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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	)	Subcase Nos.: 01-10620, 01-10621,
	)	01-10622, 01-10623, 21-13161, 37-22806,
Case No. 39576	)	63-33732, 63-33733, 63-33734, 65-23531,
	)	and 65-23532
	)	
	)	THE UNITED STATES' MEMORANDUM
	)	IN SUPPORT OF STANDARD FORM 4
	)	MOTIONS TO FILE LATE NOTICES OF
_____	)	CLAIM

Introduction

In the on-going Basin-Wide Issue No. 17 ("BWI 17") proceedings the State and others have argued that Reclamation should protect its ability to "refill" reservoir storage space vacated for flood control purposes through separate storage water rights with a junior priority. As a result, the United States now submits STANDARD FORM 4, MOTIONS TO FILE LATE NOTICES OF

**THE UNITED STATES MEMORANDUM IN SUPPORT OF SF4 MOTIONS TO FILE LATE NOTICES
OF CLAIM - Page 1**

CLAIM (“SF4s”).¹ The Notices of Claim are for supplemental beneficial use storage water rights – separate water rights with a junior priority – which, in conjunction with existing storage water rights, would allow Reclamation to complete one physical fill of its reservoirs in years when it must release stored water for flood control. This Court should accept the Notices of Claim because the supplemental storage water right claims (1) are meritorious, (2) are being filed because of recent proceedings rather than deliberate delay and (3) consideration of the claims will not prejudice potential opponents of the claims.

Factual Background

As this Court is well aware, the issue of reservoir “refill” has been the subject of recent controversy in the SRBA. The need for “refill” of a reservoir arises when water previously diverted into storage is vacated from the reservoir for flood control purposes rather than being delivered for beneficial use.² In essence the “refill” water serves to replace that vacated.

The controversy over “refill” arose late in the SRBA process. Storage water rights for Reclamation reservoirs had already been decreed in Basins 63, 65, 37 and 21 without any consideration of refill when the State formally raised the issue in Basin 01 through a Motion for Partial Summary Judgment. The State’s Motion questioned whether a remark or other authority was necessary to authorize refill and sought to strictly constrain any refill by making it subordinate to all water rights, both present and future. MOTION FOR PARTIAL SUMMARY

¹ The SF4s are attached to this Memorandum.

² Consistent with the parameters of the proceedings in BWI 17, the United States seeks supplemental storage water rights only to “refill” water vacated for flood control purposes.

JUDGMENT, subcases 01-2064 and 01-2068 *et al* (Jan. 25, 2012). The State’s motion prompted Reclamation contractors from Basins 63 and 65 join the Basin 01 proceedings and ultimately led to the PETITION TO DESIGNATE BASIN-WIDE ISSUE (June 8, 2012). This Court granted that petition and designated the question of whether Idaho law requires a remark authorizing storage rights to “refill,” *under priority*, space vacated for flood control as Basin-Wide Issue No. 17. ORDER DESIGNATING BASIN-WIDE ISSUE (Sept. 24, 2012) (emphasis in original).

In BWI 17, the United States joined with the Petitioners to assert the right to priority refill.³ The State, United Water and the Upper Valley Water Users have all argued that the Petitioners are seeking an improper enlargement of reservoir storage water rights. *See United Water’s Response Brief*, BWI 17 at 3 (Jan. 10, 2013). Under their theory, all water entering a reservoir is considered diverted, including that released for flood control, with the result that releasing water for flood control can leave a reservoir full “on paper” but not physically full. Those parties argue that because the storage water right has been “filled,” the storage of additional water under priority enlarges the quantity element of the water right. *E.g., State of Idaho’s Response Brief*, BWI 17 at 8 (Jan. 11, 2013) (“State Res. Brf.”). They further argue that to avoid that “enlargement,” a separate water right with a junior priority must be perfected. Consistent with those arguments, the proposed late claims seek a separate, supplemental water

³ As the State has done in the BWI 17 proceedings, the United States will refer to all the parties supporting priority refill in those proceedings as “Petitioners,” whether or not they formally filed a petition.

right with a junior priority which would allow Reclamation to complete one physical fill of its reservoirs in years when stored water is vacated for flood control.⁴

The supplemental storage water rights the United States seeks leave to file are beneficial use claims based on the storage and beneficial use of water prior to 1971.⁵ While many of the elements of these supplemental storage rights are identical to the initial storage water rights, including the point of diversion, place and purpose of use, the supplemental storage water rights differ from the initial storage rights water in three ways. First, the priority date is junior to that of the initial right and is based on the year in which the largest inflow to the reservoir occurred prior to 1971. Second, consistent with the legal premise advanced by the State in Basin 01 and BWI 17, the quantity claimed is the amount of that inflow. Third, the supplemental storage water right claims include a remark which will limit the quantity of water to that necessary to complete one physical fill of the reservoir after stored water is evacuated for flood control purposes.

The United States seeks to file these supplemental storage water right claims at eleven (11) Reclamation reservoirs in five (5) basins: Arrowrock, Anderson Ranch and Lucky Peak in Basin 63; American Falls, Palisades, Jackson and Minidoka in Basin 01; Island Park in

⁴ Because the proposed supplemental storage water rights would only allow the completion of one physical fill of Reclamation's reservoirs, these claims are distinct from secondary storage water rights claims the United States filed on four reservoirs early in the SRBA. *See* 63-5262 (Arrowrock); 01-4052 (American Falls); 01-4056 (Palisades); 21-4156 (Island Park). Those claims would have allowed multiple physical fills. Reclamation did not object to the disallowal of those claims because it decided to pursue only a single physical fill of its reservoirs.

⁵ The ability to perfect a water right through beneficial use ended with the adoption of a mandatory permit system in 1971. *See Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 274, 255 P.3d 1152, 1160 (2011).

Basin 21; Cascade and Deadwood in Basin 65; and Little Wood in Basin 37. This Court has Ordered that Late Claims may be filed in Basins 01, 37 and 63 through January 31, 2013. ORDER ESTABLISHING DEADLINE FOR LATE CLAIM FILING IN BASINS 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, AND 63 (October 12, 2012). The remaining Basins, 21 and 65, were closed by Order of this Court issued on April 25, 2012. ORDER CLOSING CLAIMS TAKING BASINS 21, 22, 29, 33, 35, 65, 67, 69, 71, 72, 73, 74, 75, 77, 78, 79.⁶ However, the closure orders allow for the possibility of filing Late Claims “related to the resolution of litigation pending at the time of [the] Order” in those Basins. *Id.* at 3. The claims the United States seeks to file in Basins 21 and 65 meet that criteria because at the time of that Order, the “refill” litigation that would reach those basins through BWI 17 was already pending.

Standard of Review

A motion to file a late notice of claim is reviewed under the criteria of I.R.C.P. 55(c). Administrative Order 1 § 4.d(2)(d) (“AO1”). Rule 55(c) requires showing “good cause” for the filing of a late claim. *Dorion v. Keane*, 153 Idaho 371, ___, 283 P.3d 118, 120 (Id. App. 2012); *Bach v. Miller*, 148 Idaho 549, 553, 224 P.3d 1138, 1141 (2010). “Good cause” requires a showing that the claim is meritorious, *i.e.*, that it raises a “real justiciable controversy.” *Bach*, 148 Idaho at 553, 224 P.2d at 1142 (quoting *Idaho State Police ex rel. Russell v. Real Property Situated in County of Cassia*, 144 Idaho 60, 62, 156 P.3d 561, 563 (2007) (applying Rule 60(b))).

Other primary considerations of good cause in the context of a late Notice of Claim to a water right include whether: (1) the claimant engaged in deliberate, intentional

⁶ On September 12, 2012, the Court’s Order was amended in a manner not relevant here.

conduct willfully creating the need to file a late claim; and (2) potential opponents of the claim would be prejudiced. *Dorion*, 283 P.3d at 121, 122 (citing *McFarland v. Curtis*, 123 Idaho 931, 933, 854 P.2d 274, 276 (Id. App. 1993)). The weight to apply to those two criteria is left to the discretion of this Court, *Dorion*, 283 P.3d at 122 and should reflect “the unique facts and circumstances presented.” *Baldwin v. Baldwin*, 114 Idaho 525, 527, 757 P.2d 1244, 1246 (Id. App. 1988). However, this Court’s exercise of its discretion carries an overarching obligation to act in light of the policy that cases should be decided on their merits. *Dorion*, 283 P.3d at 122. Put more directly, if this Court considers it a close call whether to accept the late claims, the Court should proceed to decide the claims on their merits. *E.g.*, *Meyers v. Hansen*, 148 Idaho 283, 287, 221 P.3d 81, 85 (2009).

Argument

I. THIS COURT SHOULD ALLOW THE FILING OF LATE CLAIMS FOR THE COMPLETION OF A SINGLE FILL OF RESERVOIR STORAGE.

In the Basin 01 “refill” proceedings and BWI 17 the parties have disputed, *inter alia*, when a reservoir storage water right should be considered filled, and how refill of the water right should occur. The proposed late claims seek to preserve Reclamation's ability to physically refill its reservoirs, in a manner consistent with the legal premises advanced by the State in those proceedings.⁷ This Court should accept the claims for filing and further proceedings because each of the three criteria applicable pursuant to AO1 and IRCP 55(c) has been met.

⁷ Should Petitioners prevail in BWI 17, the proposed claims to supplemental storage water rights would be unnecessary and withdrawn.

A. The Claims the United States Seeks to File are Meritorious.

Rule 55(c) does not require a party to prove that it will prevail on its claims. Rather a claim is considered meritorious where there is sufficient basis to warrant examining the claim upon its merits. *Hawkes v. Sparks*, 108 Idaho 917, 920, 702 P.2d 1377, 1380 (Id. App. 1985); *see also Dorion*, 283 P.3d at 121; *Bach*, 148 Idaho at 553, 224 P.3d at 1142 (meritorious claim criteria is applied to ensure there will be a justiciable controversy). The moving party “is not required to present evidence” in support of the claims; rather the party must plead factual details “with particularity.” *Dorion*, 283 P.3d at 121. The claims the United States seeks leave to file more than meet that standard.

The United States has pled each of the elements required by I.C. § 42-1411(2) with particularity. Moreover, the claims present a "real and justiciable controversy" over whether the United States has obtained a supplemental storage water right through storage and beneficial use of water prior to 1971. Indeed, the State has effectively conceded the proposed supplemental storage water right claims are meritorious by repeatedly arguing that “as a matter of law ‘refill’ rights based on claims of historic beneficial use must be perfected as separate water rights.” State of Idaho’s Reply Brief, BWI 17, at 36 (Jan. 25, 2013); *see also id.* at 21, 25; State Resp. Brf. at 15 (all arguing that rights for “refill” of space vacated for flood control must be perfected through separate water rights).

B. The Need to File Late Claims Arose from the Recent “Refill” Proceedings Rather Than Deliberate, Intentional Conduct.

The claims the United States seeks to file are a direct result of the "refill" controversy formally touched off only recently by the State's Motion for Partial Summary Judgment in the Basin 01 Subcases. Although by the time the State filed its motion numerous

reservoirs had been decreed without a “refill” remark, the State asserted that a remark was necessary to authorize any refill of vacated storage space and sought to impose tight constraints on “refill” by making it subordinate to all other water rights, both present and future. *See* State MEMORANDUM IN SUPPORT OF STATE OF IDAHO’S MOTION FOR PARTIAL SUMMARY JUDGMENT at 3 (Subcases 01-2064 & 01-2068) (Feb. 21, 2012) (“State PSJ Mem.”). As the State’s motion acknowledged, the focus of the dispute between the parties regarding “refill” is the priority to which “refill” is entitled. The importance of “refill” to the beneficiaries of Reclamation’s storage water right and the potential for the State’s motion to establish precedent that would not be limited to Basin 01 led to storage water users from Basins where storage water rights had been decreed without a “refill” remark to join the Basin 01 proceedings. The priority question raised by the State’s motion eventually spilled over from Basin 01 into BWI 17, which will finally resolve the extent to which space vacated for flood control purposes may be refilled in priority, *i.e.*, under the priority of its initial storage water right.

During the BWI 17 proceedings the State and others argued that a separate water right is required to establish a priority for the “refill” of storage space vacated for flood control purposes. Indeed, the State’s arguments in BWI 17 essentially invited the United States to file for separate junior supplemental storage water rights, as it now seeks leave to do. *See* State Resp. Brf. at 17 (arguing that rather than pursue refill in priority the United States should protect its interests by “fil[ing] applications for new water rights to appropriate ‘excess’ water for ‘refill’ use.”).

In short, the United States is not seeking to file late claims it culpably failed to file earlier. Rather, the late Notices of Claim are a product of recent judicial proceedings which

revealed uncertainty in how “refill” of reservoir storage space vacated for flood control purposes can and should be protected.

C. No Prejudice Will Result if the Claims are Allowed to Proceed.

Prejudice to potential opponents of the claims must be more than a simple delay in resolution of the case or the burden of ordinary expenses of continued litigation. *Dorion*, at 123 (citing *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001)). Consistent with that principle, this Court has recognized that the ability to object and participate in adjudication of the late claims means that no prejudice results from allowing a late claim to proceed. ORDER GRANTING MOTIONS TO FILE LATE CLAIMS, Subcase 71-10886 *et al* at 2 (July 28, 2005). That opportunity will be present here and any objecting parties will face no more burden than the ordinary expenses of litigation. As a result, allowing the supplemental storage water rights claims to proceed will not prejudice potential opponents of the claims.

D. The Court's Obligation to Act in Light of the Policy in Favor of Resolving Cases on Their Merits is Particularly Strong Because of the Public Importance of the Supplemental Storage Water Right Claims.

Idaho courts have identified the three factors discussed above as the “primary considerations,” to be evaluated pursuant to Rule 55(c). *E.g. Dorion*, 283 P.3d at 121; *McFarland*, 123 Idaho at 936, 854 P.2d at 279. An additional “consideration” courts have consistently applied is the policy in favor of resolving cases on their merits. *Id.* That policy applies with additional strength here in light of the public importance of the United States’ proposed claims. *See* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE, Civ.3d § 2685, pp. 32–41 (1998) (noting that a court should consider

whether issues of substantial public importance are at issue when deciding whether a matter should be resolved through a default judgment).

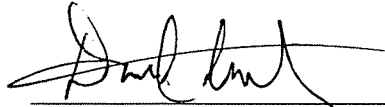
The supplemental storage water rights will provide important public benefits. The claims serve to make additional water available for irrigation use, one of the lifebloods of Idaho's economy. Further the beneficiaries of the irrigation and power components of the storage water rights are spread across much of the state. Thus it is no surprise that even the State has extolled the virtues of being able to physically refill a reservoir after water is released for flood control purposes. State PSJ Mem. at 17-18 (arguing *inter alia* that refill “effectuates the State of Idaho's ‘constitutionally enunciated policy of optimum development of water resources in the public interest’”) (quoting *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1973)). The public importance of the supplemental storage water right claims argues strongly in favor of this Court granting the United States' motion and allowing the adjudication of the claims to proceed.

Conclusion

The SF4s submitted by the United States seek leave to file late Notices of Claim for supplemental storage water rights intended to allow Reclamation to complete one physical fill of its reservoirs in years when stored water must be released for flood control. The proposed claims are meritorious because they raise real, justiciable claims, are the product of recent proceedings rather than culpable delay and their adjudication by this Court will not prejudice potential opponents of the claims. Accordingly, this Court should grant the United States' motions and adjudicate the supplemental storage water right claims.

DATED this 31st day of January, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David W. Gehlert", written over a horizontal line.

DAVID W. GEHLERT

Natural Resources Section

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CERTIFICATE OF SERVICE

I certify that on January 31, 2013, I served true and correct copies of the foregoing THE UNITED STATES' MEMORANDUM IN SUPPORT OF SF4 MOTIONS TO FILE LATE NOTICES OF CLAIM as follows:

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