

George E. And Cheryl F. Colwell

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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 TWIN FALLS COUNTY

In Re SRBA	)	Subcase No. 65-22762
	)	
Case No. 39576	)	MOTION TO AMEND OBJECTION,
	)	OR IN THE ALTERNATIVE,
_____	)	MOTION TO FILE LATE OBJECTION

MOTION

George and Cheryl Colwell by and through their counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, hereby move for leave to amend their Objection in this subcase or in the alternative to file a late Objection. These Motions are supported by the *Memorandum* below, the contemporaneously filed *Affidavit of Dana L. Hofstetter*, and also, the record in this case. The proposed new *Objection* is attached as Exhibit A hereto and the original is being lodged with the Court and copies served as required pursuant to Administrative Order 1. The only substantive change from the original *Objection* filed in this Subcase, is the addition of specific Separate Streams language.

MEMORANDUM

The Idaho Department of Water Resources ("IDWR") indicated at the last Status Conference on March 7, 2006 in Matter No. 91-65, that the failure to include this water right on the separate streams list for Basin 65 may have been because it is a stock water right and IDWR generally does not recommend stock water rights for separate streams protection. However, a review of the Basin 65 Separate Streams record indicates that IDWR has listed stock water rights on the Basin 65 Director's Report Separate Streams lists, at least where the stock water use is not *de minimis* like Water Right No. 65-22762. Further, in at least one instance, IDWR entered into a Stipulation providing that two *de minimis* stock water rights (65-22616 and 65-22617) should be added to the Basin 65 list of Separate Streams rights. Accordingly, the omission of the subject water right from the Separate Streams list apparently was an oversight as IDWR has recommended similar non-*de minimis* stock water rights on the Basin 65 Separate Streams list and even has agreed in at least one Stipulation to the inclusion of *de minimis* stock water rights on the Separate Steams list.

IDWR'S PAST PRACTICE OF INCLUDING STOCK WATER RIGHTS ON THE SEPARATE STREAMS LIST WARRANTS AMENDMENT OF THE OBJECTION

The Roseberry Irrigation District's four stock water rights (65-22587, 65-22588, 65-22589, and 65-22590) for 10,000 stock were included on the separate streams list in the Basin 65, Part III Director's Report issued in September 2001 under the Boulder Creek and Willow Creek source headings. *Affidavit of Dana L. Hofstetter, Exhibit A at*

pages 9 and 10. While the subject water right involved a late claim that was included in the Director's Report for Late Claims dated March 9, 2004, in the ordinary course it would have been included in the Basin 65, Part 3 Director's Report as the associated location was in this part of Basin 65 and Big Willow Creek, the source of the subject Water Right No. 65-22762, is identified in the Basin 65, Part III Director's Report as a separate streams source. Since it appears that other non-*de minimis*¹ stock water rights were included in the separate streams list of the Basin 65, Part III Director's Report, likely the subject right also would have been included on the separate streams list if it had been reported by IDWR at the same time as these others.

Further indicating that IDWR's policy, at least during the 2001-2002 time frame when the original Basin 65, Part III Director's Report issued, was to include stock water rights on the Separate Streams lists is an September 2002 *Stipulation* entered into between the Idaho Department of Water Resources and Island Capitol, LLC specifically providing for two *de minimis* stock water rights to be added to the Basin 65 Separate Streams list. *Affidavit of Dana L. Hofstetter, Exhibit B at page 2.* The *Stipulation* specifically provided that the two stock water rights should have been included in the

¹Non-*de minimis* refers to those stock water rights that are not subject to the 13,000 gallons per day limitation due to there being in excess of 1000 stock served.

Separate Streams list of the Basin 65, Part III Director's Report²:

3. That water right numbers 65-22616 and 65-22617 from source Boulder Creek tributary to North Fork Payette River should have been listed on "Attachment A" [to the Separate Streams provision in the Basin 65, Part III Director's Report], but were not.

These examples indicate that IDWR previously had no policy to exclude stock water rights wholesale from the Separate Streams lists. Further, when the original Separate Streams provisions in the *Payette Adjudication* are reviewed, there is no indication that stock water rights should not be covered. *Affidavit of Dana L. Hofstetter, Exhibit C*. The Separate Streams provision from the *Payette Adjudication* referred generally to "water rights from the following sources," without designating any specific types of rights from these sources that would not be included.

In summary, it appears that if the subject water right had been recommended with the other Basin 65, Part III water rights, it likely would have been included on the Separate Streams list. It is not clear why it was excluded from the 2004 Director's Report for Late Claims' Separate Streams list; perhaps, it was because of oversight. Likely also, the Claimant's original Objection for this right did not include this matter due to oversight. *Affidavit of Dana L. Hofstetter*.. However, there is good cause for amending the Objection at this time to address this matter prior to when the Court decrees the final Basin 65 Separate Streams water right list.

²By having entered into this *Stipulation*, IDWR subsequently may be barred from taking a contrary legal position.

**IN THE ALTERNATIVE, THE EXISTENCE OF GOOD CAUSE AND A
MERITORIOUS CLAIM WARRANT THE
GRANTING OF LEAVE TO FILE THE LATE OBJECTION**

This water right has not been decreed and the Special Master's Recommendation has been withdrawn. The decision to set aside an entry of default or to allow a late notice of claim to be filed, and presumably also, to allow a late objection to be filed for an undecreed right, is based on the good cause standard of I.R.C.P. 55(c). *See* SRBA Administrative Order 1, Sec. 4.d(2)(d). The Rule 55(c) standard requires only good cause and a meritorious defense. *McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d 274, 278 (Ct. App. 1993). The Rule 55(c) standard for setting aside entry of default is more lenient than the Rule 60(b) standard for setting aside default judgment. *Id.* at 935-36, 854 P.2d at 278-79. This approach is consistent with the policy that cases generally should be decided on their merits and that in the earlier stage of entry of default where there has been no judgment, a liberal approach is appropriate. *Id.* at 936, 854 P.2d at 279.

At this time, it is not clear why the original Objection filed in this subcase did not include a Separate Streams comment. Clearly, the same attorney had previously filed such objections for the omission of stock water rights from the Separate Streams list (65-22616 and 65-22617). Mostly likely, this was due to attorney oversight, and/or, perhaps, because the usual Objection form does not include a specific item for this type of objection. *Affidavit of Dana L. Hofstetter*. In any event, in view of the apparent past practice of IDWR to include stock water rights on the Separate Streams list, there is good

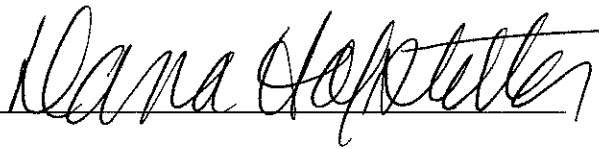
cause and a meritorious case for allowing the Separate Streams Objections to be filed at this time.

CONCLUSION

For the reasons stated above, the Motion to Amend the Objection or, in the Alternative, Motion to File Late Objection should be granted.

DATED this 7th day of April, 2006.

HOFSTETTER LAW OFFICE, LLC

By 
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2006, I caused to be served copies of the foregoing **Motion to Amend Objection, or in the Alternative, Motion to File Late Objection** by the methods indicated below:

Gail McGarry
U. S. Bureau of Reclamation
1150 North Curtis Road, Suite 100
Boise, Idaho 83706
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Idaho Department of Water Resources
Document Depository
P. O. Box 83720
Boise, Idaho 83720-0098
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Chief, Natural Resources Division
Office of the Attorney General
P.O. Box 44449
Boise, ID 83711-4449
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

U.S. Dept. of Justice
Environment & Natural Resources
550 W. Fort St., MSC 033
Boise, ID 83724
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax


Dana L. Hofstetter

4001.1/6851

**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	)	A. Subcase No. 65-22762
	)	
Case No. 39576	)	AMENDED
	)	STANDARD FORM 1
	)	OBJECTION
_____	)	

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: George E. and Cheryl F. Colwell
Address: 3990 Highway 52
Payette, Idaho 83661
Daytime Phone: 208-278-3448

Name & Address of Attorney, if any:

Dana L. Hofstetter, ISB #3867
Hofstetter Law Office, LLC
608 West Franklin Street
Boise, Idaho 83702
(208) 424-7800

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: George E. and Cheryl F. Colwell
Address: 3990 Highway 52
Payette, Idaho 83661

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)).

✗ General Provisions Basin 65, Part III
(3) Separate Streams Administration - Attachment A

1. ☐ **Name and Address**
Should be: _____
2. ☐ **Source**
Should be: _____
3. ☒ **Quantity**
Should be: The 13,000 gallons per day limit should be deleted and the .02 cfs figure increased.
4. ☐ **Priority Date**
Should be: _____
5. ☐ **Point(s) of Diversion**
Should be: _____
6. ☐ **Instream Flow Description**
Should be: _____
7. ☐ **Purpose(s) of Use**
Should be: _____
8. ☐ **Period of Year**
Should be: _____
9. ☒ **Place of Use**
Should be: The NENE of Section 20, Township 8 North, Range 4 West should be added to the place of use.
11. **I object because:**
☐ This water right should not exist.
☐ This water right was not recommended, but should be recommended with the elements described above.

E. **REASONS SUPPORTING OBJECTION(S):** This water right is for 2,000 head of cattle. The NENE of Section 20, Township 8 North, Range 4 West was claimed as part of the place of use for this right. Big Willow Creek is a Separate Streams source.

F. VERIFICATION (Must be Completed)

State of Idaho)
)ss.
County of Ada)

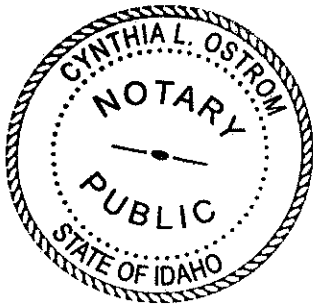
Dana L. Hofstetter, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)

Dana Hofstetter
(Attorney signing in representative capacity)

Subscribed and sworn to before me on: April 7, 2006



Cynthia L. Ostrom

Notary Public for the State of Idaho

Residing at: Boise, Idaho

My Commission Expires: 10/8/2010

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the Court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on April 7, 2006, I filed the original with the SRBA Court and mailed copies of this Objection, including all attachments, to the following:

1. Original to:

Clerk of the District Court (*via Hand Delivery*)
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:

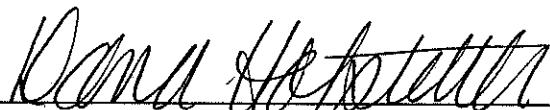
Not Applicable.

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

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
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724



Signature of Objector or attorney
mailing on Objector's behalf