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Department of Water Resources

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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

)
) **Subcases 37-20810, 37-20811,**
) **37-20812, 37-20813, 37-20814,**
) **37-20815, 37-20816, 37-20817**
)
) **AMENDED MOTION TO FILE**
) **LATE OBJECTION**

COMES NOW , the John Lezamiz Family Limited Partnership, Ltd., Claimant of the above-captioned water rights, through counsel undersigned, and moves this Court for an order allowing late objections to be filed to the Director's Reports for the subject water right claims. This motion is intended to replace and supersede the motion filed on January 24, 2003.

I. LEGAL STANDARD FOR LATE OBJECTIONS IN THE SRBA.

In subcases for which partial decrees have not been entered, a motion to file a late objection is reviewed under the same standard as that set forth in A01 for filing late

claims. *Order on Motion to Set Aside Partial Decrees and File Late Objections*, (A.L. Cattle) (Jan. 31, 2002). Accordingly, a motion to file a late objection is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho courts apply a "good cause" for untimeliness standard. I.R.C.P. 55(c). The I.R.C.P. 55(c) standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent; and
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

McFarland v. Curtis, 123 Idaho at 936, 854 P.2d at 279.

II. PROCEDURAL HISTORY OF THE SUBJECT WATER RIGHTS.

All of the subject water rights are from the same point of diversion. Water Rights 37-20810 and 37-20811 were recently split from Water Right 37-2531A, pursuant to an NCAP dated October 30, 2002. Water Right 37-2531A is a licensed right for 3.2 cfs and a priority date of June 25, 1952.

Water Rights 37-20812 and 37-20813 were recently split from Water Right 37-2532B, pursuant to an NCAP dated October 30, 2002. Water Right 37-2532B is a licensed right with a quantity of 1.85 cfs and a priority date of October 13, 1952. Water Right 37-2532B was split from Water right 37-2532, pursuant to an administrative transfer proceeding approved November 3, 1983.

Water Rights 37-20814 and 37-20815 were recently split from Water Rights 37-2804B, pursuant to an NCAP dated October 30, 2002. Water Right 37-2804B is a licensed right with a quantity of 1.57 cfs and a priority date of August 7, 1952. Water

Right 37-2804B was split from Water Right 37-2804, pursuant to an administrative transfer proceeding approved November 3, 1983.

Water Rights 37-20816 and 37-20817 were recently split from Water Right 37-8690, pursuant to an NCAP dated October 30, 2002. Water Right 37-8690 (renumbered from 36-8020) is a licensed right with a quantity of .96 cfs and a priority date of November 12, 1981. In the process of licensing 37-8690, IDWR conducted a beneficial use field examination and issued a *Beneficial Use Field Report* dated August 5, 1987. In this examination, IDWR calculated the capacity of the irrigation system to be 5.22 cfs. Accordingly, IDWR issued the license for 37-8690 with the following limitation: "The maximum combined rate of diversion under this right and Rights 37-2804B and 37-2532 shall not exceed 5.22 cfs."

Water Right 37-2531 was not subject to the 5.22 cfs limitation under the license issued for Water Right 37-8690. However, the Director's Reports filed with the Court on August 8, 2002, recommended that all four of the subject rights (37-8690, 37-2804B, 37-2532B, and 37-2531) be subject to the combined use limitation of 5.22 cfs.

The objection deadline for the Basin 37 Director's Report was October 11, 2002. No party to the SRBA has heretofore filed an objection to these water right claims.

The subject water rights, and the farm ground to which they are appurtenant, were purchased by the John Lezamiz Family Limited Partnership on February 13, 2003. Change of Ownership forms have been submitted to IDWR.

III. ARGUMENT

With respect to meeting the "good cause for untimeliness" standard under I.R.C.P. 55(c), it should be noted that there are no other parties to these sub-cases, and no other objections have been filed. Hence, there is no issue regarding potential prejudice to an

opponent, which is the gravamen of the untimeliness concept in I.R.C.P. 55(c). That being said, the *Affidavit of Kelvin Jones*, filed contemporaneously herewith, sets forth sufficient grounds for the failure to timely object to the *Director's Reports* for the subject water rights. (Kelvin Jones is a predecessor-in-interest to the John Lezamiz Family Limited Partnership, Ltd).

With respect to setting forth a meritorious position, it is the claimant's contention that the 5.22 cfs combined use limitation is in error. This rate of flow, when applied to the number of irrigated acres involved, yields insufficient water to adequately irrigate crops. The combined use limitation has not been applied to all four of these water rights prior to the issuance of the Basin 37 Director's Report in August of 2002. The claimant disputes that the system capacity is 5.22 cfs.

By statute, a water right license is binding upon IDWR, and absent some change occurring subsequent to the issuance of the license (e.g. partial forfeiture), IDWR is obligated to recommend the water rights as licensed. I.C. § 42-220; *Order on Challenge (consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-2708 et al., (December 29, 1999). In the instant matter, water right 37-2531A has not heretofore been subject to the "5.22 cfs" combined use limitation.

In accordance with the foregoing, it is respectfully submitted that the applicable legal standard has been satisfied, that no other party will be prejudiced, and therefore, the Court should issue an order allowing the claimant to file late objections to the subject water rights.

Dated March 27th, 2003

ARKOOSH LAW OFFICES, CHTD.



Theodore R. Booth
Attorney for Claimant

CERTIFICATE OF SERVICE

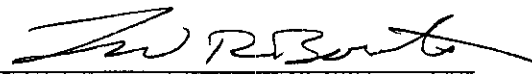
I hereby certify that on the 27th day of March, 2003, I served a true and correct copy of the foregoing document on the person(s) listed below, in the manner indicated:

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IDWR Document Depository	<u> X </u>	United States Mail, Postage Prepaid
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Chief, Natural Resources Division	<u> X </u>	United States Mail, Postage Prepaid
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