

JUL 22 2002

Department of Water Resources

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Attorneys for Margaret Hagenbarth, David J. Hagenbarth and James F. Hagenbarth

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 Nos. 31-00066A, 31-00066B, 31-00067A, 31-00067B, and 31-324

**HAGENBARTH'S RESPONSE TO
MUD LAKE'S MOTIONS TO FILE
LATE OBJECTIONS**

Objectors James F. Hagenbarth, David J. Hagenbarth, and Margaret Hagenbarth

("Objectors" or "Hagenbarth") oppose the Motion to File Late Objections submitted by Mud Lake Water Users, Inc. in the above-captioned subcases ("Hagenbarth's West Camas rights").

ARGUMENT

The SRBA Court considers motions for late objections and responses pursuant to Idaho Rule of Procedure 55(c), the standard for reversing an entry of default judgment.¹ Order on Motions to Set Aside Partial Decrees and File Late Objections, A.L. Cattle Subcases (January 31, 2001) ("*A.L. Cattle*"). A party moving for late objection must demonstrate 1) that its failure to file an objection was not willful, 2) that the late objection would not prejudice the opponent, and

¹ As discussed below, Hagenbarth maintains that Idaho Supreme Court's decision in *State of Idaho v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) and A.O.1 compel a different ruling—that parties who fail to file an objection prior to the deadlines are limited to motions to participate if they fail to file timely objections or responses.

3) that it has a meritorious position. *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (1993).

However, when applying the Rule 55(c) standard in the SRBA, consideration also must be given to the special procedures in the SRBA—procedures that provide notice of specific deadlines for objections and responses and for independent review of claims by the Idaho Department of Water Resources (the “Department”). *A.L. Cattle* at 9. Indeed, the Idaho Supreme Court indicated that late responses (and by implication late objections) are highly disfavored in the SRBA in a decision upholding an SRBA Court ruling that denied motions for late responses. *State of Idaho v. United States*, 134 Idaho 106, 109, 996 P.2d 806, 809 (2000) (“*Smith Springs*”).

In *Smith Springs*, the court recognized that the SRBA statutes and rules of procedure provide for definite deadlines for filing responses and objections: “A.O.1 provides an **absolute** rule for responses [and objections]: ‘the objection or response must be **received** by the court by the deadline specified.’”² *Id.* (emphasis in the original) (citing A.O.1. § 4(b)); *see also* I.C. § 42-1412(2) (providing that a party shall file an objection within the time specified in the notice of filing the director’s report). Because the movants for late response failed to respond before the specified deadlines, the court held that “by the plain language of the SRBA rules, the Irrigators response was untimely and the special master correctly denied the motion to file the late response.” *Id.* (emphasis added). According to the Idaho Supreme Court, motions for late objections or responses, where parties are provided notice of filing of Director’s Reports and ample time for objecting and responding, should be a rare occurrence. It follows that a movant

² This ruling by the Idaho Supreme Court can (and should) be read to hold that no late objections or responses can be considered in the SRBA. Indeed, A.O.1 and the SRBA statutes do not provide any procedure for filing late objections or responses and instead provide that parties that fail to file timely objections and responses may intervene under certain circumstances.

for such relief must show a compelling reason for why it failed to file a timely objection or response. Mud Lake fails to make this showing.

1. Mud Lake's decision not to file objections or response to the Hagenbarth West Camas rights was willful.

The deadline for objections in IDWR administrative basin 31 closed on September 7, 2001 after a four-month objection period. (The Director's Report for basin 31 was filed with the Court on May 4, 2001.) Parties then had two additional months, until November 9, 2001, to file responses. All told, the parties had six months to review the Basin 31 Director's Report and determine whether to become involved in any recommendation as a party. Mud Lake took advantage of this review time period and filed objections and responses to several Basin 31 recommendations. However, Mud Lake deliberately chose not to object or respond to the recommendations for Hagenbarth's West Camas rights. Applying the Rule 55(c) standard in light of the Supreme Court's *Smith Springs* decision, Mud Lake must demonstrate a compelling reason why it was unable to file timely objections.³

Mud Lake's alleged excuse for missing the deadlines is that it was confused because it did not understand that Hagenbarth's West Camas rights were associated with the Harmon rather than the Frazier Reservoir. According to Mud Lake, it believes that rights to the Frazier Reservoir are forfeited and would have objected had it not been confused by references to Harmon Reservoir.

Even if this were true, alleged confusion is not a sufficient justification for failing to file a late objection in light of the decision in *Smith Springs*. If a party is confused or unsure about a recommendation after investigation during the objection/response period, the appropriate action

³ There are conceivable situations where a party may be allowed to file late objections. For instance, if a party were not properly served with notice of the Director's Report or if the copy of the Director's Report they reviewed, a copy at the county courthouse for instance, were incomplete, then it may be appropriate to allow for late objections.

is to file an objection or response to become a party to the subcase. It is inappropriate to sit on the sidelines, see how the subcase develops, and then later move to file a late objection. *See North Snake Ground Water District v. Gisler*, 136 Idaho 747, 750, 40 P.3d 105, 108 (2002). If alleged confusion is grounds for filing a late objection, then the statutory deadlines essentially become meaningless as any would-be party could make this excuse to nearly any Director's recommendation.

Moreover, the contention that Mud Lake did not object because of confusion over the Harmon versus Frazier Reservoir simply is not believable. Contrary to the assertions by Mud Lake that it was confused by references to Harmon versus Frazier Reservoir, the Director's recommendations at issue do not refer to any reservoir—Harmon or Frazier. *See* Director's Reports on file with the Court. Indeed, each of the rights at issue are natural flow, not reservoir rights.⁴ Thus, this alleged confusion about the Frazier versus the Harmon Reservoir is belied by the claims and recommendations in these cases. Apparently the "reservoir confusion" justification has been engineered only recently in an attempt to generate a credible justification for Mud Lake's untimeliness.⁵

In sum, Mud Lake has not provided any credible rationale for its failure to file timely objections. Accordingly the Court should deny its motions for late objection filed nearly ten months after the objection deadline.

⁴ Mud Lake also suggests that it was confused by Hagenbarth's claims. Each of the claims at issue (on file with the Court) make it very clear that the claims are for natural flow, not storage rights.

⁵ Further, even assuming that these rights were associated with a reservoir, whether it is called the Harmon or Frazier Reservoir, only one reservoir has ever existed on West Camas Creek. According to Mud Lake, it was comfortable with recommendations for decreed rights associated with the Harmon Reservoir—a reservoir that does not and never did exist if it actually is called the Frazier Reservoir—but that it would have objected to rights associated with the Frazier Reservoir, a reservoir that did exist. If Mud Lake actually had reviewed and considered the recommendations for Hagenbarth's West Camas rights, surely it would have objected to rights associated with a reservoir that never has existed.

2. Hagenbarth would be prejudiced if Mud Lake were allowed to file late objections.

The trial in this case is scheduled for August 8, 2002. This trial has been set since May 17, 2002 following a scheduling conference where Hagenbarth and the Department concluded that the only disputed issue in the case was the point of diversion.⁶ Since that time Hagenbarth has been diligently preparing for trial on this one issue, including further settlement discussions with the Department. Mud Lake did not file its motion for late objection until June 27, 2002, alleging that the Hagenbarth West Camas rights have been forfeited and should not be decreed. Mud Lake did not consult the Court to have its motion noticed for hearing until the July 10, 2002 pre-trial conference.

Notably, Mud Lake was aware that it disagreed with the Director's recommendations since at least mid-May 2002. But rather than moving to participate in these subcases, Mud Lake engaged in a campaign, without any notice to Hagenbarth or the Court, to have the Director change his recommendations for the Hagenbarth West Camas rights. Exhibit B to the Affidavit of David R. Tuthill. The Director considered this request, reviewed water master records, and determined not to amend its Recommendations. Affidavit of David R. Tuthill. After learning that the Director would not change his recommendations, Mud Lake filed its June 27, 2002 motions for late objection.

Granting Mud Lake's motions would considerably prejudice Hagenbarth. If Mud Lake were allowed in, Hagenbarth would have only approximately two-and-half weeks to prepare for an entirely different trial than the one it has been preparing for the past several months.⁷ A drastic change of course this late in the game would unfairly place Hagenbarth in the position of having to defend against a new objection without adequate time to prepare. Mud Lake has had

⁶ Trial originally was set for July 17, 2002 but was later moved to August 8, 2002.

⁷ This time frame takes into consideration that counsel for Hagenbarth requested that the hearing on Mud Lake's motions be moved from Friday, July 19 to Tuesday, July 23, 2002.

ample opportunity to become involved in these subcases before now. Mud Lake simply has waited too long to become involved and its motions for late objection should be denied.

3. Mud Lake's motions do not provide a meritorious defense.

In addition to being untimely, Mud Lake's motions for late objection on their face do not present a meritorious defense because they allege forfeiture only during an irrelevant time period. Accordingly, it would be an idle exercise to for the Court to let Mud Lake in to present its forfeiture case. *McFarland*, 123 Idaho at 934.

To support its allegation of forfeiture, Mud Lake provides an unsworn statement from the current water master indicating that he has not delivered water to the rights in question since he became watermaster in the mid 1980's. This alone, however, is not sufficient to meet the clear and convincing standard required to prove forfeiture. The SRBA recently issued a decision indicating that forfeiture in the SRBA is tolled after the filing of claims. Memorandum, Decision and Order on Challenge, subcase 65-05663B (May 13, 2002). Consequently, to prove forfeiture in the SRBA, an objector must demonstrate a five-year period of nonuse prior to the time claims were filed. In this case, the claims were filed in 1988, making the relevant forfeiture period 1983 to 1988. Mud Lake's motion on its face fails to even allege, let alone demonstrate, nonuse during this period of time.

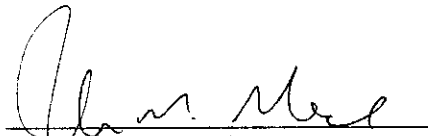
Moreover, as noted by the Court in the *A.L. Cattle* decision, consideration of whether a party has a meritorious defense is colored by the procedures in the SRBA that provide independent review of claims by the Department. In the SRBA, the merits of a particular claims are considered even though an issue is not litigated because of the Department's investigation. This is particularly in this case where Mud Lake specifically asked the Director to change his recommendations for Hagenbarth's West Camas rights, attaching the same letter for watermaster

Don Shenton included with the motions for late objection. After reviewing Mud Lake's information and independently reviewing watermaster records for 1983 and 1984, the Director determined not to amend his recommendations. Affidavit of David R. Tuthill. Relevant excerpts from these watermaster records showing full delivery of the rights in question are attached to the Marshall Affidavit.⁸

All this goes to show that Mud Lake cannot meet its clear and convincing burden of proof to show forfeiture of Hagenbarth's rights. Accordingly, it would be futile and prejudicial to let Mud Lake in these cases because it does not have a meritorious defense.

For all the reasons stated above, the Court should deny Mud Lake's motions to file late objections.

Respectfully submitted this 22nd day of July, 2002.


John M. Marshall
Givens Pursley LLP
Attorney for Hagenbarths

⁸ In May of this year Mud Lake chose to approach the Director rather than Court for recourse regarding the Hagenbarth West Camas claims. The Court should not sanction this serial approach by Mud Lake of first approaching the Director and then coming to the Court, especially as this late date.

CERTIFICATE OF MAILING

I certify that on this 22nd day of July, 2002, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Snake River Basin Adjudication
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