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DEPARTMENT OF
WATER RESOURCES

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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 REPLY BRIEF
OPPOSING MOTIONS TO FILE LATE NOTICES OF CLAIMS

Valley Sun, LLC, respectfully submits the following brief in reply to the Late Claimants' "Brief In Response To Valley Sun's Opening Brief" (dated October 15, 2009):

**I. THE PROPOSED "LATE CLAIMS" ARE AN IMPERMISSIBLE
COLLATERAL ATTACK ON PRIOR DECREES.**

As Valley Sun pointed out in its opening brief – and the Late Claimants admit in their response brief – the 1938 *Gossi* decree adjudicated their historic water rights as of that time; and they received final partial decrees from this Court for all their water rights claimed in the SRBA. Because their rights have been decreed already, the Late Claimants cannot now seek to expand their adjudicated rights by several-fold; and their so-called "late claims" are an impermissible collateral attack on those prior decrees.

SRBA Presiding Judge Melanson confirmed this recently, holding in similar circumstances that a prior water rights decree is binding on the parties to that decree – including

a final partial decree in the SRBA – and prohibits them from later seeking to claim additional amounts of water, even though they assert they always used that extra water. *See* January 12, 2009 Order in Subcases 74-15015 & 74-15861 (Riggan) (copy attached hereto). As Judge Melanson held:

The water right was decreed in the Lemhi Adjudication. The claimant is now seeking a greater quantity and more acreage than was previously decreed. The claimant offers no concrete explanation for the discrepancy other than a possible oversight by his predecessor-in-interest. The Court finds this to be a direct collateral attack on the prior decree.

Id., p. 6. As Judge Melanson further explained, such a collateral attack is impermissible even though the claimant may now be asserting that more water was historically used than was decreed, because of the binding effect of the SRBA and earlier private adjudications:

[T]he Partial Decree and Notice of Entry of Judgment was a final judgment as to those parties whose claims were subject to the Partial Decree. Accordingly, under principles of *res judicata*, law-of-the-case, and the holding in *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), any water user or successor-in-interest whose claim was decreed or who failed to file a claim is bound by the Partial Decree.

Claims in the SRBA can vary from the elements in a prior decree to account for subsequent changes in circumstances such as abandonment, forfeiture, and accomplished transfer, or to correct errors. **However, evidence of an earlier use or larger quantity than previously decreed does not fit within either of the above exceptions and constitutes a collateral attack on the prior decree. . . .**

[T]he fact that the present owner of a previously decreed water right may now have evidence of an earlier use or larger quantity than was previously decreed does not mean that an error or oversight occurred when the predecessor-in-interest filed (or failed to file) the claim in the prior adjudication. . . **[A]llowing a claimant to reopen a prior decree to present evidence of earlier use or larger quantity than was previously decreed completely undermines the principles of *res judicata* and the Supreme Court's ruling in *State v. Hagerman Water Right Owners*, as well as law-of-the-case in the SRBA.**

Id., pp. 5-6 (emphasis added).

That ruling is dispositive here. The Late Claimants admit that their “late claims” seek (vastly) increased amounts of water beyond the rights adjudicated in the 1938 *Gossi* decree and the final Partial Decrees entered by this Court; yet they claim that they have used these amounts of water all along. Such claims of “an earlier use or larger quantity” should have been brought in the *Gossi* adjudication (for then-existing uses) and/or in the SRBA Court (for subsequent uses). Because the Late Claimants did not make such claims then, and because their water rights have been adjudicated in both the *Gossi* decree and the SRBA Partial Decrees, they are barred now from collaterally attacking those decrees through their so-called “late claims.” Accordingly, the Court must deny their motions to file late notices of claims.

II. THE CLAIMED RIGHTS ARE NOT ALLOWED BY IDAHO LAW.

The motions to file late claims also must be denied because Idaho law does not recognize a water right for conveyance losses only – and particularly not for the excessive amounts of losses that the Late Claimants are seeking.

In their Response Brief, the Late Claimants repeatedly state that their proposed late claims are solely for conveyance losses, and are not part of their irrigation rights that have been adjudicated. *See* Response Brief, pp. 5-7. As they state:

[T]he 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.

Id., p. 5.

As Valley Sun explained in its opening brief, however, a water right can only be obtained for some beneficial use, such as irrigation. *See* I.C. § 42-104. While reasonable

conveyance losses are acceptable when they serve irrigation or other beneficial uses, there is no beneficial use in simply running water down a ditch to be lost through seepage or evaporation. By portraying their proposed late claims as being solely for conveyance losses – and not part of their already-adjudicated irrigation rights – the Late Claimants’ response brief thus confesses that these are not valid water right claims at all.

Moreover, the Late Claimants fail to refute Valley Sun’s showing that the proposed late claims are excessive and wasteful, and hence cannot be approved under Idaho law either. Their response brief ignores I.C. § 42-202(6) and I.C. § 42-220 – both cited in Valley Sun’s opening brief – which limit irrigation water rights to volumes far less than the amounts of water the Late Claimants now seek to obtain rights for. They also fail to distinguish the Idaho Supreme Court cases cited by Valley Sun, which emphasize that conveyance losses must be reasonable, and find that losses exceeding 50% are unreasonable and wasteful. *See Basinger v. Taylor*, 36 Idaho 591, 211 P. 1085, 1086 (Idaho 1922); *Glenn Dale Ranches v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029 (Idaho 1972) (both holding that conveyance losses of over 50% are unreasonable).

Notably, the Late Claimants seem to believe that just because they have historically wasted water at the excessive levels claimed, that fact alone shields them from having to become more efficient in the future so avoid such waste – such as by using concrete lining or pipes to carry their irrigation water. But the Idaho Supreme Court has repeatedly rejected that assertion, including in *Basinger* and *Glenn Dale*. *See also Bennett v. Nourse*, 22 Idaho 249, 124 P. 1038, 1040 (Idaho 1912) (rejecting claim to double a water right because of 50% conveyance losses, explaining, “it stands every water user in hand to construct his ditch so that there will be the least possible waste of water; and, no doubt, by either piping or cementing portions of the ditch where

the greatest waste occurs Bennett can save much of his water”).

Again, because the Late Claimants seek water “rights” solely for conveyance losses that are unreasonable and wasteful, and not for any beneficial use, the Court must deny their motion to file late claims as not presenting any meritorious position under Rule 55 and AO1.

III. VALLEY SUN WILL BE PREJUDICED.

Finally, Valley Sun must respond to the Late Claimants’ assertion, in their Response Brief, that it will suffer no prejudice if the late claims are allowed. Based on the Response Brief’s explanation of the proposed late claims, those claims would certainly prejudice Valley Sun if they are allowed.

Specifically, the Late Claimants now assert that the priority dates for the late claims would be February 15, 1938, *i.e.*, one day after the *Gossi* decree was entered. *See* Response Brief, p. 7. This means that they would obtain 1938 rights for several-fold more water than allowed under the *Gossi* decree which would be senior to any subsequent rights – including Valley Sun’s 1983 decreed surface water right (No. 72-10237A), its 1992 licensed right (No. 72-7505A), and all its groundwater rights. *See* Lucas Affidavit, ¶ 4 & Exh. 1; Gould Affidavit, Exh. A (attaching copies of decreed and licensed rights, and referencing groundwater rights).

In *Fremont-Madison Irrigation Dist v. Id. Ground Water Appropriators, Inc.*, 129 Idaho 454, 461 (Idaho, 1996), the Idaho Supreme Court explained that a change in seniority of a water right holder is an obvious case of injury. In addressing the potential impacts of subsequent water right enlargements, the Court noted that:

some injury can be identified if the enlargement takes priority over a valid established water right held by a so called junior appropriator. The junior appropriator will not receive the water he/she should have received but for the enlargement if there is not enough water to serve all water users. **It is difficult, if**

not impossible, to perceive of a situation in which enlargement would not injure an appropriator who had an established right if the enlargement receives priority.

Id., at 461 (emphasis added).

This Court has likewise held that allowing retroactive creation of new or enlarged water rights with older priorities causes senior water right holders to be “*per se* injured irrespective of the extent of the water supply.” *See* Order on Challenge (A & B Irrigation District) at p. 25, *Subcase Nos 36-02080 et. al.* (April 25, 2003). This is a *per se* injury because “the essence and value of a water right in a prior appropriation system is the priority date.” *Id.* The Idaho Supreme Court affirmed that ruling, stating:

This Court has made it clear that there are few instances in which an enlarged use will not cause injury to junior appropriators, consequently requiring subordination in the case of a new enlargement. *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. *Fremont-Madison* held that, “[i]t is difficult, *if not impossible*, to perceive of a situation in which an enlargement would not injure an appropriator who had an established right if the enlargement receives priority.” *Id.* (emphasis added). While A & B has argued that *Fremont-Madison* did not state that proposed enlargements create a *per se* injury to junior water rights holders, the specific language of the case indicates otherwise. “Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.” *Jenkins v. Idaho Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

See A&B Irrigation District v. Aberdeen-American Falls Groundwater District, 141 Idaho 746, 753, 118 P.3d 78 (2005).

Here, the Late Claimants seek to present “late” claims for water rights which will impair or diminish the seniority of Valley Sun’s rights. This is *per se* injury, and again requires denial of the motions to file late claims under Rule 55 and AOI.

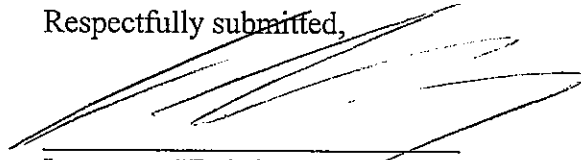
CONCLUSION

For the foregoing reasons, and those set forth in Valley Sun’s opening brief, the Motions

To File Late Notices Of Claims should all be denied by the Court.

Dated: October 29, 2009

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that I caused the foregoing VALLEY SUN'S REPLY BRIEF OPPOSING MOTIONS TO FILE LATE NOTICES OF CLAIMS to be served on October 29, 2009 upon the following persons by the means of service noted below:

Original via Federal Express, overnight delivery to:

Clerk, SRBA Court
253 Third Avenue North
Twin Falls ID 83303

Copies via first class US mail to:

Daniel V. Steenson
PO Box 2773
Boise ID 83701

IDWR Document Depository
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Chief, Natural Resources Division
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