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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 THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase No. 02-2318A
	)	
Case No. 39576	)	CLAIMANTS' RESPONSE TO
_____	)	OBJECTORS' OPENING BRIEF
		IN SUPPORT OF OBJECTORS' NOTICE
		OF CHALLENGE

Claimants, William R. Wilkerson, Sr. and Imogene Wilkerson (Wilkersons), by and through their attorneys, Beeman & Associates, P.C., respond to Objectors' Opening Brief In Support of Objectors' Notice of Challenge as follows:

I. INTRODUCTION

This subcase and controversy involves water right 02-2318A which the Wilkersons acquired under state law when they purchased land near the Snake River that includes a 13-acre parcel irrigated by licensed water right 02-2318A. Although "the subcase presents a complex history of an unequal split of a 50-acre parcel and later transfers in ownership of the two parcels—the 13-acre parcel now owned by the Wilkersons and the 37-acre parcel now owned by the Kritzes and Mr. Barker—and appurtenant water rights [for which there is] a single point of diversion from the Snake River for both parcels" (*Order Denying Motion to Strike, Granting Motion for Summary Judgment and Vacating Trial and Special Master Report* at 5-6), the

Special Master found that “the simple question now is whether the Wilkersons’ water right claim 02-2318A has been forfeited or abandoned.” *Id* at 6. In their Opening Brief in Support of Objectors’ Notice of Challenge, Objectors seek (1) to reverse the grant of summary judgment to the Wilkersons and (2) to include a remark in the Partial Decree for 02-2318A that no right of way or easement is conferred across the property of another. Objectors also assert as error (a) the Special Master’s finding of fact from Objectors’ own affidavits regarding the attempts to block Mr. Wilkerson and his predecessors from exercising water right 02-2318A and (b) the consequent conclusion that Objectors’ Motion to Strike Mr. Wilkerson’s Affidavit was no longer relevant. Based on the arguments set forth below, the Wilkersons respectfully request that the Objectors’ challenge be denied.

II. STATEMENT OF FACTS

On June 5, 1964, J.C. Jackson & Sons, Inc. filed an application for permit no. 31931 to appropriate the public waters of the State of Idaho. In 1970, James C. Jackson filed an affidavit of Proof of Application of Water to Beneficial Use for permit no. 31931. *Affidavit of Jon C. Gould, Ex. A.* The Proof of Application is a sworn statement of the extent to which permit no. 31931 had been developed. In that 1970 statement, Mr. Jackson swore to using the water right for the past twelve years; further, he stated that the water was pumped out of the Snake River and diverted to the place of use through a farm ditch. *Id.* The place of use listed on the Proof of Application includes the 13-acre parcel currently owned by Mr. Wilkerson and the 37-acre riverfront parcel now owned by the Objectors.

A field exam was conducted in 1971 and the use of the water right recognized. In 1972, the Idaho Department of Water Administration issued a water right license to J. C. Jackson and Sons, Inc. for water right no. 02-2318, based on permit no. 31931, for the irrigation of the 50-acre parcel (both the 13-acre parcel and the 37-acre parcel). *Affidavit of Jon C. Gould, Ex. B.*

The elements of the water right include the priority date of June 5, 1964, the point of diversion on the Snake River, the place of use as the entire 50-acre parcel, and the period of use from March 15 to November 15, annually. *Id.*

In 1981, a Notice of Claim was filed in the Snake River Basin Adjudication (SRBA) by Doug Larzelier and Joseph Asumendi, the new owners of water right license 2-2318. A second field exam in 1983 confirmed use of the water right, including the 13-acre parcel as being part of the place of use. *Affidavit of Jon C. Gould*, Ex. D. In 1988 and again in 1990, Peggy Jackson filed a Notice of Claim to a Water Right Acquired under State Law. *Affidavit of Jon C. Gould*, Ex. E. It is this Notice of Claim that is before this Court in this matter. In the Notice of Claim, Peggy Jackson declares that water for the entire 50-acre parcel is used from March 15 to November 15 annually. Additionally, the Notice of Claim contains all the elements of the licensed water right no. 02-2318 including priority date, source of the water, point of diversion, period of use, and place of use.

In 1991, the 50 acres identified as the place of use for license 02-2318 were partitioned and what is now the Wilkerson Property, the 13-acre parcel, was conveyed by the Jacksons to Loren Wittrock. *Affidavit of Jon C. Gould*, Ex. F, at 2. When this occurred, the Idaho Department of Water Resources (IDWR) split both water right license 02-2318 and SRBA claim 02-2318 into water right nos. 02-2318A for the 13-acre parcel and 02-2318B for the 37-acre parcel.¹ Mr. Wittrock irrigated the 13-acre parcel from 1991 to 1994, using his pump and the pumping station on the Snake River, and he was never denied access to this water delivery

¹ The Adjudication Claim File for 2-2318A which can be found at http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/f5pg01_.pdf evidences that the SRBA claim was split on July 16, 1991.

system on the Jackson property by the Jacksons. *Affidavit of Jon C. Gould*, Ex. G at 2.

Wittrock sold the 13-acre parcel to the Spellmans in 1994 (along with the water right and his water pump located on the pump stand at the point of diversion, *Id*), who then conveyed the parcel to Launie and Kristina Mashburn in 1995.

In 1992, the Jacksons sold the 37-acre river front parcel and the trailer park that the Jacksons's son and wife, Doug and Mary Jo Larzelier, had been developing on it to the Harlans who then sold to Ronald Brumley in 1993. In 1995 and 1996, Launie Mashburn and, later, the Spellmans on several occasions asked Mr. Brumley about irrigating the 13-acre parcel, either installing their own pump or using Mr. Brumley's pump for irrigation from the shared point of diversion on the Snake River; Mr. Brumley consistently refused permission and access. *Ellers Affidavit*, Ex. C, *Brumley Deposition*. In 1998, the Spellmans sold the 13-acre parcel to the Wilkersons. In 1999, Mr. Brumley sold the 37-acre river front parcel and RV resort to the Bentons who in 2003 sold the parcel and RV resort to the Objectors, Charles J. Kritz, Jr., Diane B. Kritz, and Raymond C. Barker, Jr.

Mr. Wilkerson purchased the 13-acre parcel with water right no. 02-2318A in 1998 but, as with his predecessors Launie Mashburn and the Spellmans, has been denied use of his water right since the purchase. *Affidavit of William R. Wilkerson, Sr.* at 2.² Mr. Wilkerson's repeated attempts to access the Snake River point of diversion for water right no. 02-2318A have been thwarted by the Snake River RV Park and Mr. Wilkerson has been unable to divert 02-2318A for irrigation of the 13-acre place of use. *Affidavit of William R. Wilkerson, Sr.* at 10. (See also *Affidavit of Diane Kritz in Opposition to Motion for Summary Judgment* confirming Mr. Wilkerson had tried to come on the Objectors' property in 2006-2008, accompanied by the

² The Wilkerson affidavit is cited here solely for purposes of the factual chronology. It was filed in support of the Wilkersons' Motion for Summary Judgment.

sheriff, and despite the No Trespassing signs.) On May 24, 2006, Mr. Wilkerson filed a Verified Complaint in Owyhee County alleging that he owns an easement across the Objectors' riverfront parcel for the delivery of water under water right no 02-2318A from the point of diversion on the Snake River to his 13-acre parcel.³

The Director of IDWR filed his SRBA report for 02-2318A on December 29, 2006. The Director recommended claim 02-2318A to William and Imogene Wilkerson, 2520 S. Powerline Road, Nampa, Idaho, 83686, for .27 cfs from the Snake River to irrigate 13.3 acres in Owyhee County from March 15 to November 15 with a priority date of June 5, 1964, based on a license. The same point of diversion was recommended for 02-2318B. On January 25, 2007, the Objectors objected to the Director's Report for 02-2318A, on grounds of abandonment and nonuse. The Wilkersons filed their Motion for Summary Judgment on June 9, 2010, to dismiss objections. On June 24, 2010 Objectors filed a Motion to Strike the Wilkerson Affidavit.

In the *Order Denying Motion to Strike, Granting Motion for Summary Judgment and Vacating Trial and Special Master's Report* dated August 25, 2010, the Special Master held that the Motion to Strike was no longer relevant and the Wilkersons' claim 02-2318A had neither been forfeited nor abandoned. On September 28, 2010, Objectors filed their *Motion for Reconsideration and Motion to Alter or Amend*. A hearing on the motion was held February 3, 2011. In the April 8, 2011 *Order Denying Motion for Reconsideration and Motion to Alter or Amend*, the Special Master denied the Objectors' *Motion for Reconsideration and Motion to Alter or Amend* and held that there was no reason to include a remark about right of access. The Objectors filed a *Notice of Challenge* on April 22, 2011.

³ The parties in the Owyhee County easement case are William Wilkerson, Plaintiff, v. Snake River RV Resort, LLC, Raymond C. Barker, Jr., Charles Kritz, and Diane B. Kritz, Defendants.

III. LAW AND ARGUMENT

A. Standard of Review.

Litigation in the SRBA is governed by the Idaho Rules of Civil Procedure (I.R.C.P.), the Idaho Appellate Rules (I.A.R.), and SRBA Administrative Order 1. *Administrative Order 1* (AO1), § 1(a). The Special Master's conclusions of law are not binding upon the district court, although they are expected to be persuasive. *North Snake Ground Water District v. Gisler*, 136 Idaho 747, 40 P.3d 105 (2002) (citing *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409 (1997)). The Court shall adopt the Special Master's findings of fact unless they are clearly erroneous. AO1, § 13(f); I.R.C.P. 53(e)(2). The Court must carefully consider objections to the Special Master's report. Where the findings of fact are clearly erroneous, the Court may, in whole or in part, adopt the report, modify it, reject it, receive further evidence, or remand the report with instructions. *Id.*

Water right no. 02-02318A was recommended in this case by IDWR. A Director's Report for a water right claim is *prima facie* evidence of the nature and extent of a water right. Idaho Code § 42-1411(4); *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). As such, the Director's recommendation of water right no. 02-02318A constitutes a rebuttable evidentiary presumption. *McCray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2001). An objecting party has the "burden of going forward" with evidence to establish any element which is in addition to or inconsistent with the description in the Director's Report and so the Objectors in the present case have the burden of producing evidence that rebuts the Director's recommendation of water right no. 02-02318A. Idaho Code § 42-1411 (5), *McCray, supra*, at 514.

Because Idaho Code § 42-1411 is silent as to the amount of proof necessary to rebut the Director's recommendation, objectors are required to produce "substantial evidence" of the nonexistence of a water right, *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986), and to overcome the rebuttable presumption established by the Director's Report. *Clear Springs Foods, Inc. et al. v. IDWR et al*, 136 Idaho 761 at 764 (2011). Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

B. The Special Master Did Not Err in Concluding the Objectors' Motion to Strike was Irrelevant as There was Substantial Evidence of the Objectors Denying Access from the Objectors' Affidavits and the Court Did Not Rely Upon the Affidavits of William Wilkerson, Sr. and Launie Mashburn in Granting the Claimants' Motion for Summary Judgment.

In the *Order Denying Motion to Strike, Granting Motion for Summary Judgment and Vacating Trial and Special Master Report* at p. 4 and 9, Special Master Terence A. Dolan found that "[b]eginning in 1994 through the present, the owners of the RV Resort refused access to the Snake River point of diversion on RV Resort land to irrigate the 13-acre parcel.... Regardless of some periods of nonuse, the successive owners of the 37-acre parcel—the Jacksons, the Harlans, the Brumleys, the Bentons and finally the Kritzes and Mr. Barker—prevented anyone else from using the point of diversion on their land. By their own *Affidavits*, the objectors demonstrated their consistent and unyielding efforts to bar anyone else access to the Snake River point of diversion, even when Launie Mashburn and the Spellmans asked to install their own pump." Thus, the Special Master concluded that Mr. Wilkerson was entitled to summary judgment and the Objectors' Motion to Strike was irrelevant as the findings of material facts were wholly supported by the Objectors' own pleadings and affidavits. In the *Order Denying Motion for*

Reconsideration and Motion to Alter or Amend at p. 4, the Special Master concluded that the “decision to consider the Objectors’ *Motion to Strike* irrelevant, or essentially moot, was reasonable given the evidence of record.”

In their *Opening Brief in Support of Objectors’ Notice of Challenge* at 15, counsel for the Objectors claim that there is no competent evidence in the record establishing that the owners of the 37-acre parcel prevented the Wilkersons and their predecessors access to the Snake River point of diversion. However, Objectors’ counsel concedes that on a few limited occasions Mr. Mashburn and the Spellmans approached Mr. Brumley for permission to use the point of diversion and were not granted that permission. See also *Affidavit of Debra K. Ellers in Opposition to Motion for Summary Judgment*, Ex. C – Brumley Deposition and Ex. D – Brumley Affidavit. Objectors’ counsel also asserts that the Kritz affidavit did not state that Mr. Wilkerson was prevented from exercising access. Mrs. Kritz, however, stated in that affidavit that 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.” *Affidavit of Diane Kritz in Opposition to Motion for Summary Judgment*, at 3.

Other evidence showing the Objectors’ refusal to allow access, besides the affidavits of William Wilkerson and Launie Mashurn, include Wilkerson’s Verified Complaint and the Deposition of Mr. Wilkerson in the Owyhee County proceedings, also provided by Objectors’ counsel. *Affidavit of Debra K. Ellers in Opposition to Motion for Summary Judgment*, Ex.J – Wilkerson’s Verified Complaint, and Ex. 0 – Deposition of Mr. Wilkerson. This evidence of record, from the Objectors’ affidavits, supports a finding that denial of access was due to circumstances beyond the control of past and present owners of the 13-acre parcel and

contradicts Objectors' assertion that no meaningful efforts were taken to establish any rights of way until Mr. Wilkerson filed his easement case in May, 2006.⁴ Objectors' counsel argues that a reasonable inference can be drawn that the owners of the 13-acre parcel simply "gave up" on their water right and moved on. *Opening Brief in Support of Objectors' Notice of Challenge* at 18. None of these owners, however "gave up" on their water right. What they were forced to give up on were their efforts, short of litigation, to access the Snake River point of diversion for water right 02-2318A because of the consistent and unyielding actions to bar such access taken by the Objectors and other owners of water right 02-2318B appurtenant to the 37-acre river front parcel.

C. The Special Master Did Not Err in Holding That Forfeiture under Idaho Code § 42-222(2) Was Not A Viable Argument in the Circumstances of the Present Case.

In holding that the Wilkersons' claim 02-2318A had not been forfeited, the Special Master held that any discussion of nonuse before October 7, 1988, when Peggy Jackson and the Larzeliers filed their claim in the SRBA was "superfluous." *Order Denying Motion to Strike, Granting Motion for Summary Judgment and Vacating Trial and Special Master Report* at 7.⁵ Secondly, until a partial decree is entered, the filing of the SRBA claim in 1988 tolled the running of the five-year statutory forfeiture period under Idaho Code § 42-222(2). "To be clear, the Wilkersons' claim 02-2318A has not been partially decreed by the SRBA Court since the claim [02-2318] was filed and the Wilkersons continue to prosecute the claim." *Id.* The SRBA Court affirmed that ruling in the *Order Denying Motion for Reconsideration and Motion to Alter*

⁴ Mr. Wilkerson would argue it is not the establishment of a right of way, but the interference with and obstruction to an existing easement that has been continuing.

⁵ Although Mrs. Jackson filed her Notice of Claim on January 19, 1990, the IDWR database indicates that the claim had been filed and fee paid previously but a copy of that claim could not be located. That is seemingly why the claim is dated January 19, 1990, but its date of receipt is shown as October 7, 1988. Affidavit of Jon C. Gould, Ex.E.

or Amend at 4, holding that in regards to the Objectors' contention that forfeiture should apply in this subcase, the "law of the SRBA case is clear on this point. The Objectors' predecessors-in-interest filed the [SRBA] claim for water right [license] 02-2318 in 1988, so there can be no argument of forfeiture of any part of that water right *before* that date. *After* that date, the simple act of filing the claim tolled the running of the five-year statutory period until a partial decree is entered by this Court. Simply stated, forfeiture is not a viable argument in these circumstances."

Statutory forfeiture is based upon the legislative declaration in Idaho Code § 42-222(2) that water rights may be lost if they are not applied to a beneficial use for a period of five continuous years. Forfeitures are not favored in the law, and clear and convincing proof is necessary to support a claim of forfeiture. *Jenkins v Department of Water Resources*, 103 Idaho 383, 388-389 (1982). In addition, certain defenses to forfeiture have been recognized, including (1) the Resumption of Use Doctrine (*Id*, citing *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952); *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945); *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944)), (2) wrongful interference with a water right or failure to use the water because of circumstances over which the water right holder has no control (*Id*, citing *Alamo Water v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972); *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956); *Welch v. Garrett*, 5 Idaho 639, 51 P. 405 (1897)), and (3) the Forfeiture Tolling Rule (*Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Trout)*, subcase 65-05663B (May 9,2002) ("*Wood v. Trout*") at 19).

In summary, the record contains no clear and convincing evidence that the water under water right no. 02-02318A was not applied to beneficial use on the Wilkerson Property for a continuous period of five years prior to 1996. (The Objectors provided the affidavit of William

Wilkerson, Jr. as the only evidence of nonuse and this evidence is for the period from 1997 to 2006.) Both the Forfeiture Tolling rule and the Snake River RV Park's refusal to allow Mr. Wilkerson to access the point of diversion so that he could use his water right provide defenses to forfeiture. Were these defenses not present, Wittrock's irrigation from 1991-1994 cures any alleged forfeiture prior to 1991, under the Resumption of Use Doctrine. These points are discussed in full below.

As stated above, the five-year statutory period of nonuse required to establish forfeiture tolls upon the filing of a claim in the SRBA and stays tolled until a partial decree is entered for the SRBA claim. Peggy Jackson filed a notice of claim for water right 02-2318 in October 1988 and January, 1990. Under the Forfeiture Tolling Rule, the time for any forfeiture based on nonuse ceased to accrue when SRBA claim 02-2318 was filed October 7, 1988.⁶ Objectors, however, argue that the tolling rule is inapplicable because a three year "permissive use" of 02-2318A ended in 1994 and was followed by an "approximately 12 year period of nonuse." *Opening Brief in Support of Objectors' Notice of Challenge* at 20. First, it is not clear how the Objectors assert that water right 02-2318A was exercised as a "permissive use" from 1991 to 1994 during which time Wittrock owned and irrigated the 13 acres identified as the place of use for licensed right 02-2318A. Second, Objectors do not provide any authority, nor is Wilkerson aware of any authority, to limit the defenses to forfeiture provided by Idaho Code § 42-222 and the case law cited above. There can be no forfeiture of water right 02-02318A after October 1988 while this action is pending.

In addition, forfeiture of water right 02-2318A could not have occurred because it is the successive owners of the Snake River RV Park who have prevented and continue to prevent Wilkerson from using water right 02-2318A by refusing him access to his point of diversion on the Snake River. Forfeiture does not occur when the person asserting the forfeiture prevented the right

⁶ See footnote # 3 as to the confusion concerning the two differing dates as to when the claim was filed.

from being used during the period of alleged forfeiture. *Hodges v. Trail Creek Irrigation Company, Inc.*, 78 Idaho 10, 16, 297 P.2d 524 (1956).

Finally, in *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831 (2003), the Supreme Court explained the Resumption of Use Doctrine as follows:

Under the Resumption of Use Doctrine, statutory forfeiture is not effective if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party. *Carrington v. Crandall*, 65 Idaho 525, 531-32, 147 P.2d 1009, 1011 (1944); *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937). A third party has made a claim of right to the water if the third party has either instituted proceedings to declare a forfeiture, *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945), or has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937), or has used the water pursuant to an existing water right, *Albrethsen v. Wood River Land Company*, 40 Idaho 49, 231 P. 418 (1924). Because there can be a partial forfeiture of water rights by nonuse for five years, *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997), a resumption of use of only a portion of a water right prior to a claim of right by a third party will only prevent the forfeiture of that portion of the water right, *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) (where use of only 700 miner's inches of water was resumed before a claim of right by a third party, appropriator only retained a right to 700 inches of the original appropriation). The resumption of use must also be upon land to which the water right is appurtenant. *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001). Prior to diversion, the water obviously cannot be identified as being the water entitled to be used by any particular appropriator. Whether or not a third party has made a claim to the water will usually depend upon evidence showing that the water source was overappropriated and, because of nonuse of water by the senior appropriator, water was available for use and used to fill junior water rights, or by evidence showing that resumption of use by the senior appropriator would diminish the quantity of water being used by junior appropriators from an interconnected water source. *Sagewillow, Inc.* at 842.

The record is absent of adverse claims to the water right in the present case. Also, use of water right 02-02318A occurred in 1991 and continued until at least 1994, when Wittrock owned and irrigated the 13-acre parcel. The 1991 use was either a continuance of use or a resumption of use, either of which prevents a forfeiture of 02-2318A prior to the 1991 use. The defenses to forfeiture prevent forfeiture prior to 1991 under the Resumption of Use Doctrine and subsequent to October 1988 under the Forfeiture Tolling Rule. Because these time periods overlap, there can be no

forfeiture. Objectors have only provided evidence of nonuse from 1997 to 2006. The Forfeiture Tolling Rule and the Snake River RV Park's refusal to allow Wilkerson to divert water under his water right prevent forfeiture during this 1997 to 2006 time period.

Objectors, nevertheless, argue that the use of the water by Wittrock from 1991-1994 could not satisfy the resumption in use forfeiture defense. *Opening Brief in Support of Objectors' Notice of Challenge* at 19. They reason that the Real Estate Purchase and Sale Agreement ("Agreement") dated July 2, 1991, conveying the 13-acre parcel from the Jacksons to Wittrock granted Wittrock only a temporary permissive use of the Snake River point of diversion, which constituted a license, a personal property interest that did not change the status of the water right already partially forfeited prior to Wittrock's purchase of the 13-acre parcel. *Id.* In essence, Objectors make two equally implausible arguments: First, in order to claim partial forfeiture of 02-2318A as of the 1991 sale to Wittrock, Objectors must disavow the October 1988 and 1990 SRBA claims of Peggy Jackson because each claim is a verified and notarized statement that license 02-2318 irrigated the 13-acre parcel – as well as the Objectors' 37-acre parcel – and was not forfeited as of the October 1988 and 1990 claim dates. Second, Objectors must claim the Jacksons were retaining ownership of the water right for the 13-acre parcel when they conveyed the land to Wittrock.

These arguments are not viable. "When the Jacksons sold the 13-acre parcel to Wittrock and retained the 37-acre parcel in 1991, the appurtenant Water Right 02-2318 was split proportionately - .27 cfs to irrigate 13.3 acres (02-2318A) and .73 cfs to water to irrigate 36.7 acres (02-2318B). That is how IDWR has recommended the two claims and no one has contested those figures." *Order Denying Motion to Strike, Granting Motion for Summary Judgment and Vacating Trial and Special Master Report* at 8. Further, the sales agreement included language for selling the 16 HP pump and motor (for the Snake River diversion) to Wittrock, and language of "split

13 acres water Snake River,” all consistent with splitting ownership of water right no. 02-2318 to continue irrigation of the 13-acre parcel purchased by Wittrock.

Nothing in the Agreement or subsequent actions of the Jacksons and Wittrock (who equally split the power bill pursuant to the Agreement -- *Affidavit of Debra Ellers*, Ex. B—Real Estate Purchase and Sales Agreement) suggests that the Jacksons expressly reserved to themselves the portion of licensed water right 02-2318 appurtenant to the 13 acres Jacksons sold to Wittrock. "Unless [water rights] are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention 'appurtenances.'" *Joyce Livestock Co. v. United States (In re SRBA Case No. 39576)*, 144 Idaho 1, 36-37 (2007) citing *Silverstein v. Carlson*, 118 Idaho 456, 797 P.2d 856 (1990); *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933). Thus, the inquiry is whether the water rights were expressly reserved in the deed conveying the land or whether there is clear evidence that the parties intended that the grantor would reserve them. *Id* at 37. There is nothing in the record indicating that Wittrock intended that the Jacksons would reserve the water right for the 13 acres. The Jacksons have not claimed to own the water right either after conveying the 13-acre parcel to Wittrock or after IDWR split license 02-2318 into 02-2318A (13-acre parcel) or 02-2318B (37-acre parcel). The Jacksons have not protested Wittrock's or subsequent owners' claim of ownership of the water right for the 13 acres. The Objectors have failed to provide clear evidence to support a claim that the Jacksons reserved the water right when conveying the 13-acre parcel to Wittrock and then merely granted Wittrock a temporary permissive license to use the point of diversion.

D. The Special Master Did Not Err in Finding that the Wilkersons and Their Predecessors Did Not Intend to Abandon Their Water Right and the Right to Divert Water from the Snake River.

Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right. Idaho Code § 42-222(2). Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere nonuse of a water right, standing alone, is not sufficient for a per se abandonment. *Jenkins v. Department of Water Resources*, 103 Idaho 384, 388-389 (1982). Intent to abandon is a question of fact to be decided by the trier of fact. *Id* at 389.

In this matter, there is no evidence supporting abandonment of water right 02-2318A. The original appropriator filed his proof of putting water to beneficial use in a timely fashion during the permitting process that led to issuance of license 02-2318. Peggy Jackson submitted an SRBA *Notice of Claim* for 02-2318 in 1988 and 1990. The water right was specifically identified in the 1991 Purchase and Sale Agreement between the Jacksons and Wittrock. When ownership of 13 acres of the place of use under water right 02-2318 changed, requiring a split of the water right, the new owners were prompt to inform IDWR of the change in ownership. At no time has an owner of water right 02-2318A sought to have SRBA claim 02-2318A withdrawn from determination by this Court. Since the SRBA is an in rem McCarran adjudication, relinquishment of claim 02-2318A would demonstrate an intent to abandon this water right. That has not occurred, nor have Wilkersons or their predecessors stopped efforts to exercise 02-2318A at its licensed point of diversion on the Snake River. These are unequivocal acts that water 02-2318A has not been abandoned.

Despite this Court's jurisdiction to adjudicate the existence and elements of 02-2318A, and the Wilkerson's and their predecessors continued support of SRBA claim 02-2318A,

Objectors contend that water right 02-2318A has been abandoned because of nonuse after 1994 and the lack of legal action until 2006 when the Wilkersons commenced the Owyhee County proceeding. *Opening Brief in Support of Objectors' Notice of Challenge* at 23. That Objectors and their predecessors have not wanted water right 02-2318A to be exercised at its licensed point of diversion on the Snake River does not change the Wilkerson's or their predecessors' legal right to have the Snake River point of diversion confirmed by this Court. Nor, can Objectors (who own the property at the Snake River point of diversion for 02-2318A and acknowledge they do not want any owners of 02-2318A on their property) argue that the Spellmans and the other subsequent owners of the 13-acre parcel were *required* – while pursuing the licensed Snake River point of diversion at the SRBA court -- to transfer the point of diversion or obtain easements in order to prevent abandonment of water right 02-2318A. Nonuse of water is not clear and convincing evidence of abandonment, particularly in the present case where the nonuse was a result of the Objectors and their predecessors' unyielding refusal to allow the Wilkersons and their predecessors to access their point of diversion to obtain the water. There is also no requirement under the law that owners of water rights must apply for a change of point of diversion or immediately file for an easement to prove that they did not intend to abandon their water rights. This would be true particularly for water right 02-2318A which is licensed and has been pending determination in an in rem McCarran adjudication since 1988. Abandonment requires an actual relinquishment of the water right, and proof of that is absent in this case. Had the Wilkersons or their predecessors in interest filed to change the point of diversion for 02-2318A, what would prevent the Objectors from arguing that the point of diversion for 02-2318A on the Objectors' property had been abandoned? Indeed, as the SRBA Court found, “the evidence is abundantly clear that the successive owners of the 13 acres—Wittrock, the

Spellmans, the Mashburns and finally the Wilkersons—did not intend to abandon their right to divert water from the Snake River. The Wilkersons clearly demonstrated that fact when they filed their lawsuit in Owyhee County to establish an easement to their point of diversion.” *Order Denying Motion to Strike, Granting Motion for Summary Judgment and Vacating Trial and Special Master Report* at 9.

With the lack of evidence of an intent to abandon 02-2318A and the absence of unequivocal acts to support a finding of abandonment, it is not necessary to address Objectors’ assertion that the Special Master appeared to have incorrectly grafted the five-year forfeiture requirement to the elements of abandonment, *Opening Brief in Support of Objectors’ Notice of Challenge* at 21.

Wilkersons and the previous owners of the 13-acre parcel had no intent to waive their right to divert Snake River water and had no intent to abandon or forfeit water right 02-2318A. Instead, they were involuntarily prevented from exercising their right to divert water by the actions of the successive owners of the 37-acre parcel.

E. The Special Master Did Not Err in Holding that the Wilkersons were not Barred by the Doctrine of Laches from Exercising Their Water Right.

Objectors contend that the four elements of the defense of laches are established and that the Wilkersons are barred from exercising water right no. 02-2318A. The following facts are counter to the laches argument:

1. An SRBA claim for licensed water right 02-2318 was filed in 1988 and again in 1990.
2. The claim was made in a timely manner and accepted by both IDWR and this Court, and then subsequently split to 02-2318A and 02-2318B to reflect Wittrock’s 1991 purchase from the Jacksons of 13 acres irrigated under license 02-2318.

3. The Wilkersons have actively asserted their ownership of 02-2318A (13-acre parcel).
4. The timing of the adjudication of this claim – that it was filed in 1988 and not recommended to the SRBA court until December 2006 -- is beyond the control of the Wilkersons.

Laches is not applicable to this matter. The SRBA Court's holding that there was a lack of material facts in dispute regarding the doctrines of abandonment, waiver and laches should be affirmed.

F. The Special Master Did Not Err in Finding that the Remark Requested by the Objectors was Inappropriate.

In their Motion to Alter or Amend, Objectors requested that the partial decree for 02-2318A should be modified to include a remark specifying that no right of access to the point of diversion on the 37-acre parcel had been established. The Special Master's Recommendation for the Partial Decree did not include any such remark.

Remarks on water rights must be necessary for the definition of the right, or necessary for clarification of any element of a right, or necessary for the efficient administration of the water right. Idaho Code § 42-1411(2)(j). The remark requested by the Objectors is a general statement of law and is not necessary to define or clarify or efficiently administer the water right. Also, the addition of the remark would not be a correction of fact or law. Furthermore, Objectors could not raise issues for the first time or submit new evidence as part of their Motion to Alter or Amend.

In the *Order Denying Motion for Reconsideration and Motion to Alter or Amend* at 5, the Special Master held that

The Objectors' arguments in favor of such a remark are not applicable here because we are not dealing with an appropriation or permit initiated in trespass. The water right was licensed in 1972, to irrigate 50 acres (including the Wilkersons' 13-acre parcel) with the Snake River as the point of diversion. In 1988, when the SRBA claim was filed, the same point of diversion was described.

There was no trespass; therefore, there is no reason to include a remark about right of access as might be routine for a newly acquired water right. The point of diversion for water right 02-2318A is the Snake River. The sole issue yet to be determined, as stated by Judge Thomas J. Ryan in Owyhee County District Court, is whether the Wilkersons are entitled to a statutory right of way pursuant to I.C. §42-1102.

There is no basis for adding a remark to the Wilkersons' water right. The Special Master's holding on that issue should be affirmed.

IV. CONCLUSION

Water right no. 02-2318A is a licensed water right. The effect of a license under Idaho Code § 42-220 is binding upon the state as to the right of such license to use the amount of water mentioned therein and is prima facie evidence as to such right. Thus, the right is presumed valid until it is determined otherwise by the SRBA Court or a regulatory agency empowered to make such a determination. No SRBA Court or regulatory agency has found water right number 02-2318A to be invalid for any reason, including the point of diversion and the use of water. Objectors have failed to present substantial evidence to rebut the presumption afforded to the Director's Report and the water right license, and their mere allegations do not create genuine issues as to material fact. Objectors have failed to demonstrate that the Special Master committed any errors of law or that the Special Master's findings of fact were erroneous. Therefore, the Wilkersons respectfully request that this Court uphold the decision of the Special Master and issue a Partial Decree for water right no. 02-2318A in accordance with the Special Master's Report.

DATED this 8th day of July 2011.

BEEMAN & ASSOCIATES, P.C.
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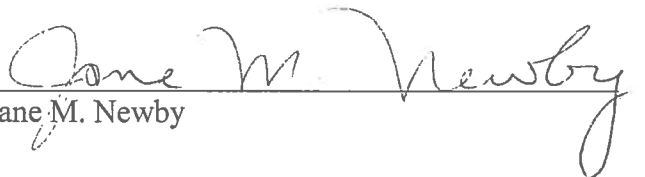
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of July 2011, I caused a true copy of the foregoing document to be deposited in an official U.S. Post Office box with First Class postage affixed, addressed to the following:

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