

SRBA
District
Twin Falls - State of Idaho

JUL 11 2008

Clerk
Deputy Clerk

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DEPARTMENT OF
WATER RESOURCES

**SUPPLEMENTAL DIRECTOR'S REPORT
REGARDING SUBCASE NO. 74-741**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
David R. Tuthill, Jr., Director
Donald V. Shaff, Adjudication Bureau Chief

July 10, 2008

I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, and Special Master Dolan's May 20, 2008 *Order Requesting 706 Report and Alternative Recommendation*, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") submits this Supplemental Director's Report ("Report") regarding subcase no. 74-741. The Report was prepared under the supervision of David R. Tuthill, Jr., Director, and Donald V. Shaff, Adjudication Bureau Chief.

The following Department employees have knowledge of the information contained in the Report: Nathaniel Arave, Water Resource Agent; Ernest Carlsen, Water Resource Program Manager.

II. DISCUSSION

A. Background

In 1970, the Lemhi County District Court ("Lemhi Court") commenced a general stream adjudication for the Lemhi River, known as the Lemhi Adjudication. On December 30, 1982, the Lemhi Court executed a partial decree pursuant to Idaho Rule of Civil Procedure 54(b) ("Lemhi Decree"), resolving most of the issues in the Lemhi Adjudication. On October 14, 1992, the Lemhi Court ordered the Lemhi Decree be considered a final decree. Water right no. 74-741 was decreed to John F. and/or Emma Herbst in the Lemhi Adjudication for the irrigation of 143.1 acres with 4.30 cfs from the Lemhi River, bearing a priority of January 8, 1908.

Water right no. 74-741 was claimed by Lynn, John, and Emma Herbst in the SRBA on April 30, 1990. In their claim, the Herbsts sought to irrigate 143 acres with 4.30 cfs from the Lemhi River. The claimed priority date was January 8, 1908. On January 19, 2006, the

Department recommended water right no. 74-741 to Lynn and Robin Herbst (“Herbst”) for the irrigation of 143 acres with 4.30 cfs from the Lemhi River with a priority of January 8, 1908.

On June 8, 2006, the Department received an objection from Herbst stating that the recommended priority date should be May 26, 1873. Because Herbst had claimed January 8, 1908 as the date of priority for water right no. 74-741, Herbst was informed that in order to pursue an earlier priority date it would be necessary to amend the claimed priority date. On June 22, 2007, Herbst filed a Standard Form 4 Amended Notice of claim to effectuate the change in priority. On August 22, 2007, the Department was ordered by Special Master Dolan to prepare an Amended Director’s Report (“ARD”) for water right no. 74-741 to consider the amended priority.

On October 11, 2007, the Department issued its ADR but did not change the priority from January 8, 1908 to May 26, 1873. The change was not made because water right no. 74-741 was previously decreed in the Lemhi Adjudication with a priority of January 8, 1908. The legal doctrine of *res judicata* bars reconsideration of the nature and extent of all water rights previously adjudicated. *See, e.g.,* Idaho Code § 42-1420. The Department considers itself barred in this instance from recommending an element inconsistent with the prior judicial determination.

On November 29, 2007, the Department received an objection from Herbst regarding the ADR, stating that the Department should recommend the claimed priority date for water right no. 74-741. On May 20, 2008, Special Master Dolan issued his *Order Requesting 706 Report and Alternative Recommendation*, in which he asked the Department to “prepare and file with the Court . . . a 706 Report concerning the underlying facts and data upon which it based its

recommendation. In addition, the Report shall include an 'alternative recommendation' in the event the Herbsts' claim is allowed."

B. Department's Recommendation

In its investigation of the claim, the Department reviewed documents provided by Herbst regarding historic water use. Copies of the information submitted by Herbst to the Department are attached hereto as Attachment A. It is the Department's understanding that the place of use associated with water right no. 74-741 was originally developed by J.B. Pattee, the first user of water from Agency Creek. In 1886, Pattee entered into an agreement with government officials associated with the Lemhi Indian Reservation. The agreement provided that in exchange for Pattee's interest in water from Agency Creek, the government would construct a ditch that would deliver water to Pattee's place of use from the Lemhi River. According to an affidavit dated June 22, 1886 that was submitted by Herbst with the amended claim, the diversion constructed by the government could deliver water to the entire place of use. However, according to a letter submitted by Herbst with the amended claim (dated June 26, 2007), the point of diversion was changed in 1907 or 1908 to a point of diversion that would deliver a "more consistent" flow of water to the place of use. A hand drawn map submitted with the amended claim shows the relative locations of the points of diversion.

The use of different points of diversion in an effort to obtain a more consistent flow of water from the Lemhi River suggests that there were two development periods associated with water right no. 74-741. The first development period would have been from the time Pattee entered into the exchange agreement with the government on June 22, 1886 to irrigate with Lemhi River water. The second development period would have been during 1907 to 1908 when Pattee, or his successor-in-interest, changed points of diversion to secure a more consistent flow

of water for irrigation from the Lemhi River. Given the uncertainty regarding how much water was developed when, the Department cannot recommend altering the priority date for water right no. 74-741.

If it could be known how much water was beneficially used by Pattee from the Lemhi River after the 1886 exchange with the government, and how much water was beneficially used when the 1908 point of diversion was developed, the Department could recommend splitting water right no. 74-741 into two rights with priority dates of June 22, 1886 and January 8, 1908. The relative quantities would be limited to a combined total not to exceed the amount decreed by the Lemhi Court: 4.30 cfs. But since the Department does not know the extent of beneficial use prior to development of the 1908 point of diversion, the Department cannot recommend splitting water right no. 74-741 because there is no basis upon which to recommend quantity prior to 1908.¹

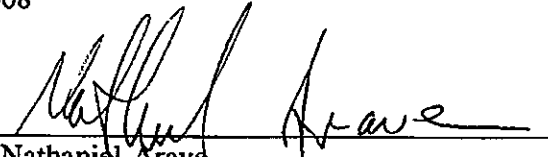
Based on review of the information, it is the Department's position that, even were it but for *res judicata*, it would recommend water right no. 74-741 as it was decreed by the Lemhi Court and recommended in the SRBA. For convenience, a copy of the January 19, 2006 Director's Report for water right no. 74-741 is attached hereto as Attachment B.

¹ Even if the Department could agree with Herbst that there was sufficient information to recommend a split of water right no. 74-741, the Department could not recommend the claimed priority date of May 26, 1873 because Pattee abandoned his right to use water from Agency Creek and its associated priority date when he entered into the exchange agreement with the government on June 22, 1886 to divert Lemhi River water. If there was sufficient evidence to support a split of water right no. 74-741, the earliest priority date for the senior split would be June 22, 1886. The same rationale would apply if water right no. 74-741 was fully developed by June 22, 1886. The Department cannot recommend the claimed priority date because of the June 22, 1886 exchange agreement.

III. CONCLUSION

But for *res judicata*, the Department would recommend water right no. 74-741 as described in its January 19, 2006 Director's Report.

Submitted this 11TH day of July 2008



Nathaniel Arave
Water Resource Agent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 11th day of July 2008.

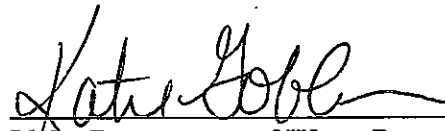
Document Served:

Supplemental Director's Report Regarding Subcase No. 74-741

Persons Served:

Paul L. Arrington
Barker Rosholt & Simpson LLP
PO Box 485
Twin Falls, Idaho 83303

Lynn and Robin Herbst
PO Box 21
Tendoy, Idaho 83467



Idaho Department of Water Resources

Attachment A

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 <u>74-00741</u>
	)	(Insert water right number)
	)	
Case 39576	)	STANDARD FORM 4
	)	
	)	MOTION TO FILE:
	)	☐ LATE NOTICE OF CLAIM
	)	☒ AMENDED NOTICE OF CLAIM

INSTRUCTIONS

This form is used to file a late Notice of Claim or an amendment to a Notice of Claim in a reporting area where the Director's Report has been filed. Forms may be obtained from the SRBA Court, the Idaho Department of Water Resources (IDWR), or you may copy or reproduce this blank form. If you copy or reproduce this form, please copy on both sides with the even-number pages upside down.

The water right number for your late or amended claim must be indicated above in the blank space following "Subcase." You must use a **separate form for each** late or amended Notice of Claim.

This form has been adopted by the court in **SRBA Administrative Order 1, Rules of Procedure** (amended Sept. 30, 1996), Section 4, which may be consulted for further information.

By filing a *Motion to File a Late Notice of Claim* or a *Motion to File an Amended Notice of Claim*, you certify that it is well-grounded in fact; is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and is not filed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

☒ I have read **SRBA Administrative Order 1, Rules of Procedure** (amended Sept. 30, 1996).

My name is LYNN A. Herbst

My address is P.O. Box 21 Tandy Id 83468

My phone number is: Work _____ Home 208-756-2584

I am an attorney representing _____

My name is _____

My address is _____

My phone number is _____

MOTION TO FILE A LATE NOTICE OF CLAIM

A Motion to File a Late Notice of Claim will require a hearing before the Presiding Judge.

☐ I did not file a Notice of claim to the use of water in the SRBA because:

☐ I filed a Notice of Claim and elected to defer judicial proceedings on my domestic or stock watering use. I desire to reinstate my Notice of Claim for domestic or stock watering use.

☐ I am providing legal and factual documentation for my claimed use of water. You must describe these documents and attach a readable copy. (You do not need to fill this out if you are reinstating a Notice of Claim for domestic or stock watering use, but you **must** attach a copy of your Notice of Claim.)

I have attached:

- ☐ A fully completed Notice of Claim (available from IDWR).
- ☐ A claim filing fee for a domestic and stock watering use. IDWR may charge this fee pursuant to I.C. § 42-1414. To determine this amount, contact IDWR at (800) 451-4129. I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of \$ _____.
- ☐ A claim filing fee and a late claim fee for those claims other than a domestic or stock watering use for which a notice of claim was not filed. To determine this amount, contact IDWR at (800) 451-4129. I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of \$ _____.

Follow these instructions regarding the hearing on this motion.

1. Contact the Clerk of the SRBA Court (208-736-3011) to request a hearing date and time.
2. Fill in the following information:

This motion will be heard on _____
(Insert Date and Time)
at the SRBA courthouse, 253 Third Avenue North, Twin Falls, Idaho.

MOTION TO FILE AN AMENDED NOTICE OF CLAIM

A *Motion to File an Amended Notice of Claim* may require a hearing before the Presiding Judge or Special Master or may be granted by leave of the court or by written consent of the parties and the Idaho Department of Water Resources. Leave to amend a claim shall be freely given when justice so requires.

I I must amend my Notice of Claim to the use of water in the SRBA because:
Information has been found supporting
My claim at an earlier priority date, on Right 74-00741

☒

I am providing legal and factual documentation to support my amended Notice of Claim.
You must describe these documents and attach a readable copy.

1 map amended Notice of claim to a water right
6 affidavits Standard Form - 4
2 water right filings - 1873-1886

I have attached:

☒

An amended Notice of Claim (available from IDWR).

☒

Payment of the following additional fees required by IDWR:

\$193.00

VERIFICATION (Must be completed)

State of Idaho

County of Lemhi

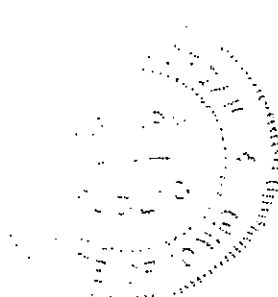
Lynn A. Herbst, being first duly sworn, upon oath, deposes and says:
(Insert name of person filing form)

That I am the party/claimant filing this motion for late or amended claim (as listed on Page 2) as defined by I.C. §§ 42-1401A(1) and (7) or that I am the attorney for the party/claimant filing this motion for late or amended claim and that I have read this motion, know its contents, and believe that the statements are true to the best of my knowledge.

Robin R. Herbst
Lynn A. Herbst
Signature of person filing motion

Robin R. Herbst
Attorney signing in representative capacity

Subscribed and sworn to before me on June 23, 2007
(Insert Date)



[Signature]
Notary Public for Idaho
Residing at: Salmon
My Commission expires: 6-10-10

INSTRUCTIONS FOR MAILING

You must mail this form, including all attachments, to the Clerk of the SRBA Court. **FAX filings will not be accepted by the SRBA Clerk of the Court.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

CERTIFICATE OF MAILING

I certify that on June 26, ²⁰⁰⁷~~199~~, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

✓
193- when filed

2. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

3. If you are filing an amended Notice of Claim in a subcase being heard before the Presiding Judge or a Special Master, you must serve a copy on all parties to that subcase.

(Insert Names/address of parties)

Lynn A. Harbit
Signature of person or attorney mailing the form

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number 74-741
Date Received: 4/30/1990
Receipt No: X999999
Received By:

AMENDED NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

LYNN A HERBST Phone: (208)756-2584

PO BOX 21
TENDON ID USA 83468

ROBIN R HERBST Phone: (208)756-2584

PO BOX 21
TENDON ID USA 83467

2. Date of Priority: 05/26/1873

3. Source: LEMHI RIVER Trib. to: SALMON RIVER

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County	Type
19N	24E	29	SE NW	LEMHI	

5. Description of diverting works:

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
IRRIGATION	3/15	11/15	4.3	
STOCKWATER	1/01	12/31	0.06	

7. Total Quantity Appropriated is:
4.3 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
19N	24E	17	NW	SE	IRRIGATION	5
			SW	SE	IRRIGATION	3
			SE	SW	IRRIGATION	32
			NE	SW	IRRIGATION	22
					Section Acres	62
19N	24E	20	NW	NW	IRRIGATION	11
			SW	NW	IRRIGATION	4
			SE	NW	IRRIGATION	26
			NE	SW	IRRIGATION	6
			NE	NW	IRRIGATION	34
					Section Acres	81
					Total Acres	143

11. Place of use in counties: LEMHI

12. Do you own the property listed above as place of use? Yes

13. Other Water Rights Used:

14. Remarks:

DIV. L-31.

AC. IRR. = 143.1.

WATER HAS BEEN USED ON AN EXCHANGE BASIS FROM AN UNNAMED SOURCE LOCATED WITHIN NENW, S29, T19N, R24E.

15. Basis of Claim: Decreed

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s):

Lynn A. Herbst
Robin R Herbst

Date: 6-23-07

Date: 6/23/07

State of Idaho)

County of Lewni)

) SS.

Subscribed and sworn (or affirmed) before me this

23rd

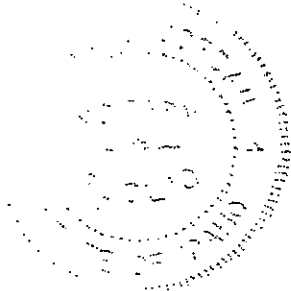
of June 2007

[Signature]

Notary Public

Residing at Salmon

My commission Expires 6-10-10



June 26, 2007

I, Lynn Herbst object to the priority date 1/8/1908 on water right 74-0741.

On May 26, 1873 JB Pattee claimed all the water that would run or be carried in his ditch from Agency Creek for his ranch, reference in water right Book A page 138.

August 29, 1914 in a court hearing, Book B of Judgement page 181 & 182, Henrietta Pattee, prior owner & plaintiff verses William Carpenter defendant an affidavit of FB Sharkey, speaks of a ditch just east of road from Sunfield to Junction. Ditch head is 100 feet from road in Agency Creek, water right filed May 26, 1873. Sharkey states water was traded to Indian Department in exchange for a ditch & water right from Lemhi River now L-31A Diverson. Ditch would be correct elevation to irrigate same ground as May 26, 1873 water right out of Agency Creek. Water right filing of 10,000 inches out of Lemhi River June 22, 1886.

The following speak of said ditch.
Affidavit of Stephen A. Mahaffey Senior
Affidavit of Dwight A. Smith
Affidavit of C.L. Smith

Court rules in favor of Defendant that right was traded.
Affidavit of CW Snook dated March 26, 1910.
Affidavit of FB Sharkey July, 1910.
Affidavit of John W Snook dated March 3, 1972, that Joe Pattee Ranch now owned by John F Herbst was irrigated from Indian Ditch in 1888, now owned by Lynn A. Herbst.

In 1907 or 1908 for a more consistent water flow a point of diversion change was made for a portion of the ground irrigated from Lemhi River since June 22, 1886, now L.31 water right #74-0741.

I believe the ground irrigated by 74-0741 has been irrigated since May 1873 from Agency Creek until June 22, 1886 when right was traded for ditch & right out of Lemhi River. Currently ground that is still irrigated out of L-31A, the original Lemhi River Ditch water right # 74-0739 has a priority date of May 26, 1873.

Based on this information I believe that 74-0741 priority date should be May 26, 1873, for it has been continuously irrigated since that date.

Attachments:
1 Map
6 Affidavits
2 Water Right filing claims, Lemhi Courthouse

Sincerely,
Lynn A. Herbst

AFFIDAVIT

STATE OF IDAHO

County of Lemhi--ss

I the undersigned, JOHN W. SNOOK, of Salmon, Idaho after being duly sworn according to law depose and say: That I was born in Salmon, Idaho in the year 1876; that as a young boy I have personal knowledge of the ditch known as the "Indian Ditch": that upon occasion I would visit what was then the Joe Pattee ranch which is now owned by Farrell Herbst, located near Tendoy Idaho and that I know for a person fact from my own observation and knowledge that the old Joe Pattee ranch was under irrigation out of the "Indian Ditch" in the year 1888.

Dated: March 3, 1972

John W. Snook
John W. Snook

Subscribed to and sworn to before me this 3rd day of March

1272

Fred Snook
Fred Snook

✓ This is hereby given that the undersigned
 claims all the Water that can be carried or
 run in the old Fort Simbo ditch, taken from
 the Creek now known as the Agency Creek
 about two miles above Fort Simbo and
 conveyed to my Ranch at Fort Simbo
 by said ditch for irrigating purposes
 Salmon City, Lemhi County -
 Idaho Territory J. B. Patten
 May 26th 1873

Filed for record in this Office this 26th day of May
 A.D. 1873 at 9 O'clock P. M. and duly
 recorded on the 27th day of May A.D. 1873
 at 8 O'clock P. M. in record of Water rights
 Book A page 138 -

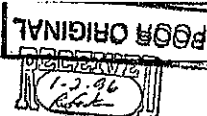
John Hogan
 County Recorder

✓ Notice to all whom it may concern, We Richard
 Williams & H. Bailey & F. Hutchinson claim the
 following described Water Course or privileges
commencing at the junction of the Big Creek
 there running down said Creek or gulch four
 hundred feet - down the creek and two hundred feet
 on each side of said Creek for Mill purposes
 August 1 1873, J. Richard Williams
 H. Bailey
 F. Hutchinson

✓ Filed for record in this Office this 15th day of
 August A.D. 1873 at 8 O'clock A. M. and duly
 recorded same day at 5 O'clock and 15 minutes
 A. M. in record of Water rights Book A
 page 138.
 John Hogan
 County Recorder

STATE OF IDAHO
 COUNTY OF LEMHI
 TERRY J. MORTON, CLERK OF THE DISTRICT COURT
 OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE
 OF IDAHO, IN AND FOR THE COUNTY OF LEMHI,
 DO HEREBY CERTIFY THAT THE PROCEEDING IS A
 TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE
 IN THIS OFFICE, IN WITNESS WHEREOF I HAVE HERE
 UNTO SET MY HAND AND AFFIXED MY
 OFFICIAL SEAL THIS 21 DAY
 OF June YEAR 1873
 TERRY J. MORTON, CLERK
 Clara Gordon

DEFENDANT'S EXHIBIT "A"



Notice is hereby given that I the undersigned claim all the water that can be carried or run in the old Fort Lemhi ditch, taken from the Creek now known as the Agency Creek about two miles above Fort Lemhi, and conveyed to my Ranch at Fort Lemhi by said ditch for irrigating purposes.

Salmon City, Lemhi County, Idaho Territory.

May 26th, 1873.

J.B.Pattee

Filed for record in this office this 26th day of May A.D. 1873 at 9 o'clock P.M. and duly recorded on the 27th day of May A.D. 1873 at 8 o'clock A.M. in record of water rights, Book A page 138.

John Hogan

County Recorder.

State of Idaho

County of Lemhi)

ss

I, W.C.Smith, County Recorder in and for

the County and State aforesaid do hereby certify that the above and foregoing is a full, true and complete copy of a notice of water location of J.B.Pattee as the appears of record in my office in Book A of water rights at page 138.

In Testimony whereof I have hereunto set my hand and affixed my official seal this 18th day of July, 1910.

W.C.Smith,

By

Deputy

County Recorder.

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JAN 04 1996

Department of Resources
Eastern District Office

the June 2nd 1888

have this 2nd day
Water right of
eight mile capacity
in capacity

entire right
year and

of June 9th 1888
of Water Right
in Hogan
County Recorder

and this day located
in the south fork
of said

in above the
by ditch and
honey, said Creek
in River about
county Idaho

A.D. 1888,
Deal

Parker locating
day of June 1888
recorded

but Hogan
County Recorder

Notice is hereby given that the undersigned has located and
claimed (10,000) New Gallons and inches of the Water of the Snake River
taken out at or near the point of the Bluff about three
or four hundred yards above the so called High Bridge
in the Snake River Reservation, or Agency, and conveyed
by ditch to my Ranch for Agricultural and other
purposes, said Water Right has been turned over to me
by the Indian Department as an equivalent for was
used by said department, that was located and claimed
by the undersigned

dated at Fort-Clark, Idaho

June 22nd 1886,

J. P. Pattee
Claimant,

Filed for record in this Office this 22nd day of June A.D.
1888, at 30 Min past 1 O'clock P.M. and duly recorded

John Hagan
County Recorder

I the undersigned a Citizen of the United States and
over the age of 21 years, do locate a Water privilege
of 500 inches on this Creek known as Whiskey Creek for
plum Mining and other purposes, to be conveyed by ditch
as follows, Commencing at this point and running along
hill on North side of said Creek to Summit, thence down
Bohannon Creek to place of using, located on this the
6th day of June 1888.

Locater George Passant

Filed for record in this Office this 25th day of June A.D. 1888
at 4 P.M. and duly recorded in Book "A" of Water Rights

John Hagan
County Recorder

Notice is hereby given that the undersigned has this day claimed
the right of way to construct a ditch of sufficient capacity
for conveying two hundred inches of Water under a four inch
pressure from the J. & L. Barnett Flour Mill, through the lands
of James Beattie, James Right and L. C. Gintorn to and upon
and upon the lands of the undersigned for irrigating and other purposes,
dated July 23rd 1888.

Chas. Jacobs

Thomas H. Bailey

Filed for record in this Office this 23rd day of July 1888 at 12 M.
and recorded in Book A of Water Rights

John Hagan
County Recorder

COUNTY OF IDAHO
COUNTY CLERK OF THE DISTRICT COURT
THE SEVENTH JUDICIAL DISTRICT OF THE STATE
IDAHO IN AND FOR THE COUNTY OF LEMHI.
DO HEREBY CERTIFY THAT THE PROCEEDING IS A
TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE
IN THIS OFFICE, IN WITNESS WHEREOF, I HAVE HERE
TO SET MY HAND AND AFFIXED MY
OFFICIAL SEAL THIS 21st DAY
OF JULY 1888
YEAR 1888
COUNTY CLERK
J. J. MORRISON

POOR ORIGINAL

DELENDVRL 2 EXHIBIT "B"
DEFENDANT(S) EXHIBIT "B"

RECEIVED
1-2-96
Rfat

NOTICE is hereby given that the undersigned has located and claimed (10000) Ten Thousand inches of the waters of the Lemhi River taken out at or near the point of the Bluff about three or four hundred yards above the so called High Bridge on the Lemhi Reservation or Agency, and conveyed by ditch to my Ranch for agricultural and other purposes, said Water Right has been turned over to me by the "Indian Department" as an equivalent for was used by said department, that was located and claimed by the undersigned

Dated at Fort Lemhi Idaho

June 22nd 1886.

J.B.Pattee

Claimant.

Filed for record in this office this 22nd day of June A.D. 1886, at 30 Minutes past 1 O clock P.M, and duly and duly recorded,

John Hogan

County Recorder

State of Idaho,

County of Lemhi.)

I, W.C.Smith, County Recorder in and for the State and County aforesaid do hereby certify that the foregoing is a full, true and complete copy of the notice of water location of J.B.Pattee as the same appears of record in my office in Book A of Water Rights at page 345, records of Lemhi County, Idaho.

In witness whereof, I have hereunto set my hand and affixed my official seal this 18th day of June, 1910.

W.C.Smith,

County Recorder.

By

W.C. Smith

Deputy.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI.

Henrietta Patten, et al.
Plaintiffs.

vs.

AFFIDAVIT.

William Carpenter, et al.
Defendants.

STATE OF IDAHO,
County of Lemhi. SS.

C. F. Smith being first duly sworn, deposes and says:

1.
That ~~he~~ is a resident of *Lemhi* County, State of
Idaho, and lives on a ranch situated about one-half mile southerly
of Agency Creek on the road leading from Sunfield to Junction.

II.

That he is acquainted with a certain ditch constructed for the
purpose of taking water from the Lemhi River at or near the front
of the bluff about three hundred or four hundred yards above the so
called High Bridge, and conducting water in a ~~water~~ northerly
direction and on to lands of the plaintiffs in the above entitled
action.

III.

That the said ditch when put in proper condition would have
a carrying capacity of from five hundred to six hundred inches of
water and that the head of the ditch is capable of receiving one
thousand inches of water.

IV.

That the water from said ditch will for irrigating purposes
cover all the land that the plaintiffs have had in cultivation
prior to March 1st., 1910.

C. F. Smith
Subscribed and sworn to before me this 29th day
July, A.D., 1910.

John E. Rios
My Commission Expires Aug. 3, 1913.
Notary Public

CLERK OF DISTRICT COURT
COUNTY OF LEMHI
TERRI J. MORTON, CLERK OF THE DISTRICT COURT
OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF LEMHI,
DO HEREBY CERTIFY THAT THE PROCEEDING IS A
TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE
IN THIS OFFICE. IN WITNESS WHEREOF I HAVE HERE
UNTO SET MY HAND AND AFFIXED MY
OFFICIAL SEAL THIS 29 DAY
OF July YEAR 1910
TERRI J. MORTON, CLERK
Agnes L. Liden

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI.

Henrietta Pattee et al.
P l a i n t i f f s .

vs.

AFFIDAVIT.

William Carpenter, et al.
D e f e n d a n t s .

STATE OF IDAHO,
County of Lemhi, ss.

Dwight A. Smith being first duly sworn, deposes and says:
1.

That he is a resident of said Lemhi County, State of Idaho,
and occupies a ranch situated about one-half mile southerly of
Agency Creek on the road leading from Sunfield to Junction.

11.

That he is acquainted with a certain ditch constructed for the
purpose of taking water from the Lemhi River at or near the front
of the bluff about ^{hundred} three or four hundred yards above the so called
High bridge, and conducting the same in a northerly direction over
lands occupied by this affiant, and on to lands of the plaintiffs
in the above entitled action.

111.

That the said ditch when put in proper condition would have
a carrying capacity of from five hundred to six hundred inches of
water and that the head of the ditch is capable of receiving one
thousand inches of water.

IV.

That the water from the said ditch will, for irrigating purposes
cover all the land that the plaintiffs have had in cultivation
prior to March 1st., 1910.

Dwight A. Smith

Subscribed and sworn to before me this 29th day
July, A.D. 1910.

John E. Riss

Notary Public.

CLERK OF IDAHO
COUNTY OF LEMHI
TERRI J. MORTON, CLERK OF THE DISTRICT COURT
OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF LEMHI,
DO HEREBY CERTIFY THAT THE PROCEEDING IS A
TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE
IN THIS OFFICE. IN WITNESS WHEREOF I HAVE HERE-
TO SET MY HAND AND AFFIXED MY
OFFICIAL SEAL THIS 21 DAY
OF June YEAR 2007

TERRI J. MORTON, CLERK

Cyril L. Larkin

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI.

Henrietta Pattee, et al.
Plaintiffs.

vs.

AFFIDAVIT.

William Carpenter, et al.
Defendants.

STATE OF IDAHO,
County of Lemhi, ss.

Stephen A. Mahaffey *sm* being first duly sworn, deposes and
says:

1.

That he is a resident of said Lemhi County, State of Idaho,
and occupies a ranch situated about one mile southerly of Agency
Creek on the road leading from Sunfield to Junction.

11.

That he is acquainted with a certain ditch constructed for the
purpose of taking water from the Lemhi River at or near the front
of the bluff about threehundred or four hundred yards above the so
called High Bridge, and conducting the same in a northerly direction
over lands occupied by this affiant, and on to lands of the
plaintiffs in the above entitled action.

111.

That in a conversation with Fred B. Pattee, one of the said
plaintiffs, this affiant was informed that said plaintiff claimed
to be the ~~owner~~ owner of said ditch and the right to conduct
water therein.

Stephen A. Mahaffey sm

Subscribed and sworn to before me this 29th
July, A.D., 1910.

My Commission expires Aug. 9, 1912.

John E. Rios

Notary Public

*Eraser of word Exclusive was made before
being subscribed and sworn to*

My Commission expires Aug. 9, 1912.

John E. Rios

Notary Public

ERRI J. MORTON, CLERK OF THE DISTRICT COURT
THE SEVENTH JUDICIAL DISTRICT OF THE STATE
IDAHO, IN AND FOR THE COUNTY OF LEMHI.
I HEREBY CERTIFY THAT THE PROCEEDING IS A
TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE
IN THIS OFFICE. IN WITNESS WHEREOF I HAVE HERE
TO SET MY HAND AND AFFIXED MY
OFFICIAL SEAL THIS 21 DAY
OF July YEAR 1911

ERRI J. MORTON, CLERK

Erreca Cardin

IN THE DISTRICT COURT OF THE SIXTH
JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF LEMHI.

Henrietta Pattee et al
P l a i n t i f f s .

vs.

A F F I D A V I T .

William M. Carpenter et al.
D e f e n d a n t s .

STATE OF IDAHO,
SS
County of Lemhi.

F.B. Sharkey, being first duly sworn according to law,
deposes and says:

I.

what now is
That he is and has been a resident of the County of Lemhi,
State of Idaho, for the last Forty-four (44) years, and during that
time has resided continuously since the fall of 1872 approximately
one and one-half miles from Agency Creek, so called.

II.

That the buildings first erected on the Lemhi Indian Reservation
for indian and government purposes, were situated near the mouth of
Agency Creek a short distance easterly of the road leading from Sun-
field to Junction, and that the persons ^{*in charge*} and officers thereof, then
first began to use the waters of said Agency Creek for beneficial
purposes.

III.

That about the year 1886 this affiant in a conversation with
J.B. Pattee, now deceased, one of plaintiffs' predecessors in inter-
est in their claim to the right to, use the waters of said Agency
Creek, as he has been informed, ~~said J.B. Pattee~~ ^{*now*} informed him that
~~he had entered into an agreement~~ ^{*he said J.B. Pattee*} with the government through the
officials of said Lemhi Indian Reservation, whereby said J.B. Pattee
had relinquished all his right, title and interest to the Waters of
said Agency Creek to the U.S. Government for its Indian Department,
in consideration that said Government ^{*would*} construct for him a ditch

that would convey and conduct water from the Lemhi River at a sufficient elevation to irrigate the land which he was then in possession of; that thereafter said ditch was so constructed by the U.S. Government, and thereafter the said land of the said J.B. Pattee was irrigated therefrom.

IV.

That thereafter the land now occupied by said Carpenter was reclaimed, irrigation ditches constructed thereon, and water appropriated ^{said Creek} ~~therefrom for irrigating the same~~ and used for irrigating the same up to the time the said improvements were offered for sale in 1907 by the U.S. Government.

V.

That the point of appropriation of water from said ~~J.B. Pattee~~ Agency Creek by said J.B. Pattee prior to said alleged contract of release to the U.S. Government was situated approximately between fifty and one hundred feet easterly of said road, and at no time was indicated to be further up said Creek and further easterly of said road, by any ditch, or head gate constructed by said J.B. Pattee.

VI.

That said ditch constructed by the U.S. Government pursuant to said contract with said J.B. ~~Pattee~~ is still in existence and capable of conducting sufficient water to irrigate all the land that was irrigated ~~therefrom~~ by water from Agency Creek prior to said contract ~~which~~ and owned by said Pattee.

VII.

That land now occupied by ~~xx~~ Fred E. Pattee and Joseph L. Pattee is also capable of being irrigated from said Lemhi River Ditch,

VIII.

That any land of plaintiffs, or any one of them, situated on the bar, so called, easterly of said road, has never been irrigated by water taken ~~from~~ from said Agency Creek, except forty acres on which water from said creek was conducted in the fall of 1909 for the first time; that the amount of land on said bar claimed by ~~plain~~ plaintiffs, or some of them, is 120 acres.

J. B. Sharkey

...of the ...
...of the ...
...of the ...

Subscribed and sworn to before me this 23d day of
July, A.D. 1900.

John C. Sinclair
Notary Public.

CLERK OF IDAHO
COUNTY OF LEMHI
TERRI J. MORTON, CLERK OF THE DISTRICT COURT
OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF LEMHI,
DO HEREBY CERTIFY THAT THE PROCEEDING IS A
TRUE, AND CORRECT COPY OF THE ORIGINAL ON FILE
IN THIS OFFICE. IN WITNESS WHEREOF I HAVE HERE
INTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL THIS
21 DAY
JULY YEAR 1900
TERRI J. MORTON, CLERK
Clyde Carden

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI.

Henrietta Pattee et al.
Plaintiff.

vs.

AFFIDAVIT.

William M. Carpenter et al.
Defendant.

STATE OF IDAHO
ss.
County of Lemhi.

C.W. Snook, being first duly sworn according to law, deposes and says:

1.

That he is and has been a resident of what now is the County of Lemhi, State of Idaho, for the last thirty years, and during that time from the fall of 1907 to 1909 resided on land and premises lying immediately west of land now occupied by defendant, William M. Carpenter, at a place nearer the mouth of Agency Creek, and that for twenty-two years prior to said 1907, affiant resided about seven miles distant from said Agency Creek, during all of which time he was acquainted with conditions existing as to the use of water from said Agency Creek.

11.

That he is well acquainted with a certain ditch constructed for the purpose of conducting water from the Lemhi River at or near a point of the bluff about three or four hundred yards above the so-called High Bridge, in a northerly direction to and on to the lands of the plaintiffs in the above entitled action, and that in conversations had with the plaintiff Fred B. Pattee, the said Fred has claimed the ownership of said ditch and the right to use all the water therein for himself and the other plaintiffs herein.

111.

That said Lemhi River Ditch before reaching lands of plaintiffs emptied its water in to said Agency Creek at a point westerly of land

of said William M. Carpenter nearer the mouth of the Creek, and about fifty yards easterly of the road leading from Sunfield to Junction, and a short distance below ~~and a short distance below said point~~ said point where the waters of said ditch were emptied in to said Creek, the said Plaintiffs, and their predecessor in interest always had their headgate up to the fall of 1909, and never did have any head gate on or above land occupied by said Carpenter.

IV.

That all and the same lands of plaintiffs and their predecessor in interest are capable of being irrigated from water flowing in said Lemhi River Ditch as were ever irrigated from water taken from Agency Creek prior to the construction of said Lemhi River Ditch.

V.

That affiant in conversation with J.B. Pattee during his lifetime, and the plaintiffs herein was informed and given to understand that the said J.B. Pattee had entered into some kind of an Agreement with the Indian Department of the United States Government whereby he had acquired the ownership of said Lemhi River Ditch and the waters therein flowing in lieu of certain rights relinquished to the use of water from said Agency Creek.

VI.

That affiant has no interest in the above entitled action whatsoever.

Chas. Snook

Subscribed and sworn to before me this 26th day of July, A.D. 1910.

Enoch W. Whitcomb

Notary Public.

STATE OF IDAHO
COUNTY OF LEMHI
TERRI J. MORTON, CLERK OF THE DISTRICT COURT
OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF LEMHI,
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OFFICIAL SEAL THIS 21 DAY
OF June YEAR 1911
TERRI J. MORTON, CLERK
Cyril Gardner DEPUTY

Attachment B

01/19/2006

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 74-741
NAME AND ADDRESS: LYNN A HERBST
PO BOX 21
TENDON ID 83468

ROBIN R HERBST
PO BOX 21
TENDON ID 83467

SOURCE: LEMHI RIVER TRIBUTARY: SALMON RIVER
QUANTITY: 4.300 CFS
PRIORITY DATE: 01/08/1908

POINT OF
DIVERSION: T19N R24E S29 SENW Within LEMHI County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	3/15 11/15	4.300 CFS
STOCKWATER	01/01 12/31	0.060 CFS

PLACE OF USE: IRRIGATION Within LEMHI County

T19N R24E S17	NESW	22.00	T19N R24E S17	SESW	32.00
T19N R24E S17	NWSE	5.00	T19N R24E S17	SWSE	3.00
T19N R24E S20	NENW	34.00	T19N R24E S20	NWNW	11.00
T19N R24E S20	SWNW	4.00	T19N R24E S20	SESW	26.00
T19N R24E S20	NESW	6.00			

STOCKWATER same as IRRIGATION

143 ACRES TOTAL

This right authorizes the irrigation of 143.1 total acres.

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

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. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed