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DEPARTMENT OF
WATER RESOURCES

Shelley M. Davis, ISB # 6788
BARKER ROSHOLT & SIMPSON LLP
205 N. 10th Street, Ste. 520
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for Earl Warthen, Objector

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 No. 45-10502
	)	
Case No. 39576	)	MEMORANDUM IN
	)	SUPPORT OF MOTION TO
	)	AMEND CLAIM NO. 45-10502
	)	AND FOR LEAVE OF THE
	)	COURT TO FILE A LATE
	)	CLAIM
_____	)	

COMES NOW the claimant, EARL WARTHEN, by and through his counsel Shelley M. Davis, of the firm Barker, Rosholt & Simpson, LLP, and moves this Court pursuant to Idaho Rules of Civil Procedure 7(b)(1), and 55(c) for an order (1) allowing Mr. Warthen to file a late claim to file a late claim for a water right for 20 acres that were included in claim 45-10502, but that should have been claimed separately, and for an order (2) allowing amendment of claim 45-10502 to reflect the removal of that 20 acres.

STANDARD TO GRANT REQUESTED RELIEF

Pursuant to this Court's Administrative Order 1, Rule 4, this Court will review a motion to allow the filing of a late claim pursuant to the good cause standard set forth at Idaho Rule of Civil Procedure 55(c). SRBA Court, AO1, 4. Id. R. Civ. P. 55(c). Rule

55(c) authorizes a court to set aside a default judgment “[f]or good cause shown.” *Id.* Mr. Warthen, for the reasons set forth herein, can demonstrate the good cause required to allow the filing of a late claim.

DISCUSSION

In 1884 Judge John T. Morgan of the Third Judicial District Court entered the Chatburn v. Brim decree. Affidavit of Shelley M. Davis in Support of Motion to Amend (“Davis Aff.”), Ex. A. In that decree 150 inches of the waters of Howell Creek were granted to James Mahoney and N.P. Williams to be used to irrigate “the E ½ of the NW ¼ and N ½ of the SW ¼ Section 16, Tp. 12 South of Range 25 East and that said right shall and does date from the 10th day of March, A.D. 1881.” *Id.* The decreed right was assigned number 45-0327. *Id.*

The watermaster records for district 45 date back to 1915.¹ Since 1915, with few exceptions, water has been continuously used on the N ½ of the SW ¼ Section 16, T12S R25E, through a series of water users. Davis Aff., Ex. B. Those users include Bert Mahoney, Dony Harris, H. Brackenburg, Dick Anderson and the Warthens.

On May 11, 1989 Mr. Warthen filed his Notice of Claim to Water Right which was assigned claim number 45-10502. In the claim, Mr. Warthen sought .40 cfs of the waters of Spring Creek (old Howell Creek channel) to be applied to 79 acres in the NW ¼ NE ¼ of Section 16, NW ¼ NW ¼ of Section 16 and NW ¼ SE ¼ of Section, and to be applied to 20 acres in the NE ¼ SW ¼ of Section 16. Davis Aff., Ex. C. At the time Mr. Warthen filed the claim he was unaware that Transfer number 1029 dated 1964 existed. Davis Aff., Ex. D. Transfer 1029 moved the decreed water off of the 79 acres in the NW

¹ The watermaster records are voluminous and will not be provided to the Court unless the Court wishes to receive a copy. If the Court does wish to receive a copy please let Ms. Davis know before March 2, and she will bring a set with her to the hearing on Summary Judgment.

¼ of Section. Id. Therefore, the Department recommended a priority date for the entire right as 1964. Davis Aff. Ex. E.

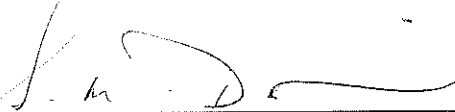
Transfer 1029 did not move any water off of the NE ¼ SW ¼ and as such, Mr. Warthen, if he had filed for those 20 acres independently of the 79 acres in the NW ¼ would have been entitled to an earlier priority date, March 1, 1881, in keeping with the decreed water that was continuously applied to the SW ¼ of Section 16. Davis Aff., Ex. D. For this reason Mr. Warthen requests leave of the Court to Amend claim number 45-10502 to remove the 20 acres in the NE ¼ SW ¼ of Section 16, and to allow him to make a late claim for those 20 acres.

The determination of whether to allow the amendment and filing of a late claim is dedicated to the sound discretion of the court. For the reasons stated above, good cause exists to grant the Motion.

Mr. Warthen requests that a hearing date on this Motion be assigned by the Court. An Amended Notice of Claim and new Notice of Claim are not provided with this Motion, but will be provided at the time of hearing.

Dated this 24th day of February, 2006.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis
Counsel for Earl Warthen

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February 2006, I served a true and correct copy of the foregoing *Motion to Amend Claim No. 45-10502 and For Leave to Allow Filing of a Late Claim* on the following by the method indicated:

Original delivered via facsimile:

Clerk
Fifth Judicial District Court
Snake River Basin Adjudication
253 3rd Ave. N.
P.O. Box 2707
Twin Falls, ID 83303-2707

Counsel for the Participants facsimile and U.S. Mail:

Michael Tribe
Ling, Robinson & Walker
P.O. Box 396
Rupert, ID 83350

Copies to via U.S. Mail:

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

United States Department of Justice
Environment and Nat'l Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

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


Shelley M. Davis