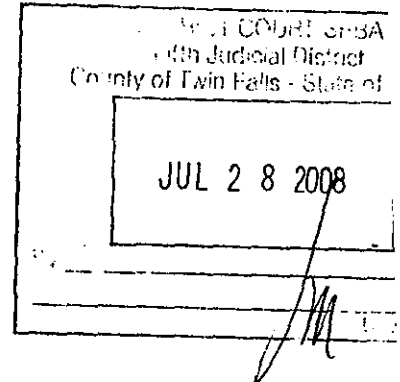


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Attorneys for Lynn A. & Robin R. Herbst



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

)
)
) **STATEMENT OF FACTS**
)
)

COMES NOW, the undersigned parties and submit this *STATEMENT OF FACTS* relative
to water right 74-741.

1. Water Right 74-741 was originally claimed in the Snake River Basin
Adjudication, by John F. and Emma Herbst, on April 20, 1990, (Exhibit 101), claiming the
following elements:

Priority Date:	January 8, 1908
Diversion:	4.3 cfs
Place of Use	62 acres in §17, T19N, R24E 81 acres in § 20, T19N, R24E

2. John and Emma Herbst acquired the property to which water right 74-741 is
appurtenant on December 3, 1969. (Exhibit 102).

3. On August 13, 1993, ownership of water right 74-741 was changed to Lynn A.
and Robin R. Herbst (hereinafter "Herbst"), to reflect Herbst's acquisition of the property and
water right. (Exhibit 103).

4. On January 23, 2006, the Director of the Idaho Department of Water Resources ("IDWR") issued its *Director's Report for Irrigation & Other Uses, IDWR Basin 74*, recommending water right 74-741 as claimed;

5. On June 26, 2007, Herbst filed a *Motion to File Amended Notice of Claim*, seeking to change the claimed priority date for water right 74-741 from January 8, 1908 to May 26, 1873. According to Herbst, information had been discovered which proved that water right 74-741 had been developed prior to January 8, 1908;

6. On August 22, 2007, Herbst's *Motion to File Amended Notice of Claim* was granted;

7. On October 11, 2007, an *Amended Director's Report* for water right 74-741 was issued. (Exhibit 104). In the Amended Director's Report, Donald V. Shaff, Adjudication Bureau Chief, stated that the "recommendation of right number 74-741 remains unchanged from the original recommendation of the right in the Director's Report for Irrigation and Other Uses, IDWR Basin 74, filed on January 23, 2006."

8. On November 27, 2007, Herbst filed a *Standard Form 1 Objection*, objecting to the amended recommendation's priority date of January 8, 1908;

9. As recommended, water right 74-741 authorizes a diversion rate of 4.3 cfs for irrigation of 143 acres. (Exhibit 104).

10. On October 6, 1971, water right 74-741 was claimed in the Lemhi Adjudication, by John F. and Emma H. Herbst with a priority date of January 8, 1908. That claim indicated that the source of the water had been changed from Agency Creek to the Lemhi River. (Exhibit 105).

11. Water Right 74-741 was decreed in the Lemhi Adjudication, with a priority date of January 9, 1908 and a point of diversion on the Lemhi River. (Exhibit 106).

12. Water development on at least a portion of the property to which water right 74-741 is appurtenant began in the late 1800's by J.B. Pattee. On May 26, 1873, Mr. 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." 706 Rpt. at 21-22.¹

13. Mr. Pattee used this water to irrigate his properties until 1886, at which time he entered into an agreement with the "Indian Department" to trade his waters from Agency Creek for waters in the Lemhi River to be used for irrigation on the same properties. See *Affidavit of J.B. Sharkey* (July 23, 1910), 706 Rpt. at 28-30. As Mr. Sharkey states:

That about the year 1886 this affiant in a conversation with J.B. Pattee, now deceased ... was informed that he [J.B. Pattee] 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 such 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 lands of the said J.B. Pattee was irrigated therefrom.

14. On June 22, 1886, around the time that he entered the agreement with the "Indian Department," Mr. Pattee filed a claim for "Ten Thousand inches of the water of the Lemhi River ... and conveyed by ditch to my Ranch for agricultural and other purposes." 706 Rpt. at 23-24.

15. John W. Snook, who lived in the area from 1876, testified that the lands owned by "Ferrell Herbst" (i.e. John F. Herbst) in 1972, were the same lands irrigated with waters from the "Indian Ditch" in at least 1888. *Id.* at 20 (*Affidavit of John W. Snook* (March 3, 1972)).

¹ 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.

16. On September 25, 1894, J.P. Pattee was granted Homestead Certificate No. 46, granting homestead entry on certain lands in §17, T19N, R24E. Included in these lands is the east half of the SW quarter. (Exhibit 107).

17. 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 (for a total of 54 acres).

18. 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 §20, T19N, R24E, (Exhibit 108), including the same §20 acres recommended under water right 74-741. License Number 3350 was issued to Joseph L. Pattee, on September 10, 1912, authorizing a diversion rate of 2.6 cfs. (Exhibit 109).

19. The diversion of water under License 3350 was subsequently changed to the Lemhi River. (Exhibit 105).

20. In a Memorandum dated January 2, 1996, Bob Foster, working in IDWR's Salmon office, advised Ernie Carlsen, of the Eastern Regional Officer, 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." (Exhibit 110).

DATED this 28th day of July, 2008.

BARKER ROSHOLT & SIMPSON, LLP

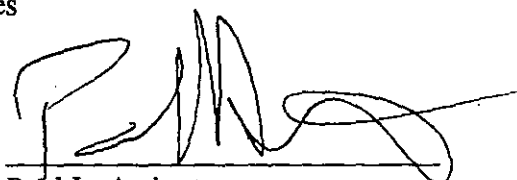


Paul L. Arrington

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of July, 2008, I served the foregoing **STATEMENT OF FACTS** upon the following by facsimile and by U.S. Mail, postage prepaid and via email (where indicated):

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


Paul L. Arrington