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DEPARTMENT OF  
WATER RESOURCES

|                                                                                         |
|-----------------------------------------------------------------------------------------|
| DISTRICT COURT-SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |
| DEC 22 2009                                                                             |
| By _____ Clerk<br>_____ Deputy Clerk                                                    |

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     | ) | SPECIAL MASTER'S            |
|                | ) | RECOMMENDATION REGARDING    |
| Case No. 39576 | ) | PREJUDICE ON MOTION TO FILE |
|                | ) | LATE CLAIM                  |
|                | ) |                             |
|                | ) | WATER RIGHT NO.: 34-14074   |
| _____          | ) |                             |

I. PROCEDURAL HISTORY

On March 20, 2009, the SRBA Court received a *Motion to File Late Notice of Claim* from Robert K. Moss for water right 34-14074. A hearing on the *Motion* was held on June 16, 2009, before then presiding Judge John M. Melanson. An *Order of Reference to Special Master Brigitte Bilyeu* was issued June 18, 2009.

In the *Order of Reference*, Judge Melanson ruled that both "good cause" for the untimeliness and a "meritorious position" had been demonstrated by the claimant. However, Judge Melanson asked this Special Master to take up further proceedings to determine prejudice to other parties, if any. A hearing was held on December 16, 2009. The Idaho Department of Water Resources was present and reported on the likelihood of prejudice to other parties.

II. STANDARD OF REVIEW

The SRBA Administrative Orders provide that *Motions to File a Late Notice of Claim* are to be reviewed under the criteria of I.R.C.P. 55(c) and 60(b). *SRBA Administrative Order 1 (AO1)* § 4 (d)(2)(d).

III. FINDINGS

Judge Melanson has previously determined that the claimant has shown both "good cause"

SPECIAL MASTER'S RECOMMENDATION  
REGARDING PREJUDICE ON MOTION TO FILE LATE CLAIM  
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and a "meritorious position." Judge Melanson asked for findings regarding "prejudice to other parties" if the late claim is allowed. The SRBA Court places emphasis on the element of prejudice to other parties in basins where the reported "irrigation and other purposes" water rights have been litigated and decreed. The SRBA Court recently noted that a late claim on a fully decreed source potentially puts parties with rights on the same source in the position of re-litigating issues that have already been decided, or in the position of addressing new issues that should have been properly raised at the time the source of the subject claim was initially report and litigated. *Order of Reference* (Subcase No. 34-13811) (October 28, 2003)

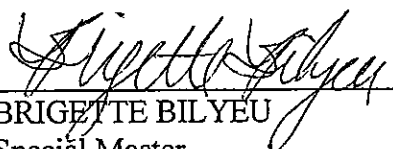
The water right at issue here is in Basin 34. The "irrigation and other purposes" water rights in Basin 34 have been litigated and decreed. It is, therefore, important to determine whether allowing a late claim would prejudice existing water rights. The Idaho Department of Water Resources is very familiar with the water rights in Basin 34. IDWR reported that it has considered the potential impact of this late claim on other water rights. IDWR notified the court that it is aware of (3) three water users with rights on Antelope Creek that may be affected by the late claim. However, because the claim is for a 1966 right for high water use, the Department anticipates that allowing this late claim will have little impact on the historical administration of water in Basin 34. IDWR reported that there would be little likelihood of prejudice to other parties.

#### IV. CONCLUSIONS OF LAW

Based on IDWR's Report, this Special Master concludes that the likelihood of prejudice to other parties in the SRBA and in Basin 34 is such that the late claim should proceed. Although there may be parties in Basin 34 with rights adjudicated on Antelope Creek, IDWR anticipates the likelihood of prejudice to these parties is remote. Furthermore, once the *Director's Report* for this water right is filed, other parties will have an opportunity to object.

THEREFORE, IT IS RECOMMENDED that the *Motion to File Late Claim* be granted for water right number 34-14074.

DATED: December 22, 2009.

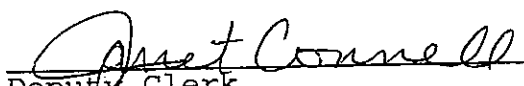
  
BRIGETTE BILYEU  
Special Master  
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S RECOMMENDATION REGARDING PREJUDICE ON MOTION TO FILE LATE CLAIM was mailed on December 22, 2009, with sufficient first-class postage to the following:

DIRECTOR OF IDWR  
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Deputy Clerk