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Department of Water Resources
Adjudication Bureau

Attorneys for Petitioner Barbara Barry

**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

)
) **Subcases: 37-353F, 37-353J, 37-353K**
) **& 37-353L**
)
) **MOTION TO FILE LATE**
) **OBJECTION**

COMES NOW, Barbara Barry ("Barry"), by and through her attorneys, Barker, Rosholt & Simplot, LLP, and submits this *Motion to File Late Objection*, pursuant to SRBA Administrative Order #1 and the Idaho Rules of Civil Procedure. For the following reasons, the Court should grant Barry's motion and allow these late objections. The proposed *Objections* are attached hereto.

INTRODUCTION

This motion results from the thorough review of a water right that was originally decreed to James Johnson in the Foster decree, more than 100-years ago.¹ Since that time, the right has been split and transferred, such that today no fewer than 14 claims have been made on the original 6.4 cfs. One such claim, 37-353G, by Barry, was disallowed by the Department in the

¹ The term "Johnson Water Right" will be used when referring to this parent right.

Basin 37, Part 3, Director's Report. This is the case, even though the Department and Water District 37 have long recognized that Barry, or her predecessors in interest, have a valid, documented, interest in a portion of Johnson Water Right. At the same time, the Department recommended the above listed rights, even though water district records fail to show that the claimants have any interest in the Johnson Water Right. Since the entire 6.4 cfs under the Johnson Water Right have been recommended, the Department's error in disallowing Barry's water right cannot be rectified unless the above listed water rights are either adjusted or disallowed.

These water rights are currently pending before two Special Masters. Water rights 37-353F, 37-353J and 37-353L are all pending before Special Master Bilyeu. However, pursuant to the July 18, 2008, *Order Rescinding Order of Reference to Special Master Brigitte Bilyeu and Order of Reference Appointing Theodore R. Booth as Special Master*, water right 37-353K is currently pending before Special Master Booth.

As discussed below, a late objection to the above listed water rights is necessary to resolve the issues with water right 37-353G.

STATEMENT OF FACTS

The Director's report for Basin 37, Part 3, recommended the above listed water rights, in part, as follows:

Water Right	Claimant	Div. Rate
37-353F	James Oosting	0.16 cfs
37-353J	Olsen Livestock Consultants, Inc.	0.32 cfs
37-353K	Mark & Dannette Fisher	0.28 cfs
37-353L	Tom & Annette Goicoechea	0.28 cfs

The Director's Report also recommended that Barry's water right, 37-353G, be disallowed. On July 25, 2008, this Court granted Barry's motion to file a late objection to her water rights.

A review of water right 37-353G has revealed the following facts, which are relevant to this motion:

1. Water Right 37-353 was originally decreed to James Johnson as a part of the *Frost decree*. The right was originally decreed with a priority date of June 12, 1886 and a diversion rate of 320 inches (or 6.4 cfs). See *Affidavit of Paul L. Arrington in Support of Motion to File Late Objection* ("Arrington Aff.") at Ex. A.

2. Beginning sometime in the mid-1970's, M.D. Dean, who had acquired water right 37-353 and the associated property, subdivided the place of use and began dividing and selling the water rights and property.

3. On November 1, 1977, Dean advised the Water District that he sold 20 inches (0.4 cfs) to Gus Chek. *Arrington Aff.* at Exs. B & C. In 1990, Chek filed claim number 37-353C for his 20 inches of the Johnson Water Right. *Id.* at Ex. D. That same year, Chek filed two *Applications for Transfer of Water Right*, which were subsequently approved, splitting his 20 inches into two 10 inch portions. *Id.* at Exs. E & F. Claim 37-353C was renumbered as water rights 37-353G and 37-353H. *Id.* Ex. G. Water Right 37-353G was acquired by Douglas Driever. *Id.* at Ex. H; see also *Id.* at Ex. B (indicating that Chek notified the Water District of the sale to Driever on October 4, 1991). On October 23, 1999, Driver sold his property, including water right 37-353G to Barry.

4. Records in the back file for water right 37-353, indicate that Water District 37 was able to account for all 320 inches of the Johnson Water Right through the use of letters,

deeds and transfers supplied to the water district. *Id.* Ex. B. These records do not recognize an ownership interest in what subsequently became claims 37-353F, 37-353J, 37-353K and 37-353L. *Id.*; see also *Id.* Ex. I (copy of Exhibit B, with notations by counsel indicating the claim number of the water right associated with each transaction).

5. In 1997, Olsen Livestock Consultants, Inc. (“Olsen”) requested the delivery of 20 inches (0.4 cfs). Prior to the delivery request, Olsen had not claimed that much of the Johnson Water Right in the SRBA, *id.* Ex. J at 2-4, and there was no indication in the Water District records that Olsen had any right to the Johnson Water Right, *id.* at 2-3, ¶ 5. In fact, Olsen had not paid any assessment for water “since 1982 or earlier.” *Id.* at Ex. J, at 3, ¶ 6. The delivery request was denied and Olsen challenged the decision. In an *Amended Preliminary Order*, the Department determined that the water district could deliver water to Olsen out of the portion the Johnson Water Right that had been acquired by Robert Kierstad. *Id.* at 4, ¶ 13. Water District records indicate that Kierstad acquired 40 inches (0.8 cfs) in 1997, *id.* Ex. B, however, Kierstad never claimed the right in the SRBA and it is unclear if Kierstad ever used that water. This authorized delivery, however, did not “divide or otherwise assign the 40 miners inches at one time shown in the Water District 37 records as owned by Robert Kierstad to satisfy the call by Olsen.” *Id.* at 5, ¶ 9. In fact, the decision was “an interim determination subject to review and revision by the SRBA Court.” *Id.* at 5, ¶ 8. On August 25, 1998, Olsen amended its claim to water right 37-353J, seeking 20 inches (0.4 cfs) of the Johnson Water Right. *Id.* at Ex. K. Prior to that time, Olsen has claimed 13.5 inches (0.27 cfs). *Id.* at Ex. J, at 3.

6. Importantly, in the Olsen decision, the Department reviewed the ownership interests in the Johnson Water Right and confirmed that Driever had a valid ownership interest in a portion of the Johnson Water Right. *Id.* at 2-3. In addition, at that time, the Department

recognized that 303.5 inches (6.07 cfs) of the original 320 inches (6.4 cfs) under the Johnson Water Right, had been claimed in the SRBA. *Id.* at 4.

7. Responding to the Olsen decision, at least two additional claims were filed on the Johnson Water Right, claiming an additional 18 inches (0.36 cfs) each – for a total of 36 additional inches (0.72 cfs). *See Id.* at Ex. L (37-353K) & Ex. M (37-353L). Water right 37-353L is claimed by Tom Goicoechea. In the Olsen decision, the Department recognized that the claimed Goicoechea water could be delivered for the same reasons identified relative to the claimed Olsen water. *Id.* at Ex. J, at 4. Again, the authorization of delivery did not constitute a decision by the Department that Goicoechea actually had any ownership interest in the water right.

8. Counting these new claims for water, including the increased claim by Olsen, total SRBA claims for the Johnson Water Right increased to 346 inches (6.92 cfs) – 26 inches (0.52 cfs) more water than was originally decreed under the Johnson Water Right. These excessive claims were recognized by the Department in a subsequent *Preliminary Order*, issued December 29, 1999. *Id.* at Ex. N, at 4-5, ¶¶ 8-9. As in the Olsen decision, the 1999 decision recognized that Driever had a valid ownership interest in the Johnson Water Right. *Id.* at 3-4, ¶ 5.

9. That 1999 decision was entered in response to a call for deliver by Richard and Paula Ziker. *Id.* at 1. As with the Olsen matter, the Water District records did not show any interest in the Zikers to the Johnson Water Right. *Id.* at 3-4, ¶ 5. Consistent with the lack of any ownership records, the Department recognized that the Zikers had not paid any assessments to the Water District “since 1982 or earlier.” *Id.* at 4, ¶ 7. The Department authorized delivery to the Zikers – even though the claims were now in excess of the original decreed water right. *Id.*

at 6, ¶ 1. The 1999 decision recognized that it was “a preliminary determination subject to revision” and that the decision would be “subject to review and revision by the SRBA Court.” *Id.* at 6, ¶¶ 7 & 3.

10. The Olsen decision and subsequent claims to the Johnson Water Right created significant concern in Water District 37, where the watermaster was then asked to deliver more water than was originally decreed under the Johnson Water Right. *See Id.* at Exs. O & P. In two separate letters, dated July 30, 1997 and April 6, 1999, the water district sought advice from the Department as to how to respond to the excessive claims for the Johnson Water Right. *Id.* at Ex. O.

11. On December 20, 1999, the Department, through Norman Young – the same individual who issued the Olsen and 1999 decisions – responded to the Water Districts’ concerns. *Id.* at Ex. P. The Department again recognized that, according to Water District records, Driever had a valid ownership interest in the water and the claimants for water rights 37-353F, 37-353J, 37-353K & 37-353L did not. *Id.* Speaking of the claimants for water rights 37-353F, 37-353K and 37-353L, the Department indicated that “the claims filed by Ziker, Price and Goicoechea” were filed without a demonstration of “probable ownership to a part of the [Johnson Water Right].” *Id.* at 2.²

Notwithstanding the long-recognized interest that Driever – and subsequently Barry – has to a portion of the Johnson Water Right, water right 37-353G was recommended as disallowed. At the same time, the Department recommended the above listed water rights, and others – each

² The letter further indicates that “if an order to deliver results from the petition [filed by Ziker], Ziker should then be included in the Decree Book.” *Arrington Aff.* at Ex. P, at 2. The 1999 decision appears to be the “order” referenced by the Department. However, much like the Olsen decision, the 1999 decision did not make any determination as to ownership interest in the Johnson Water Right and left that decision up to the SRBA Court. *See Id.* at Ex. N at 6, ¶¶ 7 & 3.

with origins in the Johnson Water Right – for a total of 320 inches (6.4 cfs). The other recommended claims to the Johnson Water Right are noticed on Exhibit J to the *Arrington Affidavit*. Like Barry’s claim, these other recommended claims have a recognized valid ownership interest in the Johnson Water Right. Since the entire Johnson Water Right has been recommended, the Department is unable to recommend water right 37-353G – and affirm Barry’s long-recognized interest in the Johnson Water Right – unless other rights are adjusted or disallowed. *Id.* at ¶ 2. As discussed above, a review of the Johnson Water Right back file has identified the above listed rights, with questionable ownership interest. Accordingly, Barry should be allowed to file late objections to the above listed water rights.

STANDARD OF REVIEW

In the *Memorandum Decision and Order on Challenge* (Subcase Nos. 47-16433 *et al*), Presiding Judge Melanson described the standard of review for filing a late objection:

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. [citation omitted]. *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. *Id.*, see *AOI* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) leave to amend a notice of claim shall be freely given when justice so requires). In the *A.L. Cattle* subcase, this Court held that the I.R.C.P. 55(c) standard should be applied to late objections to which partial decrees have not been entered, rather than the I.R.C.P. 60(b) standard.

In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho Courts apply a “good cause” for untimeliness standard. I.R.C.P. 55(c). The “good cause” standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho at 935, 854 P.2d at 279. The I.R.C.P. 55(c) good cause standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.

- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

Memorandum Decision and Order on Challenge at 5-6 (March 22, 2005) (“*Bedke I*”).

In doubtful cases, relief should be granted to reach a judgment on the merits. *Bedke I* at 10. This is because default judgments are disfavored. *See Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267 *et al.* (Jan. 31, 2001) (“*A.L. Cattle*”).

DISCUSSION

Barry’s *Motion to File Late Objection* is supported by good cause and a meritorious position, hence it meets the above standard. As the above facts demonstrate, there are serious concerns over the Department’s recommendations to water right 37-353G, and the above listed water rights. While the Johnson Water Right have changed hands and been divided multiple times throughout the years, the consistent theme that has existed throughout that time is the Department’s and Water District 37’s recognition that Barry, or Driever, her predecessor in interest, has always had a valid right to some portion of the Johnson Water Right. *See Arrington Aff.* at Exs. B, I, J, N & P. At the same time, the Department has recognized that the claimants to the above listed water rights have, at best, questionable interest in the Johnson Water Right and that the final nature of their interest, if any, would be determined in the SRBA Court. *Id.* at Exs. J & N. In fact, water rights 37-353K and 37-353L *were not even filed until after* the Department’s decision in the Olsen matter. *See Id.* at Exs. L & M. That decision authorized the delivery of water even though Water District 37 records indicated there was no record of ownership to any of that water. *See Id.* at Exs. B & J.

At the time of the Olsen decision, the Department relied upon the failure of Kierstad to file a claim to his 40 inches (0.8 cfs) in order to justify authorizing deliveries to Olsen (37-353J)

and Goicoechea (37-353L). *Id.* at Ex. J, at 4, ¶ 13 & 5, ¶ 9. Importantly, that decision did not constitute any recognition that either Olsen or Goicoechea actually had an interest in the Johnson Water Right. *Id.* Rather, the Department specifically stated that the ownership interests of Ziker (now Oosting – 37-353F), Olsen (37-353J) and Goicoechea (37-353L) would be reviewed and analyzed by the SRBA Court. *Id.* at Ex. J at 5, ¶ 8 & Ex. N, at 6, ¶¶ 7 & 3. Importantly, as of 1997, Olsen had never paid any assessment for water deliveries. *Id.* at Ex. J at 3, ¶ 6 (indicating that Olsen had not paid assessments “since 1982 or earlier”). Similarly, Ziker (now Oosting) had never paid any assessments as of 1999. *Id.* at Ex. N at 4, ¶ 7 (indicating that Ziker had not paid assessments “since 1982 or earlier”).

The Olsen decision prompted 2 new claims and an amended claim for additional water, all of which caused the SRBA claims for water under the Johnson Water Right to swell to 26 inches (0.52 cfs), more than was originally decreed. *See* at Ex. N, at 4-5, ¶¶ 8-9. To compensate for these excessive claims, the Department “reduce[d] some claims by 21.2% in order to stay within the original decreed rate of 6.4 cfs.” *Id.* at Ex. Q. At the same time, the Department ignored the overwhelming evidence and disallowed water right 37-353G.

Barry’s failure to object to the above listed water rights prior to the objection deadline was not willful. In fact, Barry, herself, did not receive notice of the recommendation to her water right, and was forced to file a late objection to water right 37-353G. Her motion to file a late objection to water right 37-353G was granted in an order dated July 25, 2008. Since that time, Barry has been reviewing her water right, as well as the other claims and recommendations to the Johnson Water Right. As explained above, the history of these water rights is long and, at times, very confusing. It was not until Barry analyzed the nearly 500 total pages of back file, and discussed the matter with the Department, that she realized that her right could not be

recommended unless the diversion rates for other recommended rights were adjusted or the rights were disallowed. Further review was then necessary to determine the rights that would be the subject of the present motion. Upon identifying the above listed rights, Barry promptly filed this motion

No prejudice will result from granting this motion. The Department's recommendation does not accurately reflect water right 37-353G, or the above listed water rights. Water right 37-353G, which was disallowed, constitutes all of the irrigation water appurtenant to Barry's property – without it, there is no irrigation water. While Barry's interests in these proceedings are significant, no party will be prejudiced by the granting of this motion. Claimants will have an opportunity to participate in these proceedings by filing a response to the objection. Furthermore, objections have already been filed for water rights 37-353J and 37-353K, which are currently pending before Special Masters Bilyeu (37-353J) and Booth (37-353K), and none of the above listed water rights have been partially decreed.

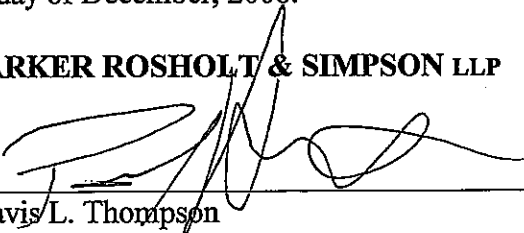
Since failure to file a timely objection was not willful, no party will be prejudiced and a meritorious position has been presented, *see Bedke I, supra*, the Barry's motion should be granted.

CONCLUSION

Barry only recently learned that her water right could not be recommended without impacting the above listed water rights. These water rights have questionable interest, at best, to the Johnson Water Right. Upon learning of the connection between 37-353G and the above listed rights, Barry instructed her legal counsel to file this motion. Since failure to file a timely objection was not willful and no prejudice will result, this Court should grant this *Motion to File Late Objection*.

DATED this 18th day of December, 2008.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Paul L. Arrington

Attorneys for Barbara Barry

CERTIFICATE OF SERVICE

I certify that on this 18th day of December, 2008, I served the foregoing **MOTION TO FILE LATE OBJECTION**, including all attachments, to the following persons, via first class mail:

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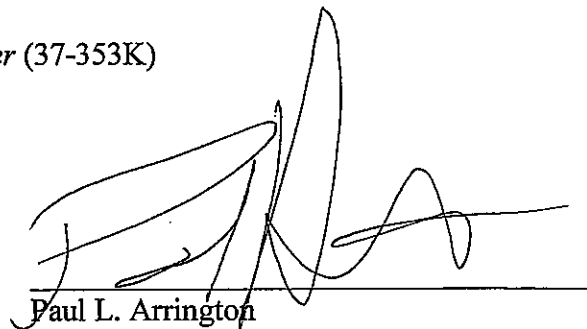
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