

Respondents' Names:

May Farms, Ltd.,
Sand Springs Ranch Partnership,
and Faulkner Land and Livestock Company

3-22

Attorneys' Names and Address:

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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 Nos. 36-00021, 36-00048A, 36-00049,
	)	36-00051A, 36-10283A and 36-15168
	)	
Case No. 39576	)	MEMORANDUM IN SUPPORT OF
	)	SPECIAL MASTER'S FINDINGS AND
	)	RECOMMENDATION OF DENIAL OF
	)	CLAIMANT'S CONSOLIDATED MOTION
	)	FOR PERMISSIVE REVIEW OF MASTER'S
	)	ORDERS
_____	)	

DESCRIPTIVE SUMMARY

This Memorandum is May Farms, Ltd.'s, Sand Springs Ranch Partnership's and Faulkner Land and Livestock Company's (collectively the "Ground Water Users") response to issues raised in the Claimants' Reply to Special Master's Findings and Recommendation of Denial of Claimant's Consolidated Motion for Permissive Review of the Master's Orders.

MEMORANDUM

I. Introduction.

The Ground Water Users sought leave to file late responses in the above-referenced subcases pursuant to the SRBA Court's July 28, 1995 Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative Order 1. The July 28, 1995 Order provided a special "mechanism" for parties to seek belated participation in subcases where participation became necessary due to the removal of the Director and IDWR as a party:

The Director's Report is no longer a pleading, and IDWR and the Director are no longer a party. Those parties who opted to rely on IDWR to litigate and advocate in favor of the Director's Report are now 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.

July 28, 1995 SRBA Order at 2.

The July 28, 1995 Order provided parties 21 days to file motions to file late objections or responses accompanied by fully executed Objection or Response forms which did not enlarge or add to existing issues. Id. The Order further provided that the Special Master shall require "good cause and meritorious position" in reviewing these motions and that parties must "allege facts which, if true, would constitute a meritorious position." Id. Pursuant to the July 28, 1995 Order, Special Master Dolan on December 12, 1995 granted the Ground Water Users' Motions to File Late Responses in the above-referenced subcases.

The claimants, Hagerman Water Users Association, Dan and Erma McFadden, Walten E. Mildren, Harry R. Gisler and Ya-Ta-Hay Investments, Inc. (collectively the "Claimants") now seek permissive review of the Special Master's decision. The Ground Water Users previously submitted a Consolidated Response Memorandum in Opposition to Motion for Permissive Review of Master's Orders (copy attached hereto as Exhibit A). That Memorandum responded to issues raised by the Claimants' original Motion for Permissive Review; this Memorandum responds to the Claimants' subsequent Reply to Special Master's

Findings and Recommendation of Denial of Claimants' Consolidated Motion for Permissive review of Master's Orders. Both the Motion for Permissive Review and the Reply filed by the Claimants made the same fundamental argument: Since certain affidavits submitted with the Motions to File Late Responses are defective, the Motions should have been denied. However, the challenged affidavits were "extra" filings and not essential to the Ground Water Users' Motions. Other pleadings submitted to the Court independently provide adequate factual support.

II. Permissive Review On The Issue Of The Validity Of The Challenged Affidavits Is Unjustified Since It Does Not Involve A Controlling Question Of Law.

The issue of the validity of the affidavits is a "red herring": 1.) the Ground Water Users were required only to "allege facts which if proven" would constitute a meritorious case and the affidavits were not necessary since other pleadings besides the challenged affidavits contained adequate allegations of fact; and 2.) even assuming that evidentiary proof by affidavit was required, the Affidavits of Josephine P. Beeman alone (never subject to a motion to strike) provide more than adequate evidentiary support. Because other pleadings besides the challenged affidavits allege sufficient facts, permissive review on the basis of inadequate affidavits is inappropriate. There is no contested "controlling question of law" required for permissive review. Budell v. Todd, 105 Idaho 2, 3, 665 P.2d 701, 702 (1983). Even if the challenged affidavits are struck, other pleadings support the Special Master's decision.

III. Other Pleadings Besides The Challenged Affidavits Allege Sufficient Facts.

The "good cause" component of the Rule 55 (c), I.R.C.P. "good cause" and "meritorious position" standard enunciated in the July 28, 1995 Order is a relatively lenient one. See McFarland v. Curtis, 123 Idaho 931, 935-36, 854 P.2d 274, 278-79 (Ct. App. 1993). At the July 18, 1995 hearing in which the SRBA Court announced the decision that ultimately would be documented in the July 28, 1995 Order, counsel for the Claimants

specifically asked the Court about its interpretation of the good cause standard. The Court explained that it was intended to be a liberal standard where "absent clear facts to the contrary, removal of the Director is tantamount to good cause":

THE COURT: Mr. Brown, any questions?

MR. BROWN: No, Your Honor, other than the obvious one which I think will come up immediately after this hearing; and that is whether the court could give us some indication whether good cause is established by removal of the director alone.

THE COURT: As a general matter, I would say that does establish good cause; but I can conceive a number of situations where there may be objective criteria in a subcase which would require a different result.

So when I say I want to view this process liberally, it is that as a general proposition, absent clear factors to the contrary, removal of the director is tantamount to good cause. You may have taken actions in a subcase previously that would not allow you to get in under this rule.

In Re SRBA, Reporter's Transcript (July 18, 1995) at 27 (emphasis added). The Ground Water Users' deposition transcript excerpts which were submitted to the Court by Affidavits of Patrick D. Brown confirm that the Ground Water Users sought leave to file late responses because of the removal of IDWR as a party. See Deposition of Ralph May, p. 19, ll. 6-21; Deposition of Tom Ambrose, p. 33, ll. 17-25 to p. 34, ll. 1-5, Deposition of Mike Faulkner, p. 32, ll. 24-25 to p. 33, ll. 1-7.

The July 28, 1995 Order does not require proof of a meritorious position, but only that the parties "allege facts which, if true, would constitute a meritorious position." The Ground Water Users' Motions to File Late Responses and the accompanying Responses themselves are based on SRBA claim reviews conducted by IDWR which found the Claimants' claims vastly excessive, in some cases as much as 15 times the usual 1 miner's inch of water per acre. These documents themselves, even without the challenged Affidavits of Tom Ambrose, Ralph May and Mike Faulkner, allege sufficient facts "which, if true, would constitute a meritorious

position." The facts need not be alleged by affidavit. The Responses function like complaints or answers in which facts are alleged. Thus, the challenged affidavits are not the sole basis of the Special Master's decision. Other pleadings allege sufficient facts. The challenged affidavits are not dispositive and, therefore, permissive review on this ground is unjustified.

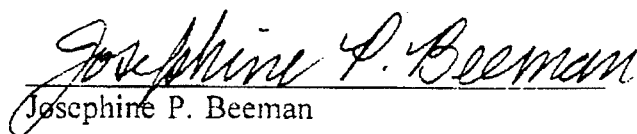
IV. The Unchallenged Affidavits Of Josephine P. Beeman Alone Allege Sufficient Facts.

It should be noted that Josephine P. Beeman's affidavit also were submitted with the Ground Water Users' Motions to File Late Responses. Those affidavits never have been subject to motions to strike by the Claimants. The Affidavits of Josephine P. Beeman submitted to the Court the entire IDWR SRBA claims review file for each of the Claimants' water rights contested by the Ground Water Users. These files, received by Ms. Beeman from IDWR, include the IDWR field examination reports of the Claimants' water use practices. These documents establish the basis for IDWR's and the Ground Water User's assertions that the claims are excessive. Thus, even if the Affidavits of Tom Ambrose, Ralph May and Mike Faulkner were to be struck and evidence by affidavit required, adequate factual allegations supporting the existence of a meritorious position are provided in the IDWR files submitted by the Affidavits of Josephine P. Beeman.

V. Conclusion

Since other unchallenged pleadings provide sufficient factual allegations, the issue raised by the Claimants does not involve a "controlling question of law" and permissive review is inappropriate. For the foregoing reasons, the Claimants' Motion for Permissive Review should be denied.

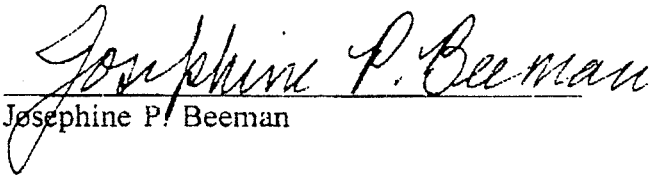
RESPECTFULLY SUBMITTED this 22nd day of March, 1996.


Josephine P. Beeman

CERTIFICATE OF SERVICE

I certify that on the 22nd day of March, 1996, I caused a true and correct copy of the foregoing document to be served on the following person(s) in the manner designated:

Patrick D. Brown	☐	U.S. Mail
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Josephine P. Beeman

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	)	CONSOLIDATED RESPONSE
	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION FOR PERMISSIVE REVIEW OF
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	)	

DESCRIPTIVE SUMMARY

This Memorandum is May Farms, Ltd.'s, Sand Springs Ranch Partnership's and Faulkner Land and Livestock Company's (collectively the "Ground Water Users") response to issues raised in the Claimants' Consolidated Motion for Permissive Review of the Master's Orders and Brief in Support.

MEMORANDUM

The claimants, Hagerman Water Users Association, Dan and Irma McFadden, Walten E. Mildren, Harry R. Gisler and YA-TA-HAY Investments, Inc. (Collectively the "Claimants") seek permissive review "on the grounds that proceedings before masters will be expedited and

CONSOLIDATED RESPONSE MEMORANDUM IN
 OPPOSITION TO MOTION FOR PERMISSIVE
 REVIEW OF MASTER'S ORDERS, Page - 1

**PLAINTIFF'S
 EXHIBIT**

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more efficient if this court now determines whether masters must follow the Idaho Rules of Procedure and Idaho Rules of Evidence." This stated basis for permissive review is most unusual as no one has asserted that the Rules of Civil Procedure and Rules of Evidence do not apply nor did the Special Master issue his decision on this basis. Thus, this matter does not appear to be contested or appropriately appealed.

Although couched in terms of the applicability of the Rules of Civil Procedure and Rules of Evidence, it appears the Claimants really take issue with the special master's decision not to strike the affidavits of Tom Ambrose, Ralph May and Mike Faulkner. However, these matters do not satisfy the criteria for permissive review. The basic criteria for permissive appeal of an interlocutory order is whether the order "involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation." Budell v. Todd, 105 Idaho 2, 3, 665 P.2d 701, 702 (1983). Permissive interlocutory appeals should be granted only in the "exceptional case" and only a limited number of these applications typically are granted. *Id.* at 4, 665 P.2d at 703.

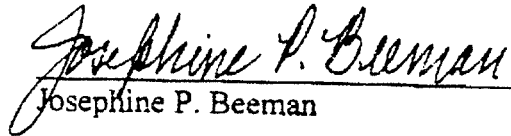
The three challenged affidavits do not involve a "controlling question of law." The affidavits relate factual information also found elsewhere in the court's record. While objecting to the Claimants' motions to strike, the Ground Water Users also noted at hearing and in their reply memorandum that sufficient other evidence exists on the record to allow the filing of the late responses. See Consolidated Reply Memorandum in Support of Motions to File Late Responses at 6-7 (copy of excerpt attached hereto as Exhibit A which is incorporated herein as if set forth in full). The Affidavit of Josephine P. Beeman (not subject to a motion to strike) submitted the Idaho Department of Water Resources' ("IDWR") files for these subcases, including the IDWR field investigation report on which the Director's recommendations are based. The three challenged affidavits simply reiterate information submitted as part of the IDWR files. The Ground Water Users' deposition transcripts which were submitted to the court by affidavits of Patrick D. Brown, also confirm that the Ground Water Users sought leave to file late responses because of the removal of IDWR as a party.

In summary, the Ground Water Users oppose the Claimants' Motion for Permissive Review on the grounds that no one has asserted that the Idaho Rules of Procedure and Rules of Evidence are inapplicable and the contested affidavits are not the only evidentiary support for the Special Master's decision.

CONCLUSION

For the foregoing reasons, May Farms, Ltd., Faulkner Land and Livestock Company and Sand Springs Ranch Partnership respectfully request that the court deny the Claimants' Motion for Permissive Review.

RESPECTFULLY SUBMITTED this 15th day of January, 1996.


Josephine P. Beeman

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CERTIFICATE OF SERVICE

I certify that on the 10th day of January, 1996, I caused a true and correct copy of the foregoing document to be served on the following person(s) in the manner designated:

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Josephine P. Beeman

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MESSAGE: Attached for filing with the Court in the Snake River Basin Adjudication, Case No. 39576, Subcase Nos. 36-00021, 36-00048A, 36-00049, 36-00051A, 36-10283A and 36-15168:

MEMORANDUM IN SUPPORT OF SPECIAL MASTER'S FINDINGS
AND RECOMMENDATION OF DENIAL OF CLAIMANT'S
CONSOLIDATED MOTION FOR PERMISSIVE REVIEW OF MASTER'S
ORDERS

The original will be sent to the Court by regular mail to be conformed and returned.
Thank you.