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DEPARTMENT OF
WATER RESOURCES

Todd Kim
Assistant Attorney General
Mark J. Widerschein
Katharine Laubach
Natural Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
550 West Fort Street, MSC 033
Boise, Idaho 83724
Phone: (202) 532-5803 (Widerschein)
Counsel for the United States of America

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

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

United States' Response in Opposition to Claimants' Motion for Summary Judgment

Claimants Keith and Karen Hood (collectively, the "Hoods") seek summary judgment confirming the Director's Reports' recommended priority date of December 28, 1896 on the alleged basis that Objector Bureau of Land Management ("BLM") cannot rebut it. The Hoods' motion ignores the thousands of pages of documents in the record, including multiple sworn affidavits by the Hoods' predecessors which directly rebut their claimed priority date. Rather than engage with that extensive documentary record, the Hoods seek summary judgment based on a single misconstrued deposition answer. The Court should deny the Hoods' Motion, grant the United States' contemporaneously filed Motion for Partial Summary Judgment, and proceed to trial with the burden on the Hoods to prove their claimed priority date.

I. Response to the Hoods' Statement of Facts

1. Uncontested.
2. Uncontested.
3. Uncontested.

4. Contested. IDWR issued two Director's Reports: one for claims purporting to overlap with BLM's decreed rights, and one for claims not purporting to overlap.
5. Uncontested.
6. Uncontested.
7. Uncontested.
8. Contested. Charles R. Edwards did not acquire the patented lands that now comprise the Hoods' base property until 1934.
9. Uncontested.
10. Contested. The evidence presented did not evidence historic grazing on the allotment by the Hoods' predecessors before 1935. There is no evidence of historic grazing on BLM managed land before the issuance of a Taylor Grazing Act permit in 1935.
11. Contested. The relevant documents do not show continuous grazing, they simply assert it without providing any extrinsic evidence.
12. Contested to the extent that IDWR issued two Director's Reports, not one.
13. Contested to the extent that IDWR issued two Director's Reports, not one.
14. Contested. The Court stamped BLM's objections on November 23, 2021, not the 24th.
15. Uncontested.
16. Uncontested.
17. Contested. Mr. Price did not indicate that this was the sole basis for BLM's objections. Further, Mr. Price's deposition answers speak for themselves, and are the best evidence of their contents.

18. Contested. Mr. Price was not asked whether he had any evidence “contrary to the Hoods’ assertion” of an 1896 priority date. Mr. Price was asked narrowly whether he had “any evidence that they were not grazing it.” Mr. Price answered correctly that he did not have evidence that they were grazing, and that he didn’t “have proof of the negative.”

II. Argument

The Hoods assert that “BLM disputes, without evidence, Charles R. Edwards’ statements” about his grazing use. Hood. Mot. at 6. They are mistaken. As the United States explained in its own motion for summary judgment, while it is the Hoods who bear the burden of proving that their predecessors were using water in the amounts claimed from the claimed sources on federal land in 1896, substantial extrinsic evidence calls Charles R. Edwards’ statements into question—including sworn affidavits submitted to the United States by Charles R. Edwards himself in 1905, and by his father, David G. Edwards in 1906. The Hoods both completely disregard the ample documentary record provided by the United States and misconstrue a deposition answer by the United States’ witness, Fredric W. Price, to a narrow question in arguing that the United States lacks any evidence to rebut the Director’s Report. Mr. Price correctly noted that he could not prove the negative of David G. Edwards non-presence, but that conversely, none of the evidence showed that he *was* present. Far from constituting a “smoking gun” admission that the United States lacks evidence, Mr. Price’s answer simply reflects that Claimants have the burden of persuasion as to their claimed priority date. Claimants have failed to carry this burden and, in fact, they disregard the ample documentary record in support of the United States’ position. The Court should deny the Hoods’ motion.

1. Claimants Misconstrue the Question & Evidentiary Record

The Hoods argue that summary judgment is appropriate because “BLM lacks sufficient evidence to rebut the 1896 priority date.” Hood Mot. at 6. The Hoods base this sweeping assertion entirely upon a single answer to a question asked during a deposition. But in doing so, the Hoods misconstrue both the evidentiary record and the deposition exchange itself.

Summary judgment is appropriate only if there are no genuine issues of material fact. *See J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 613 (2006). Here, there are disputed issues of material fact. As an initial matter, in their motion, the Hoods have presented an incomplete picture of the factual record to the Court. The Hoods state that “BLM has not produced *any*, much less sufficient evidence to rebut the findings in the Director’s Report.” Hood Mot. at 7 (emphasis added). Indeed, the Hoods seemingly assert that the factual record is limited to 1) the documents that the Hoods filed with IDWR and 2) Mr. Price’s deposition, such that Mr. Price’s answer disposes of the evidentiary record. This is difficult to understand. The United States produced over 2200 pages of documents to the Hoods pertaining to the settlement and grazing history on the allotments in question – and the lack of evidence to support the Hoods’ claimed priority date.¹ These productions included, for example, the complete Homestead Entry and Patent files for each predecessor owner of the Hoods’ base property, including proofs of entry and affidavits; original tract book entries for those predecessors; complete BLM grazing operator files for Charles R. Edwards, Melvin and Inez Dotson, Charles Edwards, and the Hoods; and BLM state office maps and allotment use reports. The assertion that the BLM has produced no evidence towards rebutting the findings in the Director’s Reports is baseless.

¹ While the Hoods never made timely discovery requests to the United States, the United States produced the documents as a matter of comity in two tranches. The United States produced the first tranche in September 2023 as exhibits to its discovery requests, which reflected the United States’ position that the 1896 priority date is inappropriate. The United States produced the second tranche in June 2024 at the request of the Hoods’ counsel.

In fact, the evidence proffered by the United States, as laid out in the United States' Motion for Partial Summary Judgment,² undermines the Hoods' core assertion that their predecessors were on the base property, watering livestock on the BLM allotment, in December 1896. To summarize, the evidentiary record illustrates that Charles R. Edwards' statements in his TGA application are unreliable, because extrinsic evidence illustrates that the Hoods' predecessors did not move onto the land until after 1900; did not own livestock until at least 1915 (that grazed on Forest Service land rather than public domain (now BLM)); and did not own the entire asserted base property until 1934, or water livestock on BLM land until after 1935, when Charles R. Edwards applied for a Taylor Grazing Act permit. *See* U.S. Mot. at 2-5, 7-11. That the Hoods now assert that BLM has "no evidence" merely shows lack of engagement with the evidentiary record, not that the evidentiary record does not exist.

Rather than engage with that evidence, Claimants focus their motion on an exchange at the deposition of Fredric W. Price, BLM's water rights specialist. Mr. Price was first asked whether he agreed that there was grazing in the area in 1895. He explained that "there probably was, just not by any of Hoods' predecessors that I have any evidence of." Price Dep. at 16:13-14. He was then asked whether he had "any evidence that they weren't, that they were not grazing it?" *Id.* at 16:15-16. He explained that he did not have evidence proving the negative. *Id.* at 16:17-22. Contrary to the Hoods' contentions, Mr. Price's deposition response was not a statement that BLM had no relevant evidence at trial, and certainly not, as the Hoods suggest, a 'smoking gun' that short circuits the entire evidentiary process. Rather, the deposition question narrowly asked about specific evidence of specific activity at a specific time, and Mr. Price responded in kind. At bottom, the presence or absence of evidence is a question for the Court.

² *See, e.g.,* U.S. Mot. at 2-5; 7-11; Declaration of Fredric W. Price; U.S. Exhibits 1-8. In lieu of an opposing declaration, the United States incorporates Mr. Price's declaration and associated exhibits by reference.

But Claimants now ask the Court to decline to even review that evidentiary record based solely on a misrepresentation of a single deposition answer. The Court should decline Claimants' invitation.

2. Claimants Misconstrue the Relevant Burdens

Even if the Court were to accept the Hoods' interpretation of Mr. Price's deposition answer as true, the Hoods misconstrue the evidentiary burdens. It is black-letter water law that a claimant bears the burden of proving their claim: "[e]ach claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right." I.C. 42-1411(5). For the Court to grant the Hoods summary judgment regarding an 1896 priority date, it would have to find – after making all inferences in the United States' favor as the non-movant on that issue – that there is *no chance* that the U.S. could provide evidence meeting the "greater than a scintilla, less than a preponderance" test. *Clear Springs Foods, Inc.*, 136 Idaho at 764. Claimants have not met that exceptionally high bar.

As the United States explained in its Motion, it is not the United States' responsibility to disprove Claimants' water right. Instead, the bar is much lower: in order to rebut a Director's Report, an objecting party must only provide "substantial evidence"; which "is defined 'as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance.'" *Id.*, quoting *Evans v. Hara's, Inc.*, 123 Idaho 473, 478 (1993). Put another way, the United States must only show that a reasonable mind *might* accept that Claimants are not entitled to an 1896 priority based on the documents attached to its Motion. If it does so, the burden of persuasion shifts back to the Hoods. Conversely, to succeed on dispositive summary judgment, the Hoods must show that, with all inferences made in the United States' favor, no reasonable mind could dispute that the Hoods' predecessors were present in 1896 watering livestock on every source that the Hoods claimed. The Hoods have not, and

cannot, meet that burden. In fact, the Hoods have not even presented countervailing evidence to the Court to *attempt* to rebut it – they simply presented the same problematic Taylor Grazing Act application. By contrast, the United States has produced specific and contemporaneous evidence which shows that the Hoods’ predecessors did not arrive on the base property until at least 1900, report owning cattle until 1915, or begin using the claimed BLM land until 1936. *See, e.g.,* Price. Decl. at 10; *see also* Price Decl. Exhibit 5. The Court should deny the Hoods’ motion and proceed to trial to develop the evidentiary record in full.

III. Conclusion

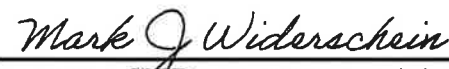
The Hoods seek summary judgment, stating that there are no genuine issues of material fact with their asserted 1896 priority date. However, there are legitimate issues of material fact with their asserted priority date. The Court should not determine the Hoods’ priority date without developing a full evidentiary record at trial, and accordingly, should deny Claimants’ motion.

Dated: August 2, 2024

Respectfully submitted,

TODD KIM, Assistant Attorney General
Environment & Natural Resources Division

JESSE LASLOVICH, United States Attorney
District of Montana


MARK J. WIDERSCHIN, Trial Attorney
KATHARINE LAUBACH, Trial Attorney
mark.widerschein@usdoj.gov | (202) 532-5803
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611

ATTORNEY FOR UNITED STATES OF AMERICA,
Bureau of Land Management

CERTIFICATE OF SERVICE

I certify that on August 2, 2024, I served true and correct copies of the foregoing document as follows:

via FAX:

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

via First Class U.S. Mail, pre-paid:

Norman M. Semanko
Garrett M. Kitamura
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, Idaho 83702

KEITH & KAREN HOOD
PO BOX 100
CAMBRIDGE, ID 83610-0100

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098



Matthew H Smith

Exhibit A

Subcase Nos:

67-15263
67-15264
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