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Department of Water Resources
Adjudication Bureau

Attorneys for Norman A. Batt, Ellen G. Batt, Frederick C. Batt & Ellen B. Batt

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 39576

Subcase 63-33143

**MOTION TO FILE LATE NOTICE
OF CLAIM**

COME NOW Norman A. Batt, Ellen G. Batt, Frederick C. Batt and Ellen B. Batt (collectively the "Claimants"), by and through their counsel, Fisher Pusch & Alderman LLP, and file this Motion to File a Late Notice of Claim (the "Motion"), pursuant to SRBA Administrative Order 1, Rules of Procedure 4(d)(2) & 10(j) based on good cause and other reasons justifying such relief as discussed in more detail below.

BACKGROUND

On March 3, 1977, Wendell Batt filed a Notice of Claim for Water Right 63-4428 (the "Claim") to divert water and put it to beneficial use. Specifically, Wendell Batt identified the following places of use in Township 4N, Range 5W:

- 1) 25 acres in the NW1/4 of the NW1/4 of Section 23;
- 2) 40 acres in the NW1/4 of the NW1/4 of Section 22;

- 3) 40 acres in the NE1/4 of the NW1/4 of Section 22;
- 4) 40 acres of the NE1/4 of the SE1/4 of Section 15;
- 5) 40 acres in the NW1/4 of the SW1/4 of Section 15;
- 6) 40 acres of the NE1/4 of the SE1/4 of Section 16; and,
- 7) 40 acres of the SE1/4 of the SE1/4 of Section 16.

No objection to the Claim was ever filed.¹ On April 22, 1979, the Claimants obtained real property, known as the “Cook Place” as more particularly described in *Exhibit A* attached to the Affidavit of John R. Hammond, Jr., which is near the place of use identified above.

Since their purchase of the Cook Place in April of 1979, the Claimants have applied water from Water Right No. 63-4428 to beneficial use on it as described in the attached Notice of Claim without changing the rate of diversion. However, because the Claimants were not aware of the details of the Claim and their lack of knowledge about the applicable Idaho water law, Claimants unknowingly failed to amend the claim or file an enlargement claim with the Idaho Department of Water Resources (“IDWR”).

In 2006, IDWR filed an Adjudication Recommended Right Report (the “Report”) regarding Water Right No. 63-4428 which appropriately only recommended that it be used on the real property as described in the Claim as no party had notified them otherwise. *See Report*. Accordingly, the Claimants respectfully request that the Court grant their Motion to File a Late Notice of Claim to recognize the additional right established, pursuant to *Idaho Code* § 42-1426, by the enlarged use of Water Right No. 63-4428 on the Cook Place. A fully completed Notice of Claim has been attached hereto.

¹ The Claimants obtained Water Right No. 63-4428 when the place of use designated in Wendell Batt’s Notice of claim was transferred to them.

LEGAL STANDARD

Pursuant to Rule 4(d)(2)(d) of SRBA Administrative Order 1, Rules of Procedure, a motion to file a late notice of claim will be reviewed under the criteria of Idaho Rule of Civil Procedure 55(c), which provides that:

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

I.R.C.P. 55(c). The Ninth Circuit Court of Appeals in considering Federal Rule of Civil Procedure 55(c), has stated that in cases of a default without a companion judgment, this rule “frees a court considering a motion to set aside default entry from the restraint of Rule 60(b) and entrusts determination to the discretion of the court.” *Hawaii Carpenter’s Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986). The Ninth Circuit did, however, recognize that the grounds for relief from judgment provided in Rule 60(b) should be consulted in determining whether to set aside a default, and that such grounds should be liberally interpreted. *Id. citing 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure Sec. 2694* (1983).

In this matter the Claimants assert that they should be granted relief under section (6) of Rule 60(b). Idaho courts have interpreted Rule 60(b)(6) as having clearly defined limits and the party making such a motion must demonstrate unique and compelling circumstances justifying relief. *Estate of Bagley v. Bagley*, 117 Idaho 1091, 1094, 793 P.2d 1263 (Ct.App. 1990) *citing Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983). The Idaho Court of Appeals also has stated that clause 6 of Rule 60(b) is applicable whenever “such action is appropriate to accomplish justice.” *First Security Bank of Idaho v. Stauffer*, 112 Idaho 133, 730 P.2d 1053 (Ct.App. 1986) *quoting Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 390, 93 L.Ed. 266, modified, 336 U.S. 942, 69 S.Ct. 384, 93 L.Ed. 1099 (1949) (emphasis added); *see*

also *R.D. Padgett v. Synthes, LTD.*, 872 F.2d 418 (4th Cir. 1989)(“Rule 55(c), under which such relief is sought, must be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments”)(internal quotations omitted).

ARGUMENT

In this case the SRBA Claim was initially filed nearly two decades ago by an older family member of the Claimants who, until his death, had been responsible for farming operations using Water Right No. 63-4428. As stated previously, in 1979 the Claimants purchased Cook Place and began using water from Water Right 63-4428 on it. In the summer of 2008, the Claimants became aware of the gap in coverage of the existing claims relative to use of water on both of these pieces of real property, one of which, the Cook Place, was acquired after filing the statutory claim for the right relied upon for filing the claims. Upon becoming aware of the problem, the Claimants sought legal assistance and were made aware of the provision for filing a late claim for enlarged use of an existing water right. Accordingly, the Claimants, by filing the Motion, are seeking to rectify this gap-in-coverage issue of which they only recently became aware.

As previously stated, in April of 1979 the Claimants began applying water from Water Right No. 63-4428 to beneficial use on the Cook Place in 1979. Further, since 1979 no party has objected to the use of water from Water Right No. 63-4428 on Cook Place. By granting the Motion on this matter no party will be prejudiced. Further, such action is necessary to accomplish justice that is to consider whether to continue to allow the Claimants to apply water to the Cook Place for farming operations through an enlargement of Water Right No. 63-4428.

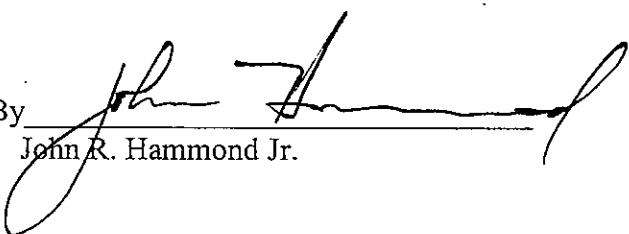
HEARING ON MOTION

This Motion will be heard at **1:30 p.m., March 17, 2009**, at the SRBA courthouse, 253 Third Avenue North, Twin Falls, Idaho.

DATED this 22 day of December, 2008.

FISHER PUSCH & ALDERMAN LLP

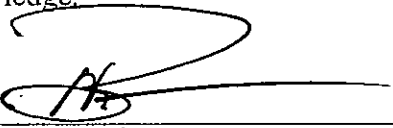
By


John R. Hammond Jr.

VERIFICATION

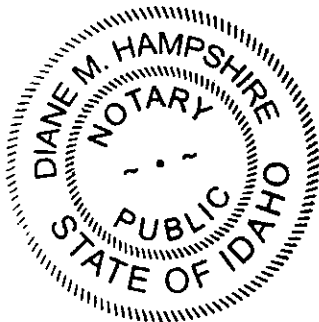
STATE OF IDAHO)
) ss.
County of _____)

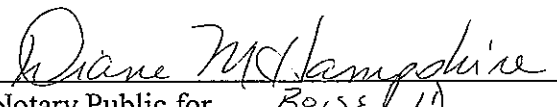
Norman A Batt, being first duly sworn, upon oath, deposes and says: That I am the party/claimant filing this motion for late or amended claim (as listed on Page 2) as defined by I.C. §§ 42-1401A(1) and (7) and that I have read this motion, know its contents, and believe that the statements are true to the best of my knowledge.



Norman A. Batt, Claimant

SUBSCRIBED AND SWORN to before me on DECEMBER 22, 2008.





Notary Public for BOISE ID
Commission expires: 08-04-14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2008, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P O Box 2707
Boise ID 83303-2707

☒ U.S. Mail
☐ Facsimile
☐ Overnight Delivery
☐ Messenger Delivery
☐ Email

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

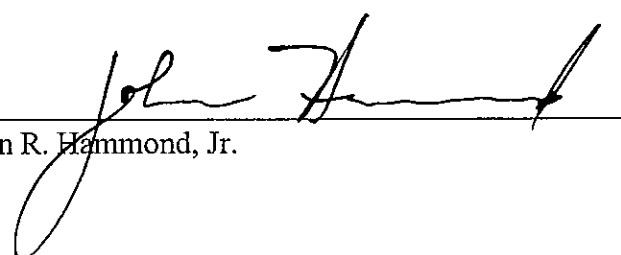
☒ U.S. Mail
☐ Facsimile
☐ Overnight Delivery
☐ Messenger Delivery
☐ Email

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

☒ U.S. Mail
☐ Facsimile
☐ Overnight Delivery
☐ Messenger Delivery
☐ Email

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

☒ U.S. Mail
☐ Facsimile
☐ Overnight Delivery
☐ Messenger Delivery
☐ Email



John R. Hammond, Jr.

Exhibit A

9707571

WARRANTY DEED

THE PARTIES HERETO are JOHN R. COOK and YVONNE B. COOK, husband and wife (herein called grantor) and FREDERICK C. BATT and ELLEN B. BATT, husband and wife, and NORMAN A. BATT and ELLEN G. BATT, husband and wife (herein called grantees) whose current addresses are both Route 1, Wilder, Idaho.

FOR VALUE RECEIVED, the grantor hereby GRANTS, BARGAINS, SELLS AND CONVEYS unto the grantees, as a community property estate, and to the heirs and assigns of the grantees, all of the following described property, situate, lying and being in the County of Canyon, State of Idaho, to wit:

The West Half of the Northeast Quarter of Section 32, Township 4 North, Range 4 West of the Boise Meridian, in Canyon County, Idaho;

Together with all water, water rights, ditches and rights of way for ditches appurtenant thereto or in anywise appertaining.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

SUBJECT to the burdens incident to the inclusion of the land within the boundaries of Wilder Irrigation District.

TO HAVE AND TO HOLD the said premises together with the appurtenances thereto unto the Grantees, as a community property estate, and to the heirs and assigns of the Grantees, forever.

THE GRANTORS, for themselves and for their successors and assigns, do hereby covenant to and with the Grantees, and with their heirs and assigns, that they are lawfully free from all encumbrances, and that the Grantors will and their successors and assigns shall warrant and forever defend the title thereto against all lawful claims and demands whatsoever. Singular terms used herein shall be read as if written in the plural when the context so requires or permits.

IN WITNESS WHEREOF, the Grantors have executed this Warranty Deed and affixed their seals this 22nd day of April, 1979.

John R. Cook
John R. Cook, Grantor

Yvonne B. Cook
Yvonne B. Cook, Grantor

STATE OF IDAHO, County of Owyhee):ss.

On this date, before me, the undersigned, a Notary Public in and for said County and State, personally appeared JOHN R. COOK and YVONNE B. COOK, husband and wife, known to me to be the persons whose names are subscribed to the within instrument and who acknowledged to me that they executed the same.

NOTARIES SUBSCRIBED AND SWORN to before me on APR 22 1979

Clayton Andersen
Notary Public for Idaho.
Residing at Homedale, Idaho

CLAYTON ANDERSEN - ATTORNEY AT LAW - POST OFFICE BOX 1186 - HOMEDALE, IDAHO 83428

3308257

9707571

RECORDED

97 MAR 12 AM 11:42

REC'D. DEAN

CANYON CNTY RECORDER

U. G. G. G.

REQUEST

Dennis G. G.

REC'D. DEAN

FEE 6.00