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WATER RESOURCES

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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	)	Subcase Number: 31-07113
	)	
Case No. 39576	)	MOTION FOR LEAVE TO FILE
	)	LATE OBJECTION
_____	)	

INTRODUCTION

This subcase concerns a water right claim that was previously-decreed by the Court without objection. The Court's partial decree was based on and consistent with the claimant's permit and IDWR's Director's Report. The partial decree described only one point of diversion, located on federal land managed by the Bureau of Land Management ("BLM").

Subsequent to issuance of the partial decree, IDWR issued an NCAP based on a license which added 14 additional PODs, all located on federal land managed by the BLM. The claimant holds rights-of-way for access to groundwater wells located on federal land, but these additional PODs do not conform to BLM right-of-way records. The United States now requests leave to file a late objection to the NCAP to allow the BLM and the claimant to attempt to reconcile the claimed POD locations and BLM right-of-way records.

FACTUAL AND PROCEDURAL BACKGROUND

On February 22, 1974, Jefferson Irrigation Company, Limited (“Jefferson”) filed Application for Permit #31-07113 with IDWR, which IDWR approved on August 13, 1975. The application described one Point of Diversion (“POD”) and was published in the Rigby Star. *See* Price Affd. ¶ 5.

On January 21, 1980, Jefferson filed Amended Application for Permit #31-07113 with IDWR (“Amended Permit”) to change the distribution of acres among the Places of Use (“POU”) without affecting the total number of acres. The Amended Permit described the same POD, was approved by IDWR on February 29, 1980, and was published in the Rigby Star. IDWR’s scanned documents contain no evidence that the Permit was subsequently amended to include additional PODs. *See* Price Affd. ¶ 6.

On October 17, 1988, Jefferson filed a Notice of Claim in this subcase that listed 14 PODs. *See* Price Affd. ¶ 7.

On May 10, 2001, IDWR recommended 31-07113 in the Final Irrigation & Other Director’s Report for Basin 31. The Director’s Report describes one POD consistent with the Amended Permit. On February 22, 2002, the Court issued a partial decree consistent with the Director’s

Report. *See Price Affd.* ¶ 8.

On February 25, 2013, IDWR issued License 31-07113 to Jefferson. License 31-07113 lists 15 PODs. The license includes the POD listed in the Amended Permit and 14 additional PODs. It does not appear that these changes contained in the license were published or otherwise noticed to the public. Only 6 of the PODs are the same as what is listed in the SRBA Notice of Claim: Lot 3 (NENENW), Lot 4 (NENWNW), SESENW, SWSWSW, NESESW, S03 and SENESE, S04, T07N, R34E. *See Price Affd.* ¶ 9.

On March 8, 2013, IDWR filed a Notice of Completed Administrative Procedure (“NCAP”) based on licensing of 31-07113. The NCAP is consistent with the License with regard to PODs, but includes 9 PODs with different descriptions than those in the Notice of Claim filed in the SRBA. *See Price Affd.* ¶ 10.

On June 25, 2013, this subcase came up for hearing at the SRBA monthly status conference on the Notice of Court’s Intent to Issue Amended Partial Decree. At that hearing, counsel for the BLM informed the Court that BLM had recently discovered problems with the PODs that were added by the License and not included in the Amended Permit, Director’s Report, or Partial Decree. *See Price Affd.* ¶ 12.

Jefferson holds rights-of-way for groundwater wells on federal land managed by the BLM. Review of the PODs listed in the NCAP indicates that the NCAP is inconsistent with BLM’s right-of-way records. The location of the PODs, except for the one POD described in the Amended Permit, Director’s Report, and Partial Decree, vary from BLM records. BLM does not have any record of two of the PODs. In addition, one existing well is not listed on the water right nor is it listed in BLM’s records. *See Price Affd.* ¶ 12.

The BLM discovered the problems with the PODs added by the License after the April 29 deadline for filing of objections to the NCAP. The BLM has been systematically reviewing SRBA Director's Reports and Docket Sheets since the commencement of the SRBA. As a result of federal budget and staffing issues which has resulted in a diminishment of BLM water rights staff, BLM has been pressed to quickly complete these tasks and, because of an oversight, did not discover problems with the POD element in the NCAP until after the deadline for filing of objections had passed on April 29, 2013. *See Price Affd.* ¶ 11.

STANDARD OF REVIEW

The SRBA Court has held that motions to file late objections are subject to the "good cause" standard of IRCP 55. *Order on Motion to Set Aside Partial Decrees and File Late Objections*, subcase nos. 65-07267 *et al.* (January 31, 2001), at 7. This standard takes into account 1) whether the default was willful; 2) whether setting aside the judgment would prejudice the opponent; and 3) whether a meritorious position has been presented. *Id.* The "good cause" standard under Rule 55(c) is more lenient than the Rule 60(b) standard applicable to obtaining relief from a judgment or setting aside an SRBA partial decree. *Id.* (citing *McFarland v. Curtis*, 854 P.2d 274, 279 (Idaho 1993)).

ARGUMENT

1. The failure to file a timely objection was not willful.

As explained in the Price Affidavit, the BLM has been systematically reviewing SRBA Director's Reports and Docket Sheets since commencement, but missed the deadline to object to the NCAP due to an oversight brought on by staffing issues. *Price Affd.* ¶ 11. Good cause for a late objection exists where a party has a systematic process of reviewing claims and Director's Reports,

but failed to find a particular claim and file a timely objection. *Order on Motion to File Late Objection*, subcase no. 23-0009B (January 18, 2005), at 3-4 (citing *Order on Motion to File Late Objection*, subcase no. 31-0006A et al.). The BLM has been diligently reviewing SRBA documents for years, often bringing to IDWR and the Court's attention inaccuracies in water right claims even when federal interests are not implicated. Accordingly, the failure to timely object in this subcase is not willful.

2. Allowing the BLM's objection would not prejudice the claimant.

The deadline for a timely objection to the NCAP was April 29, 2013. The BLM raised its concerns with the Court at the June 25 hearing. No activity of any sort occurred in this case in the interim. Furthermore, it is simply not in the claimant's interest to obtain a water right on federal land where proper federal authorizations do not exist or where the water right claim does not accurately affect the water system as it exists on the ground. The claimant will not have a legal right to use the water in either circumstance. Allowing the BLM's objection will not therefore prejudice the claimant.

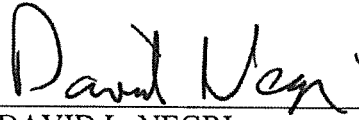
3. The BLM has a meritorious position in support of its objection.

The BLM's objection is two-fold: 1) the claimed POD's are not properly authorized under federal law and any use of the water would therefore be illegal under federal and state law, *see, e.g., In Re General Determination of Rights to Use of Surface and Ground Waters of Payette River*, 687 P.2d 1348, 1353 (Idaho 1984) (citing *Lemon v. Hardy*, 519 P.2d 1168 (Idaho 1974) (additional citations omitted); and 2) the NCAP does not accurately reflect the water system as it exists on the ground. *See* attached Objection. In either situation, the BLM's objection to decree of the water right as proposed is meritorious.

DATED this 9th day of July, 2013.

Respectfully submitted,

UNITED STATES OF AMERICA

A handwritten signature in black ink, reading "David Negri". The signature is written in a cursive style with a large initial "D" and a stylized "N".

DAVID L. NEGRI
Attorney for the United States

CERTIFICATE OF SERVICE

I certify that on July 9, 2013, I served a true and correct copy of the foregoing upon the following individuals by placing the document in the United States Mail in Boise, Idaho, postage paid, and addressed as follows:

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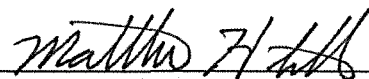
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