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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

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A. Subcase Nos. See "Attachment A"

Case No. 39576

**REPLY OF O'GARA, ET AL. AND BIG
WOOD CANAL COMPANY IN SUPPORT OF
MOTION FOR LEAVE TO AMEND**

In November of 2007, O'Gara, et al., and the Big Wood Canal Company filed timely objections to claims in the SRBA Part 3 of Basin 37 asserting the right to aesthetic, recreation, or wildlife purposes of use on the grounds that those uses were not authorized by law.¹

¹ Sinclair Oil Corporation and Newfoundland Partners chooses to characterize these objections based on Idaho's Minimum Stream Flow Act. Sinclair Response, p. 2. In fact, as Sinclair knows, and as explained to the court in oral argument and briefing on the question of whether to designate a basin-wide issue, No. 0091014, the Objection was based upon the fact that aesthetic, wildlife, and recreational uses are not recognized in the Idaho Constitution. Such uses are recognized in Idaho statutes only for aesthetic uses in the Minimum Stream Flow Act and in the Minimum Lake Level Acts. Likewise, these uses are not recognized by any rule or regulation of the Department of Water Resources of general rights. See *Asarco v. State*, 138 Idaho 719, 69 P3d 139 (2003) (a rule is required for policies

In May of 2008, counsel sent a letter to attorneys for each of the holders of rights asserting the purpose of use of aesthetic, wildlife, or recreational purposes offering to withdraw the objection in exchange for certain conditions recognized in the water right. See Exhibit to Affidavit of Scott Campbell. No response was received. Thereafter, the Concerned Water Users and Big Wood Canal Company filed the pending Motions for Leave to Amend.

These Motions for Leave to Amend seek permission to withdraw the objection to the existence of the water right on the purpose of use, and to substitute objections to the diversion rate and volume, and also requests that certain remarks relevant to the administration of these unique sets of rights claimed as Aesthetic, Wildlife, or Recreational Uses.

The Motion is opposed by Sinclair and Newfoundland,² by the Valley Club and other real estate developers representing 23 water right holders with aesthetic, wildlife, or recreation claims and by a group of 24 other claimants represented by Mr. Speck, who filed identical objections to the Motion to Amend in subcases involving those claimants. All these claimants generally raise the same issues to one degree or another. Therefore, Objectors here will respond in a single consolidated reply which is applicable to each of the responses.

Motion for Leave to Amend is Judged Under Rule 15(a) of Idaho Rules of Civil Procedure not under Standards for Motion to File a Late Objection

All of the claimants contend that the Motion for Leave to Amend is governed by the AO1 rules involving motions for leave to file a late claim. However, not a single case in the history of the SRBA is cited for that proposition by any of the parties. Under AO1 Section 1.a, the Idaho Rules of Civil Procedure are incorporated and govern litigation in the SRBA. Nothing in AO1

which have wide coverage and general and uniform applicability). See also Answer to Interrogatory No. 12, Response of Concerned Water Users to First Discovery Request from Sinclair Oil, attached as Exhibit H to Martin's Affidavit, pp.65-66.

² Subcase Nos. 37-415, 37-416, 37-12111, and 37-12130.

governs amending objections. Therefore, the Idaho Rules of Civil Procedure involving amending complaints are the most appropriate method for evaluating an amended objection because an objection essentially acts as a complaint in the SRBA and triggers an adversarial proceeding.

The original objections raised the question of whether the use of water for aesthetic, wildlife, or recreational purposes was a beneficial use under Idaho law. Judge Melanson in his Order designated basin-wide issues, July 10, 2008, stated “In the past, this Court has acknowledged potential issues surrounding the ARW [aesthetic, recreational, wildlife] purpose of use. . . .” In other words, the SRBA Court recognized that there are “issues” with the purpose of use of such rights which caught the Court’s attention, even though the State and other parties had failed to raise it previously in the SRBA.

The purpose of these proposed amendments was to focus these objections to aesthetic, recreation, and wildlife uses on a smaller subset of issues, rather than on the overarching question of whether the use should exist at all. The amended objections would presume that the use was a beneficial use, but would raise the question of how much diversion and volume a particular water right for aesthetic, wildlife, or recreation use was entitled to have and what would be the appropriate mechanisms for administering those water rights after the adjudication was completed by the way of remarks on the water rights. The interest of the objectors is in protecting their water rights from depletion by upstream aesthetic recreation and wildlife uses. The purpose of the amendment is to ensure that aesthetic, wildlife, and recreation water rights are not diverting and accumulating excessive amounts of water so that water will continue to be available to senior water users in the lower sections of the Big Wood River below the points of diversion of these aesthetic, recreation, and wildlife uses claimed water rights. There are a

number of common issues between whether such rights can be recognized as beneficial use for aesthetic, wildlife, or recreation purposes, and if so under what circumstances, and the more narrow question of what circumstances, and in particular how much water diversion to these uses is appropriate, if such use is recognized. Certainly these are not identical issues and that is why the Motion for Leave to Amend was filed. However, there is a significant overlap of common issues concerning the basis and reasons for recognizing or creating aesthetic, wildlife, and recreational uses and the amount of water that can be put to beneficial use for those purposes.

Under Rule 15(a) of the Idaho Rules of Civil Procedure
the Court Should Grant the Motion for Leave to Amend

Idaho Rule of Civil Procedure 15(a) is a liberal standard providing the court with discretion to allow a party to amend or supplement the pleadings – which should be freely given. I.R.C.P. Rule 15(a) provides in pertinent part: “leave shall be freely given when justice so requires.”

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). The court has recognized that in the interest of justice, courts should favor liberal grants of leave to amend. *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho*, 132 Idaho 318, 971 P.2d 1142 (1998); *Wickstrom v. North Idaho College*, 111 Idaho 450, 453, 725 P.2d 155, 158 (1986).

The dual purposes of rule governing amendment of pleadings are to allow claims to be determined on the merits rather than technicalities, and to make pleadings serve the limited role of providing notice of the nature of the claim and the facts that are at issue. IRCP, Rule 15(a). A court may consider whether the allegations sought to be added to the complaint state a valid

claim in determining whether to grant leave to amend the complaint. *Black Canyon Racquetball Club, Inc., v. Idaho First Nat'l Bank N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991). A court, however may not consider the sufficiency of evidence supporting the claim sought to be added in determining leave to amend because that is more properly determined at the summary judgment stage. *Christensen Family Trust*, 133 Idaho at 872, 993 P.2d at 1203, *Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 61 P.3d 557 (2002) (error to deny motion to amend).

In determining whether an amended complaint should be allowed, where leave of court is required under Rule 15(a), the court may consider whether the new claims proposed to be inserted into the action by the amended complaint 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) (citation omitted). However, the trial court may not consider the sufficiency of evidence supporting the claim sought to be added in determining leave to amend because that is more properly determined at the summary judgment state. *Thomas*, 138 Idaho at 210, 61 P.3d at 567; *Maroun v. Wyreless Systems, Inc.* 141 Idaho 604, 114 P.3d 974 (2005).

The Idaho Supreme Court has stated:

In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance to the amendment, futility of amendment, etc. – the leave sought should, as the rules required, be freely given.

Carl H. Christensen Family Trust v. Christensen, 133 Idaho 866, 871, 993 P.2d 1197, 1202 (1999) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225 (1962)) (internal citation omitted). In *Christensen*, the parties stipulated to allow motions

through October 3, a week before the stipulated hearing date. The plaintiffs filed a motion to amend their complaint on October 1. The district court denied the motion on timeliness grounds, stating “the amended complaint was not lodged with this [c]ourt until October of 1997, nearly one year after the filing of the original complaint. It was not timely filed, and it will not be accepted or considered by this [c]ourt.” *Christensen*, 133 Idaho at 871, 993 P.2d at 1202. On appeal, the Supreme Court held the district court abused its discretion in denying the plaintiff’s motion to amend because the correct legal standard for timeliness was not applied. The holding was based on the fact that the district court “did not consider whether the amendment would cause delay or would prejudice the defendants.” *Christensen*, 133 Idaho at 873, 993 P.2d at 1203.

Here the amended objections were filed in a much shorter period of time after the original pleadings than in *Christensen*. There is no evidence of undue delay or prejudice. The case is far less advanced than *Christensen*, and the amendment narrows the issues, not broadens them as suggested by Claimants. Thus the Court can deny the motion here only if there is no valid objection to quantity and volume of the AWR water right under any circumstances. This stance is at odds with all provisions of Idaho law which properly limit water use to that which can actually be put to beneficial use.

Sinclair Oil’s Response

Objectors had previously objected to the quantity of water claimed under rights 37-415 and 37-416. Sinclair Oil inexplicably argues that previous objection means that Objectors are precluding from proceeding on the objections to quantity of water claimed under those two rights. Regardless of whether or not the Motion for Leave to Amend is granted, Claimants still have previously raised the quantity issue with respect to these two rights.

Objectors have raised valid claims in the amended objections

The Idaho Code Section 42-1411 concerning the required elements of a water right in the

Director's Report states:

(2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

- (a) the name and address of the claimant;
- (b) the source of water;
- (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;
- (g) the period of the year when water is used for such purposes;
- (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except that the place of use may be described using a general description in the manner provided under section 42-219, Idaho Code, which may consist of a digital boundary as defined in section 42-202B, Idaho Code, if the irrigation project would qualify to be so described under section 42-219, Idaho Code;
- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

Under Idaho Code 42-1411 (2)(c), volume of water is an appropriate element of a water right

All of Claimants argue that the objection to the volume requirement raised in the amended Objections is a "consumptive use" requirement which is not an element of a water right under Idaho Law. They are wrong.

Sinclair Oil points to amendments to Idaho Code § 42-1411 passed in 1997 to support this claim. What all of the Claimants overlook are the provisions of Idaho Code § 42-1411(c) which expressly recognizes that "annual volume of diversion of water" for use "as necessary for

the proper administration of the water right” is a element of a water right acquired under state law. Claimants are confounding the difference between the volume diverted and the “consumptive use”. Consumptive use is “that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.” *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001), quoting Idaho Code § 42-202B.

The amended objection is to the volume diverted. The changes that were made to Idaho Code § 42-1411 in 1997 arose from objections that certain ground water users were making in the *Hagerman Water Users* case, to whether the Director was required to determine the consumptive use of different types of irrigation practices such as sprinklers versus flood irrigation. The legislature made the change in 1997 to make it clear that the amount of “consumptive use” was not an element of the water right so that irrigators were not limited only to the most efficient method of delivery of water. At the same time, the legislature retained the requirement for an annual volume of diversion where necessary for the administration of the water right in I.C. 42-1411(2)(c). This retention shows that the legislation did not do away with a requirement for an annual volume.

Measurement is a common requirement of water rights in the SRBA

Claimants next assert that the amended objection to require appropriate measurement tailored for the unique types of use of these AWR water rights is a matter of administration, and not directed at the existence of or the elements of the water right. In fact, there are hundreds if not thousands of rights adjudicated in the SRBA with measurement requirements contained therein. Moreover, Idaho Code § 42-1411(2)(j) specifically provides for “such remarks and

other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the Director.” (emphasis added)

Aesthetic, wildlife, and recreation uses are unique. These rights, particularly as asserted by private parties, have never been defined by the constitution, legislature, or even by regulations or rules of the Department. How is the water master to know how to administer or deliver the right without measurement devices which accurately tell the water master whether the diversion rate and the volume of water actually use is being used in accordance with the decreed right by the aesthetic, wildlife, or recreation user? For AWR rights, in particular, diversion measurements are necessary.

Given the Unique Nature of Aesthetic, Wildlife, and Recreation Uses, a Requirement that the Use Comply with Idaho Water Quality Standards is Appropriate

The Claimants next assert that it is improper to object to a water right and seek to have a remark on the use of the water requiring the water to be returned to the streams in compliance with Idaho Water Quality law and standards. Aesthetic, wildlife, and recreational uses are unique claims to water rights. No standards are set for these rights in the constitution, statutes or regulations. Sinclair Oil acknowledges that it appropriate for the Department of Water Resources to condition the issuance of a water right permit on compliance with state water quality standards. *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). They assert that the holding in *Shokal* does not apply in this context because that case arose under a permit and the local public interest criterion.

Aesthetics include the condition of the water and whether it contains excessive sediment or grows unsightly amounts of algae on the water. Recreation suggests contact by people with the water. Wildlife presumes that a water right is managed in to provide a benefit to wildlife. If this Court or the Department authorizes aesthetic, wildlife, or recreational uses water rights to

exist, those rights must be held and administered so that the purported beneficial uses are truly being delivered for the mandated beneficial uses and not a use which kills fish, allows unsightly growth of pond scum and other algae, or which endangers the public and recreational users by potential contact with the water diverted under this right. Objectors do not propose that the Court or IDWR to set any standards, however Objectors are simply stating that, if a beneficial use is to be recognized for aesthetic, wildlife, and recreational purposes, then the water must be of sufficient quality to comply with those beneficial uses; otherwise the use cannot in fact be a beneficial use. Therefore, a remark requiring compliance with state water quality standards is necessary for the definition of the right, for clarification of the elements of such beneficial uses and for ultimate administration under Idaho Code § 42-1411(2)(j). If the right is not being used for the beneficial use for which it was decreed, then the Department should have the authority to regulate that use just like any other user who no longer put the water to beneficial use.

Finally, it is incredible that holders of these rights for aesthetic, wildlife, and recreational purposes would seriously object to ensuring that their water rights, and their use of water, would comply with Idaho water quality standards. If they are not, they are endangering the public health and welfare, and the very beneficial uses they purport to protect with these water rights.

These water rights should be limited to a diversion rate of no more than one inch per acre

Sinclair Oil contends that Idaho Code § 42-220 forbids a limitation on diversion rate of an inch per acre for aesthetic, wildlife, or recreational uses. In fact, Idaho Code § 42-220 prohibits allotting water in excess of one inch per acre or one cfs per 50 acres unless a greater amount is proven to be necessary. The statute does not state that higher rates can be diverted for aesthetic, wildlife, and recreational uses. That is not surprising, since nothing in Idaho Code §42-220 or any other Idaho Statutes authorizes diversion for aesthetic, wildlife, or recreational

uses. The question for the Court is whether or not an appropriate limitation on the diversion rate into aesthetic, recreation, and wildlife uses should be imposed or whether or not there is an unlimited right to divert water for aesthetic recreation and wildlife purposes, as claimed by Claimants.

Sinclair Oil even recognizes that the amount of water necessary to put to beneficial use at some locations might vary depending upon the purpose of use, arguing that a recreational use for boating might require a greater depth of water than simply diverting water for the purposes of looking at it. Sinclair Oil argument supports the position of objectors and suggests that a diversion rate ought to be determined on a case-by-case basis on each of these individual aesthetic, wildlife, and recreational uses. In any event, the depth of the pond may or may not be related to diversion rates. IDWR policy recognizes that the initial fill of a pond might require a one-time acquisition of water and the rate and the maintenance of the pond level might require completely different diversion rate.

There is no prejudice to Claimants

Under the original objection, Claimants would have to defend the existence of their rights. Under the amended objection, they still have to defend these same aesthetic, wildlife, and recreational uses but only as to the amount of water being utilized for such uses. These cases have not even been set for initial hearings. No trials have been set. Little discovery has been taken. There is plenty of time to deal with the merits of the objections.

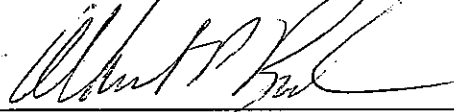
Claimants' demand for attorney fees is frivolous

The SRBA Court in basin-wide issue No. 00-09014 recognized that there are "issues" with these aesthetic, wildlife, and recreational uses. These objectors in Basin 37 have not had the chance to previously address these "issues". If Claimants want attorney's fees for having to

participate in the basin-wide issue that they initiated themselves, then they should address that issue in front of Judge Melanson who has jurisdiction over the basin-wide issue. As shown above, the objections in the amended objections are meritorious and therefore claimants demands for attorney's fees should be rejected.

DATED this 1st day of August, 2008.

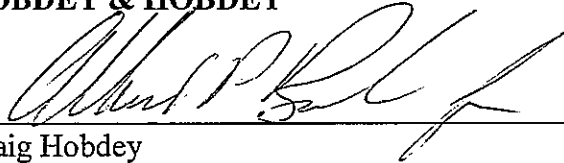
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Craig Hobdey

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 2008, I caused to be served a true and correct copy of the foregoing **REPLY OF O'GARA, ET AL. AND BIG WOOD CANAL COMPANY IN SUPPORT OF MOTION FOR LEAVE TO AMEND** by the method indicated below, and addressed to each of the following:

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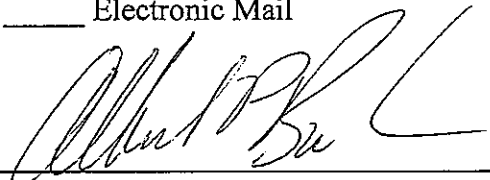
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Albert P. Barker

ATTACHMENT "A"
Water Right Numbers

37-154C	37-4100	37-8254
37-415	37-4130	37-12130
37-416	37-4131	37-12873
37-494	37-4150	37-14278
37-495	37-4184	37-19740
37-496F	37-4265	37-20866
37-509	37-4368B	37-21124
37-577CK	37-4369	37-21329
37-577CH	37-4440	37-21331
37-577BV	37-7168	37-21614
37-657B	37-7201	37-22044
37-685C	37-7296B	37-22128
37-713D	37-7493	
37-833K	37-7707	
37-863F	37-7733	
37-2418	37-7792	
37-2446	37-7836	
37-2473K	37-7882	
37-2609A	37-8199	
37-2623	37-8217	
37-2627C	37-8248	
37-2632	37-8249	
37-4016	37-8252	