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**DEPARTMENT OF
WATER RESOURCES**

**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

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) Subcase No. 37-2543
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**MEMORANDUM IN SUPPORT OF
MOTION TO FILE LATE NOTICE OF
CLAIM**

COMES NOW, David Simon ("Simon"), by and through his counsel of record, and hereby files this *Memorandum in Support of Motion to File Late Notice of Claim*. This *Motion* is supported by the *Affidavit of Paul L. Arrington* (hereinafter "*Arrington Aff.*"), the *Affidavit of David A. Simon* ("*David Simon Aff.*") and the *Affidavit of William A. Simon* ("*William Simon Aff.*"), filed together herewith.

INTRODUCTION

Through this motion, Simon seeks leave to file a late claim to resume the use of and claim a previously licensed water right. Although the water right has not been used since the late 1970's, Idaho law allows for the resumption of use of a water right for which there has not been a judicial forfeiture determination. Further, Simon meets the requirements for granting a motion

to file a late claim in the SRBA. The delay was not willful and there is no prejudice as any interested party will be able to participate in the SRBA process. Accordingly, the motion should be granted.

FACTUAL BACKGROUND

Water Right 37-2543 is a licensed water right. It was originally licensed on October 10, 1958, and authorized the diversion of 3.1 cfs of ground water to irrigate 300 acres in Camas County. *Arrington Aff.* Ex. A. The priority date is August 26, 1953. *Id.*

Prior to 1953, much of the land in the area of this water right, including the Simon farming operations, were farmed using dry land farming methods. *William Simon Aff.* ¶ 3. In 1953, a number of area farmers began installing wells and irrigating. *Id.* Farmers generally used flood irrigation and hand lines on their fields. *Id.*

Water right 37-2543 was originally licensed to George Petrie. *Arrington Aff.* Ex. A.; *William Simon Aff.* ¶ 3. In 1953, Mr. Petrie drilled the well, installed an electric pump and began irrigating the place of use with hand lines. *William Simon Aff.* ¶ 3. He also ran water in ditches for livestock. *Id.* USGS measurement data shows that water was diverted under this water right in 1977. *Arrington Aff.* Ex. B.

After 1977, Mr. Petrie reverted back to dry farming his property – growing alfalfa and grain. *Id.* at ¶ 5. Water right 37-2543 has not been used since that time. *See Id.* ¶ 4. After Mr. Petrie, Elmer and/or Joyce Johnson (Mr. Petrie's daughter and son-in-law) owned and managed the property and continued dry farming the land. *Id.* ¶ 8. The property was next farmed by Ralph Egersdorf, who used the property as pasture for his livestock. *Id.* ¶ 9. After Mr. Egersdorf passed away, his wife took over the land but did not maintain the land. *Id.* ¶ 10; *David Simon Aff.* ¶ 6. Neither David Simon, nor his dad, William, knows why use of this water right was not

resumed by any of the previous owners or why they failed to file a claim in the SRBA. *Id.* ¶ 12; *David Simon Aff.* ¶ 5. d

William Simon has been farming in Camas County for much of his adult life. *William Simon Aff.* at ¶ 2. He found that dry farming reduces his crop yields. *Id.* at 6. In the 1970's, when William Simon witnessed a lot of farmers in the area reverting to dry land farming, *id.* ¶ 5, he decided to continue using irrigation in his farming operations so as to increase his crop yields, *id.* at ¶ 6.

David Simon now owns and manages the family farming operations with his brother. *David Simon Aff.* at ¶ 3. He continues to use irrigation on the lands and also finds that irrigation provides greater crop yields than the lands he dry farms. *Id.*

Currently, the place of use for water right 37-2543 is overgrown with weeds and lingering pasture grasses. *Id.* at ¶ 6. To bring the land back into use, Simon will cultivate the land and raise grain to help fight the weeds. *Id.* He hopes to put the land into the normal crop rotation within the next irrigation season. *Id.* Irrigation water will greatly assist with the revitalization and future farming of this land. *Id.* at ¶ 7.

As to the water right itself, Simon intends to install a diesel pump on the well and to connect a main line and two or three wheel lines. *Id.* at ¶ 8. With this, Simon will be able to irrigate these fields during the 2010 irrigation season and beyond. *Id.* Simon will install these diversion works as soon as the weather permits, hopefully before the end of April. *Id.* He intends to maintain this water right for use in his farming operations. *Id.* ¶ 5

STANDARD OF REVIEW

Under this Court's *AOI*, a motion to file a late notice of claim is determined pursuant to Civil Rules 55(c). *See AOI* § 4(d)(2)(d). The Court, therefore, applies a "good cause" standard,

see Civil Rule 55(c), which is more lenient than the Rule 60(b) standard, see *McFarland v. Curtis*, 123 Idaho 931, 935 (Ct. App. 1993). The “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).¹ Finally, courts must “examine each case in light of the unique facts and circumstances presented.” *Baldwin v. Baldwin*, 114 Idaho 525, 527 (Ct. App. 1988).

THE LAW OF RESUMPTION OF USE

A water right may be lost if it is not applied to a beneficial use for a period of five years. Idaho Code § 42-222(2). However, “forfeitures are not favored.” *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 836 (2003). As such, the Courts have entertained various defenses to forfeiture and Idaho Code § 42-223 provides a number of exceptions to forfeiture. One such defense, resumption of use, was recently addressed by Special Master Booth in his *Memorandum Decision & Order on Motion for Summary Judgment*, Subcase Nos. 63-2446, et al. (Dec. 16, 2009) (the “*Monarch Order*”). That decision provided valuable insight into a water user’s ability to resume use of a water right after more than five years of nonuse.

¹ 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).

[T]he doctrine of resumption of use ... establishes that a forfeiture is not effective, even after the passage of five-year period of nonuse, unless there has been a claim of right by a third party ... The analytical framework is that a forfeiture is not effective or complete – and hence the use of such right may be resumed – unless and until one of the events listed in *Sagewillow* actually occurs (i.e. a third party either: (1) institutes legal proceedings to declare a forfeiture; (2) obtains a new water right prior to the resumption; or (3) uses the water pursuant to an existing right).

Monarch Order at 9.

This is consistent with Supreme Court precedent. In *Jenkins v. State Department of Water Resources*, 103 Idaho 384, 389 (1982), the Court held that “if use of the water right is resumed after the five year period, but before any third parties make a claim to the water, then the courts will decline to declare a forfeiture.” In *Jenkins*, the Director found that the waterway had been overappropriated and therefore denied a request to transfer a water right that had not been used for 18 years. *Id.* at 386.

In *Sagewillow*, which was relied upon by Special Master Booth in the *Monarch Order*, the Court again confirmed that:

[F]orfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party.

138 Idaho at 836. The *Sagewillow* Court held that a forfeiture analysis requires more than simply a review of the relative priorities in the area. “The mere existence of a junior appropriator, however, is not sufficient to show that the junior appropriator has made a claim of right to the water not used by the senior appropriator.” *Id.* at 837. Rather, harm would only occur “if there would not be sufficient water to fill [junior] water rights due to the senior appropriator being permitted to resume his use.” *Id.*

ARGUMENT

I. Simon Meets the “Good Cause” Standard for Amending a Notice of Claim

The central question presented here is whether Simon should be permitted to submit a late claim for a previously *licensed* water right that was historically diverted and used and that will be put back into use this spring. *See David Simon Aff.* ¶ 8. Since Simon’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. Simon Actions were not Willful

Simon purchased this property on December 15, 2009. *David Simon Aff.* ¶ 4. Prior to that time, Simon had no interest in the water right and no authority to file a claim thereon. Simon does not know why the prior owners did not attempt to resume use of the water right and claim the right in the SRBA. *Id.* at ¶ 4; *see also William Simon Aff.* ¶ 12. As soon as Simon acquired the property, he hired legal counsel to investigate the water rights on the property and take any necessary action, including filing the present this motion.

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

No other water users will be prejudiced by the granting of this motion. This right was developed and previously *licensed* by the Department. Furthermore, while resuming use of this water right may impact available water supplies, in *Sagewillow, supra*, the Court made clear that the mere existence of junior water rights does not equate to injury in the resumption analysis. Rather, harm would only occur “if there would not be sufficient water to fill [junior] water rights due to the senior appropriator being permitted to resume his use.” *Id.* Finally, if this motion is granted, the Department will be able to review the impacts of resumption under this water right

and all interested water users will be able to participate in this process, including the filing of objections and/or responses to any future recommendation. As such, no prejudice will occur.

C. A Meritorious Position has been Presented

Finally, a meritorious position has been presented. The law plainly allows a water user to resume use of a water right after five years of nonuse. *See supra*. There has been no judicial decree of forfeiture. Furthermore, the Department's analysis will include a review of existing water rights and the available water supply. So long as there is a sufficient water supply, resumption should be permitted. *Sagewillow, supra*.

Irrigation is a vital element of the Simon farming operations. *David Simon Aff.* at ¶ 3; *William Simon Aff.* at ¶¶ 5-6. Indeed, William Simon long ago decided to continue irrigating while neighboring farmers reverted to dry farming – a practice still followed by his sons, who now run the family farm. *Id.* While no prejudice will occur as a result of granting this motion, Simon will be left without a valuable resource should the motion be denied. Accordingly, the motion should be granted.

CONCLUSION

Simon meets the standard for filing a late notice of claim to a water right. The delay in filing a claim was not willful, as Simon did not own the property until late 2009 and had no authority or ability to resume use of this water right and/or claim it in the SRBA prior to that time. Furthermore, the Department's analysis will examine the impact of resumption of the water right and any interested parties may file objections and participate in these proceedings. As such, there is no prejudice. Finally, because there is a valid claim based on the law of resumption of use, a meritorious position has been presented. Accordingly, this motion should be granted.

DATED this 26th day of February, 2010.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Travis L. Thompson', written over a horizontal line.

Travis L. Thompson
Paul L. Arrington

Attorneys for David A. Simon

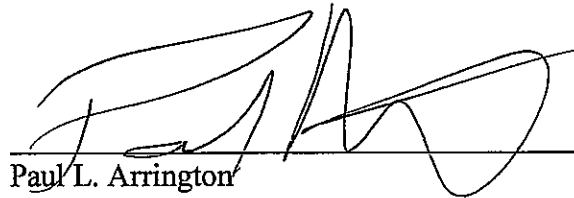
CERTIFICATE OF SERVICE

I certify that on this 26th day of February, 2010, I served a copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM**, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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Paul L. Arrington