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MAR 06 2025

DEPT. OF WATER RESOURCES

**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 <i>et al.</i> (Hood)
	)	See Ex. A
	)	
	)	

**United States' Brief in Support of Motion to Alter or Amend Special Master's
Report and Recommendation, Findings of Fact, and Conclusions of Law**

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I. Introduction

Claimants Keith & Karen Hood (the “Hoods”) asserted twenty-seven water right claims on federal land managed by the United States Department of the Interior, Bureau of Land Management (the “United States” or “BLM”).¹ While the Hoods originally benefitted from the prima facie status of the IDWR Director’s Reports associated with the claims, IDWR subsequently disavowed its own Director’s Reports during trial, putting the burden of proof on the Hoods for all twenty-seven claims. Trial Tr. 28:2–28:12. Trial was held on October 2 and 3, 2024, and on January 8, 2025, the Special Master issued a Report and Recommendation (“R&R”) recommending that all twenty-seven of the Hoods’ claims should be decreed with a priority date of April 1, 1911, and declining to make findings regarding quantity of cattle related to the claims and forfeiture due to periods of non-use for some of the claims. Special Master’s R&R (Jan. 8, 2025). Pursuant to SRBA Administrative Order 1 (“AO1”), the United States respectfully moves the Special Master to alter or amend the R&R’s recommended priorities dates, as identified below, because the evidence taken at trial does not support the finding that the Hoods’ predecessors were grazing cattle on the entire present-day base property as of the recommended priority date of April 1, 1911. The United States also respectfully moves the Special Master to alter or amend the R&R to make specific recommendations related to the role of quantity and forfeiture due to periods of non-use in assessing the proper priority date for each claim, as those issues were presented at trial and are directly tied to and impact the priority date determinations.

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¹ BLM as used herein refers to the Bureau of Land Management and where relevant, its predecessors, including, *e.g.*, the General Land Office, the Grazing Division, and the U.S. Grazing Service.

II. Background

The Hoods' present-day base property is comprised of parcels originally patented to six different individuals between 1908 and 1920, which were consolidated under the ownership of the Hoods' predecessor-in-interest Charles R. Edwards in December 1934. The Hoods are currently BLM grazing permittees on the Horse Flat Allotment, the boundaries of which are depicted in U.S. Exhibit 22. The Horse Flat Allotment contains all the public land places of use for the stockwater rights at issue in each of the Hoods' 27 claims. Prior to the passage of the Taylor Grazing Act ("TGA") on June 28, 1934, the land in the present-day Horse Flat Allotment was public domain land. The Hoods' relevant predecessors-in-interest for these subcases are David G. Edwards ("David"), Charles R. Edwards ("Charles"), and Melvin Dotson ("Dotson").

To manage public domain 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, when Charles and David first began authorized grazing—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." *Id.* 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. Trial Tr. 289:7–12.

III. Argument

The R&R identifies the three primary issues presented by the parties in post-trial briefing: when quantities of cattle related to the claims began using water, the impact of periods of non-use for Category 4 and Category 5 claims, and the original priority dates of the claims.

R&R at 2–3. However, the Special Master erred in finding that “the only issue framed by the pleadings and litigated at trial was the issue of making a factual determination of the priority dates for each of the Hoods’ 27 water right claims.” *Id.* at 3. All three issues were clearly delineated in the original pleadings. Even assuming the issues were not clearly delineated in the pleadings filed prior to trial, the trial transcript clearly indicates that quantity and forfeiture due to periods of non-use were litigated at trial inasmuch as they bear weight on the priority dates for claims. Declining to make findings on quantity and forfeiture directly impacted the priority dates recommended in the R&R.

Even notwithstanding the issues of quantity and forfeiture, the Special Master erred in recommending a universal priority date of April 1, 1911. The R&R disregards evidence presented at trial that showed as early as 1918 that the Hoods’ predecessors were not grazing on BLM land and, instead, the Special Master relied on the interpretation of information in their homestead files to find that they *could have* been grazing as early as 1911. Additionally, the R&R assumes that use occurred on the entire Stock Driveway, despite the contrary evidence in which Charles stated he did not trail livestock, that Charles was never granted a trailing permit, and that the Stock Raising Homestead Act would have required him to spend no more than one day annually moving through the Stock Driveway.

As the United States argued in its post-trial brief,² the Hoods are entitled to three different priority dates, splitting the claims into five categories of claims: (1) claims on land within the 1935 Map and the 1936 License; (2) claims on land not within the 1935 Map but within the 1936 License; (3) claims on land added in Section 9 in 1942; (4) claims on land within

² While the United States does not re-raise all arguments made in its post-trial brief in the interest of efficiency, the United States hereby incorporates its post-trial brief by reference for a complete statement of the United States’ position on the proper priority dates of each of the Hoods’ claims.

the 1935 Map but not within the 1936 License or 1942 Permit; and (5) claims on land not within the 1935 Map, 1936 License, or 1942 Permit onward. *See* U.S. Pre-Trial Brief at 2–3 & U.S. Table 1; U.S. Post-Trial Brief at 3–4 & U.S. Table 1; U.S. Ex. 30 (map showing the land in each claim). While some categories result in the same priority date, each is supported by a different set of documents and required a different analysis for the Special Master to determine the proper priority date.

The United States respectfully requests that the Special Master amend the R&R to make findings related to quantity and forfeiture due to periods of non-use, insomuch as each impact the priority date of the claims, and to make a recommendation of priority dates for each individual claim by engaging in the evidence related to each category of claim.

A. The findings regarding how many cattle each Charles and David owned at various times prior to the passage of the TGA, insomuch as they relate to priority dates for any of the Hoods’ claims, should be amended based on evidence in the record.

The Hoods bear the burden of proving every element of their twenty-seven claims. *See* I.C. 42-1411(5). 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). Evidence and testimony about the scope of the elements of their claimed water rights, 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.” Mem. Dec. on Remand, Subcases 55-10288B, *et al.*, at 3 (Jul. 3, 2008) (“*LU IP*”). As the United States’ expert witness and IDWR’s representative testified at trial, quantity of livestock and priority date are inseparable insomuch as it is necessary to consider quantity of livestock when assessing the beneficial use qualifying for a given priority date. Trial Tr. 134:19–25, 393:13–21. In fact, IDWR provides exactly this fact

pattern as an example in Adjudication Memorandum No. 12: “[T]he claimant started using a spring to water 100 head of stock in 1935, and added an additional 100 head in 1940. The claimant could submit one notice of claim for watering 200 head with a 1940 priority date.”³

In the R&R, the Special Master found that “the issue of quantity was not raised in the pleadings and was not litigated at trial.” R&R at 4. As to the pleadings, the United States raised the issue of quantity from its earliest participation in these subcases. The United States’ objections checked the box for priority date and noted in the explanatory text that, “[w]hen multiple water uses are claimed under one water claim, the priority assigned is the most junior of the uses.” *See, e.g.*, U.S. Objection to 67-15263 at 3. AO1 defines pleadings to include objections. *See* AO1(2)(R). While the United States did not check the quantity box, that is because the United States was not, and still is not, challenging the Hoods’ quantity of use as a stand-alone element. Rather, the United States asserted that the Hoods did not meet their burden to demonstrate their claimed priority date—or, moreover, the Special Master’s recommended 1911 priority date—because there is insufficient evidence showing their predecessors owned any quantity of livestock at all prior to 1915, let alone watered them on the specific claimed sources.

After being properly raised in the pleadings, the issue of quantity as a component of priority was then robustly litigated at trial. Counsel for the United States questioned IDWR’s representative at length about quantity. *See* Trial Tr. 134:19–148:4. IDWR’s representative, Craig Saxton, testified during this questioning that the number of head of cattle bears directly on the priority date of a stockwater right. Trial Tr. 134:19–25. The United States also presented documentary and testimonial evidence regarding how many cattle the Hoods’ predecessors grazed and when, and evidence showing periods of time where the Hoods’ predecessors did not

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See <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/guidance/Adjudication-Memo-12.pdf>.

appear to graze any cattle. *See, e.g.*, Joint Exs. 308, 309, 325; Trial Tr. 272:3–16, 276:15–17. The Hoods’ predecessors did not list any livestock in their Homestead Entry files, *see* U.S. Exs. 16–21, despite that, according to the United States’ expert’s trial testimony, it would have been typical for them to do so to highlight the resources they were putting into the homesteading land patent process, *see* Trial Tr. 272:3–16. Rather, their Homestead Entry files indicated that they were small subsistence farmers without a livestock operation. Trial Tr. 280:17–25, 281:1–2.

The R&R states that “findings of fact regarding quantity cannot be made” because, “[a]lthough the record reflects David Edwards and Charles Edwards grew their cattle operations over the years, no evidence of the quantity that would have been required for each incremental step in the growth of the Edwards’ cattle operation was offered at trial.” R&R at 4. As an initial matter, no specific record evidence is cited for the finding that David and Charles even had a cattle operation. It is just as likely that their homesteads at this time were used as cropped farmland or dairies, not for livestock ranching. More critically, however, the fact that no such evidence was presented by the Hoods—who bore the burden of proof—should preclude the recommendation of any priority date that predates the evidence in the record showing verifiable cattle ownership and herd size. Instead, despite stating that “findings of fact regarding quantity cannot be made,” the Special Master went on to engage in that exact kind of fact finding in the R&R when he found that, “by the 1911 grazing season, Charles Edwards could have turned out approximately 29 head plus the additional cattle owned by David Edwards,” R&R at 21 ¶ 81, and that “[b]y the start of the 1911 grazing season, Charles and David Edwards had grown their combined herd to a size that is close to the 50 head currently authorized for use by the Hoods on the Horse Flat Allotment,” *id.* ¶ 83.

In reaching specific factual findings as to quantity for David, the Special Master relied on one piece of evidence: documents in David's Homestead Entry File for Homestead Entry No. 4486, U.S. Exhibit 16 at BLM_231, BLM_253, BLM_260–61, *see* R&R at 16 ¶¶ 41–48. These documents do not directly support the R&R's findings, and those documents are not the complete body of trial evidence regarding herd size. The pages of the Homestead Entry File in the R&R discuss, *inter alia*, that David's land contained a stable, corral, fenced land, and cultivated land. R&R at 16 ¶¶ 44–45. The Special Master also notes that David indicated that the classification of his land was "partly agricultural, but chiefly grazing." *Id.* ¶ 47. Yet the documents have no information about livestock ownership, much less ownership of cattle. Yet the R&R *assumes* that because David had these items on his land, and that the land was partially suitable for grazing, David necessarily must have owned and grazed cattle, *see id.* ¶¶ 46, 48—a leap that is not supported by the evidence presented at trial. Indeed, there is no direct evidence of any livestock ownership at all anywhere in the homestead file, much less that the livestock was cattle, or any number of cattle. *See generally* U.S. Exs. 16–21; *see also* Trial Tr. 272:3–16, 280:17–25, 281:1–2. Without any evidence indicating that David owned and grazed cattle in those years, it is equally plausible that he, for example, grazed other animals on his property, such as horses, or milk cows. In fact, the first extrinsic evidence of grazing of actual livestock by David 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, which indicates he was only grazing horses, not cattle, as late as 1915.

In reaching specific factual findings as to quantity for Charles, the Special Master relied on two pieces of evidence: documents in Charles' Homestead Entry File for Homestead Entry No. 6928, U.S. Exhibit 21 at BLM_187–90, *see* R&R at 17 ¶¶ 52–54, 57, and the July 1935

Application, *see* R&R at 17 ¶ 55 (citing Joint Ex. 308 at BLM_673). Like with David, these documents do not directly support the R&R's findings, and those documents are not the complete body of trial evidence regarding herd size. The pages of the Homestead Entry File quoted in the R&R discuss, *inter alia*, that Charles cultivated 2 acres with wheat in 1905 and 44 tons of hay in the 1910 growing season. R&R at 17 ¶¶ 54, 56. It appears that the Special Master derived 44 tons of hay from Charles indicating that he cultivated 22 acres and "had a crop of about two tons to the acre of grain-hay this year." *Id.* ¶ 53 (quoting U.S. Ex. 21 at BLM_188). Yet the document has no information about what Charles did with that hay—he does not state that he utilized it to feed his own livestock. The R&R thus assumes that the hay was fed to Charles' own cattle—an assumption that is not based on the evidence presented at trial. Indeed, there is no direct evidence of any livestock ownership at all anywhere in the homestead file, much less evidence of the hay being fed to such livestock. *See generally* U.S. Exs. 16–21; *see also* Trial Tr. 272:3–16, 280:17–25, 281:1–2. Without any evidence indicating what Charles did with the hay he grew, it is equally plausible that he, for example, sold the hay to his neighbors or traded it for other materials he needed to continue to grow his homestead. The speculation continues as the R&R goes on to use the 44 tons of hay Charles grew in 1910 to calculate a herd size. R&R at 17 ¶ 56. To do this, the R&R pivots from the 44 tons of hay grown in 1910 to a statement made twenty-five years later in the July 1935 Application. *Id.* ¶ 55. The July 1935 Application indicated that when Charles fed cattle on the ranch in the winter months, he used 1.5 tons of hay per head of cattle. *See id.* The R&R concludes that, based on how many tons of hay Charles fed each head of cattle in 1935, 44 tons of hay would have allowed for Charles to feed 29 head of cattle in 1910. *Id.* ¶ 56.

Finally, although the Special Master never made a factual finding as to how many cattle David owned at any point in time, the R&R necessarily concludes he must have owned close to 31, finding that “[b]y the start of the 1911 grazing season, Charles and David Edwards had grown their combined herd to a size that is close to the 50 head currently authorized for use by the Hoods on the Horse Flat Allotment.” *Id.* ¶ 83. The Special Master’s speculation on the existence of a herd of cattle based on growing hay or having certain structures on their land does not comply with *LU Ranching* or *Joyce*’s requirements. In *LU Ranching*, the court noted that “[i]n the case of instream stock water rights on the public domain, a claimant must show that the predecessor grazed livestock on the public domain and where on the public domain the predecessor grazed the livestock.” Mem. Dec. and Order on Challenges, Subcases 55-10288B, et al., at 26 (Jan. 4, 2005) (“*LU P*”). As the *Joyce* Idaho Supreme Court went on to explain, “[a]ny water rights obtained by Joyce Livestock’s predecessors must be based upon their application of the water to a beneficial use by grazing livestock where they would have access to the water sources at issue,” and the Special Master “must examine where the individual predecessors grazed their livestock.” *Joyce Livestock Co. v. United States*, 144 Idaho 1, 16 (2007). To prove a priority date through livestock use, a claimant must show where their predecessors grazed livestock. It follows that they must prove *when* their predecessors had livestock—or indeed, at a bare minimum, that they *had* livestock at all. As the Special Master correctly noted, the Hoods did not provide this evidence at trial. R&R at 4 (“[No evidence of the quantity that would have been required for each incremental step in the growth of the Edwards’ cattle operation was offered at trial.”). The Special Master cannot rescue the Hoods’ claims with calculations of what Charles could have done with hay he grew and assumptions about the nature of David’s land and barn.

Even if this methodology were applied, the R&R recommends a 1911 priority date without fully addressing the contrary evidence. The first concrete evidence of cattle ownership by David or Charles occurred in 1918, seven years after the recommended priority date. In November 1918, the Forest Service reported in a Report on Qualifications of New Applicants (“Report”) that Charles owned 25 cattle and 13 horses. Joint Ex. 325 at BLM_2305. Although the Special Master mentions the Report once in the R&R, *see* R&R at 18 ¶ 65, he does not utilize it in the quantity fact finding conducted related to priority date, *see generally id.* at 17 ¶¶ 52–56. The R&R also mentions that Charles reported in an application for a five-year grazing permit on Forest Service land that he owned 28 cattle and 5 horses, *see id.* at ¶ 62, however, it incorrectly states this occurred in 1914 when it in fact occurred in 1918, *see* Joint Ex. 325 at BLM_2302,⁴ and it again does not utilize the document in the quantity fact finding conducted related to priority date, *see generally id.* at 17 ¶¶ 52–56. Nor does the R&R address that these documents demonstrate Charles was grazing his herd on Forest Service land, not BLM land, meaning that while these documents provide the first clear documentary ownership regarding the size of Charles’ livestock holdings, they would not support a priority date of 1918 on BLM land. Finally, even utilizing the R&R’s methodology, it is not documented how the Special Master concludes that a purported herd of 29 livestock, and perhaps an undetermined number owned by David, is the same as the modern 50 head limit. As a practical matter, applying the Special Master’s logic of assigning a priority date as of the first date 50 or more head of cattle are verifiable would take the priority to at least July 1935, when the first TGA application was filed asserting ownership of 250 head. In the alternative, at most, the Special Master could

⁴ The records contained in Joint Exhibit 325 are not in chronological order, rather, they are in the order they were in when produced to BLM by the Hoods.

recommend that the Court decree a priority as of 1918 for 28 cattle, and then 1935 for the full quantity.

In sum, the Special Master erred by finding that findings of fact regarding quantity of cattle could not be made but then proceeding to make findings of fact regarding quantity of cattle owned by the Hoods' predecessors at various points in time. Furthermore, the Special Master erred by then engaging in fact finding regarding quantity of cattle inasmuch as the R&R selectively relies on only portions of the evidence presented and does not address evidence that weighs against recommending a priority date as early as April 1, 1911. The Special Master should consider and weigh all evidence of quantity as it relates to priority date and amend the R&R accordingly.

B. The findings regarding periods of non-use, inasmuch as they relate to priority dates, should be amended based on evidence in the record.

In assessing the United States' purported arguments regarding forfeiture, the R&R appears to presume that there was use before the TGA on the areas claimed by the Hoods which were not within any of the grazing authorizations granted to Charles or Melvin Dotson until 1975. The R&R interprets the United States' post-trial brief as arguing that statutory forfeiture pursuant to I.C. 42-222 should be applied to the Hoods' Category 4 and Category 5 claims. This interpretation is incorrect. The United States' post-trial brief asserted that the Special Master needed to apply the *LUI* opinion, which states that water rights established before the passage of the TGA could not have been maintained in trespass. While the United States does not agree that any rights were appropriated before 1935, assuming *arguendo* that they were, the United States simply asks that the Special Master apply *LUI*'s binding decision in making a recommendation.

The R&R states that "[t]his issue of forfeiture was not raised on summary judgment, nor was it pled in the objections." R&R at 7. As an initial matter, while the specific period of non-

use was not raised in the United States objections, the possibility that a period of non-use constituting forfeiture exists was clearly pled. In its objection, the United States noted a different period was “forfeited due to non-use.” *See, e.g.*, 67-15263 objection. While the United States elected not to pursue arguments regarding that specific period at trial, the Hoods were on notice from the United States’ objections that there were potential periods of non-use at issue in the case. As to the summary judgement period, the United States’ motion was clearly titled “*Partial Motion for Summary Judgment.*” U.S. Mot. (emphasis added). Idaho Rule 56 does not require a Motion for Summary Judgment to include all trial issues; instead, it allows a party to move regarding “each claim or defense, or the part of each claim or defense.” I.R.C.P. 56(a). It also bears mentioning that while the R&R references pleadings and summary judgment, it does not note the United States’ pre-trial brief. In its pre-trial brief, the United States raised the issue of claims on land not authorized for use until 1975. *See, e.g.*, Proposed Findings of Fact Nos. 72–77; Proposed Conclusions of Law Nos. 12–16.

Accordingly, there was clear notice to the Hoods that the United States intended to argue that they could not establish beneficial use for certain claims any earlier than 1975. The United States logically did not provide argument pre-trial that there was use of water by the Hoods before 1934 such that a period of intervening non-use occurred, because its trial position was that there was no evidence of *any* use on these lands pre-1934. In fact, the Hoods only alleged for the first time at trial that their predecessors used this land by way of trailing cattle. As the Special Master quotes extensively in the R&R, the Hoods *did* have an opportunity to develop the trial record on this issue, and indeed, questioned a witness about it. *See* R&R at 7 (quoting Trial Tr. 86:3–87:11). Thus, the first opportunity for the United States to raise arguments in response to the Hoods’ allegations was the post-trial brief—an appropriate venue for legal argument.

Regardless, the Special Master's presumption that the *LU I* statement is a reference to statutory forfeiture appears to be in error. In *LU I*, the court's discussion of the principle that "[t]he 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" comes in the context of a discussion of water rights transferring in the chain of title. It comes in a footnote attached to the sentence "[i]n proving any beneficial use right by a predecessor-in-interest, a claimant must still 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." It appears that the *LU I* court was establishing a principle that water rights which existed pre-TGA and were not maintained in trespass post-TGA did not transfer with transfers of the base property. Accordingly, when the base property transferred from Charles to Dotson, and then onward to the Hoods, any pre-1934 use was not transferred with it, because the right was not maintained. Accordingly, the first priority date which the Hoods could properly claim and have decreed in those areas is 1975, when Dotson first initiated lawful use on the remained of the Horse Flat Allotment. The Special Master should consider and weigh all evidence of periods of non-use as it relates to priority date and amend the R&R accordingly.

C. The recommended priority date for all five categories of claims should be amended based on evidence in the record.

i. The First Permit Is Dated December 1935

The Hoods relied on a single piece of evidence to support their previously asserted December 28, 1896, priority date: a statement made by their predecessor Charles in his 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. As the United States argued in its post-trial brief, the statement of use for 40 years is problematic on its face—it is a self-serving application, with no

verification of the truth of its contents, not sworn, notarized, or witnessed. Regardless, the 40-year statement is rebuttable, and the Special Master erred in not finding that other evidence presented rebutted the statement.

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 he owned 25 cattle and 13 horses, 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. That means that, even though evidence shows that Charles owned some cattle by 1918, he was not grazing on BLM land. The Special Master erred by not addressing how he considered and overcame this evidence to nonetheless recommend a priority date of April 1, 1911, based on historic beneficial use on present-day BLM land.

The first extrinsic evidence that the Hoods’ predecessors grazed on any present-day BLM land comes in Charles’ 1935 TGA applications. A critical question is the actual date of the application and associated permits. The Special Master found that the 1936 License was issued on October 5, 1936, after the 1936 grazing season had concluded. R&R at 11 ¶¶ 20, 30. As the Special Master correctly notes, the United States’ expert witness testified that the license was issued October 5, 1935. *See* Trial Tr. 292:20–24. The Special Master provides several findings in support of this conclusion.

First, the Special Master notes that when comparing the “5” in “October 5” with the final digit of the year, “one can clearly see the flat top of the five, compared to the rounded top of the

six.” R&R at 11 ¶ 21. A clip of the relevant date, taken from Joint Exhibit 312, is provided below, for context:



Because the text is difficult to read, in this instance, the United States believes that it most appropriate to provide substantial weight to the interpretation of the witness which the Hoods stipulated to testifying as an expert, and which the Special Master then qualified as an expert in the “review of historic BLM documents that are used in water cases.” Trial Tr. 241:16–21, 254:12–15. The United States’ expert testified that the document is dated 1935.⁵ However, even if the Special Master does not credit the United States’ expert’s testimony, other ancillary evidence supports a 1935 date, rather than 1936.

First, the R&R errs in assessing the document as a stand-alone exhibit. Instead, it should be viewed in the context of the full grazing file for Charles, which was admitted as U.S. Exhibit 10. The permit in question appears at BLM_615–16. The file is broadly structured in reverse chronological order, within sections of the file. The following document, BLM_614, is an undated draft recommendation, followed by a draft recommendation dated March 31, 1936, at BLM_613. A final recommendation then follows at BLM_611 dated October 1, 1936. The document continues chronologically. *See, e.g.*, BLM_609 (December 19, 1936, Short-Form Application for Grazing Permit), BLM_608 (July 9, 1937 bill). While the file is not in perfect chronological order, the sequencing is a relevant consideration.

⁵ In the alternative, it could potentially be a typo. In either scenario, the ancillary evidence supports a finding of 1935, rather than 1936.

Second, the Special Master identifies the documents at BLM_611–14 as constituting grazing authorizations. Instead, they are grazing *privilege* documents. They reflect the Idaho Grazing District Advisory Board’s review of Charles’ February 1936 Application for Grazing Privileges. *See* U.S. Ex. 10 at BLM_664. This application was to determine “grazing privileges for the year 1936.” *Id.* As the United States’ expert testified, this application was distinct from the two applications in July and December of 1935: “[T]he other applications were for grazing authorization. This was a grazing privileges application in order to adjudicate their qualifications.” Trial Tr. 299:19–23. The distinction is critical, because “[t]he permit or license is the authorization, and the privilege is the satisfaction of the requirements” to have specific commensurate base property for your claimed cattle. Trial Tr. 299:24–300:12. This process appears to follow the 1936 Federal Range Code. *See* U.S. Ex. 27 at BLM_2251. The Range Code notes that “permits within the meaning of [the TGA] . . . shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants, or lessees to a *preferential grazing privilege*.” *Id.* (emphasis added). The sequence of documents at BLM_611–14 appear to be the record of this review for ongoing privilege, rather than of review for access. Accordingly, there is no reason that they could not come after an initial authorization was issued.

Third, as discussed above, the 1936 Range Code describes that before permits are issued, temporary licenses would be issued. The condition precedent for issuance of a permit, rather than a temporary license, was acquisition of privilege data. The authorization in question was issued as a “License” rather than a permit. *See* U.S. Ex. 10 at BLM_615. If the permit was dated October 5, 1936, it would have come after the completion of the privilege review on October 1, 1936. *See id.* at BLM_611. Accordingly, under the Range Code, it would have been

issued as a permit, rather than a temporary license. This supports an inference that it was issued in 1935, rather than 1936.

Finally, the Special Master's presumption that the permit was issued *ex post facto* after the grazing season would also run afoul of the governing regulations and require the assumption that all use by Charles during the 1936 grazing season was in trespass. Grazing upon or driving across any public lands within the grazing district without a license was a prohibited act. *See* Ex. 27 at BLM_2259. Accordingly, to lawfully access the public range to graze, the license needed to be issued before the grazing season, which for Charles, began on April 1, 1936. While billing for a given season occurs *ex post facto* based on actual use, it does not follow that authorizations occur *ex post facto*.

In sum, the parties stipulated that the United States' expert is an expert witness on BLM grazing documents, and that expert testified that the document was dated in 1935, not 1936, based on how grazing documents were issued. Ancillary evidence in the 1936 Range Code and the structure of Charles' grazing file supports the United States' experts' testimony. The Special Master erred in concluding, contrary to evidence presented, that the document was dated in 1935. The R&R should be amended to discuss that, as the United States has argued, the December 1935 permit application was a historical nullity, rather than an indication that Charles went from asserting historical use on several hundred acres to several hundred thousand acres within months.

ii. The Stock Grazing Homestead Act & Forest Reserve Grazing

The R&R provides a series of findings of fact regarding Charles' use of the National Forest and a stock driveway adjacent to the relevant public range. As briefly described *supra*, the Special Master acknowledges the existence of the U.S. Forest Service Report on

Qualification of New Applicants but does not fully analyze the text of the relevant section. *See* R&R at 18 ¶ 65. As the R&R notes, the Report does state that Charles is dependent on the forest range. *Id.* However, the full quote provides critical context for Charles' use of the public range. The full question asked of the Forest Ranger was "[i]s applicant dependent upon Forest range, or is range elsewhere available for his stock." Joint Ex. 325 at BLM_2305. The Ranger answered, "dependent on Forest Range." *Id.* The use of a conjunctive clause necessarily requires a finding here that "range elsewhere" was not "available for his stock." *Id.* The R&R does not analyze this provision, which supports a finding that Charles was not grazing the BLM land at that time.

Regarding the stock driveway, as the Special Master describes, the Stock Raising Homestead Act was signed in December of 1916. *See* R&R at 19 ¶ 67. The Special Master goes on to analyze that a 1975 document indicates that livestock are turned out on the south of the allotment and allowed to drift north. From this, the Special Master concludes that "the typical behavior of the livestock has been to move towards the north end of the modern-day Horse Flat Allotment without being persuaded or dissuaded by humans, which evidences water use of the stream reaches located between the deeded property on the south and the Forest Reserve on the north." *Id.* ¶ 71. There are several critical problems with this conclusion.

First, the R&R speculates as to the behavior of cattle and whether human control was involved without any trial evidence in support. Indeed, the only trial testimony about where predecessors may have grazed suggested that cattle likely used the lower elevations shown in green on U.S. Exhibit 33, not all the way to the north. Trial Tr. 347:10–16. However, even if they drifted without human control, it would still constitute trespass to access unlicensed federal range in this manner. *See* U.S. Ex. 27 at BLM_2259 (noting that grazing or driving is prohibited, along with "allowing stock to drift and graze on said district lands without a license"). The

evidence at trial showed that Charles was never granted a trailing permit to utilize the driveway, *see* U.S. Ex. 10 (full grazing file for Charles) and that Charles specifically indicated in multiple applications that he did not trail livestock. *See* Trial Tr. 399:13–21. The R&R does not analyze this evidence.

Second, the R&R makes the jump from a quote about drifting within the allotment to drifting from the allotment to the National Forest. This error likely arises from the Special Master’s assertion that the Horse Flat Allotment abuts the modern-day Forest. R&R at 18 ¶ 61. This is not so. *See* U.S. Ex. 25 (showing BLM land ownership in yellow, private land in white); *see also* Trial Tr. 306:10-11. Even at its full, modern-day extent, there are several miles of private land between the allotment and the national forest. *Id.* In the years prior to 1975 that may have been discussed in the document, the allotment would have been even smaller, and thus further from the national forest. Fundamentally, even if cattle drifted within the allotment, there is no basis for presuming that they drifted from the allotment to the Forest, in trespass across both federal and private land, for decades.⁶

Finally, the Special Master disregards that the Stock Raising Homestead Act did not open stock driveways for open season use, year-round. As the United States’ expert testified, Trial Tr. 346:3–11, and the United States explained in its post-trial brief, the Stock Raising Homestead Act required users to move rapidly through from where they were going to where they were going: “all stock so transported over such driveways shall be moved . . . an average of not less than six miles per day for cattle and horses.” 39 Stat. 862, Sec. 10. 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

⁶ And as the United States’ expert testified, it is much more likely that the Hoods’ predecessors would have taken a different route to the forest when accounting for local topography. Trial Tr. 406:25-407:12.

cattle and horses.” U.S. Ex. 27 at BLM_2259. Accordingly, even if Charles had been issued an authorization to use the stock driveway, he would have had to move through in approximately a half day. The United States would strongly urge the Special Master to account for this limited period in assessing the proper period of use, if it determines that use of the stock driveway did occur.

IV. Conclusion

The United States respectfully requests that the Special Master fully consider all evidence presented by the parties and, given that evidence and the arguments made by the United States regarding the impact of quantity and forfeiture on priority dates, amend the R&R to recommend that the Hoods are entitled to three different priority dates, splitting the claims into five categories of claims: (1) claims on land within the 1935 Map and the 1936 License; (2) claims on land not within the 1935 Map but within the 1936 License; (3) claims on land added in Section 9 in 1942; (4) claims on land within the 1935 Map but not within the 1936 License or 1942 Permit; and (5) claims on land not within the 1935 Map, 1936 License, or 1942 Permit onward. *See* U.S. Pre-Trial Brief at 2–3 & U.S. Table 1; U.S. Post-Trial Brief at 3–4 & U.S. Table 1; U.S. Ex. 30 (map showing the land in each claim).

Dated: February 28, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 28, 2025, I served true and correct copies of the foregoing document as follows:

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Ex. A

Subcase Nos:

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