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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

) Subcase: 31-12314
)
)
)

Case 39576

) MEMORANDUM IN SUPPORT OF
) MOTION TO FILE LATE CLAIMS
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_____)

The Claimant, the Paul Gunderson (hereinafter "Gunderson"), by and through counsel, Jerry R. Rigby, hereby files this Memorandum in Support of Gunderson's Motion to File Late Claim number 31-12314, on the grounds that substantial reasons exist to justify relief from the operation of the order closing Basin 31 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 Ray W. Rigby in Support of Gunderson's Motion to File Late Claims, filed concurrently herewith.

APPLICATION

The Court has discretion to grant Gunderson'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 number **31-12314**. Filed with this memorandum is an affidavit of Ray W. Rigby, counsel for Gunderson, which sets forth the factual basis to evidence the unique characteristics of the water rights and facts surrounding the preparation of the information and facts required to file the motion prior to the closure of the Basin together with the factual basis upon which relief should be granted as claimed by Gunderson.

Based upon the Affidavit of Ray W. 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 Gunderson in meeting with Rocky Mountain Environmental and researching the old decree and the precedent setting case law evidenced the belief that the motion would have been timely filed but for the mistaken belief that the closing date was at the end of February.

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, Gunderson in the current case will be forced to forego diverting the water in a manner which has been allowed by an old decree and in a manner which has been allowed by the SRBA court in previous rulings.

Gunderson realizes that Basin 31 has been closed by order of this Court. Nevertheless, Gunderson'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 Gunderson 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.

Gunderson has not knowingly or purposefully delayed the filing of this motion. It was simply a mistake. Had Gunderson or his counsel realized the mistake prior to the closing of the Basin 31, he and his counsel would have filed the previously prepared and investigated rights

immediately.

No parties to the SRBA will be prejudiced by a decision of the Court granting this Motion. Furthermore, due to the court's previous orders in similar cases, the source of the water is the same. Finally, granting Gunderson's motion does not automatically grant the right as claimed. Parties to the SRBA can still object to the Director's report which will be filed in its regular process. The Claim is based upon the law of accomplished transfer.

Furthermore, 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, Gunderson has a meritorious position and claims as evidenced by the filings in support of the late claim as well as previous rendered orders of the SRBA court. 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). Gunderson has been

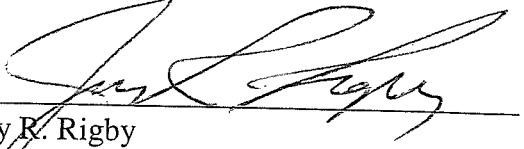
attempting to work through unique set of facts and caselaw dealing with his rights. It was during this unique process when counsel mistakenly understood that he had until the end of February in which to file the said Motion with the Court.

Gunderson 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).

CONCLUSION

It is clear that the Court has the authority and discretion to allow Gunderson to file and prosecute water right number **31-12314**. 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 Gunderson is not allowed to file said claims, he will be significantly injured in what otherwise is a valid right. Furthermore, granting a Motion under rule 60(b) of the Idaho Rules of Civil Procedure does not open the “flood gates” to all other “would be” claimants due to the fact that a time limit of six months is attached to one’s ability to file under said rule. Therefore, the above entitled Court should use its statutory discretion and grant Gunderson his motion to file his late claim for the above entitled claim.

DATED this 27th day of February, 2013.


Jerry R. Rigby

CERTIFICATE OF MAILING

I certify that on February 27, 2013, 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:

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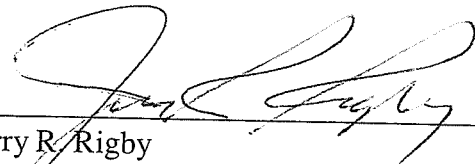
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Jerry R. Rigby