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DEPT. 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

In Re SRBA

Case No. 39576

Subcase Nos.: 67-15263, et al. (Hood)
See Exhibit A

CLAIMANTS KEITH AND KAREN
HOOD'S POST-TRIAL BRIEF

Claimants Keith and Karen Hood (collectively, "Claimants" or "Hoods"), by and through their counsel of record, Parsons Behle & Latimer, hereby submit *Claimants Keith and Karen Hood's Post-Trial Brief* in accordance with the Court's October 4, 2024, email order requesting post-trial briefing for the above-captioned matter. For the reasons that follow, the Court should find that all of the Hoods' claims (identified in Exhibit A and, hereafter, collectively referred to as the "Water Claims") have a priority date of October 15, 1900.

I. BACKGROUND

a. Relevant Congressional Acts and Federal Department Orders

As a preliminary matter, many of the material facts in this case involve the application and interpretation of federal legislation, federal agency rules, and federal department orders: the Taylor Grazing Act of 1934 ("TGA"), 43 U.S.C. § 315 et seq.; the Rules for Administration of Grazing Districts, issued on March 2, 1936, by the Secretary of the Interior pursuant to the TGA;

the Stock-Raising Homestead Act (“SRHA”) of 1916, 43 U.S.C. § 291 et seq. (repealed); and the May 17, 1918, Order of Withdrawal: Stock Driveway Withdrawal No. 20 (Idaho No. 1), issued by the Secretary of the Interior pursuant to the SRHA. These authorities are each discussed in turn.

i. The Taylor Grazing Act and the 1936 Rules for Administration of Grazing Districts

“The Taylor Grazing Act was put in place to get at solving the tragedy of the commons.” Trial Transcript, Vol. 2 (October 3, 2024), 377:2-3 (testimony of Fredric W. Price). Prior to the enactment of the TGA, homesteaders had unfettered access to graze public lands:

The situation prior to the enactment of the Taylor Grazing Act was essentially a free-for-all where anyone who wished to use public lands could do so.... This arrangement was not pursuant to any congressional legislation granting such a right but merely occurred because of the government’s sufferance of the lands being used in this way. The Taylor Grazing Act basically represented Congress’ revocation of this indiscriminate “implied license” in favor of an organized and regulated system.

Deborah F. Buckman, Annotation, *Construction and Application of Taylor Grazing Act (43 U.S.C.A. §§ 315 et seq.) and Regulations Promulgated Thereunder*, 71 A.L.R. FED. 2D 197 (Originally published in 2013).

To regulate grazing on public lands, the TGA established a permit system, administered by the U.S. Department of the Interior’s Grazing Division:

A new permit system granted grazing privileges by preference to ranchers who had actually used a grazing district’s land during a priority period before 1934. Owners of land or water rights who could support livestock on base ranches during seasons when herds were not on the grazing districts were favored; those without property were not.

Laurence A. Clement Jr., “Taylor Grazing Act,” *Encyclopedia of the Great Plains*, UNIVERSITY OF NEBRASKA-LINCOLN <http://plainshumanities.unl.edu/encyclopedia/doc/egp.ag.071> (last accessed November 14, 2024).

In the relevant period during which the Hoods' predecessors in interest were seeking TGA grazing licenses, the controlling policy was the Rules for Administration of Grazing Districts, issued on March 2, 1936, by the Secretary of the Interior. *See* Trial Exhibit No. 27 at Bates Nos. BLM_2251–2262. The Rules identified Class 1 Grazing Licenses (i.e., the highest-preference grazing licenses) as “Qualified applicants with dependent commensurate property with priority of use.” *Id.* at Bates Nos. BLM_2252. “Priority of use” was defined in the Rules as “such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper use of both the public range and the lands or water used in connection therewith.” *Id.*

While preference was granted to ranchers who had used the public range prior to enactment of the TGA, such preference did not guarantee a grant of future grazing privileges. As acknowledged at trial by Bureau of Land Management (“BLM”) Water Rights Specialist Fredric W. Price, the BLM was not required to issue to a rancher a license for all areas that the rancher grazed prior to the enactment of the TGA. *See* Trial Transcript, Volume 2 (October 3, 2024), 324:20-25. In other words, it would be erroneous to presume an applicant did not engage in pre-TGA grazing on certain public lands merely because the BLM declined to grant the applicant a grazing permit that fully encompassed the lands sought in the grazing application.

It bears noting that the TGA was not a vehicle for establishing the validity of pre-existing stockwater rights. Likewise, the TGA and its permitting scheme were not a vehicle for abridging or otherwise invalidating such rights. On the contrary, the TGA’s savings clause provides:

[N]othing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

43 U.S.C. § 315b; *see also Joyce Livestock Co. v. United States*, 144 Idaho 1, 18, 156 P.3d 502, 519 (2007) (“The Taylor Grazing Act expressly recognizes that the ranchers could obtain their own water rights on federal land.”).

ii. The Stock-Raising Homestead Act and Order of Withdrawal: Stock Driveway Withdrawal No. 20

The Stock-Raising Homestead Act of 1916 encouraged homestead settlement of lands “originally deemed of no value except for livestock grazing and the growing of forage.” *See Stock Raising Homestead Act of 1916 (SRHA)*, Earthworks <https://earthworks.org/issues/stock-raising-homestead-act-of-1916-srha/> (last accessed November 14, 2024). Section 10 of the SRHA granted the Secretary of the Interior the power to reserve “lands necessary to insure [sic] access by the public to watering places ... needed for use in the movement of stock to summer and winter ranges or to shipping points....” 43 U.S.C. § 300 (repealed). These reserved lands for moving stock are also known as “stock driveways.”

As summarized by Fredric W. Price at trial:

A stock driveway is a corridor to allow somebody to skip through the allotment to get to the other side, and you have to be authorized to do that. So they’re [sic] used to be a bunch of stock driveways, you know, across BLM land, and this allotment [the Horse Flat Allotment] happened to have one.

Trial Transcript, Volume 2 (October 3, 2024), 329:21-25. The Horse Flat Allotment stock driveway referenced in Mr. Price’s testimony was created by the Secretary of the Interior via a May 17, 1918, Order of Withdrawal: Stock Driveway Withdrawal No. 20 (Idaho No. 1), which was issued pursuant to the SRHA. *See* Trial Exhibit No. 169. The Order of Withdrawal reserved numerous lands in the modern-day Horse Flat Allotment (#95) for use as stock driveways, including the following lands in T15N, R3W:

In T. 15 N., R. 3 W., W½ NW¼, SW¼, NW¼ SE¼, Sec. 5, S½ NE¼, NW¼, S½, Sec. 8, Sec. 17, SE¼, Sec. 19, NE¼, NE¼ NW¼, S½ NW¼, SW¼, N½ SE¼, SW¼ SE¼, Sec. 20, N½ NW¼, SW¼ SW¼, Sec. 29 E½, Sec. 30 ...

Id., p. 4; *see also* Trial Exhibit No. 170. The stock driveway established under the Order of Withdrawal was dissolved in 2003 pursuant to BLM's 43 C.F.R. Public Land Order 6436.

b. *The Hoods' Predecessors in Interest: The Edwards Family*

The Hoods' Water Claims are associated with the Hoods' real property located at 3101 Rush Creek Rd., Cambridge, Idaho 83610. This property is hereafter referred to as the "Base Property." The points of diversion for all the Hoods' Water Claims are located on a federal grazing allotment known as the Horse Flat Allotment, which is managed by the Four Rivers Field Office of the BLM. *See* Trial Exhibit No. 201, p. 4; Trial Exhibit No. 203.

The predecessors in interest to the Hoods' Water Claims are certain members of the Edwards family: David G. Edwards; David's son, Charles R. Edwards; and Charles' son, Elmo Edwards. *See* Trial Exhibit Nos. 201, 202, and 320. The present-day Base Property was conveyed into private ownership through a series of patents issued between 1908 and 1920, *see* Trial Exhibit Nos. 301-306, and ownership of the Base Property was unified via a series of acquisitions by Charles R. Edwards between 1919 and 1934, *see* Declaration of Fredric W. Price in Support of United States' Motion for Summary Judgment (July 12, 2024), ¶¶ 12-13.

i. *David G. Edwards' October 15, 1900, Settlement on the Base Property*

David G. Edwards was the first member of the Edwards family to settle a portion of the modern-day Base Property. As stated in his sworn homestead entry affidavit, David first settled on a portion of the Base Property on or about October 15, 1900. *See* Trial Exhibit No. 16 at Bates No. BLM_0000253. In his testimony of homestead entry, dated November 22, 1906, David identified the character of the land he settled on as "chiefly grazing." *Id.* at Bates No. BLM_0000260. A special agent for the Government Land Office who investigated David's homestead entry claim noted that David was improving the land. *Id.* at Bates No.

BLM_0000239. The agent expressed “entire confidence” in David’s truthfulness, noting that David was a Civil War veteran and an “old man of first class reputation.” *Id.*

David G. Edwards’ statements that he settled on the Base Property on October 15, 1900, and that the land was “chiefly grazing” are noteworthy. Taken with the documentary evidence of the Edwards family’s grazing history (discussed in further detail below), David’s statements indicate that the Edwards family began watering cattle on public lands around the Base Property in the year 1900.

ii. Documentation of the Edwards Family’s Grazing History

In grazing permit applications, members of the Edwards family repeatedly averred that they had long been grazing cattle associated with the Base Property on public lands in the modern-day Horse Flat Allotment; the Edwards family also provided statements indicating that they had engaged in this grazing since at least 1900. *See Memorandum Decision on Remand and Order of Amended Partial Decrees*, In Re SRBA Case No. 39576, Subcases 55-10288B, et al. (Jul. 3, 2008), 5-6 (predecessor in interest’s representations in grazing permit applications evidence priority date). Grazing permits and recommendations issued by federal agencies further reflected the Edwards family’s grazing on public lands in the Horse Flat Allotment since at least 1900.

Documents relating to U.S. Forest Service grazing permits show that David G. Edwards and Charles R. Edwards had longstanding grazing activities on the public lands in the modern-day Horse Flat Allotment. Charles averred in a 1914 U.S. Forest Service application to graze on U.S. National Forest lands that he owned 28 head of cattle and 5 horses. Trial Exhibit No. 325 at Bates Nos. BLM_2302–2303. In 1915, David was issued a U.S. Forest Service permit to graze six horses on the West Pine Creek allotment of the Weiser National Forest (i.e., the present-day Payette National Forest). *Id.* at BLM_2304. In 1918, the “David Edwards Estate” was issued a

U.S. Forest Service permit to graze seven horses on the East Pine Creek allotment of the Weiser National Forest. *Id.* at BLM_2306. A U.S. Forest Service report on qualification, dated November 6, 1918, states that Charles owned 25 head of cattle and 13 horses. *Id.* at Bates Nos. BLM_2305. The report further states that Charles is dependent on the forest range, that his ranch is six miles from the Weiser National Forest, and that Charles is “a Class A owner [that] lives on his ranch[,] milks cows[,] and farms the place himself.” *Id.* Notably, “Class A owners” were given the highest preference to graze on the U.S. Forest Reserve: As defined by the Forest Service’s 1905 Use Book, “Class A owners” are “Small near-by owners. Persons living in or close to the reserve whose stock have regularly grazed upon the reserve range and who are dependent on its use.” U.S. Dep’t of Agriculture, Forest Service, THE USE BOOK: REGULATIONS AND INSTRUCTIONS FOR THE USE OF THE NATIONAL FOREST RESERVES (1905), p. 22.¹

David G. Edwards’ and Charles R. Edwards’ longstanding grazing is also reflected in documents relating to Grazing Service applications to graze on public lands. In a grazing permit application dated July 27, 1935, Charles requested permission to graze 250 head of cattle in Idaho Grazing District No. 1 at Sections 20, 21, 29 and 33 of T15N, R3W. Trial Exhibit No. 308, pp. 1-5. Charles claimed that he had been grazing cattle on these lands “For [the] past 40 years.” *Id.*, p. 3. Charles similarly averred in a December 13, 1935, grazing application that he had grazed the entirety of T15N, R3W “For [the] past 40 years.” Trial Exhibit No. 309 at Bates No. BLM_0000670. Consistent with Charles’ “40 years” statements in both of his 1935 applications, Charles states in a December 28, 1955, letter to the Owyhee Grazing District No. 1 Advisory Board that he and his family used “Taylor land” “continuously for sixty years and have never missed a year of use.” See Trial Exhibit No. 316. Likewise, Charles’ obituary—published in the

¹ A copy of the 1905 Use Book is available at <https://foresthistory.org/wp-content/uploads/2017/10/USFS1905UseBook.pdf>.

Idaho Statesman on Sunday, December 17, 1961—notes that Charles “came to the Salubria Valley in 1895 where he was engaged in farming and stock raising his entire lifetime.” Trial Exhibit No. 320.

In a grazing permit application dated February 21, 1936, Charles R. Edwards and Son sought a permit to graze 250 cattle in Idaho Grazing District No. 1. Trial Exhibit No. 310. Charles R. Edwards and Son identified common lands in Sections 15, 21, 22, 29, 31, 32 and 33 of T15N, R3W as the lands they sought to graze under the permit. *Id.* Not long thereafter, the Secretary of the Interior issued the Rules for Administration of Grazing Districts (discussed *supra* in Section I.a.i. of this brief). Pursuant to these Rules, Class 1 Grazing Licenses were issued to qualified applicants who had made use of the public range before June 28, 1934. Trial Exhibit No. 27 at Bates Nos. BLM_2252.

A March 21, 1936, notification of grazing allowance from the Department of Interior’s Grazing Division granted Charles R. Edwards and Son a temporary license to graze 250 head of cattle on common lands in Sections 15, 21, 28, 29, 31, 32 and 33 of T15N, R3W. Trial Exhibit No. 311. An October 1, 1936 notice from the Department of Interior’s Grazing Division recommended Charles R. Edwards and Son for a Class 1 Grazing License to graze 250 head of cattle on common lands in Sections 9, 15, 20, 21, 22, 28, 29 and 33 of T15N, R3W. Trial Exhibit No. 307 at Bates No. BLM_0000611. Consistent with the Rules for Administration of Grazing Districts, the margins of the October 1 notice state: “On Public Domain that has been used in connection with your dependent commensurate property for a period of three years prior to June 28, 1936.” *Id.* Charles R. Edwards and Son were later issued a Class 1 Grazing License on October 5, 1936, which granted them permission to graze 250 head of cattle on common lands in Sections 9, 15, 20, 22, 29 and 33 of T15N, R3W. Trial Exhibit No. 312.

Documents regarding the stock driveway in the modern-day Horse Flat Allotment further confirm the Edwards family's long history of grazing those public allotment lands. A March 20, 1975, meeting memorandum by BLM Cascade Area Manager Malcolm Schnitker identifies Elmo Edwards as an attendee. The memorandum notes that Elmo "indicated that livestock are normally turned out on the south end of the allotment (lower elevation) and allowed to drift north." Trial Exhibit No. 208, p. 1. Noting further that grazing was occurring on the forest allotment land north of the Horse Flat Allotment, the memorandum summarized a discussion about encouraging use of the south end of the common allotment and amending the grazing schedule. *Id.*, pp. 1-2. Taken with David G. Edwards' and Charles R. Edwards' Forest Service permits, these descriptions of Elmo "normally" turning his cattle out south and allowing them to drift north on forest allotment land indicate that the Edwards family had long utilized the stock driveway established under Order of Withdrawal: Stock Driveway Withdrawal No. 20 (Idaho No. 1).

II. ANALYSIS

As an overarching matter, this case concerns events that occurred upwards of 124 years ago. It bears emphasizing that historical documents relevant to this matter are relatively scarce. But it would be mistaken to assume that gaps in documentation demonstrate that the Edwards family was not grazing stock. Such an assumption is all the more misplaced given that the Hoods are not required to prove the priority date of their Water Claims beyond a reasonable doubt or by clear and convincing evidence. Rather, the Hoods merely need to make a preponderance showing—that is, the Hoods must show that the claimed priority date is more probable than its nonexistence. See *Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine Cnty.*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984), *rev'd on other grounds* 109 Idaho 299, 707 P.2d 410 (1985); cf. 2 Kenneth S. Broun et al., *McCormick On Evidence* § 339 (8th ed.)

(Robert P. Mosteller) (“The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.”).

The available documentation establishes by a preponderance of the evidence that the priority date (i.e., the date that the water was first put to beneficial use) for the Hoods’ Water Claims is October 15, 1900. This priority date derives from David G. Edwards’ first entry onto a portion of the Hoods’ Base Property—land that David was improving and that he identified as “chiefly grazing.” Trial Exhibit No. 16 at Bates Nos. BLM_0000239, BLM_0000260. This priority date is further supported by Charles R. Edwards’ repeated averments in 1935 grazing applications that he had been grazing cattle on lands in T15N, R3W, “For [the] past 40 years,” Trial Exhibit No. 308, p. 3; Trial Exhibit No. 309 at Bates No. BLM_0000670, Charles’ claim in a 1955 letter to the Owyhee Grazing District that he and his family used “Taylor land” “continuously for sixty years and have never missed a year of use,” *see* Trial Exhibit No. 316, and the statement in Charles’ obituary that he “came to the Salubria Valley in 1895 where he was engaged in farming and stock raising his entire lifetime,” Trial Exhibit No. 320.

While Charles R. Edwards’ statements as to the length of years that his family grazed do not precisely align with the year 1900, they are sufficiently approximate to the date of David G. Edwards’ homestead entry so that it is more likely than not that the Edwards family began grazing cattle on the public lands of the modern-day Horse Flat Allotment since at least October 15, 1900. Indeed, documents relating to U.S. Forest Service grazing permits show that David and Charles were engaged in grazing on public lands in the 1910s, that such grazing had occurred regularly, and that the Edwards family was dependent on such use. *See generally* Trial Exhibit No. 325; *see also* THE USE BOOK, p. 22

As to what lands the Edwards grazed beginning in 1900, the available documentation shows that it is more likely than not that all of the Hoods' Water Claims were first put to beneficial use in 1900. Charles R. Edwards stated in his December 13, 1935, application for a grazing permit that he had been grazing the entirety of T15N, R3W "For [the] past 40 years." Trial Exhibit No. 309. This statement encompasses the place of use for all the Hoods Water Claims. Various other applications, permits, notices, and BLM documents further evidence that the Edwards were grazing cattle in the places of use for many of the Hoods' Water Claims.

The places of use for claims 67-15269, 67-15270, 67-15272, 67-15278, 67-15284, 67-15285, 67-15286, 67-15287 and 67-15288 are fully within the lands identified on Charles R. Edwards' July 27, 1935, application as lands he claimed to have grazed "For [the] past 40 years." Trial Exhibit No. 308.

The places of use for claims 67-15275, 67-15276, 67-15277, 67-15285, 67-15287 and 67-15288 are fully within the lands identified in the October 1, 1936, recommendation for a Class 1 Grazing License issued to Charles R. Edwards and Son, which contained the margin note "On Public Domain that has been used in connection with your dependent commensurate property for a period of three years prior to June 28, 1936." Trial Exhibit No. 307 at Bates No. BLM_0000611. These same lands are described in the subsequent October 5, 1936, Class 1 Grazing Permit issued to Charles R. Edwards and Son. Trial Exhibit No. 312.

The places of use for claims 67-15263, 67-15264, 67-15265, 67-15266, 67-15268, 67-15271, 67-15272, 67-15274, 67-15279, 67-15280, 67-15281, 67-15282 and 67-15283 are fully within the lands reserved for stock driveway under the Secretary of the Interior's Order of Withdrawal: Stock Driveway Withdrawal No. 20 (Idaho No. 1). The places of use for claims 67-15273 and 67-15278 fall partially within the stock driveway and partially within the lands described in both Charles R. Edwards' October 5, 1936, Class 1 Grazing License and Charles'

July 27, 1935, grazing permit application. *See* Trial Exhibit No. 312; Trial Exhibit No. 308, p. 5. The areas covered by the stock driveway and the driveway's overlap with the aforementioned water right claims are accurately reproduced in Trial Exhibit No. 170.

The March 20, 1975, memorandum by BLM Cascade Area Manager Malcolm Schnitker—considered alongside David G. Edwards' and Charles R. Edwards' Forest Service grazing applications and licenses between 1914 and 1918—indicates that the Edwards family had long utilized the stock driveway before 1975. The 1975 memorandum states that grazing was occurring on the forest allotment land north of the Horse Flat Allotment and identifies “Spring Creek on the north” as a primary source of stockwater; Spring Creek is indeed (in part) adjacent to the northern portion of the stock driveway and (in other part) within the northern portion of the stock driveway. *Compare* Trial Exhibit No. 203 (IDWR map identifying bodies of water in the Horse Flat Allotment) *with* Trial Exhibit No. 170 (demonstrative exhibit with Frederic W. Price's annotations identifying the stock driveway coordinates for T15N, R3W). The notion that the Edwards family used the stock driveway is further supported by the assertion attributed to Elmo Edwards in the 1975 memorandum: his livestock “are normally turned out on the south end of the allotment (lower elevation) and allowed to drift north.” Trial Exhibit No. 208, p. 1.

III. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. Proposed Findings of Fact

i. The Base Property and Associated Water Right Claims

1. Keith and Karen Hood are the owners of certain real property located at 3101 Rush Creek Rd., Cambridge, Idaho 83610. *See* Trial Exhibit Nos. 322 and 324. This 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. *See* Trial Exhibit Nos. 322 and 324.

2. The Hoods' Base Property is associated with the following stockwater right claims, which are at issue in this litigation and are collectively referred to as the "Water Claims": 67-15263, 67-15264, 67-15265, 67-15266, 67-15267, 67-15268, 67-15269, 67-15270, 67-15271, 67-15272, 67-15273, 67-15274, 67-15275, 67-15276, 67-15277, 67-15278, 67-15279, 67-15280, 67-15281, 67-15282, 67-15283, 67-15284, 67-15285, 67-15286, 67-15287, 67-15288 and 67-15289. *See Exhibit A to Claimants Keith and Karen Hood's Post-Trial Brief; see also Trial Exhibit Nos. 201 and 202.*

3. The points of diversion for all the Hoods' Water Claims are located on a federal grazing allotment known as the Horse Flat Allotment (#95), which is managed by the Four Rivers Field Office of the Bureau of Land Management. *See Trial Exhibit No. 201, p. 4; Trial Exhibit No. 203.*

4. The Horse Flat Allotment abuts the modern-day Payette National Forest, which was established in 1944 through the consolidation of lands that had been previously established as the Weiser National Forest and the Idaho National Forest. *See Richard C. Davis, National Forests of the United States, THE FOREST HISTORY SOCIETY (September 29, 2005).*

5. The BLM holds decreed beneficial use water rights that overlap with many of the Hoods' Water Claims. *See Trial Exhibit No. 201, pp. 4-5.*

ii. First Settlement On a Portion of the Base Property, Unification of the Base Property, and Chain of Title

6. The predecessors in interest to the Hoods' Water Claims are the Edwards family; namely, David G. Edwards; David's son, Charles R. Edwards; and Charles' son, Elmo Edwards. *See Trial Exhibit Nos. 201, 202, and 320.*

7. The first member of the Edwards family to settle on a portion of the modern-day Base Property was David G. Edwards. As provided in his sworn homestead entry affidavit,

David first settled on a portion of the Base Property on or about October 15, 1900. *See* Trial Exhibit No. 16 at Bates No. BLM_0000253.

8. In his testimony of homestead entry, dated November 22, 1906, David G. Edwards identified the character of the land he settled on as “chiefly grazing.” *See id.* at Bates No. BLM_0000260.

9. According to a U.S. Department of Interior document, dated March 25, 1907, a special agent for the Government Land Office investigated David G. Edwards’ homestead entry claim. *See id.* at Bates Nos. BLM_0000238–240. Among other things, the special agent made the following findings:

From my inspection of the claim, I wish to state that there is about \$600.00 worth of improvements on the claim and he [David G. Edwards] is still improving it and it has every appearance of being his permanent home.

Claimant [David G. Edwards] is an old man of first class reputation and was a soldier in the civil war. *I have entire confidence in his truthfulness.*

Id. at Bates No. BLM_0000239 (emphasis added).

10. The Hoods’ present-day Base Property was conveyed into private ownership through a series of patents issued between 1908 and 1920, *see* Trial Exhibit Nos. 301-306, and ownership of the Base Property was unified via a series of acquisitions by Charles R. Edwards between 1919 and 1934, *see* Declaration of Fredric W. Price in Support of United States’ Motion for Summary Judgment (July 12, 2024) (“Price Decl.”), ¶¶ 12-13.

11. The United States issued Patent 2762 to David G. Edwards on May 26, 1908. Trial Exhibit No. 305. Charles R. Edwards later acquired this property on or about September 26, 1928. *See* Price Decl., ¶ 12.

12. The United States issued Patent 16246 to Nels C. Nielson on September 24, 1908. Trial Exhibit No. 301. Charles R. Edwards later acquired this property on or about December 14, 1934. *See Price Decl.*, ¶ 12.

13. The United States issued Patent 222034 to Charles R. Edwards on August 24, 1911. Trial Exhibit No. 304.

14. The United States issued Patent 462899 to Leroy T. Braden on March 15, 1915. Trial Exhibit No. 303. Charles R. Edwards later acquired this property on or about April 14, 1919. *See Price Decl.*, ¶ 12

15. The United States issued Patent 607050 to Anna Edwards on November 9, 1917. Trial Exhibit No. 306. Charles R. Edwards later acquired this property on or about December 14, 1918. *See Price Decl.*, ¶ 12.

16. The United States issued Patent 759345 to Charles R. Edwards (as assignee for Franklin B. Hardy) on June 25, 1920. Trial Exhibit No. 302.

17. In 1962, Charles R. Edwards sold the Base Property to Melvin Dotson. Trial Exhibit No. 317 at Bates No. BLM_0001817.

18. On August 28, 2012, Keith and Karen Hood purchased the Base Property from the Estate of Melvin A. Dotson. Trial Exhibit No. 231

iii. Historic Beneficial Use by the Edwards Family of the Water Right Claims

19. In a 1914 U.S. Forest Service application for grazing permit, Charles R. Edwards averred that he owns 28 head of cattle and 5 horses, and that he sought a permit to graze 20 head of cattle in U.S. National Forest lands. Trial Exhibit No. 325 at Bates Nos. BLM_2302–2303.

20. The U.S. Forest Service issued a grazing permit to David G. Edwards dated September 24, 1915. *Id.* at BLM_2304. The permit gave David permission to graze six horses on

the West Pine Creek allotment of the Weiser National Forest (i.e., the present-day Payette National Forest). *Id.*

21. On December 29, 1916, the Stock-Raising Homestead Act was signed into law. *See* 43 U.S.C. § 291 et seq. (repealed). Section 10 of the SRHA states, in relevant part, that the Secretary of the Interior may reserve “lands necessary to insure [sic] access by the public to watering places ... needed for use in the movement of stock to summer and winter ranges or to shipping points....” 43 U.S.C. § 300 (repealed).

22. The U.S. Forest Service issued a grazing permit to “David Edwards Estate” dated April 20, 1918. Trial Exhibit No. 325 at BLM_2306. The permit gave David’s estate permission to graze seven horses on the East Pine Creek allotment of the Weiser National Forest. *Id.*

23. A U.S. Forest Service report on qualification dated November 6, 1918, states that Charles R. Edwards owned 25 head of cattle and 13 horses. *Id.* at Bates Nos. BLM_2305. The report further states that Charles is dependent on the forest range, that his ranch is six miles from the Weiser National Forest, and that Charles is “a Class A owner [that] lives on his ranch[,] milks cows[,] and farms the place himself.” *Id.*

24. Notably, “Class A owners” were given the highest preference to graze on the U.S. Forest Reserve. As defined by the Forest Service’s 1905 Use Book, “Class A owners” are “Small near-by owners. Persons living in or close to the reserve whose stock have regularly grazed upon the reserve range and who are dependent on its use.” U.S. Dep’t of Agriculture, Forest Service, THE USE BOOK: REGULATIONS AND INSTRUCTIONS FOR THE USE OF THE NATIONAL FOREST RESERVES (1905), p. 22.

25. On May 17, 1918, pursuant to the SRHA, the U.S. Department of the Interior entered Order of Withdrawal: Stock Driveway Withdrawal No. 20 (Idaho No. 1), which reserved numerous lands for use by general public as stock driveways. *See* Trial Exhibit No. 169.

26. Among other lands, the Order of Withdrawal reserved numerous portions of the modern-day Horse Flat Allotment for use as stock driveways. Relevant here, the Order reserves the following areas in T15N, R3W:

In T. 15 N., R. 3 W., W $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 5, S $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, S $\frac{1}{2}$, Sec. 8, Sec. 17, SE $\frac{1}{4}$, Sec. 19, NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 20, N $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 29 E $\frac{1}{2}$, Sec. 30 ...

Id., p. 4; *see also* Trial Exhibit No. 170.

27. On June 28, 1934, the Taylor Grazing Act was signed into law. *See* 43 U.S.C. § 315 et seq. The TGA created a “new permit system [that] granted grazing privileges by preference to ranchers who had actually used a grazing district’s land during a priority period before 1934.” Laurence A. Clement Jr., “Taylor Grazing Act,” *Encyclopedia of the Great Plains*, UNIVERSITY OF NEBRASKA-LINCOLN http://plainshumanities.unl.edu/encyclopedia/doc/e_gp.ag.071 (last accessed November 14, 2024).

28. In a grazing permit application dated July 27, 1935, Charles R. Edwards sought a permit to graze 250 cattle in Idaho Grazing District No. 1. Trial Exhibit No. 308, p. 1. Charles identified Sections 20, 21, 29 and 33 of T15N, R3W as the common lands they sought to graze under the permit. *Id.*, p. 5. Charles also claimed that he had used the lands covered by the permit application “For [the] past 40 years.” *Id.*, p. 3.

29. In a grazing permit application dated December 13, 1935, Charles R. Edwards and Elmo Edwards sought a permit to graze 250 cattle in Idaho Grazing District No. 1. Trial Exhibit No. 309. Among other locations, Charles and Elmo identified the entirety of T15N, R3W as the common lands they sought to graze under the permit. *Id.* at Bates No. BLM_0000668. Charles and Elmo also claimed that they had used the lands covered by the permit application “For [the] past 40 years.” *Id.* at Bates No. BLM_0000670.

30. In a grazing permit application dated February 21, 1936, Charles R. Edwards and Son sought a permit to graze 250 cattle in Idaho Grazing District No. 1. Trial Exhibit No. 310. Charles R. Edwards and Son identified common lands in Sections 15, 21, 22, 29, 31, 32 and 33 of T15N, R3W as the lands they sought to graze under the permit. *Id.*

31. On March 2, 1936, the Secretary of the Interior issued Rules for Administration of Grazing Districts, which provided the Division of Grazing with instructions for issuing permits under the TGA. *See* Trial Exhibit No. 27 at Bates Nos. BLM_2251–2262. Relevant here, the Rules identified Class 1 Grazing Licenses (i.e., the highest-preference grazing licenses) as “Qualified applicants with dependent commensurate property with priority of use.” *Id.* at Bates Nos. BLM_2252. “Priority of use” was defined in the Rules as “such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper use of both the public range and the lands or water used in connection therewith.” *Id.*

32. In a notification of grazing allowance from the Department of Interior’s Grazing Division, dated March 21, 1936, Charles R. Edwards and Son were granted a temporary license to graze 250 head of cattle on common lands in Sections 15, 21, 28, 29, 31, 32 and 33 of T15N, R3W. Trial Exhibit No. 311.

33. In a notice from the Department of Interior’s Grazing Division, dated October 1, 1936, Charles R. Edwards and Son were given a recommendation for a Class 1 Grazing License to graze 250 head of cattle on common lands in Sections 9, 15 20, 21, 22, 28, 29 and 33 of T15N, R3W. Trial Exhibit No. 307 at Bates No. BLM_0000611. Consistent with the Secretary of the Interior’s March 2, 1936, Rules for Administration of Grazing Districts, the margins of the notice contain the following statement: “On Public Domain that has been used in connection with your dependent commensurate property for a period of three years prior to June 28, 1936.” *Id.*

34. On October 5, 1936, Charles R. Edwards and Son were issued a Class 1 Grazing License, which granted them permission to graze 250 head of cattle on common lands in Sections 9, 15, 20, 22, 29 and 33 of T15N, R3W. Trial Exhibit No. 312.

35. In a December 28, 1955, letter to the Owyhee Grazing District No. 1 Advisory Board, Charles R. Edwards states that he and his family used “Taylor land” “continuously for sixty years and have never missed a year of use.” *See* Trial Exhibit No. 316.

36. According to an obituary published in the Idaho Statesman on Sunday, December 17, 1961, Charles R. Edwards died on December 16, 1961. *See* Trial Exhibit No. 320 (“Charles R. Edwards ... died Saturday morning...”). The obituary states that Charles “came to the Salubria Valley in 1895 where he was engaged in farming and stock raising his entire lifetime.” *Id.*

37. In a memorandum dated March 20, 1975, BLM Cascade Area Manager Malcolm Schnitker documented a meeting he held with BLM land users. *See* Trial Exhibit No. 208. The memorandum identifies one of the principal sources of stockwater as “Spring Creek on the north.” *Id.*, p. 1. The memorandum notes that Elmo Edwards “indicated that livestock are normally turned out on the south end of the allotment (lower elevation) and allowed to drift north.” *Id.* Noting further that grazing was occurring on the forest allotment land north of the Horse Flat Allotment, the memorandum summarized a discussion about encouraging use of the south end of the common allotment and amending the grazing schedule. *Id.*, pp. 1-2.

38. On July 25, 1983, BLM published 43 C.F.R. Public Land Order 6436, which scheduled the stock driveway established under Order of Withdrawal: Stock Driveway Withdrawal No. 20 (Idaho No. 1)—including the affected lands in T15N, R3W—to expire on July 25, 2003.

iv. Priority Dates Based on Evidence of Historic Beneficial Use

39. On October 15, 1900, David G. Edwards was the first of the Hoods' predecessors in interest to make entry on a portion of the Base Property, as evidenced by his sworn homestead entry affidavit. *See* Trial Exhibit No. 16 at Bates No. BLM_0000253.

40. The evidence shows that David G. Edwards and his family were more likely than not grazing cattle at the time of David's October 15, 1900, homestead entry. For example, David swears in his November 22, 1906, testimony of homestead entry that the character of the land he settled on was "chiefly grazing." *See id.* at Bates No. BLM_0000260. The fact that David made these sworn statements, combined with the fact that a contemporary government official expressed high confidence in David's truthfulness, leaves no serious doubt about the veracity of these claims of entry and grazing.

41. Furthermore, there are repeated assertions by (and regarding) David G. Edwards' son, Charles R. Edwards, that support the notion that the Edwards family grazed cattle on public lands since at least 1900: Charles averred in both his July 27 and December 13, 1935, grazing applications that he been grazing common lands in the present-day Horse Flat Allotment for 40 years. *See* Trial Exhibit No. 308, p. 3; Trial Exhibit No. 309 at Bates No. BLM_0000670. Charles stated in his 1955 letter to the Owyhee Grazing District that he had his family had used "Taylor lands" "continuously for sixty years and have never missed a year of use." *See* Trial Exhibit No. 316. And Charles' obituary states that he "came to the Salubria Valley in 1895 where he was engaged in farming and stock raising his entire lifetime." Trial Exhibit No. 320.

42. These statements as to the length of years that Charles R. Edwards and his family grazed are sufficiently approximate to the date of David G. Edwards' homestead entry so that it is more likely than not that the Edwards family began grazing cattle on the public lands of the modern-day Horse Flat Allotment no later than October 15, 1900.

43. In addition, the places of use for all the Hoods' Water Claims are fully within the lands identified in Charles R. Edwards' December 13, 1935, grazing permit application, wherein he claimed to have used these lands "for [the] past 40 years." Trial Exhibit No. 309 at Bates No. BLM_0000670.

44. Charles R. Edwards statement in his December 13, 1935, application—taken together with the Edwards family's statements about when they began grazing cattle associated with the Base Property—supports a finding that the priority date for all the Hoods' Water Claims is October 15, 1900.

45. The priority date of October 15, 1900, is further supported by the other documentary statements made by members of the Edwards family and the permits issued to them.

46. Consistent with the Edwards family's assertion of cattle ownership, U.S. Forest Service grazing permits and applications evidence that the Edwards family did own cattle in the 1910s. *See generally* Trial Exhibit No. 325.

47. The places of use for claims 67-15269, 67-15270, 67-15272, 67-15278, 67-15284, 67-15285, 67-15286, 67-15287 and 67-15288 are fully within the lands identified on Charles R. Edwards' July 27, 1935, application as lands he claimed to have grazed "For [the] past 40 years." Trial Exhibit No. 308.

48. The places of use for claims 67-15275, 67-15276, 67-15277, 67-15285, 67-15287 and 67-15288 are fully within the lands identified in the October 1, 1936, recommendation for a Class 1 Grazing License issued to Charles R. Edwards and Son, which contained the margin note "On Public Domain that has been used in connection with your dependent commensurate property for a period of three years prior to June 28, 1936." Trial Exhibit No. 307 at Bates No.

BLM_0000611. These same lands are described in the subsequent October 5, 1936, Class 1 Grazing Permit issued to Charles R. Edwards and Son. Trial Exhibit No. 312.

49. Trial Exhibit No. 30 accurately reproduces the areas covered by Charles R. Edwards' July 27, 1935, application, October 1936 Class 1 Grazing Recommendation and subsequent License, and their overlap with the aforementioned water right claims.

50. The places of use for claims 67-15263, 67-15264, 67-15265, 67-15266, 67-15268, 67-15271, 67-15272, 67-15274, 67-15279, 67-15280, 67-15281, 67-15282 and 67-15283 are fully within the lands reserved for stock driveway under the Secretary of the Interior's Order of Withdrawal: Stock Driveway Withdrawal No. 20 (Idaho No. 1). The places of use for claims 67-15273 and 67-15278 fall partially within the stock driveway and partially within the lands described in both Charles R. Edwards' October 5, 1936, Class 1 Grazing License and Charles' July 27, 1935, grazing permit application. *See* Trial Exhibit No. 312; Trial Exhibit No. 308, p. 5.

51. Trial Exhibit No. 170 accurately reproduces the areas covered by the stock driveway and its overlap with the aforementioned water right claims.

52. The March 20, 1975, memorandum by BLM Cascade Area Manager Malcolm Schnitker, considered alongside David G. Edwards' and Charles R. Edwards' Forest Service grazing applications and licenses between 1914 and 1918, indicates that the Edwards family long utilized the stock driveway. The 1975 memorandum that grazing was occurring on the forest allotment land north of the Horse Flat Allotment and identifies "Spring Creek on the north" as a primary source of stockwater; Spring Creek is indeed (in part) adjacent to the northern portion of the stock driveway and (in other part) within the northern portion of the stock driveway. *Compare* Trial Exhibit No. 203 (IDWR map identifying bodies of water in the Horse Flat Allotment) *with* Trial Exhibit No. 170 (demonstrative exhibit with Frederic W. Price's annotations identifying the stock driveway coordinates for T15N, R3W).

53. The notion that the Edwards family had long used the stock driveway is further supported by the assertion attributed to Elmo Edwards in the 1975 memorandum: his livestock “are normally turned out on the south end of the allotment (lower elevation) and allowed to drift north.” Trial Exhibit No. 208, p. 1.

v. Relevant Procedural History

54. On or about July 23, 2020, the Hoods filed a Notice of Claim for their Water Claims with supporting documentation. *See, e.g.*, Trial Exhibit No. 127.

55. On September 17, 2021, the Idaho Department of Water Resources issued two Director’s Reports, recommending, as claimed, all the Hoods’ Water Claims.

56. On November 24, 2021, BLM filed a Standard Form 1 Objection to the Director’s Reports, wherein BLM objected only to the recommended priority date for the Water Claims.

57. A trial in this matter was held on October 2 and 3, 2024.

b. Proposed Conclusions of Law

1. As claimants, Keith and Karen Hood bear the burden of establishing the objected-to priority dates of the Water Claims. I.C. §§ 42-1404(3), 42-1411(2)(d).

2. While Section 42-1404 does not expressly identify the standard of proof claimants must meet to establish the elements of their water rights, Idaho courts have recognized that the preponderance of the evidence standard applies in such proceedings.² *See Intermountain Health Care, Inc. v. Bd. of County Comm’rs of Blaine Cnty.*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984), *rev’d on other grounds* 109 Idaho 299, 707 P.2d 410 (1985).

² The notion that the preponderance standard is the applicable standard in adjudicating water right claims is bolstered by the fact that the Idaho water code expressly identifies the instances where the burden of proof is greater than the preponderance standard. *See, e.g.*, I.C. § 42-222(2) (“The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.”).

3. Thus, to meet their burden, the Hoods need only prove their claimed priority dates by a preponderance of the evidence; that is, they must prove that the claimed priority date is more probable than its nonexistence. *Cf.* 2 Kenneth S. Broun et al., *McCormick On Evidence* § 339 (8th ed.) (Robert P. Mosteller) (“The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.”).

4. Water rights for stockwatering established under the constitutional method require the diversion of water and application to a beneficial use. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 8 (2007).

5. “[F]or stockwater use on federal land, the director shall accept the date of the first grazing permit issued on the federal grazing allotment, pursuant to federal grazing authorizations, including but not limited to the Taylor Grazing Act, as prima facie evidence of the date of priority, unless the claimant produces evidence of earlier stockwater use on the federal land, which shall then establish the date of priority.” I.C. § 42-1411(d).

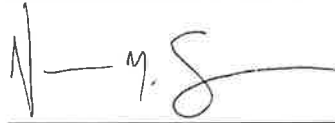
6. Representations by a predecessor in interest in grazing permit applications can serve as evidence of the date of priority. *Memorandum Decision on Remand and Order of Amended Partial Decrees*, In Re SRBA Case No. 39576, Subcases 55-10288B, et al. (Jul. 3, 2008), 5-6.

7. The evidence presented by the Hoods establishes that all the Water Claims were, more likely than not, first initiated on October 15, 1900.

8. The Hoods’ claims should therefore be decreed as having a priority date of October 15, 1900.

DATED this 14th day of November, 2024.

PARSONS BEHLE & LATIMER

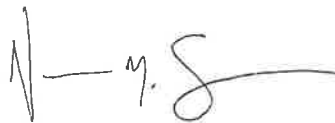


Norman M. Semanko; Garrett M. Kitamura
Attorneys for Keith and Karen Hood

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of November, 2024, a true and correct copy of the foregoing document was sent by Overnight Delivery for filing with the Clerk of the Court, and I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

United States of America U. S. Department of Justice Environmental & National Resources Div. 550 W. Fort Street, MSC 033 Boise, ID 83724	☒ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email
Director of IDWR P. O. Box 83720 Boise, ID 83720-0098	☒ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email



Norman M. Semanko; Garrett M. Kitamura

EXHIBIT A

Subcase Nos.

67-15263
67-15264
67-15265
67-15266
67-15267
67-15268
67-15269
67-15270
67-15271
67-15272
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