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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                          |

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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.1*. 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.<sup>1</sup>

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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,<sup>3</sup> 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

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<sup>3</sup>

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.”<sup>4</sup> 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).

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<sup>4</sup> 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).<sup>5</sup>

The procedure outlined under the *Order Amending A.O.1* 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.1* 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.1*. 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

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<sup>5</sup> 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.1* 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, LI. 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, LI. 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).

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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.

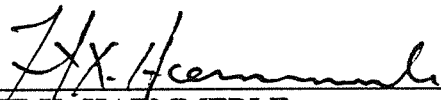
(Cranney Depo. p. 106, L. 22 - p. 107, L. 2) (emphasis added).

The Supreme Court entered its decision regarding *Musser* on February 28, 1994. IDWR sent the notices after the Supreme Court entered its decision.<sup>6</sup> 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.

  
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FRITZ X. HAEMMERLE  
Special Master  
Snake River Basin Adjudication

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<sup>6</sup> 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:

Chief, Natural Resources Division  
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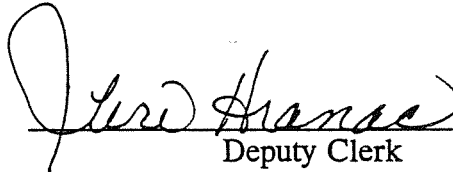
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