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MAR 31 2008

DEPARTMENT OF
WATER RESOURCES

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COPY

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

**RESPONSE TO LEADORE LAND
PARTNERS LTD. PARTNERSHIP'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

I. INTRODUCTION

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 Response to Leadore Land Partners Ltd. Partnership's 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.

The claimants, Leadore Land Partners Ltd. Partnership ("the Claimants"), filed a Motion for Summary Judgment essentially alleging that any evidence previous to December 30, 1982 (the date a partial decree in the Lemhi Adjudication was entered for 74-40) and after April 9, 1990 (the date a claim was filed in the SRBA for 74-40) is not relevant to a motion for summary judgment. Whittaker's response to Claimant's arguments are set forth below.

II. ARGUMENT.

- A. Even if any evidence previous to December 30, 1982 (the date a partial decree in the Lemhi Adjudication was entered for 74-40) and after April 9, 1990 (the date a claim was filed in the SRBA for 74-40) is not admissible because of Idaho law relative to entry of water right decrees, as argued by Claimants, the intervening time period is in excess of five years, which would be enough time for forfeiture to occur.**

As contained in Whittaker's Memorandum in Support of Motion for Summary Judgment, there are numerous affidavits evidencing historic nonuse of 74-40 from Little Timber Creek. The time periods contained in those affidavits cover the time period between December 30, 1982 and April 9, 1990, a period of 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 affidavits and evidence presented by Whittaker, there is undisputed evidence that 74-40 was not diverted from Big Timber Creek during this five (5) year period. To date, Claimants have not provided any affidavits or other evidence—other than the decree evidence for this water right—disputing the non-use of 74-40 from Big Timber Creek. And even if such evidence is presented, it would need to overcome the significant amount of evidence presented by Whittaker supporting his contention of non-use from Big Timber Creek, including testimony from the watermaster Dan Smith. As noted by Claimant in its motion for partial summary judgment, in

the context of the SRBA, “[t]he trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.”¹ It seems that the significant evidence presented by Whittaker would be more than sufficient for this court to base entry of summary judgment.

A 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. 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. Changes in the historic delivery of 74-40 would still subject 74-40 to an “accomplished transfer” pursuant to Idaho Code § 42-1425 because those changes occurred before the commencement of the SRBA.

Idaho Code §§ 42-1425 allows 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

¹ Leadore Land Partners Ltd. Partnership’s Motion for Partial Summary Judgment at 2 (quoting Intermountain Eye & Laser Centers, PLLC v. Miller, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005)).

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.

Even with the partial decree entered for 74-40 in the Lemhi Adjudication on December 29, 1982, there was a period of five years (from 1983 to 1987) to effectuate an accomplished transfer for the point of diversion. Based on the undisputed evidence, such a change did happen, and as such, the court should decree 74-40 based on this practice.

C. Evidence previous to December 30, 1982 (the date a partial decree in the Lemhi Adjudication was entered for 74-40) and after April 9, 1990 (the date a claim was filed in the SRBA for 74-40) is relevant to a motion for summary judgment as it is a proper consideration for the estoppel arguments raised by Whittaker.

Whittaker recognizes that entry of a partial decree for 74-40 with points of diversion of both Little Timber Creek and Big Timber Creek creates a difficult burden to overcome in the SRBA regarding the use of pre-December 30, 1982 evidence to demonstrate the historic use of 74-40 for partial decree in the SRBA. As noted by the Claimants, parties are bound by the determinations of a previous decree.² However, it is not necessary at this summary judgment stage to challenge the Lemhi Decree for 74-40 because there are other theories, as set forth above, to decree 74-40 in the SRBA as it has been historically used only from Little Timber Creek. As such, it is not necessary to make this argument now, but in the event summary judgment is not successful based on the theories advanced above, a challenge to the Lemhi Adjudication and/or claim of mistake in the Lemhi Adjudication would be raised at trial. In that instance, evidence of pre-December 30, 1982 water use would be relevant and appropriate.

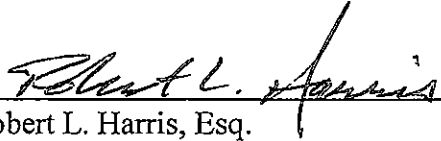
² *Id.* at 5.

At the summary judgment stage, however, evidence of pre-December 30, 1982 water use would be relevant and appropriate in regards to the estoppel arguments raised by Whittaker.³ There is nothing to preclude a court from considering this evidence upon an equitable theory raised by Whittaker, which has been done, particularly when the evidence presented by Whittaker so strongly supports his position. It is remarkable that with all of the water right claims processed by IDWR in the Lemhi Adjudication, and with limited technology (compared to the SRBA today), so few mistakes were made. Whittaker's counsel is aware of only a few other instances, which are issues before the SRBA on other subcases. Somehow there must be an avenue to address clear mistakes even when faced with an entry of a court decree, and an equitable estoppel theory is one such avenue. In order to meet the elements of a claim for equitable estoppel, pre-December 30, 1982 evidence is necessary and appropriate. Thus, Claimants' argument that it is not relevant is not persuasive, and such evidence should be considered by this court.

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 27th day of March, 2008.


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

³ We note that this is an issue that has been raised before in water cases, indeed, even in *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983), where the court held that Idaho Power's rights at Swan Falls had not been subordinated, but hinted that even without subordination, Idaho Power may have waived, abandoned, or would be estopped from asserting their rights given reliance by junior appropriators. This, of course, is the case that led to the Swan Falls Agreement and the SRBA.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th 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:

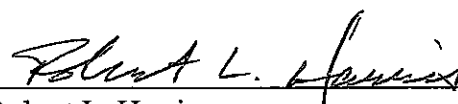
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