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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Darrell E. McDonald and Norman K. Sowards

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	)	A. Subcase 34-2462
	)	
Case No. 39576	)	MOTION TO FILE LATE
	)	OBJECTION OR ALTERNATIVELY
	)	TO PARTICIPATE
	)	

Darrell E. McDonald and Norman K. Sowards (hereinafter collectively referred to as "McDonald"), by and through their undersigned counsel and pursuant to Idaho Rules of Civil Procedure 7, 24 and 55(c) and Section 10.k of SRBA A.O.1, hereby files this Motion to File Late Objection or Alternatively to Participate in this Subcase. This Motion is supported by the Affidavits of Darrell E. McDonald and Norman K. Sowards (the "Affidavits").

McDonald seeks an order from the Court granting leave to file a late objection to the recommended points of diversion and quantities, including quantity remarks, for the water right in this Subcase (a copy of the proposed Objection is attached hereto as Exhibit A).

The factual grounds for this Motion are set forth in the Affidavits. 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(d)(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 side 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, March 22, 2005) (“*Bedke I*”). In doubtful cases, relief should be granted to reach a judgment on the merits. *Bedke I* at 10. Default judgments are disfavored. *A.L. Cattle* at 8.

The submission of this Objection after the deadline is not “willful.” As set forth in the Affidavits McDonald had no knowledge that the Claimant in this Subcase was seeking to change the terms of the partial decree for the subject water right issued by this Court almost thirteen(13) years ago. They had never even heard of the Court’s Docket Sheet much less subscribed to it or reviewed it on a regular basis online. If the relief now requested by Claimant had been sought through the

administrative water right transfer process there would have been notice in the local newspaper which is certainly far more likely to be read by McDonald and other local water right owners than the Docket Sheet! When they did find out about the requested changes to this water right from Doug Schureman in September, 2010 they diligently sought legal advice and are now seeking to file an Objection and thus be able to participate in the required determination of whether or not there was, in fact, an accomplished transfer of the points of diversion and, if so, has it injured their water rights. Clearly the failure by McDonald to file a timely Objection in this Subcase was not willful.

The proposed Objection raises exactly the same issues as the Objection filed by Doug Schureman et al. McDonald will enter the Subcase subject to the outcome of the pending Motion for Summary Judgment filed by Claimant and will not raise any new issues that could potentially delay these proceedings or otherwise prejudice Claimant.

Finally, the proposed Objection states a meritorious position for all of the reasons set forth in the Response to Claimant's Motion for Summary Judgment filed herein by Doug Schureman et al.

In the event McDonald's request for leave to file a late Objection herein is denied, McDonald seeks to intervene and participate in this Subcase pursuant to the provisions of SRBA A.O.1, Section 10.k and I.R.C.P. 24. The former states as follows:

Any party to the adjudication who is not a party to a subcase may seek leave to participate in a subcase by filing a timely Motion to Participate. A Motion to Participate shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. A party to the adjudication who does not file an objection, a response or a timely Motion to Participate waives the right to be a party to the subcase and to receive notice of further proceedings before the Special Master, except for Motions to Alter or Amend.

I.R.C.P. 24(a) provides that a party has the right to intervene,

when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

The Idaho Supreme Court addressed this provision in the context of the SRBA:

Given the monumental scope of the SRBA, which is adjudicating the rights of all water rights holders in the Snake River Basin, we agree with the SRBA court that a "generalized interest is insufficient to intervene in a subcase as a matter of right because the requirements for filing timely objections or responses under I.C. § 42-1412 would become meaningless [,] depriving the court and all parties to the SRBA the structure necessary to administer this case."

In re SRBA Case No. 39576, Minidoka Nat'l Wildlife Refuge, SRBA Subcase No. 36-15462, 134 Idaho 106, 110, 996 P.2d 806, 810 (2000). McDonald's interest is specific, not general. They seek to protect their individual water rights, diverted from wells in close proximity to the two wells, referred to as the "Island Wells", sought by Claimant as additional points of diversion for the subject water right. This precise interest is not represented by any other party to this Subcase. There is no other avenue or venue for McDonald to protect their water rights from the injury they believe will be caused by the significant potential additional diversions of ground water, which will occur if the Island Wells become additional points of diversion for the subject water right and four other water rights totaling 12.5 cfs.

In *Consolidated Subcase 67-13701*, 10 SRBA 11 (2006), the DeVenys sought to object to certain stockwater claims filed by the Nez Perce Tribe on private land owned by the DeVenys through a motion to participate filed more than two and one-half years past the deadline for filing objections and on springs for which the DeVenys pursued claims in the SRBA for their own

stockwater rights. SRBA Presiding Judge John M. Melanson, in his *Memorandum Decision and Order on Challenge*, agreed with the following statements by the Special Master:

The DeVenys were granted leave to participate in consolidated subcase 67-13701 because some springs or fountains claims were located on their private property. That was their sole concern and the reason why they objected to those claims.

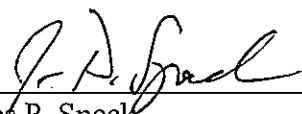
In support of their Motion to Participate, the DeVenys invoked both I.R.C.P. 24(a), Intervention of right, and (b) Permissive intervention. Because the claims were located on their private property, it was clear that the DeVenys were entitled to intervention of right because they claimed an "interest relating to the property or transaction which is the subject of the action and the applicant [the DeVenys] is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." I.R.C.P. 24(a)(2).

10 SRBA 11.20-11.21. Although the Island Wells are not located on private property owned by McDonald, they are situated in close proximity to wells which are the source of water for several senior decreed water rights owned by McDonald. The sole concern of McDonald in seeking to participate in this Subcase is to protect and preserve the priority of those water rights.

For the foregoing reasons, McDonald respectfully requests that the Court grant its Motion to File Late Objection and to accept for filing the objection attached hereto as **Exhibit A**. In the alternative, McDonald respectfully requests this Court to grant its Motion to Participate in this Subcase.

DATED this 17th day of November, 2010.

SPECK & AANESTAD
A Professional Corporation
Attorneys for McDonald

By: 
James P. Speck

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2010, I served a true and correct copy of the foregoing on the following persons in the manner designated below:

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

☒ United States Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile, with copy by United States Mail, Postage Prepaid

The United States Department of Justice
Environmental and Natural Resources
Division
550 West Fort Street
Box 33
Boise, ID 83724

☒ United States Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile, with copy by United States Mail, Postage Prepaid

Idaho Department of Water Resources
Document Depository
P.O. Box 83720
Boise, ID 83720-0098

☒ United States Mail, Postage Prepaid
☐ Hand Delivery
☐ Facsimile, with copy by United States Mail, Postage Prepaid

Mr. Paul Arrington
Barker, Rosholt & Simpson, LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls ID 83303-0485

☐ United States Mail, Postage Prepaid
☐ Hand Delivery
☒ Facsimile, with copy by United States Mail, Postage Prepaid

Mr. Robert L. Harris
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Dr., Suite 200
Idaho Falls, ID 83405

☐ United States Mail, Postage Prepaid
☐ Hand Delivery
☒ Facsimile, with copy by United States Mail, Postage Prepaid

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, ID 83318

☐ United States Mail, Postage Prepaid
☐ Hand Delivery
☒ Facsimile, with copy by United States Mail, Postage Prepaid


JAMES P. SPECK

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 34-2462

STANDARD FORM 1
OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Darrell E. McDonald and Norman K. Sowards
Address: c/o Darrell E. McDonald
P.O. Box 102
Arco, ID 83213
Daytime Phone: (208) 527-3413

Name & Address of Attorney, if any:
James P. Speck
SPECK & AANESTAD
A Professional Corporation
PO Box 987
Ketchum, ID 83340

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

Name: Charles B. Isom and Fern A. Isom
Address: 3199 W. 2200 N.
Arco, ID 83213

EXHIBIT A

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: See below.
4. ☐ **Priority Date**
Should be:
5. ☒ **Point(s) of Diversion**
Should be: . See below.
6. ☐ **Instream Flow Description**
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 should not exist.
- ☐ This water right was not recommended, but should be recommended with the elements described above.

E. **REASONS SUPPORTING OBJECTION(S):** See last page.

F. VERIFICATION (Must be completed)

State of Idaho)
) ss.
County of Blaine)

James P. Speck, being first 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: _____

Notary Public for Idaho
Residing at _____
My Commission expires _____

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 of the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on November __, 2010, 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
P. O. Box 2707
Twin Falls, Idaho 83303-2707

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

Name: Charles B. Isom and Fern A. Isom

Address: 3199 W. 2200 N.
Arco, ID 83213

3. Copies to:

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

Mr. Robert L. Harris
Holden, Kidwell, Hahn &
Crapo, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Dr., Suite 200
Idaho Falls, ID 83405

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

Mr. Paul Arrington
Barker, Rosholt & Simpson,
LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls ID 83303-0485

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, Box 33
Boise, Idaho 83734

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, ID 83318

Signature of Objector or attorney mailing on
Objector's behalf

Objection

Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, 34-10925

Diversion Rate: The recommended diversion rate is inconsistent with the licensed diversion rate as follows:

Right	License	Recommendation	Increase
34-2459	714 AFY	833 AFY	119 AFY
24-2460	714 AFY	933 AFY	119 AFY
34-2461	357 AFY	416.5 AFY	59.5 AFY
34-2462	357 AFY	416.5 AFY	59.5 AFY
		TOTAL INCREASE	357 AFY

In addition, the license for water right 34-7037, issued on September 2, 1994 includes the following remark:

The combined annual volume of water under this right [34-7037] and Right Nos. 34-2459 /2460 /2461 /32462 /7138/ 10925 shall not exceed 6930.0 acre feet. (Emphasis added).

There is no justification for enlarging the combined diversion volume to 8441.5 AFY (an increase of 1511.5 AFY).

Point of Diversion: The accomplished transfer of these water rights to add two new wells will injure water rights in the area of the new wells. The Department should perform an injury analysis.