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DEPARTMENT OF
WATER RESOURCES

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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 Nos. 37-415, 37-416,
37-12111, 37-12130

**RESPONSE IN OPPOSITION TO MOTIONS
TO AMEND OBJECTIONS**

Sinclair Oil Corporation d/b/a Sun Valley Company ("Sun Valley") and
Newfoundland Partners LP ("Newfoundland"), through undersigned counsel of record and
pursuant to Idaho Rule of Procedure 7(b)(3) and Rule 6(f)(4)(b) of this Court's Administrative
Order 1 ("AO1"), hereby file this Response in Opposition to Motions to Amend Objections that
have been filed by the Big Wood Canal Company ("BWCC") and eight individuals¹ comprising

¹ They are: Tom O'Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw, and Pepin Corso-Harris

the “Concerned Water Users” (“CWU”) (collectively, the “Objectors”) in each of the above-referenced subcases.² This Response is supported by the Affidavit of Scott L. Campbell (the “Campbell Affidavit”), the Affidavit of Tara L. Martens (the “Martens Affidavit”), and the Affidavit of Dylan B. Lawrence (the “Lawrence Affidavit”), all filed contemporaneously herewith.

I. INTRODUCTION

On November 14, 2007—the last day of the objection period for Basin 37, Part III—the Objectors filed joint Standard Form 1 Objections to each of the above-referenced water rights. All four of the affected water rights include aesthetic, recreation, and/or wildlife (“ARW”) purposes of use. As Section II of this Response will explain, three of the four objections filed by the Objectors specifically rely upon Idaho’s Minimum Stream Flow Act (the “MSFA”) for the proposition that ARW uses are not beneficial uses of water when the water right is held by a “private entity.”

On June 4, 2008—nearly seven months later, and after considerable and expensive efforts to conduct discovery, additional factual investigations, and initiation of a basin-wide issue to address the Objectors’ original objections—the Objectors filed motions to “amend” their objections to each of these water rights. Curiously, the Objectors’ proposed amended objections would no longer be based upon the MSFA. According to the Objectors, their “interest is not in debating the authority of the Department to act without legislative or constitutional

² On July 10, 2008, the Court issued an order reassigning water right 37-12111 from Special Master Bilyeu to Special Master Booth. Despite this reassignment, counsel for Sun Valley and Newfoundland believe it is more efficient to respond to the Motions to Amend Objection in all four subcases by submitting one response brief and set of supporting affidavits. This is particularly true given the similarity of the water rights and objections at issue and that the same legal standards govern each motion. Therefore, this Response and the affidavits filed in support of same are being filed in all four of the captioned subcases.

authorization to permit private parties to hold water rights for private enjoyment of ponds and streamlets.” (*See, e.g.*, Mot. to Amend Obj. filed by Objectors at 2, Subcase No. 37-415.)

Instead, the Objectors “wish . . . to amend their objection[s] 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.” (*Id.*)

These motions are subject to established legal standards. For instance, the Objectors’ motions must satisfy the standards for amending a pleading by leave of court pursuant to Idaho Rule of Civil Procedure 15(a). In addition, the motions must satisfy the standards for filing a late SRBA objection pursuant to AO1 and Idaho Rule of Civil Procedure 55(c). And, according to AO1, the motions can be granted only if “justice so requires.” As this Response will explain, the Objectors’ motions do not satisfy any of these standards.

II. STATEMENT OF FACTS

As a general matter, the legal standards enumerated above require a detailed comparison of the original Standard Form 1 Objections filed by the Objectors to the Objectors’ proposed amended objections that are attached as Exhibit A to their motions. Therefore, this Statement of Facts will, for each affected water right, describe the general terms of the water right recommendation, the original objections filed by the Objectors, the proposed amended objections, and how the two objections differ. This will help illustrate to the Court that these are not simply motions to “amend” the previous objections—they are motions that seek to both add new objections to the affected water rights and to radically change the bases of the Objectors’ original objections.

A. Water Right 37-415 (Sun Valley)

This water right is the primary water right for the year-round Sun Valley resort. The Director's Report recommendation for 37-415 provides Sun Valley with the authority to divert up to 25 cubic feet per second ("cfs") of water from Trail Creek for multiple purposes, including up to 17.6 cfs of water for irrigation purposes, up to 7.4 cfs for aesthetic purposes, and up to 7.4 cfs for wildlife purposes. Water diverted under this right is conveyed through a series of ditches and channels within and throughout the Sun Valley resort, providing irrigation water delivery, wildlife habitat, and an aesthetically-pleasing experience for resort guests. In fact, the designated place of use for this water right essentially consists of the entire Sun Valley resort.

On November 14, 2007, the Objectors filed a Standard Form 1 Objection to this recommendation, challenging the quantity and place of use elements, and asserting that the water right should not exist. (Standard Form 1 Objection filed by Objectors at 2, Subcase No. 37-415.) In support of its objection to the place of use element, the Objectors stated simply that the right should be "[l]imited to [o]riginal [c]laimed acreage of 115 acres." (*Id.*) In support of their objection to the quantity element, the Objectors assert:

Combined use of this right along with other rights from the same place of use should be limited to one inch or 0.02 cfs per acre, rather than the quantities in the recommendation. Total volume of water delivered to this property from all water rights shall not exceed 3.5 AF per acre.

(*Id.* at 3.)

In support of their claim that the water right should not exist, the Objectors assert:

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.*)

On June 4, 2008, the Objectors filed a Motion to Amend Objection and a proposed new Standard Form 1 Objection (Exhibit A to the Motion) in this subcase which seek to withdraw their objections to the place of use element and the existence of the water right, retain their objection to the quantity element, and add objections to the priority date and purpose of use elements of the water right. (Mot. to Amend Obj. filed by Objectors, Ex. A at 2, Subcase No. 37-415.)

With respect to the quantity element, rather than relying upon the same bases stated in their original objections, the Objectors now seek to significantly expand the bases of their objections to this element as follows:

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 [*sic*] exceed the original right's conveyance loss.

Volume/Consumptive Use:

Should be limited to the irrigation annual total volume of 3.5 feet [*sic*]³ 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.

(*Id.*, Ex. A at 3.)

Curiously, despite attempting to add objections to the priority date and purpose of use elements, the Objectors in their proposed amended objection do not provide any explanation of the bases to support those additional objections. (*Id.*, Ex. A at 2-3.) Moreover, the "Reasons

³ Presumably, "acre-feet."

Supporting Objection(s)” section of the proposed objection contains the following additional language, all of which is wholly irrelevant to defining any of the elements of the water right:

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.

(*Id.*, Ex. A at 3.)

B. Water Right 37-416 (Sun Valley)

This water right recommendation is essentially a smaller version of 37-415, authorizing Sun Valley to divert up to 6.5 cfs of water from Trail Creek, including up to 4.6 cfs for irrigation, up to 1.9 cfs for aesthetic purposes, and up to 1.9 cfs for wildlife purposes. As with 37-415, water diverted under this right is conveyed through a series of ditches and channels within and throughout the Sun Valley resort.

On November 14, 2007, the Objectors filed a Standard Form 1 Objection to 37-416 that is essentially identical to their original objection to 37-415 previously described, in that they both object to the same water right elements on the same bases. (*See* Standard Form 1 Obj. filed by Objectors at 2, Subcase No. 37-416.) On June 4, 2008, the Objectors filed a Motion

to Amend Objection with a proposed amended Standard Form 1 Objection to 37-416 attached as Exhibit A that are essentially identical to the materials they filed in the 37-415 subcase, with the following exceptions:

(1) the “Volume/Consumptive Use” section of the proposed amended objection for 37-416 retains the assertion from the original objection to that right that, “[c]ombined use of this right along with other rights from the same place of use should be limited to one inch or 0.02 cfs per acre, rather than the quantities in the recommendation” (this language does not appear in the proposed amended objection to 37-415); and

(2) the proposed amended objection for 37-416 retains the objection to place of use on the basis that it should be “[l]imited to original claimed acreage of 115 acres,” (this basis is not carried forward in the proposed new objection to 37-415)

(*See id.*, Ex. A at 2-3.)

C. Water Right 37-12111 (Sun Valley)

This is the water right that is associated with Sun Valley Lake—an impoundment of Trail Creek within the Sun Valley resort that provides wildlife habitat, recreational opportunities, and aesthetic values for resort guests and property owners near the lake. More specifically, this recommendation authorizes Sun Valley to divert up to 110 acre-feet of water per year and to store up to 81 acre-feet of water year-round for aesthetic, recreation, and wildlife purposes.

On November 14, 2007, the Objectors filed a Standard Form 1 Objection objecting to the quantity element and asserting that the water right should not exist. (Standard Form 1 Objection filed by Objectors at 2, Subcase No. 37-12111.) The objection also objects to the place of use on the basis that it should be “[l]imited to original claimed acreage of 115 acres”—a curious objection, given that the recommendation for this right contains no irrigation use. (*Id.*)

With respect to the objection to quantity, the objection states:

Combined use of this right along with other rights from the same place of use should be limited to one inch or 0.02 cfs per acre, rather than the quantities in the recommendation. Total volume of water delivered to this property from all water rights shall not exceed 3.5 AF per acre. Combined use of this right along with other rights from the same place of use should be limited to one inch or 0.02 cfs per acre, rather than the quantities in the recommendation. Total volume of water delivered to this property from all water rights shall not exceed 3.5 AF per acre.⁴

(*Id.* at 3.)

And, oddly, the objection contains no explanation or justification for its assertion that the water right should not exist. (*Id.*) Importantly, the objection does not assert the MSFA basis for non-existence of the water right. (*Id.*)

On June 4, 2008, the Objectors filed a Motion to Amend Objection and a proposed amended Standard Form 1 Objection in this subcase which seek to retain the objections to the quantity and place of use elements, withdraw the objection that the water right should not exist, and add objections to the priority date and purpose of use elements. (Mot. to Amend Obj. filed by Objectors, Ex. A at 2, Subcase No. 37-12111.)

With respect to the quantity element, rather than relying upon the same bases stated in their original objections, the Objectors now seek to significantly expand the bases of their objections to this element by including the same “Diversion Rate” and “Volume/Consumptive Use” explanations as previously described for 37-416. (*Id.*, Ex. A at 3.) The Objectors also continue to assert that the place of use should be limited to 115 acres, despite the fact that this is not an irrigation right. (*Id.*, Ex. A at 2.)

⁴ This repetition of the basis for the quantity objection appears in the objection itself.

As with 37-415, the proposed amended objection does not contain any explanation whatsoever as to the basis for its specific objections to priority date and purpose of use—two elements that were not challenged in the Objectors' original objection to this right. (*Id.*, Ex. A at 2-3.) And, as with 37-415, the new proposed objection contains the same language regarding measurement, administration, and water quality—issues that are, again, wholly irrelevant to the determination of any of the elements of the water right. (*Id.*, Ex. A at 3.)

D. Water Right 37-12130 (Newfoundland)

Newfoundland owns land immediately east of Sun Valley Road (Trail Creek Road) that adjoins the Sun Valley resort. The recommendation for water right 37-12130 authorizes Newfoundland to divert up to 1.6 cfs of water from Trail Creek and to store up to 4 acre-feet of such water for aesthetic and wildlife purposes.

On November 14, 2007, the Objectors filed a Standard Form 1 Objection objecting only to the priority date element and the existence of the water right. (Standard Form 1 Objection filed by Objectors at 2, Subcase No. 37-12130.) In support of these positions, the objection contains the following explanation:

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 3.)

On June 4, 2008, the Objectors filed a Motion to Amend Objection and a proposed amended Standard Form 1 Objection in this subcase which seek to retain the specific objection to the priority date element, to withdraw the objection to the existence of the water right, and to add objections to the quantity and purpose of use elements. (Mot. to Amend Obj.

filed by Objectors, Ex. A at 2, Subcase No. 37-12130.) Again, the initial objection did not object to the quantity and/or purpose of use elements. In support of its objection to priority date, the proposed new objection asserts that the priority date should be the “date of enlargement” of the water right. (*Id.*)

Regarding the new objection to quantity, the proposed amended objection form contains the same explanations of “Diversion Rate” and “Volume/Consumptive Use” that have already been described in Section II.A of this Response with respect to 37-415. As to the new objection to purpose of use, the proposed amended objection contains no explanation in support of that position. (*Id.*, Ex. A at 2-3.) And, as with 37-415, the proposed amended objection contains the same language regarding measurement, administration, and water quality—issues that are wholly irrelevant to the definition of any of the elements of the water right. (*Id.*)

III. ARGUMENT

A. The Objectors’ Motions to Amend Should Be Denied Because They Do Not Satisfy the Standards for Amending a Pleading Pursuant to I.R.C.P. 15(a)

Significantly, Rule 2(r) of AO1 provides that objections filed in the SRBA are pleadings for the purposes of the rules of civil procedure. And, Rule 15(a) of the Idaho Rules of Civil Procedure governs the amendment of pleadings in a civil action. It provides:

Rule 15(a). Amended and supplemental pleadings — Amendments. A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires, and the court may make such order for the payment of costs as it deems proper. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading,

whichever period may be the longer, unless the court otherwise orders.

I.R.C.P. 15(a).

In other words, Rule 15(a) specifically allows a party to amend a pleading only in one of the following situations:

- Once, as a matter of course, at any time before a responsive pleading is served;
- Within twenty (20) days after the pleading is served, if no responsive pleading is permitted and the action has not been placed upon the trial calendar;
- By written consent of the adverse party; or
- By leave of the Court.

Id.

The first three categories are inapplicable on their face. With respect to the first category, many parties, including Sun Valley and Newfoundland, have filed Standard Form 2 Responses to Objection in each of these subcases. Pursuant to Rule 2(r) of AO1, these responses are considered responsive pleadings and therefore foreclose the Objectors' ability to amend their objections "as a matter of course."

With respect to the second category, the Objectors filed their motions to amend 204 days after filing their original objections—well outside of the 20-day window specified in Rule 15(a).⁵ With respect to the third category, neither Sun Valley nor Newfoundland have agreed in writing to allow the objection amendments, and there is certainly no evidence in the record of these subcases of any such written agreement.⁶

⁵ And, as noted, a responsive pleading is permitted, which also renders the second category inapplicable.

⁶ Without citation or support, the Objectors state in their motions that, "[c]ounsel for Objectors has contacted counsel for claimants in the captioned matter, who have not indicated

Therefore, the Objectors must obtain leave of this Court to amend their original objections. “[T]he decision to grant or refuse permission to amend [a pleading] is left to the sound discretion of the trial court.” *Jones v. Watson*, 98 Idaho 606, 610, 570 P.2d 284, 288 (1977) (citations omitted). While Rule 15(a) specifies that leave to amend a pleading is to be “freely given,” that liberal standard by its express terms applies only “when justice so requires.” *Baxter v. Craney*, 135 Idaho 166, 169, 16 P.3d 263, 266 (2000) (“Rule 15(a) requires the district court to allow amendments [to pleadings] only when justice requires”).

Based upon this qualification, the Idaho Supreme Court has on multiple occasions upheld district court decisions to deny motions to amend pleadings. *See, e.g., Estate of Becker v. Callahan*, 140 Idaho 522, 527-28, 96 P.3d 623, 628-29 (2004); *Iron Eagle Dev., LLC v. Quality Design Sys., Inc.*, 138 Idaho 487, 492-93, 65 P.3d 509, 514-15 (2003); *Cook v. State Dep’t of Transp.*, 133 Idaho 288, 296-97, 985 P.2d 1150, 1158-59 (1999); *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho*, 132 Idaho 318, 323-25, 971 P.2d 1142, 1147-49 (1998); *Baxter*, 135 Idaho at 169, 16 P.3d at 266; *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 178, 804 P.2d 900, 907 (1991); *Jones*, 98 Idaho at 610, 570 P.2d

whether they support or oppose said motion.” (*See, e.g., Motion to Amend Objection* filed by Objectors at 2, Subcase No. 37-415.) This is a disingenuous assertion by the Objectors. Presumably, the Objectors refer to a settlement proposal letter sent by counsel for the CWU to counsel for Sun Valley and Newfoundland, which is attached as Exhibit A to the Campbell Affidavit. First, it is notable that the letter is sent only on behalf of the CWU—not the BWCC. Therefore, if this letter is indeed the “contact” referred to by the Objectors, such “contact” was not made by both Objectors. Second, the only reference in that letter to amending objections is in the last sentence of the letter, which states that, “[i]f this proposal is not acceptable to resolve the objections, the Concerned Water Users will amend their objections to raise these conditions as to the use of the water under these rights.” (Emphasis added). Far from being a request for some sort of response from counsel for Sun Valley and Newfoundland, this letter states unequivocally that the CWU members “will” amend their objections. The Objectors therefore misrepresent the letter in a variety of ways. Most importantly, this letter certainly does not constitute a “written agreement” to amend the Objectors’ objections for the purposes of the Rule 15(a) analysis. Additionally, the letter does not request input or consent to a potential motion for leave of the court to amend the objections.

at 288; *Dairy Equip. Co. of Utah v. Boehme*, 92 Idaho 301, 305, 442 P.2d 437, 441 (1968); *see also Hinkle v. Winey*, 126 Idaho 993, 997, 895 P.2d 594, 598 (Idaho App. 1995); *Bissett v. State*, 111 Idaho 865, 868-69, 727 P.2d 1293, 1296-97 (Idaho App. 1986).

“In considering whether to grant a motion for leave to amend [a pleading], a trial court may consider whether the amended pleading sets out a valid claim, whether the opposing party would be prejudiced by any undue delay, or whether the opposing party has an available defense to the newly added claim.” *Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 44, 122 P.3d 300, 303 (2005) (citation omitted). The remainder of this section of this Response will explain why evaluation of these three factors dictates that the Objectors’ motions to amend their objections should be denied.

1. The Proposed Amended Objections Do Not Set Forth “Valid Claims”

In order to evaluate whether the Objectors’ proposed amended objections set forth “valid claims,” this Court must examine the proposed amended objections themselves, as well as the motions to amend. A review of those documents demonstrates that the Objectors have not articulated “valid claims” in the context of a water rights adjudication for the purposes of Rule 15(a).

As described in this Response’s Statement of Facts, the majority of the Objectors’ “Reasons Supporting Objection(s)” deal with issues unrelated to the elements of the affected water rights. This is particularly true of Objectors’ concerns relating to consumptive use, measurement, administration, and water quality. The Idaho Legislature has specifically removed consumptive use as an element of water rights adjudicated in the SRBA. S.L. 1997, ch. 374, §§ 3, 4; *see also* IDAHO CODE §§ 42-1409, 42-1411. Therefore, the Objectors’ call for limitations upon consumptive use are totally unfounded and do not constitute “valid claims” in the SRBA, as mandated by Rule 15(a) case law.

By their very nature, the Objectors' requests for measurement and administration relate to how the water rights are administered after the conclusion of the adjudication. They do not relate to the determination of the actual terms of the water rights. This is critical, because IDWR's Standard Form 1 Objection only allows an objector to object to a water right element and to suggest what that element "should be." If an objector is not objecting to a specific water right element, the only other bases for objecting are to assert that a water right should not exist at all or that a disallowed water right should be recommended. Pursuant to Rules 4(a) and 4(d)(1) of AO1, the Standard Form 1 Objection is the form that a party "must" use to file an objection. While the Director has authority to include remarks that are necessary for the administration of a water right, Idaho Code § 42-1411(2)(j), such authority does not extend to objectors. Therefore, objecting to a water right on the basis that it should include administrative remarks does not constitute a "valid claim" in the context of the SRBA.

A similar analysis applies to the Objectors' water quality-based objections. No adjudication statutes in Title 42, Chapter 14 of the Idaho Code provide any authority for the inclusion of such language in the Sun Valley and Newfoundland water rights. To the contrary, Section 42-1411 enumerates the water right elements which may be recommended by IDWR and ultimately decreed by this Court. Water quality is not included. More generally, the authority to regulate water quality lies with the Idaho Department of Environmental Quality ("IDEQ"), not IDWR.⁷ IDAHO CODE § 39-105(3)(e). And, as with the administration and measurement

⁷ The Idaho Supreme Court affirmed this general distinction between the roles of IDWR and IDEQ in *Shokal v. Dunn* by stating that, "[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways." 109 Idaho 330, 340-41, 707 P.2d 441, 451-52 (1985). While the court went on to hold that it was appropriate in that case for IDWR to condition the issuance of a water permit on a showing that a proposed facility will meet water

language proposed by the Objectors, the standard objection form mandated by this Court does not contemplate an objection based upon water quality. It is simply not one of the bases of objection enumerated in Section D of the objection form. In short, the Objectors' requests to include water quality restrictions on these water rights do not constitute "valid claims" in the SRBA.

The Objectors' arguments that the affected ARW rights should be limited to "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" and "to the irrigation annual total volume of 3.5 [acre-]feet per acre" also do not present "valid claims." The inch per acre and 3.5 acre-feet per acre limitations are concepts that apply only to irrigation water rights—not to ARW water rights. The inch per acre limitation is established in Idaho Code Section 42-220, which provides in pertinent part:

[W]hen water is used for irrigation, no such [water right] license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary

IDAHO CODE § 42-220 (emphasis added).

quality standards, that holding does not apply in this context. That holding, by its terms, only dealt with a water permit, not a water right being adjudicated in the SRBA. The water quality remark in *Shokal* was included in that water permit pursuant to the "local public interest" criterion in Idaho Code § 42-203A(5)(e) and IDAPA 37.03.08.045.01(e). *Shokal*, 109 Idaho at 336-41, 707 P.2d at 447-52. Those provisions specifically require IDWR to consider the effect of a project on "recreation, fish and wildlife resources" and "[c]ompliance with applicable air, water and hazardous substance standards" when it evaluates a permit application. IDAPA 37.03.08.045.01(e). There is simply no analogous provision in the adjudication statutes in Title 42, Chapter 14.

Similarly, the 3.5 acre-feet per acre standard for the Big Wood River valley is reflected in IDWR's Watermaster Handbook, which is attached as Exhibit A to the Lawrence Affidavit. The name of the map in the Watermaster Handbook which reflects this standard is entitled "Irrigation Season of Use, Consumptive Irrigation and Field Headgate Requirements." (See Lawrence Aff., ¶ 2, Ex. A at 22 (emphasis added).)

Simply put, there is no basis for applying these concepts to any non-irrigation water rights, including ARW rights. Therefore, these objections do not present "valid claims" as to ARW water rights. This conclusion is further supported by the language of the proposed amended objections, which specifically assert that these duty of water limitations should be calculated based upon the "surface area of the aesthetic, recreation or wildlife use." (See, e.g., Mot. to Amend Obj. filed by Objectors, Ex. A at 3, Subcase No. 37-415.) Focusing upon the "surface area" of a pond or other water amenity without regard to the depth, capacity, or use of the pond or amenity is illogical.

For example, assume two ponds with equal surface areas: one with a designated purpose of use of aesthetic storage, and the other with a designated purpose of use of recreation storage. If the recreational pond is used for boating activities, it is reasonable to assume that due to safety concerns, it needs to be considerably deeper—and, hence, to have a larger storage capacity—than the aesthetic pond. However, the Objectors' focus upon the surface area of the ponds—and not the use and/or depth of the ponds—would result in decrees with the exact same quantity element, regardless of the historical bases of those rights; a ridiculous result with no basis in Idaho law. And, as already explained, this is in addition to the fact that the duty of water limitations only apply to irrigation water rights.

Simply put, the Objectors' proposed amended objections do not present "valid claims" pursuant to I.R.C.P. 15(a). Therefore, the Motions to Amend Objections can and should be denied on that basis alone.

2. The Objectors' Undue Delay Would Prejudice Sun Valley and Newfoundland

Allowing the Objectors the drastic amendments they request would prejudice Sun Valley and Newfoundland. Critically, this prejudice is not limited to the obvious fact that new and different legal claims would be asserted against their water rights. Rather, the prejudice also arises from the fact that Sun Valley and Newfoundland have already spent significant time and resources conducting factual and legal investigations into the original objections.

In their motions, the Objectors flippantly state that their "interest is not in debating the authority of the Department" to issue ARW water rights to private parties. (*See, e.g.,* Mot. to Amend Obj. filed by Objectors at 2, Subcase No. 37-415.) If they are not interested in that issue, then they should not have raised it in their original objections. However, that is exactly what they did, and Sun Valley and Newfoundland have taken appropriate steps to defend those objections, specifically including the following:

- Counsel for Sun Valley and Newfoundland, upon receiving the Objectors' original objections, reviewed and analyzed those objections, the terms of the Sun Valley and Newfoundland water right recommendations, and the statutory provisions of the MSFA, in order to evaluate the extent to which the MSFA may apply to those water rights. In addition, counsel for Sun Valley and Newfoundland conducted extensive review of IDWR and SRBA records to determine the extent to which similar issues may affect the Objectors' water rights. (*See, e.g.,* Aff. of Andrew J. Waldera in Supp. of Mot. to File Late Obj. and Request for Expedited Hearing, ¶¶ 9-11, Subcase Nos. 37-111, *et al.*)
- On March 14, 2008, counsel for Sun Valley and Newfoundland conducted the deposition of Carl D. Pendleton, the 30(b)(6) representative designated by BWCC. (Pendleton Dep., 1).⁸ Much of that deposition focused upon the

⁸ Relevant excerpts of the Pendleton deposition transcript are attached as Exhibit B to the Campbell Affidavit.

factual and legal bases for BWCC's objections against Sun Valley's water rights, including the MSFA. (Pendleton Dep., 34:2-39:7).⁹

- On March 24, 2008, Sun Valley filed its Motion to Designate Basin-Wide Issue in Subcase 00-91014, for the specific purpose of adjudicating the legal propriety of the Objectors' MSFA-based objections.¹⁰ Newfoundland joined this motion by filing its Notice of Appearance and Adoption of Motion to Designate Basin-Wide Issue on April 16, 2008. This resulted in the filing of several responses and affidavits in support of the designation of a basin-wide issue, but calling for the expansion of the issue. Counsel for Sun Valley and Newfoundland spent significant time and effort reviewing those responses and preparing and submitting their Reply in Support of Motion to Designate Basin-Wide Issue of June 13, 2008, which called for the limitation of the basin-wide issue to the specific objection language used by the Objectors. Counsel for Sun Valley and Newfoundland also prepared for and participated in the June 17, 2008, basin-wide issue hearing.
- Counsel for Sun Valley and Newfoundland prepared extensive written discovery requests and served them upon BWCC on behalf of Sun Valley on May 9, 2008. (Not. of Serv. of First Set of Req. for Adm., Interrog., and Req. for Prod. to Big Wood Canal Company, Subcase Nos. 37-415, *et al.*). A significant portion of these discovery requests focus upon the MSFA basis of BWCC's objections. (*See Martens Aff.*, ¶ 5, Ex. D).
- Counsel for Sun Valley and Newfoundland prepared extensive written discovery requests and served them upon CWU on behalf of Sun Valley on May 9, 2008. (Not. of Serv. of First Set of Req. for Adm., Interrog., and Req. for Prod. to Members of the "Concerned Water Users," Subcase Nos. 37-415,

⁹ It is also notable that counsel for Sun Valley and Newfoundland have also attempted to depose Wendy Pabich, the hydrologist upon whose investigations the Objectors' objections are based. (*See Martens Aff.*, ¶ 2, Ex. A; Section III.B.3, *infra.*) However, counsel for BWCC and CWU have thus far denied those deposition requests. (*Martens Aff.*, ¶ 3, 4, Ex. B, C).

¹⁰ Based upon previous correspondence, it is likely that the Objectors will assert that it was Sun Valley's decision and not the Objectors' decision to file such a motion and express their opinion that filing such a motion was inappropriate. If asserted, this argument would not be persuasive to rebut Sun Valley's and Newfoundland's claims of prejudice. There are significant practical and procedural advantages to dealing with overarching legal issues through a basin-wide issue. And, importantly, Idaho Rule of Professional Conduct 3.2 states that, "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Moreover, there have been approximately thirteen other motions to designate basin-wide issues filed with this Court since the commencement of the SRBA. In short, Sun Valley's motion was both a reasonable and foreseeable response to the broad and far-reaching objections filed by the Objectors. Moreover, the Court's recent Order Designating Basin-Wide Issue confirms Sun Valley's motion was appropriate.

et al.). A significant portion of these discovery requests focus upon the MSFA basis of CWU's objections. (See Martens Aff., ¶ 6, Ex. E).

- On June 12, 2008, counsel for Sun Valley and Newfoundland received BWCC's responses to the May 9, 2008, written discovery requests and has since that time spent significant time and effort reviewing, analyzing, and following up on those responses. (See Martens Aff., ¶ 7, Ex. F, G).
- On June 9, 2008, counsel for Sun Valley and Newfoundland received CWU's responses to the May 9, 2008, written discovery requests and has since that time spent significant time and effort reviewing, analyzing, and following up on those responses. (Martens Aff., ¶ 8, Ex. H).

The time and resources that Sun Valley and Newfoundland have expended in pursuing these tasks strongly support denial of the Objectors' motions due to the substantial prejudice resulting from drastically altering the bases of the original objections, including the assertion of entirely new and irrelevant bases. *See Baxter*, 135 Idaho at 169, 16 P.3d at 266 (affirming district court decision denying motion to amend complaint based in part upon "the amount of time and money the [defendants] had expended in defending the action").

3. Sun Valley and Newfoundland Have Strong Defenses to the Objectors' Proposed New Objections

Section III.A.1 of this Response has already explained why many of the issues raised in the Objectors' proposed new objections do not constitute valid claims. On the same or similar bases, Sun Valley and Newfoundland submit they also have strong defenses to those claims.

4. If the Motions Are Granted, This Court Should Award Costs to Sun Valley and Newfoundland

Section III.A.2 of this Response has already described the significant time, effort, and resources expended by Sun Valley and Newfoundland in responding to the Objectors' original objections. Sun Valley and Newfoundland believe this showing of prejudice supports the Court's denial of the motions altogether.

However, if this Court grants the Objectors' motions, Sun Valley and Newfoundland respectfully request that the Court award costs associated with their responses to the Objectors' original objections, with their discovery activities associated with abandoned or amended objections, and with their responses to the Objectors' Motions to Amend Objection. Pursuant to I.R.C.P. 15(a), this Court may award such costs "as it deems proper." This includes legal fees. *See* I.R.C.P. 54(e)(5); *Curtis v. City of Ketchum*, 111 Idaho 27, 31, 720 P.2d 210, 214, n.4 (1986) (noting that costs include attorney fees for the purpose of amending pleadings pursuant to I.R.C.P. 15(a) and 54(e)(5)). Awarding such costs to Sun Valley and Newfoundland is required in order to put those parties in the same position as if the Objectors had filed their proposed amended objections in these subcases initially.

B. The Objectors' Motions to Amend Should Be Denied Because They Do Not Satisfy the Standards for Filing a Late Objection Pursuant to I.R.C.P. 55(c)

1. The Standards for Filing Late Objections Apply to the Objectors' Motions to Amend Because They Seek to Both Add Objections and Fundamentally Change the Basis for their Objections

As Section II of this Response establishes, the Objectors are not simply seeking leave to correct some clerical error in their original objections, or even to clarify their original objections from a substantive perspective. And, of note, they are certainly not "narrowing" the issues as they claim in their motions. (*See, e.g.,* Mot. to Amend Obj. filed by Objectors at 2, Subcase No. 37-415).

Instead, as Section II of this Response demonstrates, the Objectors are seeking leave from this Court to add objections. More specifically, the Objectors now seek to object to the priority date and purpose of use elements for 37-415; the priority date and purpose of use elements for 37-416; the priority date and purpose of use elements for 37-12111; and the quantity and purpose of use elements for 37-12130. The Objectors did not object to any of these

elements in their original objections. Therefore, those additional objections must be considered pursuant to the standards for filing late objections.

And, as Section II of this Response also demonstrates, the Objectors now seek to fundamentally and materially change the basis for their objections to the water right elements to which they did object. According to the Objectors, they

[W]ish to withdraw their objections to the existence of the water right on those [MSFA-based] 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.

(See, e.g., Mot. to Amend Obj. filed by Objectors at 2, Subcase No. 37-415.)

The Objectors further contend that they

[A]re 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.

(*Id.*)

Contrary to this false characterization, their proposed amendments would not “narrow” their objections to a “subset” of the issues raised in their original objections. Instead, a comparison of the original objections to the proposed amended objections demonstrates that the Objectors are attempting to replace one complex set of objections with a new set of complex objections. This provides further support for reviewing the motions to amend under the standards for filing late objections. As a practical matter, that is exactly what the Objectors are attempting.

2. Discussion of Standards Governing Motions to File Late Objections

As this Court has already held, a motion to file a late objection is reviewed by reference to the rules governing filing late notices of claim, which is the “good cause shown” standard under I.R.C.P. 55(c) (“Setting aside default judgment”). *Order on Motion to Set Aside Partial Decrees and File Late Objections* at 7, Subcase Nos. 65-07267, *et al.* (Jan. 31, 2001) (“*A.L. Cattle*”); *Memorandum Decision and Order on Challenge* at 6, Subcase Nos. 47-16433, *et al.* (J. Melanson, March 22, 2005) (“*Bedke*”). Generally speaking, this involves consideration of the following three factors:

- Whether the default was willful;
- Whether setting aside the judgment would prejudice the opponent; and
- Whether a meritorious position has been presented.

A.L. Cattle, p. 7.

A court’s denial of a motion under Rule 55(c) “will not be reversed on appeal unless an abuse of discretion clearly appears.” *Bedke*, p. 9 (citation omitted). “Where the trial court makes factual findings that are not clearly erroneous, applies correct criteria pursuant to I.R.C.P. 55(c) to those facts, and makes a logical conclusion, the court will have acted within its discretion.” *Id.*

3. The Objectors’ Delay in Amending Their Objections Is Willful Because They Have Known of the Bases of Their Proposed Amended Objections Since at Least November 2007

As this Court has recognized in the context of a motion to file a late objection, a “willful” act is one done “intentionally, knowingly, and purposely, without justifiable excuse.” *Bedke*, p. 12. The deposition of Carl Pendleton, the I.R.C.P. 30(b)(6) representative of the BWCC, demonstrates that the delay in amending their objections was “willful” as to both

Objectors, because both Objectors knew of the bases of their objections since at least November 2007.

The following exchanges took place during the Pendleton Deposition, with respect to the events leading up to the BWCC's decision to file its objections in these subcases:

[THE WITNESS (MR. PENDLETON):] In October, probably, I met with one of the individuals involved in the Concerned Water Users Group. It became apparent that they had information and had been compiling information for a year on multitudes of rights and were prepared to file numerous objections. So a component of our Board met with their group after some of their leadership had come to one of our Board meetings, and we joined forces. We used their data that they have been collecting to file as the basis for the filing of the objections.

* * *

We discussed what the bases of their objections were going to be; and we adopted their list and threw our support behind them, or in conjunction with them, to file the objections.

Q. [BY MR. CAMPBELL] And when was that, sir?

A. That meeting was in November.

Q. Of last year?

A. Yes, 2007.

* * *

Q. And who was the hydrologist that they had retained to provide this analysis that you folks evaluated at this meeting?

A. Dr. Wendy Pabich. It's P-a-b-a-c-h.

* * *

Q. In terms of the meeting that occurred in November, was Dr. Pabich -- is it "Pabich"?

A. Yes.

Q. Was she present?

A. Yes, she was.

Q. Do you recall what she said at the meeting?

A. Our discussions were, of course, with the entire group. Her part of that meeting was to categorize, talk about some of the things that had been found, point out some of the ones that appeared to be flagrant, in terms of over-diversion or missteps in transfers or the question of aesthetic use and that sort of thing and whether it was appropriate.

* * *

Q. Did Dr. Pabich offer any kind of opinions with respect to whether or not a particular transfer was appropriate?

A. Yes. Based on research that was done and documents that had been found, there appeared to be some anomalies that we needed to object to.

Q. Did she identify what those anomalies were?

A. In some cases.

Q. What were some of the cases?

A. As I think I have stated before, whether the recorded -- the historic diversion quantity to a lake was appropriate and, based on the record, was it extreme compared to the right that was held?

* * *

Q. Did she or her employees evaluate any water rights that did not involve transfers but dealt with aesthetic or wildlife uses?

A. Yes, yes.

Q. And how many of those did she discuss?

A. Oh, I think, a small number. A very small number. I don't know how many. As we discussed a category of objections, if you will, there may have been one, two, or three examples of each. So the classes of objections are pretty -- are pretty defined. Maybe we talked about, you know, ten, in the entire meeting, offered as examples.

Q. Do you recall the members of the Big Wood Canal Company who were present during that meeting, besides yourself?

A. Yes.

Q. Can you give the names, please?

A. Chairman Jerry Nance was there; Vice President Mike Faulkner was there; myself -- I was there -- Greg Lehrmann, who is a Director, was there.

* * *

Q. And the members of the Concerned -- is it the Concerned Water Users?

A. Yes, I believe so.

Q. Do you know who of that group was present at the meeting?

A. I'm sure I would miss some. Do you want some names, though?

Q. The names you can recall.

A. Pete Van Der Meulen, Jerry Bashaw, Grace Eakin, Bill Molyneux, Pepin Corso-Harris. There were a couple more faces, but I can't put the names there.

* * *

Q. All right. Following this meeting in November with the Concerned Water Users Group, did the Big Wood Canal Company Board of Directors have a subsequent meeting to discuss these issues?

A. We had our regular meeting which would be the first working day of December.

Q. Did this particular topic generate any discussion?

A. It did. The discussion was, of course, whether to join the group and to financially support the group.

Q. And what was the result of that discussion?

A. That we would fund their research and hydrological activities for the month of December and then continue to be affiliated with the group and fund a portion of those same activities for the coming year, including Adjudication-type activities.

Q. With respect to that decision to fund a portion of the costs of this group, the Concerned Citizens, did that include funding for preparation of objections to be filed by the Big Wood Canal Company against the water rights that were the subject of concern?

A. Yes, it did.

Q. Did that include funding to prepare objections to the water rights identified in the Notice of Deposition, Exhibit No. 1?

A. Yes, it did.

(Pendleton Dep., 13:18-14:2, 14:7-14:14, 14:18-14:21, 15:16-16:3, 17:10-17:22, 18:12-19:6, 19:13-19:23, 20:17-21:17 (emphasis added).)

Later in the deposition, the questioning again turned to the November 2007 meeting:

Q. Let's talk about the meeting in November of 2007 again. Can you tell me what Dr. Pabich said to you, as the Big Wood Canal Company Board Members, that related to filing objections?

MR. HOBDEY: Object; calls for hearsay. Go ahead and answer it.

THE WITNESS: She indicated the number of rights that they had succeeded in preparing for objection on behalf of Concerned Water Users. She indicated some of the objection bases and classes as the basis for general categories of the rights. That was probably the context.

BY MR. CAMPBELL:

Q. You mentioned previously transfers that they had evaluated; is that correct?

A. That's right.

Q. Did she provide you any specific information concerning the hydrologic evaluation of these transfers or any other water rights at that meeting?

A. No, I don't believe so.

Q. Did she indicate the extent of the analysis that she and her employees had undertaken with respect to the objections that they had prepared?

A. Yes. To a certain extent, indicating historical record searches and evaluation of those and then the subsequent existence of a right after a transfer, a split, or a change of use.

Q. And what records, again, did they evaluate?

A. They would be records found in the Blaine County Courthouse, for instance, of the origination of the right and how it transpired to subsequent users and owners.

* * *

Q. Do you know when she was first retained by the Concerned Water Users Group?

A. I do not. But I understand they have been doing work for about a year.

Q. How do you understand that, sir?

A. Just from what was said by individuals with the Concerned Water Users Group.

Q. And which individuals?

A. Oh, I don't recall which one. One or more of the folks that were in attendance.

Q. Did any of those individuals explain what their charge or their direction to Dr. Pabich had been when they first retained her?

A. Only in the same context that the Big Wood Canal Company would have gotten involved, and that is to start to lay the basis for determining whether the rights were correct in relation to the upcoming Adjudication.

Q. And the rights being the rights of other water users; is that correct?

A. Other water users and I think, also, the membership of the Concerned Water Users, as well, to determine if their rights were whole.

(Pendleton Dep., 57:24-59:5, 59:15-60:12 (emphasis added).)

And, finally:

Q. Mr. Pendleton, I am almost finished. I may have asked this question, and I apologize for asking it again. Can you tell me when the Board of Directors of the Big Wood Canal Company decided to join in with the Concerned Citizens Group and file objections?

A. November of 2007.

Q. At the November meeting in the bunkhouse?

A. Well, actually, that was the contingent of the Board; and we made a commitment contingent upon the Board making a final decision, as a Board, at the December 1st meeting. They upheld that.

Q. So the decision actually was made at the December 2007 Board meeting?

A. Yes.

Q. Can you tell me what considerations the Board evaluated prior to making its decision?

A. The Concerned Water Users, after considerable expense and a year's worth of effort, had the basis, we felt, that we required to join in objections to water rights in the Basin under the Adjudication.

Q. And what was that based upon? The meeting in November with Dr. Pabich?

A. Yes, it was.

(Pendleton Dep., 72:6-73:3 (emphasis added).)

These excerpts from the Pendleton Deposition demonstrate that both the BWCC and the CWU relied upon the significant research efforts of a professional hydrologist in preparing their original objections in these subcases. This research was the subject of a November 2007 meeting attended by the hydrologist and representatives of both the BWCC and the CWU. Mr. Pendleton's testimony indicates that the information presented at the November 2007 meeting was the basis upon which the BWCC agreed to join in the CWU's objections.

Moreover, Mr. Pendleton's testimony indicates that the hydrologist had been working on these issues on behalf of the CWU for approximately one year prior to that meeting.

Accordingly, both the BWCC and the CWU have been aware of their bases for objecting to the Sun Valley and Newfoundland water rights objection since November 2007, at the latest. And, because the hydrologist was originally retained by the CWU, their knowledge likely precedes that meeting date. Despite this, the Objectors waited until June 4, 2008, to, in their own words, finally "provid[e] adequate notice of the entire range of issues they intend to pursue." (*See, e.g.*, Standard Form 1 Objection filed by Objectors at 2, Subcase No. 37-415.)¹¹

And, critically, neither the CWU nor the BWCC have conducted discovery in these subcases. So, their attempt to amend their objections cannot be a result of new facts uncovered during discovery. Moreover, the motions to amend do not establish that they are being filed as a result of any subsequent independent factual investigations or findings. Simply put, nothing has changed since November 2007 that justifies an attempt to both add new objections to previously unobjected-to elements and to materially change the basis for their original objections.

¹¹ This unjustified delay is in stark contrast to the efforts undertaken by Sun Valley in filing motions to file late objections to certain water rights owned by the Objectors that were the subject of a hearing before this Court on July 2, 2008. As Sun Valley explained in those motions, once Sun Valley was aware of the issues raised by the Objectors' objections, it immediately began investigating the extent to which the Objectors' water rights were potentially subject to the same concerns. (*See, e.g.*, Mot. to File Late Obj. and Request for Expedited Hearing at 5, Subcase No. 37-111; Aff. of Andrew J. Waldera in Supp. of Mot. to File Late Obj. and Request for Expedited Hearing, ¶¶ 6, 9-11, Subcase No. 37-111.) This involved reviewing documentation associated with nearly 200 water rights, and was completed in approximately three months. (*Id.*) By contrast, the Objectors learned the possible bases of their Objections no later than November 2007, and have not demonstrated any intervening factual discoveries justifying the amendment of their original objections. Moreover, the Objectors did not even conduct specific factual investigations into the water rights they were objecting to prior to filing their objections, as Sun Valley did. (*See, e.g.*, Pendleton Dep., 66:19 - 68:12.) Such factual circumstances provide additional support for a finding that while Sun Valley's delay in filing objections was clearly not "willful," the delay by the Objectors should be deemed "willful."

In terms of the “willful” standard, the Objectors have not established any “justifiable excuse” for having waited so long to, in their words, “provid[e] adequate notice of the entire range of issues they intend to pursue.” (*See, e.g.*, Mot. to Amend Obj. filed by Objectors at 2, Subcase No. 37-415). Sun Valley and Newfoundland do not agree that such notice is “adequate,” in light of the significant efforts they have already undertaken to deal with the Objectors’ original objections.

The willful nature of the Objectors’ attempt to amend their objections is particularly acute in the context of Newfoundland’s water right 37-12130. In their original objection to that water right, the Objectors did **not** assert any quantity limitations. (Standard Form 1 Objection filed by Objectors at 2, Subcase No. 37-12130.) However, they were obviously aware of that potential basis of objection, because they objected on that basis to other Basin 37 water rights, including some of Sun Valley’s. (Standard Form 1 Objection filed by Objectors at 2, Subcase No. 37-415, *et al.*) Unless the Objectors establish some intervening factual discovery—which their Motion to Amend Objection certainly does not establish—then their delay in attempting to amend their objections to the Newfoundland water right is most certainly “willful.”

4. As Already Explained, Allowing the Objectors to Amend Their Objections Would Significantly Prejudice Sun Valley and Newfoundland

Section III.A.2 of this Response has already discussed the prejudicial effects of the Objectors’ Motions to Amend Objections in the context of amending a pleading pursuant to I.R.C.P. 15(a). Sun Valley and Newfoundland specifically incorporate that discussion as the analysis of the prejudice factor for the purposes of filing a late objection pursuant to I.R.C.P. 55(c).

5. The Objectors' Motions and Proposed Amended Objections Do Not Present "Meritorious Positions" Because They Do Not Plead "Detailed Facts," Nor Do They Go "Beyond the Mere Notice Requirements"

Section III.A.1 of this Response has already explained why the Objectors' proposed amended objections do not present "valid claims," for the purposes of amending a pleading pursuant to I.R.C.P. 15(a). Sun Valley and Newfoundland specifically incorporate that discussion as the analysis of the "meritorious position" factor for the purposes of filing a new objection pursuant to I.R.C.P. 55(c).

Additionally, it is important to note that the Rule 55(c) "meritorious position" factor is more stringent than the "valid claim" standard under Rule 15(a). For example, this Court has specifically stated that Rule 55(c) "require[s] that the movant plead detailed facts that would constitute a meritorious [position]." *A.L. Cattle*, p. 13 (emphasis added). In addition, the Idaho Supreme Court has specifically held that a movant under Rule 55(c) "must show a meritorious defense going beyond the mere notice requirements which would be sufficient if plead before default." *Reeves v. Wisenor*, 102 Idaho 271, 272, 629 P.2d 667, 668 (1981) (citations omitted).

Accordingly, the Objectors' Motions to Amend Objections must "plead detailed facts" and must go "beyond the mere notice requirements" that would be acceptable in other contexts. They do neither. As explained in Section III.A.1, those motions and proposed amended objections assert issues that are ultimately not proper bases for objecting to water rights in the SRBA. They reflect the Objectors' desires, not a "meritorious position" for the purposes of filing a late objection in the SRBA.

C. The Objectors' Motions to Amend Should Be Denied Because "Justice" Does Not "Require" The Amendments

Even if this Court does not apply the Rule 55(c) standards to the Objectors' Motions to Amend, the Court should still deny those motions. Under Rule 4(d)(2)(k) of AO1, leave to amend a notice of claim is required only when "justice so requires." As this Court has stated on a number of occasions, in the SRBA, motions to file late objections are judged according to the standards for motions to file late claims. *See, e.g., A.L. Cattle*, pp. 6-7. This is due to the lack of express standards in AO1 governing late objections. *Id.* By extension, this same reasoning would result in the application of the Rule 4(d)(2)(k) standard to motions to amend objections.

Under the facts and circumstances that have already been discussed in this Response, "justice" certainly does not require that the Objectors be allowed to amend their objections. The relevant factors in this determination are:

- Both Objectors have been aware of the bases for their objections since at least November 2007—even earlier, in the case of the CWU;
- The Objectors relied upon a professional hydrologist and experienced SRBA counsel in preparing their original objections;
- The Objectors have not conducted discovery and have not alleged any additional independent factual discoveries justifying the amendment of their original objections; and
- Both Sun Valley and Newfoundland have incurred significant expense in addressing the Objectors' original objections, including their own factual and legal investigations, significant discovery efforts, and participation in the designation of a basin-wide issue to address the legal basis of the original objections.

Simply put, there is no basis for concluding that justice "requires" that the Objectors be allowed to amend their objections as they have requested. Quite the contrary, given these circumstances, justice requires that the Objectors' motions be denied.

D. The Objectors' Reliance Upon This Court's Recent Order in the "Minidoka Credit Remark" Subcases Is Unpersuasive for a Variety of Reasons

In their Motions to Amend Objections, the Objectors note that SRBA Special Master Dolan "recently permitted the City of Pocatello to amend its objections in Subcases 01-209, *et al.* 'Minidoka Credit Remark . . .'" (*See, e.g.*, Motion to Amend Objection filed by Objectors at 3, Subcase No. 37-415.) For a variety of reasons, that decision is of no precedential value to these subcases.

In the Minidoka Credit Remark subcases, the City of Pocatello filed Motions to Amend Objection,¹² to which a coalition of irrigation districts and canal companies filed a Joint Response [in Opposition] to City of Pocatello's Motion to Amend Objections¹³ (the "Joint Response"). Notably, that Joint Response does not cite to any legal authorities discussing or applying standards for amending objections. (Joint Resp., pp. 1-4)

Moreover, the only prejudice discussed in the Joint Response is a general, unsupported assertion that the respondents would be required to defend against new issues that were not in the original objection. (Joint Resp., p. 3). It certainly does not provide a detailed description of concrete efforts that had already been undertaken to deal with the original objections, as Section III.A.2 of this Response does.

Critically, as a result of such sparse legal briefing, Special Master Dolan's order contains very little factual discussion or legal analysis. (*See* Order Granting City of Pocatello's Motion to Amend Objections at 1-2, Subcase Nos. 01-209, *et al.*) More generally, that order is also based upon an entirely different set of facts and circumstances from those presented in these

¹² One of the Motions to Amend Objection is attached as Exhibit B to the Lawrence Affidavit.

¹³ Attached as Exhibit C to the Lawrence Affidavit.

subcases. In short, simply noting that the Court permitted the amendment of objections in the Minidoka Credit Remark subcases does not inform these proceedings.

IV. CONCLUSION

The Objectors now seek to “amend” the objections that they filed in November 2007. The proposed amended objections both assert new objections and drastically alter the basis of the original objections. However, the Objectors have not established any justifiable excuse for waiting this long to finally provide “notice of the entire range of issues they intend to pursue.” They have not conducted discovery or established any other factual investigations since November 2007 that would justify such a drastic amendment of their objections.

Sun Valley and Newfoundland have conducted significant factual investigations, legal evaluations, and discovery activities in response to the original objections. Therefore, allowing the Objectors to amend their objections as requested would significantly prejudice Sun Valley and Newfoundland, rendering those efforts worthless and necessitating duplication of those tasks for the “new” objections.

In summary, the Objectors’ motions and proposed amended objections do not satisfy the standards for amending a pleading or filing a late objection in the SRBA. And, under the circumstances, “justice” certainly does not “require” that the Objectors be allowed to amend their objections.

For these and the other reasons set forth in this Response, Sun Valley and Newfoundland respectfully request that this Court deny the Objectors’ Motions to Amend Objections in all four subcases. To the extent this Court does allow the Objectors to amend their objections, Sun Valley and Newfoundland respectfully request that they be awarded costs

associated with their responses to the original objections, discovery conducted on the original objections, and the Objectors' motions to amend.

Additionally, if the Court decides to grant the Objectors' Motions to Amend Objections, it should impose the condition that the Objectors stipulate that Basin Wide Issue No. 14 in Subcase No. 00-91014 is unnecessary because diversionary aesthetic, recreation, and wildlife water rights are valid under Idaho law if held by a private party. It was, after all, their objections that triggered the need for that proceeding in the first place.

DATED this 24th day of July, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of July, 2008, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTIONS TO AMEND OBJECTIONS** to be served by the method indicated below, and addressed to the following:

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Owners Assn, Gregory Ranch LLC, Lake Creek
Meadows Homeowners, Michael E Willard
Michael Engl, 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, The R Daniel
Olmstead, and William B Gordon*

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Pepin Corso-Harris
c/o Concerned Water Users
P.O. Box 1200
Bellevue, ID 83313

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Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front Street, 6th Floor
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Boise, ID 83720

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Dylan B. Lawrence

