

RECEIVED

JUN 20 2011

DEPARTMENT OF
WATER RESOURCES

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

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

Attorneys 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

**OPENING BRIEF IN SUPPORT OF
OBJECTORS' NOTICE OF
CHALLENGE**

I. INTRODUCTION

Objectors Raymond C. Barker, Jr., Charles J. Kritz, Jr. and Diane B. Kritz respectfully submit this Opening Brief in Support of Objectors' Notice of Challenge. The grounds for this Notice of Challenge include (i) an incorrect finding of fact from Objectors' own affidavits regarding Objectors' or their predecessors' alleged attempts to block Mr. Wilkerson or his predecessors from exercising Water Right No. 02-2318A and the consequent erroneous conclusion that Objectors' Motion to Strike Mr. Wilkerson's Affidavit was no longer relevant, and; (ii) Subcase issues relating to the doctrines of abandonment, forfeiture, waiver and laches

are largely factual, and based on the material facts in dispute, inferences therefrom in the record and applicable law, require denial of Claimants' Motion for Summary Judgment and proceeding to trial; and (iii) in any event, any Partial Decree of Water Right 02-2318A should contain a remark in the point of diversion element stating that no right of way or easement is conferred across the property of another.

II. STATEMENT OF FACTS

1. Objectors own a 37 acre property which fronts the Snake River ("the Riverfront Parcel") near Homedale, Idaho, which is outlined in yellow on Exhibit A hereto (which is also attached as Exhibit A to the *Affidavit of William Wilkerson, Sr.*, filed on June 10, 2010 ("*Wilkerson Affidavit*"). 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.*

2. Claimants own the 13 acre parcel outlined in black on Exhibit A ("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*").)

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, Ins. 21-25, p. 13, Ins. 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, Ins. 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, Ins. 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, Ins. 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, Ins. 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.*, 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. (*Id.* at p. 34, Ins. 18-23).

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”). A remark on the Jackson Claim states that the Idaho Department of Water Resources’ (“IDWR”) database indicated that the Claim had been filed and the fee paid previously but that a copy of the previously submitted claim could not be located. This appears to be why the Jackson Claim is dated January 19, 1990 but its date of receipt is identified as October 7, 1988. 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, Ins. 1-13). The Wittrocks requested to use the water supply from the River, conveying it under the railroad track. (*Id.*, Ins. 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 these water use terms discussed with the Wittrocks which was intended to preserve the value of the Riverfront Parcel which they were retaining and developing into an RV park:

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 section 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.” (Attached hereto as Exhibit B, also 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, as corroborated by the documentation, 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 [on the map], 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, lns. 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, lns. 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, lns.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, lns.2-18).

16. After Mr. Brumley moved to the RV Resort in August or September 1994, neither Mr. Mashburn nor anyone else used the Snake River point of diversion on the Riverfront Parcel to irrigate the 13 Acre Parcel. (*Id.* p. 14, lns. 24-25; p. 15, lns. 1-4). Mr. Brumley first met Mr. Mashburn in spring of 1995. (*Id.* p. 15, lns. 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.* lns. 23-25, p. 16, lns. 1-3). Mr. Mashburn did not indicate he believed he had any right to use that point of diversion. (*Id.* p. 16, lns. 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, lns. 17-25, p. 17, lns. 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, lns. 2-20). Mr. Brumley had used the platform to irrigate his own property; no one else had any equipment on the platform. (*Id.* lns. 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 13 Acre Parcel owners to use the new pier, nor did he have any discussions with them before he built it. (*Brumley Depo.* at p. 22, lns. 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 constructing traffic impediments on Mr. Wilkerson's property when the work was actually being performed on 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. (*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 13 Acre Parcel 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* (hereafter “*Benton Affidavit*”) ¶ 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* (hereafter “*Kritz Affidavit*”) 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 January 26, 2007, while the Easement Case remained pending, Objectors timely filed their Objection in this subcase, asserting that Water Right No. 2-2318A should not exist based on “abandonment/non-use” and attached the affidavit of Claimants’ son, William R. Wilkerson, Jr. in support. The Affidavit of William R. Wilkerson, Jr. stated that although he had resided next to the 13 Acre Parcel for about 9 years prior, “[d]uring this period of time, no water was used to irrigate my father’s 13 acre parcel on the southern side of the Snake River R.V. Park property.”

25. Mr. Wilkerson, Sr.’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, leaving only the Idaho Code § 42-1102 claim remaining pending. (*See Ellers Affidavit*, Exhibit M).

28. On or about June 9, 2010, Claimants filed their Motion for Summary Judgment in this Subcase, including assertions that none of the prior owners demonstrated an attempt to abandon the water right and that forfeiture did not apply because of the tolling rule and because Claimants had been prevented by Snake River R.V. personnel from using the Water Right since 1998. The Wilkerson Affidavit submitted in support of the Motion for Summary Judgment set forth a number of conclusory and foundationally unsupported assertions, such as purported expert testimony without establishing the requisite qualifications, and were the subject of Objectors' Motion to Strike. However, to the extent the Wilkerson Affidavit's statements regarding elevations and ditch calculations would be deemed admissible, Objectors filed 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 at issue in the Wilkersons' summary judgment motion.

29. Relevant to the summary judgment 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, meaning that the 13 acre portion of the water right had been forfeited prior to submission of the SRBA claims in 1988 and/or 1990. Also key to these issues are Mr. Brumley's deposition testimony, that no water has been diverted from the Snake River to the 13 Acre Parcel after mid-1994 and Mr. Wilkerson's deposition testimony that he has never used water on the 13 Acre Parcel from the

Snake River point of diversion since he acquired the 13 Acre Parcel in 1998. The evidence establishes that after 1982 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 on the 13 Acre Parcel was terminated and abandoned after that three year period, pursuant to the prior agreement of the respective parcel owners. Consistent with this agreement, no water has been used on the 13 Acre Parcel 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. It bears noting that Mr. Mashburn's capacity to testify about this matter is questionable as he apparently did not 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.*

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 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. Although Mr. Wilkerson purchased the 13 Acre parcel in April 1998, he waited over 8 years, until May 2006, to file the Easement Case. Since they failed to act before 2006 to establish any easement rights, neither Claimants' nor their predecessors in interest can be said to have been prevented from using the Snake River point of diversion due to circumstances over which they had no control or to have diligently prosecuted Claim 2-2318A. Also, nothing in the record establishes that either Claimants or their predecessors in interest obtained a State Easement

which also would be necessary to install a pump and pipeline to divert water from the Snake River at this location. See Exhibit D to *Ellers Affidavit*, Exhibit A thereto.

30. In the August 25, 2010, *Order Denying Motion to Strike, Granting Motion for Summary Judgment and Vacating Trial and Special Master's Report* (hereafter "*SRBA Summary Judgment Order*"), the Special Master ruled: 1. That the Objectors' Motion to Strike was no longer relevant since summary judgment was granted wholly based on the Objectors' own pleadings and affidavits which established the Claimants' forfeiture and abandonment defense of prevention of use by circumstances over which the water right holder had no control; 2. That the Objectors could not support an argument of forfeiture or abandonment prior to 1988, since the first SRBA Claim was submitted in that year for the entire 50 acres; and 3. That the SRBA tolling rule precluded forfeiture after claim filing in 1988. Left unaddressed was Objectors' request that, at a minimum, the water right decree include a clarifying remark in the point of diversion element stating that "This right does not grant any right-of-way or easement across the land of another."

31. Objectors subsequently filed a Motion for Reconsideration and a Motion to Alter or Amend asserting: 1. That the SRBA Summary Judgment Order incorrectly found that the Objectors' own evidence established denial of access due to circumstances beyond the Wilkersons' and their predecessors' control and consequently erred in concluding that the Motion to Strike Mr. Wilkerson's Affidavit was irrelevant; 2. Material issues remained on the doctrines of forfeiture, abandonment, waiver and laches; and 3. That the proposed clarifying remark was necessary.

32. In the April 8, 2011, *Order Denying Motion for Reconsideration and Motion to Alter or Amend*, the Special Master again, for similar reasons, denied considering the Motion to Strike and found forfeiture, abandonment, waiver and estoppel disproven by Objectors' own filings.

With regard to the requested point of diversion remark, the Special Master concluded that since in 1972, at the time of licensing (before the Property was divided), there was no trespass, the requested remark was not applicable.

The material facts and the applicable case law merit the denial of Claimants' summary judgment, and require a full trial on the merits, or, at least, require inclusion of the requested point of diversion remark to avoid possible misinterpretation of the point of diversion element of the Partial Decree.

III. LAW AND ARGUMENT

A. Standards on Notice of Challenge.

As this Court has ruled before, the standards applicable to reviewing a Special Master's decision on a Notice of Challenge are as follows:

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether the findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 945, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

Memorandum Decision and Order on Challenge, SRBA Subcase No. 63-32533 (April 21, 2010) at 3-4; *Memorandum Decision and Order on Challenge*, SRBA Subcase Nos. 01-23B *et al.*

(April 4, 2011) at 5-6. And the standards applicable to reviewing a summary judgment motion are as follows:

Summary judgment is properly granted when “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 judgment as a matter of law.” I.R.C.P. 56(c). The court will “liberally construe the record in favor of the party opposing the motion for summary judgment and will draw all reasonable inferences and conclusions in favor of that party.” *Arreguin v. Farmers Ins. Co.*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008). The burden of demonstrating the absence of a genuine issue of material fact, and that summary judgment is proper as a matter of law, is on the moving party. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112, P.3d 838, 842 (Ct. App. 2005).

Memorandum Decision and Order on Challenge, SRBA Subcase Nos. 01-217 *et al.*

(February 9, 2011 at 29.

B. **The SRBA Summary Judgment 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.**

Citing *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956), the *SRBA Summary Judgment Order* on p. 8 found that, “Regardless of the terms used, there can be no forfeiture or abandonment if the nonuser is prevented from exercising his rights by circumstances over which he has no control.” The *SRBA Summary Judgment Order* then states on p. 9 that: “By their own Affidavits, the objectors demonstrate their consistent and unyielding efforts to bar anyone else from accessing the Snake River point of diversion.”

Actually, however, there is no competent evidence in the record establishing that the owners of the Riverfront Parcel, prevented the Wilkersons’ and their predecessors’ access to the Snake River point of diversion. Indeed, the evidence is to the contrary. The *Wittrock Affidavit* (Exhibit G to the *Gould Affidavit*), states that the Wittrocks were permitted to use Water Right 02-2318A during their ownership of the 13 Acre Parcel. As discussed above, this three year

period of the Wittrocks' use of the Water Right coincided with the three year permissive term the Jacksons agreed to in the Real Estate Purchase and Sale Agreement. Mr. Brumley testified that on a few limited occasions Mr. Mashburn and the Spellmans approached him and asked to use the Snake River point of diversion. While Mr. Brumley did not grant permission, neither the Spellmans nor Mr. Mashburn pursued the matter further, although on one occasion Mr. Mashburn stated he intended to hire an attorney. 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 Depo.* at p. 28, Ins. 1-15, attached as Exhibit C to the *Ellers Affidavit*).

The *Benton Affidavit* 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, any evidence of prevention of use of the Snake River point of diversion involving circumstances over which the water right holder would have no control would be from Claimant's own affidavit, *Affidavit of William Wilkerson, Sr.*, filed on June 10, 2010. The many

legal deficiencies of this *Affidavit* and the *Affidavit of Launie T. Mashburn* (submitted as Exhibit H to the *Gould Affidavit*) were outlined in *Objectors' Motion to Strike* and supporting Memorandum, filed in this Subcase on June 24, 2010. Objectors asserted that relevancy, lack of personal knowledge, lack of expert qualifications, hearsay and the Best Evidence Rule required striking portions of the Wilkerson and Mashburn Affidavits.

Erroneously, the *SRBA Summary Judgment 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 findings of material facts wholly supported by the 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.

Also, the *SRBA Summary Judgment Order* at pp. 8-9 erroneously relied on the *Hodges* case to grant Claimants' summary judgment on the basis that there can be no forfeiture or abandonment when the water right holder is prevented from exercising his water right by circumstances over which he has no control. Actually, *Hodges* relied on the related (but separate) defense that the water right holder had been prevented from using the water by the wrongful acts of another. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 15, 297 P.2d 524 (1956). Further, the *Hodges* plaintiff, a remote landowner, did not learn until 1950, many years after the start of the wrongful behavior, that he was being wrongfully denied of his water. *Id.* at 14. In the instant case, although the permissive use of the Snake River point of diversion ceased in 1994, Claimants have not explained why it was not until 2006 that a lawsuit was commenced to determine whether a legal right of way existed across the Riverfront Parcel, when that was a

necessary pre-condition to exercise the water right. At the present time, with only the private right of way condemnation claim remaining in the Easement case, it has been determined that no such pre-existing right of way existed across the Riverfront Parcel. Thus, there were no wrongful acts preventing use here, as in *Hodges*. Also, there were no circumstances beyond the control of the water right holder between 1994 until at least 2006 when the first legal step was taken to actually exercise the right after the permissive use ceased in 1994.

Absent the *Wilkerson Affidavit*, and even with it, the facts do not exist in the record to support a finding 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, such as the Mashburns and the Spellmans, simply “gave up” on their water right and moved on.

C. Questions of Forfeiture, Abandonment, Waiver and Laches Are Inherently Factual, and Require A Trial on the Merits.

1. Material Issues of Fact Exist as to Whether the Doctrine of Forfeiture Applies to the Period of Non-Use Before 1990.

The SRBA Court has ruled 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 on Challenge and Order of Partial Decree*, SRBA Subcase No. 65-05663B (*Wood v. Trout*, filed in May, 2002) (hereafter the “*Wood Decision*”). Even assuming the earlier 1988 SRBA Claim is the operative one in this instance, there is substantial evidence of more than five years of non-use of water before claim filing.

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 1982 through the date of the Claim’s filing, a lapse of at least 6 years. Thus, because of the non-use of Water Right No. 2-2318 on the 13 Acre Parcel for at least 6

years prior to SRBA Claim filing, the portion of this water right associated with the 13 Acre Parcel was forfeited. *See State v. Hagerman Water Right Owners*, 130 Idaho 727, 733-35, 947 P.2d 400, 406-08 (1997).

Further, the limited use of the water right during the three year permissive grant to the Wittrocks from 1991-1994 cannot properly be deemed to satisfy the resumption in use forfeiture defense. *See e.g., Rowan v. Riley*, 139 Idaho 49, 56, 72 P 3d 889 (2003), which provides applicable principles for determining whether an interest is real or personal property. As the Supreme Court stated in *Rowan*, 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). The permissive use of the Snake River point of diversion during 1991-1994 constituted a license, a personal property interest, that is binding only between the parties to the agreement, and as such, it did not change the status of Water Right No. 02-2318, which already was partially forfeited prior to the Wittrocks’ purchase of the 13 Acre Parcel in July, 1991. Resumption of use under these circumstances would not be legally cognizable since the water right and its Snake River Point of diversion were no longer “appurtenant” to the 13 Acre Parcel. *See McCray v. Rosenkrance*, 135 Idaho 509, 518, 20 P.3d 693, 702 (2001).

2. Material Issues of Fact Exist as to 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.

No water was used on the 13 Acre Parcel under Water Right 02-2318A after the permissive use ended in 1994. Also, it is uncontroverted that from 1994 until the Easement Case was filed 2006, neither the Wilkersons, nor their predecessors, took any action to be in a position to exercise Water Right No. 2-2318A either by changing the point of diversion to Jump Creek which borders the 13 Acre Parcel or by legally establishing a right of way through the Riverfront Parcel to the Snake River point of diversion. This approximately 12 year period of non-use during which no legal efforts were undertaken to be in a legal position to allow use of Water Right No. 2-2318A constitute a failure to prosecute the claim and makes the tolling rule inapplicable during this time period.

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.

Objectors understand that the Special Master was 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, SRBA Subcase Nos. 36-2708 *et al.*, December 29, 1999, at 27-28. However, for the purposes of preserving their rights in this Subcase and noting that the application of the tolling rule on forfeiture has not yet been determined by the Idaho Supreme Court, Objectors also continue to assert that under the material issues of fact and law presented, the tolling rule should not apply here. See *Wood Decision* at p. 12, fn. 5.

3. The non-use of the Water Right after 1994 coupled with the failure until 2006 to initiate any legal action to establish a right of way or to make other arrangements to use the Water Right, establish Water Right abandonment.

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." . "Intent to abandon is a question of fact to be decided by the trier of fact." *Jenkins*, 103 Idaho at 389. The Special Master appears to have incorrectly also grafted the 5 year forfeiture requirement to these elements of abandonment. *See SRBA Summary Judgment Order* at 7 ("[A]bandonment of a water right must have been continuous for five consecutive years.").

The non-use of the Water Right after 1994, coupled with the lack of any efforts to change the point of diversion or legally establish a right of way to the Snake River during an extended period after 1994, evidence both the intent to abandon and the actual relinquishment of the portion of Water Right No. 2-2318A associated with the 13 Acre Parcel. Permissive use of the Snake River point of diversion ceased in 1994 pursuant to the agreement between the Jacksons and the Wittrocks. The Spellmans and the other subsequent owners of the 13 Acre Parcel could have then applied to transfer the point of diversion to Jump Creek or to obtain easements from the State and the owners of the Riverfront Parcel, to continue to use Water Right No. 2-2318A, but nothing was done until many years later (and many owners later) when Wilkerson filed the Easement Case in 2006. This extended failure of successive owners to use the Water Right for 12 years and to take the legal steps necessary to do so evidence an intent to cease use of and to actually abandon Water Right No. 2-2318A. Due to his predecessors' abandonment of the Water Right, the Water Right already was invalidated by the time the Wilkersons purchased the 13 Acre Parcel. At a minimum, significant issues of material fact exist which require a trial on the merits with respect to Water Right abandonment.

4. The Evidence Establishes that the Wilkersons are also Barred by the Doctrine of Laches from Exercising the Water Right.

The four elements of the defense of laches are enumerated in *Thomas v. Arkoosh Produce*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002). The Supreme Court also stated in *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho at 359, 48 P.3d at 1248 that that “[w]hether or not a party is guilty of laches is a question of fact.”

The evidence establishes that the elements of laches are satisfied and the Wilkersons are barred from exercising Water Right No. 2-2318A. With regard to the first element of laches, invasion of rights, the earlier owners of the Riverfront Parcel who attempted only on limited occasions to use the Snake River point of diversion after 1994 were denied each time. With regard to the second element, delay in asserting any rights, it was only after an extended delay of about 12 years, until 2006, that any owners of the 13 Acre Parcel took steps to establish the easement necessary to use Water Right No. 2-2318A. With regard to the third element, lack of knowledge that rights would be asserted, after this extended delay, the new owners of the Riverfront Parcel, the Objectors, had no expectation that any owners of the 13 Acre Parcel would use the Snake River point of diversion associated with Water Right 2-2318A. (*Kritz Affidavit*). With regard to the fourth element, injury or prejudice, injury to Objectors’ business operations would occur if Claimants are allowed to use the Snake River point of diversion. As the Objectors’ predecessor, Ms. Jackson, explained, resulting injury to the RV Park operations was the reason for not granting an easement across the Riverfront Parcel in the first place and only allowing a limited 3 years period of use. (*Jackson Depo.* p. 40, lns. 2-8, *quoted supra* p. 5).

For the foregoing reasons, Claimants are barred by the doctrine of laches from asserting the existence of Water Right No. 2-2318A in the SRBA. At the very least, material issues of fact precluding summary judgment exist with regard to the defense of laches.

5. Wilkerson and his Predecessors Waived Any right to Use the Snake River for Irrigating the 13 Acre Parcel.

Waiver is the voluntary and intentional relinquishment of a known right. *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct. App. 1987). An intent to waive a right may be established by conduct. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 520, 650 P.2d 657, 662 (1982). “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.*).

The record establishes that Wilkersons’ predecessors were well aware that the owners of the Riverfront Parcel, after the 3 year permissive use period, had no intention of letting them cross the Riverfront Parcel to irrigate the 13 Acre Parcel from the Snake River. Nevertheless, they took no steps to change the point of diversion to Jump Creek or to ground water or to legally establish an easement to divert water from the Snake River. Approximately twelve years of inaction resulted, during which the 13 Acre Parcel never was irrigated from the Snake River. This failure to act over an extended period reflects an intent to waive exercise of the Water Right, rather than to change the point of diversion or to attempt to establish a legal easement to use it.

D. A Remark Should Be Included in the Partial Decree’s Point of Diversion Element Clarifying that the Partial Decree Does Not Confer the Right of Access Across the Property of Another.

Objectors requested that, at a minimum, the Partial Decree include a remark clarifying that no right of access to the point of diversion on the Riverfront Parcel had been established. However, the Special Master’s Recommendation for the Partial Decree failed to include any such language. The Special Master found that such a remark was inappropriate, since at the time of water right licensing in 1972, the 13 Acre parcel and the Riverfront Parcel were under joint ownership. *Order Denying Motion for Reconsideration and Motion to Alter or Amend* (April 8, 2011) at p. 5. This determination ignores that fact that since 1991, the two parcels have

had different ownership and the 13 Acre Parcel has no Snake River frontage. Without such a clarifying remark in the SRBA, the decreed point of diversion could be misconstrued as legally exercisable in the future, when, in fact, without a legal easement across the Riverfront Parcel, it would not be.

Idaho Code § 42-1411(2)(j), regarding director's reports, 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. Idaho Code § 42-1412(6). As the SRBA Court ruled in construing these statutory provisions in *In Re SRBA*, Case No. 39576, *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, filed on December 29, 1999, at p. 6:

With respect to the "remark" section, or I.C. § 42-1411(2)(j), there are three (3) possible statutory components which need to be examined. They are:

- 1) whether the remark is necessary for definition of the right, or
- 2) whether the remark is necessary for clarification of any element of a right, or
- 3) whether the remark is necessary for the administration of the right by the Director.

In this Subcase, grounds (2) and (3) referenced here, apply. A remark is necessary to clarify that the identified point of diversion for Water Right 02-2318A is on the property of another and that the Partial Decree does not grant an easement or right of way across another's property. Also, such a remark is necessary to administer Water Right 02-2318A because a legal easement or other legal right of way is necessary for the proper distribution and use of water under the right.

Similarly, IDWR's 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*, ("Young Affidavit") ¶¶ 6 and 7. 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 (1984) that a water right is separate from the easement right to enter another’s land to access that water.

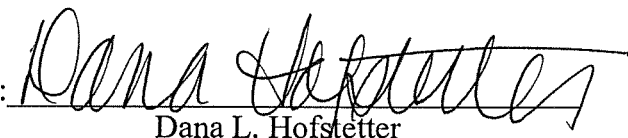
In this Subcase, with the Easement Case in Owyhee County having only the statutory condemnation easement claim still pending, and with the recommended point of diversion located on Objectors’ Riverfront Parcel, it is “necessary” to include a remark to clarify no right of access is being accorded to Claimants in the SRBA. Also, such a remark would be “necessary” for administration to ensure that the water right cannot be diverted at the point of diversion without a valid easement or right of way first being established.

IV. CONCLUSION

For the foregoing reasons, the Objectors respectfully request that this Court grant Objectors’ Notice of Challenge, grant Objectors’ Motion to Strike, deny Claimants’ Motion for Summary Judgment, and set the matter for trial, or at least, issue a Partial Decree with a remark in the point of diversion element stating that “This water right does not grant a right of way or easement across the property of another.”

DATED this 17th day of June, 2011.

HOFSTETTER LAW OFFICE, LLC

By: 
Dana L. Hofstetter

**Site Layout of Snake River RV
(T3N, R5W Section 14 NW, Owyhee County)**

EXHIBIT A



- SRRV Pump Station
- Jump Creek Alternative
- Wilkerson
- SRRV Property

300 0 300 600 900 Feet



Blumberg No. 5208

A

EXHIBIT



REAL ESTATE PURCHASE AND SALE AGREEMENT AND RECEIPT FOR EARNEST MONEY



PK 21
REV 1/87

This purchase agreement and form of sale of real property, together with the following information as set forth herein, shall constitute a legally binding contract, and you have read and understand the same.

LEON WILCOCK and FARRIE WILCOCK

MOBILE, ALA **May 2, 1981**

of the County of **DADE**, Florida, do hereby agree to sell the following described real estate hereinafter referred to as "Property" to the Buyer, **Approximate 13 Acres South of RR in lot 8 - 14 - 345W**, for the sum of **Three Thousand** Dollars (\$3,000.00) as set forth herein.

A TRUE AND COMPLETE LEGAL DESCRIPTION OF THE PROPERTY, ATTACHED ON HEREIN ON THE REVERSE SIDE, SHALL BE FURNISHED BY SELLER, Buyer hereby acknowledges that he has read the above legal description of the property and agrees to accept the same as set forth herein.

EARNEST MONEY
The Buyer hereby deposits as earnest money and a security in fulfillment of the purchase price the sum of **Three Thousand** Dollars (\$3,000.00) to be held by Seller.

The earnest money shall be held by Seller, and shall be applied to the purchase price of the property, and shall be held by Seller until the closing of the property.

The parties agree that the property is located in **DADE County, Florida**, and that the property is subject to the following conditions:

1. The property is located in **DADE County, Florida**, and is subject to the following conditions:

2. The property is located in **DADE County, Florida**, and is subject to the following conditions:

3. The property is located in **DADE County, Florida**, and is subject to the following conditions:

4. The property is located in **DADE County, Florida**, and is subject to the following conditions:

5. The property is located in **DADE County, Florida**, and is subject to the following conditions:

6. The property is located in **DADE County, Florida**, and is subject to the following conditions:

7. The property is located in **DADE County, Florida**, and is subject to the following conditions:

8. The property is located in **DADE County, Florida**, and is subject to the following conditions:

9. The property is located in **DADE County, Florida**, and is subject to the following conditions:

10. The property is located in **DADE County, Florida**, and is subject to the following conditions:

11. The property is located in **DADE County, Florida**, and is subject to the following conditions:

12. The property is located in **DADE County, Florida**, and is subject to the following conditions:

13. The property is located in **DADE County, Florida**, and is subject to the following conditions:

14. The property is located in **DADE County, Florida**, and is subject to the following conditions:

15. The property is located in **DADE County, Florida**, and is subject to the following conditions:

16. The property is located in **DADE County, Florida**, and is subject to the following conditions:

17. The property is located in **DADE County, Florida**, and is subject to the following conditions:

18. The property is located in **DADE County, Florida**, and is subject to the following conditions:

19. The property is located in **DADE County, Florida**, and is subject to the following conditions:

20. The property is located in **DADE County, Florida**, and is subject to the following conditions:

21. The property is located in **DADE County, Florida**, and is subject to the following conditions:

22. The property is located in **DADE County, Florida**, and is subject to the following conditions:

23. The property is located in **DADE County, Florida**, and is subject to the following conditions:

24. The property is located in **DADE County, Florida**, and is subject to the following conditions:

25. The property is located in **DADE County, Florida**, and is subject to the following conditions:

26. The property is located in **DADE County, Florida**, and is subject to the following conditions:

27. The property is located in **DADE County, Florida**, and is subject to the following conditions:

28. The property is located in **DADE County, Florida**, and is subject to the following conditions:

29. The property is located in **DADE County, Florida**, and is subject to the following conditions:

30. The property is located in **DADE County, Florida**, and is subject to the following conditions:

31. The property is located in **DADE County, Florida**, and is subject to the following conditions:

32. The property is located in **DADE County, Florida**, and is subject to the following conditions:

33. The property is located in **DADE County, Florida**, and is subject to the following conditions:

34. The property is located in **DADE County, Florida**, and is subject to the following conditions:

35. The property is located in **DADE County, Florida**, and is subject to the following conditions:

Exh. No. **4**
Date **4-8-10**
Name **Jackson**
M & M Court Reporting

EXHIBIT

B

Print (208) 337-3333

Blumberg No. 5208