

Attorneys for Bruce Walden

Scott L. Campbell, ISB No. 2251
Andrew J. Waldera, ISB No. 6608
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
22-090.0

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. 47-04177E

**RESPONSE IN OPPOSITION TO MOTION TO
FILE LATE OBJECTIONS**

COMES NOW, Bruce Walden ("Walden"), by and through undersigned counsel of record, pursuant to SRBA Administrative Order No. 1 ("AO1") and Idaho Rule of Civil Procedure 7(b)(3), and hereby submits this response in opposition to the Motion to File Late Objections ("Motion") filed by Tim and Karen Smalley ("Smalley") on or about October 10, 2007.

I. INTRODUCTION

On or about October 10, 2007, Smalley filed a Motion to File Late Objections seeking to object to Water Right No. 47-04177E owned by Walden. The objection period for Basin 47 closed on September 19, 2007. Smalley has failed to establish the requisite good cause excusing their failure to timely file the objection sought.

II. BACKGROUND

Walden owns six (6) acres in the NESE quarter quarter section of Section 9, Township 9S, Range 14E, located in Buhl, Idaho. Smalley owns an adjoining fourteen (14) acres in the same NESE quarter quarter section. Walden (right no. 47-04177E) and Smalley (right no. 47-04177B), in conjunction with other neighboring landowners divert water from an unnamed stream that is tributary to Deep Creek through a common diversion lateral. Each of the common lateral users owns a split portion of the parent right beneficial use claim 47-04177 filed by Melissa Smalley in 1980. On or about August 31, 2001, Smalley filed a Petition for Injunctive Relief seeking to enjoin Walden and/or his predecessor's diversion of right 4177E. In response, the SRBA Court assigned Smalley's action the subcase no. 94-00019.

In short, subcase no 94-00019 lingered on the Court's docket awaiting the issuance of the pertinent Director's Reports for Basin 47. The pertinent Director's Reports recommending the 4177 split rights issued on February 2, 2007, and were preceded by the October 20, 2006 issuance of the Preliminary Director's Reports. The final (February 2, 2007) Director's Reports set September 19, 2007, as the objection deadline for the basin. In the meantime, and via stipulation of the parties, Walden's split right (4177E) was administered in the interim for irrigation seasons 2002 through 2007. In addition to the interim administration, the

Court repeatedly revisited subcase no. 94-00019 (no fewer than thirteen (13) times between November 26, 2001 and March 28, 2007) through a series of hearings and status conferences in an concerted effort to keep it and the parties updated as to the status of the Basin 47 reporting process.

Upon issuance of the pertinent final Director's Reports, Walden filed objections with the Court on September 19, 2007. Smalley failed to do the same, and likely realized this failure during the October 3, 2007 status conference during which counsel for the Idaho Department of Water Resources and counsel for Walden reported the matter's objection status to the court. As a result, Smalley has filed this motion seeking leave of the court to excuse his failure to timely file.

III. ARGUMENT

A. Legal Standard

As Smalley's motion correctly points out, in subcases such as this (where partial decrees have not yet been entered), the legal standard for filing a late objection in the SRBA is that applied in deciding the filing of late claims. *Memorandum Decision and Order on Challenge*, Subcase Nos. 47-16433, *et al.* (March 22, 2005) ("*Bedke I*"). As such, AO1 § 4d(2)(d), providing that a motion to file a late claim is determined pursuant to the standard for setting aside an entry of default (Idaho Rule of Civil Procedure 55(c)), governs.

Idaho Rule of Civil Procedure 55(c) provides that a default may be set aside upon a showing of "good cause." *Id.* The Rule 55(c) "good cause" standard is more lenient than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 935 (Ct. App. 1993); *see also Bedke I* at 6. The Rule 55(c) "good cause" standard takes into account the following factors:

- (i) whether the default was willful;

- (ii) whether setting aside the judgment would prejudice the opponent; and
- (iii) whether a meritorious position has been presented.

McFarland, 123 Idaho at 936, and *Bedke I* at 6. The court must examine each case in light of the unique facts and circumstances presented. *Bedke I*, citing *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321 (Ct. App. 1983).

The “reasonably prudent person” and “excusable neglect or mistake” standards of Rule 60(b), are not synonymous with the “willful” standard. *Bedke I* at 12. However, the Rule 60(b) standards are not to be disregarded. *McFarland*, 123 Idaho at 936. While it is true that the word “willful” denotes an act which is intentional, knowing, or voluntary, as distinguished from accidental (*i.e.*, one done intentionally, knowingly, and purposefully, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly or inadvertently), the “reasonably prudent person” and “excusable neglect or mistake” standards of Rule 60(b) do coincide and commingle with the willful standard. In sum, the moving party must show some excuse for a failure to timely act. *Id.* (citation omitted).

B. Application To This Matter

In their motion, Smalley asserts “concern about the claimed basis for Walden’s objections,” and that the motion “is supported by good cause and a meritorious position hence it meets the [requisite legal standards].” Motion at 2-3. Just because Smalley’s motion states that it is supported by good cause and a meritorious position does not make it so.

Rather than focus upon why they failed to observe the September 19, 2007 objection deadline, and presenting any reasons or excuses supporting good cause for the failure, Smalley’s motion simply synthesizes the Petition for Injunctive Relief filed in August 2001. Strangely, Smalley does not once address a single reason why they failed to comply with the pertinent objection filing deadline. Smalley does not allege any confusion, misunderstanding,

failure to receive the pertinent Director's Report, mistake, inadvertence, or any other extenuating circumstance excusing their noncompliance. Walden submits that Smalley's silence and failure to so identify any reasons or excuses supporting their failure to act is the simple result of not having any such justifiable excuse to assert.

As noted in Section II, *supra*, controversy regarding these water rights has been pending since August of 2001. It is a controversy that Smalley initiated through the same counsel of record that filed the current motion. If anyone had a vested interest in following this matter closely and carefully, it was Smalley. No fewer than thirteen (13) separate hearings and/or status conferences were held for the purpose of keeping the court and the parties apprised as to the status of the anticipated issuance of the Director's Reports for Basin 47. Smalley certainly did not fail to observe the objection deadline for lack of notice or lack of interest.

Undoubtedly, Smalley will argue that their failure to observe the objection deadline was not willful—that the failure to timely file was not intentional or purposeful. Smalley will argue that the failure to file was inadvertent and careless at the least, perhaps negligent at the most. While many SRBA participants (particularly those who are *pro se* participants) are often afforded the benefit of the doubt, Smalley is not your average SRBA participant.

It is telling that Smalley fails to allege any mistake, confusion, or lack of notice in this matter. Not only did Smalley initiate the underlying controversy in August 2001, but Smalley has been represented in the SRBA ever since by capable counsel. Smalley's active participation and legal representation in this matter militates against allegations of mistake, confusion, lack of notice, or any other form of justifiable excuse. Given Smalley's overt participation in the SRBA process, and their omnipresent legal representation throughout,

Walden contends that Smalley's failure to timely file the objection now sought can be nothing other than a willful failure to act. At the very least, Smalley's failure to timely file is inexcusable.

Regarding the "prejudice" criterion, there is no question that permitting Smalley to file the late objection sought will prejudice Walden. The entire premise of Smalley's objection is that Walden's split right (4177E) should not exist. Smalley's proposed objection and Petition for Injunctive Relief do not seek adjust or harmonize rights amongst neighboring water users, they seek to preclude or otherwise obliterate rights altogether. Smalley had ample notice and every opportunity prosecute the interests now sought in a timely and procedurally correct manner. Walden should not be penalized for Smalley's ambivalence.

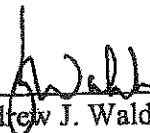
Last, Walden contends that Smalley's conclusory and unsubstantiated allegations regarding forfeiture, abandonment and waste fail to present a meritorious defense. The allegations supporting a purported meritorious defense must be sufficiently detailed. *Hearst Corp. v. Keller*, 100 Idaho 10, 12 (1979).

IV. CONCLUSION

For the foregoing, and based upon the unique facts and circumstances presented, Bruce Walden respectfully requests that Smalley's Motion to File Late Objections be denied in its entirety for failure to establish the requisite good cause set forth in AO1 and Idaho Rule of Civil Procedure 55(c). Smalley was an educated, engaged, and represented participant in this matter who was afforded ample notice and opportunity to file the proposed objection in a timely and procedurally correct fashion.

DATED this 25th day of October, 2007.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Andrew J. Waldera – Of the Firm
Attorneys for Bruce Walden

CERTIFICATE OF SERVICE

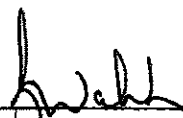
I HEREBY CERTIFY that on this 25th day of October, 2007, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTION TO FILE LATE OBJECTIONS** to be served by the method indicated below, and addressed to the following:

C. Thomas Arkoosh
Daniel A. Nevala
ARKOOSH LAW OFFICE, CHARTERED
301 Main Street
P.O. Box 32
Gooding, ID 83330-0032
Fax: (208) 934-8873

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

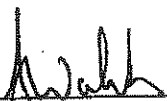
Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 East Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720-0098
Fax: 287-6700

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile



Andrew J. Waldera

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Andrew J. Waldera – Of the Firm
Attorneys for Bruce Walden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October, 2007, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTION TO FILE LATE OBJECTIONS** to be served by the method indicated below, and addressed to the following:

C. Thomas Arkoosh
Daniel A. Nevala
ARKOOSH LAW OFFICE, CHARTERED
301 Main Street
P.O. Box 32
Gooding, ID 83330-0032
Fax: (208) 934-8873

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 East Front Street, 6th Floor
P.O. Box 83720
Boise, ID 83720-0098
Fax: 287-6700

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile


Andrew J. Waldera

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829208 345 2000
208 385 5384 Fax
208 385 5418 Direct**FACSIMILE****From:** Andrew J. Waldera
Re: Subcase No. 47-04177E**Date:** October 25, 2007
File No.: 22090.0**Number of pages being transmitted including the cover page:** 8
Please call fax operator at (208) 345-2000 if all pages are not received.

To:	Name	Organization	Fax No.	Voice No.
	C. Thomas Arkoosh	Arkoosh Law Office, Chartered	(208) 934-8873	(208) 934-8872
	Clerk of the Court	Snake River Basin Adjudication District Court	208-736-2121	208-736-3011
	Director	Idaho Department of Water Resources	287-6700	287-4800

Message:

Response in Opposition to Motion to File Late Objection for filing with the Court.

PLEASE DELIVER IMMEDIATELY

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for return of the original document to us. Thank you.