

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JUN 26 2009

By _____ Clerk
_____ Deputy Clerk

**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

ORDER GRANTING MOTION TO FILE LATE OBJECTION

**SUBCASE NO.: 37-353F, 37-353J, and
37-353L**

I. PROCEDURAL BACKGROUND

A *Motion to File Late Objection* was filed by Barbara Barry on December 18, 2008. The *Affidavit of Paul L. Arrington in Support of the Motion to File Late Objection* was filed on December 18, 2008. A hearing was held on the *Motion* on March 18, 2009.

II. STANDARD OF REVIEW

The SRBA Administrative Orders do not provide a standard to be applied for filing late objections. However, the court's administrative rules set forth that *Motions to File a Late Notice of Claim* are to be reviewed under the criteria of I.R.C.P. 55(c) and 60(b). *SRBA Administrative Order I (AO1) § 4 (d)(2)(d)*.

According to case law and the Rules of Civil Procedure, a court applies the criteria of I.R.C.P. 55(c) when determining whether to allow the filing of a late answer. Motions for Late Objection have been reviewed in the SRBA under the same criteria of Rule 55(c). The proponent of a Motion for Late Objection, like a party seeking to file an untimely answer, must show both “good cause” for untimeliness and the existence of a “meritorious position.” I.R.C.P. 55(c).

The SRBA has recently affirmed the legal standard of what must be shown to satisfy “good cause” and “meritorious position.” The legal standard for “good cause” for untimeliness of an objection is determined under the standard for setting aside the entry of a default under I.R.C.P. 55(c).

The “good cause” standard under Rule 55(c) is more lenient than the standard under Rule 60(b). 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) whether a meritorious position has been presented.

Order on Motion to Set Aside Partial Decrees and File Late Objections (A.L. Cattle) (Jan. 31, 2001).

III. DISCUSSION

In support of the *Motion*, Barbara Barry explained that water rights 37-353F, 37-353J, and 37-353L and others originate from water right 37-353 which was decreed to James Johnson in *Frost v. Alturas Water Co.*, (Fourth Dist.) (Dec. 3, 1909) for 6.4 cfs with a priority of June 12, 1886. Since the time of the *Frost Decree*, the Johnson right has been split and transferred. Currently fourteen SRBA claims are derived from the Johnson right, including Barbara Barry’s claim to 37-353G. The total quantity of water claimed exceeds the amount decreed to Johnson in the *Frost Decree*. The *Director’s Report* recommended disallowance of Barry’s claim 37-353G. Barry filed a *Motion to File a Late Claim* in 37-353G, which was **granted**. Barry asks the court and IDWR to evaluate all claims which are derivative of the Johnson right. Therefore, Barry seeks to file late *Objections*.

Olsen Livestock Consultants, Inc. (hereafter Olsen) opposed the *Motion* as to 37-353J. Olsen owns 10 acres and claims water right 37-353J. (The claimants of 37-353F, and 37-353L did not attend the hearing and did not oppose the *Motion*.) Olsen argues that Barry did not show “good cause” for the lateness of the *Objections* and did not demonstrate a “meritorious position” as to 37-353J. Olsen argues that administrative decisions show that Olsen’s right is essentially unassailable. For example, IDWR determined that Olsen’s property is within the decreed place of use for the Johnson right. (*Amended Preliminary Order, Conclusion of Law* No. 2) IDWR also concluded that the Johnson water right should be prorated uniformly to the original 160 acre place of use. (Absent a valid transfer or other severance of the water) Olsen therefore concludes that Barry lacks a meritorious position.

Olsen argues that Barry’s tardiness in filing this late *Objection* does not meet the “good cause” standard. Olsen points out that objections were due on November 14, 2007, but Barry’s *Motion* was not filed until December of 2008.

Barry apparently researched IDWR’s files to determine how her right related to other

Johnson-based rights. Based on her research she filed this *Motion*. The parties agree that record keeping on the Johnson property was haphazard after the Dean Ranch Subdivision acquired the land. Therefore, it cannot be said that Barry “willfully” failed to file *Objections* by the deadline.

IV. FINDINGS

Barry did not know of the connection between her claim and the subcases for which she now seeks to file late objections at the time objections were due. Once Barry researched IDWR’s files and learned that these rights and the Barry claim were all derived from the Johnson right in the *Frost Decree*, she filed this *Motion*. Examining the circumstances of Barry’s *Objections*, it is apparent that the lateness was not willful.

In addition, the late objection will not prejudice Olsen. Had Barry filed the *Objection* on a timely basis, Olsen would have had to defend its claim in the same manner as it will now defend its claim. Since the SRBA Court determines derivative rights together, Olsen’s right would be examined by the court anyway, since there are *Objections* to other rights derived from the Johnson root right.

A “meritorious position” was alleged by Barry because she connected her proposed *Objections* to the Johnson root right in the *Frost Decree*. All parties concede that more water was claimed out of the Johnson right than was decreed in the *Frost Decree*. The SRBA court has a long-standing policy of examining all rights derived from a prior decree simultaneously. Therefore, it is appropriate that Barry’s *Objection* be examined with the other Johnson-based rights. *Memorandum Decision and Order on Challenge* at 34, (36-3A, *et.al.*) (November 23, 1990) (hereafter *New International Decree*)

Olsen argued that examining all the Johnson-based claims together could result in ignoring prior IDWR administrative decisions. That is not the case. The court presumes that IDWR’s determination that 37-363 was not forfeited, that the Olsen parcel is within the decreed place of use, and that the Johnson right should be pro-rated uniformly will be accounted for. Those prior administrative decisions, however, need to be applied and understood as a package. IDWR has accordingly asked the court to allow it to consider its *Director’s Report* now that all claims are before the court. To do otherwise would require this Special Master to ignore the important policy established in *New International Decree* at 34.

Barry’s failure to file a timely objection was not willful. The *Late Objection* will not prejudice Olsen. Barry has asserted a meritorious position because her right and other rights 37-353F, 37-353J, and 37-353L, are derived from the same root right and should be considered together.

Doing so will allow IDWR and the court to treat Johnson-derived rights uniformly. To do otherwise would violate the important policies established in *New International*.

Therefore, the *Motion to File Late Objection* is **granted**.

Dated: June 26, 2009.



BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO FILE LATE OBJECTION was mailed on June 26, 2009, with sufficient first-class postage to the following:

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