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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
OCT 31 2011	
By _____	Clerk
Deputy Clerk	

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. 02-2318A
	)
Case No. 39576	) AMENDED MEMORANDUM DECISION
	) AND ORDER ON CHALLENGE AND
	) ORDER OF PARTIAL DECREE
	) (Wilkerson)
_____	)

Holding: The Holding of the Special Master is affirmed but modified to include a clarifying remark in *Partial Decree* pertaining to the right of access.

Appearances:

Debra K. Ellers, McCall, Idaho, Dana L. Hofstetter, Hofstetter Law Office, LLC, Boise, Idaho, Attorneys for Raymond C. Barker, Jr., Charles J. Kritz Jr. and Diane B. Kritz.

Josephine P. Beeman, Jane M. Newby, Beeman & Associates, P.C., Boise, Idaho, Attorneys for William R. Wilkerson, Sr. and Imogene E. Wilkerson.

I.
FACTUAL AND PROCEDURAL BACKGROUND

1. This matter involves a dispute between neighboring landowners over the validity of water right no. 02-2318A. The right was claimed by William and Imogene Wilkerson ("Claimants"). At the heart of the dispute, however, is the Claimants' right to an easement across the neighboring property owned by Diane and Charles Kritz and

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Raymond C. Barker, Jr. (“Objectors”) for the purpose of accessing the point diversion for the water right and conveying the water across the Objectors’ property.

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. The Objectors filed an *Objection* to the recommendation in the *Director’s Report* asserting the water right should not exist due to abandonment and/or forfeiture. Following motion for summary judgment proceedings, the Special Master issued a *Special Master’s Report and Recommendation* recommending the water right in favor of the Claimants as recommended in the *Directors Report*. The Objectors now challenge the *Special Master’s Report and Recommendation*.

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”). Prior to the split, the 50 acre parcel was bordered to the north by the Snake River and to the east by Jump Creek. *Wilkerson Aff.*, Ex. A. A Union Pacific Railroad right-of-way running east to west across the property separated 36.7 acres north of the right-of-way (“Riverfront Property”) from the remaining 13.3 acres (“13 Acre Parcel”) lying to the south. *Id.* 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.

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. *Gould Aff.*, Ex. A. On March

23, 1972, a license was issued for the water right for the irrigation of the entire 50 acres. *Gould Aff.*, Ex. A.

5. At some point in the mid-1970's the Jacksons ceased watering the 13 Acre Parcel. *Jackson Depo.*, p.26. 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. *Gould Aff.*, Ex. C. The proof of beneficial use associated with the claim investigation indicated that the water had been applied to beneficial use since the Jacksons purchased the property 12 years prior. *Id.*

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 while he was in control of the property. *Ellers Aff.*, Ex. L. The Jacksons took back the 50 acres in 1987 and developed a RV park on the Riverfront Property. *Id.* After the Jacksons reacquired the property, both Mr. Larzelier and Mrs. Jackson only recall the 13 Acre Parcel being irrigated for one or two seasons but with water pumped from Jump Creek. However, there is no allegation or record of the Jacksons having a water right authorizing a diversion from Jump Creek.

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. *Gould Aff.*, Ex. E. A note on the claim indicates that the claim was filed and fees paid on October 7, 1988, by Mrs. Jackson on behalf of Doug Larzelier and his wife but that the claim was dated as received on January 19, 1990. Apparently, the claim was returned for proper notarization and after it was returned to IDWR no action was taken until Mrs. Jackson made an inquiry regarding the status of the claim on January 19, 1990. *Id.* Mrs. Jackson, and Mr. and Mrs. Larzelier's names all appear on the claim.

8. In July of 1991, the Jacksons sold the 13 Acre Parcel to the Wittrocks. The Wittrocks entered into a Real Estate Purchase and Sale Agreement dated July 2, 1991 ("Purchase and Sale Agreement"), which in section 4, titled "Personal Property Specifically Included in Sale" states: "16HP Pump and Motor & Split 13 Acres of water

Snake River—Each to pay ½ power for 3 years use then to terminate.” *Ellers Aff.*, Ex. B.

9. Mrs. Jackson testified in a deposition that the Wittrocks requested access to the point of diversion and the use of the pumps and conveyance system in order to irrigate the 13 Acre Parcel. The Jacksons agreed to the use for a period of three years. Thereafter, the Jacksons’ intent was that the Wittrocks would have to make arrangements to pump from Jump Creek or use irrigation district water. *Jackson depo.*, p. 51. Mrs. Jackson’s testimony is unclear however, whether the three year restriction was intended to apply only to access to the use of the pumping station and conveyance system or also included the use of the water right.¹

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.” *Gould Aff.*, Ex G. The Warranty Deed is silent as to water rights but includes the following appurtenance clause: “TO HAVE AND TO HOLD the said premises, with their appurtenances unto said Grantees.” *Gould Aff.*, Ex. G.

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*.² The *Notice of Change of Water Right Ownership* expressly states: “Purchaser to receive 13.3 acres of water.” *Id.* Also indicated in the *Notice* was that the change in ownership resulted in a split of the originally claimed water right. On January 31, 1992, the Wittrocks received notice from IDWR that the portion of the water right claim 02-2318 appurtenant to the 13 Acre Parcel had been split and renumbered to 02-2318A and the transfer was approved. *Id.*

¹ For example if the intent was that the right of access expired after the three year period the water right could be transferred.

² The Claimants cite to the adjudication claim file for water right 02-2318A which contains the original claim as well as all of the *Notices of Change in Ownership* transferring the claim. *Claimants’ Response Brief*, p. 2. Although the *Notices of Change in Ownership*, like the original claim are filed with the Department instead of the SRBA Court, they are nonetheless part of the record in the SRBA.

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. *Jackson Depo.*, p. 50.

13. On April 2, 1992, the Jacksons sold the Riverfront Property to the Harlans. *Jackson Depo.*, p. 52. On September 30, 1993, the Harlans sold the Riverfront Property to the Brumleys. *Brumley Depo.*, p. 8.

14. On March 7, 1994, the Wittrocks sold the 13 Acre Parcel to the Spellmans. *Ellers Aff.*, Ex. E. The Warranty Deed provides “including all water and ditch rights and rights of way for water and ditches.” *Ellers Aff.*, Ex. E. On that same date, the Wittrocks and the Spellmans filed a *Notice of Change in Ownership* with IDWR transferring ownership of claim no. 02-2318A to the Spellmans. On May 19, 1995, the Spellmans quitclaim deeded the 13 Acre Parcel to their daughter and son-in-law, the Mashburns. *Ellers Aff.*, Ex. F. On November 26, 1996, the Mashburns deeded the property back to the Spellmans. *Ellers Aff.*, Ex. G. On April 15, 1998, the Spellmans sold the property to the Claimants. *Ellers Aff.*, Ex. H. Other than an appurtenance clause, the Warranty Deed is silent as to water rights. On October 13, 1998, the Claimants filed a *Notice of Change of Water Right Ownership* for water right 02-2318A.

15. In August of 1999, the Brumleys sold the Riverfront Property to the Bentons. *Brumley Depo.*, p. 29. The Bentons sold the Riverfront Property to the Objectors in October 2003. *Kritz Aff.*, Ex. A.

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. Requests to access the point of diversion for the water right were made by the Mashburns and the Spellmans but were denied by the Brumleys during their ownership of the Riverfront Property. The Claimants also made similar requests after the Objectors acquired the Riverfront Property but were also denied. The nature and extent of these requests is discussed later in this opinion.

17. On May 24, 2006, while the claim for water right 02-2318A was still pending in the SRBA, the Claimants brought a quiet title action in Third District Court in Owyhee County, asserting the right to an easement across the Riverfront Property for access and delivery of the right from the point of diversion on the Snake River located on the Riverfront Property. *Ellers Aff.*, Ex. J. The action is still pending awaiting determination in the SRBA of the validity of water right no. 02-1318A.

18. On December 29, 2006, the Director of IDWR filed his *Director's Report, Irrigation and Other Uses, Reporting Area Basin 02* acknowledging the split of license no. 02-2318 and the change in ownership. The *Director's Report* recommended water right no. 02-2318A to the Claimants for .27 cfs for the irrigation of 13.3 acres from March 15 to November 15, with a priority date of June 5, 1964.

19. On January 26, 2007, the Objectors filed an *Objection* asserting the water right should not exist due to abandonment and/or forfeiture.

20. Following summary judgment proceedings, the Special Master determined there were no genuine issues of material fact with respect to forfeiture or abandonment prior to the time the SRBA claim was filed by Mrs. Jackson and the Lazeliers on October 7, 1988. *Order Denying Motion to Strike, Granting Motion for Summary Judgment and Vacating Trial and Special Master's Report*, subcase no. 02-2318A (Aug. 25, 2010), pp. 6-7. The Special Master ruled as a matter of law that once the claim was filed in the SRBA, the five-year statutory forfeiture period was tolled pending the issuance of a partial decree. *Id.* at 7. The Special Master determined further that the successive owners of the 13 Acre Parcel, through their various requests to divert and deliver water across the Riverfront Property, did not intend to abandon the water right. *Id.* at 9. Further, that abandonment and forfeiture do not apply when the party asserting abandonment or forfeiture is responsible for the non-use. *Id.* The Special Master ultimately recommended the right as recommended in the *Director's Report*. *Id.*

21. In a subsequent *Motion to Alter or Amend*, the Special Master rejected Objectors' request in the alternative for the inclusion of a remark in the partial decree stating that the partial decree does not confer a right of access across the property of

another. *Order Denying Motion for Reconsideration and Motion to Alter or Amend*, subcase no. 02-2318A (April 8, 2011), pp. 4-5.

22. A *Notice of Challenge* to the *Special Master's Report and Recommendation* was filed by the Objectors on April 22, 2011. The Objectors raise the following issues on Challenge: (1) The Special Master made an incorrect finding from Objectors' affidavits regarding any alleged attempts to block the Claimants or their predecessors from exercising water right no 02-2318A; (2) genuine issues of material fact exist relating to the doctrines of abandonment, forfeiture, waiver and laches and therefore summary judgment was inappropriate; and (3) any partial decree issued for water right 02-2318A should include a remark in the point of diversion element stating that no right-of-way or easement is conferred by the issuance of the partial decree.

For the reasons set forth below, the recommendation of the Special Master is affirmed in all respects except with respect to the necessity of a remark in the *Partial Decree* clarifying the status of the right of access for the right.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on July 25, 2011. The parties did not request the opportunity to submit additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or July 26, 2011.

III.

STANDARDS OF REVIEW

A. Review of a special master's findings of fact.

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d

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919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

B. Review of a special master's conclusions of law.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the special master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

C. Summary Judgment.

The Court is asked to review certain findings and conclusions of the Special Master made pursuant to an order granting summary judgment. The standard of review on appeal from an order granting or denying summary judgment is the same standard that is used by the special master in ruling on the motion. *Gibson v. Ada County*, 142 Idaho 746, 751, 133 P.3d 1211, 1216 (2006). Summary judgment is proper if 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. The burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Id.* When a court considers a motion for summary judgment, all facts are to be liberally construed in favor of the nonmoving party, and the court must draw all reasonable inferences and conclusions in that party's favor. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991).

IV.

DISCUSSION

A. The Special Master did not err in determining water right no. 02-2318A was neither forfeited nor abandoned.

Although the Objectors have raised a variety of issues each of which are addressed below, the primary issue before this Court is whether the portion water right no. 02-2318 originally used on the 13 Acre Parcel and now claimed under water right no. 02-2318A, was abandoned or forfeited through non-use. The Objectors, through affidavits and deposition testimony have established facts regarding various periods of non-use from the time the Jacksons owned the entire 50 acre parcel to the present. The Special Master found that when the Larzeliers took over the 50 acres from the Jacksons between 1982 and 1987, none of the 13 Acre Parcel was irrigated with water diverted from the Snake River. However, the Special Master concluded as matter of law that no forfeiture or abandonment occurred prior to 1988 when the Jacksons and the Larzeliers filed the claim in the SRBA seeking a water right for the entire 50 acres.

For the period following the filing of the SRBA claim to the present, the Special Master also concluded as a matter of law that forfeiture could not occur based on SRBA law-of-the-case which provides that the filing of a claim in the SRBA tolls the running of the five-year statutory forfeiture period provided the claim is actively prosecuted to partial decree. In regards to abandonment during this same period, the Special Master found that although the water right was not used on the 13 Are Parcel after the Mashburns irrigated that parcel in 1996, that no intent to abandon the water right occurred as evidenced by the repeated attempts to access the water by the Mashburns, the Spellmans and the Claimants. For the reasons set forth below this Court affirms the ruling of the Special Master on these issues.

1. Abandonment, forfeiture, resumption of use and the tolling of the forfeiture statute.

Prior to addressing the merits, a certain amount of discussion is necessary regarding the distinction between abandonment and forfeiture as well as any available defenses.

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i. Forfeiture.

Abandonment and forfeiture are distinct legal concepts. Forfeiture is a statutory concept based on Idaho Code § 42-222(2) which provides that a water right may be lost if not applied to a beneficial use for five consecutive years. I.C. § 42-222(2); *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). Forfeitures are disfavored under Idaho law and the Idaho Supreme Court has consistently held that forfeiture must be proven by clear and convincing evidence. *Id.* at 389, 647 P.2d at 1261. Finally, even if a consecutive five-year period of non-use can be established, statutory forfeiture is not effective if after the five-year period of non-use, the use of the water is resumed prior to a third party taking the following action: 1) claiming right to the water; 2) instituting proceedings to have the right declared forfeited; 3) obtaining a valid water right authorizing the use of such water with a priority date prior to the resumption of use; or 4) using the water pursuant to an existing right. *Sagewillow v. Idaho Dept. of Water Resources*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003). Although the claimant of the water right has the burden of raising defenses to statutory forfeiture, the burden of persuasion remains on the party claiming that the water right was forfeited and must disprove the defense. *Id.* at 846, 70 P.3d at 684.

ii. Abandonment.

The abandonment of a water right is a common law concept. The abandonment of water rights requires both the intent to abandon and the actual surrender or relinquishment of the water right. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 15, 156 P.3d 502, 516 (2007) (citing *Sears v. Berryman*, 101 Idaho 843, 623 P.2d at 459). Further, “[t]he intent to abandon a water right must be evidence by clear, unequivocal and decisive acts and mere non-use is not per se abandonment.” *Id.* In *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984), the Idaho Supreme Court distinguished between abandonment and forfeiture.

Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the

water right. Forfeiture, on the other hand, is predicated upon the statutory declaration that all rights to use water are lost where the appropriator fails to make beneficial use of the water for a continuous five- year period. I.C. § 42-222(2).

...
While under the doctrine of forfeiture mere non-use of water for a sufficient period of time may be sufficient to bring about a loss of water rights, abandonment is more difficult to prove than forfeiture, in that mere non-use does not result in abandonment. Rather, the party alleging abandonment must prove by clear and convincing evidence that the owner of the water right *intended* to abandon that right.

Id. at 467, 690 P.2d at 922 (internal citations omitted). The resumption of use doctrine also applies to abandonment as the resumption doctrine originated as a defense to abandonment. In Justice Kidwell's concurrence, he acknowledged:

Previous Idaho case law suggests, in dicta, that resumption of use, a common law defense to abandonment, may apply in cases of statutory forfeiture. Although somewhat obfuscated by prior case law, careful scrutiny of Idaho Code § 42-222(2) demonstrates that the legislature did not include the antiquated doctrine of a resumption of use as a defense to forfeiture.

Sagewillow at 846, 70 P.3d at 684. (internal citations omitted).

iii. The forfeiture "tolling rule."

Since 1999, the law-of-the-case in the SRBA has been that the filing of a claim in the SRBA tolls the running of the five-year statutory period for forfeiture provided for by Idaho Code § 42-222. The issue was first addressed in *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-02708 *et al.* (Dec. 29, 1999) (Hon. R. Barry Wood) ("*Facility Volume Decision*"). In the *Facility Volume Decision*, the Hon. R. Barry Wood held that the filing of a claim to a water right in the SRBA is akin to a quiet title action and the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action. *Id.* at

26-28. The *Facility Volume Decision* determined likewise that the filing of the claim in the SRBA tolls the running of statutory forfeiture period. *Id.* at 26-28.

This same reasoning was later elaborated on at length and reaffirmed by the Hon. Roger S. Burdick in *Memorandum Decision and Order on Challenge; and, Order of Partial Decree (Wood v. Troutt)*, Subcase No. 65-05663B (May 9, 2002) (“*Wood v. Troutt*”). The *Wood v. Troutt*, opinion explained that while the forfeiture provisions of Idaho Code § 42-222 are silent on whether the filing of the claim in the SRBA tolls the running of the statute, the application of the tolling rule does not require the adoption of a new principle of law. *Id.* at 15. The opinion acknowledged that prior to the enactment of Idaho’s adjudication statutes, the method for adjudicating a water right was through a quiet title action. In order to establish forfeiture in conjunction with an action to quiet title to a water right the forfeiture period had to fully accrue prior to the commencement of the action.³ *Id.* at 16-17. The opinion acknowledged this to be the case in other jurisdictions as well. *Id.* at 17-18. Finally, *Wood v. Troutt* emphasized the significance of the tolling rule in the context of a general adjudication which has exclusive jurisdiction over settling disputes over the elements of water rights within the geographic boundaries of the adjudication:

As explained in the *Facility Volume Decision*, it is a general rule that the commencement a quiet title action tolls the running of the statute, so long as the action is being prosecuted. *Facility Volume* at 27 (citing *Smith v. Long*, 76 Idaho 265, 281 P.2d 483 (1955)). Of particular significance is the fact that the record owner need not take the physical action route or otherwise engage in a self-help remedy in order to preserve his or her rights. Simply stated, seeking redress in a court of appropriate jurisdiction so long as the action is prosecuted to a final judgment does not prejudice the record owner.

Although Idaho Code section 42-222 is silent as to this general rule, the underlying concept of avoiding prejudice by coming into court, as opposed to engaging in self-help, applies equally to the running of the forfeiture statute relative to the SRBA. The magnitude and procedural

³ “Historically, disputes involving water rights were brought pursuant to Idaho’s quiet title statutes. I.C. § 6-401 *et seq.* In 1981, Idaho Code section 6-401 was amended to provide that quiet title actions involving water rights shall henceforth be brought under Chapter 14, title 42, Idaho Code.” *Wood v. Troutt* at 19, fn. 9.

mechanics of the SRBA make the application of this rule even more necessary. Typically, in disputes involving forfeiture, the party asserting the forfeiture is either claiming a right to the water that has been allegedly forfeited or for a more senior priority among the interrelated priorities (*inter sese*) on a given water source. The adverse party may already be making use of the water or benefiting from its non-use. This is a fairly common situation in the SRBA. Under Idaho Code section 42-222, a party can avoid forfeiture by resuming use before the five years has elapsed or before another water user claims the water. However, in lieu of disrupting the status quo of existing uses and potentially breaching the peace, as well as potentially being liable for damages by wrongfully depriving another user of water if the water right is ultimately determined to be forfeited, a party seeking to prevent a forfeiture should be able to file an action akin to a quiet title action (a claim in the SRBA), preserve his or her right and not be prejudiced. Among other things, the SRBA is akin to a *quasi in rem* quiet title action. In *Escalante Valley Drainage Area, Water Users Claims Nos. 551, et al., v. Criddle, supra*, in tolling the forfeiture statute in conjunction with a general adjudication, the Utah Supreme Court reasoned that it would be “arbitrary and anomalous” to require that claimants defending against forfeiture be required to use their water right during the pendency of the adjudication where such use would disrupt the orderly process of distributing water during the pendency of the adjudication. *Id.* at 778.

The opinion goes on to explain why it would be highly impractical to require claimants defending against forfeiture for non-use to file preliminary injunctions in advance of the filing of the *Director's Report* so as to avoid prejudice to their claim, as follows:

In the SRBA further difficulty arises if a party takes physical action to resume use before the expiration of the five years and a dispute erupts because the existing uses are disrupted. Parties would be required to take such action if the running of the statute failed to toll. Because of the number of subcases in the SRBA and the way the SRBA is structured, holding proceedings akin to a preliminary injunction for purposes of fashioning a preliminary or temporary remedy pending the ultimate adjudication of the water right is highly impractical and inconsistent with the timely completion of the SRBA. It is also highly impractical for IDWR to have to file a director's report in advance of the reporting schedule for an individual water right for purposes of conducting preliminary injunction proceedings or other temporary relief or to reinvestigate and re-report a water right claim because a forfeiture period

subsequently accrued after the initial director's report was filed. For efficiency and due process concerns, IDWR collectively reports water right claims within a particular subbasin and reporting area. *The comprehensive statutory notice requirements of the SRBA make reporting water rights on an individual basis prohibitive not only from an efficiency standpoint but also from a due process perspective. See I.C. § 42-1411(6).*

Id. at 18-19. (emphasis added)(footnotes omitted).

The reasoning of *Wood v. Troutt* was subsequently adopted and followed by the Hon. John M. Melanson, who succeeded Judge Burdick. *See Memorandum Decision and Order on Challenge (Poulton v. Rose), Order of Partial Decree*, Subcase: 45-00167A (Feb. 27, 2008), pp.14-15 (“[l]ong established law-of-the-case in the SRBA holds that the running of the forfeiture statute tolls upon the filing of the claim.”). The reasoning underlying the “tolling rule” is sound and remains law-of-the-case.

2. The Special Master did not err in determining that no forfeiture or abandonment occurred prior to the filing of the claim in the SRBA.

As concerns forfeiture or abandonment of the water right at issue here for any period prior to the filing of the claim in the SRBA the Special Master held that the Objectors “have nothing [legally] to support an argument of forfeiture or abandonment before October 7, 1988, when Ms. Jackson and the Larzeliers filed their claim in the SRBA for 1 cfs from the Snake River to irrigate the entire 50 acres. Any discussion of non-use before that date is superfluous.” The Special Master reasoned: “After all, it was Mrs. Jackson who signed the SRBA *Notice of Claim* stating the entire 50 acre parcel had a 1 cfs water right in 1988. It would not be fair for her successors-in-interest to claim forfeiture or abandonment before that date and SRBA.” Although the Special Master did not expressly identify the legal grounds for the ruling, this Court affirms.

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). 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."

Judicial estoppel further precludes the Jacksons and Larzeliers or their successors-in-interest from asserting the claim was forfeited or abandoned prior to the filing of the claim in the SRBA. The Idaho Supreme Court has described this doctrine as follows:

Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. The Idaho Supreme Court adopted the Doctrine of Judicial Estoppel in *Loomis v. Church*, 76 Idaho 87, 277 P.2d 561 (1954). This court listed numerous court decisions from other states as support for the doctrine and noted:

It is quite generally held that where a litigant, by means of such sworn statements, obtains a judgment, advantage, or other consideration from one party, he will not thereafter,

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by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or right against another party, arising out of the same transaction of subject matter.

A&J Construction Company v. Wood, 141 Idaho 682, 684, 116 P.3d 12, 14 (2005) (citing *Loomis*, 76 Idaho at 93-94, 277 P.2d at 565). The Court also noted that there was an important policy underlying this doctrine to protect the integrity of the judicial system that it “intended to prevent parties from playing fast and loose with the courts.” *Id.* (citing *Robertson Supply v. Nicholls*, 131 Idaho 99 at 101, 952 P.2d at 916). In *Wood*, the Court held that where A&J Construction succeeded in convincing the bankruptcy court to accept a prior position, it could not take an inconsistent position in a later court proceeding outside of the bankruptcy context. Accordingly, summary judgment was affirmed on the basis of judicial estoppel.

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.

3. The Special Master did not err in determining forfeiture did not occur after the claim was filed in the SRBA.

For the reasons previously addressed, once the claim was filed in the SRBA the running of the forfeiture statute was tolled. For reasons also previously discussed the

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Objectors may not now take the position that the forfeiture period accrued prior to the filing of the claim. Accordingly, the Special Master did not err in concluding as a matter of law that no forfeiture no forfeiture occurred during the pendency of the claim in the SRBA.

4. The Special Master did not err in determining abandonment did not occur after the filing of the claim in the SRBA.

Unlike forfeiture, abandonment does not require any specific period of non-use. However, non-use alone is insufficient to establish abandonment. Further, while the “tolling rule” is not a defense to abandonment, the filing and prosecution of a claim is nonetheless highly probative of a claimant’s intent with respect to a water right. In this case, the Special Master found that the 13 Acre Parcel was irrigated with water authorized under water right 02-02318A by the Wittrocks from 1991 to 1994 and then by the Mashburns from 1994 to 1996. Thereafter, to the present, the water right was not used to irrigate the 13 Acre Parcel. The Special Master concluded that despite the non-use of the right after 1996 abandonment did not occur because the successive owners of the Riverfront Property prevented the Claimants as well as their predecessors-in-interest from accessing the point of diversion and using the conveyance system. The Special Master ruled as a matter of law that abandonment does not apply when the party asserting abandonment is responsible for preventing the use of the water right. The Objectors argue the circumstances regarding how the use of the right was prevented raise genuine issues of material fact thereby making such a determination on summary judgment inappropriate. This Court disagrees.

At the time the Jacksons and Larzeliers sold the 13 Acre Parcel to the Wittrocks a claim for the appurtenant water right was actively pending in the SRBA. The Jacksons and Larzeliers transferred without restriction a portion the claim to the Wittrocks resulting in a proportional split of the claim between the Riverfront Property and the 13 Acre Parcel. The Wittrocks used the water right for three years on the 13 Acre Parcel. When the Wittrocks sold the property to the Spellmans, the Warranty Deed expressly

conveyed water rights and ditch easements. The Wittrocks and Spellmans also filed a *Notice of Change of Ownership* transferring ownership of the claim. The Spellmans quitclaim deeded the property to the Mashburns. At this point there are factual issues regarding whether or not the Mashburns irrigated the property. Launie Mashburn states in his affidavit that he irrigated the property until the fall of 1996 when the owner of the Riverfront Property prevented him from maintaining the irrigation system. *Mashburn Aff.* p.2. Mr. Brumley, then owner of the Riverfront Property, stated that during his ownership of that property from mid-1994 to late 1999 the point of diversion on the Riverfront Property was not used to irrigate the 13 Acre Parcel. *Brumley Depo.*, p.30. However, what is not refuted is that Mr. Brumley at some point not only prevented the Mashburns from accessing the point of diversion to replace a pump but also later prevented the Spellmans from accessing the Riverfront Property. As stated by Mr. Brumley:

[The Spellmans] came in the office there one day and introduced themselves. And long story short they were whining that they had spent their life savings on this property for their son-in-law, and bought cattle, and he sold the cattle, and now he's leaving their daughter. So they wanted to irrigate. *And then I explained to them the same thing like I had told Lonnie [sic] [Mashburn]. If you have the necessary papers showing me that you have water rights you can build a platform and you can put electric down there. But you are not going to use my pump, period. And that kind of ended the conversation.*

Brumley Depo., p.28; see also *Brumley Aff.*, p.2. Thereafter, in 1998, when the Spellmans sold the property to the Claimants, a *Notice of Change in Ownership* transferring ownership of the claim was filed on October 13, 1998. The Claimants state in an affidavit that personnel from the Snake River RV Park located on the Riverfront Property prevented them from accessing the point of diversion for the water right since purchasing the property in 1998. *Wilkerson Aff.*, p. 2. Mr. Brumley stated in deposition testimony that he never had a conversation with the Claimants regarding access to the water right. *Brumley Aff.*, p.28. However, Mr. Brumley sold the Riverfront Property to the Benton's a little over a year after the Claimants acquired the 13 Acre Parcel. Mr.

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Benton states in his affidavit that the 13 Acre Parcel was never irrigated with water diverted from the point of diversion on the Snake River but the affidavit does not address the Claimants' assertion that they were denied access.

On May 24, 2006, while the claim was still pending in the SRBA, the Claimants brought a quiet title action in Third District Court in Owyhee County, asserting the right to access and an easement for the delivery of the water right. On December 29, 2006, the *Director's Report* was filed in the SRBA recommending the water right. Between 2006 and 2008 the Claimants made several attempts to enter the Riverfront Property to use the water right. *Kritz Aff.*, p.3. At present, the Claimants are actively defending their water right claim in the SRBA.

Based on the history surrounding the claim there is nothing in the record that would raise a genuine issue of material fact concerning the intent to abandon the water right. An active claim for the right was pending in the SRBA. The claim was split and ownership was properly transferred to the successive owners of the 13 Acre Parcel. The pendency of the active claim and the successive transfers of ownership belie any assertion of an intent on behalf of the Claimants or their predecessors-in-interest to abandon the claim. Although there was an extended period of non-use by the Claimants after acquiring ownership of the claim, the Claimants' non-use was explained by uncontroverted facts, namely that access to the use of the right was denied. Mr. Brumley made it clear to both the Mashburns and the Spellmans that they could not access the point of diversion unless they could demonstrate proof of a valid water right. Unfortunately, although a claim for the right was pending in the SRBA, it would take some time for the claim to work its way through the process. Accordingly, even assuming *arguendo* that the Claimants failed to request access to use the right, they had properly acquired ownership of the pending SRBA claim and were entitled to assume, just like the Mashburns and the Spellmans before them, that they would not be able to provide proof of a valid water to gain access to use the right until the outcome of the adjudication process. At no time did the Claimants seek to withdraw their claim or engage in any other behavior suggesting intent to abandon claim.

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The Objectors argue that the failure of the Claimants to initiate any action to access the right until 2006 or make other arrangements to use the right coupled with the non-use is sufficient to establish intent to abandon the right. This argument ignores the purpose of the SRBA. Indeed there was an action actively pending in the SRBA to determine the validity of the claim. The SRBA has exclusive jurisdiction over the claim. For reasons previously explained, the fact that the Claimants failed to come into the SRBA Court seeking preliminary relief in advance of the filing of the *Director's Report* does not result in any prejudice to the claim and alone cannot be used to infer intent to abandon the claim.

Accordingly, for the foregoing reasons this Court rejects the argument that genuine issues of material fact exist with respect to whether or not the water right was abandoned during the pendency of the claim in the SRBA. The ruling of the Special Master is therefore affirmed.

B. 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.

The Objectors also argue that the Jacksons never transferred the portion of water right 02-2318 appurtenant to the 13 Acres Parcel to the Wittrocks. Instead what was transferred was a temporary use or license to use the right for a period of three years and after the three year period the Wittrocks "interest" in the water right expired. In support of the argument the Objectors point to the language in the Warranty Deed which provides "[s]ubject to all easements, restrictions and reservations of record and of use" and the language in the Purchase and Sale Agreement which states: "Personal Property Specifically Included in Sale: 16HP Pump and Motor & Split 13 Acres of water Snake River—Each to pay ½ power for 3 years use then to terminate." This argument is without merit.

The Warranty Deed is silent as to water rights but includes the following appurtenance clause: "TO HAVE AND TO HOLD the said premises, with their appurtenances unto said Grantees." The license issued for water right 02-2318 by

operation of law made a portion of the right appurtenant to the 13 Acre Parcel. I.C. 42-220 (“[e]ffect of license . . . all rights confirmed under the provisions of this chapter . . . shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted”). Even in the absence of an appurtenance clause the general rule in Idaho is that unless expressly reserved all appurtenant water rights transfer along with the property. *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 15, 156 P.3d 502, 516 (2007) (“[u]nless [water rights] are expressly reserved in the deed or it is clearly shown that the parties intended the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention ‘appurtenances’”). In this case the Warranty Deed is silent as to water rights. The provision in the Purchase and Sale Agreement relied on by Objectors 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.

C. Laches and waiver do not apply in this case.

The Objectors further argue the Claimants are barred by the doctrine of laches from asserting the existence of water right no. 02-2318A, as a result of the extended delay in asserting access to the water right. Further, as a result of that delay the Objectors had no expectation that any of the owners of the 13 Acre Parcel would assert the use of the right thereby prejudicing the Objectors’ business operations. The Objectors argue that the failure of the owners of the 13 Acre Parcel to act over this extended period of time reflects intent to waive the use of the right. This Court disagrees.

The owners in the chain-of-title of the 13 Acre Parcel did not fail to take the appropriate legal action. An active claim for the water right was pending in the SRBA. Changes of ownership for the water right claim were filed with each successive transfer of the property. Moreover, all successive owners of the Riverfront Property were on

notice of the pendency of the claim in the SRBA not only as a result of the split of the parent right but also because the claim for the remaining portion of the right appurtenant to the Riverfront Property was also pending in the SRBA. Once the *Director's Report* for the claim was filed, the Claimants actively prosecuted the claim. Accordingly, the doctrine of laches and waiver are inapplicable to the facts of this case.

D. A remark in the *Partial Decree* is necessary to clarify that the entry of partial decree does not decide any issue of access to the point of diversion and delivery system across the Riverfront Property.

The Objectors argue in the alternative that if the Court determines that the Claimants have a valid water right that a remark in the *Partial Decree* is necessary to clarify that the *Partial Decree* does not create a right of access or legal easement across the Riverfront Property. The Special Master concluded that such a remark was unnecessary.

This Court agrees in part and disagrees in part. Ordinarily, 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. Access can be in the form of a lease, revocable license or some other arrangement. In fact, in Idaho one can own a water right and not own the land to which the right is used. *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)). Following the issuance of a *Partial Decree* the terms pertaining to the right of access are subject to change which may require the holder of the water right to transfer one or more elements of the right or seek a right of access through some other legal means. Nonetheless the existence of the water right does not in and of itself confer an interest in the property of another to access to the water right. *Joyce Livestock Co.* at 20, 156 P.3d at 21.

However, the problem in this case is twofold. First, there is a long history of acrimony between the various owners of the Riverfront Property and the 13 Acre Parcel. As such when the issues pertaining to the right-of-access have been decided there needs to be certainty concerning the rights and obligations surrounding the water right so as to

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avoid any future controversy between the parties or any successors-in-interest. Second, the issues pertaining to the validity of the water right and the issues pertaining to the right of access, albeit related, are being decided in two different forums. As such, the exclusion of a clarifying remark could be misconstrued as a determination of the validity of a right of access to the water right in the parallel proceeding.

Accordingly, in the interest of addressing these concerns and pursuant to Idaho Code § 42-1411(j), the Court finds that the following remark is necessary for the clarification of the elements of a water right and for future efficient administration of the right:

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.

The Court will therefore order that the following remark appear in the “*other provisions necessary for the definition or administration of this water right*” section of the ***Partial Decree***.

V.

CONCLUSION

For the foregoing reasons, the recommendation of the Special Master is affirmed subject to the modification of including a clarifying remark in the ***Partial Decree***.

VI.

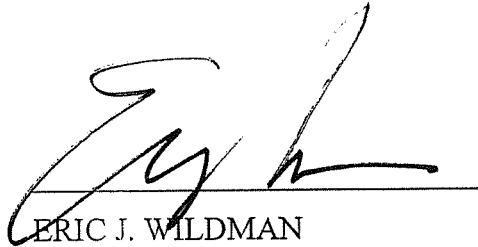
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ORDER OF PARTIAL DECREE

Based on the foregoing, IT IS ORDERED that the above-captioned water rights be **decreed** as set forth in the attached *Partial Decree Pursuant to I.R.C.P. 54(b)*.

Dated

Oct 31 2011



ERIC J. WILDMAN

Presiding Judge

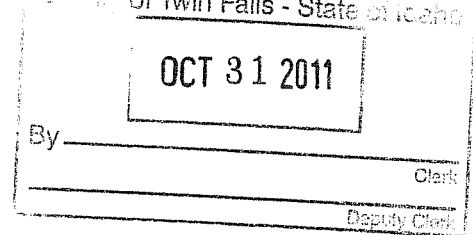
Snake River Basin Adjudication

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)
)
Case No. 39576)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 02-02318A



NAME AND ADDRESS: IMOGENE E WILKERSON
WILLIAM R WILKERSON SR
2520 S POWERLINE RD
NAMPA, ID 83686

SOURCE: SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY: 0.27 CFS

PRIORITY DATE: 06/05/1964

POINT OF DIVERSION: T03N R05W S14 LOT 6 (NWNW) Within Owyhee County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	0.27 CFS

The use of water for irrigation under this right may begin as early as March 1 provided other elements of the right are not exceeded. The use of water before March 15 under this remark is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than the date a partial decree is entered for this right.

PLACE OF USE: Irrigation Within Owyhee County
T03N R05W S14 LOT 6 (SWNW) 4.3 LOT 5 (SENW) 9.0
13.3 Acres Total

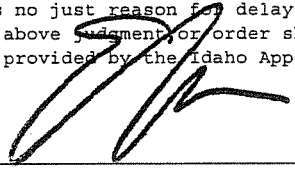
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

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.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the AMENDED MEMORANDUM DECISION AND ORDER ON CHALLENGE AND ORDER OF PARTIAL DECREE was mailed on October 31, 2011, with sufficient first-class postage to the following:

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