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DEPARTMENT OF  
WATER RESOURCES

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Attorneys for Claimants

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

In Re SRBA

Case No. 39576

)  
) For Water Right Claims: 72-16778;  
) 72-16779; 72-16780; 72-16781; 72-16782;  
) 72-16783; 72-16784; 72-16785; 72-16786;  
) 72-16787; 72-16788; and 72-16789  
)

**CLAIMANTS' BRIEF IN RESPONSE TO  
VALLEY SUN'S OPENING BRIEF**

COME NOW, Claimants of the above-listed water right claims (collectively the "East Fork Water Users"), by and through their attorneys of record, Ringert Law Chartered, and hereby submit this *Claimant's Brief in Response to Valley Sun's Opening Brief Opposing Motions to File Late Notices of Claims* ("Response Brief").

**PROCEDURAL BACKGROUND**

In October, 2008, each of the East Fork Water Users filed separate *Standard Form 4 Motions to File Late Notices of Claims* ("Motions"), based on beneficial use of the waters of the East Fork of the Salmon River ("East Fork") and several of its tributaries. A list of the East Fork Water Users and their claims is attached hereto as Attachment 1. Most of the claims are for conveyance losses. Two of the claims are for irrigation.

COPY

On January 20, 2009, the SRBA Presiding Judge heard the *Motions* in the above-captioned subcases. The Presiding Judge determined that the claimants had “demonstrated an excuse for the untimely filing of the subject late claims which is an element of the ‘good cause’ standard for filing a late claim as required by *SRBA Administrative Order 1 (AOI)* 4.d.(2)(d) and I.R.C.P. 55(c).” *Order of Reference Appointing Theodore Booth Special Master for Further Proceedings on Motion to File Late Claims*, January 21, 2009 (“*Order Appointing Special Master*”) at 1. The Presiding Judge referred the matter to Special Master Booth “for further proceedings to determine the degree of prejudice, if any, to other parties on the same claimed source.” *Id.* at 2. “If the Special Master finds no such prejudice and a meritorious position, then to recommend to this Court that the late claims be granted.” *Id.* By his *Order Appointing Special Master*, the Presiding Judge effectively consolidated the *Motions*.

Valley Sun’s counsel appeared during the January 20, 2009 hearing in opposition to the *Motions*, and filed a *Notice of Appearance* on February 9, 2009. A scheduling conference was held on May 5, 2009.

### STANDARD

Under *Administrative Order 1*, a motion to file a late notice of claim is determined pursuant to I.R.C.P. 55(c). *See AOI* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria). The “good cause” standard for motions to file late notices of claims is more lenient than the Rule 60(b) standard (*see McFarland v. Curtis*, 123 Idaho at 935, 854 P.2d at 279. The I.R.C.P. 55(c) good cause standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.

3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

*Order Granting Motions to File Late Notices of Claims*, Water Right Claim 71-10886 et al., July 27, 2005.

The rules of civil procedure favor determining a case on the merits rather than dismissing it based on faulty procedures. *Gerstner v. Washington Water Power Company*, 122 Idaho 673, 675, 837 P.2d 799, 801(1992). Chapter 14, Title 42, Idaho Code is replete with references indicating legislative intent that water rights be accurately recommended and decreed. As such, the Special Master should grant the motions to file late claims so that the claims can be determined on their merits.

### **FACTS**

Valley Sun does not dispute any of the facts presented by the East Fork Water Users in their *Motions to File Late Claims, Late Notices of Claims*, and supporting affidavits.

The specific facts pertaining to each claim are explained in the East Fork Water Users' respective pleadings and affidavits. The essential facts common to each of the conveyance loss claims are summarized in Valley Sun's Opening Brief at pages 4-8.

The East Fork Water Users own water rights to the East Fork and several of its tributaries that were decreed primarily for irrigation uses in the 1938 *Gossi v. Giampedraglia* decree, attached to the *Affidavit of Laird J. Lucas*. The priorities of these water rights range from 1880 to 1936. As is the case with many early water right decrees in Idaho, the 1938 decree gives no indication that the decreed quantities were based on water measurements, or that the East Fork diversions had every been measured. The 1938 decree does not require measurement of the diversions for the decreed rights. The quantity of each of the rights defined in the 1938 decree is based on a general finding

that 1.5 inches (.03 cfs) of water was sufficient for proper irrigation of the land. *Lucas Aff.*, Ex. 2, ¶ 3 at 2. There is no indication in the decree that any consideration was given to conveyance losses through the ditches through which water was transported from the East Fork and its tributaries to the places of use along the East Fork.

The East Fork Water Users' diversions remained unchanged for several decades, until fish screens were installed between 1995 and 2007. The diversions were measured so that the fish screens could be sized to pass the historically diverted quantities of water. Additional change came for the East Fork Water Users when they received notice that the Idaho Department of Water Resources ("IDWR") would begin measuring and regulating diversions from the East Fork in 2008 as a result of the formation of Water District No. 170 in 2006. As a consequence of these changes, the East Fork Water Users became aware that their previously decreed water rights were insufficient to provide for the conveyance losses through their ditch systems.

The undisputed evidence that the East Fork Water Users have submitted in support of their late claims clearly establishes that they and their predecessors in interest have diverted greater quantities of water than are provided by their previously decreed water rights in order to compensate for conveyance losses. Based on recent measurements reflecting the historic and current East Fork diversions, the East Fork water users filed late claims for their conveyance losses based upon beneficial use of the water. The priority dates reflect the earliest recollections of witnesses who observed the East Fork diversions, ditch systems and irrigation practices.

## ARGUMENT

In its opposition to the East Fork Water Users' *Motions*, Valley Sun does not attempt to show that it is prejudiced by the filing of the *Motions*. Instead, Valley Sun erroneously characterizes the East Fork Water Users Late Claims as modifications or amendments to their previously decreed water rights, and on this basis argues that: (1) the late claims are impermissible "expansions" of the previously-decreed rights; (2) that this Court's issuance of partial decrees confirming the East Fork Water Users' previously decreed water rights estops them (by *res judicata*) from filing the late claims, and (3) that the East Fork Water Users failed to exercise due diligence in correctly quantifying their previously decreed rights. Each of these arguments against filing the late claims fails for the simple reason that the late claims do not modify, amend or "expand" the previously decreed water rights. The late claims are for separate water rights with different priority dates based on beneficial use (the "constitutional method" of appropriation), rather than the prior decree.

Valley Sun also attempts to characterize the late claims as excessive or "wasteful," to support its argument that the East Fork Water Users' position is not meritorious. Valley Sun presents no evidence to support this argument. The reasonableness of the claimed quantities is not an issue to be resolved in the context of a motion to file a late claim. IDWR evaluates the extent of beneficial use of each water right when reviewing claims in preparation of its recommendations to the Court.

Valley Sun's arguments imply that a water user cannot have multiple water rights from the same source for the same place of use. To the contrary, this is a common occurrence. For example, Valley Sun holds five water rights that allow it to irrigate the same 294.1 acres using water from same source, the east fork of the Salmon River.<sup>1</sup> Exhibit "A" attached to *Affidavit of Jon C. Gould*. All five water rights have different priority dates.

**1. The Filing of the East Fork Water Users' Claims Late is Excusable**

The Presiding Judge decided the first prong of the three prong analysis that this Court uses to analyze motions to file late claims when he determined that the claimants had "demonstrated an excuse for the untimely filing of the subject late claims . . . ." *Order Appointing Special Master* at 2. The *Order Appointing Special Master* identifies the other two prongs, prejudice and meritorious position, as the issues to be considered by the Special Master, and directs that: "If the Special Master finds no such prejudice and a meritorious position, then to recommend to this Court that the late claims be granted." *Id.*

**a. The Claims are Not "Expansions" of the East Fork Water Users' Decreed Water Rights**

The East Fork Water Users could not have sought to increase the quantities of their previously decreed water rights through the SRBA. The late claims are later priority water rights based on beneficial use of water, not on the prior decree. They therefore do not constitute expansions of the decreed rights.<sup>2</sup>

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<sup>1</sup> Water right nos. 72-7505A, 72-10220A, 72-10221A, 72-10222A, and 72-10237 are owned by Valley Sun LLC, allow the user to irrigate the same 294.1 acres with water diverted from the East Fork of the Salmon River.

<sup>2</sup>Idaho Code § 42-1416B defines 'Expanded Use' as "an increase in the number of acres irrigated, or other additional use, under a valid ground water right, without any increase in the

**b. Res Judicata Does Not Bar the Filing of the Claims**

The late claims, being different water rights, are not barred by the SRBA Court's issuance of partial decrees confirming the East Fork Water Users previously decreed water rights.

The only potential application of res judicata to the East Fork Water Users' late claims pertains to claimed priority dates which predate the February 14, 1938 *Gossi v. Giampedraglia* decree. With respect to any late claims to which res judicata may apply, the issue is resolved by advancing the priority date to one day after the decree (February 15, 1938). See *Affidavit David B. Shaw* at 10. The East Fork Water Users anticipate that this determination will be made by IDWR in reviewing the late claims and submitting recommendations to the Court. See *Id.* If the Special Master determines that the issue must be resolved in order to grant a motion to file late claim, each of the East Fork Water Users hereby agrees to confer with IDWR and stipulate to advance claimed priority dates as determined necessary and appropriate.

**2. Opponents Will Not Be Prejudiced By Granting Claimants' Motions**

Valley Sun has not disputed any of the facts presented by the East Fork Water Users in support of their late claims, nor has Valley Sun attempted to show that it or any other party is prejudiced in any way by the filing of the East Fork Water users' Late claims. Indeed, Valley Sun has appeared throughout the Court's proceedings on the East Fork Water Users' *Motions*. Valley Sun will not be prejudice by granting claimants' motions.

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rate of diversion or volume of water diverted.”

### 3. The East Fork Water Users' Position is Meritorious

Valley Sun's characterizes East Fork Water Users' late claims for conveyance losses as "waste" as the basis for its argument that the late claims do not present a meritorious position. This argument is flawed in several respects.

Valley Sun presents no evidence to show that the East Fork Water Users have not diverted the claimed quantities as of the claimed priority dates, and utilized the water for conveyance losses. Instead, Valley Sun references the fact that IDWR performed investigations to suggest that "there is no factual basis" for the East Fork Water Users' late claims. This suggestion has no merit. When investigating water right claims based on prior decrees, IDWR verifies the decreed elements of the water right, specifically to determine whether there has been a loss of any portion of the water right by forfeiture. IDWR does not recommend that water right quantities be increased above their decreed amounts. *Affidavit David B. Shaw* at 10.

Furthermore, there is no indication in IDWR's water right files (available through the IDWR website) that IDWR performed any analysis of conveyance losses. IDWR's water right files for the East Fork Water Users' prior claims show that IDWR utilized the "Hubble analysis," which it commonly uses to evaluate water use requirements at the irrigated field. As with Valley Sun's water rights, the 1938 Decree allocated .03 cfs per acre (1.5 inches per acre). See *Affidavit David B. Shaw* at 9. The "Adjudication Claim Verification Report" attached as Exhibit 4 to the *Affidavit of Laird J. Lucas*, submitted in support of Valley Sun's *Opening Brief*, contains the following "notes":

Decree awarded 0.03 cfs per acre. ***Hubble analysis indicated requirement above amount claimed.*** Recommended as claimed for both 72-00196 and 72-00197 (overlap pou) for 2.4 cfs total.

*Lucas Aff.*, Ex. 4, p. 29 (emphasis added).

On this basis, IDWR recommended the previously decreed quantity of the water right (2.4 cfs). *Affidavit David B. Shaw* at 11. Valley Sun's own filing in this matter helps confirm that the East Fork Water Users' require more than the decreed quantities of their water rights to irrigate their lands. There is no indication that IDWR advised the Claimant of this finding or that an additional claim should be filed. The use of the Hubble analysis indicates that, as with the 1938 decree, no measurement was taken or relied upon.

**a. The Conveyance Loss Claims Do Not Constitute "Waste"**

Again, Valley Sun has not disputed any of the facts presented by the East Fork Water Users showing that they have diverted the claimed quantities of water to compensate for conveyance losses and convey sufficient water to their fields for irrigation uses. Valley Sun has presented no evidence to support its assertion that the quantities of the East Fork Water Users late claims are excessive or "wasteful."

Instead, Valley Sun argues that the claimed quantities are per se wasteful, relying upon certain statements in *Basinger v. Taylor*, 36 Idaho 591, 211 P. 1085 (1922) and *Glenn Dale Ranches v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972). Valley Sun's reliance is misplaced, as these cases do not establish a per se standard for waste. The quantity of water required for conveyance losses, and the "reasonableness" of those losses is a question of fact. The East Fork Water Users anticipate that IDWR will make such determinations when reviewing the claims. Valley Sun's unsupported assertions of "waste," do not support denial of the East Fork Water Users' *Motions to File Late Claims*.

In *Basinger*, the water users had conveyance losses of 50 per cent. *Basinger*, 94 Idaho at 596. The Court stated that a water user is entitled to allowance for only reasonable loss in conducting his water from the point of diversion to the place of use. *Id* at 597. However, the water users allowed, or took no action to prevent, the conveyed water to spread out at several places. *Id*. Thus, the court held that the conveyance losses were unreasonable because the farmers “could have been reasonably expected to prevent the water from spreading out at several places as shown by the evidence.” *Id*. The claimants’ conveyance losses are easily distinguished from those in *Basinger* because the claimants’ conveyance losses occur in the ditches, are non-consumptive and the lost water is returned to the source. Unlike *Basinger*, there are no reasonable measures that the claimants can take to prevent the conveyance losses. Accordingly, claimants’ conveyance losses are reasonable.

In *Glenn Dale Ranches* the Court as dicta cited *Basinger* that “the public policy against wasting water prohibits additional diversion to compensate for unreasonable loss.” *Glenn Dale Ranches*, 94 Idaho at 588, 494 P.2d at 1032. In *Glen Dale Ranches* the water user claimed 60 inches of water delivered from a canal and 50 inches of water delivered from a stream to irrigate 54 acres. *Id* at 586, 494 P.2d at 1030. The trial court found that appellant could apply to beneficial use only the 60 inches received from the canal system and 10 inches from the stream. *Id* at 587, 494 P.2d at 1031. The trial court relied on evidence that the water user had never divert more than 10 to 15 inches from the stream. *Id*. The Court found that the trial court finding was supported by competent evidence and it would not set aside the finding. *Id*. Here, unlike the claimant in *Glen Dale Ranches*, the claimants will be able to demonstrate that the water being claimed will be put to beneficial use.

**b. Conveyance Losses Return to the East Fork**

During the January 20, 2009 hearing on the *Motions*, the Presiding Judge asked counsel for IDWR about the assertion that water diverted from the East Fork for conveyance losses returns to the East Fork where it is available for beneficial use by downstream water users. *Affidavit of Jon C. Gould*, Ex. B at 20-21. The Presiding Judge did not indicate whether he viewed the fate of seepage losses as bearing on the issues of prejudice or meritorious position, or whether it was simply a point of interest to him.

In his response, counsel for IDWR stated that it is “common knowledge that in the East Fork drainage that the conveyance losses are high because of the nature of the soil” and that “[t]hose conveyance losses return to the river in a relatively short time.” *Id.* at 21. Thus, there is a reasonable basis for the large quantities being claimed. *Id.* at 19-20. See also *Affidavit of David B. Shaw* at 7.

The *Affidavit of Brian Hamilton* and the *Affidavit of David B. Shaw*, filed herewith, verify that the East Fork is a gaining stream throughout the reach where the East Fork Water Users’ diversions are located. Measurements taken in July and September of this year show that East Fork flows double through this reach. Mr. Hamilton’s September 9, 2009 measurements demonstrate that there is approximately 184 cfs of subterranean inflow to this reach from seepage return flows and/or ground water. *Affidavit of Brian Hamilton* at 13. Idaho Power measurements at a gaging station located close to Valley Sun’s diversions, a short distance upstream from the confluence of the East Fork with the Salmon River, during 2008 and 2009 show ample water to supply Valley Sun’s water rights. Seepage losses from irrigation ditches within the East Fork Salmon River valley return relatively rapidly to the river. *Affidavit of David B. Shaw* at 6.

## CONCLUSION

Based upon the argument herein, claimants respectfully request that the Special Master find that there is no prejudice to the opponents from granting the *Motions*, and that the East Fork Water Users have demonstrated that their claims are meritorious, and recommend to the Court that the late claims be granted.

DATED this 15<sup>th</sup> day of October, 2009.

RINGERT LAW CHARTERED

By: 

Daniel V. Steenson  
Attorney for Claimants

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, to the following on this 15<sup>th</sup> day of October, 2009:

Laird Lucas  
Attorney at Law  
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IDWR Document Depository  
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Boise, Idaho 83720-0098

Chief, Natural Resources Division  
Office of the Attorney General  
P.O. Box 44449  
Boise, Idaho 83711-4449



Daniel V. Steenson

| <b>8 Claimants</b>         | <b>12 Claims</b> | <b>Source/Purpose of Use/Priority</b>        | <b>Date Filed</b> |
|----------------------------|------------------|----------------------------------------------|-------------------|
| Eddie Baker Jr.            | 72-16778         | Big Boulder Creek / Irrig. / 4/1/1948        | 10/2/08           |
|                            | 72-16779         | East Fork / Conveyance loss / 4/1/1928       | 10/15/08          |
|                            | 72-16780         | Big Boulder Cr. / Conveyance loss / 4/1/1928 | 10/15/08          |
|                            | 72-16781         | East Fork Back Channel / Irrig. / 4/1/1961   | 10/15/08          |
| Wayne and<br>Melodie Baker | 72-16782         | East Fork / Conveyance loss / 4/1/1930       | 10/29/08          |
|                            | 72-16783         | Big Lake Creek / Conveyance loss / 4/1/1930  | 10/29/08          |
| Gary and Jackie<br>Ingram  | 72-16784         | East Fork / Conveyance loss / 4/1/1932       | 10/31/08          |
| Wes Sherwood               | 72-16785         | East Fork / Conveyance loss / 4/1/1930       | 10/31/08          |
| Doug and Cheryl<br>Baker   | 72-16786         | East Fork / Conveyance loss / 4/1/1930       | 10/30/08          |
|                            | 72-16787         | Herd Creek / Conveyance loss / 4/1/1930      | 10/30/08          |
| Robert Kopf (3G)           | 72-16788         | East Fork / Conveyance loss / 4/1/1930       | 10/31/08          |
| Lilac Three<br>(Olbum)     | 72-16789         | East Fork / Conveyance loss / 4/1/1930       | 10/30/08          |



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Daniel V. Steenson

TO: CLERK OF THE COURT - SNAKE RIVER BASIN ADJUDICATION

FROM: DANIEL V. STEENSON DATE: 10/15/09

RE: Water Right Nos. 72-16778, 72-16779, 72-16780, 72-16781, 72-16782, 72-16783, 72-16784, 72-16785, 72-16786, 72-16787, 72-16788 and 72-16789

1. Original and Copy of: Claimants' Response Brief;
2. Original and Copy of: Affidavit of Brian Hamilton;
3. Original and Copy of: Affidavit of Jon C. Gould; and
4. Original and Copy of: Affidavit of David B. Shaw.

|                                                          |                                                                      |
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| <input type="checkbox"/> FOR YOUR FILE                   | <input type="checkbox"/> PLEASE REPLY FOR MY SIGNATURE               |
| <input type="checkbox"/> PLEASE FILE                     | <input type="checkbox"/> PLEASE ANSWER AND SEND COPY OF LETTER TO ME |
| <input type="checkbox"/> IN ACCORDANCE WITH YOUR REQUEST | <input type="checkbox"/> PLEASE RECORD AND RETURN                    |
| <input type="checkbox"/> PLEASE COMMENT                  | <input type="checkbox"/> RUSH                                        |
| <input type="checkbox"/> PLEASE SIGN AND RETURN          | <input type="checkbox"/> AS PER OUR PHONE CONVERSATION               |
| <input type="checkbox"/> PLEASE TELEPHONE/SEE ME         | <input type="checkbox"/> PLEASE REVIEW AND CALL TO DISCUSS           |

REMARKS: Clerk: Please file originals and return the conformed copies to me in the enclosed pre-paid envelope. Thank you, Katie Moser.