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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 No. 39576	)	
	)	Subcase No. 63-8413
IN THE MATTER OF MOTION TO FILE A	)	
LATE NOTICE OF CLAIM OF THE CLYDE L.	)	BRIEF IN SUPPORT OF MOTION
& PEGGY G. MARCHBANKS FAMILY	)	TO FILE A LATE NOTICE OF
TRUST	)	CLAIM
	)	
	)	

COMES NOW, the Clyde L. & Peggy G. Marchbanks Family Trust (hereinafter the "Trust"), by and through its attorney of record, and submit this *Brief in Support of Motion to File Late Notice of Claim*, pursuant to SRBA Administrative Order #1 Rule 4 and Idaho Rule of Civil Procedure 55(c).

INTRODUCTION

This motion concerns a previously appropriated and licensed water right which has been continuously diverted and put to beneficial use by the Trust, and its predecessors in interest over the past 20-plus years. Unfortunately, this water right was not claimed prior to the Director's Basin 63 Report for Irrigation and Other Uses. Accordingly, once the Trust learned of the omission, it made a "good faith" effort to correct the problem by filing this motion.

STATEMENT OF FACTS

On June 5, 1984, the Idaho Department of Water Resources (“Department”) issued license number 63-8413 to Charles L. and Anna B. Klahr. *Affidavit of Paul L. Arrington in Support of Motion to File Late Notice of Claim* (“*Arrington Aff.*”) at Ex. A. This license, with a priority date of February 2, 1977, has a diversion rate of 1.9 cfs for the irrigation of 109 acres, in Canyon County. *Id.* In 1988, the Klahrs sold the property, and the appurtenant license, to Clyde and Peggy Marchbanks. *Id.* at Ex. B. Clyde Marchbanks passed away on June 16, 2005 and Peggy Marchbanks passed away on May 25, 2006. *Affidavit of Alan Marchbanks in Support of Motion to File Late Notice of Claim* (“*Marchbanks Aff.*”) at ¶ 2; Ex. A. Their son, Alan Marchbanks (“Alan”), is the executor of their Estate. *Id.* at ¶ 3. Alan is also the trustee of the family trust. Prior to his appointment, Alan was not responsible for the operations of the property and its associated water rights. *Marchbanks Aff.* at ¶ 4.

Alan is attempting to sell the license number 63-8413, along with its appurtenant property. *Id.* at 5. Prior to any sell, Alan, as executor of his parent’s estate, transferred title to the property into the family Trust. *Arrington Aff.* at Ex. C. Recently, the Trust received an offer of purchase for the property, and all appurtenances. *Marchbanks Aff.* at 5. In the process of preparing for this sale, Alan discovered that his parents had never filed a Notice of Claim on the water rights. *Id.* As he was not involved in the management of the property prior to the death of his parents, he did not discover this fact until after their death and does not know why they did not file a Notice of Claim on the license. *Id.*

STANDARD OF REVIEW

Under this Court’s *AOI*, a motion to file a late notice of claim is determined pursuant to Civil Rule 55(c). *See AOI* § 4d(2)(d). 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 (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. *McFarland*, 123 Idaho at 936; *see also Order Granting Motions to File Late 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. The Trust Meets the “Good Cause” Standard for Filing a Late Notice of Claim

The central question in the Trust’s *Motion* concerns a previously licensed water right, and whether that right should be allowed to be claimed and ultimately decreed in the SRBA. As described in greater detail below, the Trust only recently acquire the property and its appurtenant water right and does not know why it was not previously claimed. Moreover, despite its continuous diversion and use by the Trust over the years, the license remains unclaimed. Accordingly, the Trust seeks an order from this Court granting its motion to file a late notice of claim.

A. Basis for the Motion

This Court requires a movant to meet the “good cause” standard set forth in Civil Rule 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) 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). The Trust meets the standard required by this Court.

The Trust’s actions were not willful. Indeed, Alan, the executor of his parent’s estate, and the individual responsible for the property, did not know of his parent’s failure to file a claim until after their death. *Marchbanks Aff.* at ¶¶ 3-4. Furthermore, until after his parent’s death, he was not responsible for the property and water rights. *Id.*

In failing to file the claim, or pleading, the Trust inadvertently missed the deadline for the Basin 63 Director’s Report. 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.”). Prior to their deaths, the water rights were owned by Mr. and Mrs. Marchbanks. *Marchbanks Aff.* at ¶ 2. They owned the property from 1988 and failed to file a claim on the license in the SRBA. Alan did not discover, and could not have discovered, until after the death of his parents that a claim was not filed. *Id.* at ¶¶ 4-6.

Once Alan learned that the water right had not been properly claimed, it immediately asked its counsel to file a motion for late notice of claim. *Id.* at 6. In other words, Alan made a “good faith” effort to correct the mistake in not filing a timely claim for water right 63-8413 in the SRBA. Accordingly, based on the facts and circumstances, it is clear that the default was not “willful.”

B. The Trust has a Meritorious Defense

In addition to meeting the “good cause” standard, the Trust has a “meritorious defense” in that the water previously licensed to the Trust’s predecessor in interest has been continuously used by the Trust when available. *Id.* at ¶ 6. The Trust wants to ensure that its use is continued and authorized by Idaho Law. To the best of the Trust’s knowledge, no claims have been filed on this water. There is nothing in the Department’s records that indicates any portion of water right 63-8413 has ever been forfeited or abandoned. Indeed, granting the motion will not prejudice other water users in the area. The Trust’s claim is based on a license, issued by the Department more than twenty years ago. *Arrington Aff.* at Ex. A. For those twenty years, and continuing today, the land has been irrigated under permit 63-8413. The Trust is simply claiming the water that has always been used under its license – no more, no less. Accordingly, since water right 63-8413 (as originally licensed and historically used) remains unclaimed and

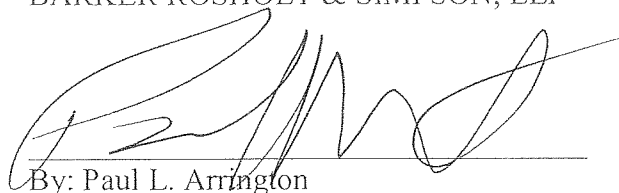
decreed by this Court, the Trust has a “meritorious defense” in filing its *Motion for Late Notice of Claim*. The water right is a vital appurtenance to the property, its continued use and validity should be affirmed in the SRBA. Accordingly, the Trust has filed the present *Motion* to correct the oversight made by the prior owners.

CONCLUSION

For the foregoing reasons, this Court should grant the *Motion to File Late Notice of Claim*.

DATED this 4th day of Sept., 2007.

BARKER ROSHOLT & SIMPSON, LLP



By: Paul L. Arrington

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of Sept, 2007, I served a true and correct copy of the foregoing BRIEF IN SUPPORT OF MOTION TO FILE A LATE NOTICE OF CLAIM on the person(s) listed below, in the manner indicated

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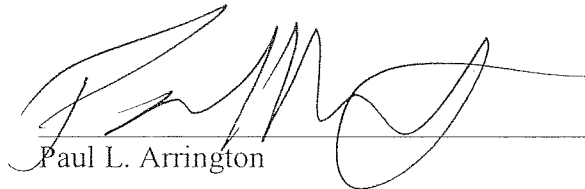
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