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DEPARTMENT OF
WATER RESOURCES

Ms. Vierling meets the requirements for filing an amended claim in the SRBA. The mistake was not willful, no parties will be prejudiced by the amendment, and finally, a meritorious position has been presented. Accordingly, this motion should be granted.

STANDARD OF REVIEW

Under this Court's *AOI*, a motion to file an amended 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 936.¹ 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).

ARGUMENT

I. Vierling Meets the "Good Cause" Standard for Filing an Amended Notice of Claim

Ms. Vierling filed a water right claim for domestic, heating, and recreation uses on March 27, 2003. Ms. Vierling claimed a quantity of 0.02 cfs. IDWR later recommended this claim in that amount. However, Ms. Vierling had previously filed a similar claim to the same source for adjoining property that she owns for 0.04 cfs, water right claim 37-13054. Ms. Vierling was

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).

confused by the amount of water she claimed back in 2003 due to IDWR's standard diversion rate for small, or de-minimus, domestic uses, which is typically 0.02 cfs. *See Vierling Aff.* Ms. Vierling realized the mistake and now seeks to correct it through an amended claim in compliance with the Court's recent scheduling order. The mistake was not willful. *See Vierling Aff.*

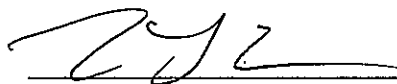
No other water users will be prejudiced by the granting of this motion. Although an existing objection has been filed to Ms. Vierling's water right claim (by Mr. Jay Pace), if this motion is granted, the Department will be able to review the amended claim and submit an amended recommendation to the SRBA Court. Finally, a meritorious position has been presented. Ms. Vierling has a valid water right claim and her claim was previously recommended for 0.02 cfs. This amendment corrects the mistake that was made back in 2003 and ensures the claimed amount is consistent with her other water right claim, 37-13054, as well as the other water right already decreed by the Court on the same source, 37-13394, for property located directly adjacent to Ms. Vierling's. Accordingly, the motion should be granted.

CONCLUSION

Vierling meets the standard for filing an amended notice of claim. The mistake made in the original claim was not willful and should be allowed to be corrected through an amended claim. Ms. Vierling mistakenly claimed 0.02 cfs when she admittedly should have claimed 0.04 cfs. Vierling respectfully requests the Court to grant this motion.

DATED this 20th day of October, 2010.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
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CERTIFICATE OF SERVICE

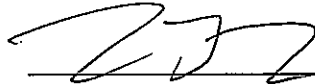
I certify that on this 20th day of October, 2010, I served a copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED NOTICE OF CLAIM**, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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