

Laurence ("Laird") J. Lucas (ISB # 4733)
PO Box 1342
Boise ID 83701
(208) 424-1466 (phone and fax)
llucas@lairdlucas.org

Attorney for Valley Sun LLC

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DEPARTMENT OF
WATER RESOURCES

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	)	For Water Right Claims: 72-16778;
	)	72-16779; 72-16780; 72-16781; 72-16782;
Case No. 39576	)	72-16783; 72-16784; 72-16785; 72-16786;
	)	72-16787; 72-16788; and 72-16789
_____	)	

VALLEY SUN'S OPENING BRIEF
OPPOSING MOTIONS TO FILE LATE NOTICES OF CLAIMS

Introduction

Pursuant to the May 8, 2009 Scheduling Order herein, Valley Sun LLC (hereafter, "Valley Sun") respectfully submits this Opening Brief opposing the "Motions To File Late Notices Of Claims" submitted by attorney Daniel Steenson on behalf of various East Fork Salmon River water right claimants, including Wayne and Melodie Baker; Richard and Cheryl Baker; Eddie Baker Jr.; Gary and Jackie Ingram; Archie Sherwood; Lilac LLC; and 3G Company (hereafter, "Late Claimants").

As the Late Claimants admit in their affidavits supporting the Motions To File Late Notices Of Claims, they claimed and received SRBA-decreed water rights for the same points of diversion and places of use as the "late claims" they propose to file now. Yet the so-called "late claims" would vastly increase the amount of water allowed under those decreed rights -- by five-

fold in most cases – solely because the Late Claimants now assert that their conveyance losses are far larger than they previously thought.

Under these facts, as explained below, the Motions To File Late Notices Of Claims must be denied. The SRBA statutes and the SRBA Court’s Administrative Order No. 1 (“AO1”) do not allow claimants to reopen adjudicated water rights under the guise of seeking to file “late claims” to expand those rights, particularly when – as here – the entire basin has been adjudicated and a final decree entered by the SRBA Court. Moreover, having filed timely claims for their water rights in the SRBA, and having received SRBA partial decrees for their claimed rights, the Late Claimants are estopped from now seeking to relitigate their adjudicated claims. To hold otherwise would mean that the SRBA will never come to end, contrary to the legislature’s intent.

Moreover, the Late Claimants have not – and cannot – establish “good cause” to submit the proposed late claims. The facts show that they did not exercise reasonable diligence; and Idaho law does not recognize a water right for the grossly excessive conveyance losses they seek here either.

Accordingly, for reasons explained more fully below, the Motions To File Late Notices Of Claims should be denied by the Court.

Statement of Relevant Facts

A. Valley Sun’s Interests.

Valley Sun is an Idaho limited liability company, which owns the Greenfire Preserve on the East Fork Salmon River. *See* Affidavit of Laird J. Lucas, filed herewith.

Located just above the confluence with the main Salmon River, the Greenfire Preserve is

the lower-most private property on the East Fork Salmon; and it is thus downstream from the Baker and other properties at issue in the Motions To File Late Notices Of Claims. *Id.*

Valley Sun is the holder of SRBA-decreed surface water rights associated with the Greenfire property, including some of the oldest water rights on the East Fork Salmon River.¹ These include water right number 72-10220A, which has a priority date of 1880; and number 72-10222A, with a priority date of 1885. *See* Lucas Affidavit, Exh. 1. Along with right numbers 72-10221A and 72-10237 (with priority dates of 1936 and 1983, respectively), Valley Sun's SRBA partial decrees – issued on January 22, 2001 – authorize it to divert water from the East Fork Salmon River at a total combined rate of 9.06 cfs and a total combined annual volume of 1015.3 acre/feet. *Id.*

B. All Basin 72 Rights Have Been Adjudicated.

Valley Sun is not the only water right holder to have received partial SRBA decrees in Basin 72, where the East Fork Salmon is located. In fact, all the Late Claimants here have also received partial decrees from the SRBA Court – most if not all of them issued in 2000 and 2001 – for their claimed rights in the East Fork Salmon River and tributaries, as their motions and supporting affidavits attest.

Because all claimed rights in Basin 72 were thus adjudicated, the SRBA Court entered a final decree for Basin 72 in July 2005, with a Rule 54(b) certificate entering final judgment for all water rights claimed in that Basin. *See* Partial Decree Pursuant To I.R.C.P. 54(b) For General Provisions In Basin 72 (filed July 27, 2005).

¹ Valley Sun also holds several groundwater rights for domestic and other uses. *Id.*

C. Wayne and Melodie Baker's Motions To File Late Notices Of Claims.

The Motions To File Late Notices Of Claims submitted by Wayne and Melodie Baker are illustrative of the "late claims" now before the Court; and are addressed in detail here and in the accompanying Lucas Affidavit, in order to highlight the key facts before the Court underlying the motions. *See* Wayne and Melodie Baker Motions To File Late Notice Of Claims Nos. 72-16782 and 72-16783.

As explained in his supporting affidavit for these motions, Wayne Baker and his wife Melodie hold a number of water rights decreed by the SRBA Court on November 11, 2000. These include water right numbers 72-224 & -225 (diverted from the EF-3 diversion in total decreed amount of 4.20 cfs); 72-196, -197, -199, & -200 (diverted from the consolidated EF-10/11 diversion in total decreed amount of 5.20 cfs); 72-199, -200 & -202F (diverted from EF-12 diversion in total decreed amount of 3.07 cfs); and 72-201C, -201F, -202A, -202D, -202E, and -202G (diverted from EF-13 diversion in total decreed amount of 1.106 cfs). *See* Affidavit of Wayne Baker (filed in Nos. 72-16782 & -16783, October 29, 2008), Exhibit A (attaching summary table of water rights, and copies of SRBA partial decrees).

As IDWR's water right records show, the Bakers (or their predecessors in interest) submitted timely claims for these rights back in 1989. *See* Lucas Affidavit, Exh. 3 (illustrative copy of Notice of Claim filed for right number 72-197). Many of their claims were based on the 1938 decree in *Gossi v. Giampedraglia*, which adjudicated the oldest East Fork Salmon claims at issue here (including Valley Sun's). *See id.*, Exh. 2 (copy of *Gossi* decree, annotated by IDWR to identify current right numbers).

IDWR's records also show that, during the 1990's, IDWR reviewed the Bakers' claims,

and conducted a field inspection and other analysis. *See* Lucas Affidavit, Exh. 4 (copy of IDWR's adjudication claim verification report for number 72-197). The Director's report was issued in December 1998. *See* Lucas Affidavit, Exhs. 5-6 (copy of adjudication profile report and Director's report recommendation for 72-197). No party objected to the IDWR recommendations, including the Bakers; and the SRBA Court entered the partial decrees in November 2000. *See* Lucas Affidavit, Exh. 7.

As Mr. Baker emphasized in his affidavit in support of the Motions To File Late Notices Of Claims, the historic use of water under these SRBA-decreed rights has not changed materially in decades:

From my earliest recollections to the present, all of the land my wife and I now own . . . has been irrigated to raise hay and for pasture. From my earliest recollections in 1965 to the present, all of this land has been irrigated with water diverted from the water sources, and through the diversions and ditches described in this affidavit. **Today, the main ditches are the same size as they were in 1965. With the exception of EF-10/11 (EF-10 was consolidated into EF-11, and EF-11 was enlarged), the same quantity of water is diverted at each diversion for our fields as was diverted in 1965.**

See Wayne Baker Affidavit, *supra*, ¶ 9 (emphasis added).

Mr. Baker stated in his affidavit, however, that the "only significant change in our diversions has been that, in recent years, fish screens have been added at or near our East Fork (EF numbered) diversions. The screens were sized so that we could continue to divert the quantities of water that we had historically diverted." *Id.*, ¶ 11.

As part of this process of installing fish screens on the diversions, Mr. Baker further stated that the Bureau of Reclamation and Idaho Department of Fish and Game conducted flow studies of the diversions – and found that substantially larger amounts of water were being diverted than provided under the SRBA-decreed rights. *Id.*, ¶¶ 12-18. Larry Weeks

of IDFG and Brian Hamilton of the Bureau submitted declarations also attesting to the measurements. *See* Weeks, Hamilton Affidavits (filed in Nos. 72-16782 & -16783, October 29, 2008).

Based on these flow measurements, Wayne and Melodie Baker's Motions To File Late Notices Of Claims thus seek much larger amounts of water than provided under their SRBA-decreed rights. Whereas their SRBA-decreed rights allow them to divert a total of 10.776 cfs from all their East Fork surface water rights listed above, under their proposed "late claims" the Bakers seek to add an additional 52.86 cfs – or about five times their adjudicated rights. *See* Wayne Baker Affidavit, *supra*, Exhibit A (summary page).

This additional five-fold increase in water is needed, according to Mr. Baker, solely to account for the conveyance (or "seepage") losses, which he asserts are the product of "very porous gravel and river rock" in the ditches. *See* Baker Affidavit, ¶ 10. Mr. Baker makes clear in his affidavit that these losses are not new at all – stating that "[s]eepage loss from the ditches has always been very high," and the "majority of the water we have diverted has always been lost to seepage." *Id.*

In other words, the "late claims" that Wayne and Melodie Baker now seek to submit would increase their decreed rights by a five-fold amount simply for conveyance losses, which the Bakers concede have been ongoing for many decades. The Bakers offer no reason for not having previously measured – or even accurately estimated – their total water diversions, including conveyance losses.

D. Other Motions To File Late Claims.

The other Motions To File Late Notices Of Claims are closely similar to those of Wayne

and Melodie Baker.

For example, Eddie Baker, Jr. filed an affidavit that describes the East Fork water rights exercised by he and his father, Eddie E. Baker (now deceased). *See* Affidavit of Edwin E. Baker, Jr. In Support Of Motion To File Late Notices of Claims (filed in Subcase Numbers 72-16779, 72-16780 & 72-16781, October 15, 2008). Similar to Wayne Baker, Eddie Baker Jr. asserts that:

The quantities of water we divert and the sizes of the ditches have not changed. The only significant change has been the installation of fish screens in many of our diversions in recent years. The screens were sized so that we could continue to divert the quantities of water that we had historically diverted. . . The bed and banks of the ditch are river rock and gravel, so there is a very large amount of seepage loss in conveying water from the point of diversion to the place of use. . .

Id., ¶¶ 4, 9-10.

Eddie Baker, Jr.'s Motions for Late Claims thus similarly seek to increase the amount of water allowed to be diverted from the East Fork Salmon by a five-fold amount over his adjudicated rights, simply for conveyance losses. *See* Motion To File Late Notice of Claim (No. 72-16779, October 15, 2008) (attached table entitled "Eddie Baker Jr. Water Rights, Late Claims, and Measurements").²

Likewise, Richard D. and Cheryl Baker received SRBA decrees for water right numbers 72-190, -193B, -194, & -2095, authorizing diversions of .4 cfs from Herd Creek (a tributary to the East Fork Salmon) and 3.44 cfs from the East Fork itself. *See* Affidavit of Richard Douglas Baker In Support of Motion To File Late Notices of Claims (filed in

² In Subcase No. 72-16778 (filed October 2, 2008), Eddie Baker Jr. also seeks to file a late claim for diversions from Big Boulder Creek, a tributary to the East Fork Salmon. Unlike the other motions, this one asserts that BLM recently advised Mr. Baker to obtain a state water right to irrigate federal public lands there. Valley Sun opposes this motion because Mr. Baker knew or should have known of his obligation to have valid water rights for all his diversions; and he has not established "good cause" under I.C. § 42-1409A(3) and AO1 for his proposed late claim.

Subcase Nos. 72-16786 & 72-16787, October 30, 2008). Their “late claims” seek to increase those amounts several-fold, to 7.4 cfs from Herd Creek and 12.01 cfs from the East Fork, again just for conveyance losses. As Richard D. Baker stated in his supporting affidavit, “the quantities of water that are diverted and applied to these lands have not diminished since 1885,” and “[s]eepage losses from the ditches has always been very high,” such that “the majority of the water we have diverted has always been lost to seepage.” *Id.*, ¶¶ 7-8. Like the other Baker affiants, Richard D. Baker asserts that the “only significant change in our diversions has been that, in recent years, fish screens have been added at or near the diversions,” and flows were measured by IDFG as part of that process. *Id.*, ¶ 9.

The other Late Claimants – Gary and Jackie Ingram (No. 72-16784); Archie Sherwood (No. 72-16785); 3G Co. (No. 72-16788); and Lilac 3 (No. 72-16789) – similarly seek to increase their SRBA-decreed rights several-fold based on the same allegations that their water uses have not changed, but recent agency measurements showed their conveyance losses were much larger than the decreed rights. *See, e.g.*, Affidavit of Gary Ingram In Support Of Motion To File Late Notice Of Claim (No. 72-16784, October 29, 2008); Affidavit of Archie Sherwood In Support Of Motion To File Late Notice Of Claim (No. 72-16785, October 31, 2008); Affidavit of Robert Y. Kopf Jr. In Support Of Motion To File Late Notice Of Claim (No. 72-16788, October 31, 2008); Affidavit of Glenn Olbum In Support Of Motion To File Late Notice Of Claim (No. 72-16789, December 16, 2008).

As with the Bakers, none of these affiants offers any reason for not having accurately measured – or even estimated – their conveyance losses before filing their water

right claims in the SRBA, which were adjudicated by the Court without objection from any party, including the claimants themselves.

Under these facts, as explained below, the Motions To File Late Notices Of Claims must be denied because they are procedurally improper and substantively unfounded.

ARGUMENT

I. THE SRBA STATUTES AND AO1 DO NOT ALLOW PARTIES WHO HAVE RECEIVED PARTIAL DECREES TO FILE “LATE CLAIMS” IN ORDER TO EXPAND THEIR DECREED RIGHTS.

The Motions To File Late Notices Of Claims should be denied, first, because they are not cognizable “late claims” within the meaning of the SRBA statutes or AO1. Instead, the Late Claimants improperly seek to modify their SRBA-decreed rights by increasing the amount of water they may divert under those rights. Such an effort to expand already-decreed rights cannot be accomplished via the “late claim” route they have chosen here.

A. Having Timely Filed Their Water Right Claims In The SRBA, The Late Claimants Cannot Use So-Called “Late Claims” To Expand Their Decreed Rights.

Under the SRBA statutes, of course, the Idaho legislature directed in 1985 that the SRBA be initiated by IDWR as a general adjudication under the McCarran Amendment. *See* I.C. § 42-1406A; *United States v. Idaho*, 508 U.S. 1, 3-4 (1993). The legislature required IDWR to give two rounds of notice to all potential water right claimants of the initiation of the general adjudication; and required all water users to file notices of claims within a set period in order to ensure that their claimed rights are included in the adjudication – or are lost forever. *See* I.C. §§ 42-1407 to 42-1409. Timely submission of claims is thus central to the integrity of the SRBA process, as it is for any water rights adjudication.

However, the Idaho legislature recognized that some claimants might not meet the deadlines for filing timely claims in the SRBA, through no fault of their own; and hence the legislature adopted Section 42-1409A of the SRBA statutes to address amendment of claims and filing of late claims. In so doing, the legislature nonetheless signaled its intention that late claims are disfavored – including by requiring that the Director’s notices advise all potential claimants that “section 42-1409A, Idaho Code, imposes substantial restrictions on the filing of amended or late notices of claims.” *See* I.C. § 42-1408(1)(i) (emphasis added).

I.C. § 42-1409A itself reflects the legislature’s intent that the SRBA proceed on a timely path, and that late claims are disfavored. Section 42-1409A thus allows a claimant to amend a claim or file a late claim “at any time prior to the final date for filing notices of claim in the notice of second round service” under § 42-1408(4). *See* I.C. § 42-1409A(1). In addition, a claimant “may amend the name and address of a claimant at any time.” I.C. § 42-1409A(2).

But after IWDR provided the second round of notices required by the SRBA statutes – which happened many years ago now – the legislature only allowed filing of late claims for “good cause” shown to the Court. *See* I.C. § 42-1409A(3) & (4). Although “good cause” is not defined in the statute, AO1 instructs that motions for late claims made after the relevant Director’s report is issued “will be reviewed under the criteria of I.R.C.P. 55(c).” *See* AO1, Section 4.d(2)(d).

This reference to Rule 55(c) confirms that parties whose claims were adjudicated in the SRBA cannot come back later, seeking to expand those decreed rights by submitting a so-called “late claim” for more water. Rule 55(c) provides that a default judgment may be set aside “for good cause shown,” and it exists so that a party – who can show good cause – can be relieved of

a default judgment and still have their day in court. *See* I.R.C.P. 55(c).

By its very terms, Rule 55(c) thus only applies to setting aside default judgments – it does not apply where a party has undergone adjudication of a claim before a court, received a judicial decree, and then seeks to change that decree, which is what the Late Claimants are improperly seeking to accomplish here.

AO1's reference to Rule 55(c) also reflects the SRBA Court's understanding that motions for late claims, which are filed after Director's reports are issued, are to be evaluated under the same "good cause" standards for setting aside a default judgment, so that the late claimant can have his or her day in court when they failed to file a timely claim. Nothing in AO1 purports to allow a claimant who did file timely claims – and thereafter received SRBA partial decrees – to later come back and seek to expand their decreed rights, as Late Claimants seek to do here.

Accordingly, because neither the SRBA statutes nor AO1 authorize the Late Claimants to use the "late claim" process as a means of seeking to expand their SRBA-decreed rights, their Motions To File Late Notices Of Claims should be denied as being improper.

B. Late Claimants Are Estopped From Now Trying To Relitigate Their Adjudicated Rights.

In addition, by seeking now to file "late claims" for the alleged conveyance losses associated with their SRBA-decreed rights, even though Basin 72 has been fully adjudicated, the Late Claimants in essence are asking the Court to relitigate their water rights in a new round of proceedings with the SRBA. They are barred by the doctrine of issue preclusion from doing so.

Issue preclusion has five elements that must be satisfied: "1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the

present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.” *Stoddard v. Hagadone Corp.*, 207 P.3d 162, 167 (Idaho 2009).

These elements are all present here. First, the Late Claimants had a full and fair opportunity to litigate all their claimed water rights – including the associated conveyance losses – after they submitted their original SRBA claims some two decades ago. They were able to bring claims for the water amounts they sought, and to litigate those claims before this Court, resulting in the entry of final decrees in their favor.

Second, the issues decided in the prior litigation are identical to the issues in the current subcase proceedings, because they involved the exact same water rights – including points of diversion, places of use, and amounts of water to be allowed under the claimed rights.

Third, the issues of the Late Claimants’ entitlement to decreed water rights was also actually decided, as evidenced by the partial decrees for each of the water rights and the final partial decree for Basin 72.

Fourth, the 2005 decree for Basin 72 contains a 54(b) certificate, which states that the order is a final judgment for all parties with rights in Basin 72, and that there is no reason to delay entering final judgment for that part of the basin. I.R.C.P. 54(b).

Finally, the Late Claimants were parties to the prior litigation because they brought the original water claims or are in privity with those who did bring the claims (*i.e.*, the previous owners). The party asserting issue preclusion does not need to have been a party to the prior litigation because Idaho courts do not require mutuality of parties. *Mastrangelo v. Sandstrom*,

Inc., 55 P.3d 298, 303 (Idaho 2002).

In short, the Late Claimants have already brought their water right claims before this Court, which adjudicated and decreed those claims. They had a full and fair opportunity to litigate the scope of their claimed water rights. Accordingly, the doctrine of issue preclusion should bar them from seeking to relitigate those claims now.

II. LATE CLAIMANTS HAVE NOT ESTABLISHED “GOOD CAUSE” UNDER RULE 55(c).

Even if the Court does not reject the Motions To File Late Notices Of Claims as being improper and barred by estoppel principles, still the Motions must be denied because the Late Claimants have failed to establish “good cause” for allowing the proposed late claims, as required under I.C. § 42-1409A(3), AO1 and Rule 55(c).

The Idaho courts look to several considerations in evaluating whether “good cause” exists to relieve a party from a default judgment under Rule 55(c), including whether the default was willful; whether the party exercised due diligence such as an ordinarily prudent person under similar conditions would exercise; whether the defaulting party has a meritorious defense; and whether setting aside the default would prejudice the opponent. *See Hearst Corp. v. Kelly*, 100 Idaho 10, 592 P.2d 66 (Idaho 1979); *Clear Springs Trout v. Anthony*, 123 Idaho 141, 815 P.2d 359 (Idaho 1992); *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274 (Idaho App. 1993). The trial court has broad discretion in evaluating these factors. *Id.*

A. Late Claimants Cannot Show The Exercise Of Due Diligence.

The facts before the Court demonstrate that the Late Claimants have not exercised “due diligence” such as an ordinarily prudent person would exercise under similar circumstances; and hence they cannot show “good cause” to file their proposed late claims under Rule 55(c) and I.C.

§ 42-1409A(3). See *McFarland, supra*, 123 Idaho at 936.

As explained above, many of the water rights at issue here date from the earliest settlement of the East Fork Salmon River valley in the 1880s; and the 1938 *Gossi* decree previously adjudicated those older rights. See Lucas Affidavit, Exh. 3. The Late Claimants themselves submitted claims in the SRBA – many based on the *Gossi* decree – and it was their responsibility at that time to accurately measure or estimate the amounts of their diversions. Following the submission of their claims, IDWR itself evaluated the claimed rights during the 1990's – including by conducting field inspections and other analysis – and then recommended the rights as they were subsequently decreed by the SRBA Court, since no party objected to the Director's report recommendation (including the Late Claimants themselves). Finally, and perhaps most importantly, the Late Claimants themselves admit in their supporting affidavits that their water use practices have not changed in decades, including the loss of the "majority" of water they have been diverting through "seepage" losses.

Under these facts, the Court can only hold that the Late Claimants have not exercised a reasonable degree of prudence; and hence have not shown "good cause" for allowing the late claims. Any reasonably prudent water user would have sought to quantify correctly the amounts of their diversions and conveyance losses, before submitting their claims and receiving SRBA partial decrees on those claimed rights.³ Valley Sun respectfully submits that it is inexcusable conduct for the Late Claimants here to have submitted Notice of Claims in the SRBA without having tried to accurately estimate their actual water diversions, and then sit back while their

³ Indeed, the Notice of Claim form requires each claimant to verify under oath that their submitted claim is accurate. See Lucas Affidavit, Exh. 3.

claims were adjudicated essentially as claimed – yet then years later contend that they were “mistaken” in their claims due to the fact that federal or state agencies finally came out and conducted measurements of their diversions.

Accordingly, because the Late Claimants are themselves at fault here – and did not exercise the reasonable prudence required under these circumstances – they have failed to show “good cause” for filing their late claims; and hence their Motions To File Late Notices Of Claims must be denied.⁴

B. Late Claimants Do Not Have A “Meritorious Defense.”

In addition, the Late Claimants fail to establish “good cause” under the Rule 55(c) factors discussed above, because they cannot establish a “meritorious defense” here to support their “late claims” seeking to expand their already-decreed rights.

The failure to establish a “meritorious defense” alone compels denial of Rule 55(c) motion for relief from judgment. *See McFarland, supra*, 123 Idaho at 934; *Idaho State Police ex rel Russel v. Real Property Situated in County of Cassia*, 144 Idaho 60, 156 P.3d 561, 563-64 (Idaho 2007) (denying motion because of lack of meritorious defense). The purpose of the “meritorious defense” requirement is that “it would be an idle exercise for the court to set aside a default if there is in fact no real justiciable controversy.” *Id.*

⁴ As noted above, Eddie Baker, Jr.’s Motion To File Late Notice Of Claim with respect to Big Boulder Creek diversions in Subcase No. 72-16778 should also be denied, because he contends only that he was recently advised by BLM to obtain state water rights for his irrigation diversions on federal lands. Every water user knows – or should know – of their obligation to have a valid state water right before diverting and applying water for irrigation use. Mr. Baker’s “ignorance of the law” assertion thus does not establish “good cause” to allow filing the late claim under Rule 55(c) as matter of law. *See Heart Corp. v. Kelly*, 100 Idaho 10, 592 P.2d 66 (Idaho 1979) (holding that ignorance of law is not grounds for setting aside default).

In this case, the Late Claimants have not even attempted to demonstrate a valid water right for the massive conveyance losses they are claiming. Nor can they do so. The essence of their so-called “late claims” is that the Court should award them additional water rights, solely to authorize their huge amount of conveyance losses. But it is elementary water law that a water right can only be secured for reasonable, beneficial use – and not for “wasteful” uses. *See* I.C. § 42-104; *U.S. v. Pioneer Irrig. Dist.*, 144 Idaho 106, 157 P.3d 600, 607 (Idaho 2007); Wells A. Hutchins, *Idaho Law of Water Rights*, 5 *Idaho L. Rev.* 1, 38-39 (1968) (citing numerous Idaho cases).

To prevent unnecessary waste of water, the Idaho Code thus limits irrigation diversions to 1 cfs for each 50 acres to be irrigated (or 1 “miner’s inch” per acre), “unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary.” *See* I.C. § 42-202(6). Likewise, the Idaho water code prohibits issuance of a license or court decree for more than 1 cfs per 50 acres, unless shown to the satisfaction of IDWR and the court that a greater amount is necessary. *See* I.C. § 42-220.

Here, as noted above, IDWR did conduct field examinations and other analysis of the water rights claims submitted by the Bakers and other movants in the SRBA, and recommended the rights which were decreed by the SRBA Court. There is no factual or legal basis for the Late Claimants to now assert that they can vastly exceed the diversion limits set by I.C. §§ 42-202(6) & 42-220, particularly when IDWR has conducted inspections and recommended the water rights as decreed by the SRBA Court.⁵

⁵ IDWR in fact allowed higher diversion rates for at least some of the rights at issue here, which were then approved in the SRBA partial decrees. For example, on rights 72-196 & 72-197, IDWR allowed a diversion rate of 0.03 cfs per acre, instead of the standard 0.02 cfs per acre,

Idaho case law confirms that the Late Claimants' massive conveyance losses – amounting to **several hundred times** the amounts of water they put to actual beneficial use, by their own admission – can only be deemed wasteful, and hence cannot be approved as a legitimate water right. *See, e.g., Basinger v. Taylor*, 36 Idaho 591, 211 P. 1085, 1086 (Idaho 1922) (conveyance losses of more than 50% called “unreasonable,” “excessive,” and “against public policy”); *Glenn Dale Ranches v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029 (Idaho 1972) (similarly holding that conveyance losses of nearly half of diverted amounts are unreasonable and contrary to public policy, and thus could not be approved by the court).⁶

The *Glenn Dale* decision is squarely on point in demonstrating that the Late Claimants here cannot be awarded their requested “late claims” comprising conveyance losses that are several-fold higher than the amount of water needed to irrigate their fields. The *Glenn Dale* Court noted that, even if the water users had previously appropriated the claimed water, the courts could not and would not issue a judicial decree (in that case, injunctive relief) in the amounts requested because of the excessive conveyance losses involved. As it stated:

This Court has declared that “it is against the public policy of the state * * * for a water user to take from an irrigation canal more water, of that to which he is entitled, than is necessary for the irrigation of his land * * *.”(fn10) That policy logically applies also to a stream supplying several farms, and prohibits appellant

based on its analysis of soils and other factors. *See Lucas Affidavit*, ¶ 10 & Exh. 4. Because IDWR has already analyzed the diversion rates and determined what rates were appropriate, it is specious for the Late Claimants to suggest that IDWR would now allow the vastly higher diversion rates they seek to obtain through their “late claims.”

⁶ Other states have similar holdings. *See, e.g., Erikson v. Queen Valley Ranch Company, et al.*, 99 Cal. Rptr. 446, 450 (CA App, 3d Dist. 1971) (holding that 80% conveyance losses were wasteful); *Washington Dep't of Ecology v. Grimes*, 852 P.2d 1044, 1052 (Wash. 1993) (limiting claimant to half of water right sought because of excessive conveyance losses amounting to one-half to two-thirds of water diverted).

from diverting more water than necessary for the beneficial purpose regardless of alleged seniority in right through priority in time.(fn11)

Appellant contends that he cannot apply the full 70 inches to his crops because nearly half is lost as it is conducted from the stream or canal to the place of use. As a result, he is required to draw some 40 more inches from the stream in order to deliver adequate water to the crops. However, the public policy against wasting water prohibits additional diversion to compensate for unreasonable loss.(fn12) This Court has held that the appropriator must construct flumes, pipes, or other lining if necessary to prevent such unreasonable loss.(fn13) Accordingly, waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use.(fn14)

Glenn Dale, supra, 94 Idaho at 588 (citing numerous cases in footnotes, including *Basinger, supra*; *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-324, 227 P. 29, 30 (1924); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912); and *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900)).

Here, the Late Claimants' own affidavits establish that their claimed conveyance losses are much higher even than the losses seen in *Basinger* or *Glenn Dale*, which the Idaho Supreme Court termed unreasonable and contrary to public policy, and thus disallowed. Even if it is true that the Late Claimants have historically incurred such massive conveyance losses in their diversions, Idaho water law and policy do not condone such wasteful practices; and will not allow their approval in the form of SRBA-decreed water rights.

Accordingly, since the Motions For Late Notices Of Claims are premised on grossly excessive conveyance losses that cannot be decreed under Idaho law, the Late Claimants have not shown "good cause" for leave to file the proposed late claims under Rule 55(c), AO1, and I.C. § 42.1409A(3); and the Court thus should again deny all the motions.

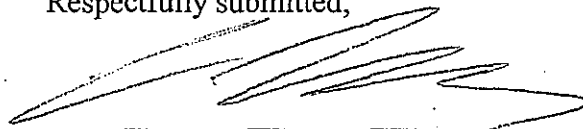
CONCLUSION

For the foregoing reasons, the Motions To File Late Notices Of Claims should all be

denied by the Court.

Dated: September 17, 2009

Respectfully submitted,



Laurence ("Laird") J. Lucas (ISB # 4733)
Attorney for Valley Sun LLC

CERTIFICATE OF SERVICE

I certify that I caused the foregoing VALLEY SUN'S OPENING BRIEF OPPOSING MOTIONS TO FILE LATE NOTICES OF CLAIMS and the accompanying AFFIDAVIT OF LAIRD J. LUCAS, plus all exhibits thereto, to be served on September 17, 2009 upon the following persons by the means of service noted below:

Original via Federal Express, overnight delivery to:

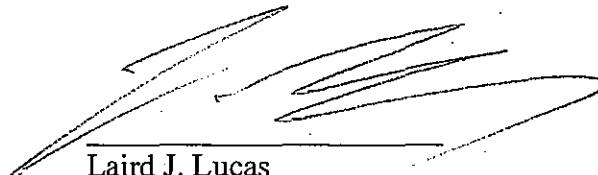
Clerk, SRBA Court
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Twin Falls ID 83303

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Laird J. Lucas