

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

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DEPARTMENT OF
WATER RESOURCES

Attorneys for Milner Irrigation District

**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	)	
	)	Subcase No. 1-17
	)	
	)	MILNER IRRIGATION DISTRICT'S
	)	MOTION TO FILE LATE
Case No. 39576	)	OBJECTION / SUPPORTING
	)	POINTS AND AUTHORITIES
	)	
	)	
	)	

COMES NOW, Claimant Milner Irrigation District ("Milner"), by and through counsel of record, Barker Rosholt & Simpson LLP, and moves this Court for an Order Granting Motion to File Late Objection in the above-entitled subcase. This motion is made pursuant to SRBA Administrative Order #1 ("AO1") and the Idaho Rules of Civil Procedure. This motion is supported by the *Affidavits of Walter R. Mullins, G. Scott Breeding, and Travis L. Thompson* filed together herewith. The motion is further supported by the points and authorities set forth below. Milner's objection is also filed together with this motion.

STATEMENT OF FACTS

On April 19, 1931, the Twin Falls County District Court decreed water right 1-17 to the Milner Irrigation District in the *Milner Low Lift Irrigation District v. Lynn Crandall* proceeding. See Ex. A to *Affidavit of Travis L. Thompson* (“*Thompson Aff.*”). Milner filed a claim for water right 1-17 in the SRBA on August 9, 1989.¹ Milner also filed claims for water rights 1-9 and 1-2050.

IDWR issued preliminary recommendations for water rights 1-9, 1-17, and 1-2050 in March 2005. See Ex. B to *Thompson Aff.* The preliminary recommendations only listed 9,468 total acres for irrigation and included various limiting remarks. The preliminary recommendation for water right 1-17 listed two limiting remarks, one referencing total acres when the right was used in conjunction with water right 1-9, and another remark limiting the irrigation of 8,114.4 acres in a single irrigation season. Milner sent IDWR notice of error replies identifying the errors in both the total acreage and the limiting remarks. See Ex. C to *Thompson Aff.* On August 15, 2005 IDWR sent a letter to Milner’s former counsel, responding to the notice of error replies and identifying the agency’s interpretation of the Idaho Supreme Court case *Bradshaw v. Milner Low Lift Irrigation Dist.*, 85 Idaho 528 (1963). See Ex. D to *Thompson Aff.* Milner’s counsel responded with a letter dated October 27, 2005. See Ex. E to *Thompson Aff.*

IDWR issued its final recommendations for water rights 1-9, 1-17, and 1-2050 in the Director’s Basin 01, Part 1 Director’s Report on May 11, 2006. See Ex. F to *Thompson Aff.* The final recommendations made numerous changes to the preliminary recommendations, including correcting the total authorized irrigated acreage to 13,335, changing the priority date for 1-2050, as well as adding, removing, and revising the remarks for the place of use elements. Importantly, the final recommendation for water right 1-17 changed the total authorized irrigated acreage

¹ Milner filed an amended notice of claim on March 4, 2005 to correct the priority date (November 14, 1916).

from 9,468 to 13,335 and removed the combined use limitation remark. However, the limiting remark for 8,114.4 acres was carried over.

Milner filed timely objections to the final recommendations for water rights 1-9 and 1-2050. However, Milner mistakenly did not file an objection to the final recommendation for water right 1-17. *See Affidavits of Walter R. Mullins and G. Scott Breeding*. Although the total acreage number had been corrected, Milner did not recognize or understand the effect of the limiting remark for water right 1-17 at the time. *Id.* Notably, the limiting acreage remark was not carried over to the final recommendation for water right 1-2050. Milner did not willfully fail to file a timely objection to the place of use remark for water right 1-17 based upon its understanding at the time. *See Breeding Aff.* at 4, ¶ 12.

Several parties objected to IDWR's recommendation for water right 1-17, including IGWA, the Mud Lake Water Users, and the Fremont-Madison Irrigation District. Milner filed responses to these objections. In January 2009, various ground water districts that had substituted as the parties in interest to IGWA's objection, amended their prior objection, including adding an objection to the place of use element. Summary judgment motions were then filed in the summers of 2008 and 2009, resulting in a decision from the Special Master on December 11, 2009. Status conferences were held in March and September 2010 and again in January 2011. The objectors then requested permissive review of the summary judgment decision which led a final decision from the Presiding Judge on June 21, 2011. No parties appealed the Presiding Judge's decision and another status conference was held on August 25, 2011 at which time counsel for the various objectors indicated they would be withdrawing their objections.

Several parties then withdrew their objections in October 2011. With the withdrawal of the ground water districts' objection, the place of use element for water right 1-17 was no longer at issue. The parties held another status conference on November 10, 2011, discussing the status of the subcase and Milner's intention to file the present motion to file late objection.

Based upon the personal knowledge of Scott Breeding, current chairman and farmer on the project since 1981, and Walt Mullins, the district's manager, Milner has not previously limited the distribution of water right 1-17 to 8,114.4 acres or less. *See Breeding Aff.* at 2-3, ¶¶ 6-10; *Mullins Aff.* at 2-3, ¶¶ 6, 10-11. Further, it is the testimony of Mr. Breeding and Mr. Mullins that Milner believed the total acreage correction made in the final recommendation had resolved all of the errors in IDWR's preliminary recommendation. *See id.* Milner did not purposely fail to object to IDWR's recommendation for water right 1-17 based upon its understanding and recollection of the final recommendation. *See Breeding Aff.* at 4, ¶ 12.

STANDARD OF REVIEW

In the *Memorandum Decision and Order on Challenge* (Subcase Nos. 47-16433 *et al.*) (March 22, 2005) ("*Bedke I*"), former Presiding Judge Melanson described the standard of review for filing a late objection:

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. [citations omitted]. **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. *Id.*, 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 just so requires). In the *A.L. Cattle* subcase, this Court held that the I.R.C.P. 55(c) standard should be applied to late objections to which partial decrees have not been entered, rather than the I.R.C.P. 60(b) standard.

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 at 935, 854 P.2d at 279. The I.R.C.P. 55(c) good cause standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

Bedke I at 5-6.

Further, in doubtful cases, relief should be granted to reach a judgment on the merits. *Id.* at 10. This is because default judgments are disfavored. *See Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267 *et al.* (January 31, 2001) (“*A.L. Cattle*”). Finally, the SRBA Court has described a list of additional criteria that the Special Masters may consider in reviewing a motion to file late objection: (1) proof that the default was not willful or culpable; (2) prompt action by the defaulting party to correct the default; (3) the existence of a meritorious defense; (4) an absence of prejudice to the opponent; (5) whether the default resulted from a good faith mistake in following a rule of procedure; (6) the nature of the defendant’s explanation for defaulting; (7) the amount in controversy; (8) the availability of effective alternative sanctions; and (9) whether entry of a default would produce a harsh or unfair result. *See Order on Permissive Review and Order of Recommitment* at 6, Subcase Nos. 45-12475 *et al.* (August 3, 2005) (“*Bedke II*”).

SUPPORTING POINTS AND AUTHORITIES

No partial decree has been entered for water right 1-17. Milner’s motion meets the “good cause” standard under I.R.C.P. 55(c). As explained below, Milner’s failure to file a timely objection was not “willful,” granting the motion will not prejudice any other party, and the basis for the objection shows a meritorious position. The Court should therefore grant Milner’s motion.

I. Milner's Failure to File a Timely Objection in Subcase 1-17 was not "Willful."

Milner did not file a timely objection to IDWR's recommendation for 1-17. However, Milner had previously identified the errors in IDWR's preliminary recommendation for water right 1-17. *See* Exs. C, E to *Thompson Aff.* Although IDWR originally only identified 9,468 irrigated acres, the number was corrected to 13,335 when the final Director's Report was filed with the Court. Both Milner's manager and chairman of the Board of Directors testified they believed the irrigated acreage issue was corrected when the final recommendation was issued for water right 1-17 in the spring of 2006. *See Breeding Aff.* at 3, ¶¶ 9-11; *Mullins Aff.* at 3, ¶ 9. Neither Mr. Mullins nor Mr. Breeding recalls any specific discussions regarding the limiting remark on the recommendation for water right 1-17. *See id.* Mr. Breeding testified that Milner's failure to file a timely objection was not purposeful and that with full knowledge and understanding of the limiting remark, he would have directed Milner to file an objection. *See Breeding Aff.* at 3-4, ¶¶ 11-12.

In defining "willful" action, the Presiding Judge, relying upon Black's Law Dictionary, has noted the following:

"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 act done carelessly, thoughtlessly, or inadvertently. A willful act differs essentially from a negligent act. The one positive and the other negative."

Bedke II at 8.

Milner's mistake in not recognizing or understanding the limiting remark for 1-17 is understandable given the multitude of changes made between IDWR's preliminary and final

recommendations.² *See generally*, Exs. B, F to *Thompson Aff.* First, for water right 1-9, IDWR corrected the total acreage and combined use remark from 9,468 to 13,335 acres. IDWR also added the spaceholder contract and *Eagle Decree* reference in the final recommendation that was not included in the preliminary recommendation. Second, for water right 1-2050 IDWR had two versions of a preliminary recommendation. The first listed a combined use and total acreage limitation of 9,468 acres (03/04/2005 version). The later preliminary recommendation proposed to disallow the right altogether (03/09/2005 version). In the final recommendation IDWR recommended the water right claim with a different priority date (7/11/1968), but corrected the irrigated acreage number to 13,335. Finally, for water right 1-17, IDWR originally proposed 9,468 total acres with two limiting remarks, one in combination with water right 1-9 for 9,468 acres, and another limiting the right to the irrigation of 8,114.4 acres on its own. The final recommendation for water right 1-17 corrected the total acreage to 13,335 acres, removed the combined use remark, but left the latter remark.

Accordingly, although Milner did not recognize that the limiting remark regarding 8,114.4 acres for water right 1-17 had been carried over to the final recommendation, both Mr. Breeding and Mr. Mullins believed all errors had been corrected. *See Breeding Aff.* and *Mullins Aff.* Milner's actions can be described as accidental or inadvertent, not knowingly or purposeful. In sum, the failure to file a timely objection to the place of use element for 1-17 was not "willful."

II. Granting Milner's Motion Will Not Prejudice Any Parties.

Various parties filed objections to IDWR's final recommendation for Milner's water right 1-17. The parties filed cross summary judgment motions in 2008 and 2009, resulting in a

² The procedure in this case is comparable to that experienced by certain water users on Carmen Creek, where IDWR made several changes between the preliminary and final water right recommendations. *See Order Granting Motion to File Late Objection and Setting Status Conference* (Subcase nos. 75-69A et al) (February 20, 2008).

decision from the Special Master in December 2009. The Presiding Judge recently reviewed the summary judgment order and issued a final decision on June 21, 2011. Although many objections have been recently withdrawn due to the Presiding Judge's decision, Milner's place of use objection was not at issue. Allowing Milner to file a late objection on the place of use element will not prejudice any parties and will allow for a decision on the merits. If Milner's late objection is allowed, any party would then be allowed to file a response pursuant to the SRBA Court's procedures. If any of those parties that had previously withdrawn their objections would seek to respond to Milner's late objection, they would have that opportunity. In sum, Milner's motion for late objection meets the "no prejudice" criteria under the Rule 55(c) standard.

III. Milner Has a Meritorious Position for its Late Objection.

Milner's actual use of water right 1-17, along with the Idaho Supreme Court's holding in the *Bradshaw* case provides a "meritorious position" to support the present motion. First, when natural flow is available under water right 1-17, Milner diverts and delivers the water throughout the irrigation project. See *Breeding Aff.* at 2-3, ¶ 6; *Mullins Aff.* at 2, ¶ 6. Milner does not limit the use of water right 1-17 on 8,114.4 acres or less. See *id.* The Water District 01 Watermaster has not limited Milner's use of water right 1-17 either. See *Mullins Aff.* at 2, ¶ 6. Accordingly, IDWR's limiting remark proposes to change the actual use of water on Milner's project. Milner's objection to this remark is therefore justifiable and should be resolved by the Court on the merits.

Next, Milner's use of water right 1-17 is consistent with Idaho law and the Idaho Supreme Court's holding in *Bradshaw*. Idaho's irrigation district code provides as follows:

Upon a change of the boundaries of a district becoming effective . . . the district shall be and remain an irrigation district, as fully and to every intent and purpose,

as if the lands which are included in the district by the change of the boundaries as aforesaid, had been included therein at the original organization of the district.

Idaho Code § 43-1010.

Interpreting this statute, the Idaho Supreme Court held the following with respect to Milner's water rights and the place of use which included the "new" lands annexed in 1952:

The trial court found that *all of the water rights* acquired by the district, except the Palisades storage water, had been *made appurtenant to, and beneficially used upon*, and had reclaimed, land in the district prior to the annexation made in October, 1952.

* * *

However, we do not construe the conclusions or judgment of the district court as denying to the owners of the new lands any right or interest whatever in the water rights held by the district prior to their annexation. *The irrigation district law regards the irrigation district as a unit*, and as a legal entity, holding title to its property and water rights in trust for the uses and purposes set forth in that law . . . *we recognize the right acquired by the owners of new lands, by their inclusion within the district, to the use of any water owned by the district when the use thereof is not required for the proper irrigation of the old lands, and when such use is not in conflict with the rights previously acquired by the owners of the old lands, or when such use is not in derogation or impairment of such prior rights.* We find nothing in the conclusions or judgment of the district court in conflict with this right of the owners of the new lands and its decree must be construed in harmony therewith.

85 Idaho at 539, 547 (emphasis added).

Accordingly, the Idaho Supreme Court has plainly recognized that the owners of the "new" lands have a "right" to use "any water owned by the district," including water right 1-17, as long as that use is not required for the proper irrigation of the old lands and the use does not conflict with or impair the rights of the "old" lands landowners.³ Although IDWR does not agree with the Supreme Court's holding and believes the limiting remark for water right 1-17 is

³ At a minimum, the decision clarifies that any limiting remark for water right 1-17, assuming for argument's sake that such a remark is warranted, should be corrected to 9,468 acres, not 8,114.4 acres. The Idaho Supreme Court found that "all water rights" had been made appurtenant to and beneficially used upon all "old" lands, defined as 9,468 acres. 85 Idaho at 534, 546.

appropriate, that is legal decision for the SRBA Court to decide. Based upon the actual water use and existing case law, Milner has a “meritorious position” to support its objection.

CONCLUSION

The limiting remark on water right 1-17 does not accurately represent Milner’s use of the water right or comply with prior case law. Since default judgments are disfavored and Milner’s motion satisfies the criteria under Rule 55(c), the Court should grant the motion to file late objection.

DATED this 16th day of November, 2011.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Attorneys for Milner Irrigation District

CERTIFICATE OF MAILING

I certify that on November 14th, 2011, I caused to be served copies of the foregoing motion and supporting documents, to the following persons, by U.S. Mail, postage prepaid:

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

United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street MSC 033
Boise, Idaho 83724

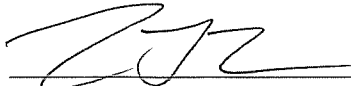
IDWR Depository
P.O. Box 83720
Boise, Idaho 83720-0098

E. Gail McGarry
United States, Department of Interior
Bureau of Reclamation
1150 N. Curtis Road, Suite 100
Boise, Idaho 83706-1234

Candice McHugh
Racine Olson
101 S. Capitol Blvd., Ste 208
Boise, Idaho 83702

Jerry R. Rigby
P.O. Box 250
Rexburg, Idaho 83440

Rob Harris
P.O. Box 50130
Idaho Falls, Idaho 83405



Travis L. Thompson