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Department of Water Resources

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and Faulkner Land and Livestock Company

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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	)	SUPPLEMENTAL MEMORANDUM
	)	
_____	)	

DESCRIPTIVE SUMMARY

This Supplemental Memorandum is May Farms, Ltd.'s, Sand Springs Ranch Partnership's and Faulkner Land and Livestock Company's (collectively the "Ground Water Users'") submission in accordance with Special Master Haemmerle's decision to allow an additional seven day period for supplemental briefing on: 1) the factual showing necessary for demonstrating the existence of a meritorious position; and 2) the role of parties permitted to file late responses in these subcases. This Supplemental Memorandum is filed in conjunction with the Affidavit of Jennifer J. Vansant.

MEMORANDUM

I. Introduction

During the June 5, 1996 Motion for Reconsideration hearing, Special Master Haemmerle provided an additional seven day period for supplemental briefing on the following two issues:

- 1) the factual showing necessary for demonstrating the existence of a meritorious position; and
- 2) the role of parties permitted to file late responses in these subcases. This Supplemental Memorandum addresses those two issues.¹

II. Allegations of Facts, Not Proof of Facts, Is All That Is Necessary In A Rule 55(C), I.R.C.P. Proceeding.

The claimants', Hagerman Water Users Association's, Dan and Erma McFadden's, Walten E. Mildren's, Harry R. Gisler's and YA-TA-HAY Investments, Inc.'s (collectively the "Claimants'") fundamental argument is that the Ground Water Users have not adequately proven the facts constituting their meritorious claim. However, the SRBA Court's original July 28, 1995 Order providing the twenty-one day window for filing these late responses and associated Rule 55(C) case law make it absolutely clear that factual proof is inappropriate at this stage and, rather, that the movant only must "allege facts which, if true, would constitute a meritorious position." July 28, 1995 Order at 2.

In the July 18, 1995 hearing and the resulting July 28, 1995 Order, the SRBA Court established that the standard for allowing the filing of late responses during the twenty-one day window was intended to be liberally applied. The Court indicated that since IDWR was removed as a party, special considerations warranted liberal grants of participation. The SRBA Court adopted the Rule 55(c) rather than the Rule 60(b) or some other more onerous standard, just for that reason. See McFarland v. Curtis, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993) ("A more lenient approach in these cases [Rule 55(c) cases] is consistent with the application of

¹ The Ground Water Users objected, based on Rule 11, I.R.C.P. and other legal grounds, to this Motion for Reconsideration process. Those objections are preserved, and this Supplemental Memorandum shall in no way constitute a waiver of those objections.

the policy that cases should be decided on their merits.”).

The purpose of the meritorious case requirement is to ensure that there is a “real justiciable controversy” to present to the court. *Id.* at 934. Whether in setting aside an entry of default under Rule 55(c) or in applying Rule 55(c) to the pending Motions to File Late Responses, it would be unreasonable to expect the parties to prove facts rather than just merely allege facts. At the time of a Rule 55(c) proceeding, all that is sought is inclusion in the case so that ultimately a trial may occur. Rule 55(c) proceedings generally occur at such an early stage that ultimate evidentiary proof is not yet be available. The Ground Water Users specifically requested the opportunity to conduct discovery but were denied as a result of their non-party status. Conclusive evidentiary proof of the Ground Water Users’ allegations must await discovery and trial.

In some Rule 60(b) cases where there has been not just entry of default by the clerk but where entry of judgment by default has occurred, it has been indicated that facts constituting the meritorious claim must be pled with detail or particularity. *Reeves v. Wisenor*, 102 Idaho 271, 272, 629 P.2d 667, 668 (1981); *Hearst Corporation v. Keller*, 100 Idaho 10, 12, 592 P.2d 66, 68 (1979); *Thomas v. Stevens*, 78 Idaho 266, 271, 300 P.2d 811 (1956). But, even in these Rule 60(b) cases, actual evidentiary proof of facts was not required. Rather, in each of these proceedings, only detailed allegations were necessary:

Further, we hold that in addition to meeting the requirements of I.R.C.P. 60(b) a party seeking to set aside a default judgment must show a meritorious defense going beyond the mere notice requirements which would be sufficient if plead [sic] before default.

Reeves at 272.

When moving to set aside a default judgment, the moving party must not only meet the requirements of I.R.C.P. 60(b) but must also plead facts which, if established, would constitute a defense to the action. It would be an idle exercise for the court to set aside a default if there is in fact no real justiciable controversy. The defense matters must be detailed. . . .

Once a default has been entered the pleading of defensive matter must go beyond the mere notice requirements that would be sufficient if pled before default. Factual details must be pled with particularity.

Hearst at 12 (emphases added).

The facts constituting the defense, whether disclosed by answer, affidavit or both, must also be detailed and must be sufficient, when established, to constitute a defense to the action on its merits. The conclusion of the party or his attorney that the defendant has a good defense is not sufficient. Whether the pleaded facts are sufficient to constitute a defense is also one for the trial court.

Thomas at 271 (emphases added).

It cannot be disputed that the facts in these subcases have been pled with particularity. The Memoranda in Support of the Motions to File Late Responses and the Responses themselves allege specific amounts claimed and contrasting specific amounts which should be decreed. These documents specifically explain that the amounts recommended for decree were based on IDWR examinations and available technical reports. The Ground Water Users encourage the Court to review the initial pleadings filed with the Motions, including the Memoranda in Support and the Responses to confirm the high level of particularity in the pleadings. These pleadings alone are more than adequate to satisfy any requirement that the facts be pled with particularity.

In addition to the Memoranda in Support and the Responses themselves, which alone plead facts with particularity, there also are the Affidavits of Josephine Beeman which submitted the entire IDWR claim investigation files for each of the subcases. These files contain the field notes and calculations on which the ultimate recommendations are based. Further, at the November 22, 1995 hearing, Josephine Beeman referred to the respective IDWR claim investigation files at length, pointing out how those investigations and calculations documented the bases for the IDWR recommendations. Affidavit of Jennifer J. Vansant. Certainly when Ms. Beeman's affidavits are considered along with the other pleadings, it is clear that these Motions have been pled with particularity of the highest order.² In fact, any additional pleading would have been excessive and unduly burdensome on the parties and the Court.

² Counsel for the Claimants continues to assert that they never were served with the Affidavits of Josephine P. Beeman. The Ground Water Users confirm that they did serve the Claimants' counsel with all of the initial pleadings including the Affidavits of Josephine P. Beeman. In fact these Affidavits were specifically referenced in the actual Responses filed on August 18, 1995. In any event, if counsel for the Claimants realized that these documents had been mislaid and were absent from their files, they have had since at least August 18, 1995 to seek to obtain additional copies of the Affidavits.

There certainly is sufficient factual particularity in the pleadings to support Special Master Dolan's original decision to grant the Motions to File Late Responses. The inclusion of the Ground Water Users in the subcases will allow the judicial system to perform as it does best: in two party proceedings where the Court has the benefit of different perspectives on the law and the facts in the subcases. It should be noted that nowhere has the Claimants' counsel alleged that the Ground Water Users substantively do not have a meritorious claim. Rather, the focus of their objections has been whether adequate "proof" of a meritorious position has been submitted. This approach diverts attention from the real issue: Whether the Claimants' claims are, in fact, excessive. There can be no denying that IDWR's recommendations were based on thorough field work and analyses and that the recommendations themselves have been pled with particularity.

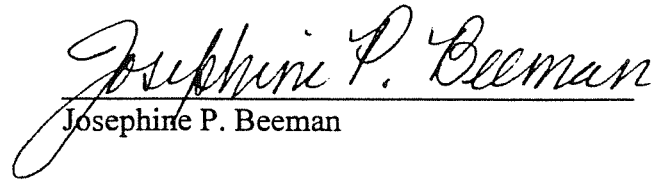
III. The Ground Water Users Will Litigate The Issues Identified By IDWR.

The Ground Water Users' pleadings are based on the review, analysis and recommendations of IDWR for each of the water rights. Throughout these proceedings, the Ground Water Users have confirmed that they would not raise additional issues to those identified by IDWR but would litigate the areas where there were discrepancies between the Claimants' claims and IDWR's recommendations. For example, where there is no discrepancy in the total number of acres irrigated but there is a discrepancy in the total cubic feet per second diverted under a water right, the Ground Water Users would seek to address the flow rate issue but could not raise an issue with respect to the total number of acres irrigated.

As parties to these subcases the Ground Water Users would be able to determine how to represent themselves in the litigation and would be able to determine how to best present their legal position. The Ground Water Users cannot be expected to make the legal arguments or conduct the proceedings as IDWR would have done it if it were still a party. While the Ground Water Users would be stepping into the shoes of IDWR they would be traveling along a path that IDWR has not taken, and, therefore, for which there are no footprints. As an ethical matter, the counsel for the Ground Water Users cannot be bound by IDWR's direction on how the subcases should be handled in the future. While, certainly, the Ground Water Users recognize that they are bound in scope by the issues originally identified by the Claimants and IDWR, how to

prepare and present those issues would be the prerogative of the Ground Water Users.

RESPECTFULLY SUBMITTED this 12th day of June, 1996.


Josephine P. Beeman

CERTIFICATE OF SERVICE

I certify that on the 12th day of June, 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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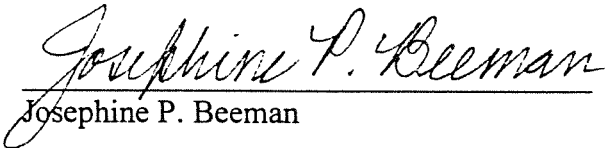
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