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DEPARTMENT OF
WATER RESOURCES

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Attorneys for Farmland Reserve, Inc.

**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. 00-91013
(Basin-Wide Issue 13)

MOTION TO FILE LATE OBJECTION
TO 706 REPORT**

FARMLAND RESERVE, INC. ("FRI"), by and through its undersigned counsel of record, files this *Motion to File Late Objection* pursuant to Idaho Rules of Civil Procedure 7 and 55(c). This Motion is supported by the *Affidavit of Ann Garner* (the "Affidavit"), filed simultaneously herewith.

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 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 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.

As set forth in the Affidavit, on May 20, 2011, FRI filed its Objection Re: State of Idaho’s Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Agreement (the “Objection”), wherein FRI objected to Water Right No. 45-7497 not being included on the list of water rights on Attachment A.

On May 26, 2011, the Deputy Clerk of the Court circulated its Scheduling Order Re: Objection to State of Idaho’s Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Agreement (the “Scheduling Order”). The Scheduling Order identified July 15, 2011 as the deadline by which the Idaho Department of Water Rights (“IDWR”) must file a “706 Report and Recommendation.” The Scheduling Order further identified July 27, 2011 as the deadline for a water user to file an objection to the “706 Report and Recommendation.”

On July 15, 2011, IDWR filed its report entitled "Supplemental Director's Report Regarding Basin-Wide Issue 13, Subcase No. 00-91013" (the "Report"). Nowhere on the title page of the Report is the Report identified as the "706 Report and Recommendation" referred to in the Scheduling Order.

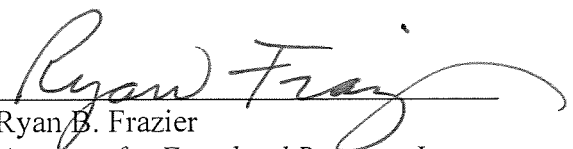
Although a careful reading of the Report indicates that it was filed in response to Judge Weldman's order to submit a "706 Report and Recommendation," Ms. Garner of FRI did not recognize this Report to be the same report to which objections must be filed prior to July 27, 2011, until after that deadline had passed. She first realized that the "Supplemental Director's Report" and the "706 Report and Recommendation" were one in the same upon receipt, on August 4, 2011, of the Scheduling Order Re: Mandatory Settlement Conferences, dated July 28, 2011.

It is apparent that the failure to file a timely Objection was not willful. FRI does not believe a late filing would be prejudicial to IDWR, since IDWR requested the information contained in the Objection, saying it would be "helpful." Finally, the information submitted in connection with the objection is factual and should satisfy the questions raised by IDWR, and the Objection is therefore meritorious.

Accordingly, FRI respectfully asks the Court to grant this Motion and accept for filing the Objection filed herewith.

DATED this 12th day of August, 2011.

KIRTON & McCONKIE

By: 
Ryan B. Frazier
Attorney for Farmland Reserve, Inc.

CERTIFICATE OF SERVICE

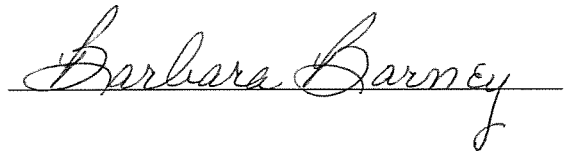
I hereby certify that on this 12th day of August, 2011, I mailed a true and correct copy of the foregoing **MOTION TO FILE LATE OBJECTION TO 706 REPORT**, postage prepaid, to the following:

SRBA District Court
PO Box 2707
Twin Falls, ID 83303-2707

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Idaho Power Company
James Tucker
PO Box 70
Boise, ID 83707

State of Idaho
Office of Attorney General
Attn: Clive Strong
PO Box 83720
Boise, ID 83720-0098



AFFIDAVIT OF ANN GARNER

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Ann Garner, being first duly sworn under oath, deposes and states:

1. I am over twenty-one (21) years of age, I am a resident of Davis County, State of Utah, and I have personal knowledge of the statements set forth in this Affidavit.

2. I make this Affidavit of my own free will and volition, I have personal knowledge of the facts stated herein, I am competent to testify to the matters set forth in this Affidavit, and if called upon to testify in a court proceeding, my testimony would be consistent with the statements set forth in this Affidavit.

3. I am the Natural Resource Analyst for Farmland Reserves, Inc. ("FRI").

4. FRI is the owner of Water Right No. 45-7497, and I am the person at FRI responsible for monitoring the judicial action referred to below involving that Water Right.

5. On May 20, 2011, FRI filed its OBJECTION RE: STATE OF IDAHO'S SECOND AMENDED MOTION TO INCLUDE SUBORDINATION LANGUAGE ON WATER RIGHTS AFFECTED BY THE SWAN FALLS AGREEMENT in Case No. 39576, Subcase No. 00-91013, Basin-Wide Issue 13 (the "Objection"), wherein FRI objected to Water Right 45-7497 not being included on the list of water rights on Attachment A.

6. On May 26, 2011, the Deputy Clerk of the Court circulated, and FRI received in due course, the SCHEDULING ORDER RE: OBJECTIONS TO STATE OF IDAHO'S SECOND AMENDED MOTION TO INCLUDE SUBORDINATION LANGUAGE ON WATER RIGHTS AFFECTED BY THE SWAN FALLS AGREEMENT (the "Scheduling Order").

7. The Scheduling Order identified July 15, 2011 as the deadline by which the Idaho Department of Water Rights ("IDWR") must file a "706 Report and Recommendation."

8. The Scheduling Order further identifies July 27, 2011 as the deadline for a water user to file an objection to the "706 Report and Recommendation."

9. On July 15, 2011, IDWR filed its report entitled "Supplemental Director's Report Regarding Basin-Wide Issue 13, Subcase No. 00-91013" (the "Report"). Nowhere on the title page of the report is the report identified as the "706 Report and Recommendation" referred to in the Scheduling Order.

10. Although a careful reading of the Report indicates that it was filed in response to Judge Weldman's order to submit a "706 Report and Recommendation," I did not recognize this Report to be the same report to which objections must be filed prior to July 27, 2011, until after that deadline had passed.

11. I first realized that the "Supplemental Director's Report" and the "706 Report and Recommendation" were one in the same upon receipt and review of the "Scheduling Order Re: Mandatory Settlement Conferences" which was dated July 28, 2011 but which I didn't receive until August 4, 2011.

12. Immediately upon realizing that FRI had missed the July 27, 2011 deadline, I requested our attorney to begin preparation of the required objection.

Further affiant sayeth not.

DATED this 12 day of August, 2011.

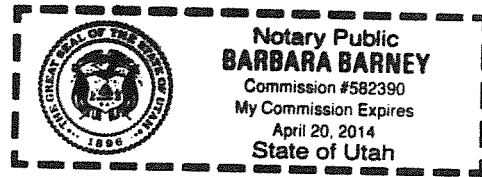


Ann Garner

Subscribed and sworn to before me this 12th day of August, 2011.

Barbara Barney

NOTARY PUBLIC



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