

Water Review

A Perspective On Western Water Issues Prepared By The Family Farm Alliance And Its Members

IDAHO-OREGON

Snake River Ranchers Will Not Be Rolled

Idaho Supreme Court Supports Ranchers' Water Rights Claims;
Petition Filed With U.S Supreme Court For Attorneys Fees Review

OVERVIEW

An Idaho Supreme Court decision earlier this year upheld a lower court ruling that Joyce Livestock Company (IDAHO) and LU Ranching Company (OREGON) have instream water rights on federal rangeland for watering livestock. These two ranching operations are linked through companion litigation aimed at the United States government in the Snake River Basin Adjudication, a massive water rights dispute.

Last February, the court ruled the ranchers held the priority right to the water, and that there was no evidence that the federal Bureau of Land Management (BLM) had appropriated any water by grazing livestock. This is a huge win for the two ranching operations, and also for other agricultural water rights holders throughout the West.

THE VICTORY was tarnished somewhat because the court also ruled that the ranchers should be denied attorneys fees.

Joyce Livestock and LU Ranching are gearing



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Paul Nettleton of Joyce Livestock Company.

up for an appeal to this ruling. The ranchers petitioned the United States Supreme Court for a Writ of Certiorari arguing that the federal Equal Access to Justice Act obligates state courts to award attorneys fees to prevailing parties such as Joyce Livestock and LU Ranching when private parties prevail in litigation against the United States.

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Background: Massive Idaho Water Rights Dispute

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JOYCE LIVESTOCK

Paul Nettleton, managing partner of Joyce Livestock, represents a ranching family caught up in a massive water rights dispute in the Snake River Basin in Idaho.

Nettleton's operation is a cattle operation located in Owyhee County (IDAHO). The ranch incorporates approximately 10,000 acres of land – a conglomeration of 29 different homesteads and small ranches. The earliest patents in the chain of title of the properties were issued in 1898, and a claim for instream stock water rights in Jordan Creek was filed that same year. The United States filed overlapping claims for instream stock watering in 1934.

THE BLM had claimed all the stock water rights within the basin, even though they had been appropriated under state law and used since the late 1800s by Idaho ranchers. However, by simply making the claim, the ranchers in the basin were forced into the expensive process of defending their rights through the adjudication process.

“For more than a decade now we have fought in court for our range stock water rights,” says Nettleton. “At first it was just a bit of legal maneuvering, but it soon became obvious that the government strategy was to make it too expensive for any rancher to continue to fight for their water rights.”

The United States' original claims were based on the date that Joyce Livestock's earliest predecessors placed the water to beneficial use. The United States later amended its claims and asserted a 1934 priority date, coinciding with the date of the enactment of the Taylor Grazing Act.

As part of the Snake River Basin Adjudication (SRBA), a special master recommended that the Joyce Livestock water rights claim be denied because there was no evidence that their predecessors had attempted to exclude other

ranchers from using the predecessors' water source. Without this evidence, the special master concluded that the predecessors lacked the necessary intent to acquire water rights. The special master also recommended that the water right claimed by the U.S. be granted. According to the special master, the actions of the BLM, 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. Joyce Livestock objected.



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“The BLM never owned a cow!” exclaimed Nettleton. “How could they claim beneficial use?”

JOYCE LIVESTOCK TOOK THINGS to the next level, where the district court denied the United States' water rights claim. That court agreed with Nettleton that there was no evidence that the United States had appropriated any water by grazing livestock.

However, the district court also reviewed the special master's recommendations and 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

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Background: Overlapping Claims Filed By U.S.

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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 denied the claims of the United States, but also denied Joyce Livestock's request for an award of attorney fees against the U.S., holding that it was not entitled to an award under Idaho law 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. Both Joyce Livestock and the United States appealed to the Idaho Supreme Court.

LU RANCHING COMPANY

LU Ranching – with headquarters in Jordan Valley (OREGON) – is a corporation that has a cattle operation located in Owyhee County (IDAHO). It owns approximately 5,000 acres of land purchased in 1976. LU Ranching's predecessors had over the years secured these total holdings through acquisition of several smaller ranches. When LU Ranching purchased this property, it also acquired grazing rights located on three allotments pursuant to the Taylor Grazing Act.

When LU Ranching first engaged in the SRBA, Tim Lowry had no idea how relentless the federal government would be towards securing the water rights the ranchers thought were their own. Entering into the SRBA process, LU Ranching claimed instream stock watering rights with a priority date of 1872 in thirteen water sources

located on federal land within those three grazing allotments. Unlike the Joyce case, the United States obtained default decrees against LU Ranching before LU Ranching's claims ever became an issue. The U.S. also took aggressive actions by filing overlapping claims to the stockwater rights and objections to other ranchers' claims in the SRBA.

When time drew near for trials over these competing claims, the court ordered the parties to meet and try to settle the disputes. The U.S. made settlement offers which conceded ownership of the water to the United States. Most ranchers accepted

The Lowry
Family

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the settlement because they feared the financial risk of fighting the unlimited resources of the federal government.

"This fear was not unwarranted," says Lowry. "Those meetings were rather intimidating."

THE MEETINGS WERE HELD in the courthouse in Murphy (IDAHO). According to Lowry, ranchers, not believing they would need an attorney to protect themselves against their own government, would walk into the meetings alone. In contrast, he says, the U.S. had "a fleet" of BLM water rights personnel and Justice Department attorneys present. Lowry says the Justice Department attorneys resorted to what he considered "extortion tactics".

"They very pointedly explained that if I did not accept their settlement, they would contest our claims all the way to the Supreme Court," recalls Lowry. "They said I should consider the fact that it would probably cost us the value of our ranch in attorney fees. They did, and it has."

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In Court: Review And action By Idaho's Supreme Court

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The matter was first heard by a special master, who found that the patents and affidavits filed as proof of homestead by LU Ranching's predecessors were sufficient to establish that they had been using federal land and the water located thereon from the time the original patent holder began living on the land. The special master, therefore, found that LU Ranching was entitled to the 1876 priority date for all of its claimed rights.

Both parties sought review by the district court, which upheld LU Ranching's claim to instream water rights on federal rangeland for watering livestock and determining the related priority dates. The district court also denied LU Ranching's request for an award of attorney fees.

IDAHO SUPREME COURT

LU Ranching Co. v. United States of America and *Joyce Livestock Company v. United States of America* were essentially jointly reviewed by the Idaho Supreme Court.

Last February, the Court issued its landmark decision on both of these cases. In summary, the Court:

- 1) Affirmed the district court's holding that the ranches had 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 re-determination 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.

- 4) Upheld the district court's denial of the ranches' request for attorney fees.

DECISION'S IMPORTANCE

The Idaho Supreme Court by unanimous decision established that water rights belong to the parties that put them to beneficial use, not necessarily to those who controlled the land.

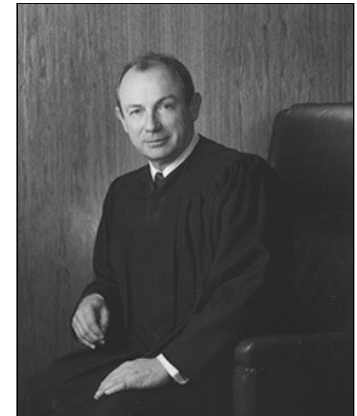
"They awarded us the stockwater rights on our federal range and completely denied all claims by the Bureau of Land Management," said Nettleton. "We won a great victory."

The late Russ Brooks, the Pacific Legal Foundation attorney who helped argue the case for the ranches, wrote eloquently about this case in a guest column he co-authored with Erin Ramsey for the Idaho *Statesmen*, just weeks before his death earlier this year.

"It would be downright unfair to deprive ranchers and other longtime users of water rights that they have relied on for decades," wrote Brooks. "Not just unfair, but also unconstitutional. The BLM was trying to confiscate ranchers' water rights without paying them, flouting the Fifth Amendment's ban on government "takings" of private property."

Brooks noted that, while the Idaho Supreme Court didn't directly address this constitutional

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Idaho State Judiciary website
Gerald F. Schroeder, Chief Justice of the Idaho Supreme Court.

Still At Issue: Attorney's Fees Are Appealed

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issue, its ruling still prevented an “unconstitutional rip-off.”

“A Western sense of right and wrong prevailed,” wrote Brooks, “And for that, the court deserves a tip of the Stetson.”

UNFORTUNATELY to the disappointment of LU Ranching and Joyce Livestock, the Idaho Supreme Court also affirmed the district court’s denial of attorney fees as requested by the ranches under both Idaho and federal law.

“This is wrong on all counts,” says Lowry. “The government must not be allowed to run over private citizens because citizens cannot afford to protect themselves.”

Nettleton worries that, with costs climbing well over \$500,000 and grazing issues still continuing, the battle has been won but the war will be lost.

“Will the Joyce Ranch have to be sold to pay for the fight that benefited all stock owners?” he asks.

NEXT STEPS

After over a decade of litigation with the federal government, the two ranches won the water rights battle in the Idaho Supreme Court.

However, they intend to appeal the Supreme Court’s decision not to award attorney fees in state court, under the Equal Access to Justice Act (EAJA).

“Though this is a huge legal precedent for all public land ranchers, the victory was not complete,” said Nettleton. “The court inexplicably failed to award us attorneys fees.”

The EAJA provides for the award of attorney

fees and other expenses to eligible individuals and small entities that prevail in litigation against the government. Congress enacted the EAJA to “level the playing field” between individuals / small organizations and the government. The EAJA is also designed to deter the United States from instituting litigation against private parties without any basis in the law, and penalizing the United States when it does so.

“We are pursuing this in the hopes that the U.S. Supreme Court will recognize and enforce the intent of the EAJA and give individuals and small organizations like LU Ranching the means to undertake and prosecute valid claims against the government in state court,” said Tim Lowry.

“We hope to receive support from others who value their property rights, who would fight for justice just like we have, if the opportunity presented itself,” adds Nettleton. “The odds are great, but we haven’t been here for 142 years by rolling over and letting folks walk on us when we know we are right.”

Joyce Livestock Company and LU Ranching Company are asking for amicus support in this pursuit. If you would like additional information on what you can do to help, contact McQuaid Bedford & Van Zandt LLP attorneys Elizabeth Ewens or Michael Van Zandt at (530)-756-0200 or (415)-905-0200.

SOURCES

Joyce Livestock Company v. United States of America; LU Ranching Co. v. United States of America; McQuaid, Bedford and Van Zandt, LLP; Range Magazine; Stewards of the Range; Supreme Court of the State of Idaho.