

RECEIVED

MAY 12 2008

Department of Water Resources
Adjudication Bureau

Attorneys for Newfoundland Partners

Scott L. Campbell, ISB No. 2251
Andrew J. Waldera, ISB No. 6608
Dylan B. Lawrence, ISB No. 7136
Andrew J. Snook, ISB No. 7761
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
16845.0014

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. 37-00870

**MOTION TO FILE LATE OBJECTION AND
REQUEST FOR EXPEDITED HEARING**

COMES NOW Newfoundland Partners (hereinafter "Newfoundland"), by and through its undersigned counsel of record, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., and pursuant to Idaho Rules of Civil Procedure 7 and 55(c), and Administrative Order 1 ("AO1") Sections 4(d)(2)(d), (k), hereby files this Motion to File Late Objection to water right no. 37-00870. This motion is supported by the affidavit of Andrew J. Waldera filed contemporaneously herewith. Further, Newfoundland requests an expedited hearing on this Motion pursuant to AO1 Section 6(f)(2), and has accordingly sent a copy of this motion and its

**MOTION TO FILE LATE OBJECTION
AND REQUEST FOR EXPEDITED HEARING - 1**

Client:906365.1

supporting documents to all parties listed in the Court's current *Certificate of Mailing for Expedited Hearings*.

I. BACKGROUND

On November 14, 2007, Tom O'Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw, Pepin Corso-Harris, and the Big Wood Canal Company (hereinafter "Concerned Water Users") filed objections to multiple water rights, which included Newfoundland water right no. 37-12130. Affidavit of Andrew J. Waldera ("Waldera Aff.") at ¶ 4. However, neither Newfoundland nor its legal counsel were served with notice of Big Wood Canal Company's objection, or those of the other Concerned Water Users, and it was not until December 18, 2007, that Newfoundland's legal counsel became aware of these objections. *Id.* at ¶¶ 5-6. Newfoundland and its counsel became aware of these objections during the investigation of a series of similar objections that the Big Wood Canal Company and the other Concerned Water Users filed against Sinclair Oil Corporation's (Sun Valley Company) water rights as counsel for Newfoundland also serves as counsel for Sun Valley Company.

Big Wood Canal Company and the other Concerned Water Users objected to the Newfoundland water right asserting that:

Under Idaho Code 42-1501, aesthetic, wildlife and recreation are not beneficial uses authorized by the Idaho legislature or Constitution to be held in the name of private entities. If such uses are allowed, the right cannot carry a priority date earlier than the first date that the legislature authorized that beneficial use to be held by a private party.

Id. at ¶ 7. The objection period for Basin 37 ended on November 14, 2007, the same day Big Wood Canal Company and the other Concerned Water Users filed their objections. *Id.* at ¶ 8.

Concerned with potential law of the case ramifications, Newfoundland's counsel immediately prepared and filed responses to 66 of the objections filed by the Big Wood Canal Company and the other Concerned Water Users. *Id.* at ¶ 9. After timely completing and filing said responses, counsel for Newfoundland then turned its attention to the review of the water rights held by Big Wood Canal Company to determine if its water rights are subject to any of the same objections raised by it, or others. *Id.* at ¶ 10.

Newfoundland's legal counsel has diligently conducted this process of addressing issues involving Newfoundland's water right and Big Wood Canal Company's water rights over the past four (4) months since becoming aware of Big Wood Canal Company's objections.¹ Understandably, this water right review process is laborious, and ongoing. Counsel for Newfoundland is still awaiting the receipt of two water right back files that are not currently available on the Idaho Department of Water Resources website. *Id.* at ¶ 11. However, and despite the ongoing nature of this process, Newfoundland presently desires to object to those Big Wood Canal Company's water rights for which it has received back files in order to avoid any further delay in presenting these objections. Attached hereto as Exhibit A is the proposed objection Newfoundland wishes to file in the present subcase.

II. ARGUMENT

A. The Legal Standard For Filing A Late Objection Is Lenient

In light of the facts and circumstances in this case, Newfoundland seeks an order from the Court granting it leave to file this present collection of late objections (those Big Wood

¹ As previously noted, this process has not been limited to review of only the Big Wood Canal Company's water rights, but included the review of all water rights held by the Concerned Water User group. Review of this volume of water rights has taken some time to complete.

Canal Company's water rights for which Newfoundland currently has backfiles). In his *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267, *et al.* (Jan. 31, 2001) ("*A.L. Cattle*"), Presiding Judge Burdick succinctly explained the standard governing motions to file late objections as follows:

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 since *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. *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 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 931, 935, 854 P.2d, 274 (1993). The I.R.C.P. 55(c) standard takes into account the following factors:

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

A.L. Cattle at 6-7.

Importantly, this Court has significant discretion to grant a motion to file a late objection, and its decision will not be reversed on appeal unless an abuse of discretion clearly appears. *Memorandum Decision and Order on Challenge*, Subcase Nos. 47-16433, *et al.*, at 9 (J. Melanson, Mar. 22, 2005) ("*Bedke I*"). And, 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. *A.L. Cattle* at 8.

B. Newfoundland's Motion Satisfies The Standard For Filing A Late Objection

1. The Delay Is Not Willful

Newfoundland's submission of its objections after the deadline is not "willful," as the term is defined by this Court. This Court has stated that "willful" means "intentional, knowing, or voluntary." *Bedke I* at 12. In addition, "willful" requires a higher degree of culpability than mere negligence or carelessness. *Id.* In order to find that any delay on behalf of Newfoundland was willful, this Court must find that Newfoundland had prior reason to investigate and review the elements of Big Wood Canal Company's water rights, that Newfoundland has been aware of the grounds for objecting to Big Wood Canal Company's water rights, and that Newfoundland has purposefully failed to act. In this case, the Affidavit of Andrew J. Waldera clearly shows that Newfoundland's delay in objecting was not willful. As stated, Big Wood Canal Company filed its objections on the final day of the objection period, and neither Newfoundland nor its counsel was served with notice of said objections. Upon discovering that Big Wood Canal Company filed an objection affecting its water right, Newfoundland has diligently worked, and continues to diligently work, to prepare objections to the water rights held by Big Wood Canal Company and the other Concerned Water Users that fail to withstand the grounds of the objections they themselves assert, among others. Newfoundland has not willfully delayed setting forth its objections. To the contrary, Newfoundland has worked quickly in presenting this current collection of objections.

2. Allowing Newfoundland's Late Objections Would Not Prejudice Concerned Water Users Or Any Third Parties

Allowing Newfoundland to file its late objections would not prejudice Big Wood Canal Company or any other third parties. The current proceeding is in its early stages, and, accordingly, no initial hearings have been scheduled, no schedule for trial has been entered, and

no settlements between the parties have occurred.² Waldera Aff. at ¶ 12. Moreover, by objecting to Newfoundland's water right on grounds including the propriety of particular categories of beneficial uses, Big Wood Canal Company's has subjected its water rights to similar scrutiny from Newfoundland and others, and should have reasonably anticipated the need to defend its rights accordingly.

Given the nascent posture of these proceedings, granting Newfoundland's proposed late objections will not amount to the prejudicial relitigation of the subject rights. *See, e.g., Order Granting Motions to File Late Objections in Subcases 51-11921, 51-11925, and 51-11936*, Subcase Nos. 51-11891, *et al.*, at 13 (Mar. 13, 2002). Further, this Court has held that some prejudice alone is not a sufficient basis to deny a late objection. *Bedke I* at 13-14. As such, it is unlikely that Big Wood Canal Company would suffer any material prejudice as a result of allowing Newfoundland's late objections.

3. Newfoundland's Objections Present Meritorious Positions

The grounds supporting Newfoundland's objections are meritorious legal positions under Idaho water law. The "meritorious position" standard simply requires that the late objector allege sufficient facts that, if established, would allow that objector to prevail. *See A.L. Cattle* at 6. Newfoundland objects to Big Wood Canal Company's water rights on various grounds including that the water rights: 1) exceed the statutory allotment of one inch per acre, 2) contain marked discrepancies between various claims and recommendations regarding points

² However, a hearing has been set for consideration of Newfoundland's prior motions for late objections regarding water rights held by the other Concerned Water Users on July 2, 2008. This motion will be noticed for the same hearing in order to further streamline this process, and so that all of Newfoundland's motions for late objection implicating the water rights held by the Concerned Water Users can be addressed at one time.

of diversion and places of use, and/or 3) that the place of use is not sufficiently described as required by law. Each of the foregoing grounds for objection represent valid concerns that must be considered in order to properly adjudicate these water rights.

Based on the valid objections set forth by Newfoundland, and the supporting facts outlined in its proposed objections, Newfoundland has presented meritorious positions for objecting to this present collection of Big Wood Canal Company's water rights because such facts, if proven, would require the revision, or outright denial, of certain water rights held by Big Wood Canal Company.

III. CONCLUSION AND PRAYER FOR RELIEF

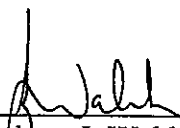
For the foregoing reasons, Newfoundland respectfully requests that the Court grant its Motion To File Late Objections and accept the objection attached hereto as Exhibit A.

REQUEST FOR EXPEDITED CONSIDERATION

Newfoundland respectfully requests the Court to consider this Motion on an expedited basis.

DATED this 8th day of May, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

Andrew J. Waldera – Of the Firm
Attorneys for Newfoundland Partners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 2008, I caused a true and correct copy of the foregoing **MOTION TO FILE LATE OBJECTION AND REQUEST FOR EXPEDITED HEARING** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front St., 6th Floor
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208) 287-6700

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

Chief, Natural Resources Division
Office of the Attorney General
STATE OF IDAHO
P.O. Box 44449
Boise, ID 83711-4449
Fax: (208) 334-2530

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

UNITED STATES DEPARTMENT OF JUSTICE
Environment & Natural Resource Division
550 W. Fort St., MSC 033
Boise, ID 83724
Fax: (208) 334-1414

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

Craig D. Hobdey
125 5th Ave. West
P.O. Box 176
Gooding, ID 83330
Attorneys for Big Wood Canal Company

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

Big Wood Canal Company
112 S. Apple St.
Shoshone, ID 83352
Claimant

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

David W. Gehlert
Natural Resources Section
Environment and Natural Resource Division
U.S. Department of Justice
1961 Stout St., 8th Floor
Denver, CO 80294
Attorneys for Bureau of Reclamation

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

Larry A. Brown
United States Department of Justice
Environment & Natural Resources Division
General Litigation Section
550 W. Fort St., MSC 033
Boise, ID 83724
Attorneys for Bureau of Land Management

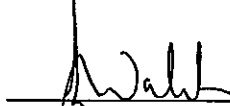
(X) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

James P. Speck
Speck & Aanestad
P.O. Box 987
Ketchum, ID 83340
*Attorneys for Black Butte Hills, LLC,
Diamond/Soldier Properties, LLC,
SV Ranch, LLC, Smokey Dome, LLC, South Cove
Ventures, LLC, and Twin Lakes Reservoir &
Irrigation Co., Ltd.*

(X) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile

Michael P. Lawrence
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83301
Attorneys for Victor M. Smith

(X) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile



Andrew J. Waldera

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

37-00870

(insert water right number)

**STANDARD FORM 1
OBJECTION**

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Newfoundland Partners

Address: 2600 Century Square, 1901 4th Avenue
Seattle, WA 98101-1688

Daytime Phone: (206) 628-7791

Name & Address of Attorney, if any:

Scott L. Campbell / Andrew J. Waldera

Moffatt, Thomas, Barrett, Rock & Fields

P.O. Box 829, Boise, ID 83701-0829

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

Name: Big Wood Canal Co.

Address: 112 S. Apple St.

Shoshone, ID 83352

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: limited to 1" per acre with a combined use limitation for overlapping rights as necessary
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: see Quantity above
8. ☒ **Period of Year**
Should be: see Quantity above
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): Combined use of this right, along with other rights for the same place of use, exceeds one inch, or 0.02 cfs, per acre.
Insertion of the following remark would avoid this problem: "This right when combined with all other rights shall provide no more than 0.02 cfs per acre."

F.

VERIFICATION (must be completed)

State of Idaho)
)ss.
County of Ada)

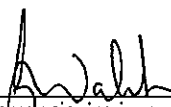
Andrew J. Waldera

(Name of person filing objection)

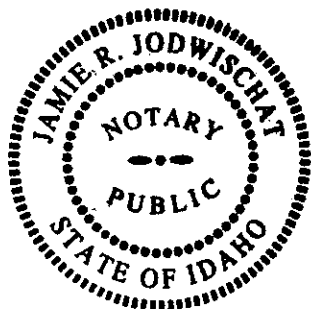
, duly sworn, upon oath, deposes and says:

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)


(Attorney signing in representative capacity)

Subscribed and sworn to before me on: May 8, 2008



Jamie R. Jodwischat

Notary Public for Idaho

Residing at: Nampa, ID

My Commission Expires: 5.23.12

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 May 8th, 2008, 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: Big Wood Canal Co.

Address: 112 S. Apple St.
Shoshone, ID 83352

3. Copies to:

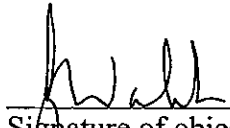
IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

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

David W. Gehlert
Natural Resources Section
Environment and Nat'l Resource Div.
U.S. Department of Justice
1961 Stout St., 8th Floor
Denver, CO 80294

Craig D. Hobdey
125 5th Ave. West
P.O. Box 176
Gooding, ID 83330
Attorneys for Big Wood Canal Company



Signature of objector or attorney
mailing on Objector's behalf