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OCT 13 2011

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'S
	)	REPLY TO [OBJECTORS'] RESPONSE
	)	BRIEF IN OPPOSITION TO CLAIMANTS'
_____	)	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. On October 6, 2011, Raymond C. Barker, Jr., Charles J. Krtiz, Jr., and Diane B. Kritz (Objectors) filed their brief in opposition to Wilkersons' Motion to Alter or Amend. Following is Wilkersons' reply.

ARGUMENT

In their *Response Brief in Opposition to Claimants' Motion to Alter or Amend* at 2, Objectors argue that the Claimants' Motion to Alter or Amend should be denied on the grounds that only 33 acres of the full 50 licensed acres were determined to have been irrigated as of the

September 16, 1983 field examination and so the 13 Acre Parcel may not have been irrigated as of that date. Objectors assert that Exhibit D to the June 10, 2010 Affidavit of Jon Gould does not necessarily confirm irrigation of the 13 Acre Parcel in either 1977 or 1983 and thus should be deleted. *Id* at 2, 3. However, materials and a map from the September 16, 1983 field exam, contained in the Objectors' 2-2318B SRBA file, reveal that as of September 16, 1983, the entire 13 Acre Parcel was being irrigated, but that the irrigated acreage now owned by the Objectors had been reduced because "a portion of their farm has been sectioned off for housing development." These materials and the map are pages 47 through 50 of Exhibit A to the Affidavit of Josephine P. Beeman in Support of William & Imogene Wilkerson's Reply to [Objectors'] Response Brief in Opposition to Claimants' Motion to Alter or Amend [August 29, 2011 Memorandum Decision and Order on Challenge] accompanying this brief. In particular, the field exam map that is located on page 48 in front of the Adjudication Claim Report of Examiners¹ dated September 16, 1983, indicates that the land area in use and being irrigated included the 13 Acre Parcel.

This map was discovered only recently by counsel for the Claimants and was found in the IDWR Adjudication backfile for the Objectors' water right 2-2318B. It was not found in the IDWR license file for 2-2318 nor in any files concerning Claimants' water right 2-2318A. While other materials concerning the September 16, 1983 field examination, in particular the Adjudication Claim Report of Examiners and the Adjudication Claim Analysis Sheet², were included in Exhibit D of the Affidavit of Jon Gould, this map was not. Counsel for Claimants discovered this map while searching IDWR and other materials for legible copies of Exhibit C

¹ Exhibit D of the June 10, 2010 Affidavit of Jon Gould was submitted and identified as, "A true and correct copy of the Field Exam conducted by the Idaho Department of Water Resources for water right no. 02-2318." The term Field Exam refers to and includes both pages of Exhibit D. The first page is entitled "Adjudication Claim Report of Examiners". The second page is entitled "Adjudication Claim Analysis Sheet."

² *Id.*

(“A Notice of Claim to Water Right No. 02-02318 signed by Doug Larzelier and Joseph Asumendi ... submitted to the IDWR on or about May 13, 1981.”) and Exhibit D (“A true and correct copy of the Field Exam conducted by the Idaho Department of Water Resources for water right no. 2-2318.”) to the June 10, 2010 Gould Affidavit. This map is page 48 of Exhibit A to the Affidavit of Josephine P. Beeman. The September 16, 1983 field exam in SRBA file 2-2318B shows that SRRV acreage is only 20 acres and Wilkerson's is 13 acres and refutes the assertion of Objectors that “careful review of Exhibit D to the Affidavit of Jon Gould indicates that the examination of September 16, 1983, did not necessarily confirm the irrigation of the 13 Acre Parcel at the time, as apparently 17 acres of the total 50 acres were specifically determined not to have been irrigated at that time, ” *Id* at 3, and also refutes the Objectors assertion that “[i]f anything, Exhibit D supports Objectors' claims of abandonment and forfeiture.” *Id* at 4.

Under Idaho Rule of Civil Procedure 60(b)(2), the court may relieve a party or his legal representative from a final judgment, order, or proceeding for newly discovered evidence which by due diligence could not have been discovered in time. Claimants assert that the field examination map of September 16, 1983 is newly discovered evidence under IRCP 60(b)(2) that should compel this Court to find that based on a field exam of September 16, 1983, the 13 Acre Parcel was determined to have been irrigated as of that date and thus revise footnote 1 on page 3 of the August 29, 2011 *Memorandum Decision and Order on Challenge*.

In their *Response Brief*, Objectors assert that the Claimants' *Motion to Alter or Amend* should be denied for the reason that the Court's proposed remark describes the status of the easement proceeding, with the exception of the fourth sentence which Objectors would not oppose to changing to reflect the fact that the easement case has not been concluded. *Id* at 2. Objectors propose to add the language “or will be” to the Court's proposed remark so that the fourth sentence would read as follows: "The judicial determination of the right of access to the

point of diversion and conveyance system was or will be decided separately in *Wilkerson v. Snake River R. V. Resort, et al*, Third Judicial District, Owyhee County (Case No. CV -06-05541).” *Id.* Objectors conclude that except for the arguable error of the verb tense in the fourth sentence, the Court’s remark “accurately and clearly states the relationship between the SRBA proceedings and the Owyhee County Easement Case and should be retained in its current form.” *Id* at 3.

Claimants would argue that the principles of judicial admission and judicial estoppel apply to the proposed remark and that the remark as proposed and revised as suggested by the Objectors does not incorporate the principles of judicial admission and judicial estoppel. Although Objectors claim that the Partial Decree does not confer or determine the right of access to the point of diversion across the property of another and without the remark the decreed point of diversion could be misconstrued as legally exercisable in the future, *Id* at 4-5, the SRBA Court, in its Aug 29, 2011 decision, also cited to case law holding that judicial admissions and judicial estoppel apply in related legal proceedings (such as Wilkerson’s Owyhee County easement case). *Memorandum Decision and Order on Challenge and Order of Partial Decree (Wilkerson)*³ at 15-16. Judicial admissions in the SRBA court estop SRRV in a related legal proceeding from asserting facts contrary to the claim of 2-2318. That claim includes the delivery system from the Snake River to the 13 Acre Parcel.

Judicial estoppel applies to subsequent related proceedings in another court. The principles of judicial admission and judicial estoppel applicable in the present case will avoid any future controversy between the parties or their successors-in-interest. Although Objectors assert that Claimants suggest that the SRBA Court’s various findings about 2-2318A “equate to a *de facto*

³ In one instance, the Court applied judicial estoppel to the claim filed by the Jackson and the Larzeliers (who 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) and rejected the later, inconsistent position of the Jacksons and Larzeliers, as well as their successors-in-interest, that a portion of the water right was forfeited or abandoned prior to the time the claim was filed. *Id* at 16.

determination of a right of access,” *Id* at 8, judicial admissions and judicial estoppel apply to prevent the Objectors from denying there was an easement and right of access as of the commencement of the SRBA and through the completion of the SRBA proceedings. Although Objectors assert that the remark “unequivocally clarifies that the SRBA Court is not determining the right of access issue and that the right of access issue is being determined by the Owyhee County proceeding,” *Id*, the SRBA Court is making determinations based on judicial admissions and judicial estoppel. Under these theories, the Objectors are estopped from denying that an easement and right of access exists as of the entry of the SRBA partial decree for 2-2318A.

Also, the Objectors’ reference to “trespass” is without merit because the judicial admissions of the Objectors’ predecessors-in-interest prevent factual allegations contrary to the admitted facts in the original SRBA claim for 2-2318. Those admitted facts in the original SRBA claim include diversion and delivery of Snake River water to irrigate the 13 Acre Parcel. The subsequent diversion and delivery of Snake River water to irrigate the 13 acre parcel by Launie Mashburn, Wilkersons’ predecessor-in-interest to 2-2318A, was the appropriate exercise of a dominant estate attached to which is the easement from the point of diversion on the Snake River to the 13-Acre Parcel. The sole purpose of the easement from the point of diversion on the Snake River to the 13-Acre parcel is to permit Snake River water to be diverted and delivered to the 13-Acre parcel. Easements pass with water rights which pass with the property to which they are appurtenant even though not mentioned in the deed. “[A]n easement appurtenant is an interest which is annexed to the possession of the dominant tenement and passes with it. . . . Moreover, in case of doubt, the weight of authority holds that the easement should be presumed appurtenant.” *Joyce Livestock Company v. United States of America*, 144 Idaho 1, 15, 156 P. 3d 502 (2007), citing *Nelson v. Johnson*, 106 Idaho 385, 387-88, 679 P. 2d, 664-665 (1984).

“We held that an appurtenant water right passed with the land even though not expressly mentioned. In doing so, we reasoned by analogy from appurtenant easements, holding that water rights and easements were sufficiently similar to have the relevant law applicable to appurtenant easements apply to appurtenant water rights.” *Id.* in reference to *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933).

Although Objectors state that it remains uncertain whether the SRBA proceedings or the Owyhee County easement case will be concluded first, *Response Brief* at 5, on September 29, 2011, the Claimants filed a Motion to Stay Proceedings in the Owyhee County case, case No. CV-2006-05541-M, requesting that the Owyhee County District Court stay all proceedings in that forum until the final disposition of the proceedings in the SRBA court. Objectors received a copy of the motion prior to the filing of their *Response Brief*. A copy of the Motion to Stay Proceedings and supporting brief are attached as Exhibit B to the accompanying Affidavit of Josephine Beeman.

Objectors argue that the last sentence of the remark does not need to be deleted because that sentence refers to any final judgment entered in the easement case and is not limited only to a decision or determination of the merits. *Id.* at 7. Objectors claim that if there were a final settlement of the easement case, the Owyhee County Court’s judgment would reflect the outcome of any stipulated settlement. *Id.* However, judgments do not automatically include the content of stipulated settlements as the parties could stipulate to dismissal based on a settlement whose terms are not disclosed.

CONCLUSION

Based on the foregoing arguments, the Claimants respectfully request that this Court remove or revise the proposed remark as suggested by the Claimants' in their brief supporting the motion to alter or amend. The inclusion of the map that was part of the 1983 IDWR field examination of 2-2318 will support the Court's determination upholding the Special Master's recommendation of 2-2318A.

Dated this 11th day of October 2011.

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By Josephine P. Beeman
Josephine P. Beeman

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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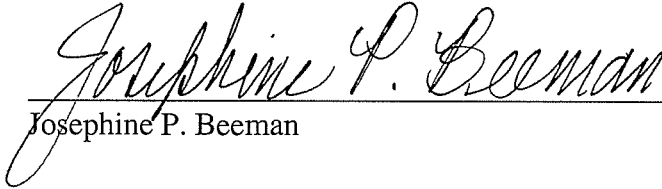
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