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DEPARTMENT OF
WATER RESOURCES

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IN RE SRBA	)	SUBCASE NO. 63-31058, LATE CLAIM NO. 63-33148
	)	
CASE 38576	)	BRIEF IN SUPPORT OF MOTION TO FILE AMENDED
	)	AND LATE CLAIMS
	)	
	)	
	)	

COMES NOW SRBA Claimant and Objector The Terteling Company, Inc. (hereinafter "TTCI"), by and through its attorneys, Ringert Law, Chartered, and hereby files this *Brief in Support of Motion to File Amended and Late Claims*. The *Motion to file Amended Claim* applies to subcase number 63-31058 for which TTCI filed a claim recommended as "disallowed" by the Idaho Department of Water Resources ("IDWR") in the SRBA, whereas the *Motion to File Late Claim* has been assigned subcase number 63-33148. These *Motions* are filed pursuant to I.R.C.P. 7(b) and Rules 4.d.(2)(d) and 4.d.(2)(e), SRBA Administrative Order No. 1. The grounds for these *Motions* are that TTCI has good cause pursuant to the standards of I.R.C.P. 55(c) for not having amended its claim to water right no. 63-31058 earlier and for not having filed a late claim earlier. Copies of the claims TTCI seeks to file are attached hereto as Exhibits "A" and "B" respectively. This Brief is supported by the *Affidavits* of Andrew J. Terteling, Edward Squires, Charles L. Honsinger and Doug Hunt submitted concurrently herewith, and by the argument herein.

COPY

FACTS

TTCI claimed water right number 63-31058 in the Snake River Basin Adjudication.

After the claim was filed, IDWR requested information about the delivery and diversion system for the claimed water right. See *Affidavit of Ed Squires*, Exhibit “B”. None of the information requested by IDWR was provided by the claimant, and, as a result, the claim was recommended as “disallowed.” In early 2008, Andy Terteling, vice-president of The Terteling Company, Inc. began to switch his focus from groundwater rights claimed by TTCI to surface water rights, and requested that his expert, Ed Squires do a full investigation of the diversion and distribution system for water right no. 63-31058 and of unclaimed water rights on the upper Terteling Ranch. See *Affidavit of Andrew J. Terteling in Support of Motion to File Amended Claim*; *Affidavit of Andrew J. Terteling in Support of Motion to File Late Claim*. Mr. Squires conducted his investigation and found that the claim to water right no. 63-31058 originally filed was neither accurate nor complete. *Affidavit of Ed Squires in Support of Motion to File Late Claim to Water Right No. 63-31058 and a Late Claim*. Mr. Squires’ investigation resulted in his location and mapping of an elaborate system of ditches, laterals and pipes through which water right no. 63-31058 is delivered to various irrigated areas and ponds. *Id.* It is Mr. Squires’ opinion from available aerial photography, that water was beneficially used on the places of use claimed pursuant to water right no. 63-31058 as early as 1938.¹ *Id.* Additionally, Mr. Squires was, through his investigation, able to determine the existence of a previously unclaimed water right

¹The water right is claimed with an 1891 priority date based upon the Affidavits of Use attached hereto.

diverted from a series of springs located on the upper Terteling Ranch. Doug Hunt, TTCI's ranch manager for the Terteling Ranch confirms the beneficial use of the springs claimed pursuant to the late claim filed by TTCI, and of the beneficial use of water from Stewart Gulch for irrigation purposes. *See Affidavit of Doug Hunt in Support of Motion to File Late Claim; Affidavit of Doug Hunt in Support of Motion to File Amended Claim.*

ARGUMENT

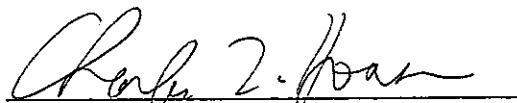
The legal standards for filing a late or amended claim to a water right recommended in the SRBA are set forth in Rules 4.d.(2)(d) and 4.d.(2)(e), SRBA Administrative Order No. 1. According to Administrative Order No. 1, such standards are the same as that by which a default judgment may be set aside pursuant to I.R.C.P. 55(c). *Id.*, at p. 6. The I.R.C.P. 55(c) standard takes into account the following factors: 1) whether the default was willful; 2) whether setting aside the judgment would prejudice the opponent; and 3) as with a Rule 60(b) motion, whether a meritorious position has been presented. TTCI's Motion to File a Late Claim and its Motion to File an Amended Claim meet the I.R.C.P. 55(c) standard.

First, TTCI did not willfully fail to file either the amended claim to water right no. 63-31058, or its late claim. Rather, as Andrew J. Terteling states in his affidavit, his focus was primarily on groundwater until earlier in 2008 when he asked Ed Squires to conduct an investigation into the surface water sources on the upper Terteling Ranch. Second, permitting TTCI to file its amended claim and late claim will not prejudice any opponent. There is no opponent with respect to the late claim, and no trial schedule or discovery deadlines has even been set yet in subcase no. 63-31058. Finally, TTCI has set forth a meritorious position with respect to both its motions. Mr. Squires' affidavit indicates that he has addressed IDWR's

concerns regarding the lack of information about the diversion and distribution system for water right no. 63-31058. Together, Mr. Hunt's affidavits and Mr. Squires' affidavit also establish the historical beneficial use of both water right no. 63-31058 and water from the springs claimed pursuant to TTCI's late claim. Beyond that, the Homestead Proof documents discussing the use of water on the property for which these water rights are claimed establish the 1891 priority dates claimed for each.

Because TTCI did not willfully fail to file either its amended claim or its late claim, because neither will prejudice any opponent, and because it has presented a meritorious position as to each, the Court should grant both TTCI's Motion to File a Late Claim, and its Motion to File Amended Claim.

Respectfully submitted this 29th day of December, 2008.


Charles L. Honsinger
Ringier Clark, Chartered

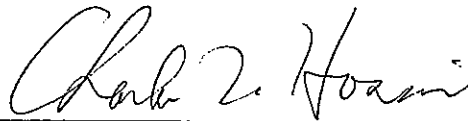
CERTIFICATE OF MAILING

I certify that on December 29, 2008, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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