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DEPARTMENT OF
WATER RESOURCES

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Department of Water Resources
Eastern Region

John Alfred Simpson
774 Lemhi Road
Salmon, ID 83467
(208) 756-6845

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF NOTICE OF
ENLARGEMENT OF WATER RIGHT
CLAIM NO. 74-15911 (Tracy)

**PETITION FOR ASSERTION OF INJURY,
BASIS OF RECOMENDATION,
RECONSIDERATION, AND REQUEST
FOR HEARING**

I, John Alfred Simpson, respectfully petition the Idaho Department of Water Resources ("Department") to reconsider its recommendation in the October 17, 2014 Supplemental Directors Report Regarding Sub-case 74-15911. Secondly, I request a hearing before the Director of the Department during which the Department explains the basis for its recommendation this claim be allowed, hear my grievances, and provide the water master/members of District 74-C, the opportunity to comment and make recommendation in accordance with Title 42-1701A. Lastly, I request the Department recognize that I have a pre-existing right (License No. 74-15624) for the use of the waste water being claimed under this Notice of Enlargement.

FACTUAL AND PROCEDURAL BACKGROUND

- May 08, 1990 Notice of Claim filed by Kirk J. Knudsen for use of waste water (74-10169).
- May 26, 2000 Notice of Change for claim (74-10169) filed by John and Susan Simpson
- June 22, 2004 John Simpson met in Salmon, ID with Department staff, Bob Foster and Roxanne Brown. Ms. Brown informed John Simpson that the Department had recommend claim 74-10169 be disallowed. Ms. Brown advised John Simpson to discontinue pursuit of claim and submit to the Department an Application For Permit to develop a water right for use of waste water.
- March 28, 2005 John Simpson submitted to the Department an Application For Permit for use of waste water.
- January 26, 2006 Department recommended claim 74-10169 be disallowed. Reason: Right not claimed in prior adjudication.

- December 27, 2013 License (74-15624) granted to John Simpson for use of waste water, Priority date: March 28, 2005
- August 26, 1986 Lot 1 of Sunrise Hills subdivision transferred from Dean Stokes to David Freel. Warranty Deed stated that no water rights conveyed with property with exception of waste water. Lot 1 subdivided by David Freel into 10 Lots (Barracks Lane Subdivision). No mention of water rights being conveyed on subsequent Warranty Deeds to purchasers of lots in Barracks Lane Subdivision.
- November 30, 2004 Tracy purchased Lot 5, Barracks Lane Subdivision. No mention of any water rights being conveyed on Warranty Deed.
- Summer 2009, Tracy began diverting waste water onto property they do not own (Lot 6) (Google Earth Imagery, August 19, 2009). Source being waste water in excess of that being diverted by John Simpson.
- May 30, 2013 Tracy filed an Application For Permit with the Department seeking a right for diversion of waste water. Note: October 23, 2013 Department notified Tracy of numerous deficiencies in their application). No further action pursued by Tracy in response to Department regarding their application of permit.
- July 25, 2013 Tracy filed Motion to File Late Notice of Claim for use of waste water
- October 15, 2013 Department hearing held on Tracy Motion. **Note:** Neither I, nor District 74-C water master/users were notified by the Department of this hearing (Personal Communication with Jerry Elzinga and District 74-C Secretary Mike Kossler).
- October 16, 2013 Department granted Tracy Motion to File Late Notice of Claim for use of waste water.
- December 31, 2013 Department recommended Tracy Late Notice of Claim be disallowed.
- June 13, 2014 Tracy submitted a Motion to File Late objection to the Department's recommendation.
- June 30, 2014 Hearing held in SRBA Court on Tracy Motion to File Late Objection **Note:** Neither I nor District 74-C water master/users were notified of this hearing.
- July 1, 2014 Court rendered final order denying Tracy Motion to File Late Objection and rendered Final Order disallowing claim 74-15911.
- July 11, 2014 Court granted Tracy Motion to File Motion for Reconsideration.
- July 21, 2014 Hearing held. **Note:** Neither I nor District 74-C water master/users notified of hearing.

- July 22, 2014 Court granted Tracy motion to File Late Objection.
- May - July, 2014 I noticed Tracy making frequent visits to my head gate. I became suspicious and upon visit to the Department's website discovered the Tracy claim for waste water and Motion to File Late Objection. **Note:** This is when I first learned of this claim.
- July 31, 2014 I filed with the Department and Court a Response to the July 22, 2014 Motion to File a Late Objection.
- August 18, 2014 Scheduling conference held with Tracy/Council, Department, and Special Master. Special Master requested Department prepare a Rules of Evidence, Rule 706 Report.
- October 17, 2014 Department submitted Supplemental Director's Report Regarding Sub-case 74-15911
- October 28, 2014 I submitted my Objection to the Department's conclusions and recommendation in the Supplemental Director's Report that the Tracy claim be allowed as part of an enlargement.
- November 10, 2014 Second scheduling conference held with Tracy/Council, Department, Special Master.
- November 20, 2014 Department posted Notice of Enlargement of Water Right in newspaper. **Note:** This is first time the Department made any effort to notify the public of this enlargement claim.
- December 5, 2014 Submitted my pleadings to the Department, Tracy/Council and SRBA Court.
- December 11, 2014 Pre-trial conference held with Tracy/Council, Department, Special Master. **Note:** It was brought to the attention of Special Master the Department's late posting of public notice of enlargement and pending date for submission of petitions. Trial rescheduled to allow anyone asserting injury an opportunity to file petition.

ARGUMENT

I hereby assert that the Department is not treating claimants fairly in its review and recommendation regarding notices of claim for water rights. The Department disallowed my claim filed in 1990 for use of waste water, the reason given because it was not recognized in the previous adjudication. The Department failed to recognize evidence provided of consistent use as an enlargement of the same water rights being claimed by the Tracys. The Department advised me to discontinue pursuit of my claim and apply for a permit to develop a water right.

I assert that in the October 17, Supplemental Director's Report, the Department intentionally neglected to acknowledge my prior claim for use of waste water or my existing water right.

I assert the Department made a gross error when it recommended in the Supplemental Director's Report that the Tracy claim be allowed as an Enlargement with a priority date of 3/15/1976. ***Idaho Code 42-243f states: "the priority of the right claimed shall be determined by the date when the water was first applied to a beneficial use provided there has been no period of abandonment or non-use or forfeiture of the water right since that date"***. In the report the Department's basis for determination of priority date for this claim is the "separation of decreed rights from waste water use". Robert Stoddard's childhood memories of irrigation with waste water is not supported by photos, nor is it sufficient for the establishment of priority date. Robert Stoddard's affidavit failed to mention there was and still is a ditch from the pond that conveys waste water to my property which was also owned by his father at the time. The Department's determination that the Tracy property as part of an enlargement is based on inconclusive and conflicting information.

I assert that the Department's reversal of its original decision to dis-allow this claim was strongly influenced by affidavits from Robert Stoddard and Alvin Bailey. Their statements claiming a history of irrigation of the Tracy property with waste water is inconsistent and not supported by evidence made available to the Department suggesting otherwise.

I assert that the Department failed to recognize that waste water for which the Tracys are claiming as part of an enlargement was forfeited, ownership reverted back the State, and was re-appropriated when the Department issued a Permit to me for the use of waste water in 2005. ***Idaho Code 42-222(2) states: "All rights to the use of water...shall be lost and forfeited by a failure for the term of 5 years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost to nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation"*** I can attest that the Tracy property was not irrigated from the time I purchased property in 2000 until 2009 when the Tracys began diverting/piping water over the Jolly Ditch to flood property they do not own (see August 2009 Google Earth Imagery). Aerial photos suggest the property went without irrigation from the late 1970's until 2009. Evidence of forfeiture is further supported by absence of any mention of water rights on Warranty Deeds for Lot 5, Affidavit from neighboring lot owner Mel Domko, absence of a conveyance ditch, and aerial photographs.

CONCLUSION

I am disappointed in how the Department reviewed and evaluated my claim for the use of waste water and the claim filed by the Tracys. It took fifteen years for the Department to make a determination that my claim be disallowed. At no time during that period did a staff person call or make a field trip to my property to verify how the water was being used.

It took the Department eight years to process my Application for permit. A staff person did visit with me on my property to verify presence of a headgate.

The Tracy's filed their Late Notice of Claim in July 2013. It took only fourteen months for the Department to make a determination their claim be allowed. At no time during that period did a staff person call me or make a field trip to Salmon to verify use of waste water. My offer to provide a tour of the area was declined by Department staff.

Department staff have admitted that my claim qualified as an enlargement and should exist. Unfortunately Department staff failed to inform me of this during processing of my claim and advised that I obtain a permit to develop a new water right which I did.

The Department failed to exercise due diligence and apprise me, the water master and District 74 users of the claim filed by the Tracys.

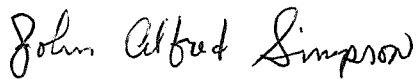
If this claim is allowed with a 1976 priority date as recommended by the Department, my right to the use of waste water would be junior and I would have to let the water pass my diversion/property.

The Department appears to be ushering this claim to trial without first seeking recommendation of the water master.

I respectfully request that the Department recommend to the Court that trial be delayed until after the Director has received recommendation of the water master and a hearing held in Salmon with the District 74-C water users and the claimant.

I respectfully request that the Department be fair and recommend this claim be disallowed and the Claimant pursue application for permit as I had to do. However, if this claim is allowed I ask the Department to recommend to the Court that it be subordinate to my existing right for the use of waste water.

RESECTFULLY SUBMITTED this 23rd day of December, 2014.

A handwritten signature in cursive script that reads "John Alfred Simpson".

John Alfred Simpson

CERTIFICATE OF MAILING

I certify that on this 23rd day of December, 2014, I served to a true and correct copy of the forgoing document to the person(s) whose names and addresses appear below by the method indicated.

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