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DEPARTMENT OF
WATER RESOURCES

COPY

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

In Re CSRBA) SUBCASE NO: 94-09433
)
) (Insert Water Right Number)
)
Case No. 49576) STANDARD FORM 7
)
) ☒ MOTION TO FILE LATE OBJECTION
) OR
) ☐ MOTION TO SET ASIDE AND MODIFY
) PARTIAL DECREE OR FINAL ORDER
_____) DISALLOWING WATER RIGHT CLAIM

NAME AND ADDRESS OF PERSON FILING MOTION FOR LATE OBJECTION OR
MOTION TO SET ASIDE PARTIAL DECREE/FINAL ORDER DISALLOWING

Name: United States of America acting through the Department of Interior
Bureau of Land Management, Idaho State Office
Address: 1387 South Vinnell Way
Boise, Idaho 83709-1657

Daytime Phone: (208) 373-3831 FAX (208) 373-3839

☒ I am an attorney representing the United States of America
My name is: David L. Negri
My address is: United States Department of Justice
Environmental and Natural Resource
Natural Resources Section
550 West Fort Street, MSC 033
Boise, Idaho, 83724
My phone number is: (208) 334-1936

CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT OR
PARTIAL DECREE/FINAL ORDER DISALLOWING

Name: Donna J. and Kent L. Davis
Address: P.O. Box 453
Mullan, Idaho 83846

If you are seeking to file a late Objection, list reason(s) this objection is late and why it is

SF-7

Amended 11/4/2014

not filed by the objection deadline:

The United States has filed multiple timely objections in the CSRBA. It has recently come to our attention during our comprehensive review process of the Basin 94 Director's Report, which contained 1,984 claims to be reviewed by our organization, that the priority date recommended for claim 94-09433 preceded the issuance of the right-of-way (ROW) which has a point of diversion (POD) element described on federal lands (BLM). Any activity on federal land prior to issuance of the right-of-way would have been unauthorized and in trespass. Due to our comprehensive review process and a diminishment of BLM water right staff, BLM has been pressed to quickly complete Director Report review tasks and, because of an oversight, did not discover problems with the priority date element until after the deadline for filing of objections had passed on July 28, 2016. As it is still early in the judicial process, prior to any initial hearing scheduled, the United States seeks permission to enter this late objection.

The SRBA Court has held that motions to file late objections are subject to the "good cause" standard of IRCP 55. *Order on Motion to Set Aside Partial Decrees and File Late Objections*, subcase nos. 65-07267 *et al.* (January 31, 2001), at 7. This standard takes into account 1) whether the default was willful; 2) whether setting aside judgment would prejudice the apponent; and 3) whether a meritorious position has been presented. *Id.* The "good cause" standard under Rule 55 (c) is more lenient than the Rule 60 (b) standard applicable to obtaining relief from a judgment or setting aside an SRBA partial decree. *Id.* (citing *McFarland v. Curtis*, 854 P. 2d 274, 279 (Idaho 1993)).

1. The failure to file a timely objection was not willful.

The BLM has been systematically reviewing CSRBA Reports and Docket Sheets since commencement, but missed the deadline to object to the claim due to an oversight brought on by staffing issues. Good cause for a late objection exists where a party has a systematic process of reviewing claims and Director's Reports, but failed to find a particular claim and file a timely objection. *Order on Motion to File Late Objection*, SRBA subcase no. 23-0009B (January 18, 2015), at 3-4 (citing *Order on Motion to File Late Objection*, SRBA subcase no. 31-00006A *et al.*). The BLM has been diligently reviewing CSRBA and SRBA documents for years, often bringing to IDWR and the Court's attention inaccuracies in water right claims even when federal interests are not implicated. Accordingly, the failure to timely object in this subcase is not willful.

2. Allowing the BLM's objection would not prejudice the claimant.

The deadline for a timely objection to the Director's Report was July 28, 2016. No activity of any sort has occurred in this case in the interim. Although the Director's Report has been filed with the court, no hearings for this claim have been set and no other litigation activity has occurred. Furthermore, it is simply not in the claimant's interests to obtain a water right on federal land where proper federal authorizations do not exist. Allowing BLM's objection will not therefore prejudice the claimant.

3. The BLM has a meritorious position in support of its objection.

As explained above, the reported priority date precedes the date of federal authorization for this water development. Any use of water on federal land without such authorization would be illegal under federal and state law. Under Idaho law, a valid water right cannot be initiated by trespass onto another's property (*Lemmon v. Hardy*, 95 Id. 778, 519 P.2d 1168 (1974)); *Jones v. McIntire*, 60 Id. 338, 91 P. 2d 373 (1939)); *Bachman v. Reynolds Irrigation District*, 56 Id. 507, 55 P. 2d 1314 (1936)); *Short v. Praisewater*, 35 Id. 691, 208 P. 844 (1922); *Rabido v. Furey*, 33 Id. 56, 190 P. 73 (1920). One who diverts water and puts it to a beneficial use by aid of trespass does not, pursuant to such trespass, acquire a water right. *Bassett v. Swenson*, 51 Id. 256, 5 P. 2d 722(1931). BLM's objection to decree of the water right claim as proposed is meritorious.

If you are seeking leave to file a late Objection,

YOU MUST ATTACH A COMPLETED STANDARD FORM 1 (Objection Form).

If you are seeking to set aside and modify a Partial Decree/Final Order Disallowing, indicate the basis for your motion:

- ☐ Idaho Rule of Civil Procedure 59 (e)
- ☐ Idaho Rule of Civil Procedure 60 (a)
- ☐ Idaho Rule of Civil Procedure 60 (b)

And list the reason(s) why a Partial Decree/Final Order Disallowing should be set aside:

INSTRUCTIONS FOR MAILING

You must mail this motion, to the Clerk of the court. **FAX filings will not be accepted.**
You must also send a copy to all parties listed below in the Certificate of Mailing

CERTIFICATE OF MAILING

I certify that on January 19, 2017, I mailed the original and copies of this motion, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Coeur d'Alene-Spokane River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
Twin Falls, Idaho 83303-2707

2. One copy to each party involved in the Subcase including the claimant, all objectors, respondents and any party granted a motion to participate. Attach a list of names and addresses.

Kent L. & Donna J. Davis
P.O. Box 453
Mullan, Idaho 83846

3. Copies to:

IDWR Document Depository
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Signature of Movant or Attorney
mailing on Movant's behalf