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APR 15 2010

DEPARTMENT OF
WATER RESOURCES

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

**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	)	Subcases: 72-16779; 72-16780;
	)	72-16782; 72-16783; 72-16784;
Case No. 39576	)	72-16785; 72-16786; 72-16787;
	)	72-16788; and 72-16789
_____	)	

VALLEY SUN'S BRIEF OPPOSING
MOTION FOR RECONSIDERATION OF ORDER
DENYING MOTIONS TO FILE LATE NOTICES OF CLAIMS

Valley Sun, LLC, respectfully submits the following brief *opposing* the "Motion for Reconsideration Of Order Denying Motions To File Late Notices Of Claims," filed by attorney Daniel Steenson on March 15, 2010 for movants Wayne and Melody Baker; Richard and Cheryl Baker; Eddie Baker, Jr.; Gary and Jackie Ingram; Archie Sherwood; Lilac LLC; and Kenneth Ryan (hereafter "Late Claimants"),¹ and Valley Sun respectfully asks the Court to deny the reconsideration motion for the following reasons:

¹ Valley Sun, LLC is the bottom-most water right holder on the East Fork Salmon River, just above its confluence with the Salmon River; and holds water rights dating back to 1880. See Lucas Affidavit (filed 9/19/2009), Exh. 1.

It is thus misleading for movants Wayne and Melody Baker *et al.* to refer to themselves in their reconsideration motion as the "East Fork Water Users." To avoid confusion with Valley Sun – another East Fork water user – this brief thus refers to them as "Late Claimants."

I. THE LATE CLAIMANTS HAVE WAIVED THEIR OBJECTIONS TO THE COURT'S DENIAL OF THEIR LATE CLAIMS.

The Motion for Reconsideration must be denied, first, because the Late Claimants have waited too long to file their so-called "motion for reconsideration," and have thereby waived their objections to the Court's denial of their Motions For Leave To File Late Notices Of Claims.

The Late Claimants seek to challenge the *Special Master's Report And Recommendation On Motions To File Late Notices Of Claims*, which was entered on January 13, 2010, and which the SRBA Court adopted on that same date in its *Order Denying Motions To File Late Notices of Claims*. Under the Special Master's Recommendation, as approved by the Court, the Late Claimants' motions to file late notices of claims were denied as being precluded by the prior adjudication of their East Fork water rights, as set forth in the 1938 *Gossi Decree*, and by the SRBA Court's subsequent issuance of Partial Decrees for the East Fork water rights claimed by the Late Claimants here.

The Late Claimants argue in their reconsideration motion that the Special Master erred in his reading of the 1938 *Gossi Decree*. But they did not file their reconsideration motion until March 15, 2010 – or 61 days after the Special Master's Recommendation was issued and adopted by the SRBA Court on January 13, 2010. Accordingly, their challenge is untimely and must be denied under the SRBA Court's rules and orders.

Specifically, the SRBA Court's Administrative Order No. 1 establishes two requirements relevant here, neither of which the Late Claimants satisfied:

First, Section 13 of Administrative Order No. 1 requires that any party seeking to challenge a Special Master's recommendation must file a Motion To Alter Or Amend within 21 days of the date that the recommendation appears on the docket sheet. *See* AO1 13(a). As AO1

13(a) expressly provides, failure to file a timely Motion To Alter Or Amend “shall constitute a waiver of the right to challenge” a Special Master’s recommendation before the SRBA Court. *Id.*

Second, AO1 Section 13 also requires that a party wishing to challenge the Special Master’s final resolution, after a motion to alter or amend has been decided, must file a “Notice of Challenge” within fourteen (14) days of the Special Master’s decision. *See* AO1 13(c). Such a Notice of Challenge must set forth a detailed statement of the issues; and cannot be subsequently amended. *Id.* AO1 then establishes procedures for obtaining the necessary transcript; providing docket sheet notice; and for briefing and oral argument on a Notice of Challenge to a Special Master’s recommendation. *See* AO1 13(d)-(e).

The Idaho Supreme Court recently affirmed that these AO1 procedures and timing requirements for challenging a Special Master’s recommendation are binding on SRBA claimants. *See Bedke v. City of Oakland*, __ Idaho __, 2010 Opinion No. 29, Docket Nos. 35217 & 35943 (Idaho Supreme Court, March 18, 2010). In *Bedke*, the Supreme Court affirmed the SRBA Court’s ruling rejecting a challenge to a Special Master’s recommendation disallowing water right claims, where the claimant failed to timely follow these requirements of AO1 13. *Id.*, slip op. at 5-7.

Here, the Late Claimants likewise failed to file the required Motion To Alter Or Amend the Special Master’s Recommendation, as provided under AO1 Section 13; nor did they file the required Notice of Challenge either. This is despite the fact that they and their counsel are experienced in the SRBA Court’s procedures. *See Bedke, supra*, slip op. at 7-8 (upholding SRBA Court decision not to grant belated extension of time to file motion to alter or amend, where the pro se claimants were “not new to the SRBA process” and had previously filed

challenges before the SRBA Court).

Indeed, the Court specifically gave notice here – on January 13, 2010 – that the Late Claimants had until February 28, 2010 to file a motion to alter or amend if they wished to challenge the Special Master's Recommendation, stating:

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, **may file a Motion To Alter or Amend on or before the 28th day of the next month.**

See Notice of Issuance of Special Master's Recommendation for Water Rights 72-16778 et al.

(Jan. 13, 2010) (emphasis added). Confirming AO1 13(a), the Court also expressly advised that failure to file a motion to alter or amend by this deadline would constitute a waiver of any right to challenge the Special Master's recommendations, stating:

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION **shall constitute a waiver of the right to challenge it before the Presiding Judge.**

Id. (emphasis added).

The Late Claimants acknowledge receiving this notice, which – in their own words – “notified the parties of the opportunity to file a motion to alter or amend by February 28th, and that failure to do so would constitute waiver of the right to challenge the *Recommendation* before the Presiding Judge.” *See* “Memorandum In Support Of Motion For Reconsideration Of Order Denying Motions To File Late Notices Of Claims,” (filed 3/15/2010), p. 3, n.2.

Now the Late Claimants seek to disregard AO1 13 and this Court's specific notice of the February 28, 2010 deadline to file a motion to alter or amend if they wished to challenge the Special Master's Recommendation. Having missed the February 28th deadline to file a motion to alter or amend, the Late Claimants have thus waived their objections to the Special Master's

Recommendation, under AO1 13 and the Court's *Notice of Issuance*.

Neither can the Late Claimants somehow cure this waiver by dressing up their challenges to the Special Master's Recommendation as a "motion for reconsideration" of the SRBA Court's Order approving that Recommendation. The arguments presented in their self-styled "motion for reconsideration" simply object to the analysis and conclusions in the Special Master's Recommendation, and thus could have – and should have – been raised within the February 28th deadline set by the Court for filing a motion to alter or amend.

In summary, by ignoring AO1 13 and delaying past the Court-ordered deadline of February 28th for filing a motion to alter or amend, the Late Claimants have waived their objections to the Special Master's Recommendation, and they cannot get a "second bite at the apple" now through the ploy of filing their untimely challenges under the guise of a "motion to reconsider." Accordingly, their motion for reconsideration should be denied.

II. THE MOTION TO RECONSIDER MUST ALSO BE DENIED ON THE MERITS.

Even if the Court is inclined to reconsider the Special Master's Recommendation and the January 13th *Order Denying Motions To File Late Notices Of Claims* based on it, still the Court must deny the reconsideration motion on the merits, both for the reasons stated in the Special Master's Recommendation and because the Late Claimants have not otherwise met the requirements for filing their proposed late notices of claims, as explained below.

A. Incorporation Of Valley Sun's Prior Filings.

If the Court does entertain the reconsideration motion on its merits, Valley Sun respectfully requests that the Court take into account all the briefings and exhibits that were filed before the Special Master, so that the Court has full appreciation of the relevant facts and law.

Those were set forth in detail in Valley Sun's briefings before the Special Master; and rather than reiterate them in unnecessary detail here, Valley Sun incorporates those filings by reference and summarizes their key points below. See "Valley Sun's Opening Brief Opposing Motions To File Late Notices Of Claims," and accompanying Affidavit of Laird J. Lucas (filed September 18, 2009); and "Valley Sun's Reply Brief Opposing Motions To File Late Notices of Claims" (filed October 30, 2009).

B. The Undisputed Facts Demonstrate That The Late Claims Must Be Denied.

As Valley Sun's briefings before the Special Master discussed in detail, the Late Claimants each filed affidavits in support of their respective "Motions For Leave To File Late Notices Of Claims," and those affidavits along with IDWR records establish the relevant facts demonstrating that the proposed late notices of claims are unlawful, and hence must be denied by the Court. See Valley Sun Opening Brief, pp. 2-9 (recounting facts from Late Claimants' affidavits and IDWR water right documents).

Specifically, the Late Claimants each assert that they have long diverted water from the East Fork Salmon River for irrigation, and that their respective irrigation diversions have not changed materially over the last few decades. Yet the Late Claimants now assert that they should be allowed to file late claims to increase the amount of their East Fork water rights by several-fold beyond the amounts of the water rights they previously claimed through two water rights adjudications – including the 1938 *Gossi Decree* and the proceedings before this Court, which issued partial decrees for all the Late Claimants almost a decade ago – because they recently measured their diversions and found that they were substantially higher than previously adjudicated. *Id.*

For example, Late Claimant Wayne Baker filed an affidavit in support of Motions To File Late Notice Of Claims Nos. 72-16782 and 72-16783, in which Mr. Baker asserted that he and his wife Melodie hold a number of water rights that were decreed by the SRBA Court on November 11, 2000. As IDWR's water right records show, the Bakers (or their predecessors in interest) submitted timely claims in the SRBA for these rights 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).

As Mr. Baker emphasized in his affidavit, 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, 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.

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, 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.* (emphasis added).

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 – 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.

The other Late Claimants make very similar assertions in their affidavits, all likewise seeking to increase their previously-adjudicated East Fork water rights by about five-fold, based on alleged conveyance losses that have been occurring for decades. *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); Affidavit of Richard Douglas Baker In Support of Motion To File Late Notices of Claims (filed in Subcase Nos. 72-16786 & 72-16787, October 30, 2008); 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).

Valley Sun demonstrated in its briefings before the Special Master that, under these facts, the proposed late claims must be denied for several reasons, including the following:

C. The *Gossi* and SRBA Partial Decrees Bar The Proposed Late Claims.

Under these admitted facts, the Late Claimants are barred from now seeking to expand their adjudicated rights to include the additional alleged conveyance losses, since their East Fork water rights were adjudicated in both the 1938 *Gossi Decree* and the Partial Decrees issued by the SRBA Court. Because their rights have been decreed twice 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. *See* Valley Sun Opening Brief, pp. 13; Valley Sun Reply Brief, pp. 1-3.

Indeed, it is a fundamental precept of Idaho law that water rights adjudications are binding on the parties; and have the preclusive effect of forbidding the parties from later re-litigating the water rights that were adjudicated. *See* I.C. § 42-1420 (providing that the “decree

entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system”); *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409, 415 (1997) (holding that previous decree entered in a private water rights adjudication is binding on parties and privies to that previous decree).

Former SRBA Presiding Judge Melanson confirmed this analysis recently, holding in similar circumstances that a prior water rights decree – including a final partial decree in the SRBA – is binding on the parties to that decree; 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 to Valley Sun’s Reply Brief). As Judge Melanson explained there:

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 held, 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 partial decree and earlier private adjudication:

[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, and its underlying analysis of the preclusive effects of prior water right adjudications, are dispositive here. The Late Claimants admit that their alleged “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, 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.

C. The Special Master Correctly Recommended That The Prior Decrees Bar The Late Claimants From Seek Additional Water Now.

The Special Master's Recommendation here focused on the language of the *Gossi Decree* and the SRBA Partial Decrees to similarly conclude that the proposed late claims should be denied. *See* Special Master Recommendation, pp. 2-7.

The Special Master thus correctly noted that the proposed late claims all relate to water

rights of the Late Claimants that were adjudicated in the *Gossi Decree*; and that while the *Gossi Decree* perhaps had a latent ambiguity as to whether the diversion amounts were based on the places of diversion or places of use (*i.e.*, whether the *Gossi Decree* included conveyance losses or not), any such latent ambiguity “has been eliminated in the SRBA Partial Decrees, which decreed the respective quantities of water to be measured at the points of diversion.” *Id.*, pp. 5-6. As the Special Master further correctly noted, Idaho law makes clear that water rights are measured at the point of diversion, not the place of use; and hence again the *Gossi* and SRBA decrees quantified the amounts of the Late Claimants’ East Fork water rights to include any conveyance losses – thus requiring that those decrees would have to be set aside if the late claims were to be allowed. *Id.*, p. 6.

But the Late Claimants have not moved to set aside the *Gossi Decree* or SRBA Partial Decrees – and it is far too late in time for them to do so. Because the Late Claimants’ East Fork water rights were adjudicated through those decrees, the terms of those decrees are binding and cannot be collaterally attacked now through the mechanism of seeking to file the so-called “late notices of claims” by which the Late Claimants seek to expand their adjudicated rights by several-fold. Accordingly, just as the SRBA Court held in the *Riggan* case discussed above, and as the Special Master recommended, the proposed late claims must be denied.

D. The Late Claimants’ Attacks On The Special Master’s Recommendation Are Unavailing.

Notably, the Late Claimants do not even address this analysis by the Special Master of Idaho law and the provisions of the *Gossi* and SRBA decrees – an omission which alone demonstrates that their motion for reconsideration lacks merit.

Instead, they focus on the Special Master’s further citation of the *Gossi Decree*’s

injunctive provision, under which the “parties were forever enjoined from diverting or using more water than set forth therein for use upon the lands described in the Decree.” *See* Special Master Recommendation, pp. 5-7. Based on this decree language, the Special Master wrote that it was his opinion “that parties to the *Gossi Decree* and their successors in interest could not divert or use more water than was described therein” for irrigated lands adjudicated in the *Gossi Decree*; although he acknowledged that the *Gossi Decree* “certainly could not have prevented the parties from making new appropriations of water for the use on land not specified in the Decree. . . .” *Id.*, pp. 5-6.

The Late Claimants seek to attack this part of the Special Master’s Recommendation using contradictory and legally unsupported arguments, none of which support overturning the Special Master’s conclusions.

First, they contend that there was no finding of “irreparable harm” to support this injunction language in the *Gossi Decree* – yet in the next breath, they admit that older water decrees commonly included similar language, and that this language was part of the legal relief necessary to “quiet title” among competing water right claimants. *See* “Memorandum In Support Of Motion For Reconsideration Of Order Denying Motions To File Late Notices Of Claims,” pp. 7-11 (citing numerous cases). And while they concede that the “nature and purpose of the *Gossi* adjudication was to quiet title to the parties’ water rights to the East Fork,” *id.*, p. 7, the Late Claimants refuse to acknowledge that the *Gossi Decree* has the legal effect to limiting their East Fork water rights to the amounts decreed, and thus prohibits them from now seeking to claim they have always diverted far larger amounts under the *res judicata* principles discussed above.

Neither are the Late Claimants correct in asserting that the Special Master supposedly

misinterpreted the *Gossi Decree*. *See id.*, pp. 6-14. Their argument hinges on the assertion that the *Gossi Decree* did not enjoin the parties from further appropriation of “unappropriated” waters from the East Fork, in amounts beyond the adjudicated rights. *Id.* Although this is undoubtedly correct as a matter of law, it is beside the point here -- because the Late Claimants are not seeking to file late claims for some new appropriations that arose after the *Gossi Decree*, but instead seek to expand their already-decreed rights, based on alleged errors in calculating the amounts of the diversions. Again, such a collateral attack on the prior decrees here (both the *Gossi Decree* and the SRBA Partial Decrees) is barred by basic principles of *res judicata* and the binding effect of water right adjudications.

Finally, the Late Claimants cannot succeed in attacking the Special Master’s Recommendation based on their further argument that he has somehow “abrogated” their “constitutional right to appropriate unappropriated water” under Article XV, § 3 of the Idaho Constitution. *See id.*, pp. 16-21. This argument again reflects the Late Claimants’ erroneous assertion that they are somehow seeking a new right for unappropriated water, when in fact they seek to increase the amount of their existing water rights, used for irrigation on the lands for which their claimed water rights were adjudicated in both the *Gossi Decree* and SRBA Partial Decrees. Again, the affidavits filed by the Late Claimants make this point crystal clear: they admit that their irrigation diversions for the respective East Fork properties have been unchanged for decades; that they have always diverted the same amounts, including huge amounts of water lost in conveyance (or “seepage”); and that they only recently found out that their adjudicated water rights are for quantities below what they have historically diverted, so they seek to “supplement” those quantities now. There is no “new” appropriation at issue here – and indeed,

the Special Master and this Court have recognized this fact, by distinguishing among the proposed late claims and approving the filing of the two late notices of claims here that were not previously claimed or adjudicated in the *Gossi Decree* or the SRBA Partial Decrees. See Special Master Recommendation, pp. 8-9 (recommending allowing late notices for claims 72-16778 & 72-16781, because they reflect irrigation diversions that were not previously claimed in any adjudication or licensed); *Order Granting Motions To File Late Notices Of Claims* (entered 1/13/2010 for water rights 72-16778 & 72-16781).

The Late Claimants are fundamentally mistaken if they believe the Idaho Constitution allows them to ignore prior water right decrees, or grants them the right to defy prior decrees in order to claim additional quantities of water on top of their adjudicated rights for the same long-standing irrigation practices. Their attempt to invoke the Idaho Constitution as grounds for reconsidering the Special Master's Recommendation must thus be rejected.

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

Although the Special Master did not reach these additional issues raised by Valley Sun, the following considerations also demonstrate that the Late Claimants' reconsideration motion and their underlying Motions For Leave To File Late Notices Of Claims must be denied by the SRBA Court, 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.* As explained below, the Late Claimants do not meet any of these criteria.

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 indicated 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). *See Valley Sun Opening Brief*, pp. 3-9 & *Lucas Affidavit*, Exhs. 3-7. 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.²

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 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.

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.*

² Indeed, the Notice of Claim form requires each claimant to verify under oath that their submitted claim is accurate. *See Lucas Affidavit, Exh. 3.*

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.

Idaho case law confirms that the Late Claimants’ alleged conveyance losses – which admittedly amount to conveyances losses of far more than 50% of the water they put to beneficial

use for irrigation – are 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”); *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”); *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).³

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. *Glenn Dale* 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 the Court 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

³ 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, supra*; 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 50% 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 their proposed late claims lack legal merit, the motions for leave to file late notices of claims must again be denied.

C. Valley Sun Will Be Prejudiced.

Finally, the motions for leave to file late notices of claims must be denied under AO1 and Rule 55(c), because Valley Sun will suffer prejudice if the late claims are allowed.

Specifically, the Late Claimants asserted before the Special Master that the priority dates

for the late claims would be February 15, 1938, *i.e.*, one day after the *Gossi Decree* was entered. See “Claimants Brief In Response To Valley Sun’s Opening Brief,” (dated October 15, 2009), p. 7. This means that the Late Claimants 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 constitutes legal 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:

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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).

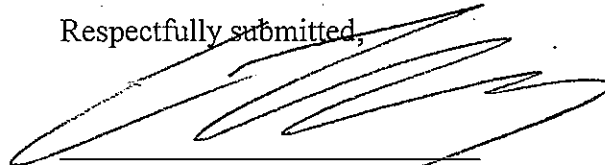
Here, the Late Claimants seek to present “late” claims for water rights which will impair or diminish the seniority of Valley Sun’s rights. This is *per se* injury, and again requires denial of the motions to file late claims under Rule 55 and AOI.

CONCLUSION

For the foregoing reasons, and those set forth in Valley Sun’s prior briefings before the Special Master, the Late Claimants’ Motion For Reconsideration should be denied by this Court, and their underlying Motions To File Late Notices Of Claims at issue here should be denied on their merits as well, even if the Court grants reconsideration.

Dated: April 14, 2010

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 BRIEF OPPOSING MOTION FOR RECONSIDERATION to be served on April 14, 2010 upon the following persons by the means of service noted below:

Original via Federal Express, overnight delivery to:

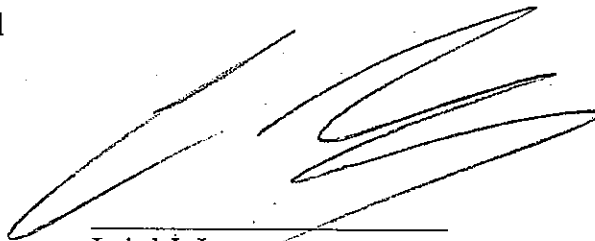
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253 Third Avenue North
Twin Falls ID 83303

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Boise ID 83701

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Boise ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
PO Box 44449
Boise ID 83711-4449

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

Laird J. Lucas