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DEPARTMENT OF
WATER RESOURCES

Attorneys for Earl Warthen, Objector

**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.: 45-10481
)
) **EARL WARTHEN'S**
) **MEMORANDUM IN OPPOSITION**
) **TO KEVIN SMYER'S MOTION FOR**
) **SUMMARY JUDGMENT**
)

COMES NOW the Objector, Earl Warthen (hereinafter "Warthen"), by and through his attorney of record, Shelley M. Davis, and files this MEMORANDUM IN OPPOSITION TO KEVIN SMYER'S MOTION FOR SUMMARY JUDGMENT.

INTRODUCTION

The dispute over certain water rights in the Albion Valley of Cassia County has been going on for almost two decades. Throughout that time, Warthen has continued to object to the water rights claimed by Kevin Smyer, Norman Smyer and Delores Smyer. Most recently, Warthen has objected to the Supplemental Director's Report Regarding Subcase Nos. 45-10480, 45-10481, 45-10502, 45-12906 and 45-13669 (hereinafter "Report"), which recommended water right 45-10481 as claimed.

Warthen has maintained, and continues to maintain, that this water was never lawfully appropriated. Warthen bases his objection on the unchallenged findings of the Department of

Water Resources (hereinafter "Department") in a January 14, 1991 *Memorandum Decision*. That decision, which determined that a separate water right held by Kevin Smyer (No. 45-292) had been forfeited due to years of nonuse, also held that *no water had been used to irrigate the land in question since at least 1932*.

Kevin Smyer's (hereinafter "Smyer") *Motion for Summary* is simply another pleading in a long line of pleadings, attempting to confuse the issues and distract the Court. Smyer argues that no third party has ever permissibly used the water in question, that, if forfeited, Smyer has lawfully resumed use of the water, and that Warthen has never disputed the recommended priority date. However, the undisputed facts of this case are clear: (1) the Department held that no water had been used to irrigate the land in question since at least 1932; and (2) no one, including Smyer, has ever challenged this finding (including in this proceeding). If the Department's unchallenged determination in 1991 was that no water had been used to irrigate the land since 1932, how can Smyer now argue that he, or his predecessors, had been using the water since 1910? The Court should not be distracted from the clear facts of this case and should deny Smyer's motion.

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*, previously filed with this Court. Earl Warthen adopts that statement of history and facts in this *Objection*.

STANDARD OF REVIEW

The standard of review is set forth in the *Memorandum in Support of Earl Warthen's Motion for Summary Judgment on all Claims & Withdrawing Objection to Sub-Case No. 45-*

10502, previously filed with this Court. Earl Warthen adopts that standard of review in this *Objection*.

ARGUMENT

I. The Place of Use and Points of Diversion Claimed in Smyer's Claim No. 45-10481 are Located Wholly on the Property Smyer, But The Surface Water Source for 45-10481 is Either Howell Creek or Spring Creek, or Both, and as Such Idaho Code § 42-212 Does Not Entitle Smyer to Unfettered Appropriation:

In Smyer's original notice of claim numbered 45-10481 filed May 9, 1989, he listed the source of water as "seep waters" tributary to "sinks." Affidavit of Shelley M. Davis in Support of Summary Judgment Motion of Earl Warthen on All Claims and Withdrawing Objection to No. 45-10502 ("Davis Aff."), Ex. I. After a field visit from Agent Kelly Christiansen of the Idaho Department of Water Resources ("Department") the claim was amended to list the source as "Spring" tributary to "sinks." Davis Aff., Ex. U. In its Supplemental Director's Report for claim number 45-10481 the Department states that this claim was recommended because the source "Spring tributary to sinks, is located in the middle of the place of use recognized for water right no. 45-10480," which "pond is visible in 1962 aerial photography of the area," and "[t]he spring water would have commingled with Howell Creek water when water right no. 45-292 was being used in 1881 and later." Davis Aff., Ex. Y.

The point of diversion is listed in the SW ¼ NW ¼ NE ¼ of Section 16, T12S, R25E and the place of use is listed as the NW ¼ NE ¼ same section and etc. Davis Aff., Ex. U. On the 1968 aerial photograph provided by the Department in its Supplemental Report as Attachment A, the only "clealy visible" pond is one that lies directly in the line of the point where Howell

Creek and what the Department has identified as Spring Creek converge. Davis Aff., Ex. Y.¹ As such, given the intentional capitalization of the word “Spring,” the Department’s recognition that the waters of “Spring” likely commingled with Howell Creek water when right no. 45-292 was being used, and the location of the pond, it seems more likely that the actual source of the water for claim number 45-10481 is not a “single spring tributary to sinks” but rather the combined waters of Howell Creek and Spring Creek. Motion for Summary Judgment and Supporting Memorandum of Kevin Smyer in Subcase No. 45-10481, also see Davis Aff., Ex. Y.

Idaho Code § 2-212 does prevent the department “from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres . . . pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person[.]” Idaho Code § 42-212. The “Spring” that Smyer claims as his source does not meet the definition of the type of spring protected from appropriation by I.C. § 42-212. Davis Aff., Ex. U, *In Re General Determination of the Rights To Use of Surface and Ground Waters of Payette River Drainage*, 107 Idaho 221, 687 P.2d 1348 (1984). In *Payette River Drainage* the Idaho Supreme adopted the definition of a spring set out by the Oregon Supreme Court, that “[a] ‘spring’ is a place where the water issues naturally from the surface of the earth.” *Id.* at 225, 687 P.2d at 1352. In that case the Idaho Supreme Court was asked to determine whether waters that emerged from a mine shaft from what was likely an underground water source that flowed from off the claimants property onto their property was properly characterized as a spring protected by I.C. § 42-212. *Id.* There the Court determined that it was not persuaded by the claimants’ argument that the waters were properly characterized as a spring because the water flow did not issue naturally from the surface of the earth, but rather was uncovered as the result of mining operations. *Id.* In

¹ Further, the Department’s use of the term “clearly visible” in reference to what I can only assume is the pond that it is referencing seems a rather loose use of the term. See attachment A to the Department’s Supplemental Report, Davis Aff., Ex. Y

this case we have a claimant who is claiming a “Spring” where a pond is located at the convergence of two surface flows that do not emanate wholly on lands owned by the claimant. Davis Aff., Exs. U and Y, Att. A. This does not qualify as a spring, but rather as seep water from Howell and/or Spring Creeks, as was originally claimed by Smyer. Mr. Smyer cannot claim the protection of I.C. § 42-212 for claim number 45-10481.

II. The Waters that Act as the Source of Water for Claim No. 45-10481 Have Been Deemed Forfeited on the Place of Use by the Department in a Prior Proceeding, and Mr. Smyer Has Not Lawfully Resumed Use of those Waters:

An extended discussion of the forfeiture proceedings that were had before the Department from 1989 through 1991 is set forth in the Memorandum in Support of Earl Warthen’s Motion for Summary Judgment on all Claims and Withdrawal of Objection to Claim No. 45-10502 filed on Friday February 24, 2006. That discussion is incorporated herein as if set forth in full. The conclusion of the Department in its 1991 Memorandum Opinion and Order was that “there is no record of delivery of water irrigating the NE ¼ of Section 16, T12S, R25E, B.M. after 1932.” Davis Aff., Ex. O at p.3. The Department further concluded that the right to divert water pursuant to right no. 45-00292 has been lost through years of non-use.” Id. at p. 5. The inescapable truth is that the Department in a prior proceeding, that has a preclusive effect on this Court’s determinations, found that water rights deriving from 45-292 to irrigate the NE ¼ of Section 16 were forfeited.

In order to lawfully resume use of forfeited waters the claimant must demonstrate that no junior water rights holders who have appropriated the forfeited waters would be injured.

Sagewillow, Inc. v Idaho Department of Water Resources, 138 Idaho 831, 837, 70 P.3d 669, 675 (2003). Claimant incorrectly asserts that Mr. Warthen would not be injured by his resumption of

the use of the waters on NE ¼ of Section 16. As was discussed in the previous section related to the true source of the waters claimed in 45-10481, the water that serves 45-10481 is from the waters of Howell and/or Spring Creeks. In *Sagewillow* the Idaho Supreme Court stated

There is, however, a connection between harm to junior appropriators as discussed in *Jenkins* and junior appropriators making a claim to water sufficient to defeat the defense of resumption of use. The junior appropriators would be harmed if there would not be sufficient water to fill their water rights due to the senior appropriator being permitted to resume his use. That would typically occur when the watercourse was overappropriated[.]

Id., citing *Jenkins v State Dept. of Water Resources*, 103 Idaho 384, 387-88, 647 P.2d 1256, 1259-60 (1982). Mr. Warthen has claimed the use of the waters of Spring Creek, tributary to Howell Creek in claim 45-10502 which has been recommended with a priority date of 1964. The waters of Howell Creek and its related tributaries including Spring Creek are undeniably overappropriated. If Smyer is allowed to resume use of the waters claimed in 45-10481 with an inexplicable priority date of 1910, then Mr. Warthen will necessarily be denied the full use of the waters he has been recommended upstream of Smyer, and will suffer harm. The right to divert waters to the NE ¼ of Section 16, T12S, R25E were declared forfeited in 1932. Allowing Smyer to divert water by asserting the resumption of use defense and to take water from an overappropriated water system will injure Mr. Warthen and as such, must be denied. See Affidavit of Earl Warthen in Support of Motion for Summary Judgment on All Claims.

III. Mr. Warthen Has Disputed the Recommended Priority Date of Claim No. 45-10481.

By asserting that no lawful appropriation was made by Smyer because his use was made in derogation of the Department's 1991 forfeiture order, Mr. Warthen objected to everything associated with Department's 2004 recommendation, including the priority date which ignores its own prior order. There is no need to separately set forth each sub-basis for objection.

CONCLUSION

For the foregoing reasons, the Objector Earl Warthen requests that this Court DENY Kevin Smyer's Motion for Summary Judgment on Claim No. 45-10481, and GRANT Mr. Warthen's Motion for Summary Judgment filed on this claim in a separate Motion.

Dated this 28th day of February, 2006

BARKER ROSHOLT & SIMPSON, LLP


Shelley M. Davis

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March 2006, I served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO KEVIN SMYER'S MOTION FOR SUMMARY JUDGMENT on the person(s) listed below, in the manner indicated:

Original filed by facsimile with the Clerk of the SRBA Court:

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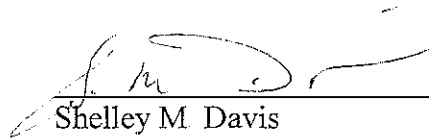
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