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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA

Case No. 39576

Subcase Nos. 74-1615 and 74-2351

**MEMORANDUM IN SUPPORT OF
MOTIONS FOR LATE CLAIM**

COME NOW Shanna Foster and Jennifer Ayers (“Shanna and Jennifer”), by and through their counsel of record, Chris M. Bromley, McHugh Bromley, PLLC, and hereby file this *Memorandum* in support of their *Motions for Late Claim* for water right nos. 74-1615 and 74-2351.¹

I. LEGAL STANDARD OF REVIEW

Pursuant to A.0.1 § 4d(2)(e), motions to file a late notice of claim are reviewed under the “good cause” standard set forth in Idaho Rule of Civil Procedure 55(c)(5). “The primary

¹ Shanna and Jennifer are also filing contemporaneously a *Motion and Memorandum to Set Aside* the Court’s disallowal of the above-captioned water rights and *Notices of Claim*. Shanna and Jennifer hereby incorporate by reference the *Motion and Memorandum to Set Aside* and *Notices of Claim*. Additionally, all filings in these subcases are being made on an expedited basis, and with actual notice to users on Lee Creek and tributaries (Everson Creek and Stroud Creek). Lee Creek and tributaries (Everson Creek and Stroud Creek) were decreed a separate source in the Lemhi Adjudication and in the SRBA.

considerations in determining good cause are: (1) whether the default was willful; (2) whether a meritorious defense has been presented; and (3) whether setting aside the default would prejudice the opponent.” *Order Granting Motion for Reconsideration as to Alternative Relief*, SRBA subcase no. 72-16779, p. 4 (May 6, 2010).

II. ARGUMENT

A. Shanna and Jennifer Meet the Good Cause and Meritorious Defense Standards

As stated in the contemporaneously filed *Motion to Set Aside and Memorandum in Support*, Shanna and Jennifer meet the “good cause” / “meritorious defense” standards articulated by A.O.1 § 4d(2)(e) and I.R.C.P. 55(c)(5), as summarized below:

- The property that is appurtenant to the water rights was homesteaded by Shanna and Jennifer’s family in 1916;
- The water rights that are appurtenant to the place of use were decreed in the Lemhi Adjudication to Albert Peterson;
- Everson Creek, from which Shanna and Jennifer divert water, is a tributary to Lee Creek. Lee Creek and tributaries (Everson Creek and Stroud Creek) were decreed as a separate source in the Lemhi Adjudication and then the SRBA;
- In addition to Shanna and Jennifer, there are two other water users on Everson Creek;
- There are seven water users on Lee Creek;
- There are three water users on Stroud Creek;
- Shanna and Jennifer’s water rights have been continually recognized as valid since at least entry of the 1982 Lemhi decree;
- When water has been available for diversion, the water rights have been delivered and put to beneficial use since at least 1983;

- Albert Peterson died before commencement of the SRBA and claims taking in Basin 74 by IDWR. Because Albert had no knowledge of the SRBA, no claims were filed by Albert in the SRBA;
- While first round service was mailed to Albert Peterson in 1990, he had been deceased since 1983, and it is not known to which address first round service was sent;
- It is undisputed that second round service was not made upon Shanna and Jennifer's predecessors-in-interest;
- Since 2006, when the Court entered its order authorizing interim administration in Basin 74, the water rights were delivered, when water was available, and put to beneficial use;
- During the 2012 and 2013 irrigation seasons, after their rights were determined unclaimed and disallowed, Shanna and Jennifer were delivered water;
- In every year since entry of the 1982 Lemhi decree, water assessments have been paid to Water District 74-Z;
- Aerial imagery of Shanna and Jennifer's place of use confirms it was irrigated;
- Because their water rights have always been delivered when water was available, Shanna and Jennifer were never aware that their rights were unclaimed in the SRBA and action needed to be taken to ensure their water rights;
- Since they became aware in late May of this year that their water rights might be invalid, Shanna and Jennifer have worked as swiftly and diligently as possible to bring this action;

- Unless relief is granted, Shanna and Jennifer will hold no valid water rights with which to irrigate their property. Their ranch will be devastated if they are not allowed to file late claims for the above-captioned water rights.

See generally Memorandum in Support of Motion to Set Aside.

B. Granting the Late Claims will not Result in Prejudice

In conjunction with the good cause and meritorious defense standards, late claims are scrutinized as to whether they are opposed by third parties, mainly in an effort to avoid prejudice to other parties who timely filed, prosecuted, and had their claims adjudicated. As stated by the Court:

A previously unaccounted for water demand on a fully appropriated and adjudicated source has the potential to undermine compromises and existing agreements made between other parties. In determining whether or not to grant a late claim this Court weighs the consequences of denying a late claimant the opportunity to have his right adjudicated and ultimately losing the right against any prejudice to other parties resulting from the unraveling of matters that have already been settled, completed and relied upon by those with decreed rights.

Order on Permissive Review Granting Motion to Set Aside Partial Decrees and Order of Recommitment to Special Master, SRBA subcase no. 79-02063 et al., pp. 8-9 (June 10, 2010) (emphasis added).

In addition to unraveling, the Court has articulated additional good cause standards:

In determining prejudice to other parties in the context of a Rule 55(c) good cause analysis this Court weighs several factors. These include, but are not limited to the following: (1) whether the late claim is a consumptive or non-consumptive claim; (2) whether the late claim will disturb a settlement agreement previously entered into by other water users on the source; (3) whether the late claim is based on a license or prior decree; (4) whether any unclaimed water is still available under the prior decree, if the late claim is based on prior decree; (5) whether the late claimant has historically and consistently been using the water in accordance with the claimed elements thereby avoiding any surprise to other water users on the source regarding a new unforeseen demand on the source; (6) whether the source is already fully or over appropriated; (7) whether the particular basin in which the late claim is asserted is a completed basin, and if so; (8) the extent to which existing users have relied on the basin being completed; and, (9) if interim administration

according to decreed rights is in effect, the extent to which existing users now rely on the current administrative scheme.

Order Granting Motion for Reconsideration as to Alternative Relief (Post-Decree Priority), SRBA subcase nos. 72-16779 *et al.*, pp. 7-8 (May 6, 2010).

1. The claims are consumptive and non-consumptive

The claims are for irrigation (consumptive) and stockwater (non-consumptive). Because of the historic return flows from flood irrigation on Shanna and Jennifer's property, denial of the late claims will alter the status quo of when water returns to the system later in the irrigation season.

2. There is no settlement agreement on the source

Unlike other SRBA basins, such as the Portneuf River in Basin 29, there is no settlement agreement in Basin 74.

3. The claims are based on prior decree

Other than the addition of stockwater to subcase no. 74-1615,² the claims are based on how they were decreed in the Lemhi Adjudication. In the Lemhi Adjudication, the claim for water right no. 74-1615 was based on beneficial use; the claim for 74-2351 was based on a prior license issued by IDWR.

4. There is unclaimed water available under the prior decree

Until the present motions filed by Shanna and Jennifer, no claim has been made for any portion of water right nos. 74-1615 and 74-2351. As a result, there is unclaimed water available under the Lemhi decree for water right nos. 74-1615 and 74-2351.

² Because stockwater was generally considered incidental to irrigation rights in the Lemhi Adjudication, and because stockwater is critical to Shanna and Jennifer's water use, they are claiming stockwater as a purpose of use in their late claim for water right no. 74-1615. Counsel has conferred with IDWR on structuring the claim for water right no. 74-1615 so as to reduce the place of use by 1 acre to allow for 0.02 cfs of stockwater as a purpose of use.

5. Shanna and Jennifer have historically and consistently used the water, thereby avoiding surprise to other users on the source

As stated in the *Affidavit of Shanna Foster* and the *Affidavit of Thomas C. Udy*, watermaster for Water District 74-Z, the water has historically and continuously been diverted and put to beneficial use. In the summer of 2000, IDWR inventoried water right nos. 74-1615 and 74-2351 as valid diversions. Since 2006, water rights in Water District 74-Z have been subject to this Court's *Order Granting State of Idaho's Motion for Order of Interim Administration of Water Rights in Basin 74*, SRBA subcase no. 92-00021-74 (May 2, 2006). Since entry of this Court's *Order Closing Claims Taking Basins 21, 22, 29, 32, 33, 65, 67, 69, 71, 72, 73, 74, 75, 77, 78 and 79 and Disallowal of Unclaimed Water Rights*, SRBA subcase no. 00-92099 (April 25, 2012), Shanna and Jennifer have taken delivery of water. Based on these facts, it is well known to water users that Shanna and Jennifer hold valid water rights that have been historically delivered.

6. It is not known if Everson Creek is fully appropriated

It is not known whether Everson Creek is or is not fully appropriated.

7. Basin 74 is effectively a completed basin

When the Court issued its *Memorandum Decision and Order on Challenge*, SRBA subcase no. 74-15051 *et al.* (January 3, 2012), which resolved the "high flow" issue, Basin 74 was effectively completed.

8. It is not known to what extent existing users have relied on Basin 74 being a completed basin

While it is not known to what extent users have relied on Basin 74 being a completed basin, it is known that Shanna and Jennifer, as well as their predecessors before them, have been delivered water and put that water to beneficial use since entry of the 1982 Lemhi decree. It is

also known, to date, that no water user has complained of Shanna and Jennifer's diversion of water from Everson Creek, despite the fact that water right nos. 74-1615 and 74-2351 were unclaimed and disallowed as unclaimed in the SRBA. Recognizing that Basin 74 has effectively been completed since 2012, Shanna and Jennifer have done everything in their power to bring light to their claims. Shanna and Jennifer have incurred cost and expense to provide notice to the SRBA's expedited service list. Because Lee Creek and tributaries (Everson and Stroud Creeks) are separate sources in the SRBA, Shanna and Jennifer incurred additional expense to provide actual notice of these claims to all users on Everson Creek, Lee Creek, and Stroud Creek. Lastly, notice of these claims will appear on the SRBA docket sheet; thereby giving notice to all parties to the SRBA.

9. Water users have relied on interim administration since 2006

In 2006, the Court entered its order authorizing interim administration in Basin 74. *Order Granting State of Idaho's Motion for Order of Interim Administration of Water Rights in Basin 74*, SRBA subcase no. 92-00021-74 (May 2, 2006). Since that time, Shanna and Jennifer have taken delivery of their water rights against other water rights, and been administered against senior water rights. Since 2006, water users have relied on delivery of Shanna and Jennifer's water rights and taken no issue.

III. CONCLUSION

Because Everson Creek is a tributary to Lee Creek, which is a separate source, and the few water users on the source have been delivered their water rights as against water right nos. 74-1615 and 74-2351, there is no possible "unraveling of matters" by allowing these late claims. Rather, not allowing these late claims will unravel and alter the historic delivery, return flows, and use of the waters from Everson Creek. In the best interests of justice, in the interests of the

proper administration of the water rights so established, and because Shanna and Jennifer have set forth good cause and a meritorious defense, the Court should grant the Motion for Late Claim for water rights nos. 74-1615 and 74-2351.

DATED this 26th day of June, 2014.



CHRIS M. BROMLEY
Attorneys for Shanna Foster and Jennifer Ayers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June 2014, I caused the following documents to be filed with the Court: *Notice of Service*, *Notice of Hearing*; *Motion to Set Aside and Memorandum in Support*; *Affidavit of Chris M. Bromley*; *Affidavit of Shanna Foster*; *Affidavit of Thomas C. Udy*; *Affidavit of Carter Fritschle*; *Affidavit of Roxanne Brown*; *Motions for Late Claims*; *Memorandum in Support of Motions for Late Claim*; *Notices of Claim*. As attested to in the *Notice of Service*, the foregoing documents were filed with the Court and true and correct copies served on the SRBA's Expedited Mailing List and water users on Everson Creek, Lee Creek, and Stroud Creek.



CHRIS M. BROMLEY

Attorneys for Shanna Foster and Jennifer Ayers