

description of the source. Nevertheless, in this motion Stevenson seeks to dismiss or strike the objection to the existence of the water right and, in the alternative, to obtain summary judgment that 37-118 is a valid right, leaving the question of source for further determinations by the Court.

Rogers agrees that the procedural background of the case was properly described in Stevenson's motion. Thus, there is no dispute that Rogers did not initially object to any part of the Stevenson water right within the time authorized for filing objections in Basin 37, Part 3. It is also undisputed that when Rogers did file his motion for a late objection, the only basis he asserted for filing that late objection was that the source was improperly described and that the only purpose for the late objection was to properly describe the source. There is no dispute that based upon that representation, the Court authorized the Department to reevaluate the description of the source and publish an amended director's report and authorized Rogers to file a late objection. There is no dispute that 2011 marked the first time in the long history of this subcase since it was recommended years before that Rogers raised any objection to the existence of the right.

Rogers asserts that, since the Court authorized him to file a late objection and did not place any limits on what he could say in this late objection, he is free to raise whatever issues he wishes to raise. In other words, a party is free to advise the Court one basis of his objection to a water right in order to obtain permission to file a late objection years after objections were due and then turn around and fundamentally change the nature of the subcase years later by raising a brand new topic never before brought to the Court's attention.

This sleight of hand should not be countenanced by the Court. Rogers told the Court the reason he wanted to file a late objection was to object to the source. That was the basis for the

Court's decision authorizing late claims and amended director's reports. The only amendment dealt with description of the points of diversion for this right. Nothing was changed about the quantity or the existence of the right. The issue of what can be brought at this late date is committed to the sound discretion of the Court in its ability to control the docket recognizing that at some point in time the SRBA has to come to an end. *Priest v. Landon*, 135 Idaho 898, 26 P.3d 1235 (Ct. App. 2001).

It is fundamentally unfair to advise the parties and the Court of one relatively minor reason for raising a late objection and then turn the entire case into a wholesale assault on the existence of a previously decreed water right. This tactic deprived the Court and the parties of the ability to request or impose specific limits on the scope of the objection since the scope was described so narrowly in the hearing. The Court should therefore strike or dismiss the portion of the late objection seeking to object to the existence of water right 37-118.

MOTION FOR SUMMARY JUDGMENT

Rogers first seeks to attack the finding in the Frost Decree that 400" of water was available to and put to beneficial use by the Buhlers at the time of the Frost Decree. Rogers argues that the *Riggan* subcase 74-15015 specifically allowed challenges to prior decrees whenever necessary to correct errors in the historic use of the water right. In fact, Judge Melanson held that the prior decree in the Lemhi adjudication was binding in that subcase and that the SRBA did not give parties a second bite of the apple to readjudicate the decreed rights. The Court does note (at footnote 2) that corrections to legal descriptions would be permitted and that issues related to subsequent changes in the nature of the use could be litigated but whether or not the right existed in the first place could not be. See Idaho Code § 42-1420. Accordingly, Rogers as a successor-in-interest to the owner of the property where the water right is decreed

cannot challenge the Frost Decree's finding that 400" were put to beneficial use from the swamp through the swamp ditch. Rogers has no evidence of the amount of water in the ditch in 1904, in any event.

With respect to the Motion for Summary Judgment, the facts are not in dispute. The Willis 1 headgate is the Department's point of measurement of right 37-118. Over the last ten years, the minimum of 400" has been delivered to the measuring point in the Willis 1 headgate for use on the Stevenson property. Moreover, for more than five years prior to the filing of the adjudication during the 1980s, a minimum of 400" was delivered to the Willis 1 headgate. From 1970 to the present, Stevenson and his predecessor-in-interest have paid the water master in full for delivery of 37-118 to the Willis 1 headgate. Thus, for five consecutive years prior to the commencement of the adjudication, the water right was in use and had not been forfeited or abandoned as of that time.

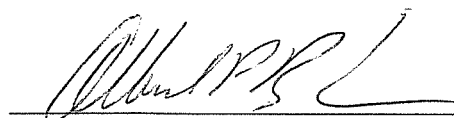
Those facts are all undisputed and Rogers offers no facts or arguments to suggest that these facts are not dispositive. For example, Rogers does not contest that forfeiture is tolled under the Facilities Volume decision by Judge Wood, during pendency of the SRBA. Accordingly, Rogers cannot point to any failure to deliver water right 37-118 to Stevenson during the pendency of the SRBA to support his abandonment or forfeiture theory, at least since the claim was filed in 1988. Second, the purpose of the SRBA is to capture the status of the water right at the time of the commencement of the adjudication or at least the filing of the claim. Idaho Code § 42-1409, § 42-1411. See also, *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriations*, 129 Idaho 545, 926 P.2d 1301 (1996). In 1988, when the claim was filed on the Buhler swamp right 37-118, the right had been in full use for the full amount of the 400". Clearly, there is no clear and convincing evidence of intent to abandon the right as

required under the standards of *Jenkins v. Idaho Dept. of Water Resources*, 103 Idaho 384, 647 P.2d, 1256 (1982).

Rogers concedes that to the extent he interfered with the flows to Stevenson's property, that there can be no forfeiture or abandonment. Rogers does not dispute the fact that he and his predecessor-in-interest, including his father, leveled and drained the land of the swamp thereby reducing the amount of water on the surface. Barker Aff. Ex. D, D. Rogers Depo. pp. 48-49. While Rogers contends that there is no evidence of interference, the evidence is undisputed that the Rogers made every attempt to drain the swamp on their property. In addition, Rogers asks this Court to speculate without offering any actual proof whatsoever that the existence of an artesian well somehow provides evidence of abandonment or forfeiture of right 37-118. Rogers asked the Court to make the leap, without any proof whatsoever of the volumes of water used, the times the water was used, or how that use of water affected delivery of the right 37-118. It is not sufficient in a summary judgment motion for the party to rely upon speculation. The party must bring forth actual facts to support its position and cannot rely on conclusory assertions. IRCP 56 (c); *Northwest Bec-Corp. v. Home Living Service*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002). There are no facts in record concerning the timing, use, or amount of water from any artesian well or its impact on the measurements of water right 37-118. Accordingly, summary judgment must be granted on the existence and amount of the right 37-118.

DATED this 27th day of July 2011.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July, 2011, I caused to be served a true and correct copy of the foregoing JOHN STEVENSON'S RESPONSE IN SUPPORT OF MOTION TO STRIKE OR DISMISS AND MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

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Copies mailed to:

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