This was a significant issue in the case, as it was a matter of first impression for Idaho. Because Idaho lacked previous decisions on this particular matter, the court looked to easement law for guidance.

The court began by dismissing the United States’ contention that “[a]n instream stock watering right appropriated on a public grazing allotment” required a physical connection to base property.³⁵ The court explained that appurtenance has never hinged upon a physical relationship. *Nelson v. Johnson*³⁶ concerned an easement around a spring. Both the easement and spring were located on a piece of land not physically connected to the rancher’s homeland. Nonetheless, the *Nelson* court found the easement to be appurtenant to the homeland. It supported its decision by stating the easement was “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

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 513.

36. *Nelson v. Johnson*, 679 P.2d 662 (Idaho 1984).

weight of authority holds that the easement should be presumed appurtenant."³⁷

Citing *Bothwell v. Keefer*,³⁸ the court next held that an appurtenant water right passed with land, despite not being mentioned in the deed.³⁹ The *Bothwell* court decided the water issue after consulting easement law. The Idaho Supreme Court supported the analogy to easements because "water rights and easements were sufficiently similar to have the relevant law applicable to appurtenant easements apply to appurtenant water rights."⁴⁰

Joyce adopted two rules from *Bothwell*. First, it decided that water rights passed appurtenant despite not being mentioned in the deed. Second, it decided that water law may look to easement law for guidance. Based on the second rule the court held that, similar to the easements in *Nelson*, *Joyce* predecessor's stock watering rights on separate land were "beneficial and useful adjuncts to their cattle ranches and would be of little use apart from the operations of their ranches."⁴¹ The court combined the rulings from *Bothwell* and *Nelson*, establishing that stock watering rights on federal land without any physical relationship to the ranch property will pass as appurtenances despite not being mentioned in the deed.

The court further clarified the attributes of an instream stock watering right, rejecting the district court's holding that an appurtenant water right passed with property only if that were the grantor's intent. Conversely, the court held "[u]nless 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.'"⁴² Because nothing in the record suggested *Joyce*'s predecessors intended to reserve water rights, the predecessors conveyed ranch land along with the appurtenant water rights.

Although the United States' argued the statute of frauds required water rights to be expressly mentioned in the deed, the court quickly rejected this claim too. The court explained that a separate writing or express mention of the appurtenant water rights would be required only if the parties attempted to convey water rights separate from the land. Because *Joyce*'s predecessors conveyed the land and water rights together, the statute of frauds had no effect on the conveyance.

37. *Id.* at 664-65.

38. *Bothwell v. Keefer*, 27 P.2d 65, 66-67 (Idaho 1933).

39. *Joyce*, 156 P.3d at 514. The *Bothwell* court addressed an appurtenant water right in general and not an appurtenant water right on un-connected federal land.

40. *Id.*

41. *Id.*

42. *Id.* at 515 (citing *Silverstein v. Carlson*, 797 P.2d 856 (Idaho 1990); *Bothwell*, 27 P.2d 65).

B. FACTORS THAT AFFECT PRIORITY DATES OF STOCK WATERING RIGHTS ON FEDERAL LAND

The district court in *LU* and *Joyce* determined priority dates based on when the predecessors applied for Taylor Grazing Act land. However, this court found the district court erred in two main areas. One error concerned the effect of not listing water rights on the application, and the other concerned the effect of Class I grazing rights.

1. Taylor Grazing Act Applicants are not Required to List Water Rights on the Application

The court first clarified that applicants did not need to identify any water rights on the application. This is because the federal government granted grazing permits, not water rights. State law, not federal, determined water rights.

The district court also incorrectly interpreted the question on the application that asked, "Do you own or control any source of water supply needed or used for livestock purposes? Describe it?" Unlike the district court's characterization, this question did not ask about water rights on federal land. Instead, it asked about water the applicants owned or controlled for livestock purposes. It could not have been about water rights because such rights do not confer any ownership of or control over that water.⁴³ Further, because the question was not about water rights, the failure to list any such rights could not constitute abandonment. Abandonment requires "both the intent to abandon and the actual surrender or relinquishment of the water rights."⁴⁴ Nothing on the application, including the questions about ownership and control, suggested that failure to list water rights could be an intent to abandon.⁴⁵

2. Class I Grazing Rights Affect Priority Dates

The court also faulted the district court for not considering a predecessor's Class I grazing rights. The government issued Class I permits only to stock owners who owned base property "and who had grazed the public range during the five years just prior to the Taylor Act's enactment."⁴⁶ Because one of *Joyce*'s predecessors possessed a Class I permit, the district court should have recognized at least one priority date that predated the Act by at least five years.

43. *Hutchison v. Watson Slough Ditch Co.*, 101 P. 1059, 1063 (Idaho 1909) (stating that a right to divert is not a right to exclusively own).

44. *Joyce*, 156 P.3d at 516 (citing *Sears v. Berryman*, 623 P.2d 455 (Idaho 1981)).

45. *Id.*

46. *Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000).

The court agreed with the district court's decision to determine priority dates by looking at the predecessors separately. However, the court disagreed with the lower court's method of reviewing those facts. It vacated the lower court's determination of priority dates, and remanded for redetermination consistent with its opinion.

C. THE UNITED STATES' CLAIM OF INSTREAM STOCK WATERING RIGHTS ON FEDERAL LAND

The United States advanced a few theories of why the lower court erred by rejecting its claim of water rights. The court rejected all of the arguments and agreed with the lower court's decision.

The United States claimed instream stock watering rights "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."⁴⁷ The court recognized that the United States permitted ranchers, through implied license or express permission, to graze livestock on public lands. However, this permission was not sufficient to establish water rights. The United States could have established water rights in this scenario only if the ranchers were acting as agents of the federal government.⁴⁸ Because none of the ranchers were agents of the United States, the federal government had no claim to their water rights.

The court also rejected the United States' argument that it acquired water rights under Idaho Code Annotated section 42-501, which stated that the BLM "may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain." Although this statute was specific to the permit method, the United States claimed it should apply to the constitutional method as well. The court reiterated that the constitutional and permit methods were separate systems of appropriation, and the constitutional method for instream stock watering required that the appropriator actually water stock.

In addition to asserting the two claims above, the United States also asserted that Idaho water law conflicted with the Act. The federal government did not mention any specific conflicting provisions, but stated Idaho water law violated the purposes of the Act. The government claimed that permitting private water rights on federal land would monopolize the federal land and prevent others from grazing in the same area. The court responded by pointing out the government's misunderstanding of water law. The court clarified that a water right

47. *Joyce*, 156 P.3d at 518.

48. *Id.* at 519 ("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." (citing *First Sec. Bank of Blackfoot v. State*, 291 P. 1064 (Idaho 1930))).

does not confer any possessory interest; it does not grant ownership nor does it grant the right to trespass on another's land to access water.⁴⁹

V. CONCLUSION

The *Joyce* court clarified many Idaho water law issues including the elements of a constitutional instream stock watering right, whether an appurtenant watering right on federal land automatically passes with a ranch conveyance, which factors affect priority dates, and whether the United States may establish stock watering rights on federal land. However, the court failed to fully explain the policy behind not requiring an intent element under the constitutional method. Subsequent decisions may further address the United States' argument of windfall benefits to unknowing constitutional method appropriators. They may also clarify why, if ranchers always intended to apply water to a beneficial use, the state legislature required an intent element under the statutory permit method.

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49. *Id.* at 520 (citing Idaho Conservation League, 911 P.2d 748 (Idaho 1995); Branson v. Miracle, 687 P.2d 1348 (Idaho 1984)).