DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAY 29 2025

By _____ Clerk

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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 Ex. A
	)	
	)	

United States' Opening Brief on Challenge to Special Master's Report & Recommendation, As Amended

I. INTRODUCTION

Claimants Keith and Karen Hood ("Hoods") assert twenty-seven water right claims for stockwater use on federal land managed by the Bureau of Land Management ("BLM").[1] The Hoods originally asserted an 1896 priority date, which they amended in post-trial briefing to 1900, while the United States asserted that a range of 1931 to 1975 was supported by the evidence.[2] The Special Master's Report and Recommendation issued January 8, 2025 ("R&R"), including the amendments made to it on April 24, 2025 ("R&R Amendments"), recommended a priority date of April 1, 1911. In making this recommendation, the Special Master erred in applying the principles of law for determining priority dates for stockwater claims on federal land laid out in this Court's precedent, as well as in *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) ("*Joyce*") and *LU Ranching Co. v. United States*, 144 Idaho 89, 156 P.3d 590 (2007) ("*LU Ranching*").

Joyce and *LU Ranching* require the Special Master to analyze, as to each claimed source, whether the Hoods' predecessors "grazed livestock where they would have access to the water sources at issue." *Joyce*, 144 Idaho at 16. As the Idaho Supreme Court explained, the Court must "examine where the individual predecessors grazed their livestock when determining whether they had acquired any water rights." *Id.* Put simply, the Court must determine where water was used, when it was put to use, and in what amount. Applying these principles, the Hoods are entitled to three different priority dates, splitting the claims into five categories of claims, based on a careful review of the history of access to each relevant portion of federal land. A chart of the United States' proposed priority dates is attached as Exhibit B, in which each of the Hoods' claims are sorted into categories numbered 1 through 5. The United States asserts that the Special Master specifically erred in:

1. Determining that the priority date for each claim was April 1, 1911 rather than the dates between 1931 and 1975 which are supported by the Hoods' predecessors' grazing files.

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[1] BLM as used herein refers to the present-day agency, as well as its predecessor agencies, including, but not limited to, the Grazing Service and General Land Office.

[2] IDWR issued Directors' Reports recommending the priority date as claimed, but at trial, disavowed its recommendations based on a review of the record. *See* Tr. 27:19–28:6 (Oct. 2–3, 2024). The Trial Transcript was lodged with the Court contemporaneously with filing of this brief.

2. Determining that Claimants met their burden of proving when, where, and in what amounts their predecessors watered livestock on federal land for each claim.
3. Determining that Claimants can show an unbroken chain of use for each claimed source back to April 1, 1911.
4. Determining that the Hoods' predecessors utilized Stock Driveway No. 20 before the expansion of the Horse Flat Allotment.
5. Determining that the Hoods' predecessors established and then maintained several claims (referred to as Category 4 & 5 claims in the United States' briefing) between 1936 and 1975 despite not receiving Taylor Grazing Act authorization to graze the land and not actually grazing the land.
6. Determining that a *de minimis* water user can later expand their water use up to 13,000 gallons per day and relate it back to an initial appropriation of less water.
7. Analyzing SRBA Basin-Wide Issue 12 and IDWR Adjudication Memorandum No. 12 in determining priority dates where an appropriator's herd size increase over time.

United States' Notice of Challenge (May 8, 2025).[3]

II. STANDARD OF REVIEW

Challenges to a Special Master's Report & Recommendation are authorized by SRBA Administrative Order 1 § 13. Pursuant to AO1 § 13(f), "the court shall accept the Special Master's findings of fact unless clearly erroneous. The court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions." In determining whether a finding of fact is clearly erroneous, "a reviewing court 'inquires whether the findings of fact are supported by substantial and competent evidence.'" *In re: SRBA*, Subcase Nos. 65-23531, *et al.*, Mem. Dec. and Ord. on Challenges, at 2–3, (Oct. 7, 2016) (citing *Gill v. Viebrock*, 125 Idaho 948, 951 (1994)). Evidence is substantial and competent if "a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." *Argosy Tr. ex rel. Its Tr. v. Wininger*, 141 Idaho 570, 572 (2005). As this Court has explained, "exactly what is meant by the phrase 'clearly erroneous,' or how to measure it, is not always easy to discern. The United States Supreme Court has stated that [a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *In re: SRBA*, Subcase Nos. 55-10135, *et al.*, Mem. Dec. and Ord. on Challenge, at 4 (Aug. 3, 2005) ("*Joyce* Challenge") (*citing United States v.*

[3] The United States incorporates by reference its previously filed Post-Trial Brief, Motion to Amend or Alter, and Notice of Challenge.

U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (internal quotations omitted)). A party challenging a finding of fact has the burden of showing error and evidence will be reviewed in the most favorable light to the prevailing party. *Id.* But "[t]he purpose of a master is to assist the district court in obtaining facts where complicated issues or exceptional conditions require it. The appointment of a master does not displace the district court's role as the ultimate trier of fact." *Dorsey v. Dorsey*, 172 Idaho 667, 679 (2023), *reh'g denied* (Oct. 5, 2023) (quoting *Seccombe v. Weeks*, 115 Idaho 433, 435 (Ct. App. 1989)). Because the Court must accept the findings of fact if not clearly erroneous, "the trial court must *independently review the* evidence to determine whether the findings were supported by substantial evidence." *Id.* (quoting *Seccombe*, 115 Idaho at 435) (emphasis in original).

Conclusions of law of a Special Master are reviewed *de novo*. While a Special Master's conclusions of law are expected to be persuasive, they are not binding on this Court, rather, "a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review." *Joyce* Challenge at 6. Similarly, if a "finding was induced by an erroneous view of the law" it may be reversed, and if it is "designated as one of fact, but is in reality a conclusion of law, it is freely reviewable." *Joyce* Challenge at 5–6.

III. ARGUMENT

A. The Special Master misapplied *Joyce* and *LU Ranching's* requirements for proving stockwater claims on federal land [Challenge Issue Nos. 2 and 3].

The R&R recommends a priority date of April 1, 1911, for all the Hoods' claims. The Special Master's recommendation rests on a misapplication of the standards for proving an appropriation by stockwater on public land that the Idaho Supreme Court established in *Joyce*, an error of law subject to *de novo* review by this Court. To prove a stockwatering appropriation on federal land, a claimant bears the burden of showing that their predecessors watered livestock with access to each claimed source as of their claimed priority date. The Hoods have failed to meet that burden under *Joyce* and *LU Ranching*.

The R&R fails to conduct the particularized analysis required by *Joyce* and *LU Ranching*. Pursuant to *Joyce*, a stockwatering right on federal land "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." 144 Idaho at 16. Implicitly, there are two critical elements to be proven: that a predecessor was 1) grazing livestock and 2) doing so where they had legal access to the modern claimed source. After the Idaho Supreme Court's decision remanding *LU Ranching*, this Court determined that a statement asserting prior use of the federal range, when made on a Taylor Grazing Act ("TGA") permit application, can serve as evidence of a pre-TGA water right. *In re: SRBA*, Subcase Nos. 55-10288B, *et al.*, Mem. Dec. on Remand and Order of Amended Partial Decrees, (Jul. 3, 2008) ("*LU II*").

1. The Special Master incorrectly analyzed statements of prior use pursuant to *LU II*.

In *LU II*, where this Court first looked to statements of prior use on TGA applications, it did not look solely at the statement on the application. The required analysis was not simply to find for a statement about prior use and interpret it as broadly as possible. Instead, the statement was one piece of a contextual review. The Court compared the area referenced in the statement on the application with where the claimant was actually "issued a Class I grazing preference for grazing on public lands covering portions of" their claims. *LU II* at 6. The Court looked carefully at whether "the entire area where he grazed his cattle [was] specified in the application," *id.* at 7, and for allotments where it was not, the Court relied on expert testimony about grazing areas in relation to TGA permitting. *Id.* at 7–8.

In this case, there are undisputedly several conflicting statements about prior use. Charles Edwards made two relevant statements on TGA applications. In his July 1935 Application, he stated that he had "used the lands covered by this application for grazing permit" and had done so "for past 40 years." Joint Ex. 308 at BLM_674. He applied for a permit on lands defined in attached plats (*see id.* at BLM_626, noting that he applied with "common users – see plats"). The attached plat marks "lands owned" with checks and "lands wished to graze on" with X marks. *Id.* The lands "wished to graze on" encompass four sections—20, 21, 29, and 33 of T15N, R3W—next to the private base property, encompassing 2,560 acres. *Id.* Then, in a December 1935 Application, Charles and Elmo Edwards jointly applied for an allotment "in common with other users" within "Tp 15N, R3W, 4W, and 5W and 16N, R2W, R3W, 4W, BM." Joint Ex. 309 at BLM_668. The applications again asked if the Edwards had used

the lands covered by this application and they stated "for past 40 years." *Id.* at BLM_670. An apparently incomplete map of deeded lands is attached. *Id.* at BLM_625. Finally, "Charles Edwards and Son" were granted a TGA license for the 1936 grazing season for specific lands in Sections 10, 15, 20, 21, 22, and 29 of T15N, R3W ("1936 License"). Joint Ex. 307 at BLM_619–20; *see also* U.S. Ex. 30.

The Special Master analyzed these documents extensively in the R&R. However, the R&R incorrectly applies *LU II* in seeking to resolve the discrepancy between the statements in the July 1935 Application, December 1935 Application, and 1936 License. In post-trial briefing, and again in the United States' Motion to Alter or Amend, there was substantial argument about whether the 1936 License was issued in October 1935 or October 1936. The Special Master concluded it was issued in 1936, such that the December 1935 Application was not a historical nullity. *See* R&R at 11–14. Even if the permit was issued in 1936, the exact date was irrelevant, as the analysis is not all-or-nothing; in other words, the December 1935 Application need not be a nullity to fail to prove a water right was appropriated within the area discussed in it.

The Special Master's specific determination is that "the statement by Charles Edwards & Son in the December 1935 [A]pplication . . . is reliable and credible evidence that [Edwards] had been grazing livestock on public domain lands near their deeded property for the time period so stated." R&R at 14, ¶ 35. This is difficult to reconcile with the finding that the Hoods are only entitled to a 1911 priority date - which is more than 15 years later than the statement claims grazing began. But regardless, the Special Master does analyze whether the 1936 License granted to Charles Edwards, covering a constrained area around the base property, countervails the 1935 applications, or provides context to *what* public domain lands were grazed. Confirming use on any public land nearby is simply not the analysis required by *Joyce* and *LU II*. The *LU II* court's consideration of both the application and the license or permit makes good sense, as neither document exists in a vacuum. That the BLM did not grant Charles Edwards a license for the entire area included in either application is itself a piece of critical evidence.

The Special Master did not make the requisite determinations of access to and grazing upon the specific federal land containing the specific claimed sources required by *Joyce* and did not conduct the

requisite comparison with the actual permit required by *LU II*. The required analysis when reviewing prior statements of use on a TGA application is not identifying whether a predecessor was grazing any "public domain lands located near their deeded property." *Id.* Here, there is a specific application with a statement of prior use and a map marking 2,560 acres on lands around the base property, *see* Joint Ex. 308 at BLM_626, an application six months later seeking a permit somewhere within 216 sections (138,240 acres, sufficient land at 5 AUM per head to sustain 27,000 cattle), *see* Joint Ex. 309 at BLM_668, and a permit covering a similar area to the July application around the base property, *see* Joint Ex. 312; *see also* U.S. Ex. 30. In this scenario, it was clear error for the Special Master to minimize the importance of both the specific map submitted by the applicant and the actual permitted area approved by the BLM, and instead, primarily credit the broadest possible claimed area in an application. It is particularly so where the larger area was necessarily rejected by the BLM, because it did not result in a larger permitted grazing area. *See* Tr. 302:3–11 (explaining the area remained unchanged until small expansion in 1942); Joint Ex. 307 at BLM_619 (expanded 1942 Permit); U.S. Ex. 30 (map). Because this finding of fact is based on a misapplication of *LU II*, it is subject to *de novo* review.

The Special Master determined that because a pre-TGA user of the federal range wasn't limited by a permit, they could graze anywhere, and accordingly, that Edwards did utilize every single source within the 138,240 acres he listed. R&R at 15, ¶¶ 36-39. The R&R makes a finding that the Hoods' predecessors used the area of federal land "near" their base property, but disregards the very specific area of federal land "near" their base property which Charles Edwards applied for and stated he used in July 1935, and without engaging with the implicit finding of BLM that the broader described areas were not 'near' under that term of art as it was used in the TGA. *See id.* at 10, ¶ 20; at 14, ¶ ¶ 33, 35. As a result, the Hoods are credited with their predecessors having grazed the exact area of their modern claims, despite countervailing evidence that the BLM did not credit *any* assertion of prior use in those areas. There is simply no evidence in the record that Edwards used all such sources - or even evidence that the entire area was public range - accordingly, these findings of fact rest on a misapplication of the law established in *Joyce*, subjecting them to free review by the Court.

This is no small error. Instead, it underpins the R&R's entire priority analysis. By finding that the Hoods' predecessors asserted prior use on a much larger area than the evidence demonstrates they did, the R&R brings more than half of the Hoods' claims to a 1911 priority date when they otherwise would not be entitled to a priority date earlier than 1975 under the Special Master's own analysis. *See* R&R Amendments at 7–8 (inserting new Finding of Fact No. 84, which finds that the Hoods' predecessors in use did not use Category 4 and 5 claims between 1936 and 1975). If this Court instead conducted the searching review of statements of prior use in the context of actual permit areas granted, it would reach a different conclusion about the correct priority.

2. The Special Master relied on improper evidence which does not comply with *Joyce*'s requirements.

The R&R reaches a recommendation of an April 1, 1911 priority date based on flawed analysis. The Special Master found that in 1911, the Hoods' predecessors grew enough hay on their base property to support a herd of approximately their modern size such that the Edwards family could have used the Hoods' modern share of the Horse Flat Allotment. R&R at 21, ¶ 81. The Special Master found that "by the 1911 grazing season, Charles Edwards could have turned out approximately 29 head plus the additional cattle owned by David Edwards," *id.*, 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. This analysis is flawed because finding that the Hoods' predecessors *could have* had fed enough cattle to graze the Hoods' modern share of the Horse Flat Allotment is not evidence that they *in fact did*, which is what *Joyce* requires.

In reaching this conclusion, the Special Master did not rely on evidence of cattle ownership, let alone of those cattle grazing on federal land. Instead, the R&R conducts an extended analysis of how much hay Charles Edwards grew. It 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). 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. The Special Master derived 44 tons of hay from Charles stating 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 used 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* Tr. 272:3–16, 280:17–25, 281:1–2. Without any evidence indicating what Charles did with the hay he grew, it is just as 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 then relies on 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 combines the 44 tons of hay grown in 1910 and a statement made twenty-five years later in the July 1935 Application. *Id.* ¶ 55. The July 1935 Application said 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. At bottom, the hypothetical ability to feed 29 head of cattle proves only that—Charles Edwards could have fed 29 cows. It does not prove that he owned 29 cows, and it does not prove that he watered the 29 hypothetical cows across every source claimed by the Hoods.

The error is compounded by the finding that David Edwards owned cattle—apparently, 31 cattle. R&R at 21, ¶¶ 81, 83. This statement, too, constitutes error, because there is no evidence in the trial record that David Edwards ever owned cattle. *Id.* ¶ 81 ("[P]lus the additional cattle owned by David Edwards."). The Special Master does not indicate the basis for asserting that David Edwards owned cattle, which would itself constitute error. In any event, there is no evidence that could have been cited. Indeed, the only evidence in the trial record related to any animal ownership by David Edwards is a 1915 application to graze six horses on the Weiser National Forest. Joint Ex. 325 at BLM_2304. David appears

to have passed away between 1915 and 1918, as the Estate of David Edwards applied for a permit in 1918, for 7 horses and still no cattle. *Id.* at BLM_2306. While the United States does not concede that amount of hay grown is a relevant metric, that information is not even known for David. Instead, the Court cites that a corral, a stable, cultivation of 14 acres, and fencing of 30 acres "are indicative of livestock ownership." R&R at 16, ¶ 46.[4] From this, the Court derives ownership of 31 cattle in 1911, and apparently, grazing of those 31 cattle on the relevant federal range. Yet, four years later, when seeking a Forest Service grazing permit, David sought a permit for 6 horses and 0 cattle. Joint Ex. 325 at BLM_2304. Only two conclusions can be drawn from this: either David owned only 6 horses and no cattle such that the corral and fenced area were for his horses, or any cattle David owned could be grazed year-round on his own private property and didn't require any federal range. Each would be fatal to the Special Master's conclusion, and to the Hoods' claims to a pre-1931 priority.

This finding of fact constitutes clear error. What *Joyce* requires is proof of actual grazing on federal land with access to the claimed sources; what the R&R points to is evidence of hay cultivation and a corral entirely on private land. Even if the R&R's math is correct, whether Charles Edwards could have fed 29 cattle is simply not a sufficient finding for the analysis the Special Master was required to conduct. In order to grant each water right, this Court must find that the Hoods proved Charles and David Edwards *did* turn out a specific number of cattle, at a specific time, on specific federal land encompassing the claimed sources. As the R&R concedes, making such a finding is impossible. *See* R&R at 4 ("Although 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."); *see also* U.S. Exs. 16–21; Tr. 272:3–16, 280:17–25, 281:1–2. The only facts supported by the trial record for 1911 are that Charles Edwards grew hay, and

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[4] The R&R also states that a homestead entry and settlement on land that is chiefly grazing in character "is indicative of livestock ownership by the entryman." R&R at 16, ¶ 48. As the United States' expert testified at trial, this statement is incorrect. Tr. at 272:17–19, 276:15–17, 280:25, 281:1–2. It is also irreconcilable with the finding in the R&R Amendments that "no inferences can be drawn from Charles Edwards not providing information regarding livestock ownership that he was not asked to provide." R&R Amendments at 6.

David Edwards had a corral and fenced area. What Charles did with the hay and David did with the corral and fenced area is unknown. A finding that growing hay on someone's private land without any indication of livestock ownership can support a broad claim to water rights on federal land nearby does not comply with *Joyce* or *LU II*'s requirement that a claimant prove where they watered cattle on the federal land and would drastically expand the scope of evidence which proves a water right.

3. The Special Master erred in disregarding evidence contrary to the R&R's conclusions.

There is no dispute that no direct evidence of cattle ownership exists in the homestead entry files of the Hoods' predecessors, let alone of watering livestock on the present-day Horse Flat Allotment. Instead, the first evidence of cattle ownership comes in permit application documents filed by Charles Edwards seeking the right to graze on the Weiser National Forest—a different piece of nearby federal land. In November 1918, the Forest Service completed a "Report on Qualifications of New Applicants" for Charles Edwards. The Forest Service noted, *inter alia*, that Charles Edwards owned 25 cattle and 13 horses, that his stock spent winters on his ranch, that he "lives on his ranch milks [sic] cows[5] and farms the place himself," and most critically, that range elsewhere was not available for his livestock. Joint Ex. 325 at BLM_2305.

This document is the very first evidence of the Edwards family owning cattle and thus would constitute the very first priority date with evidentiary support. On the very same page, however, the Report asks whether the applicant is "dependent on Forest Range, or is range elsewhere available for his stock?"; the Forest Ranger answers that he is "dependent on Forest Range." *Id.* This makes clear that other federal range—such as the public domain lands claimed in this case—were not in use by the Edwards family. In the R&R Amendments, the Special Master explained that he "place[d] no weight" to this document because Charles Edwards stated that he had never had a Forest Service permit, yet the Ranger states that he is dependent. R&R Amendments at 7. The Special Master found that this purported

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[5] This Court has found that a record which "only refers to milk cows" was insufficient to prove a claimant's predecessor was "engaged in the livestock business or engaged in an enterprise dependent on adjacent public land." *In re: SRBA*, Subcase Nos. 55-10288B, *et al.*, Mem. Dec. And Order on Challenge, at 34 (Jan. 2, 2005).

inconsistency undermined the document entirely. *Id.* As an initial matter, a possible inconsistency on another question should not undermine all information in the document; the trial record contains several examples of documents with internal inconsistencies that are still relevant to the Court's analysis.[6] Based on the trial record, however, these statements are reconcilable. The document states that his base property was acquired from "Estate of David Edwards (heir)." Joint Ex. 325 at BLM_2305. Previous documents were in the name of David Edwards. *See, e.g., id.* at BLM_2304. Charles Edwards was a new applicant in place of David but the property he inherited had prior associated use on the Forest such that he was dependent. This answer points to a settler who has been farming and raising milk cows on private property and is just beginning to expand into a larger grazing operation – indeed, the statement actually supports a finding that a 1911 priority is incorrect. The 1918 Report is then followed by an application for a five-year permit in 1919, on which Charles stated that he owns 28 cattle and 5 horses. *Id.* at BLM_2302–03. The Forest Service document is the single most compelling piece of evidence on the Hoods' predecessors grazing activities on federal land before the Taylor Grazing Act. In disregarding it entirely on the basis of a purported discrepancy, which is both immaterial to the analysis and not necessarily a discrepancy, constitutes clear error.

B. The Special Master erred in finding that the Hoods' predecessors used Stock Driveway No. 20 and that they maintained a water right by doing so [Challenge Issue No. 4].

Finally, the Special Master erred in determining that the Hoods' predecessors used Stock Driveway No. 20 ("the Stock Driveway"). It is undisputed that the Horse Flat Allotment did not exist in its present, larger form until about 1975. *See* Tr. 305:13–307:4; 316:10–13; Before this point, there were two distinct components of the BLM range at issue. Stock Driveway No. 20 makes up, broadly, the western side of the present-day allotment, but from its establishment in 1918, *see* R&R at 19, ¶ 68, until its inclusion in the Horse Flat Allotment and disestablishment, *see id.* at 20, ¶ 72, it was managed under the Stock Raising Homestead Act of 1916 ("SHRA"). Under the SHRA, the Stock Driveway was not managed as open

[6] For example, Charles Edwards stated in both his July and December 1935 applications that he had watered 250 cattle yearly for 40 years, which the trial record confirms is inaccurate. *See, e.g.,* Joint Ex. 308 at BLM_674.

range for anyone to use as they pleased under an implied license. Instead, the Stock Driveway was a 'highway' for ranchers to trail cattle to around the region. As the United States' expert testified, Tr. 346:3–11, the SHRA required users to move rapidly through from where they were 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; *cf Etcheverry Sheep Co. v. J.R. Simplot Co.*, 113 Idaho 15, 16 (1987) ("The terms 'herding' and 'trailing' are distinguishable."). After the 1936 Rules for Administration came into effect, the required speed became even quicker— "[c]rossing licenses shall follow the route prescribed . . . at a rate of not less than . . . ten (10) miles per day for cattle and horses." U.S. Ex. 27 at BLM_2259. Any consistent use of the area within the driveway necessarily would have been unlawful. In any event, this is unnecessary to analyze, as Charles Edwards swore on a signed application that his stock were "not trailed" in his "system of operation." Joint. Ex. 308 at BLM_675. As the United States' expert testified, post TGA, he would have needed a trailing permit, and was never granted one, while other users in the area were. Tr. 314:5–15.

The Special Master did not make any specific findings on whether Charles or David Edwards used the Stock Driveway, whether before its designation in 1918 or after. R&R at 20-21, ¶¶ 74–83. It could not do so, because the only evidence available is activities on their own private property. Yet the R&R nonetheless recommends a 1911 priority date for sources which are within the Stock Driveway – the United States' Category 4 and 5 claims. This constitutes clear error unsupported by any evidence. Under *Joyce*'s requirement to prove use by grazing where there would be legal access to the sources, a priority date no earlier than 1975 could apply to sources in the former stock driveway.

C. The Special Master erred in finding that the Hoods' predecessors maintained water rights between 1936 and 1975 despite finding that they did not use those water rights throughout that nearly 40-year period [Challenge Issue No. 5].

It remains the United States' contention that analysis of forfeiture principles regarding claims that were not within any TGA permits granted to the Edwards is unnecessary because they never appropriated water rights on those sources. However, because the Special Master recommended water rights on those

sources, he interpreted the United States' argument to be that those water rights were forfeited by non-use during the period from 1936 to 1975.

If the Court finds that water rights were appropriated before the TGA, the Special Master erred in applying the principles laid out in *LU I* for asserted water rights outside subsequent permits. In that case, the Court found that "new rights could not be established outside the boundaries authorized by a permit" and that "the use of water rights alleged to have existed prior to the [TGA], but located outside of the boundaries of a subsequently issued permit would not have been able to be maintained . . . ." *LU I* at 27, n.13; *see also id.* at 32. This discussion comes in the context of discussing conveyances of the base property and with them, associated water rights on the public range. *Id.* at 27.

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 Edwards to Melvin Dotson ("Dotson"), and then onward to the Hoods, any pre-1934 use was not transferred with it, because the right was not maintained. Accordingly, under *LU I*, the start of the 1975 grazing season is the first priority date which the Hoods could properly claim and have decreed in the areas that were not used between 1936 and 1975, when Dotson first initiated lawful use on the rest of the Horse Flat Allotment.

D. The Special Master Erred in assessing the import of increasing livestock herds over time [Challenge Issue Nos. 6 and 7].

1. Conclusion of Law 9.5

In the R&R Amendments, the Special Master includes a new Conclusion of Law 9.5 stating that "once a *de minimis* instream stockwater right comes into existence, the water right can be subsequently used to water more livestock than it was used for at the time of creation, so long as the quantity element and any associated gallon-per-day limited are not exceed, and no injury results to other hydraulically connected water rights." *Id.* at 8. This conclusion of law contradicts the Court's binding decision in SRBA Basin-Wide Issue ("BWI") 12 ("BWI-12"), as well as with general principles of prior appropriation in Idaho. If left unchanged, it would essentially remove *de minimis* water rights from the priority system

entirely, by allowing any water user with fewer than 1000 head of cattle to bootstrap their increased water use back to the very first moment they may have plausibly used any water, no matter how little.

Conclusion of Law 9.5 appears to rest on an overbroad reading of the standard terms which IDWR places on all *de minimis* water rights: a statement that use is limited to 13,000 gallons per day ("GPD"), and a statement that the decree does not constitute a determination of prior historical beneficial use. This practice arose out of SRBA BWI-12. *See In re: SRBA*, Subcase 00-910012, Special Master's Second Amended Recommendation Re: Basin-Wide Issue 12, at 7–9 (Aug. 12, 1996); *see also In re: SRBA*, Subcase 00-40001, Mem. Dec., at 2–4, 8 (Mar. 7, 2016) (CSRBA BWI-1 on same issue, explaining SRBA history); IDWR Adjudication Memorandum No. 58. *De minimis* water rights are, as a matter of general practice, decreed without a quantity element. *See* CSRBA BWI-1 at 10. At the same time, the statement on a *de minimis* water right that the use is under 13,000 GPD does not constitute an entitlement to use 13,000 GPD—sufficient water for 1000 head of cattle under Idaho's standards. CSRBA BWI-1 at 8 ("[T]he Director's recommendation does not bestow upon the holder an entitlement to use up to 13,000 [GPD] . . . it functions as a reiteration of the law that the right is limited to that amount put to beneficial use, thereby protecting against waste.") The Court has clarified that all water users, including *de minimis* stock users, are strictly limited to their own historic beneficial use. *Id.* The 13,000 GPD term merely indicates that the claim is somewhere under the *de minimis* threshold—whether for 1 cow or 999 cows. *Id.* The critical term is that an unquantified *de minimis* right does not constitute a determination of historical beneficial use – it is not a quantification of the claim.

Conclusion of Law 9.5 might be less objectionable if *de minimis* water rights were routinely quantified with a quantity element reflecting the historical use to which a claimant is limited. In that case, were there, *e.g.*, an acre foot cap on every claim, this provision would simply mean that it is not enlarging the original water right to water more cattle with the same amount of water. *See Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 420 (2001) ("Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use."); *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458 (1996) ("An enlargement may include such events

as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion."). Because the only provision included on a standard *de minimis* right is a diversion rate which would allow for the entire 13,000 GPD cap, this conclusion of law invites the conclusion that any *de minimis* water user can expand their use up to 13,000 GPD and relate that back to their original priority. This result would subsume the priority system for *de minimis* claims and would essentially moot SRBA BWI-12. The Conclusion of Law should be amended to read:

> A *de minimis* water right is not quantified by amount of cattle, but instead, by the amount of water those cattle put to beneficial use by drinking from a source. Once a *de minimis* water right is appropriated, each increase in use constitutes a new appropriation. The same source of water can be used to water more head of cattle under the general right to use unappropriated water, so long no injury results to other hydraulically connected water rights. Where the Court does not decree a specific quantity, a water user is still entitled solely to the quantity their predecessors historically put to beneficial use.

This is not a mere academic dispute in this case. Because number of cattle is necessarily a proxy for amount of water put to beneficial use (through, *e.g.*, a standard amount of water per head of cattle), the Hoods are entirely without evidence to prove the amount of their predecessors' use of water in any given year until there is evidence of the size of the livestock herd. Without that information, they cannot be decreed a priority date. Conclusion of Law 9.5 sidesteps this issue by allowing a *de minimis* user to increase their usage over time to any amount under 13,000 GPD while still benefitting from an earlier priority. This is a fundamental departure from Idaho water law. In Idaho's prior appropriation system, "[t]he concept that beneficial use acts as a measure and limit upon the extent of a water right is a consistent theme . . . ." *In Matter of Distribution of Water to Various Water Rts. Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, 650 (2013). Using more water than you are entitled to at a given priority is per se unlawful.

The 'where' and 'how much' questions are not independent under *Joyce*; the Hoods are not entitled to apply water historically used in one location to another. The questions for the Court in this case are not 1) when could the Hoods' predecessors support the 50 cattle they can legally water today and 2) whether they at some point watered an undefined number of those cattle on public land near their property. Instead, the question is to define when the Hoods' predecessors first watered cattle on each

source, and in what amount. The Court must make a finding that their predecessor used that specific amount of water *from that specific source* by assessing legal access to the source and indications of grazing activity.

Here, the Hoods cannot meet each of those burdens for a pre-TGA priority date for any source they claim. In 1896, there is no evidence that the Edwards were even living in the area. In 1900, there was ample evidence that they were struggling small-scale farmers, but no evidence that they owned livestock or could even have supported livestock. In 1911, there is evidence that Charles Edwards grew hay, and David Edwards had a corral, but no evidence of cattle, let alone cattle accessing the federal range. In 1915, there is evidence of 6 horses grazed on Forest Service land, and in 1918, there is evidence of 28 cattle grazed on forest service land and a signed statement that they did not use any other public land. There are no records between 1918 and 1935, and then finally, in 1935, there is a specific assertion of using 250 cattle on specific, defined federal land and a license that aligns with that statement.

2. IDWR Adjudication Memo 12

The R&R dismisses the United States' reading of IDWR Adjudication Memorandum #12 as supporting its position that each increase in a herd of cattle constitutes a new appropriation such that the larger amount can only receive the later priority date by noting that it "pertain[s] to situations involving more than one source are therefore not applicable to the Hoods' water right claims," and accordingly, disregarding the document. R&R Amendments at 4. As an initial matter, at trial, both IDWR and the United States' expert testified that where someone has a water right as of one year, and then expands that water right later, the expansion would be entitled only to the later priority date. *See, e.g.*, Tr. 226:25–227:8 (IDWR witness noting that "any new increment of beneficial use is a different water right"). In the context of stockwatering, this is particularly easy to illustrate: if someone has 100 head of stock using a source in 1935, then adds 100 in 1940 for a total of 200, they can assert *either* a claim for 100 with 1935 priority and 200 with 1940 priority, or a single claim for 200 with 1940 priority.

The R&R's dismissal of Memorandum #12 as inapplicable because it facially relates to situations involving more than one source is particularly difficult to understand. While it is admittedly titled

"multiple sources on a single claim," the plain text of the memorandum—which the R&R quotes at length—is almost identical to the situation at play in this case. In effect, the R&R dismisses the United States' arguments based on the title of the document, without contemplating the text. The Hoods' predecessors asserted ownership of 28 cattle in 1919 and 250 in 1935. Today they are authorized for 50. R&R at 21, ¶ 80. A water right for 250 cattle's worth of water use can only be granted when there is evidence that 250 cattle were drinking water. While it supports the United States' position, the Court need not apply IDWR's adjudication memorandum to determine that the Hoods cannot backdate the amount of water used by 250 (or 50) cattle to 1919, or 1911, when their predecessors undisputedly did not own that many cattle, let alone water that many cattle on the specific federal land claimed today—it simply needs to apply black letter water law. The Hoods are entitled to a water right for however much water the cattle their predecessors grazed in fact consumed, and no more. Each expansion in that herd constituted a new appropriation with a new priority.

E. The Special Master erred in recommending April 1, 1911 priority dates, rather than 1931, 1942, and 1975, depending on the claim [Challenge Issue No. 1].

If this Court corrects the Special Master's errors identified above involving Challenge Issues 2 through 9, *see supra* §§ III.A–D, it will find that the Hoods are entitled to three different priority dates, splitting the claims into five categories of claims, based on a careful review of the history of access to each relevant portion of federal land. *See* Ex. B. Specifically, this Court should find the following priority dates exist: June 28, 1931, for Category 1 and 2 claims; April 1, 1943, for Category 3 claims; and April 1, 1975, for Category 4 and 5 claims. *See id.*

1. Category 1 and 2 claims are entitled to a priority date of June 28, 1931.

This Court should find that the evidence presented demonstrates the Hoods' Category 1 claims have a priority date of June 28, 1931, for the reasons discussed above regarding Challenge Issue Numbers 2, 3, 6, and 7. *See supra* §§ III.A, III.D. These claims are both within the 1936 License granted to Charles, *see* Joint Ex. 307 at BLM_615, and the area marked as "lands wished to graze" on the plat attached to the July 1935 Application, *see* Joint Ex. 308 at BLM_626. Because these claims are associated with a Class I

license and an assertion of prior use, they can be given a pre-TGA priority date pursuant to *LU II.* In this case, the United States does not contest that the BLM made a determination finding the Edwards had used the relevant federal range for three years on the basis of a BLM stamp on the license.

This Court should also find that the evidence presented demonstrates the Hoods' Category 2 claims have a priority date of June 28, 1931, for the reasons discussed above regarding Challenge Issue Numbers 2, 3, 6, and 7. *See supra* §§ III.A, III.D. These claims are not within the areas marked on the plat attached to the July 1935 Application, *see* Joint Ex. 308 at BLM_626, however, they are within the 1936 License granted to Charles, *see* Joint Ex. 307 at BLM_615, which on its face indicates use since June 28, 1931. The 1936 License—the first TGA authorization issued to the Edwards—was granted to "Charles R. Edwards & Son" (Charles and Elmo) on October 5, 1935, and covered the grazing season from April 15 to June 1 of 1936. Joint Ex. 307 at BLM_615–16. It encompassed portions of Township 15N, Range 3W, Sections 10, 15, 20, 21, 22, and 29 as a joint allotment and a small individual allotment in Sections 29 and 33. *Id.* It was additionally subject to a trailing permit granted to another user. *Id.* The license states that it is "on public domain that has been used in connection with your dependent commensurate property for a period of three years prior to June 28, 1934." *Id.* Charles' BLM grazing file indicates that this grazing area was unchanged between 1936 and 1942. Joint Ex. 307 at BLM_586–608 (annual licenses with variations of "as noted in 1936 [[L]icense"). The area covered by the 1936 License is mapped in U.S. Exhibit 30; Tr. 320:6–14. Because BLM adjudicated use for three years prior to the TGA, in accordance with the Rules for Administration, any of the Hoods' claims within the 1936 License are entitled to a priority date of June 28, 1931.

Because the Hoods failed to meet the requirements in *Joyce* and *LU II* for proving Category 1 and 2 stockwater claims on federal land prior to their predecessors' TGA applications, *see supra* §§ III.A, III.D., this Court should find the Hoods' Category 1 and 2 claims are entitled to a priority date of June 28, 1931. Moreover, if this Court does find that any of the Hoods' Category 1 and 2 claims are entitled to an earlier priority date, it must also make findings as to quantity of livestock when assessing the beneficial use qualifying for a given priority date. *See supra* § III.D.

2. Category 3 claims are entitled to a priority date of April 1, 1943.

This Court should find that the evidence presented demonstrates the Hoods' Category 3 claims have a priority date of April 1, 1943, for the reasons discussed above regarding Challenge Issue Numbers 2, 3, 6, and 7. *See supra* §§ III.A, III.D. These claims were not within the July 1935 Application or the 1936 License, however, in 1942 Charles and Elmo were granted a ten-year permit that slightly expanded the approved grazing area, gaining a portion of Section 9, Township 15N, Range 3W on to the 1936 License area ("1942 Permit"). *See* Joint Ex. 307 at BLM_619–20; *see also* U.S. Exs. 25 and 30 (maps). The 1942 Permit authorized Charles and Elmo to begin grazing onto the newly authorized portion of Section 9 beginning April 1, 1943. Joint Ex. 307 at BLM_619–20; U.S. Ex. 25 at BLM_2300; Tr. 304:15–304:25, 305:1–305:19.

Because the Hoods failed to meet the requirements in *Joyce* and *LU II* for proving Category 3 stockwater claims on federal land prior to their predecessors' 1942 Permit, *see supra* §§ III.A, III.D., this Court should find the Hoods' Category 3 claims are entitled to a priority date of April 1, 1943. Moreover, if this Court does find that any of the Hoods' Category 3 claims are entitled to an earlier priority date, it must also make findings as to quantity of livestock when assessing the beneficial use qualifying for a given priority date. *See supra* § III.D.

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

This Court should find that the evidence presented demonstrates the Hoods' Category 4 claims have a priority date of April 1, 1975, for the reasons discussed above regarding Challenge Issue Numbers 2, 3, 4, 5, 6, and 7. *See supra* §§ III.A, III.D. These claims are within the plat attached to the July 1935 Application, *see* Joint Ex. 308 at BLM_626, but not within the 1936 License or 1942 Permit, *see* Joint Ex. 307 at BLM 615–16 and BLM _619–20. These claims have only one of the two *LU II* factors: an assertion of prior use. There is no Class I license associated with the claims. Because there is no supporting evidence for pre-TGA use, BLM did not adjudicate a three-year period of prior use. As discussed *supra*, if a claimant's predecessors did not receive a permit, any pre-TGA use necessarily

ceased, and no water right exists. Accordingly, the first date of authorized use is April 1, 1975, when the Horse Flat Allotment came into existence. Joint Ex. 317 at BLM_1823 and BLM_1933.

This Court should also find that the evidence presented demonstrates the Hoods' Category 5 claims have a priority date of April 1, 1975, for the reasons discussed above regarding Challenge Issue Numbers 2, 3, 4, 5, 6, and 7. *See supra* §§ III.A, III.D. These claims are not within the areas marked on the plat attached to the July 1935 Application, the 1936 License, or the 1942 Permit. These claims have none of the *LU II* factors, and there is no evidence, even unreliable evidence, of earlier use prior to the existence of the Horse Flat Allotment.

It is clear from the record that the Category 4 and Category 5 claims are not entitled to an earlier date. Each annual license issued to Charles covered the same area after the small 1942 expansion. *See* Joint Ex. 307 at BLM_529–86; Tr. 309:5–11, 309:22–25, 310:1–4. When the grazing authorization was transferred to Melvin Dotson, the same applies. *See* Joint Ex. 317 at BLM_1888–1932; Tr. 313:13–22 (area is consistent with 1942 Permit). That the authorized grazing area did not change is supported by multiple maps in the files over several decades. For example, in Charles' grazing file, there is a 1949 map showing the same authorized area, *see* Joint Ex. 307 at BLM_621, and a 1956 map, associated with a partial transfer of preference not at issue in this case, again showing an identical area, *see id.* at BLM_622; *see also* Tr. 307:13–25, 308:1–25, 309:1–8. In the Dotson grazing file, BLM conducted a 10-year permit inspection in 1965. Joint Ex. 317 at BLM_1897–98. As part of that inspection, BLM mapped an identical authorized grazing area to the 1942 Permit and the 1949 and 1956 maps. *Id.*; *see also* Tr. 312:18–25, 313:1–22. Dotson was granted a ten-year permit consistent with that inspection. Tr: 314:16–18; Joint Ex. 317 at BLM_1900–02.

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

1824–25. Then, in the 1975 grazing authorization, beginning April 1, 1975, references to a Horse Flat Allotment appear for the first time (along with a Dotson allotment, replacing the prior individual allotment). *Compare* Joint Ex. 317 at BLM_1932 (1974, showing Joint Allot. w/ Edwards, Ford & Warfield and Ind. Allot.), *with* BLM_1933 (Horse Flat Allotment and Dotson Allotment). The evidence suggests that in 1975, the BLM took steps to formalize the modern-day allotment for the upcoming grazing season. Accordingly, the first date that grazing was authorized on the entire modern-day Horse Flat Allotment was April 1, 1975.

To begin, for the reasons discussed above, *see supra* §§ III.A, III.D, this Court should find the Hoods failed to meet the requirements in *Joyce* and *LU II* for proving Category 4 and 5 stockwater claims on federal land prior to their predecessors' TGA applications. Additionally, for the reasons discussed above, *see supra* § III.C, if this Court were to find water appropriation by the Hoods' predecessors prior to 1936, it would also need to find that those water rights were lost by non-use during the period from 1936 to 1975 when the Hoods' predecessors had no legal authority to use those rights. This is because, as discussed above, *see supra* § III.B, the Special Master erred in determining that the Hoods' predecessors used the Stock Driveway at any time during its existence, much less lawful use that both complied with the SHRA and was sufficient to establish beneficial use. Moreover, if the Court were to find those rights were not forfeited by non-use, *see supra* § III.C, it must also make findings as to quantity of livestock when assessing the beneficial use qualifying for a given priority date, *see supra* § III.D.

IV. CONCLUSION

This Court should find that the Special Master's recommended priority date of April 1, 1911 is unsupported by the evidence presented at trial, and in making this recommendation, the Special Master erred in applying the principles for determining priority dates for stockwater claims on federal land laid out in this Court's precedent, as well as in *Joyce* and *LU II*. This Could should further find that the Hoods are entitled to the following priority dates: June 28, 1931, for Category 1 and 2 claims; April 1, 1943, for Category 3 claims; and April 1, 1975, for Category 4 and 5 claims.

Dated: May 29, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 29, 2025, I served true and correct copies of the foregoing document as follows:

via Hand Delivery:

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Matthew Lamb

Ex. A

Subcase Nos:

67-15263
67-15264
67-15265
67-15266
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Ex. B[7]

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

[7] There are more than twenty-seven listed in this table because some claimed stream sources reach across different areas. Claim splits are indicated by (Sec. X). A full map is in the trial record as U.S. Exhibit 30.