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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.: 74-54

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

F. James Whittaker and Paula J. Whittaker ("Whittaker"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and in accordance with this court's September 13, 2007 Trial Scheduling Order, hereby submit this Motion for Summary Judgment in regards to the adjudication of Water Right No. 74-54.

The question surrounding this water right is whether it has been forfeited. For the reasons set forth below, 74-54 should be disallowed due to non-use since at least the 1920s, and even perhaps earlier. For reasons not clearly understood, 74-54 was partially decreed in the Lemhi Adjudication on December 30, 1982. From the evidence set forth below, this was clearly a mistake. Nevertheless, pre-Lemhi adjudication non-use and any challenge to the Lemhi Decree is not necessarily an issue

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because on 75-54's non-use from 1983 through 1988—the statutory five-year period—before a claim for 74-54 was filed in the Snake River Basin Adjudication in 1990. For the reasons set forth below, 74-54 should be disallowed.

I. PROCEDURAL HISTORY

A. Water Right No. 74-54.

Water Right 74-54 was decreed in the Lemhi Adjudication on December 30, 1982 to Kermit Purcell, a predecessor-in-interest to the claimant. A copy of the relevant adjudication report is attached as Exhibit A to the Affidavit of Robert L. Harris in Support of Motion for Summary Judgment (hereinafter, the “Harris Affidavit”). A claim in the Snake River Basin Adjudication was filed on April 9, 1990.¹

II. SUMMARY JUDGMENT STANDARD.

In Idaho, summary judgment is proper “if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”² When a motion for summary judgment “has been properly supported with evidence indicating the absence of material factual issues, the opposing party’s case must not rest on mere speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact.”³

¹ This is the date entered on the original claim on file with the Idaho Department of Water Resources.

² I.R.C.P. 56(c).

³ *John W. Brown Properties v. Blaine County*, 129 Idaho 740, 742, 932 P.2d 368, 370 (Ct. App. 1997).

III. ARGUMENT.

A. Summary judgment must be granted in this matter because the 74-54 has been forfeited.

Attached to the Harris Affidavit as Exhibits B through F are numerous affidavits from individuals familiar with the historic use of 74-54.

James Whittaker,⁴ one of the objectors in this matter, has lived his entire life in Leadore and worked on the Two Dot Ranch. One of his main responsibilities was to ensure that water was being delivered to the ranch in priority. As set forth in his affidavit, Mr. Whittaker is very familiar with the place of use claimed under 74-54. During his lifetime, since he was very young, he had not seen water applied to the property until 2007, after his objection to 74-54 was filed in the SRBA. As he states, the place of use has been part of a BLM permit (No. 6302) and has never been fenced off in order to raise hay. It has only been used as dry pasture for as long as he could remember, between 40 to 50 years.

Julia Russell⁵ worked with Kermit Purcell on the property from 1974 until 1990, and was familiar with the practices on the Purcell Ranch. She has testified that because of her working relationship with Mr. Purcell, in which she gained insight into his personality, he would have diverted 74-54 on the place of use and even constructed a ditch ten feet deep to get it there if necessary. Further, she has testified that it was always only dry grazing ground and was used by cattle owned by Purcell in the spring time. During her 16 years on the property—including the time period from 1983 through 1988—74-54 was never applied to the claimed place of use.

⁴ See Harris Affidavit, Exhibit B.

⁵ Harris Affidavit, Exhibit C.

Also, Dan Smith,⁶ who was and is now currently the watermaster for water district 74-W, is also familiar with the delivery history of 74-54, and testified that while he was growing up, he did not see the property irrigated. Further, as a watermaster, Mr. Smith had never delivered the water to the property until 2007, when he was instructed by IDWR to do so.

To further support Mr. Smith's testimony, attached as Exhibit E are water master records from 1979 to 1986 and from 2006 from Big Timber Creek, which show that 74-54 was never diverted from that stream. These reports support Mr. Smith's affidavit that 74-54 was never diverted from Big Timber Creek during his tenure as watermaster and delivered to the place of use claimed for 74-54.

Ed Peterson⁷ worked for Kermit Purcell from May 1, 1964 until December 10, 2001, and during the course of his employment, 74-54 was never used to irrigate the claimed place of use. Mr. Peterson recalls that it was only used as dry grazing and spring range.

Mr. Ted Adams,⁸ who was raised on a neighboring ranch and lived on that ranch from 1944 to 1979, never witnessed water being delivered to the claimed place of use. Further, Mr. Adams went to work for Lemhi County Road and Bridge in 1984. As part of his employment, Mr. Adams maintains the road running next to the claimed place of use, and has not ever seen it irrigated. In short, "During all my time going to school, AI-ing cows and now maintaining the road to the property as my employment with Lemhi County requires me to do, I have never seen water on the property or in the ditch other than spring run off. This ground has always been sagebrush ground.

⁶ Harris Affidavit, Exhibit D.

⁷ Harris Affidavit, Exhibit F.

⁸ Harris Affidavit, Exhibit G.

I have spent all of my life here and Water Right 74-54 has never been used to irrigate any part of this ground.”⁹

Furthermore, attached at Exhibit H to the Harris Affidavit are notarized letters from Chet Adams and Opal Adams, who lived just south of the claimed place of use on a ranch called the Leadore Angus Ranch. Both explained that they never observed water being used on the property.

In a memorandum prepared by an unnamed IDWR officer for Tim Luke and Ernie Carlson of IDWR, which is available in IDWR’s file on this water right, it states that “the place of use does not appear to have been cultivated for an extended period of time and consists mainly of low sagebrush and some short grasses.”¹⁰ This observation further supports the testimony of affiants discussed above.

In addition to the above testimony, attached at Exhibit J to the Harris Affidavit are county assessments reports from 1952, and from 1980 through 1990. These reports show field appraisals, and classify them as “Dry Grazing Land.” For example, the very first page of all the assessments is from 1952 and is for Lots 1 and 2 of the claimed place of use. It states “Dry grazing Land. Land capable of supporting grasses and browse, but incapable of supporting crops on regular rotation.” As shown on the next page, had it been irrigated, it would have been classified with a notation of “IA”, not “DG”, which stands for dry grazing. Further, in the reports from 1980 to 1990, the claimed place of use was given a land classification of 5, which is a dry grazing classification.

Finally, as to aerial photography of the property, we provided at Exhibit K of the Harris Affidavit aerial maps from 1946 and 2004 showing the property at issue. As we view these maps, the property does not appear to be cultivated. More importantly, however, we have provided at

⁹ Id. at p. 2.

¹⁰ Harris Affidavit, Exhibit I.

Exhibit L of the Harris Affidavit maps prepared by Mr. Harris, Whittaker's counsel, using Geographic Information Systems ("GIS") data from IDWR. The map superimposes the claimed 74-54 place of use over an aerial photograph, which Mr. Harris downloaded from IDWR's interactive mapping tool available on its website. The aerial photo has a layer name of "adjudication photo", but it is not entirely clear as to the exact date this particular photo was taken. Typically, in other parts of the Snake River Plain, there is an infrared aerial photo which IDWR relies heavily upon in its water right recommendations. In the Lemhi Basin, based on conversations Mr. Harris has had with IDWR personnel, there is a mosaic of aerial photos, but that most in the basin were taken in the late 1980s and early 1990s. As shown in the photo, there does not appear to be any irrigated crop on the property. Indeed, the land appears to be the same as the neighboring properties. The second GIS map is simply a zoomed in version of the first map.

In *Wood v. Troutt*, the SRBA Court ruled that forfeiture is tolled for water rights while an adjudication claim is pending and that the five-year period for forfeiture is renewed upon issuance of a partial decree for the right.¹¹ However, "once the partial decree is issued for the water right, the non-user has five years within which to put the water to beneficial use before the decreed right is subject to forfeiture. In Idaho a decreed water right is not insulated from forfeiture, however, it has long been established that once the decree is issued the statutory time period for non-use begins to run anew."¹² Such non-use results in a forfeiture under Idaho Code § 42-222.

In *Jenkins v. State Dep't of Water Resources*,¹³ Jenkins filed an application for transfer of a water right point of diversion. Several water users protested the application. A hearing was held,

¹¹ Memorandum Decision and Order on Challenge and Order of Partial Decree (*Wood v. Troutt*), Subcase No. 65-5663B, In Re SRBA Case No. 39576, May 2, 2002.

¹² *Wood v. Troutt* at 21.

¹³ 103 Idaho 384, 647 P.2d 1256.

and the director of IDWR at the time denied the transfer of the point of diversion on Cottonwood Creek. As recounted by the court:

The director found that no water had been diverted from Cottonwood Creek for use on the Jenkin's land for the previous 18 years. He also found that waters of both Ching and Cottonwood Creeks were overappropriated. He concluded that to allow a resumption of use of the Cottonwood right would represent an enlargement of the use over the prior 18 years, and the water users would be injured thereby, . . .”¹⁴

The matter before this court is obviously not a transfer, but the same principles articulated in *Jenkins* apply in this case. 74-54 was partially decreed in the Lemhi Adjudication on December 30, 1982. A claim for this right was filed in the Snake River Basin Adjudication on April 9, 1990, approximately just over seven (7) years after the Lemhi partial decree was entered. As such, non-use during that time period for five consecutive years would subject this water right to forfeiture.

As set forth in the above Section A, there is undisputed evidence that water was not diverted pursuant to 74-54 during this five (5) year period—indeed, not even during the previous fifty years or more. Given the large number of claims processed in the Lemhi Adjudication, it is not surprising that a mistake or two was made. Indeed, it speaks to the quality of work performed by IDWR that few mistakes have been found. However, in this instance, it seems rather clear that such a mistake was made, which this court can now remedy. Rather than challenge the entry of the Lemhi Adjudication partial decree for 74-54 in this motion for summary judgment,¹⁵ it is clear under Idaho law and SRBA precedent that 74-54 was subject to forfeiture December 30, 1982 through April 8, 1990 (when the SRBA claim for this right was filed). This time period is in excess of five (5) years, and given the evidence offered above concerning non-use during the entire period between December 30, 1982 and April 8, 1990, this court can make a determination of forfeiture.

¹⁴ *Id.* at 386, 647 P.2d at 1258.

¹⁵ By making this statement, Whittaker does not waive or forfeit any right to challenge the Lemhi Adjudication as to 74-54 at trial, or on appeal.

Further, allowing use of this water right would injure Whittaker and many other water users, constitute an enlargement in use, and disrupt the historical delivery of water that the water users on Big Timber Creek have so relied for decades.¹⁶

B. Under the doctrine of equitable estoppel, 74-54 should not be partially decreed.

In relation to a party asserting equitable estoppel and the party being estopped, the elements are thus:

[A]s related to the party estopped [the essential elements of equitable estoppel] are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming estoppel, [the essential elements of estoppel] are: (1) Lack of knowledge and of means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.¹⁷

In the present case, all of the above elements have been met. The actions of the claimant's predecessors conveyed the impression to Whittaker and others that water was not to be diverted from Big Timber Creek pursuant to 74-54, and now the claimant seeks to take a position inconsistent with that history. Secondly, it would be expected that Whittaker, and the other water users on Big Timber Creek, would develop their respective properties and water rights in such a manner as to rely upon flows from Big Timber Creek. Thirdly, the claimant and his predecessors has or had, at a minimum, constructive knowledge that the water right was not diverted from Big Timber Creek.

As to the equitable estoppel position asserted by the claimants, Whittaker did not have knowledge that such a position would be taken with regards to diversion from Big Timber Creek in

¹⁶ See Exhibit M of the Harris Affidavit.

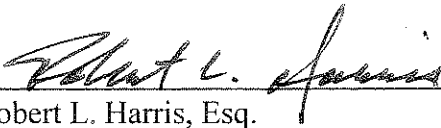
¹⁷ *Burton v. Atomic Workers Federal Credit Union*, 119 Idaho 17, 21, 803 P.2d 518, 522 (Idaho, 1990) (quoting *Tew v. Manwaring*, 94 Idaho 50, 480 P.2d 896 (1971)).

the SRBA. Secondly, Whittaker relied upon the historic practices of claimant's predecessors-in-interest in the management and development of his ranch. Thirdly, such a change would clearly prejudice Whittaker as he has developed and invested in his ranch with an expectation as to the average historic diversion of water from Big Timber Creek. To change that now would injure Whittaker and other water users. As such, the claim 74-54 should be barred on equitable estoppel grounds.

IV. CONCLUSION

For the reasons set forth above, summary judgment in Whittaker must be granted as 74-54 has been forfeited.

Dated this 14th day of March, 2008.

A handwritten signature in cursive script, reading "Robert L. Harris", is written over a horizontal line.

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2008, I mailed the original and copies of this memorandum, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

2. Copies to:

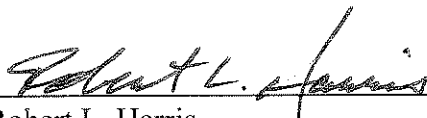
Leadore Land Partners, Ltd.
Represented by:
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