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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. 2-2318A
	)	(Wilkerson)
Case No. 39576	)	WILLIAM & IMOGENE WILKERSON
	)	BRIEF ON MOTION TO ALTER OR
	)	AMEND AUGUST 29, 2011
	)	MEMORANDUM DECISION AND
_____	)	ORDER ON CHALLENGE

INTRODUCTION

On September 12, 2011, William and Imogene Wilkerson (Wilkersons), by and through their counsel of record, Beeman & Associates, P.C., moved this Court to amend the Court's August 29, 2011 Memorandum Decision and Order on Challenge (Order on Challenge) entered in the above-captioned subcase. Following is their brief in support of that motion.

ARGUMENT

**A. The Court's findings of fact should clarify that an IDWR field exam on
September 16, 1983 confirmed irrigation of the 13 Acre Parcel.**

The Court found that "The field examiner's report for the claim filed for the right in a prior adjudication was based on an aerial photograph taken in 1977. *Gould Aff.*, Ex. D. The 13 Acre Parcel was therefore irrigated at least as of this date." *Order on Challenge* at 3, fn 1. However, at the bottom of that same page of Exhibit D relied upon by the Court, there is

evidence that the field examiner's report was also based on a field exam of the acreage and point of diversion made on September 16, 1983. Thus, the above finding of fact should be clarified to reflect the fact that irrigation of the 13 Acre Parcel from the Snake River point of diversion was confirmed in an IDWR field exam on September 16, 1983.

B. The Court's remark for SRBA Partial Decree 2-2318A needs to be removed or clarified because of the pending status of *Wilkerson v. Snake River R. V. Resort, et. al.*, [Third Judicial District, Owyhee County (Case No. CV-06-05541)].

The remark proposed for 2-2318A, printed in full below, provides both that the right of access to the point of diversion and conveyance system *was decided* separately in Owyhee County and *is subject* to any final judgment in Owyhee County:

"This water right is a split from former license 02-2318. As a result, access to the decreed point of diversion and delivery system for this water right is located on property other than that to which this water right is appurtenant. The decreed elements for this water right do not constitute a judicial determination of the validity of any right to access the point of diversion and/or conveyance system located on property other than to which this water right is decreed appurtenant. The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R. V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541). Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to any final judgment entered in that proceeding." Order on Challenge, Page 23.

Since the Owyhee County case is in process, the right of access has not been decided by the Court, and therefore the following sentence in the remark needs to be removed or clarified:

"The judicial determination of the right of access to the point of diversion and conveyance

system was decided separately in *Wilkerson v. Snake River R. V. Resort, et. at.*, Third Judicial District, Owyhee County (Case No. CV-06-05541).”

Also, if the parties settle the matter, the right of access would not be decided by a judgment of the Owyhee County court, and therefore the last sentence of the remark needs to be removed or clarified: “Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to any final judgment entered in [Owyhee County].”

Both of these concerns could be addressed by substituting the following remark for the remark proposed in the August 29 Order on Challenge:

“Water right 02-2318A is a split from former license 02-2318. An action in Owyhee County has been pending since May 23, 2006, regarding the right of access to the point of diversion and conveyance system for water right 2-2318A, *Wilkerson v. Snake River R. V. Resort, et al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541).”

The Court also needs to clarify that the remark does not address the status of the easement upon the entry of the Partial Decree.

C. The Court’s remark for SRBA Partial Decree 2-2318A needs to be removed or clarified because it could be “misconstrued” as determining that there was never a valid “right of access” for 2-2318A.

Although the Special Master concluded that the remark would be unnecessary and the Court stated that “[o]rdinarily, such a remark would be unnecessary as the ownership of a water right does not in and of itself create a permanent right of access across the property of another,” *Order on Challenge* at 23, the Court decided to include the remark in the “other provisions necessary for the definition or administration of this water right” section of the Partial Decree for 2-2318A in order to prevent SRBA Partial Decree 2-2318A from being “misconstrued as a

determination of the validity of a right of access” to the Snake River point of diversion for the 13 Acre Parcel. *Order on Challenge* at 24.

However, the SRBA is a “snapshot in time” as of November 19, 1987, and the remark could be read as stating no easement ever existed between the 13 Acre Parcel and the Snake River point of diversion, and indeed could be misconstrued as determining there was never a valid right of access to the Snake River point of diversion. A pre-existing water right – license 2-2318 -- existed at the time of the commencement of the SRBA. The Wilkersons’ portion of that right – SRBA claim 2-2318A –has been confirmed by this Court, in the following findings of fact:

2. Water right claim no. 02-2318A is for the diversion of .27 cfs from the Snake River for the irrigation of 13.3 acres located in Owyhee County from March 15 to November 15, with a priority date of June 5, 1964. As explained in detail below, the claim is based on a proportional split of a license previously issued for parent water right no. 02-2318. *Order on Challenge* at 2.

3. The 13.3 acre place of use for water right 02-2318A was originally part of a 50 acre parcel formerly owned by James and Peggy Jackson ("the Jacksons"). . . . The Jacksons split the 50 acre parcel by selling the 13 Acre Parcel. The Jacksons later sold the Riverfront Property. Through mesne conveyances the 13 Acre Parcel is now owned by the Claimants and the Riverfront Property is owned by the Objectors. *Id.*

4. In the 1960's, the Jacksons developed and acquired a license for water right no. 02-2318 to provide irrigation water to the entire 50 acre parcel. Water was diverted and pumped from the Snake River at a point of diversion located on what is now the Riverfront Property. In order to convey water to the 13 Acre Parcel, a conduit was constructed across the Riverfront Property and under the railroad right-of-way. Proof of beneficial use for the license application was submitted to the Idaho Department of Water Resources ("IDWR" or "Department") on July 10, 1970. . . . On March 23, 1972, a license was issued for the water right for the irrigation of the entire 50 acres. *Id.*

5. At some point in the mid-1970's the Jacksons ceased watering the 13 Acre Parcel. . . . On May 13, 1981, the Jacksons' son, Doug Larzelier filed an irrigation claim for the entire 50 acres in an adjudication of the lower main stem of the Snake River commenced prior to the SRBA. [Footnote accompanying the Court’s text: “The field examiner's report for the claim filed for the right in a prior adjudication was based on an aerial photograph taken in 1977. The 13 Acre Parcel was therefore irrigated at least as of this date.”] *Id.* at 3.

6. From 1982 through 1987, Doug Larzelier and his wife took over the 50

acre parcel from the Jacksons. Mr. Larzelier has no record of having ever farmed or irrigated the 13 Acre Parcel with water diverted from the Snake River . . . *Id.* [Note: Wilkersons' Motion to Alter or Amend seeks clarification that irrigation of the 13 Acre Parcel from the Snake River point of diversion was confirmed in an IDWR field exam on September 16, 1983.]

7. On October 7, 1988, Mrs. Jackson filed a claim in the SRBA for water right no. 02-2318 for 1 cfs for the irrigation of the entire 50 acres based on the prior license. . . . Mrs. Jackson, and Mr. and Mrs. Larzelier's names all appear on the claim. *Id.*

The conveyance system built and used by the Jackson family for irrigation of the 13 Acre Parcel is described in the Court's findings of fact *above*: " In order to convey water to the 13 Acre Parcel, a conduit was constructed across the Riverfront Property and under the railroad right-of-way." The findings of fact *below* address the continued use of this conveyance system from the Snake River point of diversion *after* the Jackson family sold the 13 Acre Parcel to the Wilkersons' predecessors in interest.

8. In July of 1991, the Jacksons sold the 13 Acre Parcel to the Wittrocks. *Id.* at 4.

10. A Warranty Deed from the Jacksons to the Wittrocks was signed on July 16, 1991, and recorded July 19, 1991. The Warranty Deed conveyed the 13 Acre Parcel in fee simple "[s]ubject to all easements, restrictions and reservations of record and of use." *Id.*

11. Also in July of 1991, the Larzeliers and the Wittrocks filed a *Notice of Change of Water Right Ownership* with IDWR transferring ownership of 13.3 acres of water to the Wittrocks. *IDWR Adjudication claim file for 02-2318A. 3* The *Notice of Change of Water Right Ownership* expressly states: "Purchaser to receive 13.3 acres of water." *Id.*

12. During the three year period the Wittrocks irrigated the 13 Acre Parcel with water diverted from the Snake River and conveyed across the Riverfront Property as authorized by the 02-2318A water right. *Id.* at 5.

14. On March 7, 1994, the Wittrocks sold the 13 Acre Parcel to the Spellmans. . . . The Warranty Deed provides "including all water and ditch rights and rights of way for water and ditches." . . . On May 19, 1995, the Spellmans quitclaim deeded the 13 Acre Parcel to their daughter and son-in-law, the Mashburns. . . . On November 26, 1996, the Mashburns deeded the property back to the Spellmans. . . . On April 15, 1998, the Spellmans sold the property to the Claimants. . . . On October 13, 1998, the Claimants filed a *Notice of Change of Water Right Ownership* for water right 02-2318A. *Id.*

16. After the Wittrocks conveyed the 13 Acre Parcel to the Spellmans, the facts are conflicting regarding the extent of any further use of the right to the present. These facts are discussed in detail elsewhere in this opinion. *Id.*

Licensed water right 2-2318 had a valid right-of-way to access the point of diversion on the Snake River for the 13 Acre Parcel. The Jacksons' deed of the 13 Acre Parcel to the Wilkersons' predecessors in interest conveyed water right 2-2318A and the appurtenant easement across the Riverfront Property for the delivery system built and used by the Jackson family for the 13 Acre Parcel in the perfection of licensed right 2-2318. This appurtenant easement that passed with conveyance of the 13 Acre Parcel to the Wilkersons' predecessors in interest -- and was subsequently used -- was also conveyed by the deed of the 13 Acre Parcel to the Wilkersons.

In finding that a remark is necessary, the Court relies upon the holding in *Joyce Livestock Co. v U.S.*, 144 Idaho 1, 18, 156 P.3d 502, 519 (2007)(citing *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 746, 291 P. 1064, 1065 (1930)) that in Idaho one can hold a water right and not own the land to which the water right is used. *Joyce Livestock*, however, is easily distinguished from the present case. The stock water right in *Joyce Livestock* was always located on federal land, but was found to be an appurtenance of the private ranch whose cattle made beneficial use of the water source located on the federal land. ID at 14-16. The cattle's presence on the federal land was pursuant to federal authorization, so the livestock water right was not initiated in trespass. By comparison, the Wilkersons own the 13 Acre Parcel which is the place of use for water right 2-2318A, and water right 2-2318A is not new nor was it initiated in trespass. The Jackson family developed the water right 2-2318 for all 50 acres while the Jackson family owned all 50 acres. As a part of developing the 50 acres for irrigation, the Jackson family built and used the separate conveyance system for the 13 Acre Parcel because of its location

away from the Snake River, unlike the 37 Acre Parcel (Riverfront Parcel) which was immediately adjacent to the Snake River.

From the beginning there has been a valid water right for the 13 acre parcel, which point of diversion on the Snake River has been accessed and used by the Wilkersons' predecessors through an appurtenant easement that passed with the original conveyance from the Jackson family. With the existence of this water right and the easement, there already is "certainty concerning the rights and obligations surrounding the water right," despite the Court's finding to the contrary. *Id* at 23. The "initiated in trespass" constraint of *Joyce Livestock* is not applicable. As the successor in interest of the dominant estate created by the Jackson family's sale of the 13 Acre Parcel, the Wilkersons have an appurtenant easement, as did their predecessors in interest, for the conveyance system – built and used by the Jackson family -- from the Snake River point of diversion to the 13 Acre Parcel.

CONCLUSION

The Court found that the remark was necessary because of the "long history of acrimony" between the various owners of the two parcels. *Order on Challenge* at 23. The proposed remark, however, burdens use of water right 2-2318A because it creates doubt about the right of access unquestionably enjoyed by the Jackson family for irrigation of the 13 Acre Parcel under the original water right license 2-2318 claimed by the Jackson family in the SRBA and in the adjudication of the lower Snake River preceding the SRBA. The subsequent division and sale of the 50 acres and water right 2-2318 gives no evidence that any of the subsequent owners were to enjoy less of the water right or its appurtenances than did the Jackson family. The remark is also not necessary to address the long history of refusal of access by the owners of the 37 Acre Parcel, nor is it needed to avoid any future controversy or for the future efficient administration of the right.

The Wilkersons respectfully request that the remark be removed or revised as suggested.
The clarification of the 1983 IDWR field examination will support the Court's determination
upholding the Special Master's recommendation of 2-2318A.

Dated this 26th day of September 2011.

BEEMAN & ASSOCIATES, P.C.
Attorneys for William and Imogene Wilkerson

By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of September 2011, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

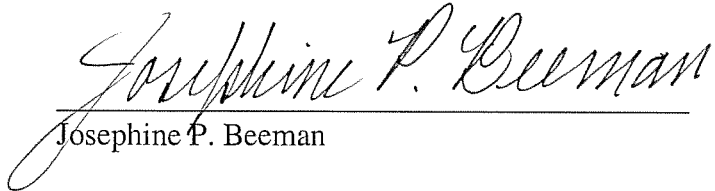
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