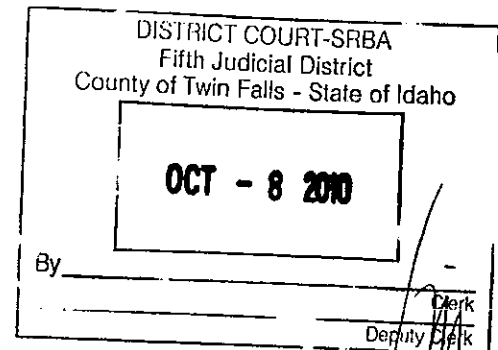


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

SUBCASE NO. 02-2318A

CLAIMANTS' RESPONSE TO
 OBJECTORS' MOTION TO
 ALTER OR AMEND

COMES NOW Claimants, by and through their counsel of record, Jon C. Gould of the law firm Ringert Law Chartered, and hereby lodge this response to Objectors' *Motion to Alter or Amend* (hereafter "*Motion*").

On August 25, 2010, the Special Master issued the *Order Denying Motion to Strike, Granting Summary Judgment and Vacating Trial and Special Master Report*, (hereafter "*Order*"). On September 28, 2010, Objectors filed their *Motion*. Objectors' *Motion* should be denied on both procedural and substantive grounds.

I. Legal Authority

Under this Court's Administrative Rule 13(a), a Motion to Alter or Amend must be filed within 21 days from the date the Special Master's Recommendation appears on the Docket Sheet. Administrative Rule 13(a) serves the same purpose as Idaho Rule of Civil Procedure 59(e). Rule

59(e) affords the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982).

II. Objection to Late Filing

A. Objectors Motion to Alter or Amend Is Untimely

In this case, the *Order* appeared on the Docket Sheet on August 25, 2010. Objectors' *Motion* was filed on September 28, 2010, 34 days after the *Order* appeared on the Docket Sheet. Thus, Objectors' *Motion*, filed 13 days late, is untimely.

B. Objector's Motion is Without Merit

The Objectors are seeking to have the *Order* amended because they allege (1) the *Order* incorrectly found that the Objectors' own evidence showed the Wilkersons' and their predecessor's were denied access to the point of diversion, (2) abandonment, waiver and laches are questions of fact requiring a trial, (3) the doctrine of forfeiture does not apply, and (4) a remark should be added to the Partial Decree.

1. Denial of Access to Point of Diversion

The Court had substantial evidence demonstrating that Mr. Wilkerson and his predecessors were denied access to the point of diversion. Because the Court did not rely on the portions of the affidavits identified in the Objectors' *Motion to Strike*, the Court correctly found the *Motion to Strike* was no longer relevant.

a. Substantial Evidence of Denying Access

Evidence showing the Objectors refusal to allow access, other than the Affidavits of William Wilkerson and Launie Mashburn, is attached to the *Affidavit of Debra K. Ellers in Opposition to*

Motion for Summary Judgment (hereafter "*Ellers Aff.*") including but not limited to Ex. C - Brumley Deposition, Ex. D - Brumley Affidavit, Ex. J - Wilkerson Verified Complaint, and Ex. O - Deposition of Mr. Wilkerson. Also, the *Affidavit of Diane Kritz in Opposition to Motion for Summary Judgment* demonstrates that the Objectors denied Mr. Wilkerson access. (See ¶ 7, p.3, Mr. Wilkerson made "several efforts in about 2006-2008 to enter our property in unauthorized, threatening and annoying actions Our property is posted with "No Trespassing" signs in accordance with Idaho law. Had we known before completing the purchase of our property in October, 2003 that we would experience trespass, disruptive activities and claimed interests from an adjacent property owner [Wilkerson], we would not have completed the purchase and . . .").

b. No Basis to Strike Portions of the Wilkerson and Mashburn Affidavits Relating to Access

Under Idaho Rules of Evidence 602, 702, 801, and the best evidence rule, Objectors sought to strike portions of the Affidavits of Mr. Wilkerson and Mr. Mashburn. There is not indication that the Court, in making its Findings of Fact and Conclusions of Law, relied on the statements identified by the Objectors in their *Motion to Strike*.

Rule 602 requires the affiant to have personal knowledge of the matter to which he testifies. Under Rule 602, Objectors move to strike ¶¶ 7, 8, and 10 of the Wilkerson Affidavit. The statements in ¶¶ 7 and 8 are not relevant to point of diversion access. The statement in ¶ 10 ("Snake River RV Resort personnel have prevented my from accessing my water right 's point of diversion and diverting water under my water right since I purchased the Property in 1998.") is based solely on Mr. Wilkerson's personal knowledge and should not be stricken. The statement is also consistent with sworn statements in the record made by Ms. Jackson (*Ellers Aff.*, Ex. A), Mr. Brumley (*Ellers Aff.*,

Exs. C and D), Mr. Benton (*Ellers Aff.*, Ex. K), Mr. Wilkerson (*Ellers Aff.*, Exs. J and O) and Ms. Kritz.

In support of striking Mr. Mashburn's sworn testimony, Objectors rely on two incorrect premises. First, that in order to provide sworn testimony about a water right, the affiant must own the water right. Then, Objectors wrongly assert that the IDWR list of owners (*Ellers Aff.*, Ex. I) is proof of ownership. The IDWR list of owners is for compiled for administrative purposes. Therefore, there is no support for striking Mr. Mashburn's statements relating to the water right.

Additionally, the Objectors moved to strike ¶¶ 12, 14, 15, and 23 from the Wilkerson Affidavit and ¶¶ 11 and 12 from the Mashburn Affidavit. These statements do not relate to the access issue and it does not appear that the Court relied on those paragraphs in concluding that Mr. Wilkerson and his predecessor's were prevented from accessing the point of diversion. There is no error in the Court's conclusion that the Objectors' *Motion to Strike* became irrelevant.

2. The Court Did Not Error Regarding Abandonment, Waiver and Laches

Objectors state that issues relating to the doctrine of abandonment, waiver and laches require the court to deny Claimants' *Motion for Summary Judgment*. Abandonment requires a showing of intent to abandon. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384 (1982). The Court found that "the evidence is abundantly clear that the successive owners of the 13 acres - the Wittrocks, the Spellmans, the Mashburns and finally the Wilkersons - did not intend to abandon their right to divert water from the Snake River." *Order* at p.9. Objectors have failed to demonstrate error in this finding.

While determination of waiver and laches may be a question of fact, the mere act of alleging those defenses does not *per se* create a genuine issue of material fact preventing a court from

granting summary judgment. If that were case, alleging waiver or laches would be an absolute bar from a grant of summary judgment – a completely absurd position. Here, Objectors, in their post Order filings, have not provided any facts to even suggest waiver or laches is applicable or that the Order is need of correction.

3. The Wilkersons Have Valid Defenses to Forfeiture

This Court held that the case law clearly bars forfeiture in this case. The Objectors argue that the existing case law should be reconsidered. This Court lacks the authority or ability to ignore the law of the case.

4. Remark Is Not Necessary

Remarks on water rights must be necessary for the definition of the right or for the efficient administration of the water right. I.C. §42-12(6). The remark requested by the Objectors is a general statement of law and is not necessary to define or efficiently administer the water right.

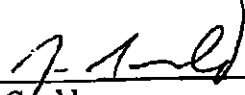
Also, through their *Motion*, Objectors can seek to correct errors of fact or law in the *Order*. The addition of the remark is would not be a correction of fact or law. Furthermore, Objectors cannot raise issues for the first time or submit new evidence as part of this *Motion*. There is no basis for adding a remark to the Wilkerson water right.

III. Conclusion

Objectors have failed to demonstrate, let alone allege, good cause for the untimely filing of their *Motion*. Furthermore, Objectors failed to state any grounds that warrant altering or amending the *Order*. Therefore, Objectors' *Motion* should be denied.

DATED this ____ day of October, 2010.

RINGERT LAW CHARTERED

By 

Jon C. Gould

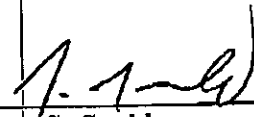
Attorneys for Claimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of October, 2010, I caused to be served a true and correct copy of the foregoing document by mailing a copy by U.S. mail, postage prepaid to the following:

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