

JON C. GOULD (ISB # 6709)
RINGERT LAW CHARTERED
455 S. Third, P. O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

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DEPARTMENT OF
WATER RESOURCES

Attorneys for Claimant

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 REPLY TO OBJECTORS'
BRIEF IN OPPOSITION TO CLAIMANTS'
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 submits his reply brief to objectors' Brief in Opposition To Claimants' Motion For Summary Judgment. The Objectors opposition to the Wilkersons' motion for summary judgment is based on the following:

1. Determination of Abandonment requires a trial
2. The Jacksons retained ownership of the water right and granted the Wittrocks a permissive license to use the water right.
3. Objectors submitted rebuttal evidence that the Director's Report is in error regarding point of diversion and use of water.
4. SRBA claim for water right 02-2318A was filed on February 27, 2001.
5. The Doctrine of Forfeiture should be applicable because of a long period of non-use.

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6. Failure and/or inability of Claimant to access the point of diversion prevents this court from ruling in favor of Claimant.
7. Doctrine of Laches bars Claimants claim to water right no. 02-2318A.
8. Doctrine of Waiver prevents Claimants from asserting a claim to water right no. 02-2318A.

I. REPLY

A. **No Evidence That the Jacksons Retained Ownership of the Water Right When They Conveyed the Land to the Wittrocks**

Objectors' allege that the Real Estate Purchase and Sale Agreement ("Agreement") dated July 2, 1991 conveying the 13-acre parcel from the Jacksons to the Wittrocks granted the Wittrocks only permissive use of the water right for the 13-acre parcel. Objectors rely on following language from the Agreement:

Personal property specifically included in the sale: 16 HP pump and motor & split 13 acres of water Snake River - each pay 1/2 power for 3 years use and then to terminate.

See Exhibit B of the *Affidavit of Debra Ellers*, ¶ 3.

This section of the Agreement identifies property specifically included in the sale – not retained by the seller as suggested by the Objectors. The plain language from the Agreement makes it clear that the sale includes the 16 HP pump and motor. Further, the language “split 13 acres water Snake River” is consistent with splitting water right no. 02-2318 to provide the Wilkerson property with its water. Lastly, the phrase “each pay ½ power for 3 years use” is consistent with the actions of the parties. There was only one source of power for two pumps. Therefore the power was split.

Mr. Wittrock's Affidavit states that “[b]ecause Mr. Jackson used some of the power to divert

water for his property, the power bill was split equally between Mr. Jackson and myself.” *Affidavit of Loren Wittrock* at 8. See also Exh. A of the *Affidavit of Debra Ellers*, ¶ 5 (My parents ... gave the Wittrocks limited permission of a few years’ duration to use the irrigation pump and pay for ½ of the power at the point of diversion on the Snake River.)

Neither this language nor subsequent actions of the parties suggest that the Jacksons were expressly reserving the water right. “Unless [water rights] are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention "appurtenances.”” *Joyce Livestock Co. v. United States (In re SRBA Case No. 39576)*, 144 Idaho 1, 36-37 (2007) citing *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990); *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933). Thus, the inquiry is whether the water rights were expressly reserved in the deed conveying the land or whether there is clear evidence that the parties intended that the grantor would reserve them. *Id* at 37. There is nothing in the record indicating that the Wittrocks intended for the Jacksons would reserve the water right. See Exh. G, Affidavit of Loren Wittrock, of the Gould Aff., ¶¶ 9 and 10 (Mr. Jackson never questioned my water right or the right to enter his property to operate, clean, maintain and repair the water delivery system. I was never denied access to the water delivery system on the Jackson property. In the spring of 1994, I sold the Property including the water right and my pump that was located on the pump stand at the point of diversion on the Jackson property to Mr. Spellman.). In the Affidavit of Peggy Jackson in Support of defendants’ Motion for Summary Judgment and In Opposition To Plaintiff’s Motion for Summary Judgment, Ms. Jackson states:

“[w]hen the Wittrocks purchased the 13 Acre Parcel from us in or about July, 1991, the Wittrocks specifically requested both an easement to use the irrigation conduit to deliver water from the Snake River and an access easement across the Riverfront Parcel. My husband and I refused to grant either easement to the Wittrocks as we were concerned about the impact of an irrigation easement on the RV park we had developed on the Riverfront Parcel.” Without a water right there would be no need for an easement.

Equally illustratively of the intent of the parties, at no point have the Jacksons claimed to own the water right after conveying the 13 acre parcel to the Wittrocks or protest the Wittrocks or subsequent owners claim of ownership of the water right. The Objectors have failed to provide clear evidence to support a claim that the Jackson’s reserved the water right when conveying the 13-acre parcel to the Wittrocks.

B. Abandonment Requires Proof of Intent

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).

Objectors rely on the 1991 Agreement to assert that the Jacksons retained ownership of water right no. 02-2318A. The Agreement, as stated above, is not clear and convincing evidence of retention of the water right by the Jacksons nor is it proof of a grant permissive use of the water right. Lastly, non-use of water is not clear and convincing evidence of abandonment. Abandonment

requires an actual relinquishment or surrender of the water right - proof of which is absent here. Objectors have not provided clear and convincing evidence of unequivocal acts to support a finding of abandonment.

C. Director's Report and the Water Right License Are Prima Facie Evidence to Which the No Substantial Rebuttal Evidence Has Been Submitted by the Objectors.

The basis of the objections to this water right are abandonment and lack of use. Objectors allege that they have submitted substantial rebuttal evidence that the report is in error regarding the point of diversion and use of water.

The point of diversion for this water right, T03N R05W S14 NWNW Lot 6 within Owyhee County, has never been questioned. While there may be a question as to the Claimants' ability to access the point of diversion, there is no question as to the point of diversion. The record is absent of any evidence of another point of diversion for water right no. 02-2318A.

Use of water is not an element of Director's Report and claimant is unaware of what is meant by 'use of water.' Assuming Objectors' mean the purpose of use, the purpose of use for water right no. 02-2318A is irrigation. The record in this matter is absent of any evidence suggestion another purpose of use for this water right.

Water right 02-2318A is a licensed water right. See attached *Affidavit of Jon C. Gould*. The effect of a license, as stated in Idaho Code § 42-220, "shall be binding upon the state as to the right of such license to use the amount of water mentioned therein, and shall be **prima facie evidence as to such right**; ..." (Emphasis added). Thus, the right is presumed valid until it is determined otherwise by the SRBA Court or a regulatory agency empowered to make such a determination. No SRBA Court or regulatory agency has found water right number 02-2318A to be invalid for any

reason, including the point of diversion and the use of water. Objectors have failed to present substantial evidence to rebut the presumption afforded to the Director's Report and the Water Right License.

D. The SRBA Claim to Water Right 02-2318a Was Filed on January 19, 1990

The SRBA claim for water right no. 02-2318 was filed on January 19, 1990. Subsequently the water right was split. The splitting on the water right did not affect, compromise or invalidate the date of the claim. The Objectors failed to present any authority in support of their position on changing the date of filing the claim.

SRBA Administrative Order #1, 17(b)(2) notes that the court may stay SRBA proceedings for that water right during the pendency of the administrative proceeding. However, this process does not change the date the SRBA claim was filed. This Court would be inundated with motions to file a late claims if every change in ownership or water right splitting right subsequent to a claim required a new claim.

Objectors' proposition that the date of the claim should be February 21, 2006 lacks merit and is frivolous. Recognizing January 19, 1990 as being the date the claim was filed, both the Forfeiture Tolling Rule and Mr. Wilkerson's inability to access the point of diversion beyond his control prevents forfeiture during the time of 1994 until 2001.

E. Defenses to the Doctrine of Forfeiture Are Not Dependant on the Duration of Non-Use.

Objectors allege that non-use of irrigation water after 1994 until the present are compelling for the application of the doctrine of forfeiture. Objectors do not provide any authority for this position. Claimants are unaware of any authority limiting the defenses to forfeiture that are provided

by Idaho Code § 42-223.

F. Inability of Claimant to Access the Point of Diversion in and of Itself Does Not Compromise Claimants Claim.

The matter before this court is determining if Claimants have a valid water right and, if so, defining the elements of the water right. Access to the point of diversion is not a factor this Court should consider. If water is not put to use, the water right may be at risk of forfeiture. However, Claimants have identified valid defenses to forfeiture of this water right at this time. Other than through forfeiture, Claimants inability to access the point of diversion for this water right does not compromise the claim.

There is a question of whether an easement exists allowing Claimant to transfer water under this water right across property owned by the Objectors. That matter is before the Owyhee District Court. The Owyhee District Court denied the Objectors request for a preliminary injunction preventing the Claimant from accessing the Objectors' property. Claimant has relied upon a civil stand-by when access the point of diversion. Claimants have not been charged with trespass when accessing the point of diversion. Again, Objectors are basing their objection to this water right claim on the existence of an easement. The existence of an easement if not before this Court.

G. Doctrine of Laches Is Not Applicable to this Matter

Objectors application of the doctrine of laches goes to the question of whether an easement exists, not a water right. The claimants have actively asserted their ownership of this water right. A claim for the water right was filed in 1990. The claim was made in a timely manner and accepted by both the Idaho Department of Water Resources and this Court. The timing on the adjudication of this claim is beyond the control of the Claimants. Laches is not applicable to this matter.

H. Doctrine of Waiver Is Not Applicable to this Matter

Claimants have not waived their claim to water right no. 02-2318A. Waiver requires an intentional relinquishment of a known right. A claim for this water right was filed in 1990. Failure to access the point of diversion may suggest forfeiture. The issue of forfeiture and the claimants defense to the same have been discussed earlier in the Reply Brief.

I. Peggy Jackson Lacks Knowledge and Her is Testimony Unreliable

The Objectors may rely on select statements of Peggy Jackson to attempt to create an issue of material fact. This Court should disregard Ms. Jackson's testimony because of it unreliable nature and she lacks personal knowledge of the use of water right no. 02-2318.

Mr. Jackson owned the 50-acre parcel before marrying Ms. Jackson. Jackson Depo at p.12, ln 2-7. Ms. Jackson married Mr. Jackson in 1965. Jackson Depo at p. 12, ln 2-7. Ms. Jackson never resided on the 50 acre-parcel. Jackson Depo at p.59, ln 5. Ms. Jackson worked both full and part-time for the phone company while married to Mr. Jackson. In addition to working for the phone company, Ms. Jackson was a bookkeeper for Jacksons & Sons, Inc, Mr. Jacksons business. Mr. Jackson had multiple farms in the area and a construction business.

Ms. Jackson agreed with the statement proved by Objectors counsel during her deposition that she thought that irrigation of the 13-acre parcel with Snake River water stopped as of about 1980. Jackson Depo at p.26, ln 18-25. Her knowledge of water use on the parcel was gained by visits to her son while he was on the parcel from 1970 to 1990. Jackson Depo at p.75, ln 1-2. Ms. Jackson did not think he watered the 13-acres. Jackson Depo at p.31, ln 23-24. However, Ms. Jackson's son, Doug Larzelier, traveled a lot for his construction employment which included work in Guam for

some time. Jackson Depo at p. 75, ln 14-24. Mr. Larzelier would leave for a year or two. Jackson Depo at p. 75, ln 24-25; p. 26 ln 1.

Mr. Jackson testified that he was irrigating the Wilkerson Property with the Snake River water since at least 1964. Ms. Jackson testified that she do not know Mr. Jackson intended on irrigating the 13-Acre Parcel but she found out when the diversion works were complete. However, Ms. Jackson stated the conduit under the railroad right of way wasn't installed until the 1970s.

Peggy Jackson testified that “[a]s near as I can recall, that parcel that’s now Wilkersons was watered by the Gem Irrigation. When we watered it, we would have had to use their source of water.” Jackson Depo at p.14 ln 1-4. Counsel for the objectors proceeded with other questions and then returns to water use on what is now owned by Wilkerson. Ms. Jackson again identifies the Wilkerson parcel on Exhibit 1 and testifies that “[t]hat parcel, I understood, was being watered by Gem Irrigation originally.” Id at p.20 ln 14-16. She then stated that the Wilkerson area was only watered by the river after she had to go in there [IDWR] and register for when the water adjudication took place.¹ Id at p.21, ln 8-10.

Ms. Jackson assumes the parcel was irrigated with Jump Creek water two or three times a month. Ms. Jackson does not state the basis for the assumption. She states that the water was taken from Jump Creek and “transferred into the ditches.” “There was probably a concrete ditch. I can’t recall if we had a concrete ditch; it seems like we did. And then there were – and it could have been a water ditch – I mean, a dirt ditch. I – I’m not sure on that.”

¹In January, 1990, Ms. Jackson submitted a notarized Notice of Claim for water right no. 02-2318 to the Idaho Department of Water Resources. There is no evidence of any other document relating to this water right being submitted by Ms. Jackson.

Ms. Jackson stated that the 13 acre parcel was irrigated with Jump Creek water by using a generator to pump water from the creek into the ditch. And then it was flowed just like water does flow.” p 63-64 ln25, ln1.

Recognizing that Jump Creek is the lowest point on the 13-acre parcel, Mrs. Jackson’s statement that water was pumped out of Jump Creek into the ditches and “flowed just like water does flow” is extremely flawed. The data supplied by Young (Affidavit of Norman C. Young in Opposition to Motion for Summary Judgment) provides elevation data for the 13-acre Wilkerson parcel. Affidavit of Norman C. Young in Opposition to Motion for Summary Judgment (“Young Aff.”) at 6-7. There is an increase of 17.66 feet in elevation going from the surface of Jump Creek on the property to the northwest corner of the property. In order for water to flow in an open ditch from Jump Creek, as stated by Peggy Jackson (Jackson Depo at p. 64, ln 1.) and using a slope of 4/10’s of 1 percent, Young Aff. at 8c, a ditch depth at the northwest corner of the property of 25.46 feet. Water will not flow uphill in an open ditch.

J. Use of the Water Right from 1970 to 1990

Larzelier’s testimony regarding use of what is now water right no. 02-2318A is limited to statements that he has no record of irrigation. See Exh. L, ¶ 3 of the Affidavit of Debra Ellers,10. Mr. Larzelier does not make an affirmative statement that what is now water right no. 02-2318A was not used. Mr. Asemundi is listed as an owner of the water right during this time period. See Exh. D, Affidavit of Jon C. Gould.

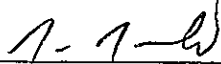
V. CONCLUSION

The objections to water right no. 02-2318A are without merit and the response by Objectors

raises frivolous allegations. 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 1st day of July, 2010.

RINGERT LAW CHARTERED

By: 
Jon/C. Gould

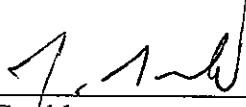
CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the within and foregoing document was made this 1st day of July, 2010, by facsimile and U.S. mail, postage prepaid, to each of the parties listed below:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098
Fax: (208) 287-6700

Dana L. Hofsetter
HOFFSETTER LAW OFFICE, LLC
608 W. Franklin Street
Boise, Idaho 83702
Fax: (208) 424-8774

Debra K. Ellers
Attorney At Law
P.O. Box 1122
McCall, Idaho 83638
Fax: (208) 634-9946


Jon Gould