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DEPARTMENT OF
WATER RESOURCES

Estate of Tina Iest, Tina Iest Family LLLP,
The Hauck Family Revocable Trust, and
Greg Obendorf

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY**

In Re SRBA

Case No. 39576

) Subcase Nos. 63-127A, 63-127B,
) 63-128A, 63-128B, 63-129A, 63-129B,
) 63-130A, 63-130B, 63-131A, 63-131B,
) 63-178B and 63-178C

)
) **REPLY IN SUPPORT OF**
) **MOTIONS TO FILE LATE AND**
) **AMENDED OBJECTIONS**

The Estate of Tina Iest, The Tina Iest Family LLLP, The Hauck Family Revocable Trust and Greg Obendorf (hereinafter "Movants"), by and through their counsel of record, Dana Hofstetter of Hofstetter Law Office, LLC, hereby respectfully submit this Reply to Tree Top Ranches, LP's Responses to the Motions to File Late and Amended Objections in the above-referenced subcases.

I. BACKGROUND

As discussed in the Movants' opening Memorandum, Water Right Nos. 63-127, 63-128, 63-129, 63-130, 63-131 and 63-178 originally were claimed in the SRBA by the Andrews Ditch Company. *Affidavit of Dana L. Hofstetter*. However, later, in 2006, after Tree Top Ranches LP submitted its own SRBA claims for these water rights, the Idaho Department of Water Resources ("IDWR") divided the Andrews Ditch Company's claimed water rights between Tree Top and Tina Iest largely based on these two parties' respective interests in the 1906 *Stewart* decree places of use for these water rights. *Id.* On this basis, Water Right Nos. 63-127B, 63-128B, 63-129B, 63-130B, 63-131B and 63-178B ("the B portions") were recommended to Tree Top Ranches; Water Right No. 63-178C was recommended to Tina Iest; and Water Right Nos. 63-127A, 63-128A, 63-129A, 63-129A, 63-130A, and 63-131A ("the A portions"), representing the remaining unallocated portions of these rights, were recommended disallowed in the name of the Andrews Ditch Company. (It should be noted that there was no 63-178A portion recommended by IDWR even though Water Right No. 63-178 was not fully allocated between Tree Top and Iest and had a leftover portion too.)

Very recently, as a result of case investigation in connection with other pending litigation concerning the B portions, it was discovered that the Hauck Family Revocable Trust and Greg Obendorf properties also were covered by the decreed place of use descriptions and that other parties should have also been recommended portions of these

water rights based on the place of use descriptions in the *Stewart* decree. *Affidavit of Dana L. Hofstetter*.

II. GOOD CAUSE EXISTS TO GRANT LEAVE TO FILE THE AMENDED AND LATE OBJECTIONS

The parties agree that the decision whether to allow a late (or amended) objection to be filed in the SRBA prior to partial decree is based on the good cause standard of I.R.C.P. 55(c). *See Order on Permissive Review and Order of Recommitment, SRBA Subcase Nos. 45-12475 et. al. (August 3, 2005)*. The Rule 55(c) standard requires both good cause and a meritorious defense. *McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d 274, 278 (Ct. App. 1993). The Rule 55(c) standard takes into account:

1. whether the default was willful; 2. whether setting aside the judgment would prejudice the opponent; and 3. whether a meritorious position has been presented. *Order on Permissive Review and Order of Recommitment, SRBA Subcase Nos. 45-12475 et. al. (August 3, 2005)*. Despite Tree Top's assertions otherwise, the three elements of the good cause standard, lack of willfulness, lack of prejudice and the presentation of a meritorious defense, are satisfied as to each of the subject Motions.

A. The failure to submit timely Objections was not willful as the existence of the other holders of Andrews Ditch Company water rights was only recently discovered.

The SRBA Court, in other similar instances, has noted that the willfulness element of the good cause standard, requires a showing that the failure to submit a timely

Objection was not intentional or knowing:

McFarland states that the first consideration in determining the “good cause” standard is whether the default is willful. Black’s Law Dictionary, citing *United States v. Murdock*, 290 U.S. 389, 394, 395, 54 S.Ct. 223, 225, defines willful as: “In civil actions the word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental.” Black’s further defines the term as, “A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.”

Order on Permissive Review and Order of Recommitment, SRBA Subcase

Nos. 45-12475 *et. al.* (August 3, 2005) at 8.

As explained in the Movants’ prior filings, the other parties’ interests in the former Andrews Ditch Company water rights were only discovered in the last couple of months. Therefore, these parties did not willfully fail to file timely Objections.

B. There would be no prejudice as these proceedings are at a relatively early stage and Rule 55(c) policy favors deciding cases on the merits.

As the basis for asserting prejudice, Tree Top claims that a delay in the trial may result if the subject Motions are granted. However, it must be noted that only a trial date is set for the B portions. Thus, as to the A portions and as to Water Right No. 63-178C, the issue of possible trial date postponement is not even presented.

The SRBA Court has provided guidelines indicating that “prejudice” is

determined from the time period before the subject Motions are filed, not after:

Prejudice. Any prejudice to the opposing party must be measured from the time that the objections were due until the *Motions to File Late Objections* were filed. Any prejudice from events occurring after the *Motions* were filed is irrelevant. The stipulations reached with other parties, especially those who also filed *Motions to File Late Objections*, may not be considered in the Special Master's determination of prejudice.

Order on Permissive Review and Order of Recommitment, SRBA Subcase

Nos. 45-12475 *et. al.* (August 3, 2005) at 10. Based on this guideline, it would not appear that the possible need to reschedule a subsequent trial would constitute “prejudice.” Since Motions to File Late Objections, by definition, subsequently may necessitate some procedural delay to address the new issues raised, under Tree Top’s definition of “prejudice,” no such Motions would ever be granted.

C. A meritorious case is presented as the 1906 *Stewart* decree, coupled with the Movants’ deeds, indicate that portions of these historic water rights are appurtenant to the Movants’ properties.

The meritorious defense element requires the movant to:

1. allege facts,
2. which if established,
3. would constitute a defense to the action, and
4. the facts supporting the defense must be detailed.

Order on Motion to Set Aside Partial Decrees and File Late Objections, SRBA Subcase

Nos. 65-19812 *et al.* (January 31, 2001) at 7 (*citing McFarland v. Curtis* 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993)).

Here, Movants have alleged interests in portions of Water Right Nos. 63-127 to 63-131 and 63-178 based on their ownership of property included within the previously decreed places of use for these water rights. In support of these allegations, the Movants have provided copies of the deeds to their properties and copies of the respective portions of the *Stewart* decree. These are specific, detailed, factual allegations which if ultimately established in the SRBA would lead to partial decrees in their names for the respective portions of these water rights. These specific allegations satisfy Rule 55(c)'s meritorious defense requirement.

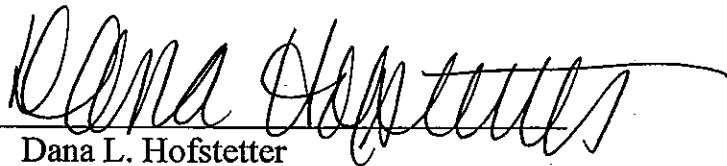
III. CONCLUSION

For the reasons stated above, the Motions to File Late and Amended Objections should be granted.

RESPECTFULLY SUBMITTED this 19th day of March, 2009.

HOFSTETTER LAW OFFICE, LLC

By


Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2009, I caused to be served copies of the foregoing **Reply in Support of Motions to File Late and Amended Objections** by the methods indicated below:

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