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Attorneys for Keith and Karen Hood

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DEPARTMENT 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, et al. (Hood)
See Exhibit 1

**MEMORANDUM IN SUPPORT OF
HOOD'S MOTION FOR SUMMARY
JUDGMENT**

Claimants Keith R. Hood and Karen M. Hood (collectively "Claimants" or "Hoods"), by and through their counsel of record, Parsons Behle & Latimer, and pursuant to Idaho Rule of Civil Procedure 56 and IDAPA 37.01.01.220, hereby submit this Memorandum in support of their Motion for Summary Judgment. This Memorandum is supported by the Declaration of Keith R. Hood ("Hood Decl.") and the Declaration of Norman M. Semanko ("Semanko Decl.") and the exhibits attached thereto.

I. STATEMENT OF FACTS

1. Claimants Keith R. Hood and Karen M. Hood are owners of certain real property located at 3101 Rush Creek Rd, Cambridge, ID 83610 ("Base Property"). *See* Hood Decl., ¶ 4.
2. The Base Property is associated with the grazing permit and water rights at issue in this matter. *See id.*

3. The Hoods are owners of water right claim nos. 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, 67-15289 (collectively “Water Rights”). *See id.*, ¶ 1.

4. According to records from the Idaho Department of Water Resources (“IDWR”), the United States of America acting through the Department of the Interior, Bureau of Land Management (“BLM”) holds water rights that overlap with the Water Rights claimed by the Hoods. *See id.*, ¶ 5.

5. The Water Rights’ points of diversion or places of use are located on a federal grazing allotment known as the Horse Flat Allotment (#95) and managed by the Four Rivers Field Office of the BLM. *See id.*, ¶ 6.

6. The Hoods have a grazing permit for Horse Flat, issued March 14, 2013 by the BLM for a term of March 14, 2013 to February 28, 2023. *See id.*, ¶ 7, Exhibit A.

7. On or about July 23, 2020, the Hoods filed a Notice of Claim for the Water Rights with supporting documentation. That same day, the Hoods also filed a Motion for Determination of Deferred De Minimis Domestic or Stock Water Use. *See id.*, ¶ 8, Exhibit B.

8. The documentation presented in the Notice of Claim showed that the Hoods’ predecessors in interest, David G. Edwards, obtained Homestead Certificates in 1908 for portions of what is now the Base Property; that, between 1911 and 1917, the Hoods’ predecessor Charles R. Edwards acquired patented lands the now comprise Base Property; and that Charles R. Edwards averred in a 1955 letter to the BLM that he had been using these lands to graze cattle “continuously for sixty years.” *See id.*

9. Relevant here, the Hoods' Notice of Claim provided December 28, 1896 as the priority date for all of the Water Rights. *See id.*

10. On or about March 10, 2021, in response to IDWR's request for additional information, the Hoods submitted further documentation that evidenced historic grazing on Horse Flat by the Hoods' predecessors in interest. *See id.*, ¶ 9, Exhibit C.

11. The further documentation presented by the Hoods showed that the Hoods' predecessor in interest had continuously grazed the lands and that Charles R. Edwards averred in 1935 that he had been grazing the lands "for [the] past 40 years." *See id.*

12. On September 17, 2021, IDWR issued a Director's Report of Deferred De Minimis Domestic and/or Stock Water Use for the Water Rights. *See id.*, ¶ 10, Exhibit D.

13. In the Director's Report, IDWR recommended, as claimed, all the Hoods' claims for the Water Rights, including the claimed priority date of December 28, 1896. *See id.*

14. On November 24, 2021, the BLM filed a Standard Form 1 Objection ("Objection") to the Director's Report, which was signed by BLM Water Rights Specialist Frederic W. Price. *See id.*, ¶ 11, Exhibit E. In its Objection, the BLM objected to the recommended priority date for the Water Rights, alleging that "[t]he evidence submitted by the claimants does not support the 1896 date of priority recommended by IDWR." *See id.*

15. On January 21, 2022, in response to BLM's Objection, the Hoods filed a Standard Form 2 Response to Objection. *See id.*, ¶ 12, Exhibit F.

16. On June 10, 2024, the Hoods, through undersigned counsel, deposed Frederic W. Price. *See Semanko Decl.*, ¶ 4, Exhibit A.

17. In his deposition, Mr. Price testified that the BLM's objection to the Hoods' claim was based on a lack of evidence showing that the Hoods' predecessors in interest were grazing in

the claimed place of use in 1895. *See id.*, Exhibit A at 16:11-22. Specifically, Mr. Price stated that the BLM disputed the veracity of the claim in 1935 by the Hoods' predecessor, Charles R. Edwards, that he had been grazing the land for the past 40 years. *See id.*, Exhibit A at 16:5-10.

18. When asked whether the BLM had evidence contrary to the Hoods' assertion (i.e., evidence to show such grazing did not occur), Mr. Price averred that the BLM lacked any evidence to show the Hoods' predecessors were not grazing in the claimed place of use. *See id.*, Exhibit A at 16:11-22.

II. LEGAL STANDARD

Rule 56 of the Idaho Rules of Civil Procedure provides that a court must grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. IDAHO R. CIV. P. 56(a); *see also* IDAPA 37.01.01.220.03 (procedures of Idaho Rule of Civil Procedure 56 applicable to motion for summary judgment before the Idaho Department of Water Resources). "The moving party bears the burden of proving the absence of material facts but is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Cumis Ins. Soc'y, Inc. v. Massey*, 155 Idaho 942, 945, 318 P.3d 932, 935 (2014) (citation and quotation marks omitted).

"The non-moving party 'may not rest upon the mere allegations or denials of that party's pleadings, but that party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" *Id.*, 155 Idaho at 946 (quoting IDAHO R. CIV. P. 56(e)).

“When an action will be tried before a court without a jury, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts.” *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009) (citations omitted). “Drawing probable inferences under such circumstances is permissible because the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial.” *Id.* (citations omitted).

III. ARGUMENT

A. The Director’s Report Correctly Identified 1896 as the Priority Date for the Hoods’ Water Rights

When determining the priority date of water rights involving stockwater use on federal land, the IDWR 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(2)(d) (cleaned up).

In their submissions to IDWR, the Hoods presented copious amounts of documentary evidence showing that the Hoods’ predecessors in interest continuously grazed and watered livestock in the Horse Flat Allotment since at least 1896. For example, the Hoods presented a July 27, 1935 Application for Grazing Permit filed by their predecessor, Charles R. Edwards, wherein Mr. Edwards confirmed that he had been grazing in the relevant area “[f]or [the] past 40 years.” *See Hood Decl.*, ¶ 9, Exhibit C. The Hoods further presented a July 27, 1955 letter from Mr. Edwards to the BLM Advisory Board, wherein Mr. Edwards discussed a permit “for Taylor [Grazing Act] land which we have used continuously for **sixty years** on exactly the same lands and have never missed a year of use....” *See id.*, ¶ 8, Exhibit B (emphasis added).

The evidence could not be clearer: The Hoods' predecessor repeatedly emphasized that he had been grazing on the land since 1895 or 1896. *Cf. Joyce Livestock Co. v. United States*, 144 Idaho 1, 11, 156 P.3d 502, 512 (2007) ("Because no diversion is required in order to obtain a water right for stock watering under the constitutional method, Joyce Livestock's predecessors could obtain water rights for stock watering simply by applying the water to a beneficial use, which they did by watering their stock." (Citations omitted).). Under Idaho Code § 42-1411(2)(d), these statements serve as prima facie evidence of the priority date, and, pursuant to the same statute, the Director properly considered these statements in concluding that the priority date for the Hoods' Water Rights is 1896.

B. The BLM Lacks Sufficient Evidence to Rebut the 1896 Priority Date Recommended in the Director's Report

For its part, the BLM disputes, without evidence, Charles R. Edwards' statement that he had been grazing the land since approximately 1896. *See Semanko Decl.*, Exhibit A at 16:11-22. But the BLM's mere doubt as to the veracity of Mr. Edwards' statement is not enough to either rebut the statements or rebut the conclusion in the IDWR Director's Report that 1896 is the proper priority date.

An IDWR Director's Report is prima facie evidence of the nature and extent of a water rights under state law. I.C. § 42-1411(4). A party opposing the Director's Report bears the burden of producing evidence to rebut the findings of the report. *McCray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2001). In other words, the facts contained in the Director's Report "are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut the presumption." *Id.*

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Here, the BLM has not produced any, much less sufficient, evidence to rebut the findings in the Director's Report. Indeed, BLM's Water Rights Specialist Fredric W. Price, conceded the BLM's lack of evidence in his deposition:

Q. [by Norman M. Semanko] So what is it that I went through that's in the Director's report background that you disagree with?

A. [by Mr. Price] The veracity of the 40-year statement in the Taylor Grazing Act application by Charles R. Edwards.

Q. Okay. So you don't think there was grazing in that area in 1895?

A. There probably was, just not by any of Hoods' predecessors that I have any evidence of.

Q. Do you have any evidence that they weren't, that they were not grazing it?

A. Well, I don't have any evidence that they were.

Q. Do you have any evidence that they were not grazing it?

A. Well, no, I don't have any evidence of the negative.

See Semanko Decl., Exhibit A, 16:5-22.

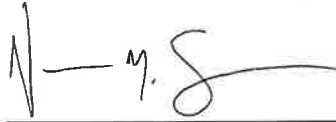
Mr. Price's testimony reveals the fatal flaws of the BLM's objection. Mr. Price calls into question Charles R. Edwards' claim that his family had been grazing the land since approximately 1896; yet, Mr. Price readily acknowledges that the BLM lacks any evidence to contradict Mr. Edwards' statement or otherwise reasonably doubt Mr. Edwards' truthfulness. Furthermore, the notion that Mr. Price "do[esn't] have any evidence that they were" grazing the land is nonsensical given the unambiguous statement to the contrary from Mr. Edwards. The BLM's baseless objection is a far cry from "sufficient evidence to rebut the presumption" of the 1896 priority date set forth in the Director's Report and supported by substantial documentary evidence. Without more, the Director's Report remains un rebutted, and the BLM's objection fails.

C. CONCLUSION

Based upon the foregoing, Hood respectfully requests the Court grant their Motion for Summary Judgment.

DATED this 11th day of July, 2024.

PARSONS BEHLE & LATIMER

A handwritten signature in black ink, appearing to read "N-M. S.", is written over a horizontal line.

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

EXHIBIT 1

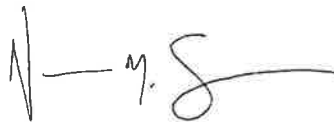
Subcase Nos.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of July, 2024, I served a true and correct copy of the foregoing document by FedEx to the Court, and 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 / iCourt:
Director of IDWR P. O. Box 83720 Boise, ID 83720-0098	☒ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email / iCourt:



Norman M. Semanko; Garrett M. Kitamura