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

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.: 37-07645

) O’GARA ET AL. OPPOSITION TO
) SINCLAIR OIL’S AND NEWFOUNDLAND
) PARTNER’S MOTION TO FILE LATE
) OBJECTION AND REQUEST FOR
) EXPEDITED HEARING

COMES NOW, claimants: Tom O’Gara; John F. Stevenson; Bill Molyneux; Pete Van
Der Meulen; Grace Eakin; Rocky Sherbine; Gerald Bashaw; Pepin Corso-Harris by and through
their attorney of record, BARKER ROSHOLT & SIMPSON LLP, and pursuant to the Idaho
Rules of Civil Procedure and this Court’s procedures set forth in *Administrative Order 1*
(“AO1”), and hereby responds to the multiple, but identical motions to file late objections filed
by Sinclair Oil Corporation, dba Sun Valley Company, and Newfoundland Partners (collectively
Sinclair Oil). The water right holders oppose and object to the motions to file late objections for
the reasons set forth herein, and requests that the court deny same. This opposition is further

supported by the *Affidavit of Albert P. Barker* (hereinafter “*Barker Aff.*”) filed and served herewith.

I.

PROCEDURAL AND FACTUAL HISTORY

Sinclair Oil and each of these respondents are the owners of water rights and filed numerous water right claims for Basin 37 part 3. The Director of the Idaho Department of Water Resources filed his recommendations for these water rights and other Basin 37 water rights through the Director’s Report with the Court on or about 02/21/2007. *See Barker Aff.*; *see also* Idaho Department of Water Resources Recommended Water Rights Acquired Under State Law, dated 02/20/2007. Pursuant to the Notice in the Director’s Report, the objection deadline for these water right recommendations was set for 11/14/2007. *See* Notice of Filing of Director’s Report For Basin 37, Part 3 for Irrigation and Other Water Rights attached as Exhibit “A” to *Barker Aff.*; *see also Barker Aff.* Responses to any objections submitted by the deadline of 11/14/2007 were due 01/15/2008. *See Id.* The Director’s notice of filing made it clear that if any water user wished to object to the claimant’s right “or any other water right” the objection “must be **received** by the SRBA court on or before **November 14, 2007.**” (bold in original).

On November 14, consistent with the Director’s Report deadline, these water users filed numerous objections to various water rights—including objections to some, but not all of Sinclair Oil’s water rights. These objections were served, via U.S. mail, on 11/14/2007. *See Barker Aff.*; *see also* Certificate of Service attached to Objections in the instant case. Sinclair Oil and Newfoundland Partners filed timely responses, which had a deadline of 01/15/2008. Prior to the November 14, 2007 deadline, Sinclair Oil and its’ counsel apparently had decided not to investigate any other water rights or file any objections to any other water rights.

As Mr. Waldera admits, only after receiving these water users' objections and filing the responses to same, did Sinclair Oil decide to review the water rights to which they now object, even though the objection period had lapsed months earlier.

Nearly six month after the deadline, 03/10/2008, Sinclair Oil filed these identical Motions to File Late Objection and Request for Expedited Hearing, and supporting Affidavit of Andrew Waldera.

II.

STANDARD OF REVIEW

The relevant standard of review for the movant's motion is summarized in this court's decision issued in subcase 47-16433 et al.:

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 AO1 for fling late claims. [citation omitted]. AO1 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 AO1 § 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. (*See* 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, Subcase Nos 47-16433, *et al.*, at 5-6 (March 22, 2005)(hereinafter "*Bedke Order*")(emphasis in original).

Special Master Cushman identified the legal standard relating to the “meritorious defense” factor identified above in his *Order Granting Motions to File Late Objections* in subcases 51-11921 et al.:

The legal standard of what must be shown to satisfy the meritorious defense requirement has been discussed several times by the Idaho Appellate Courts. (See *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993); *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979); *Thomas v. Stevens*, 78 Idaho 266 (1956)). The meritorious defense standard requires that a movant:

- 1) allege facts,
- 2) which if established,
- 3) would constitute a defense to the action, and
- 4) the facts supporting the defense must be detailed.

The detailed factual requirement also goes beyond the mere general notice requirement that would ordinarily be sufficient if pled prior to default. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). The policy behind pleading a meritorious defense is founded on the doctrine that “it would be an idle exercise for a court to set aside a default judgment if there is in fact no justifiable controversy.” *McFarlan*, 123 Idaho at 934, 854 P.2d at 277 (quoting *Hearst Corp.*, 100 Idaho at 12, 592 P.2d at 68).

(*Order Granting Motions to File Late Objections* at 7 (April 1, 2002)).

III.

RESPONSE IN OPPOSITION

I. Sinclair Oil Has Failed to State Any Cause for Failing to File Timely Objections to Any Water Right Recommendations, and Filed These Late Objections Merely in Retaliation to O’Gara’s Objections

Sinclair Oil has not stated a single reason why they did not review the Director’s Report and file objections by 11/14/2007. The motions to file late objection state, “This motion is supported by the affidavit of Andrew J. Waldera filed contemporaneously herewith.” See Motion to File Late Objection and Request for Expedited Hearing, pg. 1. No additional affidavits were

filed in support of the motion, which means that the motion is supported solely by the affidavit of Mr. Waldera.

Mr. Waldera's affidavit establishes two relevant facts: 1) that after Sinclair discovered the objections, counsel then prepared Standard Form Responses; 2) and then—only after completing said responses—did they finally decide to review the water rights of these water right holders, even though the objection period had long lapsed. *See* Affidavit of Andrew J. Waldera, *supra*, pg. 3, paragraphs 8-10.

Sinclair Oil does not provide any reasoning behind the lack of diligence in commencing the review of the recommended water rights from the time the director's report came out through the objection deadline. Sinclair Oil cannot claim lack of resources. It does not claim mistake, or that it was unaware of the Court's deadline. Sinclair Oil simply decided to review the claims and file objections after they had received the objections to their claims. However, they do not offer any reason why they did not commence reviewing the water rights when the director's report originally was filed and served.

Reasonably, one can conclude that Sinclair Oil did not have an initial objection to the recommended water rights of these water right holders, and that these objections merely developed after (and in retaliation) to the objections to the recommendations to Sinclair Oil's rights in the director's report. This conclusion is supported by Mr. Waldera's statement, "After preparing and filing the above-referenced responses, my office next turned its attention to the review of approximately 190 water rights held among the Concerned Water Users to determine whether their water rights are subject to any of the same objections..." *See* Affidavit of Andrew Waldera, *supra*, pg. 3 paragraph 10. This is reiterated in the motion itself where movant states, "SVC's legal counsel has diligently conducted this process of addressing any issues involving

the Water Rights and the Concerned Water Users' water rights over the past two (2) months since becoming aware of the Concerned Water Users' objections." *See* Motion to File Later Objection and Request for Expedited Hearing, pg. 3. Further, Sinclair Oil claims, "by objecting to SVC's Water Rights... the Concerned Water Users have subjected their water rights to similar scrutiny from SVC and others, and should have reasonably anticipated the need to defend their rights accordingly." *See Id at pg. 6*. Sinclair Oil has made unequivocally clear that it did not examine any other Basin 37 water rights, but specifically turned their attention to the water rights of these claimants—to object in retaliation. Then Sinclair Oil alleges these claimants should have anticipated Sinclair Oil's retaliatory motives.

Sinclair Oil has not supplied any cause for the untimeliness of its objections; this court cannot weigh anything against the factors to establish good cause, and therefore should deny the motion.

II. The Court Can Only Reasonably Conclude that Sinclair Oil's Delay was Willful.

Sinclair Oil's argument that their delay in filing objections was not willful is illogical. One of the factors looked at is whether the delay was *willful*. As this court noted, *willful*, for our purposes, denotes whether the act was *intentional*, or *knowing*, or *voluntary*. *See Bedke I, supra*, at 12; *see also* Black's Law Dictionary, citing *United States v. Murdock*, 290 U.S. 389, 394, 395, 54 S.Ct. 223, 225.

Sinclair Oil does not state a reason why it failed to file a timely objection by 11/14/2007. The only rationale Sinclair Oil provides for even filing an objection against these water users is, "since discovering that the Concerned Waters Users filed objections affecting its Water Rights, SVC has diligently worked, and continues to diligently work, to prepare objections to the water rights held among the Concerned Water Users..." *See* Motion to File Late Objection, *supra*, pg

5, subparagraph B(1). SVC further states, “by objecting to SVC’s Water Rights... the Concerned Water Users...should have reasonably anticipated the need to defend their rights accordingly.” *See Id.* at pg. 6.

Sinclair Oil then makes it clear that if objections had not been filed against Sinclair Oils water rights, Sinclair Oil would not have countered with their own objections (albeit late objections). Based upon Sinclair Oil’s stated rationale, coupled with the fact that the objection deadline was 11/14/2007, this court can only conclude that Sinclair Oil intentionally, or knowingly, or voluntarily decided not to file objections to any water rights by the deadline. Sinclair Oil (and its counsel) knew of the deadline, and its right to exercise independent judgment and right to file objections on any of the recommended water rights. However, Sinclair Oil voluntarily decided not to file any objections—making their choice intentional, knowing, and voluntary.

Sinclair Oil next claims that in order to find *willful* delay from Sinclair Oil, this court must find that Sinclair Oil “had prior reason to investigate and review the elements of the concerned Water Users’ water rights, that SVC has been aware of the grounds for objecting to the concerned Water Users’ water rights, and that SVC has purposefully failed to act.” *See* Motion to File Late Objections, pg. 5. In addition to being inaccurate, this is a perplexing argument from Sinclair Oil, given the surrounding facts and circumstances taken in conjunction with the instructions of the Director’s Report. Sinclair Oil is represented herein (at least according to its pleadings) by attorneys Scott L. Campbell, Andrew Waldera, Dylan B. Lawrence, and Andrew J. Snook, of Moffatt, Thomas, Barrett, Rock & Fields, attorneys familiar with Idaho Water Law and the procedures of the Snake River Basin Adjudication (SRBA). Even assuming the aforementioned attorneys were not familiar with Idaho Water Law and procedures,

or that Sinclair Oil was represented pro se (which they were not—Moffatt, Thomas has represented Sinclair Oil from the outset), the director’s report is self explanatory concerning steps in this process, and provides information where to find the standardized forms to utilize—so if anything, a person can at least check an appropriate box regarding their objections to the water right. The Director’s Report specifically states:

If you want to review someone else’s water right you need to look at the complete Director’s Report, which is available at the SRBA courthouse in Twin Falls and other locations listed below in this Notice. Copies of the report can be made, but you may be charged for copying and mailing.

See Notice of Filing of Director’s Report, supra, at pg. 2.

Sinclair Oil’s comment that the court must find that Sinclair Oil was aware of the grounds for objecting to the Water Rights is confusing and needs further clarification—especially given the fact that Sinclair Oil is represented herein by presumably four different attorneys from Moffat, Thomas, Barrett, Rock & Fields. It appears by the their argument that Sinclair Oil is claiming that they were only be aware of their objections to these water rights after someone objected to their own water rights—which does not make logical sense. Furthermore, the issues of quantity, one-inch per acre, and total volume are not new issues appearing in this basin for the first time.

Sinclair Oil has not diligently worked on objecting to these water rights. Sinclair Oil had an opportunity to review the water rights in the director’s report—like all other claimants—and to set forth their objections to the claims. Sinclair Oil knew the process and their right to file objections, and willfully decided against the filing of same. Only after discovering that objections were filed did Sinclair Oil decide to retaliate by filing objections. Sinclair Oil has admitted and clearly demonstrated that the delay was willful—intentional, knowing or voluntary.

III. Allowing Sinclair Oil's Late Objections Would Prejudice These Water Users and Any Other Party Involved

Given the fact that the objection period has lapsed, and that the allowance of late objections will at the least cause increased delay, additional pleadings and unnecessary costs, Sinclair Oil's argument that *no* prejudice will result is incorrect. Sinclair Oil basically states that no prejudice will occur because the parties are still early in the process, and these water users should have anticipated that if they objected, Sinclair Oil would retaliate by filing late objections against their claimed water rights. These arguments do not demonstrate that their late objection will not prejudice these water users. On the contrary, Sinclair Oil has demonstrated that their reason for the filing of the objection was as a retaliatory tactic—arguably designed to intimidate and harass, which will have a negative prejudicial impact on the litigation of these water rights by unnecessarily delaying and increasing the costs to adjudicate same.

Allowing for late objections based upon Sinclair Oil's rationale in the instant case would undermine resolution of these subcases—prejudicing these water users—and moreover would establish a bad precedent that would serve to allow for intimidation and the curbing of future objectors exercising their right to object for fear of retaliation.

IV. Sinclair Oil Has Not Presented Facts Sufficient to Present Meritorious Positions, and Therefore Allowing the Late Objections Would Be Futile

Lastly, Sinclair Oil's motion does not identify a *meritorious defense*, the third factor in analyzing a motion under I.R.C.P. 55(c). Sinclair Oil merely filed a bare-bones objection without alleging facts or circumstances that would tend to show this court they are presenting a meritorious position. By not providing adequate reasoning and facts, the court must look upon Sinclair Oil's ulterior motives with skepticism. Sinclair Oil has the burden to show a meritorious defense, however has failed to do so.

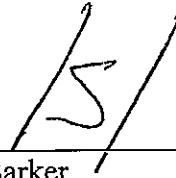
IV.

CONCLUSION

Sinclair Oil has not demonstrated any cause, let alone “good cause” to grant a motion to file a late objection pursuant to I.R.C.P. 55(c). Sinclair Oil failed to file timely objections, despite instructions and notice from the Department through the properly filed Director’s Report. Sinclair Oil has clearly established that the only reason they have decided to file objections and the instant motion was in retaliation to these water users objections. They will be prejudiced by the granting of said motion, which will cause unnecessary time, delay and additional cost. Lastly, by granting this motion, the court will be setting a precedent that allows for a claimant to file a late objection merely in retaliation against another party who filed a proper objection against their claim—ultimately curbing an objector’s exercise of their right for fear of expensive unnecessary litigation.

Dated this 23rd day of June, 2008.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to be 'A.P. Barker', written over a horizontal line.

Albert P. Barker
Attorneys for O’Gara et al.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June, 2008, I caused a true and correct copy of the foregoing O'GARA ET AL OPPOSITION TO SINCLAIR OIL'S AND NEWFOUNDLAND PARTNER'S MOTION TO FILE LATE OBJECTION AND REQUEST FOR EXPEDITED HEARING; and AFFIDAVIT OF ALBERT P. BARKER IN SUPPORT OF O'GARA ET AL OPPOSITION TO SINCLAIR OIL'S AND NEWFOUNDLAND PARTNER'S MOTION TO FILE LATE OBJECTION AND REQUEST FOR EXPEDITED HEARING filed herewith, to be served, unless otherwise indicated, by U.S. Mail, postage prepaid addressed to the following:

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

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