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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. 34-2459, 34-2460,
	)	34-2461, 34-2462,
Case No. 39576	)	34-10925
	)	
	)	JOINT RESPONSE TO MOTION
	)	FOR RECONSIDERATION, OR IN
	)	THE ALTERNATIVE, MOTION IN
	)	LIMINE
	)	
	)	
	)	
	)	

COMES NOW, Doug Schureman, Tyler Felton, Jim Huelsman, Darrell McDonald and
Norm Sowards (collectively, referred to as "Objectors"), by and through their undersigned
attorneys of record, and hereby submit this response to the *Motion for Reconsideration, or in the*

Alternative, Motion in Limine, filed by Telford Lands, LLC (“Telford” or “Claimant”), in the above captioned subcases.

INTRODUCTION

Through this *Motion for Reconsideration*, Telford seeks to convert the Director’s recommendation into something that it cannot be: a binding determination of the elements of a water right. Essentially, they claim that, since the Director reviewed information relating to injury, the matter has been decided and summary judgment is appropriate. This is not the standard in the SRBA. A recommendation is merely *prima facie* evidence of the elements of a water right. It is the partial decree that is binding on the parties. Under Telford’s theory, no one could ever challenge a Director’s recommendation. Such a notion is contrary to the law, which specifically provides an opportunity to object to the Director’s recommendation.

Furthermore, the evidence before the Court reveals questions of material fact regarding injury. First, since the evidence shows there was no accomplished transfer, recommending an additional diversion from the Island Wells would cause injury. Telford has not provided any evidence that an accomplished transfer ever occurred. Indeed, the conveyance agreements with the Big Lost River Irrigation District (“BLRID”), upon which Telford relies to show that the water from the Island Wells was delivered to the place of use, identify different wells from which water is authorized to be diverted through the BLRID system. There is no evidence that, prior to 1995, Telford had any right to divert Airport Well water from the Island Wells into the BLRID system – the only means to get the Island Well water to the Telford place of use.

Advancing the priority date does not *per se* address injury, as Telford asserts. While advancing the priority date was a recognized remedy for the enlargement statute, the Legislature did not recognize advancement of priority date as a means of addressing injury in the

accomplished transfer statute – which was enacted at the same time. Accordingly, cases addressing the enlargement statute do not inform the Court’s decision here.

Finally, since the SRBA is not the place to establish reasonable pumping levels, the Objectors do not intend to introduce such evidence at trial. However, that does not mean that Objectors should be prevented from providing evidence of injury based on depletions to the aquifer resulting from the alleged accomplished transfer.

ARGUMENT

I. A Director’s Report is Merely *Prima Facie* Evidence of the Elements of a Water Rights.

Telford’s motion is based on the notion that, since the Director’s *Supplemental Report* for the above water rights determined there was no injury, this Court must likewise find no injury. This attempt to elevate a recommendation to the status of a partial decree is not condoned by the applicable statutory provisions.

Idaho Code § 42-1411(4) provides that the Director’s report “shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law.” That notwithstanding, any party to the SRBA may file an objection to the elements of the water rights recommended. *Id.* at § 42-1411(5) & 42-1412; *see State v. Hagerman Water Rights Owners*, 130 Idaho 736 (1997) (the *prima facie* status afforded a Director’s report “constituted a rebuttable evidentiary presumption”). It is not until after the issues raised in the Objection have been resolved that the Court enters a partial decree. *Id.* at § 42-1412(5) & (6). It is only at that time, when a partial decree has issued, that the water right is “conclusive as to the nature and extent” of its elements. *Id.* at § 42-1420. As such, the claim that summary judgment is appropriate simply based on the conclusions in the Director’s supplemental report, is contrary to the law and should be rejected.

II. Objectors' Position is Not Confined to a Claim of Entitlement to "Historic Pumping Levels"; Rather, it is Based on the Injury Caused by Increased Diversions From the Island Wells.

In an effort to convince the Special Master that summary judgment is appropriate, Telford mischaracterizes the Objectors' position as being a claim of entitlement to their "historic pumping levels." *Telford Br.* at 13. Not true. Objectors discussed their concerns with the increased diversions from the Island Wells in their summary judgment briefing. The Special Master reviewed that information and concluded that summary judgment was not appropriate on this issue. Nothing has changed to now warrant a reversal of that decision.

First, it bears repeating that the Department has already addressed injury resulting from increased diversions from the Island Wells and has already determined that increased diversions would cause injury. Indeed, in 1981, water users in the area of the Island Wells combined to protest an attempt by the Claimants (then, Crater Farms, Inc.) to add a second well to then application for permit 37-7037. *Arrington Aff.* Ex. E at 3. The water users asserted that "the additional well would result in the diversion of more water than originally permitted and that the water rights of others in the area, both groundwater and surface water, would be adversely effected by the proposed change." *Id.* at 4.

Since the first Island Well had sufficient capacity to divert the entire 12 cfs diversion rate for water right 37-7037, *id.* at Ex. F, it was apparent that the only reason to add a point of diversion was to increase diversions above the 12 cfs claimed under 37-7037. The Protestants recognized this intent. The Department addressed these concerns, concluding that it "may approve the amendment [adding the point of diversion] with certain conditions in order to *prevent the diversion and use of more water than originally permitted and to prevent injury to other water users.*" *Id.* at Ex. E, 5 (emphasis added). Accordingly, the Department ordered that

the “total pumping rate does not exceed 12.00 cubic feet per second *at any time*” from the Island Wells. *Id.* (emphasis added). The Department failed to enforce the requirements of this Order.¹ As a result, the increased diversions has resulted to the Objectors. *See Sowards Aff. & McDonald Aff.* (discussing injury resulting from depleted aquifer).

Second, there is no evidence in the record to support a claim that points of diversion of the Airport Well water rights were even transferred to the Island Wells. Indeed, the conveyance agreements – the ones relied on by Telford to support his accomplished transfer theory – do not identify the Island Wells as authorized points of diversion for the conveyance of water through the BLRID system. *Arrington Aff.* at Exs. A, B & C. Indeed, it was not until 1995 that the conveyance agreements even identified the Island Wells. *Second Harris Aff.* Ex. G. Absent any evidence of an accomplished transfer, any finding that Telford can increase his diversions from the Island Wells will cause injury to the Objectors. Indeed, in 1986, the Director recognized that increased diversions would result in injury and limited the diversions from the Island Wells.

The injuries resulting from increased diversions from the aquifer have resulted. *See Third Arrington Aff.* Ex. A (Brockway Analysis). These injuries are very real to the Objectors, who have spent significant effort attempting to mitigate these impacts. *See Sowards Aff. & McDonald Aff.* Objectors do not seek their “historic pumping levels,” as Telford asserts. Rather, they seek an order from this Court confirming what the Objectors thought was confirmed in the Director’s 1985 Order – that increased diversions from the Island Wells will cause injury and should be limited to the diversion rate of water right 37-7037. *Arrington Aff.* Ex. E.

The case law cited by Telford continues to be inapposite here. Each deals with a different statutory provision that specifically allows for advancement of priority to address

¹ In his motion, Telford asserts that “any suggestion that IDWR will not or cannot enforce priorities is not only unfair to IDWR, but contrary to the facts.” *Telford Br.* at 17. However, had the Director enforced this 1985 Order, the parties would not be before the Court on this matter at this time.

potential injury resulting from an **enlargement**. I.C. § 42-1426. Importantly, section 42-1425, the accomplished transfer statute – which was enacted at the same times as section 42-1426 – does not recognize that the advancement of priority would address injury. Accordingly, neither *Fremont-Madison Irr. Dist. v. IGWA*, 129 Idaho 454 (1996), the Era Flats Decision nor the decision involving subcases 34-256, *et al.* inform the Special Master’s decision in this case as they all addressed advancement of priority under section 42-1426. *See Telford Br.* at 13-15. Had the Legislature intended advancement of priority to be an appropriate remedy under the accomplished transfer statute, it could have included such a provision when it enacted the statute.

III. Objectors Should Not Be Prohibited From Presenting Evidence of Injury Caused by Depleting Aquifer Levels.

Finally, Telford asks the Court to limit the evidence presented in trial to prevent the Objectors from presenting evidence relating to the establishment of a reasonable pumping level. *Telford Br.* at 18-21. He asserts that, since the SRBA is not the correct forum for establishing reasonable pumping levels, any such evidence must be prohibited. *Id.*

The Objectors agree that this Court is not the correct forum to establish a reasonable pumping level. However, that does not mean that the Objectors should be prohibited from presenting evidence regarding the depletion of the aquifer resulting from increased diversions. The accomplished transfer statute specifically authorizes the Department and this Court to review claims and evidence of injury relating to an alleged accomplished transfer. I.C. § 42-1425. Objectors should not be prevented from presenting their case at trial.

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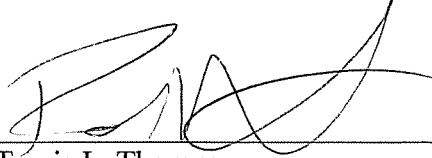
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CONCLUSION

Accordingly, for the foregoing reasons, the Court should deny the Claimants' motion.

DATED this 28th day of September, 2011.

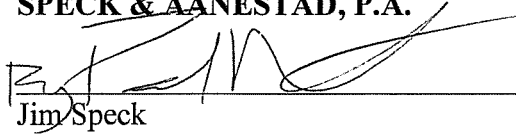
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2011, I served a true and correct copy of the foregoing document on the persons listed below, with copies by first class mail, postage prepaid:

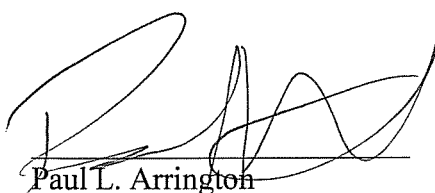
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