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DEPARTMENT OF  
WATER RESOURCES

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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. 63-33590

**TREE TOP RANCHES, L.P.'S MOTION AND  
MEMORANDUM IN SUPPORT OF MOTION  
TO FILE LATE CLAIM**

**MOTION**

COMES NOW, Tree Top Ranches, L.P. ("Tree Top"), by and through its undersigned counsel of record and pursuant to Idaho Rules of Civil Procedure 7 and 55(c), and SRBA Administrative Order 1 ("AO1") Section 4(d)(2), and hereby submits this Motion and Memorandum in Support of Motion to File Late Claim. This motion is supported by the memorandum of points and authorities contained herein, and by the Affidavit of Andrew J. Waldera filed contemporaneously herewith.

## **MEMORANDUM IN SUPPORT OF MOTION**

### **I. BACKGROUND**

This matter involves the evolution of the convoluted history of what was known locally as the Andrews Ditch Company. Through the course of investigations conducted by various parties and the Idaho Department of Water Resources (“IDWR” or the “Department”) during the SRBA, it is questionable whether the ditch company ever existed as a formal, legal entity. It appears instead that the ditch company was really nothing more than a loosely organized group of water users who collectively diverted water from the Boise River via the Andrews Ditch.

Over time, and with the guidance and input of IDWR, the parties who now comprise the landowners/water users under the Andrews Ditch conveyance system each claimed (in their respective individual capacities) their proportionate shares of the water rights conveyed by the Andrews Ditch. At issue were original parent water right nos. 63-00127, 63-00128, 63-00129, 63-00130, 63-00131, 63-00160, and 63-00178, among others. These water rights were previously decreed by the Stewart Decree in 1906.<sup>1</sup>

The water rights claims and recommendation process was largely the result of a comprehensive water rights settlement agreement between the current landowner/water users: Tree Top, Greg and Ann Obendorf, the Iest Family L.L.L.P., and THEDRAKE, LLC. The parties executed the settlement agreement in February 2011. IDWR then reviewed the terms of

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<sup>1</sup> Should the Court desire, it can obtain and review a more detailed account of the Andrews Ditch saga contained within Tree Top’s Motion and Memorandum in Support of Motion to File Late Objection in SRBA Subcase No. 63-00178C, filed December 29, 2009, as well as in the corresponding Affidavit of Andrew J. Waldera filed contemporaneously therewith, and the Affidavit of Scott L. Campbell referenced therein.

the agreement, including the parties' division of the water rights referenced therein, and issued Standard Form 5 Settlement Documents conforming with the parties' comprehensive settlement agreement in August 2011.<sup>2</sup> *See* Affidavit of Andrew J. Waldera in Support of Tree Top Ranches, L.P.'s Motion and Memorandum in Support of Motion to File Late Claim ("Waldera Aff."), ¶ 7.

During the parties' lengthy settlement negotiations, it became apparent that the Andrews Ditch conveyed (and its landowner/water users beneficially used) more water historically than was accounted for by the Stewart Decree-based water rights (nos. 63-00127, 63-00128, 63-00129, 63-00130, 63-00131, 63-00160, and 63-00178). Waldera Aff., ¶¶ 2-5. In fact, ditch measurements conducted by SPF Water Engineering at the behest of Tree Top illustrated a 13.3 cfs discrepancy between actual Andrews Ditch flows and the aggregate quantity of the Stewart Decree-based water rights. It also became apparent to the parties that the above-referenced 13.3 cfs shortfall had not been claimed by any of them in the SRBA. *Id.*

Given the parties' collective desire (and need) to maintain historic Andrews Ditch irrigation operations, the parties agreed (within the underlying February 2011 settlement agreement) to file and pursue late beneficial use claims in the SRBA to recapture the 13.3 cfs water shortfall. Waldera Aff., ¶ 6. The Iest Family L.L.L.P., Obendorfs, and THEDRAKE, LLC already filed their respective motions for late claim for their proportionate shares of the 13.3 cfs of water. The Court granted those motions for late claims on July 19, 2011, and those claims are known as Subcase Nos. 63-33497 (Obendorf), 63-33498 (Iest Family L.L.L.P.), and 63-33499 (THEDRAKE, LLC). *Id.*

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<sup>2</sup> The Court can find a copy of the parties' comprehensive settlement agreement attached as Exhibit A to the Notice of Settlement, filed with the Court on February 11, 2011, in Subcase No. 63-00178C, among others.

This motion and the proposed late claim filed herewith represent Tree Top's claim to its proportionate share of the 13.3 cfs shortfall discussed above.

## II. ARGUMENT

### A. The Legal Standard For Filing A Late Claim Is Lenient

In pertinent part, AO1 provides that “[a] Motion to File a Late Notice of Claim . . . will be reviewed under the criteria of I.R.C.P. 55(c).” AO1 Section 4(d)(2)(d); *see also*, Order on Motion to Set Aside Partial Decrees and File Late Objections, Subcase Nos. 65-07267, et al. (Jan. 31, 2001) (“*A.L. Cattle*”) (“a motion to file a late claim is determined pursuant to I.R.C.P. 55(c)”). Idaho Rule of Civil Procedure 55(c) applies a “good cause” standard. *A.L. Cattle*, pp. 6-7. In discussing the application of the “good cause” standard, then Presiding Judge Burdick explained:

The “good cause” standard is a more lenient threshold than the Rule 60(b) standard. (Citation omitted). The I.R.C.P. 55(c) standard takes into account the following factors: (1) whether the default was willful; (2) whether setting aside the judgment would prejudice the opponent; and (3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

*A.L. Cattle*, pp. 6-7.

This Court has significant discretion to grant a motion for late claim, and the Court's decision will not be disturbed unless an abuse of discretion clearly occurs. Memorandum Decision and Order on Challenge, Subcase Nos. 47-16433, et al. (March 22, 2005) (“*Bedke I*”), p. 9 (discussing the application of the same Rule 55(c) standard in the context of a motion for late objection). Moreover, in doubtful cases, relief should be granted to reach a judgment on the merits. *Bedke I*, p. 11. This is because default judgments are disfavored. *A.L. Cattle*, p. 8.

## **B. Tree Top's Motion Should Be Granted**

### **1. The Delay Is Not Willful**

As discussed by then Presiding Judge Melanson in *Bedke I*, a willful act is one done intentionally, knowingly, or purposefully, and is distinguishable from an act done carelessly, thoughtlessly, or inadvertently. *Bedke I*, p. 12. Stated differently, “[a] willful act differs essentially from a negligent act. The one is positive and the other negative.” *Id.*

Tree Top's failure to more timely file its proposed late claim was not willful. The Andrews Ditch “saga” is reasonably characterized as a “saga,” tracing its roots back to 2006 when the Department and the parties began to question whether the Andrews Ditch Company ever really existed.

While sorting out the parties' respective proportionate shares of Andrews Ditch water, it became clear that the ditch historically conveyed more water than accounted for under the 1906 Stewart Decree. Waldera Aff., ¶¶ 2-5. However, the discrepancy between actual ditch flows, and the quantity of water previously decreed by the Stewart Decree (that discrepancy being 13.3 cfs) was not readily discovered until the parties successfully negotiated the division of the Stewart Decree water amongst themselves. *Id.* In sum, the parties did not recognize or come to fully appreciate the fact that a discrepancy existed until during their settlement negotiations spanning 2010 and early 2011. *Id.*

To address the discrepancy, the parties expressly agreed to file proportionate share late claims for the 13.3 cfs of water in order to support the Andrews Ditch historic flow regime as the parties knew it. Waldera Aff., ¶¶ 5-6. However, the parties (including Tree Top) were not sure how the Department would view their underlying settlement agreement, and the division of water rights contained within it. Consequently, Tree Top did not want to expend the

time, effort, and expense of pursuing this late claim until it was assured that IDWR approved of the parties' agreement. *Id.*, ¶¶ 7-8. IDWR affirmatively demonstrated its approval of the parties' agreement when it began issuing the Standard Form 5 settlement documents prescribed within the agreement in August 2011. *Id.* In turn, Tree Top now files this motion in accordance with the parties' comprehensive settlement agreement.

At worst, Tree Top's failure to advance its proposed claim in a more timely fashion was inadvertent. In reality, neither Tree Top, Obendorf, the Iest Family L.L.L.P., nor THEDRAKE, LLC fully recognized or appreciated the ditch flow/water right discrepancy until 2010-11. After learning of the discrepancy, the parties have promptly moved this Court to authorize their respective late claims in accordance with the parties' IDWR-vetted settlement agreement.

## **2. Granting The Motion Will Not Cause Prejudice**

Tree Top is not aware of any third parties who would be prejudiced by the grant of this motion. To the contrary, Tree Top is joining with the other landowner/water users under the Andrews Ditch to maintain historic ditch operations for the mutual benefit of one another.

Not only are the settlement parties acting in accordance with the terms of their negotiated settlement agreement, but recent history demonstrates the lack of any known prejudice to any third parties. For example, and as this Court noted when granting the Obendorf, the Iest Family L.L.L.P., and THEDRAKE, LLC motions for late claims in July 2011, no objections were filed against any of the foregoing late claim notices. *See* Order Granting Motion to File Late Notice of Claim in Subcase Nos. 63-33497, 63-33498, and 63-33499, respectively.

Moreover, should a presently unknown third party express concern over Tree Top's proposed late claim, that party (or those parties) remain free to participate in this subcase

via the objection process should IDWR ultimately recommend the water right. Consequently, Tree Top submits that the grant of this motion, in and of itself, will not prejudice anyone.

### **3. Tree Top's Proposed Late Claim Presents A Meritorious Position**

The evidence and reasons supporting Tree Top's proposed late claim present meritorious legal positions under Idaho water law. The "meritorious position" standard simply requires that the late claimant allege sufficient facts that, if established, would allow the claimant to prevail. *A.L. Cattle*, pp. 5-6.

Tree Top's proposed late claim is supported by Andrews Ditch flow measurements conducted on its behalf by SPF Water Engineering ("SPF"). Tree Top engaged SPF as a consultant and as an expert witness concerning the support of its Parma ranch water right claims in the SRBA. Waldera Aff., ¶ 4. SPF's expert measurements demonstrate that the Andrews Ditch capacity and flow are 40 cfs, while the ditch's Stewart Decree-based water rights only amount to 26.7 cfs. Waldera Aff. ¶¶ 4-5.

SPF's measurements demonstrate that Andrews Ditch capacity and actual ditch flows exceed the Andrews Ditch-based water rights decreed in the 1906 Stewart Decree. Consequently, the Andrews Ditch landowners/water users (both past and present) have been beneficially diverting and using an additional 13.3 cfs of water to support their historic irrigation operations. The parties' beneficial use of water, if established/proven to the Department's satisfaction, constitutes beneficial use-based water rights under Idaho law and, therefore, represents a "meritorious position."

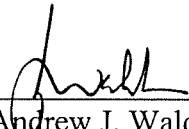
### **III. CONCLUSION**

For the foregoing, Tree Top respectfully requests that the Court grant it leave to file its proposed Notice of Claim. Tree Top's delay in filing the claim was not willful, the claim

should not prejudice anyone, and the beneficial use-based claim presents a meritorious position. Moreover, Tree Top's proposed claim is an extension of, and should be considered part and parcel with, the already Court-approved late claims of the Obendorfs, the Iest Family L.L.L.P., and THEDRAKE, LLC in SRBA Subcase Nos. 63-33497, 63-33498, and 63-33499, respectively. Each claim (including Tree Top's) arises from the parties' comprehensive settlement agreement, and each was filed to support the parties' shared, communal interest in supporting historic Andrews Ditch irrigation operations.

DATED this 28<sup>th</sup> day of October, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
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Andrew J. Waldera – Of the Firm  
Attorneys for Tree Top Ranches, L.P.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28<sup>th</sup> day of October, 2011, I caused a true and correct copy of the foregoing **TREE TOP RANCHES, L.P.'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO FILE LATE CLAIM** to be served by the method indicated below, and addressed to the following:

IDWR Document Depository  
Idaho Department of Water Resources  
322 E. Front Street, 6th Floor  
P.O. Box 83720  
Boise, ID 83720

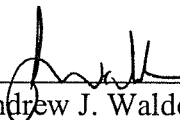
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Natural Resources Division Chief  
Office of the Attorney General  
State of Idaho  
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Boise, ID 83711-4449

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Andrew J. Waldera