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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	)	**EXHIBIT B to**
	)	**AFFIDAVIT OF JOSEPHINE P. BEEMAN IN SUPPORT OF WILLIAM & IMOGENE WILKERSON'S REPLY TO [OBJECTORS'] RESPONSE BRIEF IN OPPOSITION TO WILKERSON'S MOTION TO ALTER OR AMEND [AUGUST 29, 2011 MEMORANDUM DECISION AND ORDER ON CHALLENGE]**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of October 2011, I caused a true and correct copy of the foregoing document to be served on the following:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

WILLIAM WILKERSON, Plaintiff/Counterdefendant, vs. SNAKE RIVER R.V. RESORT, LLC, RAYMOND C. BARKER, JR., CHARLES KRITZ, AND DIANE B. KRITZ, Defendants/Counterclaimants.	Case No. CV-2006-05541-M **PLAINTIFF WILKERSON'S MOTION TO STAY PROCEEDINGS**

Plaintiff William Wilkerson respectfully submits this Motion to Stay the Owyhee County proceedings for which trial is set November 28 through November 30, 2011. Wilkerson moves this Court to stay proceedings pursuant to the Case Scheduling Order filed March 28, 2011, according to which all dispositive motions must be filed no later than September 29, 2011.

The Owyhee County proceedings were initiated in 2007 to confirm the easement for the delivery system between the Snake River point of diversion for the Plaintiff Wilkerson's water right 02-2318A and Wilkerson's 13 Acre Parcel which is the place of use for Wilkerson's irrigation water right 02-2318A. The delivery system which crosses the Defendants' property

was built and used by the Jackson family who developed water right 2-2318 and claimed the entirety of water right 2-2318 in the Snake River Basin Adjudication (SRBA) before selling and dividing the underlying property, resulting in a proportional split of water right 2-2318 to 2-2318A and 2-2318B. Summary Judgment decisions on Wilkerson's causes of action in Owyhee County are documented in interlocutory orders dated October 18, 2007, December 26, 2007, and September 8, 2011.

During the pendency of this Owyhee County case, Plaintiff's water right 02-2318A has been under review by the SRBA Court in Subcase No. 2-2318A. Wilkerson submits this Motion to Stay because of the dispositive nature of these SRBA proceedings on Wilkerson's water right 2-2318A and the August 29, 2011 SRBA Memorandum Decision and Order on Challenge and Order of Partial Decree for Wilkerson's water right 2-2318A which is not yet final, pending ruling on Wilkerson's Motion to Alter or Amend and expiration of any appeal deadline to the Idaho Supreme Court. As explained in Wilkerson's Brief in Support of Motion to Stay, the Motion is based on the principles of Idaho Rule of Civil Procedure 11(a)(2)(B) under which "the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order ... [and] that might change the specification of facts deemed to be established." *Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (Idaho 1990). This is in accord with the authority of a court to correct errors of fact and law which have occurred in its proceedings in order to circumvent a later appeal.[1] Rule 11(a)(2)(B) allows this correction process to occur, as here, before the parties proceed to trial or appeal.

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[1] *Slaatburg v. Allstate Insurance*, 132 Idaho 705, 707, 979 P.2d 107, 110 (1999), and *Johnson v. Lambros*, 143 Idaho 468, 468, 147 P.3d 100 (Idaho App. 2006), both citing *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

The final disposition of the SRBA proceedings may moot or significantly limit any factual issues for trial and may require this Court to modify its interlocutory orders on summary judgment to be consistent with the SRBA Court's factual and legal determinations for water right 02-2318A. The pending SRBA proceedings may allow ultimate confirmation of the easement for Wilkerson's water right 2-2318A based on the determination that water right 2-2318A was in existence and used prior to and after being claimed in the SRBA in 1988.

DATED this 29th day of September 2011.

BEEMAN & ASSOCIATES, P.C.
Attorneys for Plaintiff

By Josephine P. Beeman
Josephine P. Beeman

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I HEREBY CERTIFY that on the 29th day of September 2011, I caused a true copy of the foregoing document to be mailed to the following:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

WILLIAM WILKERSON, Plaintiff/Counterdefendant, vs. SNAKE RIVER R.V. RESORT, LLC, RAYMOND C. BARKER, JR., CHARLES KRITZ, AND DIANE B. KRITZ, Defendants/Counterclaimants.	Case No. CV-2006-05541-M **PLAINTIFF WILKERSON'S BRIEF IN SUPPORT OF MOTION TO STAY PROCEEDINGS**

INTRODUCTION

Plaintiff William Wilkerson respectfully submits this *Brief in Support of Motion to Stay Proceedings*. The *Motion to Stay* is addressed to the Owyhee County proceedings for which trial is set November 28 through November 30, 2011.

The *Motion to Stay Proceedings* advises the Court that Wilkerson's SRBA claim 02-2318A which has been under review in the Snake River Basin Adjudication (SRBA) is nearing final determination based on SRBA District Judge Eric Wildman's August 29, 2011 SRBA Memorandum Decision and Order on Challenge and Order of Partial Decree for Wilkerson's water right 2-2318A. The August 29 decision is not yet final, pending ruling on

Wilkerson's Motion to Alter or Amend and expiration of any appeal deadline to the Idaho Supreme Court.

The SRBA final determination of Wilkerson's water right 02-2318A may moot or significantly limit any issues for trial and may require this Court to modify its interlocutory orders on summary judgment to be consistent with the SRBA Court's factual and legal determinations for water right 02-2318A. Wilkerson requests that this Court stay the Owyhee County proceedings until final determination of the SRBA proceedings on water right 02-2318A.

THE SRBA DETERMINATION OF WILKERSON'S WATER RIGHT 02-2318A IS COMMON TO ALL CAUSES OF ACTION TO CONFIRM THE EASEMENT FOR THE DELIVERY SYSTEM CONSTRUCTED BETWEEN THE POINT OF DIVERSION AND PLACE OF USE FOR WATER RIGHT 02-2318A

In order to circumvent a later appeal[1] of this Court's interlocutory orders on summary judgment and in order to circumvent trial proceedings which may be mooted, Wilkerson requests that the Owyhee County proceedings be stayed until the SRBA proceedings on water right 2-2318A are concluded. Under Idaho Rule of Civil Procedure 11(a)(2)(B) the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order ... [and] that might change the specification of facts deemed to be established." *Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (Idaho 1990).

Two factual findings in the interlocutory orders of October 18, 2007 and September 8, 2011 are common to this Court's rulings regarding any easement for Wilkerson's water right 2-2318A:

- In the mid-1970s, the Jacksons quit farming and developed an RV park on the 37-acres which they continued to irrigate. October 18, 2007 Memorandum Decision and Order Upon Motions for Summary Judgment, at 2; September

[1] *Slaatburg v. Allstate Insurance*, 132 Idaho 705, 707, 979 P.2d 107, 110 (1999), and *Johnson v. Lambros*, 143 Idaho 468, 468, 147 P.3d 100 (Idaho App. 2006), both citing *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

8, 2011 Memorandum Decision Upon Defendants' Second Motion for Summary Judgment, at 2.

- In 1991, the Jacksons sold the 13 acre property to the Wittrocks. As part of the sale agreement, the Wittrocks could use the irrigation conduit for a three year period after which time the use was to terminate. October 18, 2007 Memorandum Decision and Order Upon Motions for Summary Judgment, at 3; September 8, 2011 Memorandum Decision Upon Defendants' Second Motion for Summary Judgment, at 2.

These two factual findings provide examples of "facts deemed to be established" in the Owyhee County proceedings. However, the August 29, 2011 SRBA Memorandum Decision and Order on Challenge and Order of Partial Decree for Wilkerson's water right 2-2318A (August 29 Order on Challenge) makes the following determinations counter to the Owyhee County findings regarding the continuous irrigation of the 13 Acre Parcel and the nature of the Wittrocks' irrigation of the 13 Acre Parcel beginning in 1991:

- 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. August 29, 2011 SRBA Memorandum Decision and Order on Challenge and Order of Partial Decree, at 3.

- 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.

- In this case, the Jacksons and the Larzeliers filed a claim in 1988 swearing and affirming that the information represented in the claim was true and correct. The claim identified the total number of irrigated acres as well as the legal description of the acres being irrigated. Those representations made in the claim constituted judicial admissions by the Jacksons and the Larzeliers. Their successors-in-interest now stand in the same position with respect to those representations. A judicial admission is a formal statement made by a party in the course of judicial proceedings with the effect of dispensing with the need for proof by the opposing party of some fact. *Strouse* v. *K-Tek, Inc.*, 129 Idaho 616,618,930 P.2d 1361, 1363 (Ct. App. 1997) (string citations omitted). The party making a judicial admission is bound by the statement and may not controvert the statement on trial or appeal. *Id.* at 619,930 P.2d at 1364 (string citations omitted). Statements in the party's pleadings are generally seen as binding judicial admissions. *Id.* To be a judicial admission a statement must be a deliberate, clear, and unequivocal statement of a party about a concrete fact within that party's knowledge. *Id.* In the SRBA, the

filing of the claim is the pleading which commences the action. *Facility Volume Decision* at 27 (citing *Fort Hall Water Users Ass'n* v. *United States,* 129 Idaho 39,41,921 P.2d 739, 741 (1995) *reh'g denied* (1996)); *see also* I.C. § 42-1409 (filing of a notice of claim initiates the procedure for making claim to a water right in the SRBA). Id., at 15.

- In this case, the Jacksons or the Larzeliers did not seek to amend the claim prior to selling the property and transferring a portion of the claim to the Wittrocks. Indeed, the Jacksons' and Larzeliers' claim to water right 02-2318 was split directly as a result of a *Notice of Change in Ownership* executed by Mr. Larzelier which expressly indicated "Purchaser to receive 13.3 acres of water." Id., at 15.

- In this case, the claim filed by the Jacksons and the Larzeliers swore and affirmed that the statements contained in the document were true and correct in effect taking the position that the entire 50 acres was being irrigated. A portion of the claim was transferred to the Wittrocks in conjunction with a *Notice of Change of Ownership* proceeding further taking the position that the 13 Acre Parcel was being irrigated. A change in ownership is an administrative proceeding. Now the Jacksons and Larzeliers, as well as their successors-in-interest, take the inconsistent position that a portion of the water right was forfeited or abandoned prior to the time the claim was filed and as a result that portion of the claim could not have transferred to the Wittrocks.

  Accordingly, as a matter of law the Special Master did not err in concluding no forfeiture or abandonment occurred prior to claim being filed in the SRBA. Id., at 16.

- **The Jacksons conveyed water right claim 02-2318A to the Wittrocks as opposed to a temporary license to use the right for a three year period.** (Heading page 20 of the August 29 Order on Challenge)
  - The Objectors [Defendants in the Owyhee County proceeding] also argue that the Jacksons never transferred the portion of water right 02-2318 appurtenant to the 13 Acres Parcel to the Wittrocks.
  - This argument is without merit.
  - The provision in the Purchase and Sale Agreement relied on by Objectors [Defendants in the Owyhee County proceeding] expressly pertains to *personal property* included in the sale. A water right is an interest in real property. In any event, the fact that Mr. Larzelier filed a *Notice of Change of Water Right Ownership* of 13.3 acres of the water right eliminates any doubt the Jacksons and Larzeliers did not reserve the portion of the water right in the conveyance to the Wittrocks. For these reasons the Court finds the argument to be without merit. Id., at 20.

IT IS APPROPRIATE TO STAY THE OWYHEE COUNTY PROCEEDINGS UNDER THE STANDARD THAT COURTS HAVE THE AUTHORITY TO CORRECT ERRORS OF FACT AND LAW IN ORDER TO CIRCUMVENT A LATER APPEAL

Wilkerson's *Motion for Stay* is filed in advance of any final judgment on the causes of action to confirm the easement for Wilkerson's water right 02-2318A. The request for stay pursuant to IRCP 11(a)(2) (B) allows the Owyhee County proceedings to be held further until the SRBA Court's factual and legal determinations for water right 02-2318A are completed. At that time, the factual and legal findings in the interlocutory orders may be corrected to be consistent with the SRBA court's rulings. This is appropriate in order to circumvent a later appeal[2] and to avoid a trial which may be mooted by the SRBA decision.

CONCLUSION

Based on the foregoing, Wilkerson respectfully requests that the *Motion to Stay Proceedings* be granted.

Respectfully submitted this 29th day of September 2011.

BEEMAN & ASSOCIATES P.C.
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By Josephine P. Beeman
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[2] *Id.*

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