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DEPARTMENT OF
WATER RESOURCES

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

<i>In Re: SRBA</i>	)	
	)	
Case No. 39576	)	Subcase Nos: 67-15263 <i>et al.</i> (Hood)
	)	See Ex. A
	)	
	)	

United States' Post-Trial Brief

INTRODUCTION

Claimants Keith & Karen Hood (“Hoods”) have asserted twenty-seven water right claims on federal land managed by the Bureau of Land Management (“United States” or “BLM”)¹ with a priority date of December 28, 1896. The Hoods have failed to meet their burden of persuasion on all elements of their claims. Instead, the evidence put forward at trial and in testimony by the United States’ expert witness, Mr. Fredric Price, shows that there is no evidence of water use by livestock on any of the claimed sources until 1931. The Court should decree the Hoods’ claims with priority dates of June 28, 1931, April 1, 1943, and April 1, 1975, based on their predecessors’ first authorizations to graze the relevant portions of federal land.

UNITED STATES’ POSITION ON PRIORITY

The Hoods have thus far relied on a single piece of evidence to support their asserted December 28, 1896 priority date: a statement made by a predecessor in a 1935 Taylor Grazing Act (“TGA”) application that his family has “previously used the lands covered by this application . . . for past 40 years.” On remand of *LU Ranching Co. v. United States*, 144 Idaho 89, 94 (2007), the Court found that it could decree a pre-TGA priority date where there was an assertion of prior use in connection with the public domain, and there was a Class I grazing license issued. Mem. Dec. on Rem. and Order of Amended Partial Decrees, Subcase Nos. 55-10288B, *et al.* (Jul. 3, 2008), at 6 (hereon, “*LU II*”).² However, the Court did not find that such statements were conclusive or

¹ “BLM” as used herein refers to BLM or BLM’s predecessors, including the General Land Office, the Grazing Division, and the U.S. Grazing Service.

² The Court has not automatically granted the broad statement proffered in a grazing application. In *LU*’s companion case *Joyce Livestock Co. v. United States*, 144 Idaho 1 (2007), the Idaho Supreme Court noted, that on June 12, 1935, Joyce Bros. Livestock Co. submitted an application for a grazing permit on federal rangeland stating it began using that rangeland in 1866. *Joyce*, 144 Idaho at 14. Yet, of the four subcases consolidated in *Joyce* (55–10135, 55–11061, 55–11385 and 55–12452), three were disallowed, and Joyce was decreed only an April 1, 1925 priority date in 55-10135. See Partial Decree (Feb. 28, 2008).

establish a bright-line rule. Here, across five categories of claims, the Hoods are entitled to three different priority dates.

Category 1: Claims that are within both the 1936 TGA license granted to Charles R. Edwards and the area marked on the plat attached to his July 1935 TGA Application as “lands wished to graze on.” They are associated with a Class I license granted by the BLM and evidence of prior use. The evidence of prior use is that the 1936 license is stamped with “on public domain that has been used in connection with your dependant [sic] commensurate property for a period of three years prior to June 28, 1934.” *See infra* Argument Section II.b. These claims have a priority date of June 28, 1931.

Category 2: Claims that are within the 1936 TGA license area but not within the plat attached to the July 1935 TGA application. While there is no associated assertion of prior use, *see infra* Argument Section II.b, the TGA license on its face indicates use since June 28, 1931. Accordingly, these claims have a priority date of June 28, 1931. Because they are not associated with the purported assertion of prior use raised by the Hoods at trial, even if the Court determines that there is evidence, these claims would not be entitled to an earlier priority date.

Category 3: Claims that are within the 1942 permit expansion area. A 1942 permit expanded the 1936 license area for the 1943 grazing season onward, beginning April 1, 1943. *See infra* Argument Section II.c. These claims have a priority date of April 1, 1943.

Category 4: Claims that are within the plat attached to the July 1935 TGA application but are not within the 1936 license or 1942 permit. These claims have only one of the two *LU II* factors: an assertion of prior use. There is no Class I license associated with the claims. As discussed *infra* in Argument Section II.d, if a claimant’s predecessors did not receive a permit,

any pre-TGA use necessarily ceased, and no water right exists. Accordingly, the first date of authorized use is April 1, 1975, when the Horse Flat Allotment came into existence.

Category 5: Claims that are not within the plat attached to the July 1935 TGA application, the 1936 license, or the 1942 permit. These claims have none of the *LU II* factors, and there is no evidence, even unreliable evidence, of earlier use. *See infra* Argument Section II.d. These claims are entitled to an April 1, 1975 priority date.

U.S. TABLE 1³

Categories	Claims	Priority Date
Category 1: Within July 1935 Plat and Within 1936 License	67-15269 67-15270 67-15273A (Sec. 21) 67-15277A (Sec. 21) 67-15278A (SESE, Sec. 20) 67-15284 67-15285A (Sec. 21) 67-15287 67-15288	June 28, 1931
Category 2: Within 1936 License and Outside 1935 Plat	65-15275 65-15276 67-15277B (Sec. 20) 67-15289A (SESE, Sec. 9)	June 28, 1931
Category 3: Within 1942 Permit	67-15267 67-15289B (SESW, Sec. 9)	April 1, 1943
Category 4: Within 1935 Plat, Outside 1936 License, and Outside 1942 Permit	67-15272 67-15274A (Sec. 20) 67-15278B (Sec. 20) 67-15283A (Sec. 29) 67-15285B (NWNW, Sec. 21) 67-15286	April 1, 1975
Category 5: Outside 1935 Plat, Outside 1936 License, and Outside 1942 Permit	67-15263 67-15264 67-15265 67-165266 67-15268 67-15271 67-15273B (Sec. 17, 20) 67-15274B (Sec. 17) 67-15279 67-15280 67-15281 67-15282 67-15283B (Sec. 30)	April 1, 1975

³ There are more than twenty-seven listed in this table because some claimed stream sources reach across different areas. Claim splits are indicated by (Sec. X).

STANDARD OF REVIEW

The Hoods bear the burden of persuasion on every element of each of their twenty-seven claims. *See* I.C. 42-1411(5). While the Hoods originally benefitted from the prima facie status of the IDWR Director's Report, at trial, IDWR expressly disavowed its own Director's Reports. Trial Tr. 27:19–28:6 (Oct. 2–3, 2024). Claims themselves hold no evidentiary weight, and accordingly, the Hoods bear “both the burden of production as well as the burden of proof as to each element of a claimed water right.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742 (1997).

The standard for proving a stockwater claim on federal land is clearly described in *Joyce Livestock Co. v. United States* (“*Joyce*”), 144 Idaho 1 (2007). These claims are “constitutional” claims, and accordingly, the Hoods’ predecessors “could obtain water rights simply by watering their livestock in the springs, creeks, and rivers on the range they used for forage.” *Joyce*, 144 Idaho at 8. A claimant’s priority date for such a stockwater claim on federal land is the first date that they can demonstrate their predecessor(s)-in-interest watered livestock on the same source, which the *Joyce* court held required showing “application of the water to a beneficial use by grazing livestock where they would have access to the water sources at issue.” *Id.* at 16. When determining whether the claimant have made the required showing, the Court must carefully examine “where the individual predecessors grazed their livestock when determining whether they had acquired any water rights.” *Id.* The standard is particularized, and “[g]eneral averments that grazing existed historically by the public at large in a general area are insufficient to establish the existence and transfer of water rights.” *LU II* at 5.

Critically, each of the Hoods’ twenty-seven claims—*i.e.*, each individual subcase—is independent. Thus, the Hoods must show through concrete evidence when their predecessors

first began watering livestock on each claimed source, grazing authorization by grazing authorization, not simply the first date their predecessor used water anywhere within their present-day grazing allotment.

BACKGROUND

On June 28, 1934, President Franklin Roosevelt signed the TGA into law. 43 U.S.C. § 315. The TGA seeks to “promote the highest use of the public lands.” *Id.* Its specific goals are to “stop injury” to the lands from “overgrazing and soil deterioration,” to “provide for their use, improvement and development,” and “to stabilize the livestock industry dependent on the public range.” 48 Stat. 1269. The TGA grants the Secretary of the Interior authority to divide the public range-lands into grazing districts, to specify the amount of grazing permitted in each district, to issue leases or permits “to graze livestock,” and to charge “reasonable fees” for use of the land. 43 U.S.C. §§ 315, 315a, 315b.

To manage federal land pursuant to the TGA, the U.S. Department of the Interior issued regulations governing use of the range. The 1936 Rules for Administration of Grazing Districts—in effect for the 1936 grazing season—split applicants into four classes. *See* U.S. Ex. 27. Of relevance here is Class I, which covered “qualified applicants with dependent commensurate property with priority of use.” U.S. Ex. 27 at BLM_2252. “Priority of use” is defined as “such use of the public range before June 28, 1934, as local custom recognized and acknowledge as a proper use of both the public range and the lands or water used therewith.” *Id.* The entire relevant area of Idaho was organized into the Idaho Grazing District No. 1 after the passage of the TGA. Tr. 289:7–289:12.

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ARGUMENT

I. The Hoods Have Not Proven a Priority Date Prior to 1931 for Any of Their Twenty-Seven Claims

The Hoods' twenty-seven water right claims each assert a priority date of December 28, 1896, based on a purported chain of title and use through predecessor owners of their present-day base property in Sections 21, 22, and 28 of Township 15N, Range 3W. In summary judgment briefing, the Hoods relied on a single piece of evidence to support their asserted December 28, 1896 priority date: a statement made by their predecessor Charles R. Edwards ("Charles") in his July 1935 TGA application ("July 1935 Application") that his family has "previously used the lands covered by this application . . . for past 40 years." Joint Ex. 308 at BLM_674.

The statement of use for 40 years is problematic on its face. As an initial matter, it is not a sworn statement—it is not notarized or witnessed. Instead, it is a self-serving application, with no verification of the truth of its contents. It does not align with the Hoods' own claims—the July 1935 Application is dated July 27, 1935, meaning the 40-year statement would indicate a priority date of July 27, 1895, which would be more than a year prior to the priority date asserted by the Hoods, now apparently abandoned for a later priority. Nothing in the evidence before the Court explains why the Hoods chose to assert December 28, 1896, based on the 40-year statement, rather than an 1895 priority date as indicated by simple math. Regardless, the 40-year statement is rebuttable, as sworn evidence from 1906 indicates that David G. Edwards ("David") did not settle on a portion of the present-day base property until October of 1900, *see* U.S. Ex. 16 at BLM_253, and Charles did not settle on a portion of the present-day base property until November of 1904, *see* U.S. Ex. 21 at BLM_187.⁴

⁴ Similarly, the other homesteaders, who the Hoods have not asserted use through, did not settle on their entries until well after 1896. Nielson settled in 1902 (U.S. Ex. 18 at BLM_2230), Braden in 1910 (U.S. Ex. 20 at U.S. POST-TRIAL BRIEF

The first extrinsic evidence of grazing of any kind by David or Charles is a U.S. Forest Service permit dated September 24, 1915, for David to graze six head of horses on the Weiser National Forest. Joint Ex. 325 at BLM_2304. In 1918, a Forest Service Report on Qualifications of New Applicants for Charles noted that “range elsewhere” was not “available for his stock,” and that he was “dependent on Forest Range.” *Id.* at BLM_2305. If Charles had relied on range now managed by BLM, then that range would have been identified to the Forest Service as range elsewhere available to him. It was not.

The first extrinsic evidence that the Hoods’ predecessors grazed on any present-day BLM land comes in the July 1935 Application and a grazing license issued to Charles in 1936, meaning that the earliest priority date supported by the evidence before the Court can be derived from Charles’ TGA license process, which indicated use began in June 1931. Notably, this is only for approximately half of the Hoods’ claims—for the remainder, the first evidence supports priority dates for as late as April 1, 1975.

1. There is no extrinsic evidence that the Hoods’ predecessors were present on any section of the present-day base property prior to 1900.

On December 28, 1896, the entire base property—as well as the entire present-day BLM allotment—was solely owned by the United States. Tr. 257:23–257:25, 258:1–258:6. The United States did not divest itself of federal ownership of the base property until it issued six land patents between 1908 and 1920. Joint Exs. 301–306. The first of the six land patents was issued on May 26, 1908, granting a portion of the base property to David. Joint Ex. 305. However, none of the homestead documents—the comprehensive files maintained by the BLM—reach back to 1896. *See generally* U.S. Exs. 16–21; Tr. 277:19–277:25. Only a single

BLM_2064), Anna Edwards in 1917 (US Ex. 17 at BLM_410), and Franklin Hardy in 1912 (U.S. Ex. 19 at BLM_359).

piece of problematic evidence presented to the Court would support a pre-1900 priority: the statement made by Charles in his 1935 TGA applications that his family had used the lands “covered by this application” for 40 years. Joint Ex. 308–309.⁵

Charles’ unsubstantiated 40-year statements made in 1935 are also belied by sworn evidence from 1906, much closer in time with the settlement history in question. On November 22, 1906, David filed a sworn affidavit with the BLM stating that he “made settlement upon said land on or about October 15, 1900.” U.S. Ex. 16 at BLM_253. While the United States certainly does not concede that David owned or watered livestock in 1900, or that living in an area alone is sufficient to prove water use, David himself swore that he did not live on the land as of 1896. *Id.*; *see also* Ord. Accepting in Part and Denying in Part Special Master’s Report and Recommendation, Subcase No. 36-15452, at 10 (Oct. 10, 1997) (“Claimants are not entitled to the water located on their land simply by virtue of land ownership.”). David’s earlier-in-time sworn statement about his own actions should be given more weight than Charles’ contradictory, unsworn statement about his family’s actions when he was a child submitted nearly thirty years later. This evidence that David did not begin living on the land, let alone grazing livestock on the federal range, undermines the reliability of Charles’ later-in-time statement. This is further underscored by evidence that Charles did not move onto any portion of the base property until 1904, that David did not live permanently on the land until years later, that David did not own the land until 1908, and that there is no evidence that either David or Charles owned cattle until at least 1915. *See, e.g.*, U.S. Ex. 16 at BLM_238–240, BLM_242–244, BLM_256–257; U.S. Ex. 21 at BLM_187, BLM_190; Joint Ex. 325 at BLM_2304–2306.

⁵ The 40-year statement is factually untrue given the fact that Charles did not own all the base property offered until December 14, 1934. Tr. 264:23–264:25, 265:1–265:8. Charles’ use of those parcels as his own base property certainly did not begin until he owned them.

The Hoods have therefore failed to demonstrate that their earliest predecessors were present on any section of the present-day base property prior to 1900, let alone that they were using their land for grazing, or using water on public range from that land, and therefore have failed to meet their burden for a pre-1900 priority date on any of their twenty-seven water right claims.

2. There is no extrinsic evidence that the Hoods' predecessors owned any cattle to water on any land prior to 1918 and, further, no extrinsic evidence that they owned any livestock at all to graze or water prior to 1915.

The United States anticipates that the Hoods' post-trial briefing will argue for a 1900 priority date for all twenty-seven claims based on an affidavit submitted with David's Homestead Act application, which states that he settled on a portion of the base property on or about October 15, 1900. U.S. Ex. 16 at BLM_253; *see* Trial Tr. at 82:24–82:25 (indicating that the Hoods' counsel stated, "1900 makes sense to us based on documents that we didn't have, my clients didn't have either").⁶ However, nothing in David's application or affidavit indicates that he was grazing livestock on that portion of the base property when he settled there. *See generally* U.S. Ex. 16.

Craig Saxton testified on behalf of IDWR at trial that, if he could have issued a new opinion that day, he would recommend a priority date of October 15, 1900, for some of the Hoods' claims, and March 4, 1975, for the remainder of the claims. Trial Tr. 31:12–31:21. He further testified that, alternatively, all the claims would need to maintain the most junior priority date which, in his opinion that day, would be March 4, 1975. *Id.* 31:22–31:25. Mr. Saxton testified that the 40-year statement was the only evidence he had seen that indicated David was grazing cattle on a portion of the base property in 1900, *see id.* 123:24–124:2, however, that he

⁶ The United States produced the relevant documents to the Hoods and their counsel well before summary judgment briefing and trial.

would make the “assumption” that David was grazing cattle in 1900 because he “had to live on the property” to get the land patent he received in 1908, *see id.* 124:3–124:19. *See also id.* 132:13–132:16 (Counsel: “So any time that you see a homesteading land patent, you assume that they grazed cattle at that time.” Mr. Saxton: “I have – yes.”); 134:15–134:18 (Counsel: “So it seems like weighing into your decision may be an assumption that someone who starts a homestead on a land patent for homesteading is grazing cattle?” Mr. Saxton: “I think that’s fair.”).

Mr. Saxton’s assumptions, while they hold no weight in determining the Hoods’ priority dates for their twenty-seven claims, are particularly concerning because they have no basis in fact or law: the Homestead Act of 1862, under which the patents to David and Charles were issued, did not impose any requirements for grazing cattle on applicants in order to successfully homestead. *See generally* Homestead Act of 1862, ch. 75, §1, 12 Stat. 392 (1862) (repealed 1976); Tr. 272:17–272:19. David and Charles’ homestead files—which this Court has previously recognized are appropriate sources of information on historical use—are devoid of any references to cattle, livestock, or grazing. *See* U.S. Exs. 16–21; *see also* Mem. Dec. And Order on Challenge, Subcases 55-10288B, *et al.*, at 26 (Jan. 2, 2005) (hereon, “*LUF*”) (noting that “[h]omestead applications and proofs, applications for grazing permits, grazing permits and other historic documents typically memorialized historic uses”) (partially vacated and remanded on other grounds); Tr. 276:15–276:17 (no evidence in homestead file of grazing activity).

Here, nothing in David’s application or his homestead file indicates that he was grazing cattle in 1900, or at any point before his patent was issued. *See generally* U.S. Ex. 16; Tr. 276:15–276:17 (no evidence in homestead file of grazing activity). Although documents from David and government employees who observed the land and evaluated his progress as part

of his application for entry indicated that David built a home on the land, cultivated some of the land, and fenced some of the land, *see, e.g.*, U.S. Ex. 16 at BLM_238–240, BLM_242–244, BLM_256–257, none of the documents mention David owning any cattle, much less grazing cattle, *see generally id.* Rather, the documents observe that David and Charles were subsistence farmers who struggled to meet the requirements of the Homestead Entry Act within the required timeframe—including requirements to make improvements and to farm or cultivate the land. *See id.*; *see also* Tr. 280:25, 281:1–281:2.

The United States anticipates that the Hoods will argue that lack of evidence does not *disprove* that they were grazing, and thus watering, livestock. This is insufficient. The Court “must examine where the individual predecessors grazed their livestock when determining whether they had acquired any water rights.” *Joyce*, 144 Idaho at 16. Necessarily, they must show the affirmative presence of both grazing and livestock, and the location of same. By statute, the Hoods bear the burden to affirmatively prove their predecessors’ water use—and must do so for each of their claims individually. They cannot do so.

Further, the documents’ silence on grazing does not mean they have no bearing on the question. As the United States’ expert on BLM grazing and homestead documents testified, livestock were considered critical valuable improvements for homesteaders of that era. Tr. 272:3–272:16. Indeed, even if not explicitly required by the forms they submitted, homesteaders typically listed livestock that they owned on homestead forms to highlight the resources they were putting into the homesteading land patent process. *Id.*

The earliest evidence of livestock use by the Hoods’ predecessors undermines, rather than supports, their case. On September 24, 1915, the Forest Service granted David a permit to graze 6 horses on Forest Service land between September 21, 1915, and October 31, 1915—land

that, notably, is not located on any portion of the present-day base property or BLM land. Joint Ex. 325 at BLM_2304. On April 29, 1918, the Forest Service also granted David's estate a permit to graze seven horses on Forest Service land between May 1, 1918, and November 30, 1918. *Id.* at BLM_2306.

In November 1918, the Forest Service reported in a Report on Qualifications of New Applicants that Charles was "dependent on Forest Range" for grazing his twenty-five cattle and thirteen horses, indicating that there was not "range elsewhere available for his stock." *Id.* The report makes clear that Charles was dependent on the Forest Service land for grazing his livestock, and that no other range—including BLM land—was available to him. *Id.*

In sum, the Hoods have failed to demonstrate that their earliest predecessors either owned or grazed cattle prior to 1918, and can only show evidence of use on other federal land not at issue in this case, and therefore have failed to meet their burden for a pre-1918 priority date on any of their twenty-seven water right claims.

II. The Correct Priority Dates are June 1, 1931, for Category 1 and 2 Claims; April 1, 1943, for Category 3 Claims; and April 1, 1975, for Category 4 and 5 Claims.

a. The Edwards' TGA Applications and Authorizations Are the First Available Evidence of Grazing on BLM Land.

The Hoods' predecessors filed multiple applications to graze within Idaho Grazing District No. 1 under the TGA. These applications are the first evidence of grazing by the Hoods' predecessors on present-day BLM land. On July 27, 1935, Charles completed an application for a grazing permit under the TGA, seeking to graze 250 cattle—the "July 1935 Application." Joint. Ex. 308. He attached a plat to the application that indicated "lands owned" in certain portions of Sections 21, 28, and 29 and "lands wished to graze" in certain portions of Sections 20, 21, 29, and 33 of Township 15N Range 3W. *Id.* at BLM_626. On October 5, 1935,

BLM issued Charles a Class I license (“1936 License”) to graze 250 cattle from April 15 to May 7, 1936, and 100 cattle from May 7 to June 1, 1936, in certain portions of Sections 9, 15, 20, 21, 22, 28, 29, and 33 of Township 15N Range 3W. Joint Ex. 312; Tr. 292:20-25, 293:1-15 (clarifying date of license); Tr. 395:10–395:25, 396:1–396:11 (court questioning Mr. Price on same).

On December 13, 1935, Charles and his son Elmo Edwards (“Elmo”) completed another application for a grazing permit under the TGA, seeking to graze 250 cattle in Idaho Grazing District Number 1 (“December 1935 Application”). Joint. Ex 309. They left blank the section of the application asking them to describe if they trailed their stock from one range to another in his system of operation. *Id.* at BLM_671. They asserted that they owned 200 acres of cultivated land and 1100 acres of grazing land across certain portions of Sections 21 and 28 of Township 15N Range 3W and Sections 14, 15, 22, and 23 of Township 16N Range 4W. *Id.* at BLM_669. They broadly indicated in the application that they wished to be given a permit to graze on land somewhere within Township 15N Ranges 3W, 4W, and 5W and within Township 16N Ranges 2W, 3W, and 4W. *Id.* at BLM_668. The December 1935 Application, filed after the 1936 License was issued in October of 1935 for the 1936 grazing season, did not modify the BLM’s decision-making, as the license for the 1937 season was the same as the prior license. *See* Joint Ex. 307 at BLM_608 (1937 license; “joint allotment as noted in 1936 license”); see also Tr. 396:4–396:10 (explaining that the December 1935 Application was an attempt to amend the 1936 License).

Finally, on February 21, 1936, Charles and Elmo submitted additional information to BLM regarding their application to graze cattle on BLM range during the 1936 season, and to that document they attached two plats indicating the “area of public domain normally used by

[their] livestock.” (“February 1936 Document”). Joint Ex. 310 at BLM_664.⁷ The attached plats indicated “lands I own” in certain portions of Sections 21, 28, and 29 of Township 15N Range 3W and Sections 15 and 22 of Township 16N Range 4W. *Id.* at BLM_623–624. The plats also indicated “lands I lease” in certain portions of Section 18 of Township 16N Range 4W, *see id.* at BLM_624, and “lands I wish to graze” in certain portions of Sections 15, 21, 22, 28, 29, 31, 32, and 33 of Township 15N Range 3W, *see id.* at BLM_623. Again, the lands described in this document did not modify the BLM’s decision-making, as the license for the 1937 season was the same as the prior license. See Joint Ex. 307 at BLM_608 (1937 license; “joint allotment as noted in 1936 license”).

The existence of multiple applications filed by the Edwards family muddies the waters. However, a careful review of Charles’ grazing file makes clear that the July 1935 Application was the operative application, because it was the basis for the first Edwards authorization to graze under the TGA. The other applications were not given any consideration by the BLM, as subsequent grazing licenses were consistent with the first license issued. *See, e.g.*, Joint Ex. 307 at BLM_607 (1938, “same joint allotment as noted in 1936 license”); BLM_598 (1939, “on joint allotment as noted in 1936 license”).

b. The Hoods’ Category 1 and 2 Claims are entitled to a priority date of June 28, 1931.

This Court should find that the Hoods’ Category 1 Claims—specifically, 67-15269, 67-15270, 67-15273A (Sec. 21), 67-15277A (Sec. 21), 67-15278A (SESE, Sec. 20), 67-15284, 67-15285A (Sec. 21), 67-15287, and 67-15288—have a priority date of June 28, 1931. These claims are both within the 1936 License granted to Charles, *see* Joint Ex. 307 at BLM_615, and

⁷ This document is not a grazing application. Instead, it was an application for a grazing preference that provided further information in support of their request for Class I priority going forward. It is discussed with the two earlier applications for clarity.

the area marked as “lands wished to graze” on the plat attached to the July 1935 Application, *see* Joint Ex. 308 at BLM_626. Because these claims are associated with a Class I license and an assertion of prior use, they can be given a pre-TGA priority date pursuant to *LU II*. In this case, the United States does not contest that the BLM made a determination finding the Edwards had utilized the relevant federal range for three years on the basis of a BLM stamp on the license. This Court should also find that the Hoods’ Category 2 Claims—specifically, 65-15275, 65-15276, 67-15277B (Sec. 20), and 67-15289A (SESE, Sec. 9)—likewise have a priority date of June 28, 1931. These claims are not within the areas marked on the plat attached to the July 1935 Application, *see* Joint Ex. 308 at BLM_626, however, they are within the 1936 License granted to Charles, *see* Joint Ex. 307 at BLM_615, which on its face indicates use since June 28, 1931.

The 1936 License—the first TGA authorization issued to the Edwards—was granted to “Charles R. Edwards & Son” (Charles and Elmo) on October 5, 1935, and covered the grazing season from April 15 to June 1 of 1936. Joint Ex. 307 at BLM_615–616. It encompassed portions of Township 15N, Range 3W, Sections 10, 15, 20, 21, 22, and 29 as a joint allotment and a small individual allotment in Sections 29 and 33. *Id.* It was additionally subject to a trailing permit granted to another user. *Id.* The license states that it is “on public domain that has been used in connection with your dependent commensurate property for a period of three years prior to June 28, 1934.” *Id.* Charles’ BLM grazing file indicates that this grazing area was unchanged between 1936 and 1942. Joint Ex. 307 at BLM_586–608 (annual licenses with variations of “as noted in 1936 license”). The area covered by the 1936 License is mapped in U.S. Exhibit 30; Tr. 320:6–320:14.

In light of this evidence, the United States has modified its position from its pretrial briefing regarding the claims within the permit area. Because BLM adjudicated use for three years prior to the TGA, in accordance with the Rules for Administration, any of the Hoods' claims within the 1936 License are entitled to a priority date of June 28, 1931.

i. The 40-Year Statement Does Not Withstand Scrutiny.

The Hoods will assert that they are entitled to an earlier priority date than June 28, 1931, because they allege these claims are also affiliated with an assertion of prior use for forty years on the 1935 TGA applications. This assertion is without merit.

The relevant assertions of prior use are found in the July 1935 and December 1935 Applications. Both applications asked whether the applicants had “previously used the lands covered by this application for grazing permit” and “if so, how many years and what is the usual period of use each year,” *see* Joint Ex. 308 at BLM_674 and Joint Ex. 309 at BLM_670, to which the applicants replied on both, “[f]or the past 40 years,” *see id.*

As an initial matter, the language of the question is ambiguous and does not necessarily establish that the applicants—Charles in the July 1935 Application and Charles and Elmo in the December 1935 Application—were even referring to the specific BLM land encompassing the sources which the Hoods now claim. “Used” is undefined, and there is no basis on its face for the Court to assume that it meant watering of livestock. The Hoods certainly have not proffered any evidence showing that this is the case and have thus failed to carry their burden. Further, the documents ask questions about both the applicants' private land and other federal range they used, thus, “the lands covered by this application for grazing permit” could just as easily refer to their own base property or to the separate federal land managed by the Forest Service on which

they at that time held a permit to use and referenced within the application. *See, e.g.*, Joint Ex. 308 at BLM_673; Joint Ex. 309 at BLM_669.

Even assuming *arguendo* that the 40-year statement relates to BLM land, a careful review of the documents shows that this area is limited. Regarding the July 1935 Application, there is a plat attached showing “lands I own” and “lands wished to graze on.” Neither party can say with any certainty that these are the “lands covered by this application” referenced. However, assuming again that the “lands wished to graze on” are the “lands covered by this application”—the lands Charles wants a permit on from the BLM—and thus, the lands on which Charles was asserting forty years of prior use—such an assertion is plainly untrue. As discussed above, Charles and his father David were small-scale subsistence farmers. There is simply no evidence that they were grazing back to 1895. The first evidence of any livestock use is not until 1915—halfway into the 40-year period—and that use was on land explicitly not referenced in the July 1935 Application. The Forest Service found in 1918 that other range—including the BLM range in question—*wasn’t available to them*. Joint Ex. 25 at BLM_2305. Simply put, *LU II* does not stand for the proposition that any assertion of prior use is automatically accepted by the Court to its fullest extent. Instead, a statement of prior use is evidence to be weighed against all the other evidence by the finder of fact. *See supra* n.2. The Hoods are still subject to their *Joyce* burden to prove when and where their predecessor used water, and they have not done so in relation to this statement.

At trial, the Hoods focused their attention on the December 1935 Application—despite that, as discussed *supra*, that application came after a license was granted and did not change future licenses, rendering it a historical nullity. They focus on it because they believe Charles asserted that he used all of Township 15N, Ranges 3W, 4W, and 5W, and all of Township 16N,

Ranges 2W, 3W, 4W for forty years, *see, e.g.*, Tr. 343:14–344:44, 371:22–373:15, and wanted the same for an individual allotment. This assertion borders on the absurd. If true, it would be completely out of line with the application Charles made just 7 months earlier—encompassing only 160 acres—and the license granted 2 months prior. In fact, the assertion would encompass 216 sections, each made up of 640 acres—a total of 138,240 acres.⁸ As Mr. Price testified, this would be far larger than the largest individual allotments he has ever seen granted. Tr. at 299:4–299:9. The evidence at trial simply does not support that a few months after his first application, Charles remembered he had actually grazed an area over 215 times greater than he first thought for the last forty years.⁹

The Hoods’ position that they have found an assertion of prior use across the entire region hidden in an ambiguous question that is not even facially connected to the actual 40-year statement within the application, such all of their claims can be related back for forty years, does not stand up to scrutiny in the context of the full record. In particular, unlike the July 1935 Application, there is no prospective statement of desire to graze going forward on the attached plat to which the 40-year statement can plausibly be connected to define the assertion of prior use to a facially reasonable area.

Finally, even if the December 1935 Application is taken at face value—and it should not be—the Hoods disregard that Charles filed another document in February of 1936, before his first grazing season. Joint Ex. 310. In the February 1936 Document, Charles noted that he was already the holder of a license and attached two plats. *Id.* at BLM_623–624. One plat was for

⁸ At five acres per AUM, this would be enough range for over 27,000 head of cattle.

⁹ As an additional matter, the plat attached by Mr. Edwards to the December 1935 application is difficult to parse. *See* Joint Ex. 309 at BLM_625. It accurately orients 16N, 4W to the north of 15N, 4W, but then orients both due to the north of 15N, 3W, which is geographically incorrect. Charles appears to be marking his deeded land in Township 15N, but what exactly he was marking in 16N is unclear. Regardless, there is no indication of grazing use.

Township 15N, Range 3W, and shows the approximate present-day base property as “lands I own,” and the approximate 1936 License as “lands I wish to graze.” BLM_623. The other was for Township 16N, Range 4W, and marks “land we own” and “land I lease”—notably, not marking any “lands I wish to graze” in Township 16N. BLM_624. This is logical, because the February 1936 Document was not a permit application, and did not contain the 40-year statement, but instead, was a filing showing qualifications for Class I privileges. Specifically, that Edwards controlled sufficient base property for his stock during months he was not using the federal range. Tr. 299:17–299:25, 300:1–300:7. Viewing the December 1935 Application in the context of the entire grazing file, instead of in a vacuum with its broadest possible interpretation, clarifies that Charles was simply noting that he had gained control of a small amount of land in Township 16N, Range 4W, and was not asserting that he had used 138,240 acres for the past forty years. Critically, Charles did not even request BLM grazing authorization anywhere in Township 16N, and BLM never granted him a license or permit for that area. Tr. 300:17–300:19.

In sum, the 40-year statement on both applications is without merit. Indeed, even IDWR and the Hoods have abandoned their assertion of the full 40-year period. *See, e.g.*, Tr. at 82:24–82:25. The evidence before the Court shows that neither David nor Charles owned any livestock until fully halfway through that 40-year period. It has no probative value on either application and the Court should disregard it in determining the Hoods’ priority dates for their claims.

c. Category 3 Claims are entitled to a priority date of April 1, 1943.

This Court should find that the Hoods’ Category 3 Claims—specifically, 67-15267 and 67-15289B (SESW, Sec. 9)—have a priority date of April 1, 1943. These claims were not within the July 1935 Application or the 1936 License, however, in 1942 Charles and Elmo were granted

a ten-year permit that slightly expanded the approved grazing area, gaining a portion of Section 9, Township 15N, Range 3W on to the 1936 License area (“1942 Permit”). *See* Joint Ex. 307 at BLM_619–620; *see also* U.S. Exs. 25 and 30 (maps). The 1942 Permit authorized Charles and Elmo to begin grazing onto the newly authorized portion of Section 9 beginning April 1, 1943. Joint Ex. 307 at BLM_619–620; U.S. Ex. 25 at BLM_2300; Tr. 304:15–304:25, 305:1–305:19.

d. Category 4 and 5 Claims are entitled to a priority date of April 1, 1975

This Court should find that the Hoods’ Category 4 Claims—specifically, 67-15272, 67-15274A (Sec. 20), 67-15278B (Sec. 20), 67-15283A (Sec. 29), 67-15285B (NWNW, Sec. 21), and 67-15286—have a priority date of April 1, 1975. These claims are within the plat attached to the July 1935 Application, *see* Joint Ex. 308 at BLM_626, but not within the 1936 License or 1942 Permit, *see* Joint Ex. 307 at BLM_615–616 and BLM_619–620. These claims have only one of the two *LU II* factors: an assertion of prior use. There is no Class I license associated with the claims. Because there is no supporting evidence for pre-TGA use, BLM did not adjudicate a three-year period of prior use. As discussed *infra* Argument Section II.c., if a claimant’s predecessors did not receive a permit, any pre-TGA use necessarily ceased, and no water right exists. Accordingly, the first date of authorized use is April 1, 1975, when the Horse Flat Allotment came into existence. Joint Ex. 317 at BLM_1823; BLM_1923.

The Court should also find that the Hoods’ Category 5 Claims—specifically, 67-15263, 67-15264, 67-15265, 67-15266, 67-15268, 67-15271, 67-15273B (Sec. 17, 20), 67-15274B (Sec. 17), 67-15279, 67-15280, 67-15281, 67-15282, and 67-15283B (Sec. 30)—likewise have a priority date of April 1, 1975. These claims are not within the areas marked on the plat attached to the July 1935 Application, the 1936 License, or the 1942 Permit. These claims have none of

the *LU II* factors, and there is no evidence, even unreliable evidence, of earlier use prior to the existence of the Horse Flat Allotment.

It is clear from the record that the Category 4 and Category 5 claims are not entitled to an earlier date. Each annual license issued to Charles covered the same area after the small 1942 expansion. *See* Joint Ex. 307 at BLM_529–586; Tr. 309:5–309:11, 309:22–309:25, 310:1–310:4. When the grazing authorization was transferred to Melvin Dotson, the same applies. *See* Joint Ex. 317 at BLM_1888–1932; Tr. 313:13–313:22 (area is consistent with 1942 Permit). That the authorized grazing area did not change is supported by multiple maps in the files over several decades. For example, in Charles’ grazing file, there is a 1949 map showing the same authorized area, *see* Joint Ex. 307 at BLM_621, and a 1956 map, associated with a partial transfer of preference not at issue in this case, again showing an identical area, *see id.* at BLM_622; *see also* Tr. 307:13–307:25, 308:1–308:25, 309:1–309:8. In the Dotson grazing file, BLM conducted a 10-year permit inspection in 1965. Joint Ex. 317 at BLM_1897–1898. As part of that inspection, BLM mapped an identical authorized grazing area to the 1942 Permit and the 1949 and 1956 maps. *Id.*; *see also* Tr. 312:18–312:25, 313:1–313:22. Melvin Dotson was granted a ten-year permit consistent with that inspection. Tr. 314:16–314:18; Joint Ex. 317 at BLM_1900–1902.

The very first reference to the existence of a Horse Flat Allotment, as the allotment is known today, comes in a memorandum memorializing a user meeting drafted by a Malcolm Schnitker, Cascade Area Manager. Joint Ex. 317 at BLM_1823. The Area Manager notes that the users were unable to assist with verifying land ownership and fence boundaries. *Id.* In his “to-do,” the Area Manager described needing to locate fence lines, locate boundaries, and “prepare allotment maps for each file.” *Id.* at BLM_1824–1825. Then, in the 1975 grazing

authorization, beginning April 1, 1975, references to a Horse Flat Allotment appear for the first time (along with a Dotson allotment, replacing the prior individual allotment). *Compare* Joint Ex. 317 at BLM_1932 (1974, showing Joint Allot. w/ Edwards, Ford & Warfield and Ind. Allot.), *with* BLM_1933 (Horse Flat and Dotson allotments). The evidence suggests that in 1975, the BLM took steps to formalize the modern-day allotment for the upcoming grazing season. Accordingly, the first date that grazing was authorized on the entire modern-day Horse Flat allotment was April 1, 1975.

i. Termination of Pre-TGA Use

As a general matter, before the passage of the TGA, there was an implied license to graze on federal land. *See Joyce*, 144 Idaho at 18 (citing *Buford v. Houtz*, 133 U.S. 320 (1890)). After the passage of the TGA, though, the United States' "express permission" was required. *Id.* In particular, the 1936 Rules for Administration of Grazing Districts, note that "the grazing upon or driving across any public lands within said grazing districts of any livestock without a license" was a "prohibited" act. U.S. Ex. 27 at BLM_2259.

It is black letter Idaho law that "a water right cannot be initiated by trespass upon private property." *Joyce*, 144 Idaho at 18, citing *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974).¹⁰ For the same reason, a water right cannot be maintained in trespass. As the Court held in *LU I*, "after the implementation of the Taylor Grazing Act and until 1995 (1971 in Idaho), a water right could only be perfected within the boundaries of where the permittee was authorized to graze; otherwise, the issue of trespass arises." *LU I* at 26.¹¹ As this Court explained, "[n]ew

¹⁰ *Lemmon* carves out "surveyed public domain." The federal land in question was surveyed.

¹¹ *LU Ranching* was largely affirmed by the Idaho Supreme Court. Only the actual determinations of priority dates were vacated and remanded for further proceedings. *See LU Ranching Co. v. United States*, 144 Idaho 89, 94 (2007). Accordingly, prior decisions of the Court otherwise remain in effect. *See also, e.g., LU Remand* at 5 (citing extensively to the original decision).

rights could not be established outside the boundaries authorized by a permit, since after the Taylor Grazing Act, new rights would require trespass in order to appropriate. The use of water rights alleged to have existed prior to the Taylor Grazing Act, but located outside of the boundaries of a subsequently issued permit *would not have been able to be maintained.*” *Id.* at 27 (emphasis added).

When the Idaho Grazing District No. 1 was created, the Hoods’ predecessors’ implied license to access any of that federal range automatically terminated and they became subject to the requirement of the express permission of the United States. They became authorized to access a limited portion of the range when the 1936 License was issued—but only the area specifically authorized in the 1936 License. As discussed above, the evidence does not support the establishment of *any* water right outside of the 1936 License and 1942 Permit areas. However, even if it did, any such right would have been lost. Accordingly, the earliest priority date the Hoods could be entitled to outside of their predecessors’ permits is April 1, 1975, when the grazing license granted to Melvin Dotson, the Hoods’ predecessor, started referencing the Horse Flat Allotment. Joint Ex. 317 at BLM_1933.

ii. The Stock Driveway

At trial, the Hoods asserted that water rights were established within Stock Driveway Withdrawal No. 20 (the “Stock Driveway”). Hood Ex. 169. This assertion is both factually unsupported and legally incorrect.

The Stock Driveway was established on May 18, 1918, pursuant to 39 Stat. 862, sometimes known as the Stock-Raising Homesteads Act (the “Act”). Section 10 of the Act authorizes the Secretary of the Interior to withdraw lands “needed for use in the movement of stock to summer and winter ranges” from the operation of the public land laws. 39 Stat. 865. It

also authorizes the Secretary of the Interior to “prescribe such rules and regulations as may be necessary for the proper administration and use of such lands.” *Id.* Finally, and importantly, it requires that “all stock so transported over such driveways shall be moved . . . an average of not less than six miles per day for cattle and horses.” *Id.*, Sec. 11.

First, as an initial matter, under *Joyce*, the Hoods’ must show their predecessors actually used water by grazing in this specific area, which they cannot do. For the areas within the stock driveway, there is simply no evidence that they ever even utilized the stock driveway to reach their Forest Service grazing permit location. At trial, the Hoods merely presented the existence of the stock driveway and suggested that it was plausible that they *could* have used it. The Hoods seemingly assert that Charles held a Forest Service permit to the north, the stock driveway is near the base property and the Forest Service permit area, so *ipso facto*, Charles must have used the driveway. This is conjecture at best. But as Mr. Price testified, it is in fact much more plausible that they used a different route to the east, following regional topography through their joint allotment. Tr. 406:25, 407:1–407:12. The Hoods ask the Court to presume that they used it, without a single scrap of evidence showing that they did.

Instead, there is strong evidence showing that they did not use the stock driveway. First, when Charles provided a plat marking where he wanted to graze, the only section within the driveway he marked was Section 20, which was directly adjacent to his base property. *See* Joint Exhibit 307 at BLM_626. He did not mark, for example, all the sections leading up to the Forest Service parcel, on which he and his family had held a permit for twenty years. Joint Ex. 325. Second, Charles was explicitly asked on his TGA applications “if stock are trailed from one range to another in your system of operation, describe routes used.” Joint Ex. 308 at BLM_675; Joint Ex. 309 at BLM_671. In July, he answered “not trailed,” *see* Joint Ex. 308 at BLM_675,

and in December, he left it blank, *see* Joint Ex. 309 at BLM_671. As Mr. Price testified, moving from one range to another across a driveway is exactly what that question was referencing. Tr. 405:12–405:15. Third, the Edwards family never sought a permit to utilize the stock driveway, which would have been required after the TGA and the creation of Idaho Grazing District No. 1, and they were never granted a permit to utilize the stock driveway. U.S Exhibit 27 at BLM_2259; *see also generally* Joint Ex. 307 at BLM_529–620 (all BLM authorizations that were granted to Charles, none of which were for trailing).

Regardless of whether there was use before the TGA, however, legal use on areas not within a valid permit ceased in June of 1934 when the TGA came into effect.¹² For example, the first Rules for Administration of Grazing Districts, U.S. Ex. 30, “prohibited . . . the grazing upon or driving across any public lands within said grazing districts of any livestock without a license.” BLM_2259. Similarly, “[a]llowing stock to drift and graze on said district lands without a license” was prohibited. *Id.* In light of this information, any trailing across federal land would have to have begun after these applications. But in order to move livestock across federal land, a permit was required. *See* U.S. Ex. 27. No permit to trail livestock across federal land was ever issued to the Hoods’ predecessors, and any use would have been in trespass, which cannot establish a water right. Accordingly, the Hoods cannot show that their predecessors ever used the Stock Driveway, before or after the TGA.

¹² The Hoods suggested at trial that neither the TGA nor the Range Code could supersede the Stock Driveway withdrawal. *See* Tr. 406:8–406:13. This is difficult to understand. The Stock Driveway withdrawal didn’t create an inviolable permanent park; it merely “withdrew from disposal under the public land laws.” Hood Ex. 169 at 1 (emphasis added). The Act itself contemplates that the Secretary of the Interior “may prescribe such rules and regulations as may be necessary for the proper administration and use of such lands.” 39 Stat. 865. A later act of Congress, such as the TGA, can of course also modify a withdrawal under a previous authority. The TGA itself contemplates the inclusion of “lands withdrawn or reserved for any other purpose” within grazing districts with the proper approval by the relevant agencies. 48 Stat. 1269.

Finally, if the Court does somehow determine that the Edwards used the stock driveway, the Court could only decree a period of use of approximately two days in those areas. As noted above, the Act required that “all stock so transported over such driveways shall be moved . . . an average of not less than six miles per day for cattle and horses.” Act, Sec. 11; *see also* Tr. 345:11–345:15. The entire length of the claimed, modern-day allotment—the area of the stock driveway that the Hoods assert their predecessors used—is approximately 5.5 miles. Accordingly, moving up to the north, they would have been limited by law to use for a maximum one day, and then a second day moving south again. After the 1936 Rules for Administration came into effect, the required speed became even quicker—“crossing licenses shall follow the route prescribed . . . at a rate of not less than . . . Ten (10) miles per day for cattle and horses.” U.S. Ex. 27 at BLM_2259. Accordingly, even if they had ever been issued an authorization to use the stock driveway, they would have had to move through in approximately a half day. Accordingly, for the period after the Rule for Administration, the Hoods would be entitled to a total period of use of approximately one day.

III. To the Extent that this Court Decides the Hoods Have Met Their Burden to Demonstrate a Priority Date Prior to 1931 for Any of Their Twenty-Seven Claims, It Must Also Determine the Quantity of Water for Each Claim in Relation to the Number of Stock Owned at the Time of the Priority Date

While the United States did not object to the quantity of the Hoods’ claims, quantity is necessarily inextricable from priority, because as a matter of black-letter water law, you are entitled to a priority for only the quantity of water which you actually put to use. *See, e.g.*, Tr. 393:13–393:21 (noting that “quantity of livestock and priority date is inseparable because that would be the beneficial use for those changes in time”). Here, there is substantial evidence before the Court that the number of cattle and, thus necessarily, the amount of water, increased over time. Accordingly, if the Court decrees a priority date before the 1936 License, it should

carefully evaluate whether it should be decreed as a partial claim for the provable amount of use at that earlier date, and then a later claim for the larger amount.

As an initial matter, the Hoods objected at trial to bringing forward evidence of quantity. But testimony about the scope of other elements, even elements that were not objected to, “would have relevance in presenting evidence of historic use in order to establish priority dates for the claims.” *LU II* at 5. As Mr. Saxton testified for IDWR, the number of head of cattle bears directly on the priority date of a stockwater right. Tr. 134:19–134:25. Indeed, it is IDWR’s own policy to take quantity of use into account when assessing priority date. See IDWR Adjudication Memorandum No. 12 (providing an example where “the claimant started using a spring to water 100 head of stock in 1935, and added an additional 100 head in 1940” then “[t]he claimant could submit one notice of claim for watering 200 head with a 1940 priority date”).¹³

In the July 1935 Application, in the same question asking Charles about his prior use, it asked Charles “how many stock have you grazed thereon during the average year?” to which he responded “250.” Joint. Ex. 307 at BLM_674. The record shows this is untrue.¹⁴ In 1915, his father received a permit for only six horses and no cattle. Joint Ex. 325 at BLM_2304. In 1918, Charles, as recipient of the estate of David Edwards reported that he owned, in total, only twenty-five cattle and thirteen horses. Accordingly, assuming *arguendo* that the 40-year statement is utilized, and the Court agrees with the Hoods that there was use on some portion of

¹³ This is not an uncommon scenario. As a parallel, consider a farmer increasing their irrigated acreage over time. It would not be questioned that if a farmer irrigated 50 acres starting in 1950, and then added 10 acres in 1960, they could not have a water right for 60 acres with a priority of 1950. Instead, they could have a water right for 50 acres with a priority of 1950, and 60 acres with a priority of 1960; or they could take only the later 1960 date for the full acreage. Allowing increases in irrigation – or increases in herd size – to relate back places a user out of priority by allowing them more water at an earlier date.

¹⁴ This discrepancy further underlines that the Court should give the 40-year statement no weight at all, as a self-serving exaggeration in an application for a competitive resource.

the BLM range, no livestock at all could be proven for 1900 through 1915, six head could be proven for 1915 through 1918, and 38 head could be proven thereafter, until the July 1935 Application first asserted 250 head of cattle. The Court should not allow the Hoods to expand their historical use by giving a priority date for more water than they used, for more cattle than their predecessors owned.

IV. Proposed Findings of Fact

1. The Hoods' base property is 640 acres in T15N, R3W, comprising the SWSW of Section 21; the NENE, NWNE, SWNE, SENE, NENW, NWNW, SWNW, SENW, NESW, NWSW, NESE, and NWSE of Section 28; and the NENE, SENE, and NESE of Section 29. Joint Ex. 319.
2. The Hoods are currently BLM grazing permittees on the Horse Flat Allotment. Joint Ex. 319.
3. The United States gained ownership of the land comprising the present-day allotment and base property pursuant to the Oregon Treaty with Great Britain on June 15, 1846. 9 Stat. 869.
4. On December 28, 1896, the United States owned all the land comprising the present-day allotment and base property, and there were no pending applications for homestead entry on those lands. 9 Stat. 896; Joint Ex. 301–306; Tr. 258:23–258:25, 259:1–258-15.
5. The United States first conveyed the base property into private ownership through a series of patents issued between 1908 and 1920, as described in proposed findings of fact numbers 6 through 11. Joint Exs. 301–306; Tr. 264:14–264:22.

6. The United States issued Patent 2762 to David G. Edwards on May 26, 1908, which conveyed a portion of the base property from the United States into private ownership. Joint Ex. 305 at BLM_018.
7. The United States issued Patent 16246 to Nels C. Nielson on September 24, 1908, which conveyed a portion of the base property from the United States into private ownership. Joint Ex. 301 at BLM_019.
8. The United States issued Patent 222034 to Charles R. Edwards on August 24, 1911, which conveyed a portion of the base property from the United States into private ownership. Joint Ex. 304 at BLM_017.
9. The United States issued Patent 462899 to Leroy T. Braden on March 15, 1915, which conveyed a portion of the base property from the United States into private ownership. Joint Ex. 303 at BLM_020.
10. The United States issued Patent 607050 to Anna Edwards on November 9, 1917, which conveyed a portion of the base property from the United States into private ownership. Joint Ex. 306 at BLM_021.
11. The United States issued Patent 759345 to Charles R. Edwards (as assignee for Franklin B. Hardy) on June 25, 1920, which conveyed a portion of the base property from the United States into private ownership. Joint Ex. 302 at BLM_022.
12. The land transferred to private ownership by the six patents described in proposed findings of fact numbers 6 through 11 comprises the present-day Hood base property, with the exception of a portion of Patent 462899. *See* Joint Ex. 324 at BLM_324 (map); *see also* Joint Ex. 319 at BLM_1451 (deed); Tr. 263:21–

263:25, 264:1–264:13.

13. David G. Edwards did not settle on any portion of the base property until on or about October 15, 1900. U.S. Ex. 16 at BLM_253.

14. In his final proof, Charles R. Edwards reported that he first established “actual residence” upon the land in November of 1904, when he completed a house. U.S. Ex. 21 at BLM_187, BLM_190.

15. Charles R. Edwards and his family were absent from his portion of the base property in the summer of 1905 “working to earn a living and to make money to improve my land.” U.S. Ex. 21 at BLM_187.

16. When asked to identify “number and kind of stock grazed each year,” no stock was identified, and he indicated that he had grown from cultivating two acres to twenty-two acres. U.S. Ex. 21 at BLM_188.

17. None of the witness affidavits submitted identify ownership of any livestock by Charles R. Edwards. U.S. Ex. 21 at BLM_192, BLM_195.

18. David G. Edwards “practically lived” with Charles R. Edwards until 1906. U.S. Ex. 16 at BLM_256.

19. As of 1906, David G. Edwards had “cultivated about 10 or 15 acres of [] land.” U.S. Ex. 16 at BLM_256.

20. When his witness, Nels C. Nielson was asked to describe the use of the land and if used for stock, he referred only to David G. Edwards having “raised crops on the land for three seasons” and that he owned chicken coops. U.S. Ex. 16 at BLM_258.

21. Neither David G. nor Charles R. Edwards owned any portion of the base property

- until 1908. Joint Exs. 304–305.
22. David and Charles Edwards were small subsistence farmers without a livestock operation. Tr. 280:17–280:25, 281:1–281:2.
23. The Homestead Entry files do not show evidence of any livestock use. *Id.*
24. On September 24, 1915, the U.S. Forest Service granted David G. Edwards a permit to graze 6 horses on Forest Service land between September 21, 1915, and October 31, 1915. Joint Ex. 325 at BLM_2304.
25. On April 29, 1918, the Forest Service also granted David G. Edwards’ estate a permit to graze 7 horses on Forest Service land between May 1, 1918, and November 30, 1918. Joint Ex. 325 at BLM_2306.
26. David G. Edwards passed away between September 1915 and April 1918. *Id.*
27. On May 17, 1918, the U.S. Department of Interior withdrew public lands in certain described areas of Idaho and reserved those lands for use by the public as stock driveways. Hood Ex. 169.
28. In November 1918, the Forest Service reported in a Report on Qualifications of New Applicants that Charles R. Edwards owned 25 cattle and 13 horses. Joint Ex. 325 at BLM_2305.
29. In November 1918, a Forest Ranger reported that Charles R. Edward was “dependent on Forest range,” and that range elsewhere was not “available for his stock.” Joint Ex. 325 at BLM_2305.
30. Charles R. Edwards was not grazing BLM range as of November 1918. *Id.*
31. In 1919, Charles R. Edwards reported in an application for a five-year grazing permit on Forest Service land that he owned 28 cattle and 5 horses. Joint Ex. 325

at BLM_2302.

32. The Taylor Grazing Act, P.L. 73-482, became effective on June 28, 1934. *See* P.L. 73-482.

33. The Taylor Grazing Act authorized the Secretary of the Interior to “establish grazing districts.” P.L. 73-482.

34. Pursuant to the Taylor Grazing Act, Idaho Grazing District No. 1 was established on April 8, 1935. *See* 6 Fed. Reg. 5657 (Nov. 7, 1941) (noting “[t]his order shall be subject to the order of April 8, 1935, of the Secretary of the Interior, establishing Idaho Grazing District No. 1”).

35. Ownership of the base property was unified by Charles R. Edwards on or about December 14, 1934. Tr. 264:23–264:25, 265:1–265:3,

36. Charles R. Edwards first applied for a TGA permit to graze portions of Idaho Grazing District No. 1 on July 27, 1935. Joint Ex. 307 at BLM_626, BLM_672–675.

37. Charles R. Edwards attached the 1935 Map to his July 27, 1935 application, indicating “Lands Owned” and “Lands wished to graze on.” Joint Ex. 307 at BLM_626.

38. In the 1935 Map, the “Lands wish to graze on” are Sections 20, 21, 29, and 33, Township 15N, Range 3W. Joint Ex. 307 at BLM_626.

39. Charles R. Edwards’ application to graze was approved on October 5, 1935, beginning with the 1936 grazing season by issuance of a license. Joint Ex. 307 at BLM_615–617.

40. Based on the October 5, 1935 license, Charles R. Edwards was granted

permission to graze portions of Sections 9, 15, 20, 21, 22, 28, 29, and 33 of Idaho Grazing District No. 1. Specifically, a joint allotment was established for SESE, S09; NWNW, SENW, NESW, S1/2SW and NWSE, S15; SESE, S20; E1/2, S1/2NW, N1/2SW, and SESW, S21; NW1/4, S22; NWNE, NESW, W1/2SE, SESE, S29; all within T15N, R03W, BM; and an individual allotment for SESE, S28; and NENE, S33 within T15N, R03W, BM. Joint Ex. 307 at BLM_615–616.

41. In 1936, the Rules for Administration of Grazing Districts were issued by the U.S. Department of the Interior. U.S. Ex. 27.
42. The 1936 Rules for Administration of Grazing Districts prohibited grazing or trailing on federal range within the Grazing District without a BLM authorization. U.S. Ex. 27 at BLM_2259.
43. On October 1, 1936, a notice was sent to Charles R. Edwards & Son that the Grazing District Advisory Board had recommended a grazing area within Sections 9, 15, 20, 21, 22, 28, 29, and 33. Joint Ex. 307 at BLM_611.
44. On December 19, 1936, Charles R. Edwards and Son applied for a permit “as noted in 1936 license.” Joint Ex. 307 at BLM_609.
45. On July 9, 1937, a license was granted to Charles R. Edwards & Son on “[j]oint allotment as noted in 1936 license.” Joint Ex. 307 at BLM_608.
46. On April 12, 1938, a license was issued “on same joint allotment as noted in 1936 license.” Joint Ex. 307 at BLM_607.
47. On December 10, 1938, Charles R. Edwards applied for a 1939 allotment on “same joint allotment as 1936.” Joint Ex. 307 at BLM_604.
48. A license was issued for 1939 “on joint allotment as noted in 1936 license.”

Joint Ex. 307 at BLM_598.

49. Charles R. Edwards was granted a 1940 license on “joint allotment as noted in 1936 license.” Joint Ex. 307 at BLM_593.

50. Charles R. Edwards and Son was granted a 1941 license on “same as noted in 1936 license.” Joint Ex. 307 at BLM_589.

51. Charles R. Edward and Sons was granted a 1942 license on “federal range on joint allotment as noted in 1936 license.” Joint Ex. 307 at BLM_586.

52. Later in 1942, Charles R. Edwards was granted a ten-year permit from July 1, 1942 through June 30, 1952, starting in the 1943 season, covering lands in the 1936 License, and adding the NESW, NWSW, SWSW, SESW, NWSE, SWSE of Section 9 (“1942 Permit”). Joint Ex. 307 at BLM_619–620.

53. Between 1942 and 1952, annual grazing in the same sections was approved without a change. Joint Ex. 307 at BLM_583 (1943, as “noted in 10 yr permit”), BLM_575 (1944, “as noted in ten year permit”), BLM_574 (1945, “as noted in ten year permit”); BLM_567 (1946, “as noted in ten year permit”); BLM_566 (1947, “as noted in ten year permit”), BLM_565 (1948, “as noted in ten year permit”), BLM_564 (1949, “as noted in ten year permit”); BLM_563 (1950, “as noted in ten year permit”), BLM_562 (1951, “in accordance with the terms of your ten year permit”), BLM_559 (1952, “in accordance with the terms of your ten year permit”); *see also* Tr. 309:5–309:11.

54. In 1949, the grazing area was unchanged from 1942. Joint Ex. 307 at BLM_621; Tr. 308:1–308:15.

55. For 1953, the ten-year permit expired, but grazing was applied for on “joint

- allotment per expired 10-year permit,” Joint Ex. 307 at BLM_560, and approved “in accordance with the terms of your ten year permit,” *id.* at BLM_559.
56. For 1954 through 1962, Charles R. Edwards continued to apply for and receive permits for the same area as the 1942 Permit. Joint Ex. 307 at BLM_554, BLM_551, BLM_547, BLM_544, BLM_541, BLM_538, BLM_535, BLM_532, BLM_529; *see also* Tr. 309:5–309:11.
57. In 1956, the grazing area was unchanged from 1942 and 1949. Joint Ex. 307 at BLM_622; Tr. 308:16–308:25, 309:1–308:7.
58. In 1962, Charles R. Edwards sold his base property to Melvin Dotson. Joint Ex. 317 at BLM_1817.
59. In 1963, 1964, and 1965, Melvin Dotson was authorized on the same “Joint & Ind. Allotment.” Joint Ex. 317 at BLM_1890, BLM_1893, BLM_1896; *see also* Tr. 312:12–312:15.
60. In 1965, as part of a ten year permit inspection for Melvin Dotson, BLM mapped “fed. Range used” as including portions of Sections 9, 15, 20, 21, 28, 29, and 33, identical to the areas in the 1942 Permit with Edwards, Warfield, and Ford. The SWSW of Section 28 and NWNW of Sections 33 are marked as “Individual Allotment.” Joint Ex. 317 at BLM_1897–1898.
61. In November 1965, Melvin Dotson was granted a ten-year permit to graze the same “Dotson, Edwards, Warfield, and Ford joint allotment” from March 1, 1966, through February 28, 1976. Joint Ex. 317 at BLM_1900.
62. Between 1966 and 1975, Melvin Dotson was reauthorized on the same allotment. Joint Ex. 317 at BLM_1905, BLM_1908, BLM_1911, BLM_1914, BLM_1917,

BLM_1921, BLM_1924, BLM_1927, BLM_1932; *see also* Tr. 313:13–313:22.

63. In 1975, Melvin Dotson was first authorized on an allotment referred to as Horse Flat, beginning on April 1, 1975. Joint Ex. 317 at BLM_1933; *see also*

Tr. 316:10–316:13.

64. U.S. Ex. 30 accurately reproduces the boundaries of the modern-day Horse Flat allotment.

65. U.S. Ex. 30 accurately reproduces the boundaries of the 1935 Map and 1936 License.

66. U.S. Ex. 30 accurately reproduces the boundaries of the 1936 License.

67. U.S. Ex. 30 accurately reproduces the boundaries of the 1942 Permit.

68. U.S. Ex. 30 accurately reproduces the location of the Hoods' claims against the boundaries of the modern-day Horse Flat Allotment, 1935 Map, 1936 License, and 1942 Permit.

69. The places of use for claims 67-15269, 67-15270, 67-15273A (Sec. 21), 67-15277A (Sec. 21), 67-15278A (SESE, Sec. 20), 67-15284, 67-15285A (Sec. 21), 67-15287, and 67-15288 are fully within the lands identified on Charles R. Edwards' July 27, 1935, TGA application as "lands wished to graze on" and the 1936 License. U.S. Ex. 30.

70. The first date Charles R. Edwards was authorized to graze those lands was April 1, 1936. Joint Ex. 307 at BLM_615–617.

71. The 1936 License indicated "[o]n public domain that has been used in connection with your dependant [sic] commensurate property for a period of three years prior to Jun. 28, 1934."

72. The priority date for Claims 67-15269, 67-15270, 67-15273A (Sec. 21), 67-15277A (Sec. 21), 67-15278A (SESE, Sec. 20), 67-15284, 67-15285A (Sec. 21), 67-15287, and 67-15288 is June 28, 1931. Joint Ex. 307 at BLM_615–617.
73. The places of use for claims 67-15275, 67-15276, 67-15277B (Sec. 22), and 67-15289A (SESE, Sec. 9) are fully within the 1936 License but not within the 1935 Map. U.S. Ex. 30.
74. The first date Charles R. Edwards was authorized to graze those lands was April 1, 1936. Joint Ex. 307 at BLM_615–617.
75. The 1936 License indicated “[o]n public domain that has been used in connection with your dependant [sic] commensurate property for a period of three years prior to Jun. 28, 1934.”
76. The priority date for Claims 65-15275, 65-15276, 67-15277B (Sec. 20), and 67-15289A (SESE, Sec. 9) is June 28, 1931. Joint Ex. 307 at BLM_615–616.
77. The places of use for claims 67-15267 and 67-15289B (SWSE, Sec. 9) are within the 1942 Permit but not within the 1935 Map or the 1936 License. U.S. Ex. 30.
78. The first date Charles R. Edwards was authorized to graze those lands was April 1, 1943. Joint Ex. 307 at BLM_619–620.
79. The priority date for Claims 67-15267 and 67-15289B (SWSE, Sec. 9) is April 1, 1943. Joint Ex. 307 at BLM_619–620.
80. The places of use for claims 67-15272, 67-1573B (Sec. 20), 67-15274A (Sec. 20), 67-15278B (NESW, NWSE, SWSE, Sec. 20), 67-15283A (Sec. 29), 67-15285B (NWNW, Sec. 21), and 67-15286 are inside the 1935 Map but not the

1936 License or 1942 Permit. U.S. Ex. 30.

81. Charles R. Edwards was not authorized to utilize those lands until their inclusion in the Horse Flat Allotment. U.S. Ex. 30.

82. The Horse Flat Allotment came into existence on April 1, 1975. Tr. 316:10–316:13.

83. The priority date for Claims 67-15272, 67-1573B (Sec. 20), 67-15274A (Sec. 20), 67-15278B (NESW, NWSE, SWSE, Sec. 20), 67-15283A (Sec. 29), 67-15285B (NWNW, Sec. 21), and 67-15286 is April 1, 1975. Joint Ex. 317 at BLM_1933.

84. The places of use for claims 67-15263, 67-15264, 67-15265, 67-15266, 67-15268, 67-15271, 67-15273C (Sec. 17), 67-15274B (Sec. 17), 67-15279, 67-15280, 67-15281, 67-15282, and 67-15283B (Sec. 30) are in none of the 1935 Map, 1936 License, or 1942 Permit. U.S. Ex. 30.

85. Charles R. Edwards was not authorized to utilize those lands until their inclusion in the Horse Flat Allotment. Joint Ex. 317 at BLM_1933.

86. The priority date for Claims 67-15263, 67-15264, 67-15265, 67-15266, 67-15268, 67-15271, 67-15273C (Sec. 17), 67-15274B (Sec. 17), 67-15279, 67-15280, 67-15281, 67-15282, and 67-15283B (Sec. 30) is April 1, 1975. Joint Ex. 317 at BLM_1933.

V. Proposed Conclusions of Law

1. As the claimants, the Hoods bear the ultimate burden of persuasion for each element of their water rights. I.C. § 42-1411(5).

2. The Directors' Reports prepared by IDWR are entitled to no prima facie weight, because IDWR has determined that they are incorrect.
3. Water rights for stockwatering established under the constitutional method require the diversion of water and application to a beneficial use. *Joyce*, 144 Idaho at 8.
4. A claimant is not entitled to the water located on their land simply by virtue of land ownership. Ord. Accepting in Part and Denying in Part Special Master's Report and Recommendation, Subcase No. 36-15452, at 10 (Oct. 10, 1997).
5. To prove beneficial use by a predecessor-in-interest, a claimant must establish the existence and scope of the right and then connect the chain of title and appurtenant water rights from the original appropriator to the claimant. *LU II* at 5.
6. "General averments that grazing existed historically by the public at large in a general area are insufficient to establish the existence and transfer of water rights." *Id.*, quoting *LU I* at 27.
7. Any implied license to graze on the federal range terminated with the passage of the TGA and creation of Idaho Grazing District No. 1. *Joyce*, 144 Idaho at 18.
8. The Court must carefully "examine where the individual predecessors grazed their livestock when determining whether they had acquired any water rights." *Joyce*, 144 Idaho at 16.
9. The Hoods have failed to meet their burden of showing use was initiated on any specific source before the passage of the Taylor Grazing Act and the granting of the 1936 License authorizing Charles R. Edwards to graze on BLM land.

10. For claimed places of use on land that falls within the 1936 License, the Hoods' predecessor began grazing on federal land on June 28, 1931, and, accordingly, established a water right on sources in that area by beneficial use on that date.
11. For claimed places of use on land that falls outside of both the July 1935 Application and 1936 License, a water right was not established in 1931, because there is no evidence of application to beneficial use by way of grazing access.
12. For claimed places of use on land that falls within the 1942 Permit, the Hoods' predecessor became authorized to graze on federal land on April 1, 1943, and accordingly, established a water right on sources in that area by beneficial use on that date.
13. A water right cannot be initiated by trespass upon private property. *Lemmon v. Hardy*, 95 Idaho 778, 780 (1974).
14. For the same reason, a water right cannot be maintained by trespass on private property. *LU I* at 27.
15. To establish and maintain a water right claim on surveyed federal land, a Claimant must be authorized by the BLM to access that federal land. *Lemmon*, 95 Idaho at 780; *Joyce*, 144 Idaho at 18.
16. After the relevant BLM land was included in Idaho Grazing District No. 1 and subject to regulation under the Taylor Grazing Act, access to the BLM land without authorization would constitute trespass. *Id.*; *LU I* at 27.

17. After the implementation of the Taylor Grazing Act and until 1995 (1971 in Idaho), a water right could only be perfected within the boundaries of where the permittee was authorized to graze; otherwise, the issue of trespass arises. *Id.*
18. New rights could not be established outside the boundaries authorized by a permit, since after the Taylor Grazing Act, new rights would require trespass in order to appropriate. *Id.*
19. The use of water rights alleged to have existed prior to the Taylor Grazing Act, but located outside of the boundaries of a subsequently issued permit would not have been able to be maintained. *Id.*
20. The Hoods' predecessors did not establish a water right on the federal land outside of the 1936 License and 1942 Permit until the land was included in their authorized allotment in 1975. *Id.*
21. After the passage of the TGA and the implementation of the 1936 Rules for Administration of Grazing Districts, a permit was required to utilize the stock driveway. U.S. Exhibit 27 at BLM_2259; *Joyce*, 144 Idaho at 18.
22. The Hoods have not met their burden to prove that their predecessors used the Stock Driveway before a permit became required, and they have not shown their predecessors were granted a permit.
23. Without a permit to access federal land, any use would constitute trespass and could not support a water right.
24. The Hoods' claims should be decreed as described in proposed findings of fact numbers 72, 76, 79, 83, and 86.

CONCLUSION

The Hoods bear the burden of proving every element of their twenty-seven claims. In asserting an 1896 priority date, they have vastly overstated the scope of their predecessors' actual beneficial use. Instead, after the careful examination of the scope of their predecessors' grazing activity and authorizations, as mandated by *Joyce*, the Court should determine that the Hoods are entitled to priority dates of June 28, 1931 for Categories 1 and 2, April 1, 1943 for Category 3, and April 1, 1975 for Categories 4 and 5.

Dated: November 15, 2024

Respectfully submitted,

TODD KIM, Assistant Attorney General
Environment & Natural Resources Division



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United States Department of Justice

Environment & Natural Resources Division

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ATTORNEY FOR UNITED STATES OF AMERICA,
Bureau of Land Management

CERTIFICATE OF SERVICE

I certify that on November 15, 2024, I served true and correct copies of the foregoing document as follows:

via Hand Delivery:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, ID 83303-2707

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BOISE, ID 83720-0098

A handwritten signature in dark ink, appearing to read "Matthew H. Smith", with a stylized, cursive script.

Matthew H Smith

Ex. A

Subcase Nos:

67-15263
67-15264
67-15265
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