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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

Case No. 39576

Subcase Nos. 36-00021, 36-
00039D, 36-00048A, 36-00049, 36-
00051A, 36-02169, 36-04260B, 36-
10283A and 36-15168

**MEMORANDUM IN SUPPORT
OF JOINT CONSOLIDATED
MOTIONS FOR PERMISSIVE
REVIEW OF SPECIAL
MASTER'S ORDERS AND
MOTION FOR EXPEDITED
DECISION**

DESCRIPTIVE SUMMARY

This is Cranney Bros., May Farms, Ltd., Sand Springs Ranch Partnership and Faulkner Land and Livestock Company's Memorandum in Support of their Motions for Permissive Review, which seek review of the Special Master's Orders denying their Motions to File Late Responses in certain Basin 36 subcases following the removal of the Director as a party by the 1994 Amendments to the SRBA Statutes.

MEMORANDUM

Cranney Bros., May Farms, Ltd., Sand Springs Ranch Partnership and Faulkner Land and Livestock Company ("Ground Water Users") hereby submit their Memorandum in Support of Joint Consolidated Motions for Permissive Review of Special Master's Orders and Motion for Expedited Decision regarding the above-captioned Subcase Nos. 36-0021, 36-0039D, 36-00048A, 36-00049, 36-00051A, 36-02169, 36-04260B, 36-10283A and 36-15168 ("Subcases").

I. INTRODUCTION AND PROCEDURAL BACKGROUND

The Ground Water Users' Motions for Permissive Review seek review by the Court of Special Master Haemmerle's June 17, 1996 and July 8, 1996 Orders on Reconsideration of Motions to Strike Affidavits and Motions to File Late Responses ("Haemmerle Orders").¹ The Haemmerle Orders represent the culmination of nearly a year of costly litigation for the Ground Water Users, involving hundreds of pages of pleadings, briefs, affidavits, and orders, and many hours of hearings before the Court and two different Special Masters. Ultimately, at issue is whether the Ground Water Users may avail themselves of the ostensible "window of opportunity" created by the Court for parties affected by the removal of the Director of the Idaho

¹ After a hearing on the judicially restyled Motion to Reconsider, the Special Master issued his June 17, 1997 Order Vacating Hearings and Order Denying Motion to File Late Responses, indicating that findings of fact and conclusions of law would be separately issued within fourteen days thereafter. Just before expiration of the two week period ordinarily allowed for motions for permissive review under Idaho Appellate Rule 12 and having not yet received the expected findings of fact and conclusions of law, the Ground Water Users filed their Joint Consolidated Motion for Permissive Review of Special Master's June 17, 1996 Order.

On July 8, 1996, Special Master Haemmerle issued his findings of fact and conclusions of law with a second Order denying the Ground Water Users party status in the subcases. The Ground Water Users now are filing a separate Motion for Permissive Review of that July 8, 1996 Order. Since both Motions are related (indeed, they relate to the same decision, issued in two parts), this Brief is filed in support of both.

Department of Water Resources ("Department") as a party in the SRBA. Also at issue is whether a full factual record will be presented concerning the disputed water rights, and whether, in resolving subcases in a "test basin", parties whose interests have been affected by changes in the rules of the game, and the adjustments those changes required, will be afforded their due process.

A. Proceedings Before the Court

When the 1994 Legislature removed the Department's Director as a party to the SRBA, the deadline for filing objections or responses to the Basin 36 Director's Report already had passed.² Prior to the removal of the Director, it was apparent and generally understood that the factual basis for the Director's recommendations would be developed for the Court for each disputed claim. The parties to the SRBA had reasonably believed that the final decree would reflect the actual beneficial use of each water right claimed, and that where claims and recommendations differed, actual beneficial use would be determined through trials or settlements in which the Director uniformly was a party. Furthermore, the parties had reasonably assumed the Director's role as a party in presenting the evidence developed through its claims investigations would obviate the need for every SRBA claimant to review every claim reported in every Basin Report, to conduct independent investigations of every claim, and thereafter to litigate every disputed claim that might impact them. With the 1994 legislation these reasonable expectations that at least "someone" would respond to an objection in each subcase

²The deadline for filing responses to Basin 36 recommendations was September 1, 1993.

and develop a full record to form the basis of a rational decree were significantly altered.³

The 1994 legislation dramatically changed the procedural rights and obligations of every party in the SRBA. Claimants throughout the Snake River Basin suddenly found themselves potentially liable for satisfying claims filed in remote test basins, while the likelihood that the Director would be able to fully present the results of his investigation as to those claims had all but vanished.⁴

Consequently, on July 14, 1995, numerous parties⁵ moved the Court for an order amending SRBA Administrative Order No. 1 to "allow any party . . . a limited time to declare an intent to participate as a party in any of the Subcases in reporting areas 1, 2 and 3 to support the Director's Report on previously identified issues, but

³This change in the Director's status as a party also came *after* the filing of a complaint in the case of *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), and *after* the Idaho Supreme Court's resulting decision that the Director was obligated to "deliver" water to Basin 36 spring users. That decision precipitated the first Notice ever issued by the Director to ground water users throughout the Eastern Snake Plain Aquifer that their water rights were subject to possible curtailment to satisfy a call by the claimants in the "test basins."

⁴This essentially was confirmed in the following colloquy with the Court:

MR. LING: So now--and I'm not saying how many people will, but we need to have some opportunity. And I need to talk to my clients and express to them do you want to appear in a particular subcase to defend the director's report because the director may not necessarily be doing that.

THE COURT: No, I think the director will not be doing that.

In Re SRBA, Reporter's Transcript (July 18, 1995) at 19-20.

⁵The Joint Motions for Amendment of Administrative Order 1 and for Expedited Hearing were filed by Idaho Power Company, A & B Irrigation District, Falls Irrigation District, Burley Irrigation District, Aberdeen-Springfield Canal Company, Big Lost River Irrigation District, Fremont-Madison Irrigation District, Mitigation Group, North Side Canal Company, Twin Falls Canal Company, Water Resources Coalition, and J.R. Simplot Company.

not to enlarge or add to existing issues." Joint Motion at 1. The joint movants argued that:

Claimants who now want to participate in the subcases for reporting areas 1, 2 and 3 should be afforded that right as a matter of law and due process. In fairness, the court should allow parties who wish to support the Director's report to file a notice of intent to participate.

Joint Motion at 3.

At the hearing on the Joint Motion, the joint movants urged that the removal of the Director fundamentally changed the status of all remaining parties to the SRBA.

MR. LING: Our concern is that because many of us relied upon the director to support his report and be an adversary in those subcases where a person may have objected to his report and his recommendations, and so nothing was done. Now that he is not there, people are concerned that we now should perhaps--when I say "we," other claimants should have the opportunity to join in that subcase and take that position that the director has taken in his recommendations, and actually support those recommendations . . .

But where the director is not there, it seems those people who want to now assure that the recommendations are properly presented and, to the extent possible, confirmed by the magistrate and ultimately this court, that they should have some window of opportunity to appear in those subcases. And that's what we're asking for, that narrow window of opportunity . . .

Certainly inadvertence and excuse, if that's what we're saying, we have excuse. I'm talking about a reliance on the status as it was when the time for filing objections was there, or responses. Now that status has changed because the director is no longer an adversary in the adjudication.

In Re SRBA, Reporter's Transcript (July 18, 1995) at 4, 5 and 19. The Court granted the Joint Motion to the extent of providing a 21-day "window of opportunity" within which to file a pleading styled as a "motion to file late objection or response," but

denied the Joint Motion to the extent that it sought an amendment to AO1, or the use of a "motion to participate" permitted under AO1, 6(g). Instead, leave to file late objections or responses would be based on the good cause and meritorious position elements as in Rule 55(c) motions.

Responding to a question regarding what would establish "good cause" for a motion to file late objection or response, the Court stated that:

As a general matter, I would say [removal of the director alone] 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 review 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 (emphases added).

B. Proceedings Before Special Master Dolan

The Ground Water Users' Motions to File Late Responses, and their proposed Responses adopting the Director's Report and Responses, were filed within the 21 day "window" on August 18, 1995. The Ground Water Users' pleadings did not enlarge the issues beyond those already raised by the Claimant and the Director in the Subcases. Because the subject Subcases were in Basin 36, the Ground Water Users' Motions were heard by Special Master Dolan, to whom all Basin 36 Subcases had been referred.

Following a November 22, 1995 hearing on the Ground Water Users' respective Motions to File Late Responses and the Claimants' Motions to Strike respecting various Ground Water Users' affidavits, Special Master Dolan issued his order

allowing the Ground Water Users' Late Responses, and denying the Claimants' Motion to Strike. *See Order Denying Motions to Strike Affidavits and Order Granting Motions and Amended Motions to File Late Responses*, December 12, 1995, and *Amended Order Denying Motions to Strike Affidavits and Order Granting Motions to File Late Responses*, December 21, 1995 ("Dolan Order") attached hereto as Exhibit A. On December 14, 1995 the Claimants filed their Motion to Stay the Subcases, which was denied by Special Master Dolan on January 2, 1996. The Claimants thereafter sought permissive review of the Dolan Order, which was denied by way of the Special Master's *Recommendation of Denial of Claimant's Consolidated Motion for Permissive Review of Master's Orders*, February 28, 1996.

In the meantime, the Claimants had failed to respond to Cranney Bros.' pending discovery requests, and after the deadline for responses had passed, sought a protective order from the Court to avoid having to respond. That motion, and Cranney Bros.' Motion to Compel, were held in abeyance by the Court due to "the overlap of issues associated with the pending *Motion for Permissive Review* filed by the 'Claimants'" *Order Denying Request for Expedited Hearing*, March 26, 1996.

C. Proceedings Before Special Master Haemmerle

On April 24, 1996, the Subcases were withdrawn from Special Master Dolan's jurisdiction and reassigned to Special Master Haemmerle. So, too, was the Claimants' Motion for Permissive Review, which still was pending before the Court. Further, in its *Order of Temporary Remand to Newly Appointed Special Master*, the Court instructed Special Master Haemmerle to address the Claimants' Motion for Permissive Review as a Motion for Reconsideration. A hearing on this restyled

Motion for Reconsideration was held on June 5, 1996, at which Special Master Haemmerle proceeded directly to rehear the Claimants' original arguments for denying the Motions to File Late Responses, and for striking the Ground Water Users' affidavits.

At the outset of the June 5, 1996 hearing, counsel for Faulkner, *et al.*, objected that reconsideration was inappropriate under Rule 11(a)(2)(B) I.R.C.P. for Rule 55(c) matters. That objection was overruled. Counsel for Cranney Bros. argued, *inter alia*, that the Claimants had not demonstrated any recognized grounds for granting a Motion for Reconsideration, including discovery of new evidence, a change in law, or manifest injustice or error of law. Nevertheless, the Special Master directed the parties to reargue the original motions and objections.

On June 17, 1996, Special Master Haemmerle issued an *Order Vacating Hearings and Order Denying Motion to File Late Responses*, attached hereto as Exhibit B. That Order denied the Ground Water Users' Motions to File Late Responses, and stated that the Court would enter a subsequent Order including findings of fact and conclusions of law within an additional two weeks. To ensure that their rights to obtain review of the initial Order of denial were preserved, the Ground Water Users filed a Motion for Permissive Review of the June 17, 1996 Order, reserving the right to address additional or different issues that might be raised by the Court's findings of fact and conclusions of law.

On July 8, 1996, approximately 1 year after the Court first established a mechanism for those parties with "something to say" to participate in a subcase, Special Master Haemmerle denied the Ground Water Users' Motion to File Late

Responses, and presumably, vacated the prior Dolan Order to the contrary. The July 8, 1996 Order is attached hereto as Exhibit C. The July 8, 1996 Order also struck the Faulkner, May and Ambrose Affidavits, but admitted the Creamer Affidavit "for the purposes of providing a complete picture of Cranney's testimony on the issue of whether the Motion to File a Late Response satisfies the requirements of the Order Amending A.O.1."⁶ July 8, 1996 Order at 6. The July 8, 1996 Order also developed a narrow "good cause" standard that is inapposite to that expressed by the Court and applied by the Dolan Order.

In summary, there are contradictory Special Masters' decisions in these Subcases. One grants the Ground Water Users leave to file their late responses; the other denies them. The Ground Water Users participation in these Subcases is critical to ensuring just outcomes in these Subcases and others involving excessive water right claims. A one-sided proceeding will not offer the complete treatment of the legal and factual issues that a two-party proceeding offers. Special Master Haemmerle should have exercised the substantial discretion available to him under I.R.C.P. Rule 55(c) and this Court's July 28, 1995 Order to allow the Ground Water Users to participate. Permissive review of the Haemmerle Orders should be granted.

II. STANDARD FOR GRANTING PERMISSIVE REVIEW

A.O.1.11.d allows permissive review of interlocutory determinations where the determination involves: (1) a controlling question of law; (2) as to which there are substantial grounds for difference of opinion; and (3) in which immediate

⁶Excerpts of the Faulkner, May, and Ambrose depositions already were included in the record of these proceedings. See Affidavit of Patrick D. Brown.

consideration of the determination may advance the orderly resolution of the litigation. See A.O.1.11.d. Guidance on the application of this standard of review is available from Idaho Appellate Rule of Civil Procedure, Rule 12.

In accepting or rejecting an appeal by certification under I.A.R. 12 the court considers:

[A] number of factors in addition to the threshold questions of whether there is a controlling question of law, and whether an immediate appeal would advance the orderly resolution of the litigation. It was the intent of I.A.R. 12 to provide an intermediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The court also considers such factors as: 1) the impact of an immediate appeal upon the parties; 2) the effect of the delay in the district court pending the appeal 3) the likelihood or possibility of a second appeal after judgment is finally entered by the district court; and 4) the case work load of the appellate courts.

Budell v. Todd, 105 Idaho 2, 3-4, 665 P.2d 701 (1983). The *Budell* Court further defined a "controlling question of law" as a question which "terminates" the case. The *Budell* Court also found that Rule 12 created the same basic procedure for a permissive appeal from an interlocutory order under 28 U.S.C. § 1292(b). A question may be controlling although it does not "terminate" a case, if it includes issues with the potential for substantially accelerating the disposition of litigation, and which involve a "clear-cut question of law against a background of determined and immutable facts." 9 Moores Federal Practice, Section 110.22[2], pp. 273-277 (2nd Ed. 1992). Permissive review is necessary to resolve the conflict in the Special Masters' inconsistent construction of the July 18th Order and its application to the facts in

this case. Resolution of this controlling legal question will ensure speedy resolution of the proceedings in these Subcases.

III. ARGUMENT

A. The Haemmerle Orders Misapply the "Good Cause" Standard as Contemplated by the Court's July 28, 1995 Order and Rule 55(c)

Although Judge Hurlbutt specifically adopted the lenient Rule 55(c) good cause standard and indicated that it should be applied "liberally" in the context of parties seeking participation as a result of the removal of the Director as a party, the Haemmerle Orders develop and apply a very narrow good cause standard. In his decision, Special Master Haemmerle created a previously unknown "reliance" criterion requiring for participation in the subcases that "(1) the respondent had knowledge of the director's recommendations as to a subcase, (2) the respondent relied on the Director to defend the recommendation, and (3) the respondent relied on the director's report during the original objection and response periods which expired on September 1, 1993." July 8, 1996 Order at 7.⁷

After fashioning this standard, the Special Master applied it to deny each of the Ground Water Users participation in the subcases on the basis that none of them had specifically read the Director's Report recommendations for the Claimants' water rights before the September 1, 1993 expiration of the original response period. The

⁷Basing his decision on this reliance criterion alone, Special Master Haemmerle concluded there is no reason to consider whether the Ground Water Users have meritorious claims. Significantly, in construing "good cause" in the strictest sense conceivable so as to deny the Respondents' admission into the Subcases, the Special Master concluded that it therefore was unnecessary to reach the issue of whether the Respondents' position that the claims are vastly overstated actually had merit. In other words, the Special Master's restrictive application of the good cause standard substantially increases the likelihood that the actual merits of the claims may not be fully presented.

Special Master concludes, therefore, that the Ground Water Users did not establish the requisite "reliance" on the Director's recommendations and his participation as a party.

1. The "Good Cause" Standard is to be Liberally Applied to Promote Decisions on Merits

The application of the "good cause" standard in the July 8, 1996 Order is substantially different from the way that the Rule 55(c) standard usually is interpreted and applied. The Rule 55(c) standard applies in general to situations where there has been an entry of default by a court clerk as a result of a failure to file a responsive pleading. *See McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d 274 (Ct. App. 1993). Judge Hurlbutt previously has invoked I.R.C.P. 55(c) and 60(b) in the SRBA where parties seek to file late objections and responses. In the context of parties seeking participation as a result of the removal of the Director as a party, Judge Hurlbutt apparently selected the Rule 55(c) good cause standard rather than the Rule 60(b) standard because the "clerk's entry of default is not of final judgment or order, unlike the default judgment, and, therefore, the Rule 55(c) standard is more lenient." *McFarland, supra*.

The SRBA is an unusual proceeding and Rule 55(c) is not by its own terms applicable to the Ground Water Users since no entry by default had occurred. Nevertheless, the SRBA Court selected this lenient standard as the appropriate one where parties were seeking leave to participate in subcases due to the removal of the Director as a party.

The law generally abhors defaults in favor of full trials resulting in judgments on the merits. Courts are reluctant to endorse unjust outcomes by default without trials on the merits. “Thus, several courts have concluded that Rules 55(c) and 60(b) express the policy of liberality towards motions for relief from default entries and default judgments.” See 10 Wright, Miller & Kane, *Federal Practice and Procedure: Civil*, 2d. ed. § 2693 at 484 (1983). Even for the somewhat more stringent Rule 60(b), which applies to default judgments, not just entries of default.

Application of the good cause standard involves the following considerations: “whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented.” *Traguth v. Zuck*, 710 F.2d 90, 94 (2d. Cir. 1983). Alternatively, the standard has been described simply as requiring “some excuse” for the failure to answer, a meritorious defense and a recognition that the basic underlying policy is to have each case decided on its merits. *Sealed Unit Parts, Co. v. Alpha Gamma Chapter*, 668 P.2d 288, 289 (Nev. 1983). The good cause standard has been explained to merely require “the moving party to provide an explanation for the default or to give reasons why vacation of the default entry would serve the interests of justice.” *Wright, Miller & Kane*, § 2696 at 513. The Rule 60(b) standard for setting aside a default judgment generally is considered more stringent than Rule 55(c) because it requires additional grounds such as mistake, inadvertence, surprise, excusable neglect or “any other reason justifying relief from the operation of the judgment.”

Under the good cause standard the presiding judge has substantial discretion in effectuating justice:

To set aside a default all that need be shown is good cause. There would be no reason for the distinction [between Rule 55(c) and Rule 60(b)] unless Rule 55(c) intended to commit the matter entirely to the discretion of the Court, to be exercised, of course, within the usual discretionary limits.

Wright, Miller & Kane, § 2692 at 470 (quoting *Teal v. King Farms Company*, 18 F.R.D. 447 (D. Ct. Pa. 1955)). Essentially, the Rule 55(c) standard allows judges (and special masters) substantial discretion to allow participation in trials on the merits when it would serve the interests of justice. But more importantly, the long-standing, guiding principle in the Courts is that such discretion is to be aimed at allowing parties their day in court. Construing or applying "good cause" narrowly and in its strictest possible sense runs counter to a proper exercise of that discretion.

As stated in *Coon v. Grenier*:

"Good cause" is a mutable standard, varying from situation to situation. It is likewise a liberal one--but not so elastic as to be devoid of substance. It derives its shape both contextually and in comparison with the more rigorous standard applicable to attempts to vacate judgments under Fed.R.Civ.P. 60(b); the "good cause" threshold for Rule 55(c) relief is lower, *ergo* more easily overcome, than that which obtains under Rule 60(b). See *Meehan v. Snow*, 652 F.2d 274, 276 (2d Cir.1981); *Phillips*, 103 F.R.d. at 179. Thus, notwithstanding the deference due to this--as other--discretionary decisions, see *Marziliano*, 728 F.2d at 156, a reviewing tribunal should not stay its hand if the district court errs by reading "good cause" too grudgingly. See *United States v. One Parcel of Real Property*, 762 F.2d 181, 183 (5th Cir.1985). Nor does "[a]n abuse of discretion need [to] be glaring to justify reversal...." *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 373-74 (D.C.Cir.1980).

Allowing an entry of default to be set aside on a showing of reasonable justification is in keeping both with the philosophy that actions should ordinarily be resolved in their merits, *One Parcel*, 763 F.2d at 183; *Meehan*, 652 F.2d at 277; *American & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980, 982 (1st Cir.1978); 147 Division St., 682 F.Supp. at 697, and with the command of the Civil Rules themselves. See Fed.R.Civ.P. 1 (rules "shall be construed to secure the just ... determination of every action"). These policy considerations, we suggest, are at their zenith in the Rule 55(c) milieu. Early in the case,

as when a default has been entered but no judgment proven, a liberal approach is least likely to cause unfair prejudice to the nonmovant or to discommode the court's calendar. *Cf. Phillips*, 103 F.R.D. at 179 (liberality justified under Rule 55(c) because entry of default a clerical act and not a final judgment). In these circumstances, a district court should resolve doubts in favor of a party seeking relief from the entry of a default.

Coon v. Grenier, 867 F.2d 73, 76 (1st Cir. 1989).

2. The Ground Water Users Meet the Appropriate "Good Cause" Standard

Under a correct application of the good cause standard, as enunciated in the case law and in legal treatises, the Ground Water Users should be granted participation in these Subcases. They have demonstrated that they had formed an understanding that the Director was a party who would defend his recommendations in each subbasin. Relying on this fact, they did not themselves elect to participate in subcases involving excess flow claims filed in the test basins.

Before the original deadline expired, the SRBA legislation provided that the Director conduct a full investigation of water rights, develop a recommendation based on that investigation, and defend that recommendation as a full party. Prior to the removal of the Director as a party, other water right holders in the SRBA, including the Ground Water Users, understood that the Director would determine which water right claims were excessive, and would ensure that all the facts supporting the recommendations with respect to reductions in these excessive claims would be addressed. The Ground Water Users have established that they were relying on the Director to defend the Director's Report in the SRBA, and therefore, they did not

attempt to become involved in the test basin subcases until the Director was removed as a party.

Mike Cranney made it clear that his "reliance" on the role of the Director as a party defending the investigations and recommendations arose in 1989, when Mike Cranney submitted his own claims and inquired about how the SRBA would proceed:

Q. (By Mr. Brown) I understand that you're seeking permission to object to the rights of Mr. Brailsford and Mr. Walmsley and Mr. McFaddan. Why are you doing that?

A. I guess basically the main reason is we're in a critical ground water area and have been restricted in use in our basin for some time. And we was kind of following this thing and we just felt like the State was going to be—when I filed my adjudication filings for the farm—

Q. The notice of claim?

A. Yeah, notices, you know. That I asked them, I said, how is this thing going to proceed? And they said, Well the State's going to go through and we'll review your water rights and we'll make recommendations to the court, and unless there's some objections, you know, we're going to—we'll just basically—shouldn't be more than a administrative proceeding and the State would basically represent us in that.

And then as this thing's progressed—you know, sit back and kind of watched it as it's progressed—and when the judge ruled that the State was no any longer a party, then I become concerned of who was going to represent me in this issue—you, know, several issues . . .

. . . But Loren Holmes was the one I talked to and I just said, How is this thing going to come down? And that was—so I guess I felt that the State was basically going to be kind of running interference for us on this stuff and that the court in most cases would adhere to the recommendations of the Department.

Q. So Loren Holmes and the other person you're referring to were both employees with the Idaho Department of Resources?

A. Right. It was in Twin Falls where I met with them.

Q. And this would have been about what time frame?

A. I think about '89 was when we filed our documents.

Deposition of Michael Cranney, p.14, l.11 - p.15, l.4; p. 16, l.5 - l.16 (attached to Creamer Affidavit). The reliance of the Ground Water Users on the Director to do

his job is also expressed by Ambrose, Faulkner, and May in their depositions. When the Director was removed and unable to defend his Report, the Ground Water Users asked to step into his shoes:⁸

Q. Is it your position that the Department of Water Resources, when they filed their director's report and you were a party to this subcase, would adequately represent Sand Springs' interests?

A. Adequately in that we did not feel we needed to do take any action other than what they took.

Q. So it's your testimony that you were relying on the Department of Water Resources to protect or preserve Sand Springs' interests?

A. Sand Springs' interests were protected by the Department reducing the water under the licenses or permits of the Hagerman people, thus reducing our obligation to mitigate.

Deposition of Tom Ambrose, p. 33, ll. 17-25 to p. 34, ll. 1-5 (Submitted by Affidavit of Patrick D. Brown).

Q. Okay. Is it your position that Idaho Department of Water Resources would adequately represent your interests in the Snake River Basin Adjudication?

A. If they were allowed to be a party?

Q. Yes.

A. I believe so.

Q. And how is that?

A. I guess just from the experience in years of dealing with them, I guess.

Deposition of Mike Faulkner, p. 32, ll. 24-25 to p. 33, ll. 1-7 (Submitted by Affidavit of Patrick D. Brown).

A. The fact that the Water Resources had examined the water rights in the Hagerman Valley, made recommendations that were significantly lower than what were - than the rights that were claimed. The Hagerman Water Users then objected to their findings; and at that point, why - well, at the point then later, the director was taken out of

⁸The deposition excerpts for Ambrose, May and Faulkner were attached to the Affidavit of Patrick Brown, which was not stricken by the Special Master.

the process and no longer was a party to - within that. So that's the issue that we saw, is that then there was - that with the director out, there was a void that we felt we needed to step in and fill.

Q. So you believe it's necessary to become involved because the director is no longer a party, is that correct?

A. That is correct.

Deposition of Ralph May, p. 19, ll. 6-21 (Submitted by Affidavit of Patrick D. Brown).

With the removal of the Director as a full party in the SRBA proceedings, concerns arose about whether the Director would be in the position to adequately present the factual basis for his recommendations. The Ground Water Users immediately sought to step into the Director's shoes. The change in status of the Director presents more than adequate "excuse" for Special Master Haemmerle to have exercised his discretion to allow the Ground Water Users to participate in these Subcases. Indeed, Special Master Dolan recognized that the Ground Water Users had a valid "excuse." The Dolan Order is consistent with Judge Hurlbutt's explanation that "removal of the Director is tantamount to good cause." *In Re SRBA*, Reporter's Transcript at 27 (July 18, 1995).

The three-part reliance standard developed in the July 8, 1996 Order is extremely restrictive, if not impossible, for any party to satisfy. A party seeking to participate in a subcase under that standard would have to prove that he or she had read the Director's Report (which includes five volumes of detailed water right recommendations and is over 4000 pages) when it initially came out, and then made a conscious decision (prior to September 1, 1993) not to file an objection or response with respect to the particular subcase as a result of the Director's full party status. To require parties seeking to participate belatedly in subcases essentially to prove

that they had fully read each particular claim in the Director's Report is unreasonable and inconsistent with the Court's intent.

At the time the Director's Report was issued there was a generalized and reasonable reliance on the fact that the Director had identified and investigated the excessive claims and, if necessary, would litigate them. The elements of this reasonable "reliance" contemplated by the Court in its July 28, 1995 Order are that: 1) at the time the Director's Reports were submitted, a party was aware that the Director was a party who would support the Director's Report; and 2) the party therefore chose not to become involved in the test basin subcases. By adopting the exceedingly stringent three-part reliance requirement, the July 8, 1996 Order has excluded the only reliance that reasonably could have been expected of parties prior to the 1994 legislation.

The three-part reliance standard also appears more difficult to satisfy than the Rule 60(b) criteria, even though "good cause" under I.R.C.P. 55(c) is recognized by the Courts to be more lenient than I.R.C.P. 60(b). For example, the Ground Water Users presumably could establish surprise, inadvertence, or excusable neglect under Rule 60(b) based on the Director's changed status. In any event, the Rule 60(b) "any other reason justifying relief" criterion presumably would accommodate the Ground Water Users' participation in the Subcases.

The three-part "reliance" requirement developed in the July 8, 1996 Order for meeting the good cause standard raises the bar for the Ground Water Users to an unreasonable level. In doing so, the Order is directly counter to the liberal policies which favor allowing participation and determinations on the merits. The substantial

discretion that the Court has in this area should have been exercised to further these policies, not thwart them.

B. The Contradictory Rulings of Two Special Masters on a Controlling Issue of Law Warrant Permissive Review

As previously discussed, the record indicates that the Court intended a liberal review of the Motions to File Late Objections or Responses, and that absent clear factors to the contrary, removal of the director would constitute "good cause." *In Re SRBA*, Reporter's Transcript (July 18, 1995) at 9, 15.

A controlling question of law exists in this case concerning the scope or nature of reliance an individual party must have placed upon the Director to establish "good cause." Each of the Special Masters considered this issue and reached different conclusions. Without belaboring the point, the driving force behind the different decisions was the conflicting Special Masters' conclusion on the reliance issue. Depending on the Court's decision, the Ground Water Users either will be excluded and these Subcases proceed to completion without them, or they will be allowed to participate and to make their case.

1. The Conflicting Orders Demonstrate the Existence of Substantial Grounds for Difference of Opinion

The Dolan Order granting Ground Water Users' Motion correctly adopted Judge Hurlbutt's liberal approach. After concluding that the motions were filed in a timely manner, were complete, and did not seek to enlarge nor add to the existing issues, Special Master Dolan addressed whether Ground Water Users' had demonstrated good cause:

It was reasonable for them to rely upon the Director to investigate all SRBA water claims and defend his findings in strict accord with Idaho water laws. When IDWR and its Director were removed as parties by the Legislature, it was also reasonable for the Movants to suspect that some claims might result in excessive rights.

* * *

Right or wrong, the Movants were concerned that future "calls," as happened in that case, *might* impact their farm operations. Given the information generally available to water users, their concern was understandable. **It made no difference that none of the Movants knew details in the Director's Report or specific facts about the Claimants' water uses.** (emphasis added).

See Dolan Order at 4. Dolan's Order established that a general reliance on the Director to defend its recommendations in the SRBA would satisfy the good cause requirement of Rule 55(c). Special Master Dolan's decision, therefore, was an appropriate implementation of Judge Hurlbutt's July 28, 1996 Order, and a recognition that, "sweeping legislative changes in the midst of ongoing litigation" resulted in "a certain 'flexible' application of SRBA Administrative Order 1 and the Idaho Rules of Civil Procedure to accomplish the ends of justice." Dolan Order at 5.

In contrast, the Haemmerle Orders apply a far different and incorrect standard. Special Master Haemmerle's decision inexplicably adopted a highly restrictive definition of "reliance" with which few, if any, parties in the SRBA could comply. In particular, the Haemmerle Order stated that, a party seeking relief under a *Motion to File Late Response* must show that they relied on the Director to defend the Director's Report "as to a particular subcase." July 8, 1996 Order at 7. These *criteria* and the definition for "reliance" simply do not comport with Hurlbutt's order

for a "liberal" application of the review process. Thus, not only is this issue significant in terms of how the Subcases will proceed, it also is a contentious issue for the parties and the Special Masters.

The creation of new and more restrictive requirements for demonstrating good cause is central to the disposition of these Subcases, and would deprive the Ground Water Users of any meaningful opportunity to defend their interests in these proceedings. As a question of first impression for this Court, Ground Water Users request a complete review of this issue before they are summarily denied the right to participate as parties in these subcases.

2. Orderly Resolution of the Proceedings

Permissive review of these issues will advance the orderly resolution of these Subcases. Eventually the Court will have to address these issues, and presumably remand and reconcile each of those cases that do not comport with the Court's ultimate decision on the reliance issue. This outcome can be avoided by addressing the correct standard now. A well-defined legal standard would obviate future uncertainty among all the parties.

Permissive review of the above-referenced issues will avoid the potential that the Subcases would be remanded for trial at some late date in the future when parties, witnesses and the availability of evidence may have changed substantially. Permissive review also will expedite resolution of these Subcases and prove more efficient and cost effective for all parties and witnesses involved.

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IV. THE GROUND WATER USERS OBJECT TO SPECIAL MASTER HAEMMERLE'S RECONSIDERATION OF THE DOLAN ORDER

A. Rule 11(a)(2)(B), I.R.C.P. Prohibits Reconsideration of Decisions Based on Rule 55(c)

At the beginning of the Motion for Reconsideration hearing on June 5, 1996, the Ground Water Users objected to reconsideration of Special Master Dolan's decision on the basis of I.R.C.P. Rule 11(a)(2)(B). Rule 11(a)(2)(B) states "there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c)" Since the Ground Water Users' Motions to File Late Responses and Special Master Dolan's decision were based on the Rule 55(c) standard, this Rule alone should have precluded reconsideration of the Dolan Order. Rule 11(a)(2)(B) is evidence of the deference given to the original decision (owing to its discretionary nature) when the Rule 55(c) good cause standard is involved.

Special Master Haemmerle denied the Ground Water Users' Rule 11(a)(2)(B) objection indicating that the Motions to File Late Responses did not involve true Rule 55(c) proceedings, and apparently, that the Rule 55(c) standards were merely being borrowed for purposes of the Motions to File Late Responses. This misinterprets the basis for Rule 11(a)(2)(B), which is intended to preclude second-guessing when, as here, the discretionary Rule 55(c) standard is involved. Special Master Haemmerle should have denied reconsideration of the Dolan Order on the basis of Rule 11(a)(2)(B).

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B. The Dolan Order Should Not Have Been Reconsidered Absent any Demonstration that the Factors Warranting Reconsideration Exist

In certain situations, the granting of reconsideration of prior interlocutory orders is appropriate. However, reconsideration is not appropriate to change the Dolan Order where there was no change in the previously presented facts or arguments to Dolan.

The factors that have been employed by the courts in considering motions for reconsideration include the existence of new facts which would alter the basis for the Court's prior conclusions. *Idaho First Nat'l Bank v. David Steed & Assoc.*, 121 Idaho 356, 825 P.2d 79 (1992); *Devil Creek Ranch v. Cedar Mesa Reserv.*, 126 Idaho 202, 879 P.2d 1135 (1994) (party seeking reconsideration carries the burden of bringing to the trial court's attention the new facts). As stated in *J. I. Case Co. v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955):

A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Other factors affecting the decision to grant reconsideration include: whether there has been a change in governing law; whether a party has offered new evidence which would affect the outcome; whether manifest injustice will result; and whether the issue was inadequately briefed or argued when first contemplated by the court. See *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306 (Utah App. 1994). In short, reconsideration should be granted only in rare instances where new issues are raised that warrant a ruling contrary to the existing ruling. See e.g., *Moore v. City of Las*

Vegas, 551 P.2d 244, 92 Nev. 402 (1976). However, on remand, the Special Master proceeded directly to reconsider the Dolan Order, *de novo*, without inquiring whether any of the relevant factors warranting reconsideration existed.

The Court's May 5, 1996 Order of Temporary Remand did not direct the Special Master to reconsider the Dolan Order. It merely directed that the issues raised by the Claimant's Motion for Permissive Review be considered "in the context of a motion for reconsideration." This should have required determination that such granting of the Motion was justified. As a first step, Special Master Haemmerle should have considered whether there was a basis for reconsidering Special Master Dolan's conclusions. Had this been done, it would have been apparent that no new issues had been identified subsequent to issuance of the Dolan Order, and that reconsideration, therefore, was inappropriate.

V. CONCLUSION

For the foregoing reasons, permissive review of the Special Master's June 17, 1996 and July 8, 1996 Orders, which establish an incorrect reliance standard and which deny the Ground Water Users' Motions to File Late Responses, should be granted.

RESPECTFULLY SUBMITTED this 22nd day of July, 1996.

DILLION, BOSCH, DAW & BOCK, CHARTERED

By

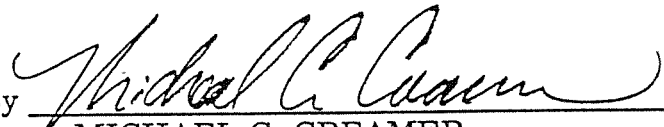


JOSEPHINE F. BEEMAN

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

GIVENS PURSLEY & HUNTLEY, LLP

By



MICHAEL C. CREAMER

Attorney for Cranney Bros.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 1996, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Patrick D. Brown
Hepworth, Lezamiz & Hohnhorst
Chartered
133 Shoshone St. N.
Twin Falls, Idaho 83301

☐ HAND DELIVER
☐ U.S. MAIL
☒ OVERNIGHT MAIL
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Chief, Natural Resources Div.
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United States Department of Justice
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Boise, Idaho

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Court's Certificate of Service for
Expedited Hearings Dated May 1, 1996

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Michael C. Creamer

EXHIBIT A

Amended Order Denying Motions to Strike Affidavits and Order Granting Motions to File Late Responses

December 21, 1995

Special Master Terrence A. Dolan

EXHIBIT A TO MEMORANDUM IN SUPPORT OF JOINT CONSOLIDATED MOTION FOR
PERMISSIVE REVIEW OF SPECIAL MASTER'S JULY 8, 1996 ORDER AND MOTION FOR
EXPEDITED DECISION

RECEIVED

DEC 22 1995

Sivano, Puraley & Huntley

1995 DEC 21 PM 1:55
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

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.: 36-00021B (36-00021)
	)	36-00039D, 36-00048A, 36-00049,
	)	36-00051A, 36-02169, 36-04260B,
Case No. 39576	)	36-10283A and 36-15168
	)	
	)	AMENDED ORDER DENYING
	)	MOTIONS TO STRIKE AFFIDAVITS
	)	and ORDER GRANTING MOTIONS TO
	)	FILE LATE RESPONSES

On August 18, 1995, Cranney Bros. filed its *Motion to File Late Responses* (Cranney *Motion*) in five of the above subcases: 36-00039D, 36-00048A, 36-00049, 36-02169 and 36-04260B.¹ Attached to the Cranney *Motion* was its *Brief in Support of Motion to File Late Responses*. The same date, Cranney Bros. lodged responses to objections in each of the five subcases.

On August 18, 1995, May Farms, Ltd. (May Farms), Sand Springs Ranch Partnership (Sand Springs) and Faulkner Land & Livestock Company (Faulkner) filed their *Motions to File Late Responses*² (May Farms, Sand Springs and Faulkner *Motions*) in six of the above

¹ The claimants/objectors in these five subcases are: Fred and Susan Walmsley (36-00039D); Dan and Irma McFaddan (36-00048A, 36-00049 and 36-02169); and Robert H. Brailsford (36-04260B).

² Amended May Farms *Motions* in Subcase Nos. 36-00021B and 36-10283A were filed on September 12, 1995.

subcases: 36-00021B, 36-00048A, 36-00049, 36-00051A, 36-10283A and 3615168.³ Attached to the May Farms, Sand Springs and Faulkner *Motions* were six separate but similar *Memoranda in Support of Motions to File Late Responses*.⁴ The same date, May Farms, Sand Springs and Faulkner lodged responses to objections in each of the six subcases.

Cranney Bros., May Farms, Sand Springs and Faulkner will sometimes be referred to collectively as Movants.

On November 21, 1995, the claimants in all nine of the above subcases (Claimants) filed their *Consolidated Memorandum Opposing Intervention*. The Claimants also filed their *Motion to Strike* the affidavit of attorney Michael C. Creamer and the attached portion of Mike Cranney's deposition (Subcase Nos. 36-00039D, 36-00048A, 36-00049, 36-02169 and 36-04260B). Finally, the Claimants filed six *Objections and Motions to Strike Affidavits* of Ralph L. May (36-00021B and 36-10283A), Mike Faulkner (36-00048A and 36-00049) and Tom Ambrose (36-00051A and 36-15168). Attached was the Claimants' *Memorandum in Support of Objection and Motion to Strike Affidavits and Preclude Intervention*.

On November 21, 1995, Cranney Bros. lodged its *Pre-Hearing Memorandum*.

A hearing was held on November 22, 1995, at the SRBA Courthouse in Twin Falls, Idaho. Jeffrey C. Fereday appeared for Cranney Bros.; Dana L. Hofstetter and Josephine P. Beeman for May Farms, Sand Springs and Faulkner; Patrick D. Brown for the Claimants; and Brent R. King for IDWR. The Cranney *Motion* was set for hearing the same day as the May Farms, Sand Springs and Faulkner *Motions*. However, because of similarities of the *Motions* and the Claimants' consolidated opposition, the hearings were combined. All counsel were present and participated throughout the hearing.

After the hearing, on December 1, 1995, Cranney Bros. filed its *Response to Motion to Strike*. The same day, the Claimants wrote to the Special Master asking that the pleading be disregarded and Cranney Bros.' counsel be admonished for submitting post-hearing briefs and

³ The claimants/objectors in four of the subcases are: Harry R. Gisler (36-00021B); Walten and Marjorie Mildren (36-00051A); Ya-Ta-Hay Investments, Inc. (36-10283A); and Hagerman Water Users Association (36-15168).

⁴ Amended Faulkner and Sand Springs *Memoranda* in Subcase Nos. 36-00049 and 36-00051A were filed on September 12, 1995.

evidence.

Motions to Strike

The Claimants moved to strike certain affidavits because the affidavits were not served with the *Motions* or they contain hearsay testimony, lack foundation and the affiants are not qualified as experts. While these criticisms are well taken for purposes of summary judgment or trial, they are less compelling in the context of these motions to file late pleadings -- particularly in these subcases. The Claimants and Movants have followed a particularly contentious motion practice and the court has been required to fashion its responses accordingly. On top of that, these are "test" subcases where fundamental and unique issues are being explored. Sweeping legislative changes in the midst of ongoing litigation only added to the challenges. The result has been a certain "flexible" application of *SRBA Administrative Order 1* and the Idaho Rules of Civil Procedure to accomplish the ends of justice.

Judge Daniel C. Hurlbutt's July 28, 1995 *Order*⁵ concerning late filings clearly intended to provide "special consideration" to some parties to the adjudication. The *Order* was made because of legislative changes in the party status of IDWR and its Director. Even now, over a year after the amendments to the SRBA statutes went into effect, the court and the partes continue to discover new implications.

Even though the affidavits complained of by the Claimants are flawed in certain respects, the timing of their filing and their contents are sufficient for purposes of these motions to file late pleadings. It must be remembered that the motions were filed by SRBA parties seeking to participate in subcases. The Movants have not had the opportunity to conduct discovery. It may reasonably be expected that their responses will be substantially refined and amended as they gather more information. The suggestion that the Movants will step into the shoes of the Director and defend the whole Director's Report is not reasonable. At this point, their burden is not to *prove* a case but to *plead* sufficient facts to support their motions. The affidavits meet that minimal burden and will not be stricken.

⁵ The full title of the Order is Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative Order 1.

Motions to File Late Responses

The Movants argue that they meet the criteria of Judge Hurlbutt's July 28, 1995 Order: (1) they filed their pending motions in a timely manner and attached completed responses; (2) they have shown good cause for not filing responses in a timely manner; (3) they have demonstrated the existence of a meritorious position; and (4) they do not seek to enlarge or add to existing issues. In support of their allegation of "good cause," all three Movants suggest that they chose not to file responses in a timely manner because they relied upon IDWR to "defend" the Director's Report. Now that the Director's Report is no longer a pleading and IDWR and the Director are no longer parties, they seek to file late responses in all nine subcases.

There is no question that the pending motions were filed in a timely manner and completed responses were attached. It is also clear that the Movants do not seek to enlarge nor add to existing issues. Almost any element they might have chosen to respond to was objected to by the Claimants. So, the issues are whether good cause and a meritorious position have been shown.

The court is satisfied that the Movants have shown both good cause for untimeliness and the existence of a meritorious position. It was reasonable for them to rely upon the Director to investigate all SRBA water claims and defend his findings in strict accord with Idaho water laws. When IDWR and its Director were removed as parties by the Legislature, it was also reasonable for the Movants to suspect that some claims might result in excessive rights. After all, at the time the *Motions* were filed, no subcase had proceeded to a full hearing before the Special Master.

The fact that the Movants chose these particular subcases to intervene is no accident. These subcases concern water claims in the Hagerman Valley where the *Musser*⁶ case arose. Right or wrong, the Movants were concerned that future "calls," as happened in that case, *might* impact their farm operations. Given the information generally available to water users, their concern was understandable. It made no difference that none of the Movants knew details in the Director's Report or specific facts about the Claimants' water uses.

Having said that, the court feels compelled to remind the Movants and Claimants of Rule 11(a)(1), Idaho Rules of Civil Procedure:

⁶ *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

The signature of an attorney or party constitutes a certification that the attorney or party has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation [emphasis added].

Therefore, IT IS ORDERED that the Claimants' *Motions to Strike Affidavits* are denied. It is further ordered that the Cranney *Motion to File Late Responses* and the May Farms, Sand Springs and Faulkner *Motions and Amended Motions to File Late Responses* are granted. However, participation of Cranney Bros., May Farms, Sand Springs and Faulkner shall be limited to litigation of those elements in the Director's Report to which the Claimants have objected and to which IDWR has responded. They may not enlarge or add to existing issues. Responses previously lodged with the court by Cranney Bros., May Farms, Sand Springs and Faulkner are deemed filed as of December 12, 1995.

DATED December 21, 1995.



Terrence A. Dolan
Special Master, Reporting Area 3
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the (AMENDED) ORDER DENYING MOTIONS TO STRIKE AFFIDAVITS and ORDER GRANTING MOTIONS TO FILE LATE RESPONSES was mailed December 21, 1995, with sufficient first-class postage to the following:

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

Patrick D. Brown
Hepworth, Lezamiz & Hohnhorst
P.O. Box 389
Twin Falls, ID 83303-0389

Josephine P. Beeman
Dana L. Hofstetter
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Jeffrey C. Fereday
Givens, Purlsey & Huntley
P.O. Box 2720
Boise, ID 83701

Brent R. King
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Courtesy copies to:

Daria J. Zane
R. Lee Leininger
William M. Ferry
The United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724-0663

Cheri C. Jacobus
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

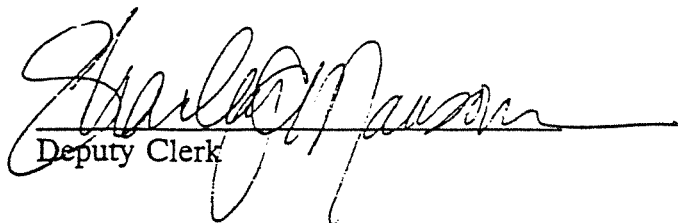

Deputy Clerk

EXHIBIT B

Order Vacating Hearings and Order Denying Motion to File Late Responses

June 17, 1996

Special Master Fritz X. Haemmerle

EXHIBIT B TO MEMORANDUM IN SUPPORT OF JOINT CONSOLIDATED MOTION FOR
PERMISSIVE REVIEW OF SPECIAL MASTER'S JULY 8, 1996 ORDER AND MOTION FOR
EXPEDITED DECISION

Givens, Purcley & Hunsley

1996 JUN 17 PM 3:25

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

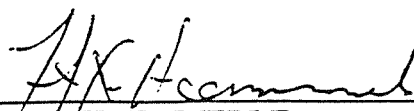
In Re SRBA	)	Subcases: 36-00048A, 36-00049,
	)	36-02169, 36-00039D, 36-04260B,
Case No. 39576	)	36-15168, 36-00051A, 36-00021B &
	)	36-10283A
	)	
	)	ORDER VACATING HEARINGS and
	)	ORDER DENYING MOTION TO FILE
	)	LATE RESPONSES

On Wednesday June 5, 1996 at 1:30 pm the court heard a *Motion to Reconsider an Order Granting Motion to File Late Responses* in the following subcases. Having reviewed this matter the court hereby denies the *Motion to File Late Responses* in the aforementioned subcases. Any and all hearings scheduled in these subcases are hereby vacated. The court will enter an Order including the Findings of Fact and Conclusions of Law within two weeks. The written decision of this court will constitute the final decision.

Therefore, IT IS ORDERED that the *Responses* filed by Cranney Bros. and Faulkner Land and Livestock for subcase 36-00048A, and 36-00049, Cranney Bros. for subcases 36-02169, 36-00039D, and 36-04260B, Sand Springs Ranch Partnership for subcase 36-15168, and 36-00051A, May Farm Ltd. for subcase 36-00021B, and 36-10283A are denied.

IT IS FURTHER ORDERED that all hearings previously set in the subcases listed above are vacated.

DATED June 17, 1996.


FRITZ X. HAEMMERLE
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER VACATING HEARING and ORDER DENYING MOTION TO FILE LATE RESPONSES was mailed on June 17, 1996, with sufficient first-class postage to the following:

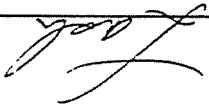
Chief, Natural Resources Division
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State of Idaho
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United States Department of Justice
Environment & Natural Resources Division
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Deputy Clerk



ORDER VACATING HEARINGS and ORDER
DENYING MOTION TO FILE LATE RESPONSE

6/17/96

EXHIBIT C

Order on Reconsideration of Motions to Strike Affidavits and Motions to File Late Responses

July 8, 1996

Special Master Fritz X. Haemmerle

EXHIBIT C TO MEMORANDUM IN SUPPORT OF JOINT CONSOLIDATED MOTION FOR
PERMISSIVE REVIEW OF SPECIAL MASTER'S JULY 8, 1996 ORDER AND MOTION FOR
EXPEDITED DECISION



18. The number of the book is 18.

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JUL - 9 1996
Givens, Pursley & Huntley
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	Subcases: 36-00048A, 36-00049,
	)	36-02169, 36-00039D, 36-04260B,
Case No. 39576	)	36-15168, 36-00051A, 36-00021B and
	)	36-10283A
	)	
	)	ORDER ON RECONSIDERATION OF
	)	MOTIONS TO STRIKE AFFIDAVITS
	)	and MOTIONS TO FILE LATE
	)	RESPONSES

PROCEDURAL BACKGROUND

This Order involves subcases 36-00048A, 36-00049, 36-02169, Dan and Irma McFaddan, claimants; 36-00039D, Fred and Susan Walmsley, claimants; 36-04260B, Robert H. Brailsford, claimant; 36-15168, Hagerman Water Users Association, claimant; 36-00051A, Walten and Marjorie Mildren, claimants; 36-00021B, Harry R. Gisler, claimant; and 36-10283A, Ya-Ta-Hay Investments, Inc., claimant (collectively "the claimants"). During the original objection period, the only objectors were the claimants. IDWR filed responses to these objections. Subsequently, the Director was removed as a party in the Snake River Basin Adjudication (SRBA).

In August, 1995, various *Motions to File Late Responses* were filed in the subcases: subcases 36-00021B and 36-10283A, Ralph May on behalf of May Farms Ltd., respondent; subcases 36-00051A and 36-15168, Tom Ambrose on behalf of Sand Springs Ranches, respondent; subcases 36-00048A and 36-00049, Mike Faulkner on behalf of Faulkner Land & Livestock, respondent; and subcases 36-00039D, 36-00048A, 36-00049, 36-02169 and 36-04260B, Mike Cranney on behalf of Cranney Bros., respondent (collectively "the respondents").

The *Motions to File Late Responses* and *Motions to Strike* were heard before the Special Master assigned to Basin 36 (Reporting Area 3). The *Motions to File Late Responses* were granted. The *Motions to Strike* were denied. Thereafter, the claimants filed a *Motion for Permissive Review* of these decisions in District Court. While the *Motion to File Permissive Review* was pending in District Court, this Special Master was assigned to preside over various subcases located in the Hagerman Valley including the subcases involved in this matter. In lieu of deciding the *Motion to File Permissive Review*, the matter was remanded back to this Special Master to reconsider the *Order Denying Motion to Strike Affidavits and Order Granting Motion to File Late Responses*. The directive from the District Court was that this Special Master "shall consider these issues in the context of a motion for reconsideration." *Order of Temporary Remand to Newly Appointed Special Master* (May 17, 1996).

During the hearing, the respondents objected to having the matter heard under a *Motion for Reconsideration*. Citing I.R.C.P. 11(a)(2)(B), the respondents alleged that a *Motion for Reconsideration* under I.R.C.P. 55(c) was improper. I.R.C.P. 55(c) deals with *Motions to Set Aside Defaults*. This matter is not a motion to set aside a default. Rather, at issue are *Motions to File Late Responses* which are treated under the same criteria as a *Motions to Set Aside a Default* under I.R.C.P. 55(c). *Order Amending A.O.I.* Therefore, the court denied the respondents' objection to the *Motion for Reconsideration*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. MOTION TO STRIKE

In support of the various *Motions to File Late Responses*, the parties filed supporting affidavits. In each of the affidavits, the party seeking to file a late response stated that they had knowledge of the director's report in particular subcases. The affiants also stated that they relied on IDWR to defend the recommendations in each respective subcase. The claimants objected to the affidavits during the original proceedings. In his decision, the Special Master found that the affidavits were "flawed in certain respects." However, the Special Master did not strike the affidavits concluding that the affidavits were sufficient to establish the "minimal burden" of

"pleading" facts upon which relief could be granted. *Order Denying Motion to Strike Affidavits and Order Granting Motions and Amended Motions to File Late Responses* at 3.

On *Motion for Reconsideration*, the claimants allege that the Special Master failed to apply the Idaho Rules of Evidence in considering the affidavits. To clarify, this court holds that the Idaho Rules of Evidence are applicable to all proceedings before the Special Master. I.C. § 42-1411(5) and I.R.E. 101(b). The only proceedings exempted from the Idaho Rules of Evidence are those outlined under I.R.E. 101(d) and (e). A *Motion to File a Late Response* is treated as a *Motion to Set Aside a Default Judgment* under I.R.C.P. 55(c) and is not exempted from the Idaho Rules of Evidence. Where the Rules of Evidence apply and in lieu of live testimony, the court may determine motions on affidavits. I.R.C.P. 43(e). Such affidavits are subject to all the requirements of the Idaho Rules of Evidence.

During the *Motion for Reconsideration*, the claimants renewed their objections to the affidavits of Tom Ambrose, Ralph May and Mike Faulkner. The bases of the objections were that the affidavits were not based on the personal knowledge of the affiants. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." I.R.E. 602. In each of the affidavits, the affiant describes the claim, director's recommendations as to the claim, and their opinion as to the veracity of each claim given the director's recommendations. After each affiant was deposed, the evidence before the court indicates that none of the affiants had personal knowledge of the information contained in their affidavits. See, Section IV, *infra*. p. 7. Without any personal knowledge of the director's report or claims, the court can only conclude that the information obtained by each affiant was the product of hearsay. While none of the affiants had personal knowledge of the information contained in the respective affidavits, the affiants conclude that they "decided not to participate in this subcase, choosing instead to rely on the director's report and IDWR's defense of its pleadings." Not having any personal knowledge of the claim, director's report or other information obtained by IDWR, the court cannot accept this conclusion without some foundation.¹

¹

For foundation purposes and in light of the reliance standard under the *Order Amending A.O.I.*, respondents need to demonstrate what information was known, how the information was obtained, and when the information was known. Without this information, the court cannot determine whether respondents in fact relied on IDWR to defend a recommendation in a particular subcase.

The respondents' affidavits mentioned certain "reputable studies, including the Department's, indicat[ing] that the standard of one inch per acre is sufficient, on average, to irrigate property. . . ." See e.g., *Affidavit of Mike Faulkner*. The "reputable studies" are hearsay and inadmissible unless the affiant citing the reputable studies is qualified as an expert in the field and relied upon the studies in drawing his/her conclusion. "If of a type reasonably relied upon by experts in the particular filed in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." I.R.E. 703. The affiants, as lay witnesses, are in no position to evaluate scientific studies and give an opinion that one inch per acre is sufficient for irrigation purposes. Lay witnesses can only give opinions as to matters which are "rationally based on the perception of the witness." I.R.E. 701.²

The claimants also objected to the *Affidavit of Michael Creamer*. Attached to Creamer's affidavit was the former testimony of Creamer's client, Mike Cranney. Originally, the claimants objected to the affidavit under I.R.C.P. 6(d) which requires parties to submit affidavits in support of a motion five days prior to the hearing on the motion. Months having passed since the original *Motions to File Late Responses and Motion to Strike* were heard, the claimants could not demonstrate any prejudice by the late filing of the affidavit. *Keeven v. Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct.App. 1994) (Parties seeking to strike affidavits under 6(d) must establish some prejudice by the late filing of an affidavit). Therefore, the *Motion to Strike* under I.R.C.P. 6(d) was denied.

The claimants also objected to the affidavit on hearsay grounds. The objectionable portion of Creamer's affidavit was the attached portion of the deposition of Mike Cranney. A very similar situation was addressed by the Ninth Circuit Court of Appeals in *Beyene v. Coleman Security Services, Inc.*, 854 F.2d 1179 (1988). In that case, the defendant moved for summary judgment. In support of the motion, the defendant's attorney attached to his affidavit the former testimony of one of the defendants' own witnesses. The former testimony of the witness was taken from a separate trial. The defendants' attorney attached the prior testimony as a "true and correct copy of Mr. Baptiste's testimony." *Id.* at 1182. The plaintiff objected to the affidavit

² No scientific studies mentioned by the affiants were included in the *Affidavit of Josephine Beeman's* which purported to include the entire investigation file of IDWR relative to the claims at issue.

on hearsay and authentication grounds. *Id.* Over the plaintiff's objections, the affidavit was considered by the trial court.

On appeal, the Ninth Circuit held that the Federal Rules of Evidence apply to all cases not specifically exempted under F.R.E. 101. *Id.* at 1181. In reversing the decision of the trial court, the court held that an affidavit with attached former testimony as an exhibit is not sufficient foundation where the attachment is "neither a certified copy of a transcript nor a signed affidavit." *Id.* The court stated further that "[e]ven if [the former testimony] had been properly authenticated, however, it would not survive Beyene's hearsay objection. It is an out-of-court statement offered for its truth. . . ." *Id.*

The deposition of Mike Cranney is hearsay as the testimony was offered for the purposes of establishing that the respondents relied on IDWR to defend the subcase at issue. The affidavit was not offered for any non-hearsay purposes outlined under I.R.E. 801(d)(1). As a statement of a party proponent,³ the only conceivable hearsay exception is "former testimony" under I.R.E. 804(b)(1). That exception is applicable only when the declarant is unavailable. Here, there is no indication that Cranney was unavailable and could not have provided his own affidavit containing the information he sought to make available to the court. Consequently, the attached deposition of Cranney is inadmissible hearsay.

However, and upon further consideration of this court's prior order granting the *Motion to Strike* Creamer's affidavit, the court finds that the affidavit was properly offered to complete the record. The claimants offered portions of Cranney's deposition in support of their objection to the *Motion to File Late Response*. In the *Response to the Motion to Strike*, the respondents alleges that "[i]t would be the height of irony and prejudice if the Claimants were permitted to engage in such discovery, present only select portions of the Cranney deposition testimony to the Court, and then be permitted to invoke Rule 6(d) to prevent a balanced presentation of that

³

Pat Brown attached portions of the deposition transcript of Ralph May, Tom Ambrose and Mike Faulkner to his affidavit for purposes of supporting his *Motion to Strike* and opposing the *Motions to File Late Responses*. As offered by the claimants, these deposition transcripts are statements of a party opponent and, therefore, are not hearsay statements under I.R.E. 801(d)(2). None of the respondents filed *Motions to Strike* the affidavits offered by the claimants.

testimony.”⁴ The court agrees. When parties believe that another party has unfairly admitted portions of transcript before the court, parties can require the party offering the transcript to produce “any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” I.R.E. 106. In this case, the deposition transcript of Cranney will be considered for the purposes of providing a complete picture of Cranney’s testimony on the issue of whether the *Motion to File a Late Response* satisfies the requirements of the *Order Amending A.O.1*.

For all these reasons, the claimants’ *Motions to Strike* the affidavits of Tom Ambrose, Ralph May and Mike Faulkner are granted. The *Motion to Strike* the affidavit of Mike Cranney, upon further consideration, is denied.

II. MOTION TO FILE LATE RESPONSE

A. Standard of Review

Under a *Motion to File Late Response*, the initiating party must establish the following: (1) good cause for untimeliness and (2) a meritorious position. *Order Granting in Part, Joint Motions for Amendment of Administrative Order 1* (July 28, 1995) (*Order Amending A.O.1*). A *Motion to File a Late Response* is examined under the criteria set forth under I.R.C.P. 55(c). *Order Amending A.O.1*. The party seeking relief under I.R.C.P. 55(c) has the burden of proving a right to relief. *Matter of Adoption of A Male Child*, 102 Idaho 225, 227, 628 P.2d 1059 (1981). “Parties must allege facts which, if true, would constitute a meritorious position.” *Order Amending A.O.1*. The necessary showing for relief required under I.R.C.P. 55(c) is as follows:

[T]he moving party 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.”

Hearst Corp. v. Keller, 100 Idaho 10, 12, 592 P.2d 66 (1979).

⁴ Contrary to the assertion that it would be unfair for the claimants to introduce portions of Cranney’s deposition, the respondents somehow assert that they are “not rely[ing] on the fact that the Claimants have themselves submitted Cranney deposition excerpts with the Court.” Regardless of how evidence is offered or whether an objection is made to certain evidence, the court can decide whether or not to admit the proffered evidence. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 839 P.2d 1192 (1992).

The facts constituting the defense, whether disclosed by answer, affidavit or both, must 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 v. Stevens, 78 Idaho 266, 271, 300 P.2d 811 (1956).⁵

The procedure outlined under the *Order Amending A.O.I* provides a mechanism for parties to file late responses only as to “parties [who] decided not to participate in certain subcases, choosing instead to rely on the Director’s Report and IDWR’s defense of its pleading.” *Order Amending A.O.I* at 1. While it is enough for a party to plead facts sufficient to establish a meritorious position, a party seeking relief under a *Motion to File Late Response* must show that they relied on IDWR to defend the director’s report as to a particular subcase. *Order Amending A.O.I*. The word “show” means to “prove.” *People v. Resolute Insurance Company*, 46 Cal. App. 3d 249, 120 Cal. Rptr. 17 (1975). When used as a verb, “show” means “to make apparent or clear by evidence, to prove.” BLACK’S LAW DICTIONARY 1379 (6th ed. 1990).

The term “reliance” used in the context of filing late responses requires the following: (1) the respondent had knowledge of the director’s recommendations as to a subcase, (2) the respondent relied on IDWR to defend the recommendation, and (3) the respondent relied on the director’s report during the original objection and response periods which expired on September 1, 1993. Without these three elements, the parties have failed to establish the prerequisite reliance necessary to show good cause. Without the element of reliance, the removal of the director would give parties seeking to file late responses a second “bite of the apple” when those parties were

⁵ In this case, the parties moving to file late responses argue for a lenient standard of review citing *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1993). In that case, the Court of Appeals discussed a distinction between setting aside an entry of default by the clerk versus an entry of judgment by default by the district court. Noting the differences, the Court of Appeals, in *dicta*, commented that a motion to set aside a clerk’s default should be evaluated under the more lenient “good cause” standard of I.R.C.P. 55(c) as opposed to a motion to set aside a default judgment entered by the court evaluated under I.R.C.P. 60(b) which requires “good cause” and “mistake, inadvertence, surprise, or excusable neglect.” In its discussion, the court conceded that “there exists authority for the position implicitly argued by *McFarland*, namely, that the good cause standard in Rule 55(c) coincides with that for setting aside a default under Rule 60(b).” *McFarland* at 936. At the very least, the court finds that parties must allege facts to support an allegation, and bare allegations, without facts, cannot support a motion to file a late response. Whatever the standard under I.R.C.P. 55(c) and/or 60(b), “good cause” for purposes of filing a late response has been defined under the *Order Amending A.O.I* as “reliance” on IDWR to defend in a particular subcase during the original objection period and response period.

unaware of particular subcases during the original objection and response periods. The removal of the Director as a party, without a showing of actual reliance on the Director's recommendations and defense of those recommendations in a particular subcase, is insufficient to establish good cause.

B. Conclusion

As to good cause and given the evidence before the court, the court finds as follows:

1. Subcases 36-10283A and 36-00021B — *Motion to File Late Responses* by Ralph May on behalf of May Farms, Ltd. There is no evidence or allegation that May relied on IDWR to defend the director's report in these subcases. In his deposition, May concedes that he never reviewed the director's report for claims 36-10283A or 36-00021B. (May Depo. p. 49, Ll. 6, 13). May did not have personal knowledge of the director's report as to these claims until August 17, 1995. (May Depo. p. 26, L. 2). Since there is no evidence indicating that May had knowledge of the director's report as to claims 36-10283A or 36-00021B prior to September, 1993, the court cannot find that May relied on IDWR to defend the recommendations prior to the removal of the director as a party. Therefore, May has failed to establish good cause for his *Motion to File Late Responses*.

2. Subcases 36-00051A and 36-15168 — *Motion to File Late Responses* by Tom Ambrose on behalf of Sand Springs Ranches. There is no evidence or allegation that Sand Springs Ranches relied on IDWR to defend the director's report for these claims. Contrary to his Affidavit, Ambrose admitted that he had no personal knowledge of the director's report as to claims 36-00051A or 36-15168. (Ambrose Depo. p. 28, L. 21). As to his knowledge of the director's report, Ambrose stated, "I told you, I didn't read it. I don't know whether it's accurate. My attorney told me it was." (Ambrose Depo, p. 31, Ll. 1-3). In this case, there has been no showing that Ambrose knew about claims 36-00051A or 36-15168 or the director's recommendations as to that claim during the original objection and response periods. Therefore, the court cannot find good cause for Sand Springs Ranches to file a late response in this subcase.

3. Subcases 36-00048A and 36-00049 — *Motion to File Late Responses* by Mike Faulkner on behalf of Faulkner Land & Livestock. There is no evidence or allegation that Faulkner Land and Livestock relied on IDWR to defend the director's report in these subcases.

Faulkner testified during his deposition that he was unaware of the director's report regrading claims 36-00048A and 36-00049 until he read it in his affidavit August 18, 1995. (Faulkner Depo. p. 33, Ll. 10-22). Faulkner further admitted that he never reviewed any of IDWR's files regarding these claims. (Faulkner Depo. p. 28, Ll. 21-23). There has been no showing that Faulkner relied on the IDWR to defend the director's report as to these claims during the original objection and response periods. Therefore, the court cannot conclude that good cause exists for Faulkner's *Motion to File Late Responses* in subcase numbers 36-00048A and 36-00049.

4. Subcases 36-00039D, 36-00048A, 36-00049, 36-02169 and 36-04260B -- *Motion to File Late Responses* by Cranney Bros. The Affidavit of Michael Creamer was offered for the purposes of establishing the extent to which Cranney Brothers relied on IDWR to defend the director's report in these subcases. Based on the affidavit, there is no evidence offered or properly before the court indicating that Cranney had knowledge of the claims or director's report as to these particular water rights during the original objection and response periods. At best, the court can only conclude that Cranney was aware of a particular class of cases where quantity exceeded one inch per acre.

A fair reading of Cranney's deposition indicates that Cranney became aware of the particular Hagerman cases only after IDWR sent notices to water right holders within the Snake River Plain aquifer regarding the potential ramifications of *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). Cranney stated:

And I got a notice from the Department of Water Resources saying that we may be subject to a call, that we could be reduced of the flow of our water rights or pay mitigation costs, depending on what the department worked out. And I think everybody else in this basin got that. And so that made us where we were involved in the issue.

(Cranney Depo. p. 106, Ll. 1-7) (emphasis added).

* * *

And I guess my presumption is, you know, I haven't been to their farm or anything, but their farm is in the Snake River Plain aquifer, according to the Musser case. And the State sends me notice and says I'm tied in, and the man says I'm tied in, so I guess my presumption is I'm tied in.

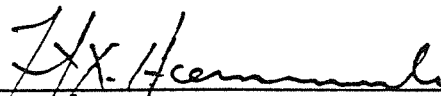
(Cranney Depo. p. 106, L. 22 - p. 107, L. 2) (emphasis added).

The Supreme Court entered its decision regarding *Musser* on February 28, 1994. IDWR sent the notices after the Supreme Court entered its decision.⁶ Given Cranney's testimony that he became involved in the issue after IDWR sent the notices, then the court cannot conclude that the respondents relied on the director's recommendations regarding these subcases during the original objection and response periods. Accordingly, the court cannot find the requisite good cause necessary for the *Motions to File Late Responses* in subcases 36-00039D, 36-00048A, 36-00049, 36-02169 and 36-04260B.

Because good cause has not been established, the *Motions to File Late Responses* are **denied**. Having concluded that good cause does not exist, the court declines to determine whether a meritorious position exists for any of the *Motions to File Late Responses*.

IT IS SO ORDERED.

DATED July 8, 1996.



FRITZ X. HAEMMERLE
Special Master
Snake River Basin Adjudication

⁶ Notices were mailed in March, 1994, by IDWR to agricultural, industrial, municipal and commercial water users.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON RECONSIDERATION OF MOTIONS TO STRIKE AFFIDAVITS and MOTIONS TO FILE LATE RESPONSES was mailed on July 8, 1996, with sufficient first-class postage to the following:

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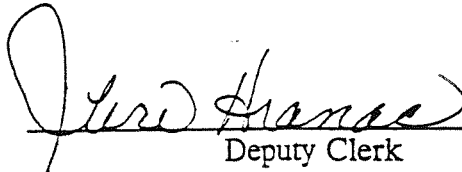
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