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JUL 22 2014

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUL 21 2014	
By _____	Clerk
_____	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	) Subcase Nos. 74-1615 and 74-2351
	)
Case No. 39576	) ORDER SETTING ASIDE
	) DISALLOWAL OF UNCLAIMED
	) WATER RIGHTS
	)
	) ORDER GRANTING MOTIONS TO
	) FILE LATE NOTICE OF CLAIM
	)
	) ORDER FOR EXPEDITED LATE
	) CLAIM DIRECTOR'S REPORT AND
	) SETTING FORTH PROCEDURES AND
	) DEADLINES FOR EXPEDITED
	) PROCESS

I.

PROCEDURAL BACKGROUND

1. On January 31, 2012, this Court entered its *Order Establishing Deadline for Late Claim Filings* in basin 74 (“*Deadline Order*”).¹ It directed that except for *de minimis* domestic and stockwater uses and late claims required to resolve litigation pending in the SRBA, the last date to file a *Motion to File Late Claim* in basin 74 “shall be March 30, 2012.”

2. The Court subsequently entered an *Order Closing Claims Taking* in basin 74, closing the basin to the filing of late claims in accordance with the *Deadline Order* (“*Closure Order*”).² The *Closure Order* also disallowed certain unclaimed water rights, including the above-captioned water rights.

¹ *Order Establishing Deadline for Late Claim Filings in Basins 21, 22, 29, 32, 33, 65, 67, 69, 71, 72, 73, 74, 75, 77, 78 and 79*, SRBA main case no. 39576, SRBA subcase no. 00-92099 (Jan. 31, 2012)

² *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 main case no. 39576, SRBA subcase no. 00-92099 (April 25, 2012).

3. On June 27, 2014, Shanna Foster and Jennifer Ayers (collectively, “Claimants”) filed a *Motion to Set Aside* and *Motion to File Late Notice of Claim* in the above-captioned subcases.

4. Water right claim 74-1615 asserts the right to divert 2.45 cfs from Everson Creek, tributary to Lee Creek, for the irrigation of 121.4 acres as well as stockwater purposes. The claim is based on a prior decree, specifically the Lemhi Decree, and seeks a priority date of April 1, 1919.

5. Water right claim 74-2351 asserts the right to divert 0.55 cfs from Everson Creek, tributary to Lee Creek, for the irrigation of 27.3 acres. The claim is based on a prior decree, specifically the Lemhi Decree, and seeks a priority date of January 9, 1963.

6. A hearing on the *Motions* was held on July 15, 2014. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or July 16, 2014.

II.

ANALYSIS

Recognizing that the taking of claims in basin 74 must at some point come to an end, this Court closed the basin to the filing of late claims as of March 30, 2012. *See infra*, *Deadline Order* and *Closure Order*. The only exceptions are: (1) late claims for deferrable *de minimis* domestic and stockwater uses; and (2) late claims required to resolve litigation pending in the SRBA at the time of basin closure. *Id.* Claimants’ *Motions* were filed on June 27, 2014, and they do not fall into one of the two recognized exceptions to the *Deadline* and *Closure Orders*.³ However, Claimants argue that this Court’s *Order* disallowing the above-captioned water rights, as well as the *Closure Order* in basin 74 should be set aside to allow for the filing of the instant late claims under the circumstances presented here. Specifically, they assert that they were not afforded proper notice of the need to file these claims in the Snake River Basin Adjudication (“SRBA”).

³ The *Deadline* and *Closure Orders* provided a claims taking deadline of March 30, 2012 “except for *de minimis* domestic and stockwater uses and late claims required to resolve pending litigation on the date of this *Order* in the SRBA.” *Deadline Order*, p.4; *Closure Order*, p.3. The term “pending litigation” was further defined to mean “an active, related subcase(s) pending at the time of the basin closure deadline wherein an additional late claim(s) is required to resolve the related water right(s).” *Id.*

When a general adjudication is commenced, the Director of the Idaho Department of Water Resources (“IDWR”) is required under Idaho law to serve notice of the adjudication commencement. I.C. § 42-1408. The adjudication statutes contemplate two rounds of service. First round service is to occur upon entry of a district court’s order commencing a general adjudication. I.C. §§ 42-1408(1) & (2). Second round service is to occur “[u]pon expiration of the period for filing notices of claims.” I.C. § 42-1408(4). On January 14, 2000, this Court entered a *Second Amended Second Round Service Order* in SRBA main case no. 39576, setting forth the method of second round service for certain basins, including basin 74. That *Order* required IDWR to identify unclaimed water rights and potential claimants in basin 74 by, among other things, a comparison of IDWR’s water right data base against claims already filed in the SRBA.

In this case, it is undisputed that neither Claimants nor their predecessor-in-interest received second round service.⁴ The *Affidavit of Danni M. Smith Re: Service of Second Round Service of Commencement Notice Not Necessary for Basin 74 (No Unclaimed Water Rights Discovered)*, filed by IDWR December 26, 2003 in SRBA main case no. 39576 (“*Affidavit of Second Round Service*”), lists each person in basin 74 to receive second round service.⁵ Neither Claimants nor their predecessor-in-interest is listed as having received second round service in the *Affidavit of Second Round Service*. Furthermore, the *Affidavit of Carter Fritschle* (“*Fritschle Aff.*”), filed in the above-captioned matter on June 27, 2014, provides in part as follows: “Based on my review of the *Affidavit of Second Round Service* and the records of IDWR, second round service was not given as to the above captioned water rights.” *Fritschle Aff.*, ¶10.⁶ There is no conflicting evidence before the Court that Claimants or their predecessor-in-interest received second round service. Therefore, the Court finds that since Claimants held two water rights of record which had not been claimed in the SRBA, Claimants or their predecessor-in-interest should have received second round service notifying them of the requirement to file those claims in the SRBA. Given that no second round service was given, the Court finds that Claimants have set forth sufficient grounds, and unique and compelling circumstances, justifying the setting

⁴ Claimants acquired the real property to which these water right claims pertain in 2010.

⁵ At the time of filing, Danni M. Smith was the administrative assistant 1 for the adjudication bureau of IDWR. *Affidavit of Second Round Service*, ¶1.

⁶ At the time of filing, Carter Fritschle was the manager of the adjudication section of IDWR. *Id.*, ¶2.

aside of the *Order* disallowing the above-captioned water rights, as well as the *Order* closing claims taking in basin 74 pursuant to Idaho Rule of Civil Procedure 60(b)(6).

III. ORDER

THEREFORE, IT IS HEREBY ORDERED that the disallowal of the above-captioned water rights in 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* dated April 25, 2012, **is hereby set aside**.

IT IS HEREBY FURTHER ORDERED that 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* dated April 25, 2012, **is hereby set aside** for the limited purpose of allowing for the filing of the instant *Motion to File Late Notice of Claim*.

IT IS HEREBY FURTHER ORDERED that the *Motion to File a Late Notice of Claim* for the above-captioned water right claims is **granted**.

IT IS HEREBY FURTHER ORDERED that the Director issue an expedited *Late Claim Director's Report* for the above-captioned water right claims, and that the parties abide by the following schedule with respect to the late claims:

1. Deadline for filing *Late Claim Director's Report*: The Director shall file an original of the *Late Claim Director's Report* for the above-captioned water right claim with this Court on or before **July 31, 2014**, and shall distribute for display and review at least one (1) copy of the *Late Claim Director's Report* to the office of the clerk of the district court for each county in which any part of the water system is located, together with a copy of this **Order**. The Director shall also serve on each claimant or the claimant's attorney a notice of filing of the *Late Claim Director's Report*. Last, the Director shall file with the Court an affidavit demonstrating compliance with the notice requirements of Idaho Code § 42-1411(6).

2. Deadline for the filing of objections to *Late Claim Director's Report*: Any party wishing to file an objection to the *Late Claim Director's Report* may do so on or before **August 31, 2014**.

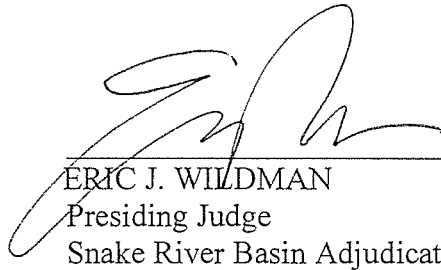
3. Deadline for the filing of responses to objections to *Late Claim Director's Report*:
Responses to objections to the *Late Claim Director's Report* must be filed on or before
September 15, 2014.

4. Hearing on uncontested claim: In the event no objections are filed, the Court will hold a hearing on the entry of the *Partial Decree* as required by I.C. § 42-1412(7). **NOTICE IS HEREBY GIVEN** that the hearing will be held on **September 16, 2014, at 1:30 p.m. (Mountain Time)**, at the **Snake River Basin Adjudication District Court, 253 - 3rd Avenue North, Twin Falls, Idaho**. Parties may participate by telephone by dialing the number 1-215-446-0193 and when prompted entering code 406128#.

5. Publication of Notice: The clerk of the court is instructed to publish a notice of the issuance of this order, together with the applicable objection, response and hearing date, on the August 2014 docket sheet.

IT IS SO ORDERED.

Dated July 21, 2014

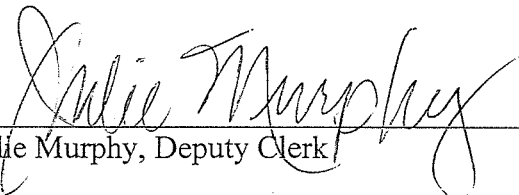

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER SETTING ASIDE
DISALLOWAL OF UNCLAIMED WATER RIGHTS / ORDER GRANTING MOTIONS
TO FILE LATE NOTICE OF CLAIM / ORDER FOR EXPEDITED LATE CLAIM
DIRECTOR'S REPORT AND SETTING FORTH PROCEDURES AND DEADLINES
FOR EXPEDITED PROCESS**, were mailed on May 21, 2014, by first-class mail to the following:

DIRECTOR OF IDWR
PO Box 83720
Boise, ID 83720-0098

Jennifer Ayers
Shanna Foster
Represented by:
Chris M. Bromley
380 S 4th Street Ste 103
Boise, ID 83702


Julie Murphy, 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 THE GENERAL ADJUDICATION OF RIGHTS TO
THE USE OF WATER FROM THE SNAKE RIVER BASIN
WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number: 74-1615

Date Received: / /2014

Received By:

DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
JUN 27 2014	
By _____	Clerk
_____	Deputy Clerk

**NOTICE OF CLAIM TO A WATER RIGHT ACQUIRED
UNDER STATE LAW**

1. Name of Claimant(s)

SHANNA FOSTER
PO BOX 212
LEADORE ID 83464
JENNIFER AYERS
87 HAWLEY CREEK RD
LEADORE ID 83464

Phone: (208) 768-2609

2. Date of Priority: 4/1/1919

3. Source: EVERSON CREEK

Tributary to: LEE CREEK

4. Point of Diversion:

<u>Township</u>	<u>Range</u>	<u>Section</u>	<u>1/4 of 1/4 of 1/4</u>	<u>Lot</u>	<u>County</u>	<u>Type</u>
15N	24E	1	SE NE		LEMHI	

5. Description of diverting works: Dam from Everson Creek into ditch, ditch conveys water to property.

6. Water is used for the following purposes:

<u>Purpose</u>	<u>From</u>	<u>To</u>	<u>C.F.S.</u>	<u>(or) A.F.A</u>
IRRIGATION	03/15	11/15	2.43	
STOCKWATER	01/01	12/31	0.02	

7. Total Quantity Appropriated is: 2.45 C.F.S. and/or A.F.A

8. Non-irrigation uses:

9. Place of use:

<u>Township</u>	<u>Range</u>	<u>Section</u>	<u>1/4 of 1/4</u>	<u>Lot</u>	<u>Use</u>	<u>Acres</u>
15N	25E	6	NE NE	1	IRRIGATION	23
			NW NE	2	IRRIGATION	6.7
			SW NE		IRRIGATION	37.3
			SE NE	6	IRRIGATION	14
			NE SE	7	IRRIGATION	10
			NW SE		IRRIGATION	30.4
					Section Acres	121.4

Total Acres

10. Place of use in counties: LEMHI

11. Do you own the property listed above as place of use? Yes

12. Other Water Rights Used:

13. Remarks:

Priority date description:

Description of use: Water Use Description

IRRIGATION

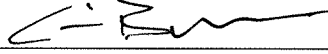
STOCKWATER

14. Basis of Claim: Decreed

15. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

For Individuals: I/We do solemnly swear or affirm under penalty or perjury that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s):  Date: 6/19/14
Attorney for Claimants Date: _____

For Organizations: I do solemnly swear or affirm under penalty or perjury that I am

_____ of _____
 Title Organization

That I have signed the foregoing document in the space below as

_____ of _____
 Title Organization

and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent _____ Date: _____

Title and Organization _____

Please print name

CERTIFICATE OF MAILING

I certify that on June 25, ²⁰¹⁴~~199~~, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. Copies to:

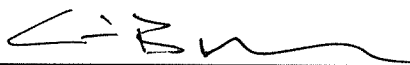
IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

3. If you are filing an amended Notice of Claim in a subcase being heard before the Presiding Judge or a Special Master, you must serve a copy on all parties to that subcase.

(Insert Names/address of parties)



Signature of person or attorney mailing the form

931

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

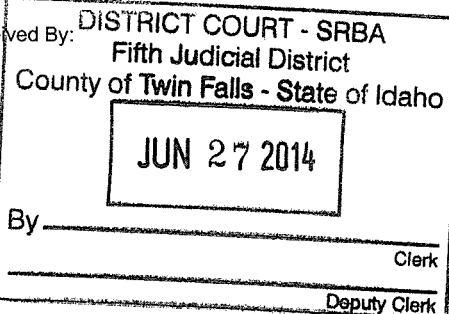
IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number: 74-2351

Date Received: ____/____/2014

Received By:



NOTICE OF CLAIM TO A WATER RIGHT ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

SHANNA FOSTER
PO BOX 212
LEADORE ID 83464
JENNIFER AYERS
87 HAWLEY CREEK RD
LEADORE ID 83464

Phone:(208)768-2609

2. Date of Priority: 1/9/1963

3. Source: EVERSON CREEK

Tributary to: LEE CREEK

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County	Type
15N	24E	1	SE NE		LEMHI	

5. Description of diverting works: Dam from Everson Creek into ditch, ditch conveys water to property.

6. Water is used for the following purposes:

Purpose	From To	C.F.S.	(or) A.F.A
IRRIGATION	3/15 11/15	0.55	

7. Total Quantity Appropriated is: 0.55 C.F.S. and/or A.F.A

8. Non-irrigation uses:

9. Place of use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
15N	25E	5	SW NW		IRRIGATION	5.2
			NW SW		IRRIGATION	13.7
					Section Acres	18.9
15N	25E	6	NE NE	1	IRRIGATION	3.6
			SE NE	6	IRRIGATION	4.8
					Section Acres	8.4

Total Acres 27.3

10. Place of use in counties: LEMHI

11. Do you own the property listed above as place of use? Yes

12. Other Water Rights Used:

13. Remarks:

Priority date description:

Description of use: Water Use

Description

IRRIGATION

14. Basis of Claim: Decreed

15. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

For Individuals: I/We do solemnly swear or affirm under penalty or perjury that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): C. R. W. Date: 6/19/2014

Attorney for Claimant Date: _____

For Organizations: I do solemnly swear or affirm under penalty or perjury that I am

_____ of _____,
Title Organization

That I have signed the foregoing document in the space below as

_____ of _____,
Title Organization

and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent _____ Date: _____

Title and Organization _____

Please print name

CERTIFICATE OF MAILING

I certify that on June 25, ²⁰¹⁴~~199~~, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

3. If you are filing an amended Notice of Claim in a subcase being heard before the Presiding Judge or a Special Master, you must serve a copy on all parties to that subcase.

(Insert Names/address of parties)



Signature of person or attorney mailing the form