

RECEIVED

MAR 01 2006

DEPARTMENT OF
WATER RESOURCES

Michael P. Tribe, ISB No. 6816
Ling, Robinson & Walker
615 H Street
P. O. Box 396
Rupert, Idaho 83350-0396
Telephone (208) 436-4717
Facsimile (208) 436-6804

Attorneys for Participants,
Norman L. Smyer and Delores J. Smyer

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

**OBJECTION TO EARL WARTHEN'S
MOTION TO AMEND CLAIM
NO. 45-10502 AND FOR LEAVE OF
THE COURT TO FILE A LATE CLAIM**

Norman L. Smyer and Delores J. Smyer ("Smyers"), by and through their attorney

Michael P. Tribe of the firm Ling, Robinson & Walker, file this Objection to Warthen's Motion to Amend Claim No. 45-10502 and for Leave to File a Late Claim. Warthen filed a Motion to Amend Claim No. 45-10502 and for Leave to File a Late Claim with a supporting Memorandum and accompanying Affidavit on February 24, 2006. The Smyers object to the *Motion* based on the untimeliness of the Motion and that such untimeliness will interfere with the final determination of the Smyers' recommended Water Right No. 45-12906. This objection will focus on the procedural aspects of Warthen's Motion. If granted, the Smyers reserve the right to

OBJECTION TO MOTION TO AMEND CLAIM
AND FOR LEAVE TO FILE A LATE CLAIM

1
2
3 further research the historic use of water on the place of use and file a formal objection.

4 **I. DISCUSSION**

5 According to SRBA AO 1 4(e) a, "*Motion to File an Amended Notice of Claim*
6 shall proceed before the Presiding Judge or the Special Master assigned to the subcase and will
7 be reviewed under the criteria of I.R.C.P. 55(c)." As stated in Warthen's Memorandum in
8 Support, a court will review a *Motion to File an Amended Notice of Claim* for good cause shown
9 A court will also review *A Motion to File a Late Notice of Claim* for good cause shown under
10 AO1 4(2)(d).
11

12 **A. Timeliness**

13 On May 11, 1989, Warthen filed his Notice of Claim to Water Right No. 45-
14 10502. Warthen contends that at the time he filed the claim he was unaware that Transfer No.
15 1029 existed. Warthen then filed an objection to Idaho Department of Water Resources
16 Recommendation for Water Right No. 45-10502 on January 2, 2005. Since that time, Warthen
17 has had the opportunity to review the recommendation of Kelly Christensen and his reasons for
18 making such a recommendation. Kelly Christensen is the Department's field officer who
19 gathered information for Water Right No. 45-10502. Warthen has had over a year to determine
20 why Water Right No. 45-10502 was not recommended as claimed and to file an amendment or
21 notice of late claim. Warthen has also had access to the documents upon which the Department
22 relied to make its recommendation for Water Right No. 45-10502 for nearly that long.
23
24

25 Therefore, Warthen should have filed the *Motion to Amend and File a Late Notice*
26 *of Claim* much earlier in this proceeding to ensure the timely resolution of all the rights on Spring
27

28 OBJECTION TO MOTION TO AMEND CLAIM
AND FOR LEAVE TO FILE A LATE CLAIM

1
2
3 Creek and other rights that are affected by Warthen's claimed rights. Allowing Warthen to now
4 amend his claim would substantially delay the resolution of the Smyers' claims. This Motion
5 will potentially injure the Smyers' currently recommended Water Right No. 45-12906, which has
6 a point of diversion from Spring Creek and will be adversely affected if Warthen is ultimately
7 successful in getting an older decree on Spring Creek. This motion is untimely and should not be
8 granted as it appears to be by Warthen's attempt to avoid a final determination of Water Right No.
9 45-10502.
10

11
12 **B. Required Filings A Motion to File a Late Notice of Claim**

13 Rule 4(f) states that a Motion to File a Late Notice of Claim shall have attached:

- 14 1) A completed Notice of Claim (available for IDWR) and;
15 2) The claim filing fee and late claim fee for claims other
16 than a domestic or stock watering use for which a notice of claim
was not filed.

17 Warthen has not filed the required attachments and therefore the Late Notice of Claim cannot be
18 granted. Warthen states in his *Memorandum in Support of Motion to File a Late Claim* that:
19 "[a]n Amended Notice of Claim and New Notice of Claim are not provided with this Motion, but
20 will be provided at the time of the hearing." Warthen, should be required to comply with the
21 rules of the Adjudication as outlined by AO1.
22

23 **II. CONCLUSION**

24 Therefore, the Smyers respectfully request that Warthen's *Motion to Amend and*
25 *File a Late Notice of Claim* be denied and that Water Right No. 45-10502 should be decreed as
26

27
28 OBJECTION TO MOTION TO AMEND CLAIM
AND FOR LEAVE TO FILE A LATE CLAIM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

recommended by the Department.

DATED this 28th day of February 2006.

LING, ROBINSON & WALKER

By: Michael P. Tribe
Michael P. Tribe
Attorneys for Norman L. Smyer
and Delores J. Smyer

OBJECTION TO MOTION TO AMEND CLAIM
AND FOR LEAVE TO FILE A LATE CLAIM

1
2
3 **CERTIFICATE OF MAILING**

4 I hereby certify that on the 28th day of February, 2006, I served the original of the
5 foregoing *Objection to Earl Warthen's Motion to Amend Claim No 45-10502 and for Leave of*
6 *Court to File a Late Claim* upon:

7 Clerk of the District Court
8 Snake River Basin Adjudication
9 253 Third Avenue North
10 PO Box 2707
11 Twin Falls, ID 83303-2707

12 and copies of said document upon:

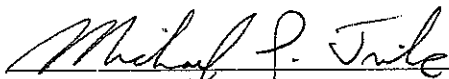
13 IDWR Document Depository
14 P. O. Box 83720
15 Boise, Idaho 83720-0098

16 Chief, Natural Resources Division
17 Office of the Attorney General
18 State of Idaho
19 P. O. Box 44449
20 Boise, Idaho 83711-4449

21 The United States Department of Justice
22 Environment and Natural Resources Division
23 550 West Fort Street, MSC 033
24 Boise, Idaho 83724

25 Shelly M. Davis
26 Barker Rosholt & Simpson, LLP
27 205 N. 10th Street, Ste 520
28 Boise, ID 83701-2139
Attorneys for Earl Warthen

by depositing said document in the United States mail, postage prepaid, in envelopes addressed
to said parties at the foregoing addresses.

25 
26 Michael P. Tribe

27 OBJECTION TO MOTION TO AMEND CLAIM
28 AND FOR LEAVE TO FILE A LATE CLAIM