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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 Nos.: 21-13194
	)	
Case No. 39576	)	
	)	
	)	
	)	THE UNITED STATES' MEMORANDUM
	)	IN SUPPORT OF STANDARD FORM 4
	)	MOTION TO FILE LATE NOTICE OF
	)	CLAIM FOR GRASSY LAKE

Introduction

The United States respectfully requests that the Court accept a STANDARD FORM 4, MOTION TO FILE LATE NOTICES OF CLAIM ("SF4") for Grassy Lake.¹ Like the United States' recently filed late claim for Ririe Reservoir, this late claim is a product of the

¹ The SF4 is attached to this Memorandum.

discussions which led to the State of Idaho's Motion for Order Decreeing Water Rights, Subcases 01-219 *et al.* (filed Jan. 30, 2015). The Court should accept the Notice of Claim because the supplemental storage water right claim (1) is meritorious, (2) is not being filed because of deliberate delay and (3) consideration of the claim will not prejudice potential opponents of the claim.

Factual Background

The Court is well versed on the subject of "refill" as it has been the subject of several recent motions and the Idaho Supreme Court's decision in *A & B Irr. Dist. v. State of Idaho*, 157 Idaho 385, 336 P.3d 792 (2014).

The supplemental storage water rights the United States seeks leave to file for Grassy Lake is an "enlargement" pursuant to I.C. 42-1426. While many of the elements of this supplemental storage rights are identical to the initial storage water right, including the point of diversion, place and purpose of use, the supplemental storage water right differs from the initial storage water right for Grassy Lake 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 the commencement of the SRBA in 1987. Second, 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 this supplemental storage water right claim at Grassy Lake in Basin 21. This Court ordered that Late Claims in Basin 21 to be filed by April 25, 2012. ORDER CLOSING CLAIMS TAKING BASINS 21, 22, 29, 33, 35, 65, 67, 69, 71, 72, 73, 74,

75, 77, 78, 79.² 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 claim the United States seeks to file meets that criteria because the refill controversy was initiated by proposed remarks on claims filed by Reclamation long before Basin 21 was closed. *See A & B Irr.*, 336 P.3d at 795 (“As a result of remarks proposed by Reclamation and the State, a dispute arose over Idaho law on storage refill”).

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, 373, 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 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

² On September 12, 2012, the Court’s Order was amended in a manner not relevant here.

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 claim, the Court should proceed to decide the claim on its 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 A LATE CLAIM FOR THE COMPLETION OF A SINGLE FILL OF GRASSY LAKE.

This Court should accept the claim for filing and further proceedings because each of the three criteria applicable pursuant to AO1 and IRCP 55(c) has been met.

A. The Claim the United States Seeks to File is Meritorious.

Rule 55(c) does not require a party to prove that it will prevail on its claim. 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 claim; rather the party must plead factual details “with particularity.” *Dorion*, 283 P.3d at 121. The claim the United States seeks leave to file more than meets that standard.

The United States has pled each of the elements required by I.C. § 42-1411(2) with particularity. Moreover, the claim presents 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.

B. The Need to File A Late Claim Did Not Arise From Deliberate, Intentional Conduct.

The claim the United States seeks to file is a direct result of the long standing “refill” controversy. Although the United States initially overlooked Grassy Lake in formulating its supplemental storage claims, the ongoing settlement negotiations demonstrated to Reclamation that Grassy Lake is similarly situated to the reservoirs for which the United States previously filed late claims and would therefore benefit from a supplemental storage water right. Thus, the United States is not seeking to file a late claim it culpably failed to file earlier.

C. No Prejudice Will Result if the Claim is Allowed to Proceed.

Prejudice to potential opponents of the claim 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 claim 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. Indeed, that burden should be slight as this claim is part of a proposed settlement already before the Court.

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 Claim for Grassy Lake.

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 claim. *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).

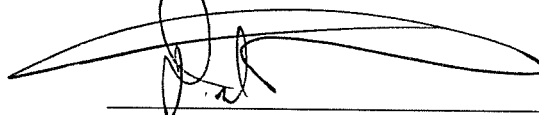
The supplemental storage water right will provide important public benefits. The claim serves to make additional water available for irrigation use, one of the lifebloods of Idaho's economy. Further, fairness counsels that the beneficiaries of the storage in Grassy Lake be put in the same position as the beneficiaries of the storage in other Reclamation Reservoirs. The public importance of the supplemental storage water right claim for Grassy Lake argues strongly in favor of this Court granting the United States' motion and allowing the adjudication of the claim to proceed.

Conclusion

The SF4 submitted by the United States seeks leave to file a late Notice of Claim for a supplemental storage water right for Grassy Lake which is intended to allow Reclamation to complete one physical fill of the reservoir in years when stored water must be released for flood control. The proposed claim is meritorious because it raises a real, justiciable claim, is not the product of culpable delay and its adjudication by this Court will not prejudice potential opponents of the claim. Accordingly, this Court should grant the United States' motion and adjudicate the supplemental storage water right claim for Grassy Lake.

DATED this 18th day of February, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. W. Gehlert', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on February 18, 2015, 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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