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DEPARTMENT OF
WATER RESOURCES

Attorneys for Petitioners James & Leslee Reed

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: 47-7689
	)	
Case No. 39576	)	MOTION TO FILE LATE
	)	OBJECTION
_____	)	

COMES NOW, James and Leslee Reed ("Reed"), by and through their attorneys, Barker, Rosholt & Simplot, LLP, and submit 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 Reed's Motion and allow this late objection. The proposed *Objection* is attached hereto.

INTRODUCTION

In recommending water right 47-7689, the Idaho Department of Water Resources ("Department") made several errors. In particular, the Department recorded the wrong point of diversion ("POD") and place of use ("POU"). When water right 47-7689 was recommended, the Reeds did own the water right or the appurtenant property. As such, they did not know that water right 47-7689 was recommended with the wrong POD and POU. As soon as they learned of the errors, they secured legal representation in order to file this *Motion to File Late Objection*.

Since water right 47-7689 has always been used on the same property and diverted from the same POD, the Court should grant this motion and allow the Reeds to object to water right 47-7689.

STATEMENT OF FACTS

The Reeds purchased water right 47-7689, and the appurtenant property, from Dwain and Barbara Knigge, on March 21, 2007. *Affidavit of Leslee Reed in Support of Motion to File Late Objection* (“*Reed Aff.*”) at ¶ 2. Since the water right 47-7689 was recommended before that time, there was no reason for the Reeds to receive notice regarding the recommendation.

Water right 47-7689 was originally licensed on May 25, 1999, with a priority date of February 2, 1981. *Affidavit of Paul L. Arrington in Support of Motion to File Late Objection* (“*Arrington Aff.*”) at Ex. A. The license indicates that both the POD and POU are located within the 40-acre quarter-section NWSE, Section 32, Township 8S, Range 14E. *Id.*

In recommending water right 47-7689, the Department made two errors, which, if allowed to remain, greatly impair the Reed’s water right. These errors, a wrong POD and POU, are contrary to the history of development and use of water right 47-7689 as well as the Department’s records. First, the Department recommended the POD as a well located in the SENWSE of Section 32, Township 8S, Range 14E. This is the wrong POD. The water right back file, including the Department’s own Beneficial User Report, available from the Department’s website, www.idwr.idaho.gov, shows that water right 47-7689 has always been diverted from a POD located in the NWNWSE of Section 32, Township 8S, Range 14E. *See Arrington Aff.* at Ex. B (Well Driller’s Report, dated September 23, 1985, showing the well’s location in the NWNWSE of Section 32); *Id.* at Ex. C (Beneficial Use Field Report for water

right 47-7689, dated March 17, 1999, showing the POD in the NWNWSE of Section 32). In fact, the well is located on Reed's property. *Reed Aff.* at ¶ 6.

Second, the shape file included on file at the Department, incorrectly shows the place of use as being in the southern half of NWSE of Section 32. *Id.* at D (Department shape file depicting incorrect POU for water right 47-7689). This is also inconsistent with the prior use of this water right. *See Id.* at Ex. B (Beneficial Use Field Report showing POU in the NWNWSE of Section 32). According to the water right back file, water right 47-7689 has been used in the NWNWSE of Section 32 for heating, a hot tub a greenhouse and fish propagation ponds. *Id.*; *see also Id.* at Ex. E (Memorandum reviewing Beneficial Use Field Report discussing the various uses of the water). This is the same use to which the water is put by the Reeds. *Reed Aff.* at ¶ 5 (describing uses water right 47-7689).

Reed did not realize that the Department had made these errors to their water right. *Id.* at ¶ 6. First, the water right was recommended before the Reeds purchased the water right. *Id.* at ¶ 3. Furthermore, the recommended POU, NESE of Section 32, includes both the actual POU and recommended POU. *Id.* As such, there was no way for the Reeds to know of the Department's error by looking at the recommendation. *Id.*

The Reeds only recently realized the Department's errors in their water right. *Id.* at ¶ 6. During a conversation between Leslee Reed and her neighbor, the neighbor indicated that the well from which water right 47-7689 is diverted did not belong to the Reeds, but belonged to the neighbor. *Id.* The Reeds immediately began researching the water right to determine why the neighbor would have made such a statement. *Id.* at ¶ 7. Upon contacting the Department, the Reeds learned that the Department made an error by recommending the wrong POD and POU for the water right. *Id.* The POU and POD listed on the water right are on the neighbor's

property. *Id.* Notably, however, the existing diversion system is set up to delivery water to the Reed property and there is no way for the water to reach the neighbor's property. *Id.* at ¶ 6.

Upon learning that the right had been recommended incorrectly, Reed immediately secured the services of legal counsel and filed this motion to file a late objection. *Id.* at ¶ 8. In light of the Department's 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*").

MOTION TO FILE LATE OBJECTION

DISCUSSION

Reed's *Motion to File Late Objection* is supported by good cause and a meritorious position, hence it meets the above standard. First, Reed's failure to timely object to the recommendation for water right 47-7689 was not willful. Water right 47-7689 was recommended prior to the time that the Reeds purchased the water right and property. *Reed Aff.* at ¶ 3. Upon review of the water right, there was no way to know that the recommended POU, in the 40-acre quarter-section NWSE was located on the wrong parcel within that 40-acre parcel. *See Id.* The Reeds did not have a copy of the Department's file, with the layout map showing the incorrect POU. *Id.* In addition, Reed did not realize that the POD was in the wrong location within the quarter-section. *Id.* However, had they known of the Department's errors, they would have filed a timely objection to water right 47-7689. *Id.* at ¶ 7.

Second, no prejudice will result from granting this motion. Protecting and defending water right 47-7689 is of the utmost importance to Reed. *Id.* at ¶ 5. Indeed, this geothermal water right provides heating for the Reed home, in addition to providing water for a hot tub and green houses. *Id.* The Reeds have no other geothermal water to help heat their home. *Id.* The well is on Reed's property and, with the existing diversion structure, cannot deliver way to any other property. *Id.* The Department's recommendation does not accurately reflect the POD or POU developed for this water right. In fact, the Department's own records show that the recommendation for water right 47-7689 is in error and is inconsistent with the historical development of the water right. *See Arrington Aff.* at Ex. A-E. While Reed's interests in objecting to water right 47-7689 are significant, no party will be prejudiced by the granting of this motion. The right has not been decreed and any party to the SRBA would have an opportunity to participate in these proceedings by filing a response to the objection.

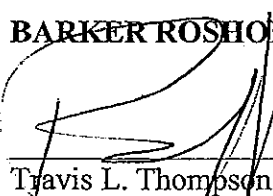
Reed has moved quickly to correct the Department's errors in recommending water right 47-7689. *Reed Aff.* at ¶¶ 7-8. Upon learning of the Department's errors, Reed immediately secured legal representation and filed this Motion. *Id.* Any failure to timely object was not willful. Furthermore, since no prejudice will result from granting this motion, Reed has presented a meritorious position and this motion should be granted.

CONCLUSION

The Department erred in recommending water right 47-7689 in contrast to the historical development of water right 47-7689 and the Department's own Beneficial Use Report. The error should be corrected. Upon learning of the Department's errors, Reed immediately hired legal counsel to file the current motion. Accordingly, since no prejudice will result, this Court should grant this *Motion to File Late Objection*.

DATED this 1st day of May, 2008.

BARKER ROSS HOLT & SIMPSON LLP


Travis L. Thompson
Paul L. Arrington

Attorneys for James & Leslee Reed

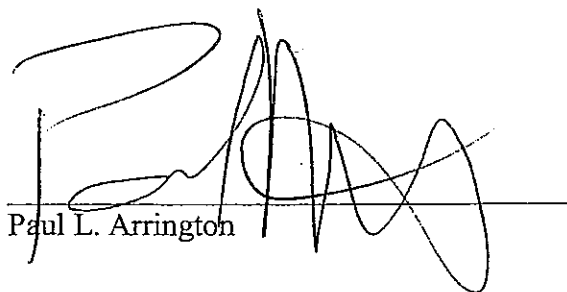
CERTIFICATE OF SERVICE

I certify that on this 1st day of May, 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

**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: 47-7689
	)	
Case No. 39576	)	STANDARD FORM 1
	)	OBJECTION
_____	)	

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: James & Leslee Reed
Address: 4799B River Rd
Buhl, ID 83316
Daytime Phone: (208) 543-0987

Name & Address of Attorney, if any: Travis L. Thompson
Paul L. Arrington
Barker Rosholt & Simpson LLP
P.O. Box 485
Twin Falls, Idaho 83303-0485
(208) 733-0700

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

Name: James & Leslee Reed
Address: 4799B River Rd
Buhl, ID 83316

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.

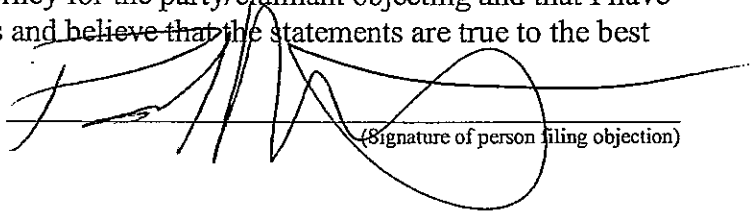
E. REASONS SUPPORTING OBJECTIONS(S): The Department's records, including the beneficial use report, accurately reflect the point of diversion and place of use as being in the NWNWSE Section 32, Township 8S, Range 14E. However, in making the recommendation, the Department erred in placing the point of diversion and place of use in the SENWSE of Section 32. This geothermal water right has always been used on the same property. The diversion system will not allow delivery of water to the south portion of the quarter-section.

F. VERIFICATION (must be completed)

State of Idaho)
)
County of Twin Falls) ss.

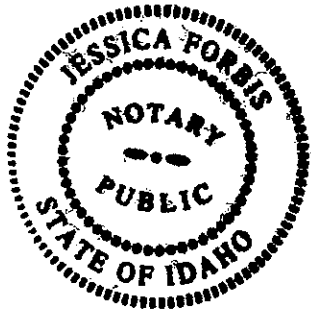
Paul L. Arrington, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

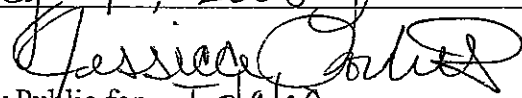
That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and(6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.


(Signature of person filing objection)

(Attorney signing in representative capacity)

Subscribed and sworn to before me on: May 1, 2008




Notary Public for Idaho
Residing at: Twin Falls
My Commission Expires: 4/3/12

G. CERTIFICATE OF MAILING

I certify that on May 1, 2008, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to (via hand delivery)

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:

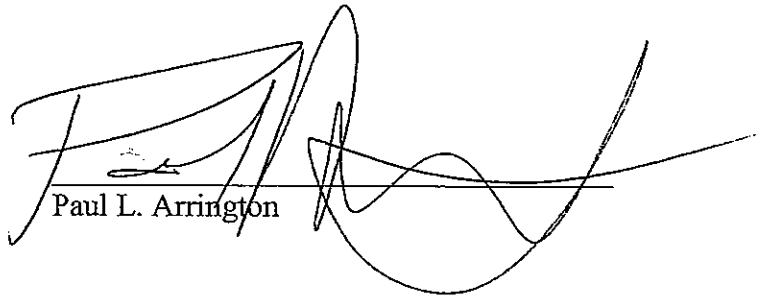
Name: James & Leslee Reed
Address: 4799B River Rd
Buhl, ID 83316

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



Paul L. Arrington