

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
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DEPARTMENT OF
WATER RESOURCES

with his regular water shares that are delivered by A&B. Should the Court grant this motion, and A&B's right be recommended by the Department, A&B has been informed that Mr. Hansen will withdraw his claim for water right 36-11508. Accordingly, good cause exists to allow this late notice of claim.

FACTUAL BACKGROUND

A&B filed claims for its water rights in the SRBA Court. In doing so, it utilized various maps that depicted (pre-1963) land within the project that was irrigated and land that was not – i.e. “dry land.” See *Arrington Aff.* Ex. A (a portion of the map depicting the land in question). On this map, shaded areas were considered “dry lands” and were not believed to have been irrigated prior to 1963. *Temple Aff.* at ¶ 4.

Gary Hansen filed a claim for water on a portion of the “dry land” within the A&B project area. See Water Right 36-11508. That water was originally claimed with a priority date of 1978. *Id.*¹

In 2008, Mr. Hansen came to the A&B office after receiving a notice of potential curtailment for water right 36-11508 in association with a water call. *Temple Aff.* at ¶ 2. Prior to that time, A&B was not aware that Mr. Hansen had filed this claim. *Id.* Dan Temple, A&B manager, assisted Mr. Hansen in researching the water right. *Id.* at ¶ 3. Through this research, A&B discovered that the right should have an earlier priority date and should have been claimed by A&B. *Id.* at ¶ 4-5. The research revealed the following facts:

1. The lands in question are included in the “dry land” area on the original maps (*Arrington Aff.* Ex. A);

¹ An Amended Partial Decree was issued for water right 36-11508 on May 22, 2002. A Motion to Set Aside Partial Decree was filed on July 3, 2007 and the matter was referred to Special Master Booth.

2. Aerial photographs from 1962 demonstrate that the land was actually irrigated by at least 1962 (*Arrington Aff.* Ex. B);
3. Testimony from John D. Hansen, who has worked around and resided near the land in question since the early 1950's, demonstrates that the land was actually put under irrigation in 1956 (*Arrington Aff.* Ex. C);
4. Mr. Hansen irrigates additional properties with shares of A&B water. This water has been diverted by Mr. Hansen and likely commingled with his A&B water shares (*Temple Aff.* at ¶ 6).

Following this research, A&B filed the attached motion and seeks leave to file late notice of a claim to a water right.

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 "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. A&B Meets the "Good Cause" Standard for Filing a Late Notice of Claim

The central question presented here is whether a water right that has been diverted and put to beneficial use since 1956 should be claimed and ultimately decreed in the SRBA. Since the water has been used and commingled with A&B shares since at least 1956, this motion should be granted.

A. A&B's Actions were not Willful

The facts demonstrate that A&B's actions were not willful. In fact, A&B did not become aware of this water right until just a year ago, when Mr. Hansen (claimant for 36-11508) came to A&B following receipt of a notice of curtailment. *Temple Aff.* at ¶ 2. A&B immediately began researching the matter and discovered that the water should have an earlier priority date and

should have been claimed by A&B for use and delivered through the A&B water system. *Id.* at ¶¶ 4-5 & 7.

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

No other water users will be prejudiced by the granting of this motion. Importantly, this water has been put to beneficial use since 1956. The water was claimed by Mr. Hansen as water right 36-11508 and A&B has been informed that the claim to water right 36-11508 will be withdrawn should this motion be granted and the right recommended by the Department. Granting this right will simply provide an opportunity for the SRBA Court to confirm a water right with the correct priority date and owner. 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 this water right was not willful. This water has been put to a beneficial use since 1956 and was previously decreed (36-11508) in the SRBA Court (although with the wrong priority date). That decree has now been set aside so that the elements of the water right can be correctly reflected in a final decree. *See Motion to Set Aside Partial Decree* (water right 36-11508). A&B has researched this matter and discovered that A&B should have claimed the water and that the priority date should have been 1956.

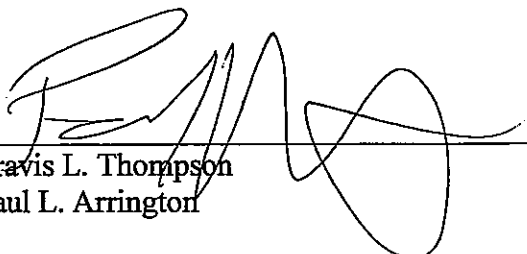
CONCLUSION

A&B seeks to file a late claim for water that has been diverted and beneficially used since 1956. The facts demonstrate that the failure to file claims for these water rights was not willful.

Accordingly, 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 6th day of April, 2009.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Travis L. Thompson', is written over a horizontal line. The signature is stylized with large, sweeping loops.

Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2009, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

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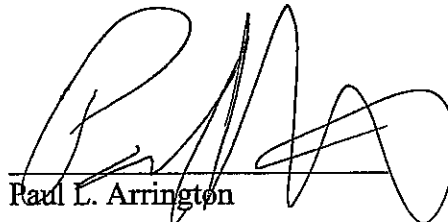
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