

RECEIVED
MAR 24 1990
DEPARTMENT OF
WATER RESOURCES

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 South Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
slc@moffatt.com
dbl@moffatt.com
22377.0001

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 No. 63-23182

MOTION TO AMEND OBJECTION

Water right claimants Jerry L. Tlucek and Mary Lou Tlucek (the "Tluceks"), by and through undersigned counsel of record, hereby file this Motion to Amend Objection in the above-referenced subcase pursuant to Sections 1(a) and 2(r) of this Court's Administrative Order 1 ("AO1") and Idaho Rules of Civil Procedure 7(b) and 15(a). It is supported by the Affidavit of Dylan Lawrence filed contemporaneously herewith (the "Lawrence Aff.").

I. BACKGROUND

On or about August 13, 1990, the Tluceks filed a Notice of Claim to water right 63-23182 (the "Water Right") in the SRBA. (Lawrence Aff. ¶ 2.) In that Notice of Claim, the

Thluceks claim a diversion rate of 1.720 cubic feet per second (“cfs”), a total consumptive use of 301.0 acre-feet per annum (“AFY”), and a place of use of 86.0 acres. (*Id.*) In 1997, the Idaho Legislature enacted legislation amending Idaho Code Sections 42-1401A, 42-1409, 42-1411, 42-1412, and 42-1424 to delete consumptive use as an element of a water right to be determined in a water right adjudication such as the SRBA. S.L. 1997, ch. 374, §§ 2-6.

On December 14, 2006, the Department of Water Resources issued its Director’s Report recommendation for the Water Right. (Lawrence Aff. ¶ 3.) The Department recommended a diversion rate of 0.80 cfs, an annual diversion volume of 220.60 AFY, and a place of use of 86.0 acres. (*Id.*) The Thluceks timely filed an Objection to the Department’s recommendation. (Lawrence Aff. ¶ 4.) In their Objection, the Thluceks assert that the quantity element for the Water Right should be 1.72 cfs and 301.0 AFY. (*Id.*)

Generally speaking, the Department calculates the recommended annual diversion volume for a water right in Basin 63 by multiplying 4.5 acre-feet per acre per year by the number of acres to be irrigated by that right. (*See, e.g.,* Lawrence Aff. ¶ 5.) When applied to the Water Right, this methodology would result in an annual diversion volume limitation of 387.0 AFY (86.0 acres x 4.5 acre-feet per acre per year = 387.0 AFY).

On March 11, 2008, counsel for the Thluceks participated by telephone in a hearing regarding this Court’s proposal to combine subcases 63-03174 and 63-23182. During that hearing, counsel for the Thluceks reviewed the Thluceks’ Objection and observed that it asserted an annual diversion volume limitation of 301.0 AFY, rather than 387.0 AFY. For the reasons set forth below, the Thluceks respectfully request leave from this Court to amend their Objection to assert an annual diversion volume limitation of 387.0 AFY. A completed and signed amended Objection reflecting this change is attached hereto as Exhibit A.

II. ARGUMENT

A water right objection in the SRBA is a pleading. AO1 § 2(r). Idaho Rule of Civil Procedure 15(a) governs the amendment of pleadings. When amendment of a pleading is not as of right, “leave [to amend] shall be given when justice so requires.” I.R.C.P. 15(a). While “the decision to grant or refuse permission to amend [a pleading] is left to the sound discretion of the trial court,” *Jones v. Watson*, 98 Idaho 606, 610, 570 P.2d 284, 288 (Idaho 1977), “courts should favor liberal grants of leave to amend.” *Wickstrom v. North Idaho College*, 111 Idaho 450, 453, 725 P.2d 155, 158 (1986). Due to the lack of articulated standards governing motions to amend a pleading, it may be helpful to briefly discuss this request in terms of the more stringent standards governing a motion to file a late objection in the SRBA.

Late objections in the SRBA are reviewed pursuant to the “good cause shown” standard of Idaho Rule of Civil Procedure 55(c). *See, e.g., Order on Motion to Set Aside Partial Decrees and File Late Objections* at 6-7, Subcase Nos. 65-07267, *et al.* (Jan. 31, 2001) (“*A.L. Cattle*”). In the context of a water right objection, this standard takes into account the following three factors: (1) whether the delay in filing the objection is willful; (2) whether allowing the late objection would prejudice the opponent; and (3) whether a meritorious position has been presented. *Id.* Generally speaking, a “willful” delay is “intentional, knowing, or voluntary,” and requires a higher degree of culpability than mere negligence or carelessness. *Memorandum Decision and Order on Challenge*, Subcase Nos. 47-16433, *et al.*, at 9 (J. Melanson, March 22, 2005) (“*Bedke P*”). The Tluceks believe these factors to weigh in favor of allowing them to amend their Objection to the Water Right recommendation.

First, it is important to emphasize that the Tluceks did file a timely Objection. They simply wish to amend that Objection based on the previous mistaken designation of

301.0 AFY as the annual diversion volume. A review of the background presented above demonstrates that when counsel for the Tluceks prepared the Objection, it mistakenly used the 301.0 AFY consumptive use figure from the original Notice of Claim. Upon discovery of that apparent error during the March 11, 2008, hearing, counsel for the Tluceks promptly investigated and confirmed the error and prepared this Motion. The delay in amending the Objection, therefore, is not “willful.”

Allowing the Tluceks to amend their Objection would not prejudice any opponents, as this is a one-party subcase. Moreover, the Tluceks have established a meritorious position for their amendment, as it is simply based on the Department’s typical methodology for calculating annual diversion volume limitations in Basin 63. (*See, e.g.*, Lawrence Aff. ¶ 5.) Therefore, the Tluceks respectfully request leave of this Court to amend their Objection to assert an annual diversion volume limitation of 387.0 AFY.

III. CONCLUSION

Idaho law favors “liberal grants” of leave to amend judicial pleadings such as water right Objections in the SRBA: As explained, the Tluceks’ delay in attempting to amend their Objection is not willful. Allowing the amended Objection would not prejudice any parties. And, the Tluceks have established a meritorious position for asserting an annual diversion volume limitation of 387.0 AFY. Therefore, the Tluceks respectfully request that the Court grant this Motion, allowing the filing of the amended Objection attached hereto as Exhibit A.

DATED this 21st day of March, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March, 2008, I caused a true and correct copy of the foregoing **MOTION TO AMEND OBJECTION** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Facsimile 208-207-6700

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Scott L. Campbell
Scott L. Campbell

EXHIBIT A

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 63-23182

(Insert water right number)

STANDARD FORM 1
OBJECTION

Please fill in the following information:

AMENDED

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Jerry L. Tlucek and Mary Lou Tlucek

Address: 15188 S. Can-Ada Road

Melba, Idaho 83641

Daytime Phone: (208) 495-2034

Name & Address of Attorney, if any:

Scott L. Campbell

Moffatt Thomas

PO Box 829, Boise, Idaho 83701

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

Name: Jerry L. Tlucek and Mary Lou Tlucek

Address: 15188 S. Can-Ada Road

Melba, Idaho 83641

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: 1.72 cfs and 387.0 AFY
4. ☒ **Priority Date**
Should be: Please see Attachment 1 hereto
5. ☐ **Point of Diversion**
Should be: _____
6. ☐ **Instream Flow Beginning and Ending Point**
Should be: _____
7. ☒ **Purpose(s) of Use**
Should be: Quantity should be 1.72 cfs and 387.0 AFY
8. ☒ **Period of Year**
Should be: Quantity should be 1.72 cfs and 387.0 AFY
9. ☒ **Place of Use**
Should be: Please see Attachment 2 hereto
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 3 hereto.

F.

VERIFICATION (must be completed)

State of Idaho)
)ss.
County of Ada)

Scott L. Campbell, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

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)

Scott L. Campbell
(Attorney signing in representative capacity)

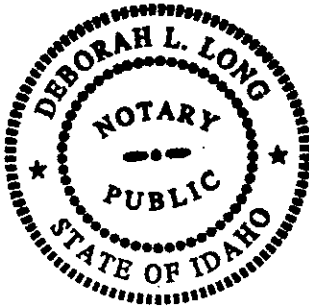
Subscribed and sworn to before me on:

March 21, 2008

Deborah J. Long
Notary Public for Idaho

Residing at: Boise

My Commission Expires: 10/10/13



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 March 21, 2008, I mailed the original and copies of this amended 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: Jerry L. Tlucek and Mary Lou Tlucek

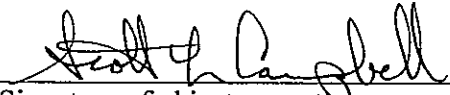
Address: 15188 S. Can-Ada Road
Melba, Idaho 83641

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



Signature of objector or attorney
mailing on Objector's behalf

**ATTACHMENT 1 TO
STANDARD FORM 1 – AMENDED OBJECTION
SUBCASE 63-23182**

Jerry and Mary Lou Tlucek are objecting to the following remark under Priority Date, as set forth in the Director's Report:

This water right is subordinate to all water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to Section 42-1426, Idaho Code. As between water rights decrees as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right.

**ATTACHMENT 2 TO
STANDARD FORM 1 – AMENDED OBJECTION
SUBCASE 63-23182**

The Director's Report incorrectly identifies the place of use for irrigation of lands under this water right. The correct, historic place of use is as follows:

TWP	RNG	SEC	1/4 of	1/4	Lot	Acres
1N	1W	22	SE	SW		40
			NE	SE		40
			NW	SE		40
			SW	SE		40
			SE	SE		40
					Total	200

**ATTACHMENT 3 TO
STANDARD FORM 1 – AMENDED OBJECTION
SUBCASE 63-23182**

Reasons Supporting Objection(s)

Quantity:

The claimed quantity of 1.72 cfs and 387.0 AFY should be recommended in full, based upon historic diversion, delivery, and use by Jerry and Mary Lou Tlucek.

Priority Date:

There is no legal basis for inclusion of the enlargement remark.

Purpose and Period of Use:

The claimed quantity of 1.72 cfs and 387.0 AFY should be recommended in full, based upon historic diversion, delivery, and use by Jerry and Mary Lou Tlucek.

Place of Use:

The place of use described in the Director's Report does not accurately describe the lands historically irrigated under this water right.