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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

Case No. 39576

)
) Subcase Nos.: 45-10480; 45-10481; 45-
) 10502; & 45-12906
)
) **EARL WARTHEN'S OBJECTION**
) **TO MOTION IN LIMINE**
)
)

COMES NOW the Claimant/Objector, Earl Warthen (hereinafter "Warthen"), by and through his attorney of record, Shelley M. Davis, and files this OBJECTION TO MOTION IN LIMINE. On February 21, 2006, Kevin Smyer, Norman Smyer and Delores Smyer (hereinafter "Smyers") filed a *Motion in Limine* in an attempt exclude a January 14, 1991 *Proposed Memorandum Decision & Order* and associated evidence (hereinafter collectively referred to as "*Memorandum Decision*"), wherein the Department of Water Resources (hereinafter "Department") found that the area in which the Smyers are claiming a water right had not been irrigated since at least 1932. In doing so, the Smyers misrepresent Warthen's arguments relative to the *Memorandum Decision*. The *Memorandum Decision* establishes that the water rights claimed by the Smyers derived from decreed right 45-292 that had not been diverted since at least 1932, and that therefore the rights had been forfeited due to years of non-use. Nevertheless, in its recommendations on claims 45-10480 and 45-10481 the Department relies

upon forfeited right 45-292 as a basis for its recommendations. Since this evidence is relevant and is not overly prejudicial, this Court should deny the *Motion in Limine*.

INTRODUCTION

On January 14, 1991, the Department held, in a *Memorandum Decision*, that a certain water right held by Kevin Smyer (No. 45-292) had been forfeited due to years of nonuse. In making its decision, the Department found that no water had been used to irrigate the land since *at least 1932*. In an attempt to circumvent the Department's clear finding, the Smyers claimed two separate water rights in the same area as forfeited water right 45-292 – water rights 45-10480 and 45-10481.¹ Remarkably, however, without any further evidence, the Department recently changed its mind and determined that water had actually been diverted in the area and recommended the water rights with a priority date of March 18, 1910.

Warthen objects to the Director's recent determination since the *Memorandum Decision* plainly held that no water had been diverted to the area since at least 1932. Warthen objects to the Director's determination, made without any evidence contradicting the previous holding, that water has been diverted since March 18, 1910.

Warthen has relied on the *Memorandum Decision* to support his objections. However, on February 21, 2006, Smyers filed a *Motion in Limine* – attempting to convince the Court that the *Memorandum Decision* is irrelevant to this case. On the contrary, the relevance is obvious. The Department in its Supplemental Report for its recommendations on 45-10480 and 45-10841 expressly relied upon decreed water right 45-292 as a basis for its recommendations, and since the right has previously been deemed forfeited as it applies to the same property at issue in these claims, the earlier proceedings are absolutely relevant to the Department's recommendations on water right claims 45-10480 and 45-10481. This case is about how the Smyers are now

¹ The Norman Smyer is also claiming water right 45-12906.

attempting to divert water in the same area the Department had previously found had not been irrigated since at least 1932.

Further, simply because evidence from the 1991 proceedings makes Mr. Warthen's case more compelling, does not mean that the evidence upon which he is relying is somehow overly prejudicial to the Smyers. As such, for the reasons stated below, the Court should not exclude this relevant evidence.

STATEMENT OF FACTS

The history and facts relevant to this case are set forth in detail in the *Memorandum in Support of Earl Warthen's Motion for Summary Judgment on all Claims & Withdrawing Objection to Sub-Case No. 45-10502*, which was filed along with this *Objection*. Earl Warthen adopts that statement of history and facts in this *Objection*. For the convenience of the Court, some facts are summarized below.

After Kevin Smyer acquired the property in question in subcase number 45-10480 in 1985, Norman Smyer inquired of the Department and learned that water right 45-292 appeared to be appurtenant to the property. *Davis Aff.*, Ex. B.² However, the Department determined in its January 14, 1991 *Memorandum Decision* that "the right to divert water pursuant to right no 45-00292 has been lost through [over 60] years of nonuse." *Id.*, Ex. O at 5. In fact, the Department determined that there was "***no record of delivery of water irrigating the NE ¼ of Section 16 ... after 1932.***" *Id.* at 3. In other words, no water from any source had been delivered to the NE ¼ of Section 16 since at least 1932.

Notwithstanding this finding, the Smyers filed claims for water rights 45-10480 and 45-10481, claiming that they and their predecessors had diverted water ***on the NE ¼ of Section 16***

² References to "*Davis Aff.*" within this *Objection* refer to the *Affidavit of Shelley M. Davis in Support of Motion for Summary Judgment on All Claims & Withdrawing Objection to Subcase No. 45-10502* filed along with this *Objection*.

since at least 1910. *See Davis Aff.*, Ex. Y at 5 & 8. In doing so, the Smyers presented no evidence to refute the Director's finding in the *Memorandum Decision*. Yet, the claims were subsequently recommended by the Director in the Supplemental Director's Report Regarding Subcase Nos. 45-10480, 45-10481, 45-10502, 45-12906 and 45-13669 (hereinafter "Report"). *See Id.* The Report further recognized that right 45-10480 diverted **through the same diversion system as 45-292**, and that right 45-10481 had "commingled" with the waters of 45-292.

Warthen objected to the Report and its unfounded conclusions. In doing so, Warthen relied, primarily, on the *Memorandum Decision* as it is the clearest evidence on the matter. Recognizing the strength of Warthen's case, the Smyers filed a *Motion in Limine* to prevent Warthen from relying on the *Memorandum Decision*. Warthen objects to this attempt to exclude such relevant evidence.

ARGUMENT

The Smyers' *Motion in Limine* is nothing more than an attempt to exclude the most damning evidence against them – arguing that this evidence is somehow irrelevant and unduly prejudicial. Yet, Idaho law plainly recognizes that a strong case does not equate to unfair prejudice. *See State v. Nichols*, 124 Idaho 651, 656 (Ct. App. 1993). The Smyers' motion alleges that Idaho's rules of evidence, particularly I.R.E. 401, 402 and 403, call for the exclusion of the Department's *Memorandum Decision*. Such an allegation is incorrect. Warthen's objections to the Smyers' water right claims are based on the evidence and holdings in the Departments' *Memorandum Decision*. Warthen is not attempting to reargue the merits of that decision. Nor is Warthen attempting to equate forfeiture of water right 45-292 to a forfeiture of the claimed water rights, as contended by the Smyers. Smyers *Motion* at 4 (arguing that "Warthen seeks the introduction of evidence of forfeiture of a different right to imply that the

Smyers' current rights have also been forfeited"). On the contrary, Warthen's use of the *Memorandum Decision* is merely to show that the land on which the challenged rights are claimed had not been irrigated since at least 1932. Surely, the Director's finding that no water had been diverted to the NE ¼ of Section 16 since at least 1932 has significant relevance to the Director's subsequent determination that water had been diverted *in the same area* since March 18, 1910. The *Memorandum Decision* definitively establishes the fact that no irrigation had taken place on this property since at least 1932 – a finding that was never contested and became final in March 1, 1991. *Davis Aff.*, Ex. P. Accordingly, for the reasons set forth below, the rules do not support exclusion of the *Memorandum Decision* and associated evidence.

I. Since the *Memorandum Decision* is Relevant to the Issue of Nonuse and is Not Unfairly Prejudicial, it Should Not be Excluded.

Rule 402 states that all "relevant evidence is admissible" unless otherwise excluded. "Relevant Evidence" is defined as "evidence having *any tendency* to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence." I.R.E. 401 (emphasis added). Such relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues ... or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." I.R.E. 403.

It is important to note, however, that this rule "does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to the party's case" – in only protects against "unfairly prejudicial" evidence. *State v. Floyd*, 123 Idaho 651, 654 (Ct. App. 1994). Stated differently, simply because a party "has a very strong case" does not mean that "the probative value of relevant evidence... is inherently outweighed by undue prejudicial impact." *State v. Nichols*, 124 Idaho 651, 656 (Ct. App. 1993).

The relevance of the *Memorandum Decision* to the case at hand is clear. In 1991, the Department determined that the area in which rights 45-10480 and 45-10481 are claimed had not been irrigated since 1932. Now, however, the Department is attempting to state that water rights 45-10480 and 45-10481 had been used since at least March 18, 1910. Warthen disputes this latest finding based in large part on the Departments previous finding – a finding that was never challenged and became final on March 1, 1991. How can the Department now say that the land in question had been irrigated since March 18, 1910 when it had previously determined that the land had not been irrigated since 1932? This is especially perplexing given the fact that the Smyers have presented no evidence to refute the Departments’ previous holding. Obviously, the Department’s previous holdings in the *Memorandum Decision* have a “tendency” to make a showing that the land in question had not been irrigated since 1932. As such, it is relevant.

Although it is relevant, the *Memorandum Decision* may still be excluded if its probative value is outweighed by considerations of prejudice, confusion or delay. The *Memorandum Decision* is not unfairly prejudicial. The Smyers are misrepresenting Warthen’s use of the *Memorandum Decision*. Warthen is not attempting to convince the Court that a forfeiture of water right 45-292 equates to or requires a forfeiture of the claimed water rights. On the contrary, Warthen is merely stating that the Department should be held to its previous decision that no water had been used to irrigate the land since 1932 (as opposed to its recent finding that the land was irrigated since 1910). Just because Warthen’s case is compelling does not make it unfairly prejudicial.

Additionally, the only confusion relative to the *Memorandum Decision* is created by the Smyers’ misrepresentations. Forfeiture of water right 45-292 is not at issue here. While the evidence being admitted does relate to water right 45-292, it is being admitted to show that,

contrary to the recommendations within the Director's Report, no water was used to irrigate this land since 1932.

Finally, the Smyers argue that consideration of the *Memorandum Decision* would "cause delay by forcing the parties to litigate immaterial issues." Smyers *Motion* at 5. Once again, this is nothing more than an attempt to distract the court from Warthen's true arguments. In fact, after no objections were filed, the *Memorandum Decision* became final on March 1, 1991 and can no longer be relitigated. Warthen is not trying to reargue that case. As discussed in greater detail in Warthen's *Memorandum in Support of Earl Warthen's Motion for Summary Judgment*, Warthen is merely attempting to hold the Department to its decision in the *Memorandum Decision* – at least until the Smyers present evidence that will refute the previous findings.³

The compelling nature of Warthen's evidence is apparent. If fact, it is because this evidence is so compelling that the Smyers are now attempting to have it excluded by arguing that it is somehow prejudicial. Yet, the strength of Warthen's evidence does not somehow make it unduly prejudicial. Therefore, this evidence should not be excluded.

CONCLUSION

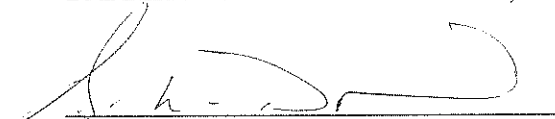
The Smyers' *Motion in Limine* is not supported by the law or facts of this case. The *Memorandum Decision* is relevant in this case as it establishes that no water had been diverted to the NE ¼ of Section 16 since 1932. Warthen is merely attempting to ensure that the Department is enforcing its previous holding - especially since no evidence has been presented

³ The Smyers claim of delay is especially perplexing given the timing of this motion. As established by the Court's February 2, 2006 *Order* adopting a stipulated briefing schedule, all dispositive motions are due by February 24, 2006. Further, the Stipulation also included an agreement that *Summary Judgment Motions* will be heard March 2, 2006. In filing their *Motion in Limine*, the Smyers did not set a hearing. Yet, this matter must be resolved before the hearing on the summary judgment. Further, if the Court grants the Smyers' motion, it will exclude the most compelling evidence in Warthen's case and more time will be required so that Warthen can obtain evidence necessary to substantiate the findings of the *Memorandum Decision* – effectively delaying these proceedings.

to refute that holding. Further, the compelling nature of Warthen's evidence does not make it unfairly prejudicial. Accordingly, the Smyers' *Motion in Limine* should be denied.

Dated this 24th day of February, 2006

BARKER ROSHOLT & SIMPSON, LLP


Shelley M. Davis

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2006, I served a true and correct copy of the foregoing OBJECTION TO MOTION IN LIMINE on the person(s) listed below, in the manner indicated:

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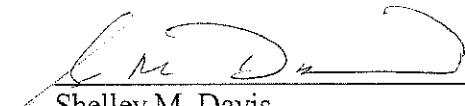
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