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

In Re SRBA

Case No. 39576

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

CLAIMANTS KEITH AND KAREN HOODS' RESPONSE TO THE UNITED STATES' OPENING BRIEF ON CHALLENGE TO SPECIAL MASTER'S REPORT & RECOMMENDATION, AS AMENDED

Keith and Karen Hood (collectively, the "Hoods"), by and through its counsel of record, Parsons Behle & Latimer, and pursuant to the Court's May 9, 2025, Challenge Scheduling Order, submit this response to the United States' Opening Brief on Challenge to Special Master Report and Recommendation, As Amended ("**U.S. Challenge**" or "**Challenge**").

For the reasons that follow, the Hoods respectfully request that the Court deny the United States' Challenge and that the Court accept the Special Master's findings of fact and conclusions of law as set forth in the Special Master's Report and Recommendation, As Amended (cited hereafter as "**R&R**").

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I. INTRODUCTION

The R&R is the product of the Special Master's careful consideration of the testimony and documentary evidence presented in the course of a two-day trial. To determine the priority date of the Hoods' stockwater claims, the Special Master conducted a searching review of the record. Among the documents reviewed and scrutinized by the Special Master to resolve the question of priority were Charles Edwards' July 27, 1935, Application for Grazing Permit, Joint Ex. 308 ("**July 1935 Application**"); Charles and Elmo Edwards' December 13, 1935 Application for Grazing Permit, Joint Ex. 309 ("**December 1935 Application**" and, collectively with the July 1935 Application, the "**1935 Grazing Applications**"); Charles Edwards & Son's February 21, 1936, informational form, Joint Ex. 310 ("**February 1936 Form**"); the Class 1 Grazing License issued to Charles Edwards & Son on October 5, 1936, Joint Ex. 312 ("**1936 License**"); and the Order of Withdrawal: Stock Driveway Withdrawal No. 20 (Idaho No. 1), Hood Ex. 169 ("**Stock Driveway**").

The United States cannot identify any clear error with the Special Master's review of these documents or the conclusions that the Special Master reached, as reflected in the R&R. The United States avers that the Special Master's weighing and consideration of documents to determine the priority date for the Hoods' stockwater claims was improper. But the United States' arguments in this regard are, in large part, a combination of the United States elevating its preferred theories over the Special Master's analysis and the United States apparently disregarding how the Special Master thoroughly evaluated various components of direct and circumstantial evidence, considered them in their larger context, and identified a coherent timeline of the Hoods' predecessors' livestock grazing practices.

The remainder of the United States' arguments are more akin to policy arguments than identification of legal errors. In sum, the United States objects to the Special Master's disregard of the United States' novel, untimely-pled, and unsupported legal theories that seek to redefine the rules and policies that form the basis for adjudicating *de minimis* stockwater rights.

Because the United States cannot identify any clear error in the Special Master's fact findings or any errors in the Special Master's conclusions of law, the United States' Challenge must be rejected.

II. STANDARD OF REVIEW

A. Findings of Fact of a Special Master

"In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous." *In re: SRBA*, Subcase No. 63-07539, Memorandum Decision and Order on Challenges (Sep. 2, 2009), at 8 (citing, *inter alia*, AO1, Section 13f). "The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party." *In re: SRBA*, Subcase No. 74-10117, Memorandum Decision and Order on Challenge (Nov. 12, 2014), at 4.

"In determining whether findings of fact are clearly erroneous, a reviewing court 'inquires whether the findings of fact are supported by substantial and competent evidence.'" *In re: SRBA*, Subcase Nos. 01-217, *et al.*, Memorandum Decision and Order on Challenge (Feb. 9, 2011), at 7 (quoting *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994)). "Substantial ***does not*** mean that the evidence was uncontracted." *In re: SRBA*, Subcase No. 63-07539, Memorandum Decision and Order on Challenge (Sep. 2, 2009), at 8 n.1 (emphasis supplied). Rather,

> All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether

> it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable mind must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached.

Id. (citations omitted) (emphasis in original).

Put another way, the district court's review of a special master's findings of fact is just as an appellate court reviews a district court's findings of fact in a non-jury action: "An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside." *In re: SRBA*, Subcase Nos. 55-10135, *et al.* (Aug. 3, 2005), at 5 (citations omitted).

B. Conclusion of Law of a Special Master

A district court reviews a special master's conclusions of law *de novo*. *See id.* at 6. Although a special master's conclusions of law are not binding upon a district court, the special master's conclusions "are expected to be persuasive." *Id.*

III. ARGUMENT

A. The Special Master Properly Considered Statements of Prior Use in Conjunction with Other Evidence to Identify a Priority Date

The United States' primary argument is that the Special Master erroneously weighed grazing applications and permits, considered "improper" evidence, and failed to give sufficient weight to one U.S. Forest Service grazing permit application.

The United States attempts to support its arguments by invoking the decisions in *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) (cited hereafter as "***Joyce***"), and *In re: SRBA*, Subcase Nos. 55-10288B, *et al.*, Memorandum Decision on Remand and Order

of Amended Partial Decrees (Jul. 3, 2008) (cited hereafter as "***LU II***"). But nothing in these cited cases prohibits or otherwise condemns the fact-finding that occurred here.

The United States' arguments are also based, in large part, on dissatisfaction with the Special Master's factual inferences. The United States cannot bear its burden to show clear error in this regard either. In accordance with the longstanding principle of appellate review, it is the province of the Special Master to determine inferences from the record, and appellate review of such inferences is subject to the same "clearly erroneous" standard as any other findings of fact. *See KMST, LLC v. County of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) ("It is the province of the trial court to determine ... the inferences to be drawn from the evidence.") (quoting *Bird v. Bidwell*, 147 Idaho 350, 352–53, 209 P.3d 647, 649–50 (2009)); *In re: SRBA*, Subcase Nos. 55-10135, *et al.* (Aug. 3, 2005), at 5 (district court reviews special master's findings of fact under the "clearly erroneous" standard, "just as an appellate court reviews a district court's findings of fact in a non-jury action"). "Even though the evidence may be equivocal and somewhat in dispute, if the trial court's findings of fact are based on reasonable inferences that may be drawn from the record, they will not be disturbed on appeal." *State v. Lutton*, 161 Idaho 556, 562, 388 P.3d 71, 77 (Ct. App. 2017) (applying clear error standard in review of fact findings that trial court relied on in denying motion to suppress evidence) (citing *State v. Jaborra*, 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct. App. 2006)).

The arguments raised by the United States are akin to a mere disagreement with the Special Master's findings as opposed to a showing of clear error. This is because the United States cannot bear its burden to demonstrate clear error. As is shown in the thoroughly reasoned R&R, the Special Master's factual findings are sound and do not breach any rule set forth in *LU*

II or *Joyce*. The mere fact that the United States would have interpreted the record differently than the Special Master is not grounds for reversal.

1. *The United States cannot show that the Special Master's well-reasoned evaluation of grazing applications and permits constitutes clear error.*

The United States argues that the Special Master improperly resolved discrepancies between, on the one hand, 1935 Grazing Applications and the February 1936 Form, and, on the other, the 1936 License that followed. On the whole, it appears the United States' position is that the Special Master gave too much weight to the 1935 Grazing Applications. But as shown by the R&R, these criticisms of the Special Master's findings are unsubstantiated. The Special Master provided a clearly-articulated and well-reasoned analysis of the permits and applications. And even where parties could, *arguendo*, differ on their interpretation of these documents, such difference of opinion does not rise to the level of showing clear error.

The United States' first volley to support its argument is to note that the parties disputed whether the faded typewritten font in the 1936 License identified the document as being dated "193**6**" or "193**5**." The United States fails to articulate how the Special Master's resolution of this factual dispute was a deviation from *LU II* and *Joyce* or was otherwise clearly erroneous. In reality, the Special Master fulfilled his duty as a factfinder: He considered contextual evidence—even explaining how he compared a number "5" that was printed near the disputed number "6"—to reach a reasoned finding that the number in question was, in fact, a "6." This reasoning was thoroughly articulated in the R&R. *See* R&R, Findings of Fact, 11 at ¶¶ 21-22.[1]

The United States next asserts that the Special Master misapplied *LU II* by giving undue weight to the 1935 Grazing Applications. The United States asserts that *LU II* requires

"consideration of both the application and the license or permit" and that this approach "makes good sense, as neither documents exist in a vacuum." U.S. Challenge, 5. But the Special Master did just this: the permit and applications were both given weight and were considered—not in a vacuum, but in the larger context of the record. The R&R shows that the Special Master properly considered (and scrutinized) Charles Edwards' statements in both of the 1935 Grazing Applications that he had been grazing stock in the identified areas "for [the] past 40 years." R&R, Findings of Fact, ¶¶ 31, 34. These "40 years" statements (and a corroborating "60 years" statement in Charles' 1955 letter to BLM, *see* Joint Ex. 316,) were appropriately considered by the Special Master as credible (but not dispositive) evidence indicating that the Hoods' predecessors-in-interest had been grazing stock possibly as far back as 1895 or 1896. *See id.*, ¶ 82.

Yet the United States cries foul, noting that the "40 years" statement (indicating a priority date of 1895 or 1896) does not align with the Special Master's assigned priority date of 1911; *ergo*, according to the United States, the Special Master must have committed error in giving weight to the application statements. *See* U.S. Challenge, 5 ("This [weight given to the December 1935 Application] 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."). Couched in this argument is the insinuation that the Special Master uncritically gave weight to Charles' "40 years" statements and/or that the difference between the "40 years" statement and the assigned priority date indicates a *per se* clear error. Ironically, this discrepancy between the "40 years" statement and the assigned priority date cuts against the United States'

[1] Due to a typographical error, the paragraph immediately following the heading "D. Date of Issuance of the Grazing License for the 1936 Grazing Season" on page 11 of the R&R was not numbered. This citation is meant to incorporate that unnumbered finding of fact.

argument. The R&R shows that this discrepancy was the result of the Special Master's engaging in thorough factfinding—not the result of clear error or blind deference to the statements in the 1935 Grazing Applications.

The R&R shows that Special Master recognized and analyzed the discrepancy between the "40 years" statement and the lack of definitive evidence to prove an 1895 (or 1896) priority date. While acknowledging that Charles Edwards had averred raising stock since approximately 1895, the Special Master further acknowledged that there was a lack of evidence to support an 1895 priority date. Thus, the Special Master turned to the rest of the record to ascertain the first evidence of grazing on public lands that corresponded to the Hoods' stockwater claims.

The Special Master first worked to determine when the Edwards family had sufficient stock to utilize the acreage of the Hoods' water rights. To do this, the Special Master considered the earliest contextual evidence of the Edwards family raising stock: homestead documents (e.g., fences, hay, averments of using the land for "grazing my own stock"). *See* R&R, Findings of Fact, ¶¶ 41-60. The Special Master found that the earliest contextual evidence showed that "the first few years of their [(the Edwards')] cattle operation was too small to utilize the entirety of the equivalent acreage of what now constitutes the Hoods' proportionate share of the Horse Flat Allotment." *Id.*, ¶ 81. Thus, the Special Master concluded that the Hoods' amended claimed priority date of 1900 (and, by extension, the original 1895/1896 claimed priority date) was off the table. *See id.*, ¶ 82 ("However, at the time of the Hoods' claimed priority date of October 15, 1900, the combined herd of David and Charles Edwards was too small to utilize the entirety of an area the size of the Horse Flat Allotment."). The Special Master then identified 1911 as the earliest evidence-supported date whereat the Edwards family had sufficient livestock to graze the lands associated with the Hoods' stockwater claims. *See id.*, ¶ 83.

Having determined the date when the Edwards family had sufficient head of cattle to graze the entirety of the lands associated with the stockwater claims, the Special Master then turned his analysis to determining whether there was sufficient evidence to show that the Edwards family actually grazed that cattle on the lands associated with the Hoods' stockwater claims. For this analysis, the Special Master properly considered the locations identified in Charles Edwards' 1936 Grazing Applications as well as the lands identified in the 1936 License. The Special Master noted how Charles Edwards, in his applications, claimed longstanding use of lands that fell within in a specific township and range, and the Special Master further observed that such lands were logically adjacent to the Base Property. *Id.*, ¶¶ 31-36. The Special Master explained how the proximity of the Base Property to the land identified in the 1936 Grazing Applications, combined with evidence of longstanding livestock raising, supported a finding that Charles Edwards "was not just randomly listing out areas of land that he was not familiar with." *Id.*, ¶¶ 38-40. The Special Master also considered the lands ultimately approved for grazing in the 1936 License as well as the preceding temporary license and recommendations. *Id.*, ¶¶ 25-28.

Given these thoroughly reasoned findings, it is unclear how the Special Master's scrutiny of the Charles Edwards' application statements violated *LU II* and *Joyce* or otherwise constituted clear error.

The notion that the Special Master blindly accepted the contents of the 1935 Grazing Applications is completely at odds with the reasoning in the R&R. The R&R shows how the Special Master, upon reviewing the record, found evidence to support Charles Edwards' claim of pre-TGA grazing. And when the Special Master determined that the evidence was insufficient to support a priority date of 1895 (notwithstanding Charles' "40 years" statement), the Special Master then engaged in a searching review of the record to identify the earliest evidence of stock

raising and grazing on the relevant lands, giving appropriate weight to applicant statements that evidenced the location and duration of such grazing.

2. ***The United States cannot show that the Special Master's consideration of contextual evidence and the inferences drawn from such evidence constitutes clear error.***

The United States takes issue with the inferences that the Special Master's drew from his review of the Edwards family's homestead documents. In sum, the United States appears to argue that the Special Master was out of line for inferring the Edwards' heads of stock based on the homestead documents and that the Special Master committed clear error because such inferences, alone, do not identify where and when the Edwards family grazed stock on federal lands. The United States' arguments here are wrong on two counts: First, the United States cannot identify any precedent that prohibits a Special Master from making reasoned inferences based on the record. On the contrary, such inferences are permissible and are given the same deference as any other finding of fact. *See KMST*, 138 Idaho at 581, 67 P.3d at 60 ("It is the province of the trial court to determine ... the inferences to be drawn from the evidence.") Second, the United States incorrectly implies that the homestead documents were the ***sole*** basis by which the Special Master determined the priority date. This is simply untrue.

The reality is that the homestead documents were one piece of the evidentiary puzzle: Charles Edwards' statements in the 1935 Applications averred longstanding grazing on public lands associated with the Hoods' stockwater claims. The homestead documents evidenced the existence of such stock. And when considered alongside the claimed "40 years" duration of grazing on public lands (which the Special Master scrutinized), the homestead documents supported the Special Master's finding that the Edwards family did own livestock at the turn of

the century and, by 1911, were capable of grazing the entirety of the grazing land associated with each of the claimed 27 stream reaches.

Yet, the United States insists that the Special Master goes too far by inferring that the Edwards family grew hay meant for consumption by their own livestock. But the United States' arguments to this point again reflect a mere disagreement with the robust R&R rather than a showing of clear error. For example, the United States insists that it is "just as plausible" that Charles Edwards "sold they hay to his neighbors or traded it for other materials he needed to continue to grow his homestead." U.S. Challenge, 8. But this theory ignores how, as noted in the R&R, Charles Edwards' homestead document identified two quarter-quarters being fenced and a barn, which the Special Master identified as "indicative of livestock ownership by Charles Edwards." R&R, Findings of Fact, ¶ 58. The United States has no rebuttal to this point. And Charles' obituary, consistent with Charles' repeated averments of his longstanding practice of raising livestock, states that he "was engaged in farming and ***stock raising*** his entire lifetime" while living in the area. *Id.*, ¶ 59 (emphasis supplied). For the United States to insist that it is equally likely that Charles Edwards used the hay for purposes besides feeding his own stock requires one to discredit numerous documents confirming that Charles raised his own cattle.

The United States relatedly claims that there is "no evidence" that David Edwards ever owned cattle and that the Special Master "did not declare the basis for asserting that David Edwards owned cattle." U.S. Challenge, 8. This completely disregards the Special Master's evidence-backed findings: The Special Master noted that David had a stable, corral, and "30 acres fenced," which the Special Master concluded to be indicative of livestock ownership by David. R&R, Findings of Fact, ¶¶ 41-46. The Special Master also noted that David Edwards expressly stated in 1916 Application and Affidavit that he had livestock. *Id.*, ¶ 49.5.

The United States nevertheless insists there is a dearth of evidence to show David Edwards' livestock ownership. The United States avers that a 1915 U.S. Forest Service grazing application shows David sought a permit to graze six horses (and no cattle) on the Weiser National Forest. *See* U.S. Challenge, 8 (citing Joint Ex. 325 at BLM_2304). But the document the United States cites is not an application; it is a permit. *See* Joint Ex. 325 at BLM_2304 (titled "United States Department of Agriculture Forest Service Grazing ***Permit***" (emphasis added)). And the permit does not purport to identify every head of livestock that David Edwards owns; instead, it merely identifies the livestock that David was permitted to graze. *See id.* Simply put, the grazing permit does not disprove or even contradict the Special Master's findings. The United States cannot reasonably assert that the Special Master made a clear error in this regard.

Finally, the United States invokes *Joyce*, claiming that the Special Master's inferred calculation of head of cattle based on homestead documents does not satisfy the requirements in *Joyce* for "proof of actual grazing on federal land." U.S. Challenge, 9. But nothing in the R&R indicates that the homestead documents served as the sole basis by which the Special Master concluded that the Edwards family had actually grazed on federal land. Again, the Special Master used the homestead files as just one piece of the puzzle: The homestead files are documentary evidence that support the finding that David and Charles Edwards raised cattle as far back as the early 1900s and that, by 1911, they had a sufficient number of livestock to graze all the federal lands associated with the Hoods' stockwater claims. R&R, Findings of Fact, ¶ 83. The 1935 Grazing Applications, in turn, contain Charles Edwards' repeated assertions that he had grazed public lands for "40 years" (as of 1935) and identify those specific federal lands.

Taken together, the homestead documents and 1935 Grazing Applications support a finding that the Edwards actually grazed livestock on the identified federal lands since at least

1911. It is simply incorrect to find that the Special Master reached this conclusion based solely on the contents of the homestead documents. The United States cannot carry its burden to show that the Special Master's review of the homestead documents was clearly erroneous.

3. *The United States cannot show that the Special Master's evaluation of the 1918 U.S. Forest Service Report on Qualification of New Applications constitutes clear error.*

In the R&R, the Special Master notes a confusing statement in a U.S. Forest Service Report on Qualifications of New Applicants dated November 6, 1918 ("**1918 Report on Qualifications**" or "**1918 Report**"):

> In the Report on Qualifications of New Applicants, there are two questions, the answers to which appear on their face to be inconsistent with each other. The first is: "Is applicant dependent upon Forest range, or is range elsewhere available for his stock?" Answer: "dependent on Forest Range." The second is: "Has applicant previously held permit on National Forest? If so, when and what disposition was made of it?" Answer: "never had one." It is unclear how the applicant, Charles Edwards, could have become dependent on Forest range without ever previously having a permit for use of National Forest land. Because of this inconsistency, this Special Master places no weight on the statement in the Report on Qualifications of New Applicants that the applicant was "dependent on Forest range" or any inferences that can be made as to whether there was "range elsewhere available for his stock." Joint Ex. 325 at BLM_2305.

R&R, Findings of Fact, ¶ 65.5 (emphasis in original).

A corresponding footnote attached to the final sentence of Finding of Fact Paragraph 65.5 further states:

> This Special Master notes that although the question appears to solicit an "either / or" answer, it is entirely possible, and even likely, that a livestock operation would be dependent on forage from land managed or owned by more than one entity, i.e., Forest Service, BLM, state, and private, etc.

Id., ¶ 65.5 n.6.

In response to the above-quoted Findings of Fact, the United States claims that the Special Master erred because he "placed no weight to this document" (i.e., the 1918 Report on

Qualifications). *See* U.S. Challenge, 10 (cleaned up and internal quotation marks omitted). The United States' premise is flawed. Paragraph 65.5 does not state that the Special Master was declining to give weight to the 1918 Report ***as a whole***. Rather, the Special Master declined to give weight to ***a portion*** of the 1918 Report: the "dependent on Forest Range" portion. *See* R&R, Findings of Fact, ¶ 65.5.

The United States contends that the "dependent on Forest Range" portion of the 1918 Report on Qualifications is significant because it indicates that the Edwards family did not graze on other public lands. The United States goes on to assert that the Special Master thus erred in failing to give weight to this portion of the report and in failing to reach the same conclusion as the United States. But the corresponding footnote to Findings of Fact Paragraph 65.5 makes clear that consideration of the "dependent on Forest Range" portion of the 1918 Report would not have materially altered the Special Master's findings because of the high likelihood that a livestock operation would likely be dependent on land managed by multiple entities like BLM. *See id.*, ¶ 65.5 n.6.

The United States further insists that the 1918 Report on Qualification carries significant weight because it is the "very first evidence of the Edwards family owning cattle." U.S. Challenge, 10. This is also incorrect. As discussed *supra*, the Special Master searching examination of the record identified direct and circumstantial evidence of the Edwards' stock-raising activities before 1918. The United States nevertheless insists that the 1918 Report is the "the single most compelling piece of evidence on the Hoods' predecessors['] grazing activities," propounding a theory that 1911 is an erroneous priority date because the 1918 Report proves that Charles Edwards was, at that time, an up-and-coming rancher who was "just beginning to expand into a larger grazing operation." *Id.* at 11. This up-and-coming dairy rancher theory appears to be

based, in large part, on the United States' misreading an unpunctuated statement in the 1918 Report that notes how Charles Edwards was, among other things, engaged in cow milking. *See* Joint Ex. 325 at BLM_2305 ("Applicant is a class A owner lives on his ranch milks cows and farms the place himself." (Lack of punctuation in original).).

Apart from being supported by little to no evidence, the United States' flimsy theory distracts from the fact that the 1918 Report on Qualification, if anything, supports the Special Master's fact findings because the head of stock identified in the 1918 Report closely aligns with the Special Master's inferred calculation of how many cattle Charles Edwards was raising in 1911. *Compare* R&R, Findings of Fact, ¶ 56 (estimating that Charles Edwards could feed 29 head of cattle in the winter of 1910-1911) *with* R&R, Findings of Fact, ¶ 65 (noting that the 1918 Report on Qualification states that Charles Edwards owned 25 head of cattle and 13 horses).

The notion that the Special Master failed to properly weigh the 1918 Report on Qualification or otherwise committed clear error in evaluating the 1918 Report is without merit. While the United States may have its preferred interpretations of the 1918 Report and may wish the Special Master had considered it in a different light, this is not sufficient to show clear error.

B. The Special Master Did Not Err in Finding that the Hoods' Predecessors Used the Stock Driveway

The findings of fact in the R&R concerning the Stock Driveway can be divided into three sub-analyses: First, there is the analysis of documents showing that David and Charles Edwards submitted requests to the U.S. Forest Service wherein they requested (and ultimately received) permission to graze on the modern-day Payette National Forest, which is located less than one-half mile away from the north end of the modern-day Horse Flat Allotment. *See* R&R, Findings of Fact, ¶¶ 61-66. Second, there is the analysis as to the scope of the Stock Driveway, which reserved numerous lands in the modern-day Horse Flat Allotment for the public to use as a

driveway to move cattle to watering places. *See id.*, ¶¶ 67-69. Notably, many of the lands corresponding with the Stock Driveway neatly overlap with the Hoods' stockwater claims and partially overlap with the lands identified in Charles Edwards' December 1935 Application. *See, e.g.*, Hood Ex. 170 (map showing Hoods' stockwater claims, with checkmarks and one large "x" hand drawn at trial by BLM Water Rights Specialist Fredric Price to indicate the location of the Stock Driveway). Finally, there is the analysis of the statements by Elmo Edwards (son of Charles Edwards), which were noted in a March 20, 1975 memorandum documenting a meeting held with grazing licensees. *See* U.S. Ex. 11 at BLM_1823-1825. The memorandum identifies Elmo as having "indicated that livestock are normally turned out on the south end of the allotment (lower elevation) and allowed to drift north." *Id.*

Combined, these three analyses provided the Special Master the basis by which to find that David and Charles Edwards had a "pre-TGA customary use of the land that now comprises the northern portion of the modern-day Horse Flat Allotment." R&R, Findings of Fact, ¶¶ 73.

The United States has its preferred alternative interpretation of these facts. The United States notes that users of the Stock Driveway were required "to move rapidly through from where they were going" and that the 1936 Rules for Administration required cattle to be moved at a rate not less than 10 miles per day. *See* U.S. Challenge, 12 (citing U.S. Ex. 27 at BLM_2259). In other words, according to the United States, the cattle could not have been watered in the Stock Driveway because they had to move through it quickly.

But the United States' theory, apart from expressing mere disagreement rather than showing clear error, has its own holes: The United States' theory requires one to believe that the Edwards' livestock passed through an area of over 5 square miles without ever once drinking water. This theory also requires one to believe that livestock cannot both drink water and "move

rapidly" through the Stock Driveway—a roughly 5-mile driveway controlled by regulations that permit cattle to take up to an entire day to travel twice that length. The United States' theory simply defies common sense and cannot reasonably serve as a basis to show that the Special Master's analysis was tainted by clear errors.

C. The Special Master Did Not Err Declining to Find, *Sua Sponte*, that the Hoods' Stockwater Claims Were Forfeited

Here, the United States restates a novel theory that only first appeared in its post-trial brief and was later expanded upon in the United States' motion to alter or amend the Special Master's R&R: Footnote 13 of *In re: SRBA*, Subcase Nos. 55-10288B, *et al.*, Memorandum Decision and Order on Challenge (Jan. 3, 2005), at 27 n.13 (cited hereafter as "***LU I***"), stands for the proposition that "non-maintenance" of a water right can automatically extinguish the right, and this means of extinguishment is distinct from the disfavored remedy of statutory forfeiture under Idaho Code § 42-222.

As a preliminary matter, it bears noting that this theory requires one to believe that a passing footnote in an SRBA memorandum established a brand-new basis by which water rights can be extinguished without a party directly challenging the existence of the water right via statutory forfeiture. The Special Master noted as much in the order amending the R&R, finding that the "concept of 'non-maintenance' found in footnote 13 does not have a basis that is independent of statutory forfeiture." Order Amending Special Master's Report, at 5. In other words, the Special Master (properly) concluded that footnote 13 of *LU I* was merely a reference to statutory forfeiture under Idaho Code § 42-222.

As discussed in the Special Master's original R&R, the United States neither pled nor attempted to litigate forfeiture (under its "non-maintenance" theory or otherwise) until post-trial briefing. *See* R&R (original Jan. 8 2025 order), 5-8. The United States cannot claim that the

Special Master erred in failing to accept the United States' belated and novel "non-maintenance" theory of forfeiture or that the Special Master erred in failing to grant, *sua sponte*, the unpled, disfavored, and non-self-executing remedy of statutory forfeiture.

D. The Special Master Did Not Err in Declining to Assess Changes in the Size of the Edwards' Livestock Herds

Conclusion of Law Paragraph 9.5 correctly summarizes the precedent established in the decision *In Re: SRBA*, Subcase No. 91-00012, Memorandum Decision and Order re: Basin-Wide Issue 12 (Apr. 25, 1997) ("**BWI 12**"). BWI 12 provides, in relevant part:

> C. It is Not Necessary to Include the Number of Cattle in *De Minimis* Claims.
>
> ...
>
> D. The Quantity Used in Cubic Feet Per Second for a *De Minimis* Claim Under I.C. 42-1407A(12) Involving Diversion May be Based on Any Hourly Rate so Long as the Amount is Capped to a Quantity Not to Exceed 13,000 Gallons Per Day.

BWI 12, at 2. It is a longstanding and undisturbed rule in the SRBA that partial decrees for *de minimis* instream stockwater rights are not required to specify the number of cattle. Instead, all *de minimis* stockwater rights are uniformly provided a cap of 13,000 GPD.

The United States cannot meaningfully dispute BWI 12 on legal grounds. The United States may disagree with BWI 12 on policy grounds and may even identify practical shortcomings and adverse consequences of BWI 12. But these briefings are simply not the proper venue to demand these kinds of changes to the State of Idaho's policies for adjudicating *de minimis* stockwater rights. BWI 12 indisputably provides that head of cattle are irrelevant and sets 13,000 GPD as the maximum quantity.

The United States' citation of IDWR Adjudication Memorandum #12 is equally unavailing. The United States never made any showing that the Hoods' stockwater claims

consists of either (1) multiple claims from a single source, or (2) a single claim encompassing multiple sources. The United States' novel theory that any change in head of livestock constitutes a *de facto* expansion of a *de minimis* stockwater right is wholly without support. Indeed, the United States did not and cannot cite any authority that would support this theory because, like the United States' scrutiny of BWI 12, these arguments are a mere expression of policy disagreement rather than an identification of legal errors with the Special Master's conclusions of law.

E. The Special Master Correctly Recommended April 1, 1911 as the Priority Date for the Hoods' Stockwater Claims

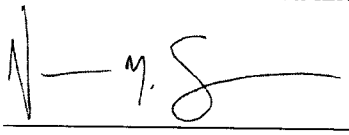
As discussed throughout this brief, the Special Master's findings of fact and conclusions of law are sound. The United States cannot identify any clear error in the Special Master's factual findings and the United States also cannot identify any errors of law. Accordingly, the Special Master's recommended priority date, based on the reasoning discussed in the R&R, should remain undisturbed.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the Special Master's R&R and the recommended priority date.

DATED this 11th day of June, 2025.

PARSONS BEHLE & LATIMER



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

EXHIBIT A

Subcase Nos.

67-15263
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of June, 2025, a true and correct copy of the foregoing document was filed with the Clerk of the Court by hand-service, and was served to the following persons by delivering the same to each 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