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Department of Water Resources

Movant: State of Idaho

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Idaho State Bar # 2597 (Barber)

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 No. 51-04037
	)	
Case No. 39576	)	MOTION FOR LEAVE TO FILE A RESPONSE
	)	OR IN THE ALTERNATIVE TO FILE A LATE
	)	RESPONSE
_____	)	

The State of Idaho, by and through David J. Barber, Deputy Attorney General, Natural Resources Division, hereby moves the Court for permission to file a response to the objection filed by WaterOne Enterprises LLC on December 28, 2001. The grounds for this motion are as follows:

1. The ORDER GRANTING MOTION TO FILE AMENDED NOTICE OF CLAIM and SETTING DEADLINES (Order) dated October 24, 2001 provided that

COPY

objections to the amended Director's report shall be filed no later than Friday, December 28, 2001. However, that Order did not set any deadlines for filing responses to any objections that may be filed. Thus, by the terms of that order, the present response is not untimely. Nonetheless, even if the present response is deemed to be untimely, good cause exists for allowing the State of Idaho to file the response at this time.

2. The Certificate of Service for that Order indicates that the Order was not served on the State of Idaho.

3. Claimant WaterOne filed an Objection to the remark associated with the purpose of use. The remark to the purpose of use stated: "COMMERCIAL USE IS FOR POOL, BATHS, INTERNAL LODGE USE AND 1 TRAILER."

4. The predecessors in interest of WaterOne had filed application to appropriate water no. 51-07362 with the Idaho Department of Water Resources (hereinafter "IDWR"), which requested the permission of the IDWR to begin the commercial bottling of water for sale at Murphy Hot Springs. The IDWR denied this application for permit. A true and correct copy of this administrative decision is attached as Attachment I.

5. The apparent reason for the present objection is to change the definition of this water right in a manner that would allow the commercial bottling of water for sale, and thus to circumvent a final administrative decision of the IDWR.

6. Because the commercial bottling of water for sale is one hundred per cent consumptive for the local watershed, it may have a substantial adverse impact on the local water resources. The participation of the State of Idaho is warranted in this subcase because of the substantial policy issues regarding this potential change in water use.

CONCLUSION

The State respectfully requests that the Court grant its request to file the Response that is attached as Attachment II and to participate further in this subcase for good cause shown.

DATED this 9th day of April 2002.

ALAN G. LANCE
Attorney General

A handwritten signature in dark ink, appearing to read "David J. Barber", is written over a horizontal line.

DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April 2002, I caused to be served a true and correct copy of the foregoing **STATE OF IDAHO'S MOTION FOR LEAVE TO FILE RESPONSE OR IN THE ALTERNATIVE TO FILE A LATE RESPONSE** to the following addressees by the method indicated:

WaterOne Enterprises LLC
251 Versailles Court
Tracy, CA 95376

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail
- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Timothy J. Schneider
Ling & Robinson
615 H Street
P.O. Box 396
Rupert, ID 83350

Purity Sweet
390 W 100 S
Paul, ID 83347

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Janet O'Crowley
16 Stubb Road
Carey, ID 83320-5026

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 823-4554
- ☐ Statehouse Mail

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

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail
- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail

United States Department of Justice
Environment and Natural Resources
Division
550 West Fort Street, MSC 033
Boise, ID 83724



DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

ATTACHMENT I

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 51-07362 IN THE) **FINAL ORDER**
NAME OF MATTHEW OLIVAS)
_____)

A hearing was conducted in Twin Falls, Idaho, on June 11, 1997, regarding protests opposing the above described application for permit to appropriate water. Murphy Hot Springs Property Owners Association was represented by Norman Semanko, attorney at law. The applicant and the other protestants represented themselves. A recommended order was issued on August 18, 1997. Matthew Olivas petitioned for reconsideration on September 5, 1997, and the petition was denied on September 19, 1997. No exceptions to the recommended order were received.

FINDINGS OF FACT

1. On July 15, 1996, Sylvia Olivas filed application to appropriate water no. 51-07362. Notice of the application was printed in the Owyhee Avalanche in Homedale, Idaho. Application for permit no. 51-07362 was subsequently assigned to Matthew Olivas (Olivas) on March 27, 1997.

2. Application for permit no. 51-07362 proposes the diversion of warm spring water from two springs on the northwest side of the East Fork of the Jarbidge River:

Source:	Murphy Hot Springs
Proposed priority:	07/15/96
Point of diversion:	SWNWNW ¹ , Section 24, T16S, R9E, B.M. ²
Place of use:	NWNW, Section 24, T16S, R9E
Flow rate:	0.04 cfs
Nature of use:	Commercial (bottling & sale of drinking water)
Period of use:	January 1 through December 31

3. The following protestants filed protests against application for permit no. 51-07362: Murphy Hot Springs Property Owners Association; Robert W. Fries; Lowell Prunty;

¹The absence of the quadrant identifier implies that the fraction "1/4" should be read into the description.

²The acronym "B.M." is an abbreviation for "Boise Meridian" and will be eliminated in the remainder of the text.

FINAL ORDER, Page 1

The foregoing is a true and certified copy of the document on file at the department of Water Resources.

Signed this 9th day of April, 2002
Shelly W. Keen

Charles R. Potter; John Etter; Janet O'Crowley; Anita Showalter; James Don Smith; David J. Long; and Virgil E. Dodd.

4. Water flowing from Murphy Hot Springs is currently captured by Olivas and supplies water to a swimming pool, three hot tubs, a home, and a lodge. The right to use water from Murphy Hot Springs for these purposes is represented by Snake River Basin Adjudication (SRBA) claim no. A51-04037:

Source:	Murphy Hot Springs
Priority:	07/01/34
Point of diversion:	NWNW, Section 24, T16S, R09E
Place of use:	NWNW, Section 24, T16S, R09E
Flow rate:	0.06 cfs
Nature of use:	Heating, domestic, and commercial
Period of use:	January 1 through December 31

5. Originally, one spring supplied water to the swimming pool and another spring supplied water to the hot tubs. In addition, one home and three trailers were supplied water from the same water line that delivers water to the hot tubs.

6. A lodge on the southwest side of the East Fork of the Jarbidge River also received warm water from the water line which supplied the hot tubs.

7. A 3/4-inch water line was tapped into the supply line delivering water to the swimming pool. The 3/4-inch water line delivered water to a residence owned by Margaret Thompson, now owned by Janet O'Crowley, one of the protestants. Ms. O'Crowley's water right for domestic use is represented by SRBA claim no. A51-10220:

Source:	Murphy Hot Springs
Priority:	05/15/71
Point of diversion:	NWNW, Section 24, T16S, R09E
Place of use:	NWNW, Section 24, T16S, R09E
Flow rate:	0.01 cfs
Nature of use:	Domestic
Period of use:	January 1 through December 31

8. License no. 51-07138, originally established by John Thompson, authorized the diversion of wastewater after use in the swimming pools and hot tubs:

Source:	Wastewater
Priority:	01/03/79
Point of diversion:	NWNWNW, Section 24, T16S, R09E
Place of use:	NWNW, Section 24, T16S, R09E

Flow rate: 0.10 cfs
Nature of use: Heating, irrigation
Period of use: January 1 through December 31

9. In September of 1993, Matthew and Trini Olivas purchased the lodge, residence, swimming pool, hot tubs, and surrounding property. Delivery of warm water to the three trailers was discontinued before the purchase by Matthew and Trini Olivas. During the spring of 1994, Olivas constructed a water line linking the swimming pool water line to the hot tub water line. He modified the water line to the hot tubs by adding another water line extending down gradient and across to the northwest side of the East Fork of the Jarbidge River to a bottling plant he had constructed. Any overflow from the swimming pool, the hot tubs, the home, or the bottling plant discharges into the East Fork of the Jarbidge River unless captured by another water user.

10. At the same time Olivas constructed the cross-connection between the two spring water lines, he changed the 3/4-inch connection for the Thompson (O'Crowley) property from the pool water line to the hot tub water line.

11. Applicant's exhibit no. 5 schematically depicts the construction as completed by Olivas. A series of valves in the system, also depicted on the exhibit, regulates the quantities of warm water flowing to the swimming pool, the hot tubs, the O'Crowley property, and finally across the Jarbidge River to the bottling plant. Olivas must adjust these valves to insure that the proper mixture of hot water and cold water is delivered to the swimming pool for swimming and to the hot tubs for bathing. He must also regulate the most downstream valve before discharge into the East Fork of the Jarbidge River to back water into the bottling plant.

12. Shortly after purchasing the property, Olivas began bottling some water for drinking. He began selling the water as part of the business at the lodge. He also began selling water to other individuals, primarily to Matt Clawson (Clawson). Clawson stated that he (Clawson) began selling approximately 36 gallons per week to customers.

13. After construction of the bottling plant and reconstruction of the water line, Margaret Thompson noticed problems with delivery of hot water through the 3/4-inch water line when Olivas was bottling water.

14. After Janet O'Crowley purchased the Thompson property in the fall of 1994, she also experienced water delivery problems. O'Crowley documented the shortages in a journal, and those entries are summarized in protestants' exhibit AA. O'Crowley correlated her water shortages directly with her observations of bottling water at the bottling plant.

15. Olivas testified that if the application is approved, he would operate one eight-hour shift for five days a week, bottling approximately twelve gallons per minute. He predicted bottling and marketing approximately 28,500 gallons per month.

16. Olivas signed a long term lease agreement with Clawson. Clawson agreed to operate the swimming pool, lodge, and hot tubs and to market the bottled water. The contract is marked as protestants' exhibit KK.

17. Olivas testified generally about the operation of the system. He did not present any data regarding the flows of the springs, the demand of the other users, and how much water would be available for appropriation.

18. Maria Minicucci (Minicucci), an employee of the Department of Water Resources (IDWR), measured flows from the springs on March 3, 1994, as part of an SRBA examination. She measured 0.07 cfs in a runoff ditch just north of the bath houses with a pygmy meter. She acknowledged she may not have measured all the flow because some water may have been diverted to the house and lodge during her measurement.

19. Minicucci also measured a swimming pool volume of 4,000 cubic feet. Olivas told Minicucci that the pool fills in 22 hours. A continuous flow of 0.051 cfs would fill the swimming pool in 22 hours. However, this flow rate may not be a representative measurement of the total output from the springs because the cross-connection may not have been complete at the time, since Olivas testified that cold water must be mixed with the low temperature geothermal water to control temperatures for swimming.

20. Two field examinations were conducted for water right no. 51-07138, established by John B. Thompson and described above in finding of fact no. 8. In January of 1979, Gary Funderburg, another IDWR employee, measured a wastewater flow of 0.042 cfs from the swimming pool and the hot tubs with a portable cippoletti weir. In August of 1984, Jan Grover, another IDWR employee, estimated that 0.10 cfs was flowing in the waste ditch below the swimming pool and hot tubs.

21. Testimony established that the system as constructed and operated with the bottling plant does not deliver sufficient water to the O'Crowley property pursuant to her claimed water right. Olivas did not present any rebuttal evidence, nor did Olivas present a plan to supply uninterrupted domestic water to O'Crowley.

22. Evidence was presented about an ongoing foreclosure action and a recent bankruptcy action, calling into question the financial ability of Olivas to construct and operate the project. Olivas submitted a tax return and financial statement as evidence. Olivas did not submit evidence regarding the cost of completing construction of the bottling plant, the cost of operating the bottling plant, or that Olivas or Clawson could finance the project. The protestants submitted evidence that Olivas/Clawson had been denied a Small Business Administration loan, with a letter by Clawson stating that the denial of the loan would jeopardize operation of the bottling plant.

23. Olivas presented testimony showing that he has already expended significant effort to print labels for the bottles and has already bottled water at the bottling plant.

24. Olivas established that the bottled water business could be a lucrative business and would increase the income of his family. He testified that the plant could employ three to four employees.

25. Olivas testified that the warm spring water had been tested for quality. Olivas testified that the water is naturally distilled when the water is geothermally heated to steam underground and then condenses to become a liquid, allegedly leaving many impurities behind. To the extent geothermal heat purifies the spring water, this is a beneficial use of the geothermal heat.

26. The protestants expressed their opinion that the construction and operation of the bottling plant would not serve the public interest. Protestants expressed concern about water quality. The protestants were particularly concerned about the surrounding corral and manure, the hygiene of people who have bottled water in the past, and the condition and exposure of the water line delivering water to the plant.

27. Protestants expressed their opinion that the increased truck traffic hauling water to and from the bottling plant would degrade the gravel roads in the area.

28. Robert W. Fries (Fries) testified that the original developer promised him free access to the swimming pool and hot tubs when he bought his residential lots. Fries testified that Olivas had denied him access to the swimming pool and hot tubs.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A(5) provides, in pertinent part, as follows:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefor

2. Idaho Code § 42-230(a)(1) states:

All ground water having a temperature of greater than eighty-five (85) degrees Fahrenheit and less than two hundred twelve (212) degrees Fahrenheit in the bottom of a well shall be classified and administered as a low temperature geothermal resource pursuant to section 42-233, Idaho Code.

3. Idaho Code § 42-233(1) states:

The right to the use of low temperature geothermal resources of this state shall be acquired by appropriation. The appropriation may be perfected by means of the application, permit and license procedure as provided in this chapter for ground water, provided that low temperature geothermal resources shall be utilized primarily for heat value and secondarily for the value as water. Usage of a low temperature geothermal resource primarily for reasons other than heat value is not a beneficial use of the resource, unless the director of the department of water resources exempts the proposed use. The director may exempt a proposed use if the director finds that the proposed use satisfies the following criteria: (i) there is no feasible alternative use of the resource; (ii) there is no economically viable source of water having a bottom hole temperature of eighty-five (85) degrees or less in a well available; (iii) the exemption is in the public interest.

4. The applicant bears the burden of proof regarding the criteria that must be considered pursuant to Idaho Code § 42-203A.

5. The applicant did not submit sufficient proof to establish that there is sufficient water for the purpose sought.

6. The applicant failed to establish that his use would not injure other water users. Protestant O'Crowley established that bottling water by Olivas had prevented the use of water to which she was entitled.

7. The applicant did not present evidence that he had sufficient financial resources to construct and operate the bottling facility.

8. The applicant has accomplished sufficient work to show that the application is not being filed for purposes of speculation or delay.

9. The protestants did not raise sufficient public interest concerns for the application for permit to be denied based on public interest except with respect to water quality issues. Degradation of county roads is an issue that should be resolved by the entities that control local road maintenance and use. Speculation about future use of the water and unfulfilled promises to land purchasers are not public interest concerns that rise to the level of justifying denial of an

application for permit to Olivas. On the contrary, the use proposed by Olivas appears to have local public interest merit because of the value of the bottled water compared with the small quantity of water that would be diverted.

10. Olivas did not submit sufficient information to show that he could comply with health regulations.

11. Because Olivas did not carry his burden of proof, application for permit no. 51-07362 will be denied.

12. Because application for permit no. 51-07362 will be denied, this decision does not require an interpretation of whether Idaho Code § 42-230 and Idaho Code § 42-233 define warm spring water as low temperature geothermal water, and whether a proposed use of warm spring water must satisfy the criteria of Idaho Code § 42-233.

13. Olivas, or another applicant, should not be prevented from applying for use of Murphy Hot Springs for bottled water or some other purpose if the criteria that must be reviewed by IDWR can be satisfied.

ORDER

IT IS HEREBY ORDERED that application for permit to appropriate water is **REJECTED**, and issuance of permit for the application is **DENIED** without prejudice.

Dated this 26th day of January, 1998.


KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 1998, I mailed a true and correct copy, postage paid, of the foregoing document to the following individuals:

Sylvia Olivas
Desert Hot Springs
Rogerson, ID 83302

Robert W. Fries
1720 Poplar Ave
Twin Falls, ID 83301

Charles R. Potter
2278 Bowlin Lane
Twin Falls, ID 83301

Janet O'Crowley
Murphy Hot Springs
Rogerson, ID 83302

James Don Smith
216 Borah Ave. W
Twin Falls, ID 83301

Virgil E. Dodd
Murphy Hot Springs
Rogerson, ID 83302

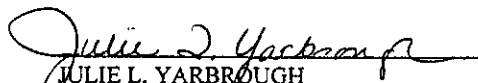
Norman M. Semanko
Rosholt, Robertson & Tucker
Murphy Hot Springs Prop Owners
P. O. Box 1906
Twin Falls, ID 83301

Lowell Prunty
Murphy Hot Springs
Rogerson, ID 83302

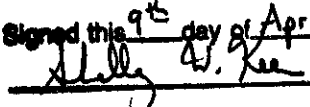
John Etter
137 2nd Ave. E
Twin Falls, ID 83301

Anita Showalter
Murphy Hot Springs
Rogerson, ID 83302

David J. Long
P. O. Box 209
Hansen, ID 83334


JULIE L. YARBROUGH
Senior Secretary

The foregoing is a true and certified copy of the document on file at the department of Water Resources.

Signed this 9th day of April, 2002


ATTACHMENT II

**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	)		
	)	A.	Subcase: 51-04037
	)		(Insert water right number
Case No. 39576	)		From the Objection Form)
	)		
	)		
	)		
	)		
	)		
	)		
	)		

**STANDARD FORM 2
RESPONSE TO OBJECTION**

Please **print or type** the following information:

B. NAME AND ADDRESS OF PERSON RESPONDING

Name: State of Idaho
Address: 700 W. Jefferson, Room 210
P.O. Box 44449
Boise, Idaho 83711-4449
Phone: Work: (208) 334-2400 Home: N/A

Name and Address of Attorney, if any:

Attorney Name: ALAN G. LANCE
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
DAVID J. BARBER
Deputy Attorney General
Attorney Address: Office of the Attorney General
700 W. Jefferson, Room 210
P.O. Box 44449
Boise, ID 83711-4449
Attorney Phone No. (208) 334-2400
Idaho State Bar # 2597

C. NAME AND ADDRESS OF PERSON WHO FILED THE OBJECTION TO WHICH YOU ARE RESPONDING

Name: WaterOne Enterprises LLC
Address: 251 Versailles Court
Tracy, CA 95376

D. I am responding to the objections to the following elements. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
2. ☐ **Source**
3. ☐ **Quantity**
4. ☐ **Priority Date**
5. ☐ **Points of Diversion**
6. ☐ **Instream Flow Description**
7. ☒ **Purpose(s) of Use**
8. ☐ **Period of Year**
9. ☐ **Place of Use**
11. **I object because:**
 - ☐ This water right should not exist.
 - ☐ This water right was not recommended, but should be recommended with the elements described above.

E. VERIFICATION (Must be Completed)

State of Idaho)
) ss.
County of Ada)

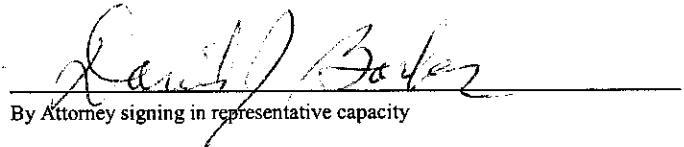
David J. Barber, Deputy Attorney General, being first duly sworn, upon oath, deposes and says:

That the State of Idaho, in both its sovereign and proprietary capacity, pursuant to I.C. § 42-1411A(16) is filing this objection and that I am a Deputy Attorney General authorized to represent the State of Idaho, which is a party/claimant in this proceeding, as defined by I.C. § 42-1401A(1) and (7), and I have read this objection, know its contents and that the statements are true to the best of my knowledge and belief.

ALAN G. LANCE
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

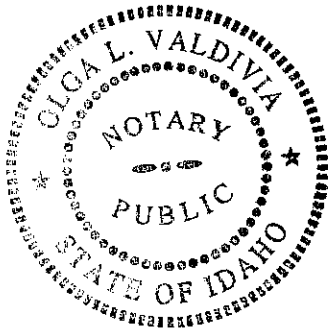
DAVID J. BARBER
Deputy Attorney General
Natural Resources Division



By Attorney signing in representative capacity

Subscribed and sworn to before me on: April 9, 2002

(Insert Date)



Olga L. Valdivia
Notary Public for IDAHO
Residing at: BOISE, ID
My commission expires: 2/8/06

INSTRUCTIONS FOR MAILING

You must mail the response, including all attachments, to the Clerk of the Court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on April 9, 2002, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

2. One copy to the owner of the water right at the following address:

WaterOne Enterprises LLC
251 Versailles Court
Tracy, CA 95376

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

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

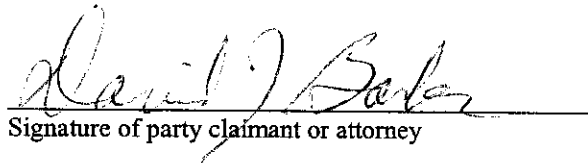
(not applicable)

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

Janet O'Crowley
16 Stubb Road
Carey, ID 83320-5026

Timothy J. Schneider
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615 H Street
P.O. Box 396
Rupert, ID 83350

Purity Sweet
390 W 100 S
Paul, ID 83347



Signature of party claimant or attorney