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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.: See Exhibit A

**WATER RIGHT HOLDERS'
MEMORANDUM IN OPPOSITION
TO MOTIONS TO AMEND
OBJECTIONS**

Claimants, Dana Dowers, The Valley Club, Inc., Al and Sally Shoemaker, Golden Eagle Ranch Homeowners Association, Inc., Silver Creek Farms Homeowners Association, Inc., the Peter M. Thomas Trust, d/b/a River Grove Farms, Sun Valley Ranch LLC, and Sun Valley Land & Minerals, Inc. (collectively, "Water Right Holders"), by and through their respective counsel, submit this Memorandum in Opposition to the Motions to Amend Objections filed by Tom O'Gara, John Fell Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw, Pepin Corso-Harris, and the Big Wood Canal Company (collectively, "Objectors").

INTRODUCTION

In November 2007, upon the recommendation of a consultant hired to research water rights in the Big Wood River valley, Objectors objected to over sixty water right claims recommended with aesthetic, recreational, and wildlife ("ARW") purposes of use in subbasin 37. All of these objections were premised on the same argument: ARW rights cannot be recommended or decreed because ARW uses are not beneficial uses. The objections stated:

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.

See, e.g., Objectors' SF1, subcase no. 37-8252 (Nov. 14, 2007).

Water Right Holders hold twenty of the ARW rights Objectors objected to. Water Right Holders have been required to expend significant time and money to respond to and otherwise defend against the objections, including hiring counsel, coordinating, to the extent possible, their responses and legal strategy, undertaking legal research to confirm the legality of ARW water rights, and conducting limited discovery, including attending the deposition of Carl Pendleton (a

Big Wood Canal Company Board member). Recognizing the broad significance of the objections, Water Right Holders have also participated in proceedings in support of a motion to designate a Basin-Wide Issue on the issue raised by the objections: whether ARW water rights are legal beneficial uses. Objectors opposed the designation of this Basin-Wide Issue, but Presiding Judge Melanson recently granted the motion and framed the issue as proposed by the State of Idaho and Water Right Holders.

Objectors now want to replace their original objections with another set of one-size-fits-all objections aimed at ARW water rights. While Objectors have represented that they no longer want to debate the validity of ARW rights, they now assert that ARW water rights require special conditions—conditions that have never before been applied to ARW (or any other) water rights as a general class and that have no relation to the facts surrounding any particular water right claim. In short, rather than attacking the legality of these rights head-on as they did in their original objections, Objectors now seek to attack ARW water rights as a class by arguing that they are inherently different from all other water rights.

Water Right Holders oppose the Motions to Amend Objections (“*Motions*”). Objectors willfully failed to timely raise the proposed objections, the proposed objections lack merit, and allowing the proposed objections would further prejudice Water Right Holders. Water Right Holders request that the Court deny the *Motions* and award Water Right Holders their attorney fees and costs under Idaho Rules of Civil Procedure 15(a) and 54(e)(1) and Idaho Code Section 12-121.

ARGUMENT

I. OBJECTORS' REQUESTS SHOULD BE DENIED.

A. The Court should consider Objectors' requests as motions for late objections under IRCP 55(c).

Objectors' request to "amend" their objections can be viewed in two ways: (1) as a withdrawal of the original objections and request to file late objections under Idaho Rule of Civil Procedure ("IRCP") 55(c); or (2) as a request for leave of court to amend a pleading under IRCP 15(a). In either case, the court must determine whether granting the request would cause prejudice and whether the proposed late objection or amended pleading would state a meritorious position. *Compare Order on Permissive Review and Order of Recommitment*, Subcases 45-12475 et al, slip op. at 5-6 (Aug. 3, 2005) ("*Bedke*") (discussing late objection standard) *with Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 44, 122 P.3d 300, 303 (2005) (discussing amended pleading standard). The difference between the two is that, in determining whether to grant a motion for late objection under Rule 55(c), the court also must consider whether the failure to timely file an objection was willful; if it was, then the motion should be denied. *Bedke*, slip op. at 5-6.

Here, the Court should apply the Rule 55(c) standard because Objectors seek to file new, late objections. They are not simply asking to amend their existing objections. In their *Motions*, Objectors state that they "wish to withdraw" their original objections and file new objections on wholly different grounds: "i.e., the extent of beneficial use, rather than whether the use is 'beneficial' in the first place." *Motions* at ¶¶ 2-3. In other words, Objectors are not attempting to clarify their original objections, but instead want to completely change the basis for their objections by eliminating the discrete legal argument they first raised and asserting all new grounds for objecting.

Because Objectors' *Motions* propose to change their legal position and state new grounds for opposition, in essence they seek to file late objections; they are not merely seeking to amend a pleading. The Court should treat their *Motions* as motions for late objections. In addition to determining whether these new objections are meritorious and whether allowing them would be prejudicial to other parties, the Court should determine whether the Objectors willfully failed to timely file them.

B. Objectors willfully failed to timely object.

A motion to file a late objection should be denied if the movant's failure to timely raise the objection was willful. "A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse." *Bedke*, slip op. at 8 (quotation marks and citations omitted). Here, Objectors have no justifiable excuse for failing to file the objections they now propose. *Cf. Memorandum Decision and Order on Challenge, Order of Recommitment*, Subcase Nos. 47-16433, et al. (Mar. 22, 2005) (lateness due to legitimate confusion caused by the SRBA process held not willful).

Objectors could have timely objected on the grounds they now propose, but they did not. Before filing the original objections, Objectors hired a consultant to research subbasin 37 ARW water right claims and recommendations. *Aff. of Michael Lawrence*, Ex. A (excerpts from Transcript of Deposition of Carl Pendleton, pp. 13-17, 57-73). Based on the consultant's recommendations, Objectors chose to file the original objections and not those they now propose. *Id.* Their decision can only be described as intentional, knowing, and purposeful.

Recently, Objectors themselves cited less culpable grounds than these in opposing Sinclair Oil Corporation dba Sun Valley Company's ("Sun Valley") motions to file late objections. The Court may recall that Objectors argued that Sun Valley's willfulness was shown by the fact that it had been represented by counsel when the objection deadline passed and did

not file any objections—indeed, at oral argument, Objectors pointed to Sun Valley’s admission that it did not even take the opportunity to review Objectors’ claims and recommendations prior to the objection deadline as evidence that its failure to timely file was willful.

Objectors’ behavior in this case is far more egregious than that: Objectors did hire a consultant to review Water Right Holders’ water right claims and recommendations and, based on the consultant’s recommendation, they did file timely objections on completely different grounds. *Aff. of Michael Lawrence*, Ex. A. If, as Objectors suggest, Sun Valley willfully failed to timely file objections then Objectors’ own failure must also be viewed as willful.

Objectors’ desire to raise the present objections arose only when Water Right Holders and others sought to elevate Objectors’ original legal theory to Basin-Wide Issue status. The recent Basin-Wide Issue designation, however, does not present a justifiable excuse for failing to timely file the proposed objections in the first place. If Objectors wanted to object on the grounds they now propose, they should have done so when they filed their original objections. When they filed their original objections, they were apprised of their consultant’s view of the facts and law surrounding Water Right Holders’ claims. Nevertheless, they filed objections on what they admit is a “significant” and “overarching” legal issue, *id.* at ¶ 3; one they now say they never really meant to raise. Objectors apparently believe they can file objections raising issues they have no intention of pursuing and later be perfectly free to amend the pleading to raise different issues when the litigation does not proceed as they had hoped. This is not good faith pleading. This Court should deny Objectors’ *Motions*.

C. Objectors’ late objections have no merit and allowing them would prejudice Water Right Holders.

Whether viewed as a request to file a late objection or to amend a pleading, Objectors must show that their request has merit and will not prejudice Water Right Holders. Because they

cannot show this, Objectors *Motions* should be denied.

Objectors propose objections to the quantity, priority date, and purpose of use elements of subbasin 37 ARW water rights. They assert that ARW water rights must have special conditions placed on them. *Objectors' Amended Objections*, ¶¶ D, E. However, they can provide no legal or factual basis to support these assertions.

First, Objectors argue that the same quantity limitations statutorily imposed on irrigation rights also should be imposed on ARW rights. *Objectors' Amended Objections*, ¶ E. But the so-called “inch per acre” limitation of Idaho Code Sections 42-202(6) and 42-220 applies to applications for permits and licenses for irrigation water rights only. There is no legal or factual basis for this Court to apply the statutory irrigation limitations to ARW or any other uses. By their nature, ARW water rights have no relation to irrigated acres. Nor can there be—the standard quantity limitations on irrigation rights have no more applicability to ARW rights than they do industrial, hydropower, or any other non-irrigation purpose of use. Similarly, the 3.5 acre-feet per acre per year limitation Objectors propose is based on irrigation use and also is inapplicable to other uses.

As for their priority date objections, Objectors state the priority date “should be: date of enlargement of water right.” *Objectors' Amended Objections*, ¶ E. Objectors, however, assert no basis for suggesting that any enlargements have occurred in the first place. Clearly, no enlargement occurred with respect to those ARW water right claims that were established by the permit and license process and that are recommended as licensed. Nor should enlargement be an issue with respect to those ARW water rights established through the transfer process where, in addition to Idaho Code Section 42-222's admonishment against enlargements, other water users (such as Objectors) had full and fair opportunity to raise the issue to the Idaho Department of

Water Resources (“IDWR”). Notably, IDWR did not recommend these water rights as enlargements. There is no basis for Objectors’ allegation that the priority dates of ARW rights should be changed, let alone that any enlargement of an original water right has occurred.

Objectors also contend that ARW water right decrees should include remarks with water quality and consumptive use conditions. But these are not appropriate grounds for objection because these are not elements of a water right and are not necessary to define or administer a water right. I.C. § 42-1411(2)(j). “Consumptive use is not an element of a water right.” I.C. § 42-202B(1). And, neither is water quality. The Idaho Department of Environmental Quality, not IDWR, ensures that the state’s water quality standards are met regardless of whether a reference to those standards is included in a water right decree.

Equally inappropriate is Objectors’ suggestion that the SRBA decrees must include provisions requiring all ARW water rights to be measured at points where they are diverted from and returned to the source. Objectors cannot explain any rational basis for including such a condition on all ARW water rights, at least not as a blanket requirement. Objectors’ proposal implies that all ARW water rights return to the source from which they are diverted and that some useful information about consumptive use might be obtained by measuring water at both ends of the use, but this is not necessarily the case. Some do return, some provide recharge to aquifers, and some do both. There are many other factual circumstances that differentiate ARW ponds, streams, and other features that make Objectors’ proposed blanket condition completely inappropriate. If, when, and where measurement is appropriate (i.e., it aids in actual administration), IDWR has the statutory authority to require it. I.C. §§ 42-701, -703.

Finally, Objectors propose a remark on the ARW rights regarding administration by the water master. This too is unnecessary because decreed ARW rights will be subject to

administration as a matter of law on par with all other decreed rights in Water District 37.

Allowing these objections would prejudice Water Right Holders by forcing them to expend more resources to defend against another round of Objectors' abusive litigation strategy. Water Right Holders already have spent considerable time and money to defend against the "significant legal issue" Objectors half-heartedly raised and now have failed to pursue. Objectors have not presented any legitimate new issues in their proposed objections. They cannot point to factual circumstances in any of Water Right Holders' ARW claims that would warrant their proposed conditions. It would be unfair to make Water Right Holders defend against these one-size-fits-all attacks that are both baseless and late.

II. WATER RIGHT HOLDERS REQUEST AN AWARD OF ATTORNEY FEES.

Water Right Holders ask the Court to award them costs and attorney fees pursuant to Idaho Code § 12-121 and IRCP 54(e)(1) on the grounds that Objectors brought and pursued their original objections and their *Motions* frivolously, unreasonably and without foundation. In Objectors' *Motions*, after having touched off an essentially state-wide controversy to which Water Right Holders and others were compelled to respond, they now say they have no interest in "debating" that issue. *Motions*, at ¶ 1. Moreover, they now seek to replace those objections with new ones that have no legal or factual basis. Water Right Holders ask the Court to award them their costs and attorney fees for opposing the *Motions* and their costs and attorney fees incurred in defending against the original objections (including those fees and costs that have been and will be incurred to litigate the Basin-Wide Issue that Objectors' original claims made necessary). Moreover, assuming Objectors have not conducted individual examinations to separate out the rights that are not derived from original irrigation rights, Objectors could face claims for IRCP 11(b) sanctions for failing to investigate the basis of their objections.

If this Court grants Objectors' *Motions*, Water Right Holders ask the Court to award them

costs and attorney fees under IRCP 15(a) for defending against Objectors' original objections.

CONCLUSION

Objectors' goal is clear: they are searching for ways to weaken ARW water rights as an entire class. First they tried to have such rights declared illegal outright; they now retreat from that strategy and suggest that all ARW rights must have special restrictions that have no legal or factual basis. Objectors' dubious tactics should not be rewarded. The Court should deny their *Motions*.

DATED this 28th day of July, 2008.

Respectfully submitted,

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EXHIBIT A

PETER M THOMAS TRUST dba RIVER GROVE FARM

37-8249

37-00577CH

SUN VALLEY LAND & MINERALS INC

37-02446

37-22128

37-04100

37-04369

37-04368B

37-21614

SUN VALLEY RANCH

37-22050

37-22051

37-22052

DANA L DOWERS

37-8252

THE VALLEY CLUB INC

37-494

37-495

37-577BV

37-657B

37-833K

37-2623

SHOEMAKER PROPERTIES

37-14278

GOLDEN EAGLE RANCH HOMEOWNERS ASSOCIATION, INC

37-154C

37-2627C

37-2632

SILVER CREEK FARMS HOMEOWNERS ASSN INC

37-685C

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th of July, 2008, the foregoing was filed, served, or copied via U.S. Mail, facsimile or e-mail:

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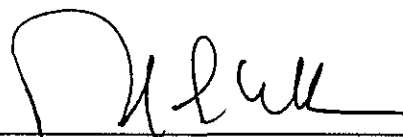
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