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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

)
) **Subcases: 37-353J**
)

) **REPLY IN SUPPORT OF MOTION**
) **TO FILE LATE OBJECTION**
)

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

INTRODUCTION

In opposing Barry's motion, Olsen Livestock Consultants, Inc. ("Olsen") ignores or misrepresents the record – hoping that the SRBA Court will reject Barry's attempt to correct errors in the recommendations on the Johnson Water Rights (i.e. 37-353, *et al*).

Relying almost entirely on the Department's 1997 *Amended Preliminary Order*, Olsen claims that all questions of ownership have been settled and that any attempt to raise that question before this Court should be foreclosed. Olsen ignores the provisions in that *Amended*

Order that contradict its claims. For example, in the *Amended Order* (attached as Ex. E to the *Waldera Aff.*) the Department specifically stated that delivery could be made to Olsen “because some of the persons presently owning part of water right No. 37-353 are not claiming ownership and are not calling for delivery.” In addition, the Department specifically deferred to the “SRBA District Court” to “finally fully determine” ownership of water right 37-353 (including 37-353J). In fact, Olsen also ignores the fact that the Department continues to consider Olsen’s ownership to be in question – even recommending a reduced diversion rate to ensure that the total recommendations under the Johnson Water Right do not exceed the original diversion rate.

Contrary to Olsen’s assertions, the facts of this case support an order granting the present motion. Barry’s filing delay was not willful. Her motion was filed as soon as she became aware that the objection to her water right would necessarily implicate other water rights. Barry’s filing will not prejudice Olsen. The Department has already recommended Olsen’s water right with a reduced diversion rate. Olsen has filed an objection to that water right and will, presumably, participate in these proceedings. In short, Olsen will be able to defend his water right.

Finally, Barry has presented a meritorious position. The record demonstrates that some of the SRBA recommendations for portions of the Johnson Water Rights are improper and should be amended. The Department has considered Olsen’s claim of ownership on at least two different occasions. The first time, the Department determined Olsen could have his water, in part, because “some of the persons presently owning part of water right no. 37-353 are not claiming ownership and are not calling for delivery under the right.” The second time, the Department determined that Olsen does not have a right to the claimed amount of water and recommended water right 37-353J at a reduced quantity. Olsen’s belief that it has a strong case against the Department’s recommendation does not make Barry’s motion frivolous.

Accordingly, the Court should grant Barry's *Motion to File Late Objection* on Water Right 37-353J.

ARGUMENT

Barry's *Motion to File Late Objection* is supported by good cause and a meritorious position.

I. The Delay in Filing this Motion was Not Willful

Olsen complains that Barry's motion is too late that that Barry should have been able to determine whether or not she would file an objection on Olsen's water right prior to the November 14, 2007 deadline for filing objections in Basin 37, Part 3. Olsen fails to understand the history of this motion. First, as this Special Master is aware, Barry did not know of the Department's recommendation to her water right until after the deadline. A *Motion to File Late Objection* was granted on July 25, 2008. Prior to that time, Barry was not aware that her objection could not be pursued unless she also filed an objection to other Johnson Water Rights recommendations. In speaking with the Department and reviewing the file, Barry learned, for the first time, that the history of the Johnson Water Right was long and confusing and would require significant time in reviewing to understand. Barry reviewed 500 pages of back file, spoke with the Department, and reviewed the recommendations for each water right. Contrary to Olsen's claim, the answer was *not* readily available for Water Right 37-353J. In fact, the record demonstrates that Olsen overstates the Department's position when it claims that the question of ownership is settled. In particular, the following information was discovered:

1. In 1997, Olsen made a call for water to which it had never claimed ownership in the SRBA. In an order on that call, the Department specifically held that Olsen could be delivered water, in part, because "some of the persons presently owning part of water right no.

37-353J are not claiming ownership and are not calling for delivery under the water right.”

Waldera Aff. Ex. E at 5.¹ In that order, the Department recognized that its decision did not affirm or confirm any ownership interest in Olsen to the Johnson Water Right. Rather, it recognized that the decision was “an interim determination subject to review and revision by the SRBA Court” and that “water right no. 37-0353 will be finally fully determined by the SRBA District Court.” *Id.* at 5-6.

2. In 1999, Norm Young, the hearing officer in the 1997 Olsen call proceedings, issued a letter providing “guidance from the Department of Water Resources on which claimants to parts of Right No. 37-0353 should be included in the Water District 37 ‘Decree Book.’” *Arrington Aff.* Ex. P. In that letter, Mr. Young provided a list of “waters users listed in the Water District Records as having an ownership interest.” *Id.* Importantly, this list includes Driever (i.e. Barry) **and does not include Olsen.** *Id.* Following this list, Mr. Young addresses:

Claimants not previously listed in the Water District records which have now filed a claim in the SRBA and for which IDWR has entered a preliminary order in response to a petition for distribution by the watermaster. **Olsen Livestock Consulting falls into this category.**

Id. (emphasis added).²

3. In a January 3, 2007 letter from James E. Stanton, with the Department, to Mr. Goiocoechea (Water Right 37-353L), the Department advised Mr. Goiocoechea that there were “four claims that have been recommended [that] cannot be traced back to known previous owners.” *Arrington Aff.* Ex. Q. These claims were reduced “in order to stay within the original

¹ Olsen asserts that this was the Water Districts’ idea and should therefore be ignored – or given no weight. *Olsen Resp.* at 5-6. Regardless of its original source, the Department specifically ordered that Olsen’s right could be fulfilled through by using the Kierstadt water. *Waldera Aff.* Ex. E at 5.

² Citing to this provision, Olsen claims that the Department “ordered” the Olsen right to be placed in the “Decree Book.” *Olsen Resp.* at 11-12. The plain language of the letter defeats Olsen’s assertion.

decreed rate of 6.4 cfs.” *Id.* The Olsen claim is one of only four claims to the Johnson Water Right that were recommended with a reduction in quantity. Barry has filed a *Motion to File a Late Objection* on all of those claims.

This matter cannot be resolved by merely reviewing the slanted facts provided in Olsen’s response brief. Rather, a thorough review of the more than 500 pages of back file was required in order to specifically identify the water rights for which an objection should be filed. Contrary to Olsen’s assertion, Barry’s motion is not a “broad-brush” attempt to lump water right 37-353J in with other, unrelated, issues. *See Olsen Resp.* at 15.³ To the contrary, a resolution of this matter necessarily involves all water rights for which the Department has recognized there is questionable title.

Upon learning which water rights should be objected to, Barry immediately filed the present motion. Contrary to Olsen’s assertion, the delay was not willful.

II. Olsen Will Not be Prejudiced by the Granting of this Motion

Olsen asserts that it will be prejudiced by this motion – claiming that Barry is seeking to “obliterate” Olsen’s right “for her sole benefit.” *Olsen Resp.* at 15. Olsen even wrongly claims that “Barry’s proposed objection does not seek to adjust or harmonize rights amongst neighboring water users.” *Id.* Such a blatant misrepresentation of the facts cannot be condoned. *See Proposed Objection* for Water Right 37-353J at 3 (indicating that the right should be “adjusted” or “disallowed”).

Olsen’s entire “prejudice” argument is based on its misguided contention that the *Amended Order* settled the question of Olsen’s ownership and interest in a portion of the

³ Apparently seeking to cast doubt on the veracity of Barry’s motion, Olsen accuses Barry of being ambivalent and neglectful. *See Olsen Resp.* at 16. Such posturing is unnecessary. Furthermore, the facts contradict Olsen’s misrepresentations.

Johnson Water Right. Olsen contends that Barry's objection "will engender the needless expenditure of additional time and resources." *Olsen Resp.* at 16. To the contrary, the record demonstrates that the question of Olsen's ownership is not settled. The *Amended Order* specifically left the final determination of Olsen's water right ownership to the SRBA Court. *Waldera Aff.* Ex. E at 5. Furthermore, should the Court allow Barry's late objection, Olsen will, presumably, participate in the defense of its claim. As such, there is no prejudice to Olsen.

III. A Meritorious Position has Been Presented

Olsen's response to Barry's claim of a meritorious position is to claim that Barry ignored the Olsen-specific facts and to, again, wrongly assert that the Department has settled the question of Olsen's interest in water right 37-353J. *Olsen Resp.* at 16. In the end, Olsen reaches the incorrect conclusion that this Court has no authority to review the facts – claiming that "the Department's orders and correspondence has long put to rest the validity of the Olsen parcel's entitled to a 20 inch (2 inch per acre) proportionate share of the original Johnson Ranch water right." *Id.* at 17. Olsen even disparages Barry's motion as "wrong", "improper", "fatally deficient" and "predicated upon a number of factual inaccuracies." *Id.* at 16-19. The recitation of the factual history summarizing the complicated origins of the Johnson Water Rights, contained in Barry's opening memorandum, belies Olsen's spurious accusations.

Olsen claims that the Court must examine the unique facts of the case, *id.* at 16, and yet ignores the facts demonstrating that its ownership is not settled. In truth, Barry has demonstrated a meritorious position. The facts, which were clearly and succinctly provided in Barry's opening brief, establish as much. The most basic of these facts, which were generally ignored or mischaracterized by Olsen include:

1. That the Department's 1997 *Amended Order* specifically determined that Olsen could be delivered water, in part, because "some of the persons presently owning part of water right no. 37-353J are not claiming ownership and are not calling for delivery under the water right." *Waldera Aff.* Ex. E at 5. This comment, however, provides context for the Department's further recognition that the decision was "an interim determination subject to review and revision by the SRBA Court" and that "water right no. 37-0353 will be finally fully determined by the SRBA District Court." *Id.* at 5-6. In essence, the Department didn't mind that the Water District used the Kierstad water to fulfill Olsen's call because a determination as to the extent of Olsen's ownership would follow – in the SRBA proceedings. Olsen ignores each of these provisions. Rather, Olsen asserts that the *Amended Order* "put to rest" the question of Olsen's ownership.

2. The 1999 letter from Norm Young confirmed that Olsen's interest did not belong in the same category as Barry and the other claimants to the Johnson Water Right when he included the Olsen claim in the group of water rights "not previously listed in the Water District records which have now filed a claim in the SRBA and for which IDWR has entered a preliminary order in response to a petition for distribution by the watermaster. *Olsen Livestock Consulting falls into this category.*" *Arrington Aff.* Ex. P (emphasis added). Olsen wholly mischaracterizes this letter in asserting that the Department has, through this letter, elevated Olsen's ownership status.

3. Finally, consistent with its prior actions relative to the Olsen water right, the Department recommended the Olsen water right with a reduced diversion rate. Importantly, in a January 3, 2007, letter Mr. Stanton confirmed that there were "four claims that have been recommended [that] cannot be traced back to known previous owners." *Arrington Aff.* Ex. Q. These claims were reduced "in order to stay within the original decreed rate of 6.4 cfs." *Id.* The

only four claims, deriving from the Johnson Water Rights, that were reduced, were water rights 37-353F, **37-353J**, 37-353K and 37-353L. Barry has filed a similar motion on all four water rights. Again, Olsen ignores this fact.

While demanding that the SRBA Court view only the “unique facts and circumstances presented” in this subcase, *Olsen Resp.* at 16, Olsen conveniently ignores the very facts and circumstances that demonstrate Barry’s meritorious position – all of which were presented to the Court in the opening memorandum. Such selective presentation of the facts cannot support the argument Olsen lodges.

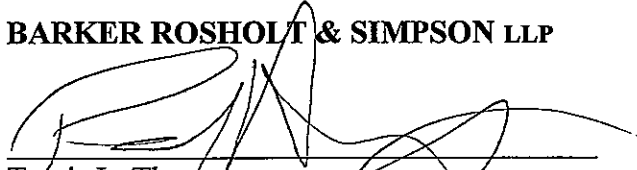
Since a meritorious position has been presented, Barry’s motion should be granted.

CONCLUSION

In objecting to Barry’s motion, Olsen provides a misleading and incomplete statement of the facts – asserting that the question of ownership has been settled. The facts do not support Olsen’s contention that this is a settled matter. The Department has recognized that Olsen’s interest in a portion of the Johnson Water Right is questionable, at best. Since Barry has demonstrated that her delay was not willful, that Olsen will not be prejudiced by granting the motion and that a meritorious position exists, the Court should grant this *Motion to File Late Objection*.

DATED this 5th day of March, 2009.

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CERTIFICATE OF SERVICE

I certify that on this 5th day of March, 2009, I served the foregoing **REPLY IN SUPPORT OF MOTION TO FILE LATE OBJECTION**, including all attachments, to the following persons, via first class mail:

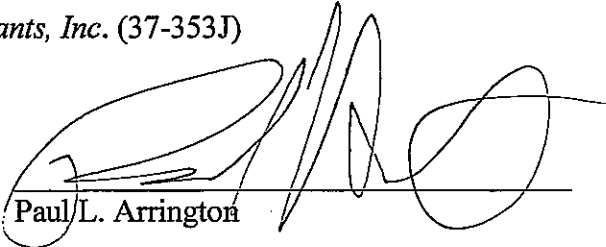
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