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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, 45-10502
	)	and 45-12906
	)	
	)	MEMORANDUM IN SUPPORT OF
Case No. 39576	)	EARL WARTHEN'S MOTION FOR
	)	SUMMARY JUDGMENT ON ALL
	)	CLAIMS AND WITHDRAWING
	)	OBJECTION TO SUB-CASE NO.
	)	45-10502

The Claimant/Objector, EARL WARTHEN, by and through his counsel of record submits this *Memorandum in Support of his Motion for Summary Judgment on All Claims and Withdrawing Objection to Sub-Case No. 45-10502* in conformance with Idaho Rule of Civil Procedure 56(c).

I. INTRODUCTION

Earl Warthen filed objections to the recommendations made by the Idaho Department of Water Resources ("Department") to sub-case numbers 45-10480, 45-10481 and 45-12906 for the reason that the Department, in a Decision and Order issued in January 1991, and entered as final in March 1991, held that water stemming from

water right number 45-292 had been forfeited for use on the claimants' property due to years of non-use. In its recommendations, and again in its Supplemental Directors Report made in conformance with Idaho Rule of Evidence 706, the Department has attempted to reverse its earlier ruling of forfeiture and grant the claimants' water rights stemming from water right number 45-292. The doctrine of claim preclusion, or collateral estoppel, prevents the Department from now forming a contrary opinion and detrimentally affecting the rights of Mr. Warthen. Mr. Warthen and the claimants have operated the use of water on their respective properties for 15 years abiding by the dictates of the Department's 1991 Opinion and Order, and the Department cannot now reverse itself. The law will not allow it.

The four subcases at issue in this Motion for Summary Judgment were consolidated for convenience, and because the parties and properties are situated such that it is more feasible and efficient to dispose of them in one action. The overriding matter that must be understood is that the Department has determined that all three of the water rights claimed by Kevin, Norman and Dolores Smyer, are derivative of decreed water right 45-292 from the *Stokes v. Wood* decree. While the circumstances and facts of their current claims may differ in some regard from the application for transfer that was at issue in 1991, the fact remains that the Department decreed the use of the waters from decree 45-292 to be forfeited in the NE ¼ of Section 16, T12S, R25E.

As a further preliminary matter, Mr. Warthen withdraws his objection to the Department's recommendation for subcase number 45-10502 and will instead file simultaneously with this Motion a separate Motion to Amend Claim Number 45-10502 and request leave of the Court to file a separate late claim.

II. STATEMENT OF PERTINENT UNDISPUTED FACTS

Kevin Smyer took possession of the property at issue in subcase numbers 45-10480, and 45-10481 in August 1985. Affidavit of Shelley M. Davis in Support of Motion for Summary Judgment on All Claims and Withdrawing Objection to Subcase No. 45-10502 ("Davis Aff."), Ex. A. The property was owned by Kate Bridger prior to the Kevin Smyer's purchasing it. *Id.* After purchasing the property, in January 1986 Norman Smyer, Kevin's father made an inquiry to the Department asking whether any water rights were appurtenant to the property. Davis Aff., Ex. B. The Department answered that decreed water right 45-292 appeared to be appurtenant to the property. *Id.* The letter from the Department included an Application for Permit to make an appropriate transfer of the water. *Id.* No application for permit or transfer was filed at that time.

On May 21, 1989 Kevin Smyer, using heavy equipment, entered the property of Dick Anderson, installed a headgate and began diverting water from Mr. Anderson's property without the permission of the department, or the supervision of the Watermaster. Davis Aff., Ex. C. The point of diversion installed by Kevin interfered with a beneficial use water right that Mr. Warthen had developed dating back to the 1960's. On May 22, 1986 counsel for Mr. Warthen called Mr. Loren Holmes with the Department to report the unlawful activity. *Id.* In a follow up letter of May 24, 1989 Mr. Warthen's counsel at that time asserted that any water right that might have been appurtenant to the property had been abandoned or forfeited through years of non-use. *Id.*

On May 23, 1989 the Department sent an application for transfer to Kevin Smyer with instructions about how to file. Davis Aff., Ex. D. On May 26, 1989 Kevin Smyer filed the application with the Department. Davis Aff., Ex. E. The application indicated

the source of the right being the waters decreed to B.F. Mahoney from Howell Creek tributary to Marsh Creek in water right number 45-292 of the *Wood v. Stokes* decree. Davis Aff., Ex. F. The May 26, 1989 application indicated that the point of diversion proposed would be located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of S16, T12S, R25E. *Id.* The place of use indicated was NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of S16, T12S, R25E, and the application sought to irrigate 30 acres. *Id.*

Counsel for Mr. Warthen filed a formal protest to the transfer on June 19, 1989 citing its interference with Mr. Warthen's claims numbered 45-10502 and 45-7538, also again raising the issue that any right that might have been appurtenant to the property had been forfeited through years of non-use, and that the water had been appropriated by other persons. Davis Aff., Ex. G. The transfer was advertised, investigated by the Department and a pre-hearing conference was held on November 15, 1989. Davis Aff., Ex. H. The result of the hearing was a recommendation from the Department not to deliver water to the Smyer property until the entire protest process had been completed because of the potential forfeiture and injury to Mr. Warthen. Davis Aff., Ex. I.

A hearing on the proposed transfer was held February 15, 1990. Davis Aff., Ex. J. No formal findings from the hearing appear in the file. Subsequent to the hearing it appears from the records that the original application was withdrawn and a new application for transfer was filed by Kevin Smyer. Davis Aff., Ex. K. Counsel for Mr. Warthen again filed a timely protest to the proposed transfer on June 1, 1990. Davis Aff., Ex. L. In the protest Mr. Warthen again asserted his position that any water that was at one time appurtenant to the property had been abandoned or forfeited due to years of non-use, and that no proper transfer existed for the water that he was attempting to use.

Id. On June 4, 1990 the Department in a memo between Gary Spackman and Loren Holmes recognized that some serious questions existed about the validity of attempting to apply water from water right number 45-292 to the Smyer property because of the forfeiture issue. Davis Aff., Ex. M. Another hearing to consider the application was held before the Department on November 13, 1990 with Gary Spackman as the hearing officer. Davis Aff., Ex. N.

The Department issued its Proposed Memorandum Decision and Order on Kevin Smyer's transfer application on January 14, 1991. Davis Aff., Ex. O. In its factual findings the Department held that water right number 45-292 had decreed 12 inches of water from Howell Creek, tributary to Marsh Creek for the purpose of irrigating land in the NE ¼ of an unidentified section in T12S, R25E, and that not only did the decreed water fail to identify the section number that the water was appurtenant to, it also failed to identify a point of diversion. *Id.* The Department also found that the watermaster records for water district 45 failed from 1915 through the date of the hearing to record any water ever being delivered to B.F. Mahoney. *Id.* The Department found that no water had been delivered to the NE ¼ of Section 16, T12S, R25E after 1932. Davis Aff., Ex. O.

In its legal findings the Department concluded that it had the authority to make a determination of forfeiture in a transfer application proceeding. Davis Aff., Ex. O. It further held that the applicant had failed to meet its burden of proof in the proceedings. *Id.* The Department found that the "absence of delivery records or any evidence of delivery, and the non-existence of a diversion structure is sufficient clear and convincing evidence of non-use," shifting the burden from the protestant to the applicant to make

some demonstration that water right no. 45-292 had not been forfeited. *Id.* The applicant made some showing that water had been diverted out of “intermittent channels rather than Howell Creek,” and that the applicant had admitted that water had not been diverted from Howell Creek. *Id.* “At best,” the Department found, “the predecessors of the applicant began diverting water from the natural channels rather than Howell Creek, completing an unrecorded transfer to the natural channels.” Davis Aff., Ex. O. In its legal findings the Department further determined that there was no evidence that the unrecorded transfer to intermittent channels had been intentional, and the watermaster records failed to record any change. *Id.* The Department held

That use of water from the natural channels (old Howell Creek channels) is only authorized by a beneficial use right that was perfected when the water was first diverted and beneficially used from the natural channels, and has no relationship to the water right attempted to be transferred by this application.

Id. Most importantly the Department held, “[t]he right to divert water pursuant to right no. 45-00292 has been lost through years of nonuse.” Davis Aff., Ex. O.

The Department’s Proposed Memorandum Decision and Order was not challenged and the Order Adopting Proposed Memorandum Decision and Order was entered March 1, 1991. Davis Aff., Ex. P.

Kevin Smyer filed a Notice of Claim to Water Right in the SRBA on May 9, 1989. Davis Aff., Ex. Q. In it he claimed 0.3 cfs of the waters of Unnamed Spring to be applied to the NE ¼ of Section 16 T12S, R25E. *Id.* The Department numbered that claim 45-10480. *Id.* On August 28, 2003 Kevin amended claim number 45-10480 to increase the acreage of the place of use, the diversion rate, the points of diversion, the sources of the points of diversion and the priority date. Davis Aff., Ex. R. In it Kevin still claims the

place of use as NE ¼ of Section 16 T12S, R25E. *Id.* The Department recommended that the right be decreed for 1.050 cfs of water from Spring Creek, to be diverted in the NE ¼ of Section 16, and to be used on the NE ¼ of Section 16. Davis Aff., Ex. S.

Kevin filed another Notice of Claim to a Water Right in the SRBA also on May 9, 1989. Davis Aff., Ex. T. In it he claimed 0.1 cfs of water from seep water tributary to sinks to be diverted in the NE ¼ in Section 16 of T12S, R25E to be used on the NE ¼ in Section 16, T12S, R25E. *Id.* The Department assigned this claim number 45-10481. *Id.* Kevin also filed an Amended Notice of Claim in the SRBA in claim number 45-10481 on August 8, 2003. Davis Aff., Ex. U. Kevin amended claim number 45-10481 to identify a single source related to the place of use, and the rate, acreage and priority date were amended to conform to the conclusions that were reached by Mr. Smyer and the Department's representative, Kelly Christiansen, after a field visit. *Id.* The Department recommended .14 cfs diverted in the NE ¼ of Section 16, T12S, R25E for use on the NE ¼ of Section 16, T12S, R25E. Davis Aff., Ex. V.

It is important to note, that in all of the field visits that Mr. Christiansen made to the water district 45 region, he never met with Mr. Warthen to discuss Mr. Warthen's water rights or claims. Affidavit of Earl Warthen in Support of Motion for Summary Judgment on All Claims and Withdrawing Objection to Claim No. 45-10502 ("Warthen Aff.")

Norman and Dolores Smyer filed a Notice of Claim to a Water Right in the SRBA on August 17, 1999. Davis Aff., Ex. W. In it they claimed .15 cfs of water from wastewater tributary to Summit Creek with a diversion in the SE ¼ of Section 16, T12S, R25E to be used on the SE ¼ of Section 16, T12S, R25E. *Id.* On August 7, 2003 the

Smyers filed an Amended Notice of Claim after a field visit from Mr. Christiansen to identify Spring Creek tributary to Howell Creek as another source of water, to amend the points of diversion, the irrigable acres, the diversion rates, and the irrigation season. Davis Aff., Ex. X. It appears Spring Creek was added as another source in order to attempt to legitimize the claim by attaching it to decreed water right 45-292. Davis Aff., Ex. Y. The Department recommended .14 cfs of water from Spring Creek and Unnamed Spring with a priority date of March 18, 1910 to be used on the areas claimed in the Amended Notice of Claim. Davis Aff., Ex. Z.

In the Department's Supplemental Director's Report Regarding Subcase Nos. 45-10480, 45-10481, 45-10502, 45-12906 and 45-13669 issued in conformance with Idaho Rule of Evidence 706 the Department further explained the reasons for the recommendations made on the claims. Davis Aff., Ex. Y. For 45-10480 the department states that "historic diversions.... have existed and been available for use since their development in the early 1900's," and further states that "[i]t is likely the diversion system was historically part of the original diversion system for water right 45-292." *Id.* at page 5. The Department made its recommendation alleging that "[a]s water for water right no. 45-10480 would have been incidental to the original decreed right [45-292], naturally captured by the Howell Creek system, the Department recommended water right no. 45-10480 with a priority date of March 18, 1910, one day after the *Bridger v. Tremayne* decree." *Id.* The Department goes on to discuss some controversy concerning the actual location of Spring Creek, as it is in debate, and is likely an old Howell Creek channel. *Id.* What the department fails to address, is what if any evidence it was provided by Kevin Smyer that contradicts the Department's 1991 findings that no water

had been applied to the property from at least 1932 forward, and that any water deriving from decreed right 45-292 had been forfeited through years of non-use. There is no historical record of any actual application of water to the property except that which was applied by Kate Bridger, Reed Shaw and Earl Warthen in 1973 and 1974. Davis Aff., Ex. AA. Without evidence of application of water to the property through some sort of ascertainable record it is unbelievable, especially in light of the Department's 1991 Order, that the Department held in its Supplemental Report, "[a]t no time was the Department able to find that water right no. 45-10480 had been abandoned or forfeited." Davis Aff., Ex. Y. The Department in 1991 found that the use of water on the NE ¼ of Section 16, T12S, R25E had been forfeited through years of non-use. No record exists to support the Department's new recommendation.

In its Supplemental Report on claim number 45-10481 the Department determined once again that water had somehow historically been applied to the property because "[d]uring the Department's field investigation, Agent Christiansen found a small pond at the spring location and a ditch coming off the pond that ran north," and further claims that the pond is visible in 1962 aerial photography. *Id.* at page 8. The Department found that the "spring water would have commingled with Howell Creek water when water right no. 45-292 was being used in 1881 and later." *Id.* at page 9. Again there is no historical record of water ever being applied to the NE ¼ of Section 16, T12S, R25E and for that reason the Department found that any use of Howell Creek water, or any decreed water from 45-292 was forfeited. Once again, it is inexplicable that the Department held in its Supplemental Report, "[a]t no time was the Department able to find that water right no. 45-10481 had been abandoned or forfeited." Davis Aff.

Ex. Y. They never even existed according to the Department's 1991 Opinion and Order, so it is difficult to find how they could have been abandoned or forfeited. No records exist to support the Department's new recommendation.

As to the recommendation made by the Department on Norman and Dolores Smyer's claim number 45-12906, the Department again asserts that "historic diversions for water right 45-12906 have existed and been available for use since their development in the early 1900's when the Smyer's property was irrigated as part of what was the originally the Anderson farmstead." Davis Aff., Ex. Y. The Supplemental Report goes on to state

Agent Christiansen was informed by the Smyer's that, when they purchased the property, the ditches existed, but were in sufficient disrepair that they had to be refurbished. The Smyers' claim was recommended based on the understanding that the place of use was historically part of the Anderson property and constituted an extension of the Anderson irrigation system to the South. At an unknown date the small reservoir was constructed on the unnamed stream and an overflow ditch was constructed to specifically apply water to the ground now owned by the Smyers. The historical development of the ditch from Spring Creek source is not known.

Davis Aff., Ex. Y, p. 10-11. The Department's conclusions regarding historical water application on the property now owned by the Smyers is not supported by the historical watermaster reports¹, by any decree or transfer to the property, nor is there any evidence that water was used in any recent time before the Smyers attempted to put water on the property after 1999. Evidence exists to support Mr. Warthen's objection that claim number 45-12906 was never lawfully appropriated, and further that if there had been any

¹ The movant has not included the voluminous watermaster records for water district 45 as they constitute approximately 1,000 pages of records, and anything less than the entire record is insufficient to prove that no record exists that water has historically been delivered to the property now owned by the Smyers. If the Court requires the records, movant will provide them.

beneficial use claim developed on the property, it was forfeited long before the Smyers purchased the property.

On August 1, 1994 Norman and Dolores Smyer purchased the parcel of property at dispute in claim number 45-12906. Davis Aff., Ex. BB. The property was purchased from Joy Solosabal and Delores Kilmartin, who along with their husbands, had acquired the property from Oliver and Janice Anderson on July 25, 1979. Davis Aff., Ex. CC. At no time from 1979 until some time after the Smyers purchased the property (1994), was there any attempt to divert and use water on the property. Warthen Aff. Failure to use even a valid decreed water right in excess of five years constitutes forfeiture in Idaho, and cannot be preserved by a resumption of use defense if the forfeited water has been validly appropriated by another water user and the resumption would cause injury to junior water rights holders. The Department's recommendation that claim number 45-12906 use Spring Creek as a source would injure Mr. Warthen's water rights. Warthen Aff. The Department's assertion that a valid water right presumptively exists on the property because it is believed to be an extension of the original Anderson farmstead is not supportable where there is no evidence to corroborate such an assumption. For this reason, the Court should declare claim number 45-12906 forfeited for years of non-use.

III. STANDARD OF REVIEW

Pursuant to Idaho Rule of Civil Procedure 56(c) the moving party is entitled to an order granting a motion for summary judgment where the motion, memorandum and supporting affidavits demonstrate that there is no genuine issue of material fact to preclude the grant of summary judgment. Id. R. Civ. P. 56(c). Facts in dispute should be construed in favor of the non-moving party. *Conway v. Sonntag*, 141 Idaho 144, 146,

103 P.3d 470, 472 (2005). “When a summary judgment motion has been supported by depositions, affidavits or other evidence, the adverse party ‘may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.’” *R Homes Corp. v. Herr*, 142 Idaho 87, 90, 123 P.3d 720, 723 (2005), *citing Gardner v. Evans*, 110 Idaho 925, 929, 719 P.2d 1185, 1189 (1986). “A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing the motion.” *Id.*, *citing Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986), additional citations omitted.

IV. LEGAL ARGUMENT

A. The Department Had the Authority to Declare a Complete Forfeiture of Water to the NE ¼ Section 16, T12S, R25E, and the January 1991 Order Has a Preclusive Effect on Future Determinations:

The Department’s 1991 Memorandum Decision and Order declared that “[t]he right to divert water pursuant to right no. 45-00292 has been lost through years of non-use.” Davis Aff., Ex. O, p. 5. It made that determination in the context of a transfer proceeding, but the determination is not limited on the facts to simply the matters in question for the transfer. The Department, after a thorough investigation of the watermaster records, as well as the various decrees, and after approximately eight hours of testimony from the parties to the transfer proceeding, the same parties to this action, determined that “[n]o evidence was submitted to show that the water right has been diverted from Howell Creek in recent history, or that the NE ¼ of Section 16, T12S,

R25E, has been irrigated from Howell Creek since 1932.” *Id.* The Department recognized that water had been applied from intermittent channels, presumably Spring Creek, but that there was no recorded transfer or evidence to indicate that it was intentional. That evidence was submitted by Mr. Warthen through testimony that in 1973 and 1974 Earl Warthen, Kate Bridger and Reed Shaw dug a ditch to apply excess wastewater to the property, but that the practice was discontinued after 1974. Davis Aff., Ex. AA, Warthen Aff. The Department held in no limited terms that the right to divert water pursuant to right no. 45-292 had been forfeited. Davis Aff., Ex. O, p. 5.

In *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), the Idaho Supreme Court determined that the Department had the authority to declare a forfeiture of water rights in a transfer proceeding. Specifically the Court stated

[w]hile ordinarily abandonment and forfeiture are to be determined in a separate proceeding, it is clear that when a water right is sought to be transferred and protestors allege that it has been abandoned or forfeited, and that to allow resumption of that right would cause some injury, a determination of abandonment or forfeiture is necessary for the performance of his power of determining injury.

Id. at 387, 647 P.2d at 1259. Furthermore, “[i]f a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation.” *Id.* at 388, 647 P.2d 1259, citing I.C. § 42-222(2) and *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943), additional citations omitted. The Court held that if a senior water right that had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, “clearly injury would result to otherwise junior appropriators.” *Jenkins v. State Dept. of Water Resources*, 103 Idaho at 388, 647 P.2d at 1259 (1982). Here we have a clear case where after thorough investigation and

fact-finding the Department determined that the right to appropriate pursuant to water

right no. 45-292 had been forfeited through years of non-use, and the parties proceeded under that Order. Yet now the Department, in its recommendations for claim numbers 45-10480 and 45-10481, attempts to assign water rights deriving from decreed right 45-292 for irrigation purposes with a priority date of 1910, after it is clear the right was declared forfeited.

In its Supplemental Report the Department makes several remarks justifying its recommendations on claim numbers 45-10480 and 45-10481 to the effect that it is based on the historic diversion systems of 45-292, that water for rights numbered 45-10480 and 45-10481 “would have been incidental to the original decreed right,” and that for those reasons they can find no abandonment or forfeiture. Davis Aff., Ex. Y. The Department never reconciles how despite that fact that in 1991 the Department determined there was no record of water deliveries to the NE ¼ of Section 16 T12S, R25E, no other transfer proceedings placing water on the property, and no other decreed water rights appurtenant to the property, it can nevertheless declare that a beneficial use right arises dating back to 1910. The Department cannot do so and this Court must rely upon the preclusive effect of the Department’s 1991 Memorandum Decision and Order declaring the right forfeited.

The Department’s 1991 Order was entered as final on March 1, 1991, and was not subsequently challenged. Through the doctrine of *res judicata* that Order acts as a bar to the Department’s later inconsistent determination related to the NE ¼ of Section 16, T12S, R25E, and the forfeiture of water right 45-292.

Res judicata is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent

jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim.

Lohman v. Flynn, 139 Idaho 312, 319, 78 P.3d 379, 386 (2003). As has already been discussed in this memorandum, the Department has the authority to adjudicate a forfeiture and render a valid final judgment on the matter. *Jenkins, supra*. The policy behind the application of *res judicata* is to preserve the supremacy of judicial authority by not subjecting the decision to inconsistent judgments, to serve the public interest by preventing oppressive repetitious litigations, and to protect the parties interests in being able to rely upon the finality of the determination. *Lohman v. Flynn*, 139 Idaho at 319, 78 P.3d at 386 (2003). Essentially by recommending that decreed water right 45-292 serves as a basis to grant Kevin Smyer the ability to place water on the NE ¼ Section 16, T12S, R25E another Department body is inconsistently challenging the validity and finality of the Department's 1991 Order of forfeiture.

Further, "[t]he doctrine of claim preclusion bars not only subsequent relitigation of a claim previously asserted, but also subsequent relitigation of any claims relating to the same cause of action which were actually made or which might have been made." *Id.*, citing *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). In the 1991 proceedings the Department not only held that decreed water right 45-292 had been forfeited, but also that

The use of water from natural channels (old Howell Creek channels) is only authorized by a beneficial use right that was perfected when the water was first diverted and beneficially used from the natural channels, and has no relationship to the water right attempted to be transferred by this application.

Davis Aff., Ex. O, p. 5. In its Supplemental Report the Department discusses at some length the problems that exist in determining what in this area probably constitutes

Spring Creek, but it is likely that Spring Creek, which is tributary to Howell Creek is the “old Howell Creek channels” referenced in the 1991 Memorandum Decision and Order. Therefore, the priority date for any water to be applied to the NE ¼ Section 16 has also been determined to be the date when there is evidence to prove that water was put on the property. The only confirmed date is that provided by Mr. Warthen and his father in his Affidavit. Davis Aff., Ex., AA, Warthen Aff. Water was first applied in 1973. However it was discontinued in 1974, and no further water was applied until Mr. Smyer began to illegally divert water from Mr. Warthen’s point of diversion in 1989. *Id.* Because there was an additional 15 year period of non-use between 1974 and 1989, then another forfeiture took place. The protestant urges the Court to abide by the forfeiture decree, but if the Court determines that some water has been developed by making this claim, then the earliest priority date that should be decreed for water right 45-10480 is 1989.

No date has been provided to make a proper determination of when spring water claimed under 45-10481 might have been developed. Davis Aff., Ex. Y. The Department’s statement that “the spring water would have commingled with Howell Creek water when water right no. 45-292 was being used in 1881 and later,” points to a forfeiture of any claim to the spring water fed by because of the 1991 Memorandum Opinion and Order. *Id.*

The parties have already litigated the issues presented in this action, and a final judgment adjudicating the parties rights was entered. “Collateral estoppel thus applies to protect the litigants from the burden of litigating an identical issue with the same party or his privy.” *Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 845, 55 P.3d 298, 300 (2002). This Court must enforce the Department’s prior order forfeiting the disputed

water rights in the NE ¼ Section 16, T12S, R25E. Mr. Warthen requests this Court enter an Order requiring the Department to revise its recommendations to disallow claims 45-10480 and 45-10481.

Norman and Dolores Smyers' claim number 45-12906 should not be allowed because the Department has failed to provide sufficient evidence that a valid water right was ever developed on the property. Davis Aff., Ex. Y, p. 10. As was stated earlier in this memorandum, the Department based its recommendation on the understanding that the place of use was "historically part of the Anderson property and constituted an extension of the Anderson irrigation system to the South." *Id.* While this may be the Department's understanding, the watermaster records do not support their supposition, nor is there any other evidence in the record that indicates water was put on the property at any recent time. The only evidence of the historical practice on the parcel is Mr. Warthen's affidavit stating that no water had been put on the property at least since the sale the Salasobols and Kilmartins. Davis Aff., Exs. BB and CC, Warthen Aff. Mr. Warthen requests that this Court either declare the right forfeited for non-use, or remand the matter to the Department to make a proper determination regarding forfeiture.

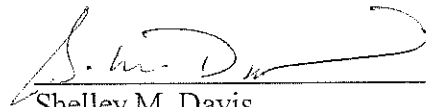
V. CONCLUSION

The Department has relied upon a long forfeited water right to recommend claim numbers 45-10480 and 45-10481. The doctrine of res judicata, or collateral estoppel, prevents the Department and this Court from undermining the finality of the Department's 1991 Opinion and Order regarding that right. For these reasons, Mr. Warthen requests that this Court remand this matter to the Department with instructions to amend its recommendation to disallow claim number 45-10480 and 45-10481.

Additionally, there is not sufficient evidence to support the Department's recommendation that a valid water right is developed by claim number 45-12906. Mr. Warthen requests that this Court either declare that right forfeited or remand the matter to the Department to conduct forfeiture proceedings.

Dated this 24th day of February 2006.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis
Counsel for Earl Warthen

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February 2006, I served a true and correct copy of the foregoing *Memorandum in Support of Earl Warthen's Motion for Summary Judgment on All Claims and Withdrawing Objection to Sub-Case No. 45-10502* on the following by U.S. Mail, postage prepaid or Facsimile:

Original hand delivered:

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Fifth Judicial District Court
Snake River Basin Adjudication
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Counsel for the Objector/Claimants:

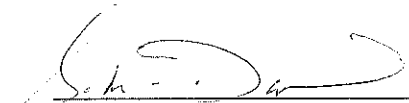
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