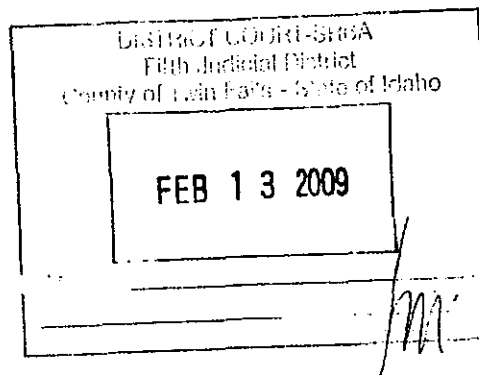


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase No. 37-00353J

**RESPONSE IN OPPOSITION TO MOTION
TO FILE LATE OBJECTION**

Olsen Livestock Consultants, Inc. ("Olsen"), by and through undersigned counsel of record, and pursuant to SRBA Administrative Order No. 1 ("AO1") § 6(f)(4)(b), hereby submits this response in opposition to the Motion to File Late Objection ("Motion") filed by Barbara Barry ("Barry"), dated December 18, 2008.

**I.
INTRODUCTION**

On or about December 18, 2008, Barry filed a Motion seeking leave of the Court to file a late objection in each of subcases 37-00353F, 37-00353J, 37-00353K, and 37-00353L.

Water right no. 37-00353J is owned by Olsen, and this response in opposition to Barry's Motion pertains only to Barry's efforts to file a late objection in this subcase (no. 37-00353J). The Olsen claim was recommended in the Director's Report for Basin 37, Part 3. The objection period for said recommendation expired on November 14, 2007. While Olsen cannot speak to the merits of Barry's Motion in relation to subcase nos. 37-00353F, 37-00353K, and 37-00353L, Barry's Motion should be denied in its entirety in this subcase for its failure to demonstrate the "good cause" required to grant her Motion.

II. BACKGROUND

Olsen owns ten (10) acres in the SENE quarter quarter section of Section 24, Township 1N, Range 18E, located south of Bellevue, Idaho. *See* Affidavit of Andrew J. Waldera ("Waldera Aff.") at Ex. A. Olsen's property is also known as Lot 2, Block 1 of the Dean Ranch Subdivision. *Id.* As Barry correctly points out, the original parent water right, 37-00353, was decreed to James Johnson as part of the *Frost Decree*. The decree granted Johnson 6.4 cfs (320 inches) of Big Wood River water with a June 12, 1886 priority date for the irrigation of a 160 acre ranch. Waldera Aff. at Ex. B. Consequently, each acre of the original 160 acre Johnson Ranch was entitled to a proportionate 2 inch share of the underlying 320 inch right. Barry also correctly points out that the original Johnson Ranch, complete with water right no. 37-00353, eventually came under the unified ownership and control of M.D. Dean ("Dean") who, in the mid 1970s, subdivided the property and the underlying water right into what is now known as the Dean Ranch Subdivision. Waldera Aff. at Ex. A. The water appurtenant to the Johnson Ranch, and later the Dean Ranch (right no. 37-00353), is administered by Water District No. 37, and is diverted from the Big Wood River through the Wood River Valley Irrigation District No. 45 Canal. Waldera Aff. at Ex. C.

With respect to the Olsen parcel in particular (Lot 2, Block 1 of the Dean Ranch Subdivision), the chain of title on said parcel is as follows:

- Dean deeded the Olsen parcel with appurtenances to Charles and Debra Anne Curtis (“Curtis”) on November 1, 1974;
- Curtis deeded the Olsen parcel with appurtenances to Dean and Judene Call (“Call”) on December 5, 1978. The deed also specifically referenced the conveyance of 20 inches of water appurtenant to the parcel;
- Call deeded the Olsen parcel with appurtenances to Robert and Sharyl Head (“Head”) on August 5, 1991. The deed also specifically referenced the conveyance of 20 inches of water appurtenant to the parcel; and
- Head deeded the Olsen parcel (again Lot 2, Block 1 of the Dean Ranch Subdivision) with appurtenances to Olsen on September 26, 1996.

Waldera Aff. at Ex. D. The foregoing chain of title was subsequently and independently investigated and verified by the Idaho Department of Water Resources (“Department”) in response to a water delivery call initiated by Olsen during irrigation season 1997. Waldera Aff. at Ex. E. As the chain of title records and Department findings establish: (1) Olsen is in fact the record owner of Lot 2, Block 1 of the Dean Ranch Subdivision; and (2) there are no real property or Department records separately severing or transferring the proportionate share of parent right no. 37-00353 appurtenant to the Olsen parcel at any time either before or after Dean’s exclusive ownership of the former Johnson Ranch, and his subsequent subdivision thereof.

While Barry’s Motion correctly states that the Water District No. 37 records did not accurately reflect Olsen’s ownership of Lot 2, Block 1 of the Dean Ranch Subdivision, or the 20 inches of water (2 inches per acre for 10 acres per the *Frost Decree*) appurtenant thereto,

Olsen's ownership of Lot 2, Block 1 and the appurtenant water was proven to the satisfaction of the Department during administrative delivery call proceedings initiated by Olsen in 1997. For example, the Department expressly found and concluded in its August 25, 1997 Amended Preliminary Order that:

- Water right no. 37-00353 had not been forfeited due to its continued delivery and use within the Wood River Valley Irrigation District No. 45 system (Conclusion of Law No. 1);
- The Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) is included within the decreed place of use of parent right 37-00353 (Conclusion of Law No. 2);
- In the absence of a valid transfer or other severance of the water from the Olsen parcel, water right no. 37-00353 is prorated uniformly to the original 160 acre place of use. This proration yields 2 inches per acre upon each acre of the originally decreed place of use (Conclusion of Law No. 2);
- Neither Blaine County nor the Department possess any records severing or transferring the appurtenant proportionate share of water right no. 37-00353 from the Olsen parcel. Moreover, Water District Records comprised of various letters and deeds issued and received from Dean after his 1974 conveyance of the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) to Curtis did not, and could not, legally sever or transfer the 20 inches of water appurtenant to said parcel (Conclusion of Law No. 3); and

- Because the portion of water right no. 37-00353 appurtenant to the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) was neither severed nor transferred, and because water users within an active water district cannot adversely possess the rights of others within the same district, the Olsen parcel is entitled to the full delivery of its proportionate (20 inch) share of parent right no. 37-00353 regardless of what the Water District No. 37 or Wood River Valley Irrigation District No. 45 records purportedly provided (Conclusions of Law Nos. 3, 5, and 6).

Waldera Aff. at Ex. E. Consequently, the Department ordered the delivery of 0.40 cfs (20 inches) of water under water right no. 37-00353 for Olsen's use upon Lot 2, Block 1 of the Dean Ranch Subdivision. *Id.* To the extent that others possessed any competent records demonstrating otherwise with respect to Lot 2, Block 1 of the Dean Ranch Subdivision, the Department's Amended Preliminary Order required those persons to produce that information or to otherwise move for reconsideration of the Department's Order. No documents were produced, and the Department's Amended Preliminary Order was not otherwise challenged.

Despite this history, Barry's Motion inexplicably and erroneously asserts the following with respect to water right no. 37-00353J:

- Olsen's 1997 delivery call "was denied"; and
- Water District No. 37 could "deliver water to Olsen out of the portion of the Johnson Water Right [37-00353] that had been acquired by Robert Kierstad."

Motion at 4. To the contrary, Olsen's 1997 delivery call was not denied. Further, the request to deliver water to Olsen out of the seemingly defunct account of Robert Kierstad came at the

request and suggestion of Wood River Valley Irrigation District No. 45, not the Department. *See* Waldera Aff. at Exs. E and C, respectively.

Barry is correct that the Department first issued a Preliminary Order with respect to the Olsen delivery call on July 22, 2007. Waldera Aff. at Ex. E. However, Barry is incorrect that the Department's Preliminary Order "denied" Olsen's delivery request. Instead, the Department's Preliminary Order concluded much the same as did the August 25, 2007 Amended Preliminary Order regarding the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision). For example, the Department's July 22, 2008 Preliminary Order concluded and confirmed that:

- Water right no. 37-00353 had not been forfeited due to its continued delivery and use within the Wood River Valley Irrigation District No. 45 system (Conclusion of Law No. 1);
- The Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) is included within the decreed place of use of parent right 37-00353 (Conclusion of Law No. 2);
- In the absence of a valid transfer or other severance of the water from the Olsen parcel, water right no. 37-00353 is prorated uniformly to the original 160 acre place of use. This proration yields 2 inches per acre upon each acre of the originally decreed place of use (Conclusion of Law No. 2);
- Neither Blaine County nor the Department possess any records severing or transferring the appurtenant proportionate share of water right no. 37-00353 from the Olsen parcel. Moreover, Water District records comprised of various letters and deeds issued and received from Dean

after his 1974 conveyance of the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) to Curtis did not, and could not, legally sever or transfer the 20 inches of water appurtenant to said parcel (Conclusion of Law No. 3); and

- Because the portion of water right no. 37-00353 appurtenant to the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) was neither severed nor transferred, and because water users within an active water district cannot adversely possess the rights of others within the same district, the Olsen parcel is entitled to the full delivery of its proportionate (20 inch) share of parent right no. 37-00353 regardless of what the Water District No. 37 or Wood River Valley Irrigation District No. 45 records purportedly provide (Conclusions of Law Nos. 5 and 6).

Waldera Aff. at Ex. E. Like the Department's subsequent August 25, 1997 Amended Preliminary Order (which superseded its July 22, 1997 Preliminary Order), the Department's July 22, 1997 Preliminary Order also ordered the immediate delivery of the Olsen parcel's (Lot 2, Block 1 of the Dean Ranch Subdivision) proportionate 2 inch per acre share of water right no. 37-00353 for Olsen's irrigation use thereon.¹ Consequently, Olsen's delivery call was not "denied" as Barry contends. Moreover, Olsen never challenged the Department's Preliminary Order either. Motion at 4.

¹ The Department's July 22, 1997 Preliminary Order instructed the delivery of 0.20 cfs (10 inches) instead of the full 0.4 cfs (20 inches) directed in the Department's August 25, 1997 Amended Preliminary Order. This 0.20 cfs instruction is a typographical error given that both of the Department's Orders likewise concluded that each acre of the former Johnson Ranch was entitled to a proportionate 2 inches per acre as decreed in the *Frost Decree*, and that the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) was entitled to this "proportionate share of water right no. 37-353."

Instead, the Department's July 22, 1997 Preliminary Order drew two letters seeking clarification and/or protesting the Preliminary Order. Waldera Aff. at Ex. C. The Department received both letters on August 4, 1997. *Id.* One letter was from Water District No. 37. *Id.* The other letter was from Wood River Valley Irrigation District No. 45. *Id.*

Water District No. 37 was concerned that the Preliminary Order might require it to deliver water to the District No. 45 Canal headgate in excess of the 6.4 cfs (320 inches) originally decreed to the Johnson Ranch in order to satisfy the Olsen delivery call. *Id.* Instead, Water District No. 37 reiterated its continuing commitment to deliver the decreed 320 inches to the head of the District No. 45 canal and nothing more. *Id.* Wood River Valley Irrigation District No. 45 also raised a number of questions with respect to the Department's Preliminary Order, and sought the reconsideration of the Preliminary Order regarding the ordered delivery of water to the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision). *Id.*

District No. 45 raised its concerns because, historically, the District did not necessarily deliver water in accordance with the underlying, decreed Johnson Ranch place of use for water right no. 37-00353. This irregular water delivery practice was largely the result of Dean's subdivision of the ranch, and his less than precise or accurate record keeping with respect to the water. Consequently, for a number of years, some portions of the Dean Ranch Subdivision received only intermittent water deliveries, some received no water at all, and others received greater than their proportionate 2 inch per acre share of water right no. 37-00353. This was the case despite the fact that Water District No. 37 always made full delivery of the appurtenant 6.4 cfs (320 inches) to the District No. 45 canal headgate. Waldera Aff. at Exs. C, F, and G. Apparently, certain Dean Ranch Subdivision landowners either did not know of their water

entitlement or they did not care. This landowner ignorance and/or ambivalence facilitated and perpetuated the District's irregular water delivery practices.

For example, instead of delivering a uniform proportionate 2 inches per acre to the former Johnson Ranch 160 acre decreed place of use, Wood River Valley Irrigation District No. 45 would simply keep some of the water in its canal, without delivery, designating that withheld water as District conveyance loss or carriage water. Waldera Aff. at Exs. C, F, and G. In other instances, the District would apparently deliver water in excess to other District patrons. *Id.* Regardless, none of District No. 45's irregular and questionable water delivery practices within its boundaries changed the facts that: (1) its full diversion and use of the Johnson Ranch water right (37-00353) negated the possibility of forfeiture, and (2) the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) was still entitled to its proportionate 2 inch per acre share of water right no. 37-00353. When the Department's Preliminary Order required Wood River Valley Irrigation District No. 45 to reconcile its past water use/delivery practices with respect to water right no. 37-00353, the District (and not the Department as Barry contends) requested that it be permitted to make the Olsen delivery out of the Kierstad account. *Id.*

In response to the Water District 37 and Wood River Valley Irrigation District No. 45 correspondence, the Department issued its August 25, 1997 Amended Preliminary Order. In short, the Department did not care from where within the District No. 45 rolls the 20 inch Olsen delivery came from. Instead, the Department made clear that the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision) was entitled to a 2 inch per acre proportionate share of parent right no. 37-00353, and that District No. 45 was to deliver that water out of the original 320 inch Johnson Ranch water right delivered to it by Water District No. 37. Waldera Aff. at Ex. E (*see* the Amended Preliminary Order at Conclusions of Law Nos. 1, 2, 3, 5, 6,

and 7, and the subsequent Order). The Department merely advised that if Wood River Valley Irrigation District No. 45 chose to effectuate the Olsen delivery out of the Kierstad account as requested in the District's prior correspondence, that the Department's Order did not in and of itself "divide or otherwise assign" that account specifically to Olsen. *Id.* (see Conclusion of Law No. 9).

Based upon the Department's uncontested August 25, 1997 Amended Preliminary Order, Olsen paid his predecessors' delinquent Water District No. 37 assessments; upgraded his District No. 45 Canal diversion infrastructure; and amended his prior SRBA claim to reflect the full 20 inch (0.40 cfs) proportionate share for which it was entitled as the record owner of Lot 2, Block 1 of the Dean Ranch Subdivision (10 acres at 2 inches per acre). Waldera Aff. at Ex. H. Unfortunately for Barry, the Department's decision in the 1997 Olsen delivery call proceedings shone a light on the water delivery discrepancies within Wood River Valley Irrigation District No. 45. Again, while Water District 37 has always ensured the full delivery of water right no. 37-00353 to the District No. 45 canal headgate (6.4 cfs/320 inches), provided that the right was in priority on the Big Wood River, District No. 45 did not necessarily deliver the water according to appurtenant entitlement within its system. Consequently, additional claims to portions of water right 37-00353 have been filed since the 1997 Olsen delivery call decision. These claims have over-claimed the original Johnson Ranch 6.4 cfs water right by some 0.52 cfs (26 inches).²

² Barry's Motion cites the "increased claim by Olsen" as a contributing factor to the subsequent over-claiming of water right no. 37-00353. Motion at 5. To the extent that Barry contends that Olsen's amended claim is somehow improper or inappropriate, Olsen objects to that inference. Olsen is merely claiming its rightful 2 inch per acre proportionate share of water right no. 37-00353 as determined by the applicable real property and Department records, and as confirmed and verified by the Department in each of its July 22 and August 25, 1997 Orders.

As a result of these subsequent claims, Water District No. 37 again wrote to the Department (on April 6, 1999) seeking guidance over concerns that it might be obligated to deliver more than the originally decreed 6.4 cfs (320 inches) to the District No. 45 Canal headgate. Affidavit of Paul L. Arrington ("Arrington Aff.") at Ex. O. The Department responded to Water District No. 37's correspondence on December 20, 1999. *Id.* at Ex. P. However, Barry again erroneously asserts that the Department's December 20, 1999 correspondence to Water District No. 37 states that Olsen (water right no. 37-00353J) "did not" have a "valid ownership interest" in the underlying Johnson water right (37-00353). Motion at 6.

While it may be true that the Ziker, Oosting, Fisher, and/or Goicoechea claims are questionable under the original Johnson right, the same most certainly cannot be said of the Olsen right (no. 37-00353J). The Olsen right is derived from its ownership of Lot 2, Block 1 of the Dean Ranch Subdivision.³ Contrary to Barry's assertions, the Department's December 20, 1999 correspondence to Water District No. 37 *verified* Olsen's ownership and entitlement to its proportionate 20 inch share of water right no. 37-00353, *and expressly directed Olsen's inclusion in the Water District's Decree Book*. See Arrington Aff. at Ex. P (wherein the Department identifies Olsen as a claimant not previously listed in the Water District's records, but for which the Department entered a preliminary order regarding the distribution of a share of water right no. 37-00353). After the Department specifically identified Olsen as a valid proportionate shareholder of water right no. 37-00353 by virtue of the Department's express findings in its August 25, 1997 Amended Preliminary Order, it then addressed the "questionable" rights of others. *Id.*

³ Again, this memorandum addresses only the Olsen parcel (Lot 2, Block 1 of the Dean Ranch Subdivision), and the 20 inch (2 inch per acre) proportionate share of water right no. 37-00353 appurtenant thereto. Nothing in this memorandum is intended to support, verify, or challenge any other claims made to water right no. 37-00353.

For example, the next paragraph of the Department's December 22, 1999 correspondence separately addressed the claims of others "who have not demonstrated a probable ownership to part of [right no. 37-00353], even though they have claims pending in the SRBA." *Id.* With respect to these individuals, the Department advised Water District No. 37 that these other individuals "should not be included [*sic*] in the Decree Book until such time as the court confirms their right *or IDWR has entered a preliminary order recognizing . . . that a probable ownership exists by the claimant. Ziker, Price, and Goicoechea are in this category.*" *Id.* (emphasis added). Consequently, and contrary to Barry's assertions otherwise, Olsen does not fall within the "questionable ownership" category given the Department's prior exhaustive review of the historical underpinnings of the Olsen claim, and the Department's December 20, 1999 correspondence reiterating the same.

Despite Barry's erroneous factual citations stating otherwise, two fundamental and immutable facts remain with respect to this matter:

- Lot 2, Block 1 of the Dean Ranch Subdivision is entitled to a 2 inch per acre proportionate share of the underlying Johnson Ranch water right (no. 37-00353) as decreed in the *Frost Decree* (*see Waldera Aff. at Exs. A, B, D, and E*); and
- Olsen is the record owner of Lot 2, Block 1 of the Dean Ranch Subdivision (*see Waldera Aff. at Exs. A, D, and E*).

Consequently, Barry's claims against/objections to the Olsen water right (no. 37-00353J) are unfounded and unsupportable.

III. ARGUMENT

A. Legal Standards

As Barry's Motion correctly points out, in subcases such as this (where partial decrees have not yet been entered), the legal standard for filing a late objection in the SRBA is the same as that applied to deciding motions seeking to file late claims. *Memorandum Decision and Order on Challenge*, Subcase Nos. 47-16433, *et al.* (March 22, 2005) ("*Bedke I*"). As such, AOl § 4d(2)(d), providing that a motion to file a late claim is determined pursuant to the standard for setting aside an entry of default (Idaho Rule of Civil Procedure 55(c)), governs.

Idaho Rule of Civil Procedure 55(c) provides that a default may be set aside upon a showing of "good cause." *Id.* The Rule 55(c) "good cause" standard is more lenient than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 935 (Ct. App. 1993); *see also*, *Bedke I* at 6. The Rule 55(c) "good cause" standard takes into account the following factors:

- (i) Whether the default was willful;
- (ii) Whether setting aside the judgment would prejudice the opponent; and
- (iii) Whether a meritorious position has been presented.

McFarland, 123 Idaho at 936, and *Bedke I* at 6. The court must examine each case in light of the unique facts and circumstances presented. *Bedke I*, citing *Avondale on Hayden, Inc. v. Hall*, 104 Idaho 321 (Ct. App. 1983).

The "reasonably prudent person" and "excusable neglect or mistake" standards of Rule 60(b), are not synonymous with the "willful" standard. *Bedke I* at 12. However, the Rule 60(b) standards are not to be disregarded. *McFarland*, 123 Idaho at 936. While it is true that the word "willful" denotes an act which is intentional, knowing, or voluntary, as distinguished from accidental (*i.e.*, one done intentionally, knowingly, and purposefully, without

justifiable excuse, as distinguished from an act done carelessly, thoughtlessly or inadvertently), the “reasonably prudent person” and “excusable neglect or mistake” standards of Rule 60(b) do coincide and commingle with the applicable “willful” standard. In sum, the moving party must show some excuse for a failure to timely act. *Id.* (citation omitted).

B. Barry’s Motion Fails To Establish The Requisite Good Cause

1. Barry’s Tardiness In Filing Her Proposed Objection

Barry contends that her tardiness in seeking to file an objection against the Olsen right (37-00353) was not willful. Motion at 9. Instead, Barry contends that her delay in filing was reasonable considering the July 25, 2008 grant of her motion to file a late objection to her own water right, and due to the need to unravel a 500 page backfile with respect to water right no. 37-00353. *Id.* at 9-10.

Frankly, Olsen fails to understand how or why Barry’s failure to act upon her own water right claim (no. 37-00353G) in any way excuses her failure to act against the Olsen claim in a timely fashion. Further, the objection period for Basin 37, Part 3 expired on November 14, 2007. Barry did not move to object to the Olsen claim until December 18, 2008—some thirteen (13) months later. This delay with respect to the Olsen claim seems excessive particularly given the concise, plain, and unambiguous historical record supporting the Olsen claim provided in the Department’s July 22 and August 25, 1997 Orders.

While tracking the history and veracity of claim nos. 37-00353F, K, and L might have required the whole cloth reconstruction of the original Johnson Ranch water right (no. 37-00353), the same cannot be said of the Olsen claim (no. 37-00353J). Instead, the Department’s prior Orders provided an ample roadmap of the historical underpinnings of the Olsen claim. Given these roadmaps, review of the Olsen claim for objection purposes would have required only limited and targeted research. As the Department noted in its

December 20, 1999 correspondence to Water District No. 37, Olsen's claim did not fall into the "questionable ownership" category of claims. Arrington Aff. at Ex. P. Instead, the Department directed that the Olsen proportionate 20 inch share of the Johnson Ranch water right (no. 37-00353) be added to the District's Decree Book given the Department's prior scrutiny of the governing real property instruments, its own records, and applicable law. *Id.*

While Olsen cannot speak to the research arguably necessary to sufficiently review the claims contained within subcase nos. 37-00353F, K, and L, Barry's implicit assertion that the Olsen claim (no. 37-00353J) required the same is unconvincing. Barry's broad-brush attempts to lump subcase no. 37-00353J in with the others that are subject to her Motion is inappropriate. *See, Bedke I, supra* (the court must examine each case in light of the unique facts and circumstances presented). The record is clear that subcase 37-00353J is unique given the level of scrutiny that it has already endured. The record in this subcase amply supports the factual underpinnings of the Olsen claim—a factual record that was independently reviewed and confirmed by the Department in 1997. It is doubtful that Barry truly required thirteen (13) months to purportedly piece together a puzzle that was already assembled for her by the Department. Therefore, Barry's substantial delay with respect to this subcase is inexcusable.

2. Granting Barry's Motion Will Prejudice Olsen

Regarding the prejudice criterion, there is no question that permitting Barry to file the late objection she seeks in subcase no. 37-00353J will prejudice Olsen. As illustrated by Barry's proposed objection to the Olsen claim, Barry contends that the Olsen right should not exist. Motion at Ex. A. Barry's proposed objection does not seek to adjust or harmonize rights amongst neighboring water users. Instead, it seeks preclude or otherwise obliterate the rights of others altogether for her sole benefit.

Currently, Olsen is the only objector in subcase no. 37-00353J. Barry's objection will engender the needless expenditure of additional time and resources to dispose of an objection that cannot successfully dispute the fact that the governing real property and Department records establish Olsen's entitlement to a proportionate share of the Johnson Ranch water right for use upon Lot 2, Block 1 of the Dean Ranch Subdivision. To suggest otherwise, as Barry's proposed objection contends, illustrates the unreasonableness of Barry's position, and the effort that will be required to ward off such an unfounded position.

Barry had ample opportunity to object to the Olsen recommendation in a timely fashion; or at the least in a more timely fashion than she has. Olsen should not be penalized for Barry's own ambivalence and neglect in this matter. Moreover, Barry's simple, conclusory statement that "no prejudice will result from granting [her] motion," (Motion at 10) does not make it so.

3. Barry's Motion Fails To Present A Meritorious Position With Respect To Subcase No. 37-00353J

Barry's Motion fails to offer a single argument in support of her single, conclusory statement that "a meritorious has been presented." Motion at 10. Instead, Barry's Motion sweeps any argument of this criterion under the rug in hopes that lumping the facts of this subcase together with those of subcase nos. 37-00353F, K, and L will carry the day. First, the allegations supporting a meritorious defense must be sufficiently detailed. *Hearst Corp. v. Keller*, 100 Idaho 10, 12 (1979). Barry's Motion elucidates no such "sufficient detail." Second, the factual underpinnings of this subcase are unique, and differ markedly from the factual records of the other implicated subcases. Consequently, it is improper and impermissible to treat this subcase in such a cursory fashion. Again, *see Bedke I, supra* (the court must examine each case in light of the unique facts and circumstances presented).

At a minimum, Barry's Motion seeks to have the quantity of Olsen's right, among others, "adjusted" in order to free up water under the original Johnson Ranch water right (no. 37-00353) to satisfy her late claim. Motion at 10-11; *see also*, Motion at Ex. A (the proposed objection). If "adjustment" does not occur, Barry contends that Olsen's right should be "disallowed" altogether in order to satisfy her late claim. Motion at 10-11. Again, Barry's purported "meritorious position" is predicated entirely upon the faulty premise that Olsen's ownership in a portion of the original Johnson Ranch right is "questionable, at best." *Id.*

While Barry might very well have a valid ownership interest in a proportionate share of the original Johnson Ranch water right, she is wrong to suggest that Olsen does not have any such interest. Moreover, Barry cannot prevail against Olsen for the reasons already discussed within Section II, *supra*.

Simply stated, Barry cannot establish a meritorious position in this subcase. Consequently, Barry is seeking redress against the wrong claimant. There is no piece of evidence that Barry can adduce, nor legal argument that Barry can craft questioning or challenging: (1) the propriety of Olsen's claim; (2) the Olsen parcel's (Lot 2, Block 1 of the Dean Ranch Subdivision) entitlement to a 20 inch proportionate share of the original Johnson Ranch water right; or (3) Olsen's record ownership of Lot 2, Block 1 of the Dean Ranch Subdivision.

The record of this matter, complete with the Department's orders and correspondence has long put to rest the validity of the Olsen parcel's entitlement to a 20 inch (2 inch per acre) proportionate share of the original Johnson Ranch water right (no. 37-00353). *See* Waldera Aff. at Exs. A, B, D, and E; *see also*, Arrington Aff. at Ex. P. Likewise, the record establishes that Olsen is, in fact, the record owner of Lot 2, Block 1 of the Dean Ranch

Subdivision. *Id.* at Ex A. This is why the Department ordered the delivery of 20 inches of water to the Olsen parcel, and why the Department advised Water District No. 37 to include Olsen within its Decree Book. *See* Waldera Aff. at Ex. E; *see also*, Arrington Aff. at Ex. P. These facts are irrefutable. Consequently, there is nothing that Barry can produce or argue supporting either the reduction or elimination of Olsen's 20 inch (0.40 cfs) proportionate share of the underlying Johnson Ranch water right (no. 37-00353J).

Barry's Motion is predicated upon number of factual inaccuracies. The two most egregious factual inaccuracies with respect to this subcase are: (1) that the Department relied upon the Kierstad account as a stop-gap interim means of disposing of Olsen's 1997 delivery call; and (2) that the Department's Orders did not resolve Olsen's ownership interest in a proportionate share of the Johnson Ranch water right via its ownership of Lot 2, Block 1 of the Dean Ranch Subdivision. Again, the Department did not care how Wood River Valley Irrigation District No. 45 chose to satisfy the Olsen delivery call, only that the District satisfy the call. If the District wanted to use the account of Kierstad to do so, as *the District* requested in its August 1997 correspondence (Waldera Aff. at Ex. C), so be it. The Department simply made clear that its Orders did not unilaterally "divide or otherwise assign" Kierstad's 40 inch account to Olsen. It was not the Department's job to reconcile Wood River Valley Irrigation District No. 45's books or delivery practices (irregular as they were). Instead, all the Department cared about were the facts that: (1) Water District No. 37 continued to deliver the entirety of the former Johnson Ranch water right for diversion into the Wood River Valley Irrigation District No. 45 Canal; and (2) that 20 inches of that Johnson Ranch water right had to be delivered to Lot 2, Block 1 of the Dean Ranch Subdivision as provided under Idaho law.

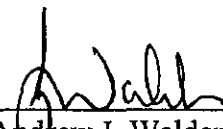
In sum, Barry's Motion is fatally deficient due to two fundamental facts that cannot be disputed. First, Lot 2, Block 1 of the Dean Ranch Subdivision is entitled to a 2 inch per acre proportionate share of the underlying Johnson Ranch water right (no. 37-00353) as decreed in the *Frost Decree*. Second, Olsen is the record owner of Lot 2, Block 1 of the Dean Ranch Subdivision. Because Barry cannot present any evidence or argument altering these immutable facts, Barry cannot possibly present a meritorious position in this subcase (37-00353J) justifying the grant of her Motion.

IV. CONCLUSION

For the foregoing, Olsen respectfully requests that the Court deny Barry's Motion in its entirety with respect to this subcase (37-00353J). Barry's Motion fails to establish the requisite good cause necessary to support a grant of said Motion. Barry's delay with respect to this subcase is inexcusable; grant of the Motion will prejudice Olsen; and Barry cannot possibly present a meritorious position in light factual record specific to this subcase.

DATED this 12th day of February, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

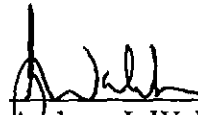
By 
Andrew J. Waldera – Of the Firm
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Consultants, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2009, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTION TO FILE LATE OBJECTION** to be served by the method indicated below, and addressed to the following:

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