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ISB #1494

COPY

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 No. 23-00009B
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MEMORANDUM IN SUPPORT OF FILING
LATE OBJECTION

FACTUAL BACKGROUND

Claimant, Rex Maughn (Maughn), Subcase No. 23-00009B and Dawn Blakely (Blakely), the party moving to file a late objection, Subcase No. 23-00008, have both made claims to the waters of Kelly Creek, a very small creek flowing out of Kelly Canyon approximately two (2) miles upstream from Heise in Jefferson County, Idaho. In March, 2004, the Idaho Department of Water Resources (IDWR) recommended a water right in favor of Blakely for .42 cfs with a priority of October 21, 1899 for 21.1 acres. The United States Bureau of Reclamation (United States) objected to the place of use because approximately 1 ½ acres was located on BLM lands. The parties entered into a SF5 in early November, 2004 eliminating the BLM lands and confirming the water right of .42 cfs for 21 acres.

At the same time, Claimant Maughn was seeking a water right to the waters of Kelly Creek for 2 cfs with the same priority date as Blakely. Apparently, BLM also filed an objection to the place of use to Maughn's claim because it also covered a small portion of BLM lands. Apparently, the parties were prepared to enter into an SF5 for a reduced amount, 34 inches rather than 2.02 cfs,

and a slight change in place of use eliminating the BLM lands. Blakely's motion to file the late objection delayed entry of the SF5.

The problem is the waters of Kelly Creek are insufficient, except for early in the season, to fill the 21 inch claim of Blakely and the 35 inch claim of Maughn. In fact, the flows will barely fill Blakely's claim after approximately mid-July. If Maughn's claim is approved, the adjudication will have created a problem rather than resolved one by recommending approval of two (2) claims having equal priority to water that simply does not exist.

ARGUMENT

Blakely is aware of the requirements of SRBA Rule 4B requiring objections or responses to be received by the Court by the deadlines specified. In *State vs. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000), the Court held it was not an abuse of discretion to deny the filing of a late objection. It was not a holding prohibiting filing a late objection, but only that denial in that case was not an abuse of discretion. Indeed, the very existence of a motion for filing late objections suggests there are times when they are appropriate.

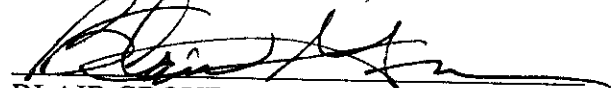
Blakely urges his failure to object is a result of inadvertence or excusable neglect. IDWR notified him in March, 2004 it was recommending his claim as filed. Ultimately, the place of use was changed slightly and reduced by .1 acres, but otherwise, the claim has been approved pursuant to a SF5. He is the first diverter on the creek (right where it leaves the mountains) and as indicated in his affidavit, has diverted all the flow (after mid-July) for more than 40 years. Consequently, when IDWR made its recommendation, he relied on the same and had no reason to believe or suspect there was any claim equal to or ahead of the one he had made. The recommendation was a positive act and Blakely's reliance was justified.

According to Blakely's affidavit, he has diverted the flow of Kelly Creek for more than 40 years with no claim or interference by anyone else. If Maughn's claim is approved, there will be two (2) claims totaling 55 inches of equal priority to a creek flowing less than half of that amount. The adjudication, rather than resolving the water right, will have for the first time in 40 years created a major conflict where none previously existed.

The recommendations in Subcase Nos. 08 and 09 cannot both be correct because there is not adequate water for both. Blakely should be permitted to proceed with his late objections so the SRBA will resolve the claim to the Kelly Creek water, not create a dispute over it.

DATED this 30th day of November, 2004.

GROVER & BUTIKOFER, P.A.


BLAIR GROVER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the State of Idaho, with my office in Rigby, Idaho; that I served a copy of the foregoing document or pleading upon the following person(s) at the addresses below their names either by hand delivering, by facsimile transmission (Fax), or by mailing said document in the United States mail with the correct postage thereon, a true and correct copy thereof this 30th day of November, 2004.

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