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DEPARTMENT OF
WATER RESOURCES

Attorneys for the City of Driggs

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: 22-626 & 22-14003
	)	
	)	
Case 39576	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO FILE LATE CLAIMS
	)	
	)	
	)	

The Claimant, the City of Driggs (hereinafter “the City”), by and through counsel, Jerry R. Rigby, hereby files this Memorandum in Support of the City’s Motion to File Late Claims numbers 22-626 and 22-14003, on the grounds that substantial reasons exist to justify relief from the operation of the order closing Basin 22 as to the above water rights under IRCP (60(b)(1) & (6).

BACKGROUND

The background and facts relevant to this matter are contained in the Affidavit of Jerry R. Rigby in Support of the City’s Motion to File Late Claims, filed concurrently herewith.

APPLICATION

The Court has discretion to grant the City's Motion to File Late Claims pursuant to its discretion granted by the Idaho Rules of Civil Procedure 60(b)(1) & (6), and by prior case law.

I.R.C.P. 60(b)(1) & (6) gives the court the discretion to set aside a final judgment, **order, or proceeding** for the following reasons: "(1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment".

Although the court is vested with broad discretion in determining whether to grant or deny a Rule 60(b) motion, it should do so when there is a showing of 'unique and compelling circumstances' justifying relief." *Mc Lean v. Cheyovich Family Trust*, 2012 WL 1970060 (Idaho)

In the case before the Court, it is clear that "unique and compelling circumstances" exist which would warrant a decision by the Court allowing Claimant to file late claims based upon claim numbers **22-626 & 22-14003**. Filed with this memorandum is an affidavit of Jerry R. Rigby, counsel for the City, which sets forth the factual basis to evidence the unique characteristics of the water rights and facts surrounding the preparation of the motions prior to the closure of the Basing together with the factual basis upon which relief should be granted as claimed by the City.

Based upon the Affidavit of Jerry R. Rigby, the fact that the motions were not timely filed was clearly a mistake as there is no other answer as to why it would have been ignored. All actions of counsel and the parties in meeting with the other water right holders and the Wyoming authorities evidenced the belief that the motions had in fact been filed.

This Court has set aside orders disallowing claims when the facts evidence excusable mistake or neglect. While a disallowance is not exactly the same as failing to file a motion to file

a late claim prior to a basin being closed, it is for all intents and purposes the same in that it is an order by the Court which essentially decrees the elements of the water right, or lack thereof. Furthermore, the motion currently before the Court is similar in that but for the absence of the Court allowing the claims to be filed, the Claimant in the current case will be forced to forego diverting the water which has been historically diverted and to which it has devoted hundreds of thousands of dollars in developing a substantial potable drinking water and irrigation water system for its citizens.

The Claimant realizes that Basin 22 has been closed by order of this Court. Nevertheless, the claimant's belief that this Court should exercise its discretion and allow the filing of the claims because the delay was not willful, only recently discovered, no parties will be prejudiced and the Claimant has a meritorious position.

In defining "willful" action, the Presiding Judge, relying upon Black's Law Dictionary, noted the following:

"In civil actions the word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." Black's further defines the term as, "A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from act done carelessly, thoughtlessly, or inadvertently. A willful act differs essentially from a negligent act. The one positive and the other negative."

Order on Permissive Review and Order of Recommitment, (Bedke II) at 8.

The Claimant has not knowingly or purposefully delayed the filing of this motion. Claimant, its counsel and all parties involved fully believed that the motion HAD been filed and that they were actively pursuing settlement of their particular issues with the necessary parties in order to end up signing a Standard Form 5 with the Court. It was simply a mistake. Had the

Claimant realized the mistake prior to the closing of the Basin 22, it would have filed the previously prepared motions immediately.

No parties to the SRBA will be prejudiced by a decision of the Court setting aside this partial decree. More importantly, this water has been historically diverted since their original priority dates. No down-stream water users are relying on this water because it has been historically and continuously diverted since the individual water rights priority dates. Furthermore, the owner of the priority right in the limited stream from which the water is diverted is the very entity which has been in negotiations with the City to work out an acceptable equitable split of the stream. Finally, granting the City's motion does not automatically grant the rights as claimed. Parties to the SRBA can still object to the Director's report which will be filed in its regular process. Furthermore, due to the previous negotiations, the overall winding down of the SRBA will not be delayed because the issues are narrowed sufficient enough to either resolved immediately upon the filing of a director's report or to be heard by the Special Master on a shortened time frame.

Finally, the Claimant has a meritorious position and claims, based upon valid and continuously diverted Wyoming decrees and permits where the rights have always been diverted. Furthermore, most of the season, any diversion made by the City will be pursuant to its right as a stockholder in Grand Teton Canal Company, which has priority on the limited water supply from the spring.

Just as default judgments are not favored and "trial courts should grant relief in doubtful cases in order to decide the case on the merits", so too should the above Court favor the allowance an otherwise valid claim the right to be processed and recommended by the Director

as all other water claims have been afforded, especially where the facts surrounding the failure to file were not of intentional neglect or failure to resolve the pending issues. See *Jonsson v. Oxborrow*, 141 Idaho 635, 115 P.3d 726 (2005).

This is not a case of mistake of law but a mistake of facts. Furthermore, this is not a case where claimant failed to prosecute its claim or failed to show due diligence in the prosecution of its rights. See *Washington Federal Savings and Loan Association v. Transamerica Premier Insurance Company* 124 Idaho 913, 865 P.2d 1004 916 (Idaho 1993) at 916 & 1007. See also: *Kovachy v. DeLeusomme*, 122 Idaho at 974, 842 P.2d at 310 (Idaho 1992). The City has been attempting to resolve the unique nature of its rights as decreed and permitted by the State of Wyoming, including the increase of flows acquired in Wyoming which arguably are not flows which would enter any stream or river of Idaho. It was during this unique process when counsel mistakenly believed that the Motions (fully prepared by Counsel and to which water right claim numbers had requested from IDWR and had been attached) had actually been filed with the Court.

The City is fully aware that the test also comes down to what “a reasonably prudent person would or should act under similar circumstances.” However, in determining what such actions are reasonable and prudent, it is clear that the actions were NOT willful, NOT without any sufficient legal reason and were NOT in disregard to the process of the Court as set forth in the Supreme Court case. See: *Crumley v. Minden*, 80 Idaho 391, 394, 331 P.2d 275, 277 (1958).

Because there are so few water right attorneys in Eastern Idaho, the City’s counsel has had the arduous task of working with hundreds of small to large water rights cases, including the most significant number of cases known as the “recrec” cases which initially were patterned after

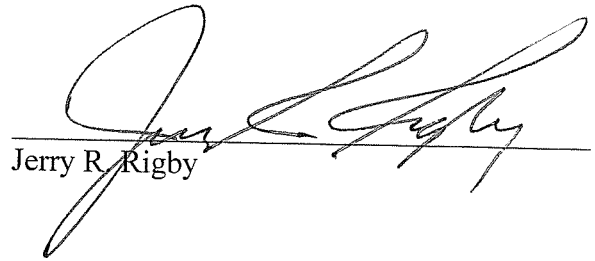
the Director Recommended rights of Aberdeen Springfield's recovered water rights. When this court overturned said right, it caused the hundreds of rights represented by the City's counsel to work with each of the individual rights as their rights were re-recommended by the Director, some with significant changes requiring going back to the basis for each of the elements. The City's Wyoming water rights issues were caught in the middle of the recrec proceedings and assumed, although mistakenly and surprisingly, having been actually filed with the Court.

CONCLUSION

It is clear that the Court has the authority and discretion to allow the City to file and prosecute water right numbers **22-626 & 22-14003**. This authority and discretion is grounded in the Idaho Rules of Civil Procedure and precedent set by the Idaho Supreme Court and the Snake River Basin Adjudication District Court as well. If the Claimant is not allowed to file said claims, the Claimant will not be allowed to continue with its current and valid Wyoming water rights and its historic and expensive practice of diverting and treating water in Wyoming for irrigation and most importantly potable water to the citizens of Driggs, Idaho.

Because the City also has a meritorious position, validated by years of historical use and valid Wyoming Decrees and Permits which supports that position, the above entitled Court should use its statutory discretion and allow the City to grant its motion to file late claims for the above entitled claims.

DATED this 10th day of July, 2012.


Jerry R. Rigby

CERTIFICATE OF MAILING

I certify that on July 10, 2012, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to

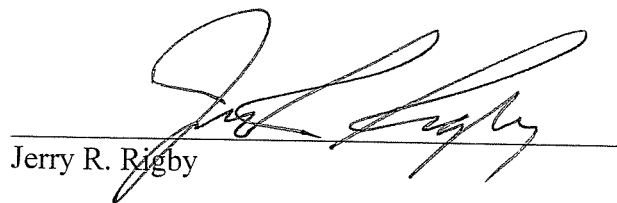
Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
Twin Falls, ID 83303-2707

2. Copies to:

IDWR Document Depository
P. O. Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
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United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724


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