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DEPARTMENT OF
WATER RESOURCES

Attorneys for Claimants, Terrie Trail and Walter Trail

**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. 02-4021

CASE NO. 39576

**MOTION TO FILE LATE OBJECTION AND
SUPPORTING MEMORANDUM**

COMES NOW Claimants, Terrie Trail and Walter Trail, ("Trails") by and through their undersigned counsel of record of the firm, Racine Olson Nye Budge and Bailey, Chartered, and hereby file this *Motion to File Late Objection* to the right identified above. This motion is made pursuant to SRBA Administrative Order #1 ("A01") and the Idaho Rules of Civil Procedure and is supported by the *Affidavit of Walter Trail and Affidavit of Candice M. McHugh* ("McHugh Affidavit") filed contemporaneously herewith.

BACKGROUND

The Idaho Department of Water Resources ("Department") filed with the SRBA District Court its *Director's Report for Basin 02 Irrigation and Other Water Rights* ("Director's Report") on December 28, 2006. The objection period closed on December 5, 2007 and the response

period on February 5, 2008. There were no objections filed to this water right recommendation. This unobjectioned to water right recommendation was identified, however, by the Department as an uncontested overlap to water right nos. 2-103 and 2-2209 including 2-2209B, 2-2209C, 2-2209E, 2-10187, 2-10189, 2-10191, 2-10196, 2-10208, and 2-10209 that were objected to and most of which have subsequently been resolved. Water Right 02-4021 has been pending before the SRBA since February 5, 2008.

The Trails seek an order from the Court granting them leave to file a late objection to the water right recommendation for claim no. 2-4021. The standard for granting this Motion and the bases for the Motion is discussed below.

MEMORANDUM IN SUPPORT OF MOTION

In subcases where partial decrees have not been entered by the court, the standard for filing late pleadings is determined by applying the “good cause” standard. The delay in filing the objection is not willful as set forth in the Affidavit of Walter Trail, will not prejudice any parties since no substantive proceedings have occurred on this particular water right, and the grounds supporting the filing of the late objection are meritorious.

This Court has previously ruled that:

“...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. *Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman*. (January 31, 2001) (*A.L. Cattle*). *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 justice 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. *McFarland*, 123 Idaho at 936, 854 P.2d 279. Other jurisdictions apply similar criteria, such as: (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 STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK*, at 874-875, (2005).”(Emphasis added)

See Order on Permissive Review and Order of Recommitment, Subcase Nos. 45-12475, et al. (August 3, 2005), pp. 5-6.

Claimants’ water right recommendation for 2-4021 contains the following remark in the quantity element:

USE OF THE RIGHTS LISTED BELOW IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 90.24 CFS. COMBINED RIGHT NOS.: 2-103, 2-4021, AND ALL PARTS OF BASE RIGHT 2-2209 INCLUDING 2-2209B, 2-2209C, 2-2209E, 2-10187, 2-10189, 2-10191, 2-10196, 2-10208, & 2-10209.

The claimant’s made a “good faith mistake” by not timely objecting to the original recommendation as they did not fully understand the implications of the combined diversion remark in the quantity element of the Director’s Report for their water right. As attested to by Mr. Trail in his affidavit, he believed the combined use remark equaled to the total of all water rights involved and only recently became aware that there may be an additional overlapping quantity that would negatively impact his water right.

Partial decrees have been entered in all of the related water rights except water right nos. 2-4012, 2-103 and 2-10191. Subcase number 2-103 is presently set for a Permissive Review Hearing on February 23, 2012, before Special Master Dolan. Water right number 2-10191 remains pending as a referred unobjected overlap. It seems practical and logical for any and all unresolved issues pertaining to the remaining overlapping rights to proceed toward resolution at the same time.

The proposed late objection presents a meritorious position. A recent review of the Department's public records (i.e. historical documents and information in the water right back file) reveals that during the early development, use and later on, the completion of the adjudication claim, a combined diversion rate condition was never required for this water right. Moreover and even more problematic, is that a review of the partial decrees for the other overlapping rights reveals some, but not all, of the rights identified by the Department in the above-quoted combined diversion rate remark have such a quantity limitation. Once partial decrees have been issued for the entire list of overlaps, this inconsistency has a real potential to impede the efficient administration of not only the Trails' right, but all of the water rights listed in the remark.

Furthermore, counsel's communication with the Department indicates that it is aware of the problem regarding the combined use remark and that there is an active investigation into whether or not the combined use remark is correct, should be modified or removed. *Aff. of McHugh.*

Granting this motion will not prejudice other parties. Counsel for the Trails has contacted attorneys for Black Mesa and they indicate they have no objection to this motion. *Aff. of McHugh.* On the other hand, the failure to grant this motion will prejudice the Trails since their water right may end up with a restriction on its use while other related rights from the same source and system will not. A copy of this motion is also being provided to the Crowleys, the

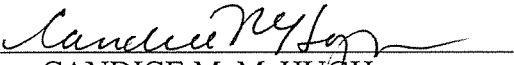
claimants to the unobjected to overlapping water right 1-10191; their water right will not be prejudiced by this motion since the Trails seek to have the remark removed or modified.

CONCLUSION

For the foregoing reasons, counsel for the Trails requests that the Court grant this *Motion for Late Objection* and accept for filing the attached proposed objection attached hereto.

DATED this 16th day of February, 2012.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED

By: 
CANDICE M. McHUGH

**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

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A. Subcase 02-4021

(Insert water right number)

**STANDARD FORM 1
OBJECTION**

Please **print or type** the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Terrie Trail and Walter Trail

Address: 5308 E Trail Rd, King Hill, ID 83633

Name & Address of Attorney, if any:

Candice M. McHugh, ISB #5908
Thomas J. Budge, ISB #7465
Racine Olson Nye Budge & Bailey, Chtd
101 South Capitol Boulevard, Suite 300
Boise, ID 83702
Telephone: 208-395-0011
Facsimile: 208-433-0167

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

Name: Terrie Trail and Walter Trail

Address: same as above

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: remark should be removed or modified.
4. ☐ **Priority Date**
Should be:
5. ☐ **Point(s) of Diversion**
Should be:
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:
11. **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 OBJECTION(S): See *Motion to File Late Objection and Supporting Memorandum, Affidavit of Walter Trail and Affidavit of Candice McHugh*. The combined use remark does not accurately account for the development and use of this water right and should be removed or modified.

F. VERIFICATION (Must be Completed)

State of Idaho)
) ss.
County of Ada)

Candice M. McHugh, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

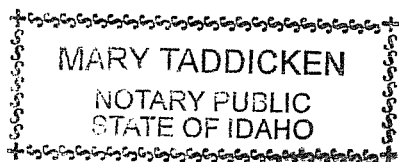
That I am the party/claimant filing this objection as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant responding and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)

Candice McHugh
(Attorney signing in representative capacity)

Candice M. McHugh

Subscribed and sworn to before me on this 16th day of February 2012.



Notary Public for Idaho

Residing at: Pocatello Boise

My Commission Expires: 9-12-13

Mary Taddicken

CERTIFICATE OF MAILING

I certify that on February __, 2012, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. **Original to:**

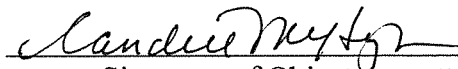
Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

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

Name: Terrie Trail and Walter Trail
5308 E Trail Rd.
King Hill, ID 83633

3. **Copies to:**

IDWR Repository PO Box 83720 Boise, ID 83720-0098	Natural Resources Division Chief State of Idaho Attorney General's Office PO Box 44449 Boise, ID 83711-4449
United States Department of Justice Environment & Natural Resources Div 550 West Fort Street MSC 033 Boise, ID 83724	Ralph and Alma Crowley <i>courtesy copy</i> 3361 S 1300 E Wendell, ID 83355
Michael Creamer <i>courtesy copy</i> Givens Pursley LLP 601 West Bannock Street PO Box 2720 Boise, ID 83701-2720	Trail Ranches, Inc. c/o Terrie & Walter Trail 5308 Trail Rd. King Hill, ID 83633


Signature of Objector or attorney
mailing on Objector's behalf