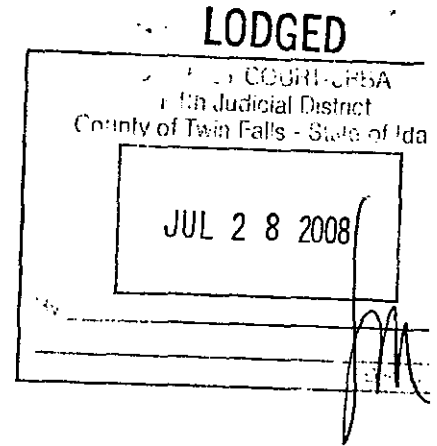


Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 West Main, Suite 303
P.O. Box 485
Twin Falls, ID 83301-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Lynn A. & Robin R. Herbst



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. 74-00741
)

Case No. 39576

)
)
) **OBJECTOR'S PRETRIAL**
) **MEMORANDUM**
)

COMES NOW, the Objector, Lynn A. and Robin R. Herbst ("Herbst"), by and through their attorneys of record, Barker, Rosholt & Simpson, LLP, and submit this *Pretrial Memorandum*. As discussed below, the Objection, filed by Herbst, should be granted – at least in part – and the priority date for water right 74-741 should be amended.¹

STATEMENT OF ISSUES

There are two issues before the Court in this trial:

1. Should Herbst be granted relief from the Lemhi Decree, to the extent that the Lemhi Decree found that water right 74-741 has a priority date of January 8, 1908?
2. If relief can be granted from the Lemhi Decree, should all or a portion of water right 74-741 be decreed with a priority date earlier than January 8, 1908?

¹ The purpose of this *Pretrial Memorandum* is to advise the Special Master as to the Herbst's position, and provide the legal foundation in support thereof. Filed concurrently herewith is a *Statement of Stipulated Facts*. Other facts will be presented during the trial on July 31, 2008. At that time, Herbst will stand for any questions that the Court may have on this matter during the trial.

STATEMENT OF OBJECTOR'S POSITION

Relief should be granted from the Lemhi Decree, so far as necessary to amend the priority date on a portion of the water right as information has recently been discovered showing that water was used to irrigate the section 17 lands long before January 8, 1908.² Herbst, the current owner of the water right, is not aware of why the previous owners or their legal counsel failed to research this matter and claim the correct priority date in the Lemhi Adjudication. Furthermore, a priority date of January 8, 1908 causes significant hardship on the Herbst's farming practices.

Water right 74-741, should be split into two water rights, as follows:

	Water Right #1	Water Right #2
<i>Priority Date:</i>	January 8, 1908	May 26, 1873
<i>Diversion Rate:</i> ³	2.6 cfs	1.7 cfs
<i>Place of Use:</i>	T19N, R24E, Lemhi Cty: • §20 lands: ○ 34 acres – NENW ○ 11 acres – NWNW ○ 4 acres – SWNW ○ 26 acres – SENW ○ 6 acres – NESW • §17 lands: ○ 5 acres – NWSE ○ 3 acres – SWSE <u>Total Acres: 89</u>	T19N, R24E, Lemhi Cty: • §17 lands: ○ 22 acres – NESW ○ 32 acre – SESW <u>Total Acres: 54</u>

All other elements should remain as recommended by Idaho Department of Water Resources ("IDWR").

STATEMENT OF FACTS

Filed concurrently with this *Pretrial Memorandum* is a *Statement of Facts* ("SOF").

These facts are incorporated herein by reference.

² Water right 74-741 authorizes the irrigation of 81 acres in §20 and 62 acres in §17, T19N, R24E, Lemhi County.

³ Water right 74-741 was recommended with a diversion rate of 4.3 cfs to irrigate 143 acres. This equates to approximately 0.03 cfs per acre.

Water Right 74-741 authorizes the irrigation of 143 acres in Lemhi County – 62 acres in section 17 and 81 acres in section 20, T19N, R24E, Lemhi County. *SOF* ¶1. The right was originally claimed in the SRBA by John F. and Emma Herbst – the parents of Lynn A. Herbst. *Id.*; Exhibit 101. John F. and Emma Herbst acquired the 143 acres to which water right 74-741 are appurtenant, from Doyle W. and Loa B. Dance, on December 3, 1969. Exhibit 102. Lynn A. and Robin R. Herbst began leasing the property from John F. and Emma Herbst in the early 1980's. They acquired ownership of the property and water right 74-741 in 1993. Exhibit 103.

On May 26, 1873, Joseph "J.B." Pattee claimed "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 ... for irrigating purposes," *SOF* ¶12; *706 Rpt.* at 21-22.⁴ Mr. Pattee claimed this water so that he could irrigate certain properties owned by him. *Id.* According to the March 3, 1972, *Affidavit of John W. Snook*, Mr. Pattee was still irrigating these properties in 1888 and these properties are the same the properties owned by "Ferrell Herbst" in 1972. *SOF* ¶15; *706 Rpt.* at 20. As Lynn Herbst will testify at trial, John F. Herbst was commonly referred to as "Ferrell" – his middle name. This is the property now owned by Herbst and to which at least a portion of water right 74-741 is appurtenant. Exhibit 103.

The claim by J.B. Pattee was for the diversion of water from Agency Creek. According to the July 23, 1910, *Affidavit of F.B. Sharkey*, on or around June 22, 1886, the "Indian Department" traded J.B. Pattee's Agency Creek water for waters in the Lemhi River. *SOF* ¶¶ 13-14; *706 Rpt.* at 23-24 & 28-30. The "Indian Department" also agreed to construct a ditch to convey the water from the Lemhi River to J.B. Pattee's property – i.e. the "Indian Ditch." *Id.*

⁴ For the convenience of the Court and parties, the *Supplemental Director's Report Regarding Subcase No. 74-741* ("*706 Rpt.*") has been sequentially numbered to allow for ease in locating the historical documents contained in Attachment A to that report. A copy of the numbered *706 Rpt.* is attached to this memorandum.

This same ditch continues to divert water from the Lemhi River and deliver that water to the Herbst property.

On September 25, 1894, J.B. Pattee was awarded "Homestead Certificate No. 46," obtaining title to the east half of the SW quarter, section 17, T19N, R24E, Lemhi County. *SOF* ¶ 16; Exhibit 107. Of the 62 acres recommended in section 17 for water right 74-741, there are 22 acres in the NESW and 32 acres in the SESW, section 17, T19N, R24E, Lemhi County (for a total of 54 acres). *SOF* ¶ 17. Pursuant to the legal requirements necessary to gain homestead entry, it is clear that these acres must have been irrigated for no fewer than 5-years prior to September 25, 1894.

On January, 8 1908, Joseph L. Pattee filed an application for permit, seeking to divert water from "Old Agency Creek" to irrigate certain lands in Section 20, T19N, R24E, Lemhi County, including the same section 20 lands recommended under water right 74-741. *SOF* ¶ 18; Exhibit 109. License 3350, authorizing a diversion rate of 2.6 cfs, was issued to Joseph L. Pattee on September 10, 1912. *SOF* ¶ 19; Exhibit 109.

At trial, Herbst will testify that, in 1971, John F. and Emma Herbst hired an attorney to file a water right claim, for water right 74-741, in the Lemhi Adjudication. The claim contained a priority date of January 8, 1908. *SOF* ¶ 10. Herbst does not know why counsel for John F. and Emma Herbst did not research and discover the historical documents that he recently discovered, showing that the use of water, on a portion of the appurtenant property, began long before January 8, 1908. The water right was subsequently decreed, with some modifications with a priority date of January 8, 1908. *SOF* ¶ 11.

Herbst will testify that he first became aware of the potential problem with the priority date in the mid-1980's, when he was still leasing the property from his father. At that time, he

was a member of Board for the water district and was speaking with some long-time residents of the area. Herbst mentioned the problems he was having with multiple curtailments during the season. These individuals, who were somewhat familiar with the history of the area, were surprised that Herbst's water right had such a late priority date. These individuals claimed to be familiar with Mr. Pattee and the early development of the lands in the area. Herbst told his father of this conversation and the possibility that water right 74-741 was developed, at least in part, prior to January 8, 1908. Apparently, Herbst's father did not act on this information.

In 1990, Herbst's father filed a claim in the SRBA. Herbst did not know that his father claimed water right h74-741 with the January 8, 1908 priority date.

Soon after acquiring ownership of the property and water right, in 1993, Herbst became aware that his father failed to research the priority date of water right 74-741 prior to making a claim in the SRBA. He began researching the issue and discovered the historical documents addressed above. He gave all of the historical information that he had discovered to IDWR to review in making a recommendation on his water right.

As Herbst will testify during trial, the priority date of January 8, 1908 impacts Herbst's ranching operation. In some years, water is curtailed as early as May – a critical time for his hay fields and pastures. In years where he is curtailed in May, he has noticed a reduction in yields of hay. Also, his pastures will not grow as well and he is forced to lease additional pastures for his livestock. His water will generally be turned back on in early June, but will be shut off again in mid-August.

Accordingly, as will be shown at trial and discussed herein, relief should be granted from the Lemhi Decree and water right 74-741 should be split, with the water appurtenant to §17 having a priority date of May 26, 1873.

STANDARD OF REVIEW

I. Idaho Rule of Civil Procedure 60(b)

Under Rule 60(b), a party may obtain relief from “a final judgment, order, or proceeding for the following reasons ... (6) any other reason justifying relief from the operation of the judgment.” Motions must be made “within a reasonable time.” *Id.* A request for relief under Rule 60(b) relief “may be granted only on a showing of ‘unique and compelling circumstances’ justifying relief.” *Miller v. Haler*, 129 Idaho 345, 349 (1996). “The court is vested with broad discretion in determining whether to grant or deny a Rule 60(b) motion.” *Id.*; *see also Thomas v. Thomas*, 119 Idaho 709, 711 (Ct. App. 1991) (decisions “pursuant to a Rule 60(b) motion is within the sound discretion of the trial court”). In exercising its discretion, this Court must “correctly perceive the issue as one of discretion,” act “within the outer boundaries of” that discretion and reach a conclusion “by an exercise of reason.” *Id.* Rule 60(b)(6) “obviously gives wide latitude to the trial court in determining those circumstances under which to relieve a party from the effects of an order.” *Hopkins v. Troutner*, 134 Idaho 445, 447 (2000).

II. Relief from Director’s Report

Findings in the Director’s Report, including the Amended Director’s Report and the Supplemental Director’s Report, “constitute prima facie evidence of the nature and extent of the water rights acquired under state law.” I.C. § 42-1411(4). The presumption, however, is rebuttable:

The Legislature’s direction that the contents of the Director’s report shall constitute prima facie evidence of some water right claims was a permissible exercise of the authority, recognized in I.R.E. 301, to create an evidentiary presumption. Unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the Director’s report are established.

In Re SRBA Case No. 39576, 128 Idaho 246, 256 (1995).

DISCUSSION

I. Relief Should be Granted from the Lemhi Decree so that the Priority Date of Water Right 74-741 May be Amended to Accurately Reflect the Historical Development of the Water Right

A. This Motion is Timely

Rule 60(b) requires that relief under the rule must be sought with a “reasonable time.”

This trial constitutes the first opportunity for Herbst to address the newly discovered information since its discovery after the claim was filed by Herbst’s father. Any delay was not willful. Indeed, Herbst did not own the property during the time that the Lemhi Adjudication was underway and did not discover this new information until after the partial decree in the Lemhi Adjudication had been issued. Herbst did not have any control over the property or water right during the Lemhi Adjudication and did not know that the owner of the water right and legal counsel would fail to make the proper claim on the water right. Nor did he know that a similar claim would be made in the SRBA.

As soon as Herbst acquired ownership of the water right, he promptly provided the information to IDWR, which was in the process of reviewing the water right claim. It was not until the original Director’s Report was issued in 2006, that Herbst had the opportunity to come to SRBA Court and seek relief the relief he is requesting. He filed a *Motion to Amend Notice of Claim*, which was granted and timely filed an *Objection* to the amended recommendation. Accordingly, this relief is being sought in a reasonable time.

B. The Court Should Exercise its “Wide Latitude” and Grant Relief From the Lemhi Decree.

The Court should grant Herbst’s relief from the Lemhi Decree. The Court’s decision in *First Security Bank of Idaho, N.A. v. Stauffer*, 112 Idaho 133 (1986), supports Herbst’s request. In that case, the Supreme Court vacated the denial of a Rule 60(b)(6) motion from an amended

decree, where the moving parties' justification for seeking the relief was that they failed to address the ramifications of amending the decree with their attorney before the decree was amended. In that case, two banks sought the joint foreclosure of liens on real property owned by two couples – Warren & Alta Stauffer and Richard & Colleen Stauffer (the “defendants”). *Id.* at 136. However, only one of the couples answered the complaint – while an order of default was entered against the other couple. *Id.* Subsequently, a decree of joint foreclosure was issued by the district court – finding the market value of the property to be \$250,000. *Id.* Four days later, the bank with the junior lien filed a motion to amend the decree, “to avoid an allegedly erroneous fair market value figure contained in the decree.” *Id.* This motion was served on all parties, including both the defendant couples. Importantly, the defendants took no action on the motion to amend – including failing to discuss the motions with their legal counsel. *Id.* at 136-37. The district court granted the motion without any hearing. *Id.* at 136. The Defendants filed a motion for relief from the amended decree, which was denied by the district Court. *Id.* at 137.

The Supreme Court vacated the decision, as well as the amended decree, asserting that “notice and a meaningful opportunity to be heard are fundamental to the due process guaranteed by the United States and Idaho constitutions.” *Id.* at 141. In essence, the Court determined that the Rule 60(b)(6) motion should be granted even though the moving parties (i) received the motion to amend the decree; (ii) reviewed the motion; (iii) failed to discuss the motion, and its ramifications if granted, with legal counsel; and (iv) failed to request any hearing or further action on the motion until after it was granted. *Id.* at 136-37.

Like the defendants in *Stauffer*, Herbst should be granted relief from the Lemhi Decree. This is not a case where the claimant ignored information until the eleventh hour and then rushed the information to IDWR or the Court. Rather, Herbst informed his father of the error in the

priority date as soon as he discovered the problem himself. He did not know that his father would fail to research the matter and claim the appropriate priority date. It was not until he acquired the property, in 1993, that he realized his father did not correct the error in the priority date. He began researching the matter and forwarded the information showing that the priority date should be earlier than January 8, 1908, to IDWR, so that it would be considered in making a recommendation for water right 74-741. Herbst did not own the property during the Lemhi Adjudication or at the time the claim was made in the SRBA and was not aware that his father failed to claim the correct priority date on water right 74-741.

Following Herbst's amendment of the claim in the SRBA, seeking to change the priority date to May 26, 1873, the Department issued its *Supplemental Director's Report*, recommending the water right with a priority date of January 8, 1908.

The information in these historical documents clearly shows that water development on the 54 acres in section 17 began long before January 8, 1908. Yet, this information was not discovered at the time of the Lemhi Adjudication and, therefore, was not used to show that an earlier priority date was appropriate. Herbst does not know why his parents, who have since passed away, and their legal counsel did not completely research this matter and file the appropriate claims with the earlier priority date in either the Lemhi Adjudication or the SRBA.

As a result of that failure, however, Herbst is left to suffer – losing a valuable priority date for his water right. Having a priority date of January 8, 1908, significantly impacts the Herbst ranching operations. In some years, water is curtailed as early as May – a critical time for his hay crops. This causes a reduction in the yields he receives from his crops. His pastures also suffer and he is forced, some years, to rent additional pasture ground for his livestock. Water will then be turned back on in early June, but some years, it is shut off again in mid-August.

Herbst's water right should reflect the proper historical development of water usage on the §17 properties. As such, relief should be granted from the Lemhi Decree.

C. The Purposes of the SRBA Will be Defeated Unless Relief Is Granted

The SRBA was commenced in order to provide a "comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from the system." I.C. § 42-1406A(1). Indeed, one purpose of the SRBA is to accurately decree water rights in accordance with the historical usage and development. The Lemhi Decree does not accurately reflect the historical development of water right 74-741. Furthermore, as discussed below, the historical development of the water right demands that the right be divided into two rights. Strict adherence to an obviously erroneous decree based on inaccurate historical data does not achieve the purposes of the SRBA.

II. Water Right 74-741 Should be Split into Two Water Rights

Historical records show that the development of water on the lands covered by water right 74-741 was divided into two phases. One phase, beginning on May 23, 1876 relative to the lands in section 17 and a second phase, beginning with the filing of an application for permit on January 8, 1908, relative to the lands in section 20. The *706 Report* touches on this fact, but fails to address the proper historical development of the water right and reaches an erroneous conclusion. *See 706 Rpt.* at 4-5.

Along with his *Motion to File Amended Notice of Claim*, Herbst attached a June 26, 2007, letter briefly explaining the historical information discussed above. *706 Rpt.* at 18. In that letter, Herbst states: "In 1907 or 1908 for a more consistent water flow a point of division change was made for a portion of the ground irrigated from Lemhi River since June 22, 1886." *Id.* In issuing its *706 Report*, IDWR has taken this language out of context and misunderstands its

intended meaning. In interpreting this statement, the 706 Report concludes that “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.” *Id.* at 4. The 706 Report determines that water was developed under the following periods: (1) “from the time Pattee entered into the exchange agreement with the government on June 22, 1886,” and (2) “during 1907 to 1908 when Pattee, or his successor-in-interest, changed points of diversion to secure a more consistent flow.” *Id.* at 4-5. However, notwithstanding this conclusion, IDWR refuses to recognize that any water was developed prior to 1908 in its recommendation. *See Id.* Furthermore, IDWR asserts that *even if* it were to recommend some portion of water right 74-741 with an earlier priority date, it would make that date no earlier than June 22, 1886. *Id.* at 5, n.1. These conclusions are wrong for at least three reasons: (1) IDWR misunderstands the intended meaning of the phrase “more consistent flow;” (2) historical documents show that water was developed on at least a portion of the place of use long before January 8, 1908; and (3) there is no evidence to justify the conclusion that Pattee was forfeiting his early priority date when he traded points of diversion with the “Indian Department.”

First, IDWR misunderstands Herbst’s intended meaning in using the phrase “more consistent flow.” As Herbst will testify at trial, the change in points of diversion in 1907 or 1908 was to a headgate about a mile closer to the Herbst property. This change in points of diversion allowed the land owner to use a shorter ditch to deliver the water to the place of use. Herbst will testify that a more appropriate phrase would have been: “more *efficient* flow/diversion” to reflect that the shorter ditch would result in less seepage and evaporation loss. It was never intended, as IDWR apparently believes, to mean that more water was somehow available or developed at the new point of diversion. There is no evidence to show that more water was diverted or that

additional water was developed pursuant to the change in points of diversion. The *706 Report's* conclusion to the contrary is not supported by any evidence and must be rejected.

Second, the evidence presented at trial will show that water was originally developed on May 26, 1873. On May 26, 1873, J.B. Pattee filed his original claim for waters from Agency Creek, "for irrigating purposes." *SOF* at ¶ 12; *706 Rpt.* at 21-22. He used this water to irrigate certain lands that he owned. In 1886, J.B. Pattee traded his water in Agency Creek for waters from the Lemhi River, pursuant to an agreement with the "Indian Department." *Id.* at ¶¶ 13-14; *706 Rpt.* at 28-30. The "Indian Ditch" was constructed pursuant to this agreement in order to allow J.B. Pattee to continue irrigating the same lands with water from a new point of diversion. *Id.* According to the *Affidavit of John W. Snook*, the lands were irrigated in at least 1888 through the "Indian Ditch." *Id.* ¶15; *706 Rpt.* at 20.

Sometime prior to 1894, J.B. Pattee filed an application for homestead entry on certain lands in section 17, pursuant to the May 20, 1862, Act of Congress known as "An Act to secure homesteads to actual settlers on the public domain" (the "Homestead Act"). The Homestead Act authorized the acquisition of certain "unappropriated public lands." Homestead Act § 1. However, *before* a claimant could obtain a Homestead Certificate, the claimant had to (i) reside on the property for at least five continuous year "immediately" prior to obtaining the Homestead Certificate and (ii) show, through "two credible witnesses that he, she or they have ... cultivated" the property for that five year period. *Id.* at § 2.

Homestead Certificate No. 46, granting ownership of certain properties, including the east half of the SW quarter of section 17, T19N, R24E, Lemhi County, was issued to J.B. Pattee on September 25, 1894. Importantly, at least 54 acres in the recommended place of use for water right 74-741 were included in that Homestead Certificate. Namely, 22 acres in the NESW and

32 acres in the SESW of section were acquired pursuant to Homestead Certificate No. 46.

Exhibit 107. As such, it is clear that water appurtenant to lands owned and homesteaded by J.B. Pattee was developed beginning on May 26, 1873. Indeed, John W. Snook, who lived in the area in 1876, testified that the lands owned by "Ferrell Herbst" (i.e. John F. Herbst) in 1972, were the same lands irrigated by J.B. Pattee in 1888 through the Indian Ditch. *760 Rpt.* at 20. As discussed above, these are the same lands originally cultivated by J.B. Pattee pursuant to his May 26, 1873 water right claim.

This information clearly shows at least some development of water right 74-741 prior to January 8, 1908. Indeed, upon reviewing this information (except the Homestead Certificate), Bob Foster, working in IDWR's Salmon Office, advised Ernie Carlsen, of the Eastern Regional Office, in a January 2, 1996, Memorandum that "There appears to be substantial documentation of the development of the water right and the priority date issue should be considered when the claim is verified in the SRBA." *SOF* at ¶20, Exhibit 110.

Finally, the *706 Report* concludes that "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." *706 Rpt.* at 5, n.1. According to IDWR, the agreement to exchange water with the "Indian Department" constituted a forfeiture of the May 26, 1873 priority date, such that Herbst is prevented from seeking an priority date earlier than June 22, 1886. *Id.*

It is true that, on June 22, 1886, J.B. Pattee filed a notice that he was claiming and using water from the Lemhi River because the "water right has been turned over to me [J.B. Pattee] by the 'Indian Department' as an equivalent for was used by said department, that was located and claimed by the undersigned." *Id.* at 24-25. Such a claim merely put others on notice that he

would be diverting his water right from the Lemhi River rather than Agency Creek. At no time does J.B. Pattee ever assert that he forfeited or traded his priority date, or any other interest associated with his water right, in the transaction. It is one thing to recognize that J.B. Pattee “relinquished all his right, title and interest to the Waters of said Agency Creek to the U.S. Government for its Indian Department.” 706 Rpt. at 28 (emphasis added). It is a different matter entirely to assume that in doing so J.B. Pattee also relinquished all the “right, title and interest” in the water right he had developed beginning on May 26, 1873. There is nothing to support IDWR’s sweeping limitations placed on water right 74-741.

Notwithstanding the errors in the 706 Report, it is true that water right 74-741 was developed in two phases. The first phase, addressed above, was for water used on 54 acres in section 17 and began on May 26, 1873. The remaining portion of the water right was developed pursuant to an *Application for Permit*, filed by Joseph L. Pattee, on January 8, 1908. Through that application, Joseph L. Pattee sought to develop water from “Old Agency Creek” to irrigate certain lands in Section 20. Exhibit 108. On September 10, 1912, License 3350 was issued, authorizing a diversion rate of 2.6 cfs to be used to irrigate many of the same acres claimed in water right 74-741. Exhibit 109.

Based on this information, water right 74-741 should be split as follows:

- >
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- >
- >
- >
- >

	Water Right #1	Water Right #2
<i>Priority Date:</i>	January 8, 1908	May 26, 1873
<i>Diversion Rate:</i>	2.6 cfs	1.7 cfs
<i>Place of Use:</i>	T19N, R24E, Lemhi Cty: • §20 lands: ○ 34 acres – NENW ○ 11 acres – NWNW ○ 4 acres – SWNW ○ 26 acres – SENW ○ 6 acres – NESW • §17 lands: ○ 5 acres – NWSE ○ 3 acres – SWSE <u>Total Acres: 89</u>	T19N, R24E, Lemhi Cty: • §17 lands: ○ 22 acres – NESW ○ 32 acre – SESW <u>Total Acres: 54</u>

All other elements should remain as recommended by IDWR.

In the alternative, should the Court determined that May 26, 1873 is not the appropriate priority date, the date should be June 22, 1886, as indicated by IDWR in the 706 Report at 5, n.1.

CONCLUSION

Sufficient justification exists for this Court to exercise its broad discretion and grant relief from the Lemhi Decree, as to the priority date on a portion of water right 74-741. Furthermore, based on the historical development records, water right 74-741 should be split into two water rights as described above.

DATED this 28th day of July, 2008.

BARKER ROSHOLT & SIMPSON, LLP



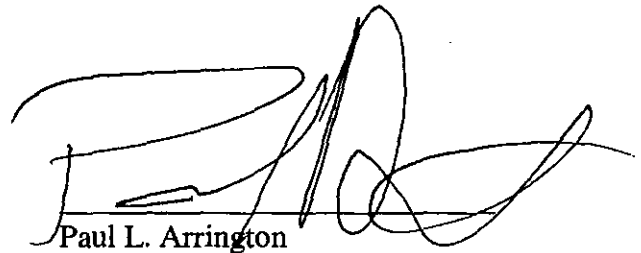
Paul L. Arrington

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of July, 2008, I served the foregoing **OBJECTOR'S PRETRIAL MEMORANDUM** upon the following by U.S. Mail, postage prepaid, and email as indicated:

Chris Bromley
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720-0098

Chris Bromley

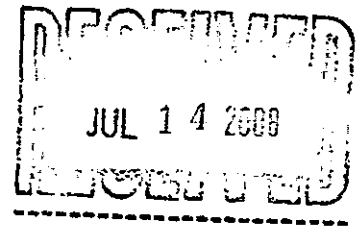


Paul L. Arrington



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**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

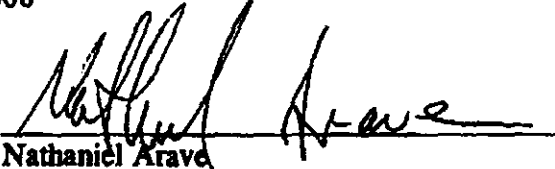
Based on review of the information, it is the Department's position that, even were it but for *res judicata*, it would recommend water right no. 74-741 as it was decreed by the Lemhi Court and recommended in the SRBA. For convenience, a copy of the January 19, 2006 Director's Report for water right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

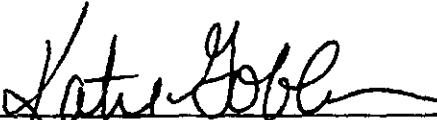
Document Served:

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 203-756-2584

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 must amend my Notice of Claim to the use of water in the SRBA because:
Information has been found supporting
My claim of 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
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: 9-10-10

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. Harbitt
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 Date: 6-23-07
Robin R. Herbst 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

From Sunfield to Junction



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

/s/ Fred Snook
Fred Snook

It is hereby given that the undersigned
 claims all the water that can be carried or
 run in that old Fort Simbi ditch, taken from
 the creek near Benson on the 4th day of
 about two miles above Fort Simbi and
 conveyed to my Ranch at Fort Simbi
 by said ditch for irrigating purposes
 Salmon City, Idaho County
 Idaho Territory J. B. Patton
 May 26th 1873

Filed for record in this office this 26th day of
 May 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 132 -

John Hogan
 County Recorder

Witness to above exhibit may concern Mr. Richard
 Williams & H. Bailey & P. H. Harkness. Claim for
 following described Water Course or privilege
 commencing at the junction of the Little Snake
 River running down said creek or gulch for
 hundred feet - then east and two hundred feet
 on each side of said creek for Mississippi
 August 3, 1873,

Richard Williams
 H. Bailey
 P. H. Harkness

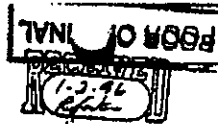
Filed for record in this office this 12th day of
 August A. D. 1873 at 8 O'clock A. M. and duly
 recorded same day at 8 O'clock A. M. and 15 miles
 A. M. in record of Water Rights Book A
 page 132.

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, 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 SEPTEMBER 1873

TERRY J. MORTON, CLERK

DEED (S) EXHIBIT "A"
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 5 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.

RECEIVED

JAN 04 1896

Department of the Interior
Eastern District Office

the June 2nd 1886

have this 2nd day
Water right of
1886

at night
Hogan

of June 2nd
of Water Right
in Hogan
County Recorder

and this day located
in the South fork
of said
by ditch and
large said
about
county Idaho
Ad. 1886
Neal

Given location
day of June 2nd
recorded
but Hogan and
County Recorder

It is hereby given that the undersigned has located and
claimed (1000) One thousand inches of the Water of the San Joaquin
taken out at or near the point of the Bluff about three
or four hundred yards above the so called High Bridge
on the San Joaquin River at the 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 some
land by said Department that was located and claimed
by the undersigned

Dated at Fort-San Joaquin Idaho J. P. Patton
June 22nd 1886 Claimant

Filed for record in this Office this 22nd day of June A.D.
1886 at 3:20 Min past 1 O'clock P.M. and duly recorded
John Hogan
County Recorder

I the undersigned a Citizen of the United States and
resident of age of 34 years do locate a Water privilege
of 500 inches on the Snake River known as Whiskey Butte for
plum Mining and other purposes to be conveyed by ditch
as follows Commencing at the station and running along
high on North side of said river to Summit then down
Bohannon Creek to place of using located on the 16th
day of June 1886

Located George Pasanek
Filed for record in this Office this 22nd day of June A.D. 1886
at 4 P.M. and duly recorded in Book 1st of Water Rights
John Hogan
County Recorder

It 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
main from the J. H. Pasanek Homestead through the land
of James Beall's James Light and S. C. Gusterson to and upon
his riparian Ranches for irrigating and other purposes
Dated July 23rd 1886
Chas. J. J. J.

Thomas H. Hall
Filed for record in this Office this 23rd day of July 1886 at 11
and recorded in Book 2nd of Water Rights
John Hogan
County Recorder

UNITED STATES DISTRICT COURT
NORTH DISTRICT OF CALIFORNIA
THE SEVENTH JUDICIAL DISTRICT OF THE STATE
OF CALIFORNIA
HEREBY CERTIFY THAT THE PROCEEDING IS A
MATTER OF RECORD IN THE OFFICE OF THE CLERK OF THE
SAYED COURT AND THAT THE ORIGINAL ON FILE
IN THIS OFFICE IS A TRUE AND CORRECT COPY
TO BE BY AND AFFIXED MY SEAL THIS
23rd DAY OF JULY 1886
J. H. PASANEC
CLERK

POOR ORIGINAL

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



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. 1888, at 30 Minutes past 1 O clock P.M, and duly and duly recorded,

By John Hogan

County Recorder

State of Idaho,

County of Lemhi.) ss

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

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

Henrietta Pattes, 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.

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 three hundred or four hundred yards above the so called High Bridge, and conducting water in a ~~xxx~~ northerly direction 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.

1V.

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. Riss
My Commission expires Aug. 5, 1918.
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,
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 24 DAY
OF July YEAR 1910

TERRI J. MORTON, CLERK
DEPT.

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

Henrietta Pattie et al.
Plaintiffs.

vs.

AFFIDAVIT.

William Carpenter, et al.
Defendants.

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 three 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

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

TERRI J. MORTON, CLERK
Terri J. Morton

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.

Stephen A. Mahaffey ²¹ 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 foot
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. Patten, 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

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

My Commission

John E. Rero
notary Public

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

My Commission expires Aug. 9, 1912.

John E. Rero
notary Public

TERRI 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 1910.

TERRI J. MORTON, CLERK
Lynne Carter

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.

A F F I D A V I T .

William M. Carpenter et al.
Defendants.

STATE OF IDAHO,
County of Lemhi. SS

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

I.

That he is and has been a resident of ^{what now is} 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~~ ^{was} informed ~~him~~ that
~~he~~ ^{the said J.B. Pattee} had entered into an agreement 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 ^{was to} 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 ~~therefrom~~ ^{said creek} ~~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 ~~Agency Creek~~ 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 ~~the~~ Fred H. 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 ~~the~~ plaintiffs, or some of them, is 120 acres.

J. B. Sharkey

NOTARY PUBLIC FOR THE STATE OF IDAHO
TERRELL 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

Subscribed and sworn to before me this 23d day of
July, A.D. 1920.

John C. Sinclair
Notary Public.

COUNTY OF LEMHI
TERRELL 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 July YEAR 1920
TERRELL J. MORTON, CLERK
Cyrus Carden Notary

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 .

vs.

A F F I D A V I T .

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

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 ~~south of the creek below~~ 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.

Emory 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,
DO HEREBY CERTIFY THAT THE PROCEEDING IS A
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OF July YEAR 1910
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	SENW	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