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Message:**Sun Valley Company and Newfoundland Partners' Reply Memorandum In Support of Motion
to File Late Objections**

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16845.0014 & 18975.4

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.: See Attachment "A"

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO FILE LATE OBJECTIONS

COME NOW Sinclair Oil Corporation, dba Sun Valley Company, and
Newfoundland Partners (collectively hereinafter "SVC"), by and through their undersigned
counsel of record, Moffatt, Thomas, Barrett, Rock & Fields, Chartered, and, pursuant to Idaho
Rules of Civil Procedure 7(b)(3)(E) and Administrative Order 1 ("AO1") Section 6(f)(4)(c),
hereby file this Reply to: (1) the O'Gara et al. Opposition to Sinclair Oil's and Newfoundland

Partner's Motion to File Late Objection and Request for Expedited Hearing; and (2) the Response to Sinclair Oil Company's Motion to File Late Objection submitted by the Big Wood Canal Company.

I. INTRODUCTION

The underlying facts of this case are set forth in SVC's initial Motion to File Late Objection and Request for Expedited Hearing (the "Motion"), submitted to the Court on March 7, 2008, as well as the supporting affidavit of Andrew J. Waldera filed contemporaneously therewith, and such facts are incorporated herein by reference. In addition, since SVC filed its Motion, Tom O'Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw, and Pepin Corso-Harris (hereinafter "O'Gara et al.") and the Big Wood Canal Company (hereinafter the "BWCC", collectively with O'Gara et al. the "Concerned Water Users" or "CWU") filed responses in opposition to SVC's Motion to File Late Objection.¹ The responses set forth by the CWU claim that SVC has failed to satisfy the good cause standard for filing late objections and that SVC merely seeks to file such objections in an effort to retaliate against CWU for objecting to SVC's water rights.

O'Gara et al. Opposition to Sinclair Oil's and Newfoundland Partner's Motion to File Late Objection and Request for Expedited Hearing ("O'Gara Opp."), p. 4; *BWCC's Response to Sinclair Oil Company's Motion to File Late Objection* ("BWCC Resp."), p. 1.

¹ A single response in opposition was filed by O'Gara et al. and a separate response in opposition was filed by BWCC. The responses in opposition assert similar positions and arguments with respect to SVC's Motion, and as a result this Reply will address both opposition briefs.

II. ARGUMENT

The CWU correctly identify the standard for 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 AO1 for filing [sic] 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).

O’Gara Opp., p. 3.

However, despite the CWU’s proper citation to the legal standard, they fail to fully understand that the standard cited above is truly a *lenient* standard that favors granting motions to file late objections so that cases may be decided on their merits rather than dismissed

on procedural issues. *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267, *et al.* (Jan. 31, 2001) ("*A.L. Cattle*"). In addition, the CWU are reluctant to recognize that this Court has significant discretion to grant a motion to file a late objection and that the Court's decision will only be reversed on appeal upon a finding of a clear abuse of discretion. *Memorandum Decision and Order on Challenge*, Subcase Nos. 47-16433, *et al.* at 9 (J. Melanson, Mar. 22, 2005) ("*Bedke I*").

A. The CWU's Argument That SVC's Delay In Filing Its Motion For Late Objection Was Willful Is Misguided And Unpersuasive

The CWU correctly cite that this Court has provided that "willful" means "intentional, knowing, or voluntary." O'Gara Opp., p. 6 (citing *Bedke I* at 12). However, as stated in SVC's Motion, "willful" also requires a higher degree of culpability than mere negligence or carelessness. Motion, p. 5 (citing *Bedke I* at 12). In addition, SVC reiterates that in order for SVC's filing its objections beyond the deadline for objections to be considered willful, this Court must find that SVC had prior reason to investigate and review the elements of the CWU's water rights; that SVC was aware of the grounds for objecting to the CWU's water rights; and that SVC purposefully failed to act prior to the objection deadline. *See* Motion, p. 5. This is the proper application of the willfulness standard despite the CWU's passing reference that this is an inaccurate interpretation of "willful." *See* O'Gara Opp., p. 7. As described in SVC's Motion and discussed herein, the facts of this subcase clearly show that SVC's filing its objections to CWU's water rights after the deadline for objections was not willful.

The foundation for all the issues concerning time and delay in this matter was established by the CWU's decision to file their objections to SVC's water rights on the final day of the objection period for Basin 37. *See Affidavit of Andrew J. Waldera in Support of Motion to*

File Late Objection and Request for Expedited Hearing ("Waldera Aff.") ¶ 8. The Director's Report for Basin 37 Part 2 was issued in December 2006. Idaho Department of Water Resources, Final SRBA Director's Reports Filed in Basin 37 Part 2, News Release, December 13, 2006. As such, the CWU waited almost an entire calendar year before filing their objections to SVC's water rights. The practical effect of this decision by the CWU, whether it was intentional or not, was to foreclose the possibility of any other water users from participating in this matter or challenging the CWU's water rights. While SVC acknowledges that evaluating the basis for objecting to water rights can be a lengthy process, SVC reasonably believes that CWU were aware of the basis upon which they intended to object to SVC's water rights long before the end of the objection period and purposely chose to delay filing their objections for tactical litigation purposes. Any position asserted by the CWU to the contrary should be viewed with skepticism.

Prior to receiving the CWU's objections to its water rights, SVC had no reasonable basis to be concerned with the nature of the CWU's water rights located downstream from SVC's interests. As a result, it is not reasonable to allege that SVC should have reviewed the Director's Reports for Basin 37 with respect to the CWU's water rights when such report was issued in order to develop any potential objections to the CWU's water rights. Only after receiving the CWU's objections to its water rights did SVC become aware of its potential interest in the nature of the CWU's water rights. While the CWU claim to find this position illogical, it is clearly unreasonable to expect a water user to review the details of every water right within a Director's Report to evaluate any possibilities for objecting to such water rights. SVC had no reason to generate needless legal expenses objecting to others' water rights that had no bearing upon their upstream water rights. Put simply, the CWU's actions implicated SVC's

rights, and the CWU waited in the weeds choosing to file their objections on the last day of the objection period. As a result, those ambushed by the CWU were precluded from filing timely objections. To a certain extent, the CWU are correct, they brought this added scrutiny upon themselves. However, this does not change the fact that SVC's proposed late objections present valid objections, and that SVC worked diligently to prepare said objections in order to meet the applicable legal standard.

After learning of the CWU's objections to its water rights, SVC immediately began working to prepare and file timely responses to all 244 of the CWU's objections. Waldera Aff. ¶ 9. As described in SVC's Motion, considerable effort was made by SVC's counsel to timely file such responses in order to avoid the potential for any law of the case issues and preserve SVC's ability to participate in this matter.² After completing said responses, counsel for SVC conducted a diligent review of approximately 190 of the water rights held by the CWU in a responsible effort to determine if there was any factual basis supporting objections to CWU's water rights on the same grounds in which CWU objected to SVC's water rights. Waldera Aff. ¶ 10.

As such, SVC's objections to the CWU's water rights were not produced without due consideration, and SVC did not merely object to all the CWU water rights reviewed, but only certain water rights with the most substantial basis for issuing an objection. Therefore, in light of the difficulties with timing created by the CWU's decision to file their objections on the final day of the objection period, and the extensive efforts required by SVC to evaluate the basis

² The BWCC improperly states that SVC supports its late filing of objections on the ambiguous basis of avoiding "law of the case ramifications." BWCC Resp., p. 1. Rather, as stated in SVC's Motion, counsel for SVC worked diligently to timely prepare its responses to the CWU's objections specifically to *avoid* any potential law of the case ramifications.

for any reasonable objections to the CWU's water rights, it is clear that SVC's filing of late objections was not a result of any willful delay on behalf of SVC.

B. SVC's Objections Will Not Sufficiently Prejudice The CWU Or Any Third Parties

Allowing SVC to file its late objections will not sufficiently prejudice the CWU or any other third parties to justify denying SVC's motion to file late objections. As stated in SVC's Motion, these proceedings are in their 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. Waldera Aff. ¶ 12. Moreover, by objecting to SVC's water rights on grounds including duty of water and the propriety of particular categories of beneficial uses, the CWU have subjected their water rights to similar scrutiny from SVC and others, and should have reasonably anticipated the need to defend their rights accordingly. Despite the CWU's position to the contrary, it is a basic tenet of the adversarial process that a party must initiate legal proceedings with "clean hands" in order to avoid dismissal based upon waiver or estoppel. Consequently, any argument by the CWU claiming they should not have to defend their water rights from the same scrutiny under which they have objected to SVC's water rights is both hypocritical and disingenuous.

Granting SVC'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). In addition, this Court has held that some prejudice alone is not a sufficient basis to deny a late objection. *Bedke I* at 13-14. As a result, any additional time or expense added to these proceedings by SVC's continued participation will not be unnecessary nor represent a material

prejudice for purposes of Rule 55(c). Further, the CWU's claim that SVC's continued participation in this matter will lead to intimidation and curb future objections is a mischaracterization of the circumstances of this case. SVC's participation in this matter is for the purpose of fully defending its rights, and fairly evaluating the validity of similar water rights, including certain water rights held by the CWU. Therefore, SVC's participation in this matter will not lead to intimidation or other negative results, but rather will facilitate the fair and equitable resolution of this matter on the merits.

C. SVC's Objections Set Forth A Meritorious Position

The CWU claim that SVC has merely set forth a "bare-bones objection" that fails to establish a meritorious position. O'Gara Opp., p. 9. 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. As set forth in SVC's Motion, SVC objects to the CWU's water rights on various grounds, including that the water rights: 1) exceed the statutory allotment of one inch per acre, 2) are based upon wildlife, aesthetic or recreation beneficial uses, 3) are accomplished transfers that represent potential enlargements of the existing water rights, 4) contain marked discrepancies between various claims and recommendations regarding points of diversion and places of use, and/or 5) possess excessive periods of use for the locale.

Each of the foregoing grounds for objection represents valid concerns that must be considered in order to properly adjudicate these water rights. Further, with regard to the allegation that SVC has failed to set forth facts "indicating that BWCC shareholders exceed the statutory allotment of one inch per acre," (*see* BWCC Resp., p. 2), such facts are evident from the face of the Director's Report, which identifies overlapping places of use for many stacked

water rights. As a result, BWCC's claim is misguided and seeks to go beyond the standard established in *A.L. Cattle*. Therefore, in light of SVC's valid objections and the supporting facts outlined in its proposed objections, SVC has presented meritorious positions, as defined in *A.L. Cattle*, for objecting to the CWU's water rights because such facts, if proven, would require the revision, or outright denial, of certain water rights held by the CWU.

D. The CWU's Allegation That SVC Objected To The CWU's Water Rights As An Impermissible Retaliatory Tactic Is Misplaced And Unpersuasive

The CWU claim that SVC merely seeks to file its objections in an effort to retaliate against the CWU for objecting to SVC's water rights. O'Gara Opp., p. 5; BWCC Resp., p. 1. However, this argument is another mischaracterization of the facts and circumstances of this case. The CWU appear to assert that a party cannot defend its rights by evaluating the position of its opponent with respect to the subject of the action. However, the current proceedings are governed by the Idaho Rules of Civil Procedure in the same manner as any other civil lawsuit and are supplemented to the extent necessary by the procedures outlined in AO1. AO1 §§ 1(a) and 1(b).

It is a fundamental concept of civil litigation that a party is entitled to an adequate opportunity to evaluate the position of its opponent with respect to the subject of the conflict. In the context of these proceedings, an objection to a water right is analogous to a complaint in a typical civil lawsuit. In such a civil lawsuit, the defendant is entitled to respond to the complaint in various ways, including filing a counterclaim against the plaintiff or asserting any affirmative defenses it may have, such as waiver or estoppel based upon a theory of unclean hands, to defend against the plaintiff's allegations. IDAHO R. CIV. P. 8, 13.

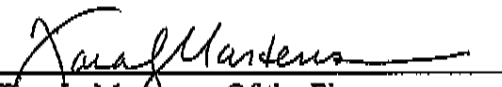
Here, SVC's objections simply serve as the analog to a counterclaim or affirmative defense in a typical civil lawsuit. SVC has not objected to the CWU's water rights to punish or intimidate the CWU, but rather has objected to their water rights for the purposes of protecting its own interests and reaching a fair and equitable resolution of this matter on the merits. To deny SVC the right to pursue the same legal theories against the CWU as the CWU have pursued against SVC would be unjust and contrary to the basic rights of due process and equal protection under the law.

III. CONCLUSION

Based on the foregoing discussion, SVC respectfully requests that this Court exercise its discretion and grant SVC's Motion to File Late Objections and allow this matter to be determined on the merits rather than a procedural issue.

DATED this 30th day of June, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2008, I caused a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO FILE LATE OBJECTIONS** to be served by the method indicated below, and addressed to the following:

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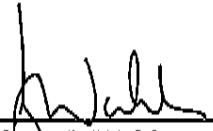
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Andrew J. Waldera

Exhibit "A"**Sun Valley Subcase Nos.:**

37-00111
37-00112
37-00114C
37-00115D
37-00116
37-00475
37-00477
37-02502
37-02561
37-02576
37-02582
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37-08003
37-08196

Newfoundland Partners Subcase Nos.:

37-00867
37-00870
37-00895
37-13043
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37-13116
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