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

In Re SRBA

Case No. 39576

Subcase No. 2-2318A

**REPLY 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 *Reply Brief in Support of Objectors' Notice of Challenge* ("Reply Challenge Brief"). In summary, the grounds for the Objectors' 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. LAW AND ARGUMENT

A. **The Standard that Applies on Review of a Special Master's Decision Granting Summary Judgment Places the Burden of Proving the Absence of All Material Facts and that Summary Judgment is Proper As a Matter of Law is on the Movants, the Wilkersons, Which Burden They Have Failed to Satisfy.**

The Wilkersons, in *Claimants' Response to Objectors' Opening Brief in Support of Notice of Challenge* ("*Challenge Response Brief*"), assert that the "clearly erroneous" standard should apply to Objectors' *Notice of Challenge*. However, while that standard may apply to a Notice of Challenge following a trial on the merits, involving a Special Master's factual findings made after the benefit of in court witness testimony, a different standard applies to the review of a Special Master's determination that summary judgment should be granted as a matter of law. On summary judgment, all reasonable inferences are construed in favor of the non-moving party and the burden of proving the absence of any material issue of fact is on the moving party:

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.

When the record is reviewed against this standard, the Special Master's summary judgment ruling cannot stand. The Wilkersons have not proven that their predecessors' had no intent to abandon or waive the Water Right No. 2-2318A (the "Water Right"); they have not proven that they and their predecessors diligently prosecuted the Water Right pursuant to the SRBA forfeiture tolling rule; they have not proven that they and their predecessors were prevented from using the Water Right through circumstances beyond their control; they have not proven that the doctrine of laches does not apply to the Water Right in view of their delay in pursuing a legal point of diversion; and they have not proven no factual need for the proposed remark to clarify, define or administer the Water Right. Accordingly, the summary judgment, should be reversed and these matters set for a trial on the merits.

Claimants also assert that Objectors bear both the burden of producing evidence rebutting the Director's Report Recommendation and also are required to produce "substantial evidence" in opposing summary judgment based on that Director's Report Recommendation. *See Challenge Response Brief* at 7. Claimants apparently do not recognize that the *prima facie* weight of the Director's Report Recommendation has been amply "burst" by Objectors' factual evidence. The *prima facie* presumption, once rebutted, does not provide an alternative to a full and fair weighing of the evidence at trial. *State v. Hagerman Water Right Owners*, 30 Idaho 736, 745-46, 947 P.2d 409, 418-19 (1997) ("Facts contained in the affidavits create triable issues to the extent they conflict with facts alleged in the Director's Report. Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant.").

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.

The record reflects a few limited attempts by the Wilkersons and their predecessors in interest to access the Snake River point of diversion on the Riverfront Parcel after the temporary permission to use it expired. In the mid 1990's, Mr. Mashburn, the then owner of the 13 Acre Parcel, asked Mr. Brumley, the then owner of the Riverfront Parcel, about using the Snake River point of diversion. (*Deposition of Ronald Brumley* taken on May 18, 2010, ("Brumley Depo."), p. 16, lns. 17-25, p. 17, lns. 1-13; *Opening Brief in Support of Objectors' Notice of Challenge* ("Opening Challenge Brief") at 7. True and correct copies of the *Brumley Depo.* excerpts referred to herein are attached as Exhibit C to the *Affidavit of Debra K. Ellers In Opposition to Motion for Summary Judgment* ("Ellers Affidavit")). Shortly thereafter, after the pump pier on the Riverfront Parcel washed away and Mr. Brumley obtained a State Easement to locate a new one in the Snake River, Mr. Mashburn showed up with a pump in the back of his truck. (*Id.* at pgs. 19-21, *see also* Exhibit D to *Ellers Affidavit*, Exhibit 2 thereto). Again, Mr. Brumley refused to allow him to place it. (*Id.* at p. 17, lns. 19-25, p. 18, lns. 1-5; *Opening Challenge Brief* at 8). Mr. Mashburn later left the area and his ex-in-laws, the Spellmans, came to Mr. Brumley and asked to use the pump for irrigation; he again said no. *Id.* p. 23, lns. 7-25; p. 24, lns. 1-3; *Opening Challenge Brief* at 8).

Other than these few limited attempts, after the three year permissive use period expired, there were no other efforts to access the point of diversion on the Riverfront Parcel by the Wilkersons' predecessors in interest. (*See Opening Challenge Brief* at 7-9.) The Special Master incorrectly found that other owners of the Riverfront Parcel during this period of time, the Jacksons, the Harlans, and the Bentons, also refused access to the Snake River point of diversion. *Order Denying Motion to Strike, Granting Motion for Summary Judgment and*

Vacating Trial (“*Summary Judgment Decision*”) at 9. There is nothing in the record indicating that the Jacksons refused access, that the Harlans refused access, or that the Bentons refused access to these predecessors in interest to the Wilkersons.

Mr. Brumley testified that he had one conversation with Mr. Wilkerson by phone after Mr. Wilkerson purchased the 13 Acre Parcel in 1998, 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 testified that prior to when he sold the Riverfront Parcel to the Bentons in 1999, he 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). Even though the Wilkersons’ first attempts to access the Snake River point of diversion may be disputed issues of fact, it is uncontroverted that although he purchased the 13 Acre Parcel in 1998, it was not until 2006 that Claimant Mr. Wilkerson filed an action to secure an easement to the Snake River, *Wilkerson v. Snake River R.V. Resort, et al*, Third Judicial District of the State of Idaho, in and for the County of Owyhee, Case No. CV-06-0551 (the “Easement Case”). *See Opening Challenge Brief* at 9-10; *Affidavit of William R. Wilkerson, Sr.* at 2, ¶ 10.

The Special Master and the Wilkersons appear to believe that the refusal of the owners of the Riverfront Parcel to allow use of the Snake River point of diversion constitute “circumstances beyond the control of the water right holder.” (*Challenge Response Brief* at 8-9.) On this basis, the Special Master apparently determined it was unnecessary to consider the affidavit of Mr. Wilkerson and did not address *Objectors’ Motion to Strike*. Since these limited attempts to access the point of diversion do not in and of themselves establish that Wilkerson and his

predecessors did everything in their control to divert and use Water Right No. 2-2318A, it was error for the Special Master to deem it unnecessary to consider *Objectors' Motion to Strike*.

While the Wilkersons' predecessors may have attempted on a few occasions to request access to the Snake River point of diversion, until 2006 when Wilkerson finally filed the Easement Case, additional reasonable steps could have been taken earlier by Wilkerson and his predecessors to secure access to water. Just as Wilkerson finally did in 2006, eight years after purchasing the property, Wilkerson's predecessors in interest could have sought to have an easement to the Snake River point of diversion legally determined through court proceedings, but they didn't. Alternatively, they could have applied to change the point of diversion or add a point of diversion on Jump Creek, but they didn't. The filing of a legal action to establish an easement right and the filing of a transfer application pursuant to Idaho Code 42-222 to add a point of diversion are matters very much within the control within the control of the Wilkersons and their predecessors.

In fact, the record reflects that at least one owner of the 13 Acre Parcel, Mr. Mashburn, was aware of the need to pursue legal remedies to obtain legal access to a point of diversion, but never actually followed up on it:

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.'..."

(*Brumley Depo.*, p. 16, lns. 17-25, p. 17, lns. 1-13).

It was not until 2006, twelve years after the three year period of permissive use ceased in 1994, that the Easement Case was first filed. The record also establishes the absence of any efforts to file a transfer application. During this twelve year period of time, Wilkerson and his predecessors never took either of these steps to be in a position to divert and use water under Water Right No. 2-2318A. Thus, from 1994 to 2006, Wilkerson and his predecessors cannot be said to have been prevented from diverting water under the Water Right due to “circumstances beyond their control.”

The case of *Hodges v. Trail Creek Irrigation Company*, 78 Idaho 10, 13-16, 297 P.2d 524, 526-27 (1956), concerned an absentee landowner who upon learning in the year 1950 of the wrongful deprivation of water to his lands, promptly pursued legal action to correct it. In that case, the Court found no forfeiture since the landowner had been wrongfully deprived of the water as it had been illegally delivered to other properties, instead of his, and that because of his lack of knowledge of the situation, the non-use of the water on his property was due to circumstances beyond his control. The facts presented in this Subcase, however, are quite different. The Easement Case has established no existing easement to the Snake River point of diversion; thus, there has been no “wrongful” deprivation by any refusals to access the Snake River. The Wilkersons and their predecessors were not absentee landowners and provide no explanation for the 12 year delay in seeking to obtain an easement to the Snake River. Thus, according to *Hodges v. Trail Creek*, neither the “circumstances beyond water right holder’s control” forfeiture defense nor the “wrongful interference” forfeiture defense applies to the facts of this Subcase.

In their *Challenge Response Brief*, the Wilkersons assert, “[I]t is not the establishment of a right of way, but the interference with and obstruction to an existing easement that has been continuing.” *Challenge Response Brief* at 9, fn. 4. However, as noted in the *Opening Challenge*

Brief, Wilkerson's only remaining claim in the Easement Case relates to *Idaho Code § 42-1102*, with the other two common law easement claims having been dismissed. *Opening Challenge Brief* at 10. *Idaho Code § 42-1102* provides for the establishment of an easement by condemnation. Thus, at the present time, the Owyhee County Court has determined that there is no existing easement, and remaining for determination is whether Wilkerson may establish an easement hence forth pursuant to *Idaho Code § 42-1102*.

Regardless, the undisputed fact remains that from 1994 to 2006, neither Wilkerson nor his predecessors pursued either an easement action or a change in point of diversion to be able to divert and use the Water Right. This extended inaction establishes not only the inapplicability of the "circumstances beyond water right holder's control" forfeiture defense, but also, evidences the 13 Acre Parcel owners' intent to "give up" on the Water Right during this twelve year period of time, a matter which also relates to the doctrines of abandonment and waiver.

In order for the Wilkersons and their predecessors to be prevented from using the Water Right due to "circumstances beyond their control," it is necessary to ask whether they did everything within their control to be able to use the Water Right. The Wilkersons and their predecessors' failure to take steps to obtain an access easement or to change the point of diversion establish that they did not do everything within their power to divert and use the Water Right. Objectors' own affidavits establish only the limited few instances where the Wilkersons' predecessors requested access to divert the Water Right, but do not provide support for the Wilkersons and their predecessors doing all they could do during these years to secure that access. Rather, Objectors' own affidavits indicate that the few meager requests were never followed up on after they were denied. Thus, Objectors' own affidavits, do not establish the "circumstances beyond water right holder's control" forfeiture defense and it was error for the Special Master to view these affidavits as establishing that material issue.

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.

Without providing any legal support, the Special Master found that because Objectors' predecessors in interest, the Jacksons, filed the SRBA claim for Water Right License 2-2318 in 1988, there can be no argument of forfeiture prior to that date. (*Summary Judgment Decision* at 7.) The record establishes that the Jacksons did not irrigate the 13 Acre Parcel from the Snake River for at least the years 1982 to 1987. (*Affidavit of Doug Larzelier in support of Defendant's Motion for Summary Judgment in Opposition to Plaintiff's Motion for Summary Judgment* ("Larzelier Affidavit") at ¶ 3 and Exhibit A thereto, filed on August 17, 2007, in the Easement Case. A copy of the *Larzelier Affidavit* is filed in this subcase as Exhibit L to the *Ellers Affidavit*.)

In view of this non-use, why the Jacksons filed an SRBA claim for the entire licensed Water Right No. 2-2318, is not clear, which is why a trial on the merits should be held. It appears from the format of the SRBA claim that the Idaho Department of Water Resources ("IDWR") likely prepared the SRBA claim from the licensed information. (*See Affidavit of Jon C. Gould*, Exhibit E.) Whether the Jacksons were even aware of the forfeiture issue with regard to the 13 Acre Parcel is uncertain. Perhaps, the Jacksons planned to resume the use in the future, plans which may have been changed as a result of their subsequent development of the RV park on the Riverfront Parcel and the subsequent decision to separate and sell the 13 Acre Parcel.

There are innumerable speculative reasons why the Jacksons may have filed the SRBA claim covering the entire licensed Water Right. In any event, an SRBA claim is not intended to be a definitive determination of the elements of a water right; indeed, that is the purpose of the SRBA to evaluate those claims and determine the current status of the various water right elements. *See Idaho Code §§ 42-1410 and 42-1411*. Further, any claim filed by the Jacksons

would not constitute a binding statement by the Objectors with regard to the status of the Water Right for the 13 Acre Parcel. Yet, without providing any legal support, the Special Master treats the Jacksons' SRBA claim filed in 1988 as a binding determination of the ultimate status of the Water Right over 22 years later.

The Wilkersons also assert that the limited permissive use of the Snake River point of diversion between the years 1991-1994 effectuated "a resumption of use" counteracting any prior forfeiture of the Water Right. This limited three year period of permissive use was followed by a period of non-use extending to the present time, a period of time extending much longer than the five year forfeiture period. In other words, any use during this three year limited period would not have affected the forfeiture subsequent to the limited three year period of use. However, also this limited three year period of permissive use pursuant to a private agreement was not legally adequate to constitute a "resumption of use," negating forfeiture.

Pursuant to the purchase and sale agreement, Wilkerson's predecessors could use the Snake River point of diversion for three years "and then to terminate." (*Ellers Affidavit*, Exhibit B.) Thereafter the continued viability of the water right for the 13 Acre Parcel was contingent on changing the point of diversion to Jump Creek, which was never attempted. If a new point of diversion on Jump Creek had been approved pursuant to *Idaho Code* § 42-222 and subsequently used to the present, the "resumption in use" forfeiture defense would be legally valid today. However, the three year period of conditional permissive use was followed by 17 years' of non-use, extending to the present day. Any use of limited duration terminating almost 20 years' ago is not adequate to establish the applicability of the resumption of use defense today. Also, just as a water right cannot be established on private ground in trespass, a limited three year period of use after which any such use would be in trespass cannot satisfy the resumption in use forfeiture

defense. *See Lemmon v. Hardy*, 95 Idaho 778, 780, 519 P.2d 1168 (1974) (“[A] water right initiated by trespass on private property is invalid.”)

For these reasons and for the other reasons discussed in the *Opening Challenge Brief*, the Water Right was forfeited by 1988, or substantial issues of material fact remain as to Water Right forfeiture during the 1980’s, and it was error for the Special Master to grant *Claimants’ Motion for Summary Judgment*.

2. Material Issues of Fact Exist as to Whether the Doctrine of Forfeiture Applies to the Long Period of Non-Use After 1994.

As noted in the *Opening Challenge Brief*, the Wood Decision’s ruling that the filing of an SRBA claim tolls the application of forfeiture, rests on the prosecution of the claim to decree. *Memorandum Decision and Order on Challenge and Order of Partial Decree, SRBA Subcase No. 65-05663B, Wood v. Trout*, filed in May, 2002 (“*Wood Decision*”) at p. 18. In contrast, the record, in this instance, reflects both the Claimants and their predecessors’ failure during the extended period of 1994-2006 to pursue either establishment of an easement to the Snake River or to change the point of diversion to Jump Creek.

As the *Wood Decision* indicates, the tolling role is not automatic. The party seeking the benefit of the tolling role must continue to prosecute the water right. However, for an extended period of about twelve years, Claimants and their predecessors did not pursue the legal options necessary to be in a position to use the Water Right. At least one of the two available options (easement action or transfer application) should have been taken early in this period to be in a position to have a legally usable water right. However, during these twelve years, neither of these steps was pursued. In this way, Claimants and their predecessors did not take all the necessary steps to prosecute the claim successfully. As a result of this delay, this SRBA Subcase is now in active litigation with no legally authorized point of diversion for the Water Right.

Quite simply, if they wanted to ensure the continued viability of the Water Right, Claimants and their predecessors should have acted on their purported rights sooner to secure an easement or to change the point of diversion. This extended failure to act evidences the absence of a continued desire to pursue the water right. At a minimum, significant material issues of fact exist as to whether Wilkerson and his predecessors did diligently prosecute the water right claim and, also, whether circumstances beyond their control prevented them from using the water right between the years 1994-2006. For these reasons and for the reasons discussed in the *Opening Challenge Brief*, it was error for the Special Master to enter summary judgment as to the post-1994 forfeiture claim.

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.

Claimants, in their *Challenge Response Brief*, assert that there are a “lack of evidence of an intent to abandon” and “the absence of unequivocal acts to support a finding of abandonment.” *Challenge Response Brief* at 17. Objectors, on the other hand, assert that the twelve year failure to act between the years 1994 to 2006 evidence both an intent to abandon and unequivocal acts (or inactions) supporting water right abandonment. At least, these are inherently factual issues that should not have been decided on summary judgment.

It is well established in Idaho that a water right holder’s failure to maintain a ditch or other diversion works or the destruction of the diversion works can provide the basis for a finding of water right abandonment. *See Joyce v. Murphy Land and Irrigation Co.*, 35 Idaho 549, 555, 208 P. 241 (1922) (“Abandonment is most usually proved by evidence of the failure of the party charged to use the right to the water or to keep the works necessary for the utilization of the water in repair.”). Similar to the filling in of diversion works or the failure to maintain diversion

works, Claimants and their predecessors failed to obtain and a legal means to divert and use Water Right No. 2-2318A. Without a valid easement or, in the alternative, a point of diversion on the 13 Acre Parcel that did not require an easement, Claimants and their predecessors behaved in a legally analogous way to filling in a ditch or not maintaining a means of diversion. Just as if the means of diversion had been destroyed and not replaced, Claimants and their predecessors failed to secure and maintain a way to divert water and get the water to their property. These facts establish water right abandonment pursuant to Idaho case law or, at a minimum, establish that there remain significant issues of fact as to water right abandonment.

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

Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002)

describes the following elements of the defense of laches:

(1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

In determining whether the doctrine applies, consideration should be given to all surrounding circumstances and acts of the parties. *Id.* Whether or not the defense applies is a question of fact. *Id.*

Under the circumstances presented in this case, the defense of laches clearly is established as to each of these elements: 1. Objectors' predecessors refused to allow Wilkerson and his predecessors to access the Snake River point of diversion; 2. Wilkerson and his predecessors delayed by at least twelve years in asserting any rights of access to the Snake River point of diversion, despite having notice and a prior opportunity to institute a suit; 3. the current owners of the Riverfront Parcel were not

aware at the time they purchased the property that any such easement rights would be asserted (*Affidavit of Diane Kritz In Opposition to Motion for Summary Judgment*); and

4. injury to the Objectors would result in the event that Wilkerson is allowed to use the Snake River point of diversion for diversion (*Id.*; *Jackson Depo.*, in Exhibit A to *Ellers Affidavit*, p. 40, lns. 2-8).

In this regard, the *Challenge Response Brief* ignores the critical period of time from 1994-2006, a time period during which the Riverfront Parcel went through 3 changes in ownership, when neither the Wilkersons nor their predecessors took any legal steps to exercise the Water Right. The Jacksons' filing of the SRBA claim in 1988, and again in 1990, and the subsequent SRBA proceedings are not sufficient to explain the subsequent extended period of time during which no legal action was taken to establish an easement or change a point of diversion with regard to the Water Right. Despite the pendency of the SRBA, the equitable defense of laches applies under these circumstances where Claimants' exercise of the Water Right after an extended period of non-use would cause significant injury.

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

The *Challenge Response Brief* states that the Wilkersons and the previous owners of the 13 Acre Parcel "had no intent to waive their right to divert Snake River water." *Challenge Response Brief* at 17. However, the facts in the record suggest otherwise. If these successive owners of the 13 Acre Parcel did not intend to waive the Water Right, the question arises why did they wait a collective twelve years, during 1994-2006, without being able to divert their water. At a minimum, this twelve year period of delay, extending over several owners of the 13 Acre Parcel, raises the question as to whether some, or all of these owners did, in fact, "waive"

their right to divert Snake River water. For this reason, summary judgment as to the issue of waiver was inappropriate.

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.

The Wilkersons support the issuance of a Partial Decree for Water Right No. 2-2318A without any remark concerning the decreed point of diversion on the basis that such a remark would only re-state the law. Objectors, on the other hand, believe that such a Partial Decree would imply that there is a valid, legally effective point of diversion, at the described location. Objectors assert that a remark is necessary to clarify that, in fact, this is not the situation and that a remark is necessary for the definition and the efficient administration of the Water Right.

The Easement Case has determined that there is no existing easement at the Snake River point of diversion, while leaving open for consideration whether the Wilkersons are in a position to condemn a right of way at that location pursuant to *Idaho Code* § 42-1102. In addition to obtaining an easement, for the Claimants to utilize the Snake River point of diversion, it is also necessary for the Wilkersons to obtain approval from IDWR for a second point of diversion at the Snake River, since the original license only authorized one point of diversion. *See Idaho Code*, § 42-222. Objectors already utilize the currently approved point of diversion under License No. 2-2318 and a second point of diversion at this location would require a transfer approval. *Id.*

Since Claimants presently do not have an easement to the Snake River and presently do not have a transfer approval to add a second point of diversion at the Snake River, it is especially important that any Partial Decree issued for this Water Right by this Court unambiguously clarify these circumstances. Otherwise, such a Partial Decree could be misinterpreted to suggest that the

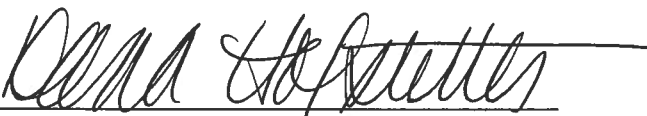
described point of diversion is associated with a valid right of way and an approved transfer pursuant to Idaho law. The right of way issue and the transfer approval issue are important considerations that would need to be addressed before water could be diverted under the Partial Decree and for purposes of water right definition, clarification and administration, such a remark needs to be included in the Partial Decree pursuant to *Idaho Code §§ 42-1411(2)(j) and 42-1412(6)*.

III. CONCLUSION

For the foregoing reasons and for the reasons discussed in the *Opening Challenge Brief*, 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 18th day of July, 2011.

HOFSTETTER LAW OFFICE, LLC

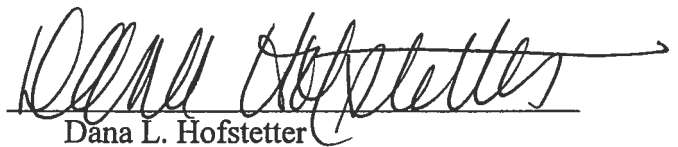
By: 
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July, 2011, I caused to be served copies of the foregoing document (with any attachments) by the pre-paid method(s) indicated below:

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Dana L. Hofstetter