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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.: 74-40

**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. 74-40.

The question surrounding this water right is whether it was ever diverted from Big Timber Creek in the SE1/4NE1/4 of Township 15N, Range 26E, Section 5, or only from Little Timber Creek in the SW1/4NW1/4 of Township 15N, Range 25E, Section 24. For the reasons set forth below, 74-40 should only be partially decreed with a point of diversion out of Little Timber Creek in the SW1/4NW1/4 of Township 15N, Range 25E, Section 24. For the court to hold otherwise would injure Whittaker and numerous other water users as it will disrupt the historic delivery of water from

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Big Timber Creek, and essentially introduce an additional early priority water right into the Big Timber Creek system, which will cause certain injury.

I. PROCEDURAL HISTORY

A. Water Right No. 74-40.

Water Right 74-40 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”). Most relevant for purposes of this motion for summary judgment is the listed points of diversion. The adjudication report lists two points of diversion: (1) SE1/4NE1/4 of Township 15N, Range 26E, Section 5, (which is a point of diversion from Big Timber Creek), and (2) the SW1/4NW1/4 of Township 15N, Range 25E, Section 24 (which is a point of diversion from Little Timber Creek). As set forth below, as both a factual and legal manner, the point of diversion on Big Timber Creek should not be listed as an authorized point of diversion for 74-40 because it has either been forfeited or been transferred pursuant to the accomplished transfer statutes to the Little Timber Creek point of diversion. Alternatively, the claimant should be estopped from receiving a partial decree with the Big Timber Creek point of diversion.

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.”¹ When a motion for summary judgment “has been properly supported with evidence indicating the absence of material factual issues, the

¹ I.R.C.P. 56(c).

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."²

III. ARGUMENT.

A. Summary judgment must be granted in this matter because the 74-40, as a factual matter, has never been diverted from Big Timber Creek.

Attached to the Harris Affidavit as Exhibits B through E are numerous affidavits from individuals familiar with the historic use of 74-40.

James Whittaker,³ one of the objectors in this matter, has lived his entire life in Leadore and worked on the Two Dot Ranch, a neighboring ranch to the claimants' property. One of his main responsibilities was to ensure that water was being delivered to the ranch in priority. As set forth in his affidavit, from his own personal observations of crossing both a ditch that diverts from Big Timber Creek (the "Big Timber Creek Ditch") and from Little Timber Creek (the "Little Timber Creek Ditch"), Mr. Whittaker has personal knowledge that the only water diverted into the Big Timber Creek Ditch was from water right 74-61, another "high" water right decreed to Kermit Purcell. Attached to the Harris Affidavit as Exhibit F is a copy of a supplemental decree in the case of *Purcell v. M.F. Barrett*. In that supplemental decree, Mr. Purcell received what was later numbered as Water Right 74-61 in the Lemhi Adjudication.⁴ 74-61 was decreed in the Lemhi Adjudication with a point of diversion from Big Timber Creek. As testified by Mr. Whittaker, the

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

³ See Harris Affidavit, Exhibit B.

⁴ See Harris Affidavit, Exhibit G.

Big Timber Creek Ditch only carried the 74-61 water if and when it was available. 74-40 was only diverted from Little Timber Creek to irrigate its decreed lands.

Julia Russell⁵ worked with Kermit Purcell on his property from 1974 until 1990, and was familiar with the practices on the Purcell Ranch. She testified that all 4.2 cfs of 74-40 were diverted from Little Timber Creek in order to get water to the upper ground on his ranch.

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 74-40, and testified that he did not deliver 74-40 from Big Timber Creek, but did so only from Little Timber Creek. To further support his testimony, attached as Exhibit H to the Harris Affidavit are water master records from 1976 through 1988 for Little Timber Creek (which is also known as the North Fork of Timber Creek). These reports show that all of 74-40 (3.0 cfs + 1.2 cfs = 4.2 cfs) was diverted from Little Timber Creek. Further, attached as Exhibit I are water master records from 1979 to 1986 from Big Timber Creek, which show that 74-40 was never diverted from that stream. These reports support Mr. Smith's affidavit that 74-40 was never diverted from Big Timber Creek during his tenure as watermaster.

Lastly, Ed Peterson⁷ worked for Kermit Purcell from May 1, 1964 until December 10, 2001, and during the course of his employment, 74-40 was never diverted from Big Timber Creek.

B. The Big Timber Creek point of diversion for 74-40 has been forfeited pursuant to Idaho Code § 42-222(2).

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

⁵ Harris Affidavit, Exhibit C.

⁶ Harris Affidavit, Exhibit D.

⁷ Harris Affidavit, Exhibit E.

of a partial decree for the right.⁸ 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.”⁹ Such non-use results in a forfeiture under Idaho Code § 42-222(2).

In *Jenkins v. State Dep’t of Water Resources*,¹⁰ Jenkins filed an application for transfer of a water right point of diversion. Several water users protested the application. A hearing was held, 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, . . .”¹¹

The matter before this court is obviously not a transfer, but the same principles articulated in *Jenkins* apply in this case. 74-40 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 74-40 was not diverted from Big Timber Creek during this five (5) year period—indeed, not even during the previous fifty years. A

⁸ 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.

⁹ *Wood v. Troutt* at 21.

¹⁰ 103 Idaho 384, 647 P.2d 1256.

¹¹ *Id.* at 386, 647 P.2d at 1258.

resumption of use of the Big Timber Creek point of diversion 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.¹² As such, the point of diversion has been forfeited and 74-40 should not be partially decreed with a point of diversion from Big Timber Creek.

B. In the alternative, 74-40 has gone through an “accomplished transfer” pursuant to Idaho Code § 42-1425.

As this court is very aware, in 1994, the Idaho Legislature enacted what some have referred to as “amnesty” statutes (Idaho Code §§ 42-1425 and 42-1426), which allow the SRBA court to partially decree water rights that underwent pre-1987 changes to elements of the water right—including a change in point of diversion—even though the water right holder did not go through the statutory transfer procedure. Most relevant for our purposes is Idaho Code § 42-1425, which allows changes in point of diversion to be recognized. The provisions are commonly referred to as the “accomplished transfer” statutes.

In this case, it is crucial to remember that Whittaker is not alleging that 74-40 was not diverted at all. Whittaker is simply claiming that the full diversion amount authorized under the right (4.2 cfs) was diverted from a single point of diversion on Little Timber Creek. There is undisputed evidence that this use predates the 1987 accomplished transfer cut-off date, and as such, would be subject to the accomplished transfer provisions of Idaho Code § 42-1426. Consequently, the 74-40 should be partially decreed as it existed pre-1987, which is with a single point of diversion out of Little Timber Creek.

¹² See Exhibit J of the Harris Affidavit.

C. Under the doctrine of equitable estoppel, 74-40 should not be partially decreed with the Big Timber Creek point of diversion.

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.¹³

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, 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 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 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

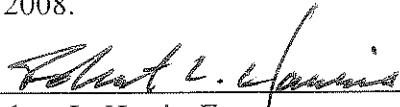
¹³ *Burton v. Atomic Workers Federal Credit Union*, 119 Idaho 17, 21, 803 P.2d 518, 522 (Idaho, 1990) (quoting *Tew v. Manwaring*, 94 Idaho 50, 480 P.2d 896 (1971)).

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.¹⁴ As such, the claim for the additional point of diversion out of Big Timber Creek should be barred on equitable estoppel grounds.

IV. CONCLUSION

For the reasons set forth above, summary judgment in favor of Whittaker must be granted as 74-40 has never been diverted from Big Timber Creek.

Dated this 14th day of March, 2008.



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

¹⁴ See Harris Affidavit, Exhibit I.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th 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:

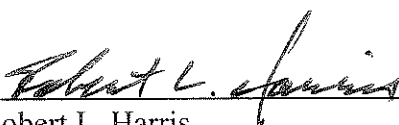
Leadore Land Partners, Ltd.
Represented by:
Josephine P. Beeman
409 W. Jefferson St.
Boise, ID 83702

Richard Foster
PO Box 55
Leadore, ID 83464

Kurt Bird
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Purcell Partnership
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Director of IDWR
PO Box 83720
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