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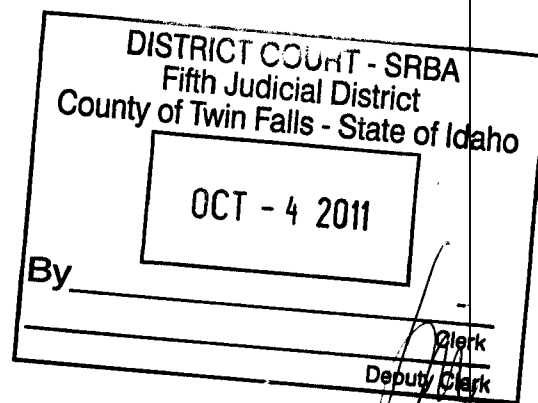
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

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

**REPLY TO JOINT RESPONSE TO
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, hereby submits this *Reply to Joint Response to Motion for Reconsideration, or In the Alternative, Motion in Limine*, which responds to matters contained in the Objectors' *Joint Response to Reply to Joint Response to Motion for Reconsideration, or the Alternative, Motion in Limine* filed on September 28, 2011 (hereinafter, "*Response*").

This memorandum is supported by the prior affidavits, director's reports, supplemental director's reports, and pleadings submitted in this matter. For the reasons set forth below,

Telford's *Motion for Reconsideration, or In the Alternative, Motion in Limine*, should be granted.

I. ARGUMENT

- A. Injury is not an element of a water right pursuant to Idaho Code § 42-1411, and therefore, the Objectors' arguments that Telford's *Motion for Reconsideration* cannot be granted because the injury remand determination by IDWR is only entitled to *prima facie* weight is unpersuasive. Even if it is an issue for trial, the fact remains that the Objectors have not presented evidence that they will be injured with the advancement of the priority date for the "Airport" water rights diverted out of the Island wells.

In response to Telford's motion, the Objectors argue that the motion attempts to elevate a recommendation to the status of a partial decree. *Response* at 1-3. Because a recommendation is only *prima facie* evidence of the nature and extent of the water right, the Objectors further argue, summary judgment cannot be granted because "[u]nder Telford's theory, no one could ever challenge a Director's recommendation." *Id.* at 1. These arguments misapprehend Telford's argument and Idaho law.

As Telford made clear in its prior memo, (at p. 11)¹ the motion for reconsideration does not request summary judgment as to the finding of an accomplished transfer, which necessarily involves—in this case—a recommendation on the points of diversion of a water right. Such a finding on the points of diversion is a part of the recommendation that is entitled to *prima facie* weight at trial and is an issue to be determined at trial, but the court has determined that there remain issues of fact on the evidence of an accomplished transfer.

¹ "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."

into a proceeding contemplated under Idaho Code § 42-222, which provides a procedure for an objected-to transfer application, complete with evidence and argument relating to the local public interest, competing hydrologists arguing over the drawdown effects of a proposed well, reasonable pumping levels, and the like. The Special Master's role is to define elements of a water right, and because injury is not an element of a water right, it should be left to the determination of the IDWR, as contemplated in the statute. The injury analysis is a separate analysis under the statute with a separate procedure, and now that IDWR has made its determination regarding injury in the SDR, the evidence of injury should not take up the precious time reserved for trial on the issue of whether there was an accomplished transfer in the first place.

In short, the trial set for this matter is not the forum to challenge this injury determination made in the separate "injury remand" procedure, rather, it can be raised on a petition for judicial review once the trial is over. The Objectors have had a full and fair opportunity to submit their evidence of injury to IDWR.

Secondly, the Objectors have not presented evidence that would survive summary judgment as to how they can suffer injury. As previously stated, 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).

What the court **has not** decided is whether or not evidence of the injury analysis associated with a finding of an accomplished transfer must be presented at trial, and/or can be determined at the summary judgment stage. A determination on the "injury remand" issue is not the same thing as a challenge to the recommended elements of the water rights, such as the point of diversion. The "injury remand" is a separate proceeding involving only IDWR. Telford is therefore not suggesting that no one could challenge a Director's recommendation on the point of diversion recommendation, but is stating very clearly that an injury analysis is separate proceeding under the statute, and contrary evidence to the findings of IDWR on that issue should not be presented a trial.

Stated another way, does IDWR need to hydrologic experts at the trial to address the items in the Brockway Report found at A to the *Third Arrington Aff.*? The answer clearly appears to be no for two major reasons: (1) The accomplished transfer process is a separate proceeding under Idaho Code § 42-1426(2)(a); and (2) the Objectors have failed to produce evidence that would prevent summary judgment.

First the accomplished transfer statute itself suggests that the remedy at this point for the Objectors is review before the district court once the trial on these subcases is held. Idaho Code § 42-1426(2)(a) provides that "[a]fter a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person is aggrieved by the director's determination, they may seek review before the district court."

While the injury remand portion of this statute has not been used significantly in the past, the statutory language is rather clear on the remedy available to the Objectors at this point, and that is a review before the district court. In other words, the trial in this matter should not turn

The Brockway report is part of the evidence presented to IDWR in its injury analysis—indeed, the primary evidence—and that evidence was reviewed by IDWR. Even with this evidence, IDWR determined that there was nothing in the report that could happen that could be protected by enforcement of the prior appropriation doctrine.

In its simplest form, prior appropriation provides water for those that have senior rights before those who have junior rights receive any. Because water supplies can vary from year to year, the doctrine protects seniors by providing them first rights to water, but this does not then deny water for junior water right holders when it is available. The opposite is true in that it promotes full economic development of the ground water resource, not hoarding of the resource by those who happened to get there first. But when supplies are short, the senior users will win and get their supplies. It may be aggravating to senior users to have to watch and protect their supplies, but this is a small price to pay to be senior in line for one of Idaho's most important resources. There is no difference between this situation and a surface water situation. When a senior finds out that his water supplies are not being met, he informs the watermaster, who adjusts supplies accordingly, so that the senior again receives the full entitlement of his water right. While a ground water system may be more complicated because of the time-delayed effects of ground water pumping, these are issues that are addressed through IDWR's modeling tools and conjunctive management rules. Therefore, while the Objectors therefore have the most important protection in a priority system—a senior priority date—it does not absolve them of action to protect their rights.

For example, another water user could file a transfer and move a well right near theirs, but they could protest the transfer to ensure appropriate protection to their water rights. This is

what was done very recently by one of the Objectors, Doug Schureman as recent as 2009 (Transfer No.75394; See *Fourth Harris Aff.* at Exhibits A and B), where he moved water rights to a well located further up the Big Lost River Valley. Mr. Schureman's 1955 water rights were therefore introduced to the vicinity of the Objectors wells—near the Island Wells—without automatic subordination. No water right is entitled to a condition that absolves them of vigilance to protect their rights. Yet this is what the Objectors' desire of Telford's water rights.

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)).

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.

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).

The Objectors suggest that Telford has mischaracterized their claims of injury. We have tried to do no such thing. Here is the exact language from the Objector's prior summary judgment briefing, after citing the subordination condition:

According to Isom, this remark will give Schureman "the protection they desire." *Id.*

Isom's argument is wrong and demonstrates a misunderstanding of the procedure for a ground water call. Unlike surface water administration with its attendant "shut and fasten" obligations, I.C. §§ 42-602 and -607, the Ground Water Act prohibits the administration of ground water rights unless and until the Director has determined a reasonable pumping level. I.C. § 42-226; *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 585 (1973) ("A senior appropriator is only entitled to be protected to the extent of the 'reasonable ground water pumping levels' as established by the IDWR"). 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.

The *Affidavit of Darrell E. McDonald* and *Affidavit of Norma K. Soward*, filed in support of their *Motion to File Late Objection or Alternatively to Participate*, demonstrate the concerns of injury shared by Schureman. Both explain how their ground water diversions have been impacted by diminishing water supplies and that they have been forced to drill deeper wells and/or install stronger pumps to divert their decreed water supplies. Based on their experiences,

they fear that increased diversions by Isom will force them to drill even deeper to acquire water.

To Schureman's knowledge, no reasonable pumping level has been established for the area including the Island Wells. Under the law, therefore, Schureman will have no recourse when Isom's diversions deplete the water supply. Accordingly, an assurance that diversions from the Island Wells will be limited to a priority of 1982, alone, is no protection at all.

Objector's Response to Claimant's Motion for Summary Judgment at 9-10

Telford has not mischaracterized the Objectors' claims of injury. They even quote to *Baker v. Ore-Ida Foods, Inc. case*, which states that is senior appropriator is only entitled to be protected to the extent of the reasonable pumping level established by IDWR., and then state "administration will not occur until a reasonable pumping level has been established and reached." Being subject to the law 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, not even the evidence that Brockway provides. Even Brockway acknowledges that "[t]here is no adopted definition of 'significant' when defining drawdown from a pumped well," and that "[t]he amount of groundwater withdrawal is not constant, but varies significantly each year due to changes in demand for supplemental water which depends on available surface supply and climatic factors." Brockway Report at 10, 14. Yet even if there is drawdown from the accomplished transfer, that drawdown must be measured against reasonable pumping levels, and if the drawdown goes below that amount, Telford's priority subordination will be enforced, and he will the Airport water rights diverted from the Island Wells will be shut off.

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. Again, protection from injury does not mandate protection from a senior's duty to be vigilant to protect its supplies.

The Objectors indicate that they "agree that this Court is not the correct forum to establish a reasonable pumping level," but then, in a circular argument, state "that does not mean that the Objectors should be prohibited from presenting evidence regarding the depletion of the aquifer resulting from increased diversions." *Response* at 6. Presenting evidence of depletion to the aquifer must be measured against a reasonable pumping level in order to determine the extent of the senior's protection before he is injured. It makes no sense to say that reasonable pumping levels will not be established at this trial, and then argue that affects on pumping levels due to depletions in the aquifer ~~are~~ to be considered by the Special Master. Both of these issues are for IDWR to determine.

Furthermore, the ~~fact~~ that IDWR has not established reasonable pumping levels does not mean that this is an injury to the Objectors. They can ask IDWR to do so because this is the protection afforded under the statute, not only to protect senior users, but to also allow full development of the resource. This is a policy decision, articulated in a statute, that neither the parties to this litigation, ~~nor~~ the court, nor IDWR now has control over. The statute articulates the policy of the people of the State of Idaho, and it is to protect seniors, but on to the extent of their reasonable pumping level. The establishment of a reasonable pumping level is simply something that the Objectors, with their senior water rights, may have to work through. Again, there is no condition that ~~can~~ absolve a water right user from vigilance.

Therefore, based on the evidence submitted by Objectors, the only conceivable way that the Objectors could be injured under this statutory scheme is to have a junior water right. With the subordination condition, they do not as a matter of law.

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 because of the priority date advancement. SDR at 4.

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 Objectors argue that priority advancement may have worked for enlargement rights, but not for accomplished transfers, because "[h]ad 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." *Response* at 5-6. This argument exalts form over substance. Just because the legislature did not specifically mention priority

advancement as a means to protect against injury in this statute does not mean it cannot ever be such a protection.

In fact, the non-inclusion of a priority advancement in this statute demonstrates just how significant and unusual the remedy afforded the Objectors is, especially when water rights can be "transferred" today without priority advancement, such as Schureman's 2009 transfer that amended his water rights. The argument and position that the priority date advancement is not enough protection indicates that the issues retained by the Objectors may not have anything to do with water. If they did, they would have objected to Schureman's transfer. Instead, they perhaps lie in the long-held belief of many in the Big Lost River Valley that Era Flat should not be irrigated.

- C. The issue of whether or not there is an accomplished transfer remains subject to a dispute of fact. However, contrary to the Objectors' claims in their briefing, there is evidence of an accomplished transfer in the record.**

The Objectors aver that "Telford has not provided any evidence that an accomplished transfer occurred." *Response* at 2. Again, Telford is not moving for summary judgment as to whether or not the accomplished transfer occurred. There are disputed issues of fact that will be sorted out at trial. However, with regards to the pleadings that have been submitted, this claim by the Objectors is simply not true.

In their prior summary judgment briefing, Telford (then Isom) provided evidence and argument summarized in their *Memorandum in Support of Motion for Summary Judgment* at pages 13-14, as well as their *Reply Memorandum in Support of Motion for Summary Judgment* at 12-14. Most critically, there is a field examination that tested the Island wells that shows it had

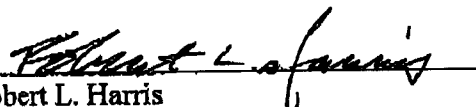
the capacity to divert 24.66 cfs. Why would Mr. Bell have drilled two wells with that capacity? It may very well be that he intended to illegally divert more than the licensed amount if it was necessary, but this is what virtually all other water users who claimed the benefit of the amnesty statutes also did—exceed or violate the elements of their water rights.

The Objectors argue that a condition on the license for Water Right No. 34-7037 included a condition that ordered that the total pumping rate was not to exceed 12.0 cfs from the Island Wells. But this order was specific to 34-7037 only, and did not bind future water right transfers, which could include accomplished transfers. Again, these are issues to be argued at trial because there are questions of fact. Nevertheless, because it was alleged that Telford had no evidence supporting a finding of an accomplished transfer, a response to the contrary was needed.

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 3rd day of October, 2011.


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

CERTIFICATE OF MAILING

I certify that on this 3rd 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:

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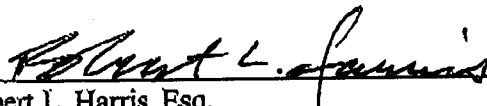
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