

RECEIVED
OCT 30 2007
DEPARTMENT OF
WATER RESOURCES

C. Thomas Arkoosh, ISB #2253
Daniel A. Nevala, ISB #6443
ARKOOSH LAW OFFICES, Chtd.
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

**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 No. 94-00019
	)	
Case No. 39576	)	FOR WATER RIGHT NO.: A47-04177E
	)	
	)	REPLY TO RESPONSE IN OPPOSITION TO
	)	MOTION TO FILE LATE OBJECTIONS
	)	
	)	
	)	
	)	

COMES NOW, Tim and Karen Smalley ("Smalley"), by and through their attorney Daniel A. Nevala, Arkoosh Law Offices, Chtd., pursuant to SRBA Administrative Order No. 1 and Idaho Rule of Civil Procedure 7(b)(3), and hereby submits this reply to the *Response to Motion to File Late Objections*.

I. INTRODUCTION

Walden correctly points out that the objection period for Basin 47 was September 19, 2007. However, Walden fails to point out that these parties have previously stipulated to administer the water rights at issue and that a determination of the status of those water rights

would be decided in the final hearing set for January 2, 2008. Walden's objection to both his water right and Smalley's water right came as a surprise to Smalley as Smalley believed that neither party felt the need to file a formal objection. This was compounded by the fact that counsel was not personally aware of the September, 19 2007 deadline until after it had passed. *See Affidavit of Daniel A. Nevala at paragraph 6* filed concurrently herewith. Smalley's failure to timely file and objection to water right 47-04177E was not willful, it was simply a mistake and misunderstanding, and therefore, leave should be granted to allow Smalley's Motion to File Late Objection.

II. ARGUMENT

Good cause exists to grant the pending Motion to File Late Objection as the failure to timely file was not willful, does not prejudice Walden, and is supported by meritorious position in that the companion litigation has been ongoing since 2001. As previously stated in Smalley's pending motion, the legal standard for granting a leave to file a late objection has been described by Judge Melanson. In the *Memorandum Decision and Order on Challenge* (Subcase Nos. 47-16433 *et al*), Presiding Judge Melanson described the standard of review for filing a late objection:

In subcases *for which partial decrees have not been entered*, the legal standard for filing a late objection to a water right claim in the SRBA has been historically determined pursuant to the standard set forth in *AOI* for filing late claims. [citation omitted]. *AOI* does not expressly provide a standard for reviewing late objections. A motion to file a late claim is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. *Id.*, see *AOI* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) leave to amend a notice of claim shall be freely given when justice so requires). In the *A.L. Cattle* subcase, this Court held that the I.R.C.P. 55(c)

standard should be applied to late objections to which partial decrees have not been entered, rather than the I.R.C.P. 60(b) standard.

In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho Courts apply a “good cause” for untimeliness standard. I.R.C.P. 55(c). The “good cause” standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho at 935, 854 P.2d at 279. The I.R.C.P. 55(c) good cause standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

Memorandum Decision and Order on Challenge at 5-6 (March 22, 2005) (“*Bedke I*”).

The consequence of the above is that the liberality of the standard requires as such that, in most cases, relief should be granted to reach a judgment on the merits. *Bedke I* at 10. This is because default judgments are generally disfavored at law. *See Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267 *et al.* (Jan. 31, 2001) (“*A.L. Cattle*”).

Smalley’s Motion to File Late Objection was filed on or about October 10, 2007, less than a month after the original filing deadline of September 19, 2007. Granting the pending Motion to File Late Objection is discretionary with the Court and would not constitute an abuse of discretion as a trial court’s denial of a motion to set aside an entry of default will not be reversed on appeal unless an abuse of discretion clearly appears and the power of a trial court to grant or deny relief under Rule 55(c) is discretionary. *McGloob v. Gwynn*, 140 Idaho 727, 729 (Idaho 2004). The purpose behind applying the more liberal standard of I.R.C.P. 55(c) instead of the more stringent standard set forth under I.R.C.P. 60(b) in granting a party leave to file a late

objection is because disfavoring defaults and allowing a party to file a late objection is to decide issues based on the merits and not dismiss issues based on procedural technicalities.

Thus, allowing Smalley leave to file a late objection will not prejudice Walden as he will be in no worse position than he would have been if Smalley's objection were filed timely. Also, this will allow the parties to fulfill their original intent of resolving the matter in the coming year as evidenced by 5 years of interim orders. Further, Smalley has a meritorious position because the pending litigation concerning Walden's forfeiture, abandonment, and waste has been pending since 2001. Finally, Smalley's failure to file a timely objection was not willful; it was an oversight on the part of his counsel.

III. CONCLUSION

For the reasons set forth above, Smalley respectfully requests that the Court grant its Motion to File Late Objection.

DATED this 30th day of October, 2007.

ARKOOSH LAW OFFICES, CHTD.



Daniel A. Nevala

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 day of October, 2007, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

RECIPIENT(S)

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

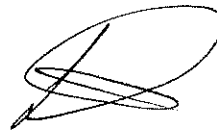
☒ U.S. Mail, Postage Prepaid
☐ Overnight Courier
☐ Hand Delivered
☒ Via Facsimile
☐ CM/ECF Notice of Electronic Filing

Scott L. Campell
Andrew J. Waldera
Moffatt Thomas Barrett Rock & Fields
PO Box 829
Boise, Idaho 83702

☐ U.S. Mail, Postage Prepaid
☐ Overnight Courier
☒ Hand Delivered
☐ Via Facsimile
☐ CM/ECF Notice of Electronic Filing

IDWR Document Depository
P.O. Box 83720
Boise, Idaho 83720-0098

☐ U.S. Mail, Postage Prepaid
☒ Overnight Courier
☒ Hand Delivered
☐ Via Facsimile
☐ CM/ECF Notice of Electronic Filing



Daniel A. Nevala