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OFFICE OF THE ATTORNEY GENERAL

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Department of Water Resources
Adjudication Bureau

6-28

Movant's Name:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division

DARIA J. ZANE
Attorney, Department of Justice
General Litigation Section
Environment and Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663
(202) 272-8351

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)
)
_____)

Subcase No. 36-02080
UNITED STATES' RESPONSE TO
MOTION TO FILE LATE OBJECTION

Descriptive Summary

This is the United States' Response to the Magic Valley
Underground Pumper's Association's Motion to File Late Objection.

I. BACKGROUND

The United States filed its notice of claim in this
subcase in a timely fashion. The claim is based on a license
awarded by IDWR to the United States in 1965 through the Bureau
of Reclamation for water for use on the Minidoka Project.

The Minidoka Project is a Bureau of Reclamation project
authorized by Congress by the Reclamation Act of June 17, 1902,
and authorized by the Secretary of the Interior. The Minidoka

Project lands extend discontinuously from the town of Ashton, in eastern Idaho, along the Snake River, about 300 miles downstream to the town of Bliss in south-central Idaho. Water for the project comes primarily from the Snake River watershed.

The Minidoka project is partially located in Basin 36. The Bureau of Reclamation right at issue, Water Right No. 36-02080, is a water right for 177 groundwater wells. These wells pump ground waters that are used within Unit B of the North Side Pumping Division of the Minidoka Project, which is within the A&B Irrigation District. The North Side Pumping Division authorized for construction by the Act of September 30, 1950 (64 Stat. 108). See Claim for Water Right No. 36-02080. See also copy of license, Exhibit K to A&B Irrigation District's Opposition to Motion to File Late Objection (hereinafter A&B's Opposition).

The facts relating to the issuance of the license are fully set forth in A&B's Opposition. See A&B's Opposition, pp. 2 through 8. Those facts are incorporated herein. Briefly, the United States applied for a permit for the 177 wells in 1948. Notice of the application was served and published in accordance with Idaho Code § 42-203. See Exhibit 1 to Affidavit of Daria J. Zane attached hereto.

This permit authorized commencement of construction and application of water to beneficial use. Idaho Code § 42-204 (1948). Proof of completion was originally due within five years, in 1953. See Idaho Code § 42-214. Beneficial use of the water was to be made within 10 years. See Idaho Code § 42-217.

After several extensions, applications for which at least one was published, See Exhibit 2 hereto, the United States filed its notice of completion. This notice was published pursuant to Idaho Code § 42-224. See Exhibit B to A&B's Opposition. Idaho Code 42-224 specifically provided that protests were to be filed on or before the date set for proof of completion. In this case that date was January 13, 1964. See Exhibit B to A&B's Opposition.

No protests were filed in a timely fashion. There were, however, protests and letters of opposition were filed in an untimely fashion. See Protests of: (a) Rodney Hanson, Exhibit 3 hereto; (b) Dale Butler, Exhibit 4 hereto; (c) G.L. Dean & Co., Exhibit 5 hereto; (d) Owyhee Ranches, Exhibit 6 hereto; (e) Magic Valley Pumpers Association, Exhibit 7 hereto; (f) Mack Neibaur, Exhibit 8 hereto; and (g) Vernon Phillips, Exhibit 9 hereto.

The license was issued on June 10, 1965. See Exhibit K, A&B's Opposition. Pursuant to Idaho Code 42-224 judicial appeals were to be taken within 60 days of the issuance of the license. Again, no timely appeals were taken. Certain lawsuits were filed beyond the time permitted for such appeals. These were dismissed on jurisdictional grounds. See Order re: G.L. Dean & Co. v. Tappan, Exhibit 10 hereto.

Over 30 years from the date of publication of the notice of completion and almost 30 years from the date of

issuance of the license, potential late objectors, the Magic Valley Underground Pumpers Association (hereinafter Magic Valley Pumpers) seeks to collaterally attack the permit process and the judgment rendered in connection with the issuance of the license through filing this late objection in the SRBA.

II. ARGUMENT

A. Standard of Review

Although Administrative Order No. 1 does not explicitly set forth the test to be applied for admitting late objections, the Court has applied the test set forth in A.O. #1 for admitting late claims to late objections. The standards by which to judge whether a late objection are those set forth in I.R.C.P. Rule 55(c) and I.R.C.P. Rule 60(b). These rules provide that the party seeking to file the late objection must show that the failure to file such objection was due to mistake, inadvertence, surprise or excusable neglect. See Schraufnagel v. Quinowski, 113 Idaho 753, 755, 747 P.2d 775 (Idaho App. 1987). In addition, the party must show that it has a meritorious claim. See Reeves v. Wisenor, 102 Idaho 271, 629 P.2d 667 (1981).

B. Magic Valley Pumpers Cannot Show Mistake, Inadvertence, Excusable Neglect Or Other Justifiable Reasons For Not Filing A Timely Objection.

1. Magic Valley Pumpers Knew Or Should Have Known About the Circumstances Surrounding Issuance of the License.

In support of their motion, Magic Valley Pumpers claim they should be excused from not filing a timely objection because they did not know of the facts surrounding the issuance of this license before last year. Magic Valley Pumpers also claim that since the license proceeding occurred 30 years ago, there was no way to know the facts surrounding such license and that "many of the members were either very young or, indeed, not even born. . . ." See Magic Valley Motion at 7.

Despite Magic Valley's allegations, a close review of the facts show that either its members or its members' predecessors in interest knew or should have known about the circumstances surrounding issuance of the license in 1965. First, even if the current member who owns a particular water right was not born or around at the time of the licensing procedure, his or her predecessor in interest was. If the water right has a priority date earlier than 1965, that predecessor in interest would have been putting those rights to beneficial use during the licensing procedure. As noted above, notices of publication were made at the time the application was filed in 1948, at the time one of the extensions was sought, in 1955, and at the time the notice of completion was made, in 1965. The publication of those notices put these individuals on notice. These individuals were the predecessors of the current members. As the current owners of the property right, the water right, they took subject to their predecessors in interest. The

predecessor's knowledge is imparted on the present day owners.

The fact that notice of an extension was sought is particularly important. By virtue of this publication not only were persons on notice of the application, but they were on notice of the fact that the Bureau of Reclamation was seeking an extension on the notice of completion, which could ultimately affect the priority date. Thus, they were on notice of the precise issue raised in this proposed objection.

More importantly, particular members of the Magic Valley Pumpers Association had personal notice of this licensing procedure. A number of the persons listed as current members filed protests in the original action. Clearly, they had notice and knew of the facts surrounding the licensing. See Exhibits 4-9. In fact, one member, G.L. Dean filed suit in this matter. Although the suit was dismissed, it clearly shows notice of the particular issues at hand. For Magic Valley to now claim it had no notice of the licensing proceedings is simply contrary to facts.

2. Magic Valley Pumpers Were Aware of Process for Filing Objections in the SRBA.

Even if it could be argued that members of the Magic Valley Pumpers did not know about the licensing proceedings, they still had notice and opportunity to object to this claim in a timely fashion. The members are admittedly water right claimants in the SRBA. As such, they are aware of the claim, objection and response procedure. Under the notice provided at the time of filing the Director's reports, persons were advised that that was

the time to file objections. Director's reports were made available to review. The files relating to claims contained in the Director's reports were available at IDWR offices.

Magic Valley Pumper members were no doubt aware of the Bureau of Reclamation's claim, 36-02080. They admit that this claim has a substantial impact in their area. They were also aware of the priority date claimed and that that claim was based on a license. If Magic Valley Pumpers members were interested in this claim and the fact that the priority date affected them, during the objection period, they could have reviewed the public records of IDWR relating to the issuance of the license to ascertain how the priority date was determined. This would have revealed the same information they now claim to have received only recently.

The fact is that the information was always available. Instead of pursuing their rights during the designated period, the objection period, Magic Valley Pumpers chose to sit on their rights and forego filing an objection. They did not perform any investigation of the claim. Such investigation would have required minimal effort in that it would only require reviewing public records, housed in IDWR, which were open and available to the public. Now they come in and seek to file this objection nearly two years since the close of the objection period. Magic Valley Pumpers cannot be rewarded for sitting on their rights by allowing this late objection.

- C. The United States Will Be Prejudiced By Permitting The Filing Of This Late Objection.

If the Court permits the filing of this late objection, the United States will be prejudiced in several ways. First, the United States will have to incur additional expense in litigating the objection. Because the objection was not filed in a timely manner, the United States will have a far smaller time period in which to develop its case.

More importantly, over the last year or so, the United States has worked with objectors in this and other subcases to reach settlements. In fact, the parties in this particular subcase, A&B Irrigation District and the United States, have discussed several proposals for settlement. It was anticipated that settlement, if reached, would avoid having to expend time and resources litigating this subcase.

Magic Valley's late objection negates all the efforts made to date. In addition, it introduces an entirely new issue very late in the litigation process. If Magic Valley Pumpers is allowed to file its late objection, the United States will incur added, if not, unnecessary expenditure of resources to address this objection. Not only is the expenditure prejudicial but the fact that it will have to be done on a very abbreviated schedule is also prejudicial.

The nature of Magic Valley Pumper's objection also demonstrates prejudice. The other objections filed to date were filed by the United States and A&B Irrigation District. The United States' objection merely seeks the addition of a remark, a matter that can simply be resolved by the Court's decision

whether it is legally appropriate. Similarly, the A&B Irrigation District objections also raise a legal issue, whether language reflecting the contractual relationship between A&B Irrigation District and the United States should be included in the decree.

Conversely, the proposed late objection raises issues about proof of completion of a license granted 30 years ago. If this late objection is permitted, the United States will be put in a position of searching for records and evidence from 30 years ago essentially to reprove its priority date. This could involve extensive investigation and factual matters. Because it involves such factual issues, the amount of resources required to expend will be exponentially greater. Requiring the United States to now address these issues after such a long time lapse is prejudicial.

More importantly, the fact that such a long time has lapsed since the issuance of the license is also prejudicial. The United States will now be faced with trying to piece together evidence and proof from events that occurred long ago. This, in and of itself, increases the burden on and prejudice to the United States. In fact, that is the very reason why Courts impose a strict time frame in which persons can come in and seek to collaterally attack judgments. See I.R.C.P. 60. Without such a time limit, parties who legitimately litigated matters would be subject to relitigation what had become state issues where evidence may have long before disappeared. To impose such a heavy burden on the United States with regard to the priority

date, a matter it believed to be resolved long ago, is prejudicial.

D. There Is No Meritorious Challenge.

Finally, Magic Valley Pumpers have not shown that they have a meritorious claim. In their brief, they continually state that the objection they seek is serious and substantial. However, they fail to demonstrate that there was no basis for the 1948 priority date. In fact, a review of the facts at the time shows that the issue they raise was fully considered during the permit procedures. In addition, lawsuits were filed. Thus, Magic Valley Pumper's arguments would be barred by res judicata.

Res judicata bars claims that were or could have been decided during a prior judicial proceedings. See Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (Idaho App. 1983). Once a judgment is issued, the case is res judicata as to all issues which were or could have been litigated. See Compton v. Compton, 101 Idaho 328, 612 P.2d 1175 (1980).

In the present case, Magic Valley's members and its predecessors litigated these matters. Thus, they should not be allowed to reopen those judgments and seek to relitigate them now.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the United States respectfully requests that claimant's motion be denied.

Respectfully submitted this 27 day of June, '1995.



DARIA J. ZANE
R. LEE LEININGER
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Environment and Natural Resources
Division
General Litigation Section
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Movant's Name:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

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Environment and Natural Resources Division

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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 No. 36-02080
)	
Case No. 39576)	
)	<u>AFFIDAVIT OF DARIA J. ZANE</u>
)	
)	
_____)	

Daria J. Zane, being first duly sworn, deposes and says:

1. That this affiant is the attorney representing the United States of America which is a claimant in the SRBA and a party to Subcase No. 36-02080.

2. Exhibits 1 through 10 attached hereto are copies of documents obtained from the office of the Idaho Department of Water Resources and maintained by Idaho Department of Water Resources as a part of its business records, all of which relate to License No. 20736 issued by the State Reclamation engineer pursuant to the statutory provisions in existence at

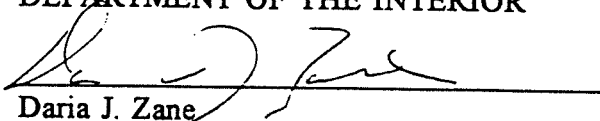
AFFIDAVIT OF DARIA J. ZANE

the time of the issuance of said license.

3. This affidavit is submitted in support of the the Response of the United States of America to the Motion of Magic Valley Underground Pumpers Association, Inc. and its individual members to file a late objection in Subcase No. 36-02080.

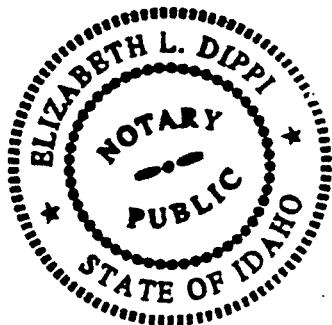
Respectfully submitted this 27th day of June, 1995.

UNITED STATES OF AMERICA
ON BEHALF OF THE
BUREAU OF RECLAMATION
DEPARTMENT OF THE INTERIOR



Daria J. Zane
Attorney, Department of Justice
Environment and Natural Resources
Division

SUBSCRIBED AND SWORN TO before me this 27th day of June 1995.



Elizabeth L. Dippi
Notary Public for Idaho
Residing at: Boise, Idaho
My Commission Expires: Jan. 11, 2001

State of Idaho,
County of Jerome

SS.

W. F. MacKnight being first duly sworn, deposes and says that he is the printer (publisher) of the Jerome North Side News, a newspaper published every week in Jerome, County of Jerome, State of Idaho; that said newspaper has been continuously and uninterruptedly published for a period of seventy-eight consecutive weeks prior to the first publication of the annexed notice, and is a newspaper qualified to publish legal notices as provided by act of the 1919 session of the legislature of the State of Idaho, known as House Bill 145; that the annexed advertisement was published once

each week for Three consecutive issues in said newspaper proper and not in a supplement; that the date of the first publication of said advertisement was on the 23rd day of Sept. 1948 and the date of the last publication was on the 7th day of October 1948

W. F. MacKnight

Subscribed and sworn to before me this 20th day of October 1948

(SEAL). G. H. Stross
NOTARY PUBLIC

JEROME NORTH SIDE NEWS
COST OF PUBLICATION

Number of Lines in Notice 67
Number of Insertions 3
67 Lines at 10c 6.70
134 Lines at 5c 6.70
TOTAL COST 13.40

(COST COMPUTED AT RATE OF 10c PER LINE FOR FIRST INSERTION,
5c PER LINE FOR ALL SUCCESSIVE INSERTIONS)

(Paste Here)

Mr. J. Appl. to
FILE OF NOTICE
App. Public Water
of State
PLAINTIFF ATTORNEY

DEPENDANT
State Reclamation

STATE OF IDAHO
DEPARTMENT OF RECLAMATION

NOTICE OF APPLICATION FOR PERMIT TO APPROPRIATE THE PUBLIC WATERS OF THE STATE OF IDAHO, IN ACCORDANCE WITH THE PROVISIONS OF SECTION 41-203, IDAHO CODE ANNOTATED.

NOTICE IS HEREBY GIVEN That the United States of America, through the Regional Director, Region 1, U. S. Bureau of Reclamation, of Boise, Idaho, on the 9th day of September, 1948, made application for permit to appropriate One Thousand Three Hundred Thirty-three and Twenty-eight Hundredths (1333.28) cubic feet per second of underground water from 306 wells for irrigation and domestic purposes.

That the points of diversion of said waters, or the location of the wells, are at various points in the following townships, to-wit:

- Twp. 9 South, Range 20 East, B. M.; Twps. 8 and 9 South, Range 21 East, B. M.; Twps. 8 and 9 South, Range 22 East, B.M.; Twps. 8 and 9 South, Range 23 East, B. M.; Twps. 7, and 8, South, Range 24 East, B. M.; Twp. 8 South, Range 25 East, B. M.

That the lands to be irrigated consist of 66,664.3 acres situated in the same townships and ranges as listed above.

That any protests against the approval of this application must be filed in the Department of Reclamation, at Boise, Idaho, within forty (40) days from the date of this notice, and such protest shall state the name and address of the protestant, and shall clearly set forth his objections to the approval of said application.

Dated this 11th day of September, 1948.

MARK R. KULP,
State Reclamation Engineer.
Date of first publication: 9-23-48.
Date of last publication 10-17-48.
Last date for protest: Oct. 21, 1948.

SERVICE OF THE FOREGOING, by copy, is hereby acknowledged, this 15th day of September, 1948.

THE UNITED STATES OF AMERICA, Applicant.
By: H. T. NELSON,
Acting Regional Director, Region 1, Bureau of Reclamation.

AFFIDAVIT OF PUBLICATION

State of Idaho, County of Lincoln—ss.

Herb. H. Love, being first duly sworn, says that he is the publisher and printer of the Lincoln County Journal, a newspaper published weekly at Shoshone, Idaho, having legal publication rights within the State of Idaho, and that the notice, a true copy of which is hereto attached, was published in said newspaper for 3 consecutive weekly issues, beginning with the issue of Sept. 24, 1948, and ending with the issue of Oct. 8, 1948.

Herb H Love

Subscribed and sworn to before me this

day of Oct 27, 1948

Notary Public

Notary Public, Shoshone, Idaho.

STATE OF IDAHO

Department of Reclamation

Notice of Application for permit to appropriate the public waters of the State of Idaho, in accordance with the provisions of Section 41-203, Idaho Code Annotated.

NOTICE IS HEREBY GIVEN, that the United States of America, through the Regional Director, Region 1, U. S. Bureau of Reclamation, at Boise, Idaho, on the 11th day of September, 1948, made application for permit to appropriate One Thousand Three Hundred Thirty-three and Twenty-eight Hundredths (1333.28) cubic feet per second of underground water from 306 wells for irrigation and domestic purposes.

That the points of diversion of said waters, or the location of the wells, are at various points in the following townships, to-wit:

- Twp. 9, South, Range 20, East, B. M.; Twps. 8 and 9 South, Range 21 East, B. M.; Twps. 8 and 9 South, Range 22 East, B. M.; Twps. 8 and 9 South, Range 23 East, B. M.; Twps. 7 and 8 South, Range 24 East, B. M.; Twp. 8 South, Range 25 East, B. M.

That the lands to be irrigated consist of 68,664.3 acres situated in the same townships and ranges as listed above.

That any protests against the approval of this application must be filed in the Department of Reclamation, at Boise, Idaho, within forty (40) days from the date of this notice, and such protest shall state the name and address of the protestant, and shall clearly set forth his objections to the approval of said application.

Dated this 11th day of September, 1948.

MARK R. KULP,

State Reclamation Engineer

Last date for protest: October 21, 1948.

Date of first publication: September 24.

Date of last publication: October 8.

Service of the foregoing, by copy, is hereby acknowledged, this 15th day of September, 1948.

THE UNITED STATES

OF AMERICA, Applicant

By

H. T. NELSON,

Acting Regional Director,

Region 1, Bureau of Reclamation.

AFFIDAVIT of PUBLICATION

State of Idaho, }
 County of Jerome } SS.

W. N. MacKnight being first duly sworn, deposes and says that he is the printer (publisher) of the Jerome North Side News, a newspaper published every week in Jerome, County of Jerome, State of Idaho; that said newspaper has been continuously and uninterruptedly published for a period of seventy-eight consecutive weeks prior to the first publication of the annexed notice, and is a newspaper qualified to publish legal notices as provided by act of the 1919 session of the legislature of the State of Idaho, known as House Bill 145; that the annexed advertisement was published once

each week for 2 consecutive issues in said newspaper proper and not in a supplement; that the date of the first publication

of said advertisement was on the 24th day of Nov.

1955 and the date of the last publication was on the 1st

day of December, 1955.

W. J. MacKnight

Subscribed and sworn to before me this 1st

day of December, 1955.

(SEAL)

[Signature]
 NOTARY PUBLIC

JEROME NORTH SIDE NEWS COST OF PUBLICATION

Number of Lines in Notice	<u>27</u>	
Number of Insertions	<u>3</u>	
<u>27</u> Lines at <u>13c</u>		<u>\$4.05</u>
<u>27</u> Lines at <u>6c</u>		<u>2.70</u>
TOTAL COST		<u>\$6.75</u>

(COST COMPUTED AT RATE OF 13c PER LINE FOR FIRST INSERTION.
 6c PER LINE FOR ALL SUCCESSIVE INSERTIONS)

COPY OF NOTICE

(Paste Here)

Notice of Application
 TITLE OF NOTICE

for extension of time
 PLAINTIFF ATTORNEY

for completion of work
 DEFENDANT

State of Idaho
 PLAINTIFF

Repl. of Reclamation
 BILL TO

NOTICE OF APPLICATION FOR
 EXTENSION OF TIME FOR
 COMPLETION OF WORKS
 PERMIT NO. 20735
 Extension of time for completion of works has been requested on Permit No. 20735 issued to the United States Bureau of Reclamation for appropriation of water for the North Side Minidoka Extension Irrigation Project.
 All the one hundred seventy-eight (178) wells have been constructed, are under construction or have been contracted. Thirty-eight wells have been completed to date and are serving 16,115 acres. Twenty-six additional wells have been completed and the rest are scheduled to be completed by September, 1956.
 Extension of Time is requested to November 5, 1956, under Section 42-204 Idaho Code.
 Written objections or expressions of interested parties will be received and considered by the State Department of Reclamation on or before December 15, 1955.
 MARK S. KULP,
 State Reclamation Engineer.

28736

N^o 219

Exhibit 2

RODNEY HANSEN
MINIDOKA COUNTY

HOME ADDRESS
ROUTE 2
PAUL, IDAHO



COMMITTEES
FINANCE
CHAIRMAN
AGRICULTURE
GUBERNATORIAL APPOINTMENTS

Idaho State Senate

THIRTY-SEVENTH SESSION
CAPITOL BUILDING
BOISE

REC'D JAN 31 1964

Route 2
Paul, Idaho
January 29, 1964

The Honorable Robert E. Smylie
Governor of Idaho
State Capitol Building
Boise, Idaho

RECEIVED
FEB 5 1964

Department of Reclamation

Dear Governor:

Enclosed is a letter to Mr. Carl Tappan regarding the Bureau of Reclamation application for water rights on the Northside Project.

It seem unfair that wells drilled in 1950 should have a water right that is preceded by a well drilled in 1960.

Anything you might do to help us in this regard would be appreciated.

Sincerely yours,

Rodney A. Hansen
Rodney A. Hansen

Carl Tappan

20735

RECEIVED

JAN 30 1964

Department of Reclamation

FORMAL PROTEST

STATE OF IDAHO)
) ss.
County of Minidoka)

I do hereby certify and declare that I own an underground water application, filed with the Idaho State Reclamation Engineer subsequent to the U. S. Bureau of Reclamation filing of 1948, and I do hereby protest the attempt now made by the Bureau to date its certificate back to 1948.

Under the Idaho law, I, as an individual, have to either pump the water onto the land within the time established or forfeit the priority gained by the filing. There is no legal or moral reason why the Federal Bureau of Reclamation should not be required to live up to the same laws. There should not be one set of rules for the federal government and another set for ordinary individuals. The powerful and the weak should receive the same treatment from the great State of Idaho.

The application of the Bureau of Reclamation to extend time within which to submit proof of the completion of works, and make presentation of the record, was denied in a formal decision by the Idaho State Reclamation Engineer on April 5, 1956. This previous decision by the Idaho State Reclamation Engineer has never been appealed or reversed in any manner and the Bureau of Reclamation's rights have been terminated.

The evidence submitted by the Bureau of Reclamation, in support of its application, affirmatively establishes that it fails to come within the exceptions provided by the Idaho statutes and the application should be peremptorily dismissed.

A decision in favor of the Bureau of Reclamation's application would result in a definite loss of property rights to all the individual water right holders who relied upon the failure of the Bureau of Reclamation to complete the project under the terms of the Idaho state statutes. These same holders of water rights are willing to honor the Bureau of Reclamation's priority as to those lands actually developed and irrigated within the time allowed by law, as previously determined, but believe that any further extension would be not only illegal, but would seriously damage and injure their own water rights.

I am informed, and now believe, that the failure of the Bureau to complete its wells within the five-year period was deliberate and was based on its policy of completing only a few wells per year. The Bureau publicly announced this program in 1948 and claimed that it would only develop the wells indicated in its permit as ground water conditions were proven. This "go slow" policy was relied upon by many individual persons and companies who have drilled wells in this area as proof that the Bureau would not attempt to destroy existing water

20726

Exhibit 4

rights through its prior filing. Also, such a policy also indicated that the Bureau would be content with a water right priority established by the actual use of proven water. I seriously doubt that the Bureau is able to present any evidence that it is entitled to such consideration within the meaning of the statute. Certainly, the statute contemplates that the grounds for such request must be based on facts and conditions beyond the control of the Bureau and not facts and conditions resulting from the deliberate policy of the Bureau or resulting from their own negligence or indifference. I am not aware that any bona fide request made by the Bureau for appropriations from Congress for the drilling of these wells or the purchasing of pumps for the same was denied.

It is earnestly urged that the State Engineer, in furtherance of justice and the democratic process, exercise his discretion in favor of the individual applicants and against the Bureau, and refuse to grant, or even hear, further proceedings attempting to relate back Permit 20736, or any other permit, and the formal decision of the State Reclamation Engineer of April 5, 1956 be recognized, honored and upheld.

Dale H Burtis
Protestor

Address: RT # 3
Rupert Idaho

Subscribed and sworn to before me this 29th day of January, 1964.

(seal)

Leis E. Stephenson
Notary Public
Residing at Rupert Idaho
My Commission Expires 12-1-65

RECEIVED
JAN 30 1964

Department of Reclamation

FORMAL PROTEST

STATE OF IDAHO)
) ss.
County of Minidoka)

I do hereby certify and declare that I own an underground water application, filed with the Idaho State Reclamation Engineer subsequent to the U. S. Bureau of Reclamation filing of 1948, and I do hereby protest the attempt now made by the Bureau to date its certificate back to 1948.

Under the Idaho law, I, as an individual, have to either pump the water onto the land within the time established or forfeit the priority gained by the filing. There is no legal or moral reason why the Federal Bureau of Reclamation should not be required to live up to the same laws. There should not be one set of rules for the federal government and another set for ordinary individuals. The powerful and the weak should receive the same treatment from the great State of Idaho.

The application of the Bureau of Reclamation to extend time within which to submit proof of the completion of works, and make presentation of the record, was denied in a formal decision by the Idaho State Reclamation Engineer on April 5, 1956. This previous decision by the Idaho State Reclamation Engineer has never been appealed or reversed in any manner and the Bureau of Reclamation's rights have been terminated.

The evidence submitted by the Bureau of Reclamation, in support of its application, affirmatively establishes that it fails to come within the exceptions provided by the Idaho statutes and the application should be peremptorily dismissed.

A decision in favor of the Bureau of Reclamation's application would result in a definite loss of property rights to all the individual water right holders who relied upon the failure of the Bureau of Reclamation to complete the project under the terms of the Idaho state statutes. These same holders of water rights are willing to honor the Bureau of Reclamation's priority as to those lands actually developed and irrigated within the time allowed by law, as previously determined, but believe that any further extension would be not only illegal, but would seriously damage and injure their own water rights.

I am informed, and now believe, that the failure of the Bureau to complete its wells within the five-year period was deliberate and was based on its policy of completing only a few wells per year. The Bureau publicly announced this program in 1948 and claimed that it would only develop the wells indicated in its permit as ground water conditions were proven. This "go slow" policy was relied upon by many individual persons and companies who have drilled wells in this area as proof that the Bureau would not attempt to destroy existing water

28726

Exhibit 5

rights through its prior filing. Also, such a policy also indicated that the Bureau would be content with a water right priority established by the actual use of proven water. I seriously doubt that the Bureau is able to present any evidence that it is entitled to such consideration within the meaning of the statute. Certainly, the statute contemplates that the grounds for such request must be based on facts and conditions beyond the control of the Bureau and not facts and conditions resulting from the deliberate policy of the Bureau or resulting from their own negligence or indifference. I am not aware that any bona fide request made by the Bureau for appropriations from Congress for the drilling of these wells or the purchasing of pumps for the same was denied.

It is earnestly urged that the State Engineer, in furtherance of justice and the democratic process, exercise his discretion in favor of the individual applicants and against the Bureau, and refuse to grant, or even hear, further proceedings attempting to relate back Permit 20736, or any other permit, and the formal decision of the State Reclamation Engineer of April 5, 1956 be recognized, honored and upheld.

Roger Dean
Protestor

Address: 929 J-St.
Rupert Idaho

Subscribed and sworn to before me this 29th day of January, 1964.

(seal)

Leis E. Stephenson
Notary Public
Residing at Rupert Idaho
My Commission Expires 12-1-65

RECEIVED
JAN 30 1964

Rupert, Idaho
Jan. 28, 1964

Mr. Carl Tappan
State Reclamation Engineer
State House
Boise, Idaho

Department of Reclamation

Dear Sir,

I wish to make this formal protest to the U.S.B.R. trying to establish a 1948 date on their 177 wells and 1100 cubic feet per minute of water from underground waters north of Rupert.

The U.S.B.R. had a permit dated 1948 which they did not complete or prove up on according to state laws by 1953, at which time they asked for an extension and were denied this extension in a determination by the State Reclamation Engineer in 1956, so I understand.

Since 1948 there has been about 100,000 acres of private land put under cultivation by private capital as against about 63,000. acres of U.S.B.R. land by United States Government public funds.

I protest the U.S.B.R. asking preferential treatment because I believe that the private individual who has spent his private capital should take his fair place with the U.S.B.R. on the application date he has used or whatever means of determination is used. I don't believe that government agencies should at any time jeopardize the legal rights of private individuals.

I also protest because the legal notice was at Christmas time when no one was suspecting such a thing (I have talked to no one who saw the legal notice in the paper.). I also protest the hearing being held in Ada county some 175 miles away from the project being involved. I found out about the hearing at 12:30 Jan. 13, 1964 to late to get to a hearing in Boise.

I protest because this date would jeopardize about 100,000 acres of private which could be a blow to the economy of Idaho.

I would like to ask the State Reclamation Engineer that a hearing could be held that would be fair to all interested parties at Rupert, Idaho where this land is located.

Sincerely yours

Roger Dean

Roger Dean

S $\frac{1}{2}$ Sec. 36 T7S R23 E.B.M.

NW $\frac{1}{4}$ Sec. 35 T7S R25 E.B.M.

NE $\frac{1}{4}$ Sec. 17 T7S R25 E.B.M.

S $\frac{1}{2}$ Sec. 5, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$

T8S, R26E.B.M.

Subscribed and sworn to before me this 29th day of January, 1964

Roger Dean
Notary Public for Idaho
Residing at Rupert, Idaho

20736

PROTEST

We, the owners of underground water applications filed with the Idaho State Reclamation Engineer since the U. S. Bureau of Reclamation filed their application in 1948, protest the extension of time now sought by that Bureau to perfect its application.

We individuals have to either pump the water on to the land within the time established or forfeit the priority gained by the filing. There is no reason on earth why the Federal Bureau of Reclamation should not be required to live up to the same rules. There should not be one set of rules for the Federal Government and another set for ordinary individuals. The powerful and the weak should receive the same treatment from the great State of Idaho.

The extension sought is undemocratic, unfair and unjust. It is an attempt to prefer the great and powerful Federal Bureau of Reclamation at the expense of the small settlers on this land.

It is earnestly urged that the State Engineer, in furtherance of justice and the democratic process of first come, first served, exercise his discretion in favor of the individual applicants and against the Bureau and refuse the extension sought under permit 20736 and all other Bureau of Reclamation permits.

NAME	ADDRESS
<i>Quynhu Lamplin</i>	<i>Minidoka Idaho</i>
<i>Howard W. Wiggins</i>	" "
<i>Howard H. Wiggins</i>	" "
<i>Ray F. Fronsinger</i>	<i>Minidoka, Idaho</i>
<i>John J. Bell</i>	<i>Rupert Idaho</i>
<i>Capital Company By E. Wayne</i>	<i>Rupert, Idaho</i>
<i>Harold Medquater</i>	<i>Rupert Idaho</i>
<i>Norman J. Henschel</i>	<i>Rupert Idaho</i>

18

20736

Exhibit 6

RECEIVED
FEB 6 1964

Department of Reclamation

6957

718 Grant Avenue
Twin Falls, Idaho
February 3, 1964

Mr. Carl Tappan
State Reclamation Engineer
State House
Boise, Idaho

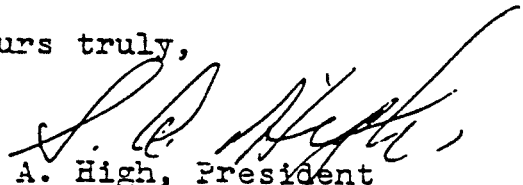
Dear Mr. Tappan:

It has come to the attention of the Magic Valley Pumpers Association that the A and B Irrigation District, Rupert, Idaho, is making application for Ground Water Rights for their District--these rights, for the entire District, to date back to the year 1948.

The Magic Valley Pumpers Association feels--in fairness to the other Ground Water appropriators throughout the state--that this application should be broken down to individual wells, and priority granted in accordance with the time of the development of each well. Inasmuch as the A and B District has been in the process of development since 1953, it does not seem possible that all of their land should have the same priority.

At this time we would like to go on record as opposing the issuance of any License for water rights, other than in the same manner as used for the individual.

Yours truly,


S. A. High, President
Magic Valley Pumpers Association

cc: H. W. Van Slyke,
Mgr. A. & B District

20736

Exhibit 7

RECEIVED
FEB 3 1964

Department of Reclamation

FORMAL PROTEST

STATE OF IDAHO)
) ss.
County of Minidoka)

I do hereby certify and declare that I own an underground water application, filed with the Idaho State Reclamation Engineer subsequent to the U. S. Bureau of Reclamation filing of 1948, and I do hereby protest the attempt now made by the Bureau to date its certificate back to 1948.

Under the Idaho law, I, as an individual, have to either pump the water onto the land within the time established or forfeit the priority gained by the filing. There is no legal or moral reason why the Federal Bureau of Reclamation should not be required to live up to the same laws. There should not be one set of rules for the federal government and another set for ordinary individuals. The powerful and the weak should receive the same treatment from the great State of Idaho.

The application of the Bureau of Reclamation to extend time within which to submit proof of the completion of works, and make presentation of the record, was denied in a formal decision by the Idaho State Reclamation Engineer on April 5, 1956. This previous decision by the Idaho State Reclamation Engineer has never been appealed or reversed in any manner and the Bureau of Reclamation's rights have been terminated.

The evidence submitted by the Bureau of Reclamation, in support of its application, affirmatively establishes that it fails to come within the exceptions provided by the Idaho statutes and the application should be peremptorily dismissed.

A decision in favor of the Bureau of Reclamation's application would result in a definite loss of property rights to all the individual water right holders who relied upon the failure of the Bureau of Reclamation to complete the project under the terms of the Idaho state statutes. These same holders of water rights are willing to honor the Bureau of Reclamation's priority as to those lands actually developed and irrigated within the time allowed by law, as previously determined, but believe that any further extension would be not only illegal, but would seriously damage and injure their own water rights.

I am informed, and now believe, that the failure of the Bureau to complete its wells within the five-year period was deliberate and was based on its policy of completing only a few wells per year. The Bureau publicly announced this program in 1948 and claimed that it would only develop the wells indicated in its permit as ground water conditions were proven. This "go slow" policy was relied upon by many individual persons and companies who have drilled wells in this area as proof that the Bureau would not attempt to destroy existing water

20736

Exhibit 8

rights through its prior filing. Also, such a policy also indicated that the Bureau would be content with a water right priority established by the actual use of proven water. I seriously doubt that the Bureau is able to present any evidence that it is entitled to such consideration within the meaning of the statute. Certainly, the statute contemplates that the grounds for such request must be based on facts and conditions beyond the control of the Bureau and not facts and conditions resulting from the deliberate policy of the Bureau or resulting from their own negligence or indifference. I am not aware that any bona fide request made by the Bureau for appropriations from Congress for the drilling of these wells or the purchasing of pumps for the same was denied.

It is earnestly urged that the State Engineer, in furtherance of justice and the democratic process, exercise his discretion in favor of the individual applicants and against the Bureau, and refuse to grant, or even hear, further proceedings attempting to relate back Permit 20736, or any other permit, and the formal decision of the State Reclamation Engineer of April 5, 1956 be recognized, honored and upheld.

Mack W. Weibauer
Protestor

Address: Pl 1

Paul J. Dalio

Subscribed and sworn to before me this 30th day of January, 1964.

(seal)

Laird E. Stephenson
Notary Public
Residing at Empire, Idaho
My Commission Expires 12-1-65

RECEIVED

FEB 10 1964

Department of Reclamation

FORMAL PROTEST

STATE OF IDAHO)
) ss.
County of Minidoka)

I do hereby certify and declare that I own an underground water application, filed with the Idaho State Reclamation Engineer subsequent to the U. S. Bureau of Reclamation filing of 1948, and I do hereby protest the attempt now made by the Bureau to date its certificate back to 1948.

Under the Idaho law I, as an individual, have to either pump the water onto the land within the time established or forfeit the priority gained by the filing. There is no legal or moral reason why the Federal Bureau of Reclamation should not be required to live up to the same laws. There should not be one set of rules for the federal government and another set for ordinary individuals. The powerful and the weak should receive the same treatment from the great State of Idaho.

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The evidence submitted by the Bureau of Reclamation, in support of its application, affirmatively establishes that it fails to come within the exceptions provided by the Idaho statutes and the application should be peremptorily dismissed.

A decision in favor of the Bureau of Reclamation's application would result in a definite loss of property rights to all the individual water right holders who relied upon the failure of the Bureau of Reclamation to complete the project under the terms of the Idaho state statutes. These same holders of water rights are willing to honor the Bureau of Reclamation's priority as to those lands actually developed and irrigated within the time allowed by law, as previously determined, but believe that any further extension would be not only illegal, but would seriously damage and injure their own water rights.

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destroy existing water rights through its prior filing. Also, such a policy also indicated that the Bureau would be content with a water right priority established by the actual use of proven water. I seriously doubt that the Bureau is able to present any evidence that it is entitled to such consideration within the meaning of the statute. Certainly, the statute contemplates that the grounds for such request must be based on facts and conditions beyond the control of the Bureau and not facts and conditions resulting from the deliberate policy of the Bureau or resulting from their own negligence or indifference. I am not aware that any bona fide request made by the Bureau for appropriations from Congress for the drilling of these wells or the purchasing of pumps for the same was denied.

It is earnestly urged that the State Engineer, in furtherance of justice and the democratic process, exercise his discretion in favor of the individual applicants and against the Bureau; and refuse to grant, or even hear, further proceedings attempting to relate back Permit 20736, or any other permit, and the formal decision of the State Reclamation Engineer of April 5, 1956 be recognized, honored and upheld.

Vernon C. Phillips
Protestor

Address: Rt 1 Box 133
Paul, Idaho

Subscribed and sworn to before me this 3rd day of February, 1964.

(seal)

Louis B. Stephenson
Notary Public
Residing at Rupert, Idaho
My Commission Expires 12-1-65

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR
MINIDOKA COUNTY.

G. L. DEAN AND SONS, an Idaho
Corporation,

Appellant,

vs.

CARL E. TAPPAN, STATE RECLAMATION
ENGINEER,

Respondent.

OPINION ON MOTION TO DISMISS APPEAL

4609 Civil No. 4609.

11 1:00
10th February 1966
August C. Smith Clerk
by E. Halling Dept

This is an appeal, pursuant to 42-224, I.C., from the granting of a license and certificate of water right by the respondent to the United States on June 10, 1965. The appeal was filed September 28, 1965. The respondent moves the dismissal of the appeal on the basis that it is not timely filed.

The appeal provisions of 42-224 provide:

"Such appeal shall be taken within sixty days from the date of license.."

The sixty days lapsed August 9, 1965. The appellant, however, argues that appeal time may be enlarged when the failure to appeal within the allowed time is the result of fraud, misrepresentation or other act of the respondent causing the appellants to allow the time to lapse. The appellant states, and apparently correctly, that it had no notice of the entry and issuance of the license and no way of knowing of the entry and issuance short of sitting in the respondent's office every day. The respondent contends that the appeal time is jurisdictional and cannot be extended by an action or inaction of the parties or through any act of the Court.

Appeal times are generally held to be jurisdictional and not subject to extension by the parties. Penny v. Nez Perces County, 4 Idaho 642, 645 (1895); Re Hanley, 142 P2d 423, 149 ALR 1250 (1943); 4 AmJur 2d 782. Notice of the entry of an order is, in the absence of a statute requiring it, not necessary to its validity. Fite v. French, 54 Idaho 104, 108; Cowee v. Marsh, 324 P2d 553, 554 (Calif 1958); 49 CJS 236. It would not appear that administrative law rules are any different. 2 AmJur2d 620. Absent statute to the contrary, then, the time for appeal must be said to ordinarily run from the entry of the order, not from the time notice is received. 4A CJS 122.

There are, however, decisions and textual statements concluding that fraud or other dereliction of the respondent can excuse an untimely filing by the appellant. 4A CJS 148; 4 AmJur 2d 786; Annot., 149 ALR 1261 (1944). Special circumstances resulting in deprivation of the rights of the appellant have, in some cases, required a relaxation of the rule. Boruff v. U.S., 310 F2d 918, 921 (5th Cir 1962).

The Idaho Rules of Civil Procedure require notice of orders and judgments to be given to the interested parties. Rule 77(d), IRCP. There has been no suggestion, however, by either the courts or the legislature that a failure of compliance with this Rule would result in an extension of time within which to appeal.

Exhibit 10

The appellant states that certain procedural steps essential to the issuance of the license were not accomplished by the United States. The respondent argues that appellant cannot, in any event, appeal because it failed to lodge formal protests within the time required by law. As I see it, neither question can be decided at this stage of the proceedings. The only question is whether the appeal, on the basis of its filing date, can be considered at all.

It is apparently true that the respondent agreed to keep the appellant's counsel advised of whatever action was taken upon the United States' application for the waters in question. His failure to do so is at least censurable and possibly gives rise to a suspicion of a deliberate intention to avoid an appeal. Nevertheless, our law is rather well established that appeal times are jurisdictional and the fact is that the appeal was not filed within the required time. It is the filing and not the notice that starts the time. I am of the opinion that I am without authority to reach any other conclusion. It occurs to me that a direct action against the respondent would be warranted in this case but that question is not before me and I make no comment as to the likelihood of success of such a venture.

The appeal must be dismissed and the motion is granted. Counsel for the respondent will prepare and submit an appropriate order.

DATED this 9th day of February, 1966.



DISTRICT JUDGE.

Certificate of Service

I certify that on this 27th day of June 1995, I served a true and correct copy of this UNITED STATES' RESPONSE TO MOTION TO FILE LATE OBJECTION and AFFIDAVIT OF DARIA J. ZANE on the following:

1. by Federal Express:

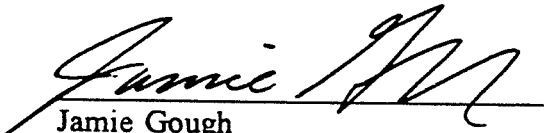
Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

2. by United States mail, postage prepaid, addressed as follows:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
Post Office Box 44449
Boise, Idaho 83711-4449

Dana L. Hofstetter, Esq.
Holland & Hart
P.O. Box 2527
Boise, ID 83701

Laird Lucas
Land & Water Fund of the Rockies
P.O. Box 1612
Boise, ID 83701


Jamie Gough
CACI, Inc.