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**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. 36-00048A
	)	
Case No. 39576	)	MEMORANDUM IN SUPPORT
	)	OF MOTION TO FILE LATE
	)	RESPONSE (McFaddan)
_____	)	

INTRODUCTION

Faulkner Land and Livestock Company, an Idaho corporation, (Faulkner) submits this memorandum in support of its Motion to File Late Response. The Motion seeks the Court's permission to enter a late response on the objection of Dan McFaddan ("McFaddan") to the Director's Report regarding WR # 36-00048A. The Court's Order of July 28, 1995, ("July 28th Order") regarding the Joint Motions for Amending Administrative Order 1 and for Expedited Hearing indicates that such motions may be made within 21 days of the July 28th Order. Faulkner's motion is made within the 21 days and is accordingly timely.

MEMORANDUM IN SUPPORT
OF MOTION TO SUBMIT A LATE RESPONSE - 1

The Court's July 28th Order also indicates that such motions will be granted or not according to criteria similar to those prevailing under I.R.C.P. 55(c) for setting aside a default (i.e. showing both good cause for untimeliness and the existence of a meritorious position.).

FACTUAL SITUATION

The Court's July 28th Order states the factual situation with respect to the basis for entry of the late response to objection by Faulkner:

The removal of IDWR and the Director as a party to the SRBA and all subcases necessitates special considerations for some parties to the adjudication. . . Based on the pleadings and party status of IDWR prior to the 1994 amendments to the SRBA statutes, some parties decided not to participate in certain subcases, choosing instead to rely on the Director's report and IDWR's defense of its pleading. . . Those parties who opted to rely on IDWR to litigate and advocate in favor of the Director's Report are unable to do so. Therefore it is necessary to provide a mechanism for parties to participate in subcases where participation is required due to the removal of the Director and IDWR as a party and the change in the status of the Director's Report as a pleading.

Movant is a party who relied on the IDWR to defend the Director's Report. See Affidavit of Mike Faulkner, _____ of Faulkner Land and Livestock Company.

The McFaddan case is one of the prototype contested subcases in the SRBA. However, there has been no significant progress in the case. There is no trial setting in the case and there has been no effort by any party to bring the McFaddan objection to trial. There is no discovery in the file and no indication that any progress has been made on the case by either McFaddan or the Department (prior to the 1994 statutory amendments removing the Department as a party.)

McFaddan has objected to the Director's Report with respect to its water right number 36-00048A in Basin 36. The source of the water is Billingsley Creek. The water right has a claimed

priority date of November 4, 1885. The differences between the Director's Report and McFaddan's objection are significant. The IDWR file for 36-00048A shows that Dan H. McFaddan and Irma R. McFaddan claimed 10 cfs (500 inches of water) for the irrigation of 178.5 acres. This is equivalent to 2.8 inches to the acre. After an examination of the McFaddan property and the applicable diversion and delivery system, the Director recommended 1.04 cfs for the irrigation of 104 acres within a permissible place of use of 175.5 acres. The claim verification report in the IDWR file for 36-00048A shows that the delivery system for McFaddan under this right is limited by a pump with a capacity of 1.04 cfs. McFaddan claimed a season of use from March 15 to November 15 and the Director recommended March 15 to November 15. The McFaddan objection seeks a year round use for irrigation. McFaddan's claim is in excess of the beneficial use of the water, Cf. IDAHO CODE § 42-220 and the capacity of McFaddan's diversion and delivery apparatus. Reputable studies, including the Department's, indicate that the statutory standard of one inch per acre is sufficient, on average, to irrigate property such as McFaddan's. These facts, if established, would constitute a meritorious defense to the McFaddan objection.

LEGAL BASIS FOR PERMITTING FAULKNER'S LATE RESPONSE

I. CRITERIA FOR PERMITTING LATE RESPONSE.

The Court's July 28th Order indicates that the criteria for determining whether to permit the late response will be similar to those under which motions under I.R.C.P. 55(c) to set aside a default will be determined. Such motions are within the sound discretion of the trial court and will not be reversed on appeal unless an abuse of discretion clearly appears. *Clear Springs Trout Company v.*

Anthony, 123 Idaho 141, 845 P.2d 559 (1992). Judgments by default are not favored and there is a preference for setting them aside so that cases can be decided on the merits. *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct. App. 1988) ("*Baldwin*"); *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721 (Ct. App. 1985). Even in doubtful cases, relief from a default is favored. *Baldwin*. Since this response comes early in the history of this case, indeed, before any default has been entered, the motion should be granted.

II. NECESSARY ELEMENTS OF MOTION.

In order to set aside a default under rule 55(c), there must be a showing of reasonable cause for the late pleading and a factual showing that if granted, a meritorious basis supporting the pleading exists. See, e.g., *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1988). Cf., Court's Order of July 28th, p. 2. However, this is not to say that the existence of the meritorious basis for the pleadings should be subject to trial at this point. It is only necessary to plead facts which, if established at trial, would support the motion. *Baldwin*. A final determination of the validity of the facts is not appropriate at this stage and the general rule, even in doubtful cases, is to grant relief in order to reach a judgment on the merits. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 626 P.2d 1171.

A. Reasonable Cause Exists to Support the Late Filing of the Response.

The affidavit submitted in favor of the motion shows that Faulkner reasonably relied on the IDWR to defend the Director's report. The facts of this subcase indicate that the Department's defense of the Report would be successful or would significantly reduce the rate of diversion from

that claimed in the objection, without outside intervention.

B. The Facts in the Supporting Affidavit, the Department's File and in the Proposed Response Provide a Meritorious Basis for Opposing the Objection. The Affidavit of Mike Faulkner establishes the factual basis for the proposed response to the McFaddan objection. This affidavit incorporates the Department's file on the objection. The facts outlined above, if established at trial, demonstrate good cause for the granting a water right according to the diversion rate recommended in the Director's Report and for rejecting the diversion rate claimed in the objection. There is a significant discrepancy between the Director's Report and McFaddan's objection in the acreage, the ability of the diversion works to accomodate the claimed flow, and the amount of water necessary to irrigate the claimed acreage. Reputable studies indicate that the statutory standard of one inch per acre is sufficient, on average, to irrigate property such as McFaddan's. Cf. IDAHO CODE § 42-220.

III. GRANTING THE MOTION WILL NOT PREJUDICE MCFADDAN.

The issue of whether to grant leave to file a late response involves a consideration of the prejudice to McFaddan if the motion is granted. *Traguth v. Zuck*, 710 F.2d 90 (2d Cir. 1983); *Meehan v. Snow*, 652 F.2d 1074 (2d Cir. 1981); *Cribb v. Matlock Communications, Inc.*, 236 Montana 27, 768 P.2d 337 (1989). However, the prejudice to be considered must be based on some other ground than the mere allowance of the late response and the direct consequences flowing therefrom. See, *In re: General Determination of Rights to the Use of Surface and Ground Waters of the Payette River Drainage Basin*, 107 Idaho 221, 687 P.2d 1348 (1984); *Johnson v. Noland*, 78 Idaho 642, 308 P.2d 588 (1957); Otherwise no later response would ever be allowed.

Since no progress has been made in this subcase, there is no prejudice uniquely attributable to permitting the late response vis' a vis' a timely response of identical dimensions. Accordingly, Faulkner's motion for leave to enter a late response should be granted.

CONCLUSION

Faulkner's motion should be granted and Faulkner's Response to McFaddan's objection should be entered as a pleading in this matter.

Respectfully submitted,

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