

Kent Foster filed documents that are identical except for the subcase numbers. I scanned 33-69 of each document and saved it to the additional numbers. We will put the original documents in the legal files.

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
330 Shoup Avenue, Third Floor
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
Idaho State Bar Number 1198

**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. 35976

A. Subcase 33-69

**MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO
FILE LATE OBJECTION**

Objections to the Director's Amended Recommendations for water rights numbers 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33-81, 33-82, 33-2086A, 33-2086B, 33-2090, 33-2091, and 33-7018, were due, in accordance with the Special Master's Amended Trial Scheduling Order of July 22, 2003, on October 17, 2003. Because of the mistake, inadvertance or neglect of counsel for the claimant, Sage Willow, Inc., the objections were not filed until October 27, 2003. The "Motion for Leave to File Late Objection" in this and in each of the referenced subcases calls upon the court's discretion under ICRP 55(c), and is based upon the grounds set forth in ICRP 60(b), which states, in part;

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ...that motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (6) not more than six (6) months after the judgment, order, or proceeding was entered or taken. ..."

Sage Willow, Inc. first filed motions in each of the referenced subcases with the late objections seeking an extension of time in which to file the late objections. The court denied these motions, but specifically invited the filing of motions for leave to file late objections. These motions for leave to file late objections, with the accompanying affidavits and this memorandum will be filed about December 15, 2003. That is still several months short of the six (6) month time period mentioned in Rule 60(b) as a reasonable time for such a motion.

The case law construing this rule (60(b)) seems to be consistent that the decision to grant relief is committed to the sound discretion of the trial court. *Sherwood and Roberts, Inc. v Riplinger*, 103 Idaho 535, 650 P.2d 677 (1982); *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984). In those and additional cases (*Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979) and *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App.1988).), the Idaho Supreme Court and Appellate Court have indicated that under Rule 60(b)(1) there is a tempering policy favoring relief in doubtful cases, but especially if the moving party pleads facts which, if established, would constitute a meritorious defense to the entry of default.

As the Special Master is aware, the dispute between Sage Willow, Inc., and the protestants has been of long duration, having commenced with the filing of seven Applications for Transfer by Sage Willow, Inc., in 1994. The matter has been before the Idaho Supreme Court twice. The most recent opinion of that court with respect to the issue of "resumption of use" is dated April 10, 2003, (*Sage Willow, Inc. v. IDWR, James May, Mays Land and Livestock, Blaine County Canal Co.*, 2003 Idaho Lexis 62 (Idaho April 10, 2003)) in which the Idaho Supreme Court held that Idaho Department of Water Resources incorrectly applied the resumption of use defense raised by Sage Willow to the Idaho Department of Water Resource order of forfeiture of all of certain Sage Willow rights and partial forfeiture of others, and vacated the department's order.

We understand the undisputed facts relied upon by the Supreme Court in its decision include the following: (1) the water rights originally appurtenant to the properties purchased by Sage Willow authorize the irrigation of a total of 2,383 acres, (2) for approximately 20 years before acquisition of the land by Sage Willow, the total irrigated acreage did not exceed 1,412 acres and (3) after purchasing the properties in 1989, Sage Willow began increasing the number of acres irrigated,

culminating in the irrigation of 2,390 acres in 1993, the irrigation season prior to the filing of the seven Applications for Transfer.

The Supreme Court concluded that resumption of use is still a valid defense to forfeiture of a water right unless junior appropriators would be harmed by the senior's resumption because the senior resumed using the same water which the juniors had been using and relying upon during the forfeiture period. In other words, the resumption of use by the senior is appropriate and effective unless it injures the water rights of the juniors. The Supreme Court pointed out the Idaho Department of Water Resources had made no finding that: (1) Any junior appropriator used the water which could otherwise have been used by the senior during the period of non-use by the senior, (2) during the period of non-use by the senior, any third party had applied for and obtained a right to the use of the very water not being used by the senior, or (3) the two water courses involved in this case were over appropriated and because of continued non-use of the senior's rights by Sage Willow and its predecessors, junior appropriators received water they would otherwise not have received.

From our understanding of the record before Idaho Department of Water Resources in the transfer proceedings, there was not sufficient evidence from which the department could have made such findings. We therefore requested Dr. Charles E. Brockway, a noted expert on such matters, to examine the evidence and prepare testimony relevant to the issue of use of the water available to fill the Sage Willow water rights during the approximately 20 year period of non-use or partial non-use prior to full resumption in 1993.

Dr. Brockway's report is filed with this memorandum, in affidavit form, in support of Sage Willow's motion. It is our understanding that he would testify essentially as follows as to the items for which there were no findings by the Idaho Department of Water Resources: Resumption of use of water to irrigate 2,390 acres instead of 1,412 acres did result in an additional depletion from the surface or groundwater system in the Little Lost River Basin of an increased amount of water transpired by the plants irrigated on 978 extra acres. Considering water requirements at this location for the type of crops grown (pasture grass and alfalfa), as well as average irrigation season precipitation, Dr. Brockway estimated that consumptive irrigation requirement to be 2.5 acre feet per acre or a total of 2,464 acre feet. He next analyzed where that extra water came from and concluded that whether diverted directly from a well or diverted from a surface stream on an exchange basis

so that the stream water is replaced with groundwater, the source of all this 2,464 acre feet diverted and used during the irrigation season is groundwater. Next, he analyzed where and when the effects of such additional depletion would be realized. He concluded that because of the geology of the basin at this location, there is a narrowing of the impervious bedrock materials near the southern end of the Sage Willow land forcing the groundwater to the surface, so that virtually all of the surface and groundwater join again in the river from this narrowing approximately down to the Blaine diversion. Consequently almost all of the impact from the extra water use is expressed in the Little Lost River itself. However, there is a significant time lag between the removal of the water from the ground on or near the upper portion of the ranch where it is applied to irrigation, and the time when the river flows begin to become reduced as a result of those diversions. Dr. Brockway estimates the effect will begin to be reflected in reduced flow in the river about 4.37 months after the diversion and use, and then will extend through the fall and winter following the irrigation season diversions. The amount of reduction that will show up in the river below the Sage Willow land during the irrigation season will be about twenty-four percent (24%) of the total diverted, or some 584.7 acre feet. This 584.7 acre feet will convert to a depletion of up to 5.97 cubic feet per second in the flow of the Little Lost River in the affected reach between the end of August and the end of October each irrigation season. The measuring devices in the river, such as that at the Blaine diversion where the Blaine Canal Company receives its surface water diversions are generally accurate to plus or minus five to ten percent (5% to 10%). The average flow of the Little Lost River at this location during August, September and October of each year is approximately 61.6 cfs. 5.97 cfs is slightly less than ten percent (10%) of this amount, and consequently difficult to measure accurately. Although the theoretical depletion would actually result in reductions between the lower end of the Sage Willow Ranch and the Blaine diversion, as a practical matter, the depletion would be difficult for a water master to measure. It is therefore impossible to demonstrate by any measurement evidence that junior water users ever relied upon or used extra water that would have been available during the period of non-use of the Sage Willow water rights, or that the junior appropriators were materially or measurably injured by Sage Willow's resumption of the use of water under its groundwater rights.

In conclusion, we submit that the evidence which will be presented by Dr. Brockway would be substantial and provide a meritorious defense under the doctrine of resumption of use as recently

articulated by the Idaho Supreme Court to the findings of forfeiture and partial forfeiture by the Idaho Department of Water Resources in the transfer proceedings. We request the Special Master to grant our motions for leave to file the late claims so that this meritorious defense might be presented at the trial herein.

RESPECTFULLY SUBMITTED this 12th day of December, 2003.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.



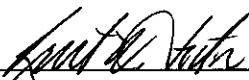
Kent W. Foster, Esq.
Attorneys for Sage Willow, Inc.

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of December, 2003, I mailed the original and copies of this objection, including all attachments, to the following persons:

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. One copy to the claimant of the water right at the following address:
Name: Sage Willow, Inc.
c/o Holden, Kidwell, Hahn & Crapo, PLLC
330 Shoup Ave., Third Floor
P.O. Box 50130
Idaho Falls, ID 83405-0130
3. Copies to:

IDWR Document Depository P.O. Box 83720 Boise, ID 83720-0098	Michael C. Creamer Givens Pursley, LLP P.O. Box 2720 Boise, ID 83701-2720
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 44449 Boise, ID 83711-4449	
United States Department of Justice Environmental and Natural Resource Division 550 West Fort Street, MSC 033 Boise, ID 83724	



Kent W. Foster, Esq.