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LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

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Movant's Name:
A & B Irrigation District

Attorney's Name & Address:
Roger D. Ling
LING, NIELSEN & ROBINSON
Attorneys at Law
P. O. Box 396
Rupert, Idaho 83350
Telephone (208) 436-4717
Facsimile (208) 436-6804

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

BRIEF IN OPPOSITION TO
MOTION FOR PERMISSIVE REVIEW

COMES NOW A & B Irrigation District, one of the parties
to Subcase No. 36-02080, by and through its attorney of record, and
submits to the Court- its Brief in Opposition to the Motion for
Permissive Review filed by Magic Valley Underground Pumpers
Association, Inc., and its individual members, hereinafter referred
to as "Association."

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Prior Proceedings

On November 2, 1992, Notice was given to all claimants in the Snake River Basin that the Director's Report for Reporting Area 3 (Basin 36) had been filed with the District Court. Claim No. 36-02080 in the name of the United States was recommended for approval by the Director in the Director's Report. The time for filing objections expired on May 1, 1993. The time for filing responses to objections expired on September 1, 1993. The only objection to Claim No. 36-02080 was made by A & B Irrigation District, relating to the contractual rights of A & B Irrigation District with the United States for the use of water under the water right represented by the claim on lands within A & B Irrigation District. On July 27, 1994, in reliance upon the unobjected to claim for Water Right No. 36-02080, as it relates to the validity of the claim and its priority date, A & B Irrigation District filed a Petition for a Delivery Call on July 27, 1994. Notice of the Petition was served on all claimants in the SRBA with a junior right from the Eastern Snake Plain Aquifer on August 10, 1994. Over four (4) months after the service of Notice of A & B Irrigation District's Petition for Delivery Call, the Association filed its Motion for Leave to File a Late Objection. Under this Motion, the Association sought to file an Objection to contest the priority date of Water Right No. 36-02080, represented by a license issued by the State Reclamation Engineer, now known as the Director

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of the Idaho Department of Water Resources. In essence, this Objection sought to contest the proceedings of the state agency and Director in charge of issuing licenses for the appropriation of waters of the State of Idaho.

Special Master Dolan, in entering his Order Denying the Association's Motion for Leave to File Late Objection, applied the standard of Rule 55(c) of the Idaho Rules of Civil Procedure, found that the Association had not exercised due diligence and failed to show a meritorious defense, and therefore denied the Motion to File a Late Objection in this subcase.

Legal Points and Authority

The Association recognizes that it filed a Motion to File a Late Objection on behalf of the individual members of the Association, who are claimants in the SRBA. It is therefore clear that in the Association's reference to acts and knowledge of the Association, it is in fact referring to the acts and knowledge of its individual members. The knowledge of an individual member cannot be ignored by referring to the knowledge of the "Association." As only the individual claimants in the SRBA have standing to file an Objection, only the knowledge and acts of the individual members of the Association are relevant as to whether or not a basis for filing a late Objection was shown.

SRBA Administrative Order 1 , Section 11(d) provides:

A special master or a party to a subcase may seek permissive review of the special master's

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interlocutory determination by the Presiding Judge where the interlocutory determination involves a controlling question of law as to which there are substantial grounds for difference of opinion and in which immediate consideration of the determination may advance the orderly resolution of the litigation. ...

To determine whether or not a permissive review of the special master's Order Denying Motion for Leave to File Late Objection should be recommended, the special master must find the following:

1. Is the Association a party to this subcase?
2. Does the Order Denying Motion for Leave to File Late Objection dated August 21, 1995 involve a controlling question of law?
3. Are there substantial grounds for a difference of opinion of any controlling question of law?
4. Whether immediate consideration of the determination may advance the orderly resolution of the litigation.

It is submitted that the Association cannot meet the first criteria in seeking to obtain a permissive review of the special master's Order. The Association is not a party to this subcase, but was seeking to become a party to the subcase by the filing of a late Objection. As it has never been allowed to file a late Objection, and did not file an Objection within the time allowed by the Court, the Association is not a party to this subcase.

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350

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To fully analyze the second criteria for granting a permissive review, it is necessary to identify the controlling question of law. The Association concedes that the standard provided by I.R.C.P. Rule 55(c) is controlling, as permission to file a late Objection is, in essence, the setting aside of an entry of default. A review of the Order of the special master dated August 21, 1995 makes it clear that he followed the standard contained in Rule 55(c) of I.R.C.P. Rule 55(c) provides, in part:

Setting Aside Default Judgment. -- For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

The Idaho Appellate Court in McFarland v. Curtis, 123 Idaho 931, 854 P.2d 274, 279 (Idaho App. 1993) stated:

The courts which have held that the Rule 55(c) "good cause" standard is more lenient than the Rule 60(b) standards have set forth several factors to consider. The primary considerations are whether the default was willful, whether setting aside the default would prejudice the opponent, and whether a meritorious defense has been presented.

The special master has noted that under Rule 55(c), the party must show that he or she has acted in good faith and exercised due diligence in the prosecution and protection of his or her rights, such as an ordinarily prudent person would exercise under similar conditions. (Order at p.9) The special master has also noted that the Association offered no explanation as to why some of its senior members did not file timely Objections in the

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SRBA. (Order at p.11) Finally, the special master noted that the Association's claimed meritorious defense is barred by the doctrine of *res judicata*. Again, it is clear that in making these findings, the special master did follow the standards set forth in Rule 55(c). Therefore, the third criteria for permissive appeal has not been met, as there are no substantial grounds for a difference of opinion on the standard to be applied in granting or denying a Motion to File a Late Objection.

Finally, it is clear that the consideration of the standards used by the special master in denying the Motion to File a Late Objection, which is not in dispute, will not advance the orderly resolution of this subcase. The orderly resolution of this subcase will be obtained in an orderly fashion as the result of the denial of the Motion by the Association, and not by an immediate consideration of the standard used to deny the filing of a late Objection.

It must be emphasized that the issue as to whether or not the special master abused his discretion in denying the filing of a late objection is not the threshold issue in recommending whether or not the permissive review should be granted or denied. It is respectfully submitted that there is no difference of opinion, or substantial grounds for a difference of opinion, as to the controlling question of law in ruling upon a Motion to File a Late

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3 Objection. For this reason, permissive review of the special
4 master's Order should be denied.

5 Notwithstanding the extensive argument by the Association
6 on the merits of the issues they seek to raise in their Objection,
7 that is not the issue before the special master or the district
8 court. Before that issue can be addressed, there must be a showing
9 that a recommendation for permissive review is warranted. The
10 Association has failed to establish the existence of the criteria
11 set forth in section 11(d) of SRBA A.O.1.

12 It is only after the Association has established a basis
13 for permissive review, can the issue of an abuse of discretion by
14 the special master be reviewed in his finding of no "good cause"
15 for relief from the default, prejudice to the claimants, and the
16 absence of a "meritorious defense." It is improper to address
17 these issues to support a permissive review.

18 Respectfully submitted, this 7th day of February, 1996.

19 LING, NIELSEN & ROBINSON

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22 By: 

Roger D. Ling, Attorneys for
A & B Irrigation District

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CERTIFICATE OF MAILING

I hereby certify that on the 7th day of February, 1996, I served copies of the foregoing *Brief in Opposition to Motion for Permissive Review* upon:

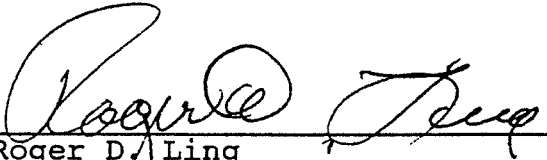
United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, Box 33
Boise, Idaho 83734

Chief, Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Jeffrey C. Fereday, Esq.
GIVENS, PURSLEY & HUNTLEY
P. O. Box 2720
Boise, ID 83701

Daria J. Zane
Attorney at Law
U.S. Department of Justice
Environmental and Natural Resource Division
General Litigation Section
Washington, D.C. 20530

by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to said attorneys at the foregoing addresses.



Roger D. Ling

LING, NIELSEN & ROBINSON
ATTORNEYS AT LAW
RUPERT, IDAHO 83350