

First in Time, First in Right

David and Goliath, aka Tim Lowry and Paul Nettleton, take on federal intruders to fight for state sovereignty in Idaho.

By Judy Boyle

Ten years after the landmark case *Joyce v. United States*, the 2017 Idaho Legislature unanimously codified the decision. In 2007, the Idaho Supreme Court held five to zero that the federal government cannot hold a stockwater right, thus reaffirming water law throughout the West. Two Owyhee County, Idaho, ranchers, Tim Lowry and Paul Nettleton, were the Davids in battling the United States' Goliath for their long-held vested stockwater rights on Bureau of Land Management lands in Owyhee County. [See "Sweet Victory," *RANGE*, Summer 2007.] With Idaho having 62 percent of its land occupied by the federal government, including 12.5 million acres claimed by the BLM, stockwater rights are definitely a state sovereignty issue.

Lowry's LU Ranch and Nettleton's Joyce Ranch had carefully traced their chains of title of their base property to livestock watering on the then-unappropriated federal lands. Lowry's water rights began in 1872 and Nettleton's in 1878, far predating the existence of the BLM or U.S. Forest Service (FS) or even



Many ranchers in the American West have water rights that precede the formation of federal land-management agencies. It seems simple to most people, but not for the government with its stampeding herd of lawyers twisting every word and pounding square pegs into round holes.
BELOW: Early spring in Owyhee County.

the state of Idaho. Under western water law of prior appropriation—first in time, first in right—the oldest water right is senior and superior to those coming later. In 1934, the Taylor Grazing Act established a grazing preference for each ranch. Those ranchers who had used public land for the previous five years in connection with their “base property” of private land and pre-existing water rights were given priority, meaning that ranchers have, at a minimum, a 1929 stockwater right based on TGA.

The Snake River Basin Adjudication began in 1987, covering two-thirds of Idaho. Through the federal McCarran Act, the federal government was allowed to make claims to Idaho water as the SRBA included an entire basin, not just one stream. U.S. Supreme Court decisions and numerous federal laws have made clear that the state owns the water within its boundary and the federal government must follow state water law. In *U.S. v. New Mexico* (1978) the U.S. Supreme Court specifically held that “any stockwatering rights must be allocated under state law to





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Tim Lowry, left, LU Ranch, and Paul Nettleton of the Joyce Ranch, were told by the state “not to worry, we have your backs.” These ranchers sued the feds to protect their long established water rights and later told Idaho legislators: “Our family hasn’t been here for 152 years by just rolling over when the going got tough. The state was wrong. The law was clear.” BELOW: Typical mixed ownership of private and government land in the West.

individual stock waterers,” i.e., the ranchers who own the livestock.

At every point in time during the development of the West, Congress has deferred to state water law and recognized private parties’ abilities to perfect water rights on the public domain. Idaho water law states that to have a water right, it must be put to beneficial use. The act of ranchers’ livestock drinking the water is the beneficial use. Those without livestock cannot claim beneficial use of water and cannot have a stockwater right. It seems simple, but not for the government with its stampeding herd of lawyers twisting every word and pounding square pegs into round holes.

Ranchers were advised by the Idaho Department of Water Resources (IDWR) and the Idaho attorney general’s office *not* to file stockwater claims as the state would defend their rights. Many ranchers took this advice only to discover too late that the state had caved in to federal pressure. Others like Lowry and Nettleton chose to file their own claims after being warned by an honest local BLM employee that the agency planned to file for all stockwater on its managed lands. The BLM quickly filed thousands of claims over the top of the ranchers’ claims.

When Lowry called IDWR and the attorney general’s office to ask how to file objections to the BLM claims, he was rebuffed. “I was told that the state would handle all objections to federal claims and I should *not* file



**It costs too much
to fight the federal
government.
But somebody
has to do it.**



individual objections. I didn’t take that bad advice and many of us in Owyhee County did file.” Once filed, the case was referred to court and the fight was on.

Lowry testified to state legislators: “The state of Idaho failed to contest the federal stockwater claims and instead conceded that the ranchers were agents of the U.S. through the passage of the Taylor Grazing Act. Idaho

did not request proof that ranchers were agents of the U.S., nor explain why ranchers, with established stockwater rights half a century before the TGA, would lose those rights when TGA explicitly protected all existing rights. Idaho surrendered both Idaho water law and the individual legitimate owners of stockwater rights to the federal government. The U.S. received our stockwater rights by default. Idaho citizens were left on their own and the feds were free to aggressively attack individual ranchers.”

In 1986, before the SRBA began, the Idaho Legislature made the law clear about beneficial use. The Idaho Supreme Court noted that the legislative intent of Idaho

Code 42-114 is to place ownership of stockwater rights with the association or persons owning or operating cattle, not with the land management agency. Minutes of the Idaho House Resource & Conservation Committee of Feb. 17, 1986, state, “This bill will place the beneficial use clearly with the con-

sumption and ownership of the cattle and not with the land management agencies.” The Legislature gave the state plain language to use in defense of ranchers. It was frustrating for legislators to see the state disregard the law and abandon Idaho citizens to the whim of the federal government.

Ranchers learned the extent of federal aggression during court-ordered settlement

meetings in Murphy, Idaho. One by one, ranchers were told by the U.S. Department of Justice (DOJ) attorneys and the BLM that the United States would not back down, that ranchers had no chance of prevailing, that the feds planned to take any case all the way to the Idaho Supreme Court, and anyone who tried to fight would end up bankrupt. Based on these ominous threats, all but Lowry and Nettleton backed down and settled for the BLM to take their stockwater rights. This also discouraged many other ranchers from even filing for their rightful water.

Nettleton told the Legislature: "Soon the battle became very expensive as the feds buried us in paperwork and delays, objecting to every motion and filing, no matter how

"A permittee on a federally administered grazing allotment shall not be considered an agent of the federal government."

small. This just created a fire in my belly to fight for what I knew was right. There could be no compromise when it came to principle. Our family hasn't been here for 152 years by just rolling over when the going got tough. The state was wrong. The law was clear. I was determined to see it to the end...even though DOJ negotiators quietly confided to our

attorneys that we might win, but it would be expensive enough to put us into bankruptcy."

Meanwhile, both Lowry and Nettleton had separate battles to fight with environmentalists who, with the assistance of BLM and U.S. District Judge Lynn Winmill, drastically cut their cattle numbers and time on the range plus a laundry list of grazing restrictions. This appeared to be a full-scale attack to wear down these two determined ranchers but they are not the quitting type. In 1865, Nettleton's great-grandfather, Matt Joyce, began the oldest family ranch in Idaho and was a founding member of the Owyhee Cattlemen's Association, Idaho's oldest. Lowry comes from a long line of cattlemen. His family moved to Idaho in 1966 to purchase the LU Ranch. Both men have served on the OCA board and are among the most respected in the area. They are the definition of "good neighbor" and are always there to help anyone in need. Owyhee ranchers are a tight-knit group offering support, work and funding when neighbors are in need.

Lowry and Nettleton did prevail after 10 years of court battles costing each well over one million dollars in attorney fees. The Idaho Supreme Court doesn't award attorney fees for the winning side, so the feds were off the hook for payment but had lost a major battle in their war to control the West. Yet the feds weren't giving up. When Idaho began the Coeur d'Alene Basin Adjudication, the Forest Service immediately filed stockwater claims, and Gary Spackman, IDWR director, sent the FS a letter asking it to prove beneficial use based on the Joyce decision. The FS replied by withdrawing its claims.

The Idaho Legislature had to wait for the SRBA process to run its long course before action could take place. After three sessions of attempts, the 2017 Legislature had the correct language to assure ranchers in law that their rights would be upheld. Sponsored by Sen. Mark Harris (R-Soda Springs) and Rep. Judy Boyle (R-Midvale), the legislation codified the Idaho Supreme Court decision and added that "a permittee on a federally administered grazing allotment shall not be considered an agent of the federal government." This last measure was to protect ranchers from being forced, through threat of loss of a permit or other means, to become an agent of the feds simply so the government can gain their water rights.

In addition, a second bill passed the 2017 Idaho Legislature, with only one dissenting vote, limiting the cost of filing stockwater claims for ranchers. The state's actions caused

CATTLE DRIVE IN WYOMING IN 1906
COURTESY IDAHO FARM BUREAU FEDERATION



In the National Interest

On April 25, 2017, President Trump issued an executive order "promoting agriculture and rural prosperity in America" and establishing an "Interagency Task Force on Agriculture and Rural Prosperity." USDA Secretary Sonny Perdue is chairman with other cabinet-level officers and various agency heads.

The executive order states: "A reliable, safe, and affordable food, fiber and forestry supply is critical to America's national security, stability, and prosperity. It is in the national interest to promote American agriculture and protect the rural communities where food, fiber, forestry, and many of our renewable fuels are cultivated. It is further in the national interest to ensure that regulatory burdens do not unnecessarily encumber agricultural productions, harm rural communities, constrain economic growth, hamper job creations, or increase the cost of food for Americans and our customers around the world."

The "purpose and function" is to "identify legislative, regulatory, and policy changes

to promote in rural America agriculture, economic development, job growth, infrastructure improvements, technological innovation, energy security, and quality of life, including:

(ix) ensure that water users' private property rights are not encumbered when they attempt to secure permits to operate on public lands; and

(xiii) address hurdles associated with access to resources on public lands for the rural communities that rely on cattle grazing, timber harvests, mining, recreation, and other multiple uses."

Additionally, "(b) the task force shall, in coordination with the deputy assistant to the president for Intergovernmental Affairs, provide state, local, and tribal officials—and farmers, ranchers, foresters, and other rural stakeholders—with an opportunity to suggest to the task force legislative, regulatory, and policy changes."

The task force was directed to submit a report to the president within 180 days of the order—in late October, at press time.—JB

this problem, so ranchers will only pay for the first four claims, similar to how change-of-use claims for irrigation are handled. Idaho ranchers should get their chain of title in order proving the earliest possible water right, map all their stockwater locations, and call IDWR for assistance in filing claims. Two employees have been funded to specifically work on stockwater filings.

However, the federal government has not given up the fight. Immediately upon both bills becoming law, the BLM and FS told permittees that no stockwater improvements or developments will be allowed—unless the ranchers turn over their water rights to the federal government. In addition to blackmailing ranchers, this tactic has been used across the West with ski resorts, cities, and others who need any federal permit.

In June 2017, U.S. Department of Agriculture Secretary Sonny Perdue and U.S. Interior Secretary Ryan Zinke were in Boise meeting with Idaho agriculture leaders. Bryan Searle, Idaho Farm Bureau Federation president, told the secretaries of the threats and blackmail to ranchers by federal employees. Secretary Zinke said, “Get us names and we will put a stop to it.” IFBF recently mailed a file with names and specific instances plus a large binder of similar instances from the Utah Farm Bureau Federation.

The West is watching to see if the new secretaries will get a handle on the long-term bureaucrats of the administrative state, some of whom have been there since President Carter. Bruce Babbitt told a 1993 law conference that ranchers and private property owners “are headed for extinction” and that “water problems of the West are going to be solved by moving water in a regulated manner.” In other words, use the federal bureaucracy to steal private property rights. Will the Trump administration allow Babbitt’s war on the West to continue? ■

Judy Boyle, from Midvale, Idaho, is an Idaho state representative who believes a legislator’s duty is to defend the state and the U.S. Constitutions and to stand between citizens and the government. She learned about private property rights from her rancher grandfather, including western water law. Her grandsons are the seventh generation to raise cattle in America.

Donations to help with attorney costs would be appreciated. Send to: AERF (Agricultural & Environmental Research Foundation), P.O. Box 4848, Pocatello, ID 83205-4848. Note on your check that it’s for the Lowry/Nettleton fund. A tax professional should determine if the gift is tax deductible.