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DEPARTMENT OF
WATER RESOURCES

Attorneys for Claimant Meadow Creek Homeowners Association

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	)	
	)	SUBCASE NUMBER 63-3165
	)	
Case No. 39576	)	MEMORANDUM IN SUPPORT OF MOTION
	)	TO FILE LATE OBJECTION
_____	)	

COMES NOW, SRBA Claimant Meadow Creek Homeowners Association (hereinafter "MCHOA), by and through its attorneys of record, Ringert Clark, Chartered, and hereby submits this memorandum in support of the Motion to File Late Objection submitted contemporaneously herewith. This Memorandum is submitted pursuant to I.R.C.P. 7(b)(3), and is supported by the Affidavit of John Everingham and the Affidavit of Charles L. Honsinger filed herewith, and the claims to water rights and recommendations thereof already on file herein.

FACTS

The Idaho Department of Water Resources (hereinafter "IDWR") issued the License for Water Right no. 63-3165 on October 3, 1973. Honsinger Affidavit, Exhibit A. The license specified that the water right was licensed for a flow rate of 2.50 cfs and volume of 283.5 acre-feet for irrigation purposes. *Id.* MCHOA filed Notice of Claim to Water Right No. 63-3165 in the Snake River Basin Adjudication on August 8, 1989. Honsinger Affidavit, Exhibit B. The claim was for 2.5 cfs for irrigation purposes and .05 cfs for domestic purposes with a total claimed flow rate of 2.5

cfs and a volume of 283.5 acre-feet. *Id.* The address listed for the claimant on the SRBA claim was “c/o O’Neill Enterprises, 871 E. Parkcenter Boulevard, Boise, Idaho 83706.” *Id.* On April 20, 1992, IDWR. On May 14, 1992, MCHOA filed an Application for Transfer of Water Right requesting a change in the purpose of water right No. 63-3165 from irrigation to aesthetic and aesthetic storage. Honsinger Affidavit, Exhibit C. The address of the applicant listed on the transfer application was the same as on the previously filed SRBA claim. *Id.* IDWR approved the Application on August 13, 1992 with a total of 2.48 cfs for aesthetic purposes, .02 cfs for irrigation purposes, 2.48 cfs for diversion to storage purposes, and 40 acre-feet for aesthetic storage purposes. *Id.*

MCHOA did not manage the water rights claimed on its behalf in the SRBA until late 1993, when O’Neill Enterprises, Inc. (the subdivision developer) turned over such management to the MCHOA Board. Affidavit of John Everingham. The members of the MCHOA Board at the time were unaware of the need to notify IDWR of their change in address. Affidavit of John Everingham As a result, according to IDWR records, the address for the owner of water right no. 63-3165 continued to be listed as “c/o O’Neill Enterprises, 871 E. Parkcenter Boulevard, Boise, Idaho 83706”.

In or about late of 2005, IDWR filed its recommendation of water right no. 63-3165 and mailed a Notice of Filing of Director’s Report to MCHOA at the 871 E. Parkcenter Blvd. address. However, MCHOA did not any longer receive mail at such address and the Notice was returned to IDWR. Affidavit of Charles L. Honsinger, Exhibit D. IDWR’s Adjudication Field Report establishes that the recommending IDWR reduced the quantity of the licensed water right based upon the agent’s assumption that only one-half of the water right was needed for the recommended use. Honsinger Affidavit, Exhibit E. The agent did not state that the unrecommended portion of the

water right had been forfeited. Recently, MCHOA requested that their attorney review the status of their water rights in the SRBA, discovered that it had not received Notice of the recommendation filed in the SRBA for water right no. 63-3165, and found that the water right's elements were diminished from that which was licensed and confirmed by transfer approval. Affidavit of John Everingham.

ARGUMENT

The legal standard for filing a late objection to a water right recommended in the SRBA is set forth in the *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-19812 *et. al.*, *In Re SRBA*, (January 31, 2001, SRBA District Court) (hereinafter "A.L. Cattle Decision"). That decision holds that motions to file late objections should be reviewed under the standards by which a default judgment may be set aside pursuant to I.R.C.P. 55(c). *Id.*, at p. 6. "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." *Id.*, at p. 7. MCHOA's Motion to File a Late Objection meets all three criteria.

1. MCHOA's Failure to File an Objection was not Willful

MCHOA was recommended only 1.25 cfs and 20.0 AFY of the 2.50 cfs and 40.0 AFY which MCHOA thought were the elements of its water right, and which were approved by IDWR pursuant to the 1992 transfer application. Because it did not receive Notice of the recommendation, MCHOA did not, and could not have been expected to file an objection to the recommendation. Its lack of objection due to lack of notice simply cannot be construed in any way as willful.

2. Granting the Motion to File Late Objection Will Not Prejudice any Party

As no other party has objected to the recommendation of water right no. 63-3165, there is no other party in the subcase whom may be prejudiced. Presumably, the court will set a response deadline to permit any party to respond to MCHOA's objection if such party feels it necessary. Accordingly, there is no prejudice to any party for granting MCHOA's Motion to File a Late Objection.

3. MCHOA's Position is Meritorious

To establish that its position with respect to water right no. 63-3165 is meritorious, MCHOA must allege detailed facts, which if established, would constitute a defense to the action. *A.L. Cattle Decision, supra*, at 13.

Under Idaho law, a water right can only be lost through forfeiture, abandonment, or adverse possession. *State v. Hagerman Water Right Owners (In Re SRBA Case No. 39576)*, 130 Idaho 736, 741 (1997). The IDWR agent recommending water right no. 63-3165 in the SRBA did not specify any legal basis for the reduced recommendation of certain elements of the water right. There are no facts in the Adjudication Field Report establishing that (1) the water right had not been used for a period of five years or more (forfeiture); (2) that MCHOA had intended to abandon the water right (abandonment); or (3) that the water right had been adversely possessed. Accordingly, the water right simply cannot legally be recommended with elements that are less than those claimed pursuant to the approved transfer. Moreover, even if forfeiture of the water right were alleged, such forfeiture could not occur during the pendency of a claim before the SRBA District Court pursuant to the "Forfeiture Tolling Rule." *Memorandum Decision and Order on Challenge; and, Order of Partial Decree (Wood v. Trout)*, at pp. 8 - 11 (Subcase No. 65-05663B) (May 9, 2002) at fn.6, pp. 14 -15,

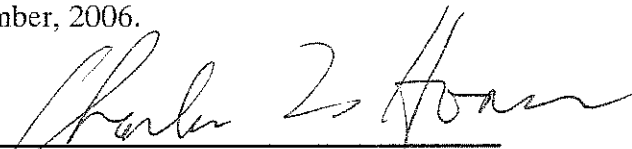
citing Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue (Subcases 36-02708 et al.) (Dec. 29, 1999).

Obviously, the facts underlying MCHOA's position, if established, will constitute a defense to IDWR's recommendation of only a portion of water right no. 63-3165. Accordingly, MCHOA has pled a meritorious defense as required by the standards set forth in the A.L. Cattle Decision, *supra*.

CONCLUSION

MCHOA has established that its failure to file an objection was not willful, that granting its motion to file a late objection will not prejudice any party, and that it has pled a meritorious defense. Therefore, this Court should grant MCHOA's Motion to File Late Objection, and assign the subcase to the appropriate Special Master for processing in the SRBA

DATED this 21st day of November, 2006.



Charles L. Honsinger
Ringert Clark, Chartered

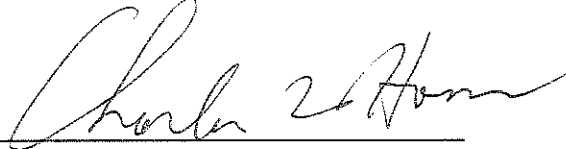
CERTIFICATE OF MAILING

I hereby certify that service of the within and foregoing Memorandum in Support of Motion to File Late Objection was made this 21st day of November, 2006, by mailing a copy thereof, postage prepaid, to each of the parties listed below.

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Person Mailing Document