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DEPARTMENT OF
WATER RESOURCES

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

Case No. 39576

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) Subcase No. 45-487A
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MEMORANDUM IN SUPPORT OF
MOTION TO FILE LATE NOTICE OF
CLAIM

COMES NOW, TUGAW RANCH, the claimant in the above subcase, by and through counsel of record, and hereby files this *Memorandum in Support of Motion to File Late Claim*. Tugaw Ranch's *Motion* is further supported by the *Affidavit of Joseph E. Tugaw* (hereinafter "*Tugaw Aff.*") and the *Affidavit of Travis L. Thompson* (hereinafter "*Thompson Aff.*") filed together herewith.

INTRODUCTION

This motion concerns a previously appropriated and decreed water right which has been continuously diverted and put to beneficial use by Tugaw Ranch over the past 40 years. Unfortunately, a portion of this water right was not claimed prior to the Director's Basin 45

Report being submitted to this Court late last year. Accordingly, once Tugaw Ranch learned of the omission and mistake on its part in not filing the proper claim, Tugaw Ranch made a “good faith” effort to correct the problem by filing this motion.

FACTUAL BACKGROUND

The water rights from Dry Creek were originally decreed by the Twin Falls County District Court on May 28, 1942, *Stoner v. Willhite* (“*Stoner Decree*”). See Exhibit A to *Thompson Aff.* The Court decreed a right for 292 inches (5.84 cfs) with a priority date of March 1, 1879 to Ethel and Julia Stoner which became known as water right no. 45-487 in the records of the Idaho Department of Water Resources (“IDWR”). See *Stoner Decree* at 3-4.

Joseph E. Tugaw, owner of Tugaw Ranch, purchased portions of the Dry Creek Ranch in 1963 and 1979. See *Tugaw Aff.* at 1-2, ¶¶ 2-3. The property included appurtenant irrigation water rights from Dry Creek, including portions of water right nos. 45-487, 45-491, 45-492, 45-493, and 45-496B. See *id.* at 2, ¶ 4. With respect to water right no. 45-487, the real estate purchase agreements entered into between Mr. Tugaw and the Fullers specifically identify the amounts being transferred with the property: 48 inches (1.04 cfs) with the 1963 agreement (Ex. A to *Tugaw Aff.* at 2) and 98 inches (1.96 cfs) with the 1979 agreement (Ex. B to *Tugaw Aff.* at 1). Mr. Tugaw has diverted and used approximately 146 inches (2.92 cfs) out of Dry Creek under water right no. 45-487, with a priority date of March 1, 1879, continuously since 1963 and 1979. See *id.*, ¶ 5.

In 1974, Mr. Tugaw filed transfer no. 1762 with IDWR. See Exhibit B to *Thompson Aff.* Mr. Tugaw filed the transfer to change the place of use for water rights on his property, including water right no. 45-487. See *Tugaw Aff.* at 3, ¶ 6. Once IDWR approved the transfer, water right no. 45-487 was split into Part A and Part B. See Exhibit C to *Thompson Aff.* Thereafter, Mr.

Tugaw filed a claim in the SRBA for water right no. 45-487B in July 1989. *See Tugaw Aff.* at 3, ¶ 7. The claim was later amended in 1999 to cover the diversion rate for the remaining portions of 45-487 that had been diverted and used by Mr. Tugaw on his property. *See id.*

Due to his work schedule in the fall of 2004, Mr. Tugaw did not review the preliminary and final recommendations for his water rights out of Dry Creek in Basin 45. *See id.* at 4, ¶ 9. Mr. Tugaw later received partial decrees for his Basin 45 Dry Creek claims in May 2005 and discovered that not all of water right no. 45-487 had been recommended by IDWR. *See id.* at 4, ¶ 10. Mr. Tugaw also discovered that he had failed to file a claim for water right no. 45-487A. *See id.* at 4, ¶ 11.

STANDARD OF REVIEW

Under this Court's *AOI*, a motion to file a late notice of claim is determined pursuant to I.R.C.P. 55(c). *See AOI* § 4d(2)(d)(late claims reviewed under I.R.C.P. 55(c) criteria). The Court, therefore, applies a "good cause" standard to motions to file late notices of claim. The "good cause" standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 935 (Ct. App. 1993). The Rule 55(c) "good cause" standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

McFarland, 123 Idaho at 936; *see also Order Granting Motions to File Lat Notices of Claim* at 1 (Subcase No. 71-10886 et al., July 27, 2005).

Other jurisdictions apply similar criteria, such as: (1) proof that the default was not willful or culpable; (2) prompt action by the defaulting party to correct the default; (3) the

existence of a meritorious defense; (4) an absence of prejudice to the opponent; (5) whether the default resulted from a good faith mistake in following a rule of procedure; (6) the nature of the defendant's explanation for defaulting; (7) the amount in controversy; (8) the availability of effective alternative sanctions; and (9) whether entry of a default would produce a harsh or unfair result. *See Memorandum Decision and Order on Challenge; Order of Recommitment* at 6 (Subcase No. 47-14633 et al., March 22, 2005).

Finally, in determining whether to grant a motion under Rule 55(c), the Idaho Court of Appeals has instructed courts to "examine each case in light of the unique facts and circumstances presented." *Baldwin v. Baldwin*, 114 Idaho 525, 527 (Ct. App. 1988). In addition, "[j]udgments by default are not favored, and the general rule in doubtful cases is to grant relief from default in order to reach a judgment on the merits." *Johnson v. Pioneer Title Co. of Ada County*, 104 Idaho 727, 732 (Ct. App. 1983).

ARGUMENT

I. TUGAW RANCH MEETS THE "GOOD CAUSE" STANDARD FOR FILING A LATE NOTICE OF CLAIM

The central question in Tugaw Ranch's *Motion* concerns a previously decreed water right, and whether that right was completely claimed and ultimately decreed in the SRBA. As described in greater detail below, Tugaw Ranch mistakenly failed to file a claim for water right no. 45-487A. Moreover, due to the mistake, it is apparent that approximately 0.56 cfs of water right no. 45-487, previously decreed by the Twin Falls County District Court in the 1942 *Stoner Decree*, has gone unclaimed in the SRBA, despite its continuous diversion and use by Tugaw Ranch. Accordingly, Tugaw Ranch seeks an order from this Court granting its motion to file a late notice of claim.

A. Water Right No. 45-487 in the Stoner Decree

On May 28, 1942, the Twin Falls County District Court entered a decree for water right claims on Dry Creek in Basin 45 in the case of *Willhite v. Stoner*. See Exhibit A. The *Stoner Decree* awarded Ethel and Julia Stoner 292 inches (5.84 cfs) from Dry Creek with a March 1, 1879 priority date. See *Stoner Decree* at 4 (Ex. A to *Thompson Aff.*). The decreed place of use included land that has since been acquired by Mr. Tugaw (E1/2W1/2, W1/2E1/2, Section 1, Township 12 South, Range 19 East). See *Stoner Decree* at 3 (Ex. A to *Thompson Aff.*). Accordingly, after the *Stoner Decree* in 1942, the right was described as follows:

<u>Water Right No.</u>	<u>Diversion Rate</u>	<u>Priority Date:</u>	<u>Place of Use:</u>
45-487	5.84 cfs	March 1, 1879	Ex. A to <i>Thompson Aff.</i> at 3-4

B. Water Right No. 45-487 After Transfer No. 1762

After Mr. Tugaw's transfer application no. 1762 was approved in 1974, IDWR apparently split water right no. 45-487 into two parts, A & B. Part A then consisted of 4.88 cfs of the original water right decreed to Ethel and Julia Stoner, and Part B then consisted of 0.96 cfs that was split pursuant to the transfer. See Exhibit C to *Thompson Aff.*

<u>Water Right No.</u>	<u>Diversion Rate</u>	<u>Priority Date:</u>	<u>Place of Use:</u>
45-487A	4.88 cfs	March 1, 1879	Ex. C to <i>Thompson Aff.</i>
45-487B	0.96 cfs	March 1, 1879	Ex. C to <i>Thompson Aff.</i>
Total	5.84 cfs		

C. Water Right No. 45-487 in the SRBA

Mr. Tugaw originally filed a claim for water right no. 45-487B in July 1989. See *Tugaw Aff.* at 3, ¶ 7. The claim was later amended in 1999 to cover the diversion rate for the remaining portion of water right no. 45-487 that was used on Mr. Tugaw's property. See *id.* Eventually,

this Court decreed water right no. 45-487B for 2.08 cfs. *See* Exhibit D to *Thompson Aff.* Mr. Tugaw did not understand whether he needed to file a separate claim for the portion of water right no. 45-487A that was still appurtenant to and used on his property. *See Tugaw Aff.* at 3-4, ¶ 8. At some point between the approval of the transfer in 1974 and the issuance of the partial decrees by this Court in 2005, IDWR apparently split the water right again into another part, Part C, which was ultimately decreed for 3.20 cfs to Darrell & Patricia Funk by this Court. *See* Exhibit E to *Thompson Aff.* Mr. Tugaw recently discovered that he had not filed a claim for the portion of water right no. 45-487A that is appurtenant to his property, and that IDWR had not recommended the entire amount of water right no. 45-487 that was previously decreed in the *Stoner Decree*. *See Tugaw Aff.* at 4, ¶¶ 10-11.

<u>Water Right No.</u>	<u>Diversion Rate</u>	<u>Priority Date:</u>	<u>Place of Use:</u>
45-487A	Not Claimed		
45-487B	2.08 cfs	March 1, 1879	Ex. C to <i>Tugaw Aff.</i>
45-487C	3.20 cfs	March 1, 1879	Ex. D to <i>Thompson Aff.</i>
Total	5.28 cfs (less 0.56 cfs from <i>Stoner Decree</i> and after T. 1762)		

Accordingly, Mr. Tugaw filed this *Motion for Notice of Late Claim* in order to properly claim the amount of water under water right no. 45-487A that is appurtenant to his property and which has gone unclaimed in the SRBA (0.56 cfs).

D. Basis For Motion for Notice of Late Claim

This Court requires a movant to meet the “good cause” standard set forth in I.R.C.P. 55(c) in order to file a late notice of claim in the SRBA. The standard into account three factors: (1) whether the default was willful; (2) whether setting aside the judgment would prejudice the opponent; and (3) as with a Rule 60(b) motion, whether a meritorious position has been

presented. *See Order Granting Motions to File Lat Notices of Claim* at 1 (Subcase No. 71-10886 et al., July 27, 2005). Tugaw Ranch meets the standard required by this Court.

First, Mr. Tugaw's affidavit establishes that the failure to file a separate claim for water right no. 45-487A was not "willful." Mr. Tugaw originally filed a claim for water right no. 45-487B and later amended that claim, but he did not understand the need to file a separate claim for the remaining portion of water right no. 45-487A that was appurtenant to and used on his property. *See Tugaw Aff.* at 3-4, ¶¶ 7-8. In addition, the facts demonstrate that Mr. Tugaw became busy with his work schedule in the fall and winter of 2004/05 and that he mistakenly failed to file a separate claim before the Director's Report for Basin 45 was submitted to this Court. *See id.* at 4, ¶ 9. In failing to file the separate claim, or pleading, Mr. Tugaw inadvertently missed the deadline for the Basin 45 Director's Report that was presented to this Court last year. Such a mistake of fact may be recognized as the type of "excusable neglect" required to set aside a default judgment under Idaho's rules of procedure. *See Stirm v. Puckett*, 107 Idaho 1046, 1049 (Ct. App. 1985) ("under some circumstances the failure to file a proper pleading may be treated both as a mistake and as excusable neglect.").

Once Mr. Tugaw learned of the mistake that the water decreed by this Court in May 2005 did not match up with the amount under the *Stoner Decree* and what had historically been diverted and used on his property, he immediately contacted and met with Doug Jones at IDWR to discuss the issue in June 2005. *See id.* at 4, ¶ 11. In other words, Mr. Tugaw made a "good faith" effort to correct his mistake in not filing a separate claim for water right no. 45-487A. Accordingly, based upon the facts and circumstances surrounding Mr. Tugaw's mistake in not filing a separate claim for water right no. 45-487A, it is clear that the default was not "willful."

In addition to meeting the “good cause” standard, Tugaw Ranch has a “meritorious defense” in that the water decreed by this Court does not reflect the actual amount of water appropriated, previously decreed, and that has been used under water right no. 45-487. Based upon a review of the history of water right no. 45-487, it is clear that the right was originally decreed for 292 inches (5.84 cfs) in the *Stoner Decree*. See Ex. A to *Thompson Aff.* Second, the full amount of this right was recognized by IDWR after transfer no. 1762 was approved in 1974 (Part A for 4.88 cfs and Part B for 0.96 cfs). See Ex. B to *Thompson Aff.* Next, it is obvious IDWR did not recommend the entire water right in the SRBA (45-487B for 2.08 cfs and 45-487C for 3.20 cfs) and no claims were filed for any water pursuant to water right no. 45-487A. There is nothing in IDWR’s records that indicates any portion of water right no. 45-487 was ever forfeited or abandoned. To the contrary, the affidavit of Mr. Tugaw explains that, at least on his property, 146 inches (2.92 cfs) under water right no. 45-487 have been continuously diverted and used every year since 1963 and 1979. See *Tugaw Aff.* at 2-3, ¶ 5.¹ Coupled with the evidence of the water already decreed by this Court, water right nos. 45-487B (2.08 cfs) and 45-487C (3.20 cfs), it is clear that all of the water appropriated and originally decreed by *Stoner Decree* (5.84 cfs) has been continuously diverted and used through 2005. Accordingly, since 0.56 cfs of water right no. 45-487 (as originally decreed and historically used) remains unclaimed and decreed by this Court, Tugaw Ranch has a “meritorious defense” in filing its *Motion for Late Notice of Claim*.

CONCLUSION

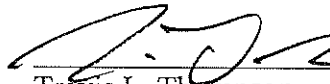
Tugaw Ranch seeks to file a late notice of claim for water right no. 45-487A. The evidence set forth in the *Affidavit of Joseph E. Tugaw* demonstrates that Mr. Tugaw mistakenly

¹ This amount equals the portions of water right no. 45-487 that were acquired by Mr. Tugaw when he purchased the two parcels of his property; 48 inches in the January 10, 1963 Agreement (See Ex. A to *Tugaw Aff.* at 2) and 98 inches in the April 7, 1979 Agreement (See Ex. B to *Tugaw Aff.* at 1).

failed to file a timely claim for water right no. 45-487A and that this mistake was not “willful.” Moreover, the evidence demonstrates that all of the water previously recognized for water right no. 45-487 in the *Stoner Decree*, including water that has been continuously diverted and used by Tugaw Ranch, has not been recommended by IDWR in SRBA. Therefore, Tugaw Ranch meets the “good cause” and “meritorious defense” standard required under *AOI* and I.R.C.P. 55(c) and respectfully requests this Court grant its *Motion to File Late Notice of Claim*.

DATED this 27th day of October 2005.

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson

Attorneys for Tugaw Ranch

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2005, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

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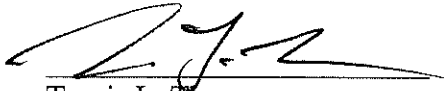
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