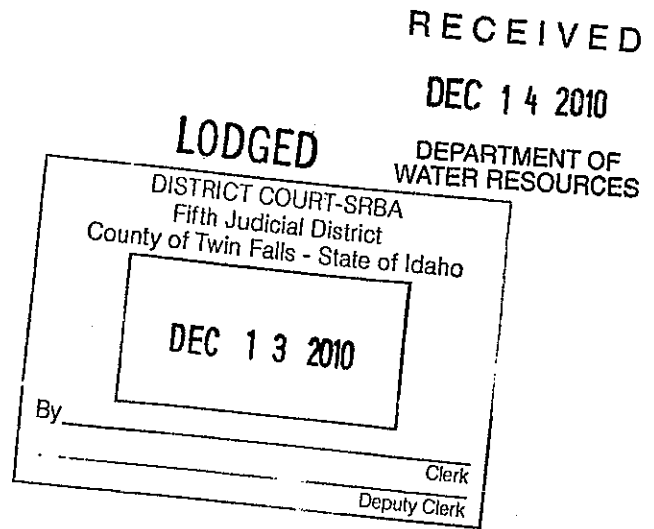


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase No. 47-~~04374~~ 17550 DAC

MEMORANDUM IN SUPPORT OF
MOTION TO FILE LATE NOTICE OF
CLAIM

COMES NOW, Point Ranch, Inc., 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 Lee Satterwhite.

INTRODUCTION

Through this motion, Point Ranch, Inc., seeks leave to file a late claim for acres developed and irrigated as a statutory approved enlargement of water right 47-4374. By 1987, Point Ranch, Inc., was delivering water to an additional 35 acres located adjacent to the original place of use for water right 47-4374. However, even though Point Ranch, Inc., was able to irrigate additional acres, Point Ranch, Inc., diverted water within the diversion rate limitation of water right 47-4374.

Point Ranch, Inc., meets the requirements for filing a late claim in the SRBA. The delay in filing the enlargement claim was not willful. Point Ranch, Inc., claimed many of these acres under its original water right 47-4374 in 1989, but did not realize that it would have to submit a separate water right claim for the enlargement acres. Just the opposite, it was Point Ranch, Inc.'s., understanding and direction from IDWR to claim all acres for water right 47-4374, which it did in 1987. No parties will be prejudiced as any who oppose this enlargement claim can 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 47-4374 is a water right authorizing a diversion rate of 3.56 cfs for the irrigation of 148 acres within Twin Falls County, with a priority date of January 1, 1880. The Idaho Department of Water Resources has recommended this right for 3.05 cfs with a priority date of May 15, 1885, for irrigation of 115 acres within a total of 145 acres described in the filed Notice of Claim in the Adjudication proceedings, however, Point Ranch, Inc., was delivering water pursuant to its water right to an additional 35 acres that are immediately adjacent to the in place of use in said water right. A review of the 1987 aerial photography of the place of use for water right 47-4374 is attached hereto as Exhibit "A," shows these additional acres being irrigated.

Point Ranch, Inc., filed its claim for water right 47-4374 in 1989. At that time, Point Ranch, Inc., included most of these enlargement acres in its claim. *Id.* The recommendation for water right 47-4374, however, did not include these acres – as the recommended place of use was consistent with the licensed place of use.

It was not until Point Ranch, Inc., reviewed the recommendation for its water rights that it learned a separate enlargement claim should have been filed for these additional acres. Point Ranch, Inc., filed an objection to the recommendation for water right 47-4374 and 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). 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. Point Ranch, Inc., Meets the “Good Cause” Standard for Filing a Late Notice of Claim

The central question presented here is whether Point Ranch, Inc., should be permitted to file a valid enlargement claim for acres irrigated prior to 1987. Idaho law provides for the filing of an enlargement water right claim when, “through water conservation and other mean,” 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). Point Ranch, Inc.’s., claim meets the statutory criteria.

Since Point Ranch, Inc.’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. Point Ranch, Inc.’s., Actions were not Willful

Unaware that it needed to file a separate claim for enlargement acres, Point Ranch, Inc., included most of these enlargement acres in its original claim to water right 47-4374. It was not until water right 47-4374 was recommended without these enlargement acres that Point Ranch, Inc., learned that it should have filed a separate claim on the enlargement acres. Point Ranch, Inc., filed an objection to the recommendation for water right 47-4374 and hired legal counsel to investigate the water rights and file 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. Point Ranch, Inc., has been irrigating these enlargement acres since at least 1987. Under the law, therefore, Point Ranch, Inc., has a right to submit this enlargement claim. I.C. § 42-1426. Furthermore, 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). Finally, if this motion is granted, the Department will be able to review the enlargement claim and submit a recommendation to the SRBA Court. 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 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. Furthermore, while irrigating these acres, Point Ranch, Inc., continues to stay within the diversion rate limitation of water right 42-4374. Accordingly, Point Ranch, Inc., meets the statutory criteria for a valid enlargement claim of 35 acres.

While no prejudice will occur as a result of granting this motion, Point Ranch, Inc., 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

Point Ranch, Inc., meets the standard for filing a late notice of claim to a water right. The delay in filing a claim was not willful, as Point Ranch, Inc., did not realize it has to file a separate

claim for these enlargement acres and included many of them in its original claim for water right 47-4374. There is no prejudice, as parties to the SRBA will be able participate in these proceedings by filing objections and/or responses. 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 13th day of December, 2010.

COLEMAN, RITCHIE & ROBERTSON

BY David A. Coleman
DAVID A. COLEMAN
Attorney for Point Ranch, Inc.

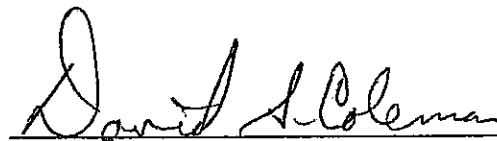
CERTIFICATE OF SERVICE

I certify that on this 13th day of December, 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
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724



DAVID A. COLEMAN

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SCANNED
DEC 14 2010

EXHIBIT "A"