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8-18

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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. 36-15168
	)	
Case No. 39576	)	MEMORANDUM IN SUPPORT
	)	OF MOTION TO FILE LATE
	)	RESPONSE (HWUA)
_____	)	

INTRODUCTION

Sand Springs Ranch Partnership, an Idaho partnership, (Sand Springs) 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 the Hagerman Water User's Association's ("HWUA's") to the Director's Report regarding WR # 36-15168. 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. Sand Spring'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 Sand Springs:

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 Tom Ambrose.

There has been no effort by any party to bring the HWUA objection to trial. There is no discovery in the file and no indication that any progress has been made on the case by either HWUA or the Department (prior to the 1994 statutory amendments removing the Department as a party.)

Hagerman Water User's Association has objected to the Director's Report with respect to their water right number 36-15168 in Basin 36. The source of the water is a spring tributary to Billingsley Creek. The water right has a claimed priority date of April 7, 1906. The differences between the Director's Report and HWUA's objection are as significant as any in Basin 36

considering both the absolute magnitude and the percentage difference between the claimed rate of diversion and the proposed rate of diversion. The HWUA objection claims 493 acres under irrigation and a 36.20 cfs rate of diversion. The Department's Report and file and Sand Springs' proposed response claim approximately 334 acres under irrigation and a rate of diversion limited by beneficial use to 7.43 cfs--a net difference of 28.77 cfs or almost 80% of the claimed diversion rate. At the statutory presumption of an inch to the acre and converting from cfs to miner's inches by a factor of 50, the difference between the claim and the response could irrigate an additional 1,400 acres. The Department's claim verification report also indicates that HWUA's diversion works may be physically incapable of the claimed rate of diversion. These facts, if established, would constitute a meritorious defense to the HWUA objection.

LEGAL BASIS FOR PERMITTING SAND SPRINGS' 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. *Id.* 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 Sand Springs 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 Tom Ambrose establishes the factual basis for the proposed response to the HWUA 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 HWUA's objection in the acreage subject to irrigation, the ability of the diversion works to accomodate the claimed flow, and the amount of water necessary to irrigate the claimed acreage. HWUA's claim exceeds three inches of water per acre of ground. Reputable studies indicate that the statutory standard of one inch per acre is sufficient, on average, to irrigate property such as HWUA's. Cf. IDAHO CODE § 42-220.

III. GRANTING THE MOTION WILL NOT PREJUDICE HWUA.

The issue of whether to grant leave to file a late response involves a consideration of the prejudice to HWUA 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 the Sand Springs motion for leave to enter a late response should be granted.

CONCLUSION

Sand Springs' motion should be granted and the Sand Springs' Response to HWUA's objection should be entered as a pleading in this matter.

Respectfully submitted,

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