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MAR 30 2006
DEPARTMENT OF
WATER RESOURCES

ditch permission to file responses to Mr. Spillet's objection, to be filed within 30 days.¹ A copy of the Decision was mailed to counsel of record for 7UD Ranches. *See Certificate of Mailing.*

On February 7, 2006, Special Master Terrence A. Dolan issued an Order Setting Trial Scheduling Conference (41-8B) and Status Conference (41-8E) (hereinafter "Scheduling Order"), which stated that the responses permitted by the District Judge should be filed no later than March 6, 2006. A copy of the Scheduling Order was *not* mailed to counsel of record for 7UD Ranches. *See Certificate of Mailing.*

On Thursday, March 2, 2006, the appropriate form for filing a response on behalf of 7UD Ranches was completed and a supplemental certificate of service was prepared. In Mr. Smith's office was a very large wall-mounted bookcase approximately fifteen (15) feet wide and four (4) feet tall. This bookcase was attached to the wall and abutted the ceiling. The bookcase had three rows of shelving and was filled with books and files. Approximately two (2) feet below the bookcase was a row of cabinets. 7UD Ranches' attorney, Mr. Smith, placed the response on the cabinet in his office to be reviewed and mailed out the next day for filing.

After business hours that night, the bookcase unexpectedly and without any notice fell off the wall and crashed onto the cabinets below. It broke in a number of locations and spilled its contents around the Mr. Smith's office. Mr. Smith had also located his computer on the same cabinets where the bookshelf had fallen.

When Mr. Smith arrived in his office on Friday, March 3, 2006, it was in disarray. Workers were called in to remove the broken bookshelf and cabinets and to repair the office. In the process, the contents of the office were boxed and temporarily stored in another part of the building. The workers did not complete the repairs until late in the day on Monday, March 6,

¹ Thirty days following entry of the Decision would have been Saturday, March 4, 2006. Pursuant to Idaho Rule of Civil Procedure 6(a), the period would have concluded on Monday, March 6, 2006. The suggestions contrary to this which might have been made during the prior hearing are without merit.

2006. Mr. Smith spent time during Monday evening bringing boxes back into his office and reorganizing his files. In this process, he discovered 7UD Ranches' response and immediately reviewed it for filing. 7UD Ranches' response was immediately mailed for filing on the following morning of Tuesday, March 7, 2006. It appears that it was not received by the Court until March 8, 2006.

On March 9, 2006, 7UD Ranches made an oral motion during a scheduling hearing for leave to file its late response. This memorandum and accompanying affidavit are filed in support for that motion.

ARGUMENT IN SUPPORT OF MOTION

It is not entirely clear what standard applies to the review and consideration of 7UD Ranches' motion for leave to file late response. In the Order on Motion to Set Aside Partial Decrees and File Late Objections, Subcase No. 65-19812, et al. (A.L. Cattle), (January 31, 2001), the Presiding Judge indicated that the standards set forth in I.R.C.P. 55(c) applied to the filing of late objections. Because Administrative Order 1 § 4(d) treats objections and responses in a similar manner, it would appear that I.R.C.P. 55(c) would also apply to the filing of late responses.

Idaho Rule of Civil Procedure 55(c) provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Under I.R.C.P. 55(c), Idaho Courts apply a "good cause" for untimeliness standard. *See* Order on Motion to Set Aside Partial Decrees and File Late Objections, Subcase No. 65-19812, et al. (A.L. Cattle), (January 31, 2001). "The 'good cause' standard is a more lenient threshold than the Rule 60(b) standard." *Id.* 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.

See id. Idaho Rule of Civil Procedure 60(b) states that relief may be granted based upon “mistake, inadvertence, surprise, or excusable neglect.”

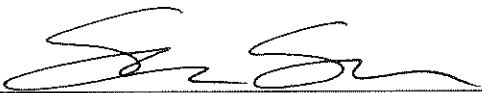
7UD Ranches contends that the unexpected and extensive damage caused to Mr. Smith’s office by the collapsing bookshelf, which resulted in the mere two-day delay in the filing of its response, constituted inadvertence and/or excusable neglect for which Rule 60(b) provides relief. The damage to Mr. Smith’s office and the two-day delay in filing was not willful and did prejudice Mr. Spillet in any manner. With regard to the existence of a meritorious position, 7UD Ranches refers the Special Master to facts and discussions set forth in IDWR’s Supplemental Directors Report and the Presiding Judge’s Decision filed in this subcase. For example, the Presiding Judge’s Decision states on page 11 that “Spillet has failed to plead facts explaining why his water claim should be more than 0.533 cfs” and that “Spillet has not pled facts which, if provided, would show why the quantities decreed to 41-8C, D and F are in error and should be reduced.” It further states on page 11 that Mr. Spillet has simply relied upon a 1965 watermaster’s record which “in no way reflects the realities of the historical use and administration of the five claims.” In addition, it states on page 12 that “it appears based on information contained in the record that Spillet’s historical use as well as the historical use of the other users is completely in line with the recommendation in the Director’s Report.”

CONCLUSION

Because the mere two-day delay in filing the response was not willful but was merely caused by inadvertence and/or excusable neglect, and because it did not prejudice Mr. Spillet and

is supported by a meritorious defense, 7UD Ranches respectfully requests that the Special Master find that there is good cause to grant 7UD Ranches' motion for leave to file its response in this subcase.

DATED this 28 day of March 2006.



SCOTT J. SMITH
Attorney for 7UD Ranches

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of March, 2006, I caused a true, correct and complete copy of the foregoing document to be served by U.S. first-class mail, postage prepaid, upon the following, unless a different method of service is indicated:

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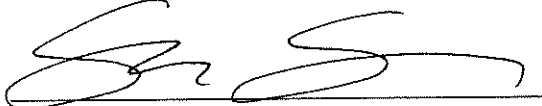
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