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DEPARTMENT OF
WATER RESOURCES

Estate of Tina Iest and
The Tina Iest Family L.L.L.P.

Dana L. Hofstetter, ISB #3867
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, Idaho 83702
Telephone: (208) 424-7800
Facsimile: (208) 424-8774

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY**

In Re SRBA

Case No. 39576

) Subcase Nos. 63-05181,
) and 63-05182
)
) **RESPONSE TO MOTION TO FILE**
) **LATE OBJECTIONS**
)

The Estate of Tina Iest and The Tina Iest Family L.L.L.P., by and through their counsel of record, Dana Hofstetter of Hofstetter Law Office, LLC, hereby respectfully submit this Response to the State of Idaho, Department of Fish and Game's ("IDFG") Motion to File Late Objections (the "Motion").

RESPONSE

1. Applicable Standard

The decision to allow a late objection to be filed in the SRBA, is based on the good cause standard of I.R.C.P. 55(c). *Order on Motion to Set Aside Partial Decrees and File Late Objections, SRBA Subcase Nos. 65-19812 et al. (January 31, 2001)*. The Rule 55(c) standard requires good cause and a meritorious defense. *McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d 274, 278 (Ct. App. 1993). The Rule 55(c) standard has been described as requiring the movant to show “whether the default was willful, whether setting aside the default would prejudice the opponent and that a meritorious position exists.” *Id.* at 936, 854 P.2d at 279.

2. The Motion Must Be Denied as No Evidence was Submitted Establishing that a Point of Diversion is on IDFG Land and the Proffered Objection Improperly Covers Two Water Right Numbers.

As the basis for its proposed late Objection IDFG generally asserts, “The IDFG only recently became aware that water right claims 63-05181 and 63-05182 have a point of diversion located on property owned by IDFG within the Fort Boise Wildlife Management Area.” Motion at 2. However, absent from the IDFG’s submission is any actual evidence supporting this claim. There’s no Deed submitted by Affidavit; there’s no legal description of the Fort Boise Wildlife Management Area; there is simply no evidence of any kind establishing that the points of diversion for 63-05181 and 63-05182 are located on IDFG property. There is no basis for granting IDFG’s Motion without the

critical evidence establishing IDFG's contention that the subject points of diversion are on IDFG property. The record is simply devoid of this necessary evidence.

The proposed Objection is also procedurally defective because it covers both water right nos. 63-05181 and 63-05182 while SRBA Administrative Order No. 1, and its Standard Form 1 Objection provides for designation of only one water right per Objection form. For this reason also, the proposed Objection is procedurally defective and cannot be filed. Further, while the proposed IDFG Objection includes only an Objection to the "Point of Diversion" element, the proposed Objection does not state how the point of diversion element should be changed, with the "Should be" line blank.

3. There Would Be Prejudice as these Proceedings are at a Relatively Late Stage.

The Basin 63, Part 3 Director's Report Recommendations for Water Right Nos. 63-05181 and 63-05182 were filed with the SRBA Court in December 2006 with Objections due June 20, 2007, and Responses due August 20, 2007. The subject two water rights, 63-05181 and 63-05182, have remained uncontested overlaps since that time. Only just recently, about 6 years later, has the IDFG attempted to object to these water rights. The proposed Objection would expand the scope of the proceeding to include previously uncontested water rights, only shortly before an October 22, 2013, trial is scheduled to begin. Without an extension of the trial date, this would create prejudice for the Claimant.

While the IDFG uses its point of diversion Objection in SRBA Subcase No. 63-174 to bootstrap onto for its Objection to 63-05181 and 63-05182, SRBA Subcase

63-174 is in a different procedural posture that Subcase Nos. 63-05181 and 63-05182. The Director's Report Recommendations for Water Right Nos. 63-05181 and 63-05182 were originally issued in 2006. No one filed Objections to these Recommendations. The Director's Report Recommendation for late claim 63-174 was first issued in June 2012 and a subsequent Amended Director's Report to correct a typographical error in the point of diversion section was issued in March 2013. IDFG's recent Objection to 63-174 perhaps can be justified based on the relatively recent issuance of an Amended Director's Report Recommendation. However, the Directors Report Recommendations for 63-05181 and 63-05182 were issued over six years ago.

Further, the status of IDFG's Objection to the Amended Director's Report for 63-174 is questionable, as it was not accompanied by a Motion to File Late Objection as, SRBA Administrative Order No. 1, specifically requires for Amended Director's Reports: "Any party wishing to file an objection to an Amended Director's Report may do so by filing *a Motion to File a Late Objection* within 21 days following the notice of filing the Amended Director's Report in the Docket Sheet." SRBA, Administrative Order No. 1, § 17(c).

Additionally, it should be noted that 63-174 (and associated Right Nos. 63-175 and 63-201) are based on the 1906 Stewart Decree, whereas 63-05181 and 63-05182 are beneficial use rights. *See* Affidavit of Dana L. Hofstetter (SRBA Subcase Nos. 63-174, 63-175 and 63-201) December 30, 2009, Exhibit A (attached hereto as Exhibit A) . The Stewart Decree indicates points of diversion for 63-175 and 63-201 in the same location

as the one that IDFG seeks to object to in 63-05181 and 63-05182. However, since the basis for 63-05181 and 63-5182 is beneficial use, not the Stewart Decree, vastly different issues could be raised by IDFG's proposed Objection.

Due to the prejudice associated with the filing of a late Objection in SRBA Subcase Nos. 63-05181 and 63-05182 at this late stage, the Motion should be denied.

4. No Meritorious Case is Presented as Whether a Point of Diversion is on IDFG Land Is a Matter of Easement Law, And Does Not Need to Be Addressed in the SRBA.

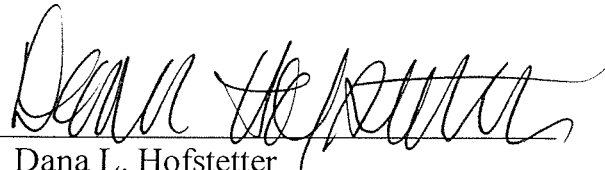
It is well established under Idaho law that a water right is separate from an easement right to access the water. *See Branson v. Miracle*, 107 Idaho 221, 227, 687 P.2d 1348, 1354 (1984) ("The mere fact that one owns a water right does not vest in the owner thereof the right to enter the lands of another for the purposes of maintaining the flow of water."). Thus, any determination of water right elements in this action is separate and independent from what easement rights may exist. *See also* SRBA Partial Decree 02-2318A (attached hereto as Exhibit B) which expressly acknowledges that the existence of an easement to access water is not necessarily part of an SRBA Subcase determination. Additionally, IDFG has presented no evidence that there is no easement or right of way at this location. Thus, no meritorious case is presented for allowing IDFG's late Objection regarding what is essentially a potential easement matter.

CONCLUSION

For the foregoing reasons, IDFG's Motion should be denied.

RESPECTFULLY SUBMITTED this 28th day of June, 2013.

HOFSTETTER LAW OFFICE, LLC

By 
Dana L. Hofstetter

CERTIFICATE OF SERVICE

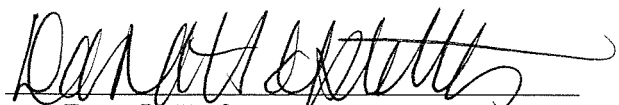
I hereby certify that on the 28th day of June, 2013, I caused to be served copies of the foregoing **Response to Motion to File Late Objections** by the pre-paid methods indicated below:

Idaho Department of Water Resources
Document Depository
P. O. Box 83720
Boise, Idaho 83720-0098
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Harriet Hensley
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
☒ U.S. Mail ☐ Fed Ex ☐ Hand ☒ Fax


Dana L. Hofstetter

4091.2/10457

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF CANYON.

Farmers' Cooperative Ditch Company, (a corporation)

Plaintiff,

vs.

D E C R E E.

Riverside Irrigating District, Limited, (a corporation)

et al,

Defendants.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF CANYON.

Farmers' Cooperative Ditch Company (a corporation)

Plaintiff,

vs.

D E C R E E

Riverside Irrigating District, Limited, (a corporation), The Sie-
benberg Cooperative Ditch Company, Limited (a corporation), Frank
Gilbert, T. W. Boone, Prior Burnett, Thomas Andrews, H. Dan Boudinet,
I. H. [redacted], C. E. J. Peterson, William McKnett, Fred [redacted],
Neil [redacted], Michael Gilbride, Lower Boise Ditch Company, (a corpora-
tion), E. H. Stockton, W. E. Vanderpool, D. D. Campbell, William
Foss, Smith Stockton, John Atkins, Ben Foss, John Foss, D. W. McKen-
nel, John Leary, John Hammen, Bird Bowman, (substituted for E. W.
Bowman Jr.), D. Mumford, T. E. Johnson, E. Carlisle, Charles Allan,
J. Fossan, Robert McQuire, Frederick Ode, Eureka Ditch Company, (a
corporation), J. Poland, Thomas J. Palmer and Noah W. Palmer (substi-
tuted for Lillian Potter, Administratrix of the Estate of L. D. Potter,
deceased, Susan E. Potter, Thad. S. Potter, Eliza Potter, Lillian
Potter, Ida Potter, James Baker), C. W. Cooper, Pioneer Dixie Ditch
Company (a corporation), William C. Young, Lizzie Young, Estella C.
Young, W. W. Kirkpatrick, S. H. Mitchell, L. F. Cook, Triphenia Jobe,
administratrix of the estate of J. W. Jobe, deceased, Triphenia Jobe,
Charlotte Conrad, [redacted] Conrad, her husband, Minto Bond and Frank
Bond, her husband, William Jobe and Alice Jobe, Edith Jobe and Ger-
trina Jobe, miners, A. Holcomb, George Milner, George Hess, John Thom-
as, W. F. Whitney, Emma S. Lee, Edwin Curtis, Eureka Water Company,
(a corporation), William Simonsen, William Lewis, Huston Frost, Elijah
Frost, George Goorich, E. W. Brannan, William Frost, Adam Schindler,
Pioneer Irrigation District, (a corporation), Franklin Ditch Company,
(a corporation), Canyon County Water Company, (an association),
Francis A. Phelps and Frances Phelps husband and wife, John D. Rut-
ledge, James Hartley, Joseph Wilson, Daniel Westersohn, Harry Stoffle,
J. McGill, W. E. Foote, J. W. Smith, John Lane, W. E. Fowler, Thomas

XXXIX

That the defendant JOHN MAMMON be, and he is hereby awarded the use of the waters of Boise River, diverted at a point on the south side of said river in Sec. 25, T. 5 N. R. 5 W. B.M., for use upon the N. $\frac{1}{2}$ of SE $\frac{1}{4}$ and lots 8 and 9 in Sec. 26, and lots 7 and 8 in Sec. 25, T. 5 N. R. 5 W. B.M., in the following amount from the following date;

90 inches, from June 1, 1869. and hereby designated as Right No. 41

That said defendant John Mammon is also hereby awarded the use of the waters of said river, diverted at a point in the NW corner of Sec. 36, T. 5 N. R. 5 W. B.M., for use upon the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ and lots 5 and 6 in Sec. 26, and lots 1, 2 and 3 in Sec. 27, and lots 7 and 8 in Sec. 25, and N. $\frac{1}{2}$ of SE $\frac{1}{4}$ and lots 8 and 9 in Sec. 26, all in T. 5 N. R. 5 W. B.M., in the following amount and from the following date;

210 inches, from June 1, 1878; and hereby designated as Right No. 68

And be adjudged to pay \$21.00 costs in addition to the costs incurred by him.

XL.

That the defendant Isaac BEDAL be, and he is hereby awarded the use of the waters of Boise River, diverted from a point on the south side thereof in SE $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 5, T. 3 N. R. 2 E. B.M., through what is known as the Thurman Mill slough or ditch, for use upon lands lying under said ditch, in the following amount and from the following date;

80 inches, from June 1, 1869; and hereby designated as Right No. 42

And be adjudged to pay \$5.60 costs in addition to the costs incurred by him.

XLI.

That the defendant FREDERICK ODE be, and he is hereby awarded the use of the waters of Boise River, diverted from a point in NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 12 and SE $\frac{1}{4}$ of Sec. 2, T. 4 N. R. 4 W. B.M., through what is known as the Center Point Ditch, for use upon lots 8 and 9, Sec. 33 and lots 5, 6 and 7, Sec. 34, T. 5 N. R. 4 W. B.M., and lot 1, Sec. 4, T. 4 N. R. 4 W. B.M. in the following amount from the following date;

180 inches, from June 1, 1869 and hereby designated as Right No. 43

And be adjudged to pay \$12.60 costs in addition to the costs incurred by him.

XLII.

That the defendant PRIOR BURNETT be, and he is hereby awarded the use of the waters of Boise River, diverted at a point in the SE $\frac{1}{4}$ of Sec. 25, and SW $\frac{1}{4}$ of Sec. 30, T. 5 N. R. 5 W. B.M., for use upon the SW $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE $\frac{1}{4}$ Sec. 23, and NE $\frac{1}{4}$ of NW $\frac{1}{4}$, and lots 1, 2, 3 and 4.

LVII

That the defendant the NAMPA & MERIDIAN IRRIGATION DISTRICT, (substituted for defendant the Boise City Irrigation & Land Company) a corporation, be and it is hereby awarded the use of the waters of Boise River, diverted at a point on the south side of said river in Lot 6, Sec. 29, T. 3 N. R. 3 E. B.M., for use upon the lands lying under its canal system, in the following amounts, from the following dates;

8500 inches, from May 1, 1878; and hereby designated as Right No. 67.
18542 inches, from August 20, 1888; and hereby designated as Right No 10

And be adjudged to pay \$1692.94 costs in addition to the costs incurred by it.

LVIII.

63-
201
That the defendant JULIA MAMMON be, and she is hereby awarded the use of the waters of Boise River, diverted from said river at a point in NW corner of Sec. 36, T. 5 N. R. 5 W. B.M., for use upon the SE $\frac{1}{4}$ of SW $\frac{1}{4}$, and S. $\frac{1}{4}$ of SE $\frac{1}{4}$, and lot 7 in Sec. 26, T. 5 N. R. 5 W. B.M., in the following amount from the following date;

138 inches, from June 1, 1873; and hereby designated as Right No. 68.

And be adjudged to pay \$11.73 costs in addition to the costs incurred by her.

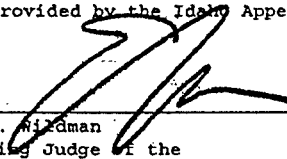
DEPARTMENT OF
WATER RESOURCES

Water Right 02-02318A

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RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



Eric J. Niedman
Presiding Judge of the
Snake River Basin Adjudication