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DEPARTMENT OF
WATER RESOURCES

Attorneys for Magic Irrigators, Inc.

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	)	
	)	Subcase No. 47-17541
Case No. 39576	)	
	)	
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO FILE LATE NOTICE OF
	)	CLAIM
	)	
	)	
	)	

COMES NOW, Magic Irrigators, Inc. ("Magic"), by and through its 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.*") and the *Affidavit of Kenneth P. Elkin* (hereinafter "*Elkin Aff.*"), filed together herewith.

INTRODUCTION

Through this motion, Magic seeks leave to file a late claim for acres developed and irrigated as a statutory approved enlargement of water rights 47-2384 and 47-2415. These existing water rights allow for a combined diversion rate of 5.00 cfs for 435 acres and are diverted at the same point of diversion. By 1987, Magic was delivering water to an additional 36.3 acres located adjacent to the place of use for water rights 47-2384 and 47-2415. At the

same time, however, Magic continued to divert and deliver water to all acres within the combined diversion limitations of water right 47-2384 and 47-2415.

Magic meets the requirements for filing a late claim in the SRBA. The delay in filing the enlargement claim was not willful. Magic did not realize that it would be required to file a separate water right claim for the enlargement acres. Just the opposite, it was Magic's understanding and direction from IDWR to claim all acres under the claims for water rights 47-2384 and 47-2415. *Elkin Aff.* As soon as Magic realized a claim would be required, Magic hired legal counsel to research the matter and file this motion. No parties will be prejudiced by the late claim as any who oppose this enlargement claim will be provided with the opportunity to object and participate in the SRBA process. Finally, a meritorious position, the existence of a valid enlargement water right claim, has been presented. Accordingly, this motion should be granted.

FACTUAL BACKGROUND

Water right 47-2384 is a licensed water right authorizing a diversion rate of 2.36 cfs for the irrigation of 205 acres within Twin Falls County, with a priority date of January 14, 1966. *Arrington Aff.* Ex. A. Water right 47-2415 is a licensed water right authorizing a diversion rate of 2.64 cfs for the irrigation of 230 acres within Twin Falls County, with a priority date of April 3, 1961. *Arrington Aff.* Ex. B. By 1987, however, Magic was delivering water pursuant to these water rights to an additional 36.3 acres located immediately adjacent to the licensed places of use. *Arrington Aff.* Ex. C. A review of the 1987 aerial photography of the place of use for water right 47-2384 (the green area) shows these additional acres being irrigated. *Id.*

Both water rights 47-2384 and 47-2415 are diverted through the same pump and diversion system located on Salmon Falls Creek. *Elkin Aff.* ¶ 3. A review of 1987 power records for the pumps shows that the diversion rate in 1987 was approximately 4.34 cfs. *Powell Aff.* Ex.

A. In other words, even though Magic had developed and was irrigating an additional 36.3 acres by 1987, Magic continued to divert less than the combined licensed diversion rate for water rights 47-2384 and 47-2415. *Id.* In short, Magic had met the statutory requirements for an enlargement claim. *See* I.C. §42-1426.

Magic did not realize that it needed to file a separate claim for enlargement acres until its water right claim 47-2269 was recommended and IDWR did not include the enlargement acres. *Elkin Aff.* at ¶¶ 4. Magic hired legal counsel to participate in the initial hearing, research the water rights and file this motion.

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

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).

of the unique facts and circumstances presented.” *Baldwin v. Baldwin*, 114 Idaho 525, 527 (Ct. App. 1988).

ARGUMENT

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

The central question presented here is whether Magic should be permitted to file a valid enlargement claim for acres irrigated prior to 1987. *See Arrington Aff.* Ex. C. Idaho law provides for the filing of an enlargement water right claim when, “through water conservation and other means,” the owner of a licensed water right has “enlarged the use of said water without increasing the rate of diversion” – even when the water user does not comply “with the mandatory permit system adopted by the legislature.” I.C. § 42-1426(1)(a). In order to prevail on an enlargement claim, the claimant must show that (1) the enlargement occurred “on or before November 19, 1987,” and (2) “the rate of diversion of the original water right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water rights.” *Id.* at § 42-1426(2). Magic’s claim meets the statutory criteria. *See Elkin Aff.*

Since Magic’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. Magic’s Actions were not Willful

Any delay in claiming these enlargement acres was not willful. Magic was unaware that it needed to file a separate claim for enlargement acres until the recommendation for water right 47-2269 was issued. *Elkin Aff.* ¶ 3. Once the recommendations were issued, Magic filed an

objection and hired legal counsel to investigate the water rights and file this motion. Magic did not intend to file an incorrect claim in the first place and was not aware that it should have filed an enlargement claim to cover the additional acres. Indeed, Idaho Code § 42-1426, enacted in 1994, did not even exist at the time Magic filed its water right claims.

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

No other water users will be prejudiced by the granting of this motion. Magic has been irrigating these enlargement acres since at least 1987. *Arrington Aff.* Ex. C. Under the law, therefore, Magic has a right to submit this enlargement claim. I.C. § 42-1426. The law protects water users who may be impacted by the enlargement – requiring “conditions directly related to” any injury resulting from the enlargement or subordination to the impacted water right. *Id.* at 42-1426(2). In fact, if this motion is granted, the Department will be able to review the enlargement claim and submit a recommendation to the SRBA Court. Any recommendation for the water right will include the general subordination provision for enlargement rights – subordinating the right to an April 12, 1994 priority date. Furthermore, all interested water users will be able to participate in this process, and will have the right to file an objection and/or responses to any future recommendation issued by IDWR. 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 file an enlargement claim, such as this one. I.C. § 42-1426. Aerial photos of the place of use for water right 42-1426, taken in 1987, plainly show that the enlargement acres were being irrigated at that time. *Arrington Aff.* Ex. C. Furthermore, while irrigating these acres, Magic continued to stay within the diversion rate limitation of water right 42-2384. *Powell Aff.* Ex. A. Accordingly, Magic meets the statutory criteria for a valid enlargement claim for these 36.3 acres.

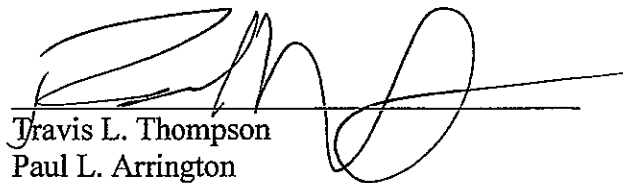
While no prejudice will occur as a result of granting this motion, Magic relies on these enlargement acres in its delivery of water, and has for well over 20 years. These acres will be lost if this motion is denied. Accordingly, the motion should be granted.

CONCLUSION

Magic meets the standard for filing a late notice of claim to a water right. The delay in filing a claim was not willful, as Magic did not realize it has to file a separate claim for these enlargement acres. Furthermore, any interested parties may file objections to any future recommendation. As such, there is no prejudice. Finally, because there is a valid enlargement claim based on section 42-1426, a meritorious position has been presented. Accordingly, this motion should be granted.

DATED this 15th day of June, 2010.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
Paul L. Arrington

Attorneys for Magic Water Company, Inc.

CERTIFICATE OF SERVICE

I certify that on this 5th day of June, 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:

IDWR Document Depository
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