

1-31

Dana L. Hofstetter, ISB No. 3867
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, Idaho 83702
Telephone: (208) 424-7800
Facsimile: (208) 424-8774

RECEIVED
FEB 01 2011
DEPARTMENT OF
WATER RESOURCES

Debra K. Ellers, ISB No. 3497
ATTORNEY AT LAW
P.O. Box 1030
McCall, Idaho 83638
Telephone: (208) 315-2827
Facsimile: (208) 634-9946

Attorney for Raymond C. Barker, Jr.
Charles J. Kritz, Jr. and Diane B. Kritz

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

**OBJECTORS' REPLY BRIEF ON
MOTION FOR
RECONSIDERATION AND
MOTION TO ALTER OR AMEND**

Objectors Raymond C. Barker, Jr., Charles J. Kritz, Jr. and Diane B. Kritz submit this reply brief on their *Motion for Reconsideration* filed on August 28, 2010, and *Motion to Alter or Amend* filed on September 28, 2010. Both *Motions* contend that the Special Master erred in the *Order Denying Motion to Strike, Granting Summary Judgment and Vacating Trial and Special Master Report* filed on August 25, 2010 (hereafter the "Order"), by failing to strike the

inadmissible portions of Claimants' *Affidavit of William Wilkerson, Sr.* and *Affidavit of Launie Mashburn* submitted in support of their *Motion for Summary Judgment*, and by recommending that summary judgment be entered against Objectors' affirmative defenses including forfeiture, abandonment, laches and equitable estoppel, or in the alternative, by failing to include a remark in the *Partial Decree* portion of the *Order* that no easement or right of access across the property of another is granted by Water Right 02-2318A.

This *Reply* addresses the points raised in Claimants' *Response*, and why Objectors' *Motions* should be granted.

1. Objectors' *Motion to Alter or Amend* Was Timely Filed.

As set forth in the accompanying *Affidavit of Dana L. Hofstetter*, the Special Master's *Order* is deemed "to appear" on the docket sheet on the 7th day of the following month. This is because the SRBA docket sheet issues at the beginning of the following month for the preceding month. Thus, for example, the August, 2010 Docket sheet, which listed every matter filed with the SRBA Court for August, 2010, including the *Order* at issue, was deemed "to appear" on September 7, 2010. Consequently, Objectors' *Motion to Alter or Amend* filed on September 28, 2010, was timely filed.

2. The Motion to Strike Should Have Been Granted.

As Objectors detailed in their *Motion to Strike* and *Memorandum in Support*, many portions of the *Affidavit of William Wilkerson* and *Affidavit of Launie Mashburn* were inadmissible, and should have been stricken. However, the *Order* refused to rule on *the Motion to Strike*, erroneously deeming it moot.

In an analogous case involving a motion to strike affidavits submitted on a motion for summary judgment, the Idaho Supreme Court ruled it reversible error for the lower court not to

first issue a ruling on the admissibility of the affidavits. *See Montgomery v. Montgomery*, 147 Idaho 1, 205 P.3d 650 (2009), *reh. den.* In that case, the Supreme Court noted the well-settled rule requiring the admissibility determination be made first, before proceeding to consider the merits of the summary judgment:

For nearly two decades, the appellate courts of this state have consistently held that the trial courts must determine the admissibility of evidence as a "threshold question" to be answered before addressing the merits of motions for summary judgment. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992); *Ryan*, 123 Idaho at 45, 844 P.2d at 27. We recently reiterated this rule in *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007):

When considering evidence presented in support of or opposition to a motion for summary judgment, a court can only consider material which would be admissible at trial. *Petricevich v. Salmon River Canal, Co.*, 92 Idaho 865, 869, 452 P.2d 362, 366 (1969); I.R.C.P. 56(e). Thus, if the admissibility of evidence presented in support of a motion for summary judgment is raised by objection by one of the parties, the court must first make a threshold determination as to the admissibility of the evidence "before proceeding to the ultimate issue, whether summary judgment is appropriate." *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999) (quoting *Ryan*, 123 Idaho at 45, 844 P.2d at 27).

In this instance, the magistrate judge refused to apply governing legal standards, despite having been directed to controlling legal authority. Simply stated, he failed to do the work required of every trial judge confronted with objections to evidence offered in connection with a summary judgment motion. This was an abuse of discretion.

A trial court's failure to determine the admissibility of evidence offered in connection with a motion for summary judgment is error that may not be remedied on appeal. *Gem State*, 145 Idaho at 15-16, 175 P.3d at 177-78. This is because the admissibility of evidence is a matter committed to the discretion of the trial court. *Id.* at 15, 175 P.3d at 177 (citing *Athay v. Stacey*, 142 Idaho 360, 366, 128 P.3d 897, 903 (2005)). When the discretion exercised by a trial court is affected by an error of law,

the role of the appellate court is to note the error made and remand the case for appropriate findings. *Id.* at 16, 175 P.3d at 178 (citing *Miller v. Haller*, 129 Idaho 345, 351, 924 P.2d 607, 613 (1996)).

Montgomery, *supra*, 205 P.3d at 655-656.

Similarly, in this Subcase, it was error not to consider and rule on the threshold question of admissibility. This error, if not corrected at this stage, will rise to the level of reversible error on appeal, requiring a remand for further findings. The failure to address the admissibility of the *Wilkerson and Mashburn Affidavits* is critical in this case.

Absent these *Affidavits*, the record does not contain support for the Special Master's finding in the *Order* that Wilkerson's or his predecessors' non-use of his water right was legally insufficient to support the application of the doctrines of abandonment, forfeiture, laches or equitable estoppel, because of the Objectors' or their predecessors' refusal to allow access to the alleged Point of Diversion on the Riverfront Parcel. The evidence from Mr. Brumley shows, at most 2 incidents in the mid-90s where Mr. Mashburn sought to use Water Right 02-2318A and was denied. The record is devoid of admissible evidence that Mr. Wilkerson ever tried to use that Water Right until approximately 2006, despite having owned the 13 Acre Parcel since Spring, 1998. (See *Affidavit of Diane Kritz in Opposition to Claimants' Motion for Summary Judgment*). This decade-long period of non-use has no explanation in the record, absent the *Wilkerson Affidavit*. The inferences that must be drawn in favor of Objectors on summary judgment dictate that a trial on the merits should be held to determine whether Wilkerson or his predecessors' lengthy non-use supports the application of Objectors' affirmative defenses of abandonment, forfeiture, laches or equitable estoppel.

3. Inferences in Favor of Objectors and Disputed Issues of Material Fact Merited Denial of Summary Judgment on Objectors' Affirmative Defenses.

The extended periods of non-use of the water on the 13 acres now owned by Claimants support the application of the legal doctrines of abandonment, forfeiture, laches and equitable estoppel, based on the authorities and arguments in *Objectors' Brief in Opposition to Motion for Summary Judgment*, which is incorporated by reference and contains numerous Idaho cases holding that these doctrines involve the application of issues of fact. Because genuine issues of material fact exist as to these legal doctrines that negate the subject water right in this matter, summary judgment should be denied, and a full trial on the merits held.

4. A Remark That the Partial Decree Does Not Grant an Easement or Right of Access Across the Property of Another Is Necessary to Clarify the Point of Diversion Element and to Administer the Water Right.

Both in their *Brief in Opposition to Claimants' Motion for Summary Judgment* at p. 22, and on their *Motion for Reconsideration*, Objectors raised the issue of adding a remark to the Partial Decree to state that no easement or right of access is being granted under Water Right No. 02-2318A, since the element of the Point of Diversion is being decreed on Objectors' property. Thus, Claimants' assertion on p. 5 of their *Response* that this issue cannot be raised now is without merit.

As the *Affidavit of Norman C. Young in Support of Motion for Reconsideration* filed on September 8, 2010 noted, IDWR's practice, where the water right holder does not own the property on which a point of diversion or place of use is located, is to state that no right of access or easement is being granted by the license at issue.

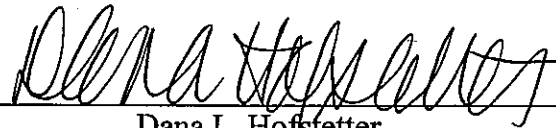
This statement simply follows established Idaho law, which is that an easement for the delivery of irrigation water is separate from a water right to divert water. *See Branson v. Miracle*, 107 Idaho 221, 227, 687 P.2d 1348, 1354 (1984) ("The mere fact that one owns a water right does not vest in the owner thereof the right to enter the lands of another for the purposes of maintaining the flow of water."). It is crucial for the Claimants or later prospective purchasers of the 13 Acre Parcel or *Water Right No. 02-2318A* to have notice that the mere existence of a Partial Decree as to that Water Right does not allow access across the Objectors' Riverfront Parcel. Whether an easement exists remains for determination in the Owyhee County case pending before Judge Ryan. Similarly, a watermaster or other administrator should be aware that the Partial Decree does not establish that a right of access to the Point of Diversion exists. Accordingly, a clarifying remark pursuant to I.C. § 42-1411(2)(j) should be added to the Point of Diversion element of the *Special Master's Recommendation* in this Subcase.

5. Conclusion.

For the foregoing reasons, the Objectors respectfully request that the Special Master grant their Motion for Reconsideration and Motion to Alter or Amend, which would deny Claimants' motion for summary judgment, and have the trial rescheduled, or alternatively, add the clarifying remarks to the Partial Decree as requested above.

DATED this 31st day of January, 2011.

HOFSTETTER LAW OFFICES LLC

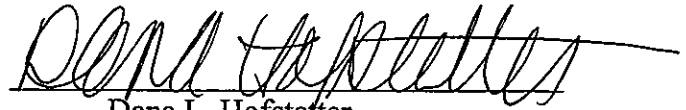
By: 
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2011, I caused to be served a copy of the foregoing document on the following by the postage pre-paid method below:

IDWR Director
P. O. Box 83720
Boise, Idaho 83720-0098
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Jon C. Gould *Facsimile No. (208) 342-4657*
Ringert Law
P.O. Box 2773
Boise, ID 83701-2773
☐ U.S. Mail ☐ Fed Ex ☐ Hand ☒ Fax


Dana L. Hofstetter