February 9, 2007

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IN THE SUPREME COURT OF THE STATE OF IDAHO

2007 Opinion No. 23

IN RE: SRBA CASE NO. 39576, (SUBCASE NOS. 55-10135, 55-11061, 55-11385 AND 55-12452).	)	
	)	**Docket Nos. 32278, 32279, & 32846**
JOYCE LIVESTOCK COMPANY,	)	
Appellant-Respondent,	)	
v.	)	
UNITED STATES OF AMERICA,	)	
Respondent-Appellant.	)	

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

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

United States Department of Justice for the United States of America. Ellen J. Durkee argued.

In an opinion released today, the Idaho Supreme Court: 1) Affirmed the district court's holding that appellant Joyce Livestock Company (Joyce Livestock) has instream water rights on federal rangeland for watering livestock; 2) Vacated the district court's determination of the priority of the water right and remanded for a redetermination of the priority dates of such rights; 3) Upheld the district court's denial of the water rights claimed by the United States based upon appropriations by those it permitted to use the rangeland after enactment of the Taylor Grazing Act in 1934; and, 4) Upheld the district court's denial of Joyce Livestock Company's request for attorney fees.

Joyce Livestock is a cattle operation located in Owyhee County, Idaho. It owns approximately 10,000 acres of land that is an accumulation of twenty-nine different homesteads and small ranches. The earliest patents in the chain of title of the properties owned by Joyce Livestock were issued in 1898. It filed a claim for instream stockwater rights in Jordan Creek with a priority date of 1898. The United States filed overlapping claims for instream stockwatering with a priority date of 1934, the year of adoption of the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.*

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

The district court reviewed the special master's recommendations. It held that the special master erred in holding that Joyce Livestock's predecessors lacked the intent required to obtain a water right. The district court ruled that the necessary intent could be inferred from the act of watering livestock. The district court determined, however, that Joyce Livestock's predecessors could not have obtained water rights on federal land unless their applications for grazing permits filed under the Taylor Grazing Act showed that they understood or believed they had acquired such water rights. Because such evidence was lacking from the grazing permit applications, the district court held that the earliest priority date Joyce Livestock could establish for its water rights was April 26, 1935, the date on which one of the predecessors filed an application for a grazing permit.

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

The district court entered a judgment awarding Joyce Livestock a water right with a priority date of April 26, 1935, and denying the claims of the United States. It certified the judgment as final pursuant to Rule 54(b) of the Idaho Rules of Civil Procedure. The district court also denied Joyce Livestock's request for an award of attorney fees against the United States, holding that it was not entitled to an award under Idaho Code § 12-121 because the United States did not act frivolously, unreasonably, or without foundation in asserting its water rights claim and opposing the claim of Joyce Livestock. It likewise denied an award pursuant to 28 U.S.C. 2412(d) because it found the position of the United States substantially justified. Both Joyce Livestock and the United States appealed.

In the opinion released today, the Idaho Supreme Court upheld the district court's determination that Joyce Livestock had acquired a water right on federal land for watering stock for the following reasons: 1) An appropriator can obtain a water right in nonnavigable waters

located on federal land; 2) Under the constitutional method, an appropriator could obtain a water right for stock watering without diverting the water from the water source; 3) Joyce Livestock's predecessors obtained water rights on federal land for stock watering simply by applying the water to a beneficial use through watering their livestock in the springs, creeks, and rivers on the range they used for forage; 4) The water rights that ranchers obtained by watering their livestock on federal land were appurtenant to their patented properties; 5) A water right appurtenant to real property is conveyed with the real property unless it is expressly reserved or the parties clearly intended that the conveyance not include the water right.

Second, the Idaho Supreme Court held the district court erred in its analysis regarding priority dates given to Joyce Livestock and remanded the case for a redetermination of priority in a manner consistent with the opinion. Specifically the Court held that the priority dates obtained by Joyce Livestock's predecessors must be based upon their application of the water to a beneficial use by grazing livestock where they would have access to the water sources at issue. As such, the Court held the district court erred by: 1) Refusing to recognize instream water rights on federal rangeland unless subsequent applications for grazing permits identified those water rights; 2) Holding that the failure to list a water right in the application for a grazing permit constituted abandonment or non-use of the omitted water right; 3) Failing to give consideration to the fact that a predecessor was issued a grazing right permit that demonstrates an earlier use.

The Idaho Supreme Court next affirmed the district court's denial of attorney fees as requested by Joyce Livestock under both Idaho and federal law. With regard to the former, the Court held there was least one legitimate issue of law presented in this case and therefore the district court did not err in attorney fees under Idaho Code § 12-121. With regard to the attorney fees requested under federal law, the Court held that 28 U.S.C. § 2412(d) does not authorize state courts to award attorney fees against the United States. The Court also held that attorney fees were not warranted on appeal for the same reasons.

Finally, the Idaho Supreme Court considered the instream water rights for stock watering claimed by the United States based upon its ownership and control of the public lands coupled with the Bureau of Land Management's comprehensive management of public lands under the Taylor Grazing Act. The district court held that such conduct did not constitute application of the water to a beneficial use under the constitutional method of appropriation, and denied the claimed water rights. The Idaho Supreme Court agreed holding that because the United States did not actually apply the water to a beneficial use the district court did not err in denying its claimed water rights.