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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	)	Subcase No. 37-0496F
	)	
Case No. 39576	)	CLAIMANT'S AND RESPONDENTS'
	)	OPPOSITION TO OBJECTORS'
	)	MOTION TO AMEND OBJECTION

The Claimants, Myer Berlow and Deborah Barr, (hereinafter collectively known as the "Claimant"), and Respondents, Barker Living Trust, Chaney Creek Ranch, LLC, Charles L. Matthiesen, Charles T. Foley, Eagle Creek Irrigation Co., ECD, Inc., Elise G. Lufkin, Gimlet Property Owners Association, Gregory Ranch, LLC, Lake Creek Meadows Homeowners, Michael E. Willard, Michael S. Engl, Ralph W. & Kandi L. Girton, River Rock Ranch, LP, James B. Fleig, Arnold Landau, Richard Dick, Dolores Pritchard, Roy R. Woods, Steven D. Holzman Trust, The Gulch Trust, John D. Pierce and The R. Daniel Olmstead Revocable Trust, and William B. and Debra Gordon (hereinafter the "Respondents"), by and through their counsel of record, hereby

oppose the Motion to Amend Objection filed herein by Big Wood Canal Company, Tom O’Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw, and Pepin Corso-Harris (the “Objectors”) on the grounds and for the reasons set forth below.

INTRODUCTION

On or about February 21, 2007, the Director of the Idaho Department of Water Resources (The “Director”) filed his recommendation for the water right which is the subject of this Subcase (the “Water Right”). That recommendation lists aesthetics among its purposes of use. The deadline for filing objections to the Water Right and other water rights recommended in the Director’s Report for Basin 37, Part 3 (the “Director’s Report”) was November 14, 1987. On that date, the Objectors filed an Objection in this Subcase challenging the priority date of the Water Right and asserting the Water Right should not exist (the “Objection”). The reasons identified by the Objectors to support the Objection were as follows:

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.

No challenge to the quantity element of the Water Right was checked, listed or otherwise identified in the Objection. The Objectors filed virtually identical objections to a total of approximately 65 water rights recommended in the Director’s Report for aesthetic, recreation and/or wildlife uses..

On or about January 10, 2008, Claimant and Respondents filed their Response to Objection in this Subcase opposing the Objection. Additional responses opposing the Objection were filed herein by Sinclair Oil Corporation d.b.a. Sun Valley Company and Newfoundland Partners.

Then, on March 24, 2008, Sinclair Oil Corporation d.b.a. Sun Valley Company filed in the SRBA a Motion to Designate Basin-Wide Issue to get a ruling from the SRBA Court on the question of law raised by the objections to water rights for aesthetic, recreation and wildlife uses filed by the Objectors. On May 22, 2008, the State of Idaho Department of Fish and Game and the Department of Parks and Recreation filed their Response in the Basin-Wide issue proceedings suggesting a more broadly worded statement of the basin wide issue. Shortly thereafter, numerous other water right holders filed their responses supporting the statement of the basin-wide issue proposed by the State of Idaho.

On June 5, 2008, the Objectors filed their Motion to Amend Objection (the "Motion") in this Subcase. In the Motion, the Objectors state in paragraph 2 as follows:

Objectors wish to withdraw their objections to the existence of the water right on [the grounds that there is no legal authority or private parties to hold water rights for aesthetic, wildlife or recreation uses] and to amend their objection to object to quantity of water used on 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.

The proposed Amended Objection (the "Proposed Objection") appended to the Motion identifies challenges to three elements of the Water Right. First, an objection to the quantity of the Water Right is described in the Reasons Supporting Objections, set forth in paragraph E of the Proposed Objection. Second, the Objectors object to the recommended priority date stating it should, instead,

be the “date of enlargement of water right”. Third, the Objectors object to the recommended purposes of use of the Water Right stating they should be as described in their Reasons Supporting Objection.

ARGUMENT

I. The Motion to Amend Objection Should Be Treated as a Motion for Late Objection.

The Motion purports to be one to “amend” the Objection filed in this Subcase by the Objectors. The pending Objection, as the Objectors candidly admit, addresses solely a legal issue of whether or not uses of water for aesthetics, wildlife or recreation are beneficial uses of water in Idaho. As noted above, that issue has become the subject of basin wide issue proceedings in the SRBA¹. The first stated purpose of the Motion is to totally withdraw and dismiss the pending Objection, thus, according to the Objectors, eliminating the need for the basin wide issue proceedings. Since the pending Objection is to be withdrawn entirely and dismissed, there will be no objection that can be amended. Instead, the Proposed Objection should be treated as a late objection and therefore subjected to the standards of this Court for approving motions to file late objections.

II. The Proposed Objection Does Not Meet this Court’s Standard for Filing a Late Objection.

¹ Following a June 17, 2008 hearing, Judge Melanson issued on July 10, 2008 his Order Designating Basin-Wide Issue; Staying Proceedings and Setting Status Conference in SRBA Basin-Wide Issue No. 00-91014. The designated basin-wide issue is: “May any person establish diversionary water rights, including to and from storage, for aesthetic, recreational or wildlife purposes?” Further proceedings in that matter are stayed until the Special Masters rule on the pending Motions to Amend Objections in the 65 subcases.

In his *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267, *et al.* (Jan. 31, 2001) (“A.L. Cattle”), Presiding Judge Burdick succinctly explained the standard governing motions to file late objections as follows:

In subcases for which partial decrees have not been entered, the legal standard for filing a late objection to a water right claim in the SRBA has been historically determined pursuant to the standard set forth in *AOI* for filing late claims since *AOI* does not expressly provide a standard for reviewing late objections. A motion to file a late claim is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. *See AOI* § 4d(d)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) (leave to amend a notice of claim shall be freely given when justice so requires). In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho Courts apply a “good cause” for untimeliness standard. I.R.C.P. 55(c). The “good cause” standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d, 274 (1993). The I.R.C.P. 55(c) standard takes into account the following factors:

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

A.L. Cattle at 6-7.

Although this Court has significant discretion to grant a motion to file a late objection, a clear abuse of discretion in doing so will result in that decision being set aside on appeal. *See, Memorandum Decision and Order on Challenge*, Subcase Nos. 47-16433, *et al.*, at 9 (J. Melanson, March 22, 2005) (“*Bedke I*”).

The key issue to be determined by this Court is whether or not Objectors have presented a “meritorious position” in the Proposed Objection. First, Objectors state the purposes of use should be as set forth in paragraph E of the Proposed Objection. However, there is no discussion

whatsoever of purposes of use in that paragraph. For this portion of the Proposed Objection, the Objectors have failed to stay any position whatsoever, much less a meritorious one.

Second, the Objectors object to the priority date of the recommended water right stating it should, instead, be the “date of enlargement of water right”. This claim only makes sense in the context of a water right recommended on the basis of the provisions of Idaho Code Section 42-1426²

² 42-1426. ENLARGEMENTS -- WAIVER OF MANDATORY PERMIT REQUIREMENTS. (1) Legislative findings regarding enlargements: (a) The legislature finds that prior to the commencement of the Snake River basin adjudication and subsequent to the mandatory permit system provided in sections 42-201 and 42-229, Idaho Code, persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion and without complying with the mandatory permit system adopted by the legislature. Enlargements have been done with the knowledge of other water users, and water has been distributed based upon the right as enlarged. Junior water users made appropriations based upon a water system that reflected these enlarged uses. Thus, the legislature further finds and declares that it is in the public interest to waive the mandatory permit requirements for these enlargements in use prior to the commencement of a general adjudication, so long as such enlargements in use did not increase the rate of diversion of the original water right or exceed the rate of diversion for irrigation provided in section 42-202, Idaho Code, after the enlargement of use, and the enlargement of use did not reduce the quantity of water available to other water rights existing on the date of the enlargement in use. (b) The legislature further finds that it is in the public interest to waive certain statutory provisions for the appropriation of water that has been diverted and applied to beneficial use to insure the economic and agricultural base in the state of Idaho as it existed on the date of the commencement of the Snake River basin adjudication and to maintain historic water use patterns existing on that date. (2) The mandatory permit requirements of sections 42-201 and/or 42-229, Idaho Code, are waived, and a new water right may be decreed for the enlarged use of the original water right based upon the diversion and application to beneficial use, with a priority date as of the date of completion of the enlargement of use for any enlargement occurring on or before November 19, 1987; provided however, that the rate of diversion of the original water right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water right; and further provided, that the enlargement in use did not injure water rights existing on the date of the enlargement of use. An enlargement may be decreed if conditions directly related to the injury can be imposed on the original water right and the new water right that mitigate any injury to a water right existing on the date of enactment of this act. If injury to a water right later in time cannot be mitigated, then the new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement. It is further provided that any such enlargement of use allowed in a general adjudication shall not constitute an abandonment or forfeiture of the original water right to the extent of current use. (3) The director shall publish a notice of enlargement of water right for all water rights recommended under this section. The notice shall contain a summary of the notice of claim and shall be published in the same manner as notices for applications to appropriate water in section 42-203A, Idaho Code. Any person who has filed an application for a water right prior to the enactment of this act or who has been issued a permit for a water right prior to enactment of this act but who has not filed a claim in an adjudication shall have thirty (30) days from the date of last publication of the notice of enlargement of a water right under this section to file a petition with the department of water resources to assert any claimed injury from the enlargement. No appeal of the determination of the department shall be allowed. If the applicant or permittee is dissatisfied with the determination of the department on any claim of injury, the sole remedy is to intervene in the general adjudication and assert their claim of injury in an objection to the water right.

which waives the mandatory permit requirements for enlargements in the use of water under valid decreed, licensed or constitutional appropriation water rights and allows the enlarged use to be decreed in the SRBA as a separate water right with a priority date as of the date of the enlargement. In this Subcase, the Water Right is based on a decree and subsequent approved water right transfer. The Proposed Objection does not refer to any fact on which the Objectors might base a claim that the Water Right should instead be based on an enlarged use under Idaho Code Section 42-1426. Furthermore, the water right transfer process required the Director to find that the change of nature of use from irrigation to aesthetics did “not constitute an enlargement in use of the original right”. Idaho Code Section 42-222(1). Clearly the Objectors have not presented a “meritorious position” for this portion of their Proposed Objection.

Third, the Proposed Objection challenges the recommended quantity of the Water Right identifying both the diversion rate and volume/consumptive use components of the quantity element of a water right. Under Idaho water law, the “meritorious position” standard requires that a late objector allege sufficient facts that, if established, would allow that objector to prevail. *See, AL Cattle*, at 6. The stated reasons in support of this portion of the Proposed Objection are (1) that the diversion rate and annual diversion volume should be limited to amounts which they assert are apparently standard limitations for irrigation water rights, to wit: one inch per acre and 3.5 acre feet per acre, (2) quantities should not exceed those of the water right from which the aesthetic, recreational or wildlife use is derived, and (3) these quantities should not exceed the actual beneficial use. In this Subcase, the Water Right was changed from irrigation use to aesthetics through the administrative water right transfer process by which, as noted above, the Director was required to

determine that the new use was “not an enlargement” of the original irrigation use. No fact is presented by the Objectors on which this Court might base a finding that the quantity element exceeds the quantity of the original irrigation water right. Last, the Objectors make the statement that the quantity of this Water Right must not “exceed the actual beneficial use”. As noted above, the Water Right is recommended on the basis of an approved water right transfer, so the quantity element for the aesthetic use is a determination by the Director of the amount of water required for this beneficial use. The Objectors do not allege any fact on which this Court could base a different finding as to the amount of “actual beneficial use” of the Water Right nor do they even suggest what that amount should be for this Water Right. Once again, the Objectors have not presented a “meritorious position” for this portion of their Proposed Objection.

Furthermore, the Objectors failure to include any of the above described challenges set forth in their Proposed Objection was certainly intentional and knowing and therefore “willful”. *See, Bedke I*, at 12. The Objectors not only had prior reason to investigate and review the elements of the Water Right, they presumably did that investigation and review in preparing and filing their Objection in this Subcase. One must also presume that this investigation and review brought to light the grounds for objecting to the Water Right now asserted in the Proposed Objection. In fact, the Objectors refer to these grounds as merely a “subset” of the issue raised in their Objection . *Motion*, paragraph 3. Finally, the Objectors intentionally and knowingly decided to not assert in their timely filed Objection the grounds they now, six months later, wish to claim in their Proposed Objection. Therefore, the Objectors’ failure to timely file the Proposed Objection was “willful”.

In summary, the Objectors' failure to timely file the Proposed Objection was "willful" and the Proposed Objection does not present a "meritorious position". Therefore, it does not meet the standard of this Court for filing a late objection and the Motion should be denied.

III. Objector's Request for a Remark Addressing "Water Quality" Is Outside the Jurisdiction of this Court.

The Objectors are apparently requesting this Court to add a remark attached to the decree for the Water Right addressing water quality. Under Idaho Code §42-1411(2)(j), a remark may be inserted into a water right recommendation only if that remark is "necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." Water quality is not an element of a water right and the director does not administer water quality. Therefore, this Court has no jurisdiction to include any water quality remark.

IV. Even If the Motion to Amend Is Treated as a Request for an Amended Objection, as Opposed to a Late Objection, the Amended Objection Is Insufficient on its Face.

If this Court should decide to resolve the Motion as one seeking to amend the Objection filed herein rather than permission to file a late objection, the Motion must still be denied. In this Subcase, responsive pleadings to the Objection have been filed and served. Amendments to pleadings in civil case such as the SRBA are governed by Rule 15(a) of the Idaho Rules of Civil Procedure. The Idaho Supreme Court describes the application of this Rule as follows:

Rule 15(a) of the Idaho Rules of Civil Procedure provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." If a responsive pleading has been served, then "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." I.R.C.P. 15(a). The decision to grant or deny a motion for leave to amend a complaint is

within the sound discretion of the trial court. *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). This Court has recognized that in the interest of justice, courts should favor liberal grants of leave to amend. *Id.*; *Wickstrom v. North Idaho College*, 111 Idaho 450, 453, 725 P.2d 155, 158 (1986). The Court has also recognized, however, that a trial court has not abused its discretion in denying a request for leave to amend a complaint if the new claims proposed to be inserted fail to state a valid claim. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

Stonewall Surplus Lines Insurance Co. v. Farmers Insurance co., of Idaho, 132 Id. 318, 324-325, 971P.2d 1142(1998).

More recently, the Idaho Supreme Court explained that a court may consider whether the new allegations sought in the amended pleading state a valid claim, but it may not consider the sufficiency of evidence supporting the claim as that is more properly determined at the summary judgment stage. *Thomas v. Medical Center Physicians*, 138 Id. 200, 210, 61 P.3d 557(2002); *Maroun v. Wyreless Systems Inc.* 141 Id. 604, 114 P.3d 974(2005). In this Subcase, it is not necessary to consider the sufficiency of any evidence presented in the Proposed Objection as there simply is none! As discussed at length above, the Proposed Objection does not present a “meritorious position” on any of the contested elements of the Water Right. For the very same reasons, this Court must conclude that the Proposed Objection does not state a valid claim and, therefore, the Motion must be denied.

V. Claimant and Respondents Should be Awarded their Attorneys Fees and Costs Incurred in Defending the Objection and Participating in the Basin-Wide Issue Proceedings.

Objectors now seek the dismissal of their legal challenge to the validity of a water right for aesthetic, recreation or wildlife uses by withdrawing the Objection filed herein and in numerous other subcases. Claimant and Respondents are more than willing to stipulate to this dismissal pursuant to Rule 41(a)(1) of the Idaho Rules of Civil Procedure as long as it includes a stipulation to the effect that any person may establish diversionary water rights, including to and from storage, for aesthetic, recreation or wildlife purposes in Idaho, and an agreement by Objectors to pay all attorneys fees and costs incurred by Claimant in defending that Objection and pursuing the basin-wide issue designation. In the alternative, under Rule 41(a)(2) of the Idaho Rules of Civil Procedure this Court may order such a dismissal upon such terms and conditions as it deems just and proper. Claimant and Respondents took very seriously the legal challenge presented by the Objection. They not only prepared and filed their Response to Objection but pursued, along with many other SRBA claimants, the designation of a basin-wide issue as the best way to resolve that challenge. In doing so they incurred a significant amount of attorneys fees and costs. Notwithstanding the protestations of the Objectors, their request to now withdraw this legal challenge, if pursued in good faith, must be viewed as an admission that there was no merit to the original Objection. If Claimant, as a matter of law, cannot divert and use water in Idaho for aesthetic, recreation or wildlife purposes, there is simply no point in arguing over the proper quantity of water he may be use for those purposes. This Court, as a condition of dismissing the Objection, should find it was pursued unreasonably and frivolously and require Objectors to pay all attorneys fees and costs incurred by Claimant in defending that Objection and pursuing the basin-wide issue designation.

CONCLUSION

The Objector's Motion must be treated as a motion for late objection. As such, the Motion must be denied as it fails to state any meritorious position whatsoever on which to base the proposed objection. Furthermore, the Objector's failure to state the grounds set forth in their Proposed Objection by the original objection deadline is clearly wilful. Finally, the proposed objection does not state a valid claim against any element of the recommended Water Right and therefore does not even meet the requirements for an amended pleading. The original Objection should be withdrawn and dismissed as long as Objectors also stipulate that any person may establish diversionary water rights, including to and from storage, for aesthetic, recreation or wildlife purposes in Idaho, and agree to pay all attorneys fees and costs incurred by Claimant in defending that Objection and pursuing the basin-wide issue designation.

Dated this 29 day of July, 2008.

SPECK & AANESTAD
A Professional Corporation
Attorneys for the Claimant and Respondents

By 
James P. Speck

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 of July, 2008, the foregoing was filed, served, or copied as follows:

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