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AUG 28 2009

DEPARTMENT OF
WATER RESOURCES

TIMOTHY W. TYREE
ADMITTED TO PRACTICE LAW IN IDAHO
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August 27, 2009

VIA U.S. MAIL

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

Re: *SRBA CASE No. 39576*
Subcase No. 37-20348

Dear Clerk:

I have enclosed for filing with the Court in connection with the Snake River Basin Adjudication (SRBA Case No. 39576, Subcase No. 37-20348) an original and one copy of a Motion to File Late Objection. Once the original has been filed with the Court, please return a conformed copy to this office in the enclosed self-addressed stamped envelope.

If you have questions or concerns regarding this matter, please do not hesitate to contact this office. Thank you for your assistance in this matter.

Very truly yours,

HAWLEY TROXELL ENNIS & HAWLEY LLP

Marcelle Morris
Legal Administrative Assistant to
Timothy W. Tyree

TWT/mm
Enclosures

c: Jerry Turco
IDWR Document Depository
United States Department of Justice Environmental & Nat'l Resources Div
Chief, Natural Resources Division, Office of Attorney General

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AUG 28 2009

DEPARTMENT OF
WATER RESOURCES

COPY

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Attorneys for Jerry Turco

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. 37-20348

MOTION TO FILE LATE OBJECTION

COMES NOW, Jerry Turco, Jr. ("Turco"), by and through his attorneys, Hawley Troxell Ennis & Hawley LLP, and submits this Motion to File Late Objection pursuant to SRBA Administrative Order #1 and the Idaho Rules of Civil Procedure. For the following reasons, the Court should grant Turco's motion and allow this late objection. The proposed Objection is attached hereto as Exhibit A.

I.

INTRODUCTION

Turco did not receive notice that Water Right 37-20348, the right appurtenant to Turco's residence in Blaine County, had been recommended as disallowed. Turco purchased the property in 1997 and filed a Notice of Claim to a Water Right in October of 2000. Turco only

recently learned on August 6, 2009 that his water right had been recommended as disallowed. Upon learning of the recommendation, Turco promptly hired legal counsel, began researching the merits of the recommendation, participated in the proceedings affecting his water right and, upon finding the grounds to overturn the recommendation, filed this Motion to File Late Objection with the SRBA Court. As discussed below, good and sufficient cause exists to grant this motion.

II.

STATEMENT OF FACTS

Turco purchased Lot 10, Block 1 of the Dean Ranch Subdivision ("Lot 10") on September 19, 1997, appurtenant to which is Water Right 37-20348. *Affidavit of Jerry Turco in Support of Motion to File Late Objection* ("Turco Aff.") at ¶ 2. With the assistance of legal counsel, Turco filed a Notice of Claim to a Water Right in October of 2000. *Id.* at ¶ 3. Water Right 37-20348 is the only irrigation water appurtenant to Lot 10. *Id.* at ¶ 4. Without the irrigation water, Turco cannot irrigate the vast majority of Lot 10. *Id.*

Turco first became aware of the recommendation for disallowance pursuant to the Proposed Settlement for Claims Filed Against Decreed Right 37-353, a letter written by Kelly K. Christensen, Sr. Water Resource Agent, dated August 4, 2009. *Id.* at ¶ 5. Because this was the first instance by which Turco became aware of the recommendation, he did not file an objection before the deadline. *Id.* at ¶ 6. The Department's recommendation is in error, as water has been used on Lot 10. Aerial photography of the land shows the fields on the property cultivated and ready to receive water. *Id.* at ¶ 8.

Once Turco became aware of the recommendation for disallowance, through legal counsel, Turco participated in the status conference held Tuesday, August 18, 2009. At the

status conference, a mandatory settlement conference was scheduled for November 6, 2009.

Turco plans to participate in the mandatory settlement conference.

III.

STANDARD OF REVIEW

In light of the facts and circumstances of this case, Turco seeks an order from the Court granting leave to file the proposed Objection attached hereto. A motion to file a late objection is evaluated under the criteria for setting aside a default judgment under Idaho Rule of Civil Procedure 55(c). *Order on Reconsideration of Motions to Strike Affidavits and Motions to File Late Responses*, Subcase Nos. 36-48A, *et al.* (S.M. Haemmerle, July 8, 1996). 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 explained the standards governing Rule 55(c) motions in the SRBA 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.

This Court has significant discretion to grant a Rule 55(c) motion, 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*”). 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.

IV.

DISCUSSION

A. Turco’s Motion Satisfies The Standards for Filing A Late Objection.

1. The Delay Is Not Willful.

Turco’s objection to the recommendation as disallowed after the original deadline is not “wilfull,” as that term has been 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.*

Turco did not receive notice that Water Right 37-20348 had been recommended as disallowed until August 3, 2009. Turco then hired legal counsel to research the merits of his claim and, upon finding support for a meritorious claim, filed this Motion. *Turco Aff.* at ¶¶ 7 & 8. Under these circumstances, there is simply no basis to argue or conclude that Turco’s motion involves “willful delay.”

2. Allowing Turco’s Late Response Would Not Prejudice Another Party

Any “delay” involved in allowing Turco’s response would not prejudice an opponent. To be clear, the inquiry for prejudice is not whether an opponent would be prejudice by the filing of the claim itself. Rather, the relevant analysis is whether an opponent would be prejudiced

specifically by the delay in filing the objection. A mandatory settlement conference is not scheduled until November of this year. The opponents in this matter have been put on notice of Turco's involvement by his participation in the scheduling conference and now the filing of this Motion. Therefore, as sufficient notice has been provided, there can be no prejudice caused by any delay in filing Turco's objection.

3. Turco Presents a Meritorious Position

As an initial matter, the "meritorious position" standard is a liberal one, particularly in the SRBA. Once learning of the recommendation to disallow, Turco immediately set out to research the merits of his claim. Historical photographs of the property show the field upon Lot 10 prepared to accept irrigation water. *Turco Aff.* at ¶ 8. That preparation would not have occurred or the costs of preparation incurred, if irrigation water had not actually been used on Lot 10. As such, the Department's recommendation is in error and Turco presents a meritorious defense.

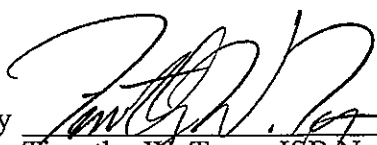
V.

CONCLUSION

Turco's delay in filing an objection was not willful, it is not prejudicial to any opponent and is based on a meritorious claim. Accordingly, this Court should grant this Motion to File Late Objection.

DATED THIS 27th day of August, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Timothy W. Tyree, ISB No. 5630
Attorneys for Jerry Turco

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2009, I caused to be served a true copy of the foregoing MOTION TO FILE LATE OBJECTION by the method indicated below, and addressed to each of the following:

Chief, Natural Resources Div.
Office of Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy

US Department of Justice
Envir. & Nat. Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

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Gerald Bashaw, Grace Eakin, John F. Stevenson, Peter
Van Der Meulen and Tom O Gara]*

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L. Fisher]*

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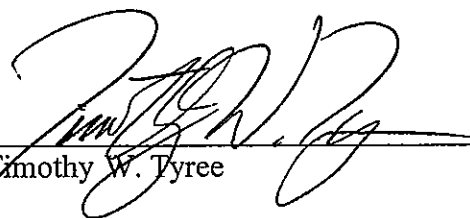
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Barbara Benson
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Timothy W. Tyree

EXHIBIT A

TO MOTION TO FILE LATE OBJECTION

SUBCASE NO. 37-20348

**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 37-20348
(Insert water right number)

**STANDARD FORM 1
OBJECTION**

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: JERRY TURCO, JR
Address: 525 RIVERSIDE AVENUE
LYNDHURST NJ 07071
Daytime Phone: 201 - 460-8981

Name & Address of Attorney, if any:

TIMOTHY W. TYREE
877 MAIN ST. # 1000
BOISE ID 83702

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

Name: JERRY TURCO
Address: 525 RIVERSIDE AVENUE
LYNDHURST NJ 07071

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: _____
4. ☐ **Priority Date**
Should be: _____
5. ☐ **Point of Diversion**
Should be: _____
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): _____

F.

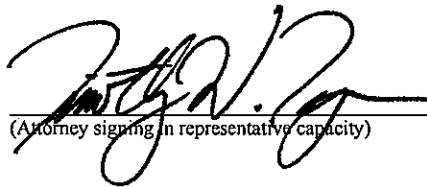
VERIFICATION (must be completed)

State of IDAHO)
)ss.
County of ADA)

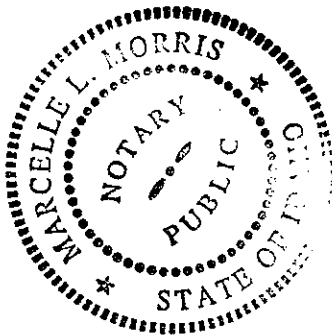
TIMOTHY W. TYREE, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

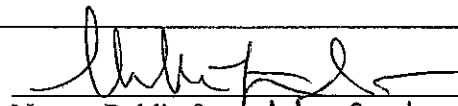
That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)


(Attorney signing in representative capacity)

Subscribed and sworn to before me on: _____




Notary Public for Ada County, Boise, ID
Residing at: Boise, ID
My Commission Expires: 3/4/2015

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 AUGUST 27, 2009, 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:

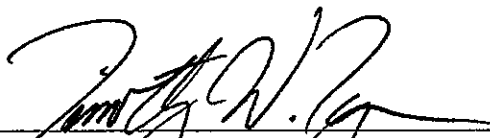
Name: JERRY TURCO, JR
Address: 525 RIVERSIDE AVENUE
LYNDHURST NJ 07071

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