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DEPARTMENT OF
WATER RESOURCES

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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. 22-13746

**MOTION TO FILE LATE OBJECTION AND
REQUEST FOR EXPEDITED HEARING**

COMES NOW B&B Farms, by and through its undersigned counsel of record,
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., and pursuant to Idaho Rules of Civil
Procedure 7 and 55(c), and Administrative Order 1 ("AO1") Sections 4(d)(2)(d), (k), hereby files
this Motion to File Late Objection to water right no. 22-13746. This motion is supported by the
affidavit of Andrew J. Waldera filed contemporaneously herewith. Further, B&B Farms requests
an expedited hearing on this motion pursuant to AO1 Section 6(f)(2), and has accordingly sent a

copy of this motion and its supporting documents to all parties listed in the Court's current *Certificate of Mailing for Expedited Hearings*.

I. BACKGROUND

On July 24, 2007, B&B Farms filed a motion for late claim in order to claim water for a 40-acre parcel of land within the SWSE quarter quarter of Section 32, T06N, R40E. Affidavit of Andrew J. Waldera in Support of Motion to File Late Objection ("Waldera Aff.") ¶ 2. The ground has been irrigated continuously since the 1965 development of the well serving water right no. 22-2236. Waldera Aff. ¶ 2. However, the ground was never licensed, and was not subsequently claimed by prior owners until B&B Farms filed its motion for late claim in July 2007. Waldera Aff. ¶ 2. The Court granted B&B Farms' motion for late claim on October 19, 2007, and allowed B&B Farms to file its late claim for the above-described 40-acre parcel. Waldera Aff. ¶ 3.

The Idaho Department of Water Resources (the "Department") first issued a Director's Report recommending water right no. 22-13746 on March 21, 2008. Waldera Aff. ¶ 4. The recommendation was included in the Director's Report for Late and Miscellaneous Claims. Waldera Aff. ¶ 4. On June 17, 2008, the Department filed an amended Director's Report recommendation of water right no. 22-13746 in which the Department corrected errors to the quantity description and the total combined diversion rate. Waldera Aff. ¶ 5. While the Department's correspondence concerning the amended Director's Report dated June 17, 2008, carbon copied Scott Campbell (also one of the attorneys for B&B Farms), there is no record of any counsel for B&B Farms ("Counsel") ever receiving the Department's letter or the enclosed amended Director's Report. Waldera Aff. ¶ 6. Moreover, according to the SRBA Court, the Department's submission of the amended Director's Report to the Court should have triggered

notice under the docket sheet procedure pursuant to AO1. Waldera Aff. ¶ 6. Despite being acknowledged as counsel of record regarding all matters pertinent to water right no. 22-13746, there is also no record of counsel ever receiving notice of the filing from the SRBA Court. Waldera Aff. ¶ 6.

Counsel first became aware of the Department's submission of the amended Director's Report, and the Court's subsequent setting of a July 28, 2008 objection deadline, on August 15, 2008, while preparing for the August 20, 2008 Initial Hearings for subcase nos. 22-2236A and 22-13797. Waldera Aff. ¶ 7. While preparing for these Initial Hearings, Counsel reviewed the IWATRS Reports for water right nos. 22-2236, 22-7088, 22-13746, 22-13747, and 22-13797 because the rights are intertwined between two clients (B&B Farms and Grant Ricks) who share common interest in the rights and the ground to which they are appurtenant. Waldera Aff. ¶ 7. After becoming aware that the objection period for water right no. 22-13746 had been set and expired approximately two weeks earlier, Counsel immediately reviewed B&B Farms' files for a copy of the Department's June 17, 2008, correspondence and any notice possibly received from the SRBA Court. Waldera Aff. ¶ 8. Finding no record of either the correspondence or notice, Counsel confirmed with the SRBA Court that B&B Farms should have received notice of the filing of the amended Director's Report via the docket sheet procedure. Waldera Aff. ¶ 8.

While the Department's amended Director's Report for water right no. 22-13746 correctly recommends the right as an enlargement right, the Director's Report incorrectly recommends the right as an enlargement of water right 22-7088. Waldera Aff. ¶ 9. Instead, water right no. 22-13746 is an enlargement of water right no. 22-2236, given that irrigation of the ground in question commenced upon the 1965 development of water right no. 22-2236 as

opposed to the 1974 development of water right no. 22-7088. Waldera Aff. ¶ 9. Consequently, the amended Director's Report quantity recommendation based upon water right no. 22-7088 is incorrect. Waldera Aff. ¶ 9. The Department personnel present at the August 20, 2008, Initial Hearings agreed with B&B Farms' rationale regarding the Director's Report's flaws. Waldera Aff. ¶ 9. As a result, the error in the amended Director's Report with respect to water right no. 22-13746 necessitates B&B Farms' filing of its motion to file late objection and the Department personnel present at the August 20, 2008 Initial Hearing agreed with such an approach.

B&B Farms' failure to timely file an objection to water right no. 22-13746 was not willful or intentional. Waldera Aff. ¶ 10. It appears that neither B&B Farms, nor its counsel of record, ever received the notices it was intended to receive from both the Idaho Department of Water Resources and the SRBA Court. Waldera Aff. ¶ 10. Once counsel became aware of the lapsed objection deadline, it contacted the SRBA Court for clarification, and it has since spoken with the Department regarding the matter. Waldera Aff. ¶ 10. Given that: (1) the Department seemingly agrees with B&B Farms' position; (2) that no other objections have been filed against the right; and (3) that no Initial Hearing had yet been set with respect to water right no. 22-13746, granting B&B Farms' motion to file a late claim should not result in any prejudice to others. Waldera Aff. ¶ 10. Initial Hearings regarding subcase nos. 22-2236B and 22-13747 (owned by Grant Ricks) are currently set for March 4, 2009. Waldera Aff. ¶ 11. Given the intertwined nature of the water rights referenced above, B&B Farms is amenable to the same March 4, 2009, Initial Hearing setting for water right no. 22-13746 should the Court grant its motion to file late objection. Waldera Aff. ¶ 11.

II. ARGUMENT

A. The Legal Standard For Filing A Late Objection Is Lenient

In light of the facts and circumstances of this case, B&B Farms seeks an order from the Court granting it leave to file this late objection to water right no. 22-13746. In his *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267, *et al.* (Jan. 31, 2001) ("*A.L. Cattle*"), Presiding Judge Burdick succinctly explained the standard governing motions to file late objections as follows:

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 since *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. *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 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 931, 935, 854 P.2d, 274 (1993). 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.

A.L. Cattle at 6-7.

Importantly, this Court has significant discretion to grant a motion to file a late objection, and its decision will not be reversed on appeal unless an abuse of discretion clearly appears. *Memorandum Decision and Order on Challenge*, Subcase Nos. 47-16433, *et al.*, at 9

(J. Melanson, Mar. 22, 2005) (“*Bedke I*”). And, 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. *A.L. Cattle* at 8.

B. B&B Farms’ Motion Satisfies The Standard For Filing A Late Objection

1. The Delay Is Not Willful

B&B Farms’ submission of its objections after the deadline is not “willful,” as the term is defined by this Court. This Court has stated that “willful” means “intentional, knowing, or voluntary.” *Bedke I* at 12. In addition, “willful” requires a higher degree of culpability than mere negligence or carelessness. *Id.* In this case, the Affidavit of Andrew J. Waldera clearly shows that B&B Farms’ delay in objecting was not willful. As stated, neither B&B Farms nor counsel was served with notice of the amended Director’s Report, and as a result B&B Farms had no knowledge of the basis for objecting to its water right or the deadline for filing such objection.

B&B Farms did not purposefully fail to act in this matter. Since discovering the existence of the amended Director’s Report, B&B Farms has diligently worked, and continues to diligently work, to determine why it was not noticed on the submission of the amended Director’s Report, and to evaluate the potential grounds for objection to the amended recommendation for its water. B&B Farms broached this subject with the Department at its earliest fact-to-face opportunity (the August 20, 2008 Initial Hearing for subcase nos. 22-2236A and 22-13797), and the Department agreed both with B&B Farms’ rationale and approach in supporting and filing this objection. As a result, B&B Farms has clearly not willfully delayed setting forth its objection to water right no. 22-13746.

2. Allowing B&B Farms' Late Objections Would Not Prejudice The Concerned Water Users Or Any Third Parties

Allowing B&B Farms to file its late objection would not prejudice any other parties. The current proceeding is in its early stages, with the objection period for water right no. 22-13746 closing roughly one month ago. In addition, no other objections have been filed and the Department seemingly agrees with B&B Farms' position with respect to water right no. 22-13746. Waldera Aff. at ¶ 12. In fact, and in an effort to further streamline these proceedings B&B Farms is amenable to setting an Initial Hearing on this subcase for the same March 4, 2009 date set for inter-related subcase nos. 22-2236B and 22-13747. Waldera Aff. at ¶ 11. As a result, granting B&B Farms' motion will not prejudice any other parties but rather will facilitate the just and proper recommendation of water right no. 22-13746.

3. B&B Farms' Objections Present Meritorious Positions

The grounds supporting B&B Farms' objection are meritorious legal positions under Idaho water law. The "meritorious position" standard simply requires that the late objector allege sufficient facts that, if established, would allow that objector to prevail. *See A.L. Cattle* at 6. B&B Farms objects to the amended recommendation for water right no. 22-13746 on the basis that the Department's amended Director's Report incorrectly recommends water right no. 22-13746 as an enlargement of water right no. 22-7088 and, consequently, also incorrectly recommends the quantity of water right no. 22-13746. The amended Director's Report quantity recommendation based upon water right no. 22-7088 is incorrect. Waldera Aff. at ¶ 9. Such grounds for objection represent valid concerns that must be considered in order to properly adjudicate B&B Farms' water right.

Based on the valid objection set forth by B&B Farms, and the supporting facts outlined in its proposed objection, B&B Farms has presented a meritorious position for objecting

to water right no. 22-13746 because such facts, if proven, would require the revision of the current Director's Report recommendation.

**III.
CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons, B&B Farms respectfully requests that the Court grant its Motion to File Late Objection and accept the objection attached hereto as Exhibit A.

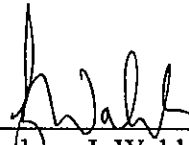
REQUEST FOR EXPEDITED CONSIDERATION

B&B Farms respectfully requests the Court to consider this Motion on an expedited basis.

DATED this 5th day of September, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

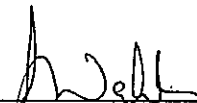
By



Andrew J. Waldera – Of the Firm
Attorneys for B&B Farms

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2008, I caused a true and correct copy of the foregoing **MOTION TO FILE LATE OBJECTION AND REQUEST FOR EXPEDITED HEARING** to be served by U.S. Mail, and addressed to the all parties to the SRBA Expedited Service List.



Andrew J. Waldera

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)
_____)

A. Subcase 22-13746
(Insert water right number)

STANDARD FORM 1
OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: B & B Farms

Address: c/o Byron Jensen

5975 W 3800 S, Rexburg, Idaho 83440

Daytime Phone: 208-345-2000

Name & Address of Attorney, if any:
Scott Campbell & Andrew Waldera

Moffatt Thomas Barrett Rock & Fields

PO Box 829, Boise, Idaho 83701-0829

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

Name: B & B Farms

Address: see Section B above.

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

1. ☐ **Name and Address**
Should be: _____
2. ☐ **Source**
Should be: _____
3. ☒ **Quantity**
Should be: 0.4 cfs (as an enlargement of 22-2236)
4. ☐ **Priority Date**
Should be: _____
5. ☒ **Point of Diversion** T05N, R40E, Section 4 NWSW within Madison County
Should be: (as an enlargement of 22-2236)
6. ☐ **Instream Flow Beginning and Ending Point**
Should be: _____
7. ☐ **Purpose(s) of Use**
Should be: _____
8. ☐ **Period of Year**
Should be: _____
9. ☐ **Place of Use**
Should be: _____
10. ☐ **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 OBJECTIONS(S): Water right no. 22-13746
represents an enlargement of water right no. 22-2236, not an enlargement of water
right no. 22-7088. The place of use has been continuously irrigated since 1965 and
the development of the well serving right no. 22-2236.

F.

VERIFICATION (must be completed)

State of Idaho)
)ss.
County of Ada)

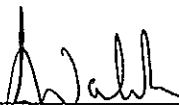
Andrew J. Waldera

(Name of person filing objection)

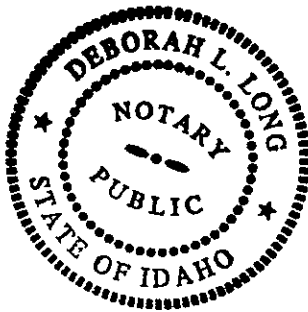
, duly sworn, upon oath, deposes and says:

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)


(Attorney signing in representative capacity)

Subscribed and sworn to before me on: September 5th, 2008




Notary Public for Idaho
Residing at: Boise, Idaho
My Commission Expires: 10/10/2013

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 September 5th, 2008, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

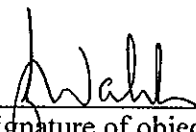
Name: B & B Farms
Address: c/o Byron Jensen
5975 W 3800 S, Rexburg, Idaho 83440

3. Copies to:

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

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449



Signature of objector or attorney
mailing on Objector's behalf