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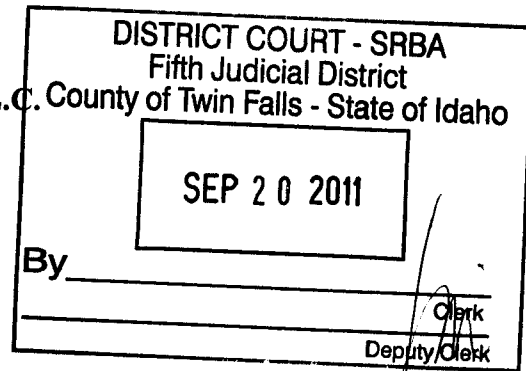
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase Nos: 34-2459, 34-2460, 34-2461,
34-2462, and 34-10925

**MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION, OR IN
THE ALTERNATIVE, MOTION IN LIMINE**

Telford Lands, LLC ("Telford" or "Claimant"), by and through its counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, pursuant to I.R.C.P. 11(a)(2)(B), hereby moves this court for reconsideration of its *Order Denying Motion for Summary Judgment* issued on March 28, 2011 (hereinafter, "*Order*"). In the alternative, Telford moves this court for a motion in limine to prevent irrelevant testimony regarding reasonable pumping levels or other injury testimony.

This memorandum is supported by the prior affidavits, director's reports, supplemental director's reports, and pleadings submitted in this matter, as well as the *Fourth Affidavit of Attorney Robert L. Harris* ("*Fourth Harris Aff.*") submitted contemporaneously herewith.

I. INTRODUCTION AND BACKGROUND

A. Water Rights Claims and Usage Background.

This matter concerns the adjudication of the above subcases that were initially claimed by Willard Bell of Crater Farms, Inc., a predecessor-in-interest to Isom Acres Limited Partnership (“Isom”), and the recent purchaser of the Isom farm, Telford. The initial claims were filed in the late 1980s. On October 30, 1990, amended claims for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 were filed by Mr. Bell. Importantly, the amended claims contained two maps: one map of the water right place of use (near the Arco Airport) and three claimed points of diversion (the Airport Wells), and the second map depicting the location of the Island Wells. This second map depicting the Island wells was not included in the original claim filed by Mr. Bell. *Second Harris Affidavit* at Exhibit A.

Further, in the claim document itself, at item 14 (the “Remarks Section”), it states the following:

Rediversion from Munsey Ditch: NW SE SE, (2 points), Section 2; SW SW NW, (2 points) Section 13,; SE SE NE Section 15; SE NE NE Section 22; SE NW SW Section 23; Township 3 North, Range 26 East.”

Second Harris Affidavit at Exhibit A. The submission of this second map and the statement in the remarks section makes it self-evident that Mr. Bell claimed the Island Wells as authorized points of diversion under this water right. Unfortunately, the legal descriptions for the Island Wells were not included on the first page of the amended claim (where the legal written legal descriptions are to be listed) as they apparently should have been based upon the included maps. The claims therefore suffered from an internal inconsistency with regards to the claimed points of diversion.

Incorrect partial decrees for the above subcases were eventually issued on December 16, 1997. They were also later amended for other reasons in 2001 as necessitated by the case of *A&B Irrigation Dist. v.; Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998). *Second Harris Affidavit* at Exhibit B. These initial partial decrees did not include the Island Wells as authorized points of diversion for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925, which was the intent of the amended claims filed by Willard Bell. The historical practices of Mr. Bell, which were continued by Isom, and now Telford, deserve additional explanation.

Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 share two common points of diversion which are located in the SWSENE and the SESENE, both in Section 2, T3N., R26E. These wells are commonly referred to as the “Airport Wells”. These water rights were originally licensed to divert from four points of diversion located near the airport, but over time, two of the wells became unusable as evidenced by Mr. Bell’s decision not to claim them in the SRBA. The two “lost” wells were essentially replaced by the two Island Wells (described in the next paragraph) in order to fully irrigate Mr. Bell’s farm of 1980 acres.

Water Right No. 34-7037 was licensed in 1990. The license was based on a 1985 field exam, and licensed the diversion of water through two wells found in the NESENE of Section 3, T4N., R26E., and the SESENE of Section 34, T5N., R26E. These wells were drilled in the 1970s and 1980s and are commonly referred to as the “Island Wells” because these wells divert into the Island Canal, and then into the Munsey Canal, to be delivered to the same place of use as water from the Airport wells.

As shown in the 1985 field exam, which is noted on the license for Water Right No. 34-7037, the Island Wells had the capacity to, and did, divert 24.66 cfs, which is more than the licensed 12 cfs for 34-7037, to service the 1980 acre place of use. Thus, the Island Wells had the capacity to divert the entirety of Water Right No. 34-7037 (12 cfs), as well as the capacity to divert the entirety of Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 (the Airport water rights) in the combined amount of 12.5 cfs, for a grand total of 24.5 cfs.

B. Motion to Set Aside Partial Decrees.

Because of the perceived clerical error in the initial partial decrees, on April 28, 2008, the then-lessee of the Isom property, Mitchell Sorensen, filed a *Motion to Set Aside Partial Decrees Pursuant to I.R.C.P. 60(a)* for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, 34-10925, and 34-7037. The basis for the motion was essentially that the Isoms informed Mr. Sorensen that Mr. Bell told them that they could divert 24.5 cfs from the Island Wells, and that the ability to divert all of Isom's water rights could be diverted from either the Airport Wells or the Island Wells. However, the water rights did not provide for the diversion of 24.5 cfs from the Island Wells.

When the hearing on Mr. Sorensen's motion was held on July 23, 2008, the motion was initially continued until November 17, 2008 because of the concerns voiced by the Special Master regarding whether there was enough evidence of a clerical error. The Special Master was obviously very careful with regards to the motion, recognizing that a motion to set aside partial decrees should not be taken lightly, and requested additional information from Mr. Sorensen.

The additional information was provided and summarized in documents submitted to the SRBA court on November 14, 2008. At the November 17, 2008 hearing, counsel for IDWR

represented to the court that IDWR personnel had concerns regarding the motion to set aside. The hearing was **again** continued until March 25, 2009.

Between the November 17, 2008 and March 25, 2009 hearings, Sorensen met with IDWR staff to further explain the rationale behind the motion to set aside partial decrees. Specifically, IDWR's concern related to Sorensen's claim that the Island Well water rights should have the Airport Wells listed as points of diversion on Water Right No. 34-7037. The licensing of Water Right No. 34-7037 (the license was issued in 1990) specifically excluded the Airport Wells. Therefore, as to Water Right No. 34-7037, it was clear that there could be no clerical error with regards to Water Right No. 34-7037, and that the only wells that could divert 34-7037 were the Island Wells.

However, as to whether or not the remaining water rights—Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925—should have the Island Wells listed as points of diversion under an accomplished transfer, IDWR did not find any document that would foreclose a claim of such an accomplished transfer. Sorensen had submitted the amended claims and their attached documents as evidence of the clerical error, which showed the conflicting maps, remarks, and listed points of diversion on the first page of the claim. At the March 25, 2009 hearing, Sorensen made an oral motion to withdraw his motion to set aside Water Right No. 34-7037 in response to IDWR's legitimate concern regarding the license issued for Water Right No. 34-7037. Therefore, the only water rights that Sorensen contended should be set aside are Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925.

At the March 25th hearing, the Court **again** expressed its concern that the alleged clerical error identified by Sorensen may not be sufficient to meet the standard contained in I.R.C.P.

60(a) to set aside these remaining water rights. The court requested additional briefing from Sorensen on this issue with summarized legal authority on the issue, which Sorensen provided on April 8, 2009.

After careful consideration, taken over a year and a half of when the initial motion to set aside was filed, the Special Master issued an *Order on Motion to Set Aside Partial Decree* on September 4, 2009, based on the evidence that was submitted. Summarily, the Special Master essentially found that the clerical error was self-evident because Mr. Bell's amended claims were internally inconsistent because of the attached maps that showed the Island Wells, but the Island Wells were not listed on the front page of the claims forms: "The Amended Claim contained a clerical error which can be corrected under Rule 60(a) because it is apparent from the attached maps that the claimant intended to claim the 'Island Wells.'" *Order on Motion to Set Aside Partial Decree* at 4.

C. Subsequent Objection Proceedings.

After the Court's *Order on Motion to Set Aside Partial Decree*, based upon the information provided by the Claimants, IDWR issued *Amended Director's Reports* on December 8, 2009 for the above subcases, which changed the partial decrees to allow for the interchanged use of the Airport and Island Wells for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925.

The amended partial decrees were also different from the original partial decrees in several respects. The amended partial decrees included a remark simply indicating that water diverted from the Island Wells is injected into a canal system owned and operated by the Big Lost River Irrigation District ("BLRID"). The condition reads as follows:

Groundwater diverted from the points of diversion in T05N 26E S34 SENWSW and T04N R26E S3 NESENW is comingled with the Island Canal then injected into the Big Lost River at the point of injection and rediverted into the Munsey Canal at the point of rediversion.

Second Harris Affidavit at Exhibit E. IDWR also took the opportunity to add volume limitations to the individual water rights, which is now standard IDWR practice, but was not at the time of issuance of the original partial decree.

Most importantly, however, to protect against potential injury because of the finding of an accomplished transfer, the amended partial decrees for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 also included the following subordination condition:

Pursuant to a call, in times of scarcity, the diversion of water under this right from the two wells in T05N R26E S34 SENWSW and T04N R25E S3 NESENW has a priority date of May 18, 1982.

Second Harris Affidavit at Exhibit E. Importantly, this condition means that to extent a delivery call is filed because of a water shortage, existing water rights are protected pursuant to this condition, including water rights owned by the objectors.¹ The subordination condition was not something that Sorensen or Isom had requested or anticipated, nor were they particularly happy with, but nevertheless, it appeared to both of these parties that IDWR was being cautious, and ultimately decided not to object to the subordination condition, or any of the other changes in the amended partial decrees.

¹ IDWR does not always subordinate water rights that are transferred to new locations. For example, one of the objectors, Schureman, filed for and received approval for Transfer No. 75394, on July 9, 2009. Schureman's property is adjacent to and directly east of the Telford property. Schureman added a well very close to the Island Wells (located in NWSWSE, Township 4N, Range 26E, Section 3) as an authorized point of diversion for his water rights that originally only had wells located near his place of use as authorized points of diversion authorized under the water rights. But because, as noted on the transfer application, his "current wells [were] not capable of diverting decreed amounts," Schureman was able to amend his water rights to add this well further up the valley to his water rights. The transfer was not protested. *Fourth Harris Aff.* at Exhibit A and B.

After the *Amended Director's Report* was issued, objections were subsequently filed by BLRID to the quantity of the water rights, the point of diversion, the place of use, and for other easement-related issues, specifically that "there is no transport agreement in place with the Big Lost River Irrigation District for this right," and that "[i]f the water right makes reference to transportation of water through the Big Lost River Irrigation District facilities, it must state that it is subject to the permission, rules and regulations of the Big Lost River Irrigation District."

Objections were also filed by Doug Schureman, Jim Huelsman and Tyler Felton, who alleged that the diversion rate was inaccurate, that the acre-feet limitation of 8441.5 acre-feet was unjustified, and should be limited to 6930 acre-feet, and that IDWR should perform an "injury analysis" as to inclusion of the Island Wells in the above subcases.

On November 4, 2010, Isom filed a motion for summary judgment regarding the volume and acreage elements of the amended partial decrees, and argued that these elements remained unchanged from the initial partial decrees, and therefore, challenge to these elements are barred by claim preclusion or issue preclusion. Isom also asserted that the historic place of use of 1980 acres could not be challenged because the prior licenses for Water Right Nos. 34-7037 and 34-7138 showed the same place of use. Isom further asserted that the BLRID easement matters should be resolved by summary judgment, because the objections voiced by BLRID concerned easement matters, which are separate and independent issues. See, e.g., *Beach Lateral Water User's Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006). Isom also argued that no contrary evidence existed demonstrating that the Island Wells did not divert 24.5 cfs, and that an injury analysis requested by IDWR should not be performed because the advanced priority date condition.

trial, the court agreed to again vacate the trial and instead, have the July 27th date reserved for another settlement conference.

The *SDR* was issued by IDWR on July 25, 2011. For reasons discussed in further detail below, even after reviewing the injury analysis documents, IDWR concluded that “on remand IDWR concludes that the rights as presently recommended provide the objectors sufficient protection against injury. It sees no need to amend its recommendations of these rights.” *SDR* at 4.

The parties had the benefit of the *SDR* at the July 27th settlement conference, and the parties left that conference with the understanding that the parties had reached a settlement. In the process of preparing the SF5’s, McDonald and Sowards’ attorney understood one aspect of the settlement to include Water Right No. 34-7037 (which, as set forth above, is not a water right that has been set aside nor received an amended partial decree), and therefore concluded that the parties did not have an agreement. Consequently, the parties again attempted mediation on September 8, 2011, but without success.

The matter is now set for trial on November 9-10, 16, 2011.

Prior to the November trial, however, and particularly with the aid of the *SDR* which the court did not have when deciding Isom’s previous motion for summary judgment, this court should revisit and reconsider its prior *Order* regarding injury in order to limit the testimony and evidence at trial. For the reasons set forth below, the objections voiced by the Objectors regarding injury should be determined as a matter of law because (1) this court does not have jurisdiction to establish reasonable pumping levels, a matter delegated solely to the Director of IDWR pursuant to Idaho Code §§ 42-226 and 42-237a(g), and (2) to the extent there could ever

be injury, the Objectors are protected because the priority date of diversions from the Island Wells under Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 has been advanced.

To be clear, this motion does not request the court to reconsider the issue of whether or not an accomplished transfer occurred. While the Claimant's believe the significant evidence of the 1985 field exam conducted by IDWR documenting the diversion of 24.5 cfs from the Island Wells is extremely persuasive, Claimant acknowledge that the Objectors have several legal and factual theories against the completion of the accomplished transfer that create questions of fact for trial. With regards to the Objector's claims of injury, however, this issue can be determined as a matter of law.

II. ARGUMENT.

A. Summary Judgment Standard.

Summary judgment is appropriate when "the pleadings, depositions 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." I.R.C.P. 56(c). When a jury trial has been demanded, disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. Without a demand for a jury trial, however, the court may construe facts differently:

[I]f an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct. App. 1985) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)).

Further, the non-moving party must submit more than just conclusory assertions in response to a motion for summary judgment. In other words, “[a] mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact.” *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

B. The SDR is clear that advancement of the priority date for diversions of water under Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 from the Island Wells will protect against the Objector’s claims of injury.

As part of the Objector’s objections, they requested an injury analysis be performed by IDWR relative to the accomplished transfer statute. The Objectors have now had their opportunity. The SDR “addresses the question of whether the addition of two points of diversion recommended for these rights pursuant to the provisions of the accomplished transfer statute, Idaho Code § 42-1425, in the Amended Director’s Reports filed in these subcases on December 7, 2009, ‘injured a water right existing on the date of the change. . .’ SDR at 1 (*quoting* Idaho Code § 42-1425(2)(a)). After considering evidence submitted by the Objectors, the SDR concluded that the Objectors’ water rights were sufficiently protected from injury in the Department’s amended partial decrees. SDR at 4.

The SDR’s findings are supported by two principles: (1) the priority date advancement, and (2) the exclusive jurisdiction of the director of IDWR to establish reasonable pumping levels. The Objector’s claims of injury are a blend of these two issues, claiming that the

increased pumping from the accomplished transfer will lower the water table, and this will impact their *historic* pumping levels, as opposed to *reasonable* pumping levels as required under Idaho Code §§ 42-226 and 42-237a(g). In other words, the Objectors believe they are entitled to a historic pumping level, and that they will be injured if IDWR abides by the provisions of Idaho Code §§ 42-226 and 42-237a(g). As set forth below, these allegations do not survive summary judgment.

As an initial matter, the Claimant's priority date for diversion of Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 from the Island Wells has been advanced to a date junior to the Objector's water rights. As admitted in the *Affidavit of Darrell E. McDonald*, for example, "[m]y water rights described above are senior to 1982." *McDonald Aff.* ¶ 10; See also *Sowards Aff.* ¶10 (same). The SDR recognized SRBA precedent allowing for restrictions to be placed on accomplished transfer to avoid injury to existing users. *SDR* at 1 (citing to *Memorandum Decision and Order on Challenge* to Subcase Nos. 01-23B, 01-297, 35-2543 and 35-4246, entered April 4, 2011 at 30 (the Aberdeen-Springfield Decision)).

After a full and fair opportunity for the Objectors to provide evidence of injury to IDWR, the SDR concludes that "[i]n reviewing the material submitted to it on remand IDWR has been **unable to ascertain what injury the objectors are asserting that cannot be mitigated by advancing the priority dates of these rights when the claimant pumps water from the two wells in question.**" *SDR* at 1-2 (emphasis added).

In Isom's previous motion for summary judgment, Isom argued that advancement of priority dates was sufficient to guard against injury, and therefore, an injury remand was not necessary. See *Memorandum in Support of Motion for Summary Judgment* at 14-15. Isom cited

to and discussed, as authority in support of this position when responding to the Objector's response to the motion for summary judgment, Special Master Bilyeu's *Special Master Report and Recommendation, Findings of Fact and Conclusions of Law for Water Rights* 34-256, 34-416, 34-618, 34-692C, 34-2330B, 34-2426C, 34-7080B, 34-7092, 34-7121A, 34-7121B, 34-7179, 34-10896, and 34-12376. *Reply Memorandum in Support of Motion for Summary Judgment* at 10-12. Nevertheless, the court denied summary judgment in her *Order* regarding the subcases in this matter, which raises the question as to why Telford is asking for reconsideration of the issue. The answer is that the Special Master now has the benefit of the *SDR*, which was issued **after** the *Order* and after the Objectors had a full opportunity to voice their injury concerns and provide evidence in support of those concerns to IDWR, which are the same issues Objectors will assert as injury at trial.

The *SDR* cited to an virtually identical decision Special Master Bilyeu's *Special Master Report and Recommendation, Findings of Fact and Conclusions of Law for Water Rights* 34-256, 34-416, 34-618, 34-692C, 34-2330B, 34-2426C, 34-7080B, 34-7092, 34-7121A, 34-7121B, 34-7179, 34-10896, and 34-12376, involving other water rights also decided by Special Master Bilyeu entitled *Special Master Report and Recommendation, Findings of Fact and Conclusions of Law for Water Rights* 34—2315, 34-02358A, 34-02417A, 34-02419A, 34-02429B, 34-02472A and 34-12419 (the Era Flat Decision). This decision is instructive.

It is undisputed that Idaho is a prior appropriation state. Idaho Code § 42-106. This doctrine, as described by this court, provides:

Under the appropriation doctrine, priority in time gives priority in right. Priority affects the exercise of existing rights and is an important protection for senior water users. 'The exercise of existing rights is curtailed in inverse order of priority in drought

or seasonal fluctuation makes the supply insufficient for all, that is, junior appropriators are shut off completely to supply fully those more senior priorities.'

The operation of the prior appropriation doctrine in a conjunctive management system is critical to the subcases before the court. Senior rights are protected during shortages, such as the drought in the Big Lost River Valley, because junior rights are shut off to supply senior rights. Compliance with the prior appropriation doctrine protects seniors from injury by junior users, because their first-in-time priority is first in right during a drought.

The proper application of the prior appropriation doctrine should protect the senior water rights in the Big Lost River Valley. Consequently, the injury alleged by the Association is not the kind of injury that should defeat the changes in use which occurred, since senior users could enforce the prior appropriation doctrine.

Era Flats Decision at 8-9 (internal citations omitted).

The *SDR* relied upon the Era Flats Decision, and further noted that Special Master Bilyeu relied upon the case of *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators*, 129 Idaho 454, (1996). This case was also discussed by the Claimants in their prior summary judgment briefing, who argued that this precedent, as a matter of law, demonstrates that advancement of priority dates is sufficient protection against juniors. *Reply Memorandum in Support of Motion for Summary Judgment* at 12. In the words of this court, "[t]he court finds there was insufficient evidence to show that the change from supplemental to primary caused injury to senior rights once the priority was advanced." Era Flats Decision at 11-12.

In the *Order*, the court quoted the subordination language, and stated that "[a]lthough the proposed language **could** offer protection to existing water rights, there are genuine issues of material fact as to whether the language is sufficient to protect against the injury alleged by the [Objectors]." *Order* at 6 (emphasis added). With the issuance of the *SDR*, there is now no dispute of fact that the priority subordination **does** protect against the injury alleged by the Objectors.

The *SDR* clearly finds that the claims of injury alleged by the Objectors are protected by the priority date advancement. The evidence of injury submitted by the Objectors consisted of “competing technical analyses, and related documents, regarding the nature, magnitude, and timing of the effect of pumping from the two wells in question on the surrounding water table, and hence their effect on the pumping levels on the wells used by the objectors.” *SDR* at 2. With regards to that evidence, the *SDR* concludes that after the priority date advancement, “IDWR has put the objectors in the position of holding rights senior to the claimant’s rights. Thereby the objectors are in a position to enforce their priorities under the prior appropriation doctrine, giving them access to the all appropriate administrative remedies and rights of judicial review encompassed therein, including the right to assert the need for protection of pumping levels.” *SDR* at 3.

It is important to remember that IDWR did not have to advance the priority dates in the amended partial decrees. Indeed, even transfers from as recent as 2009, such as the one filed by Schureman (Transfer No.75394; See *Fourth Harris Aff.* at Exhibits A and B) to move water rights to a well located further up the Big Lost River Valley, was approved without such a condition. The subordination on the subcases at issue here is something above and beyond what other users, like Schureman, have as conditions of their transfers. The priority date advancement, coupled with the Director’s exclusive jurisdiction to establish reasonable pumping levels (as described in the next section), means that there is no dispute of fact that needs to be addressed at trial on this issue. The Objectors cannot suffer injury.

In prior decisions, this court has already found enforcement of prior appropriation as a remedy sufficient to protect against injury:

[t]he proper application of the prior appropriation doctrine should protect the senior water rights in the Big Lost River Valley. Consequently, the injury alleged by The Association is not the kind of injury which should defeat the changes in use which occurred, **since senior users could enforce the prior appropriation doctrine.**

Era Flats Decision at 9 (emphasis added). Furthermore, “[u]nder the prior appropriation doctrine, these senior rights are superior in times of shortage to the rights to which The Association objected. **The court presumes that the junior rights could be shut off in times of drought. Therefore, it follows that no injury has occurred.**” Era Flats Decision at 10 (emphasis added).

With regards to allegations of injury for the movement of water to the Era Flat, or “out of the valley” as it is sometimes referred to, the court previously held that “[f]or those water rights which involved a change in place of use, The Association must show that the change resulted in injury to water rights existing at the time of the change. There is insufficient evidence to show these changes in place of use to Era Flat resulted in injury of existing rights.” Era Flats Decision at 10. Similarly, the evidence submitted to IDWR on the injury remand is insufficient to show injury, and therefore, this matter can be determined as a matter of law.

Clearly water rights administration is available to the Objectors, and there is nothing in the amended partial decrees that exempts Isom from the prior appropriation doctrine. The prior appropriation doctrine is alive and well, and is currently being enforced in various delivery calls throughout the Eastern Snake Plain Aquifer. In fact, IDWR has previously addressed a delivery call in the Big Lost River Valley. *Fourth Harris Aff.* at Exhibit C. Any suggestion that IDWR will not or cannot enforce priorities is not only unfair to IDWR, but contrary to the facts.

For the reasons set forth above, therefore, this court should reconsider its *Order* and grant Claimant’s motion for summary judgment on the injury issue. The court should find as a matter

of law that, after the opportunity to submit evidence to IDWR on the injury issue, there are no claimed injuries by the Objectors that are not already remedied by the priority date advancement.

- C. **The determination of what depth of water table is legally protectable is not a statutory element of a water right, and is further not necessary for the definition, clarification, or administration of a water right under the SRBA court's purview under Idaho Code § 42-1412(6). Reasonable pumping levels are committed exclusively to the sound discretion of the Director of IDWR.**

Even though Schureman can move ground water diversions up the valley to more productive parts of the Big Lost River aquifer without complaint, Telford's pumping, the Objectors allege, will cause them injury. While it is not plainly overt, based upon the Objector's prior briefing, including the affidavits of Mr. McDonald and Mr. Sowards, it is clear that the Objectors are seeking a special status of water rights, that in effect seek protection of their historic pumping levels, when they are not entitled to their historic pumping level—they are entitled to *reasonable* pumping levels that are established exclusively by the Director of IDWR, not the SRBA court. Therefore, as set forth in further detail below, this kind of "injury" is not a matter this court has jurisdiction to determine, and therefore, any claims relative to this issue should be decided on summary judgment. As a matter of law, it cannot be considered.

In response to the prior summary judgment motion, particularly with regards to the Claimant's arguments regarding advancement of the priority date and application of the prior appropriation doctrine, the Objectors argued that the subordination does not provide injury protection and any claim otherwise "is wrong and demonstrates a misunderstanding of the procedure for a ground water call." *Objector's Response to Claimant's Motion for Summary Judgment* at 10. The Objectors then continue in their response to discuss various provisions of

the Ground Water Act, and the establishment of reasonable pumping levels, and make the following claim:

As such, for ground water rights subject to the Ground Water Act, administration will not occur until a reasonable pumping level has been established and reached. Accordingly, those diverting under junior ground water rights are free to deplete the source while those diverting under senior ground water rights must continue to suffer the consequences of depletions that require deeper wells or even eliminate the water supply.

Id. at 10.

McDonald and Sowards also claim:

All of the water pumped from the Island Wells is removed from the portion of the aquifer from which I pump water for my water rights described herein. If Mr. Isom is granted the right to legally pump from the Island Wells at more than twice the rate he can pump under his existing water rights, I firmly believe that I will soon be forced to drill deeper to attempt to regain the ability to divert the amounts of water which I am entitled under my senior water rights at great expense to me.

McDonald Aff. at ¶11; *Soward Aff.* at ¶11.

These claims are misleading as they imply that junior water users can divert illegally out of priority and seniors will “suffer the consequences of depletions” from such out of priority diversions. This is simply not true. All ground water users are subject to the Ground Water Act, which provides for “reasonable pumping levels” and “full economic development” of that resource. This is not a license to divert out of priority. Instead, it provides the director of IDWR with the ability to establish reasonable pumping levels, and to the extent a senior right holder finds himself in a position that he is diverting from below that reasonable pumping level, then junior rights will be curtailed. To the extent the bottom of the senior’s well is above the reasonable pumping level, then he will be required to deepen his well to draw from the reasonable pumping level. The water that the juniors divert from a reasonable pumping level is

not an out of priority diversion, but it becomes such when such diversions require the senior to pump from below the established reasonable pumping level.

Stated another way, if the claimed injury by the Objectors is that the accomplished transfer will subject them to the law, that is not an injury. They cannot claim that the director's charge to fully develop the economic resource by establishing reasonable pumping levels is an injury. No amount of evidence at trial can change what the law provides for. The Objectors are not entitled to a special status water right that entitles them to the historic pumping levels they believe they are entitled to.

Even if such evidence of what the Objectors believe is a reasonable pumping level could be provided to this court, it would be in the improper forum. As stated very clearly in the *SDR*, "the determination of what constitutes a reasonable ground water pumping level is committed *exclusively* to determination by the director of IDWR by the provisions of Idaho Code §§ 42-226 and 42-237a(g)." *SDR* at 3. These issues, in IDWR's words, encompass "a technical dispute over the effect of pumping on ground water levels, coupled with a legal dispute over whether (and if so what degree) the objectors are entitled to protection of pumping levels, are matters to be raised in an administrative proceeding before IDWR." *Id.*

For these reasons, the Claimant requests entry of summary judgment on the claimed injury by the Objectors that if the accomplished transfer occurs, they will be subject to the law. This is not an injury that would cause them to be deprived of their allotted amount, because such a diversion entitlement is always subject to reasonable pumping levels, which are established exclusively by IDWR.

D. In the alternative to the above, the court should prevent the admission of evidence of reasonable pumping levels because such evidence is not a matter

**that is within the jurisdiction of this court to decide, nor is it a statutory
lement of a water right, nor is it necessary for the definition, clarification,
or administration of a water right. Therefore, such evidence is irrelevant.**

“A motion in limine seeks an advance ruling of the admissibility of evidence” and is intended to “prevent the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial.” *Warren v. Sharp*, 139 Idaho 599, 605, 83 P.3d 773, 779 (2003). In addition, “[t]rial courts have broad discretion in determining the admissibility of evidence in cases before them and ruling on motions in limine.” *Appel v. LePage*, 135 Idaho 133, 135, 15 P.3d 1141, 1143 (2000). Motions in limine may or may not be based on rules of evidence. *See, e.g., Loza v. Arroyo Dairy*, 137 Idaho 764, 53 P.3d 347 (2002); *Lawton v. Pocatello*, 126 Idaho 454, 886 P.2d 330 (1994); *Appel v. LePage*, 135 Idaho at 136, 15 P.3d at 1144.

Idaho Rules of Evidence 401 and 402 provide the following:

Rule 401. Definition of relevant evidence. “Relevant Evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

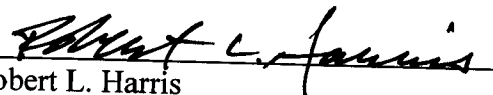
Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible. All relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

For the same reasons as those set forth above as to why Telford is entitled to summary judgment on the issue of reasonable pumping levels, this court should grant Telford’s motion in limine to prevent such evidence at trial. Such evidence is irrelevant because it goes to a matter that it not within this court’s jurisdiction to determine. It will therefore waste the court’s time and resources, as well as the parties’. As such, the evidence should be excluded.

III. CONCLUSION

For the reasons set forth above, upon reconsideration, summary judgment in favor of Telford on the matters discussed herein should be granted. The Objectors have had the opportunity to provide their injury evidence to IDWR, and the evidence presented demonstrates that the concerns are matters that addressed pursuant to the prior appropriation doctrine and conjunctive management.

Dated this 19th day of September, 2011.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

CERTIFICATE OF MAILING

I certify that on this 14th day of September, 2011, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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:

Paul L. Arrington
Barker, Rosholt & Simpson, LLP
PO Box 485
Twin Falls, ID 83303

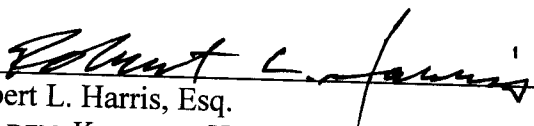
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