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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 Nos. 63-127B 63-128B
63-129B 63-130B
63-131B 63-178B
63-178C

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

COMES NOW, Larry and Marianne Williams dba Tree Top Ranches, L.P. ("Tree Top"), by and through its undersigned counsel of record, and pursuant to SRBA Administrative Order No. 1 ("AO1") § 10 and Idaho Rule of Civil Procedure 7(b)(3)(E), hereby submits this response in opposition to each of the Motions to File Late Objections and to Amend Objections ("Motions") filed by the Estate of Tina Iest, The Tina Iest Family LLLP, The Hauck Family

Revocable Trust and Greg Obendorf ("Movants") dated February 5, 2009 and February 27, 2009, respectively.

I. INTRODUCTION

On or about February 5, 2009, the Movants filed a motion seeking leave of the Court to file a late objection in each of subcases 63-127A, 63-128A, 63-129A, 63-130A, 63-131A, and 63-178C. Water right numbers 63-127A, 63-128A, 63-129A, 63-130A, and 63-131A (hereinafter "the Andrews Ditch Company rights") were originally claimed by the Andrews Ditch Company. Water right number 63-178C is claimed by Tina Iest. On or about February 27, 2009, the Movants filed a motion seeking leave of the Court to file a late objection in each of subcases 63-127B, 63-128B, 63-129B, 63-130B, 63-131B, 63-178B, and 63-178C. Water right numbers 63-127B, 63-128B, 63-129B, 63-130B, 63-131B, and 63-178B (hereinafter "the Tree Top Rights") are owned by Tree Top.¹ On the same day, Mr. Obendorf filed a motion seeking leave of the Court to amend his objections to the Tree Top rights.² These rights were all recommended in the Director's Report for Basin 63, Part 3. The objection period for said recommendations expired on June 20, 2007. The Movants' Motion should be denied in its entirety in these subcases for their failure to demonstrate the "good cause" required to grant their Motion.

¹ For reasons discussed below, the Tree Top rights are proportionate shares of the previously disallowed Andrews Ditch Company rights based upon Tree Top's land ownership patterns within the underlying Place of Use.

² Because the substantive arguments in each of the respective motions are identical, when addressing the Movants' arguments, Tree Top will hereinafter cite the "Motions."

II. BACKGROUND

Tree Top owns and claims 285 irrigated acres in Sections 22 and 27 of Township 5N, Range 5W. Mr. Obendorf, the Iest Family, and the Hauck Family Trust own adjoining acreage in Section 22, 23, 26, and 27 of Township 5N, Range 5W. In June of 2006, Tree Top and a representative of the Iest Family met with the Idaho Department of Water Resources (“Department”) to discuss the legal/operational status of the Andrews Ditch Company and to discuss the water rights claimed thereby. (Affidavit of Scott L. Campbell, ¶ 2.) It was determined and agreed upon by Tree Top, the Iest Family, and the Department, that the Andrews Ditch Company was not, at that time or at any time previously, a valid legal entity. *Id.* Consequently, the parties (Tree Top and the Iest Family) agreed that each would pursue its own separate claims in the SRBA and seek a proportionate share of the water originally claimed in the name of the Andrews Ditch Company, of which Tree Top and the Iest Family were the underlying “corporate” principals. *Id.*

On December 19, 2006, the Department recommended disallowance of the Andrews Ditch Company rights. Those former Andrews Ditch Company rights were subsequently and proportionately recommended to Tree Top and to Tina Iest. On June 15, 2007, Mr. Obendorf timely objected to the Quantity element of the Tree Top rights as recommended in the Director’s Report. On June 19, 2007, Tree Top timely objected to the Director’s Report as to Purpose of Use, Period of Year, and Place of Use. On August 20, 2007, Mr. Obendorf responded to Tree Top’s objections as to the same, although he had not objected to those elements. In addition, the Boise Project Board of Control and the U.S. Bureau of Reclamation responded to Tree Top’s objections to Purpose of Use and Period of Year.

With the exception of Mr. Obendorf, the parties (Tree Top, the Boise Project Board of Control, and the U.S. Bureau of Reclamation) engaged in negotiations to settle Tree Top's Objection to the Purpose of Use and Period of Year elements as recommended in the Director's Reports. The negotiations resulted in a Joint Motion for Approval of Season of Use, filed December 16, 2008, on behalf of Tree Top, the Boise Project Board of Control, and the U.S. Bureau of Reclamation, which sought approval of a duly negotiated season of use remark under the Purpose of Use and Period of Use element for each of Tree Top's rights. Unfortunately, Mr. Obendorf refused to participate in the negotiations and the subsequent Joint Motion. (Campbell Aff., ¶ 3.) Consequently, on December 3, 2008, the Court issued a scheduling order, setting a trial for June 11-12, 2009, as to the Tree Top rights given Mr. Obendorf's unwillingness to resolve his objection.

On February 5, 2009, Mr. Obendorf, the Iest Family, and the Hauck Family Trust filed a Motion to File Late Objections to the Andrews Ditch Company rights and the Iest right, despite the fact that Tree Top, the Iest Family, and the Department previously agreed that the Andrews Ditch Company was a legal fiction. The Movants objected to each element in the Director's Report, stating that the former Andrews Ditch Company rights should also have been partly recommended in the name of Mr. Obendorf, and that the Department should have included the Obendorf property as a recognized Place of Use for that water. The Movants also allege that the Iest right should have been partly recommended in the name of the Hauck Family Trust and should have included the Hauck Family Trust property as a recognized Place of Use for that water. Stated differently, Mr. Obendorf and the Hauck Family Trust believe that they should have received proportionate shares of the former Andrews Ditch Company rights in the same manner that Tree Top and Tina Iest received them. The problem is, neither Mr. Obendorf nor the

Hauck Family Trust ever claimed the proportionate shares of the former Andrews Ditch Company rights to which they believe they are entitled.

On February 27, 2009, Mr. Obendorf, the Iest Family, and the Hauck Family Trust filed another Motion to File Late Objections to the Tree Top rights and again to the existing Iest right. Mr. Obendorf also filed a Motion to Amend Objections to the Tree Top rights. Both of these Motions were brought on the same grounds, alleging (1) that the Tree Top rights should also have been recommended in the name of Mr. Obendorf as claimed, and that the recommendations should have included the Obendorf property within the Place of Use; (2) that water right number 63-178B should also have been recommended in the name of all of the Movants as claimed, and that that recommendation should have included each of their respective properties within the Place of Use; and (3) that the Iest right should have been recommended in the name of Mr. Obendorf and that the recommendation should have included the Obendorf property within the recommended Place of Use.

The Movants support each motion by arguing that recent investigation of the 1906 *Stewart Decree* uncovered “questions about the history of the Andrews Ditch Company.” (Motions, p. 3.) In the words of the Movants, review of the *Stewart Decree* reveals that “[p]erhaps, it was incorrect to assume that there were only 2 remaining members of the Andrews Ditch Company [and] [p]erhaps, the water rights should have been apportioned among other water users also.” (Motions, p. 3.) It is not entirely clear what information forms the basis of these statements, but it appears that the Movants are arguing that Mr. Obendorf and the Hauck Family Trust should now be recognized as part of the otherwise defunct Andrews Ditch Company in the same manner as Tree Top and Tina Iest. The Movants’ counsel has made this determination more than two years after the Iest Family took part in discussions which resulted

in a determination that the Andrews Ditch Company did not exist; nearly two years after the deadline to file objections; after settlement negotiations resolved all but Mr. Obendorf's objections; and approximately three months before a scheduled trial on the Tree Top rights. Moreover, it appears that the Movants' respective Motions function more as a request to file late claims than presenting actual, substantive objections to the Tree Top rights.

III. ARGUMENT

A. Preliminary Note

Tree Top remains largely unaware of the precise interrelationship and respective positions of Mr. Obendorf, the Iest Family, and the Hauck Family Trust, but it occurs to Tree Top that the common representation of the parties might present circumstances wherein the Iest Family, the Hauck Family Trust and Mr. Obendorf could be directly adverse to one another if these various objections are allowed. *See* Idaho Rule of Professional Conduct 1.7. As noted, Mr. Obendorf and the Hauck Family Trust have moved to file late objections as to the Iest right. The Iest Family, as claimant of water right no. 63-178C, likely has different objectives in resolving these issues than do the Hauck Family Trust and Mr. Obendorf. It appears on the surface that counsel is representing both a water right claimant and potential objectors that are directly adverse to the water right claimant.

B. Legal Standards

The legal standard for filing a late objection in the SRBA is the same as that applied to deciding motions seeking to file late claims. *Memorandum Decision and Order on Challenge*, Subcase Nos. 47-16433, *et al.* (March 22, 2005) ("*Bedke I*"). As such, pursuant to AO1 § 4d(2)(d), a motion to file a late objection is determined by utilizing Idaho Rule of Civil Procedure 55(c)'s standard for setting aside an entry of default.

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 applicable “willful” standard. In essence, the moving party must show some excuse for a failure to timely act. *Id.* (citation omitted).

C. The Movants Fail To Establish The Requisite Good Cause

1. Tardiness In Filing The Proposed Objections

The Movants contend that their tardiness in seeking to file an objection against the Andrews Ditch Company rights, the Tree Top rights, and the Iest right was not willful. In support, the Movants note that recent investigation into Mr. Obendorf’s objection to the quantity

element in the Tree Top rights subcases revealed information suggesting that “perhaps” there were more than two members of the former Andrews Ditch Company.

However, the Department recommended disallowance of the Andrews Ditch Company rights on December 19, 2006. Furthermore, a representative of the Iest Family, a named objector in these proceedings, was involved in discussions with Tree Top and the Department regarding the legal status and operation of the Andrews Ditch Company in June of 2006. Those discussions resulted in a determination that the Andrews Ditch Company never existed as a legally recognized corporate entity. As a result, the remaining Andrews Ditch Company “principals” (Tree Top and the Iest Family) agreed with the Department to file their own individual claims for the proportionate shares of the former Andrews Ditch Company water appurtenant to their respective land holdings. Finally, objections to the subcases at issue here were due on or before June 20, 2007. Even if the Court accepts that the Movants only recently investigated the matter (which is unlikely given the Iest Family’s involvement in the 2006 discussions), such a failure to timely investigate is not merely excusable neglect, but amounts to willfulness—a knowing or voluntary act given the close knit interrelationship between the Iest Family and Mr. Obendorf; and by extension Hauck, due to their common legal representation. The Movants have failed to show any excuse for their failure to timely act.

2. Granting The Motions Will Prejudice Tree Top

Regarding the prejudice criterion, there is no question that permitting the Movants to file late objections and, in Mr. Obendorf’s case, to amend objections, will prejudice Tree Top. While the Movants are correct in pointing out that no Partial Decrees have yet been issued, they are incorrect in suggesting that the subcases at issue are in their early stages. Presently, a trial is scheduled regarding the Tree Top rights on June 11-12, 2009. Tree Top has already initiated the discovery process in preparation for that trial. Furthermore, while Mr. Obendorf would not

entertain settlement discussions, Tree Top, the Boise Project, and the U.S. Bureau of Reclamation expended time and resources in a successful effort to settle certain disputes regarding the season of use. The addition of a number of other parties objecting to the Season of Use and/or Purpose of Use elements that were resolved among several parties prejudices those efforts. Simply put, if the motion is granted, significant time and resources will have been wasted and the inevitable continuance of the trial set for June of 2009, will result in substantial prejudice to Tree Top.

Again, the Movants have suggested that their counsel “only very recently found information apparently confirming the possible incorrect apportionment of the subject water rights, upon dissolution of the Andrews Ditch Company.” (Motions, p. 5.) However, the Movants were aware of the subject water rights and had ample opportunity to investigate and identify potential claims and objections accordingly. Lest the Movants forget, the Iest Family participated in significant discussions regarding these very water rights in June of 2006. Moreover, the 1906 *Steward Decree* is hardly “recent information.” Now that Tree Top has made efforts to reach an agreement with the Boise Project and the U.S. Bureau of Reclamation and a trial has been set, it is simply inappropriate to penalize Tree Top for the Movants’ neglect and ambivalence in this regard.

3. The Motions Fail To Present A Meritorious Position

The Movants fail to offer a clear and meritorious position. Allegations supporting a meritorious defense must be sufficiently detailed. *Hearst Corp. v. Keller*, 100 Idaho 10, 12 (1979). In this case, the stated potentialities are endless, but are largely without support. The Movants suggest that *perhaps* there existed more than two members of the Andrews Ditch Company and *perhaps* the water rights should have been apportioned differently. (Motions, p. 3.) The Movants loosely refer to “recently identified information,” namely the 1906 *Stewart*

Decree, which suggests “that other parties *may* have had interests in its water rights besides just Iest and Tree Top.” (Motions, p. 5) (emphasis added). Put simply, the allegations are unclear and consist of nothing more than postulation and equivocation. (Motions, p. 5.) *See also* Hofstetter Aff., p. 2 (“[I]t *appears* that IDWR’s Director’s Report Recommendations for these rights *largely* are based on the *Stewart* decree’s respective place of use descriptions for these water rights. Thus, it *appears* IDWR *largely* recommended to Tree Top or Tina Iest those rights that were decreed in the *Stewart* decree as partially associated with their respective properties.”). Moreover, if other parties have valid claims to former Andrews Ditch Company water, those parties should file *claims* to that water, not attempt to use the objection process to effect that ultimate goal.

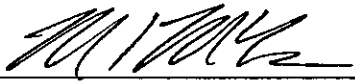
Furthermore, the Movants point out that the affairs of the Andrews Ditch Company might evidence other potential interests in the subject water rights. (Motions, p. 5.) Such affairs are entirely unidentified and undocumented in the Motions or supporting affidavit. This failure to identify any information regarding Andrews Ditch Company is especially interesting in light of the fact that one of the named Movants, the Iest Family, was among the Company’s “recognized members.” Despite failing to identify any documents associated with the Andrews Ditch Company to support their position, the Movants conclude that the Andrews Ditch Company “was acting on behalf of all its water users” when it originally filed claims in the SRBA and that the interests of the Movants deserve late consideration. These opaque, unsupported, and conclusory statements fail to outline in sufficient detail the Movants’ position. Because the Movants have not provided sufficient detail to establish a meritorious position, and in light of the tardiness and ensuing prejudice to Tree Top, the Court should deny each of the Movants’ respective Motions.

**IV.
CONCLUSION**

For the foregoing, Tree Top respectfully requests that the Court deny the Movants' Motions in their entirety with respect to these subcases. The Movants fail to establish the requisite good cause necessary to support granting late objection or late amendment. The Movants' delay with respect to this subcase is inexcusable; grant of the Motion will prejudice Tree Top; and the Movants cannot present a meritorious position.

DATED this 13th day of March, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
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By 
Matthew J. McGee – Of the Firm
Attorneys for Tree Top Ranches, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2009, 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:

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