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DEPARTMENT OF
WATER RESOURCES

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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) Subcase Nos. 45-10480, 45-10481
) 45-12906
Case No. 39576)

MOTION IN LIMINE TO EXCLUDE
MEMORANDUM DECISION AND
EVIDENCE FROM ADMINISTRATIVE
HEARING FOR WATER RIGHT
NO. 45-0292 IN ANY PROCEEDINGS
REGARDING SUBCASE NOS.
45-10480, 45-10481, 45-12906 AND
SUPPORTING MEMORANDUM

COMES NOW Kevin Smyer, Norman Smyer and Dolores Smyer (hereinafter referred to as the Smyers) the claimants in Water Right Nos. 45-10480, 45-10481 and 45-12906 by and through their attorney of record, Michael P. Tribe, and file this *Motion In Limine and Supporting Memorandum*. Pursuant to Idaho Rule of Evidence 403, the Smyers specifically seek to prohibit the introduction of the January 14, 1991, Memorandum Decision, the audio taped recordings of that hearing and any evidence from the

1 administrative hearing for Water Right No. 45-0292, because the probative value of that
2 material would be substantially outweighed by the danger of unfair prejudice to the Smyers,
3 confusion of the issues or that review of such materials would constitute a waste of time.
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5 The bases for this *Motion* are set forth as follows:

6
7 **I. FACTUAL BACKGROUND**

8 On March 15, 1990, Kevin Smyer filed with the Idaho Department of Water Resources
9 (Department) an application for transfer to establish a point of diversion for Water Right No.
10 45-0292. Earl Warthen protested the application and a hearing on the objection and transfer
11 application was held on November 13, 1990. Gary Spackman, of the Department, conducted
12 the hearing and heard evidence from both parties. Water Right No. 45-0292 was originally
13 decreed for 0.24 cfs of Howell Creek water, in the case of *Wood v. Stokes*. The court
14 decreed the water to B.F. Mahoney, for the purposes of irrigating land located in the NE ¼ of
15 an unidentified section of Cassia County of T12S, R25E., Boise Meridian. The decree did
16 not locate the point of diversion for Water Right No. 45-0292 and the purpose of Smyer's
17 application for transfer was to locate a point of diversion.
18

19 In its memorandum decision, the Department, found that no evidence was submitted to
20 show water under Water Right No. 45-0292 had been diverted from Howell Creek in recent
21 history, or that the NE1/4 of Section 16, T12S, R25E, has been irrigated from Howell Creek
22 for more than five years. The application for transfer was denied and the right was declared
23 forfeited.
24

25 The Smyers do not claim that the Order from the 45-0292 is invalid. The Smyers do
26 contend that the Order and Memorandum decision, its accompanying exhibits and the audio
27 recording of the hearing should not be permitted to be further discussed or entered into the
28

1 record in any proceeding for Water Right Nos. 45-10480, 45-10481 or 45-12906 based upon
2 the Idaho Rules of Evidence.
3

4 II. ARGUMENT

5 A. I.R.E. 401/402

6
7 In its simplest terms, a decision by a Department Hearing Officer in a prior water
8 right hearing is not relevant in a second hearing for different water rights located on a
9 different stream. Idaho Rule of Evidence 402 provides that, "[e]vidence which is not
10 relevant is not admissible. The forfeited right of Kevin Smyer was for Howell Creek water
11 with diversion points from Howell Creek. The rights currently pending for both Kevin and
12 Norman Smyer are for beneficial use of the waters of Spring Creek and a spring located
13 wholly on Kevin Smyer's property. They have no relationship to the forfeited right.
14

15 Idaho Rule of Evidence 401 defines relevant evidence as "evidence having any
16 tendency to make the existence of any fact that is of consequence to the determination of the
17 action more probable or less probable than it would be without the evidence". The prior
18 decision was for a different stream and a different right. Therefore, any evidence of the past
19 forfeiture should be prohibited, as it is not relevant to the present action before this Court.
20

21 B. I.R.E. 403

22 Under Idaho Rule of Evidence Rule 403, certain evidence may be excluded if its
23 probative value is substantially outweighed by the danger of unfair prejudice, confusion of
24 the issues, or misleading the jury, or by considerations of undue delay, waste of time, or
25 needless presentation of cumulative evidence. The Smyers are aware that I.R.E. 403 does not
26 offer protection against evidence that is merely prejudicial in the sense of being detrimental
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1 to the party's case; it protects against evidence that is unfairly prejudicial, that is, if it tends to
2 suggest decision on an improper basis. *State v. Floyd*, 123 Idaho 651, 873 P.2d 0905
3 (Ct.App.1994), *cert. denied*, 513 U.S. 935 (1994). Any reliance on the past findings of the
4 Department in a different claim would be a decision on an improper basis.
5

6 The following provisions of IRE 403 are applicable to the Memorandum Decision
7 and administrative record of Water Right No. 45-0292 because its probative value is
8 substantially outweighed by the danger of unfair prejudice, confusion of the issue and waste
9 of time.

10 1. Unfair Prejudice

11 Evidence that Kevin Smyer had a previous water right forfeited for nonuse constitutes
12 unfair prejudice. Warthen seeks the introduction of evidence of forfeiture of a different right
13 to imply that the Smyers' current rights have also been forfeited. Spring Creek rights were
14 not placed at issue in that hearing and the Smyers should not be forced to defend evidence
15 from that hearing in the current proceeding. If evidence of the past forfeiture is analyzed, the
16 Smyers and their predecessors in interest would begin with an unfair disadvantage.
17

18 Therefore, the submission of any evidence from the hearing on Water Right No. 45-0292
19 should be prohibited, as it creates unfair prejudice by focusing the decision maker's attention
20 to facts that do not apply to the resolution of the water rights currently before the Court.
21

22 2. Confusion of the Issues

23 Second, admitting any evidence regarding Water Right No. 45-0292 would only confuse
24 the issues now before this Court. The forfeiture of Kevin Smyer's right on Howell Creek is
25 not a valid consideration as to whether Water Right Nos. 45-10480, 45-10481, which are in
26 Kevin's name, have been forfeited or whether 45-12906, which is in Norman's name and
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1 who wasn't even a named party to the 45-0292 proceeding, has been forfeited. Water from
2 Howell Creek is not relevant to the Smyers' claims to Spring Creek water. Therefore, any
3 evidence from the 45-0292 proceeding should not be reviewed in this proceeding.
4

5 **3. Waste of Time**

6 Third, consideration of the evidence from 45-0292 provides no beneficial information
7 to help the Court resolve Warthen's objection to the Smyers' claims. Information of the
8 former hearing is irrelevant and would cause delay by forcing the parties to litigate
9 immaterial issues. What Warthen hopes to establish is that Smyers' claims to Spring Creek
10 are identical to Kevin Smyer's right on Howell Creek. That has no place before the Court in
11 this proceeding. The memorandum decision, exhibits and audio recording of the 45-0292
12 hearing will simply delay a decision by the Court. Any such exclusion of materials from that
13 proceeding should include any motions and hearings for Summary Judgment.
14

15 **III. Conclusion**

16 Based on the above, any evidence or discussion of the proceedings in Water Right No.
17 45-0292 should be excluded from the current proceedings based on the Idaho Rules of
18 Evidence.
19

20
21 DATED this 21st day of February, 2006.

22 LING, ROBINSON & WALKER

23
24 By: Michael P. Tribe
25 Michael P. Tribe
26 Attorneys for Kevin Smyer
27
28

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of February, 2006, I served the original and true and correct copies, respectively, of the foregoing MOTION IN LIMINE upon:

Original to:

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

Copies to:

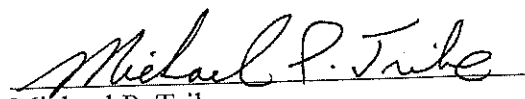
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by depositing said document in the United States mail, postage prepaid, in envelopes addressed to said persons/entities at the foregoing addresses.


Michael P. Tribe