

RECEIVED

JUN 11 2008

DEPARTMENT OF
WATER RESOURCES

Michael C. Creamer, ISB #4030
GIVENS PURSLEY LLP
601 W. Bannock St.
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300

S:\CLIENTS\9365\2\Memorandum in Support of Motion to Dismiss GP02.DOC

COPY

Attorneys for The Valley Club, Inc.

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

In Re SRBA

Case No. 39576

Subcase Nos. 37-00494, 37-00495, 37-
00577BU, 37-00577BV, 37-00657B, 37-
00833K, 37-02623

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
OBJECTIONS AND REQUEST FOR
ATTORNEY FEES**

I. INTRODUCTION

The Valley Club, Inc. ("TVC") has moved for dismissal of the objections ("Objections") to the Idaho Department of Water Resources' ("IDWR") recommendations of water rights 37-00494, 37-00495, 37-00577BU, 37-00577BV, 37-00657B, 37-00833K and 37-02623 filed by the Big Wood Canal Company ("BWCC"). The grounds for TVC's motion are that this Court lacks subject matter jurisdiction over the Objections because: 1) BWCC has not exhausted its administrative remedies; 2) the Objections are a collateral attack on a prior IDWR determination of the objected-to elements of the TVC water rights in a matter in which BWCC was a party; and 3) the SRBA Court is statutorily barred from hearing claims against such IDWR determinations

because IDWR cannot be made a party to the case. Dismissal is proper under Idaho Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

The Court should award TVC its attorney's fees in seeking dismissal because BWCC has no basis in law for contesting the TVC's water right recommendations on the grounds asserted in its Objections.

II. STATEMENT OF FACTS

On November 14, 2007, BWCC objected to IDWR's recommendations of TVC's water rights 37-00494, 37-00495, 37-00577BU, 37-00577BV, 37-00657B, 37-00833K and 37-02623.¹ BWCC objected to: 1) the recommended purposes of use; and 2) the recommended quantity of use. Specifically, the Objections assert that "aesthetic, wildlife and recreation uses are not beneficial uses authorized by the Idaho legislature or Constitution to be held in the names of private individuals..." BWCC also marked the "Quantity" box on the standard objection form, presumably alleging that the quantity recommended should be disallowed to the extent that the recommended diversion rate included diversions to aesthetic and recreational uses.

Both the nature of use (aesthetic and recreational) and the quantity of use recommended by IDWR that BWCC now objects to initially were confirmed by IDWR when it approved three separate transfer applications involving the TVC water rights in the early 1990s and in 2005. Specifically, these were Transfer 3742 (approved in March 1991 - transferring surface water rights 37-00577, 37-00494, 37-00495 and 37-00833K to change the place of use, point of diversion and nature of use to include, *inter alia*, aesthetic and recreation use on The Valley Club golf course), Transfer 3743 (approved in March 1991 - transferring ground water right 37-02623 for the same purposes) and Transfer 71721 (approved in October 2005 - transferring water right

¹ Copies of the Recommendations for these water rights, as maintained on the IDWR-SRBA database, are attached as Exhibits K through Q to the Affidavit of Michael C. Creamer in Support of Motion to dismiss Objections and Request for Attorney Fees filed contemporaneously herewith ("Creamer Affidavit").

37-657B to change the place of use, point of diversion and nature of use to include, *inter alia*, aesthetic and recreation on The Valley Club golf course).

A. Transfers 3472 and 3473

On July 2, 1990, Wood River Country Club Partners (“Partners”), TVC’s predecessor in interest, applied to IDWR to transfer surface water rights 37-00577, 37-00494, 37-00495 and 37-00833K. *See* Application for Transfer of Water Right 3742 attached as Exhibit A to the Affidavit of Michael C. Creamer in Support of Motion to Dismiss Objections and Request for Attorney Fees filed contemporaneously herewith (“Creamer Affidavit”). That same day, Partners also applied to IDWR to transfer ground water right 37-02623. *See* Application for Transfer of Water Right 3743 attached as Exhibit B to Creamer Affidavit. Partners amended Transfer 3742 on January 22, 1991. *See* Exhibit A to Creamer Affidavit. Transfers 3742 and 3743 intended to integrate the diversion and use of the surface and ground water rights on The Valley Club property, and therefore, they cross-referenced each other in the accompanying narrative supporting materials, specifically stating that each transfer was being filed in conjunction with the other. *See* Revised Addendum, Application for Transfer of Water Right T-3742 attached as Exhibit A to Creamer Affidavit *and* Addendum, Application for Transfer of Water Right T-3743 attached as Exhibit B to Creamer Affidavit. Transfers 3742 and 3743 sought to change the subject rights in three ways: 1) to move the point of diversion;² 2) to change the place of use to the areas of the land to be developed as a golf course; and 3) to change the nature of use of a portion of the water rights to authorize diversions for aesthetic and recreational uses. *Id.*

² For the surface water rights, the new point of diversion would be the Hiawatha Canal headgate. For the ground water right, the transfer maintained the historical point of diversion.

Originally the water rights under these transfers were used exclusively for irrigation. *Id.* Partners sought to change the nature of use of a 7.64% (originally appurtenant to 12.2 irrigated acres) of the water rights to aesthetic and recreational uses. This was done to accommodate several ponds and interconnecting streams that serve as golf courses hazards and that also increase the aesthetic appeal of the course. *Id.* The balance of the rights under Transfers 3742 and 3743 were to be used to irrigate up to 147.5 acres of golf course tees, fairways, rough and greens. *Id.*

As required by Idaho Code § 42-222(1), IDWR published notices of the filing of the applications for Transfers 3742 and 3743 in the Wood River Journal. Both transfer notices were published on the same dates in July and August. See Exhibit C and Exhibit D, attached to Creamer Affidavit.

On August 3, 1990, BWCC's Manager, Richard Oneida, filed BWCC's protest of Transfer 3742 (*i.e.*, the surface water right transfer). See Exhibit E to Creamer Affidavit. BWCC did not protest the related Transfer 3743 (the ground water transfer). The objection raised by BWCC in its protest of Transfer 3742 was that "this change of water right could be detrimental to the delivery of water of the BWCC". BWCC did not protest the proposed aesthetic and recreation uses or the quantity of water to be diverted for any purpose, nor do IDWR records indicate that BWCC raised such concerns in the subsequent administrative process. See Creamer Affidavit, ¶ 4.

On August 27, 1990, Mr. Oneida, withdrew BWCC's protest of Transfer 3742. See Exhibit F to Creamer Affidavit. BWCC's letter effecting its withdrawal stated that it was conditioned on "[the] flow meter and measuring device outlined in attached letter exhibit A [being] made a condition of the transfer." *Id.* "Exhibit A" to the BWCC protest withdrawal

letter is a letter from Partners' engineer, Gerald L. Martens, P.E., that includes three provisions related to a flow meter or measuring device for the intended diversions from the Hiawatha Canal.

Id. Neither the BWCC protest withdrawal letter nor Mr. Martens' August 22, 1990 letter mention any concern by BWCC about the intended approval of aesthetic and recreational uses of the transferred water rights or the quantities of water that TVC was intending to divert for any purpose under either Transfer 3742 or 3743.

On March 12, 1991, IDWR approved both Transfers 3742 and 3743 authorizing diversion of the subject water rights for irrigation, aesthetic and recreational uses in the quantities requested in Partners' applications. IDWR imposed identical conditions on each Transfer:

1. Use of the water rights are subject to the control of the Big Wood River watermaster;
2. The transferred rights are limited to a combined annual diversion volume of 3.0 acre-feet per acre;
3. Return flows to a surface water system are to meet state water quality standards; and
4. The transfers were required to be completed within one year.

See Exhibit A and Exhibit B to Creamer Affidavit. Neither approval required a flow meter or flow rate adjustment device as discussed in the Martens letter attached to BWCC's protest withdrawal. IDWR's records for Transfers 3742 and 3743 contain no indication that BWCC ever challenged the exclusion of the requested measuring device conditions or that BWCC sought a hearing or judicial review of the IDWR approvals for any reason. See Creamer Affidavit, ¶ 4.

B. Transfer 71721

On August 19, 2004, TVC applied to transfer surface water right number 37-657B. See Application for Transfer of Water Right T-71721 attached as Exhibit G to Creamer Affidavit.

Transfer 71721 sought similar changes to the subject water right as were approved in Transfers 3742 and 3743, but for adjacent lands that were to be developed as an additional nine-hole extension of the existing course that TVC had acquired from Partners. Transfer 71721 also sought to change the nature of use of a portion of water right 37-657B to mitigate evaporation from proposed golf course aesthetic and recreational water features on the new nine-hole course. *Id.* Public notice was published in the Wood River Journal on July 20, 2005 and July 27, 2005. *See* Affidavit of Publication attached as Exhibit H to Creamer Affidavit.

Transfer 71721 was not protested, and it was approved by IDWR on October 24, 2005. The approval authorized the requested aesthetic and recreational uses and diversion quantity.³ *See* Approval of Transfer T-71721 attached as Exhibit I to Creamer Affidavit.

C. Comparison of Water Right Elements in the Transfers and the IDWR Recommendations

Each of the elements of TVC's objected-to water rights (including quantities, priorities, points of diversion, places of use, nature of use and conditions of use) as authorized and described in IDWR's approvals of the three above-described transfers are the same as they have been recommended to the Court by IDWR. For example, the application for transfer T-3742 sought aesthetic and recreational uses in the SWNE, NESE, NWSE and SESE of Section 20, T3N, R18, in the SWSW of Section 21, T3N 18E, and the NWNW, SWNW and NWSW of Section 28, T3N, R18E. *See* Exhibit A to Creamer Affidavit. These uses in these locations are exactly what IDWR approved in the transfer and now has recommended to the Court. *See* IDWR Adjudication Recommendation for Water Right 37-494 attached as Exhibit K to Creamer Affidavit. Transfer 3742 also sought to transfer 7.24 cfs of water. *See* Exhibit A to Creamer Affidavit. Again, this was approved by IDWR and has been recommended to the Court. *See*

³ The transfer approval was amended by IDWR on November 5, 2005 for reasons unrelated to the instant issues. *See* Amended Approval of Transfer T-71721 attached as Exhibit J to Creamer Affidavit.

Conditions of Approval, Application for Transfer of Water Right T-3742 attached as Exhibit A to Creamer Affidavit *and* Condition of Approval #4, IDWR Adjudication Recommendation Right Report for Water Right 37-494 attached as Exhibit K to Creamer Affidavit. Transfer 3742 limited annual diversions for irrigation to 3.0 acre-feet per acre. *See* Conditions of Approval, Application for Transfer T-3742 attached as Exhibit A to Creamer Affidavit. So too does IDWR's recommendation to the Court. *See* IDWR Adjudication Recommendation Right Report for Water Right 37-494 attached as Exhibit K to Creamer Affidavit. Comparisons between the water right elements approved in Transfers 3473 and 72721 and recommended by IDWR yield similar results.

III. STANDARD OF REVIEW

When a court reviews a motion to dismiss pursuant to I.R.C.P. 12(b)(6), it must look only at the pleadings, and all inferences are viewed in favor of the non-moving party. *Owsley v. Idaho Industrial Comm'n*, 141 Idaho 129, 133, 106 P.3d 455, 459 (Idaho 2005), *citing Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (regarding 12(b)(6) motions). The court employs the same standard when reviewing motions to dismiss under I.R.C.P.12(b)(1) if the motion presents a facial challenge to the court's jurisdiction. *Id.*, *citing Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir.1990). Once the court draws all inferences in the non-moving party's favor the question is whether the non-movant has alleged sufficient facts in support of the claim, that if true, would entitle him to relief. *Id.*, *citing Rincover v. State*, 128 Idaho 653, 656, 917 P.2d 1293, 1296 (1996) (regarding 12(b)(6) motions); *Serv. Employees. Int'l v. Idaho Dept. of H. & W.*, 106 Idaho 756, 758, 683 P.2d 404, 406 (1984) (regarding 12(b) challenges generally); *Osborn*, 918 F.2d at 729 n. 6 (regarding 12(b)(1) facial challenges). The

issue is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support the claim. *Id.*, citing *Young*, 137 Idaho at 104, 44 P.3d at 1159.

IV. ARGUMENT

a. This Court Lacks Subject Matter Jurisdiction Over BWCC's Objections To TVC's Water Right Recommendations.

BWCC's Objections should be dismissed because this Court lacks subject matter jurisdiction. BWCC has failed to exhaust its administrative remedies with regard to TVC's water uses and quantities as recognized by IDWR in transfers T-3742, T-3743 and T-71721. Even if BWCC had exhausted its administrative remedies by obtaining a hearing before the IDWR concerning the water uses and quantities, which it did not, it still would be barred from seeking the judicial review of IDWR's transfer decisions because BWCC did not timely petition for judicial review of those administrative decisions.

Moreover, BWCC's Objections are a collateral attack on the IDWR decisions in Transfers 3742 and 3743 because BWCC was a party protestant in Transfer 3742 where the currently-recommended elements for water rights 37-00494, 37-00495, 37-00577BU, 37-00577BV, 37-00657B and 37-00833K were determined by IDWR, and BWCC did not protest Transfer 3743 (ground water right 37-2623), which was filed, noticed, processed and approved, and which now is being implemented, as an integral component of Transfer 3742. BWCC was not a party to Transfer 71721. BWCC did, however, have constructive notice of Transfer 71721, and to the extent that BWCC now objects *as a matter of law* to the identical aesthetic/recreational purposes of use and quantities recommended for water right 37-657B, BWCC necessarily seeks to challenge the underlying validity of TVC's purposes of use and quantities approved by IDWR in Transfers 3742 and 3743.

This Court repeatedly has held that collateral attacks on IDWR-approved *licenses* are not permissible. Even though the BWCC Objections are an attack on IDWR-approved *transfers*, the Court should apply the same rule barring collateral attack because the administrative process and judicial review process for licenses and transfers essentially are the same.

Finally, because IDWR cannot be made a party to these subcases, the Court is statutorily barred from reviewing IDWR's prior transfer decisions authorizing TVC's use of its water rights for aesthetic and recreational uses.

TVC requests its reasonable attorney's fees and costs because BWCC's Objections are frivolous and unwarranted given this Court's lack of jurisdiction to hear the issues raised and the Court's prior rulings barring collateral attacks.

i. BWCC Has Failed To Exhaust Its Administrative Remedies.

The heart of BWCC's Objections is a challenge of the elements of TVC's water rights as they were determined by IDWR in long-since-concluded administrative proceedings, including proceedings in which BWCC was a party. To obtain judicial review of those IDWR decisions, BWCC first must have exhausted all of its administrative remedies. Idaho Code § 67-5271(1). BWCC failed to do so.

ii. The IDWR Transfer Application Process

The administrative process governing water right transfers, including the proper process for contesting agency decisions on such transfers, is contained in Idaho Code § 42-222. Persons seeking to transfer a water right must apply to IDWR. Idaho Code § 42-222(1). Upon accepting and reviewing the application, IDWR then must publish notice of it. *Id.* Persons who wish to protest the transfer have ten days from the last date of the notice publication to file a protest with the IDWR. *Id.* When a protest is filed (and if not thereafter withdrawn), IDWR must hold a

hearing on the application and protest. *Id.* Upon issuance of a final agency order, “any person” aggrieved by the IDWR’s transfer approval must petition for a hearing within fifteen days from receipt of notice of the decision of the IDWR. Idaho Code § 42-222(5), Idaho Code § 42-1701A(3). Alternatively if no protest has been filed (or if the protest has been withdrawn) and, therefore, no hearing was held, a hearing may be requested any person aggrieved by IDWR’s decision on the application. Idaho Code § 42-222(5). In either case, the hearing generates an agency record and a final decision. Only after a hearing has been held may the party petition for judicial review. Idaho Code § 42-1701A(4), Idaho Code § 67-5271.

iii. Transfers 3742 and 3743

Here, simultaneous notice of Transfers 3742 and 3743 was given in the same newspaper. In response BWCC chose to protest only one transfer, even though both were dependent on each other and requested the same aesthetic and recreational uses for the same lands.

With respect to transfer T-3742, no hearing was held because BWCC expressly withdrew its protest on August 27, 1990. *See Exhibit E Creamer Affidavit.* When BWCC withdrew its protest, it stated that it did so “providing the conditions of the flow meter and measuring device as outlined in attached letter Exhibit A are made a condition of the transfer.” *Id.* IDWR thereafter approved both applications without any flow meter or measuring device conditions. Exhibit A to Creamer Affidavit. These approvals became the final order of the agency on the transfers when they were issued. If BWCC was “aggrieved” by those decisions (*i.e.*, because they did not incorporate flow measuring requirements or authorized aesthetic and recreational uses in the quantities applied for), Idaho Code §§ 42-222(5) and 42-1701A(3) provided BWCC fifteen days to request a hearing. BWCC never did so.

Now, over 17 years later, BWCC apparently deems itself aggrieved and seeks to challenge IDWR's authority to approve the aesthetic and recreational uses of water in the earlier transfers.

iv. Transfer 71721

Although IDWR's water rights records indicate notice of Transfer 71721 was published in the same newspaper and proposed to change water right 37-657B to authorize the same aesthetic and recreational uses as Transfers 3472 and 3473, BWCC did not protest this transfer. BWCC also failed to request a hearing of IDWR's decision approving Transfer 71721 as a potentially aggrieved person.

In three separate instances then—two instances involving actual notice and one involving constructive notice—BWCC failed to request a hearing concerning the requested and authorized aesthetic and recreational water uses and diversion quantities that it now objects to.

A hearing is the administrative remedy required by statute to be pursued and exhausted by aggrieved persons before pursuing judicial remedies. The exhaustion requirement implements several important policies. First it provides the agency the opportunity to consider all relevant evidence in reaching its decision. Second, it allows the development of a complete agency record in the event judicial review is sought. Third, it provides finality to agency decisions and repose to persons affected by them. The court then does not have jurisdiction to reach 17 years into the past to review IDWR's transfer approvals. Idaho Code § 67-5271; *Fairway Development Co. v. Bannock County*, 119 Idaho 121, 804 P.2d 294 (Idaho 1990) (until all administrative remedies have been exhausted the district court does not acquire subject matter jurisdiction). *See also Memorandum Decision and Order on Challenge; Order on State's Motion to Dismiss Claimant's Notice of Challenge*, Subcase No. 36-08099, 4 SRBA 2, 2.13

(2000) (IDWR license becomes final when the time to appeal it has expired), *Hardy v Higginson*, 123 Idaho 485, 849 P.2d 946 (Idaho 1993) (in an appeal of an agency determination review is limited to the administrative record). BWCC has failed to exhaust its administrative remedies by not requesting a hearing, and therefore, it is barred from seeking judicial review now.

v. Even If BWCC Had Exhausted Its Administrative Remedies, It Nevertheless Failed To Timely Appeal IDWR's Transfer Decisions.

Even if BWCC had exhausted its administrative remedies, which it did not, it still is barred from obtaining judicial review by this Court of IDWR's prior transfer decisions concerning the authorized uses and quantities of TVC's water rights. Idaho's Administrative Procedure Act, Idaho Code §§ 67-5200 *et seq.*, which governs judicial review of agency actions, requires parties to seek review of agency decisions within twenty-eight days of the agency's final order. Idaho Code § 67-5273. BWCC never pursued judicial review of any of IDWR's three administrative decisions authorizing TVC's diversions to aesthetic and recreational uses. BWCC may not ask this Court to overturn those decisions now. *See Horne v. Idaho State University*, 138 Idaho 700, 69 P.3d 120 (Idaho2003) (time period for filing judicial review is jurisdictional). *See also Petersen v. Franklin County*, 130 Idaho 176, 938 P.2d 1214 (Idaho1997) (time period for seeking judicial review begins once administrative remedies have been exhausted), *In re Quesnell Dairy*, 143 Idaho 691, 152 P.3d 562 (Idaho2007) (absent compliance with the twenty-eight-day filing deadline imposed by Idaho Code § 67-5273 a court has no jurisdiction to review an agency's final determinations). BWCC has missed the twenty-eight day deadline to petition for judicial review by more than seventeen years. BWCC's Objections should be dismissed.⁴

⁴ Idaho Code § 42-1401D bars challenges of any action of the IDWR subject to judicial review under the Idaho APA from being brought in the SRBA. Of course this statute presumes that judicial review is timely sought in the first place, which BWCC has not done. Although not directly on point with these Objections, the policy reasons for barring challenges of IDWR's decisions in the SRBA under Idaho Code § 42-1401D and this case are the same.

vi. BWCC's Objections Are An Impermissible Collateral Attack On An IDWR Determination Of Water Rights.

BWCC's Objections are an impermissible collateral attack on the prior transfers that initially authorized the uses and quantities of TVC's water rights that have been recommended to the Court for partial decree. A collateral attack is a challenge by a party in one proceeding of a binding judgment reached in another proceeding. By protesting Transfer 3472 (and by failing to protest Transfer 3473, which was inextricably linked to Transfer 3472 and involved the same uses and quantities BWCC objects to here), and by failing to appeal the IDWR transfer approvals, BWCC became bound by IDWR's decisions in those proceedings.

This Court on several occasions has ruled that a party may not subsequently challenge in the SRBA the water right conditions imposed administratively by IDWR where the party was involved in the original administrative proceeding. When a party disagrees with the conditions of license issued by IDWR, the SRBA Court is not the proper forum to challenge them. *See Order Recommending Partial Decree Be Set Aside*, Subcase Nos.:31-7311, 31-2357 and 31-2395, 8 SRBA 17, 17.3 (2004). "If a license is not appealed when issued, attempts to appeal the license in subsequent legal proceedings, such as the SRBA, would constitute a collateral attack." *Id.*, citing *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). *See also Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman*, 5 SRBA 4, 4.10 (2001) (failure to appeal a license when issued is a collateral attack); *Response to United States Motion for Status Conference*, Subcase No. 03-10022, 4 SRBA 16, 16.15 (2000) (scope of what can be litigated in SRBA is limited and does not included collateral attacks on previously perfected water rights), *Memorandum Decisions and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimants Notice of Challenge*, Subcase No. 36-08099, 4 SRBA 2 (2000)

(collateral attack on IDWR license is not permissible when a party has failed to exhaust administrative remedies).

This Court apparently has not been called upon to apply its ruling on collateral attack to an objection filed in the SRBA where the objecting party failed to challenge conditions in a water right *transfer* decision by IDWR. The policy behind the legal principle barring collateral attacks, however, is equally applicable whether the decision being challenged involves IDWR approval of a license, a transfer or other action initially pursued at the agency level and for which judicial review under the APA is available. *State v. Weber*, 140 Idaho 89, 90 P.3d 314 (Idaho 2004) (inroads into the concept of finality are served by limitations on collateral attacks), *Ada County v. Henry*, 105 Idaho 263, 668 P.2d 994 (Idaho 1983) (where no appeal of an agency action was filed, the Court will not allow a collateral attack).

There is no reason this Court's logic barring collateral attack of licenses in the SRBA should not apply here. Water right transfers are approved in a process that essentially mirrors water right permit and license approvals. When an application for either a permit or a transfer is received, the IDWR must prepare notice of the application. *Compare* Idaho Code § 42-203A(1) (IDWR must prepare notice of application for a license) *with* Idaho Code § 42-222(1) (notice of transfer applications must be provided in a similar manner to Idaho Code § 42-203A). For both permits and transfers, persons wishing to protest must do so within ten days of the last publication of notice. *Id.* If either a permit or transfer application is protested, IDWR must hold a hearing in accordance with Idaho Code § 42-17601A. *Compare* Idaho Code § 42-203A(5) (hearing must be conducted in accordance with Idaho Code § 42-1701(A) *with* Idaho Code § 42-222(1) (hearing must be held if a protest is filed) *and* Idaho Code 42-222(5) (if no protest was filed and no hearing held, aggrieved persons may request a hearing under Idaho Code § 42-

1701A(3)). Only after a hearing by IDWR may a party request judicial review *of a transfer or a license*. Compare Idaho Code § 42-203A(5) (after a hearing on a license a person aggrieved by the determination may seek judicial review under Idaho Code § 42-1701(A)(4)) *with* Idaho Code 42-222(5) (after a hearing on a transfer a person aggrieved by the determination may seek judicial review under Idaho Code § 42-1701(A)(4)). In short, the public notice requirements and the process for seeking administrative and judicial review of permits, licenses and transfers are almost identical. The prohibition on collateral attack, therefore, should apply as equally to transfers as to licenses because the opportunity for protest, hearing and judicial review of IDWR actions, and the policy behind barring collateral attacks, are identical for transfers and licenses.

BWCC failed to seek either administrative or judicial remedies when IDWR approved Partners' transfer applications. Although BWCC was on notice that Partners' application called for a change in the nature of use to include aesthetic and recreational uses for the water, it did not: 1) protest the aesthetic/recreational water uses or quantities sought; 2) seek an administrative hearing on the water uses or quantities or even the lack of flow measurement and control devices; or 3) seek judicial review of the IDWR transfer decisions. BWCC Objections are, quite simply, a belated attempt to obtain judicial review of the transfers now even though it made no attempt to do so when they were approved in 1991 and in 2005. Because BWCC's Objections are a collateral attack, they should be dismissed by the Court.

- vii. The Court Also Lacks Jurisdiction To Hear The Objections Because IDWR Cannot Be Made A Party To Defend Its Recognition Of Aesthetic And Recreational Uses As Beneficial Uses.

The BWCC Objections not only challenge IDWR's prior decisions concerning TVC's transfers, but also IDWR's legislative and constitutional authority to have done so. The Court, however, lacks jurisdiction to review the administrative agency actions relative to licensed water

rights. *See Response To United States' Motion For Status Conference*, Subcase No. 03-10022, 4 SRBA 16, 16.14 footnote 11, *citing Twin Falls Canal Co. v. IDWR*, 127 Idaho 688, 688-89, 905 P.2d 89, 89-90 (1995). The IDWR cannot be made a party to actions in the SRBA, and therefore, it cannot defend its recognition of aesthetic, wildlife and recreational uses as beneficial water uses. Idaho Code § 42-1401(b)(3), Idaho Code § 42-1401(A)(3).

If BWCC wishes to challenge IDWR's authority to recognize aesthetic, wildlife and recreational uses of water as beneficial uses, it must do so in a declaratory judgment action where IDWR's powers are at issue and where IDWR can be made party to the complaint. *Twin Falls Canal Co. v. IDWR*, 127 Idaho 688, 688-89, 905 P.2d 89, 89-90 (1995).

There are clear policy reasons for barring BWCC's Objections where IDWR cannot be made a party. BWCC's Objections are an attack on IDWR's recognition of aesthetic, wildlife and recreational uses as beneficial uses. But the SRBA Court is the forum for confirming whether or not individual water rights exist, not for challenging IDWR executive decisions or authority to recognize uses such as aesthetic, wildlife and recreational as beneficial uses. To a large extent, such policy considerations are codified in Idaho statute.

The Idaho APA allows challenges to agency interpretations of statutes but requires that the agency be made party to the action. Idaho Code § 67-5278. The agency must be made a party so it can defend its interpretations of rules and statutes. Here, BWCC seeks to invalidate IDWR's administrative authority to recognize aesthetic, wildlife and recreational water uses as beneficial uses, and by implication seeks to invalidate IDWR's interpretation and application of Idaho law on this issue. As a result, TVC (and not IDWR) is being forced to defend the agency's

interpretation and application of Idaho water law in the SRBA because the IDWR cannot be made a party to the case.⁵

The Court should dismiss the BWCC Objections because ruling on IDWR's interpretations of its own authority and its administrative decisions as to what constitutes a beneficial use, without IDWR present to defend itself, effectively creates judicial control of an executive agency.

b. The Court Should Award Attorney's Fees To TVC.

In a civil action, the court may award reasonable attorney's fees to the prevailing party. Idaho Code § 12-121. The court also may award reasonable attorney's fees to a party that has been adversely affected by frivolous conduct. Idaho Code § 12-123(2). "Conduct" includes "filing a civil action, asserting a claim, defense, or other position, in connection with a civil action, or taking any other action in connection with a civil action." Idaho Code § 12-123(1)(a). "Frivolous conduct" is "conduct of a party to a civil action or of his counsel of record that . . . is not supported by fact, or unwarranted under existing law and cannot be supported by a good faith argument for an extension, modification or reversal of existing law." Idaho Code § 12-123(1)(b).

Attorney's fees may not be awarded when there are fairly debatable questions of law. *Black v. Ameritel Inns, Inc.* 139 Idaho 511, 81 P.3d 416 (Idaho 2003) citing *Davison's Air Serv. Inc., v. Montierth*, 119 Idaho 991, 993, 812 P.2d 298, 300 (Ct.App.1990). In determining whether an action is frivolous, the court may only consider matters that are issues in the case and part of the record. See *Sun Valley Shopping Center, Inc. v. Idaho Power Co.* 119 Idaho 87, 803 P.2d 993 (Idaho 1991). Even if an issue is sincerely raised by a party, if it is clearly erroneous,

⁵ And the Court is being asked to conduct this review without a record, since BWCC never sought a hearing on any of TVC's transfers.

the court may award attorney's fees. *See Childers v. Wolters*, 115 Idaho 527, 768 P.2d 790 (Idaho App.1988) (awarding attorney fees for claim that federal reserve notes were not legal tender).

BWCC's Objections filed in the SRBA clearly constitute "conduct" under Idaho Code § 12-123(1)(a). They also qualify as "frivolous conduct" under Idaho Code § 12-123(1)(b) given the well-established principles of exhaustion and collateral attack recognized by Idaho Courts generally, and by the SRBA Court on several occasions. BWCC ignores the fact that the SRBA Court repeatedly has held that it does not provide a venue to collaterally challenge decisions from a prior agency proceeding in which the complaining party had notice and participated. *See Order Recommending Partial Decree Be Set Aside*, Subcase Nos.:31-7311, 31-2357 and 31-2395, 8 SRBA 17, 17.3 (2004). BWCC has filed its Objections even though the SRBA is specifically precluded from exercising jurisdiction over claims that are subject to review under the Idaho APA. *See* Idaho Code § 67-5271, Idaho Code § 67-52-78, Idaho Code § 42-1401A, and Idaho Code § 42- 1402D. Most importantly, the SRBA Court is precluded from hearing the claim because BWCC failed to exhaust its administrative remedies before bringing the claim and has waived any right to judicial review. *See* Idaho Code § 42-222(5), Idaho Code § 42-1701A(5), Idaho Code § 67-5271, and Idaho Code § 67-5273.

These are not novel legal principles in the SRBA or elsewhere. Further, no plausible distinction exists that would make this Court's treatment of a collateral attack on a prior IDWR transfer decision any different than a collateral attack on a prior IDWR license decision. BWCC's objection to IDWR's recommendation of right 37-657B, to the extent it challenges the validity of TVC's aesthetic and recreation uses and IDWR's statutory and constitutional authority to recognize (via permits, licenses, transfers or SRBA recommendations), also is a

collateral attack on Transfer 3742 and 3743 because if BWCC were to prevail on this issue *in any subcase or designated basinwide issue*, it presumably would become the law of the case and invalidate such uses approved in those transfers. BWCC's Objections, where TVC's water rights have been recommended with the same elements as previously authorized by IDWR in administrative proceedings in which BWCC was either a party or had a full opportunity to become a party, therefore, is unwarranted and frivolous conduct. TVC respectfully requests that it be awarded its attorney's fees in responding to and opposing BWCC's Objections.

V. BWCC and Concerned Water Users' Motion to Amend Objections.

TVC has only very recently been served with the BWCC's and Concerned Water Users' ("CWU") Motions to Amend Objections ("Motions to Amend") regarding TVC's water rights, in which BWCC and CWU assert that they now are not interested "in debating the authority of the Department to act without legislative or constitutional authorization to permit private parties to hold water rights for private enjoyment of ponds and streams." *See e.g.*, Motion to Amend Objection, Subcase No. 37-494 (dated June 4, 2008), a copy of which is attached hereto as Exhibit A. TVC reserves the right to supplement and/or renew its Motion to Dismiss on further or different grounds as a result of such filing, and to respond directly to the Motions to Amend consistent with the Idaho Rules of Civil Procedure, once it has had an opportunity to fully analyze the nature and implications of the Motions to Amend.

In the interim, TVC would point out that the wording of BWCC's and CWU's Motions to Amend leaves wide open the question raised in their Objections concerning the validity TVC's aesthetic and recreational water uses and whether the Department's approval of those uses in the TVC transfers was "without legislative or constitutional authorization." *See* Motion to Amend at 2.. Moreover, to the extent that the objectors BWCC's and CWU's proposed amendments to

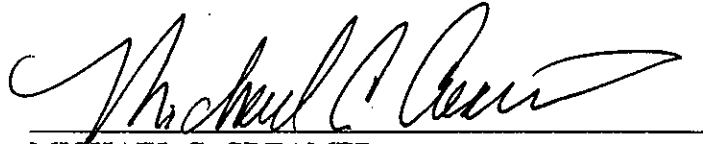
their Objections continue to object to recommended purposes, quantities *and now priorities* of TVC's water rights that were previously determined in the prior TVC transfers, the above grounds for dismissal are equally applicable to BWCC's Objections as they are proposed for amendment.

VI. CONCLUSION

For the foregoing reasons, Big Wood Canal Company's Objections to IDWR's Recommendations of The Valley Club, Inc.'s water rights should be dismissed, and TVC should be awarded its attorney fees and costs incurred in defending in this action.

RESPECTFULLY SUBMITTED this 9th day of June, 2008.

GIVENS PURSLEY, LLP

A handwritten signature in cursive script, appearing to read "Michael C. Creamer", written over a horizontal line.

MICHAEL C. CREAMER
Attorneys for The Valley Club, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 2008, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Albert P. Barker
Barker, Rosholt & Simpson, LLP
1010 W. Jefferson, Ste. 102
PO Box 2139
Boise, ID 83701-2139
Fax: (208) 344-6034

*Representing Bill Molyneux, Gerald Bashaw,
Grace Eakin, John F. Stevenson, Pepin
Corso-Harris, Peter Van Der Meulen, Rocky
Sherbine, Tom O'Gara*

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile
☐ ECF/Electronic Mail

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

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile
☐ ECF/Electronic Mail

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

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile
☐ ECF/Electronic Mail

James P. Speck
Speck & Aanestad
120 East Ave.
P.O. Box 987
Ketchum, ID 83340
Fax: (208) 726-0752

*Representing Barker Living Trust, Chaney
Creek Ranch LLC, Charles L. Matthiesen,
Charles T. Foley, Eagle Creek Irrigation
Co., ECD Inc., Elise G. Lufkin, Gimlet
Property Owners Assn., Gregory Ranch LLC,
Lake Creek Meadows Homeowners, Michael
E. Willard, Michael Engle, Myer Berlow,
Ralph W. & Kandi L. Girton, River Rock
Ranch LP, Rivers Edge Associates LLC, Roy
R. Woods, Steven D. Holzman Trust, The
Gulch Trust, R. Daniel Olmstead, William B.
Gordon*

☒
☐
☐
☐
☐

U.S. Mail, postage prepaid
Express Mail
Hand Delivery
Facsimile
ECF/Electronic Mail

Scott L. Campbell
Moffatt, Thomas, Barrett, Rock
& Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701-0829
Fax: (208) 385-5384

*Representing Newfoundland Partners,
Sinclair Oil Corporation*

☒
☐
☐
☐
☐

U.S. Mail, postage prepaid
Express Mail
Hand Delivery
Facsimile
ECF/Electronic Mail

Andrew J. Waldera
Moffatt, Thomas, Barrett, Rock
& Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701
Fax: (208) 385-5384

Representing Sinclair Oil Corporation

☒
☐
☐
☐
☐

U.S. Mail, postage prepaid
Express Mail
Hand Delivery
Facsimile
ECF/Electronic Mail

Christopher H. Meyer
Givens Pursley LLP
601 W. Bannock St.
P.O. Box 2720
Boise, ID 83701-2720
Fax: (208) 388-1300

Representing Oliver Family Trust

☐
☐
☒
☐
☐

U.S. Mail, postage prepaid
Express Mail
Hand Delivery
Facsimile
ECF/Electronic Mail

U.S. Department of Justice
Environment & Natural Resources
550 W. Fort St., MSC 033
Boise, ID 83724
Representing United States of America

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile
☐ ECF/Electronic Mail

The Valley Club, Inc.
P.O. Box 252
Sun Valley, ID 83353
Fax: (208) 727-1831

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile
☐ ECF/Electronic Mail

Director of IDWR
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098
Fax: (208) 287-6700

☒ U.S. Mail, postage prepaid
☐ Express Mail
☐ Hand Delivery
☐ Facsimile
☐ ECF/Electronic Mail


Michael C. Creamer

Albert P. Barker, ISB #2867
BARKER ROSHOLT & SIMPSON LLP

1010 W. Jefferson St., Ste. 102

P.O. Box 2139

Boise, ID 83701-2139

Telephone: (208) 336-0700

Facsimile: (208) 344-6034

*Attorneys for Tom O'Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen,
Grace Eakin, Rocky Sherbine, Gerald Bashaw, and Pepin Corso-Harris*

Craig Hobdey

Hobdey & Hobdey

P.O. Box 176

Gooding, ID 83330

Telephone: (208) 934-4420

Attorneys for Big Wood Canal Company

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 No. 37-494

) **MOTION TO AMEND OBJECTION**

COMES NOW, Tom O'Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw, and Pepin Corso-Harris, by and through their attorneys of record, Barker Rosholt & Simpson, LLP, and Big Wood Canal Company, by and through its attorneys of record, Hobdey & Hobdey, and respectfully request that the SRBA Court grant leave to amend their objections in this Subcase. The amended objection is attached hereto as Exhibit "A." Objectors move the court on grounds that they have good cause for amending and narrowing their objection:



1. Objectors' previous objections questioned whether a private party had the legal authority to hold such water rights for aesthetic, wildlife or recreation uses. Objectors are interested in impacts to the water supply from impounding water in the upper portions of Part 3 of Basin 37 and in particular the reduction in flows on the Big Wood, springs, and groundwater. Objectors' interest is not in debating the authority of the Department to act without legislative or constitutional authorization to permit private parties to hold water rights for private enjoyment of ponds and streamlets.

2. Objectors wish to withdraw their objections to the existence of the water right on those grounds and to amend their objection to object to quantity of water used in the ponds and other aesthetic, wildlife, or recreation amenities which exceed rates of use of the original water rights and which exceed the beneficial use requirements of the aesthetic, wildlife or recreational use.

3. Objectors filed timely objections to this right. By amending the objections at this time, Objectors are providing adequate notice of the entire range of issues they intend to pursue. Objectors are amending their objections in a way that disposes of a significant legal issue. This amendment will focus their objections on the factual circumstances surrounding the beneficial use of water under this right. This amendment narrows the issues in this Subcase by eliminating an overarching legal issue. The amendment turns to a subset of that issue, i.e., the extent of beneficial use, rather than whether the use is "beneficial" in the first place.

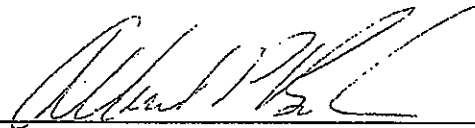
4. No prejudice will accrue to any party as no status conferences have been held, no case management schedule has been adopted, and no partial decrees have been entered.

5. Counsel for Objectors has contacted counsel for claimants in the captioned matter, who have not indicated whether they support or oppose said motion.

6. This Court, through Special Master Dolan, recently permitted the City of Pocatello to amend its objections in Subcases 01-209, et al. "Minidoka Credit Remark" even when the amendment there expanded the issues in the Subcase, when the Motion was brought in the earliest stages of the subcase, as is this Motion. Here the amendment narrows the issues in this Subcase.

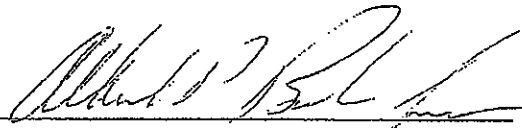
DATED this 4th day of June, 2008.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker
*Attorneys for Tom O'Gara, John F. Stevenson,
Bill Molyneux, Pete Van Der Meulen, Grace Eakin,
Rocky Sherbine, Gerald Bashaw, and Pepin
Corso-Harris*

HOBDEY & HOBDEY



Craig Hobdey
Attorneys for Big Wood Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of June, 2008, I caused to be served a true and correct copy of the foregoing **MOTION TO AMEND OBJECTION** and **STANDARD FORM ONE OBJECTION, AMENDED** by the method indicated below, and addressed to each of the following:

1. Original hand-delivered to:

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

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

Name: The Valley Club, Inc.
Address: Served c/o counsel below

3. Copies mailed to:

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

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

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

Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields
P.O. Box 829
Boise, ID 83701

Jeff Fereday
Michael Creamer
Givens Pursley
601 W. Bannock St.
P.O. Box 2720
Boise, ID 83701-2720

James P. Speck
Speck & Aanestad
120 East Avenue
P.O. Box 987
Ketchum, ID 83340

Albert P. Barker

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	)	A. Subcase No. 37-494
	)	
Case No. 39576	)	STANDARD FORM 1
	)	OBJECTION
	)	AMENDED

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING:

Tom O'Gara	Big Wood Canal Company
John F. Stevenson	112 South Apple Street
Bill Molyneux	Shoshone, ID 83352
Pete Van Der Meulen	
Grace Eakin	
Rocky Sherbine	
Gerald Bashaw	
Pepin Corso-Harris	
c/o Concerned Water Users	
P.O. Box 1200	
Bellevue, ID 83313	

Name and Address of Attorney, if any:

Albert P. Barker	Craig Hobdey
Barker, Rosholt & Simpson, LLP	Hobdey & Hobdey
P.O. Box 2139	P.O. Box 176
Boise, ID 83701	Gooding, ID 83330
Telephone: (208) 336-0700	Telephone: (208) 934-4420
Attorney for O'Gara, Stevenson, Molyneux, Van Der Meulen, Eakin, Sherbine & Bashaw	Attorney for Big Wood Canal Company

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

Name: The Valley Club, Inc.
Address: P.O. Box 252, Sun Valley, ID 83353

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

1. ☐ **Name and Address**
Should be:
2. ☐ **Source**
Should be:
3. ☒ **Quantity**
Should be: See "E" Below.
4. ☒ **Priority Date**
Should be: date of enlargement of water right
5. ☐ **Point(s) of Diversion**
Should be:
6. ☐ **Instream Flow Beginning and Ending Point**
Should be:
7. ☒ **Purpose(s) of Use**
Should be: See "E" Below.
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 OBJECTION(S):

Diversion Rate:

Should be set at the same diversion rate as an irrigation right: one inch per acre for every acre of surface area of the aesthetic, recreation or wildlife use, not to exceed the right from which the aesthetic, recreation or wildlife use is derived, and not to exceed the actual beneficial use. Conveyance loss can not exceed the original right's conveyance loss.

Volume/Consumptive Use:

Should be limited to the irrigation annual total volume of 3.5 feet per acre, not to exceed the right from which the aesthetic, recreation or wildlife use is derived, and not to exceed the actual beneficial use.

Measurement:

A single measuring device is not sufficient to adequately measure the usage by ponds and other aesthetic streamlets. Flow measuring devices specified by the Department and/or water master should be installed at the point of diversion (from stream/or to storage) and the point of discharge back to the natural stream. The measuring devices should provide a means of measurement and lockable controlling works to provide suitable control of diversion.

Administration:

The water right should be regulated by the water master of State Water District No. 37.

Water Quality:

The water used under said right when discharged back to a natural channel should comply with Idaho Water Quality Standards. The monitoring of the standards should be allowable and conducted by the Idaho Department of Water Resources and/or the Idaho Department of Environmental Quality.

Tom O'Gara
John F. Stevenson
Bill Molyneux
Pete Van Der Meulen
Grace Eakin
Rocky Sherbine
Gerald Bashaw
Pepin Corso-Harris

Big Wood Canal Company

By: [Signature]
Albert P. Barker, Attorney

By: [Signature]
Craig Hobdey, Attorney

VERIFICATION

State of IDAHO)
) ss.
County of Ada)

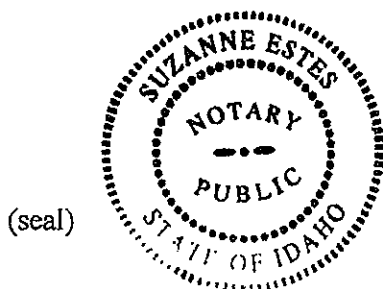
Albert P. Barker, duly sworn, upon oath, deposes and says:

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)

[Signature]
(Attorney signing in representative capacity)

SUBSCRIBED AND SWORN to before me this 4th day of June, 2008.



Suzanne Estes
NOTARY PUBLIC FOR IDAHO
Residing in: Boise, Idaho
My Commission Expires: 6/1/2012