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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 TWIN FALLS COUNTY**

In Re SRBA

Case No. 39576

Subcase No. 2-2318A

**BRIEF IN OPPOSITION TO
CLAIMANTS' MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

Objectors Raymond C. Barker, Jr., Charles J. Kritz, Jr. and Diane B. Kritz respectfully submit this Brief in Opposition to Claimants' Imogene and William Wilkerson's Motion for Summary Judgment filed on June 10, 2010. This Brief is supported by the Affidavits of Debra K. Ellers, Norman C. Young and Diane Kritz in Opposition to Summary Judgment, and other matters of record. Claimants seek to establish Water Right No. 02-2318A by relying on a license

issued in 1970, for a water right developed in the 1960s on what was then a 50 acre parcel of agricultural property along the Snake River in Homedale, Idaho. Glaringly absent from their summary judgment filings are the substantial changes in use, subdivision and ownership that the original property has undergone in nearly five decades, all of which have affected Water Right No. 02-2318A's legal status.

Moreover, Claimants have omitted key facts, including: (1) the intent of the original owners, Mr. and Mrs. Jackson, that the water right applicable to the Claimants' 13 acres, subdivided from their original 50 acres, be diverted from another source, and/or use another point of diversion, than the Snake River one Claimants assert on Objectors' property under Water Right No. 02-2318A, and (2) the extended periods of non-use of the water on the 13 acres now owned by Claimants which support application of the legal doctrines of abandonment, forfeiture, waiver and laches. Because genuine issues of material fact exist as to these legal doctrines that concern the subject water right in this matter, summary judgment should be denied, and a full trial on the merits held.

II. STATEMENT OF FACTS

The following facts form the basis for the Objectors' opposition to Claimants' Motion for Summary Judgment:

1. Objectors own a 37 acre property which fronts the Snake River near Homedale, Idaho, which is outlined in yellow on Exhibit A to the *Affidavit of William Wilkerson, Sr.*, filed on June 10, 2010 (hereafter "*Wilkerson Affidavit*") and is referred to hereafter the "Riverfront Parcel." Objectors have owned the Riverfront Parcel since 2003, where they operate an RV park known as the "Snake River RV Resort." (*Affidavit of Diane Kritz in Opposition to Motion for Summary Judgment* filed herewith).

2. Claimants own the 13 acre parcel outlined in black on Exhibit A to the Wilkerson Affidavit, hereafter referred to as “the 13 Acre Parcel.”

3. Peggy Jackson and her husband, James Jackson, owned the 13 Acre Parcel and the Riverfront Parcel when both parcels were a unified property of approximately 50 acres (the “Property”). See *Deposition of Peggy Jackson* taken on April 8, 2010 (hereafter the “*Jackson Depo.*”), p. 11, lns.19-25. (Excerpts from the Jackson Deposition are attached as Exhibit A to the *Affidavit of Debra K. Ellers in Opposition to Claimants’ Motion for Summary Judgment* (hereafter “*Ellers Affidavit*”) filed herewith.)

4. From the 1960’s through the early 1990’s, the Jackson family (including Mr. and Mrs. Jackson, their family corporation, J.C. Jackson & Sons, and a son and his wife, Doug and Mary Jo Larzelier) owned the Property. In the 1960’s, the Jacksons developed Water Right No. 2-2318 to provide irrigation water for their farming operations on the Property from a pumping station on the Snake River. (*Jackson Depo.* pgs. 14-15). They raised cattle and hay on the Property. (*Id.* at p. 12, lns. 21-25, p. 13, lns. 1-2). Initially, the irrigation was applied to the area that makes up the Riverfront Parcel, which is north of what was an active Union Pacific railroad line at the time. (*Id.* at p. 14, lns. 5-7). A few years after buying the Property in 1964, Mr. Jackson ran a conduit under the railroad right of way to apply irrigation water to the 13 acres south of the railroad line, now the 13 Acre Parcel. (*Id.* at p. 25, lns. 2-10). Before Mr. Jackson ran that conduit to the 13 Acre Parcel, Mrs. Jackson recalls that it was irrigated with water from Gem Irrigation District. (*Id.* at p. 14, lns. 1-4).

5. The Jacksons irrigated what is now the 13 Acre Parcel from the Snake River for only a “season or two” after he put in the pipeline to it, according to Mrs. Jackson “because it became too expensive to pipe water that far.” (*Id.* at p. 26, lns. 7-11). In the early to mid-

1970s, the Jacksons quit watering the 13 Acre Parcel. (*Id.*, Ins. 7-16). In the late 1970s and early 1980s, the Jacksons' son, Doug Larzelier, and his wife Mary Jo Larzelier, took over the Property. (*Id.* at p. 29, Ins. 24-25, p. 30, Ins. 1-10). Mrs. Jackson does not recall her son ever irrigating the 13 Acre Parcel while he was in possession of the Property during the 1980s. (*Id.* at p. 30, Ins. 11-15). Nor did he maintain the irrigation works associated with the 13 Acre Parcel, since he was not farming it. (*Id.* at p. 31, Ins. 20-25). Mr. Larzelier similarly confirmed that his records do not indicate that he irrigated the area of the 13 Acre Parcel with water from the Snake River between 1982 and 1987. (*Affidavit of Doug Larzelier in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* (hereafter "*Larzelier Affidavit*") at ¶ 3, and Exhibit A thereto, filed on August 17, 2007 in the case of *Wilkerson v. Snake River RV Resort, et al.*, filed in the Third Judicial District of the State of Idaho, in and for the County of Owyhee, Case No. CV-06-0551 (hereafter referred to as the "Easement Case"). A copy of the *Larzelier Affidavit* filed in the Easement Case is attached as Exhibit L to the *Ellers Affidavit*).

6. The Jacksons took back the Property from their son and his wife in the late 1980s, when they were developing a trailer park on it. (*Jackson Depo.* at p. 32, Ins. 21-24). After the Jacksons took back the Property from their son, Mr. Larzelier, they did not use any irrigation water from the Snake River on the 13 Acre Parcel. (*Id.*, at p. 33, Ins. 11-17). Mrs. Jackson recalls Mr. Jackson pumping water out of Jump Creek to the 13 Acre Parcel using a generator, two or three times a month, for one season. (*Id.* at p. 33, Ins. 23-25; p. 34, Ins. 15-17). Water was diverted directly from Jump Creek, which borders the 13 Acre Parcel, which, in turn, conveyed the water to ditches. (*Id.* at p. 34, Ins. 18-23). The Jacksons experienced no

problems with sedimentation or otherwise in pumping out of Jump Creek. (*Id.* at p. 35, lns. 10-15).

7. Mrs. Jackson filed a Notice of Claim in the SRBA for Water Right No. 02-2318 dated January 19, 1990 (hereafter the “Jackson Claim”). The Jackson Claim is attached as Exhibit E to the Affidavit of Jon C. Gould filed on June 10, 2010 (hereafter “Gould Affidavit”). The Jackson Claim was for 1 cfs to irrigate 50 acres, with the Snake River point of diversion, based on the License of Water Right issued from IDWR on March 23, 1972, a copy of which is attached as Exhibit B to the *Gould Affidavit*.

8. In July, 1991, the Jacksons sold the 13 Acre Parcel to buyers named Wittrock, after the Wittrocks (neighbors whom they knew) approached them and expressed interest in buying the 13 Acre Parcel. (*Jackson Depo.* p. 36, lns. 1-13). The Wittrocks requested a right of way to use the underground water supply from the river under the railroad track. (*Id.*, lns. 16-23). Mrs. Jackson testified that they were willing to “oblige them for three years, ...and at which time, then, they would need to find a way to water from Jump Creek, as we had with the generator, or put power in there and get their pump set there, and make some sort of arrangements. And they agreed to that.” (*Id.* at p. 36, lns. 23-25, p. 37, lns. 1-6). Mrs. Jackson further testified regarding water use terms discussed with the Wittrocks:

A. I just remember saying that I wouldn’t be interested in selling the parcel if we had to give them permanent water rights, because it would affect the value of the property and we had no desire to do that. It would not be good for future development of our trailer park.

(*Id.* at p. 40, lns. 2-8).

9. Consequently, the Wittrocks and Jacksons entered into a written Real Estate Purchase and Sale Agreement dated July 2, 1991 (hereafter, “Wittrock Contract”), which in its paragraph 4, titled “Personal Property Specifically Included in Sale,” expressly stated: “16 HP

Pump and Motor & split 13 Acres of water Snake River—Each to pay ½ power for 3 years use and then to terminate.” (See Exhibit B to Ellers Affidavit, ¶4). This section 4 of the Wittrock Contract represented the Jacksons’ and Wittrocks’ intent, and in Mrs. Jackson’s words “If we couldn’t have gotten that agreement, we wouldn’t have sold the property....” (*Jackson Depo.* p. 44, lns. 21-23; p. 45, lns. 1-4).

10. After the sale closed, pursuant to the agreement, the Wittrocks would pay ½ of the monthly power bill for the pump at the Snake River pumping station, since there was only one electrical meter. (*Id.*, at p. 46, lns. 1-21). The three year period of use was to start the date that the Wittrocks received the property, which was transferred by Warranty Deed under the Jacksons’ signatures on July 16, 1991. (See *Warranty Deed* from the Jacksons to the Wittrocks, attached to the *Affidavit of Loren Wittrock*, Exhibit G to the *Gould Affidavit*). The Warranty Deed explicitly stated that the subject property was conveyed “Subject to all easements, restrictions and reservations of record and of use.” (See *Id.*) According to Mrs. Jackson’s testimony, the three year period of use was to terminate in July, 1994, after which the owners of the 13 Acre Parcel “would no longer use the water from the Snake River through our property , the yellow portion, the river frontage. And they would obtain their irrigation by another source, either through a creek or through Gem Irrigation.” (*Jackson Depo.* p. 51, lns. 1-16).

11. The Jacksons continued to own the Riverfront Parcel for a short time after they sold the 13 Acre Parcel, and allowed the Wittrocks to use the Snake River pumping station during the irrigation season as agreed in the Wittrock Contract. (*Id.* at p. 50, lns. 1-25). On April 2, 1992, the Jacksons sold the Riverfront Parcel to the Harlans. (*Id.* p. 52, lns. 6-18). Mr. and Mrs. Jackson expressly discussed the three year arrangement of the Wittrocks with the Harlans in their sale of the Riverfront Parcel in April 1992. (*Id.* p. 53, lns. 22-25).

12. When asked by Mr. Gould about the Jackson Claim filed in the SRBA on January 19, 1990, Mrs. Jackson testified that the Jackson Claim was filed “before we sold the property to the Wittrocks, so that’s why it’s all out of the river.” (*Id.* at p. 71, Ins. 4-22). Further, the Jackson Claim was for water to irrigate 50 acres “because the property hadn’t been divided then.” (*Id.* at p. 73, Ins. 1-4).

13. The Wittrocks conveyed the 13 Acre Parcel by Warranty Deed to the Spellmans dated on or about March 7, 1994; the Spellmans conveyed the 13 Acre Parcel to Launie T. Mashburn and Kristina L. Mashburn, by quitclaim deed dated on or about May 19, 1995, and Launie T. Mashburn conveyed his interest in the 13 Acre Parcel to Kristina L. Mashburn and the Spellmans by quitclaim deed dated November 26, 1996. *See Exhibits E, F and G to Ellers Affidavit.*

14. On September 30, 1993, the Harlans sold the Riverfront Parcel to Ronald Brumley and other of his family members. (*Deposition of Ronald Brumley* taken on May 18, 2010, hereafter “*Brumley Depo.*”, p. 8, Ins.7-15. True and correct copies of the Brumley Depo. excerpts referred to herein are attached as Exhibit C to the *Ellers Affidavit*).

15. For about a year, until mid-1994, Mr. Brumley’s daughter and son-in-law operated the RV park on the Riverfront Parcel; then Mr. Brumley moved to the Riverfront Parcel to manage the property. (*Brumley Depo.* p. 10, Ins.2-18).

16. After Mr. Brumley moved to the RV Resort in August or September 1994, he never allowed Mr. Mashburn or anyone else to use the Snake River point of diversion on the Riverfront Parcel to irrigate the adjacent parcel. (*Id.* p. 13, Ins. 24-25; p. 14, Ins. 1-4). Mr. Brumley first met Mr. Mashburn in spring of 1995. (*Id.* Ins. 9-16). As Mr. Brumley testified about that first meeting, Mr. Mashburn wanted to “talk about irrigating” and said “something

like ‘We need to make a deal on the water.’ (*Id.* Ins. 23-25, p. 16, Ins. 1-3). Mr. Mashburn did not indicate he believed he had any right to use that point of diversion. (*Id.* p. 16, Ins. 6-9). A couple of months later, in mid-1995, Mr. Brumley testified that Mr. Mashburn:

A....“asked about it [the water], “And I said no. So he then said he was going to get an attorney. And I said that’s fine. That is the thing to do.”

Q. Did he ever get an attorney?

A. Not to my knowledge.”

Q. Did you ever suggest that Mr. Mashburn investigate alternative sources of irrigation for his property?

A. Well, I had told him at that point—I said, ‘You know, Lonnie, all you got to do is get two or three poles and put you down a pump on Jump Creek.’ Because the creek went through both of the properties. And I said, ‘You can have your own pump. And you can irrigate when you wanted.

Q. Did he have any response to your suggestion?

A. ‘Well, that cost money.’...

(*Id.* p. 16, Ins. 17-25, p. 17, Ins. 1-13).

17. In about Spring of 1995 or 1996, a flood washed away the pump platform that had been in place in the Snake River since Mr. Brumley purchased the Riverfront Parcel. (Brumley Depo. p.19, Ins. 2-20). Mr. Brumley had used the platform to irrigate his own property; no one else had any equipment on the platform. (*Id.* Ins. 18-23). Mr. Brumley had a new pier engineered and constructed, and obtained an easement from the State of Idaho under his name allowing the construction in the Snake River. (*Id.* at pgs. 20-21, see also Exhibit D to *Ellers Affidavit*, Exhibit 2 thereto).

18. Mr. Brumley did not intend to confer any rights on the adjacent parcel owners to use the new pier, nor did he have any discussions with them before he built it. (*Brumley Depo.* at p. 22, Ins. 2-9). After Mr. Brumley had the new pier built, he testified about an incident where Mr. Mashburn showed up with a pump in the back of his truck, which he was going to put on the platform, but which Mr. Brumley refused to allow him to place, saying he had bought and paid for the platform, and was not going to allow Mr. Mashburn to use his electricity. (*Id.* at p.

17, lns. 19-25, p. 18, lns. 1-5). That was the last encounter between Mr. Brumley and Mr. Mashburn. (*Id.* p. 18, lns. 5-7). Mr. Mashburn apparently left the area, and his ex-in-laws, the Spellmans, later came to Mr. Brumley and asked to use his pump for irrigation; he again said no. (*Id.* p. 23, lns. 7-25; p. 24, lns. 1-3). There was never any further follow up by the Spellmans with Mr. Brumley. (*Id.* p. 25, lns. 7-12).

19. In April, 1998, the Spellmans sold the 13 Acre Parcel to Claimant William Wilkerson, Sr. (See *Warranty Deed*, Exhibit H to the *Ellers Affidavit*). Mr. Brumley testified that he had one conversation with Mr. Wilkerson by phone, in which Mr. Wilkerson discussed his belief that Mr. Brumley was working on Mr. Wilkerson's property while blocking the old railroad right of way, which Mr. Brumley had just purchased from the Union Pacific. (*Brumley Depo.* at pgs. 25-27). Mr. Brumley never had any discussions or interactions with Mr. Wilkerson relating to irrigation or the use of the Snake River point of diversion, as he testified:

Q. Did you ever have any conversations with Mr. Wilkerson about his wish to use the Snake River point of diversion for irrigation?

A. Never.

Q. Did he ever attempt to access the Snake River RV Park for the purpose of irrigation?

A. Never.

Q. During the time Mr. Wilkerson was your adjoining neighbor did he ever attempt to use the irrigation equipment to cross the Snake River RV parcel?

A. No. Never.

Q. Did he ever come on to maintain it while you had ownership there?

A. Never.

(*Id.* at p. 28, lns. 1-15).

20. In late August, 1999, Mr. Brumley sold the Riverfront Parcel to the Benton Family. (*Id.* lns. 16-19). He stayed on to train them an additional 30 days. (*Id.* at p. 29, lns. 24-25). As Mr. Brumley summarized, during the time he was on the property operating the RV Park from

mid-1994 through late 1999, there was no use of water from the Snake River point of diversion on the Riverfront Parcel by the adjoining landowners. (*Id.* at p. 30, Ins. 18-24).

21. The Benton Family operated the RV Resort for approximately four years, during which no water from the Snake River was diverted or used on the Riverfront Parcel to irrigate the 13 Acre Parcel, according to Dean Benton, one of the family members who lived on site and managed the RV Park. *Affidavit of Dean Benton* ¶ 3, filed on March 12, 2007, in the Easement Case, Exhibit K to the *Ellers Affidavit*. Moreover, as Mr. Benton testified in his affidavit, during his time managing the operation, “I never observed or became aware of any person associated with the 13 acre parcel accessing the pumping station or any conduit or pipelines on the Snake River RV Park property for the purpose of irrigating the adjacent 13 acre parcel.” (*Id.* at ¶ 3).

22. The Benton Family sold the Riverfront Parcel to Objectors in October, 2003. As the *Affidavit of Diane Kritz in Opposition to Claimants’ Motion for Summary Judgment* states, prior to their purchase, Mrs. Kritz inspected the property, and noticed an old unmaintained concrete conduit that was near the old railroad right of way. Mrs. Kritz asked Mr. Benton if there were any easements or other interests in the property, and understood from that response that there were no easements or other interests. She and her other family members—her husband and brother—would not have purchased the Riverfront Parcel had they known Claimants were asserting an interest across the Riverfront Parcel.

23. About three years after Objectors’ bought the Riverfront Parcel, Wilkerson filed his Verified Complaint in the Easement Case on May 24, 2006, alleging that he owns an easement across the Riverfront Parcel for the delivery of water under Water Right No. 02-2318A, from a point of diversion on the Snake River on the Riverfront Parcel to the 13 Acre

Parcel, under three alternative theories: an implied easement by prior use, a prescriptive easement, or in accordance with Idaho Code §42-1102. *See Verified Complaint* at ¶ 16, attached as Exhibit J to the *Ellers Affidavit*.¶

24. On February 27, 2001, IDWR sent a letter to Claimants enclosing the Notice of Claim for Water Right of the same date for Water Right No. 02-2318A, a true and correct copy of which is attached as Exhibit N to the *Ellers Affidavit* (the “2318A Claim”).

25. Mr. Wilkerson’s deposition in the Easement Case was taken on March 2, 2007. *See Ellers Affidavit* at ¶13. Mr. Wilkerson admitted in his deposition that he has never had any irrigation water from the Snake River delivered across the Riverfront Parcel to his 13 Acre Parcel since he purchased it in April 1998. (*Wilkerson Deposition*,. p. 41, lns. 23-25, p. 42, lns. 1-3, true and correct copies of which are attached as Exhibit O to Ellers Affidavit)

26. Wilkerson admitted in his deposition that he has never grown any crops on the 13 Acre Parcel with irrigation water from the Snake River, and that he has not pastured any livestock on the property until approximately one month before his deposition was taken [i.e. February, 2007]. (*Id.* at p. 41, lns 3-11, Exhibit O to the *Ellers Affidavit*).

27. On October 18, 2007, the District Court (Hon. Thomas J. Ryan) in the Easement Case granted Objectors’ summary judgment on two of the three easement claims, dismissing Mr. Wilkerson’s claims for easement by prior use and prescriptive easement. (*See Ellers Affidavit*, Exhibit M).

28. The Wilkerson Affidavit sets forth a number of conclusory and foundationally unsupported assertions, such as purported expert testimony without establishing the requisite qualifications, and is the subject of Objectors’ separate motion to strike. However, to the extent the Wilkerson Affidavit’s statements regarding elevations and ditch calculations are deemed

admissible, Objectors have filed herewith the Affidavit of Norman C. Young in Opposition to Claimants' Motion for Summary Judgment. Mr. Young is a licensed professional engineer with an extensive background in Idaho water matters and a long career with IDWR. His affidavit among other matters, shows that he calculates the net elevation difference in Mr. Wilkerson's property as less than 20 feet, and that a pump is going to be required to irrigate his property whether the point of diversion is assumed to be the Snake River point of diversion on the Riverfront Parcel, or Jump Creek. These technical issues, however, should not be germane to the primary issues of forfeiture, abandonment, waiver and laches that Objectors' raise in opposition to the instant motion.

Relevant to these issues are Mrs. Jackson's deposition and Mr. Larzelier's affidavit, which establish that no water from the Snake River was used to irrigate the 13 Acre Parcel from at least 1982 until after the Wittrocks' purchase in July, 1991. Also key to these issues is Mr. Brumley's deposition testimony, that no water has been diverted from the Snake River to the 13 Acre Parcel since mid-1994 through 1999. Similarly relevant is Mr. Wilkerson's deposition testimony admitted that he has never used water delivered to the 13 Acre Parcel from the Snake River point of diversion since he acquired it in 1998. The evidence supports that there was only a brief delivery of water to the 13 Acre Parcel from the Snake River point of diversion permissively in accordance with the limited three year contractual agreement between the Jacksons and the Wittrocks from July 1991 to mid-1994. The permissive use of the Snake River point of diversion and Water Right No. 02-2318 expired after that three year period. No water has been used on the 13 Acre Parcel under these facts from mid-1994 through the present.

While Claimants have submitted the Affidavit of Launie Mashburn from the Easement Case in which he claims to have irrigated the 13 Acre Parcel from 1994-1996, at most, that

presents an issue of fact as to the last date water from the Snake River point of diversion was used to irrigate the 13 Acre Parcel. Initially, it bears noting that Mr. Mashburn's capacity to testify about the ownership of Water Right No. 02-2318A or the 13 Acre Parcel is questionable, as Mr. Mashburn was never an owner of Water Right No. 02-2318A, as shown on IDWR's list of owners, Exhibit I to the *Ellers Affidavit*. Nor did he have ownership of the 13 Acre Parcel for the entire period his affidavit purports to cover. See Exhibits E, F and G to *Ellers Affidavit*.

Regardless of these foundational defects, Mr. Mashburn alleges one attempted entry onto the Riverfront Parcel--after the pier was washed away and rebuilt by Mr. Brumley to replace the 13 Acre Parcel's pump that had also washed away in the flood. Mr. Wilkerson makes a conclusory allegation that Snake River RV Resort personnel have prevented him access to the point of diversion on the Riverfront Parcel. As will be shown, these attempted entries by Mr. Mashburn and Mr. Wilkerson onto the Riverfront Parcel after the three year period in the Wittrock Contract expired would be in trespass, which may not form the basis of a water right under Idaho law.

These material facts and the applicable case law discussed below merit the denial of summary judgment on Claimants' claimed Water Right, and require a full trial on the merits.

III. LAW AND ARGUMENT

A. Standards For Granting Summary Judgment

Summary judgment shall be granted if the court determines that "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 a judgment as a matter of law." *Bear Island Water Assn. Inc v. Brown*, 125 Idaho 717, 721, 874 P.2d 528 (1994) (*reh. den.*), citing I.R.C.P. 56(c); *Bonz*, 119 Idaho at 541, 808 P.2d at 878. "[T]he court must

evaluate [a] party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.*, quoting *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir.1991) (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987)).

Claimants cite the case of *Intermountain Eye and Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 1221, 1225 (2005) for the proposition that the Court, as the trier of fact in a non-jury case, is entitled to arrive at the most probable inferences on summary judgment, despite the possibility of conflicting inferences. However, that case makes it clear that that standard is only true as to the undisputed evidence properly before it. See *Intermountain Eye, supra*, 142 Idaho at 222. Accordingly, the general rule on summary judgment still applies that the evidence must be construed most favorably to the non-moving party where conflicting evidence is presented. See *Lawrence v. Hutchison*, 146 Idaho 892, 897, 204 P.3d 532 (Ct. App. 2009).

In this case, conflicting evidence exists as to how long the water was used from the Snake River point of diversion on the 13 Acre Parcel after 1991. Objectors' evidence includes Mr. Brumley stating the use was only through mid-1994, which is consistent with the limited three year permissive use agreement that Mrs. Jackson testified extensively about. Mr. Mashburn, relied upon by the Claimants, says the irrigation of the 13 Acre Parcel continued through 1996. Conflicting evidence is also present over the nature and extent of both Mr. Mashburn and Mr. Wilkerson's activities on the Riverfront Parcel and their communications with its owners. Conflicting evidence is also present about which Notice of Claim is the operative one for the purpose of applying the tolling rule on forfeiture, if it is to be applied in this subcase.

These conflicts require that all reasonable inferences be drawn in the Objectors' favor, as the non-moving party. Accordingly, for the purposes of further factual and legal analysis of this case, reasonable inferences would include that no water from the Snake River point of diversion went to the 13 Acre Parcel after mid-1994, that Mr. Mashburn later wanted to "make a deal" with Mr. Brumley to start irrigating again, that Mr. Mashburn never had an attorney contact Mr. Brumley about his use of water, that the Spellmans did not pursue the use of water with Mr. Brumley, and abandoned Water Right No. 02-2318A, and that Mr. Wilkerson never attempted to use or discuss the Snake River point of diversion from April, 1998 until shortly before he filed the Easement Case in 2006. Also, these conflicts show plainly that issues of witness credibility exist, which can only be resolved through a trial.

B. The Director's Report Presumption of Prima Facie Evidence Disappears Once Rebuttal Evidence is Presented, and Claimants Bear the Burden of Proving All Elements of the Claimed Water Right.

Claimants essentially rest proof of their case on the Director's Report from December, 2006 in this Subcase. However, because Objectors have submitted substantial rebuttal evidence that the report is in error regarding the point of diversion and use of water, the prima facie presumption given the Director's Report under Idaho Code section 42-1411 disappears. *See McCray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2001). As the Supreme Court noted in *McCray, supra*, 135 Idaho at 514: "Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant."

Accordingly, in this Subcase, Claimants should be required to proceed through trial and prove the elements of the claimed Water Right No. 02-2318A.

C. Material Issues of Fact Exist as to Forfeiture Prior to the Claim Being Filed in the SRBA.

The SRBA Court has ruled it the law of the case that the filing of a claim in the SRBA tolls the statutory period for forfeiture under I.C. Sec. 42-222. *See e.g., Memorandum Decision and Order of Challenge and Order of Partial Decree* in Subcase 65-0566B (*Wood v. Trout*, filed in May, 2002) (hereafter the “*Wood Decision*”). The Jackson Claim in this matter was filed on January 19, 1990 by Peggy Jackson, seeking to establish Water Right No. 02-2318 from the Snake River point of diversion for 1 cfs on 50 acres. However, the actual 2318A Claim was filed on February 27, 2001. For the purposes of this case, the 2318A Claim’s filing date should govern, as that it is the operative document showing the SRBA filing of the specific water right at issue. The evidence as viewed most favorably to Objectors is that no water was used on the 13 Acre Parcel under Water Right 02-2318A from 1994 through the 2318A Claim’s date of filing on February 27, 2001, constituting a more than five year period of non-use, and therefore qualifying as forfeiture.

Even assuming the Jackson Claim is the operative one, however, substantial evidence of more than five years of non-use of water before January 19, 1990 exists. Both the undisputed deposition testimony of Mrs. Jackson and the affidavit testimony of Mr. Larzelier provide evidence that water from the Snake River was not used to irrigate the 13 Acre Parcel after about 1980 through the date of the Claim’s filing, a lapse of approximately 11 years.

The limited use of the water right during the three year permissive grant to the Wittrocks from 1991-1994 is not properly deemed a resumption, but rather as a license. *See e.g., Rowan v. Riley*, 139 Idaho 49, 56, 72 P 3d 889 (2003), which although in the context of an easement rather than a water right, still provides applicable principles for determining whether an interest is real

or personal property. As the Supreme Court stated in *Rowan, supra*, 139 Idaho at 56: “Licenses, unlike easements, are personal property and are not appurtenant to the land....’[a] license is a permissive use of land by which the owner allows another to come onto his land for a specific purpose.’” *Id.*, citing 25 Am.Jur. 2d *Easements and Licenses* § 2 (1996). As such, it did not change the nature of Water Right No. 02-2318, which was partially forfeited prior to the Wittrocks’ purchase of the 13 Acre Parcel in July, 1991. Resumption of use is not legally cognizable if the water right is no longer “appurtenant” to the property where it is used. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001).

D. Material Issues of Fact Exist as to the Nature of the “Claim” for the Purposes of the SRBA, and Whether the Doctrine of Forfeiture Applies to the Long Period of Non-Use After 1994.

The *Wood Decision* ruling that the filing of a claim tolls the application of forfeiture, rests on the prosecution of the claim to decree. *Wood Decision, supra*, at p. 18. As the *Wood Decision* notes in discussing the SRBA’s prior ruling that the filing of a claim tolls the forfeiture statute, the claim may be abandoned, after which the forfeiture time period may start to run. *Id.* at p. 14, fn. 6. In this case, the drastic change in circumstances after Mrs. Jackson signed the Jackson Claim in 1990, by then entering into the real estate contract with the Wittrocks as purchasers which granted them only permissive use, altered the claim to such an extent that it should be deemed “abandoned” for the purposes of the present case. Also, the extreme lapse of time between the filing of the Jackson Claim and the instant subcase’s determination on the merits—two full decades—makes this Subcase much different than the one in the *Wood Decision*. (See the Court’s analysis in the *Wood Decision, supra*, at p. 20). With no use of irrigation water after mid-1994 until the present, the circumstances here are compelling for the

application of the doctrine of forfeiture. At a minimum, the 2318A Claim's date of February 27, 2001 should be used for this analysis.

Additionally, for the purposes of preserving their rights in this Subcase, Objectors assert that the application of the tolling rule on forfeiture has not been resolved by the Idaho appellate courts, and that this ruling should be reconsidered by the SRBA Court in the compelling context of this Subcase, where long periods of non-use and only brief use pursuant to a limited license exist.

E. Questions of Abandonment Are Inherently Factual, and Require A Trial on the Merits.

In *Jenkins v. State Department of Water Resource*, 103 Idaho 384, 388-389, 647 P.2d 1256 (1982), the Idaho Supreme Court provided important authority on distinguishing between statutory forfeiture and the doctrine of common law abandonment:

We note initially that care must be taken in this type of proceeding to distinguish between abandonment and forfeiture. Each is a related concept but each carries with it distinctive requirements. In the past this Court has used the terms interchangeably, resulting in some confusion. That confusion was compounded by a former statute, now repealed, 1932 I.C.A. § 41-216 (1940 Supp.), which stated that water rights would be "lost and abandoned" by five years of failure to apply them to beneficial uses. It was not until 1944 that this Court clearly pointed out the distinction between the two terms in *Carrington v. Crandall*, 65 Idaho 525, 532, 147 P.2d 1009 (1944). See Hutchins, *The Idaho Law of Water Rights*, 5 Id.L.Rev. 1, 73 (1968). In *Carrington* it was pointed out that forfeiture is a statutory procedure, but that an "actual" abandonment could occur outside the statutory requirements. In the interim, other cases have used the terms interchangeably, e.g., *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956); *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). However, this Court has recently reaffirmed that those terms relate to different legal concepts in accordance with *Carrington*, *supra*. *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976). As stated in *Sears v. Berryman*, *supra*:

"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. Forfeiture, on the other hand, is predicated upon the statutory declaration that all rights to use water are lost where the appropriator fails to make beneficial use of the water for a continuous five year period. I.C. § 42-222(2)." 101 Idaho at 847, 623 P.2d at 459.

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. *Sears v. Berryman, supra*; *Gilbert v. Smith, supra*. Intent to abandon is a question of fact to be decided by the trier of fact. *Sears v. Berryman, supra*.

(Emphasis added). In this case, evidence of the intent to abandon is found in the 1991 real estate purchase agreement which provided for the limited, three year permissive use of the water right, after which the owners of the 13 Acre Parcel were to establish another point of diversion or source that did not involve access over the Riverfront Parcel. Further evidence of abandonment is established by the non-use of irrigation water from the Snake River point of diversion (or any other point of diversion) starting in mid-1994 and continuing through the present. As authoritatively stated in *Jenkins* and prior authority, abandonment is a question of fact, which in the instant case merits denial of Claimants' motion for summary judgment.

F. Material Issues of Fact Exist as to Whether the Attempts to Exercise the Alleged Water Right After 1994 Were in Trespass, and Thus of No Effect Under Idaho Law.

A water right initiated by trespass on private land owned by other parties is invalid under Idaho law. *Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168, 1170 (Idaho 1974) As the Supreme Court further stated in the *Lemmon* case:

Furthermore in the case of *Bassett v. Swenson* [51 Idaho 256, 5 P.2d 722 (1931)] it was held that,

'It is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does

not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void.'

The *Bassett* case involved a trespass upon land privately owned. The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid.

In the case at bar the land designated as the point of diversion and place of use in appellants' original application was private property not owned by the appellants and therefore no valid water right could be developed on it. Since no valid water right was possible, it can be concluded that the application was filed for speculative purposes, not for development of a water right.

Lemmon, supra, 95 Idaho at 780. See also *Branson v. Miracle*, 107 Idaho 221, 226, 687 P.2d 1348, 1353 (Idaho 1984) ("It is established that a valid water right cannot be initiated by trespass onto another's property." (Citations omitted)).

The *Branson* case is particularly instructive to the case at bar, as it also involved questions of access across the lands of another private party to divert the water right in question.

The Supreme Court ruled in that case as follows:

The mere fact that one owns a water right does not vest in the owner thereof the right to enter the lands of another for the purposes of maintaining the flow of water.

"The fact that a party has a water right gives him no right to enter the lands of others for the purpose of constructing ditches and canals across them, except over the public lands of the United States. He must obtain that easement and right of way by purchase or condemnation." *Swank v. Sweetwater Irrigation & Power Co.*, 15 Idaho 353, 360, 98 P. 297, 299 (1908). ^[3]

Bachman v. Reynolds Irrigation District, 56 Idaho 507, 55 P.2d 1314 (1936), involved a case in which respondents were given permission to enter lands owned by appellants for the purposes of diverting water. That permission was later revoked after the respondents had perfected their water right. After the revocation, the respondents continued to enter appellants' property to divert water. The Court held that the respondents could obtain a right to cross appellants' land under the doctrines of adverse possession or prescriptive easement:

" '[R]ight of way for ditches, canals, or other works may be acquired over private lands by grant from the owner thereof. So, also, such right of way may be acquired over the private lands of another by adverse possession, from which a grant, of course, is presumed. Also ditches and canals after their construction, together with their rights of way, may be acquired by prescription The right may have its inception by permission or license, but in order to constitute adverse possession of a right to use a ditch or canal across the land of another, originally given by permission or license, the licensee must have repudiated the license and have brought the knowledge of the repudiation home to the owner of the land, and thereafter must have held adversely for the statutory period' (2 *Kinney on Irrigation and Water Rights*, 2d ed., p. 1870, sec. 1045.)

" 'Under this state of circumstances (use under revocable license or permission) before there can be any adverse holding, it is necessary for the party claiming the easement for a right of way to have repudiated the license or permission, and to have brought the knowledge of such repudiation home to the owner of the land giving such permission; and thereafter he must have continued to have held the right adversely for a time sufficient under the statute for the acquisition to an interest in the land by prescription. The right can not be regarded as adverse, while the licensee acknowledges the right of the land owner and pays compensation for the use of the land.' (2 *Kinney on Irrigation and Water Rights*, 2d ed., p. 1744, sec. 985.)" *Bachman*, 56 Idaho at 518-19, 55 P.2d 1314.

The district court in determining that the Miracles had the right of ingress and egress to maintain their right to the flow of water made no findings regarding the source of that right. It cannot be established from the court's findings of fact whether the Miracles established the requisite elements of prescriptive easement or adverse possession. The determination of whether the Miracles established a right to enter the Bransons' property under either of these grounds or under any other theory is a question of fact.

Branson, supra, 107 Idaho at 227-228 (emphasis added).

Because Wilkerson or his predecessors have no established easement interest in the Riverfront Parcel, their alleged entries upon it are unlawful under Idaho Code § 6-202. That statute provides in relevant part:

6-202. ACTIONS FOR TRESPASS. Any person who, without permission of the owner, or the owner's agent, enters upon the real property of another person which property is posted with "No Trespassing" signs or other notices of like meaning, spaced at intervals of not less than one (1) notice per six hundred

sixty (660) feet along such real property;, without lawful authority, is liable to the owner of such land, ..., for treble the amount of damages which may be assessed therefor or fifty dollars (\$50.00), plus a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails.

Consequently, viewing the facts in the most favorable light to Objectors and drawing all reasonable inferences in their favor, the permissive use of the Water Right No. 02-2318 point of diversion granted to the owners of the 13 Acre Parcel terminated in July, 1994. The sporadic and unsuccessful attempts to use the Riverfront Parcel's point of diversion asserted in the Mashburn and Wilkerson Affidavits amount to nothing more than attempted trespass on the lands of the Riverfront Parcel.

Accordingly, substantial issues of fact remain for determination as to whether Claimants have the right to access the lands of Objectors for the point of diversion claimed. In 2007, the District Court in the easement case granted summary judgment against Claimants' easement claims based on prescriptive easement and continuous use grounds. Only one easement claim remains for further resolution in the Easement Case, and Claimants have made no diligent efforts to prosecute that claim to trial. Nearly three years have elapsed since the District Court in the Easement Case entered summary judgment on two of the three claims in the Easement Case, leaving one for trial. Consequently, they have not established that they have any right to access the point of diversion or place irrigation works on the Riverfront Parcel, and a genuine issue of material fact exists as to the Claimants' alleged right to use the Snake River point of diversion set forth in the Director's Report.

Moreover, even if the doctrines of forfeiture and abandonment are not ultimately applied after a trial on the merits of this Subcase, any Partial Decree issued should either require an

application for transfer of the point of diversion, specify that the result in the Easement Case will control, or otherwise condition the decree to recognize that Claimants' have not established a right of access to the alleged point of diversion.

G. Material Issues of Fact Exist as to the Application of the Doctrine of Laches

The Supreme Court stated in *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241 (2002) the necessary elements to maintain a defense of laches as:

(1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred. (*Citing Henderson v. Smith*, 128 Idaho, 444, 449, 915 P.2d 6, 11 (1996)).

Moreover, "[w]hether or not a party is guilty of laches is a question of fact." *Thomas, supra*, 137 Idaho at 352, *citing Huppert v. Wolford*, 91 Idaho 249, 256, 420 P.2d 11, 18 (1966). "Because the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to all surrounding circumstances and acts of the parties." *Id.* (citations omitted).

Applying these elements to the subcase at bar, substantial fact questions remain for determining whether the doctrine of laches should apply to bar Claimants' claims. Element 1, invasion of plaintiff's rights, is whether Objectors or their predecessors in interest have "invaded" the alleged Water Right 02-2318A by disallowing access to the former point of diversion on the Riverfront Parcel. Element 2 is whether Claimants or their predecessors in interest had notice and an opportunity to institute suit to test their access rights. Clearly, any such right has existed since at least 1995, under the facts most favorable to Objectors presented

from Mr. Brumley's deposition testimony that Mr. Mashburn had notice from Mr. Brumley that no access would be permitted after he arrived and had his first encounter with Mr. Mashburn in early 1995. Despite this knowledge by the owners of the 13 Acre Parcel dating from the mid-90s that they could not use the Snake River point of diversion, no suit to seek easement access was filed until May, 2006.

Element 3, whether the Objectors lacked knowledge of the Claimants' intent to assert their rights, is established for the purposes of the instant motion by the Kritz Affidavit. As Mrs. Kritz testifies, she and her family members had no knowledge prior to purchasing the Riverfront Parcel that Claimants would seek to assert an easement across their property.

Element 4, prejudice to Objectors, is established because with no judicial action taken for over a decade, the Riverfront Parcel had three changes of ownership. The current owners of the Riverfront Parcel had no knowledge that their rights to possession and quiet enjoyment were going to be threatened by the Claimants' alleged easement access from the 13 Acre Parcel. This long delay in asserting Claimants' alleged rights, together with the prejudice to Objectors, presents a classic case for the application of the doctrine of laches. Laches, as inherently dependent on both questions of fact and equity, can only be fairly determined by having a full trial on the merits.

H. Substantial Issues of Fact Are Presented As to the Application of the Doctrine of Waiver.

"Waiver requires a voluntary, intentional relinquishment of a known right that is relied upon by an adverse party and which alter their position." *A & B Irrigation District v. Aberdeen-American Falls Groundwater District*, 141 Idaho 746, 753-754, 118 P.3d 78 (2005) (*reh. den.*)

(citations omitted). "Waiver is a question of fact, and requires a showing of substantial evidence on the record." *Id.*

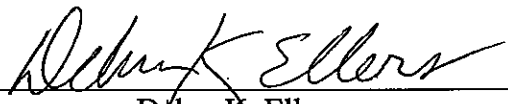
In this case, Objectors have presented substantial evidence that Claimants and their predecessors in interest refused to act in a timely manner to assert their alleged rights. Examples are Mr. Mashburn and Mr. Spellman failing to pursue any access to the alleged point of diversion whatsoever, and Mr. Wilkerson waiting some 8 years after he acquired the 13 Acre Parcel before taking formal action in the Easement Case, which has also not been diligently pursued. Objectors relied on the absence of any asserted easements or other interests when they purchased the Riverfront Parcel in 2003. Consequently, material factual issues relating to waiver are present, and justify denying the instant motion.

IV. CONCLUSION

For the foregoing reasons, the Objectors respectfully request that this Court deny Claimants' motion for summary judgment, and retain the trial setting of September 2, 2010 for a full hearing on the merits to resolve the numerous material factual issues in dispute.

DATED this 24th day of June, 2010.

DEBRA K. ELLERS
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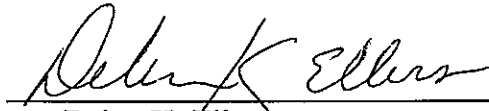
By: 
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2010, I caused to be served copies of the foregoing Brief in Opposition to Claimants' Motion for Summary Judgment by the method(s) indicated below:

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