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April 23, 2004

Diana Delaney
Clerk of the SRBA Court
253 Third Avenue North
Twin Falls, ID 83301

Re: SRBA Filings to Establish Water Rights Related to Turner Pond
Motion to File Late Objections in SRBA Subcase Nos. 65-4213A
and 65-4214; and Motions to File Late Notices of Claim in SRBA
Subcase Nos. 65-4213B, 65-4213C, and 65-4214A

Dear Diana:

As noted below, we hand delivered 12 original documents for filing and lodging with the SRBA court today (seven motions, four affidavits, and a memorandum in support of the motions). Six additional copies of the affidavits and the memorandum will be provided by courier on Monday, April 26, so that each of the seven motions will have a copy of the memorandum and a complete set of affidavits.

All of the documents relate to water rights which are either adjacent to or are claimed for an historic pond on an unnamed stream tributary to Lake Fork Creek in the Payette Adjudication. Locally, the pond is known as Turner Pond.

1. Standard Form 4 Motion to File Late Notice of Claim 65-4213B with
SRBA Notice of Claim 65-4213B attached (filed by Harts and Witt)
2. Standard Form 4 Motion to File Late Notice of Claim 65-4213C with
SRBA Notice of Claim 65-4213C attached (filed by Witt)
3. Standard Form 4 Motion to File Late Notice of Claim 65-4214A with
SRBA Notice of Claim 65-4214A attached (filed by Harts and Witt)
4. Motion for Leave to File Late Objections to 65-4213A and 65-4214 with
Standard Form 1 objection to 65-4213A attached (filed by Harts)
5. Motion for Leave to File Late Objections to 65-4213A and 65-4214 with
Standard Form 1 objection to 65-4213A attached (filed by Witt)

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6. Motion for Leave to File Late Objections to 65-4213A and 65-4214 with Standard Form 1 objection to 65-4214 attached (filed by Harts)
7. Motion for Leave to File Late Objections to 65-4213A and 65-4214 with Standard Form 1 objection to 65-4214 attached (filed by Witt)
8. Affidavit of Marchelle D. Hart
9. Affidavit of Verla Witt
10. Affidavit of Norman C. Young
11. Affidavit of Josephine P. Beeman
12. Memorandum In Support of Motions To File Late Notices Of Claim (65-4213B, 65-4213C, 65-4214A), and Motion For Leave To File Late Objections (65-4213A, 65-4214)

We appreciate your assistance. Please call if you have any questions.

Sincerely,

BEEMAN & ASSOCIATES, P.C.


Josephine P. Beeman

JPB:ja

Enclosures

cc w/ enc: State of Idaho
U. S. Department of Justice
Candice McHugh, IDWR
James C. Heckathorn
Faustino Ramos
Dorothy A. Bowker & John R. Bowker
Dorothy A. and John S. Bowker
Norman C. Young, ERO Resources
Daryl and Mickey Hart
Richard A Cummings
Verla Witt

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Attorneys for Daryl and Marchelle D. Hart
and Verla Witt

**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. 65-4213A, 65-4213B, 65-4213C,
	) 65-4214, and 65-4214A
Case No. 39576	)
	) MEMORANDUM IN SUPPORT OF
	) MOTIONS TO FILE LATE NOTICES OF
	) CLAIM (65-4213B, 65-4213C, 65-4214A),
	) AND MOTION FOR LEAVE TO FILE
	) LATE OBJECTIONS (65-4213A, 65-4214)

Daryl and Marchelle D. Hart and Verla Witt (hereinafter Harts and Witt, respectively) by and through their counsel of record Josephine P. Beeman, Beeman & Associates, P.C., submit this memorandum in support of the following motions:

- Motion to File Late Notice of Claim 65-4213B, filed by Harts and Witt;
- Motion to File Late Notice of Claim 65-4213C, filed by Witt;
- Motion to File Late Notice of Claim 65-4214A, filed by Harts and Witt; and
- Motion for Leave to File Late Objections to 65-04213A and 65-04214, filed by Harts and Witt.

PROCEDURAL BACKGROUND

A. Water rights 65-4213 and 65-4213A

January 21, 1986, water right 65-4213 was decreed in the Payette Adjudication to James C. and/or Bernice Heckathorn with priority date May 1, 1959 for 20 acres of irrigation from an unnamed stream tributary to Lake Fork Creek. *Affidavit of Josephine P. Beeman, Exhibit B.*

November 3, 1988, James C. Heckathorn filed Notice of Claim 65-4213A for seven acres of 65-4213 in the Snake River Basin Adjudication (SRBA). *Affidavit of Josephine P. Beeman, Exhibit C.*

December 8, 1999, the Idaho Department of Water Resources (IDWR) filed a director's report for 65-4213A with the SRBA court. IDWR did not recommend any other portion of 65-4213.

June 9, 2000, the United States Bureau of Reclamation (Reclamation) filed a "Separate Streams" objection to 65-4213A.

July 14, 2003, IDWR filed an amended director's report for 65-4213A, indicating name and address change from James C. Heckathorn to Faustino Ramos.

The Reclamation objection was resolved January 12, 2004, by the filing of a Standard Form 5 settlement with the SRBA court.

As of April 23, 2004, the SRBA docket sheet did not indicate the entry of a Special Master's Report and Recommendation for 65-4213A.

B. Water right 65-4214

January 21, 1986, water right 65-4214 was decreed in the Payette Adjudication to James C. and/or Bernice Heckathorn with priority date April 15, 1928 for 19 acres of irrigation from an unnamed stream tributary to Lake Fork Creek. *Affidavit of Josephine P. Beeman, Exhibit D.*

November 1, 1988, John S. and Dorothy A. Bowker filed a Notice of Claim to 65-4214 in the SRBA.¹

December 8, 1999, IDWR filed a director's report for 65-4214 with the SRBA court.

June 9, 2000, Reclamation filed a "Separate Streams" objection to 65-4214. The Reclamation objection was resolved by hearing before SRBA Special Master Cushman on January 27, 2004 which resulted in an order to add the "Separate Streams" settlement language to 65-4214.

As of April 23, 2004, the SRBA docket sheet does not indicate the entry of the Special Master's Report and Recommendation for 65-4214.

FACTUAL BACKGROUND

This case seeks to protect and confirm water rights in Turner Pond. Turner Pond is a three acre pond which spans the unnamed stream downstream from the point of diversion for 65-4213 and 65-4214 that was decreed in the Payette Adjudication. Turner pond is also adjacent to the irrigated lands described for 65-4213 and 65-4214 in the Payette Adjudication. Historically Turner pond has been used for year round recreational, aesthetic, and wildlife purposes and seasonal irrigation for one homeowner. Based on this historical beneficial use of water in and from Turner pond, the owners of the Harts and Witt properties have acquired vested water rights to the pond.

The late claims and late objections are necessary to ensure that the Turner Pond water rights are protected and confirmed in the SRBA. Specifically, late claims 65-4213B and 65-4214A and objections to 65-4213A and 65-4214 are necessary to confirm the existing water

¹ Water right 65-4214 remains in the names of John S. and Dorothy A. Bowker. John S. Bowker died a number of years ago; Dorothy A. Bowker died in April 2004. After the passing of John S. Bowker, the record owner of the property served by 65-4214 was changed to John R. Bowker (son) and Dorothy A. Bowker (see *Affidavit of Josephine P. Beeman, Exhibit E*, certified copy of recorded deed). The ownership of 65-4214 has never

rights for Turner pond. In addition, late claim 65-4213C and the objection to 65-4213A are necessary to confirm an irrigation right from Turner Pond for the Witt property. The properties that underlie this pond are presently owned by the Harts and Witt, as well as the Bowker family. The late claims are based on accomplished transfers of portions of 65-4213 and 65-4214, predating November 19, 1987.

LEGAL STANDARD

Pursuant to Administrative Order 1 (AO1), a motion to file a late notice of claim is reviewed under the criteria of I.R.C.P. 55(c). *AO1 § 4(d)(2)(d)*. 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:

- a. Whether the default was willful;
- b. Whether setting aside the judgment would prejudice the opponent; and
- c. 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. The above standard is also applied to a motion for late objection. *Id. at 6.*

I. THE FAILURE TO FILE CLAIMS AND OBJECTIONS WAS NOT WILLFUL.

Based upon the above legal standard, good cause exists for granting the motions for late claims and late objections. As for the first element, the Harts and Witt’s failure to claim the unclaimed portion of decreed right 65-4213 was not willful. In fact, the Harts and Witt had no

been changed. With the understanding there is an ongoing estate proceeding, we are using the term ‘Bowker family’

knowledge of a water right associated with their properties before February 2004, despite their diligence in working with IDWR and neighbors to confirm a water right for a pond on their properties. *Affidavit of Marchelle D. Hart* ¶ 4; *Affidavit of Verla Witt* ¶ 4.

The Harts purchased 2.5 acres of property in Valley County near McCall, Idaho in June 2000. *Affidavit of Marchelle D. Hart, Exhibit A*. Witt purchased 4.56 acres neighboring the Harts in November 2002. *Affidavit of Verla Witt, Exhibit A*. Portions of both properties are covered by a very old pond; this pond was the main attraction for the Harts and Witt in their respective decisions to purchase the properties. *Affidavit of Marchelle D. Hart*, ¶ 2, *Affidavit of Verla Witt* ¶ 2. The pond spans the streambed of an unnamed stream, and it fills and empties on an annual basis. The Harts understood that in order to preserve and protect the pond, the pond needed a water right. An advertisement for the Harts' property claimed "view of the pond and water rights." *Affidavit of Marchelle D. Hart*, ¶ 2. The pond is known locally as Turner Pond. Turner Pond dates from the 1950s or 1960s when the properties of the Bowker family, Harts and Witt were owned and farmed by members of the Heckathorn family.

After purchasing their property, the Harts met with IDWR a number of times regarding the pond. In their first meeting in 2002, the Harts learned that IDWR had no record of a water right for Turner Pond. They also learned that they could establish a 2002 priority date with a water right application, but not an historic priority date. *Id* ¶ 5. In response to this information, the Harts and their then-neighbors on the pond, Michael and Jenna Bailey, filed an application for permit to appropriate the public waters of the State of Idaho at IDWR. *Id* ¶ 5. This application was eventually withdrawn. The Baileys thereafter sold their property to Verla Witt in November 2002. *Affidavit of Verla Witt, Exhibit A*. The Harts and Witt then visited IDWR and were told again that there was no water right record for the pond and no means of establishing an historic priority date for the pond, independent of SRBA claim 65-4214, an

to indicate present and future title interests in 65-4214 and the underlying property.

irrigation right claimed by a third neighbor bordering the pond, the Bowker family, whose property was across the unnamed stream from Harts and Witt. *Affidavit of Marchelle D. Hart* ¶ 5; see also *Affidavit of Josephine P. Beeman, Exhibit E*. In response to this new information, the Harts and Witt and the Bowker family discussed the possibility of deeding part of 65-4214 to a water users' association to be formed by the landowners whose homes border the pond. *Id.* ¶ 5, *Affidavit of Verla Witt* ¶ 5. This portion of 65-4214 would then be used by the water users' association to preserve and protect Turner Pond.

These discussions regarding the transfer of a portion of 65-4214 to the pond eventually resulted in the hiring of water rights counsel in early 2004. *Affidavit of Marchelle D. Hart* ¶ 7 and 8; *Affidavit of Verla Witt* ¶ 11. It was not until water rights counsel conducted an investigation, that the property owners underlying Turner Pond learned that water right 65-4213, decreed in the Payette Adjudication, listed the Harts and Witt properties as part of the place of use for irrigation. *Affidavit of Marchelle D. Hart* ¶ 8; *Affidavit of Verla Witt* ¶ 8. At this same time, it became clear that the record owners of the properties in January 2001 – the Harts and Jeff and Kimberly Clark (prior owners to Baileys/Witt) *Affidavit of Verla Witt* ¶ 2 and *Exhibit C* – had not received notice from IDWR that their properties were part of a place of use for decreed right 65-4213 and that a portion of 65-4213 remained unclaimed in the SRBA. *Affidavit of Marchelle D. Hart* ¶ 8; *Affidavit of Verla Witt* ¶ 8. The names of these record property owners do not appear on the affidavit for IDWR's Second Round Service of Commencement Notice, Basin 65, Parts I, II & III, filed with the SRBA court on May 29, 2001. "*Affidavit of Danni M. Smith re: Service of Second Round Service of Commencement Notice, Basin 65, Parts I, II & III,*" *Exhibit A to Affidavit of Josephine P. Beeman*.

The significance of no "Second Round Service" to the Harts and the prior owners of the Witt property cannot be overstated. Due to the lack of notice, these property owners did not know they already had water rights for their properties, had a right to file SRBA claims for those

water rights, and could lose those water rights if not claimed in the SRBA. During this same time period, these property owners or their successors in interest were actively working with IDWR and questioning IDWR about water rights for their properties. Moreover, the SRBA Court's Second Amended Second Round Service Order, dated January 14, 2000, part III.A.2. states, "Unclaimed portions of water rights will be identified by comparing split claims with the water right record to determine if all of the water right record was claimed. ... To make this determination IDWR will identify the place of use for the unclaimed portion of the water right record and add it to the list described in part IV.A." Part IV.A. states, "IDWR will compile the places of use identified in part III. The records of the county recorder's office will then be checked to determine the name and address of each person with a current record interest in the land shown in the compiled list. A list of owners will be developed which will show all persons with a record interest in the places of use shown on the compiled list." Contrary to the SRBA Court's order, although 65-4213A was only partially claimed, the record owners of the unclaimed portion of 65-4213 never received Second Round Service. *"Affidavit of Danni M. Smith re: Service of Second Round Service of Commencement Notice, Basin 65, Parts I, II & III," Exhibit A to Affidavit of Josephine P. Beeman.*

Thus, despite diligent efforts by the Harts and Witt to investigate and establish a water right to preserve and protect the pond overlying their properties, it was not until February 2004 that the Harts and Witt found out that there was a water right of record which included their properties, and also found out that a portion of that water right of record, including their properties, remained unclaimed in the SRBA. Upon discovery of an unclaimed water right associated with their properties, the Harts and Witt moved diligently to confirm a water right for Turner Pond, as well as an irrigation right for Witt from the pond. *Affidavit of Marchelle D. Hart ¶ 11-14; Affidavit of Verla Witt ¶ 11 and 12.*

March 5, 2004, the Harts met with Norman C. Young, a licensed engineer and land surveyor, to discuss the detailed information necessary to document accurately the water rights for Turner Pond. This information included the following: Turner Pond covers about three acres, including the stream bed of an unnamed stream which flows into and fills the pond behind a five-foot high dike that extends the length of a football field at the lower end of the pond. The pond overlies the properties of the Harts, Witt and the Bowker family. The pond fills during the spring run-off and then empties gradually by late fall because the flow of the unnamed stream generally ceases by August 1. The pond level is maintained by check boards and any flow over those check boards ceases by August. Faustino Ramos owns property immediately downstream of Turner Pond. The Ramos property also underlies a portion of the dike for Turner Pond, adjacent to Verla Witt's property.

Mr. Young's investigation of the IDWR and SRBA files for 65-4213, 65-4213A, and 65-4214, and his meeting with the Harts resulted in the following conclusions: The historic conversion of seven irrigated acres was the basis for the water right for Turner Pond because the seven acres provided 0.14 cubic feet per second (cfs) of diversion to storage which corresponded to Turner Pond's normal fill in 30 days during the spring. In addition, three acres (of the seven acres), based upon an acre-for-acre change from irrigation, supported the water for evaporation from the surface of the pond, and the diverted volume associated with the remaining four irrigated acres provided the water to initially fill the pond each year (approximately eight acre-feet). This was based upon Mr. Young's understanding that the historic irrigation use was for hay, pasture, and other high-water use crops, the reservoir (Turner Pond) is located in an area having a high water table, and the reservoir level is allowed to recede reducing the surface area of the pond as the stream flow curtails in late summer, fall, and winter. *Affidavit of Norman C. Young ¶ 4.*

II. PREJUDICE TO OPPONENTS, IF ANY, IS OUTWEIGHED BY THE MANIFEST INJUSTICE TO HARTS AND WITT IF THEY ARE NOT ALLOWED TO PROCEED WITH THEIR CLAIMS.

Allowing the Harts and Witt to proceed with SRBA claims, and related objections, for water rights associated with their properties far outweighs any possible prejudice to opponents. The only people directly affected by the Harts and Witt claims for 65-4213B, 65-4213C, and 65-4214A and the Harts and Witt objections to 65-4213A and 65-4214 are Faustino Ramos, current claimant of 65-4213A, and the Bowker family, current claimant for 65-4214 and owner of land underlying Turner Pond.

Any prejudice to Faustino Ramos arises from his SRBA claim 65-4213A. Neither the late claims for 65-4213B and 65-4213C nor the late objections to 65-4213A directly preclude the decree of 7 acres of irrigation under 65-4213A to Faustino Ramos. First, 65-4213A, 65-4213B, and 65-4213C together account for only 13 acres of the original 20 acre right decreed for 65-4213 in the Payette Adjudication. Second, 65-4213A, 65-4213B, and 65-4213C each involve accomplished transfers and thus each claim bears scrutiny under the accomplished transfer statute, Idaho Code § 42-1425.² The objections to 65-4213A and the late claims for 65-4213B and 65-4213C cite this applicable law. Under that law, the Harts and Witt have a right to ask that 65-4213A's new point of diversion from the unnamed stream -- just below the dike for Turner Pond -- be conditioned to prevent diversion when water is not legally or physically available at 65-4213's original point of diversion upstream of the pond. The unnamed stream is dry by August in most years and Turner Pond's storage right is not a source of water for 65-4213A.

² The original decree of 65-4213 in the Payette Adjudication was for 20 acres of irrigation from a point of diversion upstream of Turner Pond. Mr. Ramos, through 65-4213A, claims 7 of those 20 acres at a new place of use and new point of diversion downstream of Turner Pond. The Hart and Witt claim for 65-4213B addresses the historic conversion of 4 irrigated acres to year round use in Turner Pond with a new point of diversion at the dike for Turner Pond; 65-4213C claims 2 irrigated acres at the original place of use, with a new point of diversion from Turner Pond.

The late claims for 65-4213B and 65-4214A directly affect the Bowker family because these two claims confirm the historic water rights for Turner Pond and specifically identify the Bowker family land which underlies Turner Pond. The Bowker family has been directly involved in the work to confirm an historic water right for Turner Pond and, despite the family's recent loss of Dorothy Bowker, has expressed its continued support for late claims 65-4213B and 65-4214A. The late objection to 65-4214 acknowledges that 3 of the irrigated acres originally decreed with 65-4214 in the Payette Adjudication were historically converted to a water right for Turner Pond.

The Harts and Witt motions are filed before a Special Masters Report and Recommendation has been issued for either 65-4213A or 65-4214. Both Mr. Ramos' water right claim 65-4213A and the Bowker family's water right claim 65-4214 were recommended to the SRBA court in December 1999, but neither has been decreed because Reclamation's objection to each was only settled in January 2004.

To the extent any prejudice exists, it must be weighed against the manifest injustice to the Harts and Witt if they are not allowed to proceed to claim and protect vested water rights based on a water right decreed to their properties. As stated above, despite diligent efforts to investigate and confirm historic water rights for their properties (the Turner Pond water rights and the irrigation from Turner Pond), the Harts and Witt did not have knowledge of water right 65-4213, its relationship to the SRBA and SRBA claim 65-4213A until late February 2004. Since that time, the Harts and Witt have included 65-4213 in their continued efforts to confirm and establish water rights for Turner Pond, moving diligently and directly in the SRBA, just as they would have proceeded had they received Second Round Service three years ago in January 2001. *Affidavit of Marchelle D. Hart* ¶ 9; *Affidavit of Verla Witt* ¶ 10.

III. THE SPECIFIC FACTS ALLEGED ESTABLISH A MERITORIOUS DEFENSE.

The following detailed facts establish a meritorious defense.

SRBA Claim 65-4213B for Turner Pond: The priority date (May 1, 1959) and the source of water supply (unnamed stream tributary to Lake Fork Creek) are based on the decree of 65-4213 in the Payette Adjudication. *See Affidavit of Josephine P. Beeman, Exhibit B.* The point of diversion on the unnamed stream is the SE1/4SW1/4, Section 34, T18N, R3E. *Affidavit of Marchelle D. Hart ¶ 3; Affidavit of Verla Witt ¶ 3; and the map attached to SRBA Claim 65-4213B.* The surface area of Turner Pond is 3 acres. *See Affidavit of Marchelle D. Hart ¶ 3; Affidavit of Verla Witt ¶ 3; Affidavit of Norman C. Young ¶ 4.* The volume of Turner Pond is 8 acre feet and the rate of diversion into Turner Pond from 65-4213B is .08 cfs. *See Affidavit of Norman C. Young ¶ 4.* The year-round purposes of use are diversion to storage and storage for recreation, aesthetic, and wildlife uses. *See Affidavit of Marchelle D. Hart ¶ 2; Affidavit of Verla Witt ¶ 2.* Turner Pond is located in the SE1/4SW1/4, Section 34, T18N, R3E, and the three parcels of land underlying Turner Pond are owned separately by Harts, Witt and Bowker family. *Affidavit of Marchelle D. Hart, Exhibit A; Affidavit of Verla Witt, Exhibit A; Affidavit of Josephine P. Beeman, Exhibit E; and the map attached to SRBA Claim 65-4213B.* The change in season of use to year-round for storage purposes does not enlarge use of water under right 65-4213B because the annual diverted volume and consumptive use are not increased from the prior irrigation use. *Affidavit of Norman C. Young ¶ 4.* The water supply for the pond is provided from the unnamed stream under a combination of use under 65-4213B and 65-4214A; right number 65-4214A provides the water for evaporation from the surface of the pond; right number 65-4213B provides the water to initially fill the pond each year. *See Affidavit of Norman C. Young ¶ 4, Affidavit of Marchelle D. Hart ¶ 13; Affidavit of Verla Witt ¶ 11.* The diversion facilities for Turner Pond and Turner Pond itself existed and were in use prior to November 19, 1987. *Affidavit of Marchelle D. Hart ¶ 3; Affidavit of Verla Witt ¶ 3.*

SRBA Claim 65-4213C: The priority date (May 1, 1959), the source of water supply (unnamed stream tributary to Lake Fork Creek), the purpose of use for irrigation, the season of use from 4/15 to 10/31, and the place of use for 2 acres of irrigation are based on the decree of 65-4213 in the Payette Adjudication. *See Affidavit of Josephine P. Beeman, Exhibit B.* The point of diversion is a pump in Turner Pond and is located in the SE1/4SW1/4, Section 34, T18N, R3E. *Affidavit of Marchelle D. Hart ¶ 3; Affidavit of Verla Witt ¶ 3; and the map attached to SRBA Claim 65-4213C.* The rate of diversion from Turner Pond for 65-4213C is .06 cfs for the irrigation of 2 acres of land in the SE1/4SW1/4, Section 34, T18N, R3E. *Affidavit of Norman C. Young ¶ 4.* The land at the place of use is owned by Verla Witt. *Affidavit of Verla Witt, Exhibit A; and the map attached to SRBA Claim 65-4213B.* The pump in Turner Pond existed and the use of water from Turner Pond for irrigation was occurring prior to November 19, 1987. *Affidavit of Marchelle D. Hart ¶ 3; Affidavit of Verla Witt ¶ 3..*

SRBA Claim 65-4214A: The priority date (April 15, 1928) and the source of water supply (unnamed stream tributary to Lake Fork Creek) are based on the decree of 65-4214 in the Payette Adjudication. *See Affidavit of Josephine P. Beeman, Exhibit D.* The point of diversion on the unnamed stream is the SE1/4SW1/4, Section 34, T18N, R3E. *See Affidavit of Marchelle D. Hart ¶ 3; Affidavit of Verla Witt ¶ 3; and the map attached to SRBA Claim 65-4214A.* The surface area of Turner Pond is 3 acres. *See Affidavit of Marchelle D. Hart ¶ 3; Affidavit of Verla Witt ¶ 3; Affidavit of Norman C. Young ¶ 4.* The volume of Turner Pond is 8 acre feet and the rate of diversion into Turner Pond from 65-4214A is .06 cfs. *Affidavit of Norman C. Young ¶ 4.* The year-round purposes of use are diversion to storage and storage for recreation, aesthetic, and wildlife uses. *See Affidavit of Marchelle D. Hart ¶ 2; Affidavit of Verla Witt ¶ 2.* Turner Pond is located in the SE1/4SW1/4, Section 34, T18N, R3E, and the three parcels of land underlying Turner Pond are owned separately by Harts, Witt, and Bowker family. *Affidavit of Marchelle D. Hart, Exhibit A; Affidavit of Verla Witt, Exhibit A; Affidavit of Josephine P. Beeman, Exhibit E;*

and the map attached to SRBA Claim 65-4213B. The change in season of use to year-round for storage purposes does not enlarge use of water under right 65-4214A because the annual diverted volume and consumptive use are not increased from the prior irrigation use. *Affidavit of Norman C. Young* ¶ 4. The water supply for the pond is provided from the unnamed stream under a combination of use under 65-4213B and 65-4214A; right number 65-4214A provides the water for evaporation from the surface of the pond; right number 65-4213B provides the water to initially fill the pond each year. See *Affidavit of Norman C. Young* ¶ 4, *Affidavit of Marchelle D. Hart* ¶ 13; *Affidavit of Verla Witt* ¶ 11. The diversion facilities for Turner Pond existed and Turner Pond was in use prior to November 19, 1987. *Affidavit of Marchelle D. Hart* ¶ 3; *Affidavit of Verla Witt* ¶ 3.

The objection to 65-4213A: The point of diversion is downstream of Turner Pond. *Affidavit of Marchelle D. Hart* ¶ 6; *Affidavit of Verla Witt* ¶ 6. The unnamed stream ceases to flow during the summer. *Affidavit of Marchelle D. Hart* ¶ 3; *Affidavit of Verla Witt* ¶ 3. Diversions from the unnamed stream below Turner Pond would injure the water rights for Turner Pond when water flow is not present at the original point of diversion for 65-4213 above Turner Pond because the water supply from the unnamed stream will not support two ponds. *Affidavit of Marchelle D. Hart* ¶ 11; *Affidavit of Verla Witt* ¶ 10.

The objection to 65-4214: Three acres of this irrigation right and .06 cfs were historically converted to a water right for Turner Pond. See *Affidavit of Marchelle D. Hart* ¶ 7; *Affidavit of Verla Witt* ¶ 7; *Affidavit of Norman C. Young* ¶ 4. The Bowker family supports and does not object to confirming that these three acres are part of a vested water right for Turner Pond based on an accomplished transfer of 65-4214. See *Affidavit of Marchelle D. Hart*.

CONCLUSION

In this case, the elements to prove "good cause" are satisfied. Together, the above detailed facts, if established, would support the issuance of water right decrees for vested rights in and from Turner Pond based on accomplished transfers of the "as yet unclaimed" portions of 65-4213, represented by SRBA claims 65-4213B and 65-4213C, as well as the issuance of a water right decree for a vested right in Turner Pond based on an accomplished transfer of a portion of SRBA claim 65-4214, represented by a new claim 65-4214A. The necessary conditions on SRBA claim 65-4213A, based on the accomplished transfer of the point of diversion and place of use decreed to 65-4213 in the Payette Adjudication, further protect these vested rights in and from Turner Pond, in accordance with the analyses required in Idaho Code 42-1425.

For the foregoing reasons, the Court should grant the Harts' and Witt's motions to file late claims and late objections.

RESPECTFULLY SUBMITTED this 23rd day of April 2004.

BEEMAN & ASSOCIATES, P.C.

By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of April 2004, a true and correct copy of the foregoing document was sent to the following by the method indicated:

Idaho Department of Water Resources

Document Depository

P. O. Box 83720

Boise, Idaho 83720-0098

☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Chief, Natural Resources Division

Office of the Attorney General

State of Idaho

P. O. Box 44449

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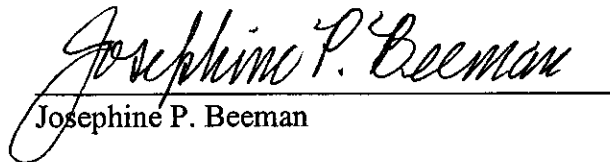
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