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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
Case No. 39576

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SUBCASE NUMBER 02-02318A

CLAIMANT'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Claimant in this proceeding, William Wilkerson (hereinafter referred to as "Wilkerson"), by and through his attorneys of record, Ringert Law Chartered, and hereby submit this Brief in support of his motion to dismiss the objections to his water right claim filed on January 3, 1990.

I. SUMMARY OF USE OF WATER RIGHT

In 1970, Mr. Jackson swore to using the water right for the past twelve years. In 1971, the field exam recognized the use of the water right. In 1972, a water right license was issued. In 1981, a Notice of Claim was filed by the new water right owners. In 1983, a second field exam confirmed use of the water right. In 1990, a Notice of Claim was filed by Peggy Jackson. Proper use of the water right was confirmed from 1991 through 1995. Beginning in 1998, Mr. Wilkerson has been

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denied use of water right 02-2318. In December 2006, the Director's Report recommended the water right as claimed by Mr. Wilkerson.

II. STATEMENT OF FACTS

On June 5, 1964, J.C. Jackson & Sons, Inc. filed an application for permit no. 31931 to appropriate the public waters of the State of Idaho. In 1970, James C. Jackson filed an affidavit of *Proof of Application of Water To Beneficial Use* (hereinafter "Proof of Application") for water right no. 02-2318. *Affidavit of Jon C. Gould* (hereafter "Gould Aff."), Exh. A. The Proof of Application is a sworn statement of the extent to which water right no. 02-2318 had been developed. *Gould Aff.*, Exh A. In that statement, James Jackson swore that he "applied for water 12 years ago - I bought place. pumped out of Snake River ever since." *Gould Aff.*, Exh A. Further, he stated that the water is pumped out of the Snake River and diverted to the place of use through a farm ditch. *Gould Aff.*, Exh A. The place of use listed on the *Proof of Application* includes the 13-acre parcel currently owned by Mr. Wilkerson (hereafter "Wilkerson Property"). See *Id.*

On August 17, 1971, an examination of the works covered by the application for permit no. 31931/02-2318 was conducted. The Idaho Department of Water Administration issued water right license J. C. Jackson and Sons, Inc. for water right number 02-2318 on March 23, 1972 for the irrigation of the 50-acre parcel. *Gould Aff.*, Exh B. The elements of the water right include the priority date of June 5, 1964; the point of diversion on the Snake River; place of use includes the entire 50-acre parcel (both the 13-acre parcel and the 37 acre parcel); and period of use from March 15 to November 15, annually. See *Id.*

In 1981, Doug Larzelier and Joseph Asumendi filed a notice of claim to water right 02-2318. *Gould Aff.*, Exh C. In 1983, a field exam was conducted by the Idaho Department of Water

Resources (“IDWR”) which confirmed the Wilkerson Property as being part of the place of use. *Gould Aff.*, Exh D.

In 1990, Peggy Jackson filed a *Notice of Claim to a Water Right Acquired Under State Law* (“*Notice of Claim*”). *Gould Aff.*, Exh E. It is this *Notice of Claim* that is before this court in this matter. In this *Notice of Claim*, Peggy Jackson declares that water for the entire 50-acre parcel is used from March 15 to November 15 annually. *Id.* She describes the diversion system used to deliver the water from the point of diversion on the Snake River to the place of use as follows: “2 pumps on platform w/pipeline to POU. Large pump puts water in ditch for irrigation and the small pump supplies water to sprinkler system.” *Id.* Additionally, the *Notice of Claim* contains all the elements of the water right no. 02-2318 including priority date, source of the water, point of diversion, period of use and place of use. *Id.* In 1990, Peggy Jackson, owner of the 50-acre parcel, claimed the use of the water as defined in the 1972 water right license; including the source, point of diversion, and the place of use. *Gould Aff.*, Exh. B and E.

In 1991, the parcel was partitioned and what is now the Wilkerson Property was conveyed by the Jacksons to Loren Wittrock. *Gould Aff.*, Exh F at 2. When this occurred, IDWR split water right no. 02-2318 into water right nos. 02-2318A for the Wilkerson Property and 02-2318B for the 37-acre parcel. Mr. Wittrock irrigated the Wilkerson Property from 1991 to 1994. *Gould Aff.*, Exh F.at 2-4. Mr. Launie Mashburn irrigated the Wilkerson Property using water right no. 02-2318A between 1994 and 1996. *Gould Aff.*, Exh G., Affidavit of Launie T. Mashburn at 2-3.

Mr. Wilkerson purchased the Wilkerson Property and water right no. 02-2318A in 1998. *Affidavit of William R. Wilkerson, Sr.* at 2 and Exh. A (hereafter “Wilkerson Aff.”). Since purchasing the parcel, Mr. Wilkerson’s repeated attempts to divert and put water under water right

no. 02-2318A to use have been thwarted by the Snake River RV Park's refusal to grant him access to his point of diversion so that he can divert water. *Wilkerson Aff.* at 10.

Mr. Wilkerson has been familiar with the Wilkerson Property since 1998. *Wilkerson Aff.* at 2-3. Mr. Wilkerson had the Wilkerson Property surveyed by licensed surveyor Dean Coon after he purchased the property. *Wilkerson Aff.* at 12. The shortest distance from Jump Creek to the highest point on the Wilkerson Property is over 1,700 feet.² *Wilkerson Aff.* at 15 and Exh. A. Jump Creek, at the southeast corner of the Parcel, is the lowest point on the 13-acre-parcel. *Wilkerson Aff.* at 11. On the Wilkerson Property, the elevation difference from Jump Creek to the conduit at the northwest corner of the property is over 40 feet. *Wilkerson Aff.* at 13.

The Wilkerson Property has a delivery ditch and the drainage ditch, both of which discharge into Jump Creek. *Wilkerson Aff.* at 16 -18. Both ditches are less than three feet deep. *Wilkerson Aff.* at 21. The delivery ditch is concrete and runs along the southwestern property boundary. *Wilkerson Aff.* at 18. The drainage ditch is earthen and runs along the northeastern property boundary. *Wilkerson Aff.* at 16. There are no other ditches on the Wilkerson Property. *Wilkerson Aff.* at 22.

III. STANDARD

Summary judgment is appropriate only where two conditions are met: (1) "if 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 (2) "the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When those two conditions are satisfied, a motion for summary judgment is proper. *See Sorenson v. Saint Alphonsus Reg'l Med. Ctr.*, 141 Idaho 754, 758, 118 P.3d 86, 90 (2005)

²The highest point on the Wilkerson Property is where the conduit from the Snake River enters the Wilkerson Property at the northwest corner.

(“Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”).

SRBA subcases are tried before the SRBA court without a jury. The summary judgment standard is that used in non-jury trial cases. The 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 summary judgment despite the possibility of conflicting inferences. *Intermountain Eye & Laser Centeres, P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.ed 1221, 125 (2005).

IV. ARGUMENT

The objectors argue that Wilkerson’s claim to water right number 02-02318A should be denied because the water right has been abandoned or not used. To support this allegation, the objectors submitted the Affidavit of William Wilkerson, Jr. In the affidavit, Mr. Wilkerson, Jr. states that between 1997 and 2006 no water was used to irrigate [Mr. Wilkerson’s] 13 acre parcel on the southern side of the Snake River RV Park property.” The Objectors cannot provide any evidence of abandonment. Mr. Wilkerson has valid defenses to any claim of non-use for the statutory period of five consecutive years so there can be no forfeiture.

I. Abandonment

Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right. Idaho Code § 42-222(2). Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a per se abandonment. *Jenkins v. Department of Water Resources*, 103 Idaho 384, 388-389 (1982). Intent to abandon is a question of fact to be decided by the trier of fact. *Id* at 389.

In this matter, there is no evidence supporting abandonment. The original appropriator filed his proof of putting water to beneficial use in a timely fashion. When ownership of the water right changed, the new owners were prompt to inform IDWR of the change in ownership. A *Notice of Claim* was filed by Larzelier in 1983. Peggy Jackson submitted a *Notice of Claim* in 1990. The water right was specifically identified in the 1991 Purchase and Sale Agreement between the Jacksons and the Wittrocks. At no time has an owner of the water right demonstrated an intent to abandon this water right with an actual relinquishment of the water right.

II. Forfeiture

Statutory forfeiture is based upon the legislative declaration in I.C. § 42-222(2) that water rights may be lost if they are not applied to a beneficial use for a period of five continuous years. *Id.* Forfeitures are not favored in the law, and clear and convincing proof is necessary to support a claim of forfeiture. *Id.* Furthermore, certain defenses to forfeiture have been recognized including the Resumption of Use Doctrine, *Id.* citing *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952); *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945); *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944), wrongful interference with a water right or failure to use the water because of circumstances over which the water right holder has no control, *Id.* citing *Alamo Water v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972); *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956); *Welch v. Garrett*, 5 Idaho 639, 51 P. 405 (1897), and the Forfeiture Tolling Rule. *Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Trout)*, subcase 65-05663B (May 9, 2002) (“*Wood v. Trout*”) at 19.

A. The Director's Recommendation is *Prima Facie* Evidence of the Nature and Existence of Water Right No. 02-02318A

Water Right No. 02-02318A was recommended in this Court by IDWR. The Director's recommendation is *prima facie* evidence of the nature and extent of that water right. I.C. § 42-1411(4). As such, the Director's recommendation of water right no. 02-02318A constitutes a rebuttable evidentiary presumption. *McCray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2001). The Objectors have the burden of producing evidence that rebuts the Director's recommendation of water right no. 02-02318A. I.C. §42-1411(5), *McCray, supra*, at 514. The facts in the Director's Report are presumed correct until the objectors produce sufficient evidence to rebut the presumption. *Id.* Because I.C. §42-1411 is silent as to the amount of proof necessary to rebut the Director's recommendation, the objectors are required to produce "substantial evidence" of the nonexistence of water right no. 02-02318A. *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986). The substantial evidence so required is "more than a scintilla, but less than a preponderance." *Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 938 (1993).

B. No Clear and Convincing Evidence of Forfeiture

The record contains no clear and convincing evidence that the water under water right no. 02-02318A was not applied to beneficial use on the Wilkerson Property for a continuous period of five years prior to 1996. The Objectors provided the Affidavit of William Wilkerson, Jr. as the only evidence of non-use and this evidence is for the period from 1997 to 2006.

C. Defenses To Forfeiture

Both the forfeiture tolling rule and the Snake River RV Park's refusal to allow Mr. Wilkerson to access the point of diversion so that he could use his water right provide defenses to forfeiture.

Additionally, the resumption of use doctrine cures any alleged forfeiture prior to 1991.

1. *Forfeiture Tolling Rule Prevents Forfeiture*

Under SRBA law of the case, the five-year statutory period of non-use required to establish forfeiture tolls upon the filing of a claim in the SRBA until a partial decree is entered. *Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Trout)*, subcase 65-05663B (May 9, 2002) at 19. As to SRBA claim 02-02318A, Peggy Jackson filed a notice of claim in January, 1990. Under the forfeiture tolling rule, the time on any forfeiture action ceased to accrue. Therefore, there can be no forfeiture of water right no. 02-02318A after January, 1990 while this action is pending.

2. *Snake River RV Park Prevented Wilkerson from Using His Water Right*

Regardless of the existence of the Forfeiture Tolling Rule and the lack of evidence that the water right had not been used, forfeiture of the water right could not have occurred because the owners of the Snake River RV Park prevented and continue to prevent Wilkerson from using his water right by preventing Wilkerson from accessing his point of diversion. Forfeiture does not occur when the person asserting the forfeiture prevented the right from being used during the period of alleged forfeiture. *Hodges v. Trail Creek Irrigation Company, Inc.*, 78 Idaho 10, 16, 297 P.2d 524 (1956). Mr. Wilkerson has been denied access to the point of diversion for his water since 1998 by the Snake River RV Park personnel.

3. *Resumption of Use Doctrine Prevents Forfeiture*

In *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831 (2003), the Supreme Court explained the resumption of use doctrine as follows:

Under the resumption-of-use doctrine, statutory forfeiture is not effective if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party. *Carrington v. Crandall*, 65 Idaho 525, 531-32, 147 P.2d 1009, 1011 (1944); *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937). A third party has made a claim of right to the water if the third party has either instituted proceedings to declare a forfeiture, *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945), or has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937), or has used the water pursuant to an existing water right, *Albrethsen v. Wood River Land Company*, 40 Idaho 49, 231 P. 418 (1924).ⁿ³ Because there can be a partial forfeiture of water rights by nonuse for five years, *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997), a resumption of use of only a portion of a water right prior to a claim of right by a third party will only prevent the forfeiture of that portion of the water right, *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) (where use of only 700 miner's inches of water was resumed before a claim of right by a third party, appropriator only retained a right to 700 inches of the original 1000-inch appropriation). The resumption of use must also be upon land to which the water right is appurtenant. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001).

ⁿ³ Prior to diversion, the water obviously cannot be identified as being the water entitled to be used by any particular appropriator. Whether or not a third party has made a claim to the water will usually depend upon evidence showing that the water source was overappropriated and, because of nonuse of water by the senior appropriator, water was available for use and

used to fill junior water rights, or by evidence showing that resumption of use by the senior appropriator would diminish the quantity of water being used by junior appropriators from an interconnected water source.

Sagewillow, Inc. at 842.

In this case, proper use water right no. 02-02318A occurred in 1991 and continued until at least 1995. Further, the record is absent of adverse claims to this water right. Whether the 1991 use was a continuance of use or a resumption of use is not relevant. If use in 1991 was merely a continuance of use (no non-use for a continual period of five years) then there was no forfeiture of this water right. If the 1991 use of the water right was a resumption of use, the resumption of use doctrine prevents forfeiture prior to 1991. Under either scenario, there can be no forfeiture prior to the 1991 use.

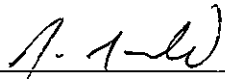
The defenses to forfeiture prevent forfeiture prior to 1991 under resumption of use doctrine and subsequent to 1989 under the forfeiture tolling rule. Because these time periods overlap, it is clear that there can be no forfeiture. Objectors have only provided evidence of non-use from 1997 to 2007. The forfeiture tolling rule and the Snake River RV Park's refusal to allow Wilkerson to divert water under his water right prevent forfeiture during this time period. Lastly, if this court determines that there is clear and convincing evidence of non-use for five consecutive years prior to 1990, the resumption of use doctrine, based on the use from 1991 through 1995, prevents forfeiture.

V. CONCLUSION

The objections to water right no. 02-2318A are without merit. For the reasons described above, this Court should dismiss all objections to the water right and grant a partial decree for water right no. 02-2318A as claimed and recommended by IDWR.

DATED this 9th day of June, 2010.

RINGERT LAW CHARTERED

By: 
Jon C. Gould
Attorneys for William Wilkerson

CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the within and foregoing Document was made this 9th day of June, 2010, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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