

PROCEDURAL BACKGROUND

On April 5, 1990, Well's predecessor-in-interest, Ona R. Roe, filed with the Idaho Department of Water Resources (IDWR) a Notice of Claim for 29-00604A, claiming a portion of the water right originally decreed to Hevedore Tindore in *United States v. Skeem*, (D. Idaho, Eastern Div.) (Apr. 7, 1920) ("*Skeem Decree*").

According to IDWR records, ownership of the water right place of use for 29-00604A changed hands several times during the 1990's. IDWR records show that ownership changes were processed for the new owners but no amendments were made to the original Notice of Claim filed by Roe.

On December 15, 2000, R. Scott Wells and Brandy Wells purchased the place of use for 29-00604A, and subsequently filed a Notice of Change of Water Right Ownership with IDWR on January 17, 2001.

On July 10, 2003, IDWR issued a director's report for 29-00604A.

On November 14, 2003, R. Scott Wells timely filed an objection to the director's report for 29-00604A, indicating that the priority date should be January 1, 1863¹ and that the purpose of use should include a right to water for year-round domestic use based upon the *Skeem Decree* and historical beneficial use. Because the original Notice of Claim filed by Roe did not claim the correct priority date and year-round domestic use, Wells indicated in his objection that he would seek leave from the Court to amend the Notice of Claim for 29-00604A. Also, it is necessary to amend the claim to correct the name and address element to include Brandy Wells.

No other claimant filed an objection or response to 29-00604A.

¹ The priority date of January 1, 1863, listed in the objection is in error. The correct priority date should be February 16, 1869, as indicated in the accompanying Amended Notice of Claim. The basis for this priority date is the *Skeem Decree* as further defined by subsequent case law. See e.g., *Skeem v. United States*, 273 F. 93 (May 2, 1921); *United States v. Hibner*, 27 F.2d 909 (Aug. 6, 1928).

On January 5, 2004, IDWR submitted its Basin 29 Case Management Report, which identified Subcase No. 29-00604A as a "Class I Subcase."

LEGAL STANDARD

Pursuant to AO1, a motion to file an amended notice of claim "will be reviewed under the criteria of I.R.C.P. 55(c)." *AO1 § 4(d)(2)(e)*. Rule 55(c) applies a "good cause" standard for setting aside an entry of default. *Order on Motion to Set Aside Partial Decrees and File Late Objections, Subcase Nos. 65-07267 et al (A.L. Cattle) at 7 (SRBA Dist. Court) (Jan. 31, 2001)*(hereinafter "*A.L. Cattle*"). This standard is more lenient than the standard under Rule 60(b). *Id.* The Rule 55(c) standard requires examination of the following factors to determine whether "good cause" exists:

1. Whether the default was willful;
2. Whether setting aside the judgment would prejudice the opponent; and
3. Whether a meritorious position has been presented.

Id. To establish a meritorious defense, the moving party must allege facts, which if established, would constitute a defense to the action, and the facts supporting the defense must be detailed.

Id at 6. In the case of claim amendments, AO1 provides that "[l]eave to amend a notice of claim shall be freely given when justice so requires." *AO1 § 4(d)(2)(k)*.

DISCUSSION

GOOD CAUSE EXISTS TO GRANT THE MOTION TO FILE AN AMENDED CLAIM.

In this case, the elements to establish "good cause" are satisfied. The first element is met. Wells' failure to amend their claim before the director's report was filed was not willful. Prior to issuance of the director's report, Scott Wells was in the process of consulting with Josephine P. Beeman, his legal counsel, and Terry Scanlan, P.E., concerning water right 29-00604A. *Affidavit of R. Scott Wells ¶ 4.* For a period of several weeks immediately preceding the issuance of the director's report for Basin 29, Wells' legal counsel was unavailable and out of the state due to

the recent death of her father. *Affidavit of R. Scott Wells* ¶ 5; *Affidavit of Josephine P. Beeman* ¶

4. Because of his legal counsel's unavailability, Mr. Wells was not able to obtain legal advice, prior to the issuance of the Basin 29 director's report, concerning a number of questions he had relating to water right 29-00604A and the nature and scope of the amendments that were required for 29-00604A. *Id.*

Following issuance of the director's report for Basin 29, Mr. Wells had an opportunity to communicate with his legal counsel concerning water right 29-00604A. *Affidavit of R. Scott Wells* ¶ 6; *Affidavit of Josephine P. Beeman* ¶ 5. Based upon those discussions, it was determined that the director's report for 29-00604A contained errors with respect to the priority date, purpose of use, and period of use elements. *Id.* Mr. Wells, through his attorney, timely filed an objection to those elements. In the objection, notice was provided that Wells would seek leave from the court to amend the claim for 29-00604A to conform to the elements set forth in the objection. No responses were filed to the objection.

Wells have subsequently sought to comply with the requirements of Administrative Order 1 concerning the timing for seeking leave from the court to amend claims. Pursuant to AO1 § 10(f), "claims shall be amended at or before the Initial Hearing." Because Wells have filed this motion prior to the initial hearing, their motion is timely.

The second element is also satisfied. Because no one else has filed an objection or response in this subcase, there is no prejudice to any opponent. Also, IDWR's legal counsel, Candice McHugh, has indicated that IDWR does not oppose the Wells' motion to amend claim.

The third element of meritorious defense has also been met. Filed in conjunction with the Motion to File Amended Notice of Claim is the proposed Amended Notice of Claim for 29-00604A. The amended claim alleges specific facts, such as priority date and year-round domestic use, such that if those facts are proved in this case, they would entitle the Wells to the earlier priority date and water for domestic uses. Also, the *Skeem Decree* sets forth an

additional factual basis for the claimed priority date and claim for year-round domestic use of water. *See e.g., Exhibit A to Affidavit of Josephine P. Beeman.* Finally, the Affidavit of R. Scott Wells also sets forth his knowledge of the facts underlying his claim for year-round domestic use of water. *See e.g., Affidavit of R. Scott Wells ¶ 7.* Together, the above detailed facts, if established, would support the issuance of a water right decree for 29-00604A with the priority date and year-round domestic use set out in the amended notice of claim.

CONCLUSION

Based on the foregoing, Wells respectfully request that their Motion to Amend Claim for water right no. 29-00604A be granted.

DATED this 20th day of April, 2004.


JOSEPHINE P. BEEMAN

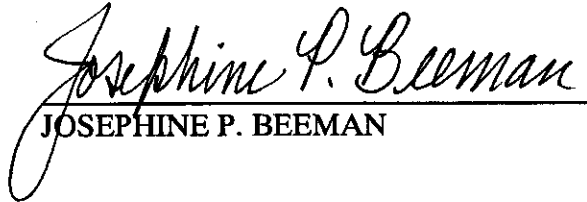
CERTIFICATE OF SERVICE

The undersigned certifies that on the 20th day of April 2004, a true and correct copy of the within document was sent to the following person(s) by U. S. Mail:

IDWR Document Depository
P. O. Box 83720
Boise, ID 83720-0098

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

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



JOSEPHINE P. BEEMAN