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DEPARTMENT OF
WATER RESOURCES

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North Side Canal Company, and Twin Falls Canal Company*

**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 Nos. 22-571, 22-12696, 22-12697
	)	
Case No. 39576	)	MOTION TO FILE LATE OBJECTIONS
	)	OR ALTERNATIVELY TO PARTICIPATE
_____	)	

COME NOW, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company ("Movants"), parties in the SRBA, by and their attorneys of record, Barker Rosholt & Simpson, and move this Court for an Order Granting Motion to File Late Objections, or alternatively, for an Order Granting Motion to Participate in the above-entitled subcases. This motion is made pursuant to SRBA Administrative Order #1 ("AO1") and the Idaho Rules of Civil Procedure. The reasons for the motion are set forth below.

INTRODUCTION

The Movants seek to file late objections to several "ground water recharge" claims filed in Basin 22. These claims are similar to other claims that the Surface Water Coalition ("SWC")

objected to in Basin 22, on July 25, 2007. The claims seek to divert water for “ground water recharge.” The Coalition is concerned about the claimed basis for these rights, i.e. “decreed.” The Movants meet the standard to file late objections, or alternatively, to participate in these subcases as provided by AOI and the Idaho Rules of Civil Procedure.

STANDARD OF REVIEW

In the *Memorandum Decision and Order on Challenge* (Subcase Nos. 47-16433 *et al*) (March 22, 2005) (“*Bedke I*”), 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.

Bedke I at 5-6.

In doubtful cases, relief should be granted to reach a judgment on the merits. *Bedke I* at 10. This is because default judgments are disfavored. *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*”).

REASONS SUPPORTING MOTION

The Movants’ Motion to File Late Objections is supported by good cause and a meritorious position; hence, it meets the above standard. The Movants only recently became aware of the issues presented by the subject claims and subcases in conjunction with the SWC’s July 25, 2007 timely filing of objections to similar claims (subcase nos. 22-589B, 22-605, 22-12654, 22-12695 and 22-13342). The subject claims in Basin 22, like the claims in Basin 22 to which the SWC has objected, seek to establish water rights for purposes of “ground water recharge,” with priority dates ranging from 1885 to 1898. The claimed points of diversion and place of use are also in the same vicinity in the Henry’s Fork area as some of the previously contested Basin 22 claims. The IDWR Director’s recommendations for these claims identify the “BASIS OF CLAIM – Decreed.” Neither the claims themselves nor the IDWR Director’s recommendations cite any legal or factual authority supporting this claimed water right for “ground water recharge,” either generally or as of the early priority dates sought. Moreover, the Movants are unaware of any court proceeding that has decreed “ground water recharge” claims in Idaho. The establishment of such claims to divert these water sources tributary to the Snake River may conflict with reservoir storage water rights and operations critical to the Movants.

While the Movants do not oppose ground water recharge generally, parties seeking water rights related to ground water recharge must comply with applicable statutes and legal authority. *See, e.g.,* I.C. §§ 42-234, 42-4201 to -4204. To the best of the Movants’ knowledge the bases

for the claims are decreed irrigation rights held by the claimants, not decreed water rights for “ground water recharge” purposes.

Recently, Special Master Bilyeu granted a substantively identical Motion, filed by the SWC in Basin 21. In the *Order Granting Motion to File Late Objection and Setting Deadline*, Special Master Bilyeu indicated:

In support of the *Motion*, the Surface Water Coalition explained that it filed the *Motion* and sought to file late objections as soon as it became aware that “groundwater recharge” was at issue. The Surface Water Coalition filed similar objections on a timely basis in Basin 22. The lateness of the objection was therefore, not willful. In addition, the Surface Water Coalition set forth a meritorious position, seeking to determine whether the claimed purpose of use for “groundwater recharge” and the priority dates from 1885 to 1897 are appropriate.

At 2 (October 17, 2007). For the same reasons, the Movants’ Motion to File Late Objections should be granted.

Alternatively, the Movants’ Motion to Participate meets the standards of AO1 and I.R.C.P. 24 for motions to intervene. *See* AO#1, Sec. 10.k (“[a] *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24”). With respect to intervention as a right under I.R.C.P. 24(a), the Movants claim an interest relating to the property or transaction which is the subject of the action, namely, that the water in the Snake River which is the subject of claimant's water right is subject to prior water rights on the river for other beneficial uses, including but not limited to storage water rights at American Falls Reservoir. Moreover, disposition of the claim through a decree in the SRBA will as a practical matter impair the Movants’ ability to protect that interest, as all parties to the SRBA ultimately will be bound by the Court's decree. Furthermore, the Movants’ interest is not adequately represented by existing parties, since no other objections have been filed.

With respect to permissive intervention under I.R.C.P. 24(b), the Movants' objection, the claim, and IDWR's recommendation have questions of law and fact in common, namely, whether the claimant can establish as a matter of law and fact that it is entitled to a water right for ground water recharge with priority dates more than a century old. Allowing the Movants' late objections or participation in this matter will not unduly delay or prejudice the adjudication of these rights. There has been no trial or substantive proceedings in these subcases, which are presently uncontested. *See Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974); *Herzog v. City of Pocatello*, 82 Idaho 505, 356 P.2d 54 (1960) (motion for intervention timely when filed before trial).

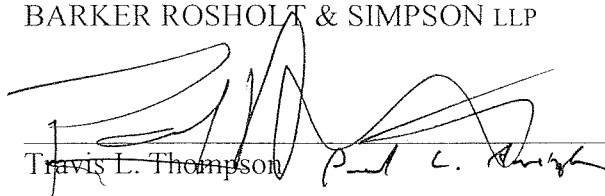
The Movants are submitting for filing together with this motion their proposed objections (see Exhibit A), which comprise their claims and defenses in these matters for purposes of procedure under I.R.C.P. 24(c).

REQUEST FOR HEARING

Counsel (Travis Thompson) for A&B, BID, Milner, NSCC, and TFCC plans to discuss the scheduling of a hearing date with the Court and the parties.

DATED this 20th day of November, 2007.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson Paul C. Rosholt

Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District, North
Side Canal Company and Twin Falls Canal
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CERTIFICATE OF MAILING

I certify that on 20th day of November, 2007, I mailed the original and copies of the foregoing motion, including all exhibits, to the following persons:

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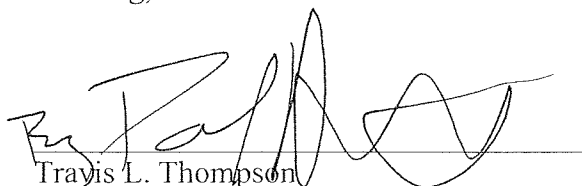
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Travis L. Thompson

Exhibit A