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OCT 11 2007

DEPARTMENT OF  
WATER RESOURCES

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

|                |   |                                 |
|----------------|---|---------------------------------|
| In Re SRBA     | ) | Subcase No. 94-00019            |
|                | ) |                                 |
| Case No. 39576 | ) | FOR WATER RIGHT NO.: A47-04177E |
|                | ) |                                 |
|                | ) | MOTION TO FILE LATE OBJECTIONS  |
|                | ) |                                 |
|                | ) |                                 |

COMES NOW, Tim and Karen Smalley ("Smalley"), by and through their attorneys, Arkoosh Law Offices, Chtd., pursuant to SRBA Administrative Order #1 ("AO1") and the Idaho Rules of Civil Procedure, and move this Court for an Order Granting Motion to File Late Objections. The reasons for the motion are set forth below.

INTRODUCTION

This companion case was assigned number 94-00019 in the Snake River Basin Adjudication. It originated with a *Petition for Injunctive Relief* filed in 2001 (a true and correct copy of which is attached hereto as Exhibit "A"). Smalley is the owner of water right No. 47-04177B. Bruce Walden ("Walden") is the current owner of water right No. 47-04177E. Interim

MOTION TO FILE LATE OBJECTIONS

administration of these rights has been ongoing since the 2002 irrigation season based on a stipulation between Smalley, former owner of Walden's right, Marjory Chessmore, and Bruce Walden, whereby Chessmore and Walden agreed not to divert any water under water right No. 47-04177E. Walden has filed objections to both 47-04177B and 47-04177E. Smalley is concerned about the claimed basis for Walden's objections and meets the standard to file late objections as provided by AO1 and the Idaho Rules of Civil Procedure.

### STANDARD OF REVIEW

In the *Memorandum Decision and Order on Challenge* (Subcase Nos. 47-16433 *et al*), Presiding Judge Melanson described the standard of review for filing a late objection:

In subcases *for which partial decrees have not been entered*, the legal standard for filing a late objection to a water right claim in the SRBA has been historically determined pursuant to the standard set forth in *AOI* for filing late claims. [citation omitted]. *AOI* does not expressly provide a standard for reviewing late objections. A motion to file a late claim is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. *Id.*, see *AOI* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) leave to amend a notice of claim shall be freely given when justice so requires). In the *A.L. Cattle* subcase, this Court held that the I.R.C.P. 55(c) standard should be applied to late objections to which partial decrees have not been entered, rather than the I.R.C.P. 60(b) standard.

In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho Courts apply a "good cause" for untimeliness standard. I.R.C.P. 55(c). The "good cause" standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho at 935, 854 P.2d at 279. The I.R.C.P. 55(c) good cause standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

*Memorandum Decision and Order on Challenge* at 5-6 (March 22, 2005) (“*Bedke I*”).

In doubtful cases, relief should be granted to reach a judgment on the merits. *Bedke I* at 10. This is because default judgments are disfavored. *See Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267 *et al.* (Jan. 31, 2001) (“*A.L. Cattle*”).

### **REASONS SUPPORTING MOTION**

Smalley’s Motion to File Late Objections is supported by good cause and a meritorious position hence it meets the above standard. With respect to both parties’ water rights, Walden’s objections, Smalley’s objections, the claims, and IDWR’s recommendations have questions of law and fact in common, namely, the determination of the respective rights.

Smalley sold approximately six acres and the appurtenant water right represented and described as 47-04177E to Walden’s predecessor in interest, Chessmore, in 1985. No entity has applied 47-04177E to beneficial use since in or about June 1985. Thus, this water right has been forfeited and abandoned under Idaho law. Further, during the summer of 2000, Chessmore, or her agents caused the installation of a plastic pipe, carrying away water from the ditch conveyance for the water described in water right 47-04177, and allowed the same to flood and waste upon unsown ground. Allowing Smalley to file late objections and consolidating a hearing on all objections will not unduly delay or prejudice the adjudication of these rights. Special Master, Brigitte Bilyeu has set for hearing the Final Hearing on Petition for Injunctive Relief for January 2, 2008. There has been no trial in this subcase.

Smalley is submitting for filing together with this motion a proposed objection to water right 47-4177E (see Exhibit “B”) which comprises both claims and defenses in this matter and

would respectfully request a hearing on this matter prior to the January 2, 2008 Final Hearing on Petition for Injunctive Relief. Alternately, Smalley will move the Court, by separate motion, to consolidate these cases for reasons of expediting the interests of the litigants and the Court.

DATED this 10<sup>th</sup> day of October, 2007.

ARKOOSH LAW OFFICES, CHTD.



\_\_\_\_\_  
Daniel A. Nevala

### CERTIFICATE OF MAILING

I certify that on October 10<sup>th</sup>, 2007, I mailed the original and copies of the foregoing motion, including all exhibits, to the following persons:

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

Scott L. Campell  
Andrew J. Waldera  
Moffatt Thomas Barrett Rock & Fields  
PO Box 829  
Boise, Idaho 83701

IDWR Document Depository  
P.O. Box 83720  
Boise, Idaho 83720-0098

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

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

Tim and Karen Smalley  
4579A River Road  
Buhl, Idaho 83316

Bruce L. Waldon  
2660 Dalton Lane  
Boise, Idaho 83704



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Daniel A. Nevala

C. Tom Arkoosh  
ARKOOSH & JAMES, PLLC  
301 Main Street  
Post Office Box 32  
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Telephone: (208) 934-8872  
Facsimile: (208) 934-8873  
Idaho State Bar: #2253

Attorney For Petitioner

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DEPARTMENT OF  
WATER RESOURCES

FILE COPY

AUG 31 2001

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:  
Case No. 39576

TIMOTHY SMALLEY, successor in  
Interest to MELISSA SMALLEY

Petitioner,

vs.

MARJORY CHESSMORE,

Respondent.

*SRBA Case No. 94-19*  
For Water Right No. A47-04177E

PETITION FOR INJUNCTIVE  
RELIEF

COMES NOW, the Petitioner in the above-entitled action, Timothy Smalley  
["Smalley"], and pursuant to Administrative Order 1 ["A0-1"] 3(i) and Idaho Rule of  
Civil Procedure [I.R.C.Pro.] 65, and as and for her cause of action for relief, complains  
and alleges, as follows:

PETITION FOR INJUNCTIVE RELIEF- 1

EXHIBIT

A

## I. PARTIES

1. That Smalley is an individual and owner of Water Right 47-04177, 41 CFS of water from an unnamed stream, tributary to Deep Creek, Township 09 South, Range 14 East, Section 9.

2. That Respondent, Marjory Chessmore ["Chessmore"] is an individual and putative owner of Water Right A47-04177E, 0.120 CFS of water from an unnamed stream, tributary to Deep Creek, Township 09 South, Range 14 East, Section 09.

## II. FACTS

3. On or about June 15, 1985, Chessmore purchased approximately six acres from Smalley, in Township 09 South, Range 14 East, Section 9, NE SE, adjacent to 30 acres of real property retained by Petitioner's predecessor, Melissa Smalley, in the same quarter, quarter section.

4. With the sale of the real property described in paragraph 3 above, Chessmore also purchased the appertinent water right represented and described as A47-04177E.

5. No entity has applied A47-04177E to beneficial use since in or about June of 1985.

6. During the summer of 2000, Chessmore, or her agents caused the installation of a four (4) inch plastic pipe, carrying away water from the ditch conveyance for the water described in Water Right 47-04177, and allowed the same to flood and waste upon unsown ground, and onto the public road adjacent to the Chessmore real property

in Township 09 South, Range 14 East, Section 9.

7. That upon information and belief, Smalley alleges that the recommendation of the Department of Water Resources for basin 47 is not expected to be provided to the court until on or after sometime in the year 2002.

8. That continuation of the wrongful diversion of the water described in Water Right A47-04177E will produce waste, or great, irreparable injury to Smalley.

9. That the continued wrongful diversion to waste by Chessmore is a violation and contrary to Smalley's rights, and Smalley is entitled to the relief hereinafter demanded.

### III. COUNT ONE

(Forfeiture)

10. Smalley realleges the allegations in paragraphs 1 through 9 of said Smalley as though the same were set forth in full herein.

11. That non-use of the water represented by Water Right A47-04177E constitutes forfeiture pursuant to Idaho Code.

### IV. COUNT TWO

(Abandonment)

10. Smalley realleges the foregoing allegations, as though the same were set forth in full herein.

11. That non-use of the water represented by Water Right A47-04177E

constitutes abandonment pursuant to Idaho Code.

## V. COUNT THREE

(Waste)

10. Smalley realleges the foregoing as though the same were set forth in full herein.

11. That the wrongful diversion of the water described in Water Right A47-04177E, without application of the same to beneficial use constitutes waste, and injury to Smalley, under Smalley's water rights.

## VI. PRAYER

WHEREFORE, Smalley prays for relief, as follows:

1. That the Court adhere to the procedural dictates of A01-3(i); and open a subcase accordingly;
2. That the Court declare, adjudicate, adjudge and find forfeiture and abandonment of Water Right A47-04177E by Chessmore.
3. That the Court declare, adjudicate, adjudge and find waste of Water Right A47-04177E by Chessmore.
4. That the Court enter its order and judgment, ordering and adjudging Chessmore and all others be enjoined from diversion of the water described in Water Right A47-04177E.
5. That Smalley awarded her costs and fees pursuant to §§12-120, 12-121 and

12-123, Idaho Code.

DATED this 28<sup>th</sup> day of August, 2001.

ARKOOSH & JAMES, PLLC



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C. Tom Arkoosh  
Attorney for Smalley

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DEPARTMENT OF  
WATER RESOURCES

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)

A. Subcase: 47-4177E

STANDARD FORM 1  
OBJECTION

Please fill in the following information:

**B. NAME AND ADDRESS OF PERSON OBJECTING**

Name: Tim Smalley and Karen Smalley

Address: 4579 A Road Buhl Idaho 83316

Buhl, Idaho 83316

Daytime Phone: (208) 539-0681

Name & Address of Attorney, if any:

C. Thomas Arkoosh/Daniel A. Nevala

Arkoosh Law Office, Chtd.

Post Office Box 32

301 Main Street

Gooding, Idaho 83330

**C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT**

Name: Bruce L. Walden

Address: 2660 Dalton Lane

Boise, Idaho 83704

EXHIBIT

tabbles

B

**D.** I object to the following elements as recommended in the Director's Report.  
(Please check the appropriate box(es)).

1. ☐ **Name and Address**

Should be: \_\_\_\_\_

2. ☐ **Source**

Should be: \_\_\_\_\_

3. ☐ **Quantity**

Should be: \_\_\_\_\_

4. ☐ **Priority Date**

Should be: \_\_\_\_\_

5. ☐ **Point of Diversion**

Should be: \_\_\_\_\_

6. ☐ **Instream Flow Beginning and Ending Point**

Should be: \_\_\_\_\_

7. ☐ **Purpose(s) of Use**

Should be: \_\_\_\_\_

8. ☐ **Period of Year**

Should be: \_\_\_\_\_

9. ☐ **Place of Use**

Should be: \_\_\_\_\_

10. ☐ **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. REASONS SUPPORTING OBJECTIONS(S):**

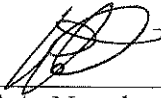
Please see attachment 1 hereto.

**F. VERIFICATION** (must be completed)

State of Idaho                    )  
                                          )ss.  
County of Ada                    )

Daniel A. Nevala, duly sworn, upon oath, deposes and says: That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

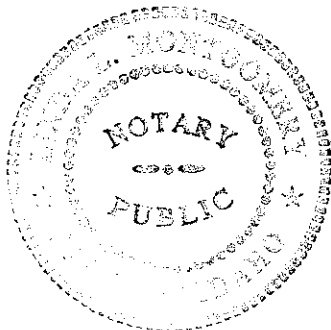
\_\_\_\_\_  
(Signature of person filing objection)



\_\_\_\_\_  
Daniel A. Nevala  
(Attorney signing in representative capacity)

Subscribed and sworn to before me on: \_\_\_\_\_

October 10, 2007  
Linda Spence  
Notary Public for Idaho  
Residing at: Boise, Idaho  
My Commission Expires: 11-15-08



## INSTRUCTIONS FOR MAILING

You must mail the objection, 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 the 10<sup>th</sup> of October, 2007, 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  
PO Box 2707  
Twin Falls, ID 83303-2707

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

Name: Bruce L. Walden

Address: 2660 Dalton Lane  
Boise Idaho 83704

3. Copies to:

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

United States Department of Justice  
Environment & Nat'l Resources Div  
550 W Fort Street, MSC 033  
Boise, ID 83724

Chief, Natural Resources Division  
Office of Attorney General  
PO Box 44449  
Boise, ID 83711-4449



\_\_\_\_\_  
Daniel A. Nevala

## **ATTACHMENT 1 TO STANDARD FORM 1 – OBJECTION**

**SUBCASE 47-4177E**

### **Objections:**

This water right has been forfeited and abandoned. Further, the historic wrongful diversion of this water constitutes waste.

### **Reasons for Objection:**

Water right 47-04177E has not been applied to beneficial use since in or about June of 1985. The non-use of the water represented by water right 47-04177E constitutes forfeiture and abandonment pursuant to Idaho Code. Further, the historic wrongful diversion of the water described in water right 47-04177E, without application of the same to beneficial use constitutes waste, and injury to objector, under objector's water rights.