

LATE CLAIM DIRECTOR'S REPORT

Water Right Nos. 74-1615 and 74-2351

In Re SRBA

Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources

Gary Spackman, Director

Carter Fritschle, Manager, Adjudication Section

July 24, 2014

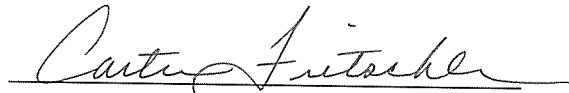
DESCRIPTIVE SUMMARY

This is a Late Claim Director's Report submitted by the Director of the Idaho Department of Water Resources.

DISCUSSION

Pursuant to the *Order for Expedited Late Claim Director's Report and Setting Forth Procedures and Deadlines for Expedited Process* issued by Judge Eric J. Wildman on July 21, 2014 (see attached), the Director submits this Late Claim Director's Report for subcases 74-1615 and 74-2351.

Respectfully submitted this 24th day of July, 2014.

A handwritten signature in cursive script, reading "Carter Fritschle", written over a horizontal line.

CARTER FRITSCHLE
Manager, Adjudication Section

07/23/2014

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 74-1615

NAME AND ADDRESS: SHANNA FOSTER
PO BOX 212
LEADORE ID 83464

JENNIFER AYERS
87 HAWLEY CREEK RD
LEADORE ID 83464

SOURCE: EVERSON CREEK

TRIBUTARY: LEE CREEK

QUANTITY: 2.450 CFS

The quantity of water under this right for stockwater use shall not exceed 13,000 gallons per day.

PRIORITY DATE: 04/01/1919

POINT OF
DIVERSION: T15N R24E S1 SENE Within LEMHI County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
STOCKWATER	01/01 12/31	0.020 CFS
IRRIGATION	03/15 11/15	2.430 CFS

PLACE OF USE: IRRIGATION in LEMHI County

T15N R25E S06 Lot 1 NENE	23.00	T15N R25E S06 Lot 2 NWNE	6.70
T15N R25E S06 SWNE	37.30	T15N R25E S06 Lot 6 SENE	14.00
T15N R25E S06 Lot 7 NESE	10.00	T15N R25E S06 NWSE	30.40

STOCKWATER same as IRRIGATION

121.4 ACRES TOTAL

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The quantity of water decreed for this water right for stockwater use is not a determination of historical beneficial use.

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

Parcel No. RP15N25E060002

Right includes accomplished change in purpose of use pursuant to Section 42-1425, Idaho Code.

07/23/2014

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 74-2351

NAME AND ADDRESS: SHANNA FOSTER
PO BOX 212
LEADORE ID 83464

JENNIFER AYERS
87 HAWLEY CREEK RD
LEADORE ID 83464

SOURCE: EVERSON CREEK

TRIBUTARY: LEE CREEK

QUANTITY: 0.550 CFS

PRIORITY DATE: 01/09/1963

POINT OF
DIVERSION: T15N R24E S1 SENE Within LEMHI County

PURPOSE AND
PERIOD OF USE:

	<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
	IRRIGATION	3/15 11/15	0.550 CFS
PLACE OF USE:	<u>IRRIGATION in LEMHI County</u>		
	T15N R25E S05 SWNW 5.20	T15N R25E S05 NWSW	13.70
	T15N R25E S06 Lot 1 NENE 3.60	T15N R25E S06 Lot 6 SENE	4.80
	27.3 ACRES TOTAL		

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

CERTIFICATE OF SERVICE

I certify that on July 25, 2014, I caused to be served a true and correct copy of this Late Claim Director's Report, to the following persons, in the manner indicated and addressed as follows:

1. Original to:

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

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

2. Copies to:

Chief, Natural Resources Div.
Office of the Attorney General
P.O. Box 44449
Boise, ID 83711-4449

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

United States Department of Justice
Environment & Natural Resources Div.
550 W. Fort Street MSC 033
Boise, ID 83724

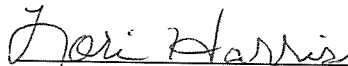
☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Lemhi County Courthouse
206 Courthouse Dr
Salmon, ID 83467

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Chris M. Bromley
McHugh Bromley
380 S. 4th Street Ste 103
Boise, ID 83702

☐ Overnight Mail
☒ Regular Mail
☐ Hand-Delivered
☐ Facsimile



Signature of person mailing the form

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**.

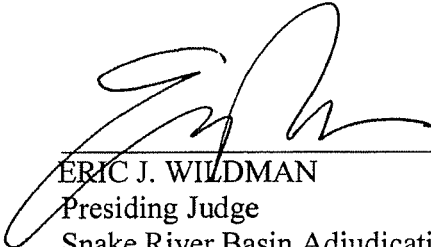
3. Deadline for the filing of responses to objections to *Late Claim Director's Report*:
Responses to objections to the *Late Claim Director's Report* must be filed on or before
September 15, 2014.

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

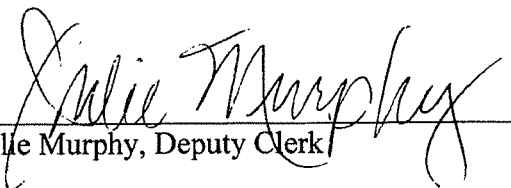

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

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