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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 SUPPORT OF
OBJECTORS' MOTION FOR
RECONSIDERATION**

I. INTRODUCTION

Objectors Raymond C. Barker, Jr., Charles J. Kritz, Jr. and Diane B. Kritz respectfully submit this Brief in Support of Objectors' Motion for Reconsideration of the Order Denying Motion to Strike, Granting Summary Judgment and Vacating Trial and Special Master Report filed on August 25, 2010 (hereafter, the "Order"). This Brief is supported by the Affidavit of Norman C. Young in Support of Motion for Reconsideration filed herewith, and other matters of

record. In particular, Objectors incorporate by reference their Motion to Strike, Memorandum in Support of Motion to Strike, Brief in Opposition to Claimants' Motion for Summary Judgment, the Affidavit of Debra K. Ellers in Opposition to Summary Judgment, the Affidavit of Norman C. Young in Opposition to Motion for Summary Judgment and the Affidavit of Diane Kritz in Opposition to Summary Judgment.

The grounds for this Motion for Reconsideration include (i) the Order incorrectly concluded that the Motion to Strike was no longer relevant based on Objectors' own evidence, and consequently made an incorrect finding of fact regarding Objectors' or their predecessors' alleged attempts to block Mr. Wilkerson or his predecessors from exercising Water Right No. 02-2318A; (ii) Subcase issues relating to the doctrines of abandonment, waiver and laches are factual, and based on the material facts in dispute and inferences therefrom in the record, require denial of Claimants' Motion for Summary Judgment and proceeding to trial; (iii) for purposes of preserving this issue, Objectors contend that the doctrine of forfeiture should be applied in this Subcase; and (iv) in any event, any Partial Decree of Water Right 02-2318A should contain a remark in the point of diversion element that no right of way or easement is conferred across the property of another.

II. LAW AND ARGUMENT

A. Standards On Motions for Reconsideration

A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. I.R.C.P. 11(a)(2)(B). A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new

evidence, although is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

B. The Order Incorrectly Found that the Objectors' Own Evidence Showed Denial of Access Due to Circumstances Beyond the Wilkersons' and their Predecessors' Control, and Consequently, Erred in Concluding that the Motion to Strike Was Irrelevant.

The Order states on p. 9 that:

Regardless of some periods of non-use, the successive owners of the 37 acres—the Jacksons, Harlans, Brumleys, the Bentons, and finally, the Kritzs and Mr. Barker—prevented anyone else from using the point of diversion on their land. By their own Affidavits, the objectors demonstrate their consistent and unyielding efforts to bar anyone else from accessing the Snake River point of diversion.

There is no evidence in the record that the earlier owners of the 37 acres, the Jacksons and Harlans, prevented anyone from accessing the Snake River point of diversion. Indeed the evidence is to the contrary in the Wittrock affidavit attached as Exhibit G to the Affidavit of Jon Gould, which states that the Wittrocks were permitted to use Water Right 02-2318A during their ownership of the 13 Acre Parcel. As pointed out, this three year period of the Wittrocks' use of the Water Right coincides with the three year permissive agreement in the Real Estate Purchase and Sale Agreement.

Moreover, there is no evidence in the Brumley Deposition, Benton Affidavit or the Kritz Affidavit that these owners refused to allow Mr. Wilkerson access. Mr. Brumley testified in his deposition that Mr. Wilkerson never raised the issue of water rights while Mr. Brumley owned the 37 acres through September 1999. In fact, 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.

(Brumley Deposition at p. 28, Ins. 1-15, attached as Exhibit C to the Ellers Affidavit).

The Benton Affidavit simply states that from 1999-2003, the conduit crossing the 37 acre parcel was never used to deliver water to the 13 acre parcel. (Exhibit K to *Ellers Affidavit*). It does not state why, or refer to any efforts to bar Mr. Wilkerson from access. Similarly, the Kritz Affidavit does not state that Mr. Wilkerson was prevented from exercising access; it references Mr. Wilkerson's actual access of the property in 2006-2008 with the Owyhee County Sheriff. Consequently, the primary evidence of efforts to block access to the Snake River point of diversion are from Claimant's own affidavit, *Affidavit of William Wilkerson, Sr.*, filed on June 10, 2010, which suffers from the many legal deficiencies outlined in Objectors' Motion to Strike.

Erroneously, the Order made the following conclusion of law on p. 9: "2. The objectors' Motion to Strike is no longer relevant in light of the above material facts wholly supported by objectors own pleadings and affidavits." As shown above, the Objectors' own evidence did not provide this factual support; it was incumbent on Claimant to come forward with admissible evidence to support his contention that he and his predecessors were denied access to the point of diversion through circumstances beyond their control. The Motion to Strike thus should have been addressed and decided, and it was error to avoid it.

Absent this affidavit, the facts do not exist in the record to support a finding of Objectors' or their predecessors' "consistent and unyielding efforts to block access." Nor do they establish that the denial of access was due to circumstances beyond their control, where no

meaningful efforts were taken to establish any alleged right of way until Claimant filed the Easement Case in May, 2006. Rather, a reasonable inference can be drawn that the owners of the 13 acre parcel, in the case of the Mashburns and Spellmans, simply “gave up” on their water right and moved on, or in the case of Mr. Wilkerson, unduly delayed exercising his rights by waiting over 8 years from the date of his purchase of the property to file a complaint asserting a right of way access across the 37 acre parcel to the Snake River point of diversion. Either inference supports the doctrines of abandonment, waiver or laches, and creates an issue of fact meriting the denial of summary judgment.

C. Questions of Abandonment, Waiver and Laches 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 stated that 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." (*quoting Sears v. Berryman* 101 Idaho at 847, 623 P.2d at 459). "Intent to abandon is a question of fact to be decided by the trier of fact." *Jenkins, supra*, 103 Idaho at 389 (*quoting Sears v. Berryman, supra*). (Emphasis added).

The Supreme Court stated in *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241 (2002) “[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).

“Waiver is a question of fact....” *A & B Irrigation District v. Aberdeen-American Falls Groundwater District*, 141 Idaho 746, 753-754, 118 P.3d 78 (2005) (*reh. den.*) (citations omitted). Consequently, material factual issues relating to all three doctrines—abandonment, laches and waiver are present in this subcase, and justified denying the summary judgment motion.

D. For the Purposes of Preserving this Issue , Objectors Contend that Material Issues of Fact and Law Exist as to the Whether the Doctrine of Forfeiture Applies under the Facts of this Subcase.

Objectors understand that the Special Master is bound to apply the tolling rule on forfeiture as held in the *Order on Challenge (Consolidated Issues) of “Facility Volume Issue and “Additional Evidence” Issue*, Subcase 36-2708 *et al.*, December 29, 1999, at 27-28. However, for the purposes of preserving this issue, Objectors continue to assert that unique material issues of fact and law exist in this Subcase that merit the application of the doctrine of forfeiture in I.C. § 42-222. Consequently, for the purposes of preserving their rights in this Subcase, Objectors assert that the application of the tolling rule under the unique facts and circumstances of this Subcase should be reconsidered.

E. Established Law and IDWR Practice Dictate that a Remark Should Be Included in the Partial Decree Point of Diversion Element Confirming that the Partial Decree Does Not Confer the Right of Access Across the Property of Another.

As stated on page 22 of Objectors’ Brief in Opposition to Claimants’ Motion for Summary Judgment, “[a]ny 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.” (Emphasis added). However, the Special Master’s Recommendation for the actual Partial Decree failed to include language confirming that it is not purporting to

confer any alleged right of way or easement access by the owner of the 13 Acre Parcel across the Riverfront Parcel to the Point of Diversion on the Snake River.

Idaho Code § 42-1411(2)(j), regarding the director's report, requires the inclusion of "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right...." In turn, SRBA Partial Decrees must "contain or incorporate a statement of each element of a water right," including any such remarks. I.C. § 42-1412(6).

IDWR routine practice where a point of diversion is located on the property of another is to include a condition of approval, which states that a water right does not grant a right of way or easement across the property of another. *See Affidavit of Norman C. Young in Support of Motion for Reconsideration*, (hereafter "*Young Affidavit*") ¶¶ 6 and 7.

An example of such a condition of approval in a license is attached as Exhibit A to the *Young Affidavit*. Exhibit A to the *Young Affidavit* is a copy of IDWR Water Right License for Water Right No. 37-07854. That License states under "Conditions of Approval," item 8 that "[t]his right does not grant any right-of-way or easement across the land of another." Mr. Young states that it is IDWR's past and current practice to include this or similar language where the applicant does not own the point of diversion, place of use or locations along the conveyance system. *See Young Affidavit*, ¶ 7.

This IDWR practice reflects the prevailing rule of law articulated in *Branson v. Miracle*, 107 Idaho 221, 227, 687 P.2d 1348, 1353 (Idaho 1984) that:

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).

In this Subcase, with the Easement Case in Owyhee County having one easement claim still pending, and the recommended Point of Diversion located on Objectors' real property, it is "necessary" to include a remark to clarify no right of access is being accorded to Claimants in the SRBA. Accordingly, the point of diversion element of the Partial Decree issued in this matter should include identical language to that used in IDWR Licenses stating that the water right does not grant any right of way or easement across the land of another.

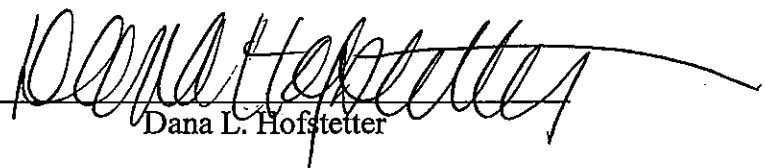
III. CONCLUSION

For the foregoing reasons, the Objectors respectfully request that this Court grant Objectors' Motion for Reconsideration, grant Objectors' Motion to Strike, deny Claimants' Motion for Summary Judgment, and set the matter for trial, and in any event, make a recommendation for a Partial Decree with a remark that the water right does not grant a right of way or easement across the property of another.

DATED this 8th day of September, 2010.

HOFSTETTER LAW OFFICE, LLC

By:

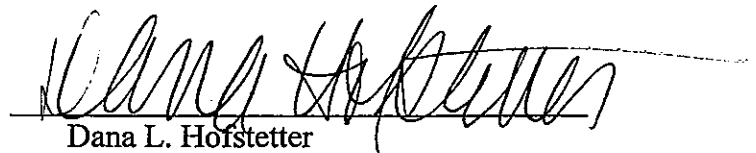

Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2010, I caused to be served copies of the foregoing Brief in Support of Objectors' Motion for Reconsideration by the method(s) indicated below:

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