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**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. 74-2047H and 74-2074B
	)	
Case No. 39576	)	Memorandum in Support of Motions for
	)	Leave to File Late Objection (74-2047H),
	)	Motion to File Amended Notice of Claim
	)	(74-2047H), and Motion for Leave to File
	)	Late Objection (74-2074B)

Robert Bonuccelli, by and through his counsel of record Josephine P. Beeman of Beeman & Associates, P.C., files this Memorandum in Support of:

- (1) Motion for Leave to File Late Objection, in 74-2047H, filed October 21, 2008;
- (2) Motion to File Amended Notice of Claim, in 74-2047H, dated October 21, 2008; and
- (3) Motion for Leave to File Late Objection, in 74-2074B, dated October 27, 2008.

PROCEDURAL BACKGROUND

I. Water Right 74-2047H

Water right 74-2047B was decreed in the Lemhi Adjudication to Raymond Young for 1.7 cfs from the Lemhi River, with a priority date September 19, 1909, for 56.8 acres of irrigation. 74-2047B is diverted from the Lemhi River at L-9, also known locally as the Mormon Ditch. *Exhibit A, Affidavit of Jason L. Hudson, dated November 6, 2008 ("Hudson Affidavit")*. In the SRBA, Vergil Olson filed SRBA claim 74-2047H on July 31, 1990, as a split of 74-2047B for 16 acres of irrigation. *Exhibit B, Hudson Affidavit*. SRBA claim 74-2047H was recommended for

disallowal on January 19, 2006. *Exhibit C, Hudson Affidavit*. The disallowal has not been decreed.

II. Water Right 74-2074B

Water right 74-2074 was decreed in the Lemhi Adjudication to Raymond Young for 0.5 cfs from Kirtley Creek (a tributary to the Lemhi River), with a priority date of January 18, 1910, for 30 acres of irrigation. *Exhibit D, Hudson Affidavit*. In the SRBA, Vergil Olson filed SRBA claim 74-2074B on July 31, 1990 for 17 acres of irrigation. *Exhibit E, Hudson Affidavit*. IDWR records for SRBA claim 74-2074B include a March 30, 1999 change in ownership from Vergil Olson to Caprice Luker (*Exhibit F, Hudson Affidavit*) and a September 9, 2004 change in ownership from Caprice Luker to Robert Bonuccelli. *Exhibit G, Hudson Affidavit*. SRBA claim 74-2074B was recommended for disallowal on January 19, 2006. *Exhibit C, Hudson Affidavit*. This disallowal has not been decreed.

III. Bonuccelli Motions

The Bonuccelli motions address what appears to have been a simple transposition of numbers affecting SRBA claims 74-2074B and 74-2047H (a split of 74-2047B), both filed by Vergil Olson on July 31, 1990. In order to explain the transposition, the actual water right records and the irrigation of the Bonuccelli acres, the following factual background is a necessary preface to the legal arguments supporting these motions.

FACTUAL BACKGROUND

The Bonuccelli irrigated acreage identified in the (1) Standard Form 1: Objection in 74-2047H dated October 21, 2008, (2) Amended Claim in 74-2047H dated October 21, 2008, and (3) Standard Form 1: Objection in 74-2074B, dated October 27, 2008, is 17 acres specifically identified as 10.2 acres in the NWSW of Section 12, 4.8 acres in the NESE of

Section 11, and 2 acres in the SESE of Section 11, all in T21N, R22E. *Map of Bonuccelli irrigated acreage, Exhibit H, Hudson Affidavit.*

		NWSW	NESE	SESE	ACRES
T21N, R22E	Section 11		4.8	2.0	6.8
	Section 12	10.2			10.2
			Total Acres		17.0

SRBA claim 74-2074B out of Kirtley Creek was recommended for disallowal in January 2006 because 74-2074 was recommended instead. *Exhibit C, Hudson Affidavit.* The SRBA partial decree for 74-2074 (*Exhibit J, Hudson Affidavit*) lists 17 acres for the NWSW Section 12, T21N, R22E. The map with SRBA claim 74-2074 (*Exhibit K, Hudson Affidavit*) identifies the same location as the previous Lemhi Adjudication map (*Exhibit L, Hudson Affidavit*) for the 17 acres irrigated in the NWSW Section 12, T21N, R22E under Kirtley Creek water right 74-2074; the location does not include any of the 17 acres claimed for irrigation by Robert Bonuccelli (*Exhibit H, Hudson Affidavit*).

IDWR records show subsequent splits of Kirtley Creek water right 74-2074 associated with changes of ownership of land in Section 12, T21N, R22E. Those IDWR records are summarized in the tables below. The IDWR records for these subsequent divisions of Kirtley Creek water right 74-2074 account for the 17 acres in the NWSW of Section 12 listed with the original Lemhi decree for 74-2074.

ORIGINAL 30 ACRES IN SRBA DECREE FOR 74-2074

	T21N, R22E	Section 12	NESW	NWSW	SWSW	SENE	TOTAL
74-2074			6	17	7		30

**SUBSEQUENT SPLITS IN OWNERSHIP OF 30 ACRES FOR KIRTLEY CREEK
RIGHT 74-02074 SHOWING RENUMBERED WATER RIGHTS FOR 74-2074 SPLITS**

			NESW	NWSW	SWSW	SEnw	TOTAL
74-2074	SPLIT INTO						
	74-15812		1.1	10.9	7		19
	74-15813	SPLIT INTO					
		74-15828	1	1.5			2.5
		74-15829				2	2
	74-15814			4.6			4.6
	74-15815		1.9				1.9
TOTAL			4	17	7	2	30

The IDWR and SRBA records for Kirtley Creek right 74-2074 do not show the 17 acres claimed by Robert Bonuccelli. IDWR records for the splits of 74-2074 also do not show the Bonuccelli acreage.

However, Vergil Olson's SRBA claim 74-2074B (*Exhibit E, Hudson Affidavit*) did include a statement about shares in the Mormon Ditch, "This claim is for a split of 74-2074 which claimant recently acquired. Documents for transfer of 60 of 80 shares out of Mormon Ditch attached." The Mormon Ditch, which diverts at L-9 from the Lemhi River is in fact the source of water for the 17 acres claimed for irrigation by Robert Bonuccelli. *See Affidavit of Steve Nafus*. The Mormon Ditch is the point of diversion for Lemhi right 74-2047B, not the point of diversion for Kirtley Creek right 74-2074B.

Vergil Olson filed SRBA claim 74-2047H on July 31, 1990, as a split of 74-2047B. *Exhibit B, Hudson Affidavit*. This is the same date that Vergil Olson filed SRBA claim 74-2074B. Olson's SRBA claim 74-2047H states that 74-2074 was also used for the place of use of 74-2047H. The Lemhi decrees for 74-2047B (*Exhibit A, Hudson Affidavit*) and 74-2074 (*Exhibit D, Hudson Affidavit*) list non-overlapping acreage in NWSW Section 12, T21N, R22E, and have no other common legal descriptions for their places of use. As discussed above, the acreage for the splits of SRBA partial decree 74-2074 (Kirtley Creek) do not include any of the

17 acres claimed for irrigation by Robert Bonuccelli. Lemhi River right 74-2047B (decreed in the Lemhi Adjudication and subsequently split in the SRBA) includes one acre in the NWSW Section 12 in common with the 17 acres claimed by Mr. Bonuccelli. Map, *Exhibit L, Hudson Affidavit*.

Vergil Olson's SRBA claim 74-2047H does not include any acreage listed with the Lemhi decree for 74-2047B. *Exhibits A and B, Hudson Affidavit*. Olson's 74-2047H lists 16 acres in the NWNE Section 11, T21N, R22E, and was denied based on SRBA recommendations for the following splits of 74-2047B: 74-2047E, 74-2047F, 74-2047M, 74-2047P, 74-15441 and 74-15442. *Exhibits M and N, Hudson Affidavit*. These splits do not total either the full cfs or acreage originally recommended for 74-2047B in the Lemhi Adjudication. Watermaster records for Water District 74 show deliveries and assessments for 74-2047H (.7 cfs) to Vergil Olson in 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, and 2005. *Exhibit O, Hudson Affidavit*.

A search of IDWR and SRBA records produced no other water right claims, recommendations, or decrees associated with Vergil Olson for the acreage in the NWNE Section 11, T21N, R22E shown on the map with Olson's SRBA claim 74-2047H. *Hudson Affidavit, p. 1, ¶ 1*.

LEGAL STANDARD

Pursuant to SRBA Administrative Order 1, §4(d)2(e), a Motion to File an Amended Notice of Claim shall be reviewed under the criteria of I.R.C.P. 55(c). Although SRBA Administrative Order 1 does not specifically speak to the standard for reviewing motions to file late objections, the SRBA Court has adopted the I.R.C.P. 55(c) standard for the review of motions to file late objections. *See Order on Motions to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman (A.L. Cattle)*, Subcase Nos. 65-7267 *et al.* (January 31, 2001). Rule 55(c) applies a "good cause" standard for setting aside an entry of

default. This standard is more lenient than the standard applied under Rule 60(b). *Id.* The Rule 55(c) standard requires examination of the following factors to determine whether “good cause” exists:

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.

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.

I. THE FAILURE TO FILE OBJECTIONS TO THE DISALLOWALS OF 74-2047H AND 74-2074B AND TO SEEK AMENDMENT OF CLAIM 74-2047H WAS NOT WILLFUL.

SRBA Claim 74-2074B contained an inadvertent transposition of its last two digits. *See* discussion in Factual Background, p. 4, *supra*. Although the claim was for shares of the Mormon Ditch, a Lemhi River diversion for 74-2047B, Vergil Olson wrote 74-2074B on the claim. 74-2074B is a water right from Kirtley Creek, a tributary to the Lemhi River. Nonetheless, SRBA claim 74-2074B describes Vergil Olson’s land now owned by Robert Bonuccelli that is irrigated from the Lemhi River through the Mormon Ditch. *Exhibits E and H, Hudson Affidavit; Affidavit of Steve Nafus*. Vergil Olson’s misnumbered SRBA Claim 74-2074B was disallowed (*Exhibit C, Hudson Affidavit*), but because of the claim’s reference to the Mormon Ditch and Steve Nafus’s knowledge that the Mormon Ditch (diverted from the Lemhi River) was the irrigation source for the Bonuccelli acreage, subsequent research disclosed Lemhi Decree 74-2047B, Vergil Olson’s SRBA claim 74-2047H (*Exhibits A and B, Hudson Affidavit*) and watermaster delivery and assessment records from the Lemhi River through the Mormon Ditch for every year from 1994 through 2005 for 74-2047H. (*Exhibit O, Hudson Affidavit*) This

subsequent research also disclosed that SRBA recommendations for the splits of Lemhi River right 74-2047B do not total the acres or cfs originally decreed to 74-2047B in the Lemhi Adjudication. The recommended disallowal of 74-2047H on January 19, 2006 was never objected to by Vergil Olson.

SRBA Claim 74-2047H for diversion from the Lemhi River through L-9, also known as the Mormon Ditch, should not have been disallowed. 74-2047B, the root right for 74-2047H, was decreed in the Lemhi Adjudication on December 30, 1982, and has been diverted from the Lemhi River through L-9 (the Mormon Ditch). Right 74-2074, also decreed in the Lemhi Adjudication, has always been diverted from Kirtley Creek, a tributary to the Lemhi River. 74-2074 and 74-2047 could easily be confused if the last two digits in either are transposed. The Objection to 74-2047H was made necessary by such an apparent transposition; the failure to file sooner relates to the necessary research and reconstruction of the complicated factual record described above.

II. PREJUDICE TO OPPONENTS, IF ANY, IS OUTWEIGHED BY THE MANIFEST INJUSTICE TO BONUCCELLI IF THE OBJECTION AND AMENDED CLAIM ARE NOT ALLOWED TO PROCEED.

Allowing the amendment of claim 74-2047H and the objections to the recommended disallowal of 74-2047H and 74-2074B far outweighs any possible prejudice to other SRBA claimants.

The original Lemhi decree for 74-2047B includes part of the Bonuccelli property, the SRBA recommendations for the splits of 74-2047B do not total the acres or cfs originally decreed to 74-2047B in the Lemhi Adjudication, and there are watermaster records for delivery of water under 74-2047H through the Mormon Ditch. In addition, the Affidavit of Steve Nafus addresses irrigation from the Mormon Ditch for the Bonuccelli acres.

The Bonuccelli objections and amendment have been lodged before Special Master Reports & Recommendations have been issued for either 74-2047H or 74-2074B. If the objections and the amended claim are not allowed to proceed, irrigation historically documented for 74-2047B from the Lemhi River and currently documented for the Bonuccelli property would be lost.

**III. THE SPECIFIC FACTS ALLEGED
ESTABLISH A MERITORIOUS DEFENSE.**

SRBA claim 74-2047H should be recommended for Robert Bonuccelli as described in the Objection to 74-2047H, and the amended claim for 74-2047H. To facilitate the most appropriate consideration and resolution of a water right for the Bonuccelli acreage, an objection to the disallowal of 74-2074B was also filed. The information about both disallowed claim 74-2074B and disallowed claim 74-2047H provided by affidavit and discussed in the factual background, establishes the facts necessary to support the merit of the claim for irrigation of the 17 acres.

The transposition:

- SRBA claim 74-2074B was intended to describe shares in the Mormon Ditch, water right 74-2047B decreed in the Lemhi Adjudication.
- Vergil Olson's SRBA claim 74-2074B states that it is for shares in the Mormon Ditch. Vergil Olson's SRBA claim 74-2047H (the Mormon Ditch) states that 74-2074 is for the same acres.
- Robert Bonuccelli owns 17 acres of irrigated land adjacent to the Mormon Ditch. The 16 acres described in Vergil Olson's SRBA claim 74-2047H do not correspond to any acreage in the Lemhi Decree for 74-2047B, nor were there any other claims, recommendations, or decrees in either the Lemhi Adjudication or the SRBA for the

NWNE of Section 11. The point of diversion for 74-2047H is correctly identified as the Mormon Ditch, consistent with the shares in the Mormon Ditch referenced by Vergil Olson on July 31, 1990 when he filed misnumbered claim 74-2074B.

The research in support of the Bonuccelli objections and amended claim includes not only the documents supplied by the Affidavit of Jason L. Hudson, filed contemporaneously with this Memorandum, but additional chain of title documents and Lemhi Decree research documents which will assist IDWR in its review of the Amended Claim, if the Bonuccelli motions are granted.

Given the extent of the documentation provided with this Memorandum, it was deemed that these additional documents presented a level of detail that would not be necessary at this time, given the very complicated nature of the facts being provided to the court today.

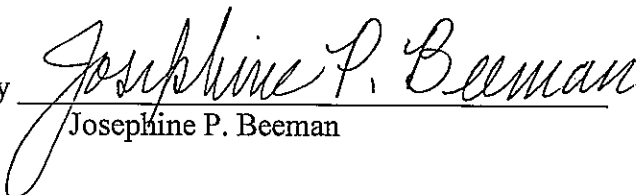
CONCLUSION

In this case, the elements to prove "good cause" are satisfied. Together, the above detailed facts, if established, would support the issuance of a water right decree for 74-2047H (as amended) for the 17 acres owned by Robert Bonuccelli.

For the foregoing reasons, the Court should grant Mr. Bonuccelli's Motions to File Late Objections 74-2047H and 74-1074B, and Motion to File Late Amended Claim 74-2047H.

RESPECTFULLY SUBMITTED this 6th day of November 2008.

BEEMAN & ASSOCIATES, P.C.
Attorneys for Robert Bonuccelli

By 
Josephine P. Beeman

CERTIFICATE OF MAILING

I certify that on November 6, 2008, I caused copies of the foregoing documents to be mailed to the following:

Original to:

Clerk of the District Court
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253 Third Avenue North
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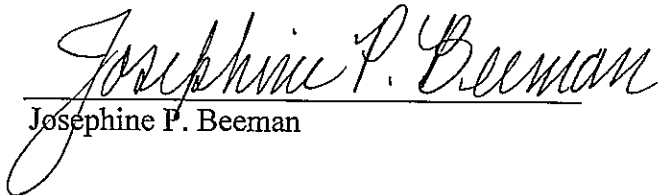
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