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Department of Water Resources

Law Offices

***RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered***

*Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam - (1954-2001)
Gregory W. Moeller*

*P.O. Box 250
25 North Second East
Rexburg, ID 83440*

*Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: Rexlaw@srv.net*

December 30, 2002

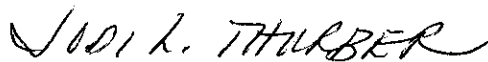
Director of IDWR
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Subcase Nos. 31-00066A, 31-00066B, 31-00067A, 31-00067B, and 31-0324

Enclosed please find copies of two documents (Settlement Conference Report and Order on Motion to File Late Objection) in the above captioned matter. These documents were intended to be attachments to the "Mud Lake Water Users Motion to Disallow Costs and Attorney Fees" which we mailed to you on Friday, December 27, 2002.

We apologize for any inconvenience this may have caused.

Sincerely yours,



Jodi L. Thurber
Secretary to Jerry R. Rigby

/jt

Enclosures
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Department of Water Resources

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

SETTLEMENT CONFERENCE REPORT

Case No. 39576

Subcase No.:

This form is used to report the results of a Settlement Conference.

A. Attendance

The following individuals and persons were present at the Settlement Conference held on Oct 29, 2002, before Settlement Moderator, Thomas Cushman:

Claimant(s): Hagenborth

Attorney: John Marshall

Objector(s): Mad Creek water users

Attorney: Jerry Rigby

Also Present: IDWR, G. Baxter

Attorney: Baxter

B. Standard Form 5

During the Settlement Conference, the parties reached an agreement as to all of the elements of this water right. The parties agree that a fully completed and executed *Standard Form 5* reflecting their agreement shall be submitted to the court no later than Nov 13, 2002 (30 days maximum).

If a fully executed *Standard Form 5* is not received by this date, the parties agree this matter immediately be set for a scheduling conference or trial.

C. ~~Partial~~ Settlement Terms

The parties reached agreement on these elements as follows:

total 12.2 - 2.44 @ CRB 1909 Pri #374

16.76 w. Camas

\$22 2.0 1891 #373

\$22 2.44 1909

12.32 POD w. Camas wsr @ \$526 + 36

Subordinates right to call this 12.32 against all others.

D. Recommendation for Additional Settlement Conferences

Settlement Moderator, Thomas Cushman, recommends this subcase be set for an additional Settlement Conference within 90 days. The parties have represented to the Settlement Moderator that they are available on _____.

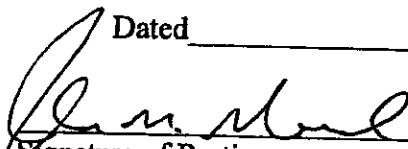
The reason(s) an additional Settlement Conference may be beneficial is:

E. Recommendation for Trial Setting:

Settlement Moderator, Thomas Cushman, recommends this subcase be set for trial. The parties have been unable to reach a resolution of elements:

1 2 3 4 5 6 7 8 9 10

Dated _____, 2001.



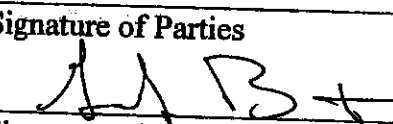
Signature of Parties



Signature of Parties

Signature of Parties


Thomas Cushman, Settlement Moderator

Signature of Parties


Signature of IDWR

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Department of Water Resources

2002 JUL 29 PM 2: 26

DISTRICT COURT-SRBA
TWIN FALLS, IDAHO

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

ORDER ON MOTION TO FILE LATE
OBJECTIONSUBCASE NOS. 31-00066A, 31-00066B,
31-00067A, 31-00067B AND 31-324

I. PROCEDURAL BACKGROUND

These water claims were filed by Margaret, James, and David Hagenbarth (hereafter "Hagenbarth") in 1988. The *Director's Report* was filed for these claims on May 10, 2001 and the deadline for *Objections* was September 7, 2001. Timely *Objections* were filed by Hagenbarths relative to the point of diversion element. On June 27, 2002, a *Motion to File Late Objection* was filed by Mud Lake Water Users, Inc. (hereafter "Mud Lake") The *Motion* states that Mud Lake owns water rights that are senior to water rights 31-66A, 31-66B, 31-67A, 31-67B, and 31-324. In support of its *Motion*, Mud Lake submitted the *Affidavit of Gerald Messerli*. The *Affidavit* asserts that the claims and the *Director's Reports* for these subcases referred to the Harmon Reservoir rather than the Frazier Reservoir as it is commonly known in the area. (*Affidavit of Gerald Messerli*) Mud Lake asserts that the confusion caused by misnaming the reservoir caused it to miss the deadline for objections in Basin 31. Mud Lake also submitted the *Affidavit of Nick Hillman* in support of its *Motion*. The *Affidavit* stated that Mr. Hillman is a water right holder in Basin 31 who owns property on which the diversion works for these subcases are located. The *Affidavit* asserts that Mr. Hillman was unaware of any requests to use the claimed water rights for 31-66A, 31-66B, 31-67A, 31-67B, or 31-324.

A hearing was held on July 10, 2002. Mud Lake and Hagenbarths agreed to a hearing date on the *Motion to File a Late Objection* and that Gerald Messerli, Nick Hillman, and Greg Shenton would be called as witnesses. A hearing on the *Motion for Late Objection* was held July

23, 2002, and continued on July 25, 2002. Mud Lake called Messerli, Hillman and Shenton as witnesses. Hagenbarths cross examined but called no witnesses.

II. FINDINGS

Mud Lake pursues its own water rights in the SRBA and follows a systematic process of reviewing the *Director's Reports* on other water rights in Basin 31. The process of reviewing the *Director's Reports* for Basin 31 includes review by Mud Lake President Gerald Messerli and by Mud Lake's secretary. Nevertheless, Mud Lake did not file timely objections to these subcases. (Testimony of Gerald Messerli) Mr. Messerli submitted an affidavit in which he asserted that the reason Mud Lake failed to timely object was because the *Director's Reports* referred to the Harmon Reservoir rather than the Frazier Reservoir as it is commonly known. (*Affidavit of Gerald Messerli*) However, after reviewing the *Director's Reports* during cross-examination, Mr. Messerli testified that the *Director's Reports* did not refer to the Harmon Reservoir at all. (Testimony of Gerald Messerli, Claimant Exhibits 01,02,03,04,06) Mr. Messerli reviewed reports for these water rights that referred to the Harmon Reservoir, however, he did not review them until after the deadline for objections had passed. (Testimony of Gerald Messerli, Objectors Exhibit 03)

The diversion works for these subcases were built in the 1960's. Nick Hillman is a rancher who has lived all of his life on the property where the diversion works for these claims are located. He has not seen water diverted for these rights. It is his testimony that these rights have been unused for more than five years. (Testimony of Nick Hillman)

III. STANDARD OF REVIEW

The SRBA Administrative Orders do not provide a standard to be applied for filing late objections. However, the court's administrative rules set forth that *Motions to File a Late Notice of Claim* are to be reviewed under the criteria of I.R.C.P. 55(c) and 60(b). *SRBA Administrative Order 1 (AO1) § 4 (d)(2)(d)*.

According to case law and the Rules of Civil Procedure, a court applies the criteria of I.R.C.P. 55(c) when determining whether to allow the filing of a late answer. Motions for Late Objections have been reviewed in the SRBA under the same criteria of Rules 55(c). The proponent of a Motion for Late Objection, like a party seeking to file an untimely answer, must show both good cause for untimeliness and the existence of a meritorious position. I.R.C.P. 55(c)

SRBA Presiding Judge Roger Burdick has recently affirmed the legal standard of what must be shown to satisfy good cause and meritorious position. The legal standard for "good cause" for untimeliness of an objection is determined under the standard for setting aside the entry of a default under I.R.C.P. 55(c). The "good cause" standard under Rule 55(c) is more lenient than the standard under Rule 60(b). 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) whether a meritorious position has been presented.

See, Order on Motion to Set Aside Partial Decrees and File Late Objections (A.L. Cattle) (Jan. 31, 2001). The legal standard for showing a meritorious defense includes:

- 1) allege facts,
- 2) which if established,
- 3) would constitute a meritorious position,
- 4) the facts supporting the defense must be detailed.

The policy behind requiring a meritorious position is that it is an idle exercise for a court to allow a late pleading if there is no justiciable controversy. *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993); *Order on Motion to Set Aside Partial Decrees and File Late Objections* (A.L. Cattle) (Jan. 31, 2001).

IV. GOOD CAUSE

Hagenbarths assert that movants failed to allege good cause for filing the late objection. The *Affidavit of Gerald Messerli* asserts good cause for missing the objection deadline that at first blush seems to rise to the level of a due process argument. The *Affidavit* states that the claims and the *Director's Report* for these subcases "referred to the Harmon Reservoir instead of Frazier Reservoir which is the common name of reservoir used by people in our area."

The testimony at hearing, however, clearly shows that the *Director's Reports* created no such confusion and did not refer to either the Harmon or Frazier Reservoir. Therefore, there is no due process-type issue created by the *Director's Report*.

Next, Mud Lake asserts it was confused by the claims or similar reports. The document offered and admitted at hearing as Objector's Exhibit 3 lists Harmon Reservoir Co. Ltd. as the

owner of the water right. However, that document was not reviewed by Mud Lake until after the objection deadline had passed. Therefore, Objector's Exhibit 3 does not support a finding of good cause for the lateness of the *Objection*.

Finally, Mud Lake had a systematic process of reviewing claims in Basin 31, but for some reason it failed to object to these subcases. Most contested motions for late objections that have been granted by this Special Master have involved more evidence relating to "good cause." However, the standard for good cause under Rule 55(c) is a lesser standard than that of Rule 60(b). A court must look at whether the default, or here, the failure to timely object was willful. Given the systematic process that Mud Lake followed in reviewing the *Director's Report* for Basin 31 and considering the notice provided for *Director's Reports* to non-claimants, this Special Master concludes that the failure to timely object was not willful.

Next, the court must consider whether allowing a late objection will prejudice Hagenbarths. Undoubtedly Hagenbarths will incur litigation expenses for defending against the late objection. But there was no showing that those expenses would be different than if the objection had been timely filed. Certainly Hagenbarths have incurred litigation expenses to prepare for trial on August 8, 2002, on the unrelated issues regarding point of diversion. However, those expenses cannot be said to create undue prejudice since Hagenbarths can still try the unrelated issue on August 8, 2002. Finally, no facts were presented to show that issues outside the litigation context, for example a pending sale of the subject property, would create undue prejudice if these subcases were not concluded on August 8, 2002. Thus, this Special Master finds "good cause" under the lower Rule 55(c) standard.

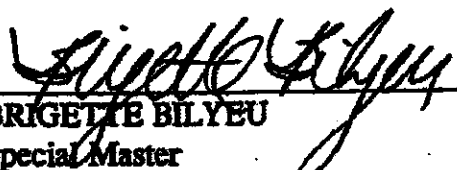
V. MERITORIOUS POSITION

A movant is not required to prevail on the merits during a motion for late objection, but must show evidence of a meritorious position. In reviewing the affidavits and the testimony presented at the hearing, the court concludes that sufficient evidence was presented to show a meritorious position that these water claims were forfeited by a period of more than five years nonuse prior to the date the claims were filed. The testimony of Mr. Shenton, did not pull together enough facts to tell whether he was testifying about the required period of five years of nonuse. However, the testimony of Nick Hillman provided sufficient facts to allege a meritorious position on forfeiture.

VI. CONCLUSION

In conclusion, this Special Master finds "good cause" for the untimeliness of the *Objections* by Mud Lake. In addition, sufficient facts were alleged to raise a meritorious position. Considering the policy of preferring to determine cases on their merits and considering the affidavits, testimony and record in these subcases, the *Motion to File Late Objection* by Mud Lake is granted.

DATED July 29, 2002.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO FILE LATE OBJECTION was mailed on July 29, 2002, with sufficient first-class postage to the following:

MUD LAKE WATER USERS, INC
MUD LAKE WATER USERS, INC.

Represented by:
JERRY R. RIGBY
PO BOX 250
REXBURG, ID 83440-0250
Phone: 208-356-3633

DAVID J HAGENBARTH
JAMES F HAGENBARTH
MARGARET HAGENBARTH

Represented by:
MICHAEL C. CREAMER
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

DAVID J HAGENBARTH
JAMES F HAGENBARTH
MARGARET HAGENBARTH
PO BOX 1128
DILLON, MT 59725
Phone: 406-683-2163

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

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