RECEIVED
JUN 03 2016
DEPARTMENT OF
WATER RESOURCES

Fritz X. Haemmerle (ISB No. 3862)
HAEMMERLE LAW, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: (208) 578-0520
Facsimile: (208) 578-0564
fxh@haemlaw.com

Attorneys for Nelson Mackay Ranch, LLC et al.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF ROTATION CREDIT IN WATER DISTRICT 34, BIG LOST RIVER BASIN	**MOTION IN LIMINE**

COMES NOW the Protestants, Nelson Mackay Ranch, LLC *et al.*, (See list of Water Right Holders attached as Exhibit 1), by and through its attorney, Fritz X. Haemmerle, of Haemmerle Law, P.L.L.C., and hereby files this Motion in Limine to prevent any water right holders, parties or the Idaho Department of Water Resources ("Department") from arguing against any of the provisions Decreed in Basin 34 under Basin Wide Issue 5, including rotation credits.

I. WATER RIGHT HOLDERS/PARTIES

Any water right holder in Basin 34 is bound by the Final Decree entered in the Snake River Basin Adjudication. As such, they are bound from arguing against the Rotation Credit Provisions (Basin Wide Issue 5), through one of two different claim preclusion theories.

First, they are prevented from arguing against, or for different provisions, than those Decreed in BWI 5 under a theory of *res judicata*. "The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action ... which might have been made.'" *Ticor Title Co. v. Stanion*, 144 Idaho 119 (2007), citing *Hindmarsh v. Mock*, 138 Idaho 92, 57 Idaho 803 (2002). *Res judicata* prevents parties or privies from re-litigating: (1) claims which were actually litigated; and (2) claims relating to the same cause of action which could have been made.

Under *res judicata*, parties or privies are prohibited from arguing against the rotation credits, or arguing for different rotation credit provisions which could have been raised in the SRBA.

Second, any party who was not in the SRBA or a privy to a party in the SRBA, is prevented from challenging the rotation credits under a collateral estoppel theory. Collateral estoppel bars re-litigation of an issue determined in a prior proceeding if:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privy with a party to the litigation.

Rodriguez v. Department of Correction, 136 Idaho 90, 29 P.3d 401 (2001), citing *Sheffer*, 134 Idaho at 144, 997 P.2d at 605; see also *Western Indus. & Envtl. Serv., Inc. v. Kaldveer Assoc., Inc.*, 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994); *Anderson v. City of Pocatello*, 112 Idaho 176, 184, 731 P.2d 171, 179 (1987). In this case, all five of the

criteria for applying collateral estoppel are present. The issue of rotation credits was heavily litigated in the SRBA. The SRBA actually decided the issue of rotation credits in BWI 5 and rotation credits were part of the Final SRBA Decree. No party should be allowed to argue against the rotation credits under a collateral estoppel theory.[1]

II. THE DEPARTMENT

The Department is bound by the SRBA Decree. "Upon entry of a final decree, the director shall administer the water rights, by distributing water in accordance with the final decree." I.C. 42-1413(2).[2]

III. STANDING AND SUBSTANTIAL INJURY ISSUES

Also, if there are parties to this proceeding who are not water right holders or privies to water right holders, those parties would not have standing or the request substantial injury to participate. To have standing, "a litigant must 'allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury.'" *Young v. City of Ketchum*, 137 Idaho 102, 106, 44 P.3d 1157 (2002). "This requires a showing of a 'distinct palpable injury' and 'fairly traceable causal connection between the claimed injury and the challenged conduct.'" *Id.*

In administrative proceedings, parties must assert that a "substantial right" has been prejudiced to assert a claim. I.C. § 67-5279(4).

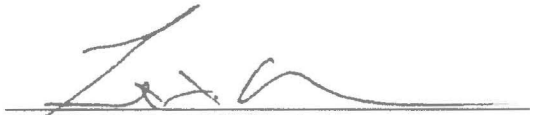
Under a standing or substantial right analysis, if a there is a party in this case who is not a water right holder, then they should be excluded from presenting any testimony.

---

[1] The Big Lost River Irrigation District is a water right holder. *See*, water right 34-12 and 34-13.

[2] Section 42-1413(2) is likely recognition that all parties, including the State of Idaho, is bound by the entry of a final decree entered in a general adjudication, such as the SRBA. Had the United States known that the State of Idaho was entitled to ignore the provision of the SRBA final decree, it may not have waived its sovereign immunity.

DATED this 3 day of June, 2016.



FRITZ X. HAEMMERLE
Attorney for Nelson Mackay Ranch, LLC

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 3 day of June, 2015 he caused a true and correct copy of the foregoing document to be served upon the following by the method indicated:

Original: Gary Spackman 322 East Front Street P.O. Box 83720 Boise, ID 83720-0098 deborah.gibson@idwr.idaho.gov	Hand Delivery ☐ U.S. Mail ☑ Facsimile ☐ Federal Express ☐ E-Mail ☑

Fritz X. Haemmerle