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DEPARTMENT OF
WATER RESOURCES

Attorneys for Gerald B. Bashaw & Audrey Bashaw

**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 No. 39576

Subcase No. 37-800 & 37-801

**MEMORANDUM IN SUPPORT OF
MOTION TO FILE LATE NOTICE OF
CLAIM**

COMES NOW, Gerald B. Bashaw and Audrey Bashaw ("Bashaw"), by and through counsel of record, and hereby file this *Memorandum in Support of Motion to File Late Claim*. This *Motion* is supported by the *Affidavit of Paul L. Arrington* (hereinafter "*Arrington Aff.*") filed together herewith.

INTRODUCTION

This motion concerns two previously appropriated *and decreed* water rights which have been continuously diverted and put to beneficial use. The rights were decreed in *Clover Land & Livestock Co. v. Allred* (Blaine Cty. District Court, May 10, 1951) (Ex. A to the *Arrington Aff.*) Since the rights were decreed and have been beneficially used, good cause exists to allow these late notices of claim.

FACTUAL BACKGROUND

Water rights 37-800 and 37-801 are ground water rights that were originally decreed in *Clover Land & Livestock Co. v. Allred*, on May 10, 1951. *See Arrington Aff. Ex. A.* The Court decreed these rights, each for 2 cfs (total of 4 cfs), with priority dates of April 1, 1930 (37-800) and April 1, 1950 (37-801). *Id.*

These water rights have been beneficially used since that time. For example, in the *Comments and Evidence*, submitted with Bashaw's Objection to water right 37-4141, three individuals testified of their personal knowledge that one of the three points of diversion was constructed in 1947 and had been used for irrigation since that time. *See Arrington Aff. Ex. B.*

When the claim for water right 37-4141 was filed, Bashaw was unaware of the *Clover Land & Livestock* decree for water right 37-800 and 37-801. Similar to the combined diversion rates for water rights 37-800 and 37-801, the claim for water right 37-4141 is for a diversion rate of 4 cfs for irrigation.¹ The Director's Report recommended that water right 37-4141 be disallowed. Bashaw has filed an objection to that recommendation.² Following Bashaw's objection, Doug Jones, IDWR water agent, informed Bashaw's council that he has discovered the *Clover Land & Livestock* decree. The Department has identified the two decreed rights, appurtenant to Bashaw's property, as water right 37-800 and 37-801. To date, no claims have been filed for either water right 37-800 or 37-801.

STANDARD OF REVIEW

Under this Court's *AOI*, a motion to file a late notice of claim is determined pursuant to I.R.C.P. 55(c). *See AOI* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria). The Court, therefore, applies a "good cause" standard to motions to file late notices of claim. The

¹ The claim also includes 0.12 cfs for stockwatering purposes.

² Should the Court grant this *Motion to File Late Notice of Claim*, and the Department recommend new water rights 37-800 and 37-801, as claimed, then Bashaw will withdraw the objection to water right 37-4141.

“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 the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.
- 3) as with a Rule 60(b) motion, 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

ARGUMENT

I. Bashaw Meets the “Good Cause” Standard for Filing a Late Notice of Claim

The central question presented here is whether water rights that (i) were previously claimed, reviewed and decreed, (ii) have been diverted and beneficially used; and (iii) were not

originally claimed in the SRBA, should be claimed and ultimately decreed in the SRBA. Since Bashaw's actions were not willful, the granting of this motion will not prejudice any other water user, and a meritorious position has been shown, *see Order Granting Motions to File Late Notices of Claim* at 1 (Subcase No. 71-10886 et al., July 27, 2005), this motion should be granted.

A. Bashaw's Actions were not Willful

The Court must first consider whether Bashaw's actions were willful. The facts demonstrate that they were not willful. First, Bashaw filed a claim for the 4 cfs decreed in the *Clover Land & Livestock* decree. The combined diversion rate for the decreed water rights is 4 cfs. Mr. Bashaw was simply unaware of the *Clover Land & Livestock* decree at the time that he submitted his claim or that the priority dates should be adjusted.

Bashaw continued to pursue the right to divert and use the 4 cfs decreed in the *Clover Land & Livestock* decree – and claimed under water right 37-4141. Bashaw filed an objection to the Director's recommendation of disallowal for water right 37-4141, and is now filing this motion, seeking to claim the decreed rights in the SRBA.

B. Granting This Motion Will not Prejudice Other Water Users.

No other water users will be prejudiced by the granting of this motion. Importantly, Bashaw has pursued the right to divert and use 4 cfs as decreed in the *Clover Land & Livestock* decree. In particular, Bashaw filed a claim for water right 37-4141, claiming 4 cfs, and has filed an objection to the Director's recommendation – asserting the right to divert and use 4 cfs. No additional objections or responses were submitted challenging Bashaw's claim. granting this right will simply provide an opportunity for the SRBA Court to confirm the rights that were

already decreed. No prejudice will result because any party to the SRBA will have an opportunity to participate in these proceedings by filing objections and/or responses.

C. A Meritorious Position has been Presented.

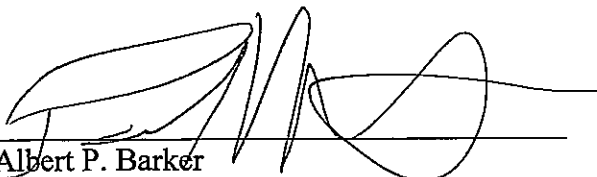
Finally, a meritorious position has been presented. As stated above, the failure to file claims for water rights 37-800 and 37-801 was not willful. This water has been put to a beneficial use since it was decreed. This water was claimed in the SRBA. This water continues to be used to this day. Bashaw was not aware of the *Clover Land & Livestock* decree until recently, at which time Bashaw submitted this motion. Failure to recognize these water rights will leave Bashaw without vital water rights necessary for their farming operations.

CONCLUSION

Bashaw seeks to file late claims for his decreed water rights – 37-800 and 37-801. The facts demonstrate that the failure to file claims for these water rights. Since no water user will be prejudiced by the granting of this motion and a meritorious position has been presented, the motion should be granted.

DATED this 30th day of March, 2009.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker
Paul L. Arrington

Attorneys for Gerald B. Bashaw & Audrey Bashaw

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2009, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

Original to:

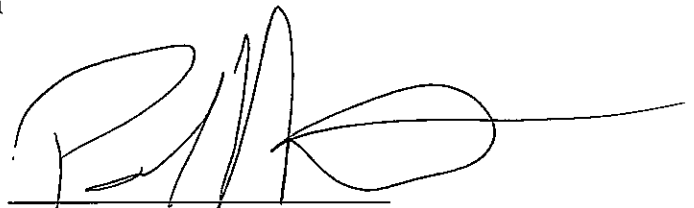
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