

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Petitioner Barbara Barry

**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: 37-353G
	)	
Case No. 39576	)	MOTION TO FILE LATE
	)	OBJECTION
_____	)	

COMES NOW, Barbara Barry ("Barry"), by and through her attorneys, Barker, Rosholt & Simplot, LLP, and submits this *Motion to File Late Objection*, pursuant to SRBA Administrative Order #1 and the Idaho Rules of Civil Procedure. For the following reasons, the Court should grant Barry's motion and allow this late objection. The proposed *Objection* is attached hereto.

INTRODUCTION

Barry did not receive notice that water right 37-353G – the right appurtenant to property she owned in Blaine County – had been recommended as disallowed. Barry has owned this water right since 2000 – when she purchased it, along with the property from Douglas Driever. However, she inadvertently failed to file a Notice of Change of Ownership with the Idaho Department of Water Resources ("Department"). As such, notice that the water right was disallowed was apparently sent to Mr. Driever – whose name still appears on the water right.

MOTION TO FILE LATE OBJECTIONS

Barry only recently learned that her water right had been recommended as disallowed. Upon learning of this recommendation, Barry secured legal counsel and promptly filed both a Notice of Change in Water Right Ownership with the Department and this *Motion to file Late Objection* with the SRBA Court. As discussed below, good cause exists to grant this motion.

STATEMENT OF FACTS

Barbara Barry purchased water right 37-353G from Douglas Driever on October 23, 1999. *Affidavit of Barbara Barry in Support of Motion to File Late Objection* (“*Barry Aff.*”) at 2. At that time, Barry hired legal counsel to review the water right appurtenant to the property and assumed that that attorney had filed a Notice of Change in Water Right Ownership with the Department. *Id.* at ¶ 3. However, notice was not filed.¹ *Id.* As such, the records of the Department still reflect that water right 37-353G is owned by Mr. Driever. *See Id.* at ¶¶ 4-5.

Water right 37-353G is the only irrigation water appurtenant to Barry’s property. *Id.* at ¶ 9. She does have a domestic well, from which she irrigates portions of her lawn and trees. *Id.* However, without this water right, she will not be able to irrigate a vast majority of her property. *Id.*

The Director’s Report for water right 37-353G recommended that the water right be disallowed due to nonuse. Since the water right records still reflect Mr. Driever as the owner, Barry did not receive notice of the Recommendation and, therefore, did not file an objection before objection deadline. *Id.* at ¶¶ 4-6. The Department’s recommendation is in error, as water has been used on this property. In fact, Wood River Valley Irrigation District #45 has provided Barry with an assessment for the 2008 irrigation season. *Id.* at ¶ 8, Ex. A. As such, had she

¹ Since recently discovering this error, Barry has filed the appropriate notice with the Department.

MOTION TO FILE LATE OBJECTIONS

received notice that water right 37-353G had been recommended as disallowed, she would have filed a timely objection to water right 37-353G. *See Id.* at ¶ 6.

Barry only recently discovered the recommendation for her water right. *Id.* at ¶ 7. She was attempting to sell her property so that she could move to a warmer climate because of her rheumatoid arthritis. *Id.* While the property was in escrow, with a buyer ready to purchase the property, and the property in escrow, Barry discovered that her water right had been recommended as disallowed. *Id.* Because the right had been disallowed, the potential buyer backed out of the deal. *Id.* There are no other potential buyers interested in the property at this time. *Id.*

Upon learning that the right had been recommended as disallowed, Barry immediately secured the services of legal counsel and filed (1) a Notice of Change in Water Right Ownership; and (2) this motion to file a late objection. *Id.* at ¶ 10. In light of Barry's actions to correct the inadvertent error, the Court should grant this motion.

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*”).

DISCUSSION

Barry’s *Motion to File Late Objection* is supported by good cause and a meritorious position, hence it meets the above standard. First, Barry’s failure to object to the recommendation for water right 37-353G was not willful. Due to the inadvertent failure to file a Notice of Change in Water Right Ownership with the Department when she purchased the property in 2000, the Department’s records do not reflect Barry’s ownership of water right 37-353G. *Barry Aff.* at ¶¶ 2-3. As a result, she did not receive notice of the Department’s recommendation for water right 37-353G, *id.* at ¶ 4, and a timely objection was not filed. However, had she known of the recommendation in time, she would have filed an objection prior to the deadline. *Id.* at ¶ 6.

Second, no prejudice will result from granting this motion. Protecting and defending water right 37-353G is of the utmost importance to Barry. *Id.* at ¶ 9. Indeed, there is no other water available to irrigate this property. *Id.* The Department’s recommendation does not accurately reflect that this water right has been used on this property, and Barry should be permitted to present her evidence to the Department to substantiate the appropriation. Such

MOTION TO FILE LATE OBJECTIONS

evidence will include the irrigation district's assessment of Barry for water usage in 2008. *Id.* at ¶ 8, Ex. A. Barry must have this water in order to irrigate her property. *See id.* at ¶ 9. While Barry's interests in these proceedings are significant, no party will be prejudiced by the granting of this motion. In fact, any party to the SRBA would have an opportunity to participate in these proceedings by filing a response to the objection.

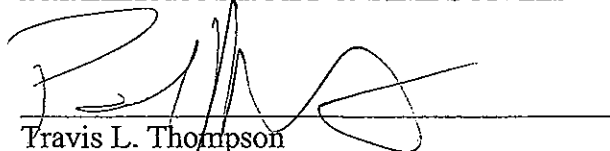
Barry has moved quickly to correct any inaccuracies in the Department's records. *See id.* at ¶ 10. She has filed a Notice of Change in Water Right Ownership, in addition to the present motion. *Id.* Any failure to update the records of the Department was not willful. Rather, it resulted from her assumption that it had already been completed. *Id.* at ¶ 3. Accordingly, an in light of her need for this water on her property, Barry has presented a meritorious position and this motion should be granted.

CONCLUSION

Barry did not receive notice that her water right had been recommended as disallowed. As such, she was unable to file a timely objection to water right 37-353G. Upon learning of the recommendation, Barry immediately hired legal counsel to correct the Departments records and file the current motion. Accordingly, since no prejudice will result, this Court should grant this *Motion to File Late Objection*.

DATED this 25th day of April, 2008.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Travis L. Thompson', is written over a horizontal line.

Travis L. Thompson

Paul L. Arrington

Attorneys Barbara Barry

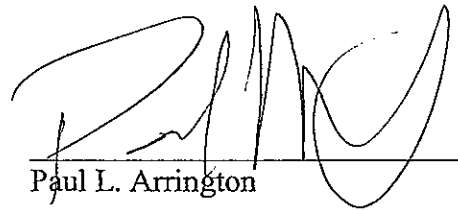
CERTIFICATE OF SERVICE

I certify that on this 25th day of April, 2008, I served the foregoing **MOTION TO FILE LATE OBJECTION**, including all attachments, to the following persons, via first class mail:

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


Paul L. Arrington